Circuit Court for Prince George's County
Case No. CT191074X

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 259

September Term, 2022

GUY MUNDELL YOUNG, JR.

v.

STATE OF MARYLAND

Berger,
Ripken,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: October 16, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms with Rule 1-104(a)(2)(B). Md. Rule 1-104.

On September 14, 2019, Samuel Wright was shot and killed in the Save-A-Lot parking lot at 5615 Sargent Road in Hyattsville, Maryland. Appellee, the State of Maryland ("the State"), successfully prosecuted Appellant, Guy Young, Jr. ("Young") for the killing. Young presents two issues for our review, which we rephrase slightly as follows:

> I. Whether the evidence at trial was sufficient to prove beyond a reasonable doubt that [Young] was guilty of second-degree murder and the firearm offenses.
>
> II. Whether the State's conduct during trial deprived Young of a fair and impartial trial.

For the reasons explained herein, we affirm Young's convictions on the grounds that, where preserved, the circuit court did not err in its rulings, and that any error that may have occurred was not reversible.

FACTS AND PROCEDURAL HISTORY

At trial, Essence Smith, Mr. Wright's girlfriend, provided context for the relationship between herself, Mr. Wright, and Young. Ms. Smith testified that, with the help of Mr. Wright, she met Young through a messaging app that facilitates communication between sex workers and their potential clients.[1] After their first encounter, Ms. Smith

[1] Ms. Smith testified that she and Mr. Wright agreed Ms. Smith should use the app to engage in sex work as a means to earn some money and find a place to store their things since the two did not have a place to stay after a falling out with another friend in the area. Testimony at trial revealed that the couple utilized a scheme in which Mr. Wright spoke to potential clients as if he was Ms. Smith, and in which the couple may have sought to extort additional money from clients.

often stayed at Young's apartment and stored some of her and Mr. Wright's belongings there.

Both Ms. Smith and Young testified that they only exchanged money for sex on one occasion, with Ms. Smith thwarting such interaction in another instance. Young later testified that after these interactions with Ms. Smith, he received phone calls from a "guy threatening [Young] about giving [Smith] money," with the "guy" saying Ms. Smith "needed extra money to do other stuff, and she need money for food, and everything just went downhill from that point."

Ms. Smith recounted an incident at a nearby grocery store on the day of Mr. Wright's killing, in which she said Young was "trying to initiate a fight" with Mr. Wright. Ms. Smith said that this was the only such hostile interaction Mr. Wright had with anyone that day. During Young's testimony, he portrayed this incident as one in which Mr. Wright was the aggressor. Young said he saw Ms. Smith with another man and approached as to inquire if this was the man making the threatening calls, to which Young said Mr. Wright again threatened him and began "reaching in his waistband," prompting Young to leave.

Evidence adduced at trial showed that the police investigation of the shooting led to the discovery in a wooded area near Young's apartment of a distinctive red and black gun and a white T-shirt purportedly worn by the shooter. When police spoke with Young the day after the killing, Young claimed that he was "nowhere near there," referring to the Save-A-Lot where Mr. Wright's shooting occurred.

The State produced 18 witnesses during a five-day trial held from December 14 to December 20, 2021. The defense's case consisted of testimony from Young and a witness to the shooting. We note at the outset that the State and Young's counsel frequently volleyed objections. We examine such exchanges in our discussion *infra*. We shall do the same and recount key aspects of the parties' closing arguments in our assessment *infra* of Young's asserted errors regarding the State's summation.

A jury returned a verdict acquitting Young on the charge of first-degree murder but convicting him on the charges of second-degree murder, use of a firearm in the commission of a crime of violence, wearing, carrying, and transporting a handgun, and illegal possession of a regulated firearm. On January 19, 2021, the circuit court denied Young's post-trial motion for a new trial, where Young again asserted the grounds of sufficiency of evidence not supporting the guilty verdicts. At his March 31, 2022 sentencing hearing, Young received a sentence of 65 years' imprisonment, with all but 60 years suspended, and five years of supervised probation.[2] Young filed his timely appeal on April 8, 2022.

[2] Breaking down the sentences in relation to each conviction, Young received 40 years' imprisonment for second-degree murder, a consecutive 20 years' imprisonment for use of a firearm in commission of a crime of violence, and a five-year suspended sentence for illegal possession of a firearm. The remaining counts of wearing, carrying, and transporting a handgun merged with the count of illegal possession of a firearm.

DISCUSSION

In this appeal, Young challenges the sufficiency of evidence providing the basis for his conviction for second-degree murder and related weapons offenses in Mr. Wright's killing. Additionally, during trial, Young lodged multiple objections alleging the State improperly commented on Young's assertion of these objections and the prosecutor, in response to Young's testimony, made faces or gestures in view of the jury. Young now argues that these comments and conduct unfairly influenced the jury and prejudiced him. Young also claims that the State improperly "vouched" for the credibility of its evidence while attacking the credibility of Young's testimony. In addition to disputing these claims on their merits, the State argues that Young failed to preserve for this Court's review any of the asserted challenges to his conviction.

We find the record sufficient to address Young's claims regarding sufficiency of the evidence, as well as his claims regarding the State's alleged faces and gesticulations during testimony and the State's responses in open court to Young's counsel's objections. We hold that his complaints regarding the State's comments during closing argument escape our review due to failures of preservation, and that to the extent we address his assertions, they do not warrant reversal. Further, on the issues we do consider, we shall affirm the trial court's rulings, thereby affirming Young's convictions.

I. The Trial Court Did Not Err By Denying Young's Motion for Acquittal Because Sufficient Evidence Existed to Support His Conviction.

A. Young's motion for acquittal lacked particularity. Nevertheless, the record provides this Court ample grounds to review this issue.

"Maryland Rule 4-324(a) requires the defendant 'to state with particularity all reasons why the motion [for judgment of acquittal] should be granted.'" *Winston v. State*, 235 Md. App. 540, 574–75 (2018) (quoting Md. Rule 4-324(a)). This Court only reviews "a question of legal sufficiency of the evidence 'for the reasons given by [the defendant] in his motion for judgment of acquittal.'" *Cornell v. State*, 215 Md. App. 483, 497 (2013) (quoting *Taylor v. State*, 175. Md. App. 153, 159 (2007)). A defendant who moves for judgment of acquittal "is not entitled to appellate review of reasons stated for the first time on appeal." *State v. Rich*, 415 Md. 567, 574 (2010). "When a defendant only argues a generality, he does not preserve for review more particularized insufficiency arguments that could have been made but were not." *Cornell*, *supra*, 215 Md. App. at 498.

This Court, however, out of concerns for "[f]airness and the interests of judicial economy," may exercise its discretion to address issues likely to appear in an "inevitable" post-conviction proceeding. *See Bible v. State*, 411 Md. 138, 150–51 (2009). Further, if we are persuaded "that there was no confusion on the part of the trial court regarding the basis for defense counsel's motion for judgment," the purpose of Rule 4-324(a) has been served, and we may "eschew[] 'magic words' . . . glorifying form over substance" and "briefly address [Young's sufficiency] argument." *Steward v. State*, 218 Md. App. 550, 557–58 (2014).

Young's motions for sufficiency failed to provide the particularity required by Rule 4-324(a). *Cf. Cornell*, *supra*, 215 Md. App. at 498–99 (holding defendant preserved his sufficiency challenges to his convictions for first-degree murder, armed robbery, and handgun charges by arguing specific deficiencies in the State's ability to prove these charges, but defendant did not sufficiently particularize arguments regarding charges of accomplice corroboration, and therefore he did not preserve that issue on appeal). At the close of the State's case, Young's attorney simply made a motion for judgment of acquittal, submitting the motion "on sufficiency of evidence on [all] the counts" against Young. Young's renewal of the motion was similarly deficient, with Young's counsel again moving "for judgment of acquittal on all five counts that were alluded to before, and we will submit on sufficiency of evidence." His post-trial motion for a new trial tersely "argue[d] that the sufficiency of the evidence did not support the verdicts of guilty," with this sentence comprising the entirety of Young's legal reasoning.

As such, the motions lacked the requisite particularity regarding any of the charges or evidentiary issues providing the basis for Young's motion. Nevertheless, the trial court clearly discerned the basis of Young's motions, providing this Court a record of its rulings that we may review. *See Steward*, *supra*, 218 Md. App. at 557–58. Further, such sufficiency issues are likely to provide grounds for a post-conviction challenge. *See Bible*, *supra*, 411 Md. at 150–51. Therefore, despite the lack of particularity of the appellant's motions, we shall entertain Young's "sufficiency of the evidence" argument on appeal.

In its rulings denying Young's motions, the court articulated the applicable legal standard and recapped the evidence presented supporting Young's conviction. Accordingly, we shall affirm the circuit court, as we explain *infra*. *See Haile v. State*, 431 Md. 448, 465 (2013) ("It is our opinion that, even if the right to appellate review had been properly preserved, the petitioner's claim of evidentiary insufficiency would fail.").

B. Though circumstantial, sufficient evidence exists, when viewed in the light most favorable to the State, for a rational finder of fact to conclude that the State established the essential elements of the crime beyond a reasonable doubt. As such, the circuit court did not err in denying Young's motions for judgment of acquittal.

When reviewing a motion for acquittal on the grounds of insufficient evidence, "the primary question we ask is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (quoting *State v. Smith*, 374 Md. 527, 533 (2003)); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "We give 'due regard to the [fact finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *State v. Suddith*, 379 Md. 425, 430 (2004) (quoting *State v. Smith*, 369 Md. 2, 12 (2002)). "Mindful not to usurp the role of the fact-finder," our review is limited, as "'[w]e do not re-weigh the evidence,' but, instead, seek to determine 'whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.'" *Haile*, *supra*, 431 Md. at 466 (quoting *State v. Smith*, 374 Md. 527, 534 (2003)).

Chief among Young's contentions is a general skepticism of the State's heavy reliance on circumstantial evidence. We find this unpersuasive, as "[t]he same standard applies to all criminal cases, including those resting upon circumstantial evidence, since, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct [evidence]." *Suddith*, *supra*, 379 Md. at 430 (quoting *State v. Smith*, 374 Md. 527, 534 (2003)). "A valid conviction may be based solely on circumstantial evidence." *Id.*

Our analysis of this case aligns with the rulings made by the trial court, and we point to the same evidence and applicable standards highlighted by that court in affirming its ruling denying Young's motion for judgment of acquittal. Twice the circuit court denied his motions for acquittal based on insufficient evidence, denying this sufficiency argument a third time when made in Young's post-trial motion for a new trial.

In denying Young's original motion, the trial court correctly reviewed evidence "in the light most favorable to the State" and determined that "[t]he Court has heard sufficient evidence to move forward with all counts in this matter." The Court proceeded to summarize the key evidence establishing the case against Young. Two witnesses testified that at the time of Mr. Wright's shooting, they heard gun shots, and shortly thereafter saw someone running from the area of the crime, later identifying this person as Young via photo arrays and one in-court identification. Law enforcement officers testified that a canine search led to a wooded area near Young's apartment where a distinct weapon was found. An analyst later determined that gun fired the bullet casings found at Mr. Wright's

shooting. When Young came into custody, police found pictures of both Mr. Wright and of the distinctive gun in Young's phone. As a result, the trial judge noted that "[s]o, I think there is sufficient evidence in the light most favorable to the State for all charges to go forward. Motion is denied."

Following the denial of his first motion for acquittal, Young proceeded to put on a case in which he presented testimony from Reina Garcia, whom he claimed was the lone eyewitness to the shooting. Ms. Garcia testified that she arrived in the parking lot and stepped out of her car almost immediately prior to the shooting, at which point she heard shots and turned in the direction of the sound to see an individual firing a gun that did not match the description of the distinctive gun found in the woods. She described the shooter as a "young black guy who had braids[,] and they were tied back." This contrasted with a surveillance photo taken earlier in the day from the store where Mr. Wright and Young had an interaction that Ms. Smith described as an "altercation," but which Young later testified to more benevolently.

Young, testifying on his own behalf, also introduced a theory of another suspect. Young recounted that earlier on the day of the shooting he claimed to have seen "DJ" and Mr. Wright in a "loud" dialogue. Young said that DJ was a friend of Young's uncle and sometimes visited Young's apartment. In one such trip, DJ brought the gun at the center of this case, which Young took a picture of because he "thought it looked cool." Further, Young described DJ as "dark-skinned, a little taller than me, and he got, like, dreads or plats." On cross-examination, Young said when he was initially questioned by police the

day after the murder, he did not alert police to Mr. Wright's interaction with DJ and thus DJ being a potential suspect because police "didn't ask me," and Young "didn't want to point fingers and not know what's going on or who did what and get somebody in trouble for nothing that I don't know if they did it or not."

Regarding the photos on his phone, Young said he took a picture of Mr. Wright, following their earlier run-in at the store on the day of the shooting, because Young was unsure if Mr. Wright wanted to harm him, and so if something were to happen to Young, "at least somebody knows, okay, this was the guy." Young said he deleted the photos of Mr. Wright and of the distinctive red gun when he was indiscriminately clearing space on his phone to record a friend's performance at church. As evidence of "[c]onsciousness of guilt," the State pointed to the photos, Young's deletion of the photos, his initial obfuscation to police about his location on the day of the shooting, and Young's failure to alert investigators to DJ as a possible suspect.

Upon the close of the defense's case, Young renewed his motion for acquittal, which the court denied. Again, the court addressed the proper standard to consider this motion, noting that "the burden has changed" to whether a reasonable juror could find Young guilty based on the evidence presented. The court went on to acknowledge that "this is a circumstantial evidence case, where jurors, it is in their purview to determine who, if anyone, they believe." The court proceeded to "believe[] that based" on the evidence presented "that a reasonable juror [could] find beyond a reasonable doubt that the Defendant did, in fact, commit these crimes."

We agree. Proof of guilt based on circumstantial evidence may receive the same weight as proof of guilt based on direct evidence. *See Suddith*, *supra*, 379 Md. at 430. Young's attack on the case against him -- disputing of the evidence presented by the State and emphasizing of the more favorable evidence put forth by his counsel -- is more appropriate for closing arguments than for an appeal to our Court, as our job is not to make such determinations between competing assertions and conflicting evidence. *See Haile*, *supra*, 431 Md. at 466. Our job is to assess whether the jury failed in its role as fact finder, and whether the court failed in its application of the deferential standard governing a motion to acquit based upon insufficient evidence. Left to parse the largely circumstantial case before it, the jury weighed the evidence and resolved most conflicts of evidence in favor of the State. The jury's acquittal on the first-degree murder charge and conviction on the remaining charges speaks to their addressing and weighing the legal issues in this case.

Notably, criminal convictions based upon the sometimes conflicting accounts of witnesses and circumstantial connections between the suspect and the crime are not unreasonable nor uncommon. Although Young's claims are unpreserved, because we may easily dispel of his arguments regarding the State's closing statement, we exercise our discretion to address these issues on the merits. *See Haile*, *supra*, 431 Md. at 465 (holding that despite the issue of evidentiary sufficiency being unpreserved, this Court will exercise its discretion under Md. Rule 8-131(a) to review the issue).

II. Young Failed to Preserve His Complaints Regarding the Prosecutor's Comments During Closing Argument and Rebuttal. Even If Preserved, the Comments Do Not Warrant Vacating Young's Conviction.

A. Because Young's counsel failed to object to any of the remarks the State made during summation, and because we do not find such statements constituted sufficient error to prompt our independent review, the issue was not properly preserved.

Young next contends that the State erred in its closing argument and rebuttal. Young first focuses on the State's review of photos purportedly of Young from both the liquor store where Young and Mr. Wright had their run-in prior to the shooting and from locations near the scene of Mr. Wright's murder. The prosecutor highlighted specific details of the clothing and shoes to enforce his assertion that the same person was in both photos, and that this person matched the description of the man running from the scene of the shooting. Prior to providing the jurors the photos to review upon deliberation, the State injected that "it looks like the same person to me, but you can see for yourself."

Additionally, during closing, the State highlighted how Young, for the first time at trial, told the story of "DJ" -- the alternative suspect who better matched the description of the shooter provided by Ms. Garcia -- as well as inconsistencies in Young's account of his actions on the day of the murder, including his walk to his apartment, his travels after the shooting, and how the photos of the gun and Mr. Wright ended up on Young's phone. The State returned to this theme in rebuttal arguments, implying incredulity in Young's "DJ" story, particularly when Young made no mention of DJ to police two years prior while police investigated Young for the murder.

Young claims the State impermissibly injected its own opinion on the veracity of what Young recounted to the jury by commenting that "to say [Young's] testimony was incredulous would be an understatement." Recalling Young's testimony alleging that DJ both fought with Mr. Wright the day of the shooting and owned the gun tied to the shooting, the State said, "Yep, that's totally believable," and rhetorically asked "why are you lying" when noting inconsistencies between Young's testimony of where he was the day of the shooting and what he told police in an interview the day after Mr. Wright's murder.

Young now argues that: (1) the prosecutor improperly "vouched" for evidence presented to the jury with his comments on the photos, and (2) the State made an impermissible "tailoring" argument interjected with the prosecutor's opinions on Young's credibility by highlighting how Young's testimony differed from what he originally told police and aligned with aspects of Ms. Garcia's testimony in a way that created a theory of an alternative suspect. The State argues these complaints were not preserved and, in the alternative, are not meritorious. Our analysis need only concur with the State's first assertion.

We are mindful that during the State's closing argument in a criminal prosecution, defense counsel sits "in a precarious position." *Curry v. State*, 54 Md. App. 250, 256 (1983). If defense counsel objects to the prosecutor's remarks at the time they are made, it might "underscore[] the prosecutor's comments and perhaps add[] greater impact to those remarks," potentially even running "the risk of the court's overruling the objections, thus emphasizing to the jury the 'correctness' of the comments.'" *Id.* Nevertheless, "[i]n order

to preserve an objection to an allegedly improper closing argument, defense counsel must object either immediately after the argument was made or immediately after the prosecutor's initial closing argument is completed." *Small v. State*, 235 Md. App. 648, 697 (2018), *aff'd,* 464 Md. 68 (2019). While "no bright-line rule" exists, "the objection must come quickly enough to allow the trial court to prevent mistakes or cure them in real time." *Id.* (quoting *Prince v. State*, 216 Md. App. 178, 194 (2014)).

Though Young highlights the State's potentially problematic statements before us now, his counsel did not object either immediately after the State made these statements or upon the State completing its summation. Accordingly, in cases like the one at bar, where "defense counsel failed to object to the allegedly improper comments at any time . . . there is no ruling of the [trial] court to review."[3] *Cornell*, *supra*, 215 Md. App. at 515. The lack of an objection, and thus the absence of a circuit court ruling thereupon, leaves the record wanting for a proper review. *See Devincentz v. State*, 460 Md. 518, 534 (2018) ("An appellate court will not 'decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court.'" (quoting Md. Rule 8-131(a)).

[3] Young argues, in the alternative, that the failure to preserve his sufficiency argument gives rise to a claim of ineffective assistance of counsel, reasoning that failing to "move[] with particularity for a judgment of acquittal" was an action by his attorney that "'fell below an objective standard of reasonableness.'" *Testerman v.* State, 170 Md. App. 324, 342–43 (2006); *see Strickland v. United States*, 466 U.S. 668, 687–88 (1984) (holding that to prevail on a claim of ineffective assistance of counsel, "the defendant must show that counsel's representation fell below an objective standard of reasonableness"). We decline the invitation to address Young's ineffective assistance of counsel argument on direct appeal. We further note that "unpreserved claims of error generally are best addressed through an ineffective assistance of counsel claim at post-conviction proceedings." *State v. Clark*, 255 Md. App. 327, 332, *cert. granted,* 482 Md. 141 (2022).

Accordingly, Young's claims are unpreserved. Notwithstanding, because we may dispel his arguments regarding the State's closing statement, we exercise our discretion to address these issues on the merits. *See Haile*, *supra*, 431 Md. at 465 (citing Md. Rule 8-131(a)). As we explain further *infra*, taken independently or cumulatively, these purported errors do not warrant reversal.

B. The State's comments did not cross the line into impermissibly "vouching" for the credibility of the State's evidence and against the credibility of Young's testimony, nor was the State's "tailoring" argument improper.

"[W]e grant attorneys, including prosecutors, a great deal of leeway in making closing arguments." *Whack v. State*, 433 Md. 728, 743 (2013). "The prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Spain v. State*, 386 Md. 145, 152 (2005) (quoting *Degren v. State*, 352 Md. 400, 429–30 (1999)). "The determination whether counsel's 'remarks in closing were improper and prejudicial, or simply a permissible rhetorical flourish, is within the sound discretion of the trial court to decide.'" *Sivells v. State*, 196 Md. App. 254, 271 (2010) (quoting *Jones-Harris v. State*, 179 Md. App. 72, 105 (2008)); *see also Savage v. State*, 455 Md. 138, 157 (2017) ("We review the trial court's ruling on objections to closing argument for an abuse of discretion."). "Generally, the trial court is in the best position to determine whether counsel has stepped outside the bounds of propriety during closing argument," therefore, "we do not disturb the trial judge's judgment in that regard unless there is a clear abuse of discretion that likely injured a party." *Whack*, *supra*, 433 Md. at 742 (quoting *Ingram v. State*, 427 Md. 717, 726 (2012)).

"Vouching" occurs when the State implies the "prestige of the government" or information not before the jury underscores the veracity of the evidence or testimony presented. *Small*, *supra*, 235 Md. App. at 698 (quoting *Sivells v. State*, 196 Md. App. 254, 277–78 (2010)). The State's highlighting of similarities between the photos and commenting to the jury that "it looks like the same person to me" did not invoke some superior vision or photographic expertise derived from the prosecutor's office in the government, nor did it allude to information not otherwise presented at trial. Therefore, it was not vouching.

Further, "[t]he rule against vouching does not preclude a prosecutor from addressing the credibility of witnesses in its closing argument," so long as such aspersions are "based on the testimony given at trial." *Sivells*, *supra*, 196 Md. App. at 277–78 (citing *State v. Spain*, 386 Md. 145, 153 (2005)); *see also Small*, *supra*, 235 Md. App. at 698 ("When undermining the credibility of a defense witness, however, the State may use only evidence established in the record."). The State anchored its assault on Young's credibility as a witness by highlighting how aspects of his trial testimony contrasted with his prior statements to police, how it aligned with the other defense witness's testimony, and how Young had an interest in asserting an alternative suspect in "DJ" for the first time at trial. *See Small*, *supra*, 236 Md. App. at 698–99 (holding "prosecutor was well within her rights to challenge [witness's] credibility by highlighting her potential bias and motive to lie[,]" doing so by relying on the evidence presented at trial and not the prestige of government or personal assurances).

Relatedly, it "is appropriate" for prosecutors to "comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony" in accordance with the evidence previously presented at trial. *Portuondo v. Agard*, 529 U.S. 61, 73 (2000). Some states have looked more favorably upon "specific tailoring," in which a prosecutor alludes to the defendant's potentially tailored testimony by connecting it to specific evidence presented at trial, rather than the "generic tailoring" endorsed by *Agard*, in which prosecutors may generally note the defendant's ability to tailor, permitting the former while disapproving the latter. *See*, *e.g.*, *State v. Mattson*, 226 P.3d 482, 497 (Haw. 2010); *Teoume-Lessane v. United States*, 931 A.2d 478, 495 (D.C. 2007); *Commonwealth v. Gaudette*, 808 N.E.2d 798, 803 (Mass. 2004).

Maryland courts have yet to make such a distinction. Regardless, the State noted specific details of Ms. Garcia's testimony aligning with Young's sudden introduction of "DJ" to the fray, as well as the discrepancies in Young's accounting of his actions from the day of the crime compared to what was told to investigators. As such, any potential tailoring accusation would be "specific," and thus permissible under *Agard* as well as under existing Maryland jurisprudence permitting prosecutors to comment on a defendant's testimony when such comments are tied to specific evidence. *See*, *e.g.*, *Small v. State*, 235 Md. App. 648, 698–99 (2018); *Sivells v. State*, 196 Md. App. 254, 277–78 (2010). Accordingly, we perceive no error in the State's summation.

III. The Trial Court Did Not Err When Ruling on Young's Objections to the Prosecutor's Alleged Making Faces and Gestures, Nor Did Such Actions by the Prosecutor So Prejudice Young as to Warrant Reversal of His Conviction.

A. Young's counsel alerted the court to his concerns regarding the State making faces and commenting on objections. When asked, the court instructed the State to curb this behavior and provided a curative instruction to the jury, thereby providing the only relief Young sought.

1. Gestures and Faces

On two occasions, Young's counsel brought to the attention of the court his concerns about the prosecution making faces or gestures in view of the jury. The first instance occurred during an extended exchange over objections while Ms. Smith testified. When Young's counsel asserted his right to make objections, he noted that the prosecutor was "sitting here making these faces and these gestures as I'm making my objections[,] and that is something that is not proper." The court responded by admitting that the judge "did not see faces, but you might be able to see better from where you are." The court assured Young's counsel that the jury would receive an instruction that "objections are a normal course of trial[,] and they should not count objections or get upset with the amount of objections, so I'm going to remind the State of that." The court encouraged Young's counsel to continue making objections when needed, but to "be louder."

A few days later, during a bench conference following an objection at the end of the State's cross-examination of Young, Young's counsel again alerted the court that "I'm picking up a lot of faces as Mr. Young answers the questions from [the State]. Counsel expressed concern that the jury, seated nearby, "can see these faces. If I can see them, they can see the faces that [the prosecutor] is making." To address this concern, counsel asked,

"Can I please have the [c]ourt instruct [the prosecutor] not to be giving these faces after Mr. Young answers his questions?" The court responded by asking the prosecutor to "try to keep your face straight. Thank you."

In the first instance, Young's counsel failed to ask the court to take any steps to remediate his concerns or to instruct the State or the jury about these purportedly impermissible faces. Upon the second instance, the court heeded Mr. Young's request and admonished the State to stop making faces. Thus, upon our review of these exchanges, we struggle to find error in the record where counsel first did not make a request for relief, and then did make such a request and received the instruction he sought. *See Hyman v. State*, 158 Md. App. 618, 631 (2004) ("Having received the only relief he requested, appellant effectively waived all other potential review on appeal."). Further, as we shall elaborate *infra*, the trial court granted a curative instruction regarding the alleged conduct.

2. Comments during objections

On two occasions, Young's counsel brought to the court's attention his concerns with the State's comments in open court in response to objections asserted by counsel. Young's counsel lodged four objections through the beginning of the State's direct examination of Ms. Smith. Following the fourth such objection -- before the court could intervene to inquire as to the basis of the objection or to rule upon it -- the State responded, "She is answering the question." In the ensuing bench conference, Young's counsel noted that "I ask if [the State] has a problem with my objection that he directs it to the Court." The court did not seem to acknowledge this critique and instead requested Young's counsel

to "speak up when you are objecting, so I make sure I hear you." Young's counsel made no further requests in this exchange as to instructions to the jury or proffer expounding Young's counsel's concerns.

The following day, during the State's direct examination of John Yori, one of the State's witnesses who claimed to have heard gunshots and then seen Young running down the street, Young's counsel objected as it appeared Mr. Yori's answer to a question might veer towards speculation or outside the scope of what was asked. Again, the State immediately responded before the court could weigh in by rhetorically asking in open court, "Can the witness answer the question please?" After the court first advised Mr. Yori to limit his answers just to the questions asked, a bench conference again ensued.

There, Young's counsel asserted the "[s]ame thing as I said earlier in trial, Your Honor, when I make an objection it's not proper for [the State] to say, ['']can the witness just answer the question[?'']" The court proceeded to apologize for again not hearing the comments made by the State. The court then advised the State that Young's counsel "has the right to make as many objections [as] he deems proper or are proper, so I would ask that you not make that comment," to which the State continued to voice its displeasure with the objections by replying "[e]mphasis on proper." No such quarrel about commenting on objections recurred through the rest of trial.

From the record, we note that Young's counsel complained twice about the State's potentially prejudicial comments, twice the court instructed the State to limit these comments, and twice the trial proceeded. Young requested no further remedial measure.

We cannot find error by the court where the court did as it was asked. *See Hyman*, *supra*, 158 Md. App. at 631.

Prior to the State's next witness after Mr. Yori, Young made a motion that the court give the jury "an instruction on objections and how [the jury is] not supposed to view objections." Young's counsel "[did not] care what kind of curative instruction the [c]ourt [gave] the jury." He stressed that "it's not fair to [Young] that the prosecution is next to the jury and [Defense is] objecting[,] and [the prosecutor] says, ['']let him answer the question.['']" The court said it did not here the comments before again instructing the State "not to do it again. If it happens again then we will deal with it. But I did not hear him make that comment. I'm sorry."

The court reaffirmed Young's right to object and that instructions will be read to the jury, but the court "[did not] think there needs to be a special instruction at this time because [the jurors] may or may not have heard it because I certainly didn't." Young's counsel again protested, noting that "the [c]ourt is up here. We are back here. He is right next to the jury[,] and that was the reason why" counsel was concerned. The court proceeded to note that "all of the jurors are separated by plastic" and assured that "if it happens again, I will deal with it. But [the State] is now aware that he will not say that again."[4] Such an incident did not repeat for the remainder of the trial.

[4] To the extent it adds useful context, we note that the trial occurred, and concluded, within two weeks of the suspension of all jury trials on December 29, 2021 due to a resurgence of COVID-19 cases. *See* Interim Administrative Order of December 27, 2021 Restricting Statewide Judiciary Operations in Light of the Omicron Variant of the COVID-

Both before the parties' opening statements and again prior to their summations, the court instructed the jury regarding objections, differentiating argument from evidence, and explaining how to interpret the court's rulings. In its initial instruction, the court advised the jury that "lawyers may object from time to time. It is the duty of a lawyer to make objections which the lawyer believes are proper. You should not be influenced by the fact that a lawyer has made objections or by the number of objections that a lawyer may make."

As to rulings on such objections, the court explained that "[i]f the evidence is something you should consider I will overrule the objection. However, if the matter is not something that should be considered[,] I will sustain the objection[,] and you should not consider the question or speculate about any possible answer." Following the close of evidence, prior to summation, the court further stressed that the jury "should not give any weight or consideration" to things that "are not evidence," including any stricken testimony or exhibits, anything the jury was told to disregard or that was not admitted into evidence, "questions that the witnesses were not permitted to answer[,] and objections of the lawyers."

19 Emergency, at 3 § (d) (Md. Dec. 27, 2021); *see also* Final Administrative Order on Jury Trials and Grand Juries During the COVID-19 Emergency, at 3 § (f) (Md. Mar. 28, 2022) (summarizing administrative orders suspending jury trials from March 16 through October 5, 2020, then from November 6, 2020 through April 23, 2021, and lastly from December 29, 2021 through March 6, 2022). As such, all parties in the courtroom routinely wore masks and removed them only to testify or speak to the judge or jury, plexiglass partitions separated jurors, and bench conferences utilized headset technology. As such, the court advised all participants to "keep your voice up," and it appears hearing each other was an issue throughout trial, particularly the bench hearing comments from attorneys.

We trust the jury heard, abided, and applied these instructions. *See Spain*, *supra*, 386 Md. at 160 ("Maryland courts long have subscribed to the presumption that juries are able to follow the instructions given to them by the trial judge, particularly where the record reveals no overt act on the jury's part to the contrary."). Additionally, Young's counsel raised no objection to the instruction given, so he cannot decry its inadequacy now. *See Watts v. State*, 457 Md. 419, 426 (2018) ("[T]he failure to object to an instructional error prevents a party on appeal from raising the issue under Md. Rule 4-325(f).").

3. Reversible Error

Further, though we acknowledge the circuit court appropriately admonished the State for making such "gestures and facial expressions," we hold that such behavior "may have been improper, but it falls far short of reversible error." *United States v. Collins*, 78 F.3d 1021, 1039 (6th Cir. 1996) (holding that prosecutor's "laughter, gestures[,] and facial expressions," observable by the court, were not likely to "mislead the jury or to prejudice the accused"). We hold the same regarding the prosecutor's comments during Young's counsel's objections.

"[T]o determine the existence of reversible error, ordinarily we conduct two inquiries: (1) whether an error occurred in the trial court; and (2) if so, whether that error was harmless beyond a reasonable doubt." *Black v. State*, 426 Md. 328, 337 (2012). In taking up the first inquiry, we note the "presumption of regularity which normally attaches to trial court proceedings," of which the petitioner has the burden to overcome by

"producing a 'sufficient factual record for the appellate court to determine whether error was committed[.]'" *Id.* (citations omitted).

Our analysis thus stops at the first step and, as we explain, *supra*, we do not find error committed by the trial court. To the extent Young's counsel asked the court to take action and provide relief, the court did as requested, without further objections or motions, thereby depriving the court the opportunity to rule (and by implication to do so correctly or erroneously). Further, these incidents occurred four times -- twice each -- in a six-day span of a multi-day proceeding, once on either side of a weekend-long break. *Cf. Lawson v. State*, 389 Md. 570, 604 (2005) (holding reversible error existed where prosecutor made successive inflammatory remarks, at multiple instances, with defense counsel objecting at least twice, and the court failed to take sufficient steps to instruct the jury and ameliorate potential prejudice, and where the case against defendant was not strong as it relied heavily on testimony from one juvenile witness). In response, when prompted the court told the prosecution to stop the objectionable behavior and delivered an instruction to the jury regarding such objections -- an instruction to which Young's counsel did not object. The record, therefore, does not support reversing the underlying convictions. *See Black*, *supra*, 426 Md. at 337.

B. The "cumulative effect" of the State's remarks in closing argument, the prosecutor's purported "making faces" and gestures, and his responses to Young's objections did not expose Young to sufficient potential prejudice to warrant reversal.

Young asserts that, even where unpreserved, we should examine all of his asserted errors for their cumulative effect prejudicing the proceedings against him, effectively arguing the case warrants plain error review. *See Lawson*, *supra*, 389 Md. at 600 ("[T]aken alone the statements may not affect the appellant's right to a fair and impartial trial, but their cumulative effect leads to a different conclusion."). Nevertheless, since we have not detected any errors by the trial court, we do not need to review the cumulative effect of other errors we do not cede occurred. *See id.* at 604–05 (2005) (holding that "*[o]nce error is determined* during a 'plain error' review, prejudice can only be determined by a consideration of the error in the context of the entire case including the cumulative effect of all errors[.]" (emphasis added)).

"Plain error is 'error which vitally affects a defendant's right to a fair and impartial trial.'" *Walker v. State*, 192 Md. App. 678, 692 (2010) (quoting *State v. Daughton*, 321 Md. 206, 211 (1990)). To find plain error, the error or defect asserted (1) must not have been intentionally abandoned; (2) "must be clear or obvious, rather than subject to reasonable dispute[;]" (3) must have substantially effected the appellant's rights, which ordinarily means that it affected the outcome of trial; and, *"if the above three prongs are satisfied,"* (4) this Court *has discretion* to remedy the error if we determine the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Rich*, *supra*, 415 Md. at 578–79 (emphasis added).

Even if we were to agree with Young that any failures to object were not intentional, his "cumulative" complaint fails the second and third requirements for us to invoke plain error. Our discussion *supra* shows that any alleged error is not so "clear and obvious" as to demand our intervention but instead is subject to reasonable dispute, at best. We see no error in the manner in which the trial court handled Young's complaints regarding the prosecutor's faces or his comments on Young's objections. Nor do we find error in our assessment of the merits of Young's unpreserved challenges to the State's closing argument. In our view, the comments at issue did not cross the line into impermissible vouching or tailoring arguments. Accordingly, this case does not warrant plain error review. We, therefore, affirm the judgments of conviction.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.