UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 360

September Term, 2016

LEUMAS ERIC WHITE

v.

STATE OF MARYLAND

Graeff,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: March 20, 2017

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

A jury in the Circuit Court for Prince George's County convicted Leumas White, appellant, of first-degree assault, using a firearm in the commission of a crime of violence, and wearing and carrying a firearm. Appellant was sentenced to a total of 45 years' imprisonment, with all but seven years suspended. In this appeal, appellant presents the following questions for our review, which we rephrase:[1]

1. Did the trial court err in failing to grant a mistrial or, in the alternative, in failing to give an immediate curative instruction following an improper comment by the State during appellant's testimony?

2. Did the trial court err in overruling defense counsel's objection to a comment made by the State during closing arguments regarding the law of self-defense?

For reasons to follow, we answer both questions in the negative and affirm the judgments of the circuit court.

BACKGROUND

On July 18, 2007, appellant was involved in an altercation with another man, Taiwan Sadler. Two days later, Mr. Sadler confronted appellant outside of a barbershop. As he did, Mr. Sadler attacked appellant with a knife, cutting him on the arm. Appellant tried to run away, but Mr. Sadler chased after him, and the two began fighting, after

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[1] Appellant phrased the questions as:

1. Whether the court abused its discretion in failing to grant a mistrial or give a timely curative instruction when the prosecutor sarcastically called appellant Leumas White "a nice murderer."

2. Whether the court abused its discretion in allowing the prosecutor to mischaracterize the law of self-defense in closing rebuttal argument to suggest an affirmative duty to retreat in every case.

which appellant managed to break free and run inside the barbershop. Mr. Sadler left and went to a nearby house with some "friends," who had come upon the scene during the altercation.

Appellant then obtained a gun from someone inside of the barbershop, put it in his pocket, and left. Shortly thereafter, Mr. Sadler, who had come back to the area of the barbershop, confronted appellant and threatened to kill him. Appellant observed Mr. Sadler "grab something from off his hip," at which time appellant could see a knife in Mr. Sadler's hand. Having already retrieved the gun from his pocket, appellant fired approximately five shots in Mr. Sadler's direction. Mr. Sadler spun around, but he did not fall to the ground, so appellant "ran over" and hit him in the back of the head with the gun. Mr. Sadler fell to the ground, and appellant fled the scene. Mr. Sadler was later transported to the hospital, where he was pronounced dead, the cause being "multiple gunshot wounds." Appellant was arrested and charged with several crimes, including first-degree murder, second-degree murder, voluntary manslaughter and first-degree assault.

At trial, appellant testified to the above events, claiming that he shot Mr. Sadler in self-defense. Several other witnesses to the shooting testified as well. One witness, Javen Mike, testified that appellant shot Mr. Sadler "five times, then he smacked him with the gun." Another witness, Richard Ball, testified that appellant shot Mr. Sadler "until the gun was empty" and then "put it to his head and tried to pull it," but the gun "didn't fire." Mr. Ball also testified that Mr. Sadler "was in the process of falling" when appellant "hit him with the gun."

During the State's cross-examination of appellant, the prosecutor asked appellant why he did not call the police when he went inside the barbershop prior to shooting Mr. Sadler. Appellant responded that he "wasn't trying to get [Mr. Sadler] locked up," and the prosecutor stated: "Oh, aren't you a nice murderer." Defense counsel objected and requested a bench conference, during which the following colloquy ensued:

> [DEFENSE]: I move for a mistrial. The State just uttered aren't you a nice murderer as she walked back towards the jury.
>
> THE COURT: I didn't hear that.
>
> [DEFENSE]: I'm sure she'll speak up if she didn't say that.
>
> [STATE]: I did mumble that.
>
> [DEFENSE]: I want to consult with my client before I follow through with my request, but that's outrageous.

The court then held a brief recess, and the jury was excused. After discussing the matter with appellant, defense counsel informed the court that appellant did not want a mistrial; rather, he wanted the court to immediately inform the jury that the prosecutor's comment was inappropriate and inadmissible as evidence. At this time, the following colloquy ensued:

> THE COURT: Well, all right. The State acknowledged that the State was inappropriate and she regrets it. With regard to the statement of the murder, quite frankly, she's been using the word murder throughout the whole trial; and it hasn't been objected to. You know, I mean the State has been calling it a murder the entire trial.
>
> Other thing, I think it would be a specific commentary at this point would unfair attention [sic] as a rebuke to the State. However, in my instructions, and I was looking at the instructions, we can include a sentence

essentially saying, you know, comments of the attorneys are not evidence and should not be considered as evidence.

However, going forward, you should ask a question, get an answer. I don't know if you're aggressive or not, but the comments that are not questions you should stop going forward.

[STATE]: The State will.

[DEFENSE]: Okay….I should at least spend a moment with my client and tell him [that] the Court is refusing to give an instruction here and now and see if that changes his position, because I need to make requests in his best interest. So, I anticipated that it would be addressed since it is conceded and since it's heard and it is inappropriate.

* * *

THE COURT: Let me ask you this question. I already made my decision, but the comment was inappropriate why the [sic] do you think it is prejudicial is [sic] going to impact the jury's deliberations?

[DEFENSE]: When a seasoned homicide prosecutor with passion that this one has about the cross-examination reaches a conclusion and calls somebody a murderer in front of the jury –

THE COURT: But, that's her whole case.

[DEFENSE]: Prosecutors have to put on a case when they're given a case. Some have more conviction about their positions than others. Some have zeal that comes through to a jury that may sway a jury based on their level of passion. This prosecutor not only is undertaking a very rigorous cross-examination, but in between questions takes advantage of extraneous commentary, including stuff that is so over the top inappropriate within the purview and the earshot of the jury without repercussion. I think it invites.

THE COURT: No. I don't think it is without repercussion, but I'm just not doing what you asked me to do. Again, I will say the past three days she's been referring to this whole incident as a murder the whole time. They've heard her use the word murder.

[DEFENSE]: My client is charged with murder, so characterizing it as a murder. You allege that he is a murderer through your charging document. It is for them to decide. That is my position.

THE COURT: That's why I think it is an appropriate thing to make a commentary. I think it could be just within the instructions that comments – when we talk about opening statements and closing arguments are not evidence, also include a sentence that says any commentary or comments that either attorney made or may make about this case is not evidence.

[DEFENSE]: It is not about the case necessarily. It is about the person, which is even worse.

THE COURT: I'm willing to entertain how you want me to phrase it exactly.

[DEFENSE]: Can I have one moment?

THE COURT: Go ahead.

Defense counsel then renewed his motion for a mistrial based on "all of the events that have already been documented." The court asked defense counsel if he would be satisfied if the court gave "an instruction after redirect, after the witness is finished testifying in general." Defense counsel responded that he wanted the court to "tend to it now" and then suggested that the jury be polled. The State objected to a polling, and the following colloquy ensued:

THE COURT: Well, I think the less intrusive way to give instruction as opposed to polling. I do think it obviously brings

attention. I'm still thinking about whether I want to give the instruction now. I think I am going to give the instruction at the end of the witness testifying.

[DEFENSE]: Okay.

THE COURT: I'll deny your motion for a mistrial.

[DEFENSE]: All right. And then at the end of the witness' testimony?

THE COURT: I will give the instruction….I am basically going to say during the course of this trial or during the course of this witness – really I should say during the course of the trial because it is – I want to remind the jurors that any comments that either attorney may make is not evidence about the case, essentially. But, the evidence that you will use to consider would be the witness' testimony; and it came from the witness stand.

[DEFENSE]: Okay. Just for record purposes, I object to that as being insufficient. I think the instruction should be made now with all due respect.

* * *

THE COURT: All right. I am going to give the general instruction that I just stated, again after the witness' testimony. So, the objection is noted…for the record.

The State then continued with its cross-examination of appellant. Following defense counsel's redirect examination of appellant, the court instructed the jury as follows:

> I just wanted to remind you all that the comments made by attorneys in this case are not evidence in this case. Any commentary or statements they made are not evidence in the case. The evidence you heard in this case came from the actual witness stand and any physical exhibits that got admitted into evidence. But, the comments and statements of the attorneys are not evidence.

Later, during its general instructions to the jury, the court gave the following instruction:

> In making your decision, you must consider the evidence in this case, that is testimony from the witness stand, physical evidence or exhibits admitted into evidence….The following things are not evidence and you should not give them any weight or consideration: any testimony that I struck or told you to disregard, any exhibits that I struck or did not admit into evidence, questions that the witnesses were not permitted to answer and objections of the lawyers. When I did not permit the witness to answer a question, you must not speculate as to the possible answer. If after an answer was given, I ordered that the answer be stricken, you must disregard both the question and the answer.

Also during its general instructions, the court provided the jury with instructions on the elements of the charged crimes and self-defense:

> The defendant is charged with assault. Assault is causing offensive physical contact to another person. In order to convict the defendant of assault, the State must prove that the defendant caused offensive physical contact with or physical harm to the victim, that the contact was the result of an intentional or reckless act of the defendant and was not accidental, and that the contact was not consented to by the victim or not legally justified.
>
> The defendant is charged with the crime of first degree assault. In order to convict the defendant of first degree assault, the State…also must prove that the defendant used a firearm to commit the assault, or the defendant intended to cause serious physical injury in the commission of the assault.
>
> * * *
>
> The defendant is charged with the crime of murder….In order to convict the defendant of murder, the State must prove that the defendant did not act in any complete self-defense or partial self-defense.
>
> If the defendant did act in complete self-defense, your verdict must be not guilty. If the defendant did not act in complete self-defense, but did act in partial self-defense, your verdict must be guilty of voluntary manslaughter and not guilty of murder.

> Self-defense is a complete defense, and you're required to find the defendant not guilty if all the following four factors are present: one, the defendant was not the aggressor, or although the defendant was the initial aggressor, he did not raise the fight to the deadly force level; two, the defendant actually believed he was in immediate and imminent danger of death or serious bodily harm; three, the defendant's belief was reasonable; and four, the defendant used no more force than was reasonably necessary to defend himself in light of the threatened or actual force.
>
> This limit on the defendant's use of deadly force requires the defendant to make a reasonable effort to retreat. The defendant does not have to retreat if the defendant was in his or her home, retreat was unsafe, the avenue of retreat was unknown to the defendant, the defendant was being robbed or the defendant was lawfully arresting the victim.
>
> In order to convict the defendant of murder, the State must prove that self-defense does not apply in this case. This means 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 complete self-defense was absent.

Following the court's instruction, the parties presented closing arguments to the jury. Among other things, defense counsel argued that the jury should find that appellant acted in self-defense because, in part, "the law does not require retreat where retreat is unsafe" and "the law allows the use of deadly force in this situation." During its rebuttal argument, the State argued that "the law requires [appellant] to at least attempt to retreat." Defense counsel objected, arguing that the State's comment was "a mischaracterization of the law." The court overruled the objection, and the State continued with its argument:

> [Appellant] doesn't even try to retreat. What does he do? He gives us an excuse. Now I am fatigued because I have lost all of this blood and I'm feeling woozy so I can't retreat. Nobody said you had to turn your back and run. You can back up. If his version is to be believed, you can back up. Yes, you can fire a warning shot. There was so much space between that witness stand and the court reporter. There was an opportunity for him to retreat if that's what happened.

Following closing arguments, the court excused the jury to the jury room for deliberations. Some time later, the court received a note from the jury that stated: "What is classified as offensive physical contact? Is it direct or indirect contact?" The court responded that the jury should "refer back to the jury instructions as provided." The jury ultimately found appellant not guilty of murder but guilty of first-degree assault and two handgun offenses.

DISCUSSION

I.

Appellant first argues that the State's characterization of appellant as a "nice murderer" was improper and that the trial court "had an obligation to promptly withdraw the specific comment from the jury's consideration." Appellant maintains that the trial court failed in this obligation when it "delivered an untimely, general instruction" at the end of appellant's testimony. Appellant maintains, therefore, that the trial court deprived appellant "of his right to a fair trial when it denied his motion for a mistrial, and then failed to sufficiently cure the prosecutor's prejudicial remark with a prompt and thorough curative instruction."

The State contends that the trial court properly denied appellant's motion for a mistrial "because there was no prejudice to the defense from the [State's] single, isolated statement." The State also contends that, even if the denial of appellant's motion was improper, any error was harmless because the jury acquitted appellant of the murder charges and because there was ample evidence to support the jury's finding of guilt on the assault charge.

"It is well-settled that a decision to grant a mistrial lies within the sound discretion of the trial judge and that the trial judge's determination will not be disturbed on appeal unless there is an abuse of discretion." *Carter v. State,* 366 Md. 574, 589 (2001). "The possible prejudice that a defendant may suffer as a result of alleged misconduct forms the threshold for the decision whether to grant a mistrial." *Cooley v. State,* 385 Md. 165, 173 (2005). "The trial judge must evaluate the circumstances of the case and '[i]n assessing the prejudice to the defendant, the trial judge first determines whether the prejudice can be cured by instruction.'" *Id.* (internal citation omitted). "If a curative instruction is given, the instruction must be timely, accurate, and effective." *Carter,* 366 Md. at 589. "Unless the curative effect of the instruction ameliorates the prejudice to the defendant, the trial judge must grant the motion for a mistrial." *Kosh v. State,* 382 Md. 218, 226 (2004).

Nevertheless, "[a] mistrial is not a sanction designed to punish an attorney for an impropriety." *Choate v. State,* 214 Md. App. 118, 133 (2013) (*citing Behrel v. State,* 151 Md. App. 64, 142 (2003)). Rather, a mistrial is "an extreme sanction that sometimes must be resorted to when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice." *Id.* As such, a denial of a motion for a mistrial will be reversed "only where 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Id.* (internal citation omitted). Moreover, such prejudice "must be shown as a 'demonstrable reality' and not as a 'matter of speculation.'" *Baldwin v. State,* 5 Md. App. 22, 28 (1968).

Thus, while it is generally improper for the prosecution to make remarks unsupported by the evidence or calculated to prejudice the defendant, "the fact that a remark made by the prosecutor in argument to the jury was improper does not necessarily compel that conviction to be set aside." *Wilhelm v. State,* 272 Md. 404, 415 (1974) (*abrogated on other grounds as recognized by Simpson v. State,* 442 Md. 446, 458 n. 5 (2015)). "[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." *Id.* at 415-16. "The applicable test for prejudice is whether we can say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Id.* at 416 (internal citation and quotations omitted). "The decisive factors are the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error." *Id.* (internal citations omitted).

That said, "[t]rial court judges are entitled to great deference in declaring a mistrial based on their assessment of the prejudicial impact of improper argument and, accordingly, shall be reversed only for an abuse of discretion." *Quinones v. State,* 215 Md. App. 1, 17 (2013). Such deference is due primarily to the fact that "the trial court 'is ordinarily in a uniquely superior position to gauge the potential for prejudice in a particular case.'" *Id.* at 18 (internal citation omitted). As the Court of Appeals explained in *State v. Hawkins,* 326 Md. 270 (1992):

> The fundamental rationale in leaving the matter of prejudice *vel non* to the sound discretion of the trial judge is that the judge is in the best position to evaluate it. The judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able to ascertain the demeanor of the witnesses and 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. at 278.

Applying the above principles to the present case, we hold that the trial court did not err in refusing to grant appellant's request for a mistrial. First, the evidence supporting appellant's convictions for first-degree assault and the two handgun offenses was ample, as appellant admitted to fighting with Mr. Sadler and eventually shooting and striking him with a handgun. The jury easily could have found that appellant assaulted Mr. Sadler at some point during the altercation while at the same time finding that appellant killed Mr. Sadler in self-defense. That the jury asked the court to clarify what constituted "offensive physical contact" suggests that the jury was considering the evidence in a nuanced and conscientious manner.

The jury's finding of not guilty on the murder charges also indicates that the State's suggestion that appellant was a "nice murderer" held little sway in convincing the jury that appellant was, in fact, a murderer. Thus, the severity of the remark was minimal, particularly given that the State had charged appellant with murder and had referred to the shooting as murder throughout the trial. In other words, it is unlikely that the State's characterization of appellant as a "nice murderer" influenced the jury to the prejudice of appellant given that the State had already implicitly characterized appellant as a "murderer" throughout the trial. The potential for prejudice is even more

incongruous in light of the fact that the trial judge, who was on the scene and had his finger on the pulse of the trial, did not even hear the comment.

Finally, even if the State's comment caused some minimal prejudice to appellant, such prejudice was sufficiently cured by the court's instructions to the jury. In deciding the sufficiency of a curative instruction following an improper comment by the State, "[w]e look at the trial judge's actions as a whole in reference to the statements." *Lawson v. State,* 389 Md. 570, 602 (2005). As the Court of Appeals has explained, "a significant factor in determining whether the jury were actually misled or were likely to have been misled or influenced to the prejudice of the accused is whether or not the trial court took *any* appropriate action, *as the exigencies of the situation may have appeared to require*[.]" *Wilhelm,* 272 Md. at 423-24 (emphasis added).

Here, the trial court issued its curative instruction after diligently assessing the severity of the State's comment, the exigencies of the circumstances, and the arguments from both the State and defense counsel. The court then addressed the comment by crafting a specific jury instruction, in which the court informed the jury that comments made by attorneys were not evidence. The court also informed the jury that the evidence "came from the actual witness stand and any physical exhibits that got admitted into evidence." Later, during its general instructions to the jury, the court reminded the jury that it was to base its verdict on the evidence, which included "testimony from the witness stand, physical evidence or exhibits admitted into evidence." Given the circumstances, and given the relatively slight prejudice inherent in the State's comment, we find the court's curative instruction sufficient.

Appellant argues that the evidence of assault was "not overwhelming" because "throughout the trial, the shooting and the assault were treated as a single exercise of self-defense, and the issue of whether they were separate events was never argued before the court." That the jury acquitted appellant of murder yet still found him guilty of first-degree assault suggests, according to appellant, that the State's comment "inflamed the jury" into believing that appellant "deserved to be punished." Appellant also contends that the trial court's instruction failed to sufficiently cure this prejudice. Relying on *Lawson v. State,* 389 Md. 570 (2005), *Lee v. State,* 405 Md. 148 (2008), and *Donaldson v. State,* 416 Md. 467 (2010), appellant maintains that the trial court's instruction was inadequate because it "failed to create a direct connection between the improper remark and the cure" and "failed to direct the jury's attention to the specific comment to be disregarded."

Appellant's arguments are unavailing. To begin with, the jury's verdict does not necessitate the leap in logic championed by appellant. Three witnesses, including appellant, testified that appellant shot Mr. Sadler five times *and then* hit him in the head with the gun. Given that the blow to the head did not contribute to Mr. Sadler's death, and given that Mr. Sadler was facing away from appellant when the blow was delivered, it is entirely plausible that the jury considered this act to be separate and distinct from the shooting.

Nevertheless, the jury's finding of guilt on the assault charge is hardly evidence that it was "inflamed," much less that such ire was brought about by an isolated remark that was neither heard by the trial judge nor repeated at any other point during the trial.

See Spain v. State, 386 Md. 145, 159 (2005) (noting that the State's improper comment was "an isolated event that did not pervade the entire trial."). Besides, had the jury wanted to "punish" appellant, as he suggests, they just as easily could have found him guilty of the more severe charges of murder or voluntary manslaughter. Instead, the jury found appellant not guilty of these charges, which suggests, at the very least, that the jury believed appellant's contention that he shot Mr. Sadler in self-defense, thus making it unlikely that the State's remark affected appellant's credibility in any discernible way. As noted, the question is not whether there is *any* possibility that the State's remark influenced the jury, but rather whether the jury was "*actually* misled or [was] *likely to have been* misled or influenced to the prejudice of the accused by the remarks of the State's Attorney[.]" *Wilhelm,* 272 Md. at 415-16 (emphasis added). Appellant's claims simply do not meet this threshold.

We similarly reject appellant's claim that the trial court's instructions were insufficient to cure the risk of prejudice. As previously explained, the instructions provided by the court were appropriate given the nature of the comment and the circumstances in which it was made. Moreover, the cases relied on by appellant in support are inapposite to the case at hand.

In *Lawson,* the Court of Appeals addressed the impropriety of statements made by the State during closing arguments. *Lawson,* 389 Md. at 575. There, the defendant was charged with various crimes related to the sexual abuse of a child and, during closing arguments, the prosecutor made several inappropriate comments, including that the jury should put themselves in the shoes of the victim, that the burden was on the defendant to

prove the victim was lying, and that the defendant was a "monster." *Id.* at 594-97. Although the trial court sustained defense counsel's objection to the first statement, the court overruled a subsequent objection to a different statement. *Id.* at 601. The trial court did instruct the jury, prior to closing arguments, that "closing arguments of lawyers are not evidence." *Id.*

The defendant was convicted, and after he noted an appeal, the Court of Appeals reversed. *Id.* at 604. In so doing, the Court noted that, although the State's comments, taken alone, may not have affected the defendant's right to a fair trial, "the cumulative effect of the prosecutor's remarks was likely to have improperly influenced the jury." *Id.* at 600, 604. The Court also noted that the "weight of the evidence was not overwhelming" and that the State's case "relied heavily upon the credibility of the victim." *Id.* at 604. Most notably, the Court found that the trial court's instruction to the jury was insufficient because it "was given only generally and then before oral argument when it could not address specifically the objectional remarks because they had not yet been made." *Id.* at 601. In the end, the Court concluded that "the trial court failed to correct multiple inappropriate statements made by the prosecution and as a result the [defendant] was denied his right to a fair and impartial trial." *Id.* at 608.

In *Lee, supra,* the Court of Appeals again addressed the impropriety of statements made by the State during closing arguments. *Lee,* 405 Md. at 152. There, the defendant was charged with, and ultimately convicted of, various crimes arising from a shooting. *Id.* at 153. At trial, the State made multiple comments during closing arguments suggesting that the "law of the streets" prevented the victim from identifying the shooter

and that the jury should "clean up the streets" by teaching the defendant a lesson. *Id.* at 155-60. Defense counsel objected several times during the State's argument, but the trial court overruled those objections. *Id.* At one point the court did interrupt the State's closing argument to inform the jurors "that appeals to passion and prejudice were not evidence," which reiterated an instruction the court gave during its general instructions prior to closing arguments. *Id.* Despite the court's instruction, the prosecutor continued making inappropriate remarks without further intervention by the court. *Id.* at 157-60.

After the defendant noted his appeal, the Court of Appeals reversed his convictions, holding that the trial court erred in permitting the State to make improper comments over defense counsel's objection. *Id.* at 179. The Court further held that this error was not harmless because the "cumulative effect of the prosecutor's comments was sufficiently prejudicial to deny [the defendant] a fair trial." *Id.* The Court explained that the State's comments "were not isolated comments but were part of persistent appeals to the jurors' biases, passions and prejudices" that continued "even after the trial court issued a curative instruction to the jury." *Id.* at 175. The Court also noted that the evidence against the defendant "was not overwhelming," as it relied primarily on the testimony of a single eye-witness. *Id.* Finally, the Court found the trial court's curative instruction wanting:

> The curative instruction was only issued after the "clean up the streets" argument, not contemporaneous with the "law(s) of the streets" comments, nor did it specifically address the "law(s) of the streets" arguments or inform the jury that the prosecutor's comments were improper. Moreover, the resulting prejudice of the comments, cumulatively, was exacerbated because the judge…allowed repeated improper comments even after the curative instruction was provided to the jury;…By summarily overruling

> multiple defense counsel objections before issuing his curative instruction, followed by yet another overruled objection, the trial judge conveyed to the jurors that there was nothing wrong with considering the prosecutor's [improper comments.]

Id. at 178.

In *Donaldson, supra,* the Court of Appeals was once again called upon to address the impropriety of statements made by the prosecution during closing arguments. *Donaldson,* 416 Md. at 473. In that case, while prosecuting the defendant on drug-related charges, the State argued that the jurors should convict the defendant to combat the drug problem. *Id.* at 477. Defense counsel objected, and the court overruled the objection. *Id.* Later, during its rebuttal argument, the State made other comments in which the prosecutor appeared to be "vouching" for the credibility of one of the State's witnesses, a police officer. *Id.* at 478. Defense counsel objected and moved to strike the comments, but the court overruled the objection. *Id.* The defendant was convicted. *Id.* at 479.

The Court of Appeals eventually reversed the defendant's convictions, holding that the admission of the statements was erroneous and that such error was not harmless. *Id.* at 496, 500. In employing its harmless error analysis, the Court first noted that the prosecutor's remarks were not "isolated events" but rather were "an important part of" and "prominent in" the State's closing arguments. *Id.* at 497-98. The Court also noted that the "majority of the evidence against [the defendant] was strongly disputed at trial" and not "overwhelming." *Id.* at 500. Lastly, the Court noted that the trial court "gave the jury no contemporaneous instructions, curative, specific, or otherwise." *Id.* at 499. Although the trial court did provide general instructions regarding closing arguments, the

Court found these insufficient, in part because they were "given before closing arguments." *Id.* at 499.

When applying the facts and principles of the above cases to those of the instant case, several notable distinctions emerge. In each of the above cases, the trial court overruled timely objections and permitted the State to make improper comments, which the Court of Appeals held to be erroneous and not harmless beyond a reasonable doubt. In the present case, however, the trial court did not overrule any objections; rather, the court denied defense counsel's request for a mistrial, choosing instead to issue a curative instruction following the State's comment.

Moreover, in each of the above cases the State made repeated comments, which the Court of Appeals found to be significant given the nature of the remarks and their "cumulative effect." Here, the comment at issue was isolated, made in passing, and fairly benign. In short, there was little risk that the single, isolated comment in the present case evoked the same risk of prejudice as the more pervasive and persistent comments seen in the cases cited by appellant.

Finally, the trial court's response to the State's comment in the present case is not riddled with the same inadequacies faced by the Court of Appeals in the above cases. In *Lawson* and *Donaldson,* not only did the court overrule timely objections to the improper comments, but the only curative instruction came during the court's general instructions, which were issued *before* the improper comments. In *Lee*, although the court did issue a curative instruction after the first improper comment, the court failed to instruct the jury

after the second improper comment and then "exacerbated" the problem by overruling defense counsel's objections.

Conversely, the trial court in the present case addressed the State's comment with a specific jury instruction following appellant's testimony. Then, prior to closing argument, the court provided a more general instruction in which it reiterated some of the sentiments encapsulated in its prior instruction. Importantly, both of these instructions were delivered *after* the State's comment, thus providing a more acute remedy when compared with the more prophylactic measures employed by the trial courts in the above cases.

Appellant seems to suggest that the court's curative instruction was insufficient because it did not come *immediately* after the State's comment or direct the jury's attention to the *specific* comment it was required to ignore. We find neither factor to be of any significance. Although the Court of Appeals has stated that a curative instruction should be "contemporaneous," we found no language in the relevant case law quantifying the exact temporal connection between the comment and the instruction. Nor did we find any indication that the court was required to repeat the improper comment or instruct the jury as to the precise nature of the State's comment.

We did, however, locate a case – *Carter v. State,* 366 Md. 574 (2001) – in which the Court of Appeals held that a curative instruction could be *too* specific. In that case, inadmissible testimony was taken regarding the defendant's prior arrest, which prompted defense counsel to move for a mistrial. *Id.* at 589-91. Instead of granting the mistrial, the trial court issued several curative instructions, during which it "mentioned the arrest four

times." *Id.* at 591. The Court of Appeals ultimately held that the trial court abused its discretion in refusing to grant the mistrial, in part because "[t]he instruction as given, rather than being curative, highlighted the inadmissible evidence and emphasized to the jury that [the defendant] had been arrested previously." *Id.* As such, the Court determined that "[t]he purported curative instruction was inadequate to cure the prejudice." *Id.*

In the present case, the trial court recognized the inherent difficulty in issuing a curative instruction that highlighted the State's comment, as doing so would have drawn the jury's attention to a comment that it may not have heard.[2] Instead, the court discussed the matter at length with both the State and defense counsel and then crafted an instruction that dealt with the issue, but in more general terms. Then, the court allowed appellant to finish his testimony before giving the crafted instruction. In light of the circumstances, and for all the reasons stated herein, we find that the trial court responded appropriately to the State's comment. Accordingly, we hold that the trial court did not err in denying appellant's motion for a mistrial.

II.

Appellant next argues that the trial court erred in overruling defense counsel's objection to the State's comment during closing argument that "the law requires

[2] That the trial court justified its decision based on the potential prejudice to the State does not alter our assessment, as "[a] curative instruction is not always for the sole benefit of the defendant. The public has an interest in the conduct of 'fair trials designed to end in just judgments.'" *Carter v. State,* 366 Md. 574, 587 (2001) (internal citation omitted).

[appellant] to at least attempt to retreat." Appellant maintains that the State's comment conflicted with the court's instruction on self-defense because it suggested that all persons have a duty to retreat regardless of the circumstances. Appellant avers that the trial court, by overruling the objection, "affirmed a material mischaracterization of the law" and "neglected its duty to impart accurate and complete instructions to the jury." Appellant further avers that such error could not be deemed harmless, as the State's comment likely misled the jury and caused prejudice to appellant.

The State argues that the comment was not improper because the prosecutor "did not assert that all cases impose a duty to retreat; she merely argued that [appellant] had a duty to retreat." The State avers, therefore, that the prosecutor "was not making a blanket statement of law; instead, implicit in her remark was the argument (perfectly proper in closing) that [appellant] had a duty to retreat because under these circumstances, retreat was safe, so any exception to the duty did not apply."

"Closing arguments are an important aspect of trial, as they give counsel 'an opportunity to creatively mesh the diverse facets of trial, meld the evidence presented with plausible theories, and expose deficiencies in his or her opponent's argument.'" *Donaldson,* 416 Md. at 487 (internal citation omitted). "Counsel use that portion of the trial to 'sharpen and clarify the issues for resolution by the trier of fact in a criminal case' and 'present their respective versions of the case as a whole.'" *Whack v. State,* 433 Md. 728, 742 (2013) (internal citations omitted). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the

ultimate objective that the guilty be convicted and the innocent go free." *Id.* (internal citations and quotations omitted).

Generally speaking, "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[.]" *Lawson,* 389 Md. at 591 (internal citations and quotations omitted). Nevertheless, "[t]here 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." *Id.* (internal citations and quotations omitted). "Accordingly, we grant attorneys, including prosecutors, a great deal of leeway in making closing arguments." *Whack,* 433 Md. at 742. In this vein, we generally defer to the judgment of the trial court, as it "is in the best position to determine whether counsel has stepped outside the bounds of propriety during closing argument" *Id.* "As such, we do not disturb the trial judge's judgment in that regard unless there is a clear abuse of discretion that likely injured a party." *Id.* (internal citations and quotations omitted). "[A]nd we do not consider that discretion to be abused unless the judge exercises it in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law." *Brewer v. State,* 220 Md. App. 89, 111 (2014) (internal citations and quotations omitted).

In the present case, the court instructed the jury that appellant's use of deadly force required him to make a reasonable effort to retreat. The court also instructed the jury that retreat was not required if such retreat was unsafe. During closing argument, defense counsel reminded the jury of this point, arguing that "the law does not require

retreat where retreat is unsafe" and "the law allows the use of deadly force in this situation." In response, the State made the objected-to comment. The State immediately followed this comment by arguing that if appellant's testimony was to be believed, then he had the opportunity to retreat but did not.

Under the circumstances, the State's comment was reasonable and within the bounds of acceptable argument. Defense counsel's theory of the case was that appellant's killing of Mr. Sadler was legally justified because, in part, retreat was unsafe. The State's theory was that appellant did not even attempt a retreat despite having the opportunity to do so. Thus, the State's comment was an appropriate response to defense counsel's argument. Accordingly, the trial court did not abuse its discretion in overruling defense counsel's objection to the State's comment.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.