

Circuit Court for St. Mary's County
Case No. C-18-CR-17-000009

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2384

September Term, 2017

JAMES GARRETT

v.

STATE OF MARYLAND

Woodward, C.J.
Leahy,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned)

JJ.

PER CURIAM

Filed: November 13, 2018

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

A jury sitting in the Circuit Court for St. Mary's County convicted James Garrett, the appellant, of second-degree assault. He appeals, asking this Court to review for plain error allegedly improper and prejudicial remarks made by the prosecutor during closing argument. We shall affirm the judgment of conviction.

On February 11, 2017, during a charity softball tournament, the appellant, a baserunner, fell after he collided with Joshua Bruce, the shortstop for the opposing team. Upon standing up, the appellant punched Mr. Bruce in the face, knocking him unconscious. The appellant did not dispute at trial that he had punched Mr. Bruce.

During opening statement, defense counsel explained that this was not an assault case, but a “mutual fight that occurred in three separate acts.” Act one was Mr. Bruce tripping the appellant, act two was the appellant punching Mr. Bruce, and act three was Mr. Bruce's brother running in from the outfield and punching the appellant. Defense counsel asserted that the appellant was the only person being held accountable for his actions that day and suggested that this was unfair.

In its case, the State called two witnesses: Mr. Bruce and Lewis Grigsby. Mr. Grigsby was playing second base when the incident occurred, but only witnessed the aftermath of the assault. The State played a video recording that depicted the appellant and Mr. Bruce colliding, and the appellant reacting by punching Mr. Bruce. In the appellant's case, he called two witnesses as well: a teammate who was in the dugout and the umpire at the game, both of whom testified that they observed Mr. Bruce trip the appellant *and* the appellant punch Mr. Bruce.

The appellant asserts that the court committed plain error by not *sua sponte* taking corrective action relative to the prosecutor’s improper and prejudicial closing argument. Plain error “review is reserved for those errors that are ‘compelling, extraordinary, exceptional or fundamental to assure the defendant of [a] fair trial.’” *Robinson v. State*, 410 Md. 91, 111 (2009) (quoting *Rubin v. State*, 325 Md. 552, 588 (1992)); *see also Morris v. State*, 153 Md. App. 480, 507 (2003) (application of “the ‘plain error doctrine’ 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon”). We decline the invitation to exercise plain error review.

The prosecutor is alleged to have incorrectly characterized Mr. Grigsby’s testimony, stating that he “said the Defendant punched Josh Bruce in the face, knocked him out.” Mr. Grigsby had testified that he did not see the appellant punch Mr. Bruce. The appellant’s criminal agency was not in dispute at trial, however, making any mischaracterization of Mr. Grigsby’s testimony on this point immaterial.

The appellant also challenges two remarks by the prosecutor relative to the alleged wrongful conduct of Mr. Bruce and his brother. First, in response to defense counsel’s comment during the opening statement that this was a “mutual fight” in three acts, the prosecutor emphasized in closing that “[p]arts three and parts one may be trials, they may be crimes,” but those alleged crimes were not before the jury for decision. Second, in her rebuttal closing argument, the prosecutor responded to defense counsel’s closing

argument¹ by reiterating that “[t]hose other cases, they may be charged, they may not be charged; it doesn’t matter because those aren’t the cases that you’re here to decide[] today.” The appellant contends that the prosecutor knowingly misrepresented the facts because a *nolle prosequi* already had been entered as to the criminal charges against Mr. Bruce and his brother for their involvement in the incident. The circuit court did not commit error, much less plain error, by not restricting this proper response to defense counsel’s improper suggestion that the jurors should speculate as to why other individuals were not facing criminal charges. The prosecutor properly reminded the jurors that the only charge before them was against the appellant for second degree assault of Mr. Bruce.

**JUDGMENT OF THE CIRCUIT
COURT FOR ST. MARY’S COUNTY
AFFIRMED. COSTS TO BE PAID
BY THE APPELLANT.**

¹ In his closing, defense counsel had argued that Mr. Bruce and his brother would never be charged for their crimes. An objection to that argument was sustained, and defense counsel was admonished by the court, twice, to focus on the charge against the appellant.