Circuit Court for Baltimore County
Case No.: 03-K-17-0561

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 826

September Term, 2018

DAVID NATHANIEL JOHNSON

v.

STATE OF MARYLAND

Beachley,
Gould,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Gould, J.

Filed: February 20, 2020

Appellant David Johnson asks us to reverse his convictions under the often-invoked-but-rarely-granted "plain error review" doctrine. This doctrine allows us in exceptional circumstances to review and correct a clear and material error, even if the issue was otherwise not preserved. As Mr. Johnson sees it, the trial court's admission of an in-court identification that was inconsistent with the witness's other testimony was one such obvious and prejudicial error.

We agree that the identification was highly suspect. In fact, it was *so* suspect that it appears that Mr. Johnson's trial counsel, rather than object, may have chosen to let the jury hear the identification and have it collapse under its own weight. We therefore will not, under the guise of plain error review, step in and second-guess a trial court for not interfering with what could very well have been an attorney's strategic decision, even if it was ultimately unsuccessful.

Mr. Johnson also challenges the sufficiency of the evidence supporting his convictions for armed robbery, armed carjacking, and carjacking. Specifically, Mr. Johnson argues that the State failed to prove that Mr. Johnson possessed a deadly weapon, as required to prove armed robbery and armed carjacking. However, because he failed to make this argument at trial, it is not preserved for our review. Further, as to the carjacking conviction, Mr. Johnson argues that there was no evidence tending to show that he took control of the victim's vehicle while it was in the victim's control. Finding the evidence sufficient to establish such control, we affirm on that issue as well.

FACTUAL BACKGROUND AND LEGAL PROCEEDINGS

On a winter evening in late 2016, Oscar Monge, a 17-year-old employee of MetroPCS, closed up shop and headed to his car. While he was sitting in his car and putting his girlfriend's address into his GPS, a masked man swung open his car door and ordered him out of the car. The man, holding what appeared to Mr. Monge to be a gun (but subsequently was revealed in surveillance videos to be only a long piece of a rifle-style weapon), forced him to reopen the store.

Once inside, the perpetrator forced Mr. Monge to fill several trash bags with money from the registers and boxes of new cell phones. He then ordered Mr. Monge to give him his car keys, loaded the bags into Mr. Monge's car, and drove away. Mr. Monge immediately called his manager, who, in turn, called the police.

As part of its subsequent investigation, the police obtained a list of the cell phones that had been stolen. Several days later, MetroPCS notified the police that one of the stolen phones had been activated using a phone number transferred from a phone registered to the account of David Johnson. Later, another stolen phone was activated by Mr. Johnson's account.

The police obtained a court order that allowed them to track the activated phone's location in real-time. This led them to 6823 Fox Meadow Road, where Mr. Johnson spent several nights a week with his fiancée. Using images from Facebook and Motor Vehicle Administration records associated with Mr. Johnson and the telephone numbers in question, the officers identified him coming in and out of the house several times.

The police then obtained a warrant to search the house at 6823 Fox Meadow Road. There, officers found trash bags filled with the stolen cell phones and SIM cards, as well as empty MetroPCS boxes. The officers also recovered paperwork and ID cards with Mr. Johnson's name on them, a dark hooded sweatshirt, and a broken-off stock from a rifle-style gun that was consistent with the weapon used by the perpetrator. Mr. Johnson was arrested that same day.

At trial, the State called Mr. Monge as its first witness. During his direct examination, the State played the store's surveillance video of the incident, in which the jurors could see a perpetrator, dressed in a black hooded sweatshirt and wearing a mask on his face, commit the crime. The suspect appeared to be holding the broken-off stock from a rifle-style weapon, which the State surmised was part of a pellet gun.

Mr. Monge testified that he was unable to get a good look at the perpetrator, because he had been wearing a ski mask and hoodie and had repeatedly threatened to kill Mr. Monge if he so much as looked at him. Mr. Monge was only able to identify him as African American and "a lot bigger" than him:

> Q: Did you ever get a clear look at the individual who entered the store?
>
> A: You could say that. I look at him, but like I said, he had a hoodie on the whole time with a black mask and then also gloves so I couldn't get a description of him.
>
> Q: Was the hood up, down or something else?
>
> A: Yeah, it was up.
>
> Q: And when you say that mask, what kind of a mask was it?
>
> A: Like a ski mask.

Q: How much of his face was visible?

A: Just his eyes, his nose, and his mouth,

Q: Were you able to tell what race that person was?

A: Yes, I was.

Q: And what race?

A: African American.

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Q: Okay. And in comparison to you, how tall do you believe the person who robbed you was.

A: At the time, he seemed a lot bigger, at least 6 foot.

Notwithstanding having never seen his attacker's face, the State asked Mr. Monge to identify the suspect. His response was undeterminative, to say the least. Nevertheless, with the State's prompting, Mr. Monge purportedly identified the defendant, Mr. Johnson, who was sitting at defense counsel's table:

Q: Mr. Monge, you indicated yesterday that during the robbery the person who robbed you had on like a ski-type mask?

A: Yes.

Q: Do you think you could identify anybody after the fact?

A: Um, not necessarily. Because it was covering the whole face. And on top of that, the hood was up.

Q: Well, let me put it to you a different way. If you had an opportunity to see the person who committed the armed robbery on December 16, 2016, do you think you could identify them?

A: In that case, yeah.

Q: And do you see the person in court today?

A: I believe so.

Q: Could you identify the person that you believe it might be?

A: I believe it's Mr. David Johnson right here.

Q: And what are you basing that on?

A: Same height, same build.

The State bolstered its case with testimony linking the stolen phones (and potential weapon) to Mr. Johnson. Specifically, police officers testified that they used GPS technology to track the stolen phones to Mr. Johnson's house, where they found the phones, SIM cards, MetroPCS boxes, a sweatshirt consistent with the one worn by the robber, and a long piece of a rifle-style weapon. Additionally, an expert from the FBI testified that he analyzed historical cell phone data and determined that a phone with Mr. Johnson's phone number had been near the MetroPCS store at the time of the incident. The jury convicted Mr. Johnson of armed carjacking, carjacking, armed robbery, robbery, and theft. Mr. Johnson noted a timely appeal.

DISCUSSION

Mr. Johnson asks us to reverse his convictions and order a new trial based on what he contends was an improper in-court identification by the State's key witness. He also argues that the evidence was insufficient to find him guilty of armed carjacking, carjacking, and armed robbery because: 1) there was no evidence that he was armed with a dangerous weapon; and 2) the victim was not in possession of the vehicle at the time it was stolen.

We disagree. Neither Mr. Johnson's challenge to the in-court identification nor the claimed error regarding weapon-related charges were preserved for our review. Further, the evidence permitted a reasonable inference that the victim was in possession of the car at the time Mr. Johnson took over control of the car.

THE IN-COURT IDENTIFICATION

We usually do not review a claimed error based on the admission of evidence in the absence of a timely objection at trial. Md. Rule 8-131(a); see also Md. Rule 4-323(a). Here, even though Mr. Johnson acknowledges that he did not object to the identification at trial, he argues that the trial court erred by permitting Mr. Monge to identify him as the perpetrator in court. Mr. Johnson urges us to exercise plain error review, a doctrine which allows us to notice and correct plain and material errors, even if they were not raised at trial. See, e.g., Hammersla v. State, 184 Md. App. 295, 306 (2009).

Plain error review is generally reserved for mistakes that are "compelling, extraordinary, [or] exceptional," and "1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." Id. at 306 (quotations omitted). Judge Moylan, in his inimitable style, suggested that plain error review should be exercised "more often than the periodic appearances of Halley's Comet but not nearly so frequently as quadrennial presidential elections." Wilson v. State, 195 Md. App. 647, 694 (2010), vacated on other grounds, 422 Md. 533 (2011).

Plain error review is inapplicable where the trial counsel's failure to object to the alleged error was a strategic decision. See Givens v. State, 449 Md. 433, 481 (2016) ("plain error review is unavailable where a defendant fails to object as a matter of trial tactics");

see also Robinson v. State, 410 Md. 91, 104 (2009) ("if the failure to object is, or even might be, a matter of strategy, then overlooking the lack of objection simply encourages defense gamesmanship"). As we explained:

> It is not for trial judges, *sua sponte*, to second-guess trial tactics, however ill-advised they might seem to the judge. *Madison v. State*, 200 Md. 1, 8–9, 87 A.2d 593 (1952) ("We are ... without authority to review errors in trial tactics of defense counsel or to speculate as to possibilities that different tactics might have produced a different result."). Even the notion of "plain error" requires, as a rock-bottom minimum, a legal error by the judge, not a tactical miscalculation by defense counsel; the judge does not sit as co-counsel for the defense. Neither does the appellate court.

Nelson v. State, 137 Md. App. 402, 423 n.5 (2001).

Here, we cannot conclude that the trial court's decision not to *sua sponte* step in and exclude Mr. Monge's identification of Mr. Johnson was a clear and obvious error because, from the trial court's vantage point, defense counsel's failure to object may very well have been a deliberate strategic decision. The trial transcripts show, and the trial court undoubtedly observed, that defense counsel had been paying close attention to the testimony and showed no reluctance to object to the admission of evidence. The trial court also likely saw the same weakness in Mr. Monge's identification that we see. It therefore would not have been unreasonable for the trial court to have viewed defense counsel's failure to object to the identification as a strategic decision to provide cross-examination fodder to attack the credibility of an otherwise wholly sympathetic witness.[1] The trial judge was in the best position to observe the ebb and flow of the trial, the alertness and demeanor

[1] In fact, defense counsel did aggressively cross-examine Mr. Monge on what he did and did not see of the perpetrator's facial features, size, and weight.

of defense counsel, and determine whether the situation warranted a *sua sponte* exclusion of evidence.

That defense counsel may have seen a potential benefit to the in-court identification was evidenced by her closing argument when she took dead aim at Mr. Monge's credibility and reliability, even going so far as suggesting that he was in on the heist:

> It wasn't until Mr. Monge came to this court after taking the stand under oath and swearing to tell the truth to you, to the Court, and to everyone about the events of December 16th. It wasn't until he came in here, and he said he identified David Johnson as being the person there on December 16th. There's no other explanation for him doing that other than he's trying to force it, because clearly you saw the video, you can't get any descriptions.
>
> His height and weight is off. Mr. Monge testified that the individual was 6 foot and 245 pounds. Now, I get, the State's Attorney says people fudge their weight a little bit on their driver's license, maybe but you're not going to fudge it that far. I get that Mr. Monge may have been a little scared, but that person wasn't that much bigger than him. And I know he said initially he weighed 180 to 190 pounds, and I asked him how much do you weigh today? Oh, I weigh about 240. You weighed 240 back then. So wouldn't you know if a person weighed about the same amount that you do? Of course you would. Of course you would. But we know that Mr. Johnson was nowhere near 6 foot and 245 pounds. We know because Detective Jones, and as the State's Attorney said, he pulled it from his MVA records, right. But then Detective Jones said, but David Johnson doesn't look the same today as he did. It looks like he lost about 15 to 20 pounds. So then how is it that Oscar Monge can come to court and say, well, I recognize him by his height and weight, it wasn't the same. How? Impossible. Oscar Monge trying to force it.
>
> Was MetroPCS robbed on December 16, 2016? Absolutely. They were. We saw it on video. No one is trying to deny that. But maybe, just maybe the story that Oscar Monge came here and told you about the person wearing gloves and having black bags, maybe that's how it was supposed to happen. And maybe Oscar Monge forgot what really happened, because he had in his mind what was supposed to happen . . . . Why close the store an hour early? Was he thinking that someone was going to come and take these phones? Why didn't he do inventory? Mr. Jabbarin testified we never do inventory at night, we do that first thing in the morning. Why was Mr. Monge

> doing inventory that night? Is it because he wanted to know what phones were going to be taken? Possible. Why did he close early? Was it because he knew someone was going to be coming to get some phones? It's quite possible.

From defense counsel's cross-examination, closing argument, and indeed the entire trial record, we cannot fault the trial judge for allowing defense counsel to make a judgment call on when to object and when to stand down. Accordingly, we decline to review Mr. Johnson's claim of error regarding Mr. Monge's in-court identification.

THE WEAPON

Mr. Johnson contends that the evidence was insufficient to convict him of armed robbery or armed carjacking. Specifically, he argues that these crimes require the use of a dangerous weapon, and that the State failed to prove that the item seen in the surveillance video qualified as a dangerous weapon. The State argues that Mr. Johnson failed to make this argument in his motion for acquittal, and as such, the issue has not been preserved for our review. See Starr v. State, 405 Md. 293, 302 (2008).

We agree with the State—and Mr. Johnson concedes—that he did not make this argument at trial. As such, we decline to review whether there was sufficient evidence that the item used by Mr. Johnson was a "dangerous weapon" as was necessary to prove armed robbery and armed carjacking.[2]

[2] Mr. Johnson has not argued that we should exercise plain error review on this issue, nor is it clear that this doctrine would apply to a sufficiency of the evidence review. We therefore need not undergo a plain error analysis. See McIntyre v. State, 168 Md. App. 504, 528 (2006) (noting that a defendant should request plain error review in his opening brief, and that "no Maryland case has utilized the plain error doctrine to reverse a trial judge's denial of a motion for judgment of acquittal when the ground raised on appeal was

THE CARJACKING

Preservation

Mr. Johnson contends that, because Mr. Monge was not seated in or traveling to or from his car when it was taken, Mr. Johnson could not have been found guilty of carjacking.

As an initial matter, the State argues that Mr. Johnson failed to preserve this issue. We disagree. During the motion for judgment of acquittal, Mr. Johnson's trial counsel argued:

> In order to find that the State Attorney has met its burden . . . the State Attorney would have to show that the Defendant obtained unauthorized possession or control of a motor vehicle, that the motor vehicle was taken, and the actual possession of it was taken in the actual possession of another person at the time and that the Defendant used force or violence against a person or put that person in fear through intimidation or threat of force or violence in order to obtain the vehicle.
>
> Your Honor, in order to obtain the vehicle is what I am alleging the State has not been able to prove in this case.
>
> The testimony by Mr. Monge was that an individual approached him at his car, pointed a gun at him, ordered him out of the car to open the store. The person then proceeded into the store, robbed the store.
>
> During that robbery, Mr. Monge had set his keys on the ground. Mr. Monge alleges that that person must have picked up those keys and left taking the car.
>
> **The time period from the time Mr. Monge was removed from the car and the time that the car may have been taken by the same person was at least 10, 15 minutes. I think Mr. Monge testified that he believed the robbery took about ten minutes.**
>
> It is my position that reading the instruction as it is written, Mr. Monge was not taken out of his car to take the car, yet Mr. Monge was taken out of his car so that the store could be robbed.
>
> If the intent was to get him out of the car to rob the store, it wasn't to get him out of the car to take the car.

never advanced before the trial court at the time the motion for judgment of acquittal was being considered").

> **If the car was taken at some subsequent point afterwards, that may be an unlawful taking of a motor vehicle, but it would not amount to a carjacking.**
>
> So I don't believe that the State has made a prima facie case of armed carjacking. That would hold true for the carjacking exception because the elements are the same.

Though defense counsel does mention intent, the gist of this challenge appears to be the timing: whether, at the time that the car was taken, it was in Mr. Monge's possession. We conclude, therefore, that the issue has been preserved.

Possession of the Vehicle When it was Stolen

When reviewing the sufficiency of evidence, we will uphold a conviction where, "in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Reeves v. State, 192 Md. App. 277, 302 (2010) (internal quotation omitted). The jury decides which inferences may be drawn from the facts, and we must defer to those inferences even if we would have reached a different conclusion. Id.

Carjacking is prohibited by Md. Code Ann., Crim. Law § 3-405(b)(1) (2002, 2012 Repl. Vol.), which states that:

> An individual may not take unauthorized possession or control of a motor vehicle from another individual who actually possesses the motor vehicle, by force or violence, or by putting that individual in fear through intimidation or threat of force or violence.

A victim is in "actual possession" of the motor vehicle in question if he is "seated in, [] operating . . . . entering, alighting from, or otherwise in the immediate vicinity of the vehicle when an individual obtains unauthorized possession or control of the vehicle by

intimidation, force, or violence, or by threat of force or violence." Mobley v. State, 111 Md. App. 446, 455-56 (1996).[3]

Mr. Johnson contends that Mr. Monge was not in possession of the vehicle when it was taken, pointing out that Mr. Monge was in the MetroPCS store when the car keys were taken from him. Mr. Johnson further argues that Mr. Monge was not seated in, entering, leaving, or in the immediate vicinity of the car when the perpetrator drove away from the scene of the crime. He argues that therefore the evidence was insufficient to establish the elements of carjacking.

We disagree. The evidence allowed for a reasonable inference that Mr. Johnson seized control of the vehicle the moment he forced Mr. Monge out of the car at gun point. See Price v. State, 111 Md. App. 487, 499 (1996) (internal quotation omitted) (cleaned up) (noting that the relevant test is whether the vehicle is so within the victim's control that he "could have, if not overcome by violence or prevented by fear, have retained [his] possession of it)." In one moment, Mr. Monge was in the driver's seat (both literally and figuratively), and in the next moment, he was dispossessed of his car, at gunpoint, at which point Mr. Johnson controlled the situation and would therefore decide *who* would take the car, and *when*. And until Mr. Johnson decided, it didn't matter whether the keys were in Mr. Monge's pocket, Mr. Johnson's hand, or anywhere else. The control came not from

[3] In Mobley, the defendant challenged his conviction for carjacking after the evidence established that he took the vehicle after the victim had exited her car. Id. at 450, 452. He argued that a carjacking could only occur "when a vehicle is taken by force or threat of force *while in transit or while occupied*." Id. at 452 (emphasis in original). We disagreed. Id.

holding the keys, but from the threat of force that began when Mr. Monge was ousted from his car, and continued until the moment the perpetrator absconded in the vehicle.

In addition, the jury was entitled to believe that Mr. Johnson initiated the crime with the intention of stealing scores of cell phones, and therefore had always intended to use Mr. Monge's car to leave the scene. In other words, a reasonable jury could have concluded that Mr. Johnson was not planning on walking over one mile, in a populous neighborhood, with one or more bags full of stolen merchandise. As such, there was sufficient evidence to sustain Mr. Johnson's conviction for carjacking.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.