UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2469

September Term, 2016

ALVICK OMENGA

v.

STATE OF MARYLAND

Wright,
Friedman,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: August 23, 2017

Appellant, Alvick Omenga, was charged by indictment in the Circuit Court for Montgomery County with armed robbery, first-degree assault, and use of a firearm in the commission of a crime of violence. After a two-day trial, the jury delivered a verdict of guilty as to the charge of armed robbery, but it did not return a verdict on the two remaining charges. Appellant accepted the partial verdict, and the court sentenced appellant to ten years' imprisonment. Appellant presents the following questions for our review, which we have rephrased slightly, as follows:

1. Was the evidence insufficient to sustain appellant's conviction?

2. Did the trial court commit plain error in failing to take curative action in response to comments made by the prosecutor in rebuttal closing argument?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

I.

FACTUAL BACKGROUND

On June 4, 2016, Yu Chao used an "app"[1] called "Offer Up"[2] to attempt to purchase a digital camera from a user identified as "Vic." Mr. Chao communicated with "Vic" through the messaging feature on the app, and he agreed to meet "Vic" at "Vic's" apartment at 1901 East West Highway, Silver Spring to purchase the camera. Mr. Chao asked "Vic" for his cell phone number so that he could communicate with "Vic" directly while traveling

[1] An "app" or "application" is "a computer program that performs a special function." "App," Merriam-Webster.com/dictionary/app (last visited August 7, 2017).

[2] Mr. Chao described "Offer Up" as an online advertisement posting service similar to Craigslist, which connects buyers and sellers online for the purchase and sale of goods. *See also* https://offerup.com/howitworks/ (last visited August 7, 2017).

to the designated location from his home in Fairfax County, Virginia. "Vic" provided Mr. Chao with the telephone number 240-595-5870.

At approximately 6:00 p.m. that same day, Mr. Chao arrived at the agreed-upon location and waited for "Vic" to arrive. Mr. Chao contacted "Vic" multiple times to ask where he was, and "Vic" responded that he would be there soon. "Vic" eventually arrived at the front of the apartment complex and located Mr. Chao. "Vic" stated that he had the camera, but that he needed to get another piece for the camera that he had forgotten. He told Mr. Chao to follow him to the back of the apartment complex, which Mr. Chao did. Once there, "Vic" "grabbed" Mr. Chao, and pulled out a "dark black" gun that Mr. Chao described as appearing similar to a "World War II . . . old style" gun. "Vic" pressed the gun against Mr. Chao's stomach, took his $300 cash and his Android phone, and told Mr. Chao to walk away.

Mr. Chao walked away and waved down a passing police cruiser and reported that he had been robbed. Mr. Chao testified that he described the robber to Montgomery County Police Officer Ian Hamilton as a dark-skinned African-American male, just under six feet tall, who looked very strong with a well-groomed beard**.** Officer Hamilton testified that Mr. Chao described the robber as a bald black male, 5'11" with a muscular build and a well-groomed beard. On cross-examination, Mr. Chao denied telling Officer Hamilton that the robber was bald, and explained that he recalled that the robber was wearing a hat.

After the robbery, Mr. Chao learned that his stolen Android phone had a default feature that he could use to trace the phone's location. Mr. Chao was able to obtain a tracing map showing the phone's location history, which he forwarded to Montgomery

County Police Detective Marc Frazier. According to the map, the phone had travelled to 2207 Luzerne Avenue in Silver Spring after the robbery. Detective Frazier learned that this address had been searched a few days earlier, pursuant to a search warrant in an unrelated case involving multiple other suspects, including an individual identified as Leroy Brown. The search of the 2207 Luzerne Avenue address resulted in the recovery of a gun that Mr. Chao described as appearing similar to the one used by the man who robbed him.

Detective Frazier obtained a subpoena for the "Offer Up" messaging records as well as the telephone records associated with the phone number used by "Vic." The subscriber information for "Vic's" phone number indicated that the number was registered to Monique Melige. Ms. Melige is appellant's mother. Ms. Melige confirmed to Detective Frazier that the subject phone number belonged to appellant at the time of the robbery. The detective also learned from a law enforcement database that "Vic's" phone number had previously been associated with appellant.

Detective Frazier prepared a photo array using a "two or three year old" photo of appellant because that was the only photo of appellant that he had available. The detective testified that he would have used a more recent photo of appellant if he had one available because appellant's appearance had changed from the time the photo was taken. Mr. Chao did not identify appellant in the first photo array. A few weeks later, Detective Frazier prepared a second photo array with a more recent photo of appellant. Mr. Chao identified appellant in the second photo array. At trial, Mr. Chao also identified appellant in court as the person who robbed him. Mr. Chao testified at trial that the photo of appellant in the

first array did not resemble appellant because he recalled that appellant had a "long face." Mr. Chao explained that appellant's photo in the first array appeared as if the image had been "compressed" because it looked like appellant's face was "squished."

At the close of the State's case, and again at the close of all evidence, defense counsel moved for judgment of acquittal, arguing that the evidence was insufficient for the case to be submitted to the jury. The court denied both motions.

II.

DISCUSSION

A. Sufficiency of the Evidence

We review a challenge to the sufficiency of the evidence to determine "'whether, after viewing 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.'" *Hobby v. State*, 436 Md. 526, 538 (2014)(quoting *Derr v. State*, 434 Md. 88, 129 (2013)) (emphasis in original). In applying this test, "[w]e defer to the fact finder's 'opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence.'" *Neal v. State*, 191 Md. App. 297, 314 (2010)(citation omitted). We defer to "any possible reasonable inferences" the jury could have drawn in reaching the verdict. *State v. Mayers*, 417 Md. 449, 466 (2010). This standard applies regardless of whether the verdict rests upon circumstantial or direct evidence since proof of guilt based on circumstantial evidence is no different from proof of guilt based on direct evidence. *State v. Suddith*, 379 Md. 425, 430 (2004). "[T]he question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw an inference,

but whether the inference [it] did make was supported by the evidence." *Id*. at 437 (citation and internal quotation marks omitted).

Appellant contends that the evidence was insufficient to sustain his convictions because the State failed to establish appellant's identity as the robber due to Mr. Chao's "contradictory" testimony, and the lack of direct evidence connecting appellant to the phone used by "Vic" at the time of the robbery. Appellant argues that Mr. Chao's inability to identify him in the first photo array, and the conflicting testimony of Mr. Chao and Officer Hamilton as to whether Mr. Chao described the robber as "bald," negates the sufficiency of the evidence identifying him as the robber. However, the State also presented direct evidence showing that Mr. Chao had identified appellant as the robber in the second photo array, and again, in court.

As the Court of Appeals stated in *(Clavon) Smith v. State*, 415 Md. 174 (2010):

> It is not our role to retry the case. Because the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence. We defer to the jury's inferences and determine whether they are supported by the evidence.
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> That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone.

(Clavon) Smith, 415 Md. at 185 (internal citations and quotation marks omitted).

In *Ross v. State*, 232 Md. App. 72 (2017), this Court reaffirmed the mandate of *(Clavon) Smith, supra,* when Judge Charles E. Moylan, Jr., writing for this Court explained:

> The message of *Smith* is clear . . . if two inferences reasonably could be drawn, one consistent with guilt and the other consistent with innocence, the

> choice of which of these inferences to draw is exclusively that of the fact-finding jury and not that of a court assessing the legal sufficiency of the evidence. The State is **NOT** required to negate the inference of innocence. It is enough that the jury must be persuaded to draw the inference of guilt.

Ross, 232 Md. App. at 98. (Emphasis in original).

If the jury found credible Mr. Chao's identification of appellant in the second photo array, and at trial, then that evidence alone was sufficient to support appellant's conviction. But in this case there was also circumstantial evidence from which the jury could reasonably infer that appellant was the individual who had robbed Mr. Chao. The State presented evidence that appellant's mother identified the phone number used by "Vic" as appellant's phone number, and that law enforcement had previously associated that same phone number with appellant. The jury could reasonably infer from that evidence that "Vic" was a nickname for the appellant, "Alvick" Omenga, and that appellant had lured Mr. Chao to travel to Silver Spring to purchase a digital camera and then pointed a gun at him and robbed him.

It is not for this Court to re-weigh testimony and the evidence. It was within the province of the jury to resolve conflicts in the evidence and make credibility determinations. Viewed in the light most favorable to the State, we are persuaded that there was sufficient evidence produced at trial to support appellant's conviction.

B. The Prosecutor's Closing Remarks

Appellant next contends that the trial court erred in allowing the State to make improper and prejudicial comments during its rebuttal argument, which unfairly attacked

and denigrated the role of defense counsel. Appellant asserts that the cumulative effect of these comments deprived him of a fair trial.

Specifically, appellant challenges portions of the State's rebuttal argument set forth below in bold type:

> Thank you Your Honor. When Judge McCormick told you just a few minutes ago that opening statements and closing arguments are not evidence and thankfully I would ask you guys to remember that when you go back to deliberate because **what you just heard was fantasy**. And you know there's an old saying about that if you have the facts on your side, you argue the facts, you don't have the facts you argue the law, if you don't have the facts or the law, you pound on the table. Well you all just heard pounding on the table and I'm going to show you why in just a minute. But you know it's kind of a smoke and mirrors situation . . .
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> **Now, I get it's 2016 and part of every defense is that the police are bad and the police did a bad job and maybe that's popular and maybe if your defendant [appellant,] I can push that on 12 people from Montgomery County** and hope that that somehow resonates. But this is not a bad investigation . . .
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> **And finally, in the final example of what you do when you have a guilty client and you don't have any defense, you heard [defense counsel] rant about [a] bad police investigation,** about failure to look at Mr. Leroy Brown which is where the gun came from the shed, why didn't they look into Mr. Leroy Brown? Why didn't they put him in a photo array? My gosh if they would have just put him in a photo array, maybe we wouldn't be here? He's the first guy in the photo array. There's his name, it's right there. **He stood up here and he told you, you know what I'll use an untruth, a falsehood, maybe I don't want to use the bad word but he looked at all of you in the eye and said he wasn't in there,** this is a bad police investigation. He is the first photograph that was shown to Mr. Chao [i]n the second photo array.

Appellant failed to object to these comments by the prosecutor, and accordingly, this issue was not preserved for review. *See* Maryland Rule 8-131(a)("Ordinarily, the appellate court will not decide any other issue unless it plainly appears . . . to have been

raised in or decided by the trial court[.]"). Recognizing that his arguments were not preserved for review, appellant asks this Court to exercise plain error review to correct the alleged errors. We decline to do so.

Appellant contends that we should reach the merits of his claim because the prosecutor's comments in the present case are similar to comments deemed inappropriate by the Court of Appeals in *Beads and Smith v. State*, 422 Md. 1 (2011). In *Beads*, the prosecutor said, "I caution you, that unlike the State, the Defense's specific role in this case is to get their Defendants off." *Id.* at 8. After defense counsel's objection was overruled, the prosecutor again referred to defense counsel, stating "[i]t is their job, and they do it well, to throw up some smoke, to lob a grenade, to confuse." *Id.* The Court of Appeals concluded that these "comments about the role of defense counsel, although inappropriate, are unlikely to have misled or influenced the jury to the prejudice of the accused," and therefore did not warrant reversal. *Id.* at 11-12 (internal quotations omitted).

The comments made in *Beads*, however, are distinguishable from those at issue in the present case. In *Beads*, the comments were made in closing argument, rather than in rebuttal, and the comments in *Beads* were aimed at attacking defense counsel's job, not defense counsel's argument. A more analogous case is *(Nathaniel) Smith v. State*, 225 Md. App. 516 (2015), *cert. denied*, 447 Md. 300 (2016). In *(Nathaniel) Smith*, the prosecutor, in rebuttal argument, twice described Smith's case as "consisting of smoke and mirrors." *Id.* at 528. Smith claimed that these statements constituted "repeated improper and prejudicial statements denigrating defense counsel and his role at trial." *Id.* We acknowledged that a prosecutor may not "impugn the ethics or professionalism of defense

counsel in closing argument." *Id.* at 529. But we determined that the State's comments were not improper because they "were clearly directed to defense counsel's argument and did not impute impropriety or unprofessional conduct to defense counsel." *Id.* Accordingly, plain error review was unwarranted. *Id.* ("non-error does not constitute plain error").

Similarly, in the present case, the prosecutor's comments that defense counsel's argument was "fantasy" and "smoke and mirrors" were made in rebuttal to defense counsel's criticism of the police investigation, including the failure to eliminate other suspects. The prosecutor's comments were a description of defense counsel's arguments, not a disparagement of defense counsel or an attack on defense counsel's integrity. With respect to the prosecutor's comments that defense counsel used "an untruth, a falsehood" when he told the jury that Leroy Brown was not in the photo array, again, we find no error. The prosecutor was pointing out that, contrary to defense counsel's statements, Leroy Brown's photo and name had actually appeared in the first photo of the second array, and that defense counsel's argument, therefore, was inaccurate. We perceive no error, much less plain error, in the prosecutor's remarks.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.