Circuit Court for Somerset County
Case No. C-19-CR-17-000234

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1003

September Term, 2019

DONTE SUMPTER

v.

STATE OF MARYLAND

Meredith,*
Friedman,
Kenney, James A., III,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith J.

Filed: February 3, 2021

*Meredith, Timothy E., J., now retired, participated in the hearing of this case while an active member of this Court, and after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

At the conclusion of a jury trial in the Circuit Court for Somerset County, Donte Sumpter, appellant, was found guilty of first-degree murder, first-degree assault, armed robbery, armed carjacking, and use of a firearm in the commission of a felony or crime of violence, as well four lesser-included offenses. After merging all but two of the convictions, the court sentenced Sumpter to life-imprisonment without the possibility of parole for first-degree murder, and sentenced him to a concurrent term of 20 years for use a firearm in the commission of a felony or violent crime. Sumpter timely appealed and presents four issues for our review:

> l. Did the court below abuse discretion by admitting evidence containing statements of Lewis Myers?
>
> 2. Did the trial judge abuse discretion by admitting evidence of Mr. Sumpter's alleged prior bad acts?
>
> 3. Did the trial judge plainly err by instructing the jury that Lewis Myers had identified Mr. Sumpter?
>
> 4. Did the trial judge abuse discretion by permitting improper closing argument by the prosecutor?

For the reasons set forth herein, we reject Sumpter's claims of reversible error, and we shall affirm the judgments of the circuit court.

FACTS

At approximately 3:00 p.m. on September 24, 2017, Lewis Myers observed a silver car parked in the driveway of his home in Princess Anne, Maryland. Myers began to approach the vehicle, and as he did so, he noticed a man walking in his yard. Myers called out to the man, but the man did not respond. Myers watched as the man approached the

vehicle's driver's window and lean into the vehicle. Myers then heard two gunshots, and watched as the assailant removed the victim from the vehicle and "left him for dead" in Myers's driveway. The assailant then entered the car and drove away.

Myers called 911. Sergeant Scott Carew and Detective Sue Dize—both of the Princess Anne Police Department—responded to the scene at 3:07 p.m. Myers reported what he had witnessed and provided the officers with a description of the shooter. Myers's statements were recorded by Detective Dize's body camera. In that recording, Myers described the gunman as a black male, 5'10", 300 pounds, with a "short afro." And Myers said the gunman had been wearing a black dress shirt and black pants. The wounded man lying on Myers's driveway was later identified as Arthur Alford.

Paramedics arrived and transported Alford to the Peninsula Regional Medical Center, but he died *en route*. Attempts to revive Alford proved unsuccessful and he was pronounced dead at 3:51 p.m. An autopsy revealed that the cause of death had been two gunshot wounds to Alford's head. The medical examiner who performed the autopsy identified the manner of death as homicide.

According to Alford's housemate, on the day of his death he had been driving a silver four-door Mercury Grand Marquis which, Alford had told her, he had recently purchased. A close personal friend of Alford likewise testified that Alford had purchased what appeared to be a silver Grand Marquis on September 23. Their testimony was similar to that of Alford's stepson, who testified that, when he and Alford had played basketball at

the University of Maryland Eastern Shore ("UMES") on the afternoon of September 24, Alford had been driving a different car than the one he usually drove.

Maryland State Troopers were dispatched to UMES for the purpose of reviewing video surveillance footage in the hope of identifying the vehicle that Alford had purchased. That footage depicted a Silver Mercury Grand Marquis with a distinctive windshield sticker leaving UMES at 2:35 p.m. on September 24. The State Troopers located the vehicle at around 11:00 p.m., and began to surveil it. At approximately 1:30 a.m. the following morning, an individual approached the car, entered it, and drove away. The surveilling officers followed the vehicle until its driver parked, exited the vehicle, and fled. A search of Motor Vehicle Administration records revealed that the automobile was registered to Sumpter, whose appearance matched the description of the shooter.

The car was impounded and processed for evidence. The crime scene technician charged with processing the vehicle discovered blood on the driver's seat headrest and seatbelt, which tested positive for Alford's DNA.

In addition to searching for the silver sedan in which Alford had been shot, the police conducted a search for his cell phone, which was "pinging" in the vicinity of McCormick Swamp Road. In the course of that search, Detective Sergeant Chasity Blades and Sergeant Sabrina Metzger observed a man, whose appearance matched the description of the gunman, walking in the road. At trial, both Detective Sergeant Blades and Sergeant Metzger positively identified Sumpter as the man whom they had seen.

As the search for Alford's cell phone continued on the morning of September 25, Senior State Trooper James Bryant discovered a bag hanging from a tree branch above McCormick Swamp Road. In that bag, Trooper Bryant found a ten-round capacity magazine for a semi-automatic handgun, which was wrapped in a paper towel and contained eight unfired rounds. Beneath the tree from which the bag had hung, Corporal Steven Hallman discovered a handgun, later identified as a Beretta .22 U22 Neos model pistol. The paper towel in which the magazine had been wrapped tested positive for Sumpter's DNA, and the handgun tested positive for Alford's.

During a post-arrest police interview, Sumpter told Corporal Scott Sears, the lead investigator assigned to Alford's homicide, that, on September 23, Alford purchased Sumpter's 2005 Mercury Grand Marquis for $3,000. One of the items recovered during a subsequent search of Sumpter's residence was a certificate of sale for a 2005 Mercury Grand Marquis and a "Notice of Security Interest Filing" relating thereto. An examination of the content of Sumpter's cell phone revealed that (i) Alford and Sumpter had exchanged numerous telephone calls on September 24, and (ii) Sumpter had received e-mails from eBay pertaining to his apparent purchase of a "Beretta Factory U22 Neos ten round stainless 22 long rifle magazine."

We shall include additional facts as pertinent to our discussion of the issues.

I

Sumpter contends that the court abused its discretion by admitting into evidence body camera footage in which Myers provided Detective Dize a description of the shooter's

appearance. Sumpter argues that Myers's recorded description was "not materially inconsistent" with his trial testimony, and that it was not, therefore, admissible as a prior inconsistent statement. The State counters by arguing that, although Myers's initial description of the shooter was not a "'flat contradiction'" of his testimony, the discrepancies between his initial statement to the police and his in-court description were sufficiently significant to render the former statement materially inconsistent with the latter.

The Inconsistencies at Issue

At trial, Myers testified that the shooter was "a large black man . . . wearing a black shirt with black pants." Myers said the man was approximately 5'11", weighed **about 180 pounds**, had facial hair, and had **hair styled in "stringy twists."** After Myers testified, the State called Detective Dize to the stand, and offered into evidence her September 24 body camera recording, wherein Myers described the gunman as a black male, 5'10", "**a heavy guy . . . about 300 pounds**, with **a "short afro,"** who had been wearing a black dress shirt and black pants.

The court admitted the footage over defense counsel's objection, ruling that it was admissible under the prior inconsistent statement exception to the rule against hearsay.

Standard of Review for Admission of Hearsay

As the Court of Appeals has explained, the admission of hearsay is subject to a two-tier standard of review.

> [T]he trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no

> deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review. Accordingly, the trial court's legal conclusions are reviewed *de novo*, but the trial court's factual findings will not be disturbed absent clear error.

Gordon v. State, 431 Md. 527, 538 (2013) (internal citations omitted).

Recordings Made by Police Body-worn Cameras

Maryland Rule 5-803(b)(8)(D) provides an exception to the rule against hearsay and permits introduction of a recording from a body camera worn by a law enforcement person. The exception, adopted in 2016, provides:

> Subject to Rule 5-805, an electronic recording of a matter made by a body camera worn by a law enforcement person or by another type of recording device employed by a law enforcement agency may be admitted when offered against an accused if (i) it is properly authenticated, (ii) it was made contemporaneously with the matter recorded, and (iii) circumstances do not indicate a lack of trustworthiness.

Maryland Rule 5-805 is the rule referred to in the first line of Rule 5-803(b)(8)(D), and it provides that hearsay within hearsay must be separately supported by its own exception to the hearsay rule. Rule 5-805 provides: "If one or more hearsay statements are contained within another hearsay statement, each must fall within an exception to the hearsay rule in order not to be excluded by that rule."

In *Paydar v. State*, 243 Md. App. 441, 453-54 (2019), this Court traced the history of Rule 5-803(b)(8)(D), and explained:

> Md. Rule 5-803(b)(8)(D) permits a recording from a body camera worn by a law enforcement person to be "offered against an accused" if the recording: (1) is made contemporaneously; (2) is properly authenticated; (3) is otherwise trustworthy; and (4) any hearsay statements within the recording fall within an independent hearsay exception under Md. Rule 5-805. Although the last requirement is not expressly articulated in Md. Rule 5-

> 803(b)(8)(D), it is subject to Md. Rule 5-805, which provides that "[i]f one or more hearsay statements are contained within another hearsay statement, each must fall within an exception to the hearsay rule in order not to be excluded by that rule."

Id. at 454. We further said: "In other words, for the recording to be admissible, the party offering the evidence must establish a hearsay exception for statements contained therein." *Id*. We concluded that the declarant's statements recorded by the police in *Paydar* were not admissible pursuant to the body camera exception because, in that case, there was no applicable exception to permit admission of the hearsay statements recorded by the body camera. "In the absence of qualifying under another exception to the hearsay rule, they were not admissible under Md. Rule 5-803(b)(8)(D)." *Id*. at 456 (footnote omitted).

In Sumpter's case, the State contends that the description recorded by the police body camera was admissible as a prior inconsistent statement pursuant to Maryland Rule 5-802.1.

Hearsay Exception for Certain Prior Inconsistent Statements

Maryland Rule 5–802.1 addresses the admissibility of a witness's prior inconsistent statements, and provides, in pertinent part:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> (a) A statement that is inconsistent with the declarant's testimony, if the statement was . . . (3) recorded in substantially verbatim fashion by . . . electronic means contemporaneously with the making of the statement[.]

Sumpter does not contest that the recording at issue was "recorded in substantially verbatim fashion by . . . electronic means contemporaneously with the making of the

statement[.]" Rule 5–802.1(a)(3). But he argues that the recorded statement "was not materially inconsistent" with Myers's trial testimony. Sumpter contends that "[t]he only two disparities were in the hairstyle ('stringy twists' vs. 'short afro') and the estimate of the suspect's weight (180-200 pounds vs. 'about 300 pounds')."

Although Sumpter did not cite authority for imposing a materiality requirement for admission of a prior inconsistent statement pursuant to Rule 5-802.1(a), this Court held in *Wise v. State*, 243 Md. App. 257, 271–72 (2019), that the inconsistency at issue must be material, and not merely peripheral or inconsequential. And, after the briefs were filed in this case, the Court of Appeals affirmed our holding in *Wise*, agreeing with our conclusion that the inconsistency between the statements must be material. *Wise v. State*, 471 Md. 431, 452 (2020). *See also* KENNETH S. BROUN, 1 MCCORMICK ON EVIDENCE § 34, at 153 (8th ed. 2020) ("Under the better, more widely accepted view, any material variance between the testimony and the previous statement suffices. The pretrial statement need 'only bend in a different direction' than the trial testimony." (Footnotes omitted.)). The Maryland Court of Appeals has previously advised: "When determining whether inconsistency exists between testimony and prior statements, 'in case of doubt the courts should lean toward receiving such statements to aid in evaluating the testimony.'" *McClain v. State*, 425 Md. 238, 250 (2012) (quoting KENNETH S. BROUN, MCCORMICK ON EVIDENCE, § 34, at 153 (6th ed. 2006)). *See also* JOSEPH F. MURPHY, JR., MARYLAND EVIDENCE HANDBOOK § 1302(F) (4th ed. 2010, 2019 Supp.) (citing *McClain*).

Here, the description of the shooter, provided by the sole eyewitness to the crime, relates to an important issue in the case, and, therefore, concerns a material fact. *See Smith v. State*, 218 Md. App. 689, 704 (2014) ("Evidence is material if it bears on a fact of consequence to an issue in the case."). Under the circumstances, we conclude that the differences between Myers's initial description of the gunman and his description at the time of trial testimony were indeed material. Myers's initial estimate of the gunman's weight was 33-40% less than his estimate at the trial. This discrepancy is, in and of itself, material. The two descriptions of the shooter's hair were also quite different, and, depending on which statement the jury found more credible, could have influenced the finding with respect to the identity of the shooter. *See McClain*, 425 Md. at 250 ("When a jury is presented with such conflicting testimony from a single witness, courts cannot speculate as to which side of the contradiction the jury will assign greater credibility." The questions of "what evidence to believe, what weight [is] to be given it, and what facts flow from that evidence are for the jury . . . to determine[.]" (Internal citations and quotation marks omitted.)).

Because there was a material difference between Myers's two descriptions of the shooter, the trial court did not err in admitting the recorded statement.

II

The second issue raised by Sumpter relates to testimony of Adrian White—a former co-worker of Sumpter's—which Sumpter claims should have been excluded, pursuant to Maryland Rule 5-404, as impermissible evidence of prior bad acts.

The Testimony of Adrian White

At the end of the second day of trial, the State advised the court that it intended to elicit testimony from White the following morning. The State proffered that he would testify that, on September 23, 2017—one day prior to the shooting—Sumpter "came and found him[.]" Reading from a statement that White had written, the State continued its proffer: "[Sumpter] 'said that he always has something with him. He showed me a gun. I don't know if it was real or not.[']" The State further proffered that White would testify that the gun that Sumpter had shown him "had a long barrel." The State represented that it would limit its examination of White to the statements as proffered. The defense objected, arguing that the proffered testimony constituted impermissible character evidence.

The court held a hearing the following morning to consider the admissibility of White's testimony. At that hearing, conducted without the jury present, White testified that, on September 23, Sumpter had approached him on Hall Avenue in Princess Anne while White was conversing with his family. Sumpter made a reference to White's failure to repay $300 that Sumpter had loaned White a month before. White testified that, during that conversation, Sumpter raised a handgun from his waistband, showed it to White, and said: "I've always got this on me." White described the handgun as having been black "with a long barrel." He further testified that State's Exhibit 44—a photograph of the alleged murder weapon—looked like the gun that Sumpter had displayed that evening. At approximately 9:30 p.m. on September 23, White reported the incident to the Maryland State Police, alleging that Sumpter had threatened him. White said that Sumpter did not

point the gun at him, but simply showed it to White and said he had it on him at all times. On cross-examination, White admitted that he did not know if the gun was real.

After hearing argument from the parties, the court ruled that a portion—but not all—of White's testimony was admissible. The court reasoned:

> [I]n considering my decision there are four steps involved in deciding whether to admit or exclude evidence of prior bad acts. First the Court must determine if, in fact, the challenged evidence concerns a prior bad act. I think we all are agreed that it does in terms of what Mr. White testified to here this morning under the *Klauenberg* case.
>
> Second, if it does, then the Court must determine if the evidence has some special relevance to the contested issue in this case under Smith versus State. I think . . . it certainly has special relevance in the fact that at least according to Mr. White's testimony, he's identified the picture of the gun as the gun he saw that evening and then when cross-examined he -- I'll say backed off to a small degree and said it looked alike to me of what I saw/seen. He said seen, I say saw.
>
> Third, with those exceptions applying, the Court must decide whether the Defendant's involvement in the prior bad act can be proven beyond a clear and convincing evidence under the *Faulkner* case. At least at -- with that burden in regards to White's testimony, I'm convinced that it does meet clear and convincing evidence at this juncture.
>
> But finally the Court must weigh the probative value of the prior bad acts evidence against the potential for undue prejudice which would result from its admission against the Defendant here in this case. And that's, quite frankly, where I think the analysis hinges under [Rule] 5–403.
>
> Although relevant, evidence may be excluded [i]f its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
>
> And quite frankly, [the State's] argument in regards to [its] proffer[] to the [court] of what the State's evidence will be in terms of Mr. Alford's DNA being on the gun[,] I think the probative value does outweigh the prejudicial value in this case in regards to the admission of the testimony as

> to Mr. White seeing the gun the night before. So I'm going to allow it for that limited purpose.

The court then limited the scope of White's testimony to the fact that Sumpter had shown White a gun the night before the murder. The court instructed counsel that there should be

> [n]o testimony as to threats being made, that money was owed, and the gun was being carried by the Defendant or he said that I carry it with me for enforcement, what that implies, that he's using it to enforce collecting the $300, I think that's what was implied by his testimony. . . . If we go there, then at that point . . . the prejudice outweighs the probative value . . . .

Counsel complied with the court's instructions to limit White's testimony. When the jury was present, White was neither asked about, nor did he testify about, having been indebted to Sumpter, or Sumpter's statement that he always had the gun "on" him. White simply recounted that, at around 9:00 p.m. on September 23rd, he saw Sumpter on Hall Avenue in Princess Anne, they conversed, and during the conversation, Sumpter briefly showed him what appeared to be a black handgun with a long barrel. When White was shown State's Exhibit 27—the handgun that had allegedly fired the fatal shots—White testified that he recognized it as the gun that Sumpter had shown him that night. On cross-examination, however, White conceded that, when Sumpter showed him the gun, he was not able to see the grip or the trigger area, and he did not know the make or model or caliber of the gun. He also agreed that he had never seen Sumpter with a gun before.

Prior Bad Acts Evidence

Sumpter contends that the court abused its discretion by admitting the testimony of Adrian White, and asserts that, in so doing, the court violated the prohibition of Maryland

Rule 5–404(b) against introducing prior bad acts evidence to prove criminal propensity. He argues that "the prior bad act was not proven by clear and convincing evidence . . ., and [that] the evidence should have been excluded because [its] probative value was substantially outweighed by the danger of unfair prejudice."

The State counters that Rule 5–404(b) is inapplicable because White's trial testimony, as limited by the trial judge, was not evidence that Sumpter had committed a crime or performed a prior bad act. We agree with the State's assertion that the testimony White gave in the presence of the jury was neither evidence that Sumpter had committed a prior crime, nor that he had performed a prior bad act. As several cases have held, the possession or ownership of a handgun does not, *without more*, impugn the character of the possessor or owner thereof. *See Klauenberg v. State*, 355 Md. 528, 551 (1999) (holding that "testimony that two guns and ammunition were found on appellant's premises, without more, does not constitute a bad act" where "[t]here was no indication that these firearms were obtained or possessed illegally"); *Snyder v. State*, 210 Md. App. 370, 395 (2013) (holding that "[s]hotgun ammunition, even for a convicted felon, is not other crimes evidence and its possession, ordinarily, is not unlawful"); *Wheeler v. State*, 88 Md. App. 512, 527 n.10 (1991) ("We . . . fail to see how showing someone a gun is 'other crimes' evidence. Showing someone a gun, without more, is, as far as we know, not a crime unless a criminal statute is violated.").

In this case, the State neither elicited testimony, nor introduced extrinsic evidence, indicating that Sumpter had (i) been disqualified from possessing a handgun, (ii) illegally

transported the purported handgun in question, or (iii) fired that handgun prior to the commission of the crimes with which he was charged. White's testimony about Sumpter's possession of a handgun, *without more*, was not evidence of a prior bad act, and the trial court did not err in permitting the State to elicit that testimony.

III

Sumpter claims that the circuit court committed plain error when it gave the jury a pattern instruction on eyewitness identification; Sumpter contends that the instruction was not generated by the evidence, and, by giving that instruction, the court erroneously told "the jury that Lewis Myers had identified Mr. Sumpter as the gunman, when the evidence did not support this assertion."

The State counters that plain error review is not warranted. It asserts that the court's identification instruction was not a misstatement of facts because, the State points out, the evidence included the testimony of two police officers (Blades and Metzger) who did, in fact, positively identify Sumpter, not as the shooter, but as a man they had seen walking in the trailer park near the place where the murder weapon was found. Alternatively, the State argues that, because the court's eyewitness instruction made no mention of Myers, any error was neither clear nor obvious. Finally, it claims that Sumpter failed to establish that the instruction affected the outcome of the proceedings, emphasizing that defense counsel's closing argument "made clear," without any contradiction by the State, "that Myers did not identify Sumpter."

The Jury Instruction at Issue

After the close of the evidence, but before closing arguments, the court instructed the jury, and included the following instruction based upon Maryland Criminal Pattern Jury Instructions (2d ed. 2012, 2013 supp.), MPJI-Cr 3:30:

> The burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the Defendant was the person who will [sic] committed it. You have heard evidence about the identification of the Defendant as the person who committed the crime. You should consider the witness'[s] opportunity to observe the criminal act and person committing it, including the length of time the witness had to observe the person committing the crime, the witness'[s] state of mind, and any other circumstance surrounding the event. You should also consider the witness'[s] certainty or lack of certainty, the accuracy of any prior description and the witness'[s] credibility or lack of credibility as well as any other factors surrounding the identification.
>
> You have heard the evidence that prior to this trial a witness identified the Defendant. The identification of the Defendant by a single eyewitness as the person who committed the crime, if believed beyond a reasonable doubt, can be enough evidence to convict the Defendant. However, you should examine the identification of the Defendant with great care. It is for you to determine the reliability of any identification and give it the weight you believe that it deserves.[1]

[1] The full text of MPJI-Cr 3:30 is:

> The burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the defendant was the person who committed it. You have heard evidence about the identification of the defendant as the person who committed the crime. You should consider the witness's opportunity to observe the criminal act and the person committing it, including the length of time the witness had to observe the person committing the crime, the witness's state of mind, and any other circumstance surrounding the event. You should also consider the witness's certainty or lack of certainty, the accuracy of any prior description, and the witness's credibility or lack of credibility, as well as any other factor surrounding the identification.

(continued . . .)

After the court had completed giving its instructions to the jury, it asked the parties: "Counsel, are you satisfied with the jury instructions?" They answered:

[THE STATE]: The State is.

[DEFENSE COUNSEL]: Yes, Your Honor.

Thereafter, when the State made its closing argument, it did not assert that Myers—the sole eyewitness to the shooting—had identified Sumpter as the shooter. And, during defense counsel's ensuing summation, counsel emphasized that Myers had not even been asked to identify Sumpter as the person he saw shoot Arthur Alford, stating:

> The testimony of Mr. Myers, while the weight does change when he gets on the stand, I think maybe he has forgotten a little bit, but the testimony of him is so important and yet the State didn't ask the one question which could have ended this all on the first day and that is did the Defendant do it? Is that the person who you saw shoot Mr. Alford? He was never asked that question. He was never asked that question because we know he couldn't identify him, we know from the testimony of Trooper Sears that he was shown a photo array and never picked him out. He never has said that that person is the person who shot Mr. Alford. And that is what we're really here about is who shot Mr. Alford.

> [You have heard evidence that prior to this trial, a witness identified the defendant by _____.]
>
> [The identification of the defendant by a single eyewitness, as the person who committed the crime, if believed beyond a reasonable doubt, can be enough evidence to convict the defendant. However, you should examine the identification of the defendant with great care.]
>
> It is for you to determine the reliability of any identification and give it the weight you believe it deserves.

When the State then made its closing rebuttal, the State did not dispute these assertions regarding the lack of identification testimony by Myers.

Plain Error

Sumpter focuses his claim of plain error on the sentence in MPJI-Cr 3:30 that instructed the jury: "You have heard the evidence that prior to this trial a witness identified the Defendant."

Although Sumpter acknowledges his trial counsel's failure to object to this instruction at trial, he urges us to consider it as a plain error. He acknowledges that Maryland Rule 4-325(e) provides: "No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." But he emphasizes that Rule 4-325(e) also expressly authorizes appellate review of any plain error: "An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object." And, Sumpter observes, apart from Rule 4-325(e), an appellate court has discretion to address an unpreserved error in "'cases in which correction is necessary to serve the ends of fundamental fairness and substantial justice.'" (Quoting *Campbell v. State*, 243 Md. App. 507, 538 (2019), *cert. denied*, 467 Md. 695 (2020), *cert. denied*, ___ U.S. ___, 2021 WL 78082 (January 11, 2021).) *See also Yates v. State*, 429 Md. 112, 130 ("Plain error review is reserved for errors that are

'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'").

But, even if Sumpter had not affirmatively waived this issue by telling the trial judge that he was satisfied with the court's instructions, we would hold that plain error review is unavailable because the court did not clearly commit reversible error by using MPJI-Cr 3:30 to instruct the jury in this case. Contrary to Sumpter's claim, at no point in its jury instructions did the court say that *Lewis Myers* had positively identified Sumpter as the gunman. And, because, as the State notes, two police officers identified Sumpter as the man they had seen in the vicinity of the murder weapon, there *was* some evidence to support the court's instruction that: "You have heard the evidence that prior to this trial a witness identified the Defendant." After making that observation, the court also instructed the jury that it "should examine the identification of the defendant with great care," and it was up to the jury "to determine the reliability of any identification and give it the weight you believe it deserves."

Those pattern jury instructions regarding identification testimony—although arguably gratuitous in light of the fact that Myers, the sole eyewitness to the shooting, had not even been asked when he was on the witness stand to identify Sumpter as the shooter—did not constitute a plain error in this case that was so "material to the rights of the accused" that a new trial "is necessary to serve the ends of fundamental fairness and substantial justice." *Campbell*, 243 Md. App. at 538.

IV

Finally, Sumpter claims that the court abused its discretion by permitting the State to suggest a possible motive, during its rebuttal closing, after defense counsel had asserted: "there's just no motive, they only had one interaction." On rebuttal, the prosecutor said: "The Defense wants you to believe that there's no motive. I'll give you a motive[:] how about Donte Sumpter ripped off Arthur Alford because he sold him a vehicle with a lien on it." A general objection was overruled. The prosecutor then added: "The Defendant never intended to give a true sale [sic] of the vehicle to Arthur Alford."

On appeal, Sumpter claims that this rebuttal argument was "unsupported by the evidence presented and was outside the bounds of permissible comment." The State replies that its argument was a "proper response to defense counsel's claim" that if, in purchasing Sumpter's vehicle, Alford "had somehow been swindled or something or the car was not functioning or anything along those lines, I'm sure that he would have mentioned it[.]" The State further contends that the suggested motive for Sumpter's decision to eliminate Arthur Alford—because Alford had just paid Sumpter for the car and may have felt "ripped off" by Sumpter—was a reasonable inference from the evidence presented at trial.

"A trial court is in the best position to evaluate the propriety of a closing argument as it relates to the evidence adduced in a case[.]" *Ingram v. State*, 427 Md. 717, 726 (2012). Accordingly, "'[t]he permissible scope of closing argument is a matter left to the sound discretion of the trial court.'" *Cagle v. State*, 462 Md. 67, 74 (2018) (quoting *Ware v. State*, 360 Md. 650, 682 (2000)). We generally do not disturb the exercise

of that discretion unless it was clearly abused and likely prejudiced the defendant. *Id*. A court abuses its discretion when its judgment is "'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Moreland v. State*, 207 Md. App. 563, 569 (2012) (quoting *Gray v. State*, 388 Md. 366, 383 (2005)).

The State enjoys "a great deal of leeway" when making a closing argument. *Degren v. State*, 352 Md. 400, 429 (1999). It is free to engage in oratorical flourishes, to "use the testimony most favorable to [its] side of the argument," and to examine, collate, sift, and treat the evidence in its own way. *Mitchell v. State*, 408 Md. 368, 380 (2009) (quoting *Wilhelm v. State*, 272 Md. 404, 412 (1974)). It may, moreover, invite the jury to draw reasonable inferences from the evidence introduced at trial. *Cagle*, 462 Md. at 75. The State may not, however, "stray outside of the record," *Whack v. State*, 433 Md. 728, 748 (2013), nor may it "invite the jury to draw inferences from information that was not admitted at trial." *Spain v. State*, 386 Md. 145, 156 (2005) (citation omitted).

But, even when a prosecutor exceeds the boundaries of proper argument, we will not find reversible error if we "conclude ultimately that those statements did not mislead or influence the jury unduly to the prejudice of [the defendant]." *Id*. at 154. As the Court of Appeals stated in *Spain*:

> Not every improper remark [made by a prosecutor during closing argument], however, necessarily mandates reversal, and "[w]hat exceeds the limits of permissible comment depends on the facts in each case." We have said that **"[r]eversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused**." This determination

> of whether the prosecutor's comments were prejudicial or simply rhetorical flourish lies within the sound discretion of the trial court. On review, an appellate court should not reverse the trial court unless that court clearly abused the exercise of its discretion and prejudiced the accused.

386 Md. at 158-59 (quoting *Degren*, 352 Md. at 430-31, internal citations omitted in *Spain*) (emphasis added).

Applying this standard to the State's rebuttal argument regarding a possible motive, we conclude that this isolated argument of the prosecutor was not likely to have misled the jury or influenced the jury to the prejudice of Sumpter.

Corporal Hallman was among the officers who conducted the search of Sumpter's residence. He testified that, during that search, the officers recovered nine items, including a certificate of sale for a 2005 Mercury Grand Marquis and a "Notice of Security Interest Filing." The former document identified Sumpter as the purchaser of the vehicle, while the latter named him as its owner. On cross-examination of Corporal Hallman, the following colloquy occurred:

> Q. [T]he title that was recovered, it says on it it's not a title, what is it?
>
> A. This would be a notice of security interest filing. So that would be more of -- it would indicate what they're trying to obtain.
>
> Q. Okay. So this is the document that says that Delmarva Motor Acceptance Corp still has some possessory interest in the vehicle, correct?
>
> A. According to that document, yes.
>
> Q. Okay. And MVA issues another title when the possessory interest is resolved, if you know?
>
> A. When they receive their proper documentation.

Q. Okay. And so this, if you were going to sell a car, would not be the title that you would need to sell the car?

A. No, it would be the document basically when they would do a lien search or something like that to determine who actually is the owner of that vehicle.

* * *

Q. And the other title that was recovered was also one that indicated that Delmarva Motor Acceptance Corp had a possessory interest?

A. I'd just refer to the document, ma'am. That's correct, they note there that they still --

Q. Okay. And this indicates that it was a duplicate or corrected title to the ones that –

A. To the document.

Corporal Scott Sears, the lead investigator into Alford's death, also testified for the State, and he confirmed that, in order to obtain new vehicle tags, a buyer must demonstrate that the seller has "clear title" to the vehicle free from any liens.

The testimony of Corporal Hallman and Corporal Sears, coupled with the fact that the vehicle's tags had not been replaced as of the date Alford was murdered and Sumpter regained possession of the vehicle, supported the prosecutor's inference that Sumpter may not have been in a position to transfer title to the vehicle to Alford because the lien on that vehicle had not yet been removed, and that could have led to Alford demanding the return of his purchase money. We also find persuasive the State's argument that, because "the only apparent connection between Sumpter and [Alford] was the sale of the vehicle, it is reasonable to infer that the motive may have had something to do with one of them being

unhappy with the sale," either because Sumpter misrepresented "the condition of the car, or the condition of the title." Even though the testimony about the lien was hazy, the prosecutor's argument was not so clearly beyond the evidence that it would have misled the jury. Consequently, we conclude that the trial court did not commit an abuse of discretion in overruling the objection to the prosecutor's argument.

JUDGMENTS OF THE CIRCUIT COURT FOR SOMERSET COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.