Circuit Court for Anne Arundel County
Case No. C-02-CR-18-000515

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1359

September Term, 2021

JOSEPH LEISSLER

v.

STATE OF MARYLAND

Wells, C. J.,
Nazarian,
Salmon, James P.,
Senior Judge, Specially Assigned,
JJ.

Opinion by Salmon, J.

Filed: November 28, 2022

In August 2016, John O'Sullivan ("O'Sullivan") was an inmate at Jessup Correctional Institute ("JCI") located in Anne Arundel County, MD. He was the leader of a prison gang known as Dead Man Inc. ("DMI"). On August 14, 2016, O'Sullivan was stabbed multiple times resulting in his death. The inmates that stabbed O'Sullivan were Brian Hare ("Hare"), Vincent Bunner ("Bunner") and Calvin Lockner ("Lockner"). His murder was captured on videotape. Several photographs of the victim, the knives ("shanks") used, and the assailants with blood on their hands, were taken by responding officers and crime scene technicians. DNA evidence extracted from the knives matched the profiles of Hare, Bunner and Lockner.

A fourth inmate, Sean Almony ("Almony"), was not at the scene of the murder but was an accessory to that murder because he helped plan it and gave Bunner a knife, knowing Bunner was going to use it to attack O'Sullivan.

Appellant, Joseph Leissler ("Leissler"), was also an inmate at JCI in August of 2016.

In the eighteen months after O'Sullivan's murder, investigators developed evidence that appellant, in his capacity as the leader in all Maryland prisons of the Aryan Brotherhood ("AB"), gave the order to murder O'Sullivan, which was carried out by Bunner, Lockner and Hare. Accordingly, on March 8, 2018, appellant was indicted in the Circuit Court for Anne Arundel County on five counts:

1. Murder in the first-degree;
2. Supervising a criminal gang;

3. Participating in a crime in association with a criminal gang resulting in death;

4. Participating in a criminal gang; and

5. Conspiracy to commit murder in the first-degree.

Appellant was tried before an Anne Arundel County jury in a six-day trial that commenced on August 18, 2021. He was convicted on all counts and was sentenced as follows:

1. Life without parole on Count 1 – Murder in the first-degree.

2. 20 years incarceration on Count 2 – Supervising a criminal gang, sentence to run concurrent with Count 1.

3. 20 years incarceration on Count 3 – Participating in a crime in association with a criminal gang resulting in death, sentence to run concurrent with Count 1.

4. Count 4 merged for sentencing into Count 2 under the Rule of Lenity; and

5. Life sentence on Count 5 – Conspiracy to commit murder in the first-degree, sentence to run concurrent with Count 1.

All of appellant's sentences were to run concurrent with a life sentence plus thirty-five years, imposed in 1994. He was serving that last mentioned sentence when the murder of O'Sullivan occurred.

Appellant filed this timely appeal in which he raises four questions[1] that we have reworded as follows:

> 1. Did the circuit court err when, over objection, it allowed the State's primary witness, Sean Almony, to testify that he was extremely fearful of being killed because of the testimony he was giving in the circuit court against appellant?
>
> 2. Did the trial court err when it informed the jury that the court was coordinating the movements of Department of Corrections personnel so that witnesses from the Department of Corrections would not be in the courthouse simultaneously?
>
> 3. Did the circuit court commit plain error when it allowed Sergeant Christopher Taylor, of the Maryland State police, to improperly vouch for the State's accomplice witness (Almony) when Sergeant Taylor described Almony's testimony at trial as being consistent with prior testimony Almony had given against co-defendants Lockner and Bunner at prior proceedings?

[1] Appellant phrases the questions presented as follows:

> A. Did the [c]ircuit [c]ourt err when it allowed the State's primary witness (Almony) to express extreme fear of being killed for testifying against the Appellant and then validating the witness's credibility by informing the jury that the Court was coordinating the movement of DOC witnesses so they would not be in the courthouse simultaneously?
>
> B. Did the [c]ircuit [c]ourt commit plain error by allowing the State to improperly vouch for the State's accomplice witness (Almony) when the court admitted testimony from the State's designated representative at trial describing the accomplice's testimony as being consistent with his prior testimonies against two other co-defendants (Bunner and Lockner) and by allowing the prosecution to argue facts to the jury that were not in evidence and which violated the [a]ppellant's presumption of innocence.

4. Did the trial court commit plain error when it allowed the prosecutor to argue, without objection, facts to the jury that were not in evidence "and which violated the [a]ppellant's presumption of innocence?"

For the reasons set forth below, we shall answer all four questions in the negative.

I.

EVIDENCE PRESENTED AT TRIAL[2]

A. Testimony About the Aryan Brotherhood

The AB is a relatively small gang within the Maryland prison system. It uses Nazi and devil symbols to intimidate other gangs in order to reduce the likelihood of its members being attacked by members of rival gangs. The AB employs swift and violent retaliatory measures when its members are attacked. Attacks by the AB are designed to kill in the presence of witnesses in order to promote AB's intimidation goals.

The central issue at appellant's trial was which member of the AB gave the order to have O'Sullivan killed. Appellant contended it was Sean Almony. Almony said it was appellant.

[2] Our summary of the facts developed at trial is not intended to be comprehensive. We have summarized only those facts that are either directly related to the questions presented by appellant or facts necessary to put those facts in context. Parts of our summary are undisputed facts that we have quoted, without direct attribution, from the facts as set forth by the State and appellant in their briefs.

B. Testimony of Sean Almony

Mr. Almony was the State's most important witness against appellant and was the first inmate witness to testify at trial. While Almony was in the courtroom, his legs were shackled and an officer was strategically positioned near him.

Almony, age 37 at the time of trial, entered the Maryland prison system as a juvenile in 2003 after he was sentenced to life without parole for murder. Prior to joining the AB in 2008 or 2009, he had been frequently attacked by members of the Black Gorilla Family ("BGF"), the largest organized gang in the Maryland prison system. His motive for joining the AB, in part, was that he believed that the AB would provide a means of protecting him against attacks from the BGF.

In 2011, Almony became a member of AB's leadership council and the number two man in the AB organization in the Maryland prison system. The AB council made major decisions for the gang including whether to attack a rival gang member. At that time, appellant "was like a father" to Almony.

Almony testified, without objection, that to be a member of the AB, one "had to be willing to kill for the Aryan Brotherhood." He admitted participation in, and ordering, the murder of other prisoners while an AB member. According to Almony, "[a]ny type of cooperation" with law enforcement was "against the [AB] rules." Members who broke those rules would face sanctions, including "being put in the hat," which meant the AB members agreed to be murdered. According to Almony, once you are "in the hat,"

somebody is going to "try to kill you or try to hurt you as bad as they possibly can, and it never stops."

Almony testified that appellant was the founder of the Maryland Chapter of the AB and "would always be in charge of the State of Maryland." As the "head of the Aryan Brotherhood," appellant had final say in any AB activities anywhere in the Maryland prison system. According to Almony, at the time of O'Sullivan's murder, he disobeyed appellant's command that he [Almony] "be positioned in the shower with the other AB members," and instead, Almony purposefully locked himself in his cell. Had appellant known that Almony had done so, he (Almony) "would have been put in the hat." Almony further testified that appellant, who was suspicious about Almony's absence from the scene of O'Sullivan's murder, thereafter ordered Almony to kill a different prisoner. When Almony refused, appellant told Almony: "Then we're going to kill you; you're getting it."

Almony, in 2016, was aware that, due to a Supreme Court decision, he was entitled to seek a re-sentencing hearing because he was a juvenile when he received a life without parole sentence.

Almony described why he decided to cooperate with the State in the subject case. Almony said he had only three options. He could either attack the AB first, which he was not "really willing to do," let them attack him and hope they didn't kill him, or work with the Maryland State police.

Almony made his decision to leave the AB in December 2016. In May 2017, Almony told his lawyer that the AB was "going to probably hit [him]" the following Monday. Almony's attorney contacted the Maryland State police and Almony was moved to another part of the JCI facility. Without objection, Almony testified that he was in "real fear" of being murdered and that his desire to leave the AB prompted him to cooperate with authorities to "dismantle" the gang.

On July 12, 2019, Almony entered into a plea agreement with the State that provided Almony immunity from prosecution for any statements he made regarding any crimes he had committed, including the O'Sullivan murder. Under the written terms of the plea agreement, it was stipulated that when Almony appeared for resentencing, the State would recommend that the judge not change his life without parole sentence. Almony's resentencing hearing was set to be heard in November 2021.

In exchange for his testimony against the appellant, Bunner and Lockner, Almony was never charged for participating in the murder of O'Sullivan even though he helped plan the murder and handed Bunner the knife used to kill O'Sullivan.

Almony testified for the State in a trial against Bunner and Lockner in 2019 and for the defense in a retrial of Bunner and Lockner in 2020.

Almony testified at appellant's trial about AB's structures, codes, methods, membership and secrets including details about six assaults on inmates that were ordered by appellant and sanctioned by the AB, the AB's involvement in drug distribution within

the prison system, and how AB members communicated with one another both inside and outside of the Maryland prison system.

According to Almony, though the AB council was used as a sounding board for decision making by appellant, appellant ultimately made all important AB decisions, including the decision to have O'Sullivan murdered. Almony testified that the murder of O'Sullivan was in retaliation for a DMI assault on Sean Jones, an AB member housed at a different Maryland prison.

Appellant ordered retaliation against O'Sullivan to occur on August 7, 2016 if the opportunity presented itself, but the appellant relented, at Almony's request, in favor of an attempt to reach a compromise with DMI.

On August 13, 2016, the appellant received information that Sean Jones had lost an eye in the attack by a DMI member. As a result, the appellant planned and ordered the O'Sullivan murder. Almony claimed that he protested appellant's decision but admitted that he thereafter helped plan the murder. Almony said that he participated in the murder only to prevent himself from being killed by the appellant for disobeying an order.

Almony admitted that he denied any knowledge of the O'Sullivan murder when he was interviewed by Sergeant Christopher Taylor, of the Maryland State police, on the date of the murder. Five days after the crime was committed, Almony also told Stephanie King, who was a close friend, that neither he nor appellant had any involvement in O'Sullivan's murder. Also, he admitted that when he was interviewed in November 2016, about one month before he decided to leave the AB, he told a Maryland

State police intelligence officer that O'Sullivan's murder was "rogue retaliation" for which neither he nor appellant was responsible. On cross-examination, Almony admitted that at the trials of Bunner and Lockner, he testified that he, not appellant, was the AB member whom the AB members feared to disobey.

C. Testimony of Lieutenant David Roman

Nine days before the murder of O'Sullivan, Lt. David Roman, an Intelligence ("Intel") officer for DOC, interviewed the appellant and Almony out of concern that a recent attack on Sean Jones, an AB member at the Maryland Correctional Institute in Hagerstown ("MCIH"), would provoke retaliation by the AB inside JCI. Lieutenant Roman described both the appellant and Almony as AB leaders, but said "the main person that was speaking" for the AB on that date was Almony. Lieutenant Roman wrote a report after that interview in which he described Almony as doing all of the talking with the appellant contributing nothing to the conversation.

In a report Lt. Roman wrote about an interview after O'Sullivan's murder, Lt. Roman recounted what was said by appellant and Almony. In that report, he wrote that Almony was the one "barking out orders" to other AB members.

D. Testimony of Brian Hare

At the time of the O'Sullivan murder, Brian Hare was an AB "prospect" but not an AB member. Because Hare's participation in the O'Sullivan murder was captured on surveillance video, Hare knew, in February or March 2017, that the State had a very strong case against him regarding that murder. At about this time, Hare wrote a letter to

law enforcement stating that he wanted out of the AB and asserted that the appellant had placed a "hit" on him for abandoning the gang.

Almost two years later, on February 13, 2019, Hare agreed to plead guilty to the first-degree murder of O'Sullivan and to testify in the State's case against appellant, Bunner and Lockner in exchange for being supplied with a television in his cell and for the State's agreement that it would recommend that he not be sent to a prison outside of Maryland. In accordance with the plea agreement, Hare did testify for the State against Bunner and Lockner.

Hare testified at appellant's trial that he joined the plot to attack O'Sullivan to avoid himself becoming the subject of an AB "hit." He acknowledged, however, that he had previously told investigators that he agreed to help kill O'Sullivan so that he could become an AB member.

Hare testified that both appellant and Almony were involved in the planning of the O'Sullivan murder. Hare admitted that he stabbed O'Sullivan several times using a knife that he had personally crafted and that he threw the knife used in the stabbing into a toilet after the attack. Hare said that he decided to testify against appellant because appellant ordered that he be killed. Hare further testified, without objection, that he was "98%" certain that he was "going to die" because he "just testified on two [AB] cases."

E. Testimony About Vincent Bunner

Vincent Bunner was, at all times here pertinent, a member of the AB. As mentioned, his participation in O'Sullivan's murder was captured on videotape.

A birthday card addressed to Bunner and signed by the appellant, Lockner and other AB members, was seized from Bunner's cell in 2018 when he was arrested and charged in the O'Sullivan murder. According to the testimony of a gang expert, that card contains symbols used by AB members to refer, indirectly, to the killing of O'Sullivan and the members' joyful sentiments over O'Sullivan's death.

F. Testimony About Calvin Lockner

In 2016, Lockner was a full member of the AB and held the position of sergeant at arms. According to a State gang expert, as the sergeant at arms, Lockner would not have the authority to authorize the killing of O'Sullivan.

G. Testimony of Sergeant Christopher Taylor of the Maryland State Police

Sergeant Taylor was the lead homicide investigator of the O'Sullivan murder. He was the last witness called by the State and he was present when Almony testified. He testified that Almony told him, on the date of the murder, that he knew nothing about it.

Although he testified in regard to several other matters concerning the O'Sullivan murder, his most relevant testimony, insofar as this appeal is concerned, was as follows:

> [PROSECUTOR]: And I want to direct your attention then to were you aware of Mr. Almony testifying in two prior proceedings?
>
> [SERGEANT TAYLOR]: Yes.
>
> [PROSECUTOR]: And did he testify consistent with what he testified to today – or yesterday?
>
> [SERGEANT TAYLOR]: Yes.

H. Testimony of Lieutenant David Barnhardt

Lieutenant Barnhardt, an intelligence officer at the North Branch Correctional Institute, was accepted by the court as an expert in "gang organization, recognition, hierarchy, history and structure" of the AB. Lieutenant Barnhardt opined that the killing of O'Sullivan by Hare, Bunner and Lockner, was a "sanctioned hit" that would only have occurred if it was authorized by a leader of the AB. This conclusion was based, in significant part, on his opinion that an unsanctioned attack on a rival gang member would have resulted in retaliation by AB members against those attackers for acting without AB approval. Lieutenant Barnhardt did not learn of any mailings or phone calls referring to retaliation against Hare, Bunner or Lockner during the last five years.

Bunner, Lockner, Hare, Almony and appellant were all moved to the most secure maximum prison in Maryland after the O'Sullivan murder where they were soon, but not immediately, segregated from each other and had little or no contact or communication with other inmates during the last five years leading up to appellant's trial.

I. Testimony of Appellant

Appellant testified that in the summer of 2016, his mother had stage IV terminal cancer. During this time, he was also going to the prison library "almost every single day" to work on a post-conviction petition he planned to file in regard to a prior conviction. When his post-conviction petition was filed, he intended to assert that his appellate counsel provided him with ineffective assistance.

Appellant testified that he loved his mother very much because she had never abandoned him. In the summer of 2016, he was preparing for his mother's visit, which was scheduled to take place on September 10, 2016. He knew that because his mother was dying of cancer, the September visit would be her last. Because of that impending visit, he did not want any retaliation against O'Sullivan, or anybody else, by members of the AB gang because he knew that if such an attack were to occur, his scheduled visit with his mother would be cancelled. According to appellant, he relinquished his AB leadership responsibility before the plot to kill O'Sullivan was formed. When he did so, Almony took over as the leader of the AB. Appellant relinquished leadership in order to focus his energies on his post-conviction effort and to avoid risking the denial of his last visit with his mother. Also, he relinquished leadership responsibilities, prior to O'Sullivan's murder, because those responsibilities put him under a great deal of stress.

As it turned out, appellant's visit with his mother was canceled due to the O'Sullivan murder. His mother died one week after she had been scheduled to visit with him. He testified, surprisingly, that even though AB members often had Nazi tattoos and used Nazi symbols, and he had been the leader of the AB in Maryland prisons, he did not personally dislike either blacks or Jews. He further testified that he was not entirely an "evil person" and that in many respects he was compassionate.

In sum, he testified that the order to kill O'Sullivan did not come from him but came from Almony and that when he heard about the attack, he was furious because he knew that the incident would prevent him from seeing his mother for the last time.

Appellant admitted on cross-examination that he put a death sentence on Almony. The following exchange is relevant:

> [APPELLANT]: I tell Michael Gross [an AB member], *I want* Almon[y] *dead*. I want Michael Gross. I want Vincent Bunner dead. I want Calvin Locklear [sic] dead. I want f****ing Brian Hare dead. . . .
>
> And it is a totality and I told [Almony] and *I said this to him numerous times*. *You are going to make me f***ing kill you*. *You are going to make me kill you*. *And that is exactly how I feel*.
>
> [THE PROSECUTOR]: So now – –
>
> [APPELLANT]: And that is exactly how I feel.
>
> [PROSECUTOR]: So now you have just admitted to this jury, that you sought from another Aryan Brother – – you put a death sentence on Mr. Almony, Mr. Lockner and Mr. Bunner – –
>
> [APPELLANT]: *They put the death sentence on themselves*.
>
> [PROSECUTOR]: – – is that correct?
>
> [APPELLANT]: All I am doing – –
>
> [PROSECUTOR]: You ordered a death sentence – –
>
> [APPELLANT]: All I am doing – – can I answer the question? All I am doing . . . [i]s validating that.

J. Testimony of Frederick Neumayer

Mr. Neumayer, an AB member, corroborated appellant's testimony that at the time of O'Sullivan's murder, Almony, not appellant, was the leader of the AB.

Additional facts will be set forth in order to answer the questions presented.

II.

QUESTION ONE

Almony's Fear of Death

The State concluded its direct examination of Almony with the following exchange:

> [STATE:] [W]hat, if any, concern do you have for your own personal safety, Mr. Almony?
>
> [ALMONY:] I'm absolutely terrified – –
>
> [DEFENSE COUNSEL I:] Objection.
>
> [DEFENSE COUNSEL II:] Objection.
>
> THE COURT: Overruled.
>
> [ALMONY]: I'm absolutely terrified that it's a high probability that I'm going to be killed in prison because of this.
>
> [STATE:] Because of what?
>
> [ALMONY:] Because of me coming here and telling everything that I have.

Appellant argues that the trial judge committed reversible error when she overruled his objection to the question as to whether Almony had "concern[s]" for his own "personal safety." Appellant contends that the objection should have been sustained because the answer to the question was irrelevant. Alternatively, appellant contends that if this Court were to rule that the answer to that question was relevant, then the prejudicial value of that answer far outweighed its probative value.

Before discussing the merits of appellant's argument, it is useful to briefly discuss our standard of review.

Relevancy is a legal issue reviewed *de novo*, *State v. Simms*, 420 Md. 705, 725 (2011), quoting *Thomas v. State*, 372 Md. 342, 350 (2002) ("'The fundamental test in assessing admissibility is relevance.'"). If the trial court's legal conclusion to admit evidence was error, then the State must show that the error was harmless beyond a reasonable doubt. *Dorsey v. State* 276 Md. 638, 659 (1976). If the evidence is relevant, then the admission or exclusion of that evidence is reviewed for an abuse of discretion.

"'Relevant evidence' means evidence having 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. The bar for relevancy is "low." *Otto v. State*, 459 Md. 423, 452 (2018); *Williams v. State*, 457 Md. 551, 564 (2018) (describing relevancy as "a very low bar to meet").

The State contends that any objection to the question as to Mr. Almony's fear was waived, because, prior to that testimony, Almony had testified, without objection, that at the time he decided to cooperate with the State, he had a "real fear" that the AB was going to have him killed. "Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection." *DeLeon v. State*, 407 Md. 16, 31 (2008). The State points to the following exchange during Almony's direct testimony:

> [STATE]: Did you have a real fear that you were going to be killed?
>
> [ALMONY]: Absolutely. Especially when I found out they were making a knife.

[STATE]: How did you know that?

[ALMONY]: Joe Davis told me.

[STATE]: Did there come a time when you reached out to law enforcement?

[ALMONY]: Yes, ma'am.

[STATE]: Do you remember when that was?

[ALMONY]: Initially I spoke to Intel, and I did not disclose anything about the murder in Jessup. I just told him that I wanted to leave the AB and that I would help DOC dismantle the leadership of the AB, that I had already started doing such things. And he asked me if I would speak to detectives about the homicide, and I said not without my attorney.

The objected to testimony by Almony very closely parallels what he said earlier when he explained, without objection, why he had decided to cooperate with the State. Because of that unobjected to parallel testimony, it is impossible to envision how appellant could have been prejudiced by Almony's later testimony that he still had the same fear at the time of trial that he had earlier when he had made the decision to cooperate with the State police.

Even if we were to assume, *arguendo*, that appellant's relevance argument was not waived, appellant would not benefit. We explain:

Appellant argues:

Almony's testimony against the Appellant was extensive. The State had no problem eliciting details from Almony. He freely implicated the Appellant in a host of prior bad acts, ill motivations, discriminatory beliefs, and criminal conduct. Almony was eager and willing to assist the State's prosecution of the Appellant. Almony freely recalled and related events to the jury as Almony chose to characterize them. He was a willing and

> enthusiastic witness against the Appellant. Consequently, Almony's state of mind was not relevant as substantive evidence or as rehabilitative evidence for Almony's credibility.

The State counters:

> In an effort to call into question Almony's motives and veracity, Leissler characterizes Almony as an "eager" witness and claims that Almony's willingness to testify renders his state of mind irrelevant. *See Howell v. State*, 465 Md. 548, 550 (2019) ("No one is eager to testify in a criminal trial. If a witness is, it likely calls into question the motives and veracity of that witness."). Whether Almony was an "eager" witness and, if so, what significance to ascribe that factor when assessing his credibility was a task reserved exclusively for the jury. Almony's willingness to cooperate with the State did not render his fear or state of mind irrelevant. To the contrary, his fear was relevant because it explained his willingness to cooperate against the Aryan Brotherhood, an organization in which he had served as an active member for years. Almony's fear was relevant to his credibility and it was properly used for that purpose.

(References to appellant's brief deleted.)

We agree with the State's argument that Almony's statement that he still feared for his life was relevant. According to Almony's testimony, the appellant said he intended to have him killed. By saying he feared for his life, Almony, in effect, communicated to the jury that he believed that the threat was real.

Few people would remain loyal to a person or organization that intended to kill him or her, especially if that intent caused great fear. That being so, Almony's fear explained why he was disloyal to appellant and the AB.

In addition to all of the above, we agree with the State that even if we were to agree with appellant that the trial judge erred in overruling his objection to Almony's testimony that he had concerns for his safety, any error would be harmless beyond a

reasonable doubt. The appellant, himself, testified that he had threatened to kill Almony and, at trial, appellant acknowledged that he still wanted Almony killed. That being so, it cannot be seriously argued that appellant was prejudiced when the jury learned that Almony feared for his life because he believed that the threat would be carried out.[3]

III.

QUESTION TWO

The Trial Judge's Statement About Scheduling

At the conclusion of Almony's testimony on direct, the trial judge decided that she would postpone cross-examination of Almony until the State called Hare, who was incarcerated at the Maryland Department of Corrections. Out of the presence of the jury, the judge expressed her concern about Hare arriving at the courthouse while Almony was being cross-examined.

[3] Appellant contends that the objected to testimony severely prejudiced him. But his only argument in that regard is that the objected to statement communicated to the jury that it had to convict him to keep Almony safe. There is no merit in that contention. The jury knew that if they acquitted appellant, he still would remain in prison because he had been sentenced in 1993 to life plus thirty-five years. In other words, Almony's safety would not be affected. Moreover, no evidence was introduced from which it could be inferred that the length of the sentence Almony was then serving would be adjusted depending on whether appellant was convicted. In fact, the jury knew that despite Almony's testimony against appellant, at Almony's re-sentencing hearing, the State was going to recommend to the sentencing judge that Almony's life without parole sentence not be changed.

After concluding the bench conference, the trial judge spoke directly to the jury, with Almony still on the stand, to let the jury know the court's scheduling plan. The trial judge said:

> Okay. At this point in time, just to try to plan for timing, this is what is going to happen. Mr. Almony, as well. I don't want to - - the [d]efense has the right to cross[-]examine him, and I don't want to cut that short and I don't want to break it up in the middle. I don't think that is fair to have half of cross today and half of cross tomorrow morning. So I am not asking [c]ounsel to do that.
>
> What we are going to do is we are actually, Mr. Almony, going to have you come back tomorrow morning for cross. Okay? So he is going to leave. I know. I see the shaking of the head [by Almony]. I tried. But we are not going to get it done. Okay?
>
> So we are going to bring him [Almony] back tomorrow morning for cross. He will be the first witness tomorrow morning.
>
> The other witness from the Division of Corrections I really don't want here until the afternoon so that we are not all together. But we can talk about that at the end.

(Emphasis added.)

Appellant argues that uttering the words about scheduling in the part of the sentence that we have emphasized constituted error. He argues:

> The judge's comments validated Almony's fears to the jury. Although the judge used the pronoun "we" in reference to the persons that she did not want all together," the context of her disclosure conveyed to the jury that the court was coordinating prisoner transports to keep Almony safe from other DOC inmates while Almony was in the courthouse. The court's expression of concern to the jury *on the heels of Almony's testimony* that he was "absolutely terrified" of being killed for his testimony against the [a]ppellant *compounded the prejudicial effect* of the erroneous admission of Almony's testimony by giving it credence.

At trial, appellant's lawyers did not object to the court's statement about scheduling. Thus, the argument is not preserved for appellate review. *See* Maryland Rule 8-131(a) (Except for jurisdictional issues, an appellate court will not ordinarily decide any other issue that is neither raised nor decided in the trial court). *See, e.g.*, *Bates v. State*, 127 Md. App. 678, 703 (1999), *overruled on other grounds by Tate v. State*, 176 Md. App. 365 (2007) (argument about prosecutor's improper comments not preserved for appellate review when "counsel neither objected when the argument was made nor at any later point [and] did not request a mistrial or a curative instruction"). Moreover, appellant does not contend in his brief that the court's statement constituted "plain error." *See* Md. Rule 8-504(a)(6) (a brief shall contain "[a]rgument in support of the party's position on each issue").

IV.

QUESTION THREE

Sergeant Taylor's Unobjected to Testimony That Almony's Trial Testimony Was Consistent With Testimony He Had Given In Two Prior Proceedings

As mentioned, page 11, *supra*, Sergeant Taylor, the State Police detective who investigated the O'Sullivan homicide, testified without objection that Almony's testimony that he had given in the subject case was consistent with the testimony Alimony had given in "two prior proceedings."

Appellant argues that the trial judge committed "plain error" when she allowed this testimony. Before discussing appellant's argument, it is important to first discuss the very limited application of the plain error doctrine.

In *State v. Rich*, 415 Md. 567, 578 (2010), the Court of Appeals set forth the test for plain error review as follows:

> [P]lain-error review—involves four steps, or prongs. First, there must be an error or defect—some sort of [d]eviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings. Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings. Meeting all four prongs is difficult, as it should be.

(Quotation marks and citations omitted.)

In *Burris v. State*, 206 Md. App. 89, 139 (2012), Judge Shirley Watts, speaking in this Court said:

> Plain error review is extraordinary so as to encourage trial counsel to preserve the record. "If every material (prejudicial) error were *ipso facto* entitled to notice under the 'plain error doctrine,' the preservation requirement would be rendered utterly meaningless." *Morris and Everett v. State*, 153 Md. App. 480, 511 (2003), *cert. denied*, 380 Md. 618 (2004). "[T]he fact that a material error has resulted in prejudice to the accused does not *ipso facto* call for the appellate court to entertain the contention notwithstanding its non-preservation." *Austin v. State*, 90 Md. App. 254, 264 (1992) (quoting *Sine v. State*, 40 Md. App. 628, 632 (1978)). Because it is so extraordinary, "the 'plain error doctrine' 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Morris and Everett*, 153 Md. App. at 507.
>
> Appellant's plain error argument is as follows:
>
> "Vouching typically occurs when a prosecutor 'place[s] the prestige of the government behind a witness through personal assurances of the witness's veracity . . . or suggest[s] that information not presented to the jury supports the witness's testimony.'" *Spain v. State*, 386 Md. 145, 154

> (2005), quoting *U.S. v. Daas*, 198 F.3d 1167, 1178 (9th Cir.1999) (citations omitted). . . .
>
> Sgt. Taylor was designated as the State's representative under Md. Crim. Pro. Code § 11-302 (2015). Sgt. Taylor was, therefore, personally present before the jury observing Almony testify against the [a]ppellant. The jury had the opportunity to see how attentive Sgt. Taylor was to Almony's testimony.
>
> The State called Sgt. Taylor as its last witness to vouch for Almony's credibility before closing the State's case-in-chief.
>
> * * *
>
> The [a]ppellant did not object, but the prejudicial impact of this improper vouching was substantial. Sgt. Taylor was no ordinary witness. He was the State's designated representative at trial. Sgt. Taylor was, in that role, the embodiment of the government bringing the case against the [a]ppellant. The State exploited Sgt. Taylor's representative status to assure the jury that Almony's testimony was true beyond a reasonable doubt by having Sgt. Taylor vouch for Almony's consistency under oath in multiple trials involving the same murder. Sgt. Taylor's role as the State's trial representative carried the imprimatur of the prosecutor; Sgt. Taylor vouched for Almony's testimony on behalf of the State against the [a]ppellant.

(Footnote omitted.)

Sergeant Taylor did not vouch for Almony's credibility, nor did he give personal assurances of Almony's veracity "or suggest that information not presented to the jury" supported Almony's testimony. Thus, vouching did not occur. *See Spain v.* State, 386 Md. 145, 156 (2005) (vouching did not occur because the prosecutor did not express any personal belief as to the credibility of any witness). In fact, no one involved in appellant's trial vouched for Almony's credibility. To the contrary, the State's evidence showed that prior to Almony agreeing to cooperate with the State, Almony had been

consistently untruthful. As mentioned earlier, on the date of the murder, Almony denied, when interviewed by Sergeant Taylor, having any knowledge about O'Sullivan's murder. Almony himself admitted that in 2016, he falsely told Maryland State police investigators that the killing of O'Sullivan was a "rogue" operation that neither he nor appellant approved. He also admitted telling Stephanie King, shortly after the murder, that neither he nor appellant had any involvement in the crime.

Moreover, contrary to appellant's implied assertion, the testimony at issue concerned a fact, not an opinion. The fact was that the testimony appellant gave at the subject trial was consistent with the testimony he had given in two other proceedings, which in context meant that the testimony Almony had given in the trial of Lockner and Bunner in 2019 and in their retrial in 2020, was consistent with the testimony he gave at appellant's trial. This did not mean that Sergeant Taylor was testifying that he knew, one way or another, that Almony's trial testimony was true. Moreover, Sergeant Taylor's statement that Almony's testimony was consistent, was a fact that defense counsel could have easily checked because defense counsel evidently had the transcripts of Almony's prior testimony. *See* page 8, *supra*.

Contrary to appellant's contention, the plain error doctrine is not here applicable. As mentioned, to be applicable, four conditions must be met. *State v. Rich*, 415 Md. at 578. The first requirement is that there must be a deviation from a legal rule. *Id.* Here, there was no such deviation.

V.

QUESTION FOUR

Prosecutor's Closing Argument

In closing argument, the prosecutor, in explaining the State's theory of accomplice liability, said:

> First[-]degree murder and second[-]degree murder. First[-]degree murder is obviously the greater charge. Second[-]degree [murder] is a lesser, included charge. But the most important part in this case that I am going to focus on and argue to you is the accomplice liability.
>
> And that is a responsibility of when someone who wasn't the actual triggerman or person with the knife can still be charged and convicted with committing the crime, *the same way as Mr. [Bunner] and Mr. Lockner and Mr. Hare were convicted of being the actual people who committed the homicide*.
>
> People who are on the sidelines or who participate in various ways can be held just as accountable and can be found just as guilty as the actual killers.

(Emphasis added.)

Appellant contends that allowing the prosecution to utter the words italicized above constituted plain error. His argument is:

> The State also vouched for Almony's credibility during closing argument by relying on information that was not introduced into evidence to let the jury know that Almony's prior testimonies against Bunner and Lockner resulted in guilty verdicts against them. The State argued to the jurors that they should find the [a]ppellant guilty "the same way as Mr. [Bunner] and Mr. Lockner and Mr. Hare were ***convicted of*** being the actual people who committed ***the homicide***." This argument was made in reference to the murder charges and based on evidence that was not part of the evidentiary record.

> There was no evidence that either Bunner, Lockner or Hare had been "convicted" under Maryland law. There was no evidence that Bunner or Lockner had been found guilty after a criminal trial, let alone that either of them had suffered a judgment of conviction for O'Sullivan's homicide. Although Hare testified that he pled guilty . . . to [f]irst[-d]egree [m]urder for O'Sullivan's death, there was no evidence presented in this case that Hare's guilty plea had been entered as a judgment of conviction against him. In Maryland, "a person is not 'convicted' of an offense until the court enters a judgment upon the verdict of guilty." *Myers v State*, 303 Md. 639, 645 (1985).
>
> The State's reference to Bunner, Lockner and Hare being "convicted" for O'Sullivan's murder was highly prejudicial. Neither Bunner nor Lockner testified in the [a]ppellant's trial; consequently, their credibility was not at issue in this case.
>
> Guilty pleas, guilty verdicts, and convictions of non-testifying co-perpetrators are not admissible against an accused as substantive evidence.
>
> > [O]rdinarily, the conviction or guilty plea of a co-perpetrator may not be used as substantive evidence of another's guilt. That principle, founded on concerns as to both relevance and unfair prejudice, is well established in Maryland and elsewhere.
>
> *Clemmons v. State*, 352 Md. 49, 55 (1998). (Reference to record and footnote omitted.)

The legal principle enunciated in *Clemmons* (just quoted), clearly did not apply in the subject case. From the outset, both sides agreed that O'Sullivan was murdered by Bunner, Lockner and Hare. Defense counsel said so, explicitly, in opening statement. Defense counsel had no real choice but to concede that fact because of the overwhelming proof that they committed the crime, *i.e.*, DNA of the three men on the murder weapon, videotape of the trio committing the murder and pictures of them (taken minutes after the murder) with the blood of the victim on their hands. As mentioned earlier, insofar as the murder was concerned, the issue was whether it was ordered by appellant or by Almony.

The State plainly did not vouch for Almony's credibility by letting the jury know that Almony's testimony resulted in Bunner and Lockner's convictions. For starters, Almony did not even testify for the State at Bunner and Lockner's 2020 retrial. Instead, the State put on unrefuted proof as to who killed O'Sullivan. And, in any event, in the context of this case, the offending remarks made by the prosecution did not even mention Almony. Therefore, the statement at issue regarding convictions could not even conceivably have prejudiced appellant, which is most likely the reason neither of appellant's trial counsel voiced any objection to the State's closing argument.[4]

Technically, it is true that there was no proof that either Bunner or Lockner was convicted after their re-trial; and it might also be true, in a technical sense, that Hare, who told the jury that he had pled guilty to first-degree-murder, may not have been convicted of that murder because he had not yet been sentenced. But in the context of this case, where the issue was not who physically committed the murder, but who ordered the murder, it made no difference whether the perpetrators were convicted.

Finally, appellant does not point out any error made by the trial judge during the prosecutor's closing argument. For appeal purposes, only a judge can commit reversible error as explained in *Apenyo v. Apenyo*, 202 Md. App. 401, 425 (2011). In *Apenyo*, we said (quoting *DeLuca v. State*, 78 Md. App. 395, 397-98 (1989)):

[4] It should be noted that the trial judge instructed the jury that what was said in closing argument was not evidence and it was the juror's recollection of the evidence, not what counsel said in closing argument, that should control.

> We begin our analysis by restating *one of the most fundamental tenets of appellate review: Only a judge can commit error.* Lawyers do not commit error. Witnesses do not commit error. Jurors do not commit error. The Fates do not commit error. *Only the judge can commit error*, either by failing to rule or *by ruling erroneously when called upon, by counsel* or occasionally by circumstances, *to make a ruling*.
>
> (Emphasis supplied). Counsel may have been neglectful, but Judge Eaves did not commit error.

If in closing argument a prosecutor refers to a fact that is not in evidence, it is defense counsel's responsibility to object. A trial judge does not sit as co-counsel for the defense. In other words, it is not the judge's obligation to object when defense counsel does not.

We hold that not only was there not any "error" committed by the trial judge who remained silent when the prosecutor made the statements at issue, but none of the remaining three elements were proven that are each necessary for us to grant plain error relief, *i.e.,* appellant failed to show that the legal error was "clear or obvious" or that the error "affected the appellant's substantial rights," or that the error "affects the fairness, integrity or public reputation of judicial proceedings." *Puckett v. United States*, 556 U.S. 129, 135 (2009).

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.