Circuit Court for Cecil County
Case No. C-07-CR-17-1538

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 331

September Term, 2018

ERIC ANDRE YOUNG

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Thieme, Raymond G., Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: September 17, 2019

Eric Andre Young was convicted in the Circuit Court for Cecil County of second-degree assault. He was sentenced to three years' incarceration, all but one year suspended, and three years' probation. He also was ordered as a condition of probation to pay $10,887 in restitution to his victim.

Mr. Young argues on appeal that the prosecutor made improper comments during closing arguments and that those comments deprived him of a fair trial. He did not object to the comments at trial, but he urges us to exercise our discretion to apply plain error review. He also challenges his restitution order because, he contends, he was forced to go forward with his restitution hearing without counsel. We decline to exercise plain error review of the errors Mr. Young alleges in the prosecutor's closing argument. The State agrees with Mr. Young, however, that he was entitled to counsel at his restitution hearing, and so do we. We vacate his restitution order and remand for further proceedings.

I. BACKGROUND

On August 31, 2017, Mr. Young had a physical altercation with Kevin Fitzsimmons on Mr. Fitzsimmons's property. Their disagreement began when Mr. Young drove, too quickly in Mr. Fitzsimmons's opinion, down his residential street, and Mr. Fitzsimmons yelled for Mr. Young to slow down. When their altercation ended, several of Mr. Young's dreadlocks had been torn from his head and Mr. Fitzsimmons had a concussion, a broken front tooth, and multiple "broken or bruised" ribs. Mr. Young was charged with second-degree assault. Both men testified at trial along with several other witnesses.

Mr. Fitzsimmons testified that he was sitting in his front yard with his dog when

Mr. Young came speeding down the street. Mr. Fitzsimmons testified that there was a "white girl" with him in the car. Mr. Fitzsimmons yelled for Mr. Young to slow down, at which point Mr. Young stopped the car abruptly and got out. Mr. Fitzsimmons stated that Mr. Young was "combative" when he stepped out of the car and that he was saying something "unintelligible." Mr. Fitzsimmons then addressed Mr. Young and asked his neighbor to lend him support in telling Mr. Young to leave:

> I said, "Boy, get in your car and leave." [] And then at that time my neighbor come down, Sherwood [Gude], and I said [] "Sherwood, can you say something to this guy?" Which Sherwood was good enough to do. He said something to this guy. And Sherwood had to leave so Sherwood left. But this fella is still standing there and he's still saying something unintelligible. . . .

After Mr. Gude departed, Mr. Fitzsimmons again told Mr. Young "Boy, get in the car and leave." Mr. Fitzsimmons testified that at that point, Mr. Young flew into a rage and told him "I'm going to lay you out in your own yard." Mr. Fitzsimmons turned away momentarily to hand his dog off to his wife, and while his head was turned, Mr. Young attacked him:

> [H]e came right up and attacked me. . . . [H]e come up and viciously punched me in the face multiple times. . . . There is a steel electric box next to where I was sitting in my yard. I got slammed into that box as a result of what he did. I ended up with a brain bleed, a broken front tooth, some severely broken or bruised [] ribs.

Mr. Fitzsimmons testified that he felt lightheaded after he hit his head, but still managed to get control of Mr. Young and place him in a headlock. When Mr. Fitzsimmons released him, Mr. Young attacked him again, this time "slamm[ing] [him] in [his] face

multiple times" until he lost consciousness. When he revived, Mr. Fitzsimmons was transported to the hospital by ambulance.

Mr. Young recounted a different version of events at trial. Mr. Young acknowledged driving over the speed limit down Mr. Fitzsimmons's street. He said that he was driving to work and was accompanied by his "baby mom's aunt," Bertha LaPointe, whom he described as "[e]ssentially a family member." As he was driving, Mr. Young saw Mr. Fitzsimmons "launch[] something at [his] car." After the object (Mr. Young thought it was a tree branch) hit the car, he stopped and got out and asked Mr. Fitzsimmons why he threw something at his car. Mr. Young described Mr. Fitzsimmons's response:

> [H]e told me like slow down. He was cussing at me; and I'm like, yo, like, all right, you know, I can slow down; but why did you have to hit the car; and he was like I am tired of you people in this neighborhood. You don't belong here. You are not from around here. Boy, take your white girl and go.

Later, after Mr. Gude had come and gone, Mr. Young testified that Mr. Fitzsimmons called him a "fucking n*****" and told him to "get the fuck out of here." Mr. Young then walked up to Mr. Fitzsimmons, and Mr. Fitzsimmons grabbed Mr. Young by the hair. Mr. Fitzsimmons pulled on Mr. Young's dreadlocks and he could feel them tearing from his head. Mr. Young testified that he told Mr. Fitzsimmons that he couldn't breathe while he had him restrained and that Mr. Fitzsimmons continued to hurl racial slurs and tell him to get out of the neighborhood.

Mr. Young testified that he broke out of Mr. Fitzsimmons's hold and acknowledged that he then hit Mr. Fitzsimmons once. Mr. Young then ran away from the Fitzsimmonses'

property. He took with him several of his dreadlocks that Mr. Fitzsimmons ripped from his head during the scuffle and ran away.

The other witnesses to the assault, Mr. Fitzsimmons's wife, Mr. Gude, and another neighbor, Wallace Perkins, largely corroborated Mr. Fitzsimmons's version of events. They didn't report hearing Mr. Fitzsimmons call Mr. Young a "n******". Mrs. Fitzsimmons acknowledged that her husband pulled out several of Mr. Young's dreadlocks and that Mr. Young had screamed "I can't breathe" as he was restrained.

Ms. LaPointe was not called to testify at trial. It is unclear from the record where precisely she was during the altercation and what she may have witnessed. Mr. Young testified that at one point she tried unsuccessfully to get Mr. Fitzsimmons off of him, then got in the car and drove off while the scuffle continued. Mrs. Fitzsimmons testified that Ms. LaPointe drove off early on, but returned in the car several times throughout the incident.

The State requested a missing witness instruction based on Ms. Lapointe's failure to testify. The court denied the request. In closing arguments, the State argued that the jury should draw "obvious inferences" from her absence. The State also argued that Mr. Young was "race baiting" and attempting to get the jury to "nullify" the verdict. Mr. Young did not object to the State's arguments.

Mr. Young was convicted of second-degree assault and sentenced to three years' incarceration, all but one year suspended, and three years' probation. The State notified the court at Mr. Young's sentencing hearing that it would be seeking restitution. Mr. Young

requested a separate restitution hearing, a request the court granted, and the hearing was scheduled for March 29, 2018.

On January 25, 2018, Mr. Young signed a letter terminating his attorneys' services and indicating that he would be seeking the public defender's assistance going forward; the letter was effective that day and, he asserts, was drafted by his attorneys. On February 7, 2018, the State requested a restitution hearing. Later the same day, the circuit court granted Mr. Young's attorneys' motion to strike their appearance.

On February 13, 2018, Mr. Young appeared in the circuit court, and the court addressed the issue of Mr. Young's counsel for the restitution hearing:

> [THE COURT]: So [trial counsel] is no longer your attorney. I'm not sure if the public defender's office will represent you, because [] it's not a matter where you can get additional jail time.
>
> [MR. YOUNG]: That's not why I discharged him. I only discharged him for the appeal. I didn't discharge him for the restitution hearing. That's not what was explained to me. … So as of right now, to my knowledge [trial counsel] still represents me. He's just not handling my appeal.
>
> [THE COURT]: Well, he does not.
>
> [MR. YOUNG]: Is that your order? Is that his order? Like, how is that working? How is somebody firing somebody that I paid?

The court stated that it had dismissed Mr. Young's counsel based on his letter. Mr. Young acknowledged signing the letter, but contended that he didn't write it and that it did not reflect his understanding of his agreement with trial counsel:

> [MR. YOUNG]: He was saying, Yo, signing this is allowing us to – it's for your appeal. Like, my law firm is not going to represent you on your appeal. It's going to be too costly. It would be better for you to use the public defender's office

> That wasn't … relinquishing him from my restitution hearing. Like, I paid him for his services for the duration of my case. The appeal is something different. He didn't volunteer to take my case; I paid him for that.
>
> [THE COURT]: The Court acted based upon this letter you signed.
>
> [MR. YOUNG]: All right. Well, I'm articulating to the Court right now how it was explained to me. … He has to represent me for my restitution hearing.
>
> [THE COURT]: Well, that's between you and [trial counsel] at this point. . . .

The court advised Mr. Young to apply for a public defender to represent him at his restitution hearing. And he did so, but the public defender responded that they could not represent him.

On March 29, 2018, the court convened the restitution hearing. Mr. Young protested that he was "not prepared to proceed without legal representation" and was not prepared to "go against" the State's attorney because he didn't know what he was doing. He asked that the court appoint an attorney for him:

> [MR. YOUNG]: You told me to get the Public Defender's Office to represent me. That day [an Assistant Public Defender] was in the courtroom [] because she's my attorney in another case, and said that the Public Defender's Office can't even represent me in specifically just a restitution matter anyway, so she didn't even know why you would have suggested that, leaving me totally like alone … I did what you told me to do. I asked the Public Defender's Office to represent me. It's something that they can't represent me [] in a restitution hearing.
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> ***
>
> [THE COURT]: I cannot appoint you an attorney and I'm not going to appoint you an attorney. You could have hired someone else.

> [MR. YOUNG]: Okay. Well, then I don't wish to proceed. … With all due respect, I'm not proceeding without legal representation. I'm not up to it.

The court then proceeded with the restitution hearing and awarded restitution in the amount of $10,887, which encompassed the victim's medical expenses and lost wages, and made the restitution a condition of Mr. Young's probation. Mr. Young appeals his conviction and restitution order.

We provide additional facts below as needed.

II. DISCUSSION

Mr. Young raises two issues on appeal.[1] He argues *first* that he was deprived of a fair trial when the prosecutor commented on Ms. LaPointe's failure to testify and accused Mr. Young's defense counsel of "race baiting" during closing arguments. Mr. Young did not preserve those arguments by objecting at trial, but he urges us to exercise plain error review and grant him a new trial. He argues *second* that the trial court violated his right to counsel by forcing him to proceed without representation at his restitution hearing. The

[1] Mr. Young phrased his Questions Presented as follows:

> 1. Did the prosecutor's improper missing witness argument and allegation that defense counsel was "race baiting" and trying to "nullify" the verdict deprive Mr. Young of a fair trial?
> 2. Did the trial court violate Mr. Young's right to counsel by striking the appearance of his attorneys without any inquiry and forcing him to proceed to his restitution hearing without a lawyer?
> 3. Did the trial court err in ordering restitution without inquiring into Mr. Young's ability to pay?

State agrees that Mr. Young had a right to counsel and that he is entitled to a new restitution hearing. We affirm Mr. Young's conviction, vacate his restitution order, and remand for a new restitution hearing.

A. We Decline To Review Mr. Young's Unpreserved Challenges To The State's Closing Argument For Plain Error.

Mr. Young argues that the State's comments during rebuttal closing argument at trial so compromised his right to a fair trial that we should employ plain error review to reverse his conviction and grant him a new trial. We disagree.

Appellate courts generally don't decide any issue that doesn't "plainly appear[] by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). An appellant's failure to raise an alleged error at trial bars him from obtaining review of that issue as a matter of right. *Robinson v. State*, 410 Md. 91, 103 (2009). Even so, we have discretion to consider an unpreserved issue via plain error review, which enables us to reach those unpreserved errors that are "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Kelly v. State*, 195 Md. App. 403, 432 (2010) (*quoting Turner v. State*, 181 Md. App. 477, 483 (2008)) (cleaned up). But although we are asked frequently to exercise that discretion, it is an extraordinary remedy that we rarely find appropriate. *Id.* at 432 (cleaned up) ("Appellate review under the plain error doctrine 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon."). Indeed, unless the alleged error "vitally affects a defendant's right to a fair and impartial trial," we will not invoke plain error doctrine. *Diggs v. State*, 409 Md. 260, 286 (2009).

Mr. Young contends that the circuit court committed plain error by allowing the State to argue to the jury in closing that it could "draw obvious inferences" from Ms. LaPointe's failure to testify. Mr. Young contends as well that the State improperly "impugned the ethics . . . of defense counsel in closing argument" by commenting on counsel's emphasis on Mr. Young's testimony that Mr. Fitzsimmons used repeated racial slurs during their confrontation. In its closing, the State accused defense counsel of "race baiting" and suggested that the jury should resist the defense's attempt to convince the jury to "nullify" the verdict. He claims that those comments collectively deprived him of a fair trial.

We cannot say that permitting the State to make these arguments in closing justifies plain error review. Attorneys have wide latitude in presenting their closing arguments. *Whack v. State*, 433 Md. 728, 742 (2013). "[I]n presenting closing arguments . . . [attorneys] may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. [They] may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions." *State v. Purvey*, 129 Md. App. 1, 25 (1999) (*quoting Wilhelm v. State*, 272 Md. 404, 413 (1974)). They are free to make any comment "warranted by the evidence or inferences reasonably drawn therefrom." *Whack*, 433 Md. 742. And absent a clear abuse of discretion that was likely to have prejudiced the defendant, the trial court's judgment of a closing argument's propriety should not be disturbed. *Grandison v. State*, 341 Md. 175, 225 (1995).

The State's comments on Ms. LaPointe's absence and on defense counsel's attempt

to "race bait" may have trod up to the margins of permissible tactics in closing arguments. *See, e.g.*, *Smith v. State*, 225 Md. App. 516, 529 (2015) ("a prosecutor may not impugn the ethics or professionalism of defense counsel in closing argument.") But the very fact that the comments' propriety is debatable makes them inappropriate for plain error review, which "afford[s] relief to appellants only for blockbuster errors." *Martin v. State*, 165 Md. App. 189, 196 (2005) (cleaned up). We decline to exercise our discretion to apply plain error review to these comments.[2] *Id.*

B. The Circuit Court Erred By Proceeding With Mr. Young's Restitution Hearing Without Counsel.

Mr. Young argues next that he was deprived of his constitutional and statutory right to counsel when he was forced to proceed *pro se* at his restitution hearing despite his unambiguous statements that he did not wish to proceed without legal representation. The State agrees that Mr. Young was entitled to counsel and is entitled to a new restitution hearing, and so do we.

The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights both guarantee a criminal defendant the right to counsel in all cases that involve the possibility of incarceration. *Smallwood v. State*, 237 Md. App.

[2] Mr. Young argues in the alternative that we should assess his counsel's performance on direct appeal, find it constitutionally ineffective, and reverse his convictions. We assess counsel's performance on direct appeal only in exceptional cases in which "the critical facts are not in dispute" and "there is no need for a collateral fact-finding proceeding" to determine whether counsel was constitutionally ineffective. *See Testerman v. State*, 170 Md. App. 324, 335 (2006). This is not such a case: we have no record on which to judge defense counsel's reasons, if any, for allowing the prosecutor's comments to go unchallenged at trial.

389, 403 (2018). That includes the right to counsel at sentencing hearings. *Id.*; *Gardner v. Florida*, 430 U.S. 349, 358 (1977). The parties agree, citing *Chaney v. State*, that because "[a]n order of restitution entered in a criminal case . . . is a criminal sanction," the right to counsel encompasses restitution hearings as well. 397 Md. 460, 470 (2007).

A criminal defendant can waive his right to counsel after trial commences, provided that the waiver is knowing, intelligent, and voluntary. *Lopez v. State*, 420 Md. 18, 30–33 (2011). The decision to dismiss counsel once trial has begun is in the discretion of the trial court, although the court "must still adhere to constitutional standards" when it determines if dismissal is appropriate. *State v. Brown*, 342 Md. 404, 426 (1996). The circuit court "must determine the reason for the requested discharge before deciding whether dismissal should be allowed." *Id.* at 428. "The ultimate decision [is] discretionary. What is mandatory is the provision of the opportunity to explain." *Barkley v. State*, 219 Md. App. 137, 165 (2014).

Mr. Young's counsel filed a motion to strike their appearance, which included a signed letter from Mr. Young, before the State filed its request for a restitution hearing. The circuit court granted Mr. Young's counsel's motion without a hearing, leaving him without representation. The circuit court did not provide Mr. Young with the required opportunity to explain why he was discharging his counsel. Had the court done so, it would have learned that Mr. Young's letter did not reflect his understanding of his arrangement with his attorneys. Mr. Young believed that he was discharging his attorneys only for the purposes of his appeal, and that their representation would continue through his restitution

hearing. And because the public defender's office would be unable to represent Mr. Young at his restitution hearing, as the circuit court explained to him, Mr. Young was left with no practical options for representation at his restitution hearing.

It's clear from Mr. Young's conversation with the court that he did not knowingly, intelligently, and voluntarily waive his right to counsel at his restitution hearing. The circuit court erred by failing to inquire why Mr. Young was discharging his counsel and by moving forward with his restitution hearing despite Mr. Young's misunderstanding and request to postpone. We vacate Mr. Young's restitution order and remand for a new restitution hearing.

JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY.