

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2676

September Term, 2012

ROBERT WAYNE DRAPER

v.

STATE OF MARYLAND

Woodward,
Nazarian,
Reed,

JJ.

Opinion by Nazarian, J.

Filed: January 23, 2015

Robert Wayne Draper was required to report to the Caroline County Detention Center (“Detention Center”) on July 11, 2011 to begin a term of incarceration. It is undisputed that he failed to report, and as a result, he was charged with second-degree escape. On February 12, 2013, after a trial in the Circuit Court for Caroline County, Mr. Draper was convicted of second-degree escape. On appeal, Mr. Draper argues that there was insufficient evidence to support his conviction and that the circuit court erroneously allowed inadmissible hearsay testimony to be presented during his trial. We find that Mr. Draper has failed to preserve these issues for appellate review and affirm his conviction.

I. BACKGROUND

On June 27, 2011, in the case captioned 05-K-10-008489, Mr. Draper was convicted in the Circuit Court for Caroline County of eluding or escaping a police officer in violation of Md. Code (1977, 2012 Repl. Vol.), § 21-904(c)(3) of the Transportation Article (“TA”). Pursuant to a court order issued the same day, Mr. Draper was required to report to the Detention Center by 6:00 p.m. on July 11, 2011 to begin his term of incarceration. Mr. Draper concedes that he failed to report to the Detention Center as required, and he was charged with escape in the second degree as a result.

On February 12, 2013, the escape case was tried to a jury. Sergeant Richard Moorner, the State’s first witness, testified that he was acting as the shift supervisor for the Detention Center on July 11, 2011 and was responsible for the prisoners who turned themselves in to begin serving their sentences. Sergeant Moorner testified that Mr. Draper failed to turn

himself in to the Detention Center by July 11, 2011 and did not notify the Detention Center that he would be unable to turn himself in by this date.

The State then called Sergeant Steve Wallace, an investigator for the Detention Center, who testified that Mr. Draper was not turned over to the Detention Center until August 1, 2012, more than a year late. Sergeant Wallace recounted that Mr. Draper indicated when he arrived at the Detention Center that he failed to report because he was incarcerated in a facility in Pennsylvania. Sergeant Wallace also testified that Mr. Draper failed to corroborate this claim. The State then rested its case and Mr. Draper did not move for judgment of acquittal.

Mr. Draper then indicated to the circuit court that he possessed paperwork demonstrating that he was incarcerated in a facility in another state at the time he was due to report. The court afforded the State an opportunity to inspect Mr. Draper's paperwork. After inspecting Mr. Draper's paperwork, the State advised the court that in its view, the paperwork did not prove that Mr. Draper was incarcerated in another state on July 11, 2011. The court then asked the State whether it had attempted to confirm Mr. Draper's story that he was incarcerated in another state on July 11, 2011. The State responded that it had attempted to confirm Mr. Draper's story but was unable to do so.

The court, appropriately, expressed concern that Mr. Draper could be convicted of escape in the second degree "when in fact it would be easily provable that he was incarcerated somewhere on" July, 11, 2011. So the court interrupted the trial and directed Sergeant Wallace to attempt to confirm whether Mr. Draper was incarcerated in Delaware

on July 11, 2011 and then testify to what he found. Sergeant Wallace completed his investigation and trial was allowed to resume. Before the trial was allowed to continue, the court noted that Sergeant Wallace would be allowed to testify about the conversations he had during his investigation and that Mr. Draper would be permitted to object if he wished.

Mr. Draper was then allowed to present his case. He first called his mother, Mary Devou, who testified that Mr. Draper was incarcerated in Delaware on June 10, 2011,¹ then was transported on August 12, 2011 to Pennsylvania, where he spent another eight months incarcerated. Ms. Devou conceded, however, that she did not personally observe Mr. Draper being locked up and that her testimony was based solely on a phone call she received from Mr. Draper. Mr. Draper next called his fiancée, Margaret Looney, who testified that Mr. Draper was arrested in Delaware on June 30, 2011 and was incarcerated in Pennsylvania from August 21, 2011 to March 9, 2012. Ms. Looney did not testify about whether Mr. Draper was incarcerated from June 30, 2011 to August 21, 2011, nor did she testify about where Mr. Draper was on July 11, 2011, the date Mr. Draper was required to report to the Detention Center. Ms. Looney also conceded that she was not present when Mr. Draper was allegedly arrested and that her testimony was based on phone calls she

¹ As Mr. Draper was sentenced in Maryland on June 27, 2011, it is unclear how Mr. Draper could have been incarcerated in Delaware from June 10, 2011 to August 12, 2011. We will give Ms. Devou the benefit of the doubt and assume that she intended to testify that Mr. Draper was incarcerated in Delaware from July 10, 2011 to August 12, 2011.

received from Mr. Draper and his family. Mr. Draper then took the stand and testified that he was incarcerated on June 30, 2011 for an unspecified period of time.

The State called Sergeant Wallace on rebuttal. Sergeant Wallace testified that he contacted a person with the Delaware Department of Corrections and was informed that Mr. Draper was not incarcerated in Delaware on July 11, 2011. Mr. Draper did not object to this testimony. The jury found Mr. Draper guilty of escape in the second degree.

II. DISCUSSION

On appeal, Mr. Draper argues that there was insufficient evidence to sustain his conviction of escape in the second degree and that the circuit court erred in allowing Sergeant Wallace to testify about conversations with Delaware officials about whether Mr. Draper was incarcerated in Delaware on July 11, 2011.² We don't reach the merits of either argument, however, because neither is preserved for appellate review.

First, Mr. Draper failed to move for a judgment of acquittal at the close of the State's case or at the close of all the evidence. In *Claybourne v. State*, 209 Md. App. 706 (2013), *cert. denied* 432 Md. 212 (2013), we reiterated that a defendant may not raise a sufficiency challenge on appeal if he did not first move for judgment of acquittal at the conclusion of the State's case or at the conclusion of his case:

² Mr. Draper's brief lists the following Questions Presented:

1. Was the evidence sufficient to sustain the conviction?
2. Did the trial court err in admitting improper hearsay testimony?

It is a well-established principle that our review of claims regarding the sufficiency of evidence is limited to the reasons which are stated with particularity in an appellant's motion for judgment of acquittal. Thus, "[a] defendant may not argue in the trial court that the evidence was insufficient for one reason, then urge a different reason for the insufficiency on appeal[.]" To be sure, "no Maryland case has utilized the plain error doctrine to reverse a trial judge's denial of a motion for judgment of acquittal when the ground raised on appeal was never advanced before the trial court at the time the motion for judgment of acquittal was being considered." We, therefore, decline to entertain appellant's sufficiency challenge and accordingly affirm the judgment of the Circuit Court for Baltimore City.

Id. (citations omitted). Mr. Draper did not seek a judgment of acquittal at either juncture, so his sufficiency argument is not preserved. *See* Md. Rule 4-324(a) (requiring a defendant to move for judgment of acquittal at the close of the State's case or at the close of all the evidence and "state with particularity all reasons why the motion should be granted"); Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears in the record to have been raised in or decided by the trial court.").³

³ Even had Mr. Draper's sufficiency challenge been adequately preserved for our review, we are comfortable that his conviction was supported by sufficient evidence. During the presentation of its case, the State elicited testimony indicating that Mr. Draper: (1) was required, pursuant to a court order, to report to the Detention Center by 6 p.m. on July 11, 2011; (2) was aware of this court order; and (3) failed to report to the Detention Center at the appointed time. This was all the State was required to prove for a jury to convict Mr. Draper of escape in the second degree. *See Handy v. State*, 175 Md. App. 538, 561 (2007) (holding that in reviewing a sufficiency challenge, an appellate court need only 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") (citations omitted); *see also* Md. Code (2002, 2012 Repl. Vol.), § 9-405(a)(2) of the Criminal Law Article ("CL") ("A person may not knowingly fail to

Second, as he concedes in his brief, Mr. Draper never challenged Sergeant Wallace’s testimony as hearsay at trial. He urges us to exercise our discretion to apply the plain error doctrine to consider his challenge, but we find this an inappropriate case for such an extraordinary remedy.

Plain error review is rare and reserved for the most extreme cases. In *Danna v. State*, 91 Md. App. 443 (1992), a case on which Mr. Draper relies, we explained that ““overlooking an appellant’s procedural failure is an “extraordinary step,” and that we will choose to do so only in exceptional cases.”” *Id.* at 450 (quoting *Austin v. State*, 90 Md. App. 254, 261 (1992)). And although we identified some of the considerations that normally bear on this question—“(1) the egregiousness of the error; (2) its impact upon the defendant; and (3) the degree of lawyerly diligence or dereliction involved”—we noted as well that ““the touchstone remains, as it always has been, ultimate and unfettered discretion.”” *Id.* (quoting *Austin*, 90 Md. App. at 268); *see also Chaney v. State*, 397 Md. 460, 468 (2007) (appellate courts’ discretion under Maryland Rule 8-131(a) “is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court’s

obey a court order to report to a place of confinement.”). Although Mr. Draper contends that the State’s case against him was undermined by testimony indicating that he was incarcerated in Delaware on July 11, 2011, it is not “the function of the appellate court to determine the credibility of witnesses or the weight of the evidence,” *Handy*, 175 Md. App. at 562, and the mere presence of contradictory evidence doesn’t render the State’s evidence insufficient.

ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.”).

In this case, the alleged error was neither plain nor egregious. Sergeant Wallace offered the testimony only after undertaking a follow-up investigation *at the direction of the court*, which stemmed from the court’s concern that convicting Mr. Draper would be unfair if he were, in fact, incarcerated at the time he was meant to report. But even assuming that the testimony (now) at issue was hearsay, it could have had negligible impact on his conviction at most—the State already had established the elements of the escape charge and Mr. Draper already had failed to prove his whereabouts. To exercise plain error review here would be to leave no good deed on the part of the circuit court unpunished, and we decline to take that extreme step here.

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