Circuit Court for Charles County
Case No. C-08-CR-20-000020

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1384

September Term, 2021

MARC CHRISTOPHER BROWN

v.

STATE OF MARYLAND

Wells, C.J.,
Berger,
Beachley,

JJ.

Opinion by Berger, J.

Filed: June 7, 2023

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

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

A jury sitting in the Circuit Court for Charles County found Marc Christopher Brown, appellant, guilty of home invasion, first-degree burglary, kidnapping, robbery, false imprisonment, second-degree assault, unlawful taking of an automobile, theft of property having a value of at least $1,500 but less than $25,000, credit card theft, identity fraud to obtain U.S. currency having a value of at least $100 but less than $1,500, malicious destruction of property having a value less than $1,000, second-degree burglary, and malicious destruction of property (belonging to a second victim) having a value less than $1,000. The circuit court imposed aggregate sentences of 75 years' imprisonment.

Brown, pro se, noted this appeal, raising six claims:

I. Whether appellant was denied due process on the ground of "facts set forth and information provided" in his "Motion to Dismiss" and "Petition for Uniform Postconviction Relief[.]"

II. Whether appellant was denied due process because the prosecutor "willfully lied about" appellant's theory of defense during closing argument.

III. Whether appellant was denied due process because the prosecution "used fabricated evidence to support its case and the [trial] judge [did not] intervene[.]"

IV. Whether appellant was denied a fair trial because "arresting detectives failed to collect surveillance video in bad faith and lied on the record[.]"

V. Whether appellant was denied a fair trial because a police witness "changed his statement" as to whether he had stepped on an envelope that was in evidence.

VI. Whether appellant was denied the effective assistance of counsel.

Because we find no merit in any of these claims and conclude that several of them are not preserved for our review, we affirm the judgments.

BACKGROUND

On December 11, 2019, Brown burglarized the home of Uchenna Okezie in Waldorf. When Ms. Okezie arrived home from work that evening and entered her home, the burglary was in progress, and Brown bound her hands and feet and forced her into her car. With Ms. Okezie in the passenger seat of her own car, Brown traveled to several automated teller machines ("ATMs") and withdrew cash from her bank account. He then left Ms. Okezie on the side of a road in Accokeek, in Prince George's County, bound and gagged.

Brown returned to Waldorf in Ms. Okezie's car, where he attempted to steal cash from an ATM inside the AMF bowling alley by backing up through the glass entrance doors. He subsequently drove Ms. Okezie's car to a wooded area near Crain Highway in Prince George's County, where he abandoned it; it was discovered several weeks later, on December 28, 2019. The car had significant damage to the rear, and its rear windshield and one of the other back windows were broken out. Pieces of broken glass were found "on the area behind the rear seats."

The day after the attack, on December 12, 2019, Brown was observed at a welding supply store, where he was arrested on open warrants.[1] A search incident to arrest yielded

[1] Brown had used a torch in other burglaries and had been spotted on surveillance video from those crimes.

$100 cash in $20 denominations on his person (consistent with cash disbursed in ATMs), a bookbag containing pieces of broken glass, an all-day VanGO bus pass, a laptop computer, and two USB flash drives. That evidence ultimately connected Brown to the crimes at issue in this case.

In January 2020, an indictment was filed, in the Circuit Court for Charles County, charging Brown with fifteen offenses: (1) home invasion; (2) first-degree burglary; (3) first-degree assault; (4) kidnapping; (5) robbery; (6) false imprisonment; (7) second-degree assault; (8) unlawful taking of an automobile; (9) theft of property having a value of at least $1,500 but less than $25,000; (10) credit card theft; (11) identity fraud to obtain U.S. currency having a value of at least $100 but less than $1,500; (12) malicious destruction of property, belonging to Ms. Okezie, having a value less than $1,000; (13) second-degree burglary; (14) malicious destruction of property, belonging to AMF lanes bowling alley, having a value less than $1,000; and (15) wearing and carrying a concealed dangerous weapon on the person.

Shortly afterward, Maryland courts (and their counterparts throughout the United States) sharply curtailed operations because of the COVID pandemic, leading to delays in bringing cases to trial. Brown initially was represented by a public defender, but, several months prior to trial, Brown moved to dismiss counsel. After the circuit court found no meritorious reason for discharging counsel, the court granted Brown's motion.[2]

[2] Brown does not claim a violation of Maryland Rule 4-215.

Two months later, the matter proceeded to a week-long jury trial, during which Brown represented himself. The State called more than 40 witnesses and introduced dozens of exhibits into evidence. After deliberating approximately one hour, the jury found Brown guilty of all thirteen charges that were submitted to the jury.[3]

Brown filed two post-trial motions, a self-styled "Motion to Dismiss" and a petition for postconviction relief. The circuit court denied the motion to dismiss and deferred ruling on the postconviction petition "following [the] outcome of any appeal[.]" The circuit court sentenced Brown to aggregate terms of 75 years' imprisonment.[4] This appeal followed.[5]

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

[3] First-degree assault and wearing and carrying a concealed dangerous weapon on the person were nol prossed.

[4] The court sentenced Brown to twenty-five years' imprisonment without the possibility of parole for home invasion and to consecutive terms of thirty years' imprisonment for kidnapping, five years' imprisonment for unlawful taking of a motor vehicle, and fifteen years' imprisonment for second-degree burglary of AMF bowling lanes. The court imposed concurrent sentences on the remaining counts.

[5] Brown filed a notice of appeal within 30 days of imposition of sentence. That notice of appeal, however, was rejected for failure to pay the filing fee. On November 4, 2021, a Notice of Indigent Appeal was accepted by the Clerk of the circuit court. The State has not moved to dismiss the appeal on the ground that it was filed more than 30 days after imposition of sentence, and under the circumstances, we shall exercise our discretion to treat this appeal as if it were timely. *See generally Rosales v. State*, 463 Md. 552 (2019) (holding that failure to file a notice of appeal within 30 days of entry of judgment is not a jurisdictional defect).

DISCUSSION

I.

Brown contends that he was denied due process on the ground of "facts set forth and information provided" in his "Motion to Dismiss" and "Petition for Uniform Postconviction Relief[.]" According to Brown, he was denied "fundamental fairness and equal protection after claims were raised" in his post-trial motions, but the circuit court did not dismiss the case, "despite substantial threat of prejudice."

This claim is completely without merit. There is no such vehicle, generally, as a post-trial motion to dismiss. "[D]ismissal of charges for prosecutorial misconduct is an extreme sanction," which "should be used sparingly, if at all." *Smith v. State*, 255 Md. App. 544, 570 (2022) (quotation marks and citations omitted), *cert. granted*, 482 Md. 534 (2023). "Even in the situation where a defendant shows willful misconduct by the State, dismissal is appropriate only when: (1) the misconduct results in irreparable prejudice; and (2) no less drastic alternative is available."[6] *Id.* at 576. That standard is not even remotely met here.

Brown fares no better if, as the State suggests in its brief, we construe his post-trial motion to dismiss as a motion for new trial under Rule 4-331(a). Brown's motion raised the same claims he raises now, on appeal, and denominates as Claims B, C, and D. As we

[6] In *Smith*, we acknowledged the possibility of dismissing charges with prejudice following trial, but only after a court finds willful misconduct by the State (in that case, intentionally withholding exculpatory evidence) and vacates a conviction, and then finds irreparable prejudice to the defense. *Smith*, 255 Md. App. at 561-62, 576.

explain *infra*, none of those claims has any merit. Because we review a circuit court's decision whether to grant a motion for new trial under Rule 4-331(a) for abuse of discretion, *Williams v. State*, 462 Md. 335, 344 (2019),[7] it follows that the circuit court did not abuse its discretion in denying Brown's motion.

Brown's post-trial, pre-appeal postconviction petition is not ripe for adjudication, given that the circuit court has not yet ruled on it. Moreover, Maryland Code (2001, 2018 Repl. Vol.), Criminal Procedure Article ("CP"), § 7-109(a), provides that "a person aggrieved by" a circuit court's denial of a postconviction petition "may apply to the [Appellate Court of Maryland] for leave to appeal the order." Under these circumstances, we do not have appellate jurisdiction over this claim because Brown seeks to circumvent the requirement to seek leave to appeal. As the State further points out, Brown is free to pursue his postconviction claim in the circuit court following the issuance of the mandate in this appeal, and in the event he does not prevail, he is required to seek leave to appeal under CP § 7-109(a) if he wishes further review.

II.

Before addressing Brown's next claim, we set forth additional facts. Because Brown drove Ms. Okezie's car through the glass entrance doors at the AMF bowling alley, there were shards of broken glass strewn throughout the vestibule of the bowling alley near

[7] *Williams* applied de novo review because there had been an instructional error, resulting from an erroneous pattern jury instruction. *Williams*, 462 Md. at 341-42. That exception, which applies only where "the losing party or that party's counsel, without fault, does not discover the alleged error during the trial," *Merritt v. State*, 367 Md. 17, 31 (2001), does not apply here.

the entrance. Some of that glass was recovered by police evidence technicians and subsequently analyzed by a forensic scientist. Furthermore, when Brown was arrested on open warrants, the bookbag he was carrying was seized as evidence, and upon inspection, it was discovered to contain glass fragments similar to those recovered from the vestibule of the bowling alley as well as from Ms. Okezie's car.

Brown contends that he was denied due process because the prosecutor "willfully lied about" his theory of defense during closing argument. According to Brown, the prosecutor misrepresented the facts concerning evidence of broken glass recovered from his bookbag.

He impliedly recognizes that this claim is unpreserved. First, Brown asks that we excuse his failure to lodge a contemporaneous objection on the ground of his "inexperience[]" and that we deem his subsequent closing argument, challenging the prosecutor's version of events, sufficient to preserve the issue. Second, Brown asks that we review for plain error.

The statement by the prosecutor that is the focus of Brown's complaint is as follows:

> [The glass] was provided to the FBI. You heard the expert from the, or the FBI expert, talk about glass that was recovered from the defendant. The glass that was recovered from the defendant's bookbag, which is what they were primarily interested in, is a match, is a match for the AMF bowling alley glass, it is a match for also the car glass. **Why is the car glass so important? Because Mr. Brown's theory up to this point is that they planted this glass, this AMF bowling alley glass. Well, they don't find the car for two weeks, so where did they get that glass?** They don't find that until like the 28th of December, in P.G. County, no less, and we will get to that.

> So, this glass that they find is a match for all this stuff that was recovered from the other scenes.

(Emphasis added).

Although Brown did not object to the prosecutor's remarks, he responded to them in his own closing argument. He led off with the claim that he had been "framed" and asserted:

> They reportedly find thirty pieces of glass inside the bookbag. We all know through common sense and common experience, you're not going to have thirty pieces of glass in your bookbag and nowhere else.
>
> You heard Ms. Gilroy testify that there were no shards of glass anywhere else. But you saw the pictures from AMF Lanes. Ms. Pierpont spent hours with a wet vac trying to suck that glass out of the carpet. That is common sense.
>
> If something is subjected to that kind of experience, that kind of event, it is going to leave large shards of glass, excuse me, small shards of glass that are going to be hard to remove. There was no glass, there were no pieces in the netting. You saw the VanGO video. There were no pieces in the back of the bookbag.

Later, Brown returned to his argument about the glass shards:

> Now, in regards to the glass, the state's attorney stated that car glass was allegedly discovered in my bookbag. But if you read the report, there was vehicle glass at the bowling alley. You have to read over that. So, once again, obscuration, somebody doesn't want you to hear. But I am going to tell you, there was vehicle glass at the bowling alley, and that was proven through forensics. So that is another lie he told you.
>
> And once again, not knowing discovery is not an excuse for not knowing the truth, which is using fabricated evidence in the furtherance of a conspiracy. You [referring to the prosecutor] know what glass was discovered there, you know

> what glass was not there, and you chose to say the vehicle glass was not there.
>
> * * *
>
> And obstruction of justice, the definition of that is, "Evidence may be false, either because it is perjured, or though[ ] itself not factually inaccurate, because it creates a false impression of the facts which are known not to be true."
>
> Such as saying vehicle glass was not at the bowling alley. That is not true, the forensics say that it was true. So now by definition, he is obstructing the administration of justice.

There is only "a single standard for assessing the procedural adequacy of an objection." *Gantt v. State*, 241 Md. App. 276, 302 (interpreting Md. Rule 4-323(c)), *cert. denied*, 466 Md. 200 (2019). Merely because a defendant "was representing himself pro se does not alter the requirements for preserving an objection for appellate review." *Id.* Because Brown did not object to the prosecutor's remarks at the time they were made, his claim is not preserved.[8] Md. Rule 4-323(c).

As for Brown's request that we review this unpreserved claim for plain error, we note that generally, an appellate court exercises its discretion to notice plain error sparingly,

[8] For example, in *Hogan v. State*, 240 Md. App. 470, 511-12, *cert. denied*, 464 Md. 596 (2019), we held that the defendant failed to preserve for appeal even a claim "of prosecutorial misconduct in which the Assistant State's Attorney had 'flagrantly lied' to the jury about the state of the evidence" by not objecting at trial, despite having raised the claim in a motion for new trial. We pointed out that preserving such a claim requires a contemporaneous objection, thereby affording the trial judge an opportunity "to correct an obvious error while the jury is still in the box before a verdict has been rendered." *Id.* at 512. The defendant's failure to do so meant that corrective action by the trial judge was "self-evidently no longer possible at a hearing on a post-trial motion." *Id.*

reserving that option only for "blockbuster errors." *Martin v. State*, 165 Md. App. 189, 196 (2005) (cleaned up), *cert. denied*, 391 Md. 115 (2006). The Supreme Court of Maryland has said that plain error review "is reserved for errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Yates v. State*, 429 Md. 112, 130 (2012) (quotation marks and citation omitted). Moreover, plain error review is never appropriate unless the error is "clear or obvious, rather than subject to reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135 (2009) (citation omitted).

In *Wright v. State*, 247 Md. App. 216 (2020), we observed that the Supreme Court of Maryland has "refused to invoke plain error even where counsel makes a claim unsubstantiated by the evidence in closing arguments." *Id.* at 229 (citing *Rubin v. State*, 325 Md. 552, 587-89 (1992)). Here, the prosecutor's remarks are not even plainly a mischaracterization or misstatement of the evidence. Moreover, the jury was instructed correctly that "closing arguments of parties are not evidence[,]" a factor further militating against reviewing for plain error. *Id.* ("Even if the State's argument was inaccurate, the trial court cured this problem by instructing the jury correctly that closing arguments are not evidence."). Nothing in this case compels us to notice plain error, and we decline Brown's request to do so.

III.

Before addressing Brown's third claim, we set forth additional facts. Because the search incident to arrest yielded a VanGO bus pass, police recovered surveillance video from the bus, depicting Brown boarding the bus earlier the same day at a stop in

Brandywine (in southern Prince George's County), carrying a bookbag and a McDonald's cup.

Brown contends that he was denied due process because the prosecution "used fabricated evidence to support its case and the [trial] judge [did not] intervene[.]" According to Brown, comparison of the depiction of his backpack in the VanGo video with photographs of that same backpack, taken following his arrest, reveals that the zipper of Brown's backpack was in a different condition after his arrest than in the video.

A "conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment[.]" *Napue v. Illinois*, 360 U.S. 264, 269 (1959). "A *Napue* claim requires a showing of the falsity and materiality of testimony and the prosecutor's knowledge of its falsity." *Basden v. Lee*, 290 F.3d 602, 614 (4th Cir.), *cert. denied*, 537 U.S. 980 (2002). Brown's claim cannot meet the threshold element of falsity because Brown does not establish that the evidence presented against him was false.

Moreover, both the VanGo video and the photographs were admitted into evidence and available to the jury. Evidently, the jury discounted any purported discrepancy in the condition of the zipper as depicted in the video versus in the photographs, which further suggests a lack of materiality. As the trial judge declared during the first sentencing hearing, "the jury heard the evidence," and "it is up to them to determine the credibility of the witnesses and to make those determinations." Brown has failed to show either falsity or materiality of the evidence at issue, and therefore, his *Napue* claim fails.

IV.

Brown contends that he was denied a fair trial because "arresting detectives failed to collect surveillance video in bad faith and lied on the record[.]" Specifically, according to Brown, Detectives Burgess and Smith "willfully failed to collect surveillance video from the stores near [the] point of arrest[,] ultimately lying about not collecting the video because the store owners stated they did."

There is generally no "undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). Even where physical evidence was collected by police but subsequently neither tested nor retained, due process is implicated only if the police acted in bad faith. *Id.* Mere negligence by the police in failing to preserve evidence, even if established, is insufficient to establish a violation of due process. *Patterson v. State*, 356 Md. 677, 697 (1999).

Here, Brown does not even establish that police were negligent, let alone that they acted in bad faith.[9] Due process requires that the prosecution disclose to a defendant exculpatory evidence in its possession or within its constructive knowledge. *See generally Yearby v. State*, 414 Md. 708, 716-20 (2010). It does not require police or prosecutors to act as a defendant's private investigative service.

[9] Brown's bald allegation that the detectives lied about collecting the video is unsupported by the record.

Brown was permitted (properly) to argue to the jury that it should draw an adverse inference against the prosecution for failing to collect the surveillance videos he claimed they should have collected. The jury clearly discounted his argument and found him guilty. That was all the process he was due.

V.

Before addressing Brown's penultimate claim, we set forth additional facts. When the police searched Ms. Okezie's home, they found "some mail on the floor" in a hallway. Sergeant Clarence Black, a Charles County Sheriff's Department officer who searched the house, testified that "there was a footprint on one of the mails[.]" That testimony was significant because forensic examination of the envelopes established a likelihood that footprints found on two of those envelopes matched the boots Brown was wearing when he was arrested.

Brown contends that he was denied a fair trial because Sergeant Black "changed his statement" as to whether he had stepped on an envelope that was in evidence. As best as we can discern, Brown appears to complain that there were discrepancies between one or more police reports (or Statements of Charges filed shortly after his arrest) and Sergeant Black's testimony at trial.

As the State points out in its brief, Brown did not attempt to introduce any such reports or statements into evidence, nor did he otherwise raise this claim during trial. Therefore, it is unpreserved. Md. Rule 5-103(a)(2); Md. Rule 8-131(a).

In any event, even if Brown's claim were true, it is merely fodder for cross-examination. During cross-examination, Brown asked Sergeant Black whether he

had observed "any other footprints" near the crime scene, whether he had noticed "any footprints on the hardwood," or "on the floor anywhere else," and whether " the technician [had] performed any analysis to look for other footprints[.]" Brown, however, never sought to impeach Sergeant Black using his prior report, and he cannot now complain on appeal of any purported discrepancy between his testimony and a police report that not only was never introduced into evidence, but also was not used for impeachment.

VI.

Finally, Brown contends that he was denied the effective assistance of counsel because his erstwhile trial counsel failed to obtain potentially exculpatory surveillance video. Because Brown discharged counsel and represented himself at trial, this claim is limited to the period when he was represented by counsel, prior to discharge.

A postconviction proceeding is the preferred forum in which a claim of ineffective assistance of counsel is litigated because the trial record generally does not shed light on the motivations and thought processes of trial counsel, and a postconviction proceeding affords the opportunity for a factual hearing, during which a convicted person may introduce "testimony and evidence directly related to allegations of the counsel's ineffectiveness." *Mosley v. State*, 378 Md. 548, 560 (2003). *Accord Massaro v. United States*, 538 U.S. 500, 504-05 (2003). It is only the unusual case, where the trial record is sufficiently developed to permit resolution of such a claim on direct appeal, where it is appropriate to do so. *Mosley*, 378 Md. at 562-68. But that narrow exception to the general rule, which applies "only when 'the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim,'" *id.* at 566 (quoting *In re*

Parris W., 363 Md. 717, 726 (2001)), does not apply here. On this record, we have no idea why trial counsel took the actions he did (or declined to take any other actions), and it is, therefore, impossible to evaluate this claim. Accordingly, we decline to address it.

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