Circuit Court for Montgomery County
Case No. C-15-CR-22-000138

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1050

September Term, 2023

DIANDRE GOODRICH

v.

STATE OF MARYLAND

Zic,
Ripken,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: December 5, 2024

*This is an unreported opinion. This 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).

Diandre Goodrich ("Appellant") was tried before a jury in the Circuit Court for Montgomery County in March of 2023. He was found guilty of attempted second-degree murder, armed robbery, and use of a firearm in the commission of a crime of violence. The circuit court sentenced Appellant to thirty years' incarceration. Appellant noted a timely appeal. For the following reasons, we shall affirm.

ISSUES PRESENTED FOR REVIEW

Appellant presents the following issues for our review:[1]

I. Whether the circuit court erred in addressing the joint motion for a continuance.

II. Whether the circuit court erred or abused its discretion in admitting body worn camera footage depicting the victim.

III. Whether the circuit court erred in permitting the State to question Appellant regarding other witnesses.

IV. Whether plain error review should be exercised regarding the circuit court's control of closing arguments.

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[1] Rephrased from:

1. Should Appellant's request to represent himself have triggered the application of Maryland Rule 4-215?

2. Did the trial court err in admitting body camera footage that was irrelevant, cumulative, and unduly prejudicial?

3. Did the trial court err in permitting the State to question Appellant about the credibility of the State's witnesses?

4. Did the trial court err in allowing the prosecutor to make improper and prejudicial statements at closing argument?

FACTUAL AND PROCEDURAL BACKGROUND

In December of 2021, police responded to a residence on Poppyseed Lane and discovered Pierre Darnell Toliver ("Toliver") in the sunroom. Toliver had suffered a gunshot wound to the face. He was transported to a trauma center and subsequently taken by helicopter to a Baltimore hospital where he underwent surgery and then remained comatose for a month. Upon coming out of his comatose state, Toliver told police that he had been shot by a man he knew only by the nickname "Dre." Toliver never identified "Dre" either during police interviews or in court.

In January of 2022, police interviewed Zaphire Acevedo-Hodge ("Acevedo-Hodge"), Appellant's former girlfriend. Acevedo-Hodge stated that she had witnessed the shooting and identified Appellant as the shooter. She entered into a plea agreement that included testifying at Appellant's trial. Khianna Crews ("Crews"), a friend of Acevedo-Hodge, testified at trial. Sarah Fazenbaker ("Fazenbaker"), who lived in the Poppyseed Lane house, also testified at trial.

On the night Toliver was shot, Acevedo-Hodge, Crews, and Appellant drove together to purchase Methylenedioxymethamphetamine ("MDMA"), also known as Ecstasy or Molly, and then went to the Poppyseed Lane house. Appellant and Acevedo-Hodge joined Toliver in the sunroom and the three smoked MDMA together. Appellant then demanded that Toliver "give him everything," pulled out a gun, and shot Toliver in the face. Appellant searched Toliver's pockets, took his wallet and cell phone, and departed with Acevedo-Hodge. At trial, the testimony regarding this timeline of events was corroborated by cell phone tracking data. The data showed Appellant's cell phone located

and moving with cell phones that belonged to Acevedo-Hodge and Crews to Poppyseed Lane, and then departing with cell phones belonging to Acevedo-Hodge and Toliver.

At trial, the parties did not stipulate to facts; however, the sole issue contested by Appellant was identity.[2] Appellant testified that he was not the man who shot Toliver. Appellant indicated that on the evening Toliver was shot, Appellant had spent time with Acevedo-Hodge and Crews at another friend's residence at a different location. Appellant testified that he permitted Acevedo-Hodge and Crews to leave with his mother's car so that Acevedo-Hodge could use the car to go to work. He testified that he did not go with Acevedo-Hodge and Crews to purchase MDMA or to the Poppyseed Lane house. Appellant stated that he was using two cell phones at the time, and that the phone for which the State presented tracking data was kept permanently in the car that Acevedo-Hodge and Crews used. Additional facts will be discussed below as they become relevant.

DISCUSSION

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION WHEN IT TREATED APPELLANT'S WORDS AS OPPOSITION TO A MOTION TO CONTINUE.

Prior to trial, the court conducted a hearing on a joint motion to continue. During the hearing, Appellant's counsel informed the trial judge that Appellant "would rather represent himself and keep the same trial date." The trial judge referred the matter to the administrative judge to address the trial date.

[2] Although Appellant used the term "agency" in the circuit court and on appeal, for ease of comprehension, we use the more common term "identity" as that is the concept to which Appellant refers. *Cf. Solomon v. State*, 101 Md. App. 331, 370 (1994) (interchanging usage of "identity" with "criminal agency").

The administrative judge inquired of Appellant directly about his words regarding representing himself. In response, Appellant began by stating: "I do not want the case postponed." He expressed that he was unhappy about the postponement because he wanted his day in court. He stated, "I would like an attorney, but I don't want to waive my speedy trial. I need my day in court, sir." He repeated, "I would like my day in court, and this is very psychologically damaging for me to see my court date that I've been waiting on for months [] be pushed back several more months." Appellant concluded by stating, "I'm willing to risk whatever it takes if I can just keep my trial date where it's at."

The administrative judge responded, "Well, sir, I want you to have an attorney, given what you're facing. You are very confident about that . . . . But I'm going to postpone this trial date, sir." The administrative judge granted the joint continuance motion and set a new trial date. Neither the trial judge nor the administrative judge made a formal ruling on a potential discharge of Appellant's counsel.

A. Party Contentions

Appellant argues that he did request to represent himself and keep his original trial date which was akin to a Rule 4-215(e) request to discharge counsel, and that the circuit court was required to follow the mandatory procedure in ruling on such a motion. He argues that neither the trial judge nor the administrative judge made a requisite determination as to whether the reasons he supplied in his request to represent himself were meritorious and that this failure amounts to an error requiring reversal.

The State argues that Appellant's sole basis for the words regarding representing himself amounted merely to an intended support of his opposition to the postponement,

and that he expressed no conflict with his attorney warranting discharge or invoking the rule. The State further argues that because Appellant stated he would like an attorney, and because the court found that a postponement was unavoidable, Appellant's comment regarding self-representation was merely transitory and did not require a full Rule 4-215 inquiry.

B. Analysis

Under Maryland Rule 4-215(e), "[i]f a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel[.]" A trial court's compliance with the requirements of the Maryland Rules is a question of law reviewed by this Court de novo. *State v. Graves*, 447 Md. 230, 240 (2016). To trigger application of the rule, a defendant "must simply express to the court that [the defendant is] dissatisfied with [the defendant's] current attorney." *State v. Davis*, 415 Md. 22, 31 (2010). Any statement which would reasonably alert the court that the defendant has the intent to discharge counsel can invite the court to inquire further. *Graves*, 447 Md. at 241–42. The rule protects a defendant's Sixth Amendment right to counsel and right to self-representation; either way, the procedural steps are the same. *See Parren v. State*, 309 Md. 260, 262–63 (1987).

Once application of Rule 4-215(e) is triggered, the trial court must first provide the defendant with a forum to explain their reasons for requesting the discharge. *State v. Taylor*, 431 Md. 615, 631 (2013). The record must sufficiently reflect that the court considered whether the defendant's reasons were meritorious. *Id.* The court must then grant

or deny the request. *Pinkney v. State*, 427 Md. 77, 94 (2012).

A defendant must have a present intent to discharge counsel in order to mandate application of Rule 4-215(e). *Henry v. State*, 184 Md. App. 146, 171 (2009). In *Henry*, the defendant, through his counsel, requested a continuance so that new counsel could be substituted. *Id.* at 169. The trial court in *Henry* did not rule on whether to discharge the defendant's counsel, but rather ruled, "'I'm not going to grant the continuance.'" *Id.* at 170. This Court held that the trial court did not abuse its discretion in treating Henry's request as a motion for a continuance, because his request for a continuance did not demonstrate a present intent to discharge his counsel. *Id.* at 171–72.

In a subsequent case analyzing *Henry*, the Supreme Court of Maryland approved this view, noting that "neither Henry nor his counsel conveyed to the court any displeasure with his current representation, leading the court to appropriately assume that he was not requesting to discharge counsel, but merely petitioning for a continuance so that he could attempt to engage [new counsel]." *Davis*, 415 Md. at 34. The Supreme Court contrasted the request in *Henry* with the request in *Davis*, where the defendant expressed dissatisfaction with his attorney's work, a statement which should have triggered application of the rule. *Id.* at 35. The Court therefore held that a defendant's intent to discharge counsel must be "current and established." *Id.* at 33.

Similarly, in *Taylor*, the Supreme Court noted that, where Taylor's request to be represented by a different attorney was contingent on the granting of a continuance and Taylor expressed no dissatisfaction or disagreement with his present attorney, the trial court properly "treated the request as a request for a continuance" and denied the request. *Taylor*,

431 Md. at 636. At a subsequent hearing, the trial court again addressed the request for a postponement so that Taylor's proposed substitute counsel could prepare for trial. *Id.* The Court held that at neither hearing did Taylor express a desire to discharge and replace his attorney. *Id.* at 635–36 (finding no error where a court treated the defendant's request to replace counsel as a request for a continuance where the granting of a continuance was a clear condition precedent to the new counsel's appearance).

It follows from *Henry*, *Davis*, and *Taylor* that a request to substitute counsel that is contingent on, or a pretext for, the granting of a continuance does not amount to a discharge of counsel request implicating Rule 4-215(e). Therefore, it is a matter of discretion for a trial court to determine whether such a request is one for, or as in this case, in opposition to, a continuance and rule accordingly. *See Henry*, 184 Md. App. at 171 ("Thus, it appears that the court treated the request as a belated motion for a continuance, and we hold that there was no abuse of discretion in denying that request."); *Taylor*, 431 Md. at 637 ("Our investigation of the record of this proceeding produced no other evidence that [Taylor's counsel], Taylor, or the court treated Taylor's assertion as a request to substitute counsel implicating Md. Rule 4-215(e).").

Here, defense counsel's initial statement that Appellant "would rather represent himself and keep the same trial date" resulted in the circuit court's proper further inquiry into his wishes. *See Graves*, 447 Md. at 241–42. Although not specifically required, the administrative judge did comply with the first step of Rule 4-215(e) by providing Appellant with a forum to discuss the issue and specify his request. It is also clear from the record that the administrative judge provided more than cursory consideration to Appellant's

reasons. *See Taylor*, 431 Md. at 631. The court invited Appellant to speak at length, offered clarifying procedural information, and asked follow-up questions. Upon examination and Appellant's clarification, it became clear that Appellant did not have a present wish to discharge his counsel as per *Davis*. Rather, he repeatedly indicated his objection was to a postponement of his trial date; self-representation was simply a means of potentially achieving that goal.

It was a matter of discretion for the court to determine whether Appellant's comments are a request pursuant to 4-215(e), or are phraseology used as part of an opposition to the continuance under consideration. *See Henry*, 184 Md. App. at 171. Appellant contends that his request should properly be characterized as an assertion of the right to self-representation. The State, on the other hand, contends that Appellant's request to represent himself was withdrawn once Appellant stated, "I would like an attorney." This statement and the context in which it was made is helpful to understanding Appellant's request.

Appellant indicates in his reply brief, "What Appellant was expressing was that he would rather represent himself, despite the risk of proceeding *pro se*, than have to continue to wait for trial." We agree. Appellant's expressed goal was to avoid a postponement of his trial date. He stated that he would like to be represented by counsel, but that he did not want to wait any longer for trial. He did not express any dissatisfaction with his attorney or a wish to represent himself independent of the context of scheduling his trial. Appellant did not oppose a continuance because he wished to represent himself; his comments related solely to his opposition of the continuance request. *See Taylor*, 431 Md. at 638 (where a

request for a substitution of counsel which was contingent upon a continuance did not indicate a present desire to discharge counsel). Notably, once the continuance was granted, Appellant acted in accord with his words that he did want to be represented by counsel, i.e., he did not indicate dissatisfaction with or a desire to discharge his attorney, nor a desire to represent himself.

While this case is factually distinguishable from *Henry* in that here Appellant was opposing a continuance, rather than requesting one, *Henry*'s holding that this type of request does not demonstrate a present intent to discharge counsel is applicable. *Id.* at 171–72. The administrative judge's ruling, that he was "going to postpone this trial date," makes it clear that he understood Appellant's request as an opposition to the continuance. Therefore, the court acted within its discretion in making the determination that the request was an opposition to the continuance and ruled accordingly. Because Appellant did not express a present intent to discharge counsel, the court was not mandated to conduct a further 4-215(e) inquiry.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED BODY WORN CAMERA FOOTAGE.

At trial, the State called Officer Morgan Hercig ("Ofc. Hercig") to testify. Ofc. Hercig responded to Poppyseed Lane and worked to stabilize Toliver until paramedics arrived. The State sought to introduce video footage from Ofc. Hercig's body worn camera. The video recording was six minutes in length and depicted Ofc. Hercig providing aid to Toliver. The video also showed the bullet casing that was recovered from the scene. Appellant's counsel objected to the admission of the video, arguing that Ofc. Hercig had

already testified to the events depicted and that it was unduly prejudicial. After hearing from both parties, the court ruled:

> I have to find that the probative value is substantially outweighed by the prejudicial effect. And there is some probative value to seeing what happened on the scene. The video is likely the best evidence of what occurred at the scene as opposed to what somebody is relaying to it . . . . It also shows the likely measures taken to try to save his life, which would be, again, relevant to the case. The prejudicial value, again—I don't think the prejudice is there because of the nature of what happened. It's startling, but I think here it's sort of mitigated by the fact that nobody really disputes what happened, but rather [identity] is the main issue. So I don't see that it's going to inflame the jury and their passions necessarily rather than to just show them what had occurred. So, I'll overrule the objection. I don't find that it's necessarily inappropriate that there is some probative value in the video.

The video was then published to the jury by playing in open court.

A. Party Contentions

Appellant argues that the circuit court erred in admitting the video. He argues that it was not relevant, as it was cumulative of testimonial and photographic evidence, and because the only contested issue was identity. Appellant further argues that even if the video was relevant evidence, the circuit court abused its discretion in admitting it because the gruesome nature of the video was highly prejudicial in comparison to its minimal probative value on the issue of identity.

The State contends that the video was relevant because it depicted the scene of the crime, the victim's condition, and the presence of a bullet casing at the scene, all of which were facts of consequence. The State further asserts that the video was probative of the facts of the crime the elements of which the State had the burden of proving. The State

notes the parties did not stipulate to these facts, and that there was no unfair prejudice because the evidence depicted the facts of the crime.

B. Analysis

In determining the admissibility of video evidence, the trial judge must determine if the evidence is relevant and, if so, whether its prejudicial effect substantially outweighs its probative value. *State v. Broberg*, 342 Md. 544, 555 (1996).[3] Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Relevance is a "very low bar to meet." *Williams v. State*, 457 Md. 551, 564 (2018). Relevant evidence is generally admissible. Md. Rule 5-402. Relevant evidence may nevertheless be excluded when its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403.

Relevance is a legal determination which this Court reviews de novo. *Williams*, 457 Md. at 563. Whether relevant evidence should be excluded because its prejudicial effects outweigh its probative value is a matter of the trial court's discretion. *Broberg*, 342 Md. at 552. The trial court's discretion in this area is broad and will not be disturbed unless plainly arbitrary. *Grandison v. State*, 305 Md. 685, 729 (1986).

[3] *Broberg* and much of the case law discussed within this section concern the admissibility of photographic evidence. "The requirements for the admissibility of photographic evidence and video evidence are essentially the same." *Covel v. State*, 258 Md. App. 308, 323 (2023).

i. *Relevance*

"A photograph is relevant if it assists the jury in understanding the case or aids a witness in explaining [their] testimony[.]" *Thompson v. State*, 181 Md. App. 74, 95 (2008). Maryland courts "have found crime scene [] photographs of homicide victims relevant to a broad range of issues, including the type of wounds, the attacker's intent, and the modus operandi." *Broberg*, 342 Md. at 553. Here, as Appellant was charged with attempted murder, Toliver's wound, his condition upon the officers' arrival, and the presence of a bullet casing were all relevant to the jury's determination of whether Appellant had an intent to kill and other elements of the offense. The video assisted the jury in understanding the severity of the wound inflicted on Toliver, as well as illustrating Ofc. Hercig's testimony concerning the efforts taken to save Toliver's life.

Appellant's argument that identity was the only contested fact at issue does not render the video irrelevant. Regardless of whether Appellant disputed that an attempted murder had occurred, the State had the burden at trial of proving every element of attempted murder beyond a reasonable doubt. *See Newman v. State*, 236 Md. App. 533, 559 (2018) ("Even in a case where the defendant might not be challenging the establishment of his identity, it would still be incumbent on the State to prove the identity of the defendant and to establish his criminal agency."); *see also Johnson v. State*, 303 Md. 487, 503 (1985) ("We have previously held that photographs of the deceased are admissible even where the location of injuries was previously described and conceded by the defendant."). Appellant conflates the sole contested issue at trial with the "sole issue for jurors to determine." The jury was tasked with determining whether an attempted homicide took place and if so, in

what degree. The video was relevant to that determination.

ii. Probative Value and Risk of Unfair Prejudice

In making the determination that the probative value of the video was not outweighed by the risk of unfair prejudice, the trial court stated that the video was "likely the best evidence of what occurred at the scene" and "shows the likely measures taken to try to save [Toliver's] life . . ." In homicide cases, "photographic evidence may be highly probative of the degree of murder[,]" and may also be probative of intent and premeditation. *Roebuck v. State*, 148 Md. App. 563, 597, 599 (2002). The video was probative of whether the shooting of Toliver was attempted murder and whether it was premeditated, assisting the jury in reaching a verdict.

Appellant argues that the video was not relevant and lacked probative value because it was cumulative of evidence already admitted. He points to the trial court's statement during a bench conference that "the intent to kill is from shooting somebody in the face. And that's been fairly well established." Prior to offering the video, the State presented Ofc. Hercig's testimony and photographs pulled from her body camera depicting the scene and Toliver's injuries. The Supreme Court of Maryland has held that "photographs may be relevant and possess probative value even though they often illustrate something that has already been presented in testimony." *Broberg*, 342 Md. at 553. Photographic evidence tends to be cumulative, but this cumulative nature can be helpful to the factfinder because "photographs present more clearly than words what the witnesses were attempting to describe." *Id.* at 554 (internal quotation marks omitted). Here, the video helped to illustrate Ofc. Hercig's testimony.

The trial court noted that the video proved intent which was supported by other evidence that had been admitted, and then reasonably exercised its discretion in determining that the video still had probative value. *See Newman*, 236 Md. App. at 559. ("[T]he fact that any particular item of evidence might not have been indispensable for that purpose would not in any way diminish or erode its probative value. The State is not required to take a minimalist approach.").

On the the issue of prejudice, the court noted, "I don't think the prejudice is there because of the nature of what happened . . . I don't see that it's going to inflame the jury and their passions necessarily rather than just show them what had occurred." Admitting photographs of victims is seldom an abuse of discretion "even when such evidence tends to be more graphic than other available evidence." *Roebuck*, 148 Md. App. at 599 (internal quotation marks omitted). The trial court's assertion that the cumulative nature of the video reduced its risk of prejudice is supported by the principle that "since the photographs are mere graphic representations of undisputed facts already in evidence, their introduction could not be held to have injured the accused." *Grandison*, 305 Md. at 730.

Appellant does not point to any unique elements of this video that make it more egregious than evidence typical of that in a homicide trial. Appellant relies on *Arca v. State* for the proposition that the admission of photographic evidence is error where "the State has no real need to introduce the photographs" and therefore "there is nothing against which to balance any prejudice to the accused." 71 Md. App. 102, 105 (1987). This Court explained in *Newman* that because *Arca* involved the admission of a mugshot in a case where identity was not at issue, there was "an additional or contaminating factor that

transformed 'legitimate prejudice' into 'unfair prejudice'"—specifically, the inference of a criminal propensity created by a mugshot. *Newman*, 236 Md. App. at 561. Appellant does not point to any comparable contaminating factor that would create unfair prejudice here.

The trial court considered the nature of the video in context of the entire case and weighed the danger of unfair prejudice against its probative value. The court's decision was not arbitrary. Thus, the trial court did not abuse its discretion in admitting the video into evidence.

III. THE ISSUE OF WHETHER THE TRIAL COURT ERRED IN PERMITTING THE STATE TO QUESTION APPELLANT REGARDING OTHER WITNESSES IS NOT PRESERVED.

Appellant testified in his case. During cross-examination, the prosecutor inquired whether Crews and Fazenbaker had been untruthful during their testimony. Appellant's counsel objected to both questions, and both objections were sustained. After sustaining the second objection, the court informed the prosecutor at the bench that it was not appropriate to ask whether a witness had been lying, noting that "one witness is never called upon to judge the credibility of another witness." The court informed the prosecutor that she was permitted to ask whether a witness was mistaken. Appellant's counsel did not object to this instruction.

After receiving the court's instruction, the prosecutor asked Appellant, "So, do you believe Ms. Fazenbaker was mistaken when she testified that you were at her house on Poppyseed Lane earlier that day with [Crews]?" Appellant's counsel objected. At a bench conference following the objection, Appellant's counsel stated, "That is not her testimony. She actually said that she didn't—that somebody came in, but [] Fazenbaker did not testify

that she saw [Crews] come in, but she did not identify [Appellant].” The court sustained the objection.

The prosecutor returned to cross-examining Appellant, and the following exchange occurred:

> [Prosecutor]: Was [] Crews mistaken when she said that you were with her at Poppyseed earlier that afternoon?
>
> [Appellant]: Yes. She was.
>
> [Prosecutor]: And was [] Crews mistaken when she said you drove her and [Acevedo-Hodge] down to Tech Road to get drugs?
>
> [Appellant]: Both comments, she lied. She was more than mistaken.

Appellant’s counsel did not object to these questions nor move to strike the response.

A. Party Contentions

Appellant argues that the circuit court erred in allowing the prosecutor to inquire whether a witness was mistaken. He argues that there is no difference in asking whether a previous witness was “lying” and asking if they were “mistaken” because both force the witness on the stand to assess whether the previous witness was telling the truth.

The State asserts that Appellant’s challenge is not preserved because he did not object at trial. The State further contends that, even if this Court finds that Appellant’s challenge is preserved, it is without merit because rephrasing the questions from “lying” to “mistaken” did not force Appellant to testify that another witness was untruthful. The State asserts that there could be many reasons why a prior witness might have been mistaken and therefore the questions did not place witness credibility in issue.

B. Analysis

"Ordinarily, an appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a).

> An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs.

Md. Rule 4-323(a). A contemporaneous general objection to the admission of evidence is sufficient to preserve all extant grounds for its inadmissibility. *Boyd v. State*, 399 Md. 457, 476 (2007). However, a general objection becomes specific where counsel voluntarily advances reasons to support the objection; a specific objection limits the grounds for appeal to those explicitly raised in the trial court. *DeLeon v. State*, 407 Md. 16, 25 (2008).

Appellant's counsel noted an objection to the first of three "were-they-mistaken" questions. Standing alone, this would serve as a general objection from which Appellant could argue that the form of the question was improper. However, a bench conference immediately followed the objection at which Appellant's counsel explained his grounds for the objection. Appellant's counsel asserted that the prosecutor had incorrectly stated that Fazenbaker had identified Appellant during her testimony. These were the only grounds for objection Appellant advanced. Thus, Appellant's objection to the question was not a general objection and did not preserve his present challenge to the "were-they-mistaken" form of the question. Appellant raised no objection to the subsequent two "were-they-mistaken" questions nor was a continuing objection requested. The issue of whether

the prosecutor's questions were phrased in a manner that improperly elicited testimony about another witness's credibility is therefore not preserved for appellate review.

Even if we were to find this issue was preserved, we would not find that the trial court erred. To be sure it is error for a trial court "to permit to go to the jury a statement, belief, or opinion of another person to the effect that a witness is telling the truth or lying." *Bohnert v. State*, 312 Md. 266, 277 (1988). Thus, trial courts are not to permit attorneys to ask a witness whether another witness was lying. *Hunter v. State*, 397 Md. 580, 589, 595–96 (2007). Courts have articulated a variety of reasons for this prohibition, including that such questions

> are overly argumentative; they create the risk that the jury may convict the defendant unless it concludes that the other witnesses are lying; they are unfair because *they create a false dilemma that excludes the possibility that the other witnesses are merely mistaken*; and they require a defendant to risk alienating the jury by accusing other witnesses of perjury.

Walter v. State, 239 Md. App. 168, 186 (2018) (internal quotations omitted, emphasis added). Thus, "were-they-lying" questions are impermissible as a matter of law. *Id.* Here, the questioning the court permitted focused on mistake as opposed to credibility. Hence, we see no error.

IV. We Decline to Engage in Plain Error Review of the Unpreserved Issue regarding the State's Closing Arguments.

Plain error review is an infrequent discretionary exception to the preservation requirement in Rule 8-131(a) and is "reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Newton v. State*, 455 Md. 341, 364 (2017) (internal quotation marks omitted). "[A]ppellate review

under the plain error doctrine '1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.'" *White v. State*, 223 Md. App. 353, 403 n.38 (2015) (quoting *Hammersla v. State*, 184 Md. App. 295, 306 (2009), *cert. denied*, 409 Md. 49 (2009)). As such, Appellate discretion to consider unpreserved issues should be exercised only "rarely," as our system ordinarily requires that all challenges to the trial court's action be in the first instance presented to that 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." *Kelly v. State*, 195 Md. App. 403, 413 (2010) (citations and quotations omitted).

In order to exercise our plain error discretion, four conditions must be satisfied:

> (1) there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant; (2) the legal error must be clear or obvious, rather than subject to reasonable dispute; (3) the error must have affected the appellant's substantial rights, which in the ordinary case means [they] must demonstrate that it affected the outcome of the [trial] court proceedings; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.

Newton, 455 Md. at 364 (internal quotation marks omitted) (quoting *State v. Rich*, 415 Md. 567, 578 (2010)).

Here, Appellant challenges the circuit court's exercise of discretion, or lack thereof, regarding control of the prosecutor's closing argument. Attorneys are afforded "great leeway" in making their closing arguments and "may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Degren v. State*, 352 Md. 400,

429–30 (1999). Trial courts have broad discretion to determine impropriety in closing arguments, and the trial court's judgment will not be disturbed unless it is a clear abuse of discretion which prejudiced the defense. *See Grandison v. State*, 341 Md. 175, 225 (1995). When improper statements are made during closing argument, their prejudicial effect is assessed using several factors: "the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Spain v. State*, 386 Md. 145, 159 (2005).

Appellant challenges the cumulative prejudicial effect of six statements made by the prosecutor during closing arguments, which he identifies as arguing facts not in evidence or mischaracterizing evidence. The six statements amount to several misattributions of testimony, which were not objected to; several statements that did elicit objections, one of which was sustained and one of which resulted in a curative instruction; and an issue raised *sua sponte* by the court and resolved by counsel. Appellant acknowledges that he has not preserved the issue he now raises but nevertheless asks this Court to review the issue under the plain error doctrine. The State argues that plain error review is not warranted here because the trial court retains broad discretion to control the scope of closing argument and because the challenged statements are partially supported by facts in evidence.

Appellant did not object to several of the statements he now challenges, nor did he raise an issue related to the cumulative effect of such.[4] "Ordinarily, an appellate court will

[4] We note that Appellant did raise objections at trial to two statements he now challenges. However, Appellant does not allege that the court's rulings on those objections were abuses of discretion, nor would the record support a finding that these rulings fell outside the circuit court's broad discretion. *See Grandison*, 341 Md. at 225; *Spain*, 386 Md. at 159

not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). To preserve a claim of error regarding a prosecutor's closing argument, the defendant must make an objection during the argument. *Shelton v. State*, 207 Md. App. 363, 385 (2012). Limiting appellate review to preserved issues "is a matter of basic fairness to the trial court and to opposing counsel, as well as being fundamental to the proper administration of justice." *In re Kaleb K.*, 390 Md. 502, 513 (2006) (internal quotation marks omitted).

Plain error review is not warranted here. To be sure, it is not proper for attorneys to comment on facts not in evidence during closing argument. *Donaldson v. State*, 416 Md. 467, 489 (2010). However, the statements Appellant challenges are not so egregious as to warrant reversal. The challenged statements, although not without issue, each have some basis in the evidence admitted at trial. *See Degren*, 352 Md. at 430–31. As the trial court has broad discretion in regulating closing argument, we conclude that there is no clear or obvious error in the circuit court's exercise of discretion here.

Appellant cites *Lawson v. State* as a basis for reversal under the plain error doctrine. 389 Md. 570 (2005). We do not find *Lawson* analogous. In *Lawson*, the prosecutor's closing argument included improper Golden Rule arguments, burden-shifting statements, appeals to fear and prejudice, and explicit implications of the defendant's risk of future criminality. *Id.* at 594–600. Here, the statements Appellant now challenges do not rise to the level of those in *Lawson*. The circuit court exercised its discretion by taking appropriate

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(where the Supreme Court of Maryland held that the trial court's curative instruction helped to correct the risk of prejudice engendered by the prosecutor arguing facts not in evidence).

remedial measures, such as a corrective instruction, as warranted. We decline to exercise plain error review.

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