Circuit Court for Prince George's County
Case No. CT16-0183X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 171

September Term, 2017

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JONATHAN JURADO

v.

STATE OF MARYLAND

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Friedman,
Beachley,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Friedman, J.

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Filed: April 12, 2018

A jury in the Circuit Court for Prince George's County convicted appellant, Jonathan Jurado, of possession with intent to distribute cocaine, possession of cocaine, two counts of trespassing, and obstructing and hindering a police officer.[1] The trial court sentenced him to a total of ten years in prison, suspending all but three years, to run consecutively to a three-year sentence previously imposed in another case. Jurado noted this appeal, asking us to consider the following questions:

> 1. Was it error to allow rebuttal closing argument by the State that Appellant had been previously banned from the apartment complex in question for prior crimes of the same kind charged in this case?
>
> 2. Did the Court err or abuse its discretion by categorically refusing to consider imposing any sentence that would be concurrent with a sentence then being served?

For the reasons that follow, we shall affirm the judgments of the trial court.

## FACTS AND LEGAL PROCEEDINGS

While on routine patrol on the evening of October 28, 2015, Prince George's County Police Officer Dennis Smith observed Jurado, whom he knew from prior contact, loitering on the property of the Newberry Square apartment complex. Officer Smith was aware that Lieutenant Jeffrey Walters had previously charged Jurado with trespassing twice and banned him from the property.[2]

After confirming with Lieutenant Walters that Jurado was still banned, Officer Smith approached Jurado on foot. As soon as Jurado noticed the officer, he turned and

[1] The trial court granted Jurado's motion for judgment of acquittal on a charge of carrying a concealed dangerous weapon, and the jury acquitted him of resisting arrest.

[2] The legal basis for Lieutenant Walters' "ban" is not contested here.

walked quickly away. After a brief attempt to pat him down, the officers placed Jurado under arrest for trespassing and handcuffed him; they then "pretty much had to carry" him to the police cruiser because he refused to walk. Before placing Jurado in the cruiser, Officer Smith patted down the outside of Jurado's pants in the groin area, at which time Officer Smith felt something that "was not a part of [Jurado's] body," believed to be drugs.

The officers transported Jurado to the jail in Hyattsville where they conducted a strip search. The search revealed a plastic bag containing ten smaller bags of cocaine in Jurado's genital area. Police also found a razor blade and approximately $190 in cash.

## DISCUSSION

### I. THE STATE'S REBUTTAL

Jurado first argues that the trial court erred in permitting the State, during rebuttal closing argument, to suggest that Lieutenant Walters had previously banned Jurado from the Newberry Square apartment complex because Jurado sold drugs there. That statement, he argues, placed inadmissible evidence of other crimes before the jury and was contrary to the prosecutor's promise to "stay away from any crimes" during the trial.[3]

[3] Jurado also alleges that the prosecutor's rebuttal argument broke his word to the court and defense counsel, and thus constituted error under the rules of professional conduct that require "candor toward the tribunal." We have explained, however, that "one of the most fundamental tenets of appellate review" is that "[o]nly a judge can commit error. Lawyers do not commit error. Witnesses do not commit error. Jurors do not commit error. … Only the judge can commit error, either by failing to rule or by ruling erroneously when called upon, by counsel or occasionally by circumstances, to make a ruling." *DeLuca v. State*, 78 Md. App. 395, 397-98 (1989). Any misconduct by the prosecutor "can do no more than serve as the predicate for possible judicial error." *Ball v. State*, 57 Md. App. 338, 359 (1984). We decline to analyze these allegations beyond noting that while Jurado suggests that defense counsel expressed his concern to the court that the *prosecutor* might try to suggest that Jurado was banned from Newberry Square for drug dealing, a fair

Before Lieutenant Walters testified, Jurado's attorney expressed concern that testimony about Lieutenant Walters' ban of Jurado from Newberry Square would get into allegations of prior crimes, and the prosecutor agreed to "stay away from other crimes," and go no further than the ban itself. As promised, the prosecutor elicited from Lieutenant Walters only testimony that Jurado had been banned from the Newberry Square property on two occasions prior to October 28, 2015, and twice charged with trespassing.

The State also called Detective Gaston to testify as an expert in the drug trade, and she explained that the trespassing charges were significant in the rendering of her opinion that Jurado had sold drugs in the area upon which he had been found trespassing:

> When it comes to the drug world of selling drugs, you have certain areas that drug dealers cover. And if that's your area, you are going to go back to it. Because if you sell drugs in another area they are going to get you. Not only are they going to get you, you know, there's other things that happen. So, you're in this area, your client knows you're going to be in this area. That has a lot to do with it.

During his closing argument, the prosecutor told the jury that on the day in question, Jurado quickly walked away from Officer Smith because he knew that he had cocaine on his person and, having been banned from the Newberry Square property, was not supposed to be there. The prosecutor pointed out, without objection, that Detective Gaston had testified that the "trespassing issue becomes really important because that's where he

reading of the colloquy is that defense counsel was worried that Lieutenant Walters, who was about to testify, would tell the jury why he had banned Jurado from the property. The prosecutor's "promise" to stay away from prior crimes therefore would have been a promise not to ask Lieutenant Walters about the ban, a promise by which he abided.

makes his money at, that's [because] he has a license to sell there. That's why he keeps coming back. That's where he makes his money."

In his closing argument, defense counsel attempted to counter the State's claim that Jurado was guilty of possession with the intent to distribute by suggesting that Jurado was a mere user of cocaine and that the small amount of cocaine found on his person was for his own personal use. Counsel went on to say that there had been no suggestion that Jurado was dealing drugs when he was arrested on October 28, 2015, and that "[t]here is nobody on planet earth who is going to come in, who did come in and point a finger at that guy and say, he's a drug dealer. I see him sell drugs. I saw him hustling drugs. Nothing at all … . There's no evidence he's ever dealt drugs." Defense counsel asserted that Jurado continues to return to the Newberry Square location not because he is a cocaine dealer but "because he's a user of powder cocaine," presumably to suggest that Jurado habitually purchases his own drugs from someone else at the apartment complex.

In his rebuttal closing argument, the prosecutor responded to defense counsel's statements by reminding the jury that Detective Gaston had testified that a drug user can also be a drug seller and that "you don't have to see somebody dealing drugs … to know they are a drug dealer." At the end of his rebuttal closing argument, the prosecutor made the comments about which Jurado now complains:

> [PROSECUTOR]: Ladies and gentlemen, … I am going to ask you to just use your plain common sense. The reason [Jurado] got kicked off of that place in the first place is for probably because for what he was out there doing already [sic].
>
> [DEFENSE COUNSEL]: Objection.

> THE COURT: There's no evidence one way or the other.
>
> [PROSECUTOR]: Okay. Well, why did he keep coming back? Because that's how he makes his money.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Argument.
>
> [PROSECUTOR]: That's why he keeps coming back. He has a license, according to Detective Gaston. You can certainly come to the conclusion that [he] essentially has a permit to deal in that area.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: There's no evidence he has a permit to deal.
>
> [PROSECUTOR]: That's his area. So, that's why he keeps coming back. So, I am just going to ask you, again, to use your good old common sense and come back with a guilty of each and every count.

Although the trial court did not expressly sustain defense counsel's objections to the prosecutor's comments, it did so implicitly by giving limiting instructions. If the court had overruled the objections, it would have been unnecessary to instruct the jury following the prosecutor's remarks.

Thereafter, defense counsel did not request any additional instruction, move to strike the prosecutor's comments, or request a mistrial. The record therefore indicates that the trial court immediately provided all the relief defense counsel requested, and Jurado's contention that the prosecutor's rebuttal closing argument was improper is waived. *Lamb v. State*, 141 Md. App. 610, 644-45 (2001) (holding that in the absence of a request for

further relief when the prosecutor made an inflammatory remark during closing arguments, "appellant did not properly preserve this issue for appellate review").

Even if considered, Jurado's claim of impermissible rebuttal closing argument would fail. In general, "attorneys are afforded great leeway in presenting closing arguments to the jury" and may make "'any comment that is warranted by the evidence or inferences reasonably drawn therefrom.'" *Degren v. State*, 352 Md. 400, 429-30 (1999) (quoting *Jones v. State*, 310 Md. 569, 580 (1987)). The trial court's regulation of closing arguments will not be overturned "unless there is a clear abuse of discretion that likely injured a party." *Ingram v. State*, 427 Md. 717, 726 (2012).

To address a challenge to comments made by a prosecutor in rebuttal closing argument in response to defense counsel's closing argument, we have explained that:

> analysis of appellant's contention requires several steps. Initially, we must assess whether the prosecutor's comments, standing alone, were improper. If so, we assess whether, in light of the argument made by defense counsel, the prosecutor's comments were a reasonable response pursuant to the "opened door" doctrine or the invited response doctrine. If not, we must determine whether reversal is required because, under the totality of the circumstances, the comments were likely to have improperly influenced the verdict.

*Sivells v. State*, 196 Md. App. 254, 271 (2010).

Applying that analysis, we look first to whether the prosecutor's comments, standing alone, were improper. It is well-established that a prosecutor is generally prohibited from commenting on a defendant's prior crimes, wrongs, or acts if they are offered "to prove the character of a person … to show action in conformity therewith." Maryland Rule 5-404(b). Here, the prosecutor's comments that Jurado was "probably"

banned from Newberry Square for dealing drugs on the property were improper because they suggested to the jury that Jurado was guilty of possession with the intent to distribute cocaine in this instance because he had distributed cocaine in the past. Moreover, to the extent that this suggested knowledge of evidence not presented, the comments were improper.[4] *See Paige v. State*, 222 Md. App. 190, 210 (2015) (quoting *Mitchell v. State*, 408 Md. 368, 381 (2009)) ("[C]ounsel is not permitted to 'comment on facts not in evidence or . . . state what he or she would have proven.'").

The next step is to determine whether the prosecutor's comments, although improper in isolation, were a reasonable response under the "opened door" and/or "invited response" doctrines. We have explained that the "opened door" doctrine:

> Is based on principles of fairness and permits a party to introduce evidence that otherwise might not be admissible in order to respond to certain evidence put forth by opposing counsel. Both this Court and the Court of Appeals have applied this doctrine to closing argument.
>
> The opened door doctrine permits the admission of otherwise irrelevant evidence that has become relevant in response to the presentation of the other side's case.

*Sivells*, 196 Md. App. at 282 (cleaned up).[5] "Whether the opponent's evidence was admissible evidence that injected an issue into the case or inadmissible evidence that the

[4] Lieutenant Walters did not specify why he had banned Jurado from Newberry Square. Detective Gaston did present her opinion, however, that Jurado's return to the apartment complex, even after having been banned, implied that he dealt drugs there because he had a customer base who knew where to find him.

[5] "Cleaned up" is a new parenthetical intended to simplify quotations from legal sources. *See* Jack Metzler, *Cleaning Up Quotations*, J. APP. PRAC. & PROCESS

court admitted over objection, once the 'door has been opened' a party must, in fairness, be allowed to respond to that evidence." *Conyers v. State*, 345 Md. 525, 545 (1997).

The invited response doctrine involves "a prosecutorial argument … made in reasonable response to improper attacks by defense counsel." *Lee v. State*, 405 Md. 148, 163 (2008). This does not permit prosecutors to use improper arguments, but rather, looks at whether "the prosecutor's remarks were 'invited,' and did no more than respond substantially … to 'right the scale,' [if so] such comments would not warrant reversing a conviction." *U.S. v. Young*, 470 U.S. 1, 12-13 (1985).

Here, notwithstanding Detective Gaston's expert opinion that Jurado sold drugs at Newberry Square and that he returned there—even though banned—because his customers knew that is where they could find him to purchase drugs, defense counsel stated, in closing argument, that there was no evidence that Jurado had ever dealt drugs. Therefore, in response to defense counsel's argument, it was reasonable for the prosecutor to rebut the claim that there was no evidence Jurado had ever dealt drugs by commenting on the contradictory evidence presented.

Even if we were to agree that the prosecutor went too far and that his comments were not a reasonable response to defense counsel's closing argument, "reversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Spain v.*

(forthcoming 2018), https://perma.cc/JZR7-P85A. Use of (cleaned up) signals that to improve readability but without altering the substance of the quotation, the current author has removed extraneous, non-substantive clutter such as brackets, quotation marks, ellipses, footnote signals, internal citations or made un-bracketed changes to capitalization.

*State*, 386 Md. 145, 158 (2005). Thus, we would have to determine whether this was harmless error, that is "whether or not the [error], in relation to the totality of the evidence, played a significant role in influencing the rendition of the verdict, to the prejudice of the [defendant]." *Degren*, 352 Md. at 432.

Jurado challenges brief comments that came at the very end of the prosecutor's rebuttal closing argument. During Detective Gaston's testimony, however, defense counsel did not object when Detective Gaston gave her expert opinion that Jurado's trespassing charge after his ban from Newberry Square evidenced the likelihood that he dealt drugs there. Nor did defense counsel object during the State's initial closing argument when the prosecutor restated Detective Gaston's testimony that the "trespassing issue becomes really important because that's where he makes his money at, that's since he has a license to sell there. That's why he keeps coming back. That's where he makes his money." Given the admissible expert testimony regarding Jurado's likely drug dealing and the un-objected to closing argument that put before the jury the same information about which Jurado now complains, we are persuaded that the prosecutor's brief remarks did not unfairly prejudice Jurado or influence the jury's verdict. *See Yates v. State*, 429 Md. 112, 120-21 (2012) (holding that error was harmless when other competent evidence was introduced on the point it tended to prove). The error, if any, in the State's rebuttal closing argument was harmless and does not require reversal of Jurado's convictions.

## II. SENTENCING

Jurado also contends that the trial court erred when it "categorically refused" to consider imposing a sentence on the possession with intent to distribute charge that would

run concurrently with, rather than consecutively to, a sentence he was then serving for a prior conviction. In refusing to consider a concurrent sentence, Jurado argues that the court failed to exercise its discretion in sentencing him, which itself is an abuse of its discretion.

During Jurado's sentencing hearing, defense counsel explained to the trial court that Jurado's pre-sentence investigation ("PSI") revealed that he had previously been convicted of possession of marijuana and disorderly conduct and was then serving a sentence for an assault committed after the crimes at issue in this matter. Notwithstanding the sentencing guidelines' suggestion of a three to seven year prison term for the possession with intent to distribute cocaine charge, counsel asked the court to suspend all but three years, concurrently with the sentence then being served, while leaving the maximum 20 year sentence "hanging over his head."

The prosecutor had a "much different perspective of the Defendant," given his 20 to 25 prior contacts with the police, which rendered him a "moderate offender." The State's position was that any sentence should run consecutively to the sentence Jurado was then serving because he did not deserve the benefit of a concurrent sentence.

The court discussed its decision as follows:

> We had the trial, in the case of possession with intent to distribute, I'll impose a sentence of ten years, I'll suspend all but three years. I don't believe, as a general proposition, in concurrent sentences. A concurrent sentence is no sentence. So that will be consecutive to any other case [that you are already serving].
>
> The possession of cocaine will merge. The trespassing will be three months concurrent with the first Count. The second trespass will be three months concurrent with the—they may

> merge, but it doesn't matter, it's going to be concurrent with the first Count.
>
> And the hindering is 60 days and that's concurrent with the first Count. So you get three years concurrent.

Initially, we agree with the State's contention that Jurado's argument has not been preserved for our review. This Court has made clear that challenges to sentencing determinations generally are waived if not raised during the sentencing proceeding. *Clark v. State*, 218 Md. App. 230, 257 (2014); *see also Ellis v. State*, 185 Md. App. 522, 550 (2009) ("[A] timely objection is required to prevent waiver of a defendant's claim that the sentencing judge relied upon impermissible sentencing considerations.").[6]

In the instant case, Jurado failed to object during or after the trial court's announcement of his sentence. If he had expressed any concern about the propriety of the court's alleged sentencing policy of declining to impose concurrent sentences, the court could have considered the argument and clarified what factors it was considering in imposing sentence. Instead, Jurado said nothing during his sentencing hearing, thereby failing to preserve this issue for appellate review.

Even if the issue had been preserved, however, Jurado still would not prevail. The Court of Appeals clearly set forth our standard of review for sentencing proceedings in *Jackson v. State*:

[6] Of course, pursuant to Maryland Rule 4-345(a), a court may correct an illegal sentence at any time, even if no objection was made when the sentence was imposed. *Chaney v. State*, 397 Md. 460, 466 (2007). There is neither allegation nor evidence that the sentence imposed upon Jurado was illegal.

> It is well settled that a judge is vested with very broad discretion in sentencing criminal defendants. However, a judge should fashion a sentence based upon the facts and circumstances of the crime committed and the background of the defendant, including his or her reputation, prior offenses, health, habits, mental and moral propensities, and social background. The judge is accorded this broad latitude to best accomplish the objectives of sentencing—punishment, deterrence and rehabilitation. It is also well settled that only three grounds for appellate review of sentences are recognized in this State: (1) whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements; (2) *whether the sentencing judge was motivated by ill-will, prejudice or other impermissible considerations;* and (3) whether the sentence is within statutory limits.

364 Md. 192, 199-200 (2001) (cleaned up). In this matter, as in *Jackson*, "[t]he first and third grounds are not applicable …; however, the issue before us involves the second ground—whether the sentencing judge was motivated by ill-will, prejudice[,] or other impermissible considerations." *Id.* at 200.

There can be no question that a trial court encountering a matter that falls within the realm of judicial discretion must exercise that discretion in ruling on the matter. *Gunning v. State*, 347 Md. 332, 351 (1997). And, a proper exercise of discretion must involve consideration of the particular circumstances of each case; a court errs when it attempts to "resolve discretionary matters by the application of a uniform rule, without regard to the particulars of the individual case." *Id*. at 352. In other words, a trial court may not apply a "hard and fast rule" or adhere to a uniform policy without considering the circumstances of the case before it. *Colter v. State*, 297 Md. 423, 428-31 (1983).

In *Gunning*, the Court of Appeals concluded that the trial court had abused its discretion—by not exercising any discretion—in refusing to give a requested jury instruction because it "never give[s] that instruction." 347 Md. at 353-54. And, in *Dennison v. State*, 87 Md. App. 749, 763 (1991), this Court held that the trial court's statement, "[W]hen they kill people I always go right at the maximum," was evidence of its failure to exercise discretion by adhering to a uniform policy in sentencing.

In this case, however, we find at least three reasons that support the conclusion that the circuit court did exercise its discretion. *First*, the trial court did not state that it "never" or "always" imposes consecutive sentences rather than concurrent sentences. Instead, it said that, "as a general proposition" it did not believe in concurrent sentences because they amount to no sentence at all for the convicted criminal.[7] The whole point of the phrase

[7]

> The fact that a judge, even as a general rule, has a policy of imposing stiff sentences on those who bring a 'killer drug' into his community is not a failure to exercise discretion. It is, rather, one of the myriad ways in which discretion may be exercised.
>
> That a veteran and experienced judge does not approach each sentencing exercise as if it were some new judicial experience of first impression does not mean that that judge has thereby failed to exercise discretion. That a veteran and experienced judge develops over the years a consistently applied and deeply ingrained sentencing philosophy does not mean that that judge has thereby failed to exercise discretion. That an experienced and veteran judge may fall into predictable and identifiable sentencing habits and patterns does not mean that that judge has thereby failed to exercise discretion.

*Holland v. State*, 122 Md. App. 532, 547 (1998).

"general proposition" indicates that there are exceptions to the general rule. The trial court's statement does not evidence a hard and fast application of a rule, rather it adequately indicates its exercise of discretion in fashioning Jurado's punishment. *Second*, the trial court did, in fact, impose concurrent sentences upon Jurado for several of the lesser crimes of which he had been convicted. This shows that the trial court does not adhere to an unbreakable rule of declining to impose concurrent sentences. And *third*, in meting out his punishment, the court carefully considered Jurado's extensive prior criminal history, which the court found to "raise a flag about your behavior. I don't know what's going on, but it has to stop." Notwithstanding Jurado's many prior crimes, the court specifically declined to impose the seven year prison term requested by the State because Jurado was "not a monster" and pointed out that Jurado would likely be released after serving 60 or 65 percent of the three year sentence imposed in this matter. The trial court therefore explained its decision to impose a consecutive sentence upon Jurado and did not impermissibly apply a hard and fast rule at sentencing.

**JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**