

Circuit Court for Baltimore City  
Case No. 118057018

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 2697

September Term, 2018

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TYERRIA CLEA

v.

STATE OF MARYLAND

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Wright,  
Kehoe,  
Moylan, Charles E., Jr.  
(Senior Judge, Specially Assigned),

JJ.

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PER CURIAM

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Filed: September 30, 2019

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following a jury trial in the Circuit Court for Baltimore City, Tyerria Clea, appellant, was convicted of robbery, second-degree assault, and theft of property with a value of less than \$1,000. She raises two issues on appeal: (1) whether the court abused its discretion in denying her motion for a mistrial, and (2) whether the court abused its discretion in restricting defense counsel’s cross-examination of one of the State’s witnesses. For the reasons that follow, we shall affirm.

### I.

At trial, the victim testified that Ms. Clea approached her on the street, stated “give me what you got,” and grabbed her by the shirt. When the victim stated that she would not give Ms. Clea anything, Ms. Clea reached into the victim’s pocket, took \$30 or \$40, and walked away. The victim testified that she had seen Ms. Clea “a lot” around the neighborhood prior to the robbery and that she knew Ms. Clea as “Reds.”

At the end of the victim’s testimony, the court asked the prosecutor whether the victim could be released from her subpoena. The prosecutor responded in the presence of the jury: “Yeah, just keep her as a rebuttal witness in the event the defendant testifies.” Defense counsel objected and requested a mistrial, claiming that the prosecutor’s comment constituted improper burden shifting and therefore, violated her constitutional right to avoid self-incrimination. The court denied the motion, noting that the prosecutor had not stated that Ms. Clea was required to testify. On appeal, Ms. Clea contends that the court abused its discretion in denying her motion for a mistrial. We disagree.

The test for determining whether a prosecutor’s statements violate a defendant’s right against self-incrimination is “whether the [ ] remarks were reasonably susceptible of

the inference that the [defendant’s] failure to testify would be indicative of his guilt.” *Simpson v. State*, 442 Md. 446, 460 (2015). Here, the prosecutor’s comment to the court was not susceptible to such an inference as the prosecutor did not assert that Ms. Clea would testify, was required to testify to rebut the State’s evidence, or that the jury could consider her silence against her. Rather, the prosecutor simply indicated that he wished to keep the victim under subpoena *in the event* appellant elected to testify. Because we are not persuaded that the prosecutor’s comments were improper, a mistrial was not required.

## II.

The State also called Baltimore City Police Department Detective Antonio Queen as a witness. Detective Queen testified that he had spoken to the victim after the incident and that, based on that conversation, he had identified Ms. Clea as a possible suspect. He further indicated that the victim gave him the impression that she knew the person who robbed her. He did not testify that the victim had identified Ms. Clea in his presence.

During cross-examination the following exchange then occurred:

[DEFENSE COUNSEL]: And you are aware of cases where eyewitness accounts have proven to be –

THE COURT: Sustained.

[DEFENSE COUNSEL]: You’ve never had a case where you got information from a witness?

THE COURT: Sustained.

[PROSECUTOR]: Objection.

[DEFENSE COUNSEL]: You talked about you went back to investigation school?

QUEEN: Correct.

THE COURT: I'm going to sustain it. So how many times you ask it, I'm going to sustain it. Move on.

[DEFENSE COUNSEL]: I have moved on.

THE COURT: All right

Ms. Clea contends that the court abused its discretion by restricting defense counsel's cross-examination of Detective Queen regarding the reliability of eyewitness identifications. Although she concedes that Detective Queen "was not an expert on the science underlying the reliability of eyewitness identifications," she nevertheless asserts that he "did possess other relevant knowledge related to the reliability of eyewitness identifications from his experience investigating crime."

However, Maryland Rule 5-103 provides that appellate error may not be predicated upon a ruling that excludes evidence unless "the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered." Md. Rule 5-103(a)(2). Thus, "a formal proffer of the contents and relevancy of the excluded evidence must be made in order to preserve for review the propriety of the trial court's decision to exclude the subject evidence." *Merzbacher v. State*, 346 Md. 391, 416 (1997).

Here, it appears that defense counsel was attempting to question Detective Queen about whether he had ever interviewed a crime victim or other eyewitness who had misidentified an alleged perpetrator. However, at no time did defense counsel make a proffer, formal or otherwise, as to content or potential relevance of the excluded testimony.

And although the nature of defense counsel’s question is clear, the record is devoid of any indication that Detective Queen had an opinion, or other relevant information, regarding the reliability of eyewitness identifications, as appellant now claims, and, if he did, whether it would have been favorable to the defense. Consequently, this issue is not preserved for our review. *Merzbacher*, 346 Md. at 416 (holding that where the witness did not answer the question after the trial court sustained the State’s objection, a proffer was required to preserve for review the propriety of the trial court’s decision to exclude the evidence because the witness “could have answered the question in any number of ways,” and the Court of Appeals was “in no position . . . to discern what that answer may have been, whether favorable or unfavorable to the defense”).<sup>1</sup>

**JUDGMENTS OF THE CIRCUIT  
COURT FOR BALTIMORE CITY  
AFFIRMED. COSTS TO BE PAID  
BY APPELLANT.**

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<sup>1</sup> Moreover, even if preserved, this claim lacks merit. A trial court may make judgment calls and control the scope and mode of cross-examination. *Peterson v. State*, 444 Md. 105, 124 (2015). Here defense counsel’s questions were outside of the scope of direct as Detective Queen did not testify that the victim had identified appellant in his presence or that he believed her in-court identification of Ms. Clea was reliable. Moreover, even if we assume that Detective Queen would have testified that he had been involved in another case where a witness had misidentified a perpetrator, the court could reasonably conclude that such testimony would not have assisted the jury in determining whether the victim had correctly identified Ms. Clea in this case.