Circuit Court for Anne Arundel County
Case No. C-02-CR-17-000038

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 600

September Term, 2018

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BRANDEN COREY WILLIAMS

v.

STATE OF MARYLAND

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Berger,
Arthur,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

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PER CURIAM

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Filed: June 10, 2019

*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.

Following a jury trial in the Circuit Court for Anne Arundel County, Branden Williams, appellant, was convicted of possession with intent to distribute heroin, possession of heroin, and possession of drug paraphernalia. He raises two issues on appeal: (1) whether there was sufficient evidence to sustain his convictions, and (2) whether the trial court abused its discretion in allowing the prosecutor to make improper comments during closing. For the reasons that follow, we shall affirm.

**I.**

Mr. Williams first contends that the evidence was insufficient to sustain his convictions because the State failed to prove that he possessed the heroin and drug paraphernalia. In reviewing the sufficiency of the evidence, we ask "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Ross v. State*, 232 Md. App. 72, 81 (2017) (citation omitted). Furthermore, we "view[ ] not just the facts, but 'all rational inferences that arise from the evidence,' in the light most favorable to the" State. *Smith v. State*, 232 Md. App. 583, 594 (2017) (quoting *Abbott v. State*, 190 Md. App. 595, 616 (2010)). In this analysis, "[w]e give 'due regard to the [fact-finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Potts v. State*, 231 Md. App. 398, 415 (2016) (quoting *Harrison v. State*, 382 Md. 477, 487-88 (2004)).

For purposes of drug offenses, "possess" is defined by statute as the "exercise [of] actual or constructive dominion or control over a thing by one or more persons." Md. Code Ann., Criminal Law § 5-101(v). "Control" is defined as "the exercise of a restraining or

directing influence over the thing allegedly possessed." *Handy v. State*, 175 Md. App. 538, 563 (2007) (quotation marks and citations omitted). Control may be actual or constructive, joint or individual. *Id.* "[K]nowledge of the presence of an object is generally a prerequisite to the exercise of dominion and control." *Id.* (citation omitted). Although "possession is determined by examining the facts and circumstances of each case," the Court of Appeals has found several factors to be relevant in the determination of whether an individual was in possession of the CDS, including the defendant's proximity to the drugs, whether the drugs were in plain view of and/or accessible to the defendant, whether there was indicia of mutual use and enjoyment of the drugs, and whether the defendant has an ownership or possessory interest in the location where the police discovered the drugs. *Smith v. State*, 415 Md. 174, 198-99 (2010) (citations omitted).

Viewed in a light most favorable to the State, the evidence at trial established that (1) the police executed a search warrant at 432 Salisbury Road in Edgewater, Maryland; (2) Detective Mason Ellis spoke with Mr. Williams and asked him if there was anything illegal in the house; (3) Mr. Williams responded that there was "dope," money, and needles in the basement but that he "didn't have an exact location," because "he had several hiding spots in the basement"; (4) the police searched a bedroom in the basement and located heroin capsules, a syringe, a scale, and $810 inside a pencil box that was hidden under the bed; (5) the police also located two letters in the bedroom addressed to Mr. Williams; and (6) the police recovered $190 during a subsequent search of Mr. Williams' person. Based on this evidence we are persuaded that the jury could find that Mr. Williams exercised

dominion and control over the contraband. Consequently, the State presented sufficient evidence to support his convictions.

**II.**

Mr. Williams also asserts that the trial court erred in allowing the prosecutor to make two improper remarks during closing. First, he claims that the prosecutor argued facts not in evidence. During closing, defense counsel asserted that a female, who was present in the residence when the search warrant was executed, also lived in the home and was the person who actually possessed the contraband. The prosecutor then argued during rebuttal that the female was not a resident but had come to the house to purchase heroin from appellant, snorted the heroin, and then passed out. On appeal, Mr. Williams contends that there was no evidence at trial that the female had "snorted heroin and lost consciousness because of it[.]"

"[C]ounsel may not comment upon facts not in evidence." *Francis v. State*, 208 Md. App. 1, 15 (2012). However, "[c]ounsel is free to use the testimony most favorable to his side of the argument to the jury, and the evidence may be examined, collated, sifted and treated in his own way[.]" *Mitchell v. State*, 408 Md. 368, 380 (2009) (citation omitted). It falls "within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is afforded a wide range." *Id.* The determination whether counsel's comments in closing were improper and prejudicial is a matter within the discretion of the trial court, and we "generally will not reverse the trial court unless that

court clearly abused the exercise of its discretion and prejudiced the accused." *Sivells v. State*, 196 Md. App. 254, 271 (2009).

Based on our review of the record, we are persuaded that the prosecutor's argument did not improperly reference facts not in evidence, but rather drew logical inferences from the evidence presented. Specifically, the evidence at trial demonstrated that: (1) the officers who executed the search found the female sleeping on the concrete floor of the basement at 10 a.m.; (2) no mail belonging to the female was found in the house; and (3) a straw and two empty gel caps containing a mix of heroin and fentanyl were found in her purse. Moreover, the State's drug expert testified that heroin users often ingest heroin immediately after they purchase it and that the items found in the female's purse were consistent with someone possessing heroin for personal use. The State's expert and Detective Ellis also testified that heroin can be ingested by opening the gel cap containing the heroin and snorting it with a straw. Collectively, that evidence supported an inference that the female did not live in the residence, had recently used heroin, and then passed out on the floor. Therefore, the court did not abuse its discretion in overruling defense counsel's objection to the prosecutor's argument.

Moreover, even if we assume that the argument was improper, it is well-settled that not every improper remark made by the State during closing argument results in a new trial. *See Wilhelm v. State*, 272 Md. 404, 431 (1974). ("[T]he mere occurrence of improper remarks does not by itself constitute reversible error"). Instead, reversal is only required if it appears that improper remarks "actually misled the jury or were likely to have misled or influenced the jury to the defendant's prejudice[.]" *Donaldson v. State*, 416 Md. 467,

496-97 (2010) (citation omitted). In determining whether an allegedly improper statement in closing argument constitutes reversible error, we consider the following factors: (1) the severity and pervasiveness of the remarks; (2) the measures taken to cure any potential prejudice; and (3) the weight of the evidence against the accused. *Id*. at 497 (citation omitted).

Here, the State had a strong case against Mr. Williams, including his own admission to Detective Ellis that he had hidden drugs in the basement. Moreover, the prosecutor's comment was isolated and the trial judge instructed the jurors that closing arguments were not evidence. Consequently, even if improper, the prosecutor's comment would not warrant reversal under the circumstances.

Mr. Williams finally contends that the prosecutor improperly denigrated the role of defense counsel when she stated during rebuttal: "Smoke and mirrors, smoke and mirrors, that is Defense Counsel's job." He acknowledges, however, that this claim is not preserved because he did not object at trial. He therefore requests that we engage in plain error review.

Although this Court has discretion to review unpreserved errors pursuant to Maryland Rule 8-131(a), the Court of Appeals has emphasized that appellate courts should "rarely exercise" that discretion because "considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court[.]" *Ray v. State*, 435 Md. 1, 23 (2013) (citation omitted). Therefore, plain error review "is reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the

defendant of [a] fair trial." *Savoy v. State*, 218 Md. App. 130, 145 (2014) (quotation marks and citation omitted). Under the circumstances presented, we decline to overlook the lack of preservation and thus do not exercise our discretion to engage in plain error review. *See Morris v. State*, 153 Md. App. 480, 506-07 (2003) (noting that the five words, "[w]e decline to do so [,]" are "all that need be said, for the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation.") (emphasis and footnote omitted). Consequently, we affirm the judgments of the circuit court.

**JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**