Circuit Court for Cecil County
Case No. C-07-CR-21-000918

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 491

September Term, 2022

FREDERICK R. HUBBERT

v.

STATE OF MARYLAND

Graeff,
Zic,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 4, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

A jury in the Circuit Court for Cecil County convicted appellant, Frederick R. Hubbert, of second-degree assault. The court sentenced appellant to a ten-year term of imprisonment, all but eight years of which were suspended.

On appeal, appellant presents two questions for our review:

1. Did the circuit court abuse its discretion when it refused to ask whether any juror had "strong feelings" about "the abuse of illegal drugs"?

2. Did the circuit court commit plain error when it permitted the prosecutor to argue facts not in evidence and to engage in prosecutorial vouching during closing argument?

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

FACTUAL AND PROCEDURAL BACKGROUND

In connection with an incident that occurred on July 17, 2021, appellant was charged with first- and second-degree assault. A two-day jury trial began on April 27, 2022.

Gina Cooper testified that she and appellant had been involved in a romantic relationship that ended in 2019. On July 17, 2021, shortly before 1:00 a.m., appellant knocked on the door of her home. Ms. Cooper told appellant that he was "not supposed to be [t]here" and asked him to leave.[1] She said that she was expecting a call from her friend, Joey, and as soon as he called, she would be going to his house. Appellant explained that he "just wanted to talk" to Ms. Cooper, but Ms. Cooper said that she did not want to talk.

[1] At sentencing, the prosecutor informed the court that, at the time of the incident, appellant was on probation due to two previous assaults on Ms. Cooper, and a condition of his probation was that he not have any contact with her.

Ms. Cooper was "fighting over the door" and "trying not to let [appellant] in," but appellant "won his way through the door."

Ms. Cooper testified that appellant took her phone, and then "drew back and punched" her in the face "as hard as he could," causing her to fall. Appellant then got on top of Ms. Cooper, put his knees on her arms, and punched her 10 to 15 times "as hard as he could with his fist." Appellant "kept putting his knee into [her] throat," and he choked her with his hands.

Appellant told Ms. Cooper that he was "going to have to kill" her because he "messed [her] face up so bad." He said that he was going to drag her body and get rid of it. Appellant then got up, took off his shirt, and "went back to strangling [her] again."

Ms. Cooper kicked appellant in an effort to get him off her. Appellant fell over and hit the back of his head on a piece of furniture. He then got up, sat down on a loveseat, and fell asleep. Ms. Cooper left the house and drove to her stepmother's house. Ms. Cooper's stepmother called 911, and Ms. Cooper was taken to the hospital by ambulance.

On cross-examination, defense counsel asked Ms. Cooper if she was actively addicted to drugs at the time of the incident. Ms. Cooper responded: "No." She denied that she had used heroin or fentanyl or "shot up" that day.

Nicole Possenti, an expert in forensic nursing and interpersonal violence, testified that she examined Ms. Cooper at approximately 3:00 a.m. on July 17, 2021. She was "concerned" about Ms. Cooper's injuries. Ms. Possenti stated that Ms. Cooper "was made a trauma alert," i.e., "a patient that has the potential for a life or limb threatening injury."

After hospital personnel completed a medical exam, Ms. Possenti conducted a forensic exam and took photographs of Ms. Cooper's injuries. There were multiple bruises and abrasions on Ms. Cooper's face, neck, breast, and arms. A lot of the bruises were purple and/or red, which indicated to Ms. Possenti that the injuries had occurred within the past 24 hours.

Ms. Cooper reported to Ms. Possenti that, during the assault, she had difficulty breathing and speaking, had changes in her voice and in her vision, and had an urge to urinate or defecate. Ms. Cooper also reported that she experienced memory loss, disorientation, and dizziness during the assault. In Ms. Possenti's opinion, Ms. Cooper's symptoms were "all consistent with non-fatal strangulation."

Defense counsel asked Ms. Possenti if she saw any indication of intravenous drug use during her examination of Ms. Cooper. Ms. Possenti responded that she "did not document any injuries," other than "acute injuries related to trauma." Counsel also asked Ms. Possenti whether Ms. Cooper appeared to be "under any influence of anything." Ms. Possenti responded that Ms. Cooper was able to complete the exam and answer all of Ms. Possenti's questions.

Corporal Todd Finch of the Elkton Police Department testified that, at approximately 4:30 a.m. on the date of the incident, he responded to Ms. Cooper's residence to look for appellant. When police arrived, the door to the home was slightly ajar. The police knocked on the door for approximately four minutes, and then announced

themselves, shouted into the residence, and asked appellant to come to the door. According to Corporal Finch:

> As that was happening, the door just suddenly slammed shut. So we knocked on the door some more. After a few moments, the door open[ed] slightly, and I could see [appellant] inside the residence talking to us from the door. We asked him to step outside to talk to us, and then he slammed the door shut again.

At that point, police entered the residence and arrested appellant. Appellant had blood on his hands, neck, and chest, and he had several scratches on his arms and back.

Appellant testified that he and Ms. Cooper were still "boyfriend and girlfriend" on the date of the incident. He stated that, at approximately 3:00 p.m. on July 16, 2021, Ms. Cooper drove to his parents' house, where he was staying, and picked him up. Appellant's mother testified for the defense and corroborated appellant's testimony that Ms. Cooper picked him up that day.

Appellant stated that he and Ms. Cooper stopped for something to eat and then went to Ms. Cooper's house "to chill back, watch a movie, [and] get high." He testified that, at that time, he was actively using heroin intravenously, and so was Ms. Cooper.

Appellant claimed that Ms. Cooper's "veins [were] shot" from years of drug use, and it was difficult to "get a good vein." It took him almost two hours, but he finally "got her high."

After getting high, he and Ms. Cooper had sex. He stated that Ms. Cooper "liked to have rough sex" and liked him to put his hands around her neck and put pressure on it. He said that they "had sex like that that night," and they then fell asleep.

Sometime after midnight, Ms. Cooper woke him up and asked him to "sho[o]t her up again." He refused, and an argument ensued. Ms. Cooper jumped up and shoved him down, and then "jumped on top" of him, and "snapped" him "a few times." He grabbed Ms. Cooper's hands and tried to pull her off him. Appellant was able to stand up, but Ms. Cooper kicked him in the groin and stomach, causing him to fall down. Appellant said that "went on probably for three or four rounds," where she got up off the sofa, jumped on him, hit him, and punched him. Eventually, he and Ms. Cooper "called it quits," and they both fell asleep. Appellant woke up when the police came to the door.

Appellant denied that he intentionally hit Ms. Cooper. He said that, if he did hit her, "it would have been a slip through, trying to grab her hands and [his] hands hit her face." Appellant claimed that the bruises on Ms. Cooper's face had to be caused by her getting on top of him and fighting with him.

The bruises on Ms. Cooper's body were "from trying to get needles in and out of her." Appellant testified that Ms. Cooper "bruised so easy, it's unbelievable. . . . [Y]ou put a needle in her and it leaves a bruise like that."

As indicated, the jury convicted appellant of second-degree assault. Additional facts will be discussed as necessary in the discussion that follows.

DISCUSSION

I.

Voir Dire

Appellant contends that the court abused its discretion in refusing to ask potential jurors whether they had strong feelings about illegal drug abuse. Appellant asked the court to include the following question on voir dire: "Does any juror have strong feelings one way or another in regard to the abuse of illegal drugs, or does any member of the panel have experience personally, or with family or personal friends and the abusive use of drugs?"

The court initially stated that it did not intend to pose the question because appellant was not charged with drug-related offenses. The court asked defense counsel if there were other grounds that might justify the inquiry. Defense counsel initially responded that it was "a big part of the case." The colloquy continued, as follows:

> THE COURT: I mean, is that a defense or something that is going to be raised? . . . .
>
> [DEFENSE COUNSEL]: It was just part – well, I don't know how this will affect. I mean, I just like to flesh it out. I mean, I don't know if it makes a difference or not to any of the jurors.
>
> THE COURT: Well, I am not going to throw it out there. If it is an allegation in the case, I mean, I am not going to ask people about their . . . feelings about drug abuse if we are not dealing with a drug case.
>
> [DEFENSE COUNSEL]: All right. . . . I will just note the objection, thanks.

On appeal, appellant argues that the strong feelings question regarding drug abuse "was designed to reveal bias related to [him] and his defense," which was "inextricably linked" to heroin because it "explained why Ms. Cooper attacked [him] and provided an explanation for a number of the marks and bruises on Ms. Cooper's body." He argues that the court "should be required to ask a question . . . aimed at revealing whether a potential juror may be biased because of the nature of the defendant's defense."

The State contends that the court did not abuse its discretion in declining to ask whether the prospective jurors had strong feelings about illegal drug use because none of the offenses were drug-related, and an affirmative response would not have provided a basis to strike for cause. It asserts that questions relating to defenses are not in the category of mandatory voir dire.

"The Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights both guarantee a criminal defendant the right to 'an impartial jury.'" *State v. Ablonczy*, 474 Md. 149, 156 (2021) (quoting U.S. Const. amend. VI; and Md. Const., Decl. of Rts., art. 21). The process of voir dire, which "entails examination of prospective jurors . . . to determine the existence of bias or prejudice," is "the mechanism whereby the right to a fair and impartial jury . . . is given substance." *Id.* at 158 (quotation marks omitted).

"[U]nlike courts in many other jurisdictions, Maryland courts allow only 'limited *voir dire*' - - meaning that the sole purpose of *voir dire* questioning is to determine whether prospective jurors should be struck for cause, not to elicit information for the exercise of

peremptory strikes in the second stage of jury selection." *Kidder v. State*, 475 Md. 113, 125 (2021).[2] The Supreme Court of Maryland[3] has identified "'two categories of specific cause for disqualification: (1) a statute disqualifies a prospective juror; or (2) a collateral matter is reasonably liable to have undue influence over a prospective juror.'" *Collins v. State*, 463 Md. 372, 376 (2019) (quoting *Pearson v. State*, 437 Md. 350, 357 (2014)). "'The latter category is comprised of biases [that are] directly related to the crime, the witnesses, or the defendant.'" *Id.* at 377 (quoting *Pearson*, 437 Md. at 357).

A trial judge has "broad discretion in the conduct of voir dire, especially regarding the scope and form of the questions propounded." *Thomas v. State*, 454 Md. 495, 504 (2017). The court "need not make any particular inquiry of the prospective jurors unless that inquiry is directed toward revealing cause for disqualification." *Id.* "[W]e review a trial judge's decisions during voir dire under an abuse of discretion standard." *Id.*

Mandatory areas of inquiry during voir dire include, among other things, religious, racial, ethnic, and cultural bias, and "placement of undue weight on police officer credibility." *Dingle v. State*, 361 Md. 1, 10 n.8 (2000) (citing cases). In addition, it is an

[2] Peremptory challenges allow "'a party to eliminate a prospective juror with personal traits or predilections that, although not challengeable for cause, will, in the opinion of the litigant, impel that individual to decide the case on a basis other than the evidence presented.'" *Pietruszewski v. State*, 245 Md. App. 292, 302 (quoting *King v. State Roads Comm'n of State Highway Admin.*, 284 Md. 368, 370 (1979)), *cert. denied*, 471 Md. 127 (2020).

[3] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

abuse of the court's discretion to refuse a request to ask "whether any prospective juror has 'strong feelings' about the crime with which the defendant is charged." *Pearson*, 437 Md. at 363. The court is not required, however, to ask whether prospective jurors have "strong feelings" about matters that do not "specifically relate to any of the crimes with which [the defendant] was charged." *Colkley v. State*, 251 Md. App. 243, 303, *cert. denied*, 476 Md. 268 (2021).

In *Colkley*, the defendant was charged with murder and attempted murder, along with related conspiracy and firearms offenses. *Id.* at 253. The State's theory of the case was that the alleged crimes were committed by the defendant "at the behest of a large-scale drug supplier." *Id.* at 255. On appeal, the defendant claimed that the trial court erred in refusing to propound "a proposed voir dire question asking whether prospective jurors had strong feelings about illegal drugs." *Id.* at 261. The defendant argued that the case was "inextricably linked" to drugs because the State's theory of the case suggested that the murder was motivated by a rivalry between two illegal drug distributors. *Id.* at 303. This Court held that the court did not err in declining to ask the question, reasoning that, although there were references to drugs in the case, "those references did not specifically relate to any of the crimes with which [the defendant] was charged." *Id.*

The State maintains that, as in *Colkley*, the court in this case was not obligated to ask whether any members of the jury panel had strong feelings about illegal drug use because drug use did not "specifically relate" to the charged crimes of first- or second-degree assault. Appellant argues, however, that *Colkley* is not dispositive because it did

not address whether a court abuses its discretion in refusing to ask questions on voir dire that specifically relate to the defense of the case.

The Supreme Court, however, has held that questions related to defenses to a criminal charge "do not fall within the category of mandatory inquiry on voir dire." *State v. Logan*, 394 Md. 378, 397 (2006), *abrogated on other grounds*, *Kazadi v. State*, 467 Md. 1, 46 (2020). In *Logan*, the Court held that the circuit court did not abuse its discretion in declining to ask questions relating to Logan's defense that he was not criminally responsible. *Id.* at 400.[4] Appellant cites no case holding that it is mandatory for a court to ask a voir dire question designed to reveal bias related to the defense of the case.

Moreover, even if such a question might be required in some circumstances, the court's ruling in this case was not an abuse of discretion where the court was not provided with a relationship between drug use and the defense theory of the case. Although defense counsel initially stated that illegal drug use was a "big part of the case," when the court asked defense counsel if drug use was "a defense or something that is going to be raised," defense counsel stated that he would "just like to flesh it out," and he did not know if it would "make[] a difference" to any of the jurors. Based on the grounds supplied to the court, it was within the court's discretion to decline to ask the jury panel whether it had

[4] Appellant claims that *Logan v. State*, 349 Md. 378, 400 (2006) is "entitled to no weight" because it was abrogated by *Kazadi v. State*, 467 Md. 1 (2020). In *Kazadi*, however, the Court stated that it did not "disturb case law as to *voir dire* questions concerning jury instructions other than those on the presumption of innocence, the burden of proof, and the right not to testify." 467 Md. at 46. The portion of *Logan*, 349 Md. at 397 denoting that defenses "do not fall within the category of mandatory inquiry on voir dire" was not affected by *Kazadi*.

strong feelings about illegal drug abuse. *See Colkley*, 251 Md. App. at 300 ("'[A] trial court need not ask a voir dire question that is not directed at a specific cause for disqualification or is merely fishing for information to assist in the exercise of peremptory challenges.'") (quoting *Pearson*, 437 Md. at 357). There was no abuse of discretion here.

II.

Closing Argument

Appellant contends that the court failed to take curative action when the prosecutor made allegedly improper statements during closing argument. First, he argues that the prosecutor improperly vouched for Ms. Cooper when she argued that Ms. Cooper "never changed" the substantive parts of her account of the assault. Second, he asserts that the prosecutor argued facts not in evidence by stating that, if Ms. Cooper had consumed drugs, as appellant claimed she did, she would have been "high as a kite" when she was seen in the emergency room. Third, appellant argues that the prosecutor improperly shifted the burden of proof when she told the jury that it was the job of defense counsel to create reasonable doubt.

Appellant acknowledges that there was no objection to the prosecutor's closing argument, and therefore, the issue is not preserved for appeal. He urges this Court, however, to recognize plain error.

The State contends that this Court "should decline to review for plain error whether the State's closing remained within the bounds of permissible argument." It asserts that

appellant has not established "the stringent requirements needed to obtain" plain error review.

This Court has "repeatedly held that pursuant to Rule 8-131(a), a defendant must object during closing argument to a prosecutor's improper statements to preserve the issue for appeal." *Shelton v. State*, 207 Md. App. 363, 385 (2012). As appellant concedes, there was no objection below, and the issue is not preserved for review.

"Although this Court has discretion to review unpreserved errors, the [Supreme Court] has explained that 'appellate courts should rarely exercise'" that discretion. *Harris v. State*, 251 Md. App. 612, 660 (2021), *aff'd on other grounds*, 479 Md. 84 (2022) (quoting *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. (quoting *Chaney*, 397 Md. at 468). *Accord Robson v. State*, 257 Md. App. 421, 460 ("The purpose of the preservation requirement is to preserve the integrity and the efficiency of the trial itself. . . . Its primary purpose is to eliminate any necessity for appellate review."), *cert. denied*, 483 Md. 520 (2023). Accordingly, the exercise of plain error review is reserved "for instances when the 'unobjected to error [is] compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Harris*, 251 Md. App. at 660 (quoting *State v. Brady*, 393 Md. 502, 507 (2006)) (cleaned up).

As this Court recently explained in *Mungo v. State*, ___ Md. App. ___, ___, No. 1658, Sept. Term, 2021, slip op. at 36 (filed July 25, 2023):

> For an error to be eligible for plain error review, it must meet three conditions: (1) the error must not have been "intentionally relinquished or abandoned, i.e., affirmatively waived"; (2) the error must be "clear or obvious rather than subject to a reasonable dispute"; and (3) the error must have affected the "substantial rights" of the appellant, which means "he must demonstrate that it affected the outcome of the district court proceedings." *State v. Rich*, 415 Md. 567, 578 (2010) (cleaned up). Even if these three requirements are met, this Court should exercise its discretion to review the error only if it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id. Accord Beckwitt v. State*, 477 Md. 398, 464, *cert. denied*, 143 S. Ct. 216 (2022).

Based on our review of the record, we are not persuaded to exercise our discretion to review appellant's unpreserved claim of error regarding the prosecutor's closing argument for plain error. Consequently, we shall not address it.

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