

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2324

September Term, 2013

NATHAN C. ROGERS

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: August 10, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On October 4, 2013, following a five-day jury trial in the Circuit Court for Prince George’s County, Nathan C. Rogers, appellant, was acquitted of first-degree murder but convicted of second degree murder. On November 20, 2013, the circuit court sentenced appellant to serve a period of incarceration of thirty years for his conviction. In his timely filed appeal, appellant raises two questions for our consideration:

I. Did the trial court err in permitting the State to introduce evidence at trial that the victim was pregnant?

II. Did the trial court err in permitting the State to make improper comments and gestures during closing and rebuttal argument?

Discerning no error or abuse of discretion, we shall affirm the judgments of the circuit court.

FACTUAL BACKGROUND

Around 7:00 p.m. on the evening on April 27, 2012, the body of twenty-three-year-old Jasmine Moss was discovered by an officer of the Prince George’s County Police Department. Ms. Moss’s fully clothed body was lying underneath a blue tarp in the backseat of her black Volkswagen Jetta, which was parked on the street in front of 7114 Mason Street in District Heights, Maryland. She had been stabbed once in the back and numerous times in the head and chest, and then dragged across the ground, before being put face-down in the backseat. An autopsy revealed that Ms. Moss had suffered ninety-five separate cutting and stabbing wounds, several of which were deep enough to have caused her death. At the time of her death, Ms. Moss was between thirteen- and fifteen-weeks pregnant. Ms. Moss had told her mother that her boyfriend, “Fresh,” was the father of her baby.

Appellant, who is also known as “Fresh,” was Ms. Moss’s boyfriend. At the time of Ms. Moss’s murder, appellant was living with his grandparents, Reginald David Young, Sr. and Teresita Young, at 6943 Halleck Street, in District Heights, Maryland, just around the corner from where Ms. Moss’s body was discovered. When questioned by police around 8:00 p.m. on April 27, 2012, appellant denied having a girlfriend or knowing who owned the black Jetta.

Appellant’s next-door neighbor told the police she had been awakened between 2:00 a.m. and 3:00 a.m. on April 27, 2012, by noises coming from the back of appellant’s house that sounded like a “female . . . being tortured.” The noises continued for fifteen to twenty minutes and then stopped. The neighbor did not tell anyone about the noises until she was questioned by the police.

From Ms. Moss’s car, the police recovered a receipt from a nearby gas station that was issued at 2:19 a.m. on April 27, 2012, a paint bucket containing a small amount of liquid that smelled like cleaning products, and a cigarette butt from which DNA was collected that was consistent with appellant’s DNA.

The police observed that two knives were missing from the butcher’s block in appellant’s kitchen. In appellant’s bedroom, the police recovered a black and white work glove and appellant’s cell phone. Around appellant’s house, the police observed marks that looked like something had been dragged across the ground. From the porch and yard, the police recovered a black and white work glove, a blue latex glove, several rocks and yard

debris that appeared to have blood on them, several bricks from the back patio that appeared to have blood on them, and swabs of suspected blood stains elsewhere on the outside of the house and in the yard. The police also found a smear of blood on the frame of the kitchen door inside appellant's house. The DNA collected from the blood on one of the patio bricks and from the blood smear on the kitchen door frame was consistent with Ms. Moss's DNA.

From the storm drains near appellant's house, the police recovered two pairs of blue latex gloves, a comforter, a broken rake and its handle, a superflex rake, a mop, a piece torn from a blue tarp, one brown glove, two white work gloves, and a white plastic garbage bag. The comforter smelled like it had some type of cleaning product on it. Appellant's grandfather identified the blue tarp and the superflex rake recovered from the storm drain as one he usually kept in a tool shed behind the house, where he also had a lawnmower that was normally covered by a blue tarp. DNA collected from blood on the superflex rake and one of the black and white work gloves was consistent with Ms. Moss's DNA. Appellant's grandmother identified the mop that was recovered from the storm drain as her mop.

The police observed a public trash can near appellant's house that had recently been emptied. From the dumpster where the trash can's contents had been deposited, the police recovered another white trash bag containing a pair of brown boots, a pair of jeans, one black and white work glove, two white t-shirts, a black Adidas sweatshirt, a washcloth type rag, a pair of socks, a pair of gray winter gloves, a brown trash bag containing four black and white work gloves, and an empty pack of Newport cigarettes. DNA collected from the blood

on one of the white t-shirts, one of the socks, and both boots was consistent with Ms. Moss's DNA. DNA collected from the sweatshirt was consistent with a combination of Ms. Moss's DNA and appellant's DNA.

Appellant's grandmother and grandfather had both seen Ms. Moss's black Volkswagen Jetta parked in front of their house on the morning of August 27, 2012. Returning from an errand sometime between 9:00 a.m. and 10:00 a.m., Mr. Young saw appellant sitting in the driver's seat of the car. When Mrs. Young returned from work just before 6:00 p.m., the car was no longer there. Having failed to find any keys to Ms. Moss's car, the police determined that if the car was put in neutral gear, an individual could successfully move the car from the street in front of appellant's residence to the place where the car was ultimately discovered.

Around 10:00 p.m. on April 26, 2012, Ms. Moss's aunt, with whom Ms. Moss resided, had seen Ms. Moss sitting on the couch in their house, watching television, and texting on her cell phone. Sometime later that night, Ms. Moss's aunt was awakened by the noise of Ms. Moss loudly arguing with a man. Ms. Moss's cell phone records indicate that on the night she died the following calls occurred between Ms. Moss's phone and appellant's phone: a twenty-nine-second call at 9:54 p.m., a fifty-minute call at 11:08 p.m., a six-minute call at 1:44 a.m., and a nineteen-second call at 2:25 a.m. The last call was relayed through the cell tower near appellant's house. There were also hundreds of text messages between Ms. Moss's phone and appellant's phone in the three days preceding Ms. Moss's death, the

last occurring at 2:29 a.m on April 27, 2012. Following her last text to appellant, Ms. Moss did not send any more texts from her phone and did not make or answer any more phone calls. Ms. Moss's phone was never recovered. Appellant's phone was recovered, but had been cleared of all data related to Ms. Moss.

ANALYSIS

I. The Evidence of Ms. Moss's Pregnancy

Prior to appellant's trial, defense counsel moved to exclude all references to the fact that Ms. Moss was pregnant at the time she was murdered, arguing that the prejudice that would accrue to appellant as a result of the jury's knowing about the pregnancy would outweigh the probative value of that information. Defense counsel suggested, instead, that the jury should be informed only that there was a dispute between Ms. Moss and appellant, which would satisfy the State's need to show motive while withholding the potentially inflammatory nature of the dispute. The State responded, contending that evidence of Ms. Moss's pregnancy was relevant and admissible because it helped to explain why Ms. Moss went to appellant's house on the night she was murdered, why Ms. Moss and appellant were fighting, and why appellant may have killed Ms. Moss. The court denied the defense motion, ruling that Ms. Moss's pregnancy "[wa]s certainly relevant based on the aspect of motive/intent that the State intends to put forward in this matter[,]" and that "the probative value of such while there was undoubtedly a risk of prejudice to appellant, it was not "unfair"

in this case where the State alleged that appellant murdered his pregnant girlfriend when she insisted that he acknowledge paternity.

At appellant's trial, the State introduced evidence of Ms. Moss's pregnancy through the testimony of three different witnesses, Ms. Moss's mother, appellant's brother, and the medical examiner. Each time the State presented evidence to the jury that Ms. Moss was pregnant, defense counsel objected.

On appeal, appellant contends that the circuit court erred by denying defense counsel's pre-trial motion to exclude all evidence of Ms. Moss's pregnancy and by overruling defense counsel's objections to the admission of this evidence at appellant's trial. Appellant asserts that, in the absence of any evidence that appellant knew that Ms. Moss was pregnant or that the couple had argued about the paternity of the unborn child, the evidence of Ms. Moss's pregnancy was not relevant to prove motive, and therefore, as a matter of law, the evidence was not admissible. Appellant further asserts that evidence that Ms. Moss was pregnant at the time of her death "amounted to nothing more than a collateral fact only serving to divert the jury's attention and arouse their emotions" and, therefore, the trial court's admission of this unfairly prejudicial evidence constituted an abuse of discretion.

The State responds, asserting first that appellant failed to properly preserve his argument regarding the relevance of this evidence for appellate review. Addressing the merits of appellant's contentions, the State asserts that the trial court did not err in determining that the probative value of the evidence outweighed any prejudice that would

accrue to appellant as a result of its admission. In the alternative, the State contends that, inasmuch as the evidence that Ms. Moss was pregnant at the time of her death was primarily relevant to prove motive, intent, and premeditation, all of which are elements of the offense of first degree murder, the jury's acquittal of appellant on that charge indicates that the jury rejected or disregarded the evidence of Ms. Moss's pregnancy. The State concludes, therefore, that any error in the circuit court's admission of evidence regarding Ms. Moss's pregnancy was harmless.

We will first address the State's preservation contentions. Based on our review of the record, we are persuaded that defense counsel's arguments in support of his pre-trial motion urging the circuit court to exclude evidence of Ms. Moss's pregnancy focused exclusively on the prejudicial impact of the evidence and its tendency to inflame the sympathies of the jury. At no time did appellant assert in support of his motion, as he now does in his appeal, that the State failed to prove appellant knew Ms. Moss was pregnant, and, in the absence of such proof, that evidence of Ms. Moss's pregnancy was not relevant to prove appellant's motive.

It is well established that this Court generally will not decide an issue, "unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). Where a party has made a specific objection to a court's evidentiary ruling, our review "is limited to the ground assigned[.]" *Colvin-El v. State*, 332 Md. 144, 169 (1993), *cert. denied*, 512 U.S. 1227 (1994). Arguments that are not raised in the court below are not

preserved for appellate review. *Conyers v. State*, 367 Md. 571, 593 (2002); *see also White v. State*, 324 Md. 626,640 (1991) (“[An] argument... not made to the trial court... is not properly before us”); *In re Kaleb K.*, 390 Md. 502, 512 (2006) (“[A]lthough Petitioner preserved his right to appeal... he did not preserve his argument,[made on appeal]... because the argument was never before the Circuit Court for consideration.”); Md. Rule 5-103(a) (requiring timely objections to a trial court’s erroneous evidentiary rulings); Rule 4-323(c) (stating the proper method for making objections to the trial court’s rulings).

If we were so inclined, we could conclude that because appellant did not raise his current argument before the circuit court regarding what relevance evidence of Ms. Moss’s pregnancy might have in proving that appellant was the person who killed her, that argument is not properly before this Court for appellate review. But there is a complicating factor in this case, which we will now explore.

In responding to appellant’s pre-trial motion to exclude, the State proffered that it had two witnesses who would testify that appellant was the father of Ms. Moss’s unborn child. Defense counsel also knew that the State intended to call one of Ms. Moss’s friends at appellant’s trial, who would testify that, on the night Ms. Moss was murdered, it was her intention to go over to appellant’s house and confront him regarding his denials of paternity. Based on this proffer and this knowledge, appellant had little basis upon which he could argue that the evidence of Ms. Moss’s pregnancy was not relevant.

However, because of an adverse evidentiary ruling, the State did not present this evidence.¹ Consequently, although the State introduced circumstantial evidence indicating that appellant knew Ms. Moss was pregnant, there was no direct evidence presented during appellant's trial from which the jury could discern appellant's feelings regarding the pregnancy or Ms. Moss's purpose for going to appellant's house on the night she was killed.

Maryland Rule 5-104 provides that “[w]hen the relevance of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding by the trier of fact that the condition has been fulfilled.” Md. Rule 5-104(b). Maryland Rule 4-323 addresses a party's obligation to make a proper objection if the party believes that the condition of fact has not been proven:

When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court may admit the evidence subject to the introduction of additional evidence sufficient to support a finding of the fulfillment of the condition. *The objection is waived unless, at some time before final argument in a jury trial or before the entry of judgment in a court trial, the objecting party moves to strike the evidence on the ground that the condition was not fulfilled.*

Md. Rule 4-323(a) (emphasis added).

¹The State proffered that Ms. Moss's friend would testify that, a few days before the murder, he was in the car with Ms. Moss when she received a phone call. After Ms. Moss ended the call, she told her friend that she planned to confront appellant because he was claiming not to be the father. The State acknowledged that the evidence was not that appellant said he was not the father of Ms. Moss's baby, but that Ms. Moss told her friend that someone else had told her that appellant was making such denials. The court ruled that Ms. Moss's friend would not be permitted to testify to the phone call or to Ms. Moss's reaction to the call. Consequently, the State chose not to call the witness to testify.

After both parties had rested, but before jury instructions and closing arguments began, the court revisited several of the evidentiary rulings it had made during appellant’s trial, and provided some explanation regarding the basis for those rulings. Among the rulings discussed by the court was its decision to admit “the evidence that Ms. Jasmine Moss, the victim in this horrible homicide, was pregnant at the time of her death.” The court reiterated its reasons for each of the evidentiary rulings and then asked counsel:

Any issues that you would like to be placed [sic] as a result of those comments of the earlier rulings of the court now justified by how I feel the testimony and evidence has shown?

[Defense counsel]: No, Your Honor.

In other words, the court expressly invited defense counsel to raise any additional objections he had to the court’s admission of evidence indicating that Ms. Moss was pregnant, and defense counsel declined to do so. At no time did defense counsel ask the court to strike the testimony of the State’s witnesses indicating that Ms. Moss was pregnant at the time of her death. Nor did appellant move for a mistrial on the grounds that the jury was indelibly tainted by the State’s presentation of this evidence. We conclude, therefore, that appellant has failed to preserve any argument that is premised upon the State’s alleged failure to prove the factual premise upon which the evidence regarding Ms. Moss’s pregnancy was conditionally admitted. Md. Rule 4-323(a).²

²Even had appellant’s argument been properly preserved, we would still decline to
(continued...)

What appellant did argue at trial was that evidence of Ms. Moss’s pregnancy was unduly prejudicial. He reiterates the same contentions on appeal.

Relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Md. Rule 5-403. The trial court concluded that evidence of Ms. Moss’s pregnancy “is certainly relevant based on the aspect of motive/intent that the State intends to put forward in this matter [and] the probative value of such evidence far outweighs any prejudicial impact that it may have on the jury as I understand the facts and circumstances.”³

²(...continued)

reverse appellant’s convictions based on the trial court’s admission of evidence that Ms. Moss was pregnant. The threshold for relevancy is not exacting. *See* Md. Rule 5-402 (providing that “all relevant evidence is admissible” and “[e]vidence that is not relevant is not admissible”). Maryland Rule 5-401 defines relevant evidence as that which 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” (emphasis added)).

There was evidence that Ms. Moss was pregnant, that she had told her mother that she was pregnant, and that she and appellant had been involved in a romantic relationship. There was undisputed evidence that appellant and Ms. Moss were in frequent communication with one another in the days before the murder. From this, a jury could infer that Ms. Moss told appellant of her pregnancy and that her condition motivated him to kill her. To be sure, the evidence is circumstantial but motive is often proven through circumstantial evidence. *See Snyder v. State*, 361 Md. 580, 604 (2000) (“Like intent, motive is a mental state, the proof of which necessarily requires inferences to be drawn from conduct or extrinsic acts.”).

³The State’s theory was that, although Ms. Moss referred to appellant as “her boyfriend,” to appellant, Ms. Moss “was just somebody to have sex with.” The State
(continued...)

We afford considerable deference to a trial court’s determinations regarding whether evidence is relevant and whether the prejudicial effect of evidence outweighs its probative value. *See e.g Merzbacher v. State*, 346 Md. 391,404 (1997) (“the admission of evidence is committed to the considerable and sound discretion of the trial court”). In light of the State’s theory of the case, the trial court did not abuse its discretion when it admitted evidence of Ms. Moss’s pregnancy.

II. Improper Closing Argument

Appellant’s second challenge is directed to allegedly improper remarks made by the State during closing argument and rebuttal closing argument, which appellant asserts were so “continuous in nature” that their “cumulative effect . . . was likely to have improperly influenced the jury.” Appellant variously asserts that the prosecutor improperly argued facts not in evidence, engaged in a lengthy demonstration of cutting and stabbing motions while holding a knife, unfairly evoked the jury’s sympathy for the victim, and improperly impugned defense counsel. The State responds that to the extent appellant’s arguments are preserved, the prosecutor’s remarks constituted valid illustrations of inferences the jury could draw from

³(...continued)

contended that appellant ‘clearly did not want her to have this baby or at least go around telling people that it was his child.’ Accordingly, posited the State, appellant planned to stab Ms. Moss to death and had lured her to his home in the early morning hours of April 27th to murder her.

the evidence, forceful oratorical flourishes, or permissible comments upon the evidence presented and the arguments made by defense counsel during appellant’s trial.

Generally, during closing arguments, the parties are permitted “liberal freedom of speech” and “may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom.” *Whaley v. State*, 186 Md. App. 429, 452 (2009) (quoting *Spain v. State*, 386 Md. 145, 152 (2005)). “Summation provides counsel with an opportunity to creatively mesh the diverse facets of trial, meld the evidence presented with plausible theories, and expose the deficiencies in [opposing counsel’s] argument.” *Stevenson v. State*, 94 Md. App. 715, 729 (1993) (quoting *Henry v. State*, 324 Md. 204, 230 (1991)).

“The regulation of argument rests within the sound discretion of the trial court.” *Grandison v. State*, 341 Md. 175, 224 (1995). “[N]ot every improper comment made during closing argument requires reversal.” *Clarke v. State*, 97 Md. App. 425, 432 (1993) (citation omitted). “What exceeds the limits of permissible comment depends on the facts in each case.” *Wilhelm v. State*, 272 Md. 404, 415 (1974). “In determining whether reversible error occurred, we must take into account the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error, if any.” *Wise*, 132 Md. App. at 142 (citation omitted). Reversal “is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.” *Lawson v. State*, 389 Md. 570, 592 (2005); *see*

also *Calloway v. State*, 141 Md. App. 114, 120 (2001) (“Even an improper remark does not necessarily compel reversal of a conviction unless the jury was actually misled or it was likely they were influenced to the prejudice of the defendant.”) (citations omitted).

We shall first address each of appellant’s preserved objections. First, during the State’s closing argument, the prosecutor described a blood smear on a door frame as resembling the effect “if there was something on my pants and I were to brush up against this wall.” Defense counsel objected, but his objection was overruled. Appellant now asserts that the prosecutor’s comment assumed facts that were not in evidence. We find no error in the prosecutor providing a reasonable explanation for how Ms. Moss’s blood came to be on the wall in appellant’s house. Moreover, the jury saw pictures of the blood on the wall, and could determine for themselves whether it was properly characterized as a smear, a swipe, or a brush mark.

Next, during rebuttal, appellant contends that the prosecutor “attempted to demean” defense counsel and to “paint [him] in a negative light[,]” by characterizing defense counsel’s cross-examination of appellant’s grandfather as an “attack” and that defense counsel “attacked” the grandfather in closing. While we agree that it is improper for the State to impugn the competence or veracity of opposing counsel in their closing argument, it is entirely proper for the State to directly address the issues raised by defense counsel in his closing argument. *Degren v. State*, 352 Md. 400, 433 (1999). Pointing out inaccuracies, inconsistencies, or exaggerations in an opponent’s arguments is not improper. *See e.g.*

Warren v. State, 205 Md. App. 93, 138, *cert. denied*, 427 Md. 611 (2012) (holding that it was permissible for the prosecutor to call defense counsel’s arguments “red herrings” and “sound and fury”). At no time did the prosecutor assert that defense counsel was dishonest or incompetent. We conclude, therefore, that the prosecutor’s remarks did not constitute improper personal attacks on defense counsel.

Finally, the court permitted the prosecutor, over defense counsel’s objection, to make motions while holding a knife, “thrusting a hand out for stabbing and then doing a wide sweep with her hand for cutting[,]” characterizing the prosecutor’s demonstration as her “interpret[ation] of the evidence.” Inasmuch as the central question in this case was whether appellant’s murder of Ms. Moss was premeditated, the prosecutor’s demonstration of how long it would take to inflict ninety-five separate cutting and stabbing wounds was not improper or unfairly prejudicial.⁴

Appellant next highlights several of the prosecutor’s remarks that were brought to the trial court’s attention by defense counsel’s timely objections, which the court then sustained.⁵

⁴ The Court of Appeals has previously found sufficient evidence of premeditation in cases where there was “time for reflection and decision” in the “interval between fatal blows of where the assault occurs over a protracted period of time.” *See e.g. Colvin v. State*, 299 Md. 88, 109 (1984) (discussing several cases).

⁵Defense counsel’s objections were sustained to the following portions of the prosecutor’s closing or rebuttal:

(1) that a cigarette butt containing appellant’s DNA that was found in Ms. Moss’s car looked like a Newport;

(continued...)

First we note that after his objections were sustained, defense counsel never requested any additional relief: he never moved to strike, never requested a supplemental jury instruction, and never moved for a mistrial. Thus, the record indicates that the trial court immediately provided all of the relief defense counsel requested. We discern no error in the trial court’s failure to provide additional relief for which appellant failed to ask. *Hairston v. State*, 68 Md. App. 230, 237, *cert. denied*, 307 Md. 597 (1986) (“Where an objection to opening or closing argument is sustained, . . . there is nothing for this Court to review unless a request for specific relief, such as a motion for a mistrial, to strike, or for further cautionary instruction is made.”).

Appellant asserts that even though the majority of defense counsel’s objections were sustained, that the cumulative effect of all of the prosecutor’s improper and inflammatory remarks, both those that were permitted and those that were sustained, should be weighed to determine whether appellant was unfairly prejudiced by the prosecutor’s closing argument and rebuttal closing argument, as a whole. After reviewing the trial transcript and considering the prosecutor’s comments and the arguments of counsel in context, we are not persuaded.

⁵(...continued)

(2) that the stab wound to Ms. Moss’s back was the first of the ninety-five knife wounds that appellant inflicted;

(3) that appellant was waiting outside with a knife when Ms. Moss arrived at his house; and

(4) that Ms. Moss’s unborn child remained unharmed because Ms. Moss was “doing what any mother would have done[.]”

The trial court was in the best position to assess the effect of the prosecutor's comments on the jury. *See Wilhelm*, 272 Md. at 429 (“In environment of the trial[,] the trial court is peculiarly in a superior position to judge the effect of any of the alleged improper remarks.”) Discerning no error or abuse of discretion in the trial court's rulings, we decline to overturn appellant's convictions on this basis.

III. Harmless Error

The State contends any error on the trial court's part was harmless. An appellate court can conclude error is harmless only when we find beyond a reasonable doubt that the error could not have influenced the jury's verdict. *Dionas v. State*, 436 Md. 97, 108 (2013); *Dorsey v. State*, 276 Md. 638, 659 (1976). We believe that the State's harmless error argument meets this exacting standard. The State's evidence that appellant murdered Ms. Moss was overwhelming. We find beyond a reasonable doubt that the jury's verdict was unaffected by any suppositional error or errors on the trial court's part.

**THE JUDGMENT OF THE CIRCUIT
COURT FOR PRINCE GEORGE'S COUNTY
IS AFFIRMED; COSTS TO BE PAID BY
APPELLANT.**