Circuit Court for Prince George's County
Case No. CT160020X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 336

September Term, 2017

DEANDRE CARVEL HARLEY

v.

STATE OF MARYLAND

Meredith,
Leahy,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: May 17, 2019

In the Circuit Court for Prince George's County, Deandre Carvel Harley was convicted of one count of robbery, two counts of second-degree assault, and two counts of theft under $1,000. He was also acquitted of one count of robbery.[1]

Before this Court, Harley presents three questions for review, which we have recast:

1. Did the trial court err in not granting a mistrial based on the prosecution's closing argument?

2. Did the trial court err in not merging his theft convictions?

3. Was the evidence sufficient to support his convictions?

For the reasons that follow, we shall affirm the judgments of conviction. We shall, however, remand the case to the circuit court for further proceedings as set out in Part 2. of this opinion.

1. Motion for Mistrial

In the State's closing argument, the prosecutor said to the jury:

> [H]ow do you plausibly explain that the sweatshirt ended up in a dumpster feet away from where your girlfriend lives and where you were seen carrying two bags to the dumpster?
>
> How do you explain that the tracker was found in this dumpster over here? And we know from the GPS records that at some point that tracker was inside 31 Chesapeake Street. And we know from her MVA records that the defendant's girlfriend, Ms. Broadus, lives at 31 Chesapeake Street.

At the conclusion of the State's argument, defense counsel asked for a mistrial, stating:

[1] Harley was sentenced to ten years in prison for the robbery conviction, with all but three years suspended. The court merged one each of the assault and theft convictions into the robbery conviction, and sentenced him to two 18-month concurrent terms for the remaining assault and theft convictions.

> The fact that [the prosecutor] said several times in his closing arguments "How does Mr. Harley explain this or how does he explain this?" Mr. Harley doesn't have to explain anything. That burden stays with the State, and they should not be inferred [sic] to the jury that Mr. Harley has any obligation to explain any evidence that was brought against him.

At the outset, it is significant to note that defense counsel's representation to the court of the prosecutor's argument was overbroad. The prosecutor did not say to the jury "[h]ow does Mr. Harley explain" any aspect of the evidence. Each example was prefaced with either the phrase "how do *you* plausibly explain …." or "[h]ow do *you* explain …." (Emphasis added). There was no specific reference to a need by Harley to explain anything. In fact, each of those questions was met with the prosecutor's own explanation of how it could be explained from the evidence presented.

After hearing defense counsel, the court offered "to instruct the jury again regarding the presumption of innocence." Defense counsel agreed and the court again instructed the jury on presumption of innocence and the State's burden of proof, which counsel accepted without further objection. The court did not offer an express ruling on the motion for mistrial but it was, perforce, implicitly denied. Harley now argues that the court's re-instruction was insufficient and that the court further erred by not telling the jury "that what the prosecution had urged them to consider was improper."

Waiver

The State first posits that Harley has waived the mistrial issue. We agree. After the court heard the timely motion for mistrial, the State proposed that the court again instruct the jury on the burden of proof and presumption of innocence. The court agreed to do so

and defense counsel concurred. The court again instructed the jury and there was no further discussion of mistrial.

As the State points out, in *Gilliam v. State*, 331 Md. 651, 691 (1993), the Court of Appeals noted that, "[a]s [defendant] did not object to the course of action proposed by the prosecution and taken by the court, and apparently indicated his agreement with it, he cannot now be heard to complain that the court's action was wrong."

Nonetheless, should we reject the State's position on waiver, we find that Harley's argument on the need for a mistrial is without merit.

While a prosecutor is permitted "liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom[,]" *James v. State*, 191 Md. App. 233, 257 (2010) (quoting *Spain v. State*, 386 Md. 145, 152-53 (2005)), the prosecutor's "great leeway" afforded in closing arguments is not without limit. *Small v. State*, 235 Md. App. 648, 697 (quoting *Ware v. State*, 360 Md. 650, 681 (2000)), *cert. granted*, 459 Md. 399 (2018). *See also Degren v. State*, 352 Md. 400, 429-30 (1999). And, as we have consistently held, the regulation and propriety of argument is left to the sound discretion of the trial judge. *Warren v. State*, 205 Md. App. 93, 132 (2012) (internal quotations and citations omitted). *See also Grandison* v. State, 341 Md. 175, 224 (1995); *Evans v. State*, 333 Md. 660, 678 (1994); *Booth v. State*, 327 Md. 142, 193 (1992).

Mistrial

"We note that the 'declaration of a mistrial is an extraordinary act which should only be granted if necessary to serve the ends of justice.'" *Wilder v. State*, 191 Md. App. 319, 345 (2010) (quoting *Cooley v. State*, 385 Md. 165, 173 (2005)). It is well established that

a "mistrial is an 'extreme sanction that sometimes must be resorted to when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice.'" *McIntyre v. State*, 168 Md. App. 504, 524 (2006) (quoting *Coffey v. State*, 100 Md. App. 587, 597 (1994)). In the context of a motion for mistrial made in response to an asserted prejudicial argument, we have said that the question before the trial court is "whether the damage in the form of prejudice to the defendant transcended the effect of a curative instruction and deprived the appellant of a fair trial." *Id.* We have also said that, "[w]hat exceeds the limits of permissible comment or argument by counsel depends on the facts of each case[.]" *Mines v. State*, 208 Md. App. 280, 304 (2012) (citing *Smith and Mack v. State*, 388 Md. 468, 488 (2005)).

As this Court has recently explained, a "trial judge ha[s] his thumb on the pulse of the trial – that he has a sense that no cold record can communicate – as to the impact on a trial of a passing incident of possible error." *Bynes v. State*, 237 Md. App. 439, 456–57 (2018) (citing *Hunt v. State*, 321 Md. 387, 422 (1990)). Further, since a trial judge "is in the best position to determine if the extraordinary remedy of a mistrial is appropriate[,] [w]e will not reverse a trial court's denial of a motion for mistrial unless the defendant was so clearly prejudiced that the denial constituted an abuse of discretion." *Id.* at 457 (emphasis from *Bynes* omitted) (quoting *Hunt*, 321 Md. at 422).

On the record before us, we do not find anything in the prosecutor's closing argument that would result in overwhelming prejudice. Nor do we find that the court's curative instruction was insufficient to cure any potential prejudice to Harley. Finally, we find no abuse of discretion in the court's consideration of the motion and ruling.

2. Merger of theft counts

The State's prosecution of Harley arose from an incident that occurred at the Oxen Hill GameStop in Prince George's County, in which Harley was alleged to have entered the store and displayed a handgun and demanded money from employees. There were two employees present, Ashley Young and Phillip McQueen, each of whom assisted in providing money to the robber. The State charged, and the jury convicted Harley of, separate counts of theft for the offenses committed against the two employees. However, the jury convicted Harley on only one count of robbery in which Young was the victim. One of the theft convictions was merged into the robbery conviction for the offenses committed against Young. The other theft conviction, relating to McQueen, was not merged, and a separate concurrent sentence was imposed. That, Harley posits, was error because both theft convictions ought to have been merged with the robbery conviction under the single larceny doctrine. We agree.

As Harley recognizes in his brief, the single larceny doctrine "'rests on the notion that the separate takings are all part of a single larcenous scheme and a continuous larcenous act.'" *Kelley v. State*, 402 Md. 745, 756 (2008) (quoting *State v. White*, 348 Md. 179, 188-89 (1997)). The Court wrote further:

> "[T]he stealing of several articles *at the same time*, whether belonging to the same person or to several persons, constituted but one offense…. It is but one offense because the act is one of continuous act,– the same transaction; and, the gist of the offense being the felonious taking of the property, we do not see how the legal quality of the act is in any manner affected by the fact that the property stolen, instead of belonging to one person, is the several property of different persons."

402 Md. at 750 (emphasis in *Kelley*) (quoting *State v. Warren*, 77 Md. 121, 122 (1893)).

On the evidence presented, it is clear that Harley's conduct was part of a single larcenous scheme, even though the money was delivered to him by two people. The handing-over of the money from separate cash registers was in response to a single demand and occurred as part of the same transaction. Moreover, the funds were not the property of the store clerks; rather the funds were the property of the proprietor.

3. Sufficiency of the evidence

Lastly, Harley makes a broad-based attack on the sufficiency of the evidence to support conviction on any of the counts, asserting that "there was insufficient evidence to link [him] to the robbery, assault and theft."

At the conclusion of the State's case, counsel was heard:

> [DEFENSE COUNSEL]: Your Honor, at this time we would make a motion for judgment of acquittal … and we would make the motion based on sufficiency of the evidence for all counts.

The State responds that counsel's motion lacked the particularity required by Maryland Rule 4-324(a) – "[t]he defendant shall state with particularity all reasons why the motion should be granted." Thus, the State asserts, our review of insufficiency claims is available "only for the reasons given by appellant in his motion for judgment of acquittal." *Whiting v. State*, 160 Md. App. 285, 308 (2004). Further, that "[w]hen no reasons are given in support of the acquittal motion, this Court has nothing to review." *Taylor v. State*, 175 Md. App. 153, 159-60 (2007).

With one exception, we agree with the State that counsel's motion was not argued with particularity; hence, but for that singular aspect of the motion, we shall decline to address Harley's sufficiency argument.

Counsel did, however, speak with particularity as to the counts charging Harley with robbery, assault and theft as to Phillip McQueen. McQueen did not testify. Harley suggests that the evidence, including the security film, shows that McQueen merely stood aside so that his fellow employee, Ashley Young, could access the second cash register. Moreover, he argues that McQueen did not hand over any money to the robber, nor was there any evidence that he was either physically assaulted or put in fear. We shall, therefore, entertain Harley's challenge to the sufficiency of the evidence as to the crimes against McQueen.

We need look no further than the testimony of Young, the other clerk on duty at the time. When asked, while viewing the security video:

> [PROSECUTOR]: Now, is that still Phil [McQueen] who is to the right of you in the picture?
>
> [MS. YOUNG]: Yes, right here.
>
> [PROSECUTOR]: Okay. And did the individual get any money from Phil as well?
>
> [MS. YOUNG]: Yes.

It is an established principle of criminal law that the question to be examined by a court reviewing a challenge to the sufficiency of the evidence "is 'whether, after viewing [both direct and circumstantial evidence, and all reasonable inferences drawn therefrom][,] 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.'" *Handy v. State*, 201 Md. App. 521, 558 (2011) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

There are two aspects to Harley's challenge – insufficiency of the evidence of McQueen having been the victim of the robbery or theft, and insufficiency of the evidence of McQueen having been the victim of a second-degree assault.

As to the first, the answer is found in the testimony of Young, cited above, that the robber got money from Phil as well as from her. That evidence was sufficient to create a jury question. *See Handy*, 201 Md. App. at 558 (explaining that the "purpose of this rule is to give 'full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts'" (quoting *Jackson*, 443 U.S. at 319)).

As we consider the second aspect of Harley's sufficiency challenge, we look to the elements of second-degree assault of the intent-to-frighten variety, that: (1) a defendant commits an act intending to place a victim in fear of immediate physical harm; (2) the defendant has the present apparent ability to bring about the physical harm; and (3) the victim is aware of the imminent harm. *See Snyder v. State*, 210 Md. App. 370, 382 (2013). The evidence, presented through the testimony of Young, and with reference to the security video, reveals that McQueen was present when the robber showed the handgun by placing it on the counter. From that, it is reasonable to conclude that a rational trier of fact could find the essential elements of second-degree assault beyond a reasonable doubt. *See Wilder*, 191 Md. App. at 336–37 (explaining that "Maryland 'has long held that there is no difference between direct and circumstantial evidence'" (quoting *Hebron v. State*, 331 Md. 219, 226 (1993)); *Burlas v. State*, 185 Md. App. 559, 569 (2009) (recognizing that "'[n]o greater degree of certainty is required when the evidence is circumstantial than when it is

direct, for in either case the trier of fact must be convinced beyond a reasonable doubt of the guilt of the accused'" (quoting *Nichols v. State*, 5 Md. App. 340, 350 (1968))).

Finally, we note our opinion in *Montgomery v. State*, 206 Md. App. 357, 394 (2012), in which we said that "[e]vidence is sufficient to support a conviction for second-degree assault where a defendant enters a victim's workplace and demands threateningly that the victim take certain action within the scope of the victim's employment."

JUDGMENTS OF CONVICTION AFFIRMED; CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH PART 2. OF THIS OPINION – MERGER; COSTS ASSESSED 2/3 TO APPELLANT AND 1/3 TO PRINCE GEORGE'S COUNTY.