Circuit Court for Baltimore City
Nos. 115344013, 115344014, and 115344015

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 982

September Term, 2017

STEVEN JOHNSON

v.

STATE OF MARYLAND

Berger,
Nazarian,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: October 24, 2018

A jury sitting in the Circuit Court for Baltimore City acquitted appellant Steven Johnson of first-degree murder, but convicted him of conspiracy to commit murder, second-degree murder, use of a handgun in the commission of a crime of violence, carrying a handgun, possession of a regulated firearm by a prohibited person, second-degree assault, and reckless endangerment. The court sentenced him to a total of 80 years of incarceration. He appealed.

Johnson presents the following questions:

1. Did the trial court err in permitting the State to use impermissible burden-shifting language in its closing argument?

2. Did the trial court err in limiting defense counsel's cross examination of the State's expert in firearms operability?

For the reasons discussed below, we shall affirm the judgments.

BACKGROUND

On August 26, 2015, Sergeants David Brust and Jeffrey Young of the Baltimore City Police Department were working in plain clothes, in an unmarked car, in the 100 block of South Calverton Road in West Baltimore. While talking to people on the street, Sergeant Brust noticed two black men – one wearing a white t-shirt, and the other wearing a black t-shirt. The men were coming from an open field known as "the Pit," which ran between South Calverton and South Pulaski Street, a block to the east. The men walked down the sidewalk on South Calverton in the opposite direction from where the sergeants were parked. Sergeant Brust testified that he did not pay much attention to the men because they were not doing anything out of the ordinary at the time.

A short time later, however, Sergeant Brust heard gunfire. He looked in the

direction from which the sound came and saw the same two men firing handguns at a third man. The third man, later identified as Kevin Gray, was sitting on the front steps of a vacant house at 123 South Calverton Road, approximately 40 yards from the sergeants. Sergeant Young also heard the gunshots and saw two black men, one with a white t-shirt and the other with a black t-shirt and brownish shorts, firing guns at Gray.

The shooters retreated on South Calverton, toward the sergeants, and went back through the Pit towards South Pulaski Street.

The sergeants got into their car, drove around the block onto South Pulaski, and notified the dispatcher of the shooting. In a radio transmission, Sergeant Young described two suspects, one as a black male, five feet, eight inches tall, with a slightly heavy build, wearing a black t-shirt and khaki-colored cargo shorts, who was running toward Payson Street (east of Pulaski); and the other as a black male, wearing a white t-shirt.

As the sergeants drove onto South Pulaski, they saw the two men come out of the Pit and approach a gold Buick Century that was parked in front of the house at 48 South Pulaski Street. The man in the white t-shirt went to the passenger side of the car, but abruptly turned and ran in the opposite direction, back into the Pit. The man in the black t-shirt ran towards the Buick, but then turned and ran away from the sergeants and away from the crime scene. The sergeants pursued the man in the black shirt, as did three undercover detectives who were in another unmarked car. No one went after the man in the white t-shirt.

One of the undercover detectives got out of his car at the intersection of South

Pulaski and Boyd Street and chased after the man in the black t-shirt. The detective lost sight of the man as he entered a field behind a vacant house. The field, which was essentially an unsanctioned dump, was overgrown with tall grass, weeds, trees, and brush and filled with debris. A wrought-iron fence, part of which was wrapped in razor wire, separated the field from the parking lot of a business next door. The detective stopped after running five to seven yards into the field because he was concerned for his safety, but other officers quickly set up a perimeter around the block and held it in place to ensure that the black-shirted suspect could not leave the area.

After additional officers arrived, SWAT officers searched the field and the surrounding area for the suspect. After about an hour of searching, they found Spence Jeffers hiding between a brick wall and a wooden shed in the adjacent parking lot. Jeffers was wearing khaki cargo shorts and no shirt, but the officers located a black t-shirt hidden underneath the shed, within reach of where Jeffers was found. Sergeant Young testified that Jeffers "had the same shorts, . . . the same physical build, skin complexion, and close cut hair," as the assailant whom he saw wearing the black t-shirt.

Jeffers was handcuffed, and gunshot residue (GSR) samples were collected from his hands. One unique particle of GSR was found on Jeffers's right hand.

At the time when Jeffers was arrested, he had a key to the gold Buick in his possession. His latent fingerprints were found both on the exterior of the driver's door and on a bottle inside the car. He did not, however, have a gun in his possession. The police were unable to locate Jeffers's gun despite extensive searches on August 26 and 27, 2015.

A victim of the shooting, Kevin Gray, died as a result of six gunshot wounds, mostly to his back. Another victim, a 93-year-old woman who was sitting on her front steps when the shooting occurred, suffered a graze wound to her head. She was treated and released from a hospital.

The elderly victim, Clara Canty, lived next door to where Gray was shot. She said that she saw two black men approach Gray. Without saying anything, one of the men started shooting. Gray attempted to run, but fell on the sidewalk.[1]

Just before noon on the day after the shooting, appellant Johnson walked into Franklin Square Hospital, in eastern Baltimore County. He complained of a gunshot wound to his right forearm. He told the medical personnel that he had been shot the day before, from a distance of 10 to 15 feet.

Because Johnson claimed to have been shot in Baltimore City, Sergeant Joseph Dobry, who was assigned to the violent crimes unit in the northeastern district, went to the hospital to investigate. Johnson told Sergeant Dobry that he had been shot during the robbery of a dice game on the 2000 block of East 33rd Street. He also told Sergeant Dobry that he had been wearing a white t-shirt and black shorts at the time of the shooting, but that he had discarded the clothing before going to the hospital. Johnson

[1] A third person, Quandre Dixon, walked into another hospital several hours after the shooting, suffering from a gunshot wound. Dixon claimed to have been shot in the 100 block of South Calverton. A homicide detective interviewed him, and he voluntarily provided a DNA sample that was to be compared to the blood samples that were recovered from the murder scene. The detectives determined that Dixon may have been shot during a different incident, but that he was not a victim of the shooting that killed Gray and injured Ms. Canty.

was unable to provide any specific details about the alleged robbery and refused to give a recorded statement.

Sergeant Dobry canvassed the area where Johnson claimed to have been shot, but found no blood or other evidence that a shooting had occurred. He determined that the police had received no calls complaining of gunshots being fired or of someone being shot near the 2000 block of East 33rd Street at around the time when Johnson claimed to have been shot.

Meanwhile, at the crime scene on South Calverton Road, the investigators collected several blood samples for DNA analysis. They found a blood trail running from the sidewalk on the South Calverton side of the Pit, through the Pit, and onto the sidewalk on South Pulaski where the Buick was parked. Lieutenant Rhoden[2] found a .40 caliber Glock handgun, which had blood on the grip of the magazine, in the backyard of 48 South Pulaski Street. As the result of an analysis of the samples taken from the .40 caliber handgun and the blood trail, the police determined that Johnson was the single male contributor of DNA on the grip and the magazine of the handgun.

Seven cartridge casings were found in front of 123 South Calverton. Three were .40 caliber casings and were marked "Blazer 40 S&W." Four were 9 mm. Luger casings and were marked "PMC 9mm Luger." Daniel Lamont, one of the State's firearms examination, comparison, and operability experts, testified that the three .40 caliber cartridge casings had been fired from the .40 caliber Glock that was found by Lieutenant

[2] Lieutenant Rhoden's first name does not appear in the record.

Rhoden – *i.e.*, the weapon that had Johnson's DNA on the magazine and the grip. At the time of the firearms expert's initial examination, he was able to conclude that the 9 mm. Luger casings had all been fired from the same firearm, but the identity and location of that firearm was then unknown.

On February 4, 2016, a little more than five months after the shooting, Detective Sergeant Gregory Ostrander was conducting an unrelated investigation in the field where Jeffers had been apprehended. During that investigation, Detective Ostrander found a 9 mm. Glock handgun hidden amongst some debris. One of the State's firearms experts, Mr. Lamont, determined that the 9 mm. Glock was the gun that fired the four 9 mm. Luger cartridge casings that were found at the scene of Gray's shooting.

We shall discuss additional facts as they become relevant.

ANALYSIS

I. Burden-shifting Language

In his opening statement and in his cross-examination of the police witnesses, Johnson's attorney implied that the officers had not pursued a second suspect because there was no second suspect to pursue. During closing arguments, the State undertook to address that contention. To explain why the police did not chase Johnson, the second suspect, the State asserted:

> [Y]ou heard this[,] why aren't you chasing Steven Johnson? What are [the police] supposed to do? They got picked because they separated. You pick wrong and both get away, and then what do we do? Don't fault [the police] because they were put in a position where they have to decide who to go after. *Shift that responsibility back to the people who first committed the act.*

(Emphasis added.)

Johnson objected, but the court overruled his objection.

On appeal, Johnson contends that the court erred in overruling his objection, because, he says, the State's argument impermissibly shifted the burden of proof to the defense. We disagree with Johnson's characterization of the prosecutor's comment. But even if the characterization were correct, we would not conclude that this single comment requires the reversal of Johnson's convictions and the grant of a new trial.

"[A]ttorneys are afforded great leeway in presenting closing arguments[.]" *Degren v. State*, 352 Md. 400, 429 (1999); *accord Winston v. State*, 235 Md. App. 540, 572, *cert. denied*, 458 Md. 593 (2018). "'The prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom.'" *Degren v. State*, 352 Md. at 429-30 (quoting *Jones v. State*, 310 Md. 569, 580 (1987)); *accord Winston v. State*, 235 Md. App. at 572-73.

> While arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments [of] opposing counsel, generally speaking, liberal freedom of speech should be allowed. There are no hard-and-fast limitations within which the argument of earnest counsel must be confined—no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.

Wilhelm v. State, 272 Md. 404, 413 (1974); *accord Degren v. State*, 352 Md. at 430; *Winston v. State*, 235 Md. App. at 573.

Nevertheless, because "[e]very defendant in a criminal jury trial is entitled to the

same presumption of innocence and reasonable doubt standard of proof," *Ruffin v. State*, 394 Md. 355, 372-73 (2006), a prosecutor may not state or imply that the defendant has a burden to prove his or her innocence. *See Eley v. State*, 288 Md. 548, 555 n.2 (1980).

"[T]he propriety of closing argument must be judged contextually, on a case-by-case basis[.]" *Mitchell v. State*, 408 Md. 368, 381 (2009). Viewed in context, we believe that the State's comments were not an improper burden-shifting argument.

The State did not state, imply, argue, insinuate, or suggest that Johnson was required to prove his innocence. To the contrary, the State attempted to explain why the officers did not pursue both of the fleeing suspects: the suspects split up and ran in different directions, and the officers made a snap judgment that it would be better to work together to catch one than to divide their efforts and risk losing both. The argument did not become an improper, burden-shifting argument merely because the prosecutor used the word "shift" when he argued that the defendants were responsible for the officers' inability to catch both of them.

In this regard, we note that during closing argument the prosecutor made other, similar comments, to which Johnson did not object. For example, when discussing the investigators' failure to find the 9 mm. Glock until months after the shooting, the prosecutor argued that Jeffers was responsible because he had discarded the gun in the field:

> That's why it was so hard to find that gun. Don't fault the police for that. They looked. *Put the responsibility back on the person who committed the act.*

(Emphasis added.)

In addition, when responding to an argument that the State called Ms. Canty, the elderly shooting victim, only to engender sympathy, the State argued, without objection, that the defendants were responsible for making her a witness:

> *But if you want to put any responsibility, put it on the people that did it.* You heard that question, why is she being brought in here? She's a victim. Don't blame me, I didn't put a bullet in her head. These two did.

(Emphasis added.)

At the conclusion of its rebuttal closing argument, the State responded, without objection, to a defense argument about the lack of any evidence of a motive for the killing:

> My problem is not with the motive. My problem is that the solution to whatever that motive is is that [Gray] had to die. Nothing else was sufficient to solve their problem. Murder was the only answer. And *if that's the decision that these two men are going to make then it's up to you to put that responsibility back in their laps*. And that's exactly what I'm asking you to do.

(Emphasis added.)

During rebuttal, the State made it clear that, in saying that the jury should assign responsibility to the defendants, it did not mean that the defendants had any burden to prove their innocence: "So when I say put the responsibility back on them, what I'm saying is if they're going to make this decision, let's hold them accountable."

Finally, in rebuttal, the State agreed that the defendants were presumed innocent. But, the State argued, it had overcome the presumption through the evidence that it presented at trial.

On this record, there is no plausible basis to contend that the State made an

improper burden-shifting argument. At worst, the State made a single comment that, through the use of the word "shift," might ambiguously implicate the burden of proof. In context, however, the single comment cannot reasonably be understood to imply that Johnson and his co-defendant had the burden of proving their innocence. To the contrary, the State acknowledged its burden of proof, but argued that it had met the burden. In telling the jury to "shift that responsibility back to the people who first committed the act," the State was simply arguing that Jeffers and Johnson were responsible for forcing the officers to choose which suspect to pursue – just as they were similarly responsible for the delay in finding the hidden second gun, for making their 93-year-old victim into a witness, and for the death of their victim. The State's single, isolated use of the word "shift" was not improper.

But even if the comment were improper, it would not necessarily require reversal. *See Lee v. State*, 405 Md. 148, 164 (2008); *see also Wilhelm v. State*, 272 Md. at 431 ("the mere occurrence of improper remarks does not by itself constitute reversible error"). "[U]nless it appears that the jury were actually misled or were likely to have been misled or influenced to the prejudice of the accused by the remarks of the State's Attorney, reversal of the conviction on this ground would not be justified." *Wilhelm v. State*, 272 Md. at 415-16. In determining whether an allegedly improper statement in closing argument constitutes reversible error, an appellate court considers: (1) the severity and pervasiveness of the remarks; (2) the measures taken to cure any potential prejudice; and (3) the weight of the evidence against the accused. *Donaldson v. State*, 416 Md. 467, 497 (2010) (quoting *Lee v. State*, 405 Md. at 165, *which quoted Lawson v.*

State, 389 Md. 570, 592 (2005)).

This case involves a single comment that is arguably ambiguous only if it is improperly divorced from all context – i.e., only if one ignores the specific argument to which the State was attempting to respond, as well as the State's other, similar comments that drew no objection. The comment was innocuous and isolated, not severe and pervasive. *Compare Lawson v. State*, 389 Md. 570, 579-80, 604 (2005) (reversing a conviction for child sexual-abuse where the State not only argued that defendant failed to prove that the victim had a motive to lie, but called him a monster, asked the jurors to put themselves in the shoes of the victim's mother, and implied that he would abuse other children if he were acquitted).

Admittedly, the court took no measure to cure any potential prejudice, but that is because the prejudice was almost impossible to discern. Had the prosecutor told the jurors to "put" the responsibility on the defendants, rather than to "shift" it to them (as he did on other occasions), Johnson probably would not have objected at all. The trial judge did not commit reversible error by failing to correct a single, infelicitous verb choice during the heat of closing argument.

Lastly, it would be something of an understatement to say that the evidence against Johnson was extremely strong. He left a trail of blood that ran from the scene of the murder on South Calverton Road to South Pulaski Avenue, where he turned to run from the officers. His blood was also found on the grip and magazine of one of the murder weapons, the .40 caliber Glock that was found near South Pulaski Street on the day of the crime. He admitted that he had been shot on the day of the murder, but he

waited until the next day to obtain medical care, went all the way to eastern Baltimore County to find a hospital (passing at least four other hospitals on the way), and made a palpably false claim about having been shot in a dice game. The case against Johnson was not close.

In short, we have no reason to conclude that the State's comment misled or was likely to have misled the jury to Johnson's detriment. *Wilhelm v. State*, 272 Md. at 415-16. Therefore, even if the State's comment were improper (it was not), we would not reverse the conviction. *Id.*

II. Impeachment of the State's Firearms Operability Expert

At trial, the State called Jennifer Ingbretson, a forensic scientist with the Baltimore City Police Department, to testify about the operability of the 9 mm. Glock that an officer found in the overgrown field several months after the murder. Following Jeffers's cross-examination of Ms. Ingbretson, Johnson's attorney requested a bench conference.

During the bench conference, Johnson expressed his intention to ask Ms. Ingbretson whether she remembered admitting that she made an untruthful statement during another trial in which his counsel was involved. According to Johnson, Ms. Ingbretson had testified that 10 "matches" were required for DNA evidence to be considered inclusive. During the retrial, however, Ms. Ingbretson testified that only eight "matches" were required for the evidence to be considered "inclusive." Johnson's attorney asserted that Ms. Ingbretson had committed perjury and that he should be permitted to challenge her credibility for "lying on the stand."

The trial court rejected Johnson's argument, reasoning that Ms. Ingbretson was not

testifying about DNA in this case. The court ruled that, because Ms. Ingbretson had testified only about firearm operability, Johnson could not challenge her credibility on issues arising from prior testimony about DNA analysis. When Johnson reiterated his objection after the bench conference had ended, the court again explained that it would not permit the proposed line of questioning because the questions "had nothing to do with what she testified here this morning[.]"

Rule 5-608(b) states that a party may examine a witness about conduct that did not result in a conviction if the conduct is probative of a character trait for untruthfulness and if there is a reasonable factual basis for the inquiry:

> **(b) Impeachment by Examination Regarding Witness's Own Prior Conduct Not Resulting in Convictions.** The court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness. Upon objection, however, the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred. The conduct may not be proved by extrinsic evidence.

Md. Rule 5-608(b) (emphasis in original).

The rule imposes some limits on a party's ability to examine a witness about prior conduct that did not result in a conviction:

> First, the trial judge must find that the conduct is relevant, *i.e.*, probative of untruthfulness. Second, upon objection, the court must hold a hearing outside the presence of the jury, and the questioner must establish a reasonable factual basis for asserting that the conduct of the witness occurred. Third, the questioner is bound by the witness' answer and may not introduce extrinsic evidence of the asserted conduct. Finally, as with all evidence, the court has the discretion to limit the examination, under Rule

> 5-403, if the court finds that the probative value of the evidence is outweighed by unfair prejudice.

Pantazes v. State, 376 Md. 661, 686-87 (2003).

Here, the State concedes that the trial court erred in ruling that the proposed line of inquiry was irrelevant because Ingbretson's alleged perjury did not concern the same area of expertise as her testimony on direct. However, it argues that we need not reverse the conviction because Johnson's proffer was insufficient to establish the requisite factual basis for the proposed inquiry. We agree.

The requirement of a reasonable factual basis is intended "to ensure that the questions are propounded in *good faith* and are not aimed to put before the jury unfairly prejudicial and unfounded information supported only by unreliable rumors or innuendo." *Pantazes v. State*, 376 Md. at 687 (emphasis in original) (collecting authorities). To establish a reasonable factual basis to impeach a witness on the basis of prior conduct that did not result in a conviction, counsel must "demonstrate a firm basis for believing that the conduct in fact occurred[.]" *Robinson v. State*, 298 Md. 193, 201 (1983). "[M]ere accusations of crime or misconduct may not be used to impeach" (*State v. Cox*, 298 Md. 173, 179 (1983)), and a "hearsay accusation of guilt" is not sufficient. *Id.* at 181. "[I]nquiries into prior acts of witnesses are evaluated rigorously." *Pantazes v. State*, 376 Md. at 685; *compare Fields v. State*, 432 Md. 650, 674 (2013) (stating that trial court erred in excluding findings of internal investigation that "sustained" findings that police detectives had falsified time records).

Here, the trial court excused the jury and gave Johnson's counsel an opportunity to

proffer a reasonable factual basis for his line of questioning. Counsel responded, in substance, that on one occasion Ingbretson had said that 10 matches were required, but that on another she had said that only eight were required. Counsel did not have a transcript to substantiate his allegation. Nor did he give the court any reason to believe that the alleged testimonial discrepancy involved a knowing and intentional falsehood, as opposed to a careless or even an innocent mistake, or perhaps a change in the relevant scientific protocols. Nor did counsel represent that he had complained to the State's Attorney or the Police Department about the alleged perjury, let alone that any complaint had been investigated and substantiated. In short, Johnson's counsel had nothing more than "mere accusations," which are insufficient to establish a reasonable factual basis for impeachment under Rule 5-608(b). *See Pantazes v. State*, 376 Md. at 691.

Johnson argues that, because the court erroneously believed that he could not cross-examine the witness about a subject (DNA) that she had not discussed on direct examination, it necessarily denied him the opportunity to demonstrate that he had a reasonable factual basis for cross-examination. He likens this case to *Fields v. State*, 432 Md. at 674, where the trial judge erroneously "assumed" that the defendants were "precluded automatically" from even attempting to demonstrate a reasonable factual basis to impeach police officers for submitting false overtime requests, because a discovery judge had denied the defendants pretrial access to the records of the internal investigation.

In our view, the trial court's conceptual error in this case – its mistaken belief that impeachment was permissible only if it concerned an issue that had come up on direct

examination – did not have the same effect as the error in *Fields*. Here, the trial court did not categorically prohibit Johnson from attempting to establish a reasonable factual basis for impeachment. Instead, the court excused the jury and gave counsel the opportunity to say what he had to say. Because Johnson's counsel had only unspecific, unsupported allegations that the witness had given different answers on different occasions for reasons that may or may not have involved a knowing and intentional effort to mislead the finder of fact, the trial court would not have abused its discretion in concluding that he had failed to establish a reasonable factual basis to conclude that the witness had committed perjury.

Even if the trial court abused its discretion in failing to provide Johnson an adequate opportunity to demonstrate a reasonable factual basis for his cross-examination about Ingbretson's prior testimony, we would conclude that any error was harmless beyond a reasonable doubt under *Dorsey v. State*, 276 Md. 638, 659 (1976).

The State's theory was that Jeffers used the 9 mm. Glock and that Johnson used the .40 caliber Glock to kill Gray. Ingbretson's testimony was limited to her examination of the 9 mm. Glock that Jeffers had allegedly used: she testified that the 9 mm. Glock was operable when she examined it in February 2016 and that three of the eight unfired cartridges found in its magazine were of the same brand as the four 9 mm. casings found at the scene of the shooting.

Those facts were not only undisputed, but they had already been established by other evidence. Mr. Lamont, the State's other firearms expert, whose credibility was unchallenged, had previously testified that the 9 mm. cartridges at the shooting scene had

been fired from the same 9 mm. Glock that Ingbretson had testified about. Furthermore, the 9 mm. Glock was obviously operable at all relevant times, because it had managed to eject those 9 mm. cartridges on August 26, 2015, the day of the murder.

At most, Ingbretson's testimony was cumulative of other evidence that tended to show that the 9 mm. Glock was used in the killing. Notably, she said nothing about who had used the 9 mm. Glock. She certainly did not say that Johnson had used the 9 mm. Glock, as that would have contradicted the State's theory that Johnson had used the .40 caliber Glock that had his blood on the grip and magazine. In these circumstances, it is difficult to see how Johnson suffered any prejudice as a result of the ruling that prohibited him from impeaching Ingbretson.

Finally, as we have previously stated, the evidence against Johnson was extremely strong. His blood was all over one of the weapons that was used to kill Gray – the .40 caliber Glock. Moreover, that weapon was found along the path of his egress from the shooting scene, where his blood trail was also found. Because Ingbretson's testimony about the 9 mm. Glock did not conceivably contribute to the guilty verdicts against Johnson, we need not reverse the convictions.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.