Circuit Court for Wicomico County
Case No.: C-22-CR-17-000004

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 740

September Term, 2017

DAQUAN PARKS

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Fader,

JJ.

Opinion by Shaw Geter, J.

Filed: August 8, 2018

*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.

This case arises from an altercation involving a high school student and a school administrator. After his petition to transfer the case to juvenile court was denied, appellant Daquan Parks was tried by a jury in the Circuit Court for Wicomico County, and convicted of first-degree assault, second-degree assault, and disorderly conduct. He was sentenced to a term of ten years imprisonment, with five years suspended. Appellant timely appealed and raises the following questions for our review, which we rephrase:

I. Was the evidence sufficient to convict appellant of first-degree assault, where the victim did not sustain serious physical injuries?

II. Did the State's remarks in closing argument violate appellant's right to a fair trial?

For the following reasons, we affirm the judgments.

BACKGROUND

On the morning of December 7, 2016, Lisa Forbush, the Assistant Principal of James M. Bennett High School in Salisbury, noticed students congregating in the hallway by the main office. School policy required that students wait in the cafeteria or outside the building before 7:35 a.m. Consequently, Forbush left the office and proceeded to usher the students toward the designated areas. Appellant, who was accompanied by two friends, was among the students in the hall. The night before, appellant and Forbush were involved in a confrontation at a basketball game concerning an alleged rule violation. Appellant became angry and swore at Forbush while being ejected from the event. As Forbush directed students out of the hall, she overheard appellant say, "that fucking bitch better not approach me." Forbush walked over to appellant and his friends and asked one of his companions to "do the right thing and go to the appropriate location," to which appellant

responded, "back off, bitch." After she asked appellant twice to wait in the cafeteria or outside the building, Forbush told appellant to go to the main office because he was causing a scene.

Administrative employee Jeni Feeney was seated at her desk when she saw Forbush and appellant enter the main office.[1] Forbush pointed toward the "administrative hall" beyond the reception area and told appellant to have a seat on a bench and wait there. Appellant initially walked toward the hall, but then turned toward the employees who were present and said, "you ladies better get that bitch." Appellant then walked back toward Forbush. Forbush testified that appellant "start[ed] to flex" toward her and, because he was entering her personal space and she was nervous that the encounter would become physical, she put her hand forward to block him. When her hand touched his chest, appellant slapped it away. When Forbush raised her hand again, appellant advanced toward her stating, "I'm gonna fucking kill you." He then pushed Forbush backward over a desk and choked her. Forbush testified that she was unable to breathe or talk, and that she was afraid.

Two employees ran to pull appellant off Forbush, and Feeney radioed for help. Principal Rick Briggs heard the "frantic" radio dispatch and, as he entered the main office, he saw appellant trying to fight through the office staff to get to Forbush. Briggs, thinking that he had seen appellant's fist reach back to swing, grabbed appellant to pull him away from Forbush, and Briggs and appellant both fell to the ground. When Briggs regained his

[1] Ms. Feeney's first name is spelled "Jeni" and "Jenny" in some sections of the record.

footing he, along with several students who had entered the office, moved appellant into a corner, where they tried to calm him down. From his position in the corner, appellant yelled at Forbush, "I'm gonna fucking kill you, I'm gonna see you outside of school, I'm gonna find out where you live." When appellant calmed down, Briggs escorted him into his office, where appellant told Briggs that Forbush had touched him, and said "nobody touches me."

In addition to testimony from Forbush, Feeney, and Briggs, the State also introduced into evidence surveillance camera footage from the office reception area. The evidence also included photographs of Forbush's red and swollen neck, which were taken on the date of the incident.

DISCUSSION

I. Sufficiency of the Evidence

Appellant contends that the evidence was insufficient to sustain his conviction for first-degree assault. Specifically, he argues that the incident was brief, and that he used only enough force "to make it difficult for [Forbush] to 'breath or talk' for a few seconds and leave 'some red marks' on her neck." He further asserts that, despite stating that he was going to "kill" her, there was no way that a rational trier of fact could conclude that his statements were a serious threat rather than teenaged "bluster." Appellant claims that the State failed to present sufficient evidence that he intended to cause serious physical injury, and that his conviction must therefore be reversed.

The State disagrees and argues that an attempt to cause serious physical injury is sufficient to sustain a first-degree assault conviction. The State contends that appellant's

act of gripping Forbush's neck while exerting enough pressure to prevent her from breathing was sufficient evidence of first-degree assault, especially when accompanied by his verbal threats to kill her. We agree with the State.

To review for sufficiency of the evidence, "we review the evidence in the light most favorable to the prosecution and determine whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Perry v. State,* 229 Md. App. 687, 696 (2016) (quoting *State v. Smith,* 374 Md. 527, 533 (2003)). The sole concern of the appellate court, therefore, is "'whether the verdict was supported by sufficient evidence, direct or circumstantial, which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.'" *State v. Manion,* 442 Md. 419, 431 (2015) (quoting *Taylor v. State*, 346 Md. 452, 457 (1997)). "Because the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185 (2010) (citing *Tarray v. State*, 410 Md. 594, 608 (2009)). "We defer to any possible reasonable inferences the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *State v. Mayers*, 417 Md. 449, 466 (2010).

Md. Code Ann., Crim. Law (C.L.) § 3-202(a)(1) governs first-degree assault and provides, in part, that "[a] person may not intentionally cause or attempt to cause serious physical injury to another." The statute defines "serious physical injury" as "physical

injury that: (1) creates a substantial risk of death; or (2) causes permanent or protracted serious: (i) disfigurement; (ii) loss of the function of any bodily member or organ; or (iii) impairment of the function of any bodily member or organ." C.L. § 3-201(d). To sustain a conviction for first-degree assault, the State must prove a defendant's "specific intent to cause, or attempt to cause, serious physical injury." *Dixon v. State*, 364 Md. 209, 239 (2001).

Appellant distinguishes the facts in this case from *Chilcoat v. State*, 155 Md. App. 394, 400*, cert. denied,* 381 Md. 675 (2004), where the defendant struck his victim with a beer stein with enough force to cause two depressed skull fractures that required surgery to replace a portion of his skull with wire mesh held in place by titanium screws. Chilcoat challenged the sufficiency of the evidence to convict for first-degree assault, citing expert testimony that it would be "unusual" for someone to die from the injuries his victim sustained. *Chilcoat,* 155 Md. App. at 401. We rejected Chilcoat's assertion that the injuries he caused were not life-threatening and affirmed his conviction, explaining that "a jury may infer the necessary intent from an individual's conduct and the surrounding circumstances, whether or not the victim suffers such an injury. Also, the jury may infer that one intends the natural and probable consequences of his act." *Id.* at 403.

Appellant also differentiates these facts from *Cathcart v. State,* 169 Md. App. 379, 383 (2006), *vacated on other grounds*, 397 Md. 320 (2007), where the defendant punched a woman in the face and choked her until she lost consciousness, causing bilateral jaw fractures, a broken nose, and dislocated chin. The defendant challenged the conviction, claiming that the State had failed to prove serious physical injury. *Id.* at 392. We held that

the evidence was sufficient to infer that the defendant intended to cause serious physical injury and affirmed the conviction for first-degree assault. *Id.* at 393-94.

Rather than dispute the evidence concerning his actions, appellant asserts that a rational jury could not find that he intended to cause serious physical injuries because Forbush was not hurt as badly as the victims in *Chilcoat* and *Cathcart*. We find this argument unpersuasive. As this Court recognized in *Brown v. State*, 182 Md. App. 138, 179 (2008), "an attempt to cause 'serious physical injury,' not merely a completed injury" is sufficient to sustain a conviction for first-degree assault under C.L. § 3-202(a).

Here, the jury viewed surveillance footage that showed appellant advance toward Forbush, strike the hand that she raised to prevent him from entering her personal space, and then shove her backwards. Forbush testified that immediately before the attack, appellant said he was going to kill her. The jury also heard her testimony that appellant gripped her throat with enough force to make it difficult for her to breathe. Forbush's testimony was corroborated by that of Sweeney, who, upon seeing appellant choke Forbush, radioed for help as her colleagues leapt from their desks to intervene. Briggs stated that when he entered the office, he grabbed appellant to stop him from continuing his attack. The jury also saw photographs of Forbush's red and swollen neck. The "natural and probable consequences" of appellant's actions, namely, threatening to kill Forbush, choking her until she could not breathe, and continuing to attack her until bystanders separated them reflected his intent to cause serious physical injury. Accordingly, we hold that there was sufficient evidence from which a rational trier of fact could have found that appellant intended to cause or attempt to cause serious physical injury.

II. The Prosecutor's Closing Argument

After the conclusion of evidence, the trial judge instructed the jury as to the elements of the charged offenses, including first and second-degree assault using the Pattern Jury Instructions. Appellant does not contend that the instructions were defective in any way. The State then gave its closing argument, and the prosecutor stated, in part:

> [I]n fact, what you decide today is whether what the Defendant did at Bennett High School, *you guys get to decide what's acceptable or was the Defendant's behavior, what goes down at Bennett High School, what happened to Ms. Forbush and the principal, whether that's okay or not.*
>
> It's not my opinion. It's not Counsel's. *You guys have an input on the behavior that's acceptable in our school system.*

(Emphasis added).

Defense counsel, during closing argument, contrasted the burden of proof required to secure a conviction in criminal court to the lower standard of a school disciplinary hearing, and stated:

> We're not dealing with discipline after the fact to remove people from a school. We're dealing with the laws, the adult criminal laws of the state of Maryland. Which I'm going to ask you to follow.
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> ***
>
> I respectfully disagree with [the prosecutor]. This is not about what's acceptable at James M. Bennett High School. It's not. If they want they can kick Daquan Parks out of James M. Bennett High School. This is about whether or not he's guilty of a crime under Maryland law, whether he, just like all other adults or all other people who find themselves in an adult criminal court, are entitled to the same right of self-defense, when someone lays their hands on them in an aggressive manner.

During rebuttal closing argument, the prosecutor summarized first-degree assault as follows:

> [M]y guess is when you go back there, there will be some debate whether it's first or second degree assault, what level of force did he use against Ms. Forbush. Was it a second degree assault, you know, by choking her, is that just second degree assault? Or is that first degree assault? *And if you believe that choking somebody can either kill them or do serious damage, you know, to the throat and vocal cords, then its first degree.* If you go, well, it's not that bad getting choked, it's just getting choked, then it's second degree.

(Emphasis added).

Appellant first contends that the prosecutor inappropriately "ask[ed] the jurors to send a message to the school system" with their verdict, thereby unfairly mischaracterizing the issue before the jury. Second, appellant asserts that the prosecutor misstated the law concerning first-degree assault during rebuttal closing argument, effectively lowering the burden of proof needed to secure his conviction. Appellant concedes that he did not object to either remark, however, he urges this Court to exercise plain error review because he maintains that the cumulative effect of the prosecutor's statements misled the jury and violated his right to a fair trial.

"[A]ttorneys are afforded great leeway in presenting closing arguments to the jury." *Degren v. State,* 352 Md. 400, 429 (1999). "The prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefore." *Id.* at 429-30. Not all statements made during closing arguments are permissible, however, as "there are limits in place to protect a defendant's right to a fair trial." *Id*. at 430. Even when a prosecutor's comment is deemed improper, 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.'" *Winston v. State*, 235 Md. App. 540, 572-73, *cert. denied sub nom. Mayhew v. State,* 458 Md. 593 (2018) (quoting *Lawson v. State*, 389 Md. 570, 592 (2005)).

Where, as here, the defendant failed to object during trial, the appellate court, in its discretion, may consider an issue if it constitutes plain error. *McCracken v. State*, 150 Md. App. 330, 362 (2003) (citing *United States v. DePew*, 932 F.2d 324, 327-28 (4th Cir. 1991); *Rubin v. State*, 325 Md. 552, 587-88 (1992)). Plain error review is reserved for issues that are "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *State v. Hutchinson,* 287 Md. 198, 203 (1980). "This exercise of discretion to engage in plain error review is 'rare.'" *Yates v. State*, 429 Md. 112, 131 (2012). In fact, "the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation." *Morris v. State,* 153 Md. App. 480, 507 (2003). The court may consider four factors when examining whether an improper closing argument constitutes plain error: "(1) the degree to which the remarks had a tendency to mislead the jury and prejudice the defendant; (2) whether the remarks were isolated or expansive; (3) the strength of the competent evidence to establish guilt absent the remarks; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." *McCracken,* 150 Md. App. at 362 (citing *United States v. Harrison*, 716 F.2d 1050, 1052 (4th Cir. 1983)). We find, however, these factors do not favor engaging in plain error review in the case *sub judice* and thus we decline review.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.