Circuit Court for Baltimore City
Case No.: 114325005

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 978

September Term, 2016

ISAIAH BANKS

v.

STATE OF MARYLAND

Nazarian,
Shaw Geter,
Raker, Irma S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: July 24, 2017

This case arises from the armed robbery of a cab driver on October 23, 2014, in Baltimore City. Following a three-day jury trial in the circuit court, appellant, Isaiah Banks, was convicted of first-degree assault, conspiracy to commit first-degree assault, armed robbery, conspiracy to commit armed robbery, and use of a handgun in the commission of a crime of violence. He received a sentence of twenty years, with eight years suspended. Thereafter, appellant noted this timely appeal, presenting three questions that we have reordered as follows:

I. Was the "show-up" police procedure by which the victim identified Banks so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification under the U.S. and Maryland constitutions?

II. Was the evidence at trial insufficient to convict Banks of use of a handgun in the commission of a crime of violence, where the only evidence of a handgun was the uncorroborated testimony of an alleged accomplice?

III. Did the State's improper arguments in closing, including vouching for three key witnesses and misstating the law, violate Bank's right to a fair trial under the U.S. and Maryland constitutions?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

BACKGROUND

Jeanette Siegman was employed as a cab driver and on October 23, 2014, she received a call around 11:30 a.m. for service outside of a pawnshop on Annapolis Road in Baltimore City. Two males got into the cab, and Siegman, who had worked as a cab driver for twenty-five years, made a number of observations about both individuals.[1] Siegman

[1] Appellant challenged the accuracy of Siegman's observations both at the suppression hearing and at trial.

described the first individual—whom she later identified as appellant—as wearing a hat, a red jacket, a hooded sweatshirt, and dark pants. She also noted he was in his mid-twenties, had a mustache, a little beard, and his face was "pockmarked" or had a "cratered" complexion. The second individual, whom Siegman identified as Donte Bazemore, sat in the rear passenger seat; Siegman indicated that he wore a black jacket and dark pants. Siegman also observed that he was skinnier than the first individual; he was in his early twenties; and he had short hair, a chubby face, and a little mustache. Once both individuals were in the cab, they told her to drive to Huron Street, approximately fifteen minutes away.

Siegman could see appellant and Bazemore in her rearview mirror during the cab ride. When she arrived at Huron Street, she put the vehicle in park, and, suddenly, she felt two cold objects pressed against her neck.[2] The passengers demanded that she hand over her money, car keys, cell phone, and any other valuable possessions in the cab. Bazemore then walked around to the front of the vehicle, searched her belongings, and went through her glove box. He also had Siegman lift up her shirt to ensure she was not hiding anything—while appellant ensured compliance by continuing to press the object against her neck.

After the robbery, appellant and Bazemore told Siegman to stay in the car. They told her that if she agreed not to call the police, they would place her cell phone by the

[2] Siegman initially testified that the "cold objects" she felt were guns. She later stated that she never turned around to see what was in the first individual's hand, although she believed the object was a gun; Siegman also testified that the object held by the second individual appeared to be a BB gun, but she was not taking any chances.

street corner; if she did not cooperate, she would get hurt. Siegman initially sat in the car and froze, but once appellant and Bazemore left, she ran to the street corner. She was not able to find her cell phone but eventually borrowed a phone from a group of people walking by. She called her dispatcher, who in turn called the police.

Multiple officers responded to the scene. Siegman provided a description of appellant and Bazemore to the officers. At one point, while she was giving a recorded statement, Detective John Voorhees asked if he could drive her to a nearby light rail station to look at a potential suspect. Siegman was accompanied by two detectives in a vehicle with tinted windows. She remained in the vehicle and observed an individual approximately thirty feet away with his hands behind his back next to two officers. Detective Voorhees asked if there was anyone that she recognized. Siegman positively identified appellant as the one who robbed her, and she broke down in tears. She was later taken to another location and identified the other robber in the taxicab, Donte Bazemore.

Before trial, on February 23, 2016, appellant challenged Siegman's identification. The court held a hearing on the motion to suppress, wherein appellant argued that the manner in which the show-up was conducted and the inconsistencies in appellant's description produced an impermissibly suggestive and unreliable identification. Following testimony, the court first ruled that the police procedures were not so impermissibly suggestive to cause a misidentification. Next, the court noted that Siegman had an extended period of time to observe appellant; she testified that she was "100 percent sure" appellant was the one that robbed her; and she broke down crying after identifying him.

The court also observed that Siegman's description of appellant was detailed and the length of the detention was very brief. The court then ruled, alternatively, that the identification was reliable. As a result, the court denied the motion to suppress.

At trial, appellant argued that he and Bazemore were incorrectly identified as the robbers by Siegman. Defense counsel noted that Siegman did not provide a consistent description of appellant to the officers at the scene, he challenged Siegman's timeline of the robbery, and he challenged Bazemore's impartiality as a witness. The jury ultimately returned a verdict convicting appellant of first-degree assault, conspiracy to commit first-degree assault, armed robbery, conspiracy to commit armed robbery, and use of a handgun in the commission of a crime of violence. This appeal followed.

DISCUSSION

I. The Suppression Hearing

Appellant first argues that the circuit court erred in denying his motion to suppress Siegman's identification because the show-up procedure was unnecessarily suggestive and unreliable. When reviewing the disposition of a motion to suppress evidence, "we view the evidence adduced at the suppression hearing, and the inferences fairly deductible therefrom, in the light most favorable to the party that prevailed on the motion." *Crosby v. State*, 408 Md. 490, 504 (2009). "We extend great deference to the fact finding of the suppression court and accept the facts as found by that court unless clearly erroneous," *Wilkes v. State*, 364 Md. 554, 569 (2001), while questions of law are reviewed *de novo*. *Crosby*, 408 Md. at 505. In order to determine whether a violation occurred, we "make our

own independent constitutional appraisal by reviewing the law and applying it to the facts of the case." *State v. Williams*, 401 Md. 676, 678 (2007).

Due process protects defendants against "unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *Webster v. State*, 299 Md. 581, 600 (1984) (quoting *Moore v. Illinois*, 434 U.S. 220, 227 (1977)). The test regarding the admissibility of evidence involves a two-step burden shifting analysis. First, the court must decide whether the identification procedure was impermissibly suggestive. *Smiley v. State*, 442 Md. 168, 180 (2015). During this stage, the burden is on the defendant to show "some unnecessary suggestiveness" in the procedures employed by the police. *Thomas v. State*, 139 Md. App. 188, 208 (2001). Suggestiveness exists where, "[i]n effect, the police repeatedly said to the witness, [t]his is the man." *McDuffie v. State*, 115 Md. App. 359, 367 (1997) (internal quotation marks and citations omitted). However, "mere suggestiveness does not call for exclusion." *Turner v. State*, 184 Md. App. 175, 180 (2009). Further, the use of a show-up may be justified by "the desirable objectives of fresh, accurate identification which in some instances may lead to the immediate release of an innocent suspect and at the same time enable the police to resume the search for the fleeing culprit while the trail is fresh." *Foster v. State*, 272 Md. 273, 290 (1974) (citation omitted).

If the defendant makes a showing of impermissible suggestiveness, the burden shifts to the State to prove, under the totality of the circumstances, "the existence of reliability in the identification that outweighs the corrupting effect of the suggestive procedure." *Thomas*, 139 Md. App. at 208. The factors considered in evaluating the identification are:

"the witness's opportunity to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of any prior description, the witness's level of certainty, and the length of time between the crime and the identification." *Id.* at 210.

Appellant argues on appeal that the show-up procedure was unnecessarily suggestive because two officers flanked him with their hands on his arms; he was the only person in the vicinity flanked by officers; Detective Voorhees pointed at him when asking Siegman to make the identification; Siegman (mistakenly) believed he was in handcuffs; and Siegman was too far away to observe the pockmarked complexion she previously described. Appellant also argues that the procedure was unnecessary and that the in-court identification was irrevocably tainted by the improper out-of-court identification. Conversely, the State argues that appellant was detained for a short period of time; he was not handcuffed; and the show-up ensured a speedy and accurate identification.

Davis v. State is instructive. 13 Md. App. 394 (1971). There, the police utilized a show-up procedure where the suspect was the sole occupant inside a police cruiser. *Id.* at 396. The officers asked the victim to look through the window to see if the person inside was one of the robbers. *Id.* In assessing the suggestiveness of the procedure, we explained:

> While a person who is in police custody and is singly exhibited to an eyewitness to the crime undoubtedly creates a suggestive situation, the fact that his police custody involves being placed in a patrol wagon as the sole occupant thereof rather than simply being in the physical presence of a police officer would seem to make little if any difference so far as the extent of the suggestiveness is concerned. In both situations the suspect is alone in police custody and the police are in effect saying to the witness, 'We have apprehended this person because we believe he may possibly be the one who committed the crime. Look at him and tell us whether you can identify him as the culprit.'

Id. at 402–03. We noted this rationale was consistent with the Supreme Court's holding in *Stovall v. Denno*, 388 U.S. 293 (1967), and we concluded that the identification was not impermissibly suggestive. *Davis*, 13 Md. App. at 403.

Here, the suppression court ruled that the show-up procedure was permissible because the case involved "an armed robbery and a suspect armed robber." The court added, "I don't think the police would be exercising their discretion well if they let someone go who goes out and sticks up somebody else to get money to get out of town." Moreover, the court noted that the length of the detention was very short—approximately twenty minutes. While the presence of the officers may have made the show-up suggestive, its use was justified in obtaining a "fresh, accurate identification," and this is not a case where the procedures used by the police were the equivalent of saying "this is the man." As such, the suppression court did not err in ruling that the identification was not impermissibly suggestive. Further, because the show-up was not impermissibly suggestive, we find no error with the subsequent in-court identification.

Alternatively, the suppression court also held that even if the procedure was impermissibly suggestive, the identification was still admissible because the State had proven it was reliable. Appellant challenges the court's reliance on three factors considered in its analysis. Appellant first argues that Siegman did not have an opportunity to see the first individual because she only occasionally looked in her mirrors and according to her recorded statement, she could only see the individual from the nose up. Next, her attention was focused on driving, not observing the passengers, and Siegman did not turn around to

see the first individual once she knew she was being robbed. Finally, there were numerous discrepancies in Siegman's general and particularized description of appellant.

The court's fact finding, however, was clear. First, the court noted that Siegman viewed appellant enter the cab; she spoke with appellant during the ride; she watched him in the rearview mirror; and the cab ride lasted for an extended period of time. Second, "[h]er attention to detail while this was happening is another matter that argues strongly for the State and the accuracy of her description." Third, the court referred to appellant's booking photo and stated that his "complexion on the date of the event is anything but smooth." Fourth, the court explained that Siegman's level of certainty was demonstrated by both her testimony that she was "100 percent sure" appellant was the one who robbed her and by breaking down and crying as a result of the identification. Fifth, the length of time between the crime and the identification highly favored the State.

As previously stated, "we extend great deference to the fact finding of the suppression court and accept the facts as found by that court unless clearly erroneous." *Wilkes*, 364 Md. at 569. In the case at bar, the factual findings underlying the court's rulings that the procedure was not impermissibly suggestive and that, based on the totality of the circumstances, the reliability of the identification outweighed any suggestiveness was not error.

II. The Handgun Conviction

Appellant argues that the evidence at trial was insufficient to find him guilty of use of a handgun in the commission of a crime of violence. In analyzing the sufficiency of the

evidence, we consider "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." *Goines v. State*, 89 Md. App. 104, 108 (1991) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

The State's presentation of evidence consisted of testimony from Siegman, who testified on direct examination: "[a]s I put [the car] in park I felt two things going in the back of my neck which were two guns in my neck." Although Siegman later stated that she never saw what was in the first individual's hand, she testified on redirect that "[w]hen I went to turn around to collect the money from them, that's when I felt the two guns in the back of my neck." Bazemore, the accomplice, also testified that once they arrived at Huron Street, "Isaiah pulled out his gun, [and] put it to the back of [Siegman's] head."

Appellant argues that the State did not present any evidence that supported Bazemore's assertion that he carried a gun: Siegman did not turn around to see whether the object on her neck was a gun, and any number of items could have felt cold to her. The State, on the other hand, argues that accomplice testimony does not require specific corroboration about all the details of the crime; and, alternatively, Siegman's testimony was sufficient to sustain the conviction.

It is well settled that accomplice testimony must be corroborated by at least some of the material points involved tending to show the guilt of the accused. *Boone v. State*, 3 Md. App. 11, 17 (1968). "However, only slight corroboration is required which would tend either: (1) to identify the defendant with the perpetrators of the crime, or; (2) to show

the defendant's participation in the crime." *Oliver v. State*, 53 Md. App. 490, 506 (1983). That corroboration, moreover, "need not extend to every detail and indeed may even be circumstantial is also settled by our cases." *Brown v. State*, 281 Md. 241, 244 (1977); *see also Brown v. State*, 182 Md. App. 138, 166–67 (2008) ("[T]angible evidence in the form of the weapon is not necessary to sustain a conviction; the weapon's identity as a handgun can be established by testimony or by inference.").

Siegman's testimony about the "two guns" on the back of her neck independently establishes each prong of the *Oliver* test. First, Siegman's testimony, coupled with her prior identification, identifies appellant with Bazemore—the perpetrator of the crime. Second, Bazemore clearly stated that appellant had a gun, and only "slight corroboration" is required to establish appellant's participation in the crime. Siegman's testimony about the guns on her neck, under the totality of the circumstances of an armed robbery, permitted the trier of facts to reasonably infer that appellant used a handgun, keeping in mind that only *slight* corroboration is required. Accordingly, the evidence at trial was sufficient to convict appellant of use of a handgun in the commission of a crime of violence.

III. The Prosecutor's Closing Argument

Appellant raises three arguments in connection with the prosecutor's closing argument. First, he argues that the prosecutor improperly vouched for three of the State's witnesses: Officer Ivan Gonzalez, Jeanette Siegman, and Donte Bazemore. Second, the prosecutor misstated the law, effectively lowering the burden of proof needed to secure his conviction. Third, the cumulative effect of the prosecutor's errors denied him an impartial

trial. Appellant did not object to any of these issues during closing; he, therefore, asks us to invoke the plain error doctrine to grant his request for a new trial.

The general rule where, as here, a defendant fails to object during trial is that any issue he seeks to raise will not be preserved for review. *Rubin v. State*, 325 Md. 552, 587 (1992). An appellate court, however, may, in its discretion, take cognizance of plain error even though the matter was not raised at trial. *Id.* The court looks at four factors when examining whether improper 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 v. State*, 150 Md. App. 330, 362 (2003) (citing *United States v. Harrison*, 716 F.2d 1050, 1052 (4th Cir. 1983)).

The plain error doctrine will apply only where the error is "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *State v. Hutchinson*, 287 Md. 198, 203 (1980); *see also Morris v. State*, 153 Md. App. 480, 512 (2003) ("Many trial advocates seem to suffer the misapprehension that if the instructional error, even in the absence of an objection, is plain and is material to the rights of the accused, the appellate court is thereby divested of its discretion and is required to consider the contention on its merits. The appellate discretion is not so cabined. On the question of overlooking non-preservation, the appellate discretion is plenary."). As we have stated,

appellant did not properly preserve these issues; but even if they were preserved, none of the prosecutor's arguments fundamentally denied him a fair trial.

A. The Vouching Claims

While lawyers generally have wide latitude in closing argument to "draw reasonable inferences from the evidence, and discuss the nature, extent, and character of the evidence," *Smith v. State*, 367 Md. 348, 354 (2001), prosecutorial vouching for or against the credibility of a witness in its closing argument infringes on a defendant's right to a fair trial. *Sivells v. State*, 196 Md. App. 254, 277 (2010). Such vouching typically occurs "when a prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity . . . or suggests that information not presented to the jury supports the witness's testimony." *Spain v. State*, 386 Md. 145, 153 (2005) (internal quotation marks omitted) (quoting *United States v. Daas*, 198 F.3d 1167, 1178 (9th Cir. 1999)).

The prohibition against vouching, however, does not preclude a prosecutor from addressing witness credibility in closing. *See Spain*, 386 Md. at 155 (quoting *United States v. Walker*, 155 F.3d 180, 187 (3rd Cir. 1998) ("[W]here a prosecutor argues that a witness is being truthful based on the testimony given at trial, and does not assure the jury that the credibility of the witness based on his own personal knowledge, the prosecutor is engaging in proper argument and is not vouching.")).

Even if the prosecutor's comments are improper, "reversal is not automatically mandated. Rather, 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." *Sivells*, 196 Md. App. at 288 (internal quotation marks omitted). In making this determination, we apply the two-part test from *Sivells*. First, we assess "the severity of the remarks, cumulatively, the weight of the evidence against the accused and the measures taken to cure any potential prejudice." *Id.* at 289 (quoting *Lee v. State*, 405 Md. 148, 174 (2008)). In evaluating the potential prejudice, an important factor is "the strength of the State's case against the defendant. If the State has a strong case, the likelihood that an improper comment will influence the jury's verdict is reduced." *Sivells*, 196 Md. App. at 289. Second, we consider "the nature of the prosecutor's remarks. In assessing this factor, we consider whether there was one isolated comment, as opposed to multiple improper comments, and whether the comments related to an issue that was central to a determination of the case or a peripheral issue." *Id.* at 290.

In *Sivells*, the prosecutor argued in closing that the police officers who testified would risk losing their pensions and jobs if they gave false testimony; the prosecutor also repeatedly referred to two detectives as "honorable men" and specifically stated that they "told the truth." *Id.* at 278. We held that, "[a]lthough a single reference to police work as 'honorable' might not be impermissible, the repeated references to the officers as 'honorable men,' and the ultimate statement that 'they told the truth,' crossed the line." *Id.* at 280. Further, "[b]ecause the comments were not tied to the evidence presented, the comments violated the rule against vouching and were improper." *Id.*; *see also Spain*, 386 Md. at 164 (finding the prosecutor's statement "you have to understand that Officer

Williams has no motive to lie, because he has everything to risk in this case" constituted improper vouching). Appellant asserts three circumstances where the prosecutor engaged in improper vouching. We shall address each.

1. Officer Ivan Gonzalez

Officer Ivan Gonzalez canvassed the area around Huron Street after receiving a description of the two suspects from Siegman. He then searched the pawnshop where Siegman received the initial call for service and a nearby pawnshop, where he observed a surveillance video of two individuals that resembled Siegman's description. At trial, Officer Gonzalez testified that Siegman described the first suspect as wearing a sweatshirt with white lettering, brown jeans, and as having long dreadlocks. But none of that information was contained in Officer Gonzalez's police report or testified to by any other witness during the trial. During closing argument, the prosecutor explained this discrepancy in the following manner:

> Now Officer Gonzalez's description, I would submit to you is undoubtedly shaped largely by the video. Regardless of whatever he testified to -- and he's testifying from his heart, but I have no doubt in my mind that his analysis as to what to look for was largely shaped by seeing the video and having the video generally match what Ms. Siegman described. So he sees the video. Now he has in his mind how he would perceive the two individuals and now armed with his perceptions, he goes out and looks.

Appellant argues that the prosecutor engaged in improper vouching by assuring the jury there was "no doubt in [his] mind" that Officer Gonzalez's investigation was shaped by having the video match what Siegman described and by stating that Officer Gonzalez was "testifying from his heart." The State, by contrast, argues that the prosecutor's remarks

did not suggest that Officer Gonzalez was truthful or not but asserted that inconsistencies in his testimony did not mean he was unworthy of belief.

We agree with the State. The prosecutor did not claim that Officer Gonzalez was an honorable man or provide personal assurances of Officer Gonzalez's veracity. Rather, he used evidence from the trial to explain a discrepancy in Officer Gonzalez's testimony. His statements about Officer Gonzalez were therefore proper argument and not vouching.

2. Jeanette Siegman

Appellant takes issue with statements made by the prosecutor during closing and rebuttal arguments concerning Jeanette Siegman. During the trial, one of appellant's primary strategies was to attack Siegman's credibility by pointing out inconsistencies in the descriptions she gave to various police officers. In closing, the prosecutor argued that the jury should find Siegman credible because she genuinely feared appellant:

> And if you talk about fear -- I just want to talk about that for a second. This is a woman who is pleading to them to go home to her children. This is a woman who's pleading with them to not take her things. This is a woman who's very much afraid. You could see the fear when she's on the stand. So there's no question this fear was genuine. There's no question this fear was real. And there's no question that no one, no one should have a gun pulled on them, let alone put to their head so that the things that they have can be taken from them.

Appellant argues that the prosecutor acted improperly by instructing the jury that Siegman's fear was "real" and "genuine" because it signaled his own opinion of her veracity and it put the weight of his authority behind her testimony. He avers that the prosecutor's statement that there was "no question" about the sincerity of these emotions was equally improper and implied that he had knowledge the jurors did not. Conversely,

the State argues that the prosecutor did not suggest that Siegman should be believed because he believed her or otherwise endorse her testimony. While the prosecutor remarked on her fear, that went to the genuineness of her belief—i.e., her credibility—rather than his personal opinion of Siegman's testimony.

We agree with the State. The prosecutor in this case, unlike in *Sivells*, did not claim that Siegman "told the truth" and, despite appellant's argument to the contrary, his statements about the sincerity of Siegman's fear did not express any personal belief or assurance as to her credibility. The prosecutor's remarks were therefore proper argument and not vouching.

Next, during rebuttal, the prosecutor sought to respond to the following statements made by defense counsel, which attempted to undercut the reliability of Siegman's identification:

> Well, think about it, ladies and gentlemen, here you are, you've just been robbed, you're upset and you're told we want you to go identify somebody that we just picked up that we believe is suspected of doing this. And low and behold, they go down and surrounded by two police officers is the person they want her to identify. What do you think she's going to say? Of course, of course she's going to say it. It's the only person around that's surrounded by police officers; right? Now the State asked her, oh, if that wasn't him, what would you have said? Really? What do you think she's going to come in here and say? Oh, well, I would have convicted him. I would have said that's him anyway because I don't really care. Of course she's going to say, no, I wouldn't have said that.

The prosecutor responded in rebuttal:

> These -- in court the identification made of the defendant equally, there is no script. There is no like rails, this thing is on like a train and it has to go a certain way. This is not TV at all. This is happening before you. This is how we find justice, one way or the other. All right. There's no script. She can say anything. Ms. Siegman could have got on the stand and been like look, looking at him now, I just -- I'm not sure.

> That happens all the time. It didn't happen in this instance. And Defense wants you to ignore that.
>
> She sat here and said I was 100 percent positive then and I'm 100 [percent] positive now that my life changed because of that man.

Appellant challenges two statements made by the prosecutor: his statement that Siegman could have said "looking at him now, I just -- I'm not sure" and the statement "that happens all the time." These statements were improper, appellant argues, because they invited the jury to draw an inference from a fact not in evidence and not relevant to the case.

Although the prosecutor referred in rebuttal to evidence outside of the record, the "opened door doctrine permits the admission of otherwise irrelevant evidence that has become relevant in response to the presentation of the other side's case." *Sivells*, 196 Md. App. at 282. Moreover, it is well settled that, during closing argument, "[j]urors may be reminded of what everyone else knows, and they may act upon and take notice of those facts which are of such general notoriety as to be matters of common knowledge." *Johnson v. State*, 408 Md. 204, 222 n.4 (2009) (quoting *Wilhelm v. State*, 272 Md. 404, 439 (1974)).

In response to defense counsel's closing argument, the prosecutor was permitted to inform the jury that an eyewitness may recant a statement at trial and, as noted by the State, the statement addressed a matter of common knowledge. Therefore, we find no error in the prosecutor's closing or rebuttal about Jeanette Siegman.

3. Donte Bazemore

Appellant argues that the prosecutor improperly vouched for the credibility of Donte Bazemore. In defense counsel's closing, he challenged Bazemore's credibility by arguing that Bazemore had to implicate appellant to receive the benefit of the plea agreement. In rebuttal, the prosecutor responded:

> Defense counsel's argument is whose truth? Well, this document requires that Mr. Bazemore be 110 percent completely honest with us. He can't withhold. If he does, he jeopardizes the condition of (inaudible). It binds him only to what he has agreed to be true. . . There's no other source for this information besides Mr. Bazemore.
>
> * * *
>
> Defense argues that you should not trust Mr. Bazemore because in your ordinary life you wouldn't rely on him for things. Well, to be clear, I would not take stock advice from Mr. Bazemore. I would not take medical advice from Mr. Bazemore. I would not look to Mr. Bazemore to provide me with real estate advice as to where I should buy [my] next home. None of those things I trust Mr. Bazemore for because he has no basis of knowledge as far as I know in these things.
>
> However, what can I trust Mr. Bazemore for? Mr. Bazemore has told you that he's engaged in a criminal act, something that he's lived, something that he did, a choice he made and how it impacted those around him. When Mr. Bazemore tells you about that experience, you can bank on that. It's not the same as saying would I take a doctor recommendation from Mr. Bazemore, no. But would I believe Mr. Bazemore about an experience that Mr. Bazemore himself had and who he had it with? Yes, yes I would. It's a totally different argument.

Appellant challenges the prosecutor's assurance that the plea agreement required Bazemore to be "110 percent honest." Appellant also claims that the prosecutor's statements "would I believe Mr. Bazemore about an experience that Mr. Bazemore himself had and who he had it with? Yes, yes I would" and "you can bank on that" constitute impermissible vouching. While we do not find any error with the comment that the plea

agreement required Bazemore to be "110 percent honest," we agree that the prosecutor's other statements impermissibly sought to assure the jury of Bazemore's credibility. And it is no answer that the prosecutor was responding to defense counsel's closing argument, since improper vouching is never admissible. *See Sivells*, 196 Md. App. at 282 (internal quotation marks omitted) ("The [opened door] doctrine does not permit the admission of evidence that is incompetent, *i.e.*, evidence that is inadmissible for reasons other than relevancy.").

As noted in *Sivells*, however, reversal is not automatically mandated where a prosecutor's comments are improper. Rather, "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." *Id.* at 288. Here, the State had a strong case against appellant, with Siegman testifying she was "100 percent sure" that Banks was the one that committed the robbery, and her identification was corroborated by the surveillance video from the pawnshop. Moreover, the prosecutor's comments were isolated, they did not pervade the entire trial, and the trial judge instructed the jurors as to their roles as judges of the credibility of witnesses.[3] Therefore, although improper, the prosecutor's comments do not warrant reversal.

[3] Because the prosecutor's remarks were isolated, *United States v. Kerr*, 981 F.2d 1050 (9th Cir. 1992) is not controlling in this case.

B. The Purported Misstatement of Law

Appellant next argues that, in addition to vouching for the State's witnesses, the prosecutor misstated the law, effectively lowering the burden of proof needed to secure his conviction. Specifically, the prosecutor instructed the jury that the BB gun in Donte Bazemore's possession would suffice for the charges that had been brought against him. The State argues that the prosecutor's comments had no bearing on the offenses appellant committed because Bazemore specifically testified appellant had a gun.

As with the vouching analysis, the first step in analyzing the prosecutor's remarks is to determine "whether the prosecutor's statements, standing alone, were improper." *Sivells*, 196 Md. App. at 271. Here, the prosecutor argued to the jury that "as far as robbery [with a] deadly weapon is concerned, as far as first-degree assault is concerned, as far as all these other offenses are concerned, that BB gun suffices." While a BB gun does not rise to the level of first-degree assault or qualify for the offense of use of a handgun in the commission of a crime of violence, the inquiry does not end there.

The next question is whether the prosecutor's comments were likely to have misled the jury. *Sivells*, 196 Md. App. at 288. Prior to closing argument, the trial court instructed the jury that a firearm is "a weapon that fires or is designed to fire or may readily be converted to fire a projectile by the action of an explosive or even just the frame or receiver of that weapon," and a firearm includes an "antique firearm, handgun, rifle, shotgun, short barreled rifle, short barreled shotgun, starter gun or any other firearm whether loaded or unloaded." The court also stated that "[t]he instructions that I give you about the law are

binding upon you. In other words, you must apply the law as I explain it in arriving at your verdict." The court's instructions, combined with Bazemore's testimony that appellant possessed a gun, make it unlikely that the prosecutor's comments would have misled the jury. While the prosecutor did err, the misstatement of law does not warrant a new trial.

C. The Cumulative Effect Argument

In sum, appellant's argument about the cumulative effect of the prosecutor's comments does not warrant a new trial. The prosecutor's improper statements did not pervade the entire trial, and the trial judge clearly instructed the jurors as to their roles as judges of the credibility of witnesses; and the judge then gave accurate instructions. Simply put, these errors, when taken individually or as a whole, are not of a compelling, extraordinary, or exceptional nature; nor did they fundamentally deny appellant a fair trial. *State v. Hutchinson*, 287 Md. 198, 203 (1980). This court, therefore, declines review.

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

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 978

September Term, 2016

ISAIAH BANKS

v.

STATE OF MARYLAND

Nazarian,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Concurring in Part and Dissenting Opinion
by Raker, J.

Filed: July 24, 2017

Raker, J., concurring in part and dissenting:

I join the majority in denying appellant's claim of error with respect to the show-up identification evidence and his attack on the prosecutor's closing argument, holding three of the arguments are unpreserved for our review, not worthy of plain error notice,[1] and the fourth error is harmless beyond a reasonable doubt. I respectfully dissent with respect to the use of a handgun in the commission of a crime of violence. I would hold that the evidence is not sufficient to support the judgment of conviction for use of a handgun in a crime of violence, and hence, would reverse that judgment of conviction.

Appellant was convicted of first-degree assault, conspiracy to commit first-degree assault, armed robbery, conspiracy to commit armed robbery, and use of a handgun in the commission of a crime of violence. The evidence was sufficient for all of the crimes except

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[1] Plain error review is one we exercise rarely, and only when the "unobjected to error [is] compelling, extraordinary, exceptional, or fundamental to assure the defendant a fair trial." *Smith v. State*, 64 Md. App. 625, 632 (1985) (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)). Appellate review of unpreserved claims under the plain error doctrine "1) always has been, 2) still is, and 3) always will be a rare, rare phenomenon." *In re Matthew S.*, 199 Md. App. 436, 463 (2011) (quoting *Kelly v. State*, 195 Md. App. 403, 432 (2010)). Appellant in this case falls decidedly short of meeting the required prongs of the plain error analysis. *See, e.g., State v. Rich*, 415 Md. 567, 578 (2010). First, his failure to object to the prosecutor's closing arguments constituted an affirmative waiver under Rule 4-323(a) and this failure "intentionally relinquish[ed]" the right to appeal. Second, the comments were not a clear or obvious issue and, if there had been an objection, it would be an issue subject to a reasonable dispute or, more than likely, overruled. There is no alleged error that seriously affects the fairness, integrity, or public reputation of judicial proceedings, and appellant presents nothing to cause us to exercise our discretion and consider the issues he raises under plain error. I would simply so hold, and not consider his arguments in any detail.

the use of the handgun conviction; indeed, appellant raises only the sufficiency of the handgun offense.[2]

Appellant argues that the evidence is insufficient to support his conviction for use of a handgun in a crime of violence in reviewing the sufficiency of the evidence. The standard of review for a sufficiency challenge is whether, 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." *Hobby v. State*, 436 Md. 526, 538 (2014) (quoting *Jackson v. Virginia*, 443 U.S. 307, 313 (1979) (internal quotations removed)); *State v. Suddith*, 379 Md. 425, 429 (2004) (internal citations omitted). "We defer to the fact finder's 'opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence.'" *Neal v. State*, 191 Md. App. 297, 314 (2010) (quoting *Sparkman v. State*, 184 Md. App. 716, 740, *cert. denied*, 410 Md. 166, 978 A.2d 246 (2009)). We "assume the truth of all evidence, and inferences fairly deducible from it, tending to support the findings of the trial court, and, on that basis, simply inquire whether there is any evidence legally sufficient to support those findings." *Mid S. Bldg. Supply of Maryland, Inc. v. Guardian Door & Window, Inc.*, 156 Md. App. 445, 455

[2] A reversal on the use of a handgun in a crime of violence does not affect appellant's other convictions, and specifically this armed robbery conviction. *See Bennett v. State*, 237 Md. 212, 216 (1964) (holding that a microphone cord from a taxicab's two-way radio, which was used to strangle the cab driver during a robbery, qualifies as a "dangerous or deadly weapon."). "It is not necessary that a gun be capable of discharging a lethal bullet to be a deadly weapon. Intimidation produced by the use of a weapon coupled with the apparent ability to execute the implied threat to use the weapon if resistance is offered, are sufficient." *Crum and Dunbar v. State*, 1 Md. App. 132, 134 (1967), *cert. denied*, 246 Md. 755 (1967) (finding that a .22 caliber gas starter pistol incapable of firing a bullet was sufficient to support robbery with a dangerous and deadly weapon).

(2004). The State has the "burden to prove beyond a reasonable doubt each element of each charged offense." *Carroll v. State*, 428 Md. 679, 693 (2012).

Due process requires that the State prove not only that appellant have been the person who committed the crime, but also to prove each element of the charged criminal offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). Because the State charged appellant with use of a firearm in the commission of a crime of violence, and thereby increased its burden of proof by specifying a firearm rather than just alleging use or exhibition of a deadly weapon to raise robbery to armed robbery, the State was bound to prove that a firearm was used or exhibited during the robbery. *See* Md. Code, Crim. Law ("C.L.") § 4-204 (2002, 2012 Repl. Vol., 2016 Supp); Md. Code, Public Safety Article ("P.S.") § 5-101(h) (2003, 2011 Repl. Vol., 2016 Supp).

In order to convict appellant of violating C.L. § 4-204,[3] use of a firearm in a crime of violence, the State must prove that the weapon in question was a firearm. "Firearm"

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[3] Md. Code, Crim. Law ("C.L.") § 4-204 (2002, 2012 Repl. Vol., 2016 Supp), states as follows:

> "(a) Firearm defined. — (1) In this section, "firearm" means:
>
> (i) a weapon that expels, is designed to expel, or may readily be converted to expel a projectile by the action of an explosive; or
>
> (ii) the frame or receiver of such a weapon.
>
> (2) "Firearm" includes an antique firearm, handgun, rifle, shotgun, short-barreled rifle, short-barreled shotgun, starter gun, or any other firearm, whether loaded or unloaded.
>
> (b) Prohibited. — A person may not use a firearm in the commission of a crime of violence, as defined in § 5-101 of the
>
> (footnote continued . . .)

means "a weapon that expels, is designed to expel, or may readily be converted to expel a projectile by the action of an explosive; or the frame or receiver of such a weapon." P.S. § 5-101(h). The statute defines a "handgun" as "a firearm with a barrel less than 16 inches in length." P.S. § 5-101(n)(1). Handgun means, "a pistol, revolver, or other firearm capable of being concealed on the person." C.L. § 4-201(c)(1). BB guns or toy guns do not meet this definition and are not firearms. *See Brooks v. State*, 314 Md. 585, 600 (1989).

Appellant moved for judgment of acquittal at the close of the State's case, arguing as follows:

> "[DEFENSE COUNSEL]: And then when you take that in light of his testimony – if you're going to use the accomplice testimony at all, he says, oh, I had a BB gun. What evidence – he never described the gun. He didn't say it was an actual real handgun. All he said was he pulled a gun from – how do we know it wasn't a BB gun? Which would not –
>
> THE COURT: He said it was a real gun.

> Public Safety Article, or any felony, whether the firearm is operable or inoperable at the time of the crime.
>
> (c) Penalty. — (1) (i) A person who violates this section is guilty of a misdemeanor and, in addition to any other penalty imposed for the crime of violence or felony, shall be sentenced to imprisonment for not less than 5 years and not exceeding 20 years.
>
> (ii) The court may not impose less than the minimum sentence of 5 years and, except as otherwise provided in § 4-305 of the Correctional Services Article, the person is not eligible for parole in less than 5 years.
>
> (2) For each subsequent violation, the sentence shall be consecutive to and not concurrent with any other sentence imposed for the crime of violence or felony."

> [DEFENSE COUNSEL]: I don't – that's not what he said. He just said he pulled a – actually what he said was he pulled a weapon from his thing. So again, all we're left with is his testimony – he's only one who says he had a gun and that's not enough. Accomplice testimony is not enough."

Of course, the fact that the gun was not recovered in a criminal case is not fatal to the case. *See, e.g., Brown v. State*, 182 Md. App. 138, 166 (2008). Nonetheless, the evidence at trial must be sufficient to support the elements of the criminal offense beyond a reasonable doubt. Here, Dante Bazemore, the accomplice, testified that appellant had "a gun." Ms. Siegman, the victim, testified that she "felt something cold on her neck." She also testified that she thought Bazemore had a BB gun. Because the two robbers had "guns" does not support an inference that appellant had a firearm or handgun; something more is required. The State could have asked Bazemore what type of gun appellant was carrying. The State could have asked Bazemore to describe the gun appellant was carrying. The State did not do so. Bazemore could have testified that the gun was in fact "a handgun." Bazemore could have given some description of "the gun." It is the State's burden to prove the elements of the offense beyond a reasonable doubt. And even though only *slight* evidence is required to corroborate an accomplice's testimony, the accomplice's testimony, even standing alone, is insufficient to carry the State's burden of proof, beyond a reasonable doubt. Simply stating that appellant has "a gun" does not satisfy the State's burden to prove that the weapon was a firearm and a handgun.

The offense of use of a handgun in a crime of violence provides enhanced penalties for the use of a firearm. *See Eldridge v. State*, 329 Md. 307, 317 (1993). The penalty is incarceration for not less than five years and not exceeding twenty years for the first

offense. C.L. § 4-204. Greater penalties are required for subsequent offenses. *Id.* Robbery with a dangerous and deadly weapon carries a term of incarceration up to twenty years. C.L. § 3-403. For the State to impose the enhanced penalties, more is required than a witness testifying that the defendant displayed, used or carried "a gun." Circumstantial evidence would be sufficient. But again, more is necessary, *i.e.*, recovery of ammunition, or verbal threats of shooting or death, or a witness stating that the weapon was or looked like a handgun.

This case differs from the ones in which eyewitness testimony that the offender used "a gun" was held to be sufficient. *See, e.g.*, *United States v. McNeal*, 818 F.3d 141 (4th Cir. 2016). In that case, the accused was charged with committing a crime of violence, using or carrying a firearm. *Id.* at 144. McNeal had been charged with committing three bank robberies, and claimed that expert testimony was required to show that the firearms were capable of expelling a projectile. *Id.* at 148-49. The court rejected his contention. There, "several eyewitnesses testified concerning the bank robberies in Counts Two, Four, and Six and confirmed that, in each bank, one of the robbers had *displayed a handgun*." *Id.* at 149 (emphasis added). In the instant case, the only testimony from Bazemore was that appellant had "a gun," and the victim, who stated that she felt something cold on her neck.

I would reverse the use of a handgun in a crime of violence conviction.