Circuit Court for Baltimore City
Case No. 117291004

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2259

September Term, 2019

DAVON CROWNER

v.

STATE OF MARYLAND

Fader, C.J.,
Beachley,
Ripken,

JJ.

Opinion by Ripken, J.

Filed: April 16, 2021

This case is before us on appeal from the Circuit Court for Baltimore City, where appellant, Davon Crowner ("Crowner"), was convicted of first-degree murder, use of a firearm in the commission of a crime of violence, possession of a firearm by a disqualified person, and wearing, carrying, or transporting a handgun. The court imposed an aggregate sentence of life plus 35 years of imprisonment. Crowner raises three contentions on appeal. First, he contends that the trial court erred in not instructing the jury on cross-racial identifications. Second, he contends that the trial court erred by allowing the prosecutor to question him about the accuracy of certain documents. Last, he contends that the trial court committed plain error by permitting the State to comment on his testimony during its closing argument. For the reasons discussed below, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Crowner was arrested and charged following a shooting that took place on June 11, 2016, which resulted in the death of Xavier Antonio Starke ("Starke").[1] At trial, Patricia Buchanan ("Buchanan") testified that, on the day of the shooting, she was with Starke and another friend, Christopher Jones ("C. Jones"), in the Lexington Market area of Baltimore. At some point, the three got in Buchanan's car and traveled to a neighborhood on Shipley Avenue. When they arrived, Starke and C. Jones exited the vehicle and walked north on Shipley Avenue, while Buchanan waited in the front seat of the car. Approximately twenty minutes later, Starke and C. Jones returned, and C. Jones reentered the car. Starke walked alone back up Shipley Avenue. Shortly thereafter, Buchanan observed Starke running

[1] The victim's name is sometimes spelled without the "e" in trial transcripts. We will proceed with "Starke" given it is spelled this way in the indictment.

toward the car while another individual was "chasing after him with a gun" and "shooting the gun." Buchanan then saw Starke fall down, at which point the shooter stood over Starke "and shot him in the face." According to Buchanan, the shooter looked directly at her from a distance of five feet before taking off. In court, Buchanan, a Caucasian woman, identified Crowner, an African American man, as the shooter and stated that she was one hundred percent certain.

At trial, the State called C. Jones as a witness. He said that he was with Buchanan and Starke on the day of the shooting, and that they traveled to the area of the shooting to buy drugs. C. Jones stated that he saw the shooting and remembered the shooter as "a black dude, like kind of heavyset."

The State called two additional eyewitnesses, both African American men. Both recanted their pre-trial statements to police. Hence, the State introduced into evidence at trial the recorded police interviews that each gave following the shooting. In the first recording, Joseph Corbin ("Corbin"), stated that he saw the shooting. After being shown a photographic array, Corbin identified Crowner as the shooter. Corbin also indicated that he had known Crowner "for a while" and that he had seen Crowner in that area before. In the second recording, DeAndre Jones ("D. Jones"), told the police that he was in the area around the time of the shooting, that he heard shots fired, and that he saw an individual carrying a "smoking" gun and running away from the scene after the shooting. D. Jones was also shown a photographic array and identified Crowner as the person he saw with the gun. D. Jones indicated that he knew Crowner by his nickname "Baby" or "Big Baby."

Crowner testified in his own defense and denied shooting Starke. On cross-examination, the prosecutor asked Crowner whether Motor Vehicle Administration ("MVA") documents listing someone's weight could be inaccurate, and Crowner responded in the affirmative. At the close of trial, Crowner requested a jury instruction on cross-racial identifications, which the court declined to give. The prosecutor stated without objection in closing arguments that he knew Crowner was not going to get on the stand and admit guilt. Crowner was subsequently convicted, and this timely appeal followed. Additional facts will be provided as needed.

ISSUES PRESENTED FOR REVIEW

In this appeal, Crowner presents three questions for our review:

1. Did the trial court err in not instructing the jury on cross-racial identifications?

2. Did the trial court err in permitting the prosecutor to question appellant about the accuracy of certain documents listing an alternative suspect's weight?

3. Did the trial court commit plain error when, during the State's closing argument, the court allowed the prosecutor to comment on appellant's testimony?

For reasons to follow, we hold that the trial court did not err.

DISCUSSION

I. The Trial Court Did Not Err in Declining to Instruct the Jury on Cross-Racial Identifications

Crowner first contends the trial court erred by refusing to give his requested jury instruction on cross-racial identification. Further, he asserts the court's refusal

overemphasized Buchanan's certainty as to the accuracy of her identification. In making this argument, Crowner contends that none of the witnesses actually knew him prior to making their respective identifications. We first provide additional facts relating to this issue, then discuss the standard of review, and finally evaluate Crowner's legal arguments.

A. Background

At the close of evidence, defense counsel requested that the court instruct the jury on cross-racial identifications:

> [DEFENSE]: And then I had [] requested an instruction on cross-racial identification. It was on my list.
>
> THE COURT: You have one? Is there one in this?
>
> [DEFENSE]: I do. It's not in the Maryland Pattern Jury Instructions. It's actually—it was a proposed Maryland jury instruction on cross-racial identification.
>
> It says—it says it's developed for use in Maryland as follows. In this case the defendant is of a different race than the identifying witness, so you insert the person's name.
>
> The witness who has identified him or her, you may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race than the witness has affected the accuracy of the witness' original perception or the accuracy of a later identification.
>
> You should con—
>
> THE COURT: Where are you taking this from?
>
> [DEFENSE]: It's actually—I can pass this up. This is something that I had—
>
> THE COURT: I mean there[] certainly have been appellate decisions on this. I mean, I don't know if there had been—there certainly isn't a Pattern jury instruction that I'm aware of.

> [DEFENSE]: No. There's just obviously a lot of issue[s] about cross-racial identifications being inherently unreliable and something that I would ask to just hold—bring to the jury's attention.

After the State objected to the proposed instruction, the trial court took the matter under advisement and recessed for the day. At the start of the next day's proceedings, before bringing the jury into the courtroom, the court denied defense counsel's request:

> THE COURT: Okay. Now, as to the—as to the cross-racial identification, just for the record I did review I think what are the cases.
>
> * * *
>
> Yeah. It seems to me what it is based on the case law, it's in my discretion to do it, see whether or not it would be covered—generally by identification.
>
> I note from the case law—I mean I'm not blaming counsel for this, but it wasn't raised until—it wasn't raised during the trial, and certainly wasn't raised during cross-examination of Ms. Buchanan.
>
> She did seem to, to quote her, she was a hundred percent sure that this was the person who shot Mr. Starke.
>
> I would note that the evidence, this is not a standalone identification. However counsel wants to argue about the probative value of it, there were two other people who just happened to be African Americans, who did in fact, I think there's evidence clearly that they identified the defendant as the shooter in the case.
>
> There was nothing also expressed by Ms. Buchanan regarding a difficulty because of race or anything along those lines. That wasn't raised at all, and she didn't raise it, and didn't seem to hesitate about the identification as well.
>
> So with all that, then I'm going to deny your request. I'm going to exercise my discretion and think—and say that it's covered by the identification instruction, and will not give the instruction.

The court gave the following Identification of the Defendant Instruction:

> THE COURT: Now, you've heard evidence about the identification of the defendant as the person who committed the crime. You should consider the witness' opportunity to observe the criminal act and the person committing it, including the length of time the witness had to observe the person committing the crime, the witness' state of mind, and the other circumstances surrounding the event.
>
> You should also consider the witness' certainty or lack of certainty, the accuracy of any prior description, and the witness' credibility or lack of credibility, as well as any other factor surrounding the identification.
>
> Now, the identification of the defendant by a single eyewitness as the person who committed the crime, if believed beyond a reasonable doubt, can be enough evidence to convict the defendant.
>
> However, you should examine the identification of the defendant with great care. It's for you to determine the reliability of any identification and give it the weight you believe it deserves.

B. Standard of Review

Pursuant to Maryland Rule 4-325(c), a "court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." Maryland courts have consistently interpreted Rule 4-325(c) to require "the giving of a requested instruction when the following three-part test has been met: (1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given." *Dickey v. State*, 404 Md. 187, 197–98 (2008). "We review a trial court's decision on whether to provide a cross-racial identification instruction for an abuse of discretion." *Harriston v. State*, 246 Md. App. 367, 382 (2020), *cert. denied* 471 Md. 77 (2020). "In doing so, we are mindful that 'jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the

issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate.'" *Kazadi v. State*, 240 Md. App. 156, 190 (2019) (quoting *Fleming v. State*, 373 Md. 426, 433 (2003)), *rev'd on other grounds,* 467 Md. 1, 48 (2020).

C. Jury Instructions on Cross-Racial Identifications

We first discussed the issue of cross-racial identification instructions in *Smith v. State*, 158 Md. App. 673, 679–80 (2004), *rev'd on other grounds*, 388 Md. 468, 486 (2005). In *Smith*, the trial court gave an Identification of the Defendant Instruction pursuant to Maryland Criminal Pattern Jury Instruction 3:30, but refused to give a more specific cross-racial identification instruction. *Id.* at 679–80. We addressed the defendant's request that this Court adopt the *Cromedy* standard for giving a cross-racial identification instruction. *Id.* at 696. In *Cromedy*, the New Jersey Supreme Court held that a cross-racial identification instruction must be given when the identification is crucial to the case and is not corroborated by other evidence. *State v. Cromedy*, 727 A.2d 457, 467 (N.J. 1999). We declined to adopt this standard, and instead held that "even when identification is a critical issue in a case and there is no corroborating evidence, an identification instruction is not necessarily required . . . ." *Smith*, 158 Md. App. at 697. We ultimately concluded that the "question of identifying specific factors in an eyewitness identification instruction [was] too complex to simply mandate that race should be identified as a factor." *Id.* at 702. Finally, we noted that "the Court of Appeals has already ruled that the giving of a general eyewitness identification instruction is discretionary, and by necessary implication, the same is true with respect to an instruction that identifies specific factors, such as race." *Id.*

Applying those principles to the facts of *Smith*, we held that the trial court did not abuse its discretion. *Id.* at 703–04. We explained that the eyewitness—a robbery victim—had identified the defendant as her attacker within two weeks of the crime, that she had articulated "specific features" of her attacker, and that she had been consistent in her identification. *Id.* at 704. We also noted that there was no evidence that the victim lacked familiarity with persons of the defendant's race or that race played a part in the identification. *Id.* We concluded that, "[b]ecause there was no evidence of any problem associated with cross-racial identification, the pattern instruction given, which advised the jury to, 'examine the identification of the defendant with great care,' was sufficient." *Id.*

A few years later, in *Janey v. State*, we reaffirmed that the giving of a cross-racial identification instruction lies within the trial court's discretion. 166 Md. App. 645, 654–64 (2006). We again held that a trial court did not err in refusing to give an instruction because the witness' identification was not a critical issue, given there was other evidence corroborating the identification. *Id.* at 664. Additionally, the witness, who was not African American, admitted that he was not good at identifying African American people, which the jury could consider in determining reliability of his identification. *Id.* at 664–65.

In reaching our conclusion, we cautioned that "our holding in this case . . . should not be interpreted as holding that it is never appropriate to give such an instruction." *Id.* at 666. Instead, we explained, a court "must, upon request, consider whether an instruction is appropriate in the case," and should not be deterred from giving a cross-racial instruction simply because no such instruction appears in the Maryland Criminal Pattern Jury

Instructions. *Id.* We explained that "it would be an abuse of discretion for a trial judge to apply a uniform policy of rejecting all requested instructions that are not covered by some pattern instruction." *Id.*

Since *Smith* and *Janey*, we have continued to leave the propriety of such instructions to the discretion of the trial court, which examines the "unique facts" of each case such as corroboration of the identification, witness familiarity with the accused, and level of certainty of the witnesses. *Id.* In *Kazadi v. State*, we concluded a trial court did not abuse its discretion in refusing to give a cross-racial instruction because the two witnesses who identified the defendant had known the accused for several years, had separately identified the accused in a photo array, and expressed certainty in their identifications. 240 Md. App. at 194. Similarly, in *Harriston v. State*, this Court upheld a trial court's refusal to give a cross-racial identification instruction where a witness made a photographic identification of the accused, the witness had known the accused for some time prior to the identification, and the witness' testimony was corroborated by other testimony. 246 Md. App. at 387.

Against this backdrop, we hold that the trial court in the instant case did not abuse its discretion in refusing Crowner's requested instruction on cross-racial identification. First, the court did not apply an arbitrary or predetermined position; rather, the court carefully considered the request in light of the relevant case law and the facts of the case. Those facts included the lack of evidence suggesting that Buchanan had any difficulty with cross-racial identification, the certainty of Buchanan's identification, and the fact that two other witnesses, Corbin and D. Jones, both of whom were African American, identified

Crowner as the shooter. In addition, although Buchanan did not indicate any familiarity with Crowner beyond the shooting, both Corbin and D. Jones indicated in statements to police that they had known Crowner in some capacity prior to the shooting, and the jury was able to evaluate the validity of eyewitness testimony. In light of these facts, the court's Identification of the Defendant Instruction sufficiently informed the jury on how to consider an eye witness' identification in its deliberations.[2] The trial court did not abuse its discretion in declining to instruct the jury on cross-racial identification.[3]

II. The Trial Court Did Not Err in Permitting the Prosecutor to Question Appellant About the Accuracy of Certain Documents Listing an Alternative Suspect's Weight

Crowner next contends the trial court erred by permitting the State to question him during cross-examination in a way that required him to "pass judgment on the accuracy of information about Keith Manuel's weight," which constituted an inadmissible "were-they-lying" question. The State contends that the question at issue was not a "were-they-lying question" but rather was a "do you dispute" clarifying question, which, according to the State, is permissible. The State further contends that, even if the question was improper,

[2] To be sure, there may be instances where the risk of misidentification would warrant further jury instruction on cross-racial identifications.

[3] In addition, Crowner argues that the court improperly emphasized the recanted identifications of Corbin and D. Jones when, in declining to provide a jury instruction on cross-racial identification, it noted that Buchanan was the only one of the three whose identification was cross-racial. There is nothing in the record to suggest that the court "endorsed" the State's evidence or that it did so in front of the jury. Crowner provides no justification for his claim that the court's consideration of those identifications in making its ruling on the proposed instruction on cross-racial identification was erroneous.

any error was harmless. We first provide additional facts on this issue, then discuss the standard of review, and finally address Crowner's legal arguments.

A. Background

At trial, Baltimore City Police Detective Walter Naylor, the lead detective in the case, testified on cross-examination that the shooter had been described by at least one witness as being "five foot eight and 200 pounds." Detective Naylor also testified that, during his investigation, he learned that the victim had a telephone conversation with an individual named Keith Manuel ("Manuel") just prior to the shooting. Detective Naylor reviewed Manuel's MVA records to discern Manuel's height and weight. Based on those records, Detective Naylor noted Manuel's height and weight "could have been similar" to the initial description of the shooting suspect.

Later, during his direct testimony, Crowner testified that Manuel was a drug dealer who sold drugs in the same neighborhood as Crowner. Crowner described Manuel as "chunky and chubby" and being "not too short, not too tall, like between . . . five, eight and six feet." Regarding his own height and weight, Crowner testified that he was six foot two and that, at the time of the shooting, he weighed approximately 320 pounds.

During cross-examination, the State showed Crowner a picture of himself from an arrest report taken around the time of the shooting listing his height and weight:

[STATE]: Who's that, Mr. Crowner?

[APPELLANT]: That's me.

[STATE]: That's you. And this photograph was taken on or about May 4th of 2016; right?

[CROWNER]: Okay.

[STATE]: You see that?

[CROWNER]: Yes.

[STATE]: And that would be about a month prior to the incident; right?

[CROWNER]: Yes.

[STATE]: And the reported height was?

[CROWNER]: Six, one.

[STATE]: And the reported weight?

[CROWNER]: 290.

[STATE]: Okay. So not 325?

[CROWNER]: I'm saying I didn't write that or anything like that. I'm saying that right there was—that right there was taken from me being arrested.

[STATE]: One month prior?

[CROWNER]: Right.

[STATE]: Did you gain 35 pounds in the month prior to the murder of Xavier Starke?

[CROWNER]: I wasn't 290.

[STATE]: You weren't 290?

[CROWNER]: No.

[STATE]: So this information is inaccurate?

[CROWNER]: Yes.

[STATE]: Okay. So you're saying that information, for example, from like an MVA about somebody could be inaccurate?

[CROWNER]: It can be.

[STATE]: So we can't rely on that information when we're trying to describe Keith Manuel, then, can we?

[DEFENSE]: Objection.

THE COURT: Overruled.

[CROWNER]: No, you can't.

[STATE]: Okay. You actually have to see the person?

[CROWNER]: No. I'm saying you actually have to weigh the person.

B. Standard of Review

"The scope of cross-examination lies within the sound discretion of the trial court." *Pantazes v. State*, 376 Md. 661, 681 (2003). We will not reverse a conviction because of a trial court's error unless the error is "both manifestly wrong and substantially injurious." *Lawson v. State*, 389 Md. 570, 580 (2005). But if a defendant establishes error in a criminal case, "unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and reversal is mandated." *Hunter v. State*, 397 Md. 580, 587 (2007) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

C. Testimony Regarding Accuracy of Other Witnesses

"In a criminal case tried before a jury, a fundamental principle is that the credibility of a witness and the weight to be accorded the witness' testimony are solely within the

province of the jury." *Bohnert v. State*, 312 Md. 266, 277 (1988). Thus, it is "error for the court to permit to go to the jury a statement, belief, or opinion of another person to the effect that a witness is telling the truth or lying." *Id.* "Whether a witness on the stand personally believes or disbelieves testimony of a previous witness is irrelevant, and questions to that effect are improper, either on direct or cross-examination." *Id.* Such "were-they-lying" questions are impermissible as a matter of law. *Hunter*, 397 Md. at 589.

In *Hunter*, the defendant was arrested following a burglary. *Id.* at 584. At trial, two detectives testified regarding the defendant's involvement in the burglary. *Id.* at 584–86. The defendant also testified, denying his involvement in the burglary. *Id.* at 584. On cross-examination, the State posed five questions that asked the defendant to evaluate whether the two detectives were lying. *Id.* at 585–86. The Court of Appeals ultimately held that the State's questions were "impermissible as a matter of law because they encroached on the province of the jury by asking [the defendant] to judge the credibility of the detectives and weigh their testimony . . . ." *Id.* at 595. In addition to being overly argumentative and effectively placing a responsibility on the defendant which is solely within the province of the jury, these questions posed serious problems. First, "the risk that the jury might conclude that, in order to acquit [the defendant], it would have to find that the police officers lied." *Id.* Second, that the defendant was forced "to choose between answering in a way that would allow the jury to draw the inference that he was lying or taking the risk of alienating the jury by accusing the police officers of lying." *Id.* at 596. The Court

concluded that "[w]hen prosecutors ask 'were-they-lying' questions, especially when they ask them of a defendant, they, almost always, will risk reversal." *Id.* at 596.

Turning back to the instant case, we hold that the State's question that Crowner objects to—"So we can't rely on [potentially inaccurate MVA information] when we're trying to describe Keith Manuel, then, can we?"—was not an impermissible "were-they-lying" question.[4] Unlike *Hunter*, where the questions unambiguously referred to whether detectives were lying, here, the prosecutor was not asking Crowner, directly or indirectly, to opine on the detective's or any other witness' truthfulness when testifying. The question, and Crowner's answers, did little more than suggest that the MVA records or some unspecified description of Manuel may be inaccurate. Detective Naylor testified that witnesses described the shooter as being "five foot eight and 200 pounds" and that, according to MVA records, Manuel's height and weight "could have been similar" to that description. But Crowner's acknowledgment—or, had he answered differently, the refusal to acknowledge—that an MVA record could be inaccurate is far removed from an assertion that another witness was lying to the jury. Crowner's answer did not contradict his own testimony about Manuel's height or weight (that Manuel was "chunky and chubby," "not too short, not too tall") or Detective Naylor's testimony. The actual MVA records pertaining to Manuel's height and weight were not entered into evidence and were not

[4] Taking Crowner's statements in context, the question immediately before asked: "So you're saying that information, for example, from like an MVA about somebody could be inaccurate?" To which he responded: "It can be."

contested at trial. We fail to see how the prosecutor's question called for Crowner to opine on another testifying witness's truthfulness.

Crowner also contends that the State's question put him in a "bind" because it presented him with a "lose/lose" situation. But, to the extent that Crowner was in a bind, it did not result from any error by the trial court. "A defendant is not entitled to testify without subjecting himself to cross-examination and impeachment." *Dallas v. State*, 413 Md. 569, 583 (2010). The State sought to impeach Crowner about his precise weight by reference to a record apparently generated during a prior arrest. By equivocating about the accuracy of such records, Crowner accepted an implied premise in Detective Naylor's theory of the case: that an MVA record may not be reliable enough to match a suspect to a witness description. In any event, that premise is not particularly notable or revelatory. The accuracy of MVA records about Manuel had no bearing on the defense's primary theory that Crowner was taller and heavier than witness descriptions of the shooter.

In sum, we conclude that the prosecutor's question did not constitute a "were-they-lying" question. Detective Naylor never testified that the records were accurate or that Manuel was of a particular height or weight. As such, there was virtually no risk that Crowner's answer would encroach on the province of the jury to resolve witness credibility. Thus, the trial court did not err in permitting the question.

D. Harmless Error

Presuming for purposes of this analysis that an error occurred, reversal would still not be required as any error was harmless beyond a reasonable doubt. For "were-they-

lying" type questions, the reviewing court will find that an error is harmless where the court is "convinced beyond a reasonable doubt that the error did not influence the verdict." *Hunter*, 397 Md. at 588. In determining if the error influenced the verdict, we consider multiple factors. *Id.* at 597. We look at "the number and the combination of the questions themselves, the repeated emphasis on them during the State's closing argument, and, most importantly, the jury's behavior during its deliberations." *Id.*

In *Hunter*, the five "were-they-lying" questions asked on cross-examination of the defendant and emphasized in the State's closing argument were not harmless. *Id.* at 585–87, 597. The Court found significant that the jury doubted its ability to reach a unanimous verdict and sent multiple notes seeking clarification on the information presented. At least one jury note was directly related to the "were-they-lying" questions. *Id.* at 597. The Court was thus unable to find, beyond a reasonable doubt, that the verdict was not influenced by the questions. *Id.*

These indicators are absent in the present case. Specifically, there was one alleged "were-they-lying" question, and the information referenced was not entered into evidence, nor did the State reference the answer in closing arguments or any other time. Additionally, there is no indication that the verdict was influenced by this single question given that the jury reached a unanimous verdict and did not send notes to the court seeking clarification on this issue.[5] Thus, if any error existed, we conclude beyond a reasonable doubt that it was harmless.

[5] The record indicates that jury sent multiple notes to the judge. The first asked why they had not heard from a particular detective. The second indicated they were unable to reach

III. The Trial Court Did Not Commit Plain Error in Permitting the Prosecutor's Closing Statements Regarding Crowner's Testimony

Last, Crowner contends the trial court committed plain error in permitting the prosecutor to reference Crowner's testimony during closing arguments. Crowner argues that the prosecutor's comments were improper because they were "susceptible of an impermissible inference," namely, that his constitutionally protected decision to testify was "just for show" and that he could not be trusted to tell the truth on the stand. Crowner concedes this issue was not properly preserved for review and requests this Court review for plain error.

The State contends that the prosecutor's comments were not improper and that plain error review is inappropriate. The State argues that, "like every other witness, [Crowner's] motives for testifying untruthfully were relevant, and the prosecutor could comment on [Crowner's] potential motivations to lie." The State also contends that Crowner has cited no legal authority in support of his claim that the prosecutor was prohibited from arguing that Crowner may have testified untruthfully to avoid implicating himself in the charged crimes. First, we provide additional background information, then we discuss the standard of review, and finally we address Crowner's legal arguments.

a unanimous verdict and asked to reconvene in the morning with a clear head. The third read: "Could you bring in the large T.V. so that we can all view the videos?" No note indicated the jury was seeking clarification about the MVA records or any testimony related thereto.

Background

During closing arguments—prior to making the comment at issue—the prosecutor discussed Corbin's statements to the police identifying Crowner as the shooter. In so doing, the prosecutor argued that Corbin, in making that identification, was "not a person who's telling a story to get out of trouble" but rather, was "a person who's giving you the truth." The prosecutor then stated:

> And then there's Mr. Crowner. Mr. Crowner decided to exercise his right to share with you what he knows about this case. *And let's be honest, there shouldn't be anybody in this room who ever thought that the defendant was going to sit on the stand and say, "I'm the guy that did it." Right? That was never going to happen. I knew that.* That's why I don't really focus on those questions.
>
> There are certain things that you have to admit, that you can't deny. And there are certain things that you can't ever admit. *And "I did it" was one of those things that I knew was never going to come out of his mouth.*
>
> But when it came to questions about everything else, there were certain things that he could say a little bit but didn't want to. And that kind of gives you an understanding of why I knew he was never going to say he did it.

(Emphasis added).

A. Standard of Review

"Generally, the trial court is in the best position to determine whether counsel has stepped outside the bounds of propriety during closing argument." *Whack v. State*, 433 Md. 728, 742 (2013). "As such, we do not disturb the trial judge's judgement in that regard unless there is a clear abuse of discretion that likely injured a party." *Id*.

Appellate courts have discretion to engage in plain error review for unpreserved issues, although such discretion should be "rarely exercise[d], as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court . . . ." *Chaney v. State*, 397 Md. 460, 468 (2007). On one hand, the Court of Appeals has "characterized the instances when an appellate court should take cognizance of unobjected to error as compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial, and as those which vitally affect a defendant's right to a fair and impartial trial . . . ." *State v. Brady*, 393 Md. 502, 507 (2006) (citations and internal quotation marks omitted). On the other hand, plain error review is inappropriate "as a matter of course" when the error is "purely technical, the product of conscious design or trial tactics or the result of bald inattention." *Id.* (citations and internal quotation marks omitted).

The Court of Appeals set forth the following test regarding plain error review:

> (1) there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant; (2) the legal error must be clear or obvious, rather than subject to reasonable dispute; (3) the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.

Newton v. State, 455 Md. 341, 364 (2017) (internal quotation marks omitted) (quoting *State v. Rich*, 415 Md. 567, 578 (2010)).

B. Closing Arguments

Counsel "is afforded generally wide latitude to engage in rhetorical flourishes and to invite the jury to draw inferences." *Ingram v. State*, 427 Md. 717, 727 (2012). However, "arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel . . . ." *Lawson v. State*, 389 Md. 570, 591 (2005) (citations omitted). "Not every improper remark [by a prosecutor], however, necessarily mandates reversal, and what exceeds the limits of permissible comment depends on the facts in each case." *Degren v. State*, 352 Md. 400, 430–31 (1999) (citations and internal quotation marks omitted) (quoting *Wilhelm v. State*, 272 Md. 404, 415 (1974)).

Although the State is prohibited from commenting on a defendant's constitutional right to *not* testify, *Smith v. State*, 367 Md. 348, 353 (2001), it is not prohibited from commenting on defendant's right *to* testify. Crowner cites no case in which either this Court or the Court of Appeals has held that a prosecutor's comments regarding defendant's choice to testify were improper. Rather, he argues that a defendant's silence as to his guilt during testimony should equate to a defendant's silence in refusing to testify, as they are "the flip side of the same coin." We disagree.

We hold that the prosecutor's comments in this case were not improper. The comments at issue, in which the prosecutor stated that he "knew" Crowner was not going to testify that he committed the shooting, had nothing to do with Crowner's silence or failure to testify. To the contrary, the prosecutor's statements were related to Crowner's

decision *to* testify and his denial of the allegations against him. In addition, the context of these statements does not lend itself to an inference regarding Crowner's failure to admit to crimes. Prior to making the statements at issue, the prosecutor discussed the significance of James Corbin's statements to the police identifying Crowner as the shooter and his motivation, or lack thereof, to lie to the police. Immediately thereafter, the prosecutor noted that it was unsurprising that Crowner denied involvement in the shooting. Such a remark was therefore a permissible comment on the significance of pieces of evidence. Simply put, a comment on a defendant's choice to testify does not equate to a comment on a defendant's refusal to testify, as the two are not the "flip side of the same coin."

Crowner cites *Degren* as being "instructive" as to what constitutes improper comments by a prosecutor. In *Degren*, the prosecutor argued during the State's rebuttal argument that the defendant should not be believed because "nobody in this country has more reason to lie than a defendant in a criminal trial," and "this defendant has every reason to lie." 352 Md. at 429. The Court of Appeals commented that it "[does] not condone such comments" because they were "unprofessional and injudicious." *Id.* at n.14. Even so, the Court nonetheless held that the trial court did not err in allowing the prosecutor to make these comments because they were made in response to an issue first raised by the defendant and did not prejudice the defendant. *Id.* at 437.

Turning back to the instant case, we fail to see how *Degren*, a case in which the Court of Appeals found no error, is "instructive" as to how the trial court in the instant case committed plain error. As in *Degren*, the remarks in the instant case did not bear on

Crowner's constitutional rights; rather, the comments were made in reference to Crowner's direct testimony. Additionally, as in *Degren,* the trial court in the instant case instructed the jury on the presumption of innocence, the jury's role in judging the credibility of witnesses, and the arguments of counsel not being considered as evidence.

Last, assuming that the prosecutor's comments could reasonably be construed as improper, plain error review is nonetheless unwarranted. "Because each one of the four conditions is, in itself, a necessary condition for plain error review, the appellate court may not review the unpreserved error if any one of the four has not been met." *Winston v. State*, 235 Md. App. 540, 568 (2018). "For the same reason, the court's analysis need not proceed sequentially through the four conditions; instead, the court may begin with any one of the four and may end its analysis if it concludes that that condition has not been met." *Id.* Crowner's argument fails on element (2) as any error was not "clear or obvious." An error is clear or obvious where it is not subject to dispute, such as it being obvious under existing caselaw or a long-held principle. *Newton*, 455 Md. at 364. As Crowner acknowledges, it is unusual to argue that a prosecutor may not comment on the defendant's choice to testify. Moreover, he cites no cases that hold a prosecutor may not comment on the defendant's choice to testify. Absent authority indicating a prosecutor cannot do so, it cannot be said that such error, if any, is "clear and obvious." Thus, we decline to consider Crowner's unpreserved claim of error regarding the prosecutor's closing argument.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.