Circuit Court for Wicomico County
Case No. C-22-CR-17-000298

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 336

September Term, 2018

NORMAN JOSEPH FISHER

v.

STATE OF MARYLAND

Berger,
Leahy,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: June 10, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

A jury in the Circuit Court for Wicomico County convicted Norman Fisher, appellant, of first-degree assault, second-degree assault, illegal possession of ammunition, use of a firearm in the commission of a felony or crime of violence, and illegal possession of a rifle or shotgun. The court sentenced Fisher to ten years' imprisonment for first degree assault, and to a consecutive five years imprisonment for use of a handgun in the commission of a felony or crime of violence. The court merged the remaining convictions for sentencing. Thereafter, Fisher noted this timely appeal.

QUESTIONS PRESENTED

1. Did the trial court err in refusing to grant appellant's motion for a mistrial?
2. Did the circuit court err in overruling appellant's objection to postponing his trial date beyond *Hicks*?[1]

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

BACKGROUND

In early 2017, appellant, his wife Jamie Fisher, and their two children, lived in their home on Deep Branch Road in Quantico, Maryland. Ms. Fisher testified that, on February 25, 2017, sometime after 10 p.m., appellant awakened her by yelling at her to "get up." Soon, it got "ugly" and appellant began "screaming and hollering and swearing there was people in the house." Ms. Fisher said that appellant was "pissed and high." After appellant told Ms. Fisher to "grab the gun," she gave appellant a rifle which appellant starting waiving around "swearing there were people in the house." When asked on cross-

[1] *Hicks v. State*, 285 Md. 310 (1979).

examination at trial why she would give an angry person who was also under the influence of drugs a gun, she said: "Because I was ready for it to be over…If I hadn't given him the gun, he would've grabbed it anyway and beat the hell out of me with it." Ms. Fisher said that appellant pointed the gun at her, "at the wall, even himself at one point." When appellant pointed the gun at the wall, Ms. Fisher screamed to appellant that her "children were on the other side of the wall, you're crazy." After their children were awakened, appellant told Ms. Fisher "to get the hell out." Ms. Fisher thereafter left in her truck with her children and dogs. She drove about a mile away, called 9-1-1, and told the operator "[m]y husband's done lost his mind, he's kicked me and my small children out of the house in the middle of the night, he's smoking crack and he's tore my house all to hell, threatening to kill me and my kids."

Deputy Sheriff Ben Parsons, from the Wicomico County Sheriff's Office, responded to Ms. Fisher's 9-1-1 call and met her at her location. Thereafter, Deputy Parsons and other police officers went to the Fisher's home and "set up a perimeter" around it. When appellant walked outside to smoke a cigarette, Deputy Parsons, after identifying himself as a police officer, told appellant to walk out to the road. Appellant responded by lifting his shirt and turning around in a circle, which Deputy Parsons took to mean that appellant was showing the police officers that he was not armed. After several more commands to walk out to the road, appellant eventually began to comply, but then he stopped about halfway to the road. Another Sheriff's Deputy then grabbed appellant in an attempt to "direct him to the ground." When Deputy Parsons saw appellant resisting going to the ground, he used his taser. Appellant thereafter complied and was placed under arrest.

During a subsequent search of the Fisher's home, the police recovered ammunition and two .22 caliber rifles, a Charter Arms AR-7 Explorer, and a Marlin Model 925.

At trial, the State and appellant stipulated that, in 2000, he had been convicted of a second-degree assault. The court later instructed the jury that such a conviction disqualified appellant from possessing ammunition and firearms. Additional facts will be addressed as they become relevant in the following discussion.

DISCUSSION

I.

The State's Closing Argument

Appellant contends that the trial court erred in failing to grant his request for a mistrial, rather than issue a cautionary instruction to the jury, in response to his objection to a portion of the State's closing argument. According to appellant, the cautionary instruction was not sufficient to cure the prejudice that flowed from the State's impermissible comment on appellant's privilege against self-incrimination.

During the State's closing argument, after the State pointed out that, in order to secure Ms. Fisher's attendance at trial, she had to be placed in custody, the State began discussing the events of the night of appellant's arrest, as follows:

> STATE: But you listened to [Ms. Fisher's] testimony, and she gave you a pretty frightful account of what happened that night. This is a woman who had to pack up her kids at two o'clock in the morning on a cold night and drive them down the street just so she could find cell service to call the police. Which is exactly what you'd expect someone to do in that situation; and of course she did, the police respond, and what do they find but the Defendant in the house, just as she had described, talking to himself, agitated, they have to force him to the ground. First

> they have to call him out of the house, repeatedly try to get him to comply with their requests, he clearly shows a high level of agitation. **This is not someone who came out and said, hey, what's going on, what happened, why are you guy[s] here? He didn't ask any questions like that.** That's not something you would expect from somebody who didn't do exactly what the Victim said. But, no, he stood there, and in fact, without even being told by the officers, he lifted his shirt and did a twirl around basically saying I don't have any guns.
>
> Now, that's, if you recall the officer's testimony, they didn't ask him to do that. They only asked him to come down off the porch. So clearly he knows why the officers are there. He knows they're there, he knows now she called the police, and he's basically showing them, look, I don't have any guns on me right this second. So a familiar circumstance, I mean, again, in his mind he knows exactly why the police are there.
>
> So, again, **he didn't come to the door and say, I'm sorry, I don't know what you're talking about, I don't know why you're here** –
>
> DEFENSE: I object.
>
> STATE: -- you know, he's not sitting down on the porch --
>
> THE COURT: Wait a minute.
>
> DEFENSE: Object.
>
> THE COURT: What are you objecting to?
>
> DEFENSE: May we approach?
>
> THE COURT: Come forward.

The following exchange took place at the bench:

> DEFENSE: My client has the right to remain silent. The State's argument is that he didn't come out and say I don't know why you're here, like he's attributing conversations
>
> THE COURT: Yeah, don't do any more --
>
> STATE: I won't, I'll just, I'll strike that part of the testimony.

> DEFENSE: I'd ask for a mistrial.
>
> THE COURT: I don't think it's that ... if you want me to give a cautionary instruction --
>
> DEFENSE: I would.
>
> THE COURT: -- I'll just instruct them that any argument concerning the statements or lack thereof are not an issue to be decided by them.
>
> DEFENSE: Thank you, Your Honor.

The trial court then instructed the jury as follows:

> THE COURT: Ladies and gentlemen of the jury, any argument concerning statements of the Defendant or lack thereof are not proper issues to be before you deciding this case. Satisfactory, [Defense Counsel]?
>
> DEFENSE: Thank you, Your Honor.

As can be seen from the foregoing exchange, during closing argument, the State twice mentioned that, when confronted by the police, appellant did not ask "…why are you guy[s] here?" As noted above, appellant contends that those comments, which referenced what appellant did not say to the police, suggested to the jury that they should view his silence as evidence of his guilt "in violation of his federal and state constitutional right against self-incrimination." Appellant also contends that the trial court's instruction to the jury, that they were not to consider "statements of the Defendant or lack thereof" in deciding the case, was not sufficient to cure the prejudice caused by the State's comments, and that, therefore, a mistrial was the only appropriate remedy. In response, the State contends, *seriatim*, that (1) the State's closing argument was appropriate because it dealt with appellant's interaction with the police and not with his decision to not testify at trial,

(2) if the closing argument was improper, the trial court's decision to sustain the objection and instruct the jury rather than declare a mistrial was not an abuse of discretion, and (3) any argument that the trial court's instruction was insufficient to cure any prejudice caused by the State's closing argument is a waived "appellate afterthought" because appellant never expressed any dissatisfaction at trial with the trial court's actions.

Even though generally "attorneys are afforded great leeway in presenting closing arguments to the jury[,]" *Degren v. State*, 352 Md. 400, 429 (1999) (citations omitted), there are acknowledged boundaries that counsel may not exceed, including commenting on a defendant's failure to testify in violation of the privilege against self-incrimination. *Simpson v. State*, 442 Md. 446, 454-57 (2015). The privilege against self-incrimination is guaranteed by the Fifth Amendment of the United States Constitution, Article 22 of the Maryland Declaration of Rights, and Section 9-107 of the Courts and Judicial Proceedings Article ("CJP").[2] The Court of Appeals has, on several occasions, "pointed out that the privilege against self-incrimination protected by Article 22 of the Maryland Declaration of Rights generally is in *pari materia* with the Self–Incrimination Clause of the Fifth Amendment. *Marshall v. State*, 415 Md. 248, 259, (2010) (internal quotation omitted). However, the Court of Appeals also has "interpreted Maryland's privilege against self-incrimination to be more comprehensive than that of the federal government."[3] *Id* at 259.

[2] CJP 9-107 provides: "A person may not be compelled to testify in violation of his privilege against self-incrimination. The failure of a defendant to testify in a criminal proceeding on this basis does not create any presumption against him."

[3] One area where Maryland affords greater protection than the federal government deals with the admissibility of "pre-arrest" silence. Maryland prohibits the use of pre-arrest

First, we agree with the State that appellant waived his argument that the trial court's instruction to the jury was not sufficient to cure the prejudice that flowed from the State's closing argument when appellant not only failed to make that argument below, he also agreed that the trial court's instruction was "satisfactory" when asked by the trial court. Appellant is not "allowed to assert one position at trial and another, inconsistent position on appeal," *i.e.*, appellant may not approve of the instruction at trial and then complain about its inadequacy on appeal. *Burch v. State*, 346 Md. 253, 289 (1997).

Nevertheless, even if the claim were before us, appellant would fare no better because the circuit court did not abuse its discretion in not declaring a mistrial. "The decision as to whether to grant a mistrial is committed to the sound discretion of the trial court and will be overturned only for an abuse of that discretion." *Martin v. State*, 165 Md. App. 189, 209 (2005). "The grant of a mistrial is considered an extraordinary remedy and should be granted only 'if necessary to serve the ends of justice.'" *Carter v. State*, 366 Md. 574, 589 (2001) (quoting *Klauenberg v. State*, 355 Md. 528, 555 (1999) (citations omitted).

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silence on the basis that such evidence is too ambiguous to be probative under Maryland's common law rules of evidence. *Weitzel v. State*, 384 Md. 451, 456 (2004).

There are also cases addressing the admissibility for post-arrest pre-*Miranda* silence, *Wills v. State*, 82 Md. App. 669, 678 (1990) (post-arrest pre-*Miranda* silence is inadmissible under Maryland law), *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (post-arrest pre-Miranda silence may be admitted for impeachment), and post-arrest post-*Miranda* silence. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976) (post-arrest post-Miranda silence almost always inadmissible).

The parties in the instant case do not mention any of these distinctions and do not tell us whether they believe appellant had been arrested at the time of his silence. Under the circumstances of this case, however, the parties lack of analysis on these points is immaterial. The result would be the same under any iteration of the foregoing because the State's comments were improper under any analysis.

Further, "the trial court is ordinarily in a uniquely superior position to gauge the potential for prejudice in a particular case." *Simmons v. State*, 208 Md. App. 677, 691 (2012) (citation and internal quotation marks omitted), *aff'd*, 436 Md. 202 (2013). A trial court's decision to not grant a mistrial will not be deemed to be an abuse of discretion unless it is "'well removed from any center mark imagined by the reviewing court and is beyond the fringe of what that court deems minimally acceptable.'" *Id.* (quoting *Moreland v. State*, 207 Md. App. 563, 569 (2012)).

We agree with appellant that the State's comments "were susceptible of the inference" that the jury should consider appellant's silence as evidence of guilt. *See Smith v. State*, 367 Md. 348, 354 (2001). The State's argument was focused on the idea that appellant knew the police were there to investigate his wife's complaint that he had just pointed a gun at her, and that was why he lifted his shirt. Where the State crossed the line was when the State commented that appellant did not ask why the police were there. Nevertheless, the trial court was in the best position to judge whether a mistrial was the appropriate remedy or whether an instruction to the jury would suffice to remove the prejudice from the State's comments. We hold that the trial court's admonishment to the jury that "any argument concerning statements of the Defendant or lack thereof are not proper issues to be before you deciding this case" cured any prejudice to appellant. Therefore, the trial court did not abuse its discretion in denying appellant's request for a mistrial.

II.

Hicks

Appellant next contends that the circuit court abused its discretion in granting the State a postponement so that it could secure Ms. Fisher as a witness when such a postponement meant that the case would not be tried within 180 days as required by the so-called *Hicks* rule which is embodied in Md. Rule 4-271, section 6-103 of the Criminal Procedure Article, and *Hicks v. State*, 285 Md. 310 (1979). Those provisions of law establish that

> the trial in a circuit court criminal prosecution must begin no later than 180 days after the earlier of (1) the entry of the appearance of the defendant's counsel or (2) the first appearance of the defendant before the circuit court. However, on motion of a party, or on the court's initiative, and for good cause shown, the county administrative judge or that judge's designee may grant a change of a circuit court trial date. A determination of what constitutes good cause is dependent upon the facts and circumstances of each case as the administrative judge, in the exercise of his discretion, finds them to be.

Peters v. State, 224 Md. App. 306, 357–58 (2015) (internal citation and quotation omitted) (cleaned up). In *State v. Brown*, 355 Md. 89 (1999), the Court of Appeals explained:

> [T]he critical postponement for purposes of Rule 4–271 is the one that carries the case beyond the 180 day deadline [the *Hicks* date]. It is that postponement to which a reviewing court looks, and, when deciding whether to dismiss a case for inordinate delay, it is the length of the delay between the postponed trial date and the rescheduled date that is significant.

Id. at 108–09.

The trial court has wide discretion in deciding good cause, and its determination carries a "heavy presumption of validity." *Dalton v. State*, 87 Md. App. 673, 682 (1991). If the State fails to try a defendant within the mandatory requirements, the appropriate sanction is dismissal of all charges. *See Goldring v. State,* 358 Md. 490, 502-03 (2000).

Turning to the instant case, as indicated earlier, the trial court granted a postponement, which carried the case beyond the 180-day mark, at the request of the State so that the State could secure the attendance of Ms. Fisher as a witness. Because counsel for appellant entered his appearance in appellant's case on May 2, 2017, the 180th day, or *Hicks* date, was October 30, 2017. On October 23, 2017, the day trial was scheduled to commence, Ms. Fisher did not appear, and the State requested a postponement explaining:

> Your Honor, preliminarily, this matter was set for trial today.
>
> The State's Victim, Jamie Fisher, has failed to appear for court. The State under the circumstances, Your Honor, would be asking for a body attachment for that individual. We would be asking for the Court to continue this matter.
>
> Certainly, under the circumstances, you know, I obviously wouldn't have an objection to the Court revisiting the issue of bond. However, these are very serious charges.
>
> Given the gravity of the case, it does allege first degree assault with a firearm as well as firearm possession by a disqualified person.
>
> I've had personal contact with her on at least two occasions. She has had contact with our investigator. She was aware of this trial date. She has been served. She knew she had to be here.
>
> We haven't had any contact with her in the last couple of weeks, sent the investigator out to her house, left her a note. I have even ridden personally with our investigator, I would say within the last month to try to obtain, you know, further contact

> with her, to try to maintain contact with her. But she certainly, there's no doubt, she knew that she needed to be here today.
>
> She also failed to appear for a defense summons on Friday for motions. So, again, I think she's just kind of flagrantly trying to avoid this process, but this case is very serious. A lot of effort has gone into attempting to prosecute this matter.
>
> So for those reasons, Your Honor, we would ask for a body attachment. We could bring her in and address bond at that time, see what the particular issue is.
>
> And I would ask for a continuance to accomplish that. And like I said, Your Honor, under the circumstances, I certainly wouldn't gripe about the Court revisiting the issue of bond, Your Honor.

The trial court granted the State's request for a postponement to secure the attendance of Ms. Fisher, noting:

> the case law so indicates unless the State has, unless there is some allegation that the attorney, the prosecutor has made some, you know, in other words, they've advised a witness not to show up, something of that nature to get the continuance that a Victim or a witness victim like in this case not showing up is good cause to go beyond *Hicks*.
>
> And in light of that, I'm going to grant the continuance and find there is good cause. In light of the fact that she has not shown up, the Court's going to issue a body attachment to have her brought before the Circuit Court.

"Although … there is no absolute or per se definition of 'good cause', the 'good cause' condition is satisfied when it is established that a necessary witness is unavailable" so long as the party requesting the continuance is not responsible for the unavailability of the witness. *State v. Farinholt*, 54 Md. App. 124, 134 (1983), *aff'd*, 299 Md. 32 (1984), *see also Marks v. State*, 84 Md. App. 269, 278 (1990) (affirming the trial court's good cause determination based on the victim's unavailability as a witness); *Choate v State*, 214 Md.

App. 118 (2013) (affirming the trial court's good cause determination based on a DNA analyst's unavailability and based on the prosecutor's scheduling conflict).

We, therefore, hold that the administrative judge in this case did not abuse its discretion in granting the State's request for a postponement so that it could secure the attendance at trial of Ms. Fisher, who had been properly summoned and who was a fundamentally critical witness for the State.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.