UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2344

September Term, 2013

LARRY PHILLIP OFFUTT

v.

STATE OF MARYLAND

Krauser, C.J.,
Berger,
Reed,

JJ.

Opinion by Berger, J.

Filed: October 19, 2015

Following a jury trial in the Circuit Court for Prince George's County, Larry Offutt ("Offutt"), appellant, was convicted of robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and other related offenses. On appeal, Offutt presents three questions for our review,[1] which we have rephrased as follows:

> 1. Whether the trial court erred by limiting cross-examination of a State's witness regarding her involvement in an unrelated offense.
>
> 2. Whether the trial court erred in overruling an objection to the prosecutor's statements on the grounds that the statements impermissibly shift the burden of proof to the defense.
>
> 3. Whether the trial court erred in imposing two enhanced sentences.

For the reasons that follow, we answer questions one and two in the negative. The State concedes, and we agree, that it was error for the trial court to impose two enhanced sentences here. Accordingly, we shall affirm Offutt's convictions, but we vacate his sentence for him to be resentenced on remand.

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[1] The issues, as presented by Offutt, are as follows:

> 1. Did the trial court err in limiting cross-examination that would have impeached the credibility of the State's key witness?
>
> 2. Did the State's closing argument impermissibly shift the burden of proof to the defense?
>
> 3. Did the trial court err in sentencing Appellant to two 25-years-without parole sentences for a third conviction for a crime of violence?

FACTS AND PROCEDURAL BACKGROUND

On January 23, 2013, Jenny Cruz ("Cruz") was working as a sales representative at a Boost Mobile store located in Oxon Hill, Maryland. At or around 7:15 p.m., Cruz was alone working in the front of the store when a man entered the store, pointed a silver revolver at her, and told her to give him the money. When confronted by the assailant, Cruz briefly stuttered, and initially refused to surrender the money. Video of the robbery confirms that Cruz paused briefly when confronted by the robber. Cruz's manager, Mariano Fernandez ("Fernandez"), then emerged from the restroom in the rear of the store. The assailant similarly threatened Fernandez and demanded money. Fernandez physically handed the man the entire cash register, whereupon the man instructed Cruz and Fernandez to go to the back of the store while he fled.

After the robbery, on January 23, 2013, David Vastag, a corporal with the Prince George's County Police Department, recovered fingerprints from the door the assailant used to enter the Boost Mobile store. The parties stipulated that the fingerprints were Offutt's. Detective John Hamer, with the Metropolitan Police Department, subsequently came into contact with Offutt on January 31, 2013, in Washington, D.C., where he was taken into custody and interviewed by members of the Metropolitan Police Department, the Prince George's County Police Department, and the Federal Bureau of Investigation. During the interview, Offutt denied having gone to Oxon Hill, Maryland, stated that he "had never been to any other store -- phone store, besides a Cricket," or that he had any involvement in the

January 23, 2013 robbery. Cell phone records, however, showed that Offutt's cell phone was used near the scene of the crime at approximately 7:15 p.m. the evening of the robbery.

Subsequent to the robbery that occurred on January 23, 2013, but prior to May 7, 2013, Cruz learned that another crime was going to occur at the Boost Mobile store with which she was employed. Approximately two weeks prior to May 7, 2013, Cruz contacted law enforcement and informed them of the possible future crime. On May 7, 2013, the Boost Mobile store was, again, robbed. Furthermore, on May 7, 2013, Cruz indicated to law enforcement that she knew the second robbery was planned, she knew the perpetrators of that robbery, and she knew that the cashier working at the time of the second robbery "was supposed to go along with it."

On May 9, 2013, two days after the second robbery, police presented Cruz with a photo array. Cruz identified Offutt as the culprit of the January 23, 2013 robbery that occurred approximately four months prior. Four days after having identified Offutt, on May 13, 2013, Cruz admitted to being involved in the May 7, 2013, robbery. On October 11, 2013, the week prior to Offutt's trial, Cruz pled guilty to two counts of being an accessory after the fact to the May 7, 2013, robbery. The facts that gave rise to that plea were that Cruz counseled the two robbers as to how to "cover their tracks" by "throwing away their phones and leaving the [S]tate of Maryland." At the time of Offutt's trial, Cruz had yet to be sentenced.

At trial, Cruz testified that the assailant was a tall African-American man with glasses and a mustache who looked to be in his fifties. She further testified that although there was nothing covering the man's face during the incident, she was not able to see his face clearly. Finally, Cruz testified that on May 9, 2013, she successfully identified Offutt as the assailant in the January 23, 2013 robbery. Fernandez averred that the man had a mustache and was in his forties. Fernandez further testified that he remembered the assailants mustache, but otherwise could not recall any other identifying characteristics.

Offutt testified at trial that on January 23, 2013, he was at a Home Depot near Oxon Hill, where he dropped and broke his Cricket cell phone. Offutt further averred that, upon the advice of a man at the Home Depot, he took this Cricket phone to the Boost Mobile store that afternoon in an effort to have his phone repaired. Aside from Offutt's visiting the Boost Mobile store in the afternoon, Offutt presented an alibi defense where he claimed either to be at home, walking his dog, sleeping, or picking up his prescriptions around the time the robbery was committed.

After the presentation of evidence, Offutt was found guilty of twelve offenses emanating from this conduct. Of the five sentences Offutt received, two of them were enhanced sentences of 25 years' incarceration without parole.

We shall recite additional facts as we address the issues before us.

DISCUSSION

I. Allegations of Trial Error

Offutt presents two allegations of trial error. Offutt argues the trial court improperly limited the defense from pursuing a line of questioning with regard to Cruz's pending criminal case involving another robbery at the same store, and the prosecutor made improper statements during closing agreements that impermissibly shifted the burden of proof to the defendant. For the reasons that follow, we reject Offutt's arguments and affirm his convictions. We explain.

A. Limiting Cross-Examination

Offutt argues that by prohibiting him from questioning Cruz about her involvement in the May 7, 2013, robbery, he was denied his right to confront witnesses against him as guaranteed by the Fourteenth Amendment to the United States Constitution.[2] The Sixth Amendment to the U.S. Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . to be confronted with the witnesses against him[.]" U.S. Const. Amend. VI. "The right of confrontation includes the opportunity to cross-examine witnesses about matters relating to their biases, interests, or motives to testify falsely." *Martinez v. State*, 416 Md. 418, 428 (2010) (citing *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974)). This

[2] Notably, Offutt does not argue that the trial judge abused his discretion by limiting questioning pursuant to Md. Rule 5-403, or Md. Rule 5-611. Accordingly, we confine our analysis to whether the limitation on Cruz's testimony offends the Confrontation Clause of the U.S. Constitution.

provision of the Sixth Amendment has been incorporated against the States through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 405 (1965) ("[T]o deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law."). "This same right is guaranteed to a criminal defendant by Article 21 of the Maryland Declaration of Rights." *Marshall v. State*, 346 Md. 186, 192 (1997).

"To comply with the Confrontation Clause, a trial court must allow a defendant a 'threshold level of inquiry' that 'expose[s] to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witnesses.'" *Peterson v. State*, 444 Md. 105, 122-23 (2015) (alteration in original) (quoting *Martinez*, *supra*, 416 Md. at 427). Indeed, the defense must be "'permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness[.]'" *Martinez*, *supra*, 416 Md. at 428 (quoting *Davis*, *supra*, 415 U.S. at 318). Thereafter, so long as this constitutional threshold is satisfied, a trial court may impose limitations on a witness's testimony "when necessary for witness safety or to prevent harassment, prejudice, confusion of the issues, and inquiry that is repetitive or only marginally relevant." *Martinez*, *supra*, 416 Md. at 428. The question here, then, is whether Offutt was afforded a sufficient opportunity to present facts to the jury that may suggest a State's witness is unreliable.

The Court of Appeals was recently called upon to decide a similar issue regarding whether limitations on cross-examination offended a defendant's rights under the Confrontation Clause in the case of *Peterson v. State*, 444 Md. 105 (2015). In *Peterson*, *supra*, the defendant, Peterson, was on trial for a homicide resulting from a foiled drug deal. 444 Md. at 113. One of multiple witnesses against Peterson, Rose, gave testimony incriminating Peterson, including Rose's direct observations at the time of the killing. *Id.* at 117-18. In an effort to impeach the testimony of Rose, Peterson sought to question Rose about at least three charges pending against Rose in Maryland and Virginia, and whether he expected to receive a benefit in exchange for his testimony. *Id.* at 127. The trial judge, however, refused to permit that line of inquiry, citing Md. Rule 5-616(b)(6). *Id.* at 131-32.

In affirming Peterson's conviction, the Court of Appeals drew a distinction between facts that constitute improper impeachment evidence and facts that (although otherwise inadmissible) are permitted because they are a factual predicate for inquiry into a witness's bias or motive to perjure themself. *Peterson*, *supra*, 444 Md. at 135 ("The pending charges are not the impeachment evidence; rather, they are part of the factual predicate for asking the permitted questions about bias or motive."). In drawing this distinction the Court of Appeals recognized that a litigant cannot admit otherwise inadmissible evidence merely by uttering the words "bias or motive," rather, the litigant must show:

> some evidence–either direct (*e.g.*, an agreement with the prosecution to resolve charges in return for testimony) or circumstantial (*e.g.*, release of witness from custody, dismissal of charges, a decision to forgo charges, postponement of

> disposition of a violation of probation charge) that the witness has an expectation of benefitting from the testimony with respect to the pending charges.

Peterson, *supra*, 444 Md. at 135-36 (footnotes omitted). Moreover, even when there is some factual foundation to support an inference of bias or motive, a trial judge is permitted to limit questioning if "'the probative value of such an inquiry is **substantially** outweighed by the danger of undue prejudice or confusion.'" *Id.* at 136 (emphasis in original quotation) (quoting *Calloway v. State*, 414 Md. 616, 638 (2010)).

Peterson, *supra*, illustrates that when considering whether the trial judge violates the Confrontation Clause by limiting cross-examination of a State's witness in a criminal trial, it is immaterial whether the judge's decision complies with Maryland's rules of evidence.[3] *Peterson*, *supra*, 444 Md. at 137 (observing that "the trial court responded to defense counsel that 'pending charges are not admissible' for impeachment–a statement that is indisputably true, as pending charges themselves are not admissible in the same way that a conviction may be for purposes of impeachment"). Rather, whether a defendant has been deprived a right to confront a witness through cross-examination hinges on whether there is a sufficient

[3] In the case *sub judice*, neither party asserts that the offense committed by the State's witness should be admitted as impeachment evidence so that the jury may draw the inference that Cruz's guilty plea makes her unreliable. While the Court of Appeals in *Peterson*, *supra*, opined that the trial judge's statement was "indisputably true," we decline to expand the scope of our inquiry beyond the Confrontation Clause because the parties have not otherwise challenged the legal basis of the trial judge's evidentiary ruling.

factual predicate, aside from the offense itself, to permit an inference that the witness is biased of has a motive to perjure themself. *Id.* at 135-36.

In this case, Offutt was provided ample opportunity to present facts that would allow the jury to draw inferences as to what effect, if any, Cruz's guilty plea in an unrelated robbery had on her testimony in Offutt's case. Just before trial, the State presented a motion in limine to prohibit the defense from questioning Cruz about her involvement in the May 7, 2013, robbery. The State argued that the May 7, 2013, robbery had no bearing on Cruz's credibility and would only serve to confuse the issues for the jury. Offutt, for his part, argued that Cruz's involvement in the May 7, 2013 robbery may give rise to a reason for Cruz to fabricate her testimony. When questioned by the court whether there was any evidence to serve as a factual predicate, the following colloquy ensued:

> [DEFENSE COUNSEL]: If she's covering up for a robbery of that same store on May 7th, that would be credible evidence to show that it's possible that at the time she identified my client, she could be covering up for another person she may have had knowledge of.
>
> THE COURT: What evidence is there of that?
>
> [DEFENSE COUNSEL]: There is none.

Defense counsel continued, arguing that Cruz's suspicious conduct during the January 23, 2013, robbery (*i.e.*, her stuttering and brief pause when threatened with a revolver) offered support for the inference that Cruz had a motive to fabricate her testimony. The trial judge

declined to decide upon the motion in limine, and opted instead to wait and see what facts were adduced on direct examination before ruling upon the State's motion in limine.

Later, during the trial after the State's direct examination of Cruz, Offutt again argued that the video of the January 23, 2015, as compared to the facts in the May 7, 2013, robbery could indicate bias or a motive to fabricate testimony. Accordingly, Offutt sought to question Cruz about the specific conduct of her offense on May 7, 2013. The chain of inferences necessary to reach Offutt's conclusion was follows: (1) the video of the January 23, 2013, robbery shows that Cruz had an abnormal response to being robbed; (2) her response was consistent with having prior knowledge that the robbery was going to occur; (3) Cruz had pled guilty to being an accessory after the fact in a robbery that she had knowledge was going to occur; (4) Cruz could have been similarly involved in the January 23, 2013, robbery just as she was the May 7, 2013, robbery; (5) Cruz's testimony could be motivated by a desire to protect herself or her accomplices in the January 23, 2013, robbery thereby undermining her credibility in Offutt's trial.

The trial judge rejected Offutt's argument that the specific circumstances of the May 7, 2013, robbery were necessary factual predicates to further a legitimate inquiry regarding Cruz's bias or motive to fabricate testimony. Indeed, the trial judge made a preliminary finding that Cruz's behavior during the January 23, 2013, robbery, if anything, indicates that Cruz resisted, rather than participated in, that robbery because it was ultimately

Fernandez who surrendered the cash register.[4] The trial court articulated its rationale on the record as follows:

> THE COURT: All right. Well, I've listened to the evidence. There is some circumstantial evidence that might lead someone to believe that Ms. Cruz, I guess her identification in the photo array on May 9th and her testimony here today is based on her attempt to gain some benefit in the separate case.
>
> However, there is a great danger of confusion of the issues, so I'm going to limit what defendants can ask about it. I'm going to let the defendant ask -- inquire that she became aware of -- that others were planning a crime -- that after this January thing, January robbery, some months later she became aware that others were planning a crime, that she reported it and -- including to the police. That the crime actually did occur two weeks later on May 7th. She gave a statement to the police at the time saying that she knew it had been planned. And I take it the statement says, I've never seen it, that she knew who was involved. And then two days later she was shown a photo spread in this case and made an identification and that she was later charged and pled guilty to accessory after the fact to that other crime and has a sentencing set for November.
>
> So I'll let you talk all about those issues that go to her possible motivation, but you need to be very clear in your questions, if you are not I will. We are talking about something entirely separate from this incident and really don't need to go into what that other crime is, you know, that it involved the same business. That's not relevant. What is relevant is whether she thinks she's going to get some benefit in her case from either the identification or her testimony today.
>
> * * *

[4] We note that this was a preliminary question, and it was within the province of the trial judge to decide this preliminary questions under the preponderance of the evidence standard. *See Ezenwa v. State*, 82 Md. App. 489, 513 (1990).

> Because I find that's not relevant and it -- that the nature of the offense is not relevant to her credibility. And it runs the danger of confusion of issues where we are talking about an armed robbery of the same location, which is not what -- you've already conceded that there's no evidence she's involved in this one, so the only question that you argued is that -- her credibility and that her credibility comes into question because she was maybe trying to gain some benefit in this case for the other one. So the other one could have been a murder for all we care. It doesn't matter as to whether she's trying to seek a benefit. What matters is whether she is or not. And the facts of that other one are irrelevant and any remote relevance is outweighed by danger of unfair -- or confusion of the issues, talking about another robbery at the same business.

After the court's ruling on this matter, the following colloquy ensued between Cruz and Defense Counsel:

> [DEFENSE COUNSEL:] All right. Now, I'd like to ask you about something other than this particular robbery. So this robbery occurs in January, correct?
>
> [CRUZ:] Correct.
>
> [DEFENSE COUNSEL:] And you became aware of somebody else that was planning a crime separate from this robbery, right?
>
> [CRUZ:] Correct.
>
> [DEFENSE COUNSEL:] Any you went and -- or that crime occurred on May 7th of 2013, right?
>
> [CRUZ:] Yes.
>
> [DEFENSE COUNSEL:] And two weeks before that other crime occurred, you went to the police to tell them that something was going to happen, right?

[CRUZ:] Yes. Yes, I did.

[DEFENSE COUNSEL:] And you told the police, hey, I know about this other crime that's going to occur. Here's what might happen.

[CRUZ:] Yes.

[DEFENSE COUNSEL]: And after that crime occurred on May 7th, you wrote a statement to the police saying that you knew about it, right?

[CRUZ:] Yes.

[DEFENSE COUNSEL:] And then two days later, the police came to you with this photo array, right?

[CRUZ:] Yes.

[DEFENSE COUNSEL:] Now, you were later charged with offenses related to that other crime, right?

[CRUZ:] Right.

[DEFENSE COUNSEL:] And, in fact, you pled guilty just this past Friday to accessory after the fact related to that other offense, right?

[CRUZ:] Right.

[DEFENSE COUNSEL:] And that offense would have occurred before you did the photo array here?

[CRUZ:] Can you repeat yourself?

[DEFENSE COUNSEL:] The other offense that you pled guilty to being involved with, that occurred prior to you making the photo identification in this case, right?

[CRUZ:] Yes.

> [DEFENSE COUNSEL:] And that sentencing is currently set for November?
>
> [CRUZ:] Yes.

Thereafter, on redirect examination the State questioned Cruz with respect to the May 7, 2013, crime whereby the following exchange occurred:

> [THE PROSECUTOR:] And [DEFENSE COUNSEL] also questioned you about a case that you pled guilty to this past Friday; is that correct?
>
> [CRUZ:] Correct.
>
> [THE PROSECUTOR:] And does that case have anything to do with this case?
>
> [CRUZ:] Not at all, two separate cases.
>
> [THE PROSECUTOR:] And did you at any time feel like the case where you are testifying today that -- about a robbery that happened January 23rd, and you were the victim in that case; is that correct?
>
> [CRUZ:] Yes.
>
> [THE PROSECUTOR:] At any time, did you ever get the impression that you would get a better deal in you case by testifying here today?
>
> [CRUZ:] No.

The right of an accused to confront the witnesses against him, and the limitations we impose on that right, represent a balance between our unassailable commitment to the principle that the right to confront one's accusers is " a fundamental right essential to a fair trial," *Pointer*, *supra*, 380 U.S. at 404, and our competing interest in excluding "[e]vidence

that appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [that] may cause a jury to base its decision on something other than the established propositions in the case." 1 J. Weinstein & M. Berger, Weinstein's Evidence § 403(03) (1991).

In this case, the trial judge was clearly cognizant of these competing interests when he crafted a narrowly tailored ruling that gave Offutt the opportunity to cross-examine Cruz as to any fact that may indicate bias or an incentive for her to fabricate her testimony, while, at the same time, maintaining a focused and orderly trial so as not to confuse the jury or distract the jurors from the issues at hand. Here, the trial judge recognized that Cruz's guilty plea and her pending sentencing hearing could most certainly bear on her credibility. Further, the judge recognized that testimony relating to a separate robbery of the same store months after the January 23, 2013, robbery would only serve to distract the jury in the absence of any factual predicate that connected Cruz to the commission of the first robbery. Accordingly, Cruz was only permitted to testify as to what effect, if any, her pending case had on her credibility.

The Confrontation Clause is not an open door for defendants to confront witnesses on any matter, regardless of its relevance to the trial. Indeed, "'a criminal defendant's constitutional right to cross-examination is not boundless . . . [and t]he question is whether the trial judge imposed limitations upon cross-examination that inhibited the ability of the defendant to receive a fair trial.'" *In re Caitlin N.*, 192 Md. App. 251, 273 (2010) (quoting

Parker v. State, 185 Md. App. 399, 426 (2009)). In this case, Offutt was given a sufficient opportunity to inquire as to facts that may undermine Cruz's credibility and was afforded a fair trial. The Confrontation Clause affords Offutt no right to inquire into matters irrelevant to the accusations against him. We, therefore, hold that the trial judge did not err in limiting Offutt from inquiring into the facts of Cruz's conviction.

B. Prosecutor's Closing Argument

Offutt further maintains that the State impermissibly shifted the burden of proof to the defendant when the prosecutor commented on the lack of evidence that corroborated Offutt's testimony. We begin our analysis with the indisputable time-tested constitutional cannon that Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). It is because of this fundamental principle that we will not tolerate an argument by the State that implies a necessity for a defendant to prove their innocence. *Eley v. State*, 288 Md. 548, 555 n.2 (1980) ("[C]omment upon the defendant's failure to produce evidence . . . might in some cases be held to constitute an improper shifting of the burden of proof to the defendant."); *Kashansky v. State*, 39 Md. App. 313, 320 (1978) ("A permissible inference does not shift . . . these burdens."). While under no circumstance may a prosecutor argue that a defendant has failed to prove their innocence by *failing to produce* evidence, it is entirely permissible for a prosecutor to argue that the evidence a defendant *does produce* lacks credibility. *Marshall v. State*, 213 Md. App. 532, 540

("Commentary on the lack of corroborating witnesses is permissible when a defendant elects to testify."), *cert. denied*, 436 Md. 329 (2013).

The distinction between the permissible inference that a defendant's evidence lacks credibility, and the impermissible negative inference that the defendant's failure to produce evidence is indicative of his guilt is not always obvious. Indeed, the propriety of a particular statement often depends on the context of that statement. *See Oken v. State*, 343 Md. 256, 295 (1996) ("Reading the prosecutor's closing argument *in context*, however, we do not believe the statements were comments [that violate the defendant's constitutional rights.]" (emphasis added)); *Collins v. State*, 318 Md. 269, 279 n.7 (1990) ("[I]t is necessary to consider the disputed closing argument remarks in the context of the remarks as a whole[.]").

It is because of the particularized, contextual, and fact-specific nature of these inquiries that, "'[t]he regulation of argument rests within the sound discretion of the trial court.'" *Paige v. State*, 222 Md. App. 190, 210 (2015) (quoting *Grandison v. State*, 341 Md. 175, 224 (1995)). Further, "[a]n 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.'" *Donati v. State*, 215 Md. App. 686, 731-32 (2014) (emphasis in original) (quoting *Washington v. State*, 180 Md. App. 458, 473 (2008)).

When reviewing a closing argument under the abuse of discretion standard, we are cognizant that attorneys are to be afforded "'great leeway'" in presenting closing arguments

to the jury. *Spain v. State*, 386 Md. 145, 152 (2005) (quoting *Degren v. State*, 352 Md. 400, 429 (1999). As the Court of Appeals has explained:

> Closing arguments serve an important purpose at trial. 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. 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. Accordingly, we grant attorneys, including prosecutors, a great deal of leeway in making closing arguments. The prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom.

Whack v. State, 433 Md. 728, 742 (2013) (internal quotations omitted); *accord Wilhelm v. State*, 272 Md. 404, 412 (1974) ("Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom; the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct[.]"), *abrogated by Simpson v. State*, 442 Md. 446, 458 n.5 (2015).

After reviewing the entire record and the context within which the prosecutor made her closing arguments, we are confident that Offutt was not denied the presumption of innocence to which he is constitutionally entitled. We shall explain.

Offutt avers that the following colloquy striped him of his presumption of innocence.

> [THE PROSECUTOR:] Let's look at other aspects of his testimony. He has no other evidence to present but him. He said he was in the hospital that day.

> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> [THE PROSECUTOR]: Did you see any hospital records? He dropped off a prescription, no prescription . . . .

Initially we agree with Offutt that the statement, "[h]e has not other evidence to present but him," when read in isolation, is troubling. When read in the context of the prosecutor's entire rebuttal argument, however, it appears obvious to us that she was referring to lack of support for Offutt's alibi defense. Indeed, in rebuttal the prosecutor argued as follows:

> [THE PROSECUTOR:] So let's look at the issue of credibility. Judge Wallace's instruction said you have to look at the witness's motivation, what he gains from his or her testimony and his bias. Well, the defendant takes the stand. Does anybody in this case have more to loose than the defendant? He's the one that's seated before you in the defendant's chair. Is there anybody else with more to lose and to gain by their testimony? No, it's him. So let's look at his testimony. And when you're sworn as jurors, we never ask you to leave your common sense at the door. So put your common sense hats on that have been on the whole time, and let's walk through whether or not his testimony makes any sense.
>
> This happened on January 23rd. He walked us through the day, his day. Very specific about what time he came here, what time he came there. And awfully convenient how, what was it, he was in at the Boost Mobile store 3:00 to 3:15. He went home at 4:30 to 5:00 and got up at around 7:00. Why is that so convenient? Because he's seen the phone records. He watched Detective Swonger testify. He knows that between 2:30 and 5:30, there was no activity on the phone. Nothing happened on that phone. So he could have been anywhere, but that's when he was exactly in the Boost Mobile store. Very convenient. About 7:00, 7:15, where were you then? Oh, I don't remember. Oh, wait, I do remember. My cousin came to

> pick me up and we went to go walk the dog around C Street. How very convenient just when his phone is moving. And I asked him, what day of the week was it? Oh, I don't really remember. Tuesday, Wednesday, couldn't really remember, but he remembered all these pharmacy and dropping off a prescription and at a place said he went to the hospital then, too. Couldn't remember any details about that day. Couldn't recall them for you. Why not? Because that robbery didn't happen on the 29th. There's no need to make up details about a day that you didn't -- you weren't accused of doing anything wrong.
>
> How about this one? He goes into a Boost Mobile Store to get a Cricket phone fixed. I've had a Sprint phone for a long time. Have I ever stepped inside a Verizon store to get my phone fixed? It's a Sprint phone. Why am I going to a Verizon store to get a Sprint phone fixed? He's had a Cricket phone for a year. He said a year. So he goes to a Cricket store every month to reup his minutes. Why is he going into a Boost Mobile store to get a Cricket phone fixed?
>
> Let's look at other aspects of his testimony. He has no other evidence to present but him. He said he was in the hospital that day.
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> [THE PROSECUTOR]: Did you see any hospital records? He dropped off a prescription, no prescription. . . .

Critically, the entire theory of Offutt's alibi defense was that he was either at home, walking his dog, or picking up his medication at the time of the offense in question. In support of his defense, Offutt offered only his testimony. In her rebuttal argument, the prosecutor offered many reasons as to why Offutt should not be believed. For example, the prosecutor argued that Offutt's interest in the outcome of the trial, as well as his convenient

ability to remember only his alibi defense, but nothing else, undermined his credibility. Additionally, the prosecutor argued that the peculiarity of Offutt's claim that he went to a Boost Mobile store to have his Cricket phone repaired, and the lack of support for Offutt's alibi defense are further indicative of his untrustworthiness. In this context, the prosecutor's statement that "he has no other evidence to present but him," was clearly made in reference to why Offutt's alibi defense lacks credibility.

In the abstract, it may appear ambiguous as to whether the statement "he has no other evidence to present but him" draws the prohibited inference that Offutt had a duty to prove his innocence or whether that statement was offered for some other permissible purpose. When read in the context of the prosecutor's rebuttal argument, however, this statement merely seeks to discount the credibility of the evidence presented by Offutt. We, therefore, hold that the trial judge did not commit error by permitting the prosecutor to argue how the dearth of evidence supporting Offutt's alibi defense undermines the credibility of his testimony.[5] A prosecutor:

[5] Offutt continues to argue that not only did the trial judge err by permitting the prosecutor to make this statement, but that error was not harmless. For the reasons stated herein, we hold that the trial judge did not err in denying Offutt's objection to the prosecutor's rebuttal agreement. Assuming, *arguendo*, that the trial judge did err, we are confident, beyond a reasonable doubt, that the error was harmless. We are cognizant that in a harmless error analysis we are to consider the severity of the remarks, the weight of the evidence against the accused, and the measures taken to cure any potential prejudice. *Jones v. State*, 217 Md. App. 676, 694 (2014). After reviewing these factors, we observe this brief remark, in context, is relatively minor. Moreover, there was substantial evidence that corroborated the conviction, ranging from cell phone records, to a fingerprint analysis, to the (continued...)

> may prosecute with earnestness and vigor- indeed, [s]he should do so. But, while [s]he may strike hard blows, [s]he is not at liberty to strike foul ones. It is as much h[er] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). In the case *sub judice*, this prosecutor skillfully and successfully toed the fine line between her competing interests as a partisan advocate and a minister of justice. We, accordingly, affirm Offutt's conviction.

II. Sentencing

Offutt contends, and the State agrees, that the trial court improperly sentenced him to duplicate enhanced sentences. We agree. The trial court imposed two enhanced sentences pursuant to Section 14-101 of the Criminal Law Article, which, at the time of sentencing, was codified at Md. Code (2002, 2012 Repl. Vol.), § 14-101 of the Criminal Law Article. While no party disputes the fact that Offutt was properly exposed to an enhanced sentence pursuant to Crim. Law § 14-101, both parties likewise concur that Offutt should not have been sentenced to two, separate, enhanced terms under that provision for multiple convictions for crimes of violence arising from a single incident. *Williams v. State*, 220 Md. App. 27, 44 (2014), *cert. denied*, 441 Md. 219 (2015). Accordingly, we shall vacate Offutt's

[5] (...continued)
testimony of Fernandez. Further, a curative instruction, assuming one was required, would likely have done more harm than good by bringing the comment to the forefront of the jury's attention. Although we hold that there was no error here, we are confident that any error with respect to the prosecutor's closing argument was harmless beyond a reasonable doubt.

sentences, and remand to the circuit court for the imposition of a single enhanced sentence, pursuant to Crim. Law § 14-101, for but one of the two convictions.[6] *See Jones v. State*, 336 Md. 255, 265 (1994) (holding that the rule of lenity requires that only one enhanced sentence be imposed for one instance of conduct).

JUDGMENTS OF CONVICTION AFFIRMED. SENTENCES VACATED AND CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR RESENTENCING CONSISTENT WITH THIS OPINION. APPELLANT TO PAY 2/3 COSTS; REMAINING 1/3 COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.

[6] The trial judge has the discretion to determine which conviction will have the enhanced sentence. As noted by the Court of Appeals, in construing a statutory predecessor to Crim. Law § 14-101:

> We hold that where a defendant is convicted of more than one crime of violence as the result of a single incident and has otherwise satisfied the prerequisites for imposition of the § 643B(c) sentence, the sentencing judge, in imposing only one § 643B(c) sentence, may impose the § 643B(c) sentence upon any one of the qualifying crime of violence convictions.

Jones v. State, 336 Md. 255, 265 (1994).