UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1404

September Term, 2015

JAMES THOMAS SHEPPARD

v.

STATE OF MARYLAND

Krauser, CJ
Wright,
Nyce, Erik H.
(Specially Assigned),

JJ.

Opinion by Nyce, J.

Filed: November 2, 2016

A jury, in the Circuit Court for Baltimore County, convicted James Thomas Sheppard, appellant, of first-degree burglary, malicious destruction of property, two counts of reckless endangerment, and violating a peace order. Appellant was thereafter sentenced to fifteen years' imprisonment for first-degree burglary; to a consecutive five years' imprisonment for one count of reckless endangerment to run concurrent with a sentence of five years in prison for the second count of reckless endangerment, and to time served for malicious destruction of property and violating a peace order. Appellant filed this timely appeal, in which he raises the following issue:

> Did the trial court err in precluding defense counsel from commenting on the defendant's liberty during closing argument?

We shall answer that question in the negative and affirm appellant's conviction.

BACKGROUND

In late 2013, appellant began a relationship with Doreen Chandler. In March of 2014, the relationship ended and Ms. Chandler called the police to have appellant removed from her home. Ms. Chandler continued to see appellant but obtained a Peace Order in September of 2014 alleging that appellant attacked her. While the Peace Order was still in effect on December 11, 2014, appellant confronted Ms. Chandler at a club, grabbed her by the neck, and proceeded to choke her. Police officers on the scene intervened, and Ms. Chandler went to a friend's house for the night.

In the early morning of December 12, 2014, Ms. Chandler's 10-year-old son, Tahear,[1] and her 9-year-old daughter, Talia, were home alone at Ms. Chandler's

[1] Spelled Tahir in appellee's brief.

residence, after her 21-year-old daughter, Alexis, left. At approximately 5:00 a.m., Tahear woke up, walked to Ms. Chandler's room, and saw that the television was gone, the cable box was ripped out, and there was paint splashed all over Ms. Chandler's clothes. Tahear heard noises and glass shattering in the home, so he ran to his room and called Ms. Chandler. Ms. Chandler instructed Tahear to call the police. Upon his arrival, Officer Lundquist saw that the front window of the home had been shattered. Appellant was found by Officer Power at the rear of Ms. Chandler's home in a car that contained two televisions belonging to Ms. Chandler. Appellant was arrested and charged.

On the first day of trial, the State of Maryland (hereinafter, "the State") and counsel for appellant (hereinafter, "defense counsel") gave opening statements. Defense counsel, among other things, made the following statements in his opening to the jury:

> Now, Mr. Sheppard over there, he has something in common with all of you. He's an American citizen. And like every American citizen, he is faced with the possibility of losing his liberty when he is accused of a crime. Your liberty is the most valuable thing that you own, whether you think so or not, because without your liberty there is nothing else that you can do. There's nothing else in our society you can do without your liberty.
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> And he has been accused of a crime. It's not his burden to prove that he's guilty or is it? It's the State's burden to prove that he's guilty beyond a reasonable doubt, and that is their burden throughout the entire trial. It never switches to the Defendant to prove his innocence. He doesn't even have to testify, because his liberty is at stake. His liberty is at issue. And when your liberty is at issue, and the State is accusing of you [sic] of something, it is the job of the State to prove their case. And it is the job of the panel to see if they've proven their case.
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> In life we are sometimes called to do the right thing against the very nature that we feel instinctively is the right thing. That we automatically respond to it emotionally. I'm asking you to leave your emotion at the door and to be fair and impartial during the course of this trial. Because it's all

> up to you, my client's liberty is all up to you. Whether he looses [sic] it or whether he gains it back, is all up to you being fair and impartial.

During a break in testimony, the State made a motion *in limine* to preclude defense counsel from commenting on appellant's liberty again in closing argument:

> Just with respect to closing arguments, during opening, counsel referenced to the jury that his client faced the possibility of losing his liberty, and that is improper. So I would just raise a Motion in Limine that counsel not be allowed to do that during closing arguments.
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> I think that makes the jury consider, you know, what the possible outcome [sic], and that's not their job. They're just to weigh the testimony and the evidence that's been presented before them to determine guilt or innocence and not have to even be consumed or worried about what the ramifications of that decision could be.

In response, defense counsel argued:

> [I]t would be improper to tell the jury how much time he could get. It's not improper to tell the jury that a man's liberty is at stake. That is true when anyone is here for a crime. To act as though that that's not true would be a fallacy and a lie. I did not say how much time he was facing. I just said that his liberty was at jeopardy, and he could lose his liberty, which is true.
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> Your Honor, I have used those words before in lots of openings and lots of closings. It is well within the jury's purview to understand that what they are about to do is a serious act, and they need to be fair and impartial about it. That is part of their oath, and they need to take it seriously.

Ultimately, the circuit court ruled in favor of the State and granted the motion *in limine*, precluding defense counsel from commenting on appellant's liberty in his closing argument.

DISCUSSION

It is well established that criminal defendants have a constitutional right to present a closing argument at the close of evidence. *Holmes v. State*, 333 Md. 652, 658-59 (1994). While a great deal of creative latitude is given, counsel is limited to discussing only "the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence[.]" *Wilhelm v. State*, 272 Md. 404, 412 (1974). It is not proper for counsel to "appeal to the prejudices or passions of the jurors, or invite the jurors to abandon the objectivity that their oaths require." *Mitchell v. State*, 408 Md. 368, 381 (2009) (internal citations omitted). It is also not permissible for counsel to appeal to the jury's sympathy. *See Lee v. State*, 405 Md. 148, 154 (2008) (quoting the instruction given to the jury that they "should not be swayed by sympathy, prejudice or public opinion. . . ."). "What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case." *Smith v. State*, 388 Md. 468, 488 (2005).

One of the limitations on arguments made to the jury is discussing issues related to sentencing and punishment. *See Mitchell v. State*, 338 Md. 536, 540 (1995) (stating that "[a]s a general rule, a jury should not be told about the consequences of its verdict—the jury should be focused on the issue before it, the guilt or innocence of the defendant, and not with what happens as a result of its decision on that issue."); *see also Shannon v. United States*, 512 U.S. 573, 579 (1994) (noting that "[i]t is well established that[,] when a jury has no sentencing function, it should be admonished to reach its verdict without regard to what sentence might be imposed.") (Citation, quotation marks, and footnote omitted). In this case, the jury was instructed:

> The question of punishment or penalty in the event of a conviction is no concern of the jury, and it should not enter or influence your deliberations in any way. You should not guess or speculate about the punishment. Your job will be done after finding the [d]efendant guilty or not guilty. In the event that you do find the [d]efendant guilty, the responsibility of punishment will be solely upon this court.

Appellant argues that the concept of "liberty" may include incarceration, however, it encompasses more than just a prison sentence and may be implicated by a conviction alone. Defense counsel stated below, "I'm not talking about jail time when I['m] speaking of liberty. I'm speaking of the idea that as Americans we have a sense of freedom . . . to do and be the people we want to be."

Appellant's argument mirrors the reasoning in *State v. Jones*, 398 S.W.3d 518, 522-23 (Mo. Ct. App. 2013), where the Missouri Court of Appeals held that it was trial court error to grant a motion *in limine* prohibiting the defendant's counsel from saying the word "liberty" in closing argument:

> Here, Jones's liberty is implicated not solely by the length of sentence, but also by the fact of conviction. The existence of a criminal conviction may adversely affect an individual's ability to obtain employment, creates a stigma associated with being found guilty of a criminal offense, and generates other collateral consequences not produced directly by the sentence rendered by the trial court or recommended by the jury.

(Citation omitted.) However, Missouri law differs from Maryland law. In Missouri, the State is allowed to argue that "the jury has a duty to enforce the law and the merit of sending a message that criminal conduct will not be tolerated." *Id*. at 523 (citation omitted). The *Jones* Court reasoned that if the State has wide latitude to discuss the impact that crime has on the community, a "logical corollary" would be to allow the defendant to discuss the impact a conviction would have on him. *Id*.

In Maryland, the State is prohibited from asking the jury to "send a message" with its verdict, because that allows the jurors to consider their own interests instead of objectively viewing the evidence. *See Lee*, 405 Md. at 171-73. Any argument that "asks the jury to place themselves in the shoes of the victim, or in which an attorney appeals to the jury's own interests," is considered a "golden rule" argument, and is expressly prohibited. *Id*. at 171 (citations omitted). In the case *sub judice,* the State did not make any such argument, so the "logical corollary" present in *Jones* does not apply. The holding in *Jones* is inconsistent with Maryland law.

During his opening statement, defense counsel placed the concept of "liberty" before the jury eight times with minimal reference to the anticipated evidence. The purpose of an opening statement is "to apprise with reasonable succinctness the trier of facts of the questions involved and what the State or the defense expects to prove so as to prepare the trier of facts for the evidence to be adduced." *Wilhelm*, 272 Md. at 411-12. To be sure, the concept of "liberty" is permitted in opening statements and closing arguments as part of the "oratorical conceit or flourish" in which counsel may indulge. *Id.* at 413. However, when the plea to "liberty" appears to be an attempt to discuss punishment, then the argument is not proper and may be restricted by the trial judge. *See Ingram v. State*, 427 Md. 717, 728 (2012) (stating that "whether a portion of counsel's argument is improper or prejudicial rests largely within the trial judge's discretion because he or she is in the best position to determine the propriety of argument in relation to the evidence adduced in the case.").

Appellant suggests that because the possibility of incarceration is a "*fact* of such general notoriety as to be a matter of common knowledge," defense counsel should have been permitted to discuss it in closing argument. (Emphasis added.) In support, appellant points to *Wilhelm*, where the Court noted "it is proper for counsel to argue to the jury—even though evidence of such facts has not been formally introduced—matters of common knowledge or matters of which the court can take judicial notice." *Wilhelm*, 272 Md. at 438. Even if the possibility of incarceration were a fact of general knowledge in the community, any argument as to punishment is prohibited. *See Mitchell,* 338 Md. at 540; *see also Shannon,* 512 U.S. at 579. Not only are discussions of sentencing not permissible, but they also invite the State to respond with "golden rule" arguments, *see supra*, which are prohibited as well. *See Lee*, 405 Md. at 171.

Defense counsel went far beyond simply mentioning appellant's liberty sporadically and, instead, made the concept the crux of his entire opening statement. *See Wilhelm*, 272 Md. at 436 (holding that a "singularly made and unrepeated" improper argument was not prejudicial). This argument appeared to call upon the jury's sympathy. Absent a proffer of how defense counsel wished to use the concept of liberty in closing, we will infer that it would have been similar to the opening statement. In that context, the circuit court was within its discretion to grant the motion *in limine*. Any additional discussion would have only continued to appeal to the jury's sympathy.

Based on the aforementioned, we hold that the circuit court's decision to grant the State's motion *in limine* was not an abuse of discretion.

Moreover, from our review of the record, we have concluded that any purported error was harmless. The Court of Appeals in *Dorsey v. State*, 276 Md. 638, 659 (1976), held that if error is established "unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated." Had we found that the circuit court erred, we do not believe it would have influenced the verdict in this case. A similar conclusion was reached in the *Jones* case relied upon by appellant. *See Jones,* 398 S.W.3d at 523-524:

> We find no evidence in the record that any prejudice resulted from the trial court's error. The jury was presented with two significantly different versions of the facts relating to the assault on Woods. The jury believed the testimony of Woods over the version of events portrayed by Jones. We are not persuaded that the jury would likely have altered this factual determination had Jones been allowed to argue in closing argument that his liberty was at stake. Moreover, as already noted, the trial court permitted Jones to argue, and Jones did argue to the jury, that its decision would have significant and long-lasting consequences on him. Although Jones was denied his right to use the word "liberty," the trial court permitted Jones to emphasize to the jury that its decision would have significant consequences for him. The terms Jones was permitted to use aptly describe for the jury the impact their verdict could have upon Jones.
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> Given the clear determination of witness credibility by the jury, and the language Jones was permitted to use during closing argument, we reject any suggestion that the jury would have acquitted Jones but for the trial court's prohibition of the use of the word "liberty" during Jones's closing argument. Because the trial court's error did not result in prejudice to Jones, we deny this point on appeal.

In the case *sub judice*, there was a significant amount of evidence to support a verdict of guilty. Appellant testified and gave an alternative explanation for the various circumstances, which the jury was free to believe or disbelieve. The fact that the jury

found appellant guilty beyond a reasonable doubt is an indication, like in *Jones*, that they believed the evidence that the State produced. This Court does not believe that a discussion of the appellant's liberty in closing argument would have changed the jury's decision.

Finding no trial court error, we affirm the judgment of the circuit court.

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