UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1119

September Term, 2014

JERROD LAMONT BENSON

v.

STATE OF MARYLAND

Meredith,
Berger,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: July 15, 2015

Jerrod Lamont Benson, appellant, was convicted of assault in the second degree following a two-day jury trial in the Circuit Court for Charles County. In this appeal, appellant challenges the hearing court's denial of his motion to suppress identification evidence, as well as the trial court's denial of appellant's motions for a mistrial.

QUESTIONS PRESENTED

Appellant presented three questions for our review, which are as follows:

1. Did the court below err by denying appellant's pre-trial motion to suppress identification evidence.

2. Did the trial court depart from a position of neutrality and interfere with appellant's right to a fair trial by *sua sponte* interrupting defense counsel's opening statement twice and admonishing counsel before the jury once?

3. Did the trial court err by denying appellant's two motions for a mistrial made during the testimony of Christopher Jones?

Because we conclude that the hearing court properly denied appellant's motion to suppress identification evidence, and because we also conclude that the trial court did not abuse its discretion regarding defense counsel's opening statement or in denying appellant's two motions for mistrial, we will affirm the judgment of the circuit court.

BACKGROUND

On August 2, 2012, at approximately 9:00 p.m., Christopher Jones and his fiancée, Zanetta Maclin, were walking to a 7-11 convenience store near their home in Waldorf, Maryland, when they were approached by a group of five young men. After a brief verbal exchange with the group, the couple turned away to avoid a confrontation and walk home. Maclin testified: "We were going towards our house. We turned, you know, the opposite way and my fiancé was hit; sucker punched from behind and the altercation began." Maclin

identified appellant as the man who "sucker punched" Jones from behind. Maclin testified that, after appellant punched her fiancé, appellant held Maclin back so that she could not help Jones while two of the remaining four men attacked him and kicked him. Jones sustained a broken knee-cap from the incident, causing permanent injury. Maclin viewed the attack as "random," saying, "I didn't want any trouble with them. I was going to the store . . . . [W]hy would I want to pick a fight with young children[?]"

A. The victim's identification of appellant.

Corporal Caroline Baker of the Charles County Sheriff's Office testified that she was assigned to conduct a follow-up investigation after the incident. When she first spoke with Jones and Maclin, she received a "very basic" description of the suspects. Maclin initially described the assailant to the police as having "brown skin and dreads," and Jones described the youths as being 16-23 years of age, with one of them having dreadlocks.

On August 23, 2012, Jones called Corporal Baker to tell her that he had seen the men who assaulted him on a television broadcast regarding a separate crime. On August 27, 2012, Baker met with Christopher Jones at his home and showed him a series of photo arrays. Jones selected appellant's photograph from the first array he viewed, and identified appellant as the person who "punched me from the back."

Corporal Baker showed the same set of photo arrays in a different order to Maclin in November 2012. Maclin also identified appellant from a photo array as the individual who had punched her fiancé from behind. At the trial, Maclin stated that she did not see appellant's photograph in the news. But, she acknowledged that she had previously testified

that on August 22, 2012, she had seen a news report about a group of men being arrested for another crime. At trial, both Maclin and Jones stated that they were completely certain of their identification of appellant as the one who threw the first punch.

Appellant moved pretrial to suppress the identifications, arguing that they were tainted by publicity about other crimes in the neighborhood. Appellant asserted that the press release and accompanying photographs of the suspects relative to an unrelated crime prompted Jones to contact the police. The information regarding the other crime was released on August 22, 2012, and Jones called Corporal Baker the following day to report his belief that he had seen his attacker in the news report. On March 4, 2013, a pre-trial hearing was held, and the court heard testimony from Corporal Baker regarding her contact with witnesses Christopher Jones and Zanetta Maclin. Ultimately, the hearing court denied appellant's motion to suppress evidence of extrajudicial identifications made by the two witnesses from the photo arrays, concluding that the identification procedure was not impermissibly suggestive.

B. Opening statement of defense counsel.

During opening statement, appellant's counsel described the anticipated testimony of the victims about the assault. The presentation was interrupted twice by the trial court. Immediately prior to the first interruption, counsel was describing the situation as a confrontation between victim Christopher Jones and the group of young men. The relevant section of the transcript is as follows:

> DEFENSE COUNSEL: . . . Mr. Jones sees a group of teenagers . . . . He assumes that these kids are gonna cause trouble . . . . He's ready for them . .

> . . He's trying to show he's the man . . . . These young'un's, they aren't gonna be causing him problems. They aren't gonna disrespect him in front of his lady . . . . This is his fiancé [sic] who is there with him. Nothing has happened. And he [Jones] tells her [Maclin], go on now . . . . And he's sending her off into the night by herself and nothing has happened yet. Now you think, a man who's there with his girlfriend.
>
> THE COURT: Approach the bench please.
>
> (Counsel approaches the bench).
>
> This is summation and final argument. It's not; it's supposed to be opening statement.
>
> (Counsel returns to trial tables).

Appellant's counsel resumed her argument, but, a few minutes later, she was interrupted by the trial court a second time. The transcript reflects:

> DEFENSE COUNSEL: Think about the description he [Jones] gave that night . . . . If somebody does punch you from behind you're focusing on all of these different things going on. You're here. You're there. Are you paying attention to a person's face? Can you describe him? . . . Zanetta Maclin and Christopher Jones were not focused on details and again they did not give details and again the police lacked a description [of the assailant].
>
> THE COURT: Ms. [Defense Counsel], I'm not gonna caution again.

Appellant's counsel did not register any complaint on the record during trial regarding these two interruptions, but simply continued with her opening statement.

C. Victim's blurt outs regarding other crimes.

During the trial, appellant's counsel moved for a mistrial twice. The trial court denied both motions. On separate occasions, witness Jones made two statements referring to a separate crime. During his direct examination testimony, Jones testified without any prompting:

> And I sat on the side [after the assault] . . . . The police came and . . . he took a statement and he said he had to leave because it was a robbery at the 7-11 that we was about to go to that (unintelligible) if I know that them guys end up robbing.

Defense counsel requested a bench conference to raise an objection about Jones's reference to "them guys" robbing the nearby 7-11. Defense counsel "call[ed] for a mistrial and if [the court would not grant a mistrial] . . . a curative instruction saying [appellant] was never arrested or doesn't have charges pending for robbing a 7-11." After discussion with counsel, the trial court instructed the jury as follows:

> Ladies and gentlemen, there have been a couple of instances here where the witness has made statements that were not directly responsive to the questions that were put and one thing that was said just now had to do with the witness['s] understanding that people were charged in connection with robbing the 7-11. The lawyers agree and stipulate that this Defendant, Mr. Benson, was not charged with robbing the 7-11. So, to the extent that the witness had information to that effect, it was mistaken. And Mr. Benson is not charged with robbing the 7-11. The only thing that's before you has to do with the incident the witness [Jones] is attempting to describe with respect to him and his girlfriend on the sidewalk near the Safe Gas Station.

(Formatting of paragraphs altered.)

Defense counsel did not object to the curative instruction. Later, on cross-examination, after Jones answered a series of questions about the events leading up to his pre-trial photo identification, Jones asserted: "I seen them on TV. I called Detective Baker, and I got confirmation from one of their guys, man, so who they was." Without any objection from either the appellant or State, the trial judge called a bench conference to discuss Jones's testimony: "The last part was again, like the previous time we were up here, it was not solicited by the question. It was volunteered by the witness. It was not responsive.

Anybody want anything done about it?" Defense counsel requested a mistrial; the request was denied and no further curative instruction was requested by either the State or appellant.

Appellant was subsequently convicted of second degree assault and sentenced to 10 years' incarceration. This timely appeal followed.

STANDARD OF REVIEW

In reviewing a ruling on a motion to suppress evidence, the appellate court will assess the suppression hearing court's findings of fact and reasonable inferences drawn from the facts in the light most favorable to the prevailing party, which in this case is the State. *Crosby v. State*, 408 Md. 490, 504 (2009). The reviewing court will uphold the hearing court's findings of fact unless they are clearly erroneous. *Carter v. State*, 367 Md. 447, 457 (2002).

Ordinarily, "the appellate court will not decide any [issue other than jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court." Maryland Rule 8-131(a). Appellate review of unpreserved errors is "limited to circumstances warranting plain error review." *Savoy v. State*, 420 Md. 232, 243 (2011). *See also State v. Hutchinson*, 287 Md. 198, 203 (1980).

In reviewing a denial of a motion for mistrial, the appellate court will reverse the trial court's ruling only when it is shown that "the defendant was so clearly prejudiced that the denial constituted an abuse of discretion." *Hunt v. State*, 321 Md. 387, 422 (1990). A mistrial is an "extreme sanction . . . resorted to when such overwhelming prejudice has

occurred that no other remedy will suffice to cure the prejudice." *Coffey v. State*, 100 Md. App. 587, 597 (1994).

DISCUSSION

I.

Appellant contends that the hearing court erred in denying his motion to suppress the out-of-court identifications made by Jones and Maclin. Appellant argued that the use of the photo arrays was "impermissibly suggestive" because the photos were not shown to the victims until after there had been publicity about another case in which appellant was a suspect. Appellant argued the pretrial identifications were improper because:

> [T]he potential for suggestiveness arose from the possibility that [Christopher Jones] heard about suspects in an unrelated case (taking place three days after the crime in this case), saw Appellant's photograph among the group of people whose arrest had been publicized, spent four days thinking about those images before looking at the photo arrays, and mistakenly identified Appellant as one of the group of attackers who confronted him on August 2, 2012. With regard to Zanetta Maclin, it is possible that her identification was affected in the same way.

When a defendant challenges the admissibility of an extrajudicial identification procedure, the accused "bears the initial burden of showing that the procedure employed to obtain the identification was unduly suggestive." *James v. State*, 191 Md. App. 233, 252, *cert. denied,* 415 Md. 338 (2010). "Impermissible suggestiveness exists where the police, in effect, repeatedly say to the witness: 'This is the man.'" *In Re: Matthew S.*, 199 Md. App. 436, 448 (2011)(citations and some internal quotation marks omitted). In other words, "[t]o do something impermissibly suggestive is . . . to feed the witness clues as to which identification to make. THE SIN IS TO CONTAMINATE THE TEST BY SLIPPING THE

ANSWER TO THE TESTEE." *Conyers v. State*, 115 Md. App. 114, 121, *cert. denied*, 346 Md. 371 (1997) (capitals in original).

The motions court considered appellant's arguments and denied the motion, stating:

> . . . I don't know what the police are supposed to do other than what … [Cpl.] Baker did here after her phone call from Mr. Jones . . . . We can speculate here that the witnesses read that article in detail and considered and continued studying it and had a more fixed impression [than] . . . they might otherwise. But it's just as likely the newspaper ended up at the bottom of a birdcage as that they studied it intently. Could it have been better? Sure it could [have] . . . but first of all there's no police misconduct here. Second of all, there's no inappropriate taint of the sort that would compromise the witnesses['] ability to discriminate in the best sense of that term. And all of the suggestions that Defense Counsel have made here are appropriate subjects for cross-examination of the witness . . . and argument before the ultimate fact finder. But we're dealing here today with the question of whether . . . the evidence concerning this out of court identification has put us in a position where we should prevent these witnesses from purporting to identify the defendants in open court and the answer is no . . . .

(Formatting of paragraphs altered.)

We are persuaded that it was not error for the hearing court to find that the photo array procedure was not "impermissibly suggestive." *See Jones v. State*, 395 Md. 97, 109 (2006). The procedure utilized by the police was not suggestive. It did not "slip the answer to the [witness]." *Conyers, supra,*, 115 Md. App. at 121. As the circuit court stated in its ruling, appellant's concern about the impact of the news reports was a proper subject for cross-examination of Jones and Maclin. This concern goes to the reliability of Jones's and Maclin's identification, not to its suggestiveness. Because the procedure was not unduly suggestive, our "inquiry is at an end." *James, supra*, 191 Md. App. at 252.

II.

Appellant contends that the trial court committed plain error by interrupting defense counsel's opening statement twice and warning defense counsel before the jury after the second interruption. This argument was not preserved. Maryland Rule 8-131(a); *Ware v. State*, 360 Md. 650, 668 (2000). We decline to exercise our discretion to review the issue for plain error.

Contrary to appellant's suggestion, the interjections of the trial judge in this case are not analogous to the circumstances of *Diggs v. State*, 409 Md. 260 (2009). In *Diggs*, the Court of Appeals determined that plain error review was warranted after examining numerous instances in which the trial judge questioned witnesses and essentially acted as a co-prosecutor, which ultimately impaired the defendant's right to a fair and impartial trial due to the trial court's "egregious and repeated behavior reflecting partiality and bias." *Diggs*, 409 Md. at 294.

In the instant case, the trial court's two interruptions were to remind counsel to avoid argumentative rhetoric in opening statement. Because such brief admonishments were not interruptions that raise serious concerns about the fairness or integrity of judicial proceedings, we decline to consider the unpreserved objections. *See Yates v. State*, 429 Md. 112, 130-31.

III.

Appellant contends that the trial court committed reversible error in failing to grant a mistrial when witness Christopher Jones made two objectionable statements about a separate crime. When reviewing a denial of a motion for mistrial, the appellate court will reverse the trial court only when it is shown that "the defendant was so clearly prejudiced that the denial constituted an abuse of discretion." *Hunt*, 321 Md. at 422. To aid in the determination of whether a defendant was prejudiced by an improper remark, several factors are used to evaluate the prejudicial effect of the remark:

> Whether the remark was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon which the entire prosecution depends; the timeliness of the curative instruction; and whether a great deal of evidence otherwise exists.
>
> *Rainville v. State*, 328 Md. 398, 408 (1992).

We are persuaded that the trial court did not abuse its discretion in denying the two motions for a mistrial. The witness's two references to a prior incident were isolated statements that were not intentionally elicited by the prosecutor. The curative instruction given after the first reference to a robbery made it clear that appellant had no connection with the 7-11 robbery. After that curative instruction was given, appellant did not object further regarding that comment of witness Jones. When a trial court provides curative instructions, it is presumed that a jury will follow them. *Brooks v. State*, 68 Md. App. 604, 613 (1986) ("[W]hen curative instructions are given, it is presumed that the jury can and will follow them.").

The second comment as to which appellant complains was elicited during the cross-examination of Jones. Although the specific comment that prompted the trial judge to call for a bench conference was arguably not a response to a specific question from defense counsel, the comment came at the conclusion of a long series of questions from defense counsel about what the witness had heard regarding other crimes. The transcript reflects the following:

> Q [by Defense Counsel]: And you were watching the news on August the 23rd?
>
> A [Jones]: I guess that was the date. I don't know.
>
> Q: So, let's say about three weeks, four weeks; more like three weeks, why not; **about three weeks after this happened you saw something on the news; you saw those pictures**?
>
> A: **Yes, and I just seen him**. I mean —.
>
> Q: You called Detective Baker?
>
> A: Yes.
>
> Q: And you said now I'm ready to do some photo lineups?
>
> A: No. No.
>
> **I told Detective Baker that I think the guys that ya'll have in this**; in this (unintelligible) **case is one of the guys that I was; that was in my altercation.**
>
> **That's what I told her** and that's what —.
>
> Q: **After seeing the pictures on the news that's what got you to call Detective Baker** and say, I want; I want to see some photo arrays?
>
> A: Yes.

Q: And so Detective Baker came about four days later?

A: She did?

Q: Okay.

A: You telling me or you asking me?

Cause like I told you I don't know these dates.

Q: Yeah, I understand that some of the dates may be a little dicey but she didn't come that day?

A: Oh, I know she didn't come the exact day; no.

Q: And she didn't come the next day?

A: No.

Q: She came about four days later?

A: Oh, okay.

Q: **And in-between you also had a chance; you went and you looked at the web?**

A: Why would I do that?

Q: You wanted to see if there were additional pictures on the web.

THE COURT: The question isn't why you'd do it, Sir. The question is whether you did it.

A: No, I didn't do it but I'm trying to figure out why she's telling me I did this.

Q: So you're saying; so you're saying you never looked at the web?

A: No.

Q: Okay.

A: I can't; **didn't we have this problem last time.**

Didn't you say this last time?

Q: Actually exactly.

Last time; you have testified previously, right?

A: Huh?

Q: You testified previously?

A: Oh, yes. I was doing this —.

Q: And when you; when you testified previously you took an oath, right?

A: Same oath I'm taking now.

Q: Right.

A: And you're asking me this exact same question that you did last time.

Q: And I'm getting a different answer.

A: No, you're getting exact answer. The only difference; the only difference is I'm being sarcastic.

Q: Okay.

Well, last time you took an oath to tell the truth and the whole truth, right?

A: Yes.

Q: Okay.

And this time you took an oath to tell the truth and nothing but the truth.

A: And that's exactly what I'm doing.

Q: Okay.

A: Now if you're talking word for word, I know my words are not gonna be the exact same.

Q: If we can mark this as Defense Exhibit 4 for —.

* * *

THE COURT: So what; 4 is a transcript of an earlier proceeding, right?

Q: Yes, Your Honor.

And the Court asked you her general question was whether you had looked at the website and the pictures on the website?

Say yes, no or I don't remember.

Yes.

And so I asked okay, so did you look at the pictures on the website and you said yes.

A: And that was the; that was the confusion.

THE COURT: Please move on Mrs.; Ms. [Defense Counsel].

A: That was the confusion we had last time.

THE COURT: What page are you on, Ms. [Defense Counsel]?

Q: I apologize, Your Honor.

I'm on Page 98 of the transcript of the ----.

A: That's the confusion we had last time.

THE COURT: Okay.

Hold it. Hold it.

You've give me through Page 64.

Give me the rest of it.

Q: Oh, sure.

Of course, Your Honor.

I apologize.

I know that we were making bunches of copies yesterday. So everybody can read along except for —.

THE COURT: The jury can't at this point.

Q: Of course.

And it's on Page 98, Your Honor; starting in the middle of the page is what I was reading.

And **so again, last time you said yes, you looked at pictures on a website.**

A: **No.**

You said; no.

That's the same thing we went through last time.

No.

I seen them on the TV. I called Detective Baker and I got confirmation from one of their own guys, man, so who they was.

THE COURT: All right.

Approach the bench.

(Counsel approaches the bench).

THE COURT: Okay.

That last part was again, like the previous time we were up here, it was not solicited by the question. It was volunteered by the witness. It was not responsive.

Anybody want anything done about it?

MS. [Defense Counsel]: I mean I don't know what we could really do.

THE COURT: Quote I got it from one of the guys.

I don't know what in the hell that means but I; I can guess.

MR. [Defense Counsel]: May we confer?

May we confer, Judge?

THE COURT: Yeah.

(Defense Counsel in conference).

(Counsel returns to the bench).

MS. [Defense Counsel]: Your Honor, if he said that he found out from one of the other guys who it is[,] I also that's [sic] something that could be a mistrial.

It makes it sound like there's some outside evidence that he knows about that the rest of us don't.

THE COURT: Doesn't sound like (unintelligible).

* * *

THE COURT: But I thought I'd better drag you guys up here and figure out where we're going here before; before doing anything.

MS. [Defense Counsel]: Yeah, I guess —.

MR. [Prosecutor]: (Inaudible, 4-5 words) Ms. [Defense Counsel]'s questions if she's not able to (unintelligible) them nearly enough to get the answers (inaudible, 2-3 words).

MS. [Defense Counsel]: He just wants to; this was him just going off on a weird tangent. There wasn't anything even touching on that.

* * *

THE COURT: Okay.

I think; I think; I think careful questioning can —.

MS. [Defense Counsel]: There was nothing in the even ballpark of getting that.

THE COURT: Can resolve this particular problem.

It hasn't gotten to the mistrial level yet. This one hasn't. This one hasn't yet.

MS. [Defense Counsel]: Yeah. I think the accumulation of stuff though, Your Honor.

THE COURT: Well, we could end up with an accumulation.

This is Round 2.

(Laughter).

It's getting there, okay?

So, I'm just trying to preserve this if there's any way of doing it.

So Mr. [Prosecutor] your point is well taken regarding what he could mean by volunteering information that wasn't solicited.

So it's not fatal yet but let's try to tread lightly here.

MS. [Defense Counsel]: Again, Your Honor, I'm gonna just put up for the record and say; I'm gonna say that at this point in time the Defense is again asking for a mistrial.

THE COURT: Well, I'm gonna deny it at this point because I say, I don't think it's necessarily bad.

I think it can be.

* * *

THE COURT: . . .

And we had a stipulation on that one.

All right.

I have said three times this isn't a mistrial at this point.

I'm not gonna say it a fourth time. Let's tread lightly.

(Counsel returns to trial tables).

(Emphasis added.)

When we consider the context in which the ambiguous reference was made to "confirmation from one of their own guys," we are satisfied that the trial judge did not abuse his discretion in failing to grant a mistrial on the basis of that statement.

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