Circuit Court for Baltimore County
Case No. C-03-CR-20-002730

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 604

September Term, 2022

JAEKWAN JACOB STEPHENS

v.

STATE OF MARYLAND

Reed,
Albright,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: July 11, 2023

*This is an unreported opinion. The opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

** 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 sitting in the Circuit Court for Baltimore County found Jaekwan Stephens, appellant, guilty of murder in the first degree and related handgun charges. The court imposed sentences totaling life imprisonment plus five years of active incarceration. He noted this appeal, raising four issues for our review:

> I. Did the trial court err in denying appellant's motion for a new trial;
>
> II. Did the trial court abuse its discretion in refusing to declare a mistrial on the asserted ground that there was an unacceptable risk that the jury was exposed to unfairly prejudicial information;
>
> III. Should this Court find plain error on the asserted ground that the trial court did not sua sponte prevent the prosecutor from vouching for a witness; and
>
> IV. Was the evidence sufficient to sustain the convictions.

Because we find no merit in appellant's arguments, we affirm the judgments.

BACKGROUND

The Crimes

Shortly after midnight on August 18, 2020, Charles Anthony Green, Jr., was murdered just outside an apartment building in the Catonsville section of Baltimore County.[1] He was shot fourteen times at close range with a 9 mm handgun. Although Mr.

[1] It appears that the location of the crime was the Mount Ridge Apartments, which we determined from the address where the decedent's body was found. Md. Rule 5-201. In different parts of the record, the apartments are called the "Garden Ridge Apartments" and the "Mount Royal Apartments."

Green was armed with a loaded Glock Model 27 .40 caliber semi-automatic handgun,[2] there was no evidence that it had been fired.

Appellant had been inside a nearby apartment socializing with his ex-girlfriend, Monet Brandon, Robert Foster, Devin Singleton, Charles Anthony Green Jr., and several other people. At some point, appellant and Mr. Green went outside. There was some testimony that it was because a minor dispute had arisen between them. None of the other persons in the apartment saw the shooting, but they all heard gunshots shortly after appellant and Mr. Green went outside, as did a few neighbors.

Baltimore County Police officers responded to the scene and obtained statements from several witnesses.[3] Patrol and aviation units followed a white Honda, which had been seen fleeing the scene. Those units followed that vehicle into east Baltimore, where its three occupants abandoned it and fled. One of the occupants, Robert Foster, was apprehended shortly afterward, but the other two escaped.[4] A second occupant of the car, Devin Singleton, was arrested the following day and gave a statement to police detectives.

[2] Detective Scott Young of the Baltimore County Police Department, the lead detective in this case, queried the Maryland Handgun Registry and determined that the Glock handgun was registered to Mr. Green.

[3] One of those witnesses, Tianna Shaw, who had been in the apartment in question, testified that she told a police detective that, shortly before the shooting, she observed the butt of a handgun protruding from appellant's right pocket.

[4] After chase had concluded, "upwards of 15 to 20" police officers searched the paths where the suspects had fled. No weapons were recovered at that time, or later, when appellant's residence was searched at the time of his arrest.

Police officers determined that the car was registered to appellant. Forensic examination of appellant's car revealed that gunshot residue was on the steering wheel and the gear shift knob. According to Messrs. Foster and Singleton, appellant had been driving that night.

On August 27, 2020, an arrest warrant was executed at appellant's residence in the Middle River section of Baltimore County. He was found hiding in a closet. A search of his premises yielded a "live" bullet with a headstamp that matched the shell casings that had been recovered from the murder scene,[5] in a drawer along with "a piece of paper that was addressed to" appellant.

Legal Proceedings

A seven-count indictment was filed in the Circuit Court for Baltimore County, charging appellant with first-degree premeditated murder; use of a firearm in the commission of a crime of violence; first-degree assault; wearing, carrying, or transporting a handgun on the person; carrying a loaded handgun on the person; attempting to elude a uniformed police officer; and attempting to elude a marked police vehicle.

During a five-day jury trial, the State called twenty witnesses, including detectives, other police officers who had responded to the crime scene or were involved in the ensuing vehicle chase, evidence technicians, a tool mark examiner, a forensic scientist, the pathologist who performed the autopsy of Mr. Green, a few neighbors who had overheard

[5] The bullet and the shell casings were marked, "9 MM Luger" and were manufactured by Winchester.

gunshots on the night of the murder, Messrs. Foster and Singleton, and several women who had been in the apartment with appellant, namely, Monet Brandon, Gweneth Pyle, and Tianna Shaw. Appellant exercised his right not to testify, and the defense called no witnesses.

Four counts were submitted to the jury: first-degree premeditated murder, second-degree murder, use of a firearm in the commission of a crime of violence, and wearing, carrying, or transporting a handgun on the person.[6] After deliberating approximately two hours, the jury found appellant guilty of first-degree premeditated murder, use of a firearm in the commission of a crime of violence, and wearing, carrying, or transporting a handgun on the person.[7]

Within ten days after the verdict, appellant filed a motion for new trial. In that motion, he contended, among other things: that the evidence was insufficient, that the verdict was against the weight of the evidence, that the trial judge's admonishment of a recalcitrant witness (Devin Singleton) that "he could face charges of perjury" if he were to continue to testify inconsistently with a prior statement he had given to police violated appellant's right to a fair trial, and that the trial judge had erred in failing to declare a mistrial because the jurors may have overheard the court's remarks to sheriff's deputies strongly implying that appellant was in custody. At the ensuing sentencing hearing, the

[6] Nolle prosequi was entered on counts 5, 6, and 7.

[7] No verdict was returned on the lesser-included charge of second-degree murder because the jury had been instructed not to consider that charge after finding appellant guilty of first-degree premeditated murder.

court denied appellant's motion for new trial and sentenced him to life imprisonment for first-degree murder, and a consecutive term of twenty years, all but five years suspended and without the possibility of parole, for use of a firearm in the commission of a crime of violence. The remaining conviction of wearing, carrying, or transporting a handgun on the person was merged for sentencing purposes into that for illegal use of a firearm. This timely appeal followed.

Additional facts are included when pertinent to discussion of the issues.

DISCUSSION

I.

Parties' Contentions

Appellant contends that the circuit court erred in denying his motion for new trial because the trial judge warned a turncoat witness, Devin Singleton, that he was exposing himself to perjury and, in so doing, denied appellant a fair trial. Appellant likens this case to *Archer v. State*, 383 Md. 329 (2004), and *Marshall v. State*, 291 Md. 205 (1981), cases in which the Court of Appeals (now the Supreme Court of Maryland)[8] reversed convictions because the trial judges had issued allegedly similar coercive warnings to a witness or to the defendant himself.

[8] 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. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules, or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland….").

The State counters that this claim was not preserved because appellant failed to lodge a contemporaneous objection and that raising the claim in a motion for new trial does not circumvent the contemporaneous objection rule. Moreover, were we to address the claim on its merits, we should reject it, urges the State, because the trial court's "advice to the witness was a proper general warning and not a threat." The State analogizes this case to *State v. Stanley*, 351 Md. 733 (1998), in which the Supreme Court of Maryland rejected a claim that a prosecutor's comment to a witness about the penalties she faced if she committed perjury deprived the defendant of his right to compulsory process because that comment "was a general admonition, not a threat, and did not improperly coerce or badger the witness." *Id.* at 754.

Analysis

First, we provide some context. Mr. Singleton was a reluctant State's witness. During direct examination, the prosecutor attempted to refresh his recollection with a prior recorded statement he had given to police on the day of the murder. Out of the presence of the jury, the court engaged in a colloquy with Mr. Singleton:

> THE COURT: Okay. So, Mr. Singleton, when you sat down -- before you sat down, you took an oath to tell the truth. Do you remember that?
>
> THE WITNESS: Yes.
>
> THE COURT: You understand that you are subject to perjury if you lie?
>
> THE WITNESS: Yes.
>
> THE COURT: What we are going to ask you to do, I want you to go down there. Because it's going to be a little easier for you to see the video.

> And the whole purpose is to show it to you to see if that helps refresh your recollection. Okay?
>
> THE WITNESS: Um-hum.

The prosecutor then played parts of the video recording while Mr. Singleton observed and listened. Defense counsel did not object on the basis that the court's admonition violated appellant's right to due process and a fair trial. The jury was brought back into the courtroom, and direct examination continued. Contrary to his earlier testimony, Mr. Singleton then testified consistently with his earlier statement to police.

Subsequently, appellant filed a motion for new trial, within ten days after the verdict, which included a claim that "when the Court admonished the State's witness that he could face charges of perjury, the Court was no longer impartial and the defendant was denied his right to a fair trial."

Thereafter, at the sentencing hearing, the court heard argument on the motion for new trial, and defense counsel declared:

> Now, like I said, the State has differentiated the [*Archer*] case and what occurred here. But the concern is for the defense that, as a result of that statement, as a result of warning that witness with respect to what he is in jeopardy of opening himself up to another charge, the Court stepped out of its role of being a disinterested impartial party.
>
> I guess, you know, with respect to the Court's role in a trial. And, therefore, denied [appellant's] due process to a fair trial.

The prosecutor addressed the merits of appellant's claim, distinguishing this case from *Archer* and expressing his view that "the comments by the Court were appropriate, judicious, and neutral" and that they "[d]id not violate due process." The court denied appellant's claim, explaining:

> Finally, turning to the argument in which the defense identifies and argues [*Archer*], [*Archer*] is completely different than the circumstances before this Court.

Preservation

On appeal, appellant contends that the trial court, in denying his motion for new trial, "abused its discretion and erred as a matter of law[,]" which raises two different standards of review. The State regards this claim as an attempt to circumvent the contemporaneous objection rule and argues lack of preservation.[9]

In *Merritt v. State*, 367 Md. 17 (2001), the Supreme Court of Maryland undertook an extensive review of its decisions regarding the appealability of the denial of a motion for new trial and concluded that "'an appeal will lie from the … denial of a motion for a new trial[.]'" *Id.* at 29 (quoting *Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51, 56-57

[9] In large part, the State relies upon our decision in *Isley v. State*, 129 Md. App. 611 (2000), *overruled on other grounds*, *Merritt v. State*, 367 Md. 17 (2001). In *Isley*, we observed:

> If such alleged [trial] errors were not preserved for appellate review by timely objection at trial, raising them in a Motion for a New Trial and then appealing the denial of that motion is not a way of outflanking the preservation requirement.

Id. at 619 (citing *Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51, 61 (1992)). The point on which the Supreme Court of Maryland overruled *Isley* was its assertion "that the denial of a motion for new trial is absolutely unreviewable on appeal except for the situation where the trial judge has failed to exercise any discretion." *Merritt*, 367 Md. at 24 (citing *Isley*, 129 Md. App. at 639-74).

(1992)). Ordinarily, we review such a decision for abuse of discretion, *Williams v. State*, 462 Md. 335, 344 (2019), subject to an exception not applicable here.[10]

The *Merritt* Court further pointed out that the extent of a trial court's discretion varies with the circumstances:

> "Accordingly, it may be said that the breadth of a trial judge's discretion to grant or deny a new trial is not fixed and immutable; rather, it will expand or contract depending upon the nature of the factors being considered, and the extent to which the exercise of that discretion depends upon the opportunity the trial judge had to feel the pulse of the trial and to rely on his own impressions in determining questions of fairness and justice."

Merritt, 367 Md. at 30 (quoting *Buck*, 328 Md. at 58-59).

It is unclear whether the State is arguing that the ruling on the motion is not preserved or that the alleged error in admonishing the witness is unpreserved and, thus, cannot be relied on as a ground for error as a matter of law. We reject any contention that the ruling on the motion is not before us. Appellant filed the motion for new trial within ten days after the verdict, in accord with Maryland Rule 4-331(a),[11] and he filed a notice

[10] *Williams* applied de novo review because there had been an instructional error, resulting from an erroneous pattern jury instruction. *Williams*, 462 Md. at 341-42. That exception to the ordinary, deferential standard of review applies only where "the losing party or that party's counsel, without fault, does not discover the alleged error during the trial[.]" *Merritt*, 367 Md. at 31.

[11] Maryland Rule 4-331 implements Maryland Code (2001, 2018 Repl. Vol.), Criminal Procedure Article, § 6-105, and governs motions for new trial in criminal cases. Subpart (a) of the rule provides, "(a) **Within ten days of verdict.** – On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial." In *Love v. State*, 95 Md. App. 420 (1993), *disapproved on other grounds*, *Hunt v. State*, 474 Md. 89, 108-09, 114 (2021), we explained that the "list of possible grounds for the granting of a new trial by the trial judge within ten days of the verdict is virtually open-ended" but that "[t]his broad base for awarding a new trial is tightly circumscribed (continued…)

of appeal within thirty days after the imposition of sentence and concomitant denial of his motion. This is all that is required to challenge the denial of the motion for new trial on appeal.

There is, however, a price to be paid for the lack of a contemporaneous objection to the trial court's purported admonishment of the witness, specifically, a review of appellant's claim for legal error. Because there was no objection, we review appellant's claim for abuse of discretion. *Merritt,* 367 Md. at 31.

Here, the extent of the trial court's discretion, in denying the motion for new trial, was near its zenith. *See Buck*, 328 Md. at 59 (noting that, where "the exercise of discretion … depends so heavily upon the unique opportunity the trial judge has to closely observe the entire trial, complete with nuances, inflections, and impressions never to be gained from a cold record, it is a discretion that will rarely, if ever, be disturbed on appeal"). Thus, in this case, we may reverse on this issue only if the trial court's ruling was "beyond the fringe" of what we deem "minimally acceptable." *Alexis v. State*, 437 Md. 457, 478 (2014) (quotation marks and citation omitted). In the context of reviewing the denial of a motion for new trial, our high Court has further explained that reversal is appropriate only if the "degree of probable prejudice [was] so great that it was an abuse of discretion to deny a new trial[,]" or alternatively, that the trial judge "exercise[d] discretion in an arbitrary or

by the timeliness requirement" that the motion be filed within ten days after the verdict. *Id.* at 427.

capricious manner" or "act[ed] beyond the letter or reason of law." *Williams*, 462 Md. at 345 (quotation marks and citations omitted).

Merits of the Claim

Under the highly deferential standard of review we apply to this claim, we have no trouble in concluding that the trial court did not abuse its discretion in denying appellant's motion for new trial on the basis of his unpreserved *Archer* claim. In this case, the court did not badger or intimidate the witness, unlike *Archer*, in which the court threatened to impose criminal contempt charges on a recalcitrant witness, in open court, and orchestrated the cooperation of another judge, who would preside, within "the next day or so," over a contempt trial. *Archer*, 383 Md. at 338-40. Moreover, in *Archer*, the court coached the recalcitrant witness regarding his testimony. *Id.* at 341-42. Here, the court advised the witness that he was "subject to perjury" if he lied. The statements did not rise to the level of badgering and intimidation as found to exist in *Archer*. Here, the court "'excuse[d] the jurors and, *in a judicious manner*, caution[ed] the witness to testify truthfully, pointing out to him generally the consequences of perjury[.]'" *Id.* at 358 (quoting *State v. Locklear*, 306 S.E.2d 774, 778 (N.C. 1983)). Consequently, were we to review this claim under a de novo standard, we would still conclude that the court did not err.

II.

Parties' Contentions

Appellant contends that the trial court abused its discretion in refusing to declare a mistrial on the ground that there was an unacceptable risk that the jury was exposed to unfairly prejudicial information. According to appellant, the trial judge inadvertently

instructed sheriff's deputies, within earshot of the jury, to "take him [appellant] back[,]" thereby informing the jurors that appellant was presently incarcerated. The judge's remark, according to appellant, conveyed "an unmistakable message" to the jury, "akin to … being shackled or in prison garb," that he was "dangerous and had to be kept separate from the public."

The State counters that there is no evidence in the record to suggest that any jurors heard the purportedly offending remark. Even if a juror had heard the court's direction to "take him back[,]" that would, according to the State, fall far short of what is required to find inherently prejudicial error.

Analysis

Before addressing this contention, we provide some context. At the time of trial, jury selection took place in a separate building (the American Legion building) several blocks from the circuit court.[12] After the jury had been selected but before it had left the American Legion building, the trial judge allegedly told one or more Sheriff's Department deputies, "You guys are going to take him back now." According to appellant, the judge inadvertently made that remark within earshot of the jury. Upon reconvening in the circuit

[12] At the time of appellant's trial, the circuit court was following COVID protocols, which was why jury selection was held in a separate, larger building, so that everyone could observe "social distancing." It was not until April 4, 2022, that Maryland courts resumed normal operations. *Administrative Order Lifting the COVID-19 Health Emergency as to the Maryland Judiciary*, issued Mar. 28, 2022 (available at https://www.mdcourts.gov/coronavirusorders) (last visited Jun. 22, 2023).

court, appellant moved for a mistrial, contending that "a substantial amount" of the jurors thereby discovered that he had to be "secured[,]" which unfairly prejudiced him.

The trial judge recounted his recollection of the facts:

> Actually, you [referring to the prosecutor] were present. You were standing probably about 10 feet away from me. Because when I turned to the deputies, I was mindful that we had jurors in that rather large room.
>
> The closest group of jurors to where I was standing was probably about 25 feet. There's a plastic shield on the make-shift judge's bench. There was a plastic shield on the make-shift defense bench, which separated the jurors from us.
>
> And when I turned to the deputies and asked them to return -- I was inquiring if they were going to take him back up to the courthouse now, I was mindful that the jurors were that close. So I was very quiet in what said.

Based on that recollection of events, the trial judge denied appellant's motion for a mistrial, declaring, "I am confident that they didn't hear me because I was mindful that they were still present." The trial judge then asked, "What is the next motion?"

In response, defense counsel requested that the court conduct "a brief voir dire with the jurors to see whether or not they heard the comment[.]" The trial judge denied that request on the ground that he was "confident" that the jurors had not heard the offending remark, and that conducting voir dire would convey to the jurors the very information (that appellant was incarcerated) defense counsel had found objectionable.

Defense counsel persisted, asserting that her recollection differed from that of the trial judge:

> It is my recollection that the Court was standing in front of trial table because the Court had come from behind the … virtual bench set up in the American Legion and was addressing the jurors directly.

> And then that's when the Court turned around and made the comment to the deputies, You guys are going to take him back. So I just want to say my first recollection is that this comment was not made behind the barriers.
>
> At that time, the Court had come from behind the bench and was pretty much almost right in front of the defense trial table. Other than that, Your Honor, I accept the Court's ruling with respect --
>
> The trial judge replied:
>
> Your exceptions are noted. I remember where I was. I was -- the Court was cognizant of the fact that the jurors were still in the room.
>
> They were not within earshot, with all due respect. But I was cognizant of what I inquired of the deputies about returning [appellant] to the courthouse.
>
> I think you have made your record. We have exhausted that topic. So let's move on, if we can.

For good measure, defense counsel renewed these arguments in appellant's motion for new trial, but to no avail.

A mistrial is an extraordinary remedy and should be declared only where "'necessary to serve the ends of justice.'" *Winston v. State*, 235 Md. App. 540, 569 (quoting *Cooley v. State*, 385 Md. 165, 173 (2005)), *cert. denied*, 458 Md. 593, *cert. dismissed*, 461 Md. 509 (2018). "An appellate court will not reverse a denial of a mistrial motion absent clear abuse of discretion, and certainly will not reverse simply because it might have ruled differently." *Id.* at 570 (internal citation omitted). "A trial court abuses its discretion when its ruling is clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result," when its ruling "is violative of fact and logic," or when its ruling "constitutes an untenable judicial act that defies reason and works an injustice." *Id.* (quotation marks and citations omitted).

This claim must fail if for no other reason than that the trial judge declared, on the record, that he was "cognizant of" the jurors' presence and deliberately spoke in a low voice to ensure that his remarks were not overheard; indeed, the trial judge declared that he was "confident" that the jurors did not overhear him. The judge further recalled that the jurors were separated from the judge's make-shift bench by two plastic shields, which reduced their ability to hear any remarks by the judge. These are factual findings that are not clearly erroneous, Md. Rule 8-131(c),[13] and they completely undermine appellant's claim. Furthermore, we agree with the trial court's observation that granting appellant's request to voir dire the jury risked the very harm (exposing them to unfairly prejudicial information) that appellant sought to avoid. Under these circumstances, we conclude that the trial court did not abuse its discretion in denying appellant's motion for a mistrial.

III.

Parties' Contentions

Appellant contends that the trial court plainly erred in failing to prevent the prosecutor from vouching for a witness (Tianna Shaw) during closing argument.[14]

[13] Although Rule 8-131(c), by its terms, applies to actions tried without a jury, it also applies to those parts of a jury trial that are conducted outside of the jury's presence and where the trial court acts in a fact-finding role. *See, e.g.*, *Bryant v. State*, 436 Md. 653, 668-69 (2014) (noting that Rule 8-131(c) applies to sentencing proceedings where a trial judge makes factual findings to support the sentence it imposes but does not supplant the contemporaneous objection rule).

[14] Appellant's claim is somewhat ironic, given that Ms. Shaw was a reluctant witness who testified inconsistently with a prior statement she had given to police detectives shortly after the murder. After testifying inconsistently with her statement, the court, at the prosecutor's request, dismissed the jury and permitted him to examine her, (continued…)

Appellant acknowledges that defense counsel did not make a contemporaneous objection, either during closing argument or rebuttal closing argument, but he requests that we review for plain error. According to appellant, the "prosecutor did not merely encourage the jury to believe [Ms.] Shaw; he unequivocally told the jury that [Ms.] Shaw 'was honest' and had testified truthfully about 'what she saw.'" Furthermore, contends appellant, the prosecutor "communicated his personal opinion in stating, 'I think it was very clear.'" To make matters worse, contends appellant, "the prosecutor expressed his own interpretation of [Ms.] Shaw's demeanor and body language[.]" Indeed, according to appellant, the prosecutor's comment that Ms. Shaw "told … the truth despite not really wanting to, despite not being comfortable doing it because she had to" improperly "implied that the prosecutor had extrajudicial knowledge about [Ms.] Shaw's reluctance to testify."[15] Citing *Lawson v. State*, 389 Md. 570 (2005), appellant asserts that we "should recognize plain error" in this case.

with the apparent intent of attempting to introduce her prior statement under Maryland Rule 5-802.1 and *Nance v. State*, 331 Md. 549 (1993). When apprised of the difficulties he would face in attempting to do so, the prosecutor abandoned that plan, but eventually, he elicited incriminating testimony from Ms. Shaw, specifically, that she observed the butt of a gun protruding from appellant's pocket shortly before the murder. Her prior statement was not admitted into evidence.

[15] Ms. Shaw testified pursuant to a body attachment. Presumably and ordinarily, the jury would not have been informed of that fact because of the possibility of unfair prejudice to appellant. However, Ms. Shaw was in the late stages of pregnancy (most likely visibly so). She became ill and had to leave the courtroom to seek medical attention before the defense was able to cross-examine her. In lieu of bringing her back to court and delaying the proceedings, the parties stipulated to what her answers would have been to defense counsel's questions. Thus, at least in part, the jury was aware that she was an unwilling witness, although it did not know the full extent of her reasons for not wishing to testify.

The State counters that we should decline to excuse non-preservation of this claim, and in any event, the prosecutor did not vouch for Ms. Shaw.

Analysis

Again, before addressing this contention, we provide some context. During closing argument, the prosecutor declared to the jury:

> **She [Ms. Shaw] was honest**, ladies and gentlemen. She told you what she saw. She is not as old as the other individuals who maybe have a reason to say, oh, here is what I did or didn't see and be a little more cagey about it.
>
> **I think it was very clear.** And her testimony was I saw Jaekwan Stephens' gun handle right pocket specific about where it's at on his person in that apartment before he stepped out with just the victim.

(Emphasis added.) Defense counsel did not object.

Thereafter, during rebuttal closing argument, the prosecutor declared:

> When you look at that jury instruction, it says what bias, what motive, do they have a reason to not be credible? What reason in this whole world would Ms. [Tianna] Shaw who was 17 when it happened and is 19 now, have a connection in some way to this Defendant because, as she said, the girl she's friends with knows, is there getting their hair braided.
>
> She seen her with him before when she came over, and she saw them at one point. There's a connection there. What reason would she have to then come into a courtroom.
>
> And you saw her in her state get up on a witness stand and say that man had a gun. What benefit at all does she receive from that?
>
> What bias at all is there? You saw her demeanor, ladies and gentlemen. You saw it. You take it as you will. **But she looked fearful.** When she got to the point of picking out a picture and saying, there's a gun, you saw that change.
>
> Where is the reason for her to lie and say that? You saw it. **She did not want to be here at all.** And if you do not want to be here, why would you come in and double down and say something so (inaudible) on someone?

> Especially when you are concerned that he knows your good friend, Ms. Brandon? Why? What bias, ladies and gentlemen, at all? There's no reason. The reason, plain and simple. **She told you the truth despite not really wanting to, despite not being comfortable doing it because she had to.**
>
> She told you, yes, I talked with the detective and I remember. And, yes, this is what I told him. You saw her looking away. Her body turning. Becoming guarded. How you say, yes, confronted, knowing, I am here. I have to testify under oath, tell the truth. There's nowhere to go at this point.
>
> Yes, that's what I saw. There's no reason for her to say that, ladies and gentlemen. How does that benefit her in any way in this day and age?

(Emphasis added.) Once again, defense counsel did not object. Because defense counsel did not object, either to the prosecutor's closing argument or his rebuttal closing argument, appellant asks that we exercise our discretion, under Maryland Rule 8-131(a),[16] to review for plain error.

Plain error review is reserved for errors that are extraordinary or compelling or that seriously undermine our confidence in the fairness of a trial. *Yates v. State*, 429 Md. 112, 130 (2012); *State v. Hutchinson*, 287 Md. 198, 203 (1980). We exercise our discretion to address an unpreserved claim for plain error sparingly. *Savoy v. State*, 420 Md. 232, 255 (2011) (observing that an appellate court engages in plain error review only in "rare" cases). We have said that plain error review is reserved for cases in which there was a "'blockbuster'" error. *Martin v. State*, 165 Md. App. 189, 196 (2005) (quoting *United*

[16] Maryland Rule 8-131(a) states in relevant part: "Ordinarily, an appellate court will not decide any other issue [except a jurisdictional defect] unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal."

States v. Moran, 393 F.3d 1, 13 (1st Cir., 2004)) (cleaned up), *cert. denied*, 391 Md. 115 (2006). We have further emphasized that noticing plain error is an act of appellate "'grace[,]'" appropriate only in a case of "'outraged innocence[.]'" *Morris v. State*, 153 Md. App. 480, 523 (2003) (quoting *Jeffries v. State*, 113 Md. App. 322, 326, *cert. denied*, 345 Md. 457 (1997)), *cert. denied*, 380 Md. 618 (2004).

"[O]ne technique in closing argument that consistently has garnered [the Supreme Court of Maryland's] disapproval, as infringing on a defendant's right to a fair trial, is when a prosecutor 'vouches' for (or against) the credibility of a witness." *Spain v. State*, 386 Md. 145, 153 (2005). "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." *Id.* (quotation marks and citation omitted) (cleaned up).

Not only may such comments "convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury;" but furthermore, "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19 (1985) (citing *Berger v. United States*, 295 U.S. 78, 88-89 (1935)).

A quick perusal of the cases reveals the stark difference in the way appellate courts treat vouching claims, depending upon whether there was an objection at trial. For example, in *Spain*, the claim was preserved, *Spain*, 386 Md. at 151, but the Supreme Court

of Maryland determined that the error was harmless. *Id.* at 158-61. Similarly, in *Sivells v. State*, 196 Md. App. 254 (2010), *cert. granted*, 418 Md. 397, *cert. dismissed*, 421 Md. 659 (2011), the claim was preserved, *id.* at 274-77, and there, we determined that the error was not harmless and reversed. *Id.* at 288-93. Even where the vouching was egregious, reversal is by no means automatic if the defense fails to preserve the claim by making a timely objection. *See Young*, 470 U.S. at 5-6 (declining to find plain error where prosecutor offered his personal opinion that the defendant had committed fraud and that jurors would not be "doing [their] job" were they to acquit); *id.* at 36 (Stevens, J., dissenting) (declaring that "the prosecutor's comments crossed the lines of permissible conduct established by the ethical rules of the legal profession" (quotation marks and citation omitted)).

It is an unusual case where an appellate court will find plain error because a prosecutor was permitted to make improper comments. Appellant cites *Lawson v. State*, *supra*, 389 Md. 570, but in that case, there were distinguishing features that are absent here. In *Lawson*, the prosecutor made repeated comments that were deemed improper, *id.* at 594-600; defense counsel objected to two of those comments but not to several others, *id.* at 604-05; and most importantly, the improper comments in *Lawson* were especially egregious and unfairly prejudicial. *Id.* at 594 (improper "golden rule" argument); *id.* at 595-96 (burden-shifting statements); *id.* at 596-99 (appeals to the jury's fears and prejudices, such as calling the defendant, on trial for child sexual offenses, a "monster"); *id.* at 599 (assertion of defendant's future criminality).

Even were we to assume that the prosecutor's comments in this case were improper, the purported error complained of here does not come close to establishing plain error, and we decline to exercise our discretion to review this admittedly unpreserved claim.[17]

IV.

Parties' Contentions

Finally, appellant contends that the evidence was insufficient to sustain his convictions. According to appellant, there were "rampant inconsistencies in the testimony," there was no eyewitness to the shooting, and "one person out of the many who were with" him "that night claimed to have seen him with a gun."

The State counters that appellant's "concerns are not pertinent to a sufficiency determination" and that, in any event, "the evidence was more than sufficient" to sustain the convictions. The State further points out that it was up to the jury to make "credibility

[17] Appellant's reliance on *Donaldson v. State*, 416 Md. 467, 500-01 (2010) (urging that we not be "persuaded beyond a reasonable doubt that the prosecutor's improper statements failed to influence the jury's verdict"), is misplaced. There, the trial court overruled defense counsel's timely objection to the prosecutor's remarks, *id.* at 478, and the Supreme Court of Maryland therefore applied the harmless error standard to Donaldson's claim that the remarks were improper. *Id.* at 496-501. Here, in contrast, defense counsel did not object, and therefore, the harmless error standard does not apply. *See United States v. Dominguez Benitez*, 542 U.S. 74, 81-83 (2004) (observing that the prejudice standard for plain error is substantially similar to the "reasonable probability" of a different result standard); *Bowers v. State*, 320 Md. 416, 425-27 (1990) (equating the "reasonable probability" standard and the "substantial possibility" standard); *Patterson v. State*, 229 Md. App. 630, 638-39 (2016) (noting the "stark contrast" between the *Dorsey* harmless error standard (*see Dorsey v. State*, 276 Md. 638 (1976)) and the "substantial possibility" standard).

determinations[,]" to "resolv[e] any discrepancies in the evidence[,]" and to decide the weight to be afforded to the evidence.[18]

Analysis

The standard we apply in assessing 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "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). Accordingly, 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). "'An inference drawn from circumstantial evidence need only be reasonable and possible; it need not be necessary or inescapable.'" *State v. Smith*, 374

[18] This claim was preserved for appeal, and the State does not contend otherwise. After the close of the State's case-in-chief, appellant moved for judgment of acquittal, raising substantially the same arguments he raises now on appeal. *Starr v. State*, 405 Md. 293, 302-03 (2008) (noting that "'appellate review of the sufficiency of the evidence in a criminal case tried by a jury is predicated on the refusal of the trial court to grant a motion for judgment of acquittal'" and that review is limited to the grounds raised at trial (quoting *Lotharp v. State*, 231 Md. 239, 240 (1963))).

Md. 527, 539 (2003) (quoting *Commonwealth v. Russell*, 705 N.E.2d 1144, 1145-46 (Mass. App. Ct. 1999)) (cleaned up).

Typically, in addressing a sufficiency claim, we would set forth the elements of each offense and parse the evidence to determine whether, in a light most favorable to the verdicts, a prima facie case was established. Here, however, we construe appellant's claim to be an alleged lack of proof of his criminal agency,[19] not that the elements of the crimes otherwise were not established.

Appellant's sufficiency argument "is simply an invitation to reweigh the evidence, which we cannot do." *Winston*, *supra*, 235 Md. App. at 576. "It does not matter that the State adduced" neither the murder weapon nor eyewitness testimony that appellant was the shooter, or that only one person "out of the many who were with" him that night testified that they saw him in possession of a gun, as long as "some rational jury could conclude that the other evidence was sufficient to establish his guilt." *Id.* at 576-77.

In this case, Ms. Shaw testified that she observed the butt of a gun, protruding from appellant's right pocket, a few minutes before he left Ms. Brandon's apartment. Several people testified that appellant was present, just before the murder, and that he and Mr. Green, the victim, had a dispute and left Ms. Brandon's apartment at the same time.[20]

[19] The prosecution must prove the defendant's criminal agency beyond a reasonable doubt. *State v. Simms*, 420 Md. 705, 722 (2011). The defense theory in this case was a claim that "I didn't do it."

[20] There was conflicting testimony as to whether appellant and Mr. Green had a disagreement or argument just before they left. There was also conflicting testimony as to whether all the men left the apartment prior to the shooting. It was up to the jury to resolve (continued…)

Several people testified that, shortly afterward, they heard gunshots outside, and when they ventured outside, they observed Mr. Green, face down, on a nearby grassy area, mortally wounded. Several witnesses observed appellant, with his two companions, drive off shortly afterward in a white car, which subsequently was chased by the police and ultimately located in east Baltimore. That car was registered to appellant, and forensic testing indicated that gunshot residue was on the steering wheel and the gear shift knob. Considered in a light most favorable to the State, we conclude that there was sufficient evidence of appellant's criminal agency. In the interest of completeness, however, we shall summarize the evidence that established each element of the crimes of which appellant was convicted.

We begin with murder in the first degree. The elements of murder in the first degree are: "(1) that the defendant caused the death of [the victim]; and (2) that the killing was willful, deliberate, and premeditated." Maryland Criminal Pattern Jury Instructions ("MPJI-Cr") 4:17 (Homicide--First Degree Premeditated Murder and Second Degree Specific Intent Murder (No Justification or Mitigation Generated)). *See Lipinski v. State*, 333 Md. 582, 588 n.2 (1994) (citing the 1986 version of the pattern instruction). Willful, in turn, "means that the defendant actually intended to kill [the victim]." MPJI-Cr 4:17. Deliberate "means that the defendant was conscious of the intent to kill." *Id.* And premeditated "means that the defendant thought about the killing and that there was enough

any conflicts in the testimony. *Smith*, 415 Md. at 185 (observing that "we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence").

time before the killing, though it may only have been brief, for the defendant to consider the decision whether or not to kill and enough time to weigh the reasons for and against the choice."[21] *Id.*

It was undisputed that the victim had been shot fourteen times. Several entrance wounds were on the victim's back (indicating that he had been shot from behind), and several of them exhibited stippling[22] (which indicated that those shots had been fired at close range), including one on "the left side of the back of the [victim's] neck[.]" There was more than sufficient circumstantial evidence that the killing in this case was willful, deliberate, and premeditated. *See Cummings v. State*, 223 Md. 606, 611-12 (1960) (finding sufficient evidence of willfulness, deliberation, and premeditation where defendant "shot the deceased seven times with a deadly weapon at point-blank range"); *Pinkney v. State*, 151 Md. App. 311, 333 (en banc) (observing that "the circumstances of the death, i.e., the defendant's actions, often speak for themselves when they so clearly involve actions that are likely to bring about death"), *cert. denied*, 377 Md. 276 (2003).

The elements of use of a firearm in the commission of a felony or crime of violence are: "(1) that a firearm was used by the defendant, and (2) that he used it in the commission

[21] To further emphasize this point, the pattern instruction concludes, "The premeditated intent to kill must be formed before the killing." MPJI-Cr 4:17.

[22] The State's expert in forensic pathology, Richard Morris, M.D., who performed the autopsy of the victim, testified: "Gunpowder stippling is when unburnt or partially burnt particles [contained in the gaseous plume created when a bullet is fired] actually hit the skin, and what you wind up with is a small, usually red defect on the skin, so you'll see that up to approximately two feet."

of a felony or crime of violence." *Hallowell v. State*, 235 Md. App. 484, 507 (2018). In the context of this case, the latter element becomes that the defendant used a firearm in the commission of a murder in the first degree. *Id.* at 508; *see Sequeira v. State*, 250 Md. App. 161, 188-93 (2021) (analyzing the connection between the charged predicate offense and the associated charge of unlawful use of a firearm). The elements of wearing, carrying, or transporting a handgun on the person are that "'the defendant wore, carried, or transported a handgun[23] that was within his or her reach and available for his or her immediate use.'" *Lawrence v. State*, 475 Md. 384, 393 n.8 (2021) (quoting MPJI-Cr 4:35.2).[24] It goes without saying that the same evidence that sufficed to show that appellant murdered Mr. Green in the first degree also sufficed to show that he used a firearm in the commission of that crime, that the firearm in question was a handgun, and that he was wearing, carrying, and transporting it on his person.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.

[23] A handgun, in turn, "'is a pistol, revolver, or other firearm, capable of being concealed on or about the person, and which is designed to fire a bullet by the explosion of gunpowder.'" *Lawrence*, 475 Md. 384, 393 n.8 (2021) (quoting MPJI-Cr 4:35.2).

[24] As the Supreme Court of Maryland reiterated, knowledge is not an element of this strict liability offense. *Lawrence*, 475 Md. at 416-22.