UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2482

September Term, 2014

KEVIN MARSEY

v.

STATE OF MARYLAND

Wright,
Graeff,
Moylan, Jr., Charles E.
(Retired, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: July 11, 2016

Kevin Marsey, appellant, was convicted by a jury in the Circuit Court for Washington County of five counts of possessing a weapon in a correctional facility.[1] The court imposed a sentence that totaled fifteen years.[2]

On appeal, appellant presents the following three questions for our review:

> 1. Did the circuit court err in limiting defense counsel's direct-examination of appellant?
>
> 2. Did the circuit court err in permitting evidence of appellant's prior conviction?
>
> 3. Did the circuit court abuse its discretion in preventing permissible closing argument by defense counsel?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Correctional Officer Jeremey Knieriem, an employee of the Maryland Correctional Institution in Hagerstown ("MCI-H"), testified that, on June 16, 2014, at 8:45 a.m., he conducted a search of a cell shared by appellant and Anthony Russomanno.[3] Officer Knieriem noticed that the mattress on the bottom bunk, which belonged to appellant, had a different color thread, looked as if it had been sewn, and had a small tear on the side.

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[1] All five counts of the information charged appellant with possession of a weapon, pursuant to Maryland Code (2013 Supp.) § 9-414(a)(4) of the Criminal Law Article ("CR"). That section provides: "A person detained or confined in a place of confinement may not knowingly possess or receive a weapon." CR § 9-414(a)(4).

[2] Appellant was sentenced to five years on Count 1, with consecutive sentences of five years on both Count 2 and Count 4. Count 3 merged into Count 2; and Count 5 merged into Count 4 for sentencing purposes.

[3] The State and appellant stipulated that appellant was incarcerated in a place of confinement during the relevant period.

Officer Knieriem pulled out appellant's mattress, tore its seams, and pulled out the stuffing. He found several metal and plastic objects, five of which were sharpened. Officer Knieriem identified the five sharpened objects at trial, classifying them as "[h]omemade weapons." Officer Knieriem stated that an inmate's mattress "goes with the inmate."

Officer Knieriem noticed that a cell locker, which was shared by the inmates, was missing a hinge and had a piece of sharp metal broken off and hanging from the locker. The metal weapons and the damaged locker were the same color, and Officer Knieriem believed that the weapons could have been made from the locker metal. He had never encountered an inmate with five weapons stashed in his cell.

Correctional Officer Justin Chappell accompanied Officer Knieriem on the search of appellant's cell. He confirmed that appellant's mattress contained five weapons. He did not know when the locker had been tampered with, or how long the items had been in appellant's mattress.

Lieutenant Jeffrey Coulter, the uniform manager at MCI-H, was called to appellant's cell to photograph the weapons found in the mattress. He also took a handwritten statement from appellant, in which appellant stated that "[a]ll the knives found in [the cell] are mine because the Dawgs got me holding . . . for them." Lieutenant Coulter explained that "Dawgs" stands for "DMI," "Dead Man's Incorporated," which he described as "a security threat group" or a "group of members that form a gang . . . and . . . have their own community." Appellant did not tell Lieutenant Coulter that DMI had threatened him.

Appellant testified on his own behalf. He recalled telling Lieutenant Coulter that he had weapons in his mattress because "DMI forced [him] to hold them." Appellant

explained that DMI told him numerous times that, if he "didn't hold those knives they were going to stab [him] with them." Appellant believed that he was in immediate danger of death or serious bodily harm if he did not hold the weapons. He feared that, if he reported the threats or transferred to another institution, he still would not be safe, and he "would have got [sic] stabbed either way or hit or assaulted badly, either way." Appellant testified that "DMI is everywhere," and even in protective custody, "they can get you." He stated that DMI gave him a weapon to hold about once a month, and he had been threatened as recently as a week or two prior to the weapons being found in his cell. Appellant named "Speedy" and "Tommy" as two of the DMI gang members who had threatened him.

In rebuttal, Detective Sergeant Fagan, an investigator with the Department of Public Safety in the Intelligence and Investigative Division, testified that inmates can report violations by other inmates anonymously, and the correctional facility can protect the reporting inmate by moving him to a different location, perhaps even to an individual cell. He acknowledged that other inmates in protective custody would have access to each other. He also stated that the prison keeps a database of inmates in particular security threat groups, and if an individual had an issue with a security threat group, he would not be placed in protective custody with a member of that group.

At the conclusion of evidence, the court instructed the jury regarding the defense of duress, tracking the language of Maryland Criminal Pattern Jury Instruction 5:03, as follows:

> You have heard evidence that the defendant acted under the influence of an overpowering force. This is called duress. You are required to find the defendant not guilty if all of the following four factors are present.

> Number one, the defendant actually believed that the duress placed him in immediate and impending danger of death or serious bodily harm.
>
> Number two, the defendant's belief was reasonable.
>
> Number three, the defendant had no reasonable opportunity for escape.
>
> And number four, the defendant committed the crime because of duress.
>
> The defense of duress is not established by proof that the defendant had been threatened with violence at an earlier time. He must have been under a present threat [at] the time of the commission of the crime charged.
>
> In order to convict the defendant, the State must prove that the defendant did not act under duress. This means that you are required to find the defendant not guilty unless the State has persuaded you beyond a reasonable doubt that at least one of the four factors of duress was absent.

DISCUSSION

I.

Direct Examination of Appellant

Appellant contends that the trial court erred in limiting his testimony on direct examination. In support, he points to four questions to which the court sustained the State's objections. He asserts that, in sustaining these objections, the "trial court prevented [appellant] from testifying about his personal experiences with DMI, his understanding of the group's practices, and his anticipated release date." "Such testimony," he argues, was relevant to his duress defense and "would have had a direct bearing on whether [he] had a legitimate, reasonable belief that he faced immediate danger unless he possessed the shank-like items."

The State contends that the trial court acted within its discretion in sustaining its objections to "speculative and irrelevant questions." It further argues, that even if there was error, it was harmless error that does not require reversal of appellant's convictions.

A.

Proceedings Below

The rulings at issue here involved four specific objections during appellant's testimony, as follows:

1.

> [APPELLANT'S COUNSEL]: And . . . based on the threat that was made to you, did you . . . believe that you were in immediate and pending danger of death or serious bodily harm?
>
> A. Yes.
>
> Q. And . . . how – In your experience in the Division of Corrections, how frequently do . . . people get assaulted by DMI?
>
> [THE STATE]: Objection your Honor.
>
> THE COURT: Sustained.

2.

> [APPELLANT'S COUNSEL]: When is your . . . current projected release date from the . . . Maryland Division of Corrections?
>
> [THE STATE]: Objection.
>
> THE COURT: Sustained.
>
> [APPELLANT'S COUNSEL]: Your Honor, I believe it would go to one of the elements of the duress defense.
>
> THE COURT: Objection is sustained.

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[APPELLANT'S COUNSEL]: . . . What do you believe the consequences for you would have been if you would have ratted or snitched?

A. I would have got stabbed either way or hit or assaulted badly, either way.

Q. And, and you're going to be likely at Maryland Correctional Institution for a number of years to come, is that correct?

A. Yes.

[THE STATE]: Objection.

THE COURT: Sustained.

3.

[APPELLANT'S COUNSEL]: Thank you your Honor. Is there any way for you to avoid contact with members of DMI in the Maryland Correctional Institution?

A. Probably if I rat and snitch and go on PC, protective custody.

Q. And . . by "rat and snitch" you mean inform on members of DMI to staff at the [facility], is that correct?

A. Yes.

Q. And . . . is there any reason why you would not want to do that?

A. Because DMI is everywhere, even on PC, they can – they can get you.

[THE STATE]: Objection.

[APPELLANT]: Anywhere.

THE COURT: . . . sustained.

4.

[APPELLANT'S COUNSEL]: . . . Have you personally observed members of DMI engaging in violence against –

[THE STATE]: Objection.

Q. – other individuals?

THE COURT: Sustained.

[APPELLANT'S COUNSEL]: No further questions your Honor.

B.

Legal Standards

"The right to testify on one's own behalf is guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution." *Belton v. State*, 152 Md. App. 623, 634, *cert. denied*, 378 Md. 617 (2003). That absolute right, however, does not extend to allowing defendants to present otherwise inadmissible or improper evidence during their testimony. *See, e.g., Dallas v. State*, 413 Md. 569, 582 (2010) ("The right to testify, however, 'is not without limitation.'") (quoting *Rock v. Arkansas*, 483 U.S. 44, 55 (1987)). Indeed, rules excluding certain evidence from criminal trials "do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (quoting *Rock*, 483 U.S. at 54).

Trial courts retain discretionary power to control the examination of all witnesses, including defendants testifying in their own behalf. Md. Rule 5-611. Rule 5-611(a) provides: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." We review a

trial court's ruling in this regard under the abuse of discretion standard, reversing only when the trial court's action "'impair[s] the ability of the defendant to answer and otherwise receive a fair trial.'" *Myer v. State*, 403 Md. 463, 476 (2008) (quoting *State v. Hepple*, 279 Md. 265, 270 (1977)).

To be admissible, evidence must be relevant. *See* Md. Rule 5-402 ("Evidence that is not relevant is not admissible."). Maryland Rule 5-401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence is admissible subject to the court's exercise of discretion to exclude it "'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *Odum v. State*, 412 Md. 593, 615 (2010) (quoting Md. Rule 5-403).

To determine whether the questions that defense counsel asked would have elicited evidence relevant to the defense of duress, we must look to elements of that defense. The Court of Appeals has noted that threats by identified gang members permits a jury to infer that the defendant had a "well-grounded apprehension of death or serious bodily injury" if he or she did not commit the crime. *McMillan v. State*, 428 Md. 333, 356 (2012). As this Court has explained, however:

> "In order to constitute a defense, the duress by another person on the defendant must be present, imminent, and impending, and of such a nature as to induce well grounded apprehension of death or serious bodily injury if the act is not done. It must be of such a character as to leave no opportunity

> to the accused for escape. Mere fear or threat by another is not sufficient nor is a threat of violence at some prior time."

Id. at 348 (quoting *Frasher v. State*, 8 Md. App. 439, 449 (1970)).

Here, appellant was permitted to testify that he was threatened by DMI. The questions to which the court sustained objections merely involved an awareness that members of DMI engaged in violence and a subjective belief that the members were dangerous. As the State notes, such evidence "does not in any way show that [appellant] possessed an objectively reasonable fear of imminent harm at the time prison officials found the weapon in [appellant's] mattress."

With respect to the question regarding appellant's release date, as the State correctly notes, the duress defense requires that the person believes that he is in immediate, imminent danger of harm. That a person may fear harm in the future is not sufficient, and therefore, that appellant was going to be incarcerated for a long time was irrelevant. *See McMillan v. State*, 428 Md. 333, 348 (2012) ("'The defense cannot be raised if the apprehended harm is only that of property damage or future but not present personal injury.'") (quoting *Frasher v. State*, 8 Md. App. 439, 449 (1970)). The circuit did not abuse its discretion in sustaining the objections and restricting appellant's testimony in this regard.

II.

Appellant's Prior Conviction

Appellant next argues that the trial court abused its discretion in ruling that appellant could be impeached with his 2011 conviction for first degree rape. Although he agrees that first degree rape is an infamous crime that may be used to impeach the credibility of a

witness, and that the date of the conviction was within the time allowed for impeachment, he asserts that the trial court abused its discretion in admitting the evidence because first-degree rape is similar to possessing a weapon in a correctional facility, and therefore, it created a "high risk of causing the jury to convict [him] merely because he was a convicted rapist."[4] The State contends that the trial court acted within its discretion in admitting the evidence after balancing the probative value of appellant's prior conviction against the risk of unfair prejudice.

Maryland Rule 5-609 pertains to impeachment by evidence of a prior conviction of a crime. It states, in pertinent part, as follows:

> (a) **Generally.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.
>
> (b) **Time limit.** Evidence of a conviction is not admissible under this Rule if a period of more than 15 years has elapsed since the date of the conviction.

Rule 5-609 seeks to balance the competing rights of a defendant to testify in his own defense and the State to impeach that defendant by presenting evidence of his past convictions. *Jackson v. State*, 340 Md. 705, 713 (1995). It was designed to prevent a jury

[4] After the ruling, appellant elicited the evidence of his prior conviction. He asserts that, by drawing "the sting" on direct examination, rather than waiting for the State to elicit the conviction on cross-examination, he did not waive his objection to the court's ruling on his motion in limine. We agree. *See Cure v. State*, 421 Md. 300, 322-23 (2011) (holding that where the trial court ruled that defendant could be impeached with prior conviction, defense did not waive issue by drawing sting).

from convicting a defendant based on his past criminal record or because the jury thinks he is a bad person. *Id.* at 715. To minimize the danger of prejudice, the Rule "imposes limitations on the use of past convictions in an effort to discriminate between the informative use of past convictions to test credibility, and the pretextual use of past convictions where the convictions are not probative of credibility but instead merely create a negative impression of the defendant." *Id.* at 715-16.

Rule 5-609 creates a three-part test for determining the admissibility of prior convictions for impeachment purposes:

> "First, subsection (a) sets forth the 'eligible universe' for what convictions may be used to impeach a witness's credibility. This universe consists of two categories: (1) 'infamous crimes' and (2) 'other crimes relevant to the witness's credibility.' Infamous crimes include treason, common law felonies, and other offenses classified generally as *crimen falsi*. If a crime does not fall within one of the two categories, then it is inadmissible and the analysis ends. This threshold question of whether or not a crime bears upon credibility is a matter of law. If a crime falls within one of the two categories in the eligible universe, then the second step is for the proponent to establish that the conviction was not more than 15 years old, that it was not reversed on appeal, and that it was not the subject of a pardon or a pending appeal. Finally, in order to admit a prior conviction for impeachment purposes, the trial court must determine that the probative value of the prior conviction outweighs the danger of unfair prejudice to the witness or objecting party. This third step is clearly a matter of trial court discretion."

Cure v. State, 421 Md. 300, 324 (2011) (quoting *State v. Westpoint*, 404 Md. 455, 477-78 (2008)).

Here, appellant agrees that first degree rape is an infamous crime because it originated as a common law felony. *See Robinson v. State*, 4 Md. App. 515, 523 n.3 (1968) ("The common law felonies were murder, manslaughter, robbery, rape, burglary,

larceny, arson, sodomy and mayhem."). He also does not dispute that the conviction was within the time period allowed by Rule 5-609.

Rather, his contention focuses on the third part of the three-part test, whether the probative value of the evidence outweighed the danger of unfair prejudice. *Cure*, 421 Md. at 325. In making that determination, courts typically weigh five, nonexhaustive factors:

> "(1) the impeachment value of the prior crime; (2) the point in time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the . . . charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility.'"

Id. (quoting *Jackson*, 340 Md. at 717).

The State contends that the crime, which was relatively recent, had a "very high impeachment" value. Appellant does not dispute this assertion. With respect to the third factor, notwithstanding appellant's protests to the contrary, his rape conviction had no similarity with the charged crime of possession of weapons in a correctional institution. Fourth, given that appellant's entire defense was an affirmative defense that could only be established by his testimony, his testimony was important to the case. With respect to the fifth factor, because appellant was the only source of his duress defense, his credibility was central to the case. Weighing these factors, we conclude that the circuit court did not abuse its discretion in admitting evidence of appellant's prior rape conviction.

III.

Closing Argument

Appellant's final argument is that the trial court committed reversible error "in forbidding defense counsel from arguing in closing that the lack of any evidence showing

that [appellant] used the items demonstrated his innocence." He argues that the "fact that the State did not charge [him] with actually using the weapons did not mean evidence of use, or lack thereof, was irrelevant."

The State contends that "the trial court was within its discretion in curtailing the defense closing argument about irrelevant issues." It asserts that, in a case where appellant "admitted repeatedly . . . to possessing the weapons, and where the only issue was whether he was acting under duress throughout his period of possession," appellant's counsel's "sudden foray into the legally and factually irrelevant question of the 'use' of the weapons, and 'blood' on the same, was downright bewildering." Evidence of "use," it asserts, "would have been an irrelevant comment" that "did not have the faintest connection to anything at issue at trial," and therefore, it "risked creating a legal confusion in the minds of jurors."

A.

Proceedings Below

In closing arguments, appellant's counsel attempted to argue that appellant's innocence was shown by the fact that there was no evidence that he actually used the weapons found in his cell. The following transpired.

> [APPELLANT'S COUNSEL]: Now there is another nuance in the law to the fact that the . . . items in question . . . must be found to be a weapon and certainly I'm not going to argue that these are things that could be used to hurt somebody else. But you have heard no testimony, no indication that [appellant] intended to hurt anybody with these things. You've heard no testimony that they were presently available for him to use, they were sewn into a mattress. You've heard no testimony that they were ever actually used. There has been no evidence –

[THE STATE]: Your Honor, I'm going to object.

[APPELLANT'S COUNSEL]: -- there was blood on them.

[THE STATE]: Those aren't requirements of the law.

THE COURT: He's correct. He's correct, [appellant's counsel].

[APPELLANT'S COUNSEL]: I believe I'm required to comment on the absence of evidence.

THE COURT: Excuse me?

[APPELLANT'S COUNSEL]: I believe, I'm, I'm allowed to comment on the absence of evidence.

THE COURT: Well you can certainly comment about that but the question is as to what a weapon is. I think you are stepping far afield at this point.

B.

Closing Argument was Properly Limited to the Issues

It is well established that "'attorneys are afforded great leeway in presenting closing arguments to the jury.'" *Pickett v. State*, 222 Md. App. 322, 329 (2015) (quoting *Degren v. State*, 352 Md. 400, 429 (1999). *Accord Sivells v. State*, 196 Md. App. 254, 270 (2010), *cert. dis'd as improv. granted*, 421 Md. 659 (2011). "'As to summation, it is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is afforded a wide range.'" *Donati v. State*, 215

Md. App. 686, 730 (quoting *Wilhelm v. State*, 272 Md. 404, 412 (1974)), *cert. denied*, 438 Md. 143 (2014).

Nevertheless, there are limitations upon the scope of a proper closing argument. The Court of Appeals has emphasized that "'counsel should not be permitted by the court, over proper objection, to state and comment upon facts not in evidence or to state what he could have proven.'" *Pickett*, 222 Md. App. at 330 (quoting *Wilhelm*, 272 Md. at 413). *Accord Lee v. State*, 405 Md. 148, 166 (2008) (improper to make comments "that invite the jury to draw inferences from information that was not admitted at trial"). In other words, although "'liberal freedom of speech should be allowed,'" 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 to opposing counsel.'" *Id.* at 163 (quoting *Wilhelm*, 272 Md. at 413).

The determination and scope of closing argument is within the sound discretion of the trial court. *Wise v. State*, 132 Md. App. 127, 142, *cert. denied*, 360 Md. 276 (2000). An appellate court should not "'interfere with that judgment unless there has been an *abuse of discretion* by the trial judge of a character likely to have injured the complaining party.'" *Washington v. State*, 180 Md. App. 458, 473 (2008) (quoting *Wilhelm*, 272 Md. at 413. "'Abuse of discretion' . . . has been said to occur 'where no reasonable person would take the view adopted by the [trial] court,' or when the court acts 'without reference to any guiding rules or principles.'" *Nash v. State*, 439 Md. 53, 67 (quoting *North v. North*, 102 Md. App. 1, 13 (1994)), *cert. denied*, 135 S. Ct. 284 (2014).

Here, the State was required to prove beyond a reasonable doubt that appellant knowingly possessed the weapons. The uncontested evidence, including appellant's own admission, supported a finding of possession. Appellant's affirmative defense was that he possessed the weapons under duress. Neither the crimes charged, nor the affirmative defense, involve evidence of "use" of the weapons. Thus, appellant's counsel's line of argument was not only irrelevant to the factual issues in the case, but it risked creating confusion in the minds of the jurors. Because the State did not have to prove "use," appellant's counsel's arguments were incorrect and misleading, and the court properly exercised its discretion in limiting appellant's closing argument to the charges at issue.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.