

HEADNOTE: *White v. State*, No. 42, September Term, 2008

“PLAIN ERROR” REVIEW OF ERRONEOUS INSTRUCTION: Because the Circuit Court delivered a “clarifying” instruction on the issue of “territorial jurisdiction,” the Court of Special Appeals erroneously concluded that plain error occurred when the Circuit Court delivered an earlier unobjected-to instruction on that issue.

“PLAIN ERROR” REVIEW OF ALLEGEDLY IMPROPER REBUTTAL ARGUMENT: The Court of Special Appeals erroneously concluded that plain error occurred during the State’s rebuttal argument when the prosecutor expressed doubt that the defendant would be prosecuted for murder in the jurisdiction where the victim’s body was recovered.

IN THE COURT OF APPEALS

OF MARYLAND

No. 42

September Term, 2008

ARTHUR FRANKLIN WHITE, JR.

v.

STATE OF MARYLAND

Bell, C.J.
Harrell
Battaglia
Greene
*Murphy
Adkins
Eldridge, John C., (Retired,
Specially Assigned),

JJ.

Opinion by Murphy, J.
Eldridge, J., joins in the judgment only.

Filed: October 25, 2011

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

In the Circuit Court for Charles County, a jury convicted Arthur Franklin White, Jr., Petitioner, of first degree murder and related offenses. The State presented overwhelming evidence that Petitioner participated in the kidnapping, armed robbery, and murder of the victim, whose body was found in the District of Columbia three days after he was shot and kidnapped in Waldorf, Maryland. Petitioner noted an appeal to the Court of Special Appeals. In an unreported opinion, while rejecting Petitioner's "insufficient evidence" arguments and affirming every judgment of conviction other than first degree murder and use of a handgun in the commission of a crime of violence, the Court of Special Appeals stated:

Because we find that the jury instructions and the prosecutor's argument to the jury were plain error, we reverse [Petitioner's] convictions for first degree murder and use of a handgun in the commission of first degree murder and remand for further proceedings. We affirm the balance of his convictions.

Petitioner filed a Petition for Writ of Certiorari in which he presented two questions for our review:

1. Did the Court of Special Appeals err in reversing some, but not all, of the judgments in this case after recognizing plain error by the trial court in its jury instructions on territorial jurisdiction and finding plain error in the closing argument where the prosecutor urged the jury to find Mr. White guilty because a D.C. jury would not never [sic] do so?
2. Did the trial court lack territorial jurisdiction to try Mr. White for first-degree murder, conspiracy to commit murder, armed robbery, and related offenses because there was insufficient evidence that the crimes occurred in Maryland?

In its Answer to the Petition, the State rephrased the questions as follows:

1. After recognizing plain error regarding the instruction on territorial jurisdiction and comments made by the prosecutor in closing argument, did the Court of Special Appeals properly reverse the judgment only as to the offenses actually impacted by such error?

2. Was the evidence sufficient to establish that the Maryland [sic] had territorial jurisdiction to try White for first degree murder, conspiracy to commit murder, armed robbery and related offenses?

For reasons that are not apparent in the record, the State did not request that we review the issues of whether “plain error” occurred during the jury instructions or during the prosecutor’s rebuttal argument. From our review of the record, however, we are persuaded that the Circuit Court did not commit plain error on either of those occasions. We shall therefore direct that Petitioner’s murder and “use of a handgun” convictions be reinstated.

Background

The theory of the State’s case was that (1) the victim was a drug dealer who Petitioner and two co-conspirators, Johnny Goldring and Tyrone Lyles, planned to rob, (2) on August 27, 2005, Goldring telephoned the victim and requested to purchase drugs from the victim in Lyles’ trailer, located on Lyles Place in Waldorf, (3) when the victim entered the trailer, he was shot, (4) after the victim was shot, Petitioner and an unidentified man dragged the victim from the trailer and threw the victim into the trunk of the victim’s car, and (5) Petitioner then drove the victim’s car away, with the co-conspirators following in another vehicle. The State’s evidence, which included

testimony about statements that Petitioner had made to a cell mate at the Charles County Detention Center and to a fellow detainee at that facility, was consistent with that theory.

The “territorial jurisdiction” issue was generated by the fact that the victim’s body was found in the backseat of his car in Southeast Washington, D.C. As noted by the Court of Special Appeals:

Ricky Nichols, a forensic science unit technician for the Charles County Sheriff’s Office, was one of the Charles County Sheriff’s employees that responded to Southeast Washington, D.C. after being notified that [the victim’s] body was found there. He said [the victim’s] body was “in the advanced stages of decomposition.” [The victim] was “laying face down on the rear seat.” He had a black hood “over his back area” and his hands were tied behind his back with flex cuffs. He also had a jacket tied around his neck. His pants were missing and he did not have a wallet.

The State’s evidence was sufficient to prove beyond a reasonable doubt that the victim was killed in Maryland, and that the “dumping” of his body was (in the words of the prosecutor’s rebuttal argument) “all that took place in the District of Columbia.”

The Circuit Court’s jury instructions included the following “territorial jurisdiction” instruction:

The evidence that has been presented is that certain activity occurred at or near Lyles Place in Waldorf, in Charles County, Maryland, and the evidence is undisputed that the remains of [the victim] were recovered several days later in Southeast Washington, D.C., outside of the territorial jurisdiction of the State of Maryland. It is essential to the government’s proof in this and any criminal case, that the essential elements, not all the elements but at least the essential elements of any offense charged occur in Maryland. Maryland does not have the subject matter jurisdiction to deal with

criminal behavior that occurred beyond it's borders. Put another way, or to repeat, I guess, a little bit of what I have already said, the state must prove beyond a reasonable doubt, that at least one of the essential elements of the crimes charged, occurred in Maryland. We are going to talk about the elements of the charges and the lawyers are going to argue to you about the significance of what evidence you heard to this question of Maryland's jurisdiction.

The following transpired when the Circuit Court concluded its instructions:

THE COURT: Any questions of me, or requests of me, or complaints?

[THE PROSECUTOR]: Your Honor, I'm sitting there and listening and I'm concerned about the continuing crime. Can the court make a comment as to the crime that's considered to be of a continuing nature[?]

[PETITIONER'S COUNSEL]: I don't have any instructions that directs that issue.

THE COURT: Is it not the law that if, I'm trying to think of an example not relevant to this particular elements of the offenses in this case. Let's say, you've got a –

[PETITIONER'S COUNSEL]: Theft is a continuing crime.

THE COURT: Well, okay, you've got a theft. I'm going to use that as an example. That's a good example, a theft. Somebody, lets use the reverse order for once. Somebody shoplifts in Landover and comes to Waldorf– that's somewhat nasty, but – the crime is of a continuing nature. Charles County could assert jurisdiction and proceed, as could Prince George's County, in that example.

[THE PROSECUTOR]: I agree.

[PETITIONER'S COUNSEL]: Okay.

THE COURT: Would that suffice if I said that to them?

[THE PROSECUTOR]: Well, I think we have to apply it to the particular crimes that are charged.

[PETITIONER'S COUNSEL]: Yes, that's my—

THE COURT: Well, I was trying to give you that platform on which to argue.

[THE PROSECUTOR]: I'm obviously going to argue it but I don't think there's any dispute over what the continuing crimes are though. The killing is one, we all know that.

After some further discussion, the Circuit Court delivered the following “clarifying” instruction:

Ladies and gentlemen, the lawyers have asked me to try to clarify an issue here that may be less problematic than some of us fear, but there is a concept that, you know, some criminal activity is continuing in nature, and it is not at all unusual for a project to commence in one geographical area and have consequences or end up in another. An awfully lot of frankly federal criminal jurisdiction has to do with crossing state lines and where it's difficult, sometimes impossible, to discern where things started, even if you know where they ended. An example that is meant not to pertain to the evidence in this case, but has to do with the theft. Let's say, for example, that someone steals a car in Landover in Prince George's County, north of here, and drives it down the beltway, down route 3, or Branch Avenue, and comes into Waldorf or La Plata. Either jurisdiction could, either Charles or Prince George's County, could initiate a prosecution. The guy couldn't be convicted twice and it usually is a situation where the first guy to, the first police agency that gets him initiates the charges and the prosecution is there. That's because in that theft example an essential element of the offense is occurring in both counties, and that is the carrying away of someone else's property, to wit, the car. An essential element that has occurred in Prince George's, and the taking

itself apparently occurred in Prince George's in that example, but the carrying is still going on by the time the guy gets down here. So the jurisdictional issue is resolved by the law, conceding the east jurisdiction, the right to file a charge, and if you will, whoever gets him first, keeps him. There's a – well, the younger generation of lawyers doesn't remember it, but back when there was a north bond toll on the Nice Bridge down here, Charles County used to get a lot of stolen Virginia cars, the guys who stole the cars and headed north without fifty cents to pay the toll. That used to happen. The point is Charles County used to prosecute an awful lot of the Virginia theft cases, given the continuing nature of the offense. Either King George or West Moreland could have charged over there. We got the guy here and we'd charge him here. You can see, I hope, obviously analogies with respect to the facts of this case. The nature of the kidnaping charge is such that essential elements of it must have occurred in Charles County, Maryland, and it is apparent that other elements of it meaning continuing transportation must have occurred once the car got over the District of Columbia line. **With regard to the assaultive behavior, if you will, the shooting, that occurs in one place at one time, the government must prove for that, the purposes of this case, that that occurred in Maryland. So, too, with the robbery. So I'm hoping, counsel, that that clarifies that somewhat and doesn't further confuse it.**

(Emphasis supplied). Petitioner's trial counsel did not note an exception to the supplemental jury instruction.

The closing argument of Petitioner's trial counsel included the following statements:

The court instructed you that the state has the burden to prove beyond a reasonable doubt that the offenses occurred within the state of Maryland. I suggest to you that not only do we not know where the shooting occurred, the body was found in the District of Columbia, remember, with two shots, two bullet holes in the head. I don't know where those bullets were fired, and if it was an execution, did the execution take place in

the District of Columbia? If it did, then if you believe it did, it cannot be prosecuted here. You cannot find beyond a reasonable doubt, and I suggest that is the issue. Are there doubts and are those doubts reasonable, and I suggest to you that it is reasonable to doubt the place that the fatal wound to [the victim] was fired.

You heard the Medical Examiner testify that the one shot was not fatal. If that shot was not fatal, and if that shot took place at Lyles' trailer, if that man was being dragged out, there would have been blood somewhere. As I indicated on the shot in the back of the head, if that had occurred at Lyles' trailer there sure would have been evidence of some body tissue, blood in that trailer and there was none.

I suggest to you that it is doubtful that that fatal blow occurred in Maryland. We don't really know where it occurred, but it is the state's burden to prove to you that that is where it occurred. The state's burden is a heavy one, and I will only have this one opportunity to talk to you. So there are many things that the state will say to you in rebuttal that I will not be able to address.

The State's argument in rebuttal included the following statements:

Now, let me get directly to the jurisdiction issue because [Petitioner's counsel] wanted to make a large deal out of that. And by that, ladies and gentlemen, we're talking about proving that these crimes occurred here in Maryland. And generally speaking, I don't know what jurisdiction is about, you know, a crime is committed in a certain state, all right, that state should be the ones to take care of it. I mean, that citizenry is violated, their dignity is affected, okay, the victims suffer in that state, all of these things. All right. It is ludicrous to me that [Petitioner's counsel] can honestly try to persuade you that this case any part of it should be heard in the District of Columbia, because that's the only thing we have here. See, the argument is that, you know, the body was found there so he must have been killed over there. That man beefed with [the victim] here in Charles County, Maryland, he threatened [the victim] here in Charles County, Maryland, he conspired here, put together a plan here,

executed a plan here, kidnapped [the victim] here, executed [the victim] here, in Maryland. Everything about this case with one small exception, happened here in Maryland. Okay? Here in Maryland. And [Petitioner's counsel] wants you to say, hey, let D.C. deal with the murder. Well, you know, as if D.C. doesn't have enough murders, number one. Number two, would they even handle it. Well, lets see. The Charles County Sheriff's Office has had to respond in Southeast D.C., their forensic science unit had to respond up into Southeast D.C. Lets see. Do you think D.C. is going to handle this case? Of course not.

And one thing that [Petitioner's counsel] is not telling you, okay, see, he wants you to think that, you know, D.C. ought to handle this case, and you know, whatever you do, say, you know what, we don't know, we think that D.C. should handle the case, and somehow this case is going to go to D.C. Well, that's a possibility. That's a possibility. One, I don't think D.C.'s going to do it. But one thing you need to know. Everything I say about why this case should be in Maryland, when this case goes to D.C., see that jury, those twelve people sitting up there in your position on that date, if that ever comes, okay, they've got to make the whole decision. They're not going to know anything. And [Petitioner's counsel's] going to get up there and pound on the rail in front of them- - everything happened in Maryland, everything happened in Maryland. You can't find him guilty here in D.C., they just found the body here.

It's a trick, ladies and gentleman. That's exactly what it is. [Petitioner] tricked [the victim] out of his life, just like he told [his fellow detainee in the Charles County Detention Center]. Don't let him trick you out of handling this case. I know it might be easy to pass the buck and not make the hard decisions that have to be made sometimes, but if justice is going to be done in this case, you all are going to have to do it. That's just the reality of it, and I'm sure, you've taken your oath and you're willing to do that.

* * *

This is clearly a dumping. Let me, please, ladies and

gentlemen, use your common sense for just a moment. Okay? [The victim] is found without a wallet, with no valuables, his pants taken off him- - nothing. I mean, it's his car, so we know it's his car. Okay? But they have totally taken anything that's going to identify him for anybody, whoever finds him, from him. When you go dump a body, you do go because you are distancing the evidence of the murder from yourself. Please tell me what sense it makes to go through everything you go through, get the zip ties, handcuff him, put a bullet to the back of his head after he has gone through everything else, once you get him to D.C.? It doesn't make any sense because that's not what people do, and make no mistake about it, they had a plan, as I think my colleague said, or [Petitioner's counsel], I don't know who said it, well, [Petitioner's counsel] wouldn't have said it, you know, zip ties aren't easy to come by. You know, I don't have those laying around my house, I don't know about you. That was planned. Okay? And where they were going to dump the body was planned. That's all that took place in the District of Columbia.

Petitioner's trial counsel made no objection to the State's rebuttal argument.

The record includes the VERDICT SHEET on which the jury returned the following verdicts:

	<u>GUILTY</u>	<u>NOT GUILTY</u>
1. First degree premeditated murder	✓	
2. Second degree murder	✓	
3. First degree felony murder	✓	
4. First degree assault (firearm)	✓	
5. First degree assault (serious injury)	✓	
6. Second degree assault	✓	
7. Kidnapping	✓	

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|---|---|
| 8. Robbery with a deadly weapon | ✓ |
| 9. Use of a handgun in a crime of violence
(Murder) | ✓ |
| 10. Use of a handgun in a crime of violence
(First degree assault) | ✓ |
| 11. Use of a handgun in a crime of violence
(Robbery with a deadly weapon) | ✓ |
| 12. Conspiracy to commit murder | ✓ |
| 13. Conspiracy to commit robbery
with a deadly weapon | ✓ |
| 14. Conspiracy to commit kidnapping | ✓ |
| 15. Possession of regulated firearm | ✓ |

As stated above, Petitioner noted an appeal to the Court of Special Appeals, which reversed the murder convictions and the conviction for use of a handgun in the commission of the murder.

Discussion

“[T]his Court ordinarily will not consider an issue not included in the petition for certiorari.” *Richmond v. State*, 330 Md. 225, 235, 623 A.2d 630, 636 (1993). It is well settled, however, that this Court does have discretion to do so. *State v. Parker*, 334 Md. 576, 596-97, 640 A.2d 1104, 1114 (1994). In the case at bar, the Court of Special Appeals exercised its discretion to address the merits of two “unpreserved” arguments, and concluded that “plain error” occurred when the Circuit Court (1) delivered an

erroneous “territorial jurisdiction” instruction, and (2) took no action in response to improper rebuttal argument. In the interest of judicial economy, we shall exercise our discretion to determine whether the Court of Special Appeals erred in its conclusions.

In *Richmond, supra*, this Court stated:

Plain error is "error which vitally affects a defendant's right to a fair and impartial trial." *State v. Daughton*, 321 Md. 206, 211, 582 A.2d 521 (1990). We have limited the instances in which an appellate court should take cognizance of unobjected to error to those which are "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *State v. Hutchinson*, 287 Md. 198, 203, 411 A.2d 1035 (1980). *See also Rubin v. State*, 325 Md. 552, 588, 602 A.2d 677 (1992); *Calhoun v. State*, 297 Md. 563, 594, 468 A.2d 45 (1983), *cert. denied*, 467 U.S. 1268, 104 S.Ct. 3564, 82 L.Ed.2d 865 (1984). We will "intervene in those circumstances only when the error complained of was so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Trimble v. State*, 300 Md. 387, 397, 478 A.2d 1143 (1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1231, 84 L.Ed.2d 368 (1985). In each case, we will "review the materiality of the error in the context in which it arose, giving due regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald inattention." *Hutchinson, supra*, 287 Md. at 203, 411 A.2d 1035.

330 Md. at 236, 623 A.2d at 636.

In *Savoy v. State*, 420 Md. 232, 22 A.3d 845 (2011), this Court stated:

We set forth in *State v. Hutchinson* the circumstances under which an appellate court should consider exercising discretion to take cognizance of plain error: “[A]n appellate court should take cognizance of unobjected to error” when the error is “compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.” 287 Md. 198, 203, 411 A.2d 1035, 1038 (1980). Factors to consider in that determination

include “the materiality of the error in the context in which it arose, giving due regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald inattention.” *Id.*, 411 A.2d at 1038. We have not deviated from that standard in the years since *Hutchinson*. See, e.g., *Miller v. State*, 380 Md. 1, 29-30, 843 A.2d 803, 820 (2004) (collecting cases).

Id. at 243, 22 A.3d at 852.

I.

As to the “territorial jurisdiction” instruction, the Court of Special Appeals noted that “in the instant case, the court erroneously instructed the jury that ‘the state must prove beyond a reasonable doubt that at least one of the essential elements of the crimes charged occurred in Maryland.’” The opinion of the Court of Special Appeals, however, (1) focuses entirely on the instruction that was delivered *before* the bench conference that resulted in the above quoted “clarifying” instruction, and (2) makes no mention of the supplemental instruction during which the Circuit Court stated, “[w]ith regard to the assaultive behavior, if you will, the shooting, that occurs in one place at one time, the government must prove for that, the purposes of this case, that that occurred in Maryland.” Based upon the supplemental instruction and the above quoted arguments of counsel, it is unreasonable to hypothesize that the jury was confused about whether it could convict Petitioner of murder even if the State did not prove beyond a reasonable doubt that the fatal shot was fired in Maryland. Because the supplemental instruction was entirely consistent with Petitioner’s “territorial jurisdiction” defense, it is understandable why Petitioner’s trial counsel did not note an exception and/or request a further

clarification.

In *Savoy, supra*, this Court stated:

Review [of a jury instruction] for plain error requires as an initial step that the instruction contain error.... The next step in the analysis requires that we consider whether the error was “plain” and “material” to Petitioner’s right to a fair trial; that is, we must consider whether the error in the instruction lowered the burden of proof and thereby created error that was clear and “fundamental to assure the defendant a fair trial.” *Miller*, 380 Md. at 29, 843 A.2d at 820 (quoting *Hutchinson*, 287 Md. at 203, 411 A.2d at 1038).

420 Md. at 244, 22 A.3d at 853. As the Circuit Court’s supplemental instruction was a correct statement of what the State was required to prove when the issue of territorial jurisdiction was generated by the evidence, Petitioner’s murder and use of a handgun convictions should not have been reversed on the ground that the Circuit Court delivered an erroneous instruction on that issue.

II.

In concluding that the rebuttal argument “certainly mislead the jury into believing that if they did not find for the State on the jurisdictional issue, [Petitioner] would not be prosecuted in Washington, D.C. and thereby go free,” the Court of Special Appeals focused upon the following portions of the State’s argument in rebuttal:

And [Petitioner’s counsel] wants you to say, hey, let D.C. deal with the murder. Well, you know, as if D.C. doesn’t have enough murders, number one. Number two, would they even handle it. Well, lets see. The Charles County Sheriff’s Office has had to respond in Southeast D.C., their forensic science unit had to respond up into Southeast D.C. Lets see. Do you think D.C. is going to handle this case? Of course not.

And one thing that [Petitioner's counsel] is not telling you, okay, see, he wants you to think that, you know, D.C. ought to handle this case, and you know, whatever you do, say, you know what, we don't know, we think that D.C. should handle the case, and somehow this case is going to go to D.C. Well, that's a possibility. That's a possibility. One, I don't think D.C.'s going to do it.

* * *

It's a trick, ladies and gentleman. That's exactly what it is. [Petitioner] tricked [the victim] out of his life, just like he told P.J. Ford. Don't let him trick you out of handling this case. I know it might be easy to pass the buck and not make the hard decisions that have to be made sometimes, but if justice is going to be done in this case, you all are going to have to do it. That's just the reality of it, and I'm sure, you've taken your oath and you're willing to do that.

Those statements, however, must be placed in appropriate context. The opinion of the Court of Special Appeals makes no mention of two other statements in the rebuttal argument. After stating, "would they even handle it," the prosecutor stated: "Well, lets see. The Charles County Sheriff's Office has had to respond in Southeast D.C., their forensic science unit had to respond up into Southeast D.C." After stating, "I don't think D.C.'s going to do it," the prosecutor stated:

But one thing you need to know. Everything I say about why this case should be in Maryland, when this case goes to D.C., see that jury, those twelve people sitting up there in your position on that date, if that ever comes, okay, they've got to make the whole decision. They're not going to know anything. And [Petitioner's counsel's] going to get up there and pound on the rail in front of them- - everything happened in Maryland, everything happened in Maryland. You can't find him guilty here in D.C., they just found the body here.

Because the prosecutor was entitled to point out the jurisdictional argument that would certainly have been made in a District of Columbia courtroom, while emphasizing the circumstantial evidence that the victim was robbed and murdered in Maryland, the unobjected-to expression of doubt that Petitioner would be charged in D.C. clearly “does not rise to the level of the deprivation of a fair trial.” *Rubin v. State*, 325 Md. 552, 588, 602 A.2d 677, 694 (1992).

**JUDGMENT OF THE COURT OF THE
COURT OF SPECIAL APPEALS
AFFIRMED IN PART AND REVERSED IN
PART; JUDGMENTS REVERSING
CONVICTIONS OF MURDER AND USE OF
A HANDGUN REVERSED; JUDGMENTS
OTHERWISE AFFIRMED; PETITIONER
TO PAY THE COSTS.**

Judge Eldridge joins in the judgment only.