UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2485

SEPTEMBER TERM, 2014

MARK STEVEN ANDERSON

v.

STATE OF MARYLAND

Eyler, Deborah, S.,
Nazarian,
Friedman,

JJ.

Opinion by Eyler, Deborah, S., J.

Filed: October 20, 2015

*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 Baltimore County convicted Mark Steven Anderson, the appellant, of second degree assault, carrying a weapon openly with intent to injure, and violation of a protective order.[1] The court sentenced him to ten years' imprisonment for the second degree assault conviction, three years concurrent for the weapons conviction, and ninety days concurrent for the protective order violation.

The appellant poses two questions on appeal, which we have rephrased:

> I. Did the trial court commit reversible error by overruling objections to certain questions by the prosecutor that included assertions of facts known to the prosecutor but not in evidence and not admissible?
>
> II. Is the evidence legally sufficient to support the appellant's conviction for carrying a weapon openly with intent to injure?

For the reasons that follow, we shall affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

This case stems from an assault with a belt upon Ms. B.,[2] on March 18, 2014, at the Doncaster Village Apartments in Baltimore County. The following evidence was adduced at trial, through witnesses called by the State and evidence admitted in the State's case. (The appellant rested at the close of the State's case.)

Diantre Hart worked as a service technician for the apartment complex. In the afternoon on the day in question, he and a co-worker went to 8 Barnwell Court, which is part of the complex, to fix the refrigerator in apartment 203. When they entered the

[1] The appellant also was charged with false imprisonment, but the State *nol prossed* that charge during the trial.

[2] We have chosen not to use the victim's full name.

building, they heard the voices of a man and a woman screaming and yelling. They ignored them and entered apartment 203 (which was not the source of the screaming), where they spent twenty to thirty minutes working on the refrigerator. They realized that they needed a part, so they left the apartment. As they were locking it, they again heard screaming. They followed the screaming sounds to the third floor and pinpointed them as coming from apartment 302.

Standing outside apartment 302, Mr. Hart heard a woman scream, “help me, stop.” He pulled out his mobile phone and started to record what he was hearing, so he would have documentation for his property manager. The recording was moved into evidence at trial. The male and female were yelling and screaming as they spoke, and a child was crying in the background.

FEMALE: Why, why? Please!
[loud whipping sound, then female wailing]

MALE: Um hm, um hm, um hm, yep. That’s what a person gets that doesn’t listen. I want it to burn. It’s going to burn some more, yo. I told you I was going to kick your ass if you woke me up out of my sleep again. Did you take as a joke?

FEMALE: (inaudible) no.

MALE: Stand up again. Shut the fuck up. Shut your bitch ass up. Shut your bitch ass the fuck up. How many times have I asked you don’t wake me up out of my sleep?

FEMALE: You don’t have to ask me anymore, I get it.

MALE: You sure?

FEMALE: I’m three thousand percent positive.

MALE: I'm not sure if you're positive, yo, because I did this to you before, yo. I already been to this point with you, yo. I think you need one more, yo. I think one more would do the job, yo.

FEMALE: I get it, Mark.

MALE: You sure?

FEMALE: I'll get down on my knees and tell you that I get it.

MALE: Oh, that don't do nothing for me.

FEMALE: I get it.

MALE: Your, your sympathy don't do nothing - -

FEMALE: I get it.

MALE: No, you don't get it.

FEMALE: Yes, I do.

MALE: So if you get it, why didn't you get it yesterday? Why didn't you get it the day before? Why didn't you get it the day before this? Why didn't you get it the day before that? Why didn't you get it the day before that? Why didn't you get it the day before that?

FEMALE: I get it Mark.

MALE: Because everyday [sic] I said something about it, didn't I? Every day I said something about it. I said some, the same thing that I've been saying for eight months.

FEMALE: I get it, Mark (inaudible).

MALE: I've been saying it to you for eight fucking months. This is, this is, this is a person that's been talking for eight months.

FEMALE: I swear to you - -

MALE: You made me talk about this for eight months.

FEMALE: I swear to you I get it.

MALE: You make, why you making me talk about something for eight months?

FEMALE: I'll never make you talk about it again. I get it, Mark. I get it, please. I get it. I get it.

MALE: Don't ever wake me up out of my sleep again. If you ever wake me up out of my sleep again, I'm gonna break your fucking jaw. I'm going to break your fucking, jaw. How many times did I say something to you about this before escalating to this?

FEMALE: A lot.

MALE: So that's what I'm not understanding. Don't say no, no, no, no, no, don't hit me, (inaudible) don't do any of that. You weren't doing that when I asked you to stop and I was saying it nicely, when I wasn't touching you. How many times do I have to ask, how many times did I ask where I didn't touch you?

FEMALE: Way too many.

MALE: Way too many, right. So that means you took me for a joke.

FEMALE: Please, Mark. I get it.

MALE: No, you don't, yo.

FEMALE: I will never do it again. If I do it again you can kill me.

MALE: I'm not going to that point, you're not going to have me in jail for life because of you.

FEMALE: If I ever do it again, you, you can do whatever you want to me.

MALE: Well, no, no, no, no, no, no, no, no.

FEMALE: Mark, please don't do it again.

MALE: Why, why should I have sympathy for you?

FEMALE: You shouldn't.
[loud whipping sound followed by grunt]

MALE: Good, good, good, good. I should have no sympathy for you, you told me that. You told me to have no sympathy for you.

Mr. Hart stopped recording and called the police. They arrived quickly, with guns drawn. He and his co-worker retreated to the second floor, to be out of the way, and heard the police knock on the door of apartment 302 and announce their presence. There was a pause, during which there was silence, and then a woman in the apartment opened the door. Mr. Hart and his co-worker left.

Officer Jeremy DeFord was one of several members of the Baltimore County Police Department who responded to the call for a domestic disturbance at apartment 302. The officers approached the door and heard yelling and screaming from inside. They knocked and then there was silence. They knocked again, announced that they were the police, and ordered that the door be opened. There was a pause. Eventually a woman, later identified as Ms. B., opened the door and the police entered. Officer DeFord's first task was to determine who was in the apartment. He and the other officers searched, but the only people present were Ms. B. and her baby. Officer DeFord opened the sliding glass door from the apartment to the balcony and saw footprints in the snow from the back of the apartment complex, right under the balcony, into the woods. Photographs were taken of the footprints and were moved into evidence.

Officer DeFord could tell that Ms. B. was upset and had been crying. She spoke to him and then pulled her pant leg up to show him injuries to her leg. Officer DeFord asked

Officer Crystal Himes, another officer who was present, to speak to Ms. B. Officer Himes took Ms. B. into the bathroom, spoke to her privately, and took photographs of her injuries. The photographs were admitted into evidence.[3] Based on the conversation Ms. B. had with Officer Himes, the police looked for a belt, which they found in a closet in the living room of the apartment. The belt also was admitted into evidence. Photographs taken by the police of black marks on the living room wall of the apartment were admitted into evidence as well.

Sergeant John Matthews was among the police officers who responded to the call to apartment 302. As he was standing in the hallway in front of the apartment, he heard a male voice and a female voice. When the police entered, the only occupants of the apartment were a female (Ms. B.) and her baby. Sergeant Matthews and other officers, including Officer Adam Swartzendruber, followed the footprints Officer DeFord had spotted in the snow. They lost the trail in the woods and then searched the immediate area. They saw the appellant at a nearby farm. He ran, and they chased him into the woods and apprehended him.

Officer Swartzendruber determined that Ms. B. had obtained a final protective order prohibiting the appellant from being near her or her apartment. The order had been issued on September 24, 2013, and still was in effect.

Ms. B. testified that the appellant is the father of her son, who was 13 months old at the time of trial, and was 6 months old on March 18, 2014. She and the appellant dated on

[3] Officer Himes did not testify at trial.

and off beginning in 2010. In March of 2014, she was living in apartment 302, which she leased. The appellant would stay there with her about once a week.

Contrary to what the prosecutor expected, Ms. B. testified that she was not sure whether anyone other than she and her son were in her apartment on March 18, 2014. She claimed not to remember the police coming to her apartment that day and not to remember the police taking photographs of her. She identified the photographs that had been moved in evidence as being pictures of herself, but stated that she did not recall where she was when the photographs were taken or that the photographs were taken by a police officer. She identified marks to parts of her body that are depicted in the photographs, but testified that she had no recollection of how she received these injuries. She also testified that she did not recognize any of the voices in the recording made by Mr. Hart and that at no time did the appellant hit her with a belt.

We shall include additional facts as pertinent to the issues on appeal.

DISCUSSION

I.

Immediately after Ms. B. testified that she was not sure whether anyone other than she and her son were in her apartment on March 18, 2014, that she did not recall the police coming to her apartment that day, and that she did not remember the police taking photographs of her, the prosecutor asked to be heard outside the presence of the jury. Once the jurors had left the courtroom, the judge questioned Ms. B., asking whether anyone had tried to influence her testimony or whether she was feeling uncomfortable about testifying

for any reason. She responded in the negative. On questioning by the prosecutor, Ms. B. repeated that she did not remember the police being at her apartment on March 18, 2014, or the police taking photographs of her. She acknowledged speaking with the prosecutor the day before trial, but claimed not to remember telling the prosecutor what had happened on the day in question or how she had sustained the injuries documented in the photographs.

The jury was brought back into the courtroom, and the prosecutor continued her examination of Ms. B. Ms. B. was shown photographs taken inside her apartment by the police. She testified that she could not tell whether the photographs were of her apartment. The prosecutor asked Ms. B. whether she remembered meeting with her (the prosecutor) the day before trial and talking about these photographs. Defense counsel objected. At a bench conference, defense counsel argued that the question was improper because it was communicating to the jury facts not in evidence and that were not admissible in evidence. The objection was overruled. The defense was granted a continuing objection.

The prosecutor resumed her direct examination, returning to the apartment photographs. Ms. B. again testified that she could not tell whether the photographs were of her apartment. The prosecutor then asked, *"When you met with me yesterday and we went over these photographs, is it true that you told me this was your living room?"* Ms. B. responded that she did not remember.

The prosecutor showed Ms. B. the photographs of her injuries. Ms. B. agreed that the pictures were of her. She testified that she did not recall a police officer taking the photographs and did not know where she was when they were taken. She agreed that the

close up photographs showed markings on her body and identified the parts of her body on which the markings appeared. She testified that the photographs fairly and accurately depicted her. The prosecutor then asked how Ms. B. had sustained the injuries shown in the photographs, to which she responded, "I don't remember." The following ensued:

[PROSECUTOR]: *Do you recall speaking with me about how you sustained those injuries yesterday?*

MS. B.: No, ma'am.

The prosecutor then questioned Ms. B. about the recording made by Mr. Hart. Ms. B. stated that she had listened to the recording before trial, and she did not recognize the voices on it. This exchange followed:

[PROSECUTOR]: You don't recognize the voices on the recording? When you met with me yesterday, did you identify yourself and the Defendant in this recording?

MS. B.: I don't remember doing that.

The prosecutor played the recording for Ms. B. After she testified that hearing it did not enable her to identify the voices, the following ensued:

[PROSECUTOR]: *Isn't it true that you previously identified the female voice on that recording?*

MS. B.: I don't remember doing that.

[PROSECUTOR]: *You don't remember doing that yesterday?*

MS. B.: No.

The appellant contends the court abused its discretion by allowing the prosecutor to pose these questions to Ms. B. because they conveyed to the jury facts not in evidence, and

not admissible, about what the prosecutor maintained Ms. B. had told her the day before trial. He argues that this sort of question, which "suggests its own otherwise inadmissible answer" and is posed in the "hop[e] that the jury will draw the intended meaning from the question itself," is improper. *Elmer v. State*, 353 Md. 1, 13 (1999). *See also Walker v. State*, 373 Md. 360, 403 (2003) (reversible error for court to allow prosecutor to ask a witness certain questions about what the witness had divulged in a prior interview).

The State concedes that the court's ruling was an abuse of discretion and that the prosecutor should not have been allowed to pose the three questions at issue to Ms. B. It argues, however, that the error was harmless beyond a reasonable doubt because any facts implied by the questions either were "inconsequential to the verdict or were proven by otherwise overwhelming evidence."

"[U]nless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that [an] error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated." *Dorsey v. State*, 276 Md. 638, 659 (1976). "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Taylor v. State,* 407 Md. 137, 165 (2009) (citations omitted).

In *Dionas v. State*, 436 Md. 97 (2013), the Court of Appeals identified factors relevant to a harmless error analysis, including, *inter alia*, the importance of a witness's testimony; whether the testimony was cumulative; evidence corroborating or contradicting

the testimony on material points; and the overall strength of the prosecution's case. *Id.* at 105. Also important are "the nature, and the effect, of the purported error upon the jury," *id.* at 110, and "the jury's behavior during deliberations." *Id.* at 111. The Court of Appeals made clear that just because there is "otherwise sufficient" evidence to support the verdict, that is not enough to establish harmless error. *Id.* at 118. Rather, "the trial court's error [must be] unimportant in relation to everything else the jury considered in reaching its verdict." *Id.*

"*When you met with me yesterday and we went over these photographs, is it true that you told me this was your living room?*"

The first improper question by the prosecutor implied that Ms. B. had told her that the photographs of an apartment interior with black marks on the walls depicted Ms. B.'s living room. The implication could be significant if Ms. B. had identified the photographs as depicting her apartment on March 18, 2004, and there was evidence that the marks were caused by the appellant's using the belt to whip Ms. B. The State asserts that the photographs were immaterial because there was no evidence about when the marks on the wall were made. So, even if the jurors understood the improper question to convey that Ms. B. had told the prosecutor, during a meeting before trial, that the photographs were of her apartment, in the absence of evidence that the marks were *made* to the wall on March 18, 2014, the fact that the marks were *present* on the wall that day was inconsequential. The State also points out that, to the extent the mere presence of the black marks on the wall was of any significance, Officer DeFord testified that he saw the marks and that the photographs in question depicted what he saw.

The appellant maintains that this question gave the jury the impression that Ms. B. had told the prosecutor the day before trial that the photograph depicted her apartment walls, and that she was lying when she testified that she did not remember telling the prosecutor that. The prosecutor's question did not suggest that the marks on the apartment wall were made by the appellant, that they were made on March 18, 2014, or that they were made in connection with the assault. The question did not give rise to an inference negative to the appellant or favorable to the State. Moreover, there was independent evidence, in the form of Officer DeFord's testimony, about there being black marks on the wall of Ms. B.'s apartment on March 18, 2014. Therefore, the prosecutor's question did not put before the jury otherwise inadmissible facts. At most it put before the jury facts that were otherwise actually admitted in evidence. In these circumstances, the question was unimportant in relation to the verdict and the court's erroneous ruling was harmless beyond a reasonable doubt.

"*Do you recall speaking with me about how you sustained those injuries yesterday*?"

The State argues that this second question, although technically improper, did not convey any particular information to the jurors that could have influenced their decision-making. The question suggested that Ms. B. had spoken to the prosecutor about how she had sustained the injuries depicted in the photographs. The State maintains that, because the question did not contain any details about what Ms. B. told the prosecutor about how she was injured, the prosecutor did not use her question to put before the jurors any facts, not in evidence, about how Ms. B. sustained her injuries.

Citing *Walker v. State*, 373 Md. at 403, the appellant maintains that, through this question, the prosecutor made "prejudicial assertions of personal knowledge of facts not in evidence." *Walker* is distinguishable, however. There, the prosecutor was permitted to ask a reluctant witness the following questions: "[W]hen I met with you on Friday, didn't you tell me that you had been threatened?"; and "[D]id you not tell me that day that you had been threatened and that is why you didn't want to testify?" The defense moved for a mistrial, which was denied. The Court of Appeals reversed, holding that the prosecutor's questions cast "additional negative aspersions on [the defendant's] character by implying that someone, probably [the defendant] or someone at his behest, had threatened [the witness] not to implicate [the defendant]." 373 Md. at 404. The questions in *Walker* had embedded in them facts harmful to the defense that would not otherwise be admissible and that the prosecutor was vouching for.

Elmer v. State, 353 Md. 1, also cited by the appellant, does not support his position. In that case, the prosecutor asked Elmer's co-defendant questions such as:

> [D]id you ever make the statement that when you came down around the curve . . . your attention was drawn to the people that were running from your left, and that at that point in time Allen Elmer put that gun out the window, pulled the trigger, the gun boomed, and the first thing you said to him is what the F did you do? Did you ever make that statement?

353 Md. at 5. The Court of Appeals observed that "the prosecutor's questions suggested the existence of facts which he could not prove, and indeed . . . *knew* he could not prove." *Id.* at 14 (emphasis in original). It held that the trial court committed reversible error by allowing this question and others like it.

Unlike the improper questions in *Walker* and *Elmer*, the second question posed by the prosecutor–"*Do you recall speaking with me about how you sustained those injuries?*"– did not include or suggest any specific facts about the events constituting the crimes for which the appellant was on trial. It was a general, open ended question free of any embedded facts about how the injuries were inflicted.

Moreover, the evidence that Ms. B.'s injuries were inflicted by the appellant was overwhelming. Mr. Hart's recording, made while he was standing directly outside Ms. B.'s apartment door, captured whipping sounds, consistent with her being hit by a belt. It also recorded Ms. B. repeatedly calling the appellant by name. Officer DeFord arrived moments after the recording was made and saw the marks on Ms. B., which were photographed. When the police knocked on the apartment door, there was silence and a pause. When they entered, they saw fresh tracks in the snow leading away from under Ms. B.'s balcony; and they apprehended the appellant in the vicinity, after he tried to flee.

We conclude that the second question did not prejudice the appellant, as it did not put information before the jury showing that the appellant was the person who injured Ms. B.; and, in any event, there was overwhelming evidence that the appellant in fact was the person who caused Ms. B.'s injuries. The trial court's error was harmless beyond a reasonable doubt.

"Isn't it true that you previously identified the female voice on [Mr. Hart's] recording?"

Finally, with respect to the third question, which implied that, before trial, Ms. B. told the prosecutor that her voice was on the recording, the State maintains that there was

overwhelming evidence, completely independent of that question, that the voices on the recording were Ms. B. and the appellant, and the question, though improper, had no effect on the outcome of the trial. We agree. The recording was played for the jury. Having heard Ms. B. testify, the jurors could tell for themselves whether the female voice on the recording was hers. Moreover, the recording was made in front of Ms. B.'s apartment, soon before she opened the apartment door for the police. And Ms. B. agreed in her testimony that the crying baby on the recording was her baby. The evidence was overwhelming that the female voice on the recording was that of Ms. B.[4]

We note, in closing, that the jury in this case deliberated for about 20 minutes before returning guilty verdicts.[5] There were no jury questions during deliberations. The length of deliberations is consistent with the overwhelming evidence against the appellant.

We are confident that the trial court's errors in allowing the prosecutor to pose the three improper questions about her interview of Ms. B. the day before trial did not affect the outcome of the case. We also are confident that Ms. B.'s responses, in which she claimed not to remember what she said during her interview with the prosecutor regarding the apartment photographs, how she sustained her injuries, and the identity of the female

[4] The prosecutor's earlier question, "When you met with me yesterday, did you identify yourself and the Defendant in this recording?" did not suggest an answer. The question that suggested an answer only asked about Ms. B.'s voice, not the appellant's voice. In any event, the evidence was overwhelming that the male voice on the recording was the appellant's. The female voice, readily identifiable as Ms. B., repeatedly called the man on the recording "Mark," the appellant's first name.

[5] The trial transcripts reflect that the jury retired to deliberate shortly before 4:27:54 p.m. and returned its verdict shortly after 4:47:51 p.m.

voice on the recordings, also were harmless. At most, the jurors could have construed Ms. B.'s questionable memory failures as showing that she presented the classic picture of a domestic violence victim who either wanted to protect her abuser from criminal liability or was afraid not to. Any such signal would not have been important to the jury's decision, however, because, as explained, there was overwhelming evidence that the appellant in fact was the person who had beaten Ms. B. with a belt on March 18, 2014, and by his admission on the tape recording, at other times as well. Accordingly, the trial court's errors in allowing the prosecutor's questions were harmless beyond a reasonable doubt.

II.

The appellant contends the evidence was legally insufficient to support his conviction for carrying a dangerous weapon openly with the intent to injure. That crime is codified at Md. Code (2002, 2012 Repl. Vol.), section 4-101(c)(2) of the Criminal Law Article ("CL"), which states:

> A person may not wear or carry a dangerous weapon . . . openly with the intent or purpose of injuring an individual in an unlawful manner.

Thus, the elements of the crime are that the defendant wore or carried a dangerous weapon; that he did so openly; and that he did so with the intent or purpose to injure someone in an unlawful manner. A belt can be a dangerous weapon for purposes of this statute.

The appellant argues that the evidence showed only that he *used* the belt, and that the *mere use* of the belt does not constitute wearing or carrying it openly with the intent to injure. And, any incidental movement of the belt in the course of using it is not carrying it openly with intent to injure.

The State initially responds that this issue is not preserved for review because the argument the appellant now advances was not made in support of his motion for judgment of acquittal at the close of the evidence. Rather, he made a different argument in support of that motion (which he does not pursue on appeal). On the merits, the State argues that Mr. Hart's recording was evidence that supported a reasonable finding that the appellant was carrying the belt openly while using it to threaten Ms. B. and to whip her.

At the close of the State's case-in-chief, defense counsel moved for judgment of acquittal on the weapons charge, arguing: "[T]here's no evidence that Mr. Anderson ever had a belt in his hand or used a belt against [Ms. B.] on that day." The prosecutor responded that, viewing the evidence in the light most favorable to the State, "there is evidence there was a belt that was recovered from the property, that injuries that are depicted in the photographs are consistent with a belt mark, they're welt marks." The court denied the motion. The defense rested and renewed its motion for judgment of acquittal, incorporating the arguments made at the close of State's case but adding no more.

We agree with the State that this issue is not preserved for review. Under Rule 4-324(1), a defendant in a criminal case must "state with particularity all the reasons why the motion [for judgment of acquittal] should be granted." When a defendant argues, on appeal, that the evidence was legally insufficient to support his conviction, but does so based on a reason different from that argued below, that sufficiency issue is not preserved for review. *Testo v. State*, 205 Md. App. 334, 384 (2012).

Here, the sole basis for the appellant's motion for judgment of acquittal on the weapons charge was that the evidence was legally insufficient to support a finding that he had a belt in his hand or that he used a belt against Ms. B. on the day in question. This is not the argument the appellant advances on appeal. Rather, he now argues that his mere use of the belt against Ms. B. is not proof that he wore or carried it openly, with the intent or purpose of injuring Ms. B. in an unlawful manner. Because this issue is not preserved for review, we shall not address it.

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