Circuit Court for Wicomico County
Case No. C-22-CR-18-000341

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2184

September Term, 2019

DIONTE KEITH DUTTON

v.

STATE OF MARYLAND

Fader, C.J.,
Kehoe,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: September 21, 2021

Jaquanta Walton was shot and killed outside of the VFW Post in Salisbury, Maryland. According to the State's theory, Lee Braboy killed Walton at the behest of his friend, appellant Dionte Dutton. A jury convicted Dutton of second-degree murder, conspiracy to commit first-degree assault, and possession of a regulated firearm by a prohibited person. On appeal, Dutton raises three issues (which we have reordered): (1) a sufficiency of the evidence claim; (2) a claim that the prosecutor made improper statements; and (3) an evidentiary question concerning the admissibility of a picture of a handgun. We hold that the evidence of Dutton's complicity in the killing was legally sufficient. We also hold, however, that the prosecutor's comments were improper in several regards. Given the severity and importance of the improper comments, juxtaposed against the thinness of the State's case, we exercise our discretion to engage in plain error review, and reverse Dutton's conviction. As a result of these holdings, we need not reach the question regarding the admissibility of the picture of the handgun.[1]

BACKGROUND

In June of 2017, Dionte Dutton and Jaquanta Walton both attended a party at the Veterans of Foreign Wars (VFW) Post in Salisbury, Maryland.[2] While Walton danced,

[1] Because we have concluded that the evidence against Dutton was legally sufficient, the State may elect to retry him without violating constitutional or common law prohibitions on double jeopardy. *See Benton v. State*, 224 Md. App. 612, 629 (2015) (explaining that a retrial may only occur, "if the evidence was [sufficient] to sustain the conviction[s] in the first place").

[2] The VFW is a nonprofit veterans service organization, but many of the posts have event spaces and club rooms that are rented out for private events.

Dutton mostly stood to the side of the dance floor. The two men may have had a disagreement while at the party. At some point while at the VFW, Dutton texted his friend, Lee Braboy, "Bro, come out here wit yea doe." When the party ended, Dutton and Walton left the VFW separately. Dutton got into the passenger seat of Braboy's maroon Lincoln Town Car. Walton walked across the street to join a group of people shooting dice. At some point, Dutton and Braboy switched seats. Dutton drove the Lincoln around the block and closer to the dice game. Braboy eventually got out of the Lincoln. At around 1:30 a.m., Braboy ran through the dice game, shot Walton in the chest at point-blank range, and ran away. Some of Walton's companions drove him to a nearby hospital, but abandoned him at the doorstep of the hospital, where he died.

In the ensuing investigation, the police obtained the footage from surveillance cameras inside and around the outside of the VFW, from which they could see the party, the dice game, the Lincoln driving around the VFW, and the killing. The police identified Dutton as a person of interest and questioned him in the days after the shooting. Dutton told the police that he drove Braboy's Lincoln, "from time to time," but denied any knowledge about or connection to Walton's death. As part of their investigation, the police extracted data from Braboy's cellphone. The police found the text that Dutton sent to Braboy ("Bro, come out here wit yea doe"), and a picture of a handgun that Braboy had sent to Dutton nearly two months before the shooting. The police also found the record (but not the contents) of two text messages, six phone calls, and one attempted phone call

between Dutton and Braboy, all between 12:30 a.m. and 2:06 a.m. on the morning of the shooting.

The police also obtained a wiretap order for Dutton's cellphone. Between April 6th and April 19th of 2018, the police intercepted and were able to review the contents of approximately 4,000 phone calls, eleven of which the State later argued to the jury, showed that Dutton was "worried" and "spooked" by the investigation.

On April 19th, Dutton was arrested. He again denied any connection to or knowledge about Walton's death, but acknowledged that he and Braboy were in the Lincoln together before Braboy shot Walton. The State charged Dutton with murder in the first degree, murder in the second degree, conspiracy to commit assault in the first degree, assault in the first degree, assault in the second degree, reckless endangerment, use of a firearm in the commission of a felony or crime of violence, possession of a regulated firearm by a prohibited person, and wearing, carrying or transporting a handgun in a vehicle.

At Dutton's trial, the jury was shown the relevant surveillance footage, the text message that Dutton sent to Braboy from the VFW hall during the party ("Bro, come out here wit yea doe"), the picture of the handgun that Braboy sent to Dutton two months before the shooting, which was admitted into evidence over Dutton's objection, and eleven phone calls the police intercepted after securing the wiretap order for Dutton's cellphone. The jury also heard from the State's gang expert, George Norris. As part of the defense, Dutton's counsel argued to the jury that an individual named Tyquan King, rather than

Dutton, was involved in Walton's death. Dutton's counsel also offered into evidence additional surveillance footage that showed the headlights of King's car flash on and off two seconds before Braboy shot and killed Walton. Dutton's counsel argued that this was the signal for Braboy to shoot Walton.

The jury convicted Dutton of second-degree murder, conspiracy to commit first degree assault, and possession of a regulated firearm by a prohibited person. The trial court sentenced Dutton to 83 years' incarceration. Dutton noted a timely appeal.

DISCUSSION

As noted above, Dutton argues (1) that the evidence was insufficient as a matter of law to sustain his convictions; (2) that the prosecutor made improper statements in closing argument that prejudiced his right to a fair trial; and (3) that the picture of the handgun that Braboy texted to him months before the shooting should not have been admitted into evidence. Because of our resolutions of issues 1 and 2, we need not, and do not, reach issue 3.

I. SUFFICIENCY OF THE EVIDENCE

Dutton contends that the evidence was insufficient to convict him of second-degree murder, conspiracy to commit first-degree assault, and possession of a regulated firearm by a prohibited person. Specifically, Dutton argues that the State failed to put on evidence that he acted as Braboy's accomplice, that is, that he "advocated or encouraged" Braboy to commit the crime. *See Silva v. State*, 422 Md. 17, 28 (2011); *see also Martin v. State*, 218 Md. App. 1, 33 (2014) (explaining that an accessory before the fact is one who, "aided,

counseled, commanded[,] or encouraged the commission [of a felony] without having been present … at the moment of perpetration"). Dutton also argues that the State failed to put on evidence that he formed the specific intent to kill or inflict grievous bodily harm (such that death would likely be the result) that the State needed to support the second-degree murder charge, *see Kouadio v. State*, 235 Md. App. 621, 627-28 (2018); failed to put on evidence of an agreement necessary to prove conspiracy, *see Townes v. State*, 314 Md. 71, 75 (1988); and failed to put on evidence that Dutton had constructive possession of the handgun that Braboy held and used, *see Price v. State*, 111 Md. App. 487, 498-99 (1996).

When reviewing the sufficiency of the evidence, we view the evidence and any reasonable inferences to be drawn from that evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. *Fuentes v. State*, 454 Md. 296, 307-08 (2017). Where there are "competing rational inferences available" from the evidence adduced at trial, the appellate court will not second guess the jury's determination. *Roes v. State*, 236 Md. App. 569, 583 (2018) (quoting *State v. Manion*, 442 Md. 419, 431 (2015)). In evaluating the sufficiency of the evidence, we do not consider whether the State has proved its case beyond a reasonable doubt. *Lindsey v. State*, 235 Md. App. 299, 311 (2018). We only consider whether the State satisfied its burden of production and was entitled to have the charges submitted to the jury. *Chisum v. State*, 227 Md. App. 118, 125 (2016).

We begin by reviewing, in some detail, the evidence that the State produced. There were five pieces of evidence that could have satisfied the State's burden: (1) the

surveillance footage from in and around the VFW; (2) the text message from Dutton to Braboy that said, "Bro, come out here wit yea doe,"; (3) the expert testimony of George Norris; (4) the phone record showing that Braboy sent Dutton a picture of a handgun two months before Walton was killed; and (5) the eleven phone calls, which the State argued showed that Dutton was "worried" and "spooked" by its investigation.

A. The Surveillance Footage

The surveillance footage shows that Dutton entered the VFW at approximately 11:32 p.m., was scanned with a handheld metal detector by a security guard, and proceeded to the area around the dance floor. Walton and his friend, subsequently identified as Devon Cormack, entered the VFW at approximately 11:49 p.m.

At 11:53 p.m., the camera captured Walton on the dance floor, and Dutton near some tables and chairs set up to the left of the dance floor. Dutton then exited the main event hall through a side door, to perhaps a courtyard or another room, while Walton remained on the dance floor. At 11:55 p.m., Walton exited through the same door. Roughly ten seconds later, Dutton walked back through the door into the main event hall.

The next piece of surveillance footage begins at 12:22 a.m. In it, Walton danced while Dutton stood on the edge of the dance floor looking on. Walton appeared to make hand signs and gestures while he was dancing, although the gestures did not appear to be

directed at one specific person, or in a single direction.[3] At one point, an unidentified man and Walton draped their arms over each other's shoulders. The unidentified man then turned around seconds later, and he and Dutton embraced. Walton continued to dance for the next ten minutes, and although the footage has been edited with brightened ovals to highlight where Dutton and Walton were relative to one another, it is difficult to see Dutton. When Dutton can be seen, he was standing on the side of the dance floor.

At 12:35 a.m., Dutton stepped onto the dance floor, and he and Walton appeared to yell at one another. The two men were either kept apart, or never really attempted to physically engage. Dutton left the dance floor two minutes later. At 12:40 a.m., Dutton again exited the main dance hall through the side door, briefly reentered at 12:42 a.m., and exited again. At 12:43 a.m., Dutton reentered and stood on the side of the dance floor, while Walton left the dance floor to pose for photographs. The dance floor cleared, the lights came on, and around 12:48 a.m., Dutton left the VFW, and Walton left approximately one minute later.

After leaving the VFW, Dutton walked across Main Street to a parking lot across from the VFW, where he left the view of the surveillance camera. A minute later, he reappeared and stood alone by a light post near the parking lot. Dutton then got into the passenger seat of Braboy's Lincoln, which drove east on Main Street. At 1:01 a.m., Walton

[3] The significance and interpretation of Walton's hand signs and gestures is addressed in the testimony of George Norris, described below.

crossed Main Street and walked to the same parking lot. He spent the next several minutes shooting dice with a group of men while the Lincoln continued to drive around the area, coming in and out of the view of the surveillance cameras. At 1:07 a.m., the surveillance footage showed Walton playing dice, while the Lincoln turned into a driveway behind the dice game. The Lincoln remained motionless, partly obscured behind a building, with the brake lights on until 1:09 a.m., when the Lincoln started to move again, until it was fully behind the building. The Lincoln reemerged a minute later and spent the next five minutes slowly driving east on Main Street towards Walton and the dice game. The Lincoln stopped near the dice game around 1:16 a.m., and slowly crawled past the dice game. At 1:19 a.m., the Lincoln again left the view of the surveillance cameras.

Two and a half minutes later, Dutton drove the Lincoln west on Main Street, and stopped across from Walton and the dice game for two minutes, before driving around the block again. The Lincoln pulled out of the driveway behind the parking lot, proceeded to Main Street, and left the view of the surveillance camera at 1:27 a.m. At 1:30 a.m., Braboy ran through the crowd playing dice, shot Walton in the chest at point-blank range, ran across Main Street, and disappeared into a thicket behind the VFW.

B. The Text Message

In addition to the surveillance footage, there was the text message that Dutton sent to Braboy while inside the VFW that read, "Bro, come out here wit yea doe."[4]

C. The Picture Message

Fifty-one days before Braboy shot and killed Walton, Braboy sent a picture of a handgun, by text message, to Dutton.[5]

D. George Norris's Expert Testimony

A great deal of the State's case against Dutton came down to the expert testimony offered by George Norris, a former law enforcement officer who was identified as an expert

[4] Even without the contents of the text message, under the prevailing legal standard, a reasonable jury was entitled to infer that Dutton signaled Braboy to bring a gun: Dutton sent Braboy a text and Braboy came with a gun. That is enough to establish legal sufficiency under the cases discussed above: *Fuentes*; *Roes*; *Lindsey*; and *Chisum*. We agree with Dutton, however, that Norris' expert testimony that Dutton used the word "doe" to mean "gun" added little to the jury's understanding. He did not identify a basis for such a view. Norris did not, for example, testify that other gang members use the word in this way or that he had read of its use in this way in an academic treatise, a dictionary, or elsewhere. On cross examination, he admitted that it might have meant money.

[5] There was no demonstrable connection between the picture of the handgun and Walton's murder, no evidence that Braboy took the picture or had access to the handgun in the picture, and no evidence that Dutton even saw the picture of the handgun, or understood the picture to imply that Braboy had access to handguns in general, or that handgun specifically. It could well have been a picture of a handgun taken by someone else, clipped from a magazine, or found online. Dutton argues that the picture of the handgun was not admissible. Relevant evidence is that which tends to make any fact of consequence more probable or less probable than it would be without the evidence. MD. R. 5-401. While the bar for admitting evidence is low, it is not non-existent. Even where evidence is relevant, it should be excluded where "the 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

in "gang recognition, identification, and culture, specifically dealing with hand signs, gestures, and body movement[,]" based on his training in "gang recognition, awareness, intervention and prevention, gang enforcement, surveillance, and … electronic surveillance class, culture classes for different cultures, [and] other things to help deal with the gangs."[6] After providing the jury with a primer on gangs, Norris testified that, in his opinion, there was "gang-related activity" inside the VFW that night. Norris testified that rival gang members often use "a series of hand signs and gestures to communicate a story or communicate a message to someone else." It was Norris's opinion that Walton was making these types of hand signs and gestures toward Dutton while dancing inside the VFW. According to Norris, the surveillance footage depicted Walton "throwing 'C' shaped" hand gestures towards Dutton, "Crip walking," and gesturing as if he was spraying gunfire. Walton was also accompanied by Devon Cormack, who was dressed in blue clothing, which Norris testified is a sign of Crip affiliation. Based on these indicators, Norris testified that

presentation of cumulative evidence. MD. R. 5-403. But because we reverse on other grounds, we need not reach this issue.

[6] Dutton did not object below, or in this Court, to Norris being accepted by the trial court as an expert in gang behavior. As such, we do not consider whether Norris was qualified to provide the testimony he did. On retrial, however, we note that the trial court may be asked to admit him again, this time pursuant to the new standard under Rule 5-702. *Rochkind v. Stevenson*, 471 Md. 1, 35 (2020). Under *Rochkind*, "*all* expert testimony" is assessed for its reliability, and no single factor is dispositive. *Id.* at 36 (emphasis in original) (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999)). Just because Mr. Norris has been previously qualified as a gang expert—at least here and in *Gutierrez v. State*, 423 Md. 476 (2011)—that is not necessarily dispositive of the question of whether he should be allowed to testify if he is again offered as an expert on retrial.

Walton was "probably a Crip." Norris testified that he watched the surveillance footage, as described above, and concluded that there was gang activity inside the VFW, because there were "hand signs[,] … stacking[,] … Crip walking[,] … [and] a homicide."

Norris also testified that when Dutton texted Braboy, "Bro, come out here wit yea doe," the word "doe" was coded gang language for the word "gun." Thus, according to Norris, Dutton asked Braboy to "come [to the VFW] with yea [gun]." Norris later qualified this testimony and said that the word "doe" could also refer to money and did not necessarily mean gun. This was the extent of Norris's testimony that connected Dutton to the shooting of Walton.

E. The Intercepted Phone Calls

Of the 4,000 phone calls the police intercepted pursuant to the wiretap order they obtained for Dutton's cellphone, the State introduced the transcripts and records of eleven of those calls into evidence, for the purpose of demonstrating that Dutton was, in the prosecutor's words, "spooked" and "worried" by the investigation. The calls, at best, show that Dutton was aware of the investigation, and aware that he, and those he spoke to on the phone, were persons of interest. This is unsurprising. Dutton admitted that he was, in fact, in the Lincoln with Braboy before Braboy got out and shot Walton.

F. Conclusion

Even though the evidence was not particularly strong, we conclude that the State produced evidence sufficient to submit each of the criminal charges to the jury. For each charge, the text message from Dutton to Braboy, as interpreted by Norris, combined with

evidence of what Braboy and Dutton did once Braboy arrived at the VFW, was sufficient to demonstrate the necessary elements to send the charge to the jury. Thus, the text message (as interpreted by Norris) summoning Braboy to the VFW—combined with the evidence that Braboy came to the VFW, rode in the same car with Dutton, emerged from the car and then shot Walton—was legally sufficient to satisfy the State's burden of producing evidence that Dutton commanded or commissioned Braboy's killing of Walton such that accomplice liability claims could go to the jury. Similarly the text message (as interpreted by Norris), combined with the fact that Dutton drove Braboy around the area where Walton was playing dice and, shortly after Braboy emerged from the vehicle, he shot Dutton, was legally sufficient to establish that Dutton had the intent that Braboy kill or cause grievous bodily harm to Walton such that death was a likely result. Likewise, the evidence of conspiracy was legally sufficient because the text message, (as interpreted by Norris), could be interpreted as showing the agreement between Dutton and Braboy. Finally, the text message, (again, as interpreted by Norris), and Dutton's proximity to Braboy and the handgun in the Lincoln, was legally sufficient to give Dutton constructive possession of Braboy's handgun, when Dutton's possession of any type of gun was illegal.

Evidence is not insufficient simply because the jury could have drawn other inferences. The text message summoning Braboy to the VFW and (as interpreted by Norris) instructing Braboy to bring a gun, Norris's expert testimony, the time spent in the Lincoln driving around the VFW, the surveillance footage, the eventual assault, and the intercepted phone calls were legally sufficient for the jury to conclude that Dutton committed the crimes

with which he was charged. The evidence presented, viewed in the light most favorable to the State, was sufficient to sustain each of Dutton's convictions.

II. THE PROSECUTOR'S COMMENTS

Dutton next challenges that, during closing arguments, the prosecutor made several statements that were improper and prejudiced the jury against him. At trial, however, Dutton's counsel did not object to these statements. Ordinarily, we will not decide an issue unless it was raised or decided in the trial court. MD. R. 8-131(a). Under very rare circumstances, we will exercise plain error review when we find that "the unobjected to error is compelling, extraordinary, exceptional, or fundamental to assure the defendant a fair trial." *State v. Brady*, 393 Md. 502, 507 (2006) (cleaned up).[7] When exercising plain error review, we apply a four-part test. *First*, the error or defect must not have been affirmatively waived by the appellant. *Malaska v. State*, 216 Md. App. 492, 525 (2014) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)). *Second*, the legal error must be clear or obvious, and not subject to reasonable dispute. *Id*. *Third*, the error must have

[7] Our jurisprudence makes clear that plain error review, although frequently invoked, is rarely granted. Our colleague, Judge Charles E. Moylan, Jr., has described plain error review as a "rare, rare phenomenon," *Morris v. State*, 153 Md. App. 480, 507 (2003), reserved for "truly extraordinary occasion[s]," *Wilson v. State*, 195 Md. App. 647, 693-94 (2010), "like a trip to Angkor Wat or Easter Island … not a casual stroll down the block to the drugstore or the 7-11," *Garner v. State*, 183 Md. App. 122, 152 (2008), which should occur "more often than the periodic appearances of Halley's Comet but not nearly so frequently as quadrennial presidential elections." *Wilson*, 195 Md. App. at 693-94. Nevertheless, for the reasons that follow, we think this is an appropriate case for use of this rarely used tool.

affected the appellant's substantial rights, in that the error affected the outcome of the proceedings. *Id*. *Fourth*, the error complained of must "seriously affect[] the fairness, integrity[,] or public reputation of judicial proceedings." *Id*. If these four prongs are all satisfied, the appellate court has the discretion to remedy the error.

Dutton has identified six separate statements made by the prosecutor in closing arguments that he argues were improper and prejudiced the jury against him. A prosecutor generally has "wide latitude in presenting a closing argument [and] is free to speak harshly and engage in oratorical conceit or flourish and in illustrations and metaphorical allusions." *Hunt v. State*, 321 Md. 387, 434 (1990). That latitude is not unlimited. *Id*. at 435. The prosecutor should not "make remarks calculated to inflame the jury and prejudice the defendant … comment on matters not in evidence … or infer that the defense counsel suborned perjury or fabricated a defense." *Id*. (cleaned up); *see also Clarke v. State*, 97 Md. App. 425, 431-32 (1993). "When … there are multiple inappropriate statements and the trial court fails to cure the prejudice created by the cumulative effect of those statements, the admissibility of such statements may amount to more than harmless error." *Lawson v. State*, 389 Md. 570, 608 (2005). Given both the severity of the improper statements identified by Dutton, and the relative thinness of the State's case against him, we exercise our discretion to review these under our plain error doctrine. Because we find the cumulative effect of the prosecutor's improper statements to be prejudicial, we reverse Dutton's convictions. We will address each of the prosecutor's improper statements in turn.

A. Attack on Dutton's Trial Counsel

During closing arguments, the prosecutor told the jury that Dutton's counsel was lying:

> the only person selling you crap is [Dutton's trial counsel]. He's twisting the testimony, he's inserting his opinion in facts, he's picking apart typos because desperate times call for desperate measures.

This comment from the prosecutor violates at least two well-understood rules. *First*, a prosecutor may not say, or even imply, that defense counsel has fabricated a defense. *Hunt*, 321 Md. at 435 (citing *Reidy v. State*, 8 Md. App. 169, 172-79 (1969)). Here, by accusing defense counsel of "selling [the jury] crap," the prosecutor argued that defense counsel manufactured a false defense.[8] We understand the phrase "selling crap" in context to mean that someone was "saying things that are not true," or implying that they are "not to be believed." *See*, *e.g.*, *Full of crap*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/full%20of%20crap (accessed July 21, 2021). That is improper. *Second*, it is improper for a prosecutor to "impugn the ethics or professionalism of defense counsel in closing argument." *Beads v. State*, 422 Md. 1, 9-11 (2011) (disapproving of

[8] As noted above, part of Dutton's defense was that Tyquan King had, in fact, acted as Braboy's accomplice. This theory of the defense, we note, was not entirely unbelievable. There was evidence that King flashed the headlights of his vehicle towards the dice game two seconds before the shooting. King, however, was ruled out as a person of interest very early on in the investigation. Because there was, as a matter of fact, evidence to support the defense theory, it was inappropriate for the prosecutor to accuse Dutton's counsel of fabricating the defense.

prosecutor's comment, "I caution you, that unlike the State, the Defense's specific role in this case is to get their Defendants off …. It is their job, and they do it well, to throw up some smoke, to lob a grenade, to confuse."); *Carrero-Vasquez v. State*, 210 Md. App. 504, 510 n.4 (2013) (disapproving of prosecutor's comment, "[defense counsel's] job is to sling mud and let's see what sticks. Sort of smoke and mirrors but they have to count on a couple of things. That you all aren't that bright and that you're easily confused."). Here, there can be no doubt that the prosecutor's statements— "selling you crap," and "twisting the testimony,"—impugned the ethics and integrity of Dutton's counsel.

In defense of these comments on appeal, the State proffers that "selling you crap" doesn't mean lying, and suggests that even if the prosecutor's statements were improper, they were acceptable under the "invited response" or "opened door" doctrines. *See Mitchell v. State*, 408 Md. 368, 379-88 (2009). The short answer is that defense counsel did, in fact, begin the buying-and-selling metaphor, but the prosecutor's remarks constituted an unwarranted and improper escalation of the metaphor.[9] And finally, the State argues that the trial court's standard instruction to the jury, to decide the case on evidence not the

[9] During opening arguments, Dutton's counsel said, "[The State has] a story they want you to buy. I'm telling a different story. Yes, I'd like you to buy it. And probably, no, I don't care why if you buy it, I don't care why, but I think you'll see the logic of where I'm going as I go through this trial." The buying-and-selling analogy reemerged in the prosecutor's initial closing argument, where the prosecutor said, "[Defense counsel] asked you in opening not to buy what the State is selling you. I am not selling you anything. I am not a used car salesman."

arguments of counsel, was a curative instruction that remedied the improper statement.[10] We are not convinced.[11]

B. Improper 'Golden Rule' Arguments

It is a fundamental rule that prosecutors may not appeal to the prejudices and fears of the jury. *Lawson*, 389 Md. at 597. One form of these improper appeals to fear and prejudice are the so called "golden rule arguments … in which a litigant asks the jury to place themselves in the shoes of the victim or in which an attorney appeals to the jury's own interests." *Lee v. State*, 405 Md. 148, 171 (2008) (cleaned up). When prosecutors make

[10] By so instructing the jury, the trial court merely read MPJI-CR 3:00 to the jury to instruct them on what they may consider as evidence when reaching a verdict. This was not a specific curative instruction, but rather the one that is given in every criminal case tried to a jury. This was plainly insufficient. We need not, and therefore do not, decide whether a carefully focused curative instruction could have cured the prejudice or whether this is a comment so egregiously prejudicial that its harm could not be cured. *Carter v. State*, 366 Md.574, 592 (2001) (quoting *Bruton v. United States*, 391 U.S. 123, 135 (1968)).

[11] Dutton also draws our attention to the following comment, in which he argues that the prosecutor improperly referred to him as an animal.

> [Dutton] drove that car around. Around and around and around and around like they are **hunting** some kind of **prey** in the middle of Salisbury …. [Dutton and Braboy] **hunted** and they **hunted** and they **hunted** and they **hunted**.

(Emphasis added). Prosecutors may not refer to a criminal defendant as an animal. *Walker v. State*, 121 Md. App. 364, 381 (1998); *see also Lawson*, 389 Md. at 597-99 (reversing for, among other things, calling the defendant a "monster"). On this record, we read the prosecutor as calling Dutton a hunter, not necessarily an animal and therefore the comments were not clearly improper. Nevertheless, we caution on retrial that the State "maintain an air of dignity and stay above the [fray]." *Lawson*, 389 Md. at 598 (quoting *Walker*, 121 Md. App. at 381).

a golden rule argument, they are "calling for the jury to indulge itself in a form of vigilante justice rather than engaging in a deliberative process of evaluating the evidence." *Id*. at 173, 174-79; *see also Hill v. State*, 355 Md. 206, 225 (1999) (noting that it is improper and prejudicial for a prosecutor to suggest that jurors convict to preserve the safety or quality of their communities.) Dutton has identified three separate statements that he argues are improper golden rule arguments.

1. The Prosecutor Compared Salisbury to Compton

The prosecutor told the jury, "I don't know when Salisbury became Compton, but it is." The prosecutor was not comparing Salisbury, Maryland to Compton, Maryland, a crossroads community near Leonardtown in St. Mary's County, or to the idyllic seaside town of Little Compton, Rhode Island. Rather, the prosecutor was referring to the City of Compton, California, a majority Hispanic and Black city in the southeast region of Los Angeles county, notorious in popular culture for gang violence and crime during the 1980s and 1990s. By referencing the City of Compton, the prosecutor was invoking the same Compton that N.W.A. rapped about in their breakout album, *Straight Outta Compton* (Ruthless/Priority Records 1987), featuring songs such as *Straight Outta Compton*, *Fuck the Police*, and *Gangsta, Gangsta* and the 2015 film biography of N.W.A. by the same name. *See* STRAIGHT OUTTA COMPTON (Legendary Entertainment 2015). In those and many other popular depictions, the City of Compton is shown as controlled by street gangs and plagued by violence. *See also*, Angel Jennings & Paloma Esquivel, *'Straight Outta' A Different Compton: City Says Much Has Changed in 25 Years*, L.A. TIMES (August 14,

2015) https://perma.cc/V4QA-X24W (accessed July 21, 2021). Rather than convincing the jury that the evidence presented proved Dutton's guilt beyond a reasonable doubt, the prosecutor, with this remark, asked the jury to find that gang violence is, in fact, a problem in Salisbury, and suggest that the members of the jury could be part of the solution by convicting Dutton. That's precisely the sort of improper prosecutorial argument that the Court of Appeals rejected in *Hill*. We hold that this comment was improper.

2. The Prosecutor Implied that Only Jurors Who Didn't Care Would Acquit Dutton

The prosecutor also said:

> So what we're doing, it's a big ask, because we're going to ask you to do what nobody on [the video of Braboy shooting Walton] did, we're going to ask you to invest enough to care about who did this …. I'm asking you to care …. I'm asking you to go through each and every one of these charges and I'm asking you to care enough to find him guilty.

This statement by the prosecutor is almost a classic example of the improper golden rule argument. It is a clear appeal to the moral interests of the jurors, rather than an appeal to the State's evidence or the logic of its argument. As such, it is improper.

The State defends this statement on appeal by arguing that, rather than an exhortation to the jury to care, it was, in fact, a comment on the fact that no one at the scene of the shooting outside the VFW called the police, because no one cared, and no one stayed with Walton after he was dropped off at the hospital doorstep, also because no one cared. Grammatically, we find this theory unconvincing. Alternatively, the State contends that, insofar as it was an exhortation to the jury, it was "an exhortation that the jury properly

perform its function by *carefully* looking at the evidence and charges." (emphasis added). Again, we are not convinced. There is a clear difference between asking the jury to "care enough to find him guilty," and asking the jury to look "carefully" at the evidence. This comment implies that only those jurors who "care" will vote to convict Dutton, and that if a juror chooses to acquit Dutton instead, then they must be like those non-caring persons who didn't call the police after the shooting and those who dropped Walton off at the hospital doorstep and left. Not even the gloss that the State asks us to put on this statement can make it acceptable.

3. The Prosecutor Asked the Jury to Step into the Shoes of Walton's Family and Imputed Blame on the Jurors

The prosecutor also said, "[A]t the end of the day, it's somebody's somebody, a 20-year-old kid that *we* let die on the street." (emphasis in original). This argument turns the jury's attention away from the facts and evidence, and towards their own interests and feeling about Walton's murder. The use of the word "we"—emphasized in the excerpt—places blame on the jury, and thus asks the jurors to consider their owns interests, instead of the evidence in the case. *See, e.g.*, *Holmes v. State*, 119 Md. App. 518, 527 (1998) (prosecutor's comment "we say no" to the jury implored jurors to consider their own interests, thus violated the prohibition against golden rule arguments). Furthermore, the "it's somebody's somebody" comment seems to ask the jurors to place themselves in the shoes of Walton's family and friends who lost their "somebody." *See Lawson*, 389 Md. at 594-95 (addressing impropriety of prosecutor asking jury to place themselves in the shoes

of a mother whose child had been molested). Again, this was an improper golden rule style argument.

C. Improper Comments on Matters Not in Evidence

During the April 2018 wiretap of Dutton's cellphone, the police collected the contents of over 4,000 calls, but only a handful of those calls were admitted into evidence at trial. During closing arguments, the prosecutor argued that he was not permitted to show the jury all of those calls and thus was precluded from showing the jury all of the evidence of Dutton's guilt:

> Some of the information is pertinent, like you have them say pertinent means it had anything to do whatsoever with the facts of this case, that's a pertinent call. Non-pertinent calls are I'm going to talk to my mom about what I want for dinner. **But of the pertinent calls some of them can be entered at trial because they are admissible, some of them can't. Some of them have information that we can share with you in totality, and some of them we can't.**

(Emphasis added).

A prosecutor may not comment on facts not in evidence. *Donaldson v. State*, 416 Md. 467, 489 (2010) (quoting *Mitchell*, 408 Md. at 381); *see also Hunt*, 321 Md. at 435. Here, the prosecutor's comment quite clearly suggested to the jury that there was inadmissible evidence in those phone calls that would have proven Dutton's guilt. This is just the sort of comment on facts not in evidence that the law prohibits. Moreover, such a comment is unfair to the trial judge and the judicial system, because it suggests that evidentiary determinations are intended to hide the truth from the jury. It is inherently

prejudicial for the prosecutor to suggest to the jury that there was additional "pertinent" evidence that it was not allowed to see. This is a particularly egregious and improper argument.

D. Conclusion

Maybe each of these comments alone wouldn't be enough to warrant a finding of plain error, but cumulatively, the comments were prejudicial and deprived Dutton of a fair and impartial trial. *See Lawson*, 389 Md. at 599-600, 604-05. As noted above, Dutton's counsel failed to object to any of these improper statements. Ordinarily, then, the statements would not be cognizable on direct appellate review.[12] MD. R. 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court"). Nevertheless, we choose to exercise our discretion to recognize the prosecutor's comments as plain error. *First*, although Dutton did not preserve these claims, he did not affirmatively waive them. *See Yates v. State*, 202 Md. App. 700, 721-22 (2011) (explaining difference between waiver and forfeiture of an

[12] Whether by way of plain error review, or in a subsequent post-conviction proceeding alleging ineffective assistance of trial counsel in failing to object to the prosecutor's improper comments, a court would have to reach the merits of Dutton's arguments one way or another. *See, e.g.*, *Robinson v. State*, 410 Md. 91, 120 (2009) (Greene, J., dissenting) (explaining that granting plain error would be appropriate because "[t]his issue is also likely to appear in a post-conviction proceeding. Deciding the merits at this point will avoid further appeals. Rule 8-131(a) allows us to consider a matter not addressed in the lower court if it would … prevent another appeal.") (cleaned up). We might as well do it now.

objection); *Carroll v. State*, 202 Md. App. 487, 509-10 (2011). *Second*, we find that the errors were, as discussed above, plain and obvious and, the State's protestations to the contrary notwithstanding, not subject to reasonable dispute. *Third*, and most critically in this case, we find that the juxtaposition of the severity of the prosecutor's improper arguments with the thinness of the State's evidentiary case against Dutton, makes it likely that the errors were outcome-determinative and resulted in a trial that did not comport with our standards of fairness. *See, e.g.*, *Colkley v. State*, ___ Md. App. ___, ___ (2021) (No. 833, Sept. Term 2019) (quoting *Carroll v. State*, 240 Md. App. 629, 663 (2019) (explaining that the "propriety of prosecutorial argument must be decided contextually, on a case-by-case basis."). One of the most important factors to consider when a defendant fails to object to a prosecutor's improper comments is "the strength of the competent evidence to establish guilt absent the remarks." *McCracken v. State*, 150 Md. App. 330, 362 (2003) (quoting *United States v. Harrison*, 716 F.2d 1050, 1052 (4th Cir. 1983)); *Billings v. Polk*, 441 F.3d 238, 250 (4th Cir. 2006). We also consider "the centrality of the issue affected by the error." *Harrison*, 716 F.2d at 1052 (quoting *United States v. Callanan*, 450 F.2d 145, 151 (4th Cir. 1971)). *See also Wise v. State*, 132 Md. App. 127, 142 (2000) (citing *Henry v. State*, 324 Md. 204, 230 (1991) ("In determining whether reversible error occurred, we must take into account the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error, if any."). *Fourth*, we are persuaded that the errors seriously affected the fairness, integrity, and public reputation of judicial

proceedings. *See State v. Stanley*, 352 Md. 733, 747 n.6 (1998) (quoting *Campbell v. State*, 37 Md. App. 89, 96 (1977).

CONCLUSION

We hold that the evidence, although thin, was legally sufficient to support Dutton's convictions. We further hold, however, that the prosecutor's comments during closing arguments were improper and require reversal. Given the juxtaposition between the State's thin case against Dutton and the severity of the prosecutor's inappropriate remarks, we exercise our discretion on plain error review to vacate Dutton's convictions and remand this case for a new trial.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY ARE REVERSED. CASE REMANDED TO THE CIRCUIT COURT FOR WICOMICO COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS ASSESSED TO WICOMICO COUNTY.