Circuit Court for Baltimore City
Case No. 117034004

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3193

September Term, 2018

ANTHONY L. BOWERS

v.

STATE OF MARYLAND

Graeff,
Reed,
Gould,

JJ.

Opinion by Graeff, J.

Filed: January 11, 2021

Anthony Bowers, appellant, was charged in the Circuit Court for Baltimore City in connection with a shooting outside a bar on December 11, 2016, which injured five people. The jury convicted appellant of one count of attempted second-degree murder, three counts of first-degree assault, five counts of reckless endangerment, and related firearm counts. The trial court sentenced appellant to 115 years in prison.

On appeal, appellant presents the following question:

> Did the circuit court err in allowing the prosecutor to make improper and prejudicial comments during closing argument?

For the reasons that follow, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 1:50 a.m. on December 11, 2016, Baltimore City police officers responded to Maynard's Cafe following reports of a shooting. Upon arrival, the officers discovered four gunshot victims, along with another victim suffering from related injuries.

The subsequent investigation revealed that, shortly before the shooting, appellant had been involved in a fight on the dance floor at Maynard's. As a result, the owner of the bar, George Marousis, asked appellant to leave the premises and had two of his bouncers, Cornell Thomas and Victor Regusters, escort appellant out of the bar through a side door. As appellant exited, he said to Mr. Thomas, "you got to come out here sometime," which Mr. Thomas took as a threatening statement. Appellant then ran off toward the front of the building. Mr. Thomas went to the front door of the bar to ensure that appellant had left the property.

Security camera footage showed that, after being ejected from Maynard's, appellant ran toward a nearby parking area and then went back to the front door of the bar. Upon his return, appellant pointed a handgun directly at Mr. Thomas and fired 11 shots that went through the front door and windows of the bar, hitting Mr. Thomas and three patrons inside—Roderick Alston, Amani Oliver, and Chante Johnson. Another patron, Bonnie Matter, was struck with flying glass or debris as she stood near the front door. All five victims survived their injuries.

Appellant was indicted on four counts of attempted first-degree murder, four counts of attempted second-degree murder, four counts of first-degree assault, five counts of reckless endangerment, and related firearm charges. After a jury trial, appellant was convicted of attempted second-degree murder with respect to Cornell Thomas; five counts of reckless engagement, one for each victim; three counts of first-degree assault with respect to Mr. Alston, Ms. Oliver, and Ms. Johnson; four counts of use of a firearm with respect to Mr. Thomas, Mr. Alston, Ms. Oliver, and Ms. Johnson; wearing, carrying, and transporting a handgun and illegal possession of a regulated firearm. The jury acquitted appellant of the attempted first and second-degree murder charges pertaining to Mr. Alston, Ms. Oliver, and Ms. Johnson, and the attempted first-degree murder charge with respect to Mr. Thomas.

DISCUSSION

Appellant contends that the circuit court erred in permitting the prosecutor to make improper statements during closing argument. Specifically, he argues that the court erred in allowing the prosecution to: (1) argue the law by advising the jury that appellant's act

of firing 11 shots into a crowded bar indicated a concurrent intent to harm all the victims; and (2) shift the burden of proof by suggesting that the defense maintained the same power as the State to issue a summons for a police witness.

The State contends that the court "properly exercised its discretion in regulating the State's closing arguments." It asserts that counsel failed to preserve any objection to the first comment, which does not warrant plain error review. It argues that the second comment did not shift the burden of proof.

This Court has described the principles governing our review of comments made during closing arguments as follows:

> It is well established that "'attorneys are afforded great leeway in presenting closing arguments to the jury.'" *Pickett v. State*, 222 Md. App. 322, 329, 112 A.3d 1078 (2015) (quoting *Degren v. State*, 352 Md. 400, 429, 722 A.2d 887 (1999). *Accord Sivells v. State*, 196 Md. App. 254, 270, 9 A.3d 123 (2010), *cert. dis'd as improv. granted*, 421 Md. 659, 28 A.3d 704 (2011). "'As to summation, it is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is afforded a wide range.'" *Donati v. State*, 215 Md. App. 686, 730, 84 A.3d 156 (quoting *Wilhelm v. State*, 272 Md. 404, 412, 326 A.2d 707 (1974)), *cert. denied*, 438 Md. 143, 91 A.3d 614 (2014).

State v. Newton, 230 Md. App. 241, 254–55 (2016), *aff'd*, 455 Md. 341 (2017), *cert. denied*, 138 S.Ct. 665 (2018). Moreover, even where there is an improper comment, reversal is required "only '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.'" *Id.* (quoting *Pickett*, 222 Md. App. at 330).

"We review a trial court's allowance of allegedly improper remarks by a prosecutor under an abuse of discretion standard." *Pietruszewski v. State*, 245 Md. App. 292, 318,

cert. denied, 471 Md. 127 (2020). With that background in mind, we review the specific contention raised here.

I.

In his opening statement, the prosecutor advised the jury, without comment from the defense, that

> the fact that [appellant] then raised the gun will show . . . his intent to commit murder. That intent is what is called concurrent across the entire zone of danger that is created by Mr. Bowers firing 11 shots into a crowded bar. . . . [T]hat intent to try and kill Mr. Thomas extends to everyone within that cone of danger that is created by firing bullets into a bar and that is why that intent to kill extends to the three other victims.

Defense counsel did not object to that statement.

Later, in discussing the requested jury instructions, the prosecutor asked the trial court to include an instruction on concurrent intent. Because the prosecutor had provided the court only with research on the topic, rather than with a draft instruction, and the court stated that it would take a "solid 45 minutes" to draft its own concurrent intent instruction, the court declined to give such an instruction. The court stated, however, that the prosecutor could argue concurrent intent to the jury during closing argument. Defense counsel did not make any objection.

In its instructions, the trial court advised the jury that the State was required to prove, with respect to the charge of attempted first-degree murder, that appellant "willfully and with premeditation and deliberation intended to kill Cornell Thomas, Roderick Alston, Am[ani] Oliver or Chante Johnson," and with respect to the charge of attempted second-

degree murder, that appellant "actually intended to kill, Cornell Thomas, Roderick Alston, Am[ani] Oliver or Chante Johnson."

During his initial closing argument, the prosecutor stated:

> And Cornell Thomas testified that when the Defendant raised the gun up, he was looking at Cornell Thomas. His intent was formed the second he ran down Bristol and maintained all the way, the 40 seconds later that he ran back up to Hanover Street side and fired at Cornell Thomas. So that intent to kill Cornell Thomas and the way that the Defendant acted firing 11 indiscriminate shots into a crowded bar, that intent to kill that one person is concurrent to all the people within that cone of danger that the Defendant made by firing all of those shots.
>
> If I'm just shooting at this one, if someone is just shooting at this one person and fires 11 shots, spraying them, anyone, everyone in this zone, that intent is concurrent to all of them. And that's important because Roderick Alston, Am[ani] Oliver, Chante Johnson, right, you saw that none of them, well Mr. Alston and Ms. Oliver, right, [de]spite the best efforts of the detective, not here, but it doesn't matter because you have photos of Mr. Alston's injuries. You have medical records from Ms. Oliver showing that they were both shot.
>
> So therefore, that intent is concurrent on all.

Defense counsel did not object to these comments, either contemporaneously or at the end of the prosecutor's initial closing argument.

Appellant contends that the court erred in allowing these comments because counsel is not permitted to "argue the law," and the comments here constituted "a legal advisement never mentioned by the trial court during jury instructions." He asserts that, as a result, the court "allowed for the jury to apply law different [from] that given by the judge."

The State notes that defense counsel made no objection to the comments. It argues that this Court should decline to exercise plain error review of this contention.

Ordinarily, Maryland appellate courts 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). The purpose of requiring counsel to raise an objection below is "to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings[.]" *Robinson v. State*, 404 Md. 208, 216 (2008) (quoting *Fitzgerald v. State*, 384 Md. 484, 505 (2004)). "[T]o 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). *Accord Purohit v. State*, 99 Md. App. 566, 586 (Defendant failed to preserve his claim that the State made an improper comment during closing argument "because counsel failed to object to [that] portion of the State's closing argument."), *cert. denied*, 335 Md. 698 (1994).

Appellant acknowledges that defense counsel failed to object below to the prosecutor's comments regarding concurrent intent. He contends, however, that we should review this claim for plain error. Although this Court has discretion to review unpreserved errors, the Court of Appeals has explained that "appellate courts should rarely exercise" their discretion under Md. Rule 8-131(a). *Chaney v. State*, 397 Md. 460, 468 (2007). This is because considerations of both

> fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

Id. Accord Kelly v. State, 195 Md. App. 403, 431 (2010), *cert. denied*, 417 Md. 502 (2011), *cert. denied*, 563 U.S. 947 (2011).

We reserve our exercise of plain error review for instances when the "unobjected to error [is] 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *State v. Brady*, 393 Md. 502, 507 (2006) (quoting *State v. Hutchinson*, 287 Md. 198, 202 (1980)). *Accord Steward v. State*, 218 Md. App. 550, 566–67, *cert. denied*, 441 Md. 63 (2014). Appellate review based on plain error is "a rare, rare, phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003), *cert. denied*, 380 Md. 618 (2004).

Here, we decline to exercise our discretion to engage in plain error review. As the State notes, any error in the comments related to the intent required for the attempted murders of the victims other than Mr. Thomas did not affect the outcome of the proceedings, given that he was acquitted of the attempted murder charges pertaining to the other patrons in the "zone of danger," i.e., those relevant to concurrent intent, and he was convicted only of attempted second-degree murder of Mr. Thomas. Under these circumstances, we are not persuaded that the extraordinary remedy of reversal for plain error is warranted, and we decline to address this contention.

II.

Appellant next contends that the circuit court erred in permitting the prosecutor to make comments that improperly shifted the burden of proof to defendant. The State, not surprisingly, disagrees. It contends that the court properly exercised its discretion in allowing the rebuttal argument because the defense opened the door to the prosecutor's "narrow and isolated remarks."

In the defense's closing argument, counsel questioned the credibility of Maynard's owner, George Marousis, noting that Mr. Marousis refused to give the bar's credit card receipts from the night of the shooting to the police and stated: "What's going on here?" Counsel continued:

> I said, Mr. Marousis, George Marousis, I said you have an interest in trying to keep down the number of fights that happen in your bar because it can impact your liquor license; couldn't it? And he said, yes. I asked him, I said, you've met with Lieutenant Nowawago, right? Who is Lieutenant Nowawago? Now Nowawago was an officer on the scene who strangely enough is kind of doing his own investigation of this right now or was or is we don't know and he said, oh the detective learns that Detective Nowawago goes and shows pictures of possible suspects. Pictures. These people had a criminal record, violent criminal record and they were in the bar that night and he's trying to show George. Hey, hey look at these pictures. Were any of these people there, but the detective doesn't know much about it at all. Did he show those pictures to Mr. Cornell Thomas because Mr. Thomas might have said oh well, yeah, that's the person. Remember, Victor Regusters writes on his, hey it seems like, most like. Why wouldn't you show him the pictures? Why wouldn't you compare the pictures to the video? Why? What's going on here?
>
> There are obviously other suspects in this and we have two investigations going on here. The detectives should be collaborating. They should both know what the other is doing or doing it altogether. That is what you might consider good police work. Is there additional information that Lieutenant Nowawago has? The State didn't call him. Does he have additional suspects or information? Did he have anything that he recovered that might be helpful or is being tested. We don't know.

In his rebuttal closing argument, the prosecutor addressed the defense's closing, as follows:

> [PROSECUTOR]: [Defense counsel] wants to beat up on Mr. Marousis because you saw him on the stand, right? English wasn't exactly perfect. Had some difficulty understanding some questions, right? He was asked, did you submit those bullets to evidence. He handed them over. He might not have submitted them to what he thought was the police. He got a little confused, but the fact is, doesn't change his identification at all. These

> three pictures that Lieutenant Nowawago showed, [defense counsel] wants to know where Lieutenant Nowawago. Well, guess what, defense has the exact same powers the State—
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> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: —exact same powers the State to summons a witness in. And you heard Detective Corriveau testify that those three pictures, he did compare them to the video. He did and he ruled them out because they didn't match.

As indicated, appellant contends that the prosecutor's statement was a comment about his failure to present evidence, which was improper because it shifted the burden of proof from the State to the defense. The State agrees that a prosecutor generally may not "draw the jury's attention to the failure of the defendant to call witnesses," but it asserts that the comments here were proper because defense counsel "opened the door with his own comments in closing argument." It contends that the prosecutor's comments were a "narrow and tailored response to the issue injected into the trial by defense counsel" regarding the failure to call Lieutenant Nowawago as a witness. We agree.

The "opening the door" doctrine is based on principles of fairness and permits "parties to meet fire with fire, as they introduce otherwise inadmissible evidence in response to evidence put forth by the opposing side." *State v. Robertson*, 463 Md. 342, 352 (2019) (cleaned up). In *Mitchell v. State*, 408 Md. 368, 387–92 (2009), the Court of Appeals discussed this doctrine in its analysis of a prosecutor's comments regarding the defense's failure to subpoena witnesses. In the defense's closing argument, counsel listed various individuals who had been discussed at trial but were not called to testify. *Id.* at

375–76. Counsel claimed that the absence of those witnesses created "a situation where a misidentification could take place," and suggested,

> *Let's bring Wal[i] Henderson here so we can see if he's a heavyset, dark-skinned man. Let's bring Antonio Corprew here so we can gauge his stature. Let's look at Man–Man, what does he look like? Get that hat out of the car. Does that hat fit his head?*

Id. at 376–77.

The prosecutor responded in his rebuttal closing argument:

> The defense made mention a couple times about what the State didn't present to you all. We never saw Cochran, never saw Corprew, never saw Turner, never saw Wal[i] Henderson. . . .
>
> * * *
>
> If [defense counsel] thought that them being here would have shown that something we presented was so contradictory to something about them, he could have brought them in as well. The defense has subpoena power just like the State does. You can't say why didn't the State present a witness, when they had an equal opportunity to present it to you, and then try to say, well, it wasn't presented. They had an equal right to present it if they thought it would contradict something we presented.

Id. at 377, 379.

The Court of Appeals held that the prosecutor's statements amounted to "fair comment" because defense counsel's closing argument "opened the door" for the prosecution to alert the jury that the defense had subpoena power. *Id.* at 387–88. By suggesting that it would have been helpful for additional named people to testify, the defense "argued the relevancy of their absences and the weakness in the State's case." *Id.* at 388–89. The prosecutor's remarks drawing attention to the defense's subpoena power were a narrow, justified response to defense counsel's "opening the door," and "such

remarks did not shift the burden of proof." *Id*. at 392. *Accord Harriston v. State,* 246 Md. App. 367, 380 (Prosecutor's remarks on rebuttal did not impermissibly shift the burden, in part, because they were "an express response to defense counsel's closing remarks" and did not speak "directly to the defendant's failure to provide evidence" or "call out [his] failure to provide an explanation for his innocence."), *cert. denied*, 471 Md. 77 (2020).

The same analysis applies here. The prosecutor's comment that the defense had the ability to summons a witness was an express response to defense counsel's closing argument. As in *Mitchell*, it did not improperly shift the burden of proof. Accordingly, the circuit court did not abuse its discretion in permitting the prosecutor's remarks in this regard.

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