UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0601

September Term, 2014

DAQUON WILLIAMS

v.

STATE OF MARYLAND

Meredith,
Berger,
Thieme, Jr., Raymond G.
(Retired, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: August 3, 2014

Following a trial in the Circuit Court for Prince George's County, a jury convicted appellant, Daquon Williams, of robbery, robbery with a dangerous weapon, second-degree assault, first-degree assault, use of a handgun in the commission of a crime of violence, wearing, carrying, or transporting a handgun, theft of items with a value of at least $1000 but less than $10,000, conspiracy to commit robbery with a dangerous weapon, and conspiracy to commit theft of items with a value of at least $1000 but less than $10,000. The trial court sentenced appellant to a total of seven years in prison, the first five years without the possibility of parole, after which he timely noted this appeal.

Appellant presents the following questions for our consideration:

1. Did the trial court commit plain error in allowing improper remarks during the prosecutor's opening statement?

2. Was the evidence sufficient to support appellant's convictions?

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

FACTS AND LEGAL PROCEEDINGS

On August 22, 2013, appellant phoned Marquise Vanzego, a tattoo artist with whom he had gone to high school and who had inked some of appellant's tattoos, and asked Vanzego to meet him to complete a tattoo for him and to create tattoos for two friends. Vanzego agreed to pick the men up at appellant's home in Oxon Hill, Prince George's County, and take them to a hotel room to complete the tattoos.

When Vanzego arrived at appellant's home, appellant got into the front seat of Vanzego's car and another man, whom Vanzego knew as "Andres," got into the back seat.

As Vanzego began to pull away, Andres placed a gun against Vanzego's neck and said, "[G]ive me all that."

Appellant took Vanzego's bag and opened the passenger door, whereupon a third man, whom Vanzego knew through his use of Instagram as "Juice,"[1] opened the driver's door, punched Vanzego in the face, kicked him, and took his money. Andres ordered Vanzego to open the trunk; he and appellant took all the items in the trunk, which included $800, clothing, shoes, a cell phone, an iPad, and tattoo equipment. Vanzego estimated the value of all the items at approximately $7000.

The robbers then ran off into a building. Shortly thereafter, as Vanzego attempted to leave the scene, a police officer arrived and asked what had happened. Vanzego identified appellant and Juice as two of the robbers from Instagram photos he pulled up on his cell phone.

At the close of the State's case-in-chief, appellant moved for judgment of acquittal. The court granted the motion as it related to a charge of possession of a regulated firearm by a person under the age of 21, as no evidence of appellant's age had been adduced. It denied the motion as to the remainder of the charges.

[1] Instagram is "an online mobile photo sharing, video sharing, and social networking service that enables its users to take pictures and videos and share them on a variety of social networking platforms." wikipedia.com (last visited July 23, 2015).

"Juice" was later identified as Patrick Marquise Gonzalves. "Andres" was never identified or apprehended.

Appellant did not put on any evidence. At the close of the entire case, he renewed his motion for judgment of acquittal. The court did not expressly deny the motion, but we infer a denial of the motion from the fact that all the remaining charges were submitted to the jury for deliberation.

Additional relevant facts will be set forth as necessary.

DISCUSSION

I.

Appellant first asserts that the trial court erred in permitting the prosecutor to comment, during his opening statement, that appellant's facial tattoo, "Fear no man," represented appellant's motto and "brazen attitude," which led him to rob Vanzego. Conceding that he did not object to the statement, thus failing to preserve the issue for appellate review, appellant nonetheless urges us to invoke our discretion to review the matter for plain error.

At the start of his opening statement, the prosecutor remarked:

> Fear no man. Fear no man. That is the defendant's motto. In fact, the defendant feels so strongly in that motto that he got those exact words permanently tattooed to his face. It's that brazen attitude which led the defendant to rob the victim in this case[.] Mr. Marquise Vanzego is a tattoo artist. He's known the defendant for several years. In fact, he's done some of the defendant's tattoos for him in the past.

Appellant neither objected when the prosecutor made the statement, nor requested a mistrial or curative instruction. Thus, the alleged error appellant raises on appeal was never

presented to the trial court and clearly is not preserved. *See* Md. Rule 8–131(a) ("Ordinarily, the 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[.]"). He now asserts, however, that plain error review is warranted because the above-referenced comments "attempted to emotionally persuade the jury, demonstrated bad faith, and resulted in substantial prejudice," as the prosecutor "could not have thought" that appellant's tattoo and the prosecutor's pure speculation about appellant's motto in life would be admissible.

When a defendant fails to lodge an objection to the action of the trial court, an appellate court indeed possesses plenary discretion to notice plain error material to the rights of a defendant, even though the matter was not raised below. *Frazier v. State*, 197 Md. App. 264, 278 (2011). But, an appellate court should "'intervene in those circumstances only when the error complained of was so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial.'" *James v. State*, 191 Md. App. 233, 246 (2010) (quoting *Richmond v. State*, 330 Md. 223, 236 (1993)). Even reversible error invokes plain error review only when "the unobjected to error is 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Id.* at 246-7 (quoting *Stone v. State*, 178 Md. App. 428, 451 (2008)). We perceive no such error here.

The primary purpose of an opening statement in a criminal case is "to apprise with reasonable succinctness the trier of facts of the questions involved and what the State or the defense expects to prove so as to prepare the trier of facts for the evidence to be adduced."

Wilhelm v. State, 272 Md. 404, 411-12 (1974). The prosecutor is allowed reasonable latitude in his opening statement, but "he should be confined to statements based on facts that can be proved and his opening statement should not include reference to facts which are plainly inadmissible and which he cannot or will not be permitted to prove, or which he in good faith does not expect to prove." *Id.* at 412.

An opening statement by counsel is not evidence and generally has no binding force or effect.[2] A reversal based on an improper opening statement will only be warranted if the defendant establishes bad faith on the part of the prosecutor in stating what he expects to prove or establishes substantial prejudice resulting therefrom. *Id.* What exceeds the limits of permissible comment depends on the facts in each case. *Id.* at 415.

We are satisfied that the prosecutor's opening statement was not improper under the facts of this matter. Despite appellant's claim that appellant's tattoos were irrelevant to the crimes at issue, as the State points out, the crimes centered almost entirely on tattoos and tattoo equipment. On the day of the robbery, appellant initiated a call to Vanzego, asking him to complete a tattoo for appellant and to create tattoos for his friends. When Vanzego arrived at appellant's home, he was robbed of, among other items, expensive tattoo

[2]Indeed, the trial court instructed the jury: "Opening statements and closing arguments of the lawyers are not evidence in this case. They are intended to help you to understand the evidence and to apply the law. Therefore, if your memory of the evidence differs from anything the lawyers or I may say, you must rely on your own memory of the evidence."

equipment in what logically may be referred to as a "brazen" daytime robbery by appellant, whom Vanzego had known since high school and had worked with previously, thus leaving no question as to the identity of at least one of the robbers.

Furthermore, although appellant argues that the prosecutor could not have believed that what was tattooed on appellant's face would be admissible at trial, the tattoo reading "Fear no man," to which the prosecutor referred in his opening statement, was clearly visible on the face of appellant. And, Vanzego testified, without objection, that he had created that very tattoo, at appellant's request.

Under the particular circumstances of this case, we cannot say that the prosecutor's comments during his opening statement were made in bad faith or were improper. As such, we perceive no extraordinary plain error that would warrant reversal.

II.

Appellant also argues that the evidence presented at trial was insufficient to sustain his convictions because Vanzego's testimony established that it was Andres and Juice who assaulted and robbed him; the State proved only appellant's "mere presence" during the robbery and related crimes, which was insufficient for a finding of his guilt. Even if the evidence proved that he was "associated with" Andres and Juice, he continues, "that alone would be insufficient to support the convictions," as mere association with conspirators does not make one a co-conspirator.

The State counters that appellant, in failing to present specific argument during his motions for judgment of acquittal, has not preserved this issue for appellate review. And, in any event, the State concludes, the evidence supported a reasonable inference that appellant acted in concert with Andres and Juice.

We agree with the State that appellant has failed to preserve this issue for our review. When a jury is the trier of fact, appellate review of the sufficiency of the evidence is available "'only when the defendant moves for judgment of acquittal at the close of all the evidence and argues precisely the ways in which the evidence is lacking.'" *Walker v. State*, 144 Md. App. 505, 545 (2002) (quoting *Anthony v. State*, 117 Md. App. 119, 126 (1997)), *rev'd on other grounds*, 373 Md. 360 (2003). A criminal defendant who moves for judgment of acquittal is required by Md. Rule 4-324(a) to "'state with particularity all reasons why the motion should be granted[,]' and is not entitled to appellate review of reasons stated for the first time on appeal." *Starr v. State*, 405 Md. 293, 302 (2008) (quoting *State v. Lyles*, 308 Md. 129, 135-36 (1986)). The language of the rule is mandatory. *Whiting v. State*, 160 Md. App. 285, 308 (2004), *aff'd*, 389 Md. 334 (2005). Therefore, sufficiency arguments that were not presented to the trial court that are then presented to this Court are rejected. *Starr,* 405 Md. at 303.

At the close of the State's case-in-chief, the court inquired whether appellant had a motion:

> MR. [Defense Counsel]: We would move for motion for judgment of acquittal at this time, Your Honor.
>
> THE COURT: I'm going to deny your motion for judgment of acquittal based on the testimony. The evidence is that there was, in fact, a robbery with a dangerous weapon or robbery, a first degree assault, a second degree assault. The only one I haven't heard any evidence about was his age.
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> MR. [Prosecutor]: State would submit on Count 6, which is under 21.
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> THE COURT: I'm going to grant it as to Count 6, possession of a regulated firearm by a person under 21.
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> MR. [Defense Counsel]: As to Count 7, we would argue wear and carry, transport. All the testimony is the other individual has it.
>
> THE COURT: Well, yes, but he's aiding and abetting or at least allegedly aiding and abetting. I didn't hear any age.

Appellant did not put on any evidence, and following discussion regarding requested jury instructions, appellant renewed his motion for judgment of acquittal, as follows:

> MR. [Defense Counsel]: We're on the record. Defense elected not to testify. We would make a motion for judgment of acquittal at this time.
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> THE COURT: Go ahead and put it on the record.
>
> MR. [Defense Counsel]: Defense incorporates prior reference to earlier motion for judgment of acquittal and would like to remake that motion at this time. Defendant wishes not to testify.
>
> THE COURT: All right. Let's bring the jury back.

It is clear that appellant never stated with specificity any grounds in support of his motions for judgment of acquittal, other than to argue that "the other person" had the weapon with regard to Count 7 of the indictment, the wearing, carrying, and transporting charge,

which differs from the argument he raises on appeal. As such, he has failed to preserve the issue of sufficiency of the evidence for appellate review.

Even were we to consider the insufficiency argument appellant advances, he would not prevail. This Court has set forth the applicable standard of review in determining the sufficiency of the evidence on appeal:

> The test of appellate review of evidentiary sufficiency 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. The Court's concern is not whether the verdict is in accord with what appears to be the weight of the evidence, but rather is only with whether the verdicts were supported with sufficient evidence-that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offense charged beyond a reasonable doubt. We must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference. Further, we do not distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.

Donati v. State, 215 Md. App. 686, 718, *cert. denied*, 438 Md. 143 (2014) (Internal quotation marks and citations omitted).

Although appellant claims that the State proved only his "mere presence" at the scene of the robbery and related crimes, Vanzego's testimony, if believed by the jury, showed that appellant played an active part in the crimes. It was appellant who knew Vanzego and had employed his tattoo artistry in the past, and it was appellant who phoned Vanzego and lured him to appellant's home in the pretense of desiring Vanzego's services on the day of the

robbery. Appellant facilitated Andres's and Juice's access to Vanzego in his vehicle, where they assaulted and robbed him.

Vanzego also testified that the three men took all his belongings from his car, with appellant opening the passenger door to Vanzego's car and taking one of his bags. When asked specifically which of the three men involved in the robbery took his belongings, Vanzego answered, "Daquon and Juice, they went to the back of the trunk and just took all my bags that I had in there." The three men then ran off together into a building.

From the evidence presented at trial, a rational jury could have found, beyond a reasonable doubt, that appellant either directly participated in the charged crimes or acted in concert with Andres and Juice as an aider or abettor.[3]

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

[3]Under established case law, a person who did not actually commit the crimes in question may nevertheless be guilty to the same degree as the person who did. *Kohler v. State,* 203 Md. App. 110, 119 (2012). "Whereas principals in the first degree 'commit the deed as perpetrating actors, either by their own hand or by the hand of an innocent agent,' principals in the second degree are 'present, actually or constructively, aiding and abetting the commission of the crime, but not themselves committing it[.]'" *Id.* (quoting *Handy v. State,* 23 Md. App. 239, 251 (1974)). "An aider is one who assists, supports or supplements the efforts of another in the commission of a crime," and "[a]n abettor is one who instigates, advises or encourages the commission of a crime." *Handy,* 23 Md. App. at 251.