Circuit Court for Baltimore City
Case No. 115251021

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2279

September Term, 2016

MAURICE PAGE

v.

STATE OF MARYLAND

Friedman,
Beachley,
Eyler, James R.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: February 13, 2018

A jury in the Circuit Court for Baltimore City convicted Maurice Page, appellant, in the stabbing death of Damon Ramsey. Page was sentenced to thirty years for second degree murder and a concurrent three years for carrying a dangerous weapon openly with the intent to injure. He presents the following four issues, which we have re-ordered chronologically as follows:

1. Did the trial court err in allowing the prosecutor to make an improper opening statement?
2. Did the trial court err in permitting a recording of Toni Lee's prior testimony to be played into the record under Maryland Rule 5-804?
3. Did the trial court err in excluding evidence of what Tamika Walker told appellant?
4. Was appellant deprived of a fair trial because the trial court failed to preserve an attitude of impartiality in its questioning of appellant?

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

Because Page does not challenge the sufficiency of the evidence supporting his convictions, the following summary of the trial record focuses on providing context for the issues raised in this appeal. *See Washington v. State*, 180 Md. App. 458, 461 n.2 (2008).

On July 24, 2015, Maurice Page fatally stabbed Damon Ramsey. At trial, the issues were whether Ramsey was armed and whether Page acted in self-defense. The State presented surveillance videos (without audio) and testimony from eyewitnesses to support its prosecution theory that Page killed Mr. Ramsey in retaliation for an incident involving Page's young relatives.

Tamika Walker testified that on the evening of July 24, 2015, she went into a liquor store at the corner of Harford Road and Cliftview Way in Baltimore. Two of her sons, ages nine and twelve, stayed in her parked car while she was in the store and talking with a friend. When Ms. Walker returned to her vehicle, a stranger she later identified as Mr. Ramsey was sitting in the car next to her twelve-year-old. Mr. Ramsey exited the vehicle, saying "he thought he was in a cab." He walked "down to the carry-out" located "three stores down" Harford Road.

Panicked, Ms. Walker retrieved a baseball bat from the trunk of her car and began "hoop, hollering, and fussing." She was concerned that Page had "touched" her son.[1] Toni Lee was outside the store as Ms. Walker expressed her distress and drew about ten people to the corner. Page, who was related to both boys through their mother, was among the group who gathered on the sidewalk.[2]

While they were still there, Mr. Ramsey returned. Video recordings from the liquor store's surveillance camera and CCTV cameras, capturing Mr. Ramsey's approach and the ensuing altercation, were played for the jury. The footage shows Mr. Ramsey walking toward the street corner. After Mr. Ramsey passed a few people, Page took two strides toward him and used an overhand motion to strike him. Although a weapon cannot be seen in the video, Page hit the right side of Mr. Ramsey's head, causing Mr. Ramsey to bend

[1] After her son denied that Mr. Ramsey had touched him, Ms. Walker took the child to the hospital for an examination, which satisfied her that he was not harmed.

[2] Page testified that he considers the boys his nephews because their grandmother is the sister of his daughter's mother.

forward, put his hands up to his head, and move away. As Mr. Ramsey did so, Page struck again in his back.

Mr. Ramsey continued for several steps into the street. While avoiding cars, he faced toward Page, who had followed to the edge of the sidewalk. Mr. Ramsey then turned and took two steps up the street before collapsing. He lay face down in the busy traffic lane while cars swerved around him.

Page and all the witnesses left the scene. A man on a bicycle who stopped to check on Mr. Ramsey may have picked up something from the ground next to Mr. Ramsey.

Although first responders arrived within minutes of a motorist's 911 call at 11:31 p.m., Mr. Ramsey suffered two stab wounds that were fatal. The first, which corresponded to the initial blow struck by Page, entered the right side of Mr. Ramsey's head near his ear; the wound was three and a half inches deep, extending through the right carotid artery, crossing behind the trachea, and injuring both the left carotid artery and jugular vein. The second stab wound, which corresponded to the later blow struck by Page, entered the medial mid-left back, extending into the chest cavity, injuring the left aorta and lung.

Mr. Ramsey, who had a blood alcohol content of .15 percent as well as morphine and cocaine in his system, had no weapon or cell phone when first responders arrived. Ms. Walker later told police that she saw Page with a knife but did not see Mr. Ramsey with a weapon. Although Mr. Ramsey was swinging his hand and trying to act "tough" as he returned, the only thing Ms. Walker saw in Mr. Ramsey's hand was a beer can. After striking Mr. Ramsey, Page told Ms. Walker, "I had to get him out of there."

Toni Lee, who was standing next to Page, saw only a cigarette in Mr. Ramsey's hand. Neither Ms. Walker nor Ms. Lee recalled hearing Mr. Ramsey say anything before Page struck. Trial testimony from Ms. Walker and previously recorded testimony by Ms. Lee were consistent with their earlier accounts that Mr. Ramsey was not armed or belligerent.

When police interviewed Page on August 18, he admitted stabbing Mr. Ramsey with his folding knife but claimed that Mr. Ramsey was armed with a "blade" and acting "aggressively." Page admitted that he asked detectives whether Mr. Ramsey was armed, then clarified that he also told the officers that he thought Ramsey was armed.

At trial, Page continued to assert that he acted to defend himself, Ms. Walker, and her son, who was standing next to her when Mr. Ramsey returned. Page testified that after Mr. Ramsey got out of Ms. Walker's vehicle, he walked down the street to a carry-out. From the corner, Page saw Mr. Ramsey conduct a "transaction" that Page "assum[ed]" was the purchase of a knife, because Ramsey was carrying a knife in his hand when he returned to the corner. Concerned about Ms. Walker and her son, who were standing next to him, Page "pushed [Mr. Ramsey] out of the way and . . . lunged at him" with a pocket knife.

The jury, rejecting Page's claims of perfect and imperfect self-defense, convicted him of second degree murder and carrying a dangerous weapon openly with intent to injure. After the trial court denied Page's motion for a new trial, Page noted this timely appeal.

We shall add details from the trial record in our discussion of the issues raised by Page.

DISCUSSION

I. OPENING STATEMENT BY THE PROSECUTOR

Page contends that "the trial court erred in allowing the prosecutor to make an improper opening statement." Specifically, he points to the following ruling at the close of the State's opening:

> [PROSECUTOR]: Ladies and gentlemen, on July the 24th of 2015 Mr. Page acted and he committed a murder. He killed Damon Ramsey. And at the end of this case, after you listen to all of the testimony from Tamika Walker, from the officers who responded, from the medical examiner, after you review the same information that the police officers saw during their investigation –
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Come up.
>
> (Counsel and Defendant approached the bench, and the following occurred:)
>
> THE COURT: What you [sic] objecting to?
>
> [DEFENSE COUNSEL]: Objecting to the words "after you review the evidence that the police officers reviewed," meaning that they are going to come to the same conclusion as the police officers, and giving credibility to the police officers.
>
> THE COURT: What exactly did you say?
>
> [PROSECUTOR]: I said after they had reviewed all of the evidence that they heard in the courtroom, that they had seen all of the evidence that the police officers had reviewed.
>
> THE COURT: Oh. You're saying that the evidence presented in the courtroom will be evidence that the police reviewed?
>
> [PROSECUTOR]: Yes.
>
> THE COURT: That's what you're saying? Overruled.

> (Counsel and Defendant returned to the trial tables, and the following occurred in open court:)
>
> [PROSECUTOR]: After you review all of it, I'm going to ask that when you return to the deliberation room that you use all of your common sense, that you fairly look at every piece of evidence, and that you find the Defendant, Mr. Maurice Page, guilty for the murder of Damon Ramsey. For stabbing him on July the 24th of 2015 in the 2300 block of Harford Road, in the side of the head, in the middle of his back. Thank you for your attention.

We review the propriety of an opening statement under the following standards:

> The primary purpose or office of an opening statement in a criminal prosecution is to apprise with reasonable succinctness the trier of facts of the questions involved and what the State or the defense expects to prove so as to prepare the trier of facts for the evidence to be adduced. While the prosecutor should be allowed a reasonable latitude in his opening statement he should be confined to statements based on facts that can be proved and his opening statement should not include reference to facts which are plainly inadmissible and which he cannot or will not be permitted to prove, or which he in good faith does not expect to prove. An opening statement by counsel is not evidence and generally has no binding force or effect. To secure a reversal based on an opening statement the accused is usually required to establish bad faith on the part of the prosecutor in the statement of what the prosecutor expects to prove or establish substantial prejudice resulting therefrom.

Wilhelm v. State, 272 Md. 404, 411-12 (1974), *abrogated on other grounds, as recognized in Simpson v. State*, 442 Md. 446, 458 n.5 (2015). *See also Allen v. State*, 318 Md. 166, 178-79 (1989) (purpose of an opening statement "is to inform the trier of facts of the issues involved and what evidence will be offered as proof to resolve those issues") (citation omitted).

In Page's view, the challenged remarks "are reversible error" for two reasons. First, he argues, the prosecutor improperly "directed the jury to consider in their determination of guilt or innocence the police investigation that preceded the trial[,]" even though "[t]he

prosecutor could not have thought that law enforcement's determination to prosecute appellant would be admissible." In support, he points out that "[c]ourts generally do not admit information which caused police to undertake certain actions in the course of their investigations, because it is generally irrelevant" and unfairly prejudicial, citing *Zemo v. State*, 101 Md. App. 303, 310 (1994) ("The jury, of course, has no need to know the course of an investigation unless it has some direct bearing on guilt or innocence."). Second, Page contends that the prosecutor's remarks amounted to "improper vouching" for police witnesses, because "what the prosecutor did was tell the jury to rely, in its task of deciding appellant's guilt, on the pretrial determination of trained officers to prosecute appellant." *See generally Spain v. State*, 386 Md. 145, 153 (2005) ("Vouching typically occurs when a prosecutor 'places the prestige of the government behind a witness through personal assurances of the witness's veracity . . . or suggests that information not presented to the jury supports the witness's testimony.'") (citation omitted).

We agree with the State that "[t]he words used by the prosecutor simply do not support" either of Page's challenges. The prosecutor's statement was merely that the jury would be able to convict Page based on the evidence obtained during the police investigation. She did not mention the decision to prosecute Page for murder, much less suggest that jurors should convict based solely on such a decision to prosecute. Nor did she give any personal assurance regarding the veracity of a witness. When viewed in context, the prosecutor's opening statement was well within the State's prerogative to

comment on "what evidence will be offered as proof to resolve" the issues in the case. *See Wilhelm*, 272 Md. at 411-12.

The *Zemo* Court's admonition against routinely admitting evidence to explain the course of a police investigation is both factually and legally inapposite because the issue here is the propriety of a non-evidentiary remark in the State's opening statement. Moreover, nothing in the challenged remark negated the trial court's instructions – given just before that opening statement and again just before deliberations – that such argument by counsel could not be considered as evidence. *Cf. Spain*, 386 Md. at 160 ("With these instructions in mind, we are confident that a reasonable jury would be able to fulfill properly its role and discern argument from evidence without undue prejudice to the defendant"). Accordingly, the trial court did not abuse its discretion in overruling the defense objection.

II. PRIOR RECORDED TESTIMONY BY TONI LEE

Page asserts that "the trial court erred in permitting a recording of Toni Lee's prior testimony to be played into the record under Maryland Rule 5-804." We conclude that both the record and the law support the trial court's ruling.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Unless the out-of-court statement in question fits within an established exception to the rule against hearsay, it "is not admissible." Md. Rule 5-802. This Court determines

de novo whether evidence constitutes inadmissible hearsay. *See Parker v. State*, 408 Md. 428, 436 (2009).

Here, the hearsay exception at issue applies to prior testimony by an "unavailable" witness "if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Md. Rule 5-804(b)(1) (2018). A witness is unavailable if she "is unable to be present or to testify at the hearing because of death[.]" Md. Rule 5-804(a)(1)(4). Generally, the prior testimony must have been given in a proceeding where "the party against whom the statement is offered had an 'opportunity' and 'similar motive' to develop the testimony of the witness when the prior statement was made, by direct, cross- or redirect examination." *Dulyx v. State*, 425 Md. 273, 284-85 (2012); Md. Rule 5-804(b). A defendant's "motive is 'sufficiently similar' when 'the party now opposing the testimony would have had, at the time the testimony was given, 'an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue' now before the court.'" *Id.* The opportunity to develop testimony "'is generally satisfied when the defense [was] given a full and fair opportunity to probe and expose infirmities through cross-examination.'" *Id.* at 285 (citations omitted).

In our view, this case presents a classic example of when prior recorded testimony may be properly admitted to fill the gap caused by the witness's death. Before Ms. Lee's recorded testimony was played during this trial, the court gave defense counsel and Page an opportunity to review the recording. When Page was initially tried over five days in

April 2016, Ms. Lee was brought into court as a material witness. She testified about the same incident and charges. Her testimony was given on April 4, 2016, under oath in the same court, where the State was represented by the same prosecutor, and Page was represented by the same defense counsel. Defense counsel cross-examined (and re-cross-examined) Ms. Lee at length. Counsel had a full opportunity to impeach Ms. Lee, and did so, by eliciting admissions that she lied to police and used heroin a couple hours before the incident, and by establishing other inconsistencies between her trial testimony and her statement to police. *Cf. Williams v. State*, 416 Md. 670, 696-97 (2010) (opportunity to cross-examine witness during prior testimony was impaired by State's failure to disclose Brady material). Following her death several days later, the trial court declared a mistrial.

On this record, the trial court did not err or abuse its discretion in admitting Ms. Lee's recorded testimony under Rule 5-804. We reject Page's argument that he did not have the same opportunity to probe and expose the infirmities of Ms. Lee's testimony because "Ms. Walker . . . had not appeared for the first trial," but "was a witness at the retrial." Page offers no reason why Ms. Walker's absence from the first trial would have diminished either his opportunity or his incentive to cross-examine Ms. Lee during that trial. We see none. To the contrary, it is reasonable to infer that defense counsel's opportunity and incentive to cross-examine Ms. Lee in the first trial was at least as strong given that at the time she testified, Ms. Walker had not testified. Moreover, the record supports the trial court's factual finding that defense counsel released Ms. Lee following her testimony and had no plans to recall her in the defense case.

III. STATEMENT BY TAMIKA WALKER

Page's remaining assignments of error arise from his trial testimony. He contends that "the trial court erred in excluding evidence of what Tamika Walker told" him about Page's encounter with her sons, which was "necessary to corroborate [his] self-defense argument." We disagree and explain.

On direct examination, when defense counsel attempted to elicit Ms. Walker's out-of-court statements, the following occurred:

> [DEFENSE COUNSEL]: And what happens next?
>
> [THE DEFENDANT]: What happens next, I'm talking to her. "Why don't you . . . put that bat out," this, that, "and tell me what happened. What's going on?" So she's telling me. This is a one on one. She's telling me what's happening. So I'm walking up the street, I'm –
>
> [DEFENSE COUNSEL]: Well, what, if anything, does she tell you?
>
> [THE DEFENDANT]: She tells me –
>
> [PROSECUTOR]: Objection.
>
> THE DEFENDANT: – that –
>
> THE COURT: Sustained.
>
> BY [DEFENSE COUNSEL]: . . . What was her demeanor?
>
> [THE DEFENDANT]: She was emotionally upset, disturbed. She was shaking and then angry. That was her demeanor.
>
> [DEFENSE COUNSEL]: And under those circumstances – have you ever seen her like that before?
>
> [THE DEFENDANT]: It was unusual behavior for her to be the way she was that night, yes.

> [DEFENSE COUNSEL]: And so when she is in that state, what, if anything does she say to you?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.

After eliciting Page's testimony that Ms. Walker was "screaming, howling" and "disturbed," defense counsel asked, "what, if anything, was she yelling out?" The prosecutor again objected, prompting a bench conference that led to the ruling challenged on appeal:

> THE COURT: Okay. We already got out that she was yelling, "This MF was in my car." So what else are you trying to get?
>
> [DEFENSE COUNSEL]: She was telling him some other stuff –
>
> THE COURT: Well, it's hearsay . . . . and she's objecting, so why do you keep . . . . [coming] back to it? . . . .
>
> [DEFENSE COUNSEL]: -- because I'm trying to . . . . lay the found – she's upset. She is – it's just happened. It's presence [sic] sense impression about an event that has just –
>
> THE COURT: Now which is it, presence [sic] sense . . . . or excited utterance.
>
> [DEFENSE COUNSEL]: Well, it can be both. It can absolutely, in certain circumstances, be both.
>
> THE COURT: Well, the excited utterance would mean that the MF is in my car. So what else . . . . are you trying to get him to say? . . .
>
> [DEFENSE COUNSEL]: Well, he also – she describes how he was – she's afraid he was messing with her kids and she wants to, you know, go after him and she's –
>
> THE COURT: Well, you know, [counsel], I understand. I don't know if you're trying to paint the impression that maybe she did whatever happened to him –

[DEFENSE COUNSEL]: No, I'm not.

THE COURT: – because he already [said] he stabbed him. So I'm going to sustain. Let's move on.

In Page's view, "the trial court should have allowed [him] to testify as to what Ms. Walker told him" because "[t]his evidence was admissible under the excited utterance and the present sense impression exceptions to the hearsay rule." *See* Md. Rule 5-803(b)(2); Md. Rule 5-80(b)(1). The State counters that "[t]he issue weighing upon the trial judge was not whether the statement was hearsay, but, rather, whether Walker's (supposed) statement that 'she wanted to go after' the victim was relevant."

We agree that the court's ruling was premised on relevance rather than the rule against hearsay. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. "Evidence that is not relevant is not admissible." Md. Rule 5-402. Even if the proffered evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence." Md. Rule 5-403. We review a decision to exclude evidence on relevance grounds for abuse of discretion. *See Brooks v. State*, 439 Md. 698, 708-09 (2014).

As the excerpted transcript shows, defense counsel failed to proffer how Ms. Walker's out of court statement was relevant to an issue in the case. Page had already testified that he learned about the incident from Ms. Walker, who had already testified that she was afraid Mr. Ramsey had "touched" her child. When defense counsel proffered that

Page would testify that Ms. Walker said she was afraid Mr. Ramsey had harmed her children, the trial court did not abuse its discretion in concluding that such testimony would be "needless presentation of cumulative evidence." As for the alternative defense proffer that Ms. Walker told Page "to get" Mr. Ramsey, the trial court did not abuse its discretion in concluding that such evidence was irrelevant, given that Page admitted killing Mr. Ramsey and Ms. Walker's statement would not make it more likely that he acted in self-defense. Accordingly, the trial court did not abuse its discretion in excluding evidence of what Ms. Walker told Page about Mr. Ramsey's encounter with her sons.

IV. QUESTIONING BY THE COURT

Page insists that he "was deprived of a fair trial because the trial court failed to preserve an attitude of impartiality in its questioning of" him. In Page's view, the trial judge's questioning was "judicial overreaching" because it gave jurors the impression that she did not believe Page's claim of self-defense and/or that she sought to discredit that defense. Conceding that his trial counsel did not object during these exchanges, Page nevertheless maintains that the judge's partiality so tainted his trial that it either constitutes structural error or warrants plain error reversal. For the reasons explained below, we conclude that such relief is not warranted.

A. Standards Governing Review of Partiality Complaints Arising From Questioning by the Court

Because manifestations of a trial judge's opinion may "significantly impact the jury's verdict," a criminal defendant has a due process right to have his or her trial conducted by a judge who not only *is* impartial but also *appears* impartial to jurors. *See*

Diggs v. State, 409 Md. 260, 287-89 (2009) (reviewing cases); *Jefferson-El v. State*, 330 Md. 99, 106 (1993). The Court of Appeals has held that "questioning by a trial judge showing his disbelief of the witness' testimony [is] beyond the line of impartiality over which a judge must not step." *Vandegrift v. State*, 237 Md. 305, 311 (1965).

When evaluating whether a trial judge crossed that line, we ask whether the "'judge's comments . . . could cause a reasonable person to question the impartiality of the judge,'" so that "'the defendant has been deprived of due process and the judge has abused his or her discretion.'" *Archer v. State*, 383 Md. 329, 357 (2004) (quoting *Jackson v. State*, 364 Md. 192, 207 (2001)). In practice, the challenge is to identify "the 'fine line between assisting the jury by bringing out facts and 'sharpening the issues,' which is permissible, and influencing the jury's assessment of facts or of a witness's credibility by indicating his own opinions, which is not permissible.'" *Smith v. State*, 182 Md. App. 444, 489 (2008) (quoting *Leak v. State*, 84 Md. App. 353, 364-65 (1990)). Appellate courts have

> distilled the following principles regarding judicial intervention in the examination of witnesses. (1) The primary purpose of judicial interrogation of witnesses is to clarify matters elicited on direct or cross-examination. (2) Judicial interference in the examination of witnesses should be limited and it is preferable for the trial judge to err on the side of abstention from intervention in the case. (3) Although the number of questions posed by the trial judge exceeds those normally asked by a trial judge, the sheer number, standing alone, is not determinative of whether reversal is warranted. (4) It is preferable for the presiding judge to afford counsel the opportunity to elicit relevant and material testimony prior to interceding. (5) Continued inquisitorial participation in the questioning of witnesses runs afoul of the court's role as impartial arbiter, whether such questions are proper or improper, when they tend to influence the jury regarding the court's view of the testimony and evidence. (6) The most egregious manner of intervention is the trial court's personal injection of its views and/or attitude toward witnesses or parties or their theory of the case through intimidation,

> threatening, sarcasm, derision or expressions of disbelief, irrespective of the frequency or the point in time during or at the conclusion of direct or cross-examination of counsel. (7) If the direct and cross-examination of counsel is woefully inadequate, requiring extensive supplementation thereof, the preferred procedure is for the court to summons both counsel to the bench or in chambers and suggest how it wishes to proceed. (8) Greater latitude is granted to a trial judge based on the complexity of a case.

Id. at 486-87 (citations omitted).

When an appeal challenges the partiality of a trial judge based on his or her questioning of a witness, but trial counsel did not properly object, the leading case is *Diggs v. State*, 409 Md. 260 (2009). In consolidated appeals, the Court of Appeals held that repeated instances of biased judicial questioning warranted plain error relief:

> In the cases sub judice, . . . the judge intervened with inappropriate questions and comments throughout the trials.
>
> In *Diggs*, the judge rehabilitated the prosecutor's case by laying the foundation for the [drug] distribution charge during questioning of the lead detective, Detective Giganti; rehabilitated Detective Georgiades after he appeared confused; questioned Sherienne Diggs regarding the denominations of bills, where she put her keys, and the timing of her telling the police that the car and drugs belonged to her boyfriend rather than her brother; commented to Ms. Diggs, "You have a very good memory on everything else," and questioned her whether she was comfortable with her testimony, all of which bolstered the State's case while implying a disbelief in the defense and created the aura of partiality in front of the jury. Similarly, in *Ramsey*, the judge elicited key elements of the State's case from Officer Torbit including the timing and in-court identification of the defendant; established key aspects of the officer's testimony regarding the drugs; elicited testimony regarding the elements of intent to distribute after the prosecutor finished questioning the witness; made comments to the jurors to bolster the integrity of the prosecutor that "most lawyers, good lawyers, talk to their witnesses," and established the chain of custody of the drugs after the prosecutor failed to do so. In so doing, the judge acted as a co-prosecutor, and his behavior exceeded "mere impatience" and crossed the line of propriety, creating an atmosphere so fundamentally flawed as to prevent Diggs and Ramsey from obtaining fair and impartial trials.

Id. at 292-93 (footnote omitted).

In both trials, defense counsel expressed concern about the court's questions during bench conferences but did not follow up by lodging contemporaneous or continuing objections. *Id.* at 284-85. Although "[n]either Diggs' nor Ramsey's counsel interjected objections regarding most instances of repeated and egregious behavior[,]" both appellants asserted "that continuous objections would have been futile and unprofessional and would have created more hostility and tension." *Id*. at 293.

The Court of Appeals discussed the use of structural error and plain error concepts to remedy egregious partiality, explaining:

> In the past, when addressing the issue of judicial bias, we have inferred that unobjected to behavior can be reviewed by utilizing structural error review. *See Harris v. State*, 406 Md. 115, 130 (2008); *Redman v. State*, 363 Md. 298, 303 n.5 (2001) ("It is because structural error is impossible to quantify that it defies analysis by the harmless error standard . . . . [T]he Supreme Court has found an error to be structural and subject to automatic reversal in a very limited number of cases. . . . Such defects include . . . a judge who is not impartial, *see Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437 (1927)."). We also have reviewed allegations of judicial bias without necessarily articulating our bases or requiring repeated objections; in *Jackson v. State*, 364 Md. 192 (2001), despite the failure to object during sentencing to comments made by the judge, we reversed the conviction and held that the trial judge's comments exceeded the outer limit of a judge's broad discretion and amounted to impermissible sentencing criteria.
>
> More frequently, however, we have invoked the "plain error" doctrine in support of our review of allegations of unobjected to judicial bias. Plain error is "error which vitally affects a defendant's right to a fair and impartial trial." *State v. Daughton*, 321 Md. 206, 211 (1990), citing *State v. Hutchinson*, 287 Md. 198, 202 (1980). We have recognized the boundaries of that error to which we apply our review as that which is "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Abeokuto v. State*, 391 Md. 289, 327 (2006), quoting *Richmond v. State*, 330 Md. 223, 236 (1993) (citations omitted). *See also Rubin v. State*,

> 325 Md. 552, 588 (1992); *Hutchinson*, 287 Md. at 203. We will "intervene in those circumstances only when the error complained of was so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Trimble v. State*, 300 Md. 387, 397 (1984), *cert. denied*, 469 U.S. 1230, 105 S. Ct. 1231 (1985). In each case, we will "review the materiality of the error in the context in which it arose, giving due regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald inattention." *Hutchinson*, 287 Md. at 203.

Id. at 285-87.

Holding that the biased questioning throughout both Diggs's and Ramsey's trials warranted plain error relief, the Court of Appeals reasoned that "repeated objections" by defense counsel may have led to "tension in the courtroom." *Id*. at 294-95. Nevertheless, the Court cautioned that relief from unpreserved partiality complaints should be rare, so that

> the failure to object will only be countenanced in those instances in which the judge exhibits repeated and egregious behavior of partiality, reflective of bias. *Failure to object in less pervasive situations may not have the same result, nor will we necessarily intervene.*
>
> *We deem it crucial to note that . . . defense counsel must object in order to seek correction by the judge and preserve the issue for appeal.*

Id. at 294 (emphasis added).

Previously, in *Smith v. State*, 182 Md. App. 444, 478-80 (2008), this Court applied these preservation principles, explaining:

> We decline to apply the preservation rule in a hyper-technical fashion, foreclosing appellate review of meritorious claims, where the record shows that trial counsel has made good faith and timely objections and attempted to explain, on the record, counsel's concerns regarding a pattern of questioning by the trial court. In this case, appellant objected generally to the trial court's questioning of Officer Goodwin, Detective Bealefeld and Tycara Johnson.

> In addition, at the bench conferences following the objections to the trial court's examination of Detective Bealefeld and Tycara Johnson, appellant's counsel either specifically noted his concern that the court was showing preference for the State's case or adopted objections when raised by co-defendant's counsel. Under the circumstances of this case, appellant has properly preserved for our review the court's impartiality, vel non.

Id. at 480-81.

As these cases teach, plain error relief may be available when trial counsel has lodged some complaint about the court's questioning of one or more witnesses, but failed to make the contemporaneous or continuing objections necessary to preserve a particular partiality challenge for appellate review.

B. The Trial Record

During the State's case-in-chief, the jury viewed video of the stabbing and heard testimony from both Ms. Walker and Ms. Lee, supporting the prosecution theory that when Mr. Ramsey returned to the group assembled at the street corner, Page attacked without provocation. On direct examination, Page testified that when he learned about the incident with his nephews, he told Mr. Ramsey to leave. According to Page, Mr. Ramsey walked down Harford Road to "Mike's," a nearby carry-out, where Page saw him conduct a "transaction" that Page believed was a knife purchase. When Mr. Ramsey returned, Page was standing with Ms. Walker and her older son along the railing of a handicap ramp located along the front of the liquor store.

As Page attempted to explain how and why he struck to Mr. Ramsey, the trial court interjected questions that, according to Page, "crossed the line" by signaling the court's

disbelief of his self-defense claim. Rather than list only the judicial remarks challenged by Page, we shall place them in context, highlighting in boldface the statements about which Page complains.

> [DEFENSE COUNSEL]: When [Mr. Ramsey] comes back up the sidewalk, do you see him coming up the sidewalk towards the group?
>
> [THE DEFENDANT]: Yes, ma'am.
>
> [DEFENSE COUNSEL]: And do you see all of him or part of him? What part do you see?
>
> [THE DEFENDANT]: I'm seeing a silhouette of him because it's dark. I'm seeing a silhouette at first and then as he approached and got closer, I – that's when I, you know, notice and recognized that he had a beer and he was still swinging [his hand]. He set the beer down and I turned my attention back towards Tamika.
>
> Everything was like split second timing and then my next encounter with him when he comes into my view, he's standing right behind me, nearly right behind me. There's only other individual [sic] in-between us and he's coming around that individual.
>
> So before – and Tamika's here (indicating), I'm here (indicating). I'm (indicating), Tamika's in front of me, [her] child's here (indicating), the person's here (indicating) and he's coming around that person. I turned. I'm only – I'm paralyzed on one side, so I only have really one side that I can really use and I turned with that side and that's the side I used to defend myself.
>
> **THE COURT: Well, was his back to you? Because you stabbed him in the back.**
>
> THE DEFENDANT: No, his back was not to me.
>
> **THE COURT: Well, how'd you stab him in the back?**
>
> THE DEFENDANT: He was – he was crouched down and still coming at me and at – (indicating) – I went down. I didn't know –

THE COURT: So you stabbed him over top of his head, is that what you're trying to say?

THE DEFENDANT: Yes, ma'am.

THE COURT: But he never touched you?

THE DEFENDANT: Yes, he did.

THE COURT: What'd he do to you?

THE DEFENDANT: What did he do?

THE COURT: Yeah?

THE DEFENDANT: Well, at that point when he was crouched down, I really didn't give him a chance to do anything to me, but he touched me just by his encounter.

THE COURT: He touched you with what part of his body?

THE DEFENDANT: His shoulder.

THE COURT: So he's down here your – your stomach area then?

THE DEFENDANT: No, he's coming down. He's in my chest area. He's coming –

THE COURT: How tall are you?

THE DEFENDANT: – up under me. Roughly, I'm 5'11".

THE COURT: Next question.

BY [DEFENSE COUNSEL]: Now, Mr. Page, when he is coming towards you, you indicated – you said that you saw the weapon in his hand?

[THE DEFENDANT]: Yes.

[DEFENSE COUNSEL]: What, if anything, did that look like?

[THE DEFENDANT]: It brand [sic] – looked like a knife.

[DEFENSE COUNSEL]: Do you know how big of a knife?

[THE DEFENDANT]: It was – it was a nice size, like I really couldn't gone [sic] or give inches wise what it was, but was large enough for me to see it.

Defense counsel next elicited Page's testimony that he was not aware that Mr. Ramsey's injuries were fatal until he talked with police on August 18, and that he left the area that night and went to a casino as he had planned. Defense counsel then asked what happened to the knife, and the following ensued:

[DEFENSE COUNSEL]: And what, if anything, did you do with the knife?

[THE DEFENDANT]: The knife, I don't recall what happened to the knife.

[DEFENSE COUNSEL]: Well, did you keep it? Did you throw it away?

[THE DEFENDANT]: I was – I was in shock, so I probably just threw it or dropped it.

THE COURT: You were in shock?

THE DEFENDANT: Yes, I was.

THE COURT: But then you went to the casino?

THE DEFENDANT: Yes, I was.

THE COURT: Uh-huh.

[DEFENSE COUNSEL]: Why did you go to the casino?

[THE DEFENDANT]: Well, that's a place where I really – I try to gather my thoughts at. That's why I went to the casino. I'm trying to get myself together. I'm upset. I don't know what's – what's going on, what happened but I'm upset and that's where I go.

[DEFENSE COUNSEL]: How often do you go to the casino?

[THE DEFENDANT]: I go to the casino two, three, times a week.

[DEFENSE COUNSEL]: When Mr. Ramsey was coming up the street and towards you, do you recall when, if at all, you pulled out your pocket knife?

[THE DEFENDANT]: I pulled out my pocket knife when he was right up on me. He's behind me.

[DEFENSE COUNSEL]: Well, he was behind you?

[THE DEFENDANT]: When he was behind me, I pulled my hand out my pocket [sic] and I had the knife in my hand.

[DEFENSE COUNSEL]: Okay. But when you were describing, so it's clear, your back was to North Avenue [sic] for a period of time and how is he behind you? Describe so that's clear.

[THE DEFENDANT]: He's behind me because the corner of Cliftview and Harford Road where the – the bar is in from the exhibit that we used, there's a railing. Cliftview's here (indicating), the railing's here (indicating) and my back is this way because [Ms. Walker's son] is just sitting up on the railing and that's –

[DEFENSE COUNSEL]: Mr. Page, your back is towards the railing?

[THE DEFENDANT]: No. My back is towards Harford Road.

[DEFENSE COUNSEL]: Okay. And then which – where do you – where are you when you first see him?

[THE DEFENDANT]: When I – when I see him, I'm still standing there. [Ms. Walker's son is] on the railing. He's about to get down. Tamika's here (indicating). It's been a long time ago so I'm – I'm –

THE COURT: Just tell – say what you're saying, sir.

THE DEFENDANT: And I'm here (indicating), so Mike's [carry-out] is this way (indicating). I'm looking. They're here. I'm here. My back's here. The other person's in back of me here (indicating), okay? So my – I'm here (indicating). This is Mike's coming this way (indicating). This is where I see him coming, my peripheral vision –

THE COURT: Okay. Let me just stop you a minute.

THE DEFENDANT: Yes, ma'am.

THE COURT: When he puts the beer down on the ramp, which is the handicap ramp that goes in to the liquor store, right, that's in front of you?

THE DEFENDANT: That's on the side of me.

THE COURT: On the side of you. The railing's in front of you though, right?

THE DEFENDANT: The railing's in front of me, but when you go up the street, that's more like the side. Where he set the beer bottle down, it's still [t]he ramp and it's still the ramp to the bar, but that's – that area there, that's still the ramp to the bar but that's on the side –

THE COURT: Well, is it –

THE DEFENDANT: – of me –

THE COURT: Okay. But that's right next to the railing, though, right? Because it's all attached to the building. The railing is right in front of the building, right?

THE DEFENDANT: The railing is –

THE COURT: So it's all –

THE DEFENDANT: – in front of the building.

THE COURT: – attached?

THE DEFENDANT: The railing goes – the ramp goes all the way down.

THE COURT: Okay. That's fine.

THE DEFENDANT: It's a handicap ramp.

THE COURT: I understand. So you can see that clearly, right?

THE DEFENDANT: Right.

THE COURT: Because you saw him put the beer down?

THE DEFENDANT: Yes.

THE COURT: So your back's not to that to him [sic] when he puts that beer down?

THE DEFENDANT: No, my –

THE COURT: So you're looking right at him?

THE DEFENDANT: No, I'm looking from my side view.

THE COURT: Well, whatever. You're looking –

THE DEFENDANT: Okay.

THE COURT: – at your side. You turn your head –

THE DEFENDANT: Right.

THE COURT: – or whatever, but you're you know – we can move our heads around. Your body may be here (indicating) but your head –

THE DEFENDANT: Head, exactly.

THE COURT: – can all the way around – not all the way around –

THE DEFENDANT: Yeah.

THE COURT: – but from side to side –

THE DEFENDANT: Exactly.

THE COURT: Right? So you turn your head and you see him –

THE DEFENDANT: Yes.

THE COURT: – but your body is still to Harford Road, right?

THE DEFENDANT: My back is still –

THE COURT: Your back –

THE DEFENDANT: – to Harford Road.

THE COURT: – is Harford Road. Okay. So at some point when he puts that beer down, **you're telling the ladies and gentlemen of the jury he then goes around another guy, doesn't come in front of you but goes to the back again?**

THE DEFENDANT: He goes to the back.

THE COURT: So his back now is also facing Harford Road?

THE DEFENDANT: No.

THE COURT: Well, if he's behind you, why isn't his back behind –

THE DEFENDANT: Because he's coming down –

THE COURT: No, I'm not talking about when he's coming. When he gets there? When he gets to your back? If your back is facing Harford Road and he's behind you is –

THE DEFENDANT: Oh, his –

THE COURT: – what you're saying –

THE DEFENDANT: – back is to Harford Road.

THE COURT: All right. Okay.

THE DEFENDANT: Exactly.

THE COURT: So both backs on [sic] Harford Road?

THE DEFENDANT: Right.

THE COURT: Okay. So then you must turn?

THE DEFENDANT: Right.

THE COURT: And then you're saying that's when he bends down like in a football stance or, you know, as if he's going to tackle you in some kind of way and you stab him in the back. Got it. Let's go.

[DEFENSE COUNSEL]: When he comes around, do you turn to – a

[THE DEFENDANT]: Yeah.

[DEFENSE COUNSEL]: – face Harford Road?

[THE DEFENDANT]: Yes, ma'am.

[DEFENSE COUNSEL]: When do you turn to face Harford Road?

[THE DEFENDANT]: I turn to face Harford Road when I hear the shouting.

[DEFENSE COUNSEL]: Okay. And he's already put his beer down? You've already see that?

[THE DEFENDANT]: Yes.

[DEFENSE COUNSEL]: And do you turn to the right this way (indicating) or do you turn around to the left?

[THE DEFENDANT]: Uh –

THE COURT: Well, he just turns around. What difference does it make? Because the man's right behind him he says. Isn't that right? You just turned. What's your natural –

THE DEFENDANT: Turned.

THE COURT: – way of turning?

THE DEFENDANT: Yeah, I turned –

THE COURT: Right.

THE DEFENDANT: – to –

THE COURT: He turned around.

THE DEFENDANT: – turned to my –

BY [DEFENSE COUNSEL]: And you had your knife out at that point?

[THE DEFENDANT]: I pulled my knife, yes, ma'am.

[DEFENSE COUNSEL]: And do you have – strike that. At that point when you see him put the beer down and coming around, what, if anything, are you thinking?

[THE DEFENDANT]: I'm thinking that he's coming to hurt Tamika or myself at that point because I'm – I'm feeling he's angry. He's angry at that point and I know if I'm feeling that he's coming to – to cause me bodily harm, me or Tamika.

[DEFENSE COUNSEL]: If you recall, after you, your encounter with him, did he have any other encounters, verbal encounters, with anyone else?

THE COURT: When?

BY [DEFENSE COUNSEL]: After you had your verbal encounter with him, you tell him to leave and you describe him storming off aggressively. After that, did you see anyone else outside of the exchange that you describe, did you see anyone else have a verbal encounter with him from your group or the group that was there?

[THE DEFENDANT]: I think –

[PROSECUTOR]: Objection, Your Honor.

THE COURT: Sustained.

BY [DEFENSE COUNSEL]: Do you see him talk – you describe this exchange.

[THE DEFENDANT]: Uh-hum.

[DEFENSE COUNSEL]: And then you back away, you're talking to Tamika, you've talked to the group about going away.

THE COURT: Ms. [Defense Counsel], I don't mean to interrupt you but so that the record is clear, you're talking about when he first talked with him and told him to leave the area and the gentleman walked up to Mike's? That's what you're talking about?

[DEFENSE COUNSEL]: Yes, Your Honor.

THE COURT: So could you make that clear for the record? Because he's talking about a number of encounters?

BY [DEFENSE COUNSEL]: That was your main encounter with him?

[THE DEFENDANT]: That was my initial encounter with him, yes.

[DEFENSE COUNSEL]: And you described him as being angry and upset?

[THE DEFENDANT]: He was angry – seemed like he was angry at me for – for –

[PROSECUTOR]: Objection, Your Honor.

THE DEFENDANT: – asking him to leave. He asked me – he's –

THE COURT: Well, overruled.

THE DEFENDANT: He was angry at me for asking him to leave[.]

C. Page's Challenge

Page argues that "the trial judge violated" the due process standards requiring an impartial tribunal "by interrupting defense counsel's examination of her client and engaging in extensive inquisitorial questioning of [him]. The judge's questions – well over thirty-four – went far beyond clarifying to conveying disbelief of [his] theory of self-defense." In support, he cites the bold-faced remarks excerpted above. Conceding that "defense counsel voiced no objections to the court's behavior[,]" Page maintains that "the court's actions cumulatively functioned to actually deprive [him] of a fair trial, constitut[ing] plain error and structural error, and are not subject to harmless error analysis." In Page's view,

> Judge Phinn's extensive inquisitorial questioning of [him] could not be characterized as anything but impeaching and suggesting disbelief. Her cross-examination style questions . . . , including consistently interrupting him to press him for more and more details, were designed to expose fabrication and unmistakably conveyed the judge's opinion of [Page's] credibility. Given the patent derisive attitude by the judge in her questioning of [Page], it strains credulity to accept that it did not affect the jury.

We are not persuaded this is one of the rare cases when we should excuse trial counsel's failure to object to allegedly biased questioning by the trial judge. As the Court of Appeals explained in *Diggs*, such an unpreserved challenge is best evaluated under the analytical framework for plain error relief, which is limited to "repeated and egregious behavior of partiality, reflective of bias." *Diggs*, 409 Md. at 294. In conducting that

inquiry, we must "'review the materiality of the [alleged] error in the context in which it arose[.]'" *Id*. at 286 (citation omitted). When Page's "cherry-picked" remarks are viewed in context the remarks are not so pervasively and egregiously partial that defense counsel's failure to lodge any objection may be excused.

From the outset, the trial judge indicated to the prosecutor and defense counsel that she intended to move expeditiously, suggesting that counsel should be prepared with written questions for each witness, so as to avoid unnecessary objections and delays. On several occasions, the judge called bench conferences to assist both attorneys in formulating questions that would accomplish those objectives. In addition, she interjected questions to both prosecution and defense witnesses in order to expedite the examination and clarify potentially confusing questions and answers.

Although the trial judge perhaps lacked some of the patience suggested by appellate courts, this was not the type of "derisive" or "inquisitorial" questioning that so taints a trial as to make it fundamentally unfair. Indeed, the strongest indication that the court's questioning did not "cross the line" is that defense counsel never complained about it. In contrast to the bench-conference objections voiced in both *Diggs* (i.e., that "the court was testifying") and *Ramsey* (i.e., that the court "was essentially buttressing the credibility of the prosecutor"), defense counsel did not lodge a single objection, register a complaint about bias, or otherwise ask the court to stop questioning Page. *See Diggs*, 409 Md. at 285.

Instead, defense counsel waited until after the verdicts were rendered to lodge Page's first complaint, via his motion for a new trial. This was too little and too late. We

are not persuaded that defense counsel "swallowed" partiality objections to avoid antagonizing the court. To the contrary, we may fairly infer that defense counsel's failure to object was "'the product of conscious design or trial tactics[.]'" *Id*. at 286-87. Granting plain error relief in these circumstances would undermine the important purpose of the preservation requirement, which is to give the trial court an opportunity to consider complaints while they might still be addressed and avoided. *See* Md. Rule 4-323(a); Md. Rule 8-131(a). For these reasons, we deny Page's request for plain error relief.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.