UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1720

September Term, 2014

ANTONIO GORHAM

v.

STATE OF MARYLAND

Meredith,
Berger,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: October 5, 2015

Following a jury trial in the Circuit Court for Baltimore City, Antonio Gorham ("Gorham"), appellant, was convicted of robbery and first degree assault. On appeal, Gorham presents three questions for our review,[1] which we rephrase as follows:

1. Whether Detective Cain's testimony identifying Gorham in the surveillance video constitutes plain error.

2. Whether the prosecutor's closing arguments constitute plain error.

3. Whether the trial court erred by imposing two enhanced sentences.

For the reasons that follow, we answer questions one and two in the negative. The State concedes, and we agree, that it was error to impose two enhanced sentences here. Accordingly, we shall affirm Gorham's convictions, but vacate his sentence and direct that he be resentenced on remand.

FACTS AND PROCEEDINGS

On June 30, 2013, Gorham and at least two accomplices assaulted and robbed a victim, Mr. Graves, shortly after midnight in front of the Penn Liquor Store on Greenmount

[1] The issues, as presented by Gorham, are:

1. Did the trial court err by allowing Detective Cain to identify Mr. Gorham in a surveillance video?

2. Did the prosecutor's improper closing arguments constitute plain error?

3. Did the trial court impose an illegal sentence by giving Mr. Gorham two enhanced sentences?

Avenue in Baltimore. Graves was going to the store to buy cigarettes, when he was grabbed, forced to the ground, punched, and kicked by three assailants. During the attack, Graves lost consciousness, and the assailants stole his wallet and other property. Two of the three assailants were later identified as Spanish Crowder ("Crowder"), and Gorham. John Lee, the owner of the liquor store, maintains a number of surveillance cameras that display views of both the exterior and interior of the store. Lee's cameras recorded the incident.

On August 13, 2013, a circuit court grand jury returned an eight count indictment charging Gorham and Crowder with attempted second degree murder, robbery, first degree assault, conspiracy, and other related offenses. Crowder pleaded guilty to first degree assault and robbery, while Gorham went to trial.[2] The third assailant had not yet been identified.

The recording of the surveillance video was played for the jury during the testimony of Detective Aaron Cain.[3] Detective Cain narrated the video for the jury and also described various still photographs that had been developed from the video recording. Detective Cain identified Gorham and Crowder from the video. The admission of Detective Cain's testimony is the basis for one of Gorham's allegations of error.

[2] Gorham enlisted Crowder as a witness. The latter accepted responsibility for the assault and robbery.

[3] Detective Cain's name is spelled "Kane" at some points in the transcripts. We shall use the spelling that generally appears in the trial transcript and in the briefs.

The jury found Gorham guilty of first degree assault and robbery. The trial court imposed two concurrent, enhanced, sentences of twenty five years' incarceration, without the possibility of parole, for each conviction.

We shall recite additional facts as we address the issues before us.

DISCUSSION

I. Allegations of Trial Error

The two assertions of trial error--the complaint that the trial court erred by admitting identification testimony and then erred by omission during the State's rebuttal argument--appear for the first time on appeal. Although Gorham moved before trial to preclude the identification testimony, and, indeed, was successful in limiting the number of law enforcement witnesses who could pick him out from the video, he did not lodge a contemporaneous objection to the testimony at trial, and did not object to the State's closing and rebuttal argument. Accordingly, appellate consideration of either issue will be confined to review for plain error.

"Plain error is error that is so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Steward v. State*, 218 Md. App. 550, 565 (citation and internal quotation marks omitted), *cert. denied*, 441 Md. 63 (2014); *accord Malaska v. State*, 216 Md. App. 492, 524-25 (explaining that plain error review can remedy defects that denied "a defendant's right to a fair and impartial trial."), *cert. denied*, 439 Md. 696 (2014), *and cert. denied*, 135 S. Ct. 1162 (2015). Review for plain error is reserved for

error that is "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Savoy v. State*, 420 Md. 232, 243 (2011).

Plain error review exists in recognition that:

> [e]rror in a trial court may be committed only by a judge, and only when he rules, or, in rare instances, fails to rule, on a question raised before him in the course of a trial, or in pre-trial or post-trial proceedings. Appellate courts look only to the rulings made by the trial judge, or to his failure to act when action was required, to find reversible error.

Williams v. State, 34 Md. App. 206, 209 (1976) (quoting *Braun v. Ford Motor Co.*, 32 Md. App. 545, 548 (1976)). Indeed,

> [t]he quintessential thrust of the rule is that an objection unmistakably articulated before the trial judge, giving him the opportunity to rule thereon, is the sine qua non of appellate review. . . . [T]he oft-neglected truth [is] that an appellate court is not some omnipresent, omniscient and omnipotent ombudsman ready, willing and able to set aright all the ills of the world. . . . [A]n appellate court sits rather in a more limited judgment upon the rulings of a trial judge when he has been called upon to rule.

Williams, *supra*, 34 Md. App. at 209. For the reasons that follow we conclude that neither Detective Cain's identification of Gorham, nor the prosecutor's closing arguments constitute plain error.

A. Identification Testimony

Gorham challenges the introduction of Detective Cain's testimony by asserting that the detective was not sufficiently acquainted with him so as to offer a credible identification,

or, in other words, his identification is merely irrelevant speculation or surmise. Indeed, he also maintains that the detective's lay opinion invaded the province of the jury to be the sole trier-of-fact.

The State disclosed that three detectives, who were familiar with the store and the neighborhood, would testify that they identified Gorham from the Penn Liquors surveillance video. Prior to trial, Gorham and Crowder, moved to exclude the officer's identification testimony. The trial court granted the defendants' motion in limine to exclude the identification testimony of the detectives who viewed the recording, with the exception of Detective Cain.

Detective Cain testified at the pre-trial hearing on the motion to exclude his testimony that he identified Gorham from the video. He recounted the nature and extent of his familiarity with Gorham:

> [PROSECUTOR:] And can you, as we just did with respect to Mr. Crowder, explain your interactions with Mr. Gorham that allowed you to recognize him in the tape?
>
> A Well with Mr. Gorham I didn't have that many run-ins with him, but I know him well enough by his -- he had a lot of facial hair at the time of the -- my interactions with him.
>
> Q So although you didn't have as many interactions, do you have any idea over again what time period those interactions occurred during you --
>
> A About the same time. Maybe three to five years, but at the most 10 or 15 times at the most. And this is general conversation. It's just talking with him in the area.

On cross-examination by Crowder's attorney, Detective Cain explained why he needed to become familiar with the local residents as a function of community policing:

> I mean that's generally how a lot of things happen. We talk to people. You got to get to know who they are especially in a post, you know, you got to get to know your people because sometimes it's just you by yourself and you got to get to know your people in your area. That way if something happens to you some people may call on you. Some people may not, but at least they know who you are and they, you know, know your face everyday.

On cross-examination by Gorham's counsel, Detective Cain said that this liquor store was the "main store" in the area, and consistently drew gatherings of people; "[s]ort of the same faces." Although he did not know the names of Crowder or Gorham, Detective Cain learned their names after speaking with another detective, Detective More. When asked by Gorham's counsel whether he would be surprised to know that Gorham had been in the Department of Corrections from 2003 until 2008, Detective Cain testified that it was a "possibility" that he encountered Gorham in the neighborhood. Detective Cain was confident that he had interacted with Gorham in the past. When counsel persisted, the detective stated that "[i]t's a strong possibility[,]" and, after further prodding, reiterated that "[i]t's a strong possibility, counsel."

Detective Tavon More had numerous contacts with Gorham. When asked at the motions hearing whether there was "anything particular" about Gorham's appearance that "assisted [his] ability to recognize [Gorham,]" Detective More pointed out that the "only

difference for Mr. Gorham now is he shaved[.]" Detective More otherwise cited his contact from "stopping [Crowder and Gorham] in the area."

The hearing was continued until the next day, and following jury selection the trial court heard additional argument and ruled that the State could present testimony from Detective Cain that he identified Gorham.

Turning to his trial testimony, Detective Cain testified that, shortly after 12:00 a.m. on June 30, 2013, he arrived at Penn Liquor Store to investigate reports of an assault. The police were aware that the proprietor of the liquor store maintained video surveillance. The store owner prepared a DVD video disc which depicted the incident. The DVD video was admitted into evidence through the testimony of Detective Cain.

Detective Cain viewed the recording and recognized Gorham and Crowder. Although Detective Cain did not know their names at that time, he would later learn their identities from his investigation. He emphasized that, at the time of the assault and robbery, Gorham wore a distinctive hat during the incident. We conclude that the admission of Detective Cain's identification testimony does not constitute error, and, assuming any error was present in the court's exercise of its discretion, it is certainly not "plain." We explain.

Maryland Rule 5-701 governs lay testimony and provides:

> **Rule 5-701. Opinion testimony by lay witnesses.**
>
> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on

> the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

"Lay opinion testimony is testimony that is rationally based on the perceptions of the witness." *Ragland v. State*, 385 Md. 706 (2005). "[L]ay opinions which are helpful to the trier-of-fact in that they have incremental probative value beyond that of the underlying facts will be permitted." *Robinson v. State*, 348 Md. 104, 119 (1997).

This Court has noted that "permissible lay opinion testimony generally falls into one of two categories." *Moreland v. State*, 207 Md. App. at 571 (citation, internal quotation marks and alterations omitted). The first category is "where the facts cannot otherwise be adequately presented or described to the jury, lay opinion testimony should be admitted." *Robinson*, *supra*, 348 Md. at 119. The "second category . . . is where the lay trier of fact lacks the knowledge or skill to draw the proper inferences from the underlying data." *Id.* (internal quotations omitted).

Discounting the strength of Detective Cain's familiarity with him, Gorham stresses that, unlike the police officer witness in *Moreland v. State*, who had previously known Moreland "for 40 to 45 years," 207 Md. App. at 567, Detective Cain had only seen him over a period of a few years. Hence, Gorham asserts, Detective Cain "did not have substantial familiarity with or intimate knowledge of [his] appearance."

We are unconvinced. In *Moreland*, this Court cited with approval the opinion of the Colorado Supreme Court in *Robinson v. People*, 927 P.2d 381 (Colo. 1996). In that case,

Robinson was convicted of the aggravated robbery of a convenience store. *Robinson, supra*, 927 P.2d at 382. The robbery was recorded by a surveillance video, and a police officer took the stand and identified that Robinson was the robber depicted on the surveillance videotape. *Id.*

On appeal, Robinson argued that the trial court erred by admitting the officer's testimony that it was Robinson who was on the video. He specifically maintained that the detective's "lay opinion testimony was not helpful to the jury because the detective was in no better position than the jury to determine whether the robber in the videotape was Robinson." *Id.* at 382.

Both Colorado appellate courts disagreed. Following a survey of cases from other jurisdictions, the Colorado Supreme Court held, that a

> lay witness may testify regarding the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury. Moreover, the lay witness need only be personally familiar with the defendant, and the intimacy level of the witness' familiarity with the defendant goes to the weight to be given to the witness' testimony, not the admissibility of such testimony. Additionally, the defendant's appearance need not have changed from the time of the photograph to the time of trial, so long as the lay opinion testimony is helpful to the jury. Thus, we hold that, although the witness must be in a better position than the jurors to determine whether the image captured by the camera is indeed that of the defendant, this requires neither the witness to be "intimately familiar" with the defendant nor the defendant to have changed his appearance.

Robinson, *supra*, 927 P.2d at 384. The Colorado Supreme Court concluded that the detective's "lay opinion testimony was helpful to the jury in that he was more likely to correctly identify Robinson from the photograph than was the jury." *Id*. at 384-85. This was so even though the detective had previous "face-to-face" contact with Robinson, although he was "not intimately familiar" with him. *Id*. The court added that the detective's previous contact was "sufficient to be helpful to the jury[,]" and explained that the detective was "more likely to correctly identify Robinson from the photograph than was the jury." *Id*. at 384-85.

In the case before us, Detective Cain recognized Gorham from prior contacts with him when the detective had been a uniformed patrol officer in the Eastern District. Although he could not provide specifics as to his interaction with Gorham during that period, he testified that he had contact with Gorham for "[r]oughly a few years maybe."

We agree with the State that the amount of time the witness has spent observing, or interacting with, a defendant, generally goes to the weight of the witness's testimony, and not its admissibility. Furthermore, the testimony must also be of assistance to the jury. Such is the case here, where Gorham's appearance changed between the time of the robbery until trial. As was noted in the pre-trial hearing, and confirmed by our independent review of the record, Gorham had a beard at the time of the offense that was not present at the hearing or at trial. Detective Cain could thus draw on his prior interaction with Gorham, when the latter had a beard, to identify Gorham in the video.

Although Detective Cain had not interacted with Gorham as frequently as had the witness in *Moreland*, we conclude that his interaction with him during the detective's policing in the neighborhood provides a sufficient rational and adequate basis for his identification of Gorham as one of the robbers in this case, which we review for plain error. Any weaknesses in his identification are for the jury to assess.

We agree with Gorham that there is some point at which a lay witness may have such an unfamiliarity with the subject of their testimony that their testimony becomes irrelevant. We need not articulate that precise point here, however, because (1) we are not inclined to say that Detective Cain was so unfamiliar with Gorham that his testimony fails to satisfy the incredibly low threshold or relevance and is not of benefit to the jury; and (2) assuming, *arguendo*, that Detective Cain's testimony does fall below our acceptable threshold of relevance, Gorham has not shown that this error deprived him of a substantial trial right.

Critically, the admission of evidence is entrusted to the discretion of the trial court. *Moreland*, *supra*, 207 Md. App. at 568-69. Here, the trial court did not abuse its discretion by permitting Detective Cain's identification testimony. Accordingly there was no "error," plain or otherwise. Assuming, without holding, that the trial court's allowance of the disputed testimony constituted an abuse of discretion, and was "error," we readily conclude that Gorham has failed to demonstrate that the admission of this testimony affected his substantial rights. Accordingly, we decline to exercise our discretion to review the trial court's admission of Detective Cain's identification testimony. The introduction of the

detective's identification demonstrably did not "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." We, therefore, hold that Gorham is not entitled to the extraordinary appellate relief afforded after plain error review on this point.

B. The Prosecutor's Closing Argument

Gorham next complains that the trial court did not intervene to correct improper arguments made by the prosecutor during rebuttal argument. Urging that we grant relief after plain error review, Gorham first asserts that the prosecutor first shifted the burden of proof to the defense by questioning his failure to produce evidence. Gorham next maintains that the prosecutor's rebuttal argument went too far when it "impermissibly commented on the demeanor, specifically on [his] lack of remorse[.]"

Two passages from the State's rebuttal are the reasons for Gorham's allegations of prosecutorial misconduct. The first prompted Gorham's complaint that the State shifted the burden of proof. We set forth the relevant argument in greater context:

> [PROSECUTOR]: [I]t's strange that defense counsel is complaining that the police department didn't act quickly and actually arrest his client here sooner than they did. I think it's commendable that Det. Cain followed like an actual judicial process. However, the charges against the Defendant are not evidence (inaudible) the officer's comments. But there is a process that is followed and Det. Cain is just one small (inaudible) that leads down the road to where we are here today. So it's a little ironic to complain that essentially Det. Cain followed that process as he should.
>
> The State is asking you to rely on just Detectives Moore and Cain. The thing about what Counsel is saying, we're talking

> about Det. Cain, a 13 year veteran, and Det. Moore, approximately seven years. Twenty years of combined service to the Baltimore City Police Department, to the Eastern District, to the citizens of this city. Are we asking you to rely on their testimony as a part of the evidence? Absolutely. Was there one thing introduced during this trial, one question, one piece of evidence, one prior incident that says that they're not good police? That they don't do good work? That they're not committed to this city? They've devoted their lives to it. They continue to do so today.

Gorham next complains of what he views as the prosecutor's assertion that he had not demonstrated remorse:

> [PROSECUTOR:] But consider how disturbing it is that in light of everything you've been through in terms of this trial of Mr. Crowder and Mr. Gorham, the mentality of these men that Mr. Crowder, and he didn't accept responsibility, unless I missed that. I was trying to pay attention. He didn't accept responsibility. Even if he did, you can clearly see on the tape that Mr. Gorham comes along and kicks the victim. This isn't like a one suspect case. So he, Mr. Crowder, taking responsibility for an act of multiple people committed wouldn't negate this defendant, Mr. Gorham's, guilt anyway. But he flat out just lied. He never took responsibility.
>
> You see there's no remorse. I mean, again, it's his right to plead guilty. It's right of Mr. Gorham to have a trial. The two are unrelated in terms of your decision but there was nothing there. I mean it was just blankness. He doesn't regret it, there's no remorse, he doesn't care and he's willing, now that he's taken a plea there's nothing else that can happen to him, at least on this case. He's willing to come here and just right out lie to try to get another suspect that he knows off. And you think that's scary, I guess disturbing, and if anything it just heightens kind of the state of mind, the mentality of Mr. Crowder and Mr. Gorham, which is sort of self-evident from the tape. Like even before and after the testimony of Mr. Crowder,

> so again you would be asking to have [the victim] to convict Mr. Gorham because he did it. And that is justice. Thank you.

Initially, we disagree with Gorham's factual premise that the State's rebuttal arguments either impermissibly shifted the burden of proof to the defense or amounted to an improper comment on Gorham's lack of remorse. As we read the transcript, we are satisfied that, with respect to Detectives Moore and Cain, the prosecutor's rebuttal focused on the absence of any reason to doubt their competence as police officers or their thoroughness as investigators. Further, the jurors were instructed that the burden of persuasion rested with the State. Given that the prosecutor did not comment on Gorham's decision not to testify, thus implicating Gorham's Fifth Amendment right, we discern no error, plain or otherwise, in the trial court's decision not to intervene. *See Mitchell v. State*, 408 Md. 368, 392-93 (2009) (concluding that similar remarks made by prosecution did not shift the burden of proof).

Nor do we perceive any error, plain or otherwise, in the trial court's decision not to intervene during the second rebuttal passage cited by Gorham. A fair reading of the transcript satisfies us that the prosecutor, in referring to the lack of remorse, was focused solely on the defense witness, Crowder. Any mention of Gorham in the context of the State's

rebuttal argument went to the nature of the crime, with comment on any level of remorse directed at the defense witness, Crowder.[4]

We recognize that "[c]losing arguments are an important aspect of trial, as they give counsel 'an opportunity to creatively mesh the diverse facets of trial, meld the evidence presented with plausible theories, and expose the deficiencies in his or her opponent's argument.'" *Donaldson v. State*, 416 Md. 467, 487 (2010) (quoting *Henry v. State*, 324 Md. 204, 230 (1991)). Given the importance of closing argument, Maryland courts have "given attorneys wide latitude in the presentation of closing arguments[.]" *Lee v. State*, 405 Md. 148, 162 (2008) (citation omitted).

Moreover, no conduct by the prosecutor during rebuttal argument was so egregious that the trial court's failure to intervene *sua sponte* seriously affected the fairness, integrity or public reputation of judicial proceedings. *See, e.g., Lawson v. State*, 389 Md. 570, 593-94 (2005) (defendant complained about "four different occasions" in which the prosecutor's argument to the jury was improper: use of a "golden rule" argument, an improper burden-shifting argument, an appeal to the fears and prejudices of the jury and the insinuation that a conviction would prevent harm to another child). Accordingly, we hold that there is no

[4] Indeed, no prosecutor would be authorized to make any such comment, inasmuch as Gorham, as any defendant still in trial, continued to be clothed in the presumption of innocence. Until a conviction, there would be no basis for a defendant to feel apologetic or remorseful. The prosecutor's oratory was clearly directed at the credibility of the defense witness, Crowder.

basis to grant relief after plain error review. Assuming, *arguendo*, that the prosecutor's argument was improper, Gorham has failed to call our attention to any misstep during the State's rebuttal summation that adversely affected his substantial rights. Indeed, Gorham has failed to demonstrate that we must exercise our discretion to remedy any error in the trial court's response to the State's argument that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." Accordingly, we refuse to employ plain error review to undermine Gorham's conviction here.

II. Sentencing

Gorham contends, and the State agrees, that the trial court improperly sentenced him to duplicate enhanced sentences. We agree. The trial court imposed two enhanced sentences pursuant to Section 14-101 of the Criminal Law Article, which, at the time of sentencing, was codified at Md. Code (2002, 2012 Repl. Vol.), § 14-101 of the Criminal Law Article. While no party disputes the fact that Gorham's prior two convictions for violent crimes exposes him to an enhanced sentence pursuant to Crim. Law § 14-101, both parties likewise concur that Gorham should not have been sentenced to two, separate, enhanced terms under that provision for multiple convictions for crimes of violence arising from a single incident. *Williams v. State*, 220 Md. App. 27, 44 (2014), *cert. denied*, 441 Md. 219 (2015). Accordingly, we shall vacate Gorham's sentences, and remand to the circuit court for the

imposition of a single enhanced sentence, pursuant to Crim. Law § 14-101, for one of the two convictions.[5] *See Jones v. State*, 336 Md. 255, 265 (1994) (holding that the rule of lenity requires that only one enhanced sentence be imposed for one instance of conduct).

JUDGMENTS OF CONVICTION OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. SENTENCES VACATED AND CASE REMANDED FOR RESENTENCING CONSISTENT WITH THIS OPINION. APPELLANT TO PAY 2/3 COSTS; REMAINING 1/3 COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

[5] The trial judge has the discretion to determine which conviction will have the enhanced sentence. As noted by the Court of Appeals, in construing a statutory predecessor to Crim. Law § 14-101:

> We hold that where a defendant is convicted of more than one crime of violence as the result of a single incident and has otherwise satisfied the prerequisites for imposition of the § 643B(c) sentence, the sentencing judge, in imposing only one § 643B(c) sentence, may impose the § 643B(c) sentence upon any one of the qualifying crime of violence convictions.

Jones v. State, 336 Md. 255, 265 (1994).