

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2844

September Term, 2015

THURSTON YERBY

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: May 18, 2017

* This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

A jury in the Circuit Court for Prince George’s County convicted Thurston Yerby, the appellant, of two counts of second-degree murder for the deaths of Tina Towler and James Ferguson. The court sentenced him to two 30-year prison sentences, to be served consecutively.

On appeal, Yerby raises two questions:

- I. Did the trial court err in allowing the prosecutor to elicit evidence of [his] invocation of [his right to] counsel before the jury?
- II. Did the trial court err in allowing the prosecutor to mischaracterize the DNA evidence at closing argument?

Recognizing that he failed to preserve these issues, Yerby urges us to review them for plain error. We decline to do so and shall affirm the judgments.

FACTS AND PROCEEDINGS

The evidence adduced at trial showed the following.

The bodies of Ms. Towler and Mr. Ferguson were found in their apartment on Muirkirk Road, in Laurel, on the morning of May 2, 2013. Olachi Ekeocha, a nurse for Ms. Towler’s severely disabled daughter, who lived with her mother and Mr. Ferguson, arrived at the apartment at 8:00 a.m. that day. She found the bodies in the bedroom Ms. Towler and Mr. Ferguson shared with Ms. Towler’s daughter, who was unharmed.¹

¹ Ms. Ekeocha described Ms. Towler’s daughter as “disabled” and unable to care for herself or communicate.

Ms. Ekeocha immediately called the police, who responded. Ms. Towler and Mr. Ferguson were pronounced dead at the scene. Detective Joseph Bellino led the investigation into their deaths.²

Corporal Patrick Whittington processed the apartment and collected evidence. He found the bedroom to be “disheveled,” like there “had been a struggle.” The evidence recovered from the apartment included a blood-stained towel from the bathroom, a red folding knife found in the bathroom sink—which was next to a bar of soap and possible blood stains—and pots, pans, and a broken “Eveready” flashlight found on the bed. Corporal Whittington also collected several empty beer cans from the trash and a glass vial—later determined to have contained PCP—from the bedroom. He observed that the bedroom door appeared to have been kicked in, and the handle to that door was on the floor behind the door “in pieces.”

Carol Allan, M.D., an expert in forensic pathology, performed the autopsies. She testified that both deaths were homicides. Ms. Towler’s body displayed signs of strangulation—asphyxia—as well as numerous blunt force and sharp force injuries. Ms. Towler had bruises on her neck; signs of blunt force trauma to her forehead, ears, nose, torso, and arms; and six stab wounds, which damaged her lungs, spinal column, and right kidney. Ms. Towler also had a patterned injury that may have been caused by the broken flashlight because the pattern showed the letters “EVER” on her body. Dr. Allan reported

² All law enforcement personnel in this case were members of the Prince George’s County Police Department.

Ms. Towler’s cause of death as “[m]ultiple injuries.” Dr. Allan testified that Mr. Ferguson had suffered bruises to his head and chest, internal bleeding around the brain, eight stab wounds, and eight cutting wounds.³ His cause of death was “[b]lunt and sharp-force injuries.” Dr. Allan testified that the knife the police recovered from the sink was consistent with Ms. Towler’s and Mr. Ferguson’s wounds. She also noted that both victims had alcohol, cocaine, and PCP in their systems at the time of their deaths.

Lilycent Igbani, another nurse for Ms. Towler’s daughter, testified that the day before the bodies were found, she was scheduled to work and arrived early at Ms. Towler’s request. Ms. Towler was not at the apartment, however, and another nurse let Ms. Igbani into the apartment around 6:00 p.m. Then, Paul Young, Mr. Ferguson’s brother, dropped by for a short time.⁴ Around 8:00 p.m., Ms. Towler and Mr. Ferguson arrived home. They were accompanied by Mr. Ferguson’s sister, Pamilla Colbert, and her fiancé Kevin Campbell. Ms. Colbert and Mr. Campbell left after using the bathroom. When Ms. Igbani left at 9:20 or 9:30 p.m., only Ms. Towler, Mr. Ferguson, and the daughter were in the apartment.

Meanwhile, a short distance away, Yerby and a man named Norman Gary were drinking at a house in which Mr. Gary, his wife, his mother—Mary Mitchell—and her

³ According to Dr. Allan, a stab wound is one that is “deeper than it is long on the skin[,]” whereas a cutting wound is “when the injury in the skin is longer than it is deep.”

⁴ Mr. Young testified that he occasionally spent nights at Ms. Towler and Mr. Ferguson’s apartment. He recalled cutting himself shaving while staying with his brother a “month or two” before the murders, and he used a towel in their bathroom to clean up.

boyfriend, Ronnie Redman, lived. According to Mr. Gary, James Towler, Ms. Towler's ex-husband, used to be roommates with Mr. Redman. Also, Mr. Ferguson had dated Ms. Mitchell. When Mr. Redman moved out of Mr. Towler's house, Yerby had moved in with Mr. Towler.⁵ Sometime that evening (May 1, 2013), Ms. Mitchell and Mr. Redman joined Mr. Gary and Yerby. Later, an argument broke out after Yerby tried to grope Ms. Mitchell and/or grab her groin. Mr. Redman and Ms. Mitchell forced Yerby to leave. Mr. Gary walked out with him and they spoke outside. Yerby told Mr. Gary, "Man, I need to find me a woman to fuck with."⁶ Around 9:00 or 10:00 p.m., Yerby left in a white Ford Expedition.

Later that night, around 10:50 p.m., Natasha Mills, a neighbor of Ms. Towler and Mr. Ferguson's, saw a white SUV idling outside their apartment. She could see a person inside the SUV smoking a cigarette, but could not identify anyone.

Within a week of the murders, Detective Bellino interviewed Mr. Towler and Yerby.⁷ At trial, Mr. Towler testified that Yerby (who was his roommate when the murders happened) was not home when he went to bed around 9:00 p.m. on May 1, 2013. When he woke up at around 6:00 a.m., Yerby was there. In the interview with Detective Bellino, Yerby stated that he routinely drove his girlfriend's 2001 white Ford Expedition. He

⁵ Mr. Redman testified that he and Yerby worked some construction jobs with Mr. Towler.

⁶ At trial, Mr. Redman testified that he believed Yerby and Ms. Towler had a physical relationship because he had seen them use cocaine together and had found them naked together on one occasion.

⁷ Portions of the video-recorded interview of Yerby were played for the jury.

acknowledged that on the night of May 1, 2013, he drank and used drugs with Mr. Redman and Ms. Mitchell. He said that he left Mr. Gary's house at 10:15 p.m. and went home. He denied ever stepping foot in Ms. Towler and Mr. Ferguson's apartment. Detective Bellino testified that during the interview, Yerby refused to provide a DNA sample and took an empty water bottle and cigarette butt with him when the interview was over.

Robin Wilford, Yerby's girlfriend at the time of the crimes, testified that she was at Yerby's apartment on the night of May 1, 2013, and that he arrived home between 10:00 p.m. and 11:00 p.m. On cross-examination, she admitted that she was asleep when Yerby got home.

Mertina Davis, a fingerprint analyst with the Prince George's County Police Department, testified as an expert in fingerprint identification. She opined that fingerprints recovered from the crime scene included the victims' prints and Yerby's prints. Specifically, Yerby's fingerprints were recovered from one of the beer cans in the trash.

Kristen Lease was called by the State as an expert in forensic serology and DNA analysis. She tested the recovered evidence from the crime scene and found Yerby's DNA on recovered beer cans.⁸ She conducted DNA tests on several stains on the towel recovered from the bathroom. The towel had DNA from the victims, Mr. Young (Mr. Ferguson's

⁸ Ms. Lease testified that the chances of selecting an unrelated individual with the same DNA profile as on the beer cans was 1 in 36.4 quadrillion for the U.S. Caucasian population, 1 in 89 trillion for the African American population, 1 in 42.3 quadrillion for the Southeast Hispanic population, and 1 in 54.7 quadrillion for the Southwest Hispanic population.

brother), Yerby, and two unknown minor contributors. One stain on the towel revealed Yerby’s DNA profile only.⁹ Ms. Lease further testified that she performed DNA testing on what was suspected to be a blood stain in the sink. That stain showed the presence of the victims’ DNA and Yerby’s DNA at ten of fifteen loci.¹⁰ She also found the victims’ DNA on the knife; and she found a DNA profile on the knife handle consistent with Yerby’s at fourteen of fifteen tested loci. On cross-examination, Ms. Lease testified that the recovered broken flashlight and some of the pots and pans had blood on them.

STANDARD OF REVIEW

Yerby concedes that he failed to object to either issue he raises on appeal. He asks us to review for the issues for plain error.

“[P]lain error review is a ‘rare, rare phenomenon,’ undertaken only when the unobjected-to error is extraordinary.” *Perry v. State*, 229 Md. App. 687, 710 (2016) (quoting *Pickett v. State*, 222 Md. App. 322, 342 (2015)). There are four prongs to plain error review:

“First, there must be an error or defect[—]some sort of deviation from a legal rule[—]that has not been intentionally relinquished or abandoned . . . by the [defendant]. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the [defendant]’s substantial rights, which . . . means [that the defendant] must demonstrate that [the error] affected the outcome of the [trial] court proceedings. Fourth and finally, if the above three prongs are satisfied, the [appellate court] has the

⁹ Ms. Lease stated that the chances of selecting an unrelated individual with the same DNA profile as on the towel stain containing the appellant’s was the same as that previously stated concerning the beer can.

¹⁰ Ms. Lease explained that when analysts test evidence, they compare DNA samples at sixteen loci, or “short tandem repeat locations[.]”

discretion to remedy the error[—]discretion [that] ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Meeting all four prongs is difficult, as it should be.”

Givens v. State, 449 Md. 433, 469 (2016) (quoting *State v. Rich*, 415 Md. 567, 578 (2010)). See also *White v. State*, 223 Md. App. 353, 403 n.38 (2015) (plain error review is appropriate when the error is ““compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial,”” and ““review under the plain error doctrine 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon”” (internal citations and quotations omitted)). Moreover, plain error review is suitable only in cases of ““blockbuster errors.”” *Olson v. State*, 208 Md. App. 309, 363 (2012) (quoting *Martin v. State*, 165 Md. App. 189, 196 (2005)). A defendant “is entitled to a fair trial, but not necessarily a perfect one.” *Gutierrez v. State*, 423 Md. 476, 499 (2011) (citing *Hook v. State*, 315 Md. 25, 36 (1989)).

DISCUSSION

I. Right to Counsel Testimony

The following took place on direct examination of Detective Bellino:

[THE STATE]: During the course of your interview with Mr. Yerby, what, if any, request did you make of him?

[DETECTIVE BELLINO]: I asked if he would provide a sample of fingerprints and DNA for elimination.

Q: What was his response?

A: He refused.

Q: Did he give a reason why?

A: He said that he didn't think it was a good idea, that he would have to talk to a lawyer.

There was no objection or motion to strike.

Yerby contends this testimony infringed upon his constitutional right to counsel. He cites *Hunter v. State*, 82 Md. App. 679 (1990), and its progeny for the proposition that any testimony concerning seeking or speaking with counsel is inadmissible to show consciousness of guilt. The State responds that we should decline plain error review of this issue and points out that in the cases Yerby relies on, objections were made. The State also notes that there was no other reference to this testimony at any point in the trial.

In *Hunter*, the defendant was the driver of a vehicle involved in a car accident in which a person died, and the State alleged that he was under the influence of alcohol. He was convicted of negligent homicide by vehicle, driving while intoxicated, and other traffic violations. The defendant testified. On cross-examination, the prosecutor asked him why he had called his lawyer right after the accident. Defense counsel's objection was overruled, and a later motion for mistrial by the defense was denied. In closing, the prosecutor reminded the jury about Hunter's having called his lawyer.

On appeal, we reversed, holding that "it is impermissible for the State to offer evidence of, or comment upon, a criminal defendant's obtention of counsel or his attempt, request, or desire to obtain counsel in order to show a consciousness of guilt." 82 Md. App. at 686. *See also Casey v. State*, 124 Md. App. 331, 337–39 (1999) (reversing convictions where evidence admitted over objection that Casey wanted to speak to a lawyer during an interrogation); *Waddell v. State*, 85 Md. App. 54, 60-65 (1990) (concluding that

testimony that Waddell said he needed to call a lawyer when accused of shooting someone was inadmissible).

In *Hunter* and the other cases Yerby cites, timely objections were made to the testimony concerning the defendant’s invocation of the right to counsel. *See Casey*, 124 Md. App. at 338; *Waddell*, 85 Md. App. at 61; *Hunter*, 82 Md. App. at 686. Indeed, in *Hunter*, a police officer testified, before the defendant testified, about the defendant’s calling his lawyer right after the accident; however, we observed that while his testimony was “inappropriate no timely motion was made to strike that part of [the officer’s] testimony, no complaint can be made of it now.” 82 Md. App. at 685-86. We see no reason to overlook Yerby’s failure to object to the testimony he now complains about on appeal. We note, moreover, that the State never referred to this testimony at any other point in the trial. As such, we decline to review this issue for plain error.

II. Closing Argument

The prosecutor argued in closing, in part, as follows:

Of course [Yerby’s] DNA isn’t just on that beer can, that one beer can. There are three beer cans with DNA. You’ve got DNA on the towel in the bathroom. It’s Exhibit Number 81. The towel i[s] State’s 15. You’ve seen that towel a few times. It’s pretty raunchy.

I don’t blame—I think it was Pam[illa Colbert] who said I didn’t wipe my hands on the towel. I wiped my hands on my pants. I don’t blame her for one second. We’ve all seen that towel, but there’s DNA on that towel.

There’s Paul Young’s who stayed there regularly, with [Ms. Towler’s] and [Mr. Ferguson’s] DNA. And again, why is [Yerby’s] DNA on that towel? It was on there because he was there. He was in that bathroom. **And you heard that his DNA cannot be excluded in 14 out of 15 loci on the knife in that sink, 14 out of 15.**

Now, I admit, I told you in my opening statement, it's not Ms. Lease coming in here and saying that's Mr. Yerby's DNA on that knife. You can't exclude him in 14 out of 15 loci? And most of the DNA is on this knife.

(Emphasis added.) The prosecutor reiterated this point in rebuttal closing:

When you look at this evidence, all the evidence, taken all in total, there is only one reasonable conclusion here. There is only one person looking for a woman to fuck with. There's only one person who had a prior relationship with [Ms. Towler] that didn't get away with it. One person goes in that apartment and denies being in that apartment.

One person doesn't live in that apartment or stay in that apartment, but his DNA is on a beer can. Three beer cans in that apartment. His fingerprints are on a beer can in that trash can. His DNA is on a towel in an apartment he's not ever supposed to have been in, **who cannot be excluded in 14 out of 15 loci on the knife with the victim's blood on it in the sink being cleaned.**

(Emphasis added.)

Yerby contends the prosecutor mischaracterized the DNA evidence, specifically in the highlighted portion above. He argues that the prosecutor implied that most of the DNA found on the knife belonged to Yerby or, alternatively, that Yerby's DNA "matched at all loci save one." Yerby again recognizes that he failed to object, but maintains that we should engage in plain error review because of the importance of DNA evidence.

The State urges us not to engage in plain error review, mainly because the prosecutor's arguments tracked the testimony of Ms. Lease. Furthermore, the State argues that the prosecutor did not overstep the "great leeway" afforded to attorneys in closing arguments.

Trial courts indeed should give attorneys “‘great leeway in presenting closing arguments to the jury.’” *Green v. State*, 231 Md. App. 53, 77 (2016) (quoting *State v. Newton*, 230 Md. App. 241, 254 (2016), *cert. granted*, 451 Md. 577 (2017)). “‘Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom’ and, in doing so, to ‘indulge in oratorical conceit or flourish[.]’” *Anderson v. State*, 227 Md. App. 584, 589 (2016) (quoting *Wilhelm v. State*, 272 Md. 404, 412-13 (1974)). Furthermore, so “‘long as ‘counsel does not make any statement of fact not fairly deducible from the evidence his argument is not improper[.]’” *Id.* (quoting *Wilhelm*, 272 Md. at 412).

We shall not review this supposed error for plain error because, as the State points out, the prosecutor’s arguments in fact tracked the testimony of Ms. Lease. On direct examination, Ms. Lease testified without objection: “The swabs from the handle area yielded an indistinguishable mixed DNA profile from at least three contributors. Tina Towler and James Ferguson cannot be excluded as possible contributors to the mixed DNA profile at 15 of the 15 tested loci. And Thurston Yerby cannot be excluded as a possible contributor at 14 of the 15 tested loci.” The prosecutor’s arguments tracked this language, and we are not persuaded that the State overstepped the “great leeway” afforded to attorneys in making closing arguments. Moreover, “plain error review is reserved for cases of ‘truly outraged innocence [that] call for the act of grace of extending’ plain error review.” *Gross v. State*, 229 Md. App. 24, 37 (2016) (quoting *Jeffries v. State*, 113 Md. App. 322, 326 (1997)). This is not one of those cases.

**JUDGMENTS OF THE CIRCUIT COURT
FOR PRINCE GEORGE’S COUNTY
AFFIRMED. COSTS TO BE PAID BY THE
APPELLANT.**