UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0962

September Term, 2015

RICHARD SHELDON BLESS

v.

STATE OF MARYLAND

Krauser, C.J.,
Woodward,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: July 29, 2016

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A jury in the Circuit Court for Worcester County convicted Richard Sheldon Bless, appellant, of attempted robbery, following an incident that occurred on November 9, 2014, near West Ocean City. The court sentenced appellant to a prison term of seven years, consecutive to sentences that the court imposed for violating probation in other, unrelated cases. Appellant raises one issue on appeal:

> Did the trial court err in not granting the defense request for a mistrial based on an improper comment by the prosecutor in opening statement?

For the reasons that follow, we answer this question in the negative and affirm.

BACKGROUND

Although not pertinent to the issue raised on appeal, we provide the following factual background for context.

On the afternoon of November 9, 2014, David Nave, a recovering alcoholic, went to the Atlantic Club to watch the second half of a Baltimore Ravens game. The Atlantic Club is part of the Worcester Addictions Center ("WAC") and is an area where recovering addicts can socialize. After the game, Nave went outside to smoke a cigarette and was approached by appellant. Appellant introduced himself as "Ricky" and asked Nave if he would be willing to help appellant install drywall the next day for his grandmother for $15/hour, and his grandmother would pay. Nave agreed, and appellant provided a contact number, which Nave input into his cell phone.

Then, appellant asked Nave if he would give appellant a ride to Selbyville, Delaware, so that appellant could repay money to a friend. Appellant offered Nave $15 for the ride.

Nave agreed and because appellant stated that he misplaced his cell phone, allowed appellant to use Nave's cell phone to contact the friend. When appellant initially failed to locate his friend, he offered Nave an additional $5 to drive further, which Nave accepted.

Appellant directed Nave to an area where he observed a man standing near a wooded trail. Appellant told Nave to stop, and appellant asked the man how much a bundle was, which Nave interpreted to mean a bundle of heroin. Appellant then gave the man some money, and the man walked away. When appellant got out of Nave's truck to check on the man, Nave attempted to drive away. Before he could do so, however, appellant re-entered the vehicle. Upset, Nave yelled at appellant for putting him in this situation, but he told appellant that he still wanted the $20 for the ride.

After stopping at a gas station in an effort to obtain change, appellant directed Nave to drive to a mobile home park near the WAC where appellant said his girlfriend had $20 for Nave. Appellant told Nave to turn off the truck, which Nave refused to do, and when appellant reached toward the keys, Nave grabbed appellant's arm. Suddenly, appellant held a small black gun in his other hand and told Nave that he was "going to blow [his] fucking head off" if he did not give him money. Nave jumped out of his truck, screaming for someone to call the police. Eventually, one of the mobile home residents called 911, and Nave spoke with the arriving police officers, relating the events of the evening. Deputy Allison Herrman of the Worcester County Sheriff's Office showed Nave an image of

appellant, and Nave identified appellant as his assailant. Police eventually located and arrested appellant in New Jersey.

The State charged appellant with attempted robbery, attempted robbery with a dangerous weapon, first-degree assault, and use of a firearm in the commission of a crime of violence. The jury acquitted appellant of every charge, except for attempted robbery.

Appellant testified in his own defense. He stated that Nave was aware that appellant wanted to purchase drugs, and that Nave gave appellant $40 to purchase cocaine. Appellant testified that he gave the man money for drugs, but the man walked away from them without giving them the drugs. Appellant indicated that he would get the money back for Nave, but appellant left before giving Nave any money.

DISCUSSION

During the prosecutor's opening statement, the following occurred:

> [THE STATE]: You're going to hear facts from the detectives, from the officers involved that are going to help you understand that **what Mr. Nave was telling you – or what he tells you all fits. It all fits. And the defendant I'm sure will have – if you'll hear, might not be the same if in fact you hear something**.
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE COURT]: Approach.

(Whereupon, Counsel and Defendant approached the bench and the following occurred out of the jury's hearing:)

[THE COURT] What's the basis of your objection?

[DEFENSE COUNSEL]: Defendant you would hear, if in fact you hear something.

[TH E COURT]: Read back what the State's Attorney said, Madam Court Reporter.

(Whereupon, the Court Reporter read back the last statement made by the State's Attorney.)

[THE COURT]: Do you want to be heard?

[THE STATE]: Your Honor, I would just indicate that certainly, number one, that counsel has indicated that the defendant intends to testify in this case. And while I know that he may change his mind, that has been what has been presented to the State was that he does intend to take the stand.

Secondly, I don't think that anything that was – any comments that were made were reflective of whether or not on his right to not speak based on a Fifth Amendment right or not speak based on trial rights.

[DEFENSE COUNSEL]: Your Honor, my indications to the State and to the Court outside of the hearing of the jury are – were strictly for the motions *in limine*. So I don't believe that that is a factor here.
But secondly, I believe – and I can – if the Court would allow me, I can grab the case. I believe that there's a case on the issue of

mentioning the defendant's right to testify or the defendant's potential testimony as being automatic grounds for a mistrial. I believe that it prejudices [appellant] against the jury. If, in fact, based on some things that happened, he decides to change his mind and not testify, his testimony or potential testimony has been alluded to by the State. I believe that is improper and grounds for a mistrial.

[THE COURT]: State want to be heard any further?

[THE STATE]: I would just indicate, Your Honor, again, that there's no – the State has not affirmatively mentioned that he will or will not testify. The question that remains, you know, what you may hear, not what you will hear or won't hear. And the prejudice to the defendant based on the comments that the State made, the State does not believe give rise to the level of a mistrial. Perhaps a curative instruction, but not a mistrial.

[DEFENSE COUNSEL]: Again, Your Honor, I believe there is a case on the matter even referencing the defendant's testimony, not whether or not he will testify, but the defendant could or could not testify, the defendant may or may not testify. I believe that was the case – that was factual circumstances in that particular case, and that was grounds for a mistrial. It wasn't stating that the defendant will testify, the defendant won't testify, it was just saying the defendant may say this or may not say that, and that was grounds for a mistrial. I don't recall

the name of the case right now, but if Your Honor would give me the opportunity, I can find it.

[THE COURT]: Well, that case to which you refer did not deal with the precise factual situation that we have here. My recollection is that in that case the State referred to the failure of the witness – of the defendant to testify.

But in any event, **I think the State's opening statement is improper inasmuch as it referenced the possibility of the defendant testifying; simply something that's not appropriate to be brought up in opening statement.** I don't think the appropriate remedy is a mistrial. I'm going to sustain the defense's objection. **If you wish, I will inform the jury that the defendant has an absolute right not to testify**. **If indeed the defendant decides to exercise that right in this case, that's a matter that would not be – it could not be held against the defendant, and it could not be considered by them in any way whatsoever. Do you want me to offer that instruction**, recognizing of course that your request for a mistrial is denied?

[DEFENSE COUNSEL]: **Yes, Your Honor**. Not waiving any argument that I've made, **I would request that curative instruction**.

[THE COURT]: All right. I'll give it.

(Emphasis added).

The court then gave the jury a curative instruction:

> Ladies and gentlemen of the jury, in her opening statement the State's Attorney made reference to the possibility that the defendant might testify. You're instructed that a defendant has an absolute constitutional right not to testify. If indeed the defendant exercises that right in this case not to testify, that circumstance could not be held against him and must not be held against the defendant and must not be considered by you in any way or even discussed by you.

On appeal, appellant claims that the trial court should have granted his request for a mistrial, and that this result is mandated by *Simpson v. State*, 442 Md. 446 (2015). Appellant concedes that he accepted the court's offer of giving a curative instruction, but contends that such acceptance was merely a Hobson's Choice, and that the curative instruction was an inadequate response.[1] Finally, appellant argues that the court's error is not rendered harmless by his decision to testify because appellant's decision was "coerced" by the State's opening error.

The State argues that appellant's interpretation of *Simpson* is incorrect, and that *Simpson* does not stand for the proposition of automatic mistrial when the prosecution refers to a defendant's constitutional right not to testify. Moreover, the State asserts, the prosecutor's statements here were made in good faith, and appellant is required to show bad faith on the part of the State in order to secure a mistrial. The State further contends that

[1] A Hobson's Choice "refers to the paradox of an apparently free choice when in reality there is no alternative. The phrase originated from the practice of Thomas Hobson, circa 1630s, an English liveryman, to require every customer who wanted to buy a horse to take the horse nearest the door." *Simpson*, 442 Md. at 464 n.8 (citing THE NEW LEXICON WEBSTER'S ENCYCLOPEDIC DICTIONARY OF THE ENGLISH Language 460 (Bernard S. Cayne ed. 1990)).

appellant has waived any argument as to the giving of the curative instruction because when the trial judge offered to give the instruction, appellant agreed with the court giving the instruction, as well as language of such instruction. Finally, the State argues that appellant never raised the issue of coercion with the trial court, and thus waived such issue.

The Court of Appeals has remarked: "It is well understood that the federal and Maryland constitutions prohibit the prosecutor in a criminal case from making an adverse comment upon the defendant's failure to testify." *Simpson*, 442 Md. at 448. *See also* U.S. Const. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself[.]"); Md. Declaration of Rights Art. 22; Maryland Code (1973, 2013 Repl. Vol.), Courts & Judicial Proceedings Article ("CJP"), § 9-107. "The prosecutor 'may strike hard blows, [but] he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'" *Simpson*, 442 Md. at 463 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

Certainly, an improper "foul blow" may be grounds for a mistrial, but "a mistrial is generally an extraordinary remedy and that, under most circumstances, the trial judge has considerable discretion regarding when to invoke it." *Powell v. State*, 406 Md. 679, 694 (2008) (citing *Cooley v. State*, 385 Md. 165, 173 (2005)). A mistrial must be declared, however, where "it is the remedy 'necessary to serve the ends of justice.'" *Id.* (quoting

Cooley, 385 Md. at 173). "In the environment of the trial the trial court is peculiarly in a superior position to judge the effect of any of the alleged improper remarks." *Simmons v. State*, 436 Md. 202, 212 (2013) (quotation marks and citation omitted). In other words, "'[t]he judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able . . . to note the reaction of the jurors and counsel to inadmissible matters. That is to say, the judge has his finger on the pulse of the trial.'" *Id.* (quoting *State v. Hawkins*, 326 Md. 270, 278 (1992)).

Whether a mistrial is required in the instant case depends on the facts of the case. In this analysis, we are concerned with "whether the prosecutor's remarks in opening statement were reasonably susceptible of an adverse inference by members of the jury that the defendant's failure to testify would be indicative of the defendant's guilt." *Simpson*, 442 Md. at 459.

To begin, *Simpson* does not, contrary to appellant's position, stand for the proposition that even so much as a reference by the prosecutor to the possibility that the defendant may testify constitutes automatic grounds for a mistrial. The Court of Appeals recognized that the prosecutor's comments in opening statement were improper in *Simpson*, but did not automatically grant a reversal. *Id.* at 459-60. Rather, the Court analyzed the comments and held that the jury could have reasonably inferred an adverse inference from them, such that the comments ran afoul of the federal and Maryland constitutions. *Id.* at 460-61.

Simpson was charged with, among other crimes, arson for his role in starting three fires at the home of his ex-girlfriend and her family. *Id.* at 449. Simpson provided a written statement to police in which he confessed to all three fires. *Id.* at 450. During opening statement, the prosecutor made the following relevant remarks:

> Ladies and gentlemen ..., the Defendant himself will tell you, number one, that he burned down the garage ... he committed those crimes of arson. And further, he'll tell you why he did it. But even with the Defendant's own words, the State – I will bring members of the Prince George's County Fire Marshall's office, and members of the Prince George's County Police Department, here to restify before you. And they're going to ... corroborate everything that the Defendant has said .... [A]t the end of this trial I'm going to ask you to listen to what the Defendant has said, to listen to how his words are corroborated[.]

Id. at 451 (emphasis omitted). The trial court overruled Simpson's objection to these remarks. *Id.*

The Court of Appeals recognized that the prosecutor may have been referring to Simpson's confession, but the paramount consideration was the jury's understanding of the remarks. *Id.* at 459-61. Noting that the jurors were "presumably unfamiliar with the nuances of the law, evidentiary rules, and trial procedures," the Court reasoned that the prosecutor's remarks "were reasonably susceptible of the inference by the jury that [Simpson] had an obligation to testify and, if he did not, the jury should view that as evidence of his guilt." *Id.* at 461.

Appellant's case is distinguishable from *Simpson*. Whereas the prosecutor in *Simpson* repeatedly told the jury what Simpson would say and that he would testify, the prosecutor in this case obliquely referred one time to the possibility of appellant testifying: "And the defendant I'm sure will have – **if you'll hear**, might not be the same **if in fact you hear something**." (Emphasis added).[2] This comment does not, in our view, lead a reasonable juror to an adverse inference that appellant's failure to testify is evidence of guilt.

Moreover, unlike in *Simpson*, appellant immediately objected to the prosecutor's comment, and counsel conversed with the court as to the propriety of the remark. Indeed, the next time the court addressed the situation in *Simpson* was given three days after opening statements. *Simpson*, 442 Md. at 463. In this case, with appellant's agreement, the court immediately gave a curative instruction, which juries are presumed to follow. *See Dillard v. State*, 415 Md. 445, 465 (2010).

"Whether a curative instruction is a reasonable alternative to a mistrial depends on whether the prejudice was so substantial as to deprive a party of the right to a fair trial and therefore warrant a mistrial." *Simmons*, 436 Md. at 219 (citing *Bruton v. United States*, 391 U.S. 123, 135 (1968)). In considering an improper remark at trial, "'[t]he trial judge must

[2] We reject the State's contention that appellant must demonstrate that the comments were made in bad faith in order to obtain a reversal. The Court of Appeals stated in *Wilhelm* that "[t]o secure a reversal based on an opening statement the accused is usually required to establish bad faith on the part of the prosecutor in the statement of what the prosecutor expects to prove or establish substantial prejudice resulting therefrom." 272 Md. at 412. The Court has since abrogated that reasoning where the prosecutor's comments go to the constitutional right to remain silent. *See Simpson*, 442 Md. at 458 n.5.

assess the prejudicial impact of the [remark] and assess whether the prejudice can be cured. If not, a mistrial must be granted. If a curative instruction is given, the instruction must be timely, accurate, and effective.'" *Id.* (quoting *Carter v. State*, 366 Md. 574, 589 (2001)).

We agree with the State that appellant has waived any argument as to the giving of the curative instruction because defense counsel agreed to the giving of such instruction and its contents. In so doing, appellant affirmatively waived any perceived error in the contents of the instruction. We note that appellant did not, in actuality, face a Hobson's Choice. Simpson, however, did: "[E]ither testify and subject himself to all the adverse consequences that might hold, or invoke his constitutional right to remain silent and risk that the jury would punish him for the prosecutor's error by inferring guilt from his failure to testify." *Simpson*, 442 Md. at 464. Appellant, rather, faced a tactical decision to agree to the curative instruction or let the objection go sustained with no further comment from the judge. *See Fleming v. State*, 194 Md. App. 76, 93 (2010) (stating that decision faced by defense counsel as to a curative instruction and noting that defense counsel is free to reject curative instruction).

Finally, we are not persuaded that appellant was prejudiced by the curative instruction, especially where appellant concurred with the court as to the language of the instruction. *See Somers v. State*, 156 Md. App. 279, 311-12 (2004) (holding that Somers waived argument as to content of instruction where he proposed the language), *cert. denied*, 382 Md. 347

(2004). *See also Paige v. State*, 222 Md. App. 190, 200-01 (2015) (finding that Paige waived argument as to curative instruction where he did not object); *Drake and Charles v. State*, 186 Md. App. 570, 588-89 (2009), *rev'd on other grounds*, 414 Md. 726 (2010).

Accordingly, it was not an abuse of discretion to deny appellant's motion for a mistrial based on the prosecutor's comment in opening statement. The comment, unlike those of the prosecutor in *Simpson*, did not reasonably lead the jury to an adverse inference that appellant's invocation of his constitutional right to remain silent would be an inference of guilt. Furthermore, the court quickly and correctly instructed the jury, with appellant's agreement, as to appellant's constitutional right to remain silent. Given our holding, there is no need to address whether the prosecutor's remark was rendered harmless by appellant's later decision to testify.

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