Circuit Court for Baltimore City
Case No.: 116187029-31

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2143

September Term, 2017

ANTHONY CLARK

v.

STATE OF MARYLAND

Woodward C.J.,
Leahy,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: November 7, 2018

*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.

On November 15, 2017, appellant, Anthony Jerome Clark Jr., was convicted by a jury sitting in the Circuit Court for Baltimore City of possession of a regulated firearm after having been convicted of a disqualifying crime.[1] The court sentenced him to fifteen years of incarceration without the possibility of parole. This timely appeal followed wherein he argues that the "trial court erred in allowing the State to mislead the jury about critical DNA evidence at closing argument" and that the evidence was legally insufficient to sustain his conviction. We disagree and affirm.

BACKGROUND

On June 10, 2016, 21 year-old De'Jhuan Colic, his girlfriend Destiny Fields, and a friend nicknamed "Pootie" were walking together in downtown Baltimore. As they passed the intersection of Baltimore and Charles Streets, Colic was attacked by a group of men who punched and kicked him to the ground. Fields testified that, during the assault, while Pootie had not tried to intervene, she had tried to push the men off Colic, but had been unsuccessful. After the assault the three continued two blocks down on Baltimore Street where they ran into a man named Miguel, who was close friends with Colic. Colic told Miguel about the fight, whereupon Miguel called out to two to three additional people to walk down to the corner where Colic had been assaulted. Once at the corner, Miguel discovered that he knew the people who had assaulted Colic, and that Pootie had not come

[1] The court declared a mistrial on the remaining counts, including murder and attempted murder, after the jury failed to reach a verdict on them. Appellant later pleaded guilty to the second-degree murder of Deandre Barnes, attempted murder of De'Jhuan Colic, and related firearm offenses, and was sentenced to a total one hundred years of incarceration, with all but ninety years suspended.

to Colic's aid during the assault. As a result, Pootie was then assaulted by the people who Miguel had brought with him, and the original assailants who had attacked Colic. Pootie was injured badly and was bleeding from his face.

After the assault on Pootie, Colic and Fields began to walk in the direction of 900 Pennsylvania Avenue, the location of their home, which they shared with Mia Harris Carlos. Before arriving there, they stopped at a takeout restaurant located nearby. It was approaching midnight. Inside the restaurant Colic recognized a friend of his, Deandre Barnes, who was there with a few of his friends. After receiving their food, Colic and Fields continued walking to their home. Barnes and his friends walked alongside them. It was approximately 1:30 a.m. on June 11th. As they arrived at the 900 block of Pennsylvania Avenue, and walked up to their house, they saw Harris Carlos standing on the front steps with a man dressed in black. As they got within two to three feet of the steps, the man asked who had "banked" or assaulted his brother. No one responded to the question, whereupon the man again asked who "banked" his brother. He then pulled out a gun and began shooting. Colic was shot once in the chest and began to run away and down the street to the corner of Martin Luther King Boulevard and Pennsylvania Avenue. Fields testified that, after Colic had been shot, she heard four to five more shots.

Colic collapsed at the intersection of Martin Luther King and Pennsylvania, whereupon Fields called 911. As Colic lay on the ground, he and Fields saw the shooter and Harris Carlos walk together, past their location. Colic was transported to the hospital to be treated for a bullet wound to the chest.

When the police responded to the location, they also discovered Barnes suffering from multiple gunshot wounds. Barnes died as a result of his injuries. He was thirteen years old.

Fields was transported to the police station where she advised the police that although she did not know the shooter, Harris Carlos would know his identity. Police detectives later interviewed Harris Carlos. After speaking with both Fields and Harris Carlos, the police developed appellant as a suspect. Fields was then shown a photo array containing appellant's photo, whom she identified as the shooter. Harris Carlos left Maryland before trial and was not present to testify. Colic was not forthcoming with information when interviewed by police, nor at trial.

Three spent cartridge cases were found on the ground in front of 907 and 909 Pennsylvania Avenue. Police obtained a search and seizure warrant for an apartment at 821 North Fremont Avenue[2] and executed it on the day after the shooting. Several articles of clothing and a couple of cell phones were recovered in the front room of the apartment. A backpack was collected from the rear room of the apartment. Inside the backpack was a .40 caliber glock handgun with seven cartridges and a magazine. Also in the backpack were several articles of clothing and a toothbrush. James Wagster, an expert in the field of firearms examination, identification, and comparison test fired the handgun and found it to be operable. He also compared the three spent cartridge casings found at the crime scene with the bullets he fired from the handgun during the test fire. In his expert opinion, the

[2] The significance of this location was not provided at trial.

spent cartridge casings found at the crime scene were fired with the handgun found at 821 North Fremont Avenue.

The handgun and several items taken from 821 North Fremont were swabbed for DNA and compared against the DNA profile of appellant, which had been obtained through a search and seizure warrant. The handgun "yielded a DNA profile consistent with an indeterminate mixture of at least four contributors," of which appellant was the greatest contributor.[3] A sample from the toothbrush found in the backpack with the handgun "yielded a DNA profile consistent with a major, single source male contributor and at least two indeterminate minor contributors. The major male profile is that of an unknown male." Additional items found inside the bag were not analyzed "due to the availability of other probative items."[4] A sample from the zipper and straps of the backpack "yielded a DNA profile consistent with an indeterminate mixture of at least six contributors."[5] Three sweatshirts found in the front room of the home were also swabbed and "yielded a DNA profile consistent with an indeterminate mixture" of at least four to five contributors.[5]

[3] A match between appellant and the DNA profile on the handgun was "59.6 quintillion (59,625,500,000,000,000,000) times more probable than a coincidental match to an unrelated individual in the African American population."

[4] These items included a pair of socks, a white belt, a pair of jean shorts, a pair of black pants, a pair of boxer shorts, a white t-shirt, a gray t-shirt, and an umbrella.

[5] "Due to the complexity of the genetic information available or the possibility of incomplete detection of genetic information, no definitive conclusions can be made whether an individual may or may not be a contributor to the DNA profile."

The parties stipulated that appellant "was previously convicted of a crime which thereby prohibits his possession of a regulated firearm such as a handgun under Public Safety Article 5-133(c)."

DISCUSSION

Closing Argument

Appellant argues that "the trial court erred in allowing the State to mislead the jury about critical DNA evidence at closing argument." We disagree.

"As a general matter, counsel are afforded 'great leeway' when presenting" their closing argument. *Francis v. State*, 308 Md. App. 1 (2012) (quoting *Donaldson v. State*, 416 Md. 467, 488 (2010)). A "trial court is in the best position to evaluate the propriety of a closing argument as it relates to the evidence adduced in a case." *Ingram v. State*, 427 Md. 717, 726 (2012). 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*.

"Closing argument, however, is not without limitation, in that the court should not permit counsel to state and comment upon facts not in evidence or to state what he or she would have proven." *Smith v. State*, 388 Md. 468, 488 (2005). "What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case." *Id*. "Not every improper remark, however, necessarily mandates reversal." *Degren v. State*, 352 Md. 400, 430 (1999).

An "error in closing argument is subject to harmless error review." *Fuentes v. State*, 454 Md. 296, 321 (2017) "Reversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury

to the prejudice of the accused." *Jones v. State*, 310 Md. 569, 580 (1987) (vacated and remanded on other grounds). "To determine 'whether overruling defense objections to improper statements during closing argument constitutes reversible, or harmless error,' we focus our attention on three factors: first, 'the weight of the evidence against the accused;' second, 'the severity of the remarks, cumulatively;' and third, 'the measures taken to cure any potential prejudice.'" *Fuentes*, 454 Md. at 321 (quoting *Lee v. State*, 405 Md. 148, 174 (2008)).

In closing, counsel for appellant argued that appellant's DNA found on the gun was not dispositive of the issue of whether appellant possessed the gun, because DNA present on clothing in the backpack could have transferred to the gun. He argued that since appellant was the largest contributor to the DNA profile found on the handgun, "if there was another match in [the clothing in the backpack], he would be [the largest contributor]." Defense counsel further argued that the clothing in the backpack was never examined for DNA and, therefore, the State could not prove beyond a reasonable doubt that appellant actually possessed the handgun because it could not prove that the DNA profile had not been transferred. During its rebuttal closing, the following occurred:

> [STATE]: Counsel talks about DNA and how we don't have all the evidence. Actually you do. You have the full report, both the initial report and the amended report.
>
> He talks about the clothes weren't tested. They were. It's all in here. There's a bunch of clothing that was in that backpack. There was a black Russel sweat shirt which yielded a DNA profile consistent –
>
> [DEFENSE COUNSEL]: Objection.
>
> [STATE]: It's in evidence.

THE COURT: It's in evidence.

[DEFENSE COUNSEL]: May we approach.

THE COURT: It's still argument. Come on up, since you want to do it.

(Counsel and the defendant approached the bench, and the following ensued)

THE COURT: Is that in the report?

[STATE]: Yeah. Right there.

[DEFENSE COUNSEL]: Wisner said all of those sweatshirt, there were none in that backpack. That's the evidence.

[STATE]: Where's the –

THE COURT: This is the report. It's in evidence. Would you step back. It's overruled.

(Counsel and the defendant returned to the trial tables, and the following occurred:)

THE COURT: You may continue.

[STATE]: Thank you, Your Honor.

Black Russell sweatshirt was tested, and it yielded a DNA profile consistent with an indeterminate mixture of at least four contributors. Black Champion sweat shirt was analyzed, cuffs and collar area. It even says it right here. Yielded DNA profile consistent with an indeterminate mixture of at least four contributors.

Black New Balance sweat shirt. It's a black sweat shirt in the backpack. Cuffs and collar yielded DNA profile consistent with indeterminate mixture of at least five contributors.

Toothbrush from the backpack. Major male contributor to the toothbrush, and at least two indeterminate minor contributors. There's either at least three people on a toothbrush in this backpack.

None of these say defendant. He's not on any of the sweat shirts. He's not on the toothbrush. He's on the gun. He put the gun there to try to hide it.

On appeal, the State concedes that the prosecutor misstated the facts when he argued in closing argument that the clothing in the backpack had been swabbed and tested for DNA, but they argue that the "isolated misstatement does not call for reversal." We agree and hold that the State's improper statement was harmless.

Here, although eyewitnesses gave different descriptions of the shooter,[6] Virginia Sladko, an expert in the field of DNA analysis testified that in her opinion, to a reasonable degree of scientific certainty, appellant's DNA was found on the gun used to shoot the two victims in this case. Appellant argues that this evidence does not prove that he possessed the handgun as his DNA could have been present on the untested clothing in the backpack and could have rubbed off on the handgun. Assuming appellant is correct, and had the clothing in the backpack been tested and found to contain his DNA, it would have, as the State points out, only "strengthened the conclusion that [appellant] possessed the backpack and its contents, including the [handgun]."

Moreover, the State's comment was one isolated misstatement of the evidence. Teri Labbe, a serologist with the Baltimore City Police Department testified that she did not swab or forward for DNA testing any of the clothing found in the backpack. Sladko's report, which was admitted into evidence and which was available for review by the jury during its deliberations indicated that the clothing found in the backpack was not analyzed "due to the availability of other probative items." Finally, the court instructed the jury that the "closing arguments of lawyers are not evidence," and "if [their] memory of the evidence

[6] The jury failed to reach a verdict on any of the counts related to the shooting.

differs from anything the lawyers or I may say, you must rely on your own memory of the evidence." In short, we are not persuaded that the jury was misled by the prosecutor's misstatements.

Sufficiency of Evidence

Appellant next contends that the "evidence was insufficient to support the conviction for knowing possession of a firearm with a disqualifying conviction. Appellant's claim is not preserved.

Maryland Rule 4-324(a) requires that a motion for judgment of acquittal "shall state with particularity all reasons why the motion should be granted." A party's failure to comply with the rule renders the claim unpreserved. *Darling v. State*, 232 Md. App. 430, 468 (2017).

At the close of the State's case, counsel for appellant made a motion for judgment of acquittal on all counts, stating, "I don't believe the State had [sic] met its burden and no reasonable juror could find that my client was the perpetrator of this crime." Counsel did not make any further argument and the motion was denied. Appellant was advised of his right to testify to which he declined. Appellant's counsel then rested, renewed his motion for judgement of acquittal and "incorporate[d] what [he] previously said," but made no further argument. Appellant concedes that his trial counsel did not argue with particularity as required by Rule 4-324. As a result, his claim is unpreserved.

Despite trial counsel's failure to preserve appellant's claim for appellate review, he argues that this Court should "address this issue on the ground that counsel's failure to renew the motion for judgement of acquittal deprived appellant of his constitutional right

to the effective assistance of counsel." He further argues that this "Court should review the sufficiency issue as part of appellant's claim that his trial lawyer rendered ineffective assistance of counsel by failing to properly raise and preserve this claim." We shall not address this issue because it is best left for postconviction. *See Mosely v. State*, 378 Md. 548 (2003).

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