UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2553

September Term, 2013

---

GERALD WAYNE GARDNER

v.

STATE OF MARYLAND

---

**Zarnoch,
Arthur,
Sonner, Andrew L.
(Retired, Specially Assigned),

JJ.

---

Opinion by Sonner, J.

---

Filed: November 12, 2015

**Zarnoch, Robert A., J., participated in the conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

A jury sitting in the Circuit Court for Prince George's County convicted appellant, Gerald Wayne Gardner, of theft of property with a value of at least $1,000 but less than $10,000, as well as malicious destruction of property with a value over $500. Upon receiving a sentence of ten years' imprisonment, all but eight years suspended, for the theft conviction and a concurrent three-year sentence for malicious destruction, to be followed by three years' probation,[1] Gardner noted this appeal, raising two issues:

> 1. Whether the evidence of the value of the property stolen was sufficient to sustain his conviction of theft of property with a value of at least $1,000 but less than $10,000; and
>
> 2. Whether the circuit court erred or abused its discretion in denying Gardner's motion for mistrial.

We hold that the State failed to adduce evidence from which a reasonable fact finder could infer that the value of the stolen property was at least $1,000[2] but otherwise find neither error nor abuse of discretion. Accordingly, we vacate the judgment of conviction for theft of property with a value of at least $1,000 but less than $10,000 and direct that a verdict of guilty of theft of property with a value of less than $1,000 be entered, and remand so that the circuit court may impose a sentence for that conviction, but otherwise affirm. *See Champagne v. State*, 199 Md. App. 671, 677-78 (2011).

[1]Gardner's brief erroneously states that his sentence for theft was ten years' imprisonment, all but five years suspended.

[2]Gardner does not otherwise challenge the sufficiency of the evidence that he committed theft, only that the value of the property stolen was not proven to be at least $1,000.

## FACTUAL AND PROCEDURAL BACKGROUND

On the evening of January 25, 2013, Detective Kenneth Smith of the Prince George's County Police Department was conducting surveillance, in the vicinity of the former Giant Food warehouse in Landover, for reasons unrelated to this case.[3] Around midnight, when his work that evening had concluded, Detective Smith, while on his way home, "as [he] was driving down Sheriff Road," observed Gardner, "coming from the Giant warehouse with copper and walking across the street." Driving slowly, Detective Smith continued for a short distance, maintaining visual contact with Gardner through his rear view mirror. Detective Smith then turned his vehicle around and drove back towards the gate of the Giant warehouse, arriving there "[l]ess than two minutes" after he had first noticed Gardner. By then, Gardner was headed "back" towards the warehouse "to retrieve more copper."

As he approached in his unmarked police cruiser, Detective Smith lowered the window of his car and addressed Gardner, who replied, "Who are you?" Detective Smith responded, "I'm the police," whereupon Gardner fled from the scene. But Detective Smith exited his police cruiser and gave chase, catching up to Gardner a short while later. Detective Smith then called Detective Andrea Sheehan, of the Pawn and Scrap Unit of the

[3]Detective Smith testified that that surveillance was being conducted for the violent crimes unit, a joint task force involving both the Prince George's County Police Department as well as the United States Bureau of Alcohol, Tobacco, Firearms, and Explosives.

Prince George's County Police Department, which investigates "high-dollar scrap theft." Detective Sheehan took over the investigation from there.

Gardner was arrested, and, incident to that arrest, police recovered physical evidence of the theft, including a bucket, later identified as coming from the Giant Food warehouse; pieces of copper pipe, some of which were covered with insulation and some of which were not, and all of which, apparently, had been cut on their ends, as they had been "rip[ped] . . . out of the ceiling"; various pieces of plumbing, including two "ball valves" and three "stop valves," which were attached to the pipes; and what the State claimed were burglar's tools, including a flashlight, a pair of gloves, and "a locking mechanism to a door."

A grand jury in the Circuit Court for Prince George's County subsequently issued an indictment, charging Gardner with burglary in the second degree, burglary in the fourth degree, burglary in the fourth degree with the intent to commit theft, possession of burglar's tools, theft of property with a value of at least $10,000 but less than $100,000, and malicious destruction of property with a value over $500. A jury trial on those charges ensued.

During that trial, the State called five witnesses: Detectives Smith and Sheehan, and three employees of MAI Michel Companies, Inc., the property management firm contracted to manage the former Giant Food warehouse—Alphfonzo Pearsall, the "second engineer" for that property, responsible for regularly checking the status of the property whenever "the primary engineer is out"; Jason Soistman, the senior property manager for the property, among whose duties was to "routinely review purchases that are made by

building engineers for various supplies in the building," such as plumbing, HVAC, and "other types of building systems"; and James Simpson, the "chief engineer" for the property, responsible for checking the property "on a daily basis" to "make sure everything is running."

Among the items of evidence introduced during the State's case-in-chief were the bucket and the cut-off pieces of copper pipe; photographs depicting that bucket and its contents as well as similar buckets full of stolen copper pipe; and the purported burglar's tools. (In the words of Detective Smith, there was "a lot more copper that they didn't bring to court.")

Detective Smith testified in detail about how he had encountered Gardner, apparently in the act of taking the stolen copper pipe from the warehouse, and his ensuing apprehension of the fleeing Gardner. He also identified the physical and photographic evidence as having come from the warehouse on the night of the arrest.

All three of the property management employees identified the copper pipe and insulation, as introduced into evidence and as depicted in photographs which were introduced into evidence, as similar or "identical to" or "consistent with" that contained in the warehouse, and Pearsall and Soistman identified the bucket as similar to buckets found throughout the building.

Soistman further testified regarding the building inspection he had performed, the morning after Gardner's arrest, which revealed extensive damage to the ceiling, drywall, HVAC systems, and hot water heaters. Because it was his practice (as well as Simpson's) to regularly inspect the building, Soistman concluded that that damage had taken place the

same night when Gardner was caught stealing copper pipe at that location. The parties stipulated that Gardner did not have permission to be in the building and was so aware.

Detective Sheehan identified the stolen pipe and the bucket as having come from the former Giant Food warehouse. She also identified a flashlight, a pair of gloves, and "a locking mechanism to a door," which she had recovered from Gardner's person on the night of his arrest.

As to the value of the items stolen from the warehouse, only Soistman offered any testimony. We shall set forth that testimony in greater detail in the discussion of the issues.

At the close of the State's case-in-chief, Gardner moved for a judgment of acquittal, contending, among other things, that the evidence of the value of the items stolen was insufficient. The circuit court denied that motion and then instructed the jury. The theft charge, as presented to the jury, permitted three possible verdicts—theft of property with a value of at least $10,000 but less than $100,000, and two lesser included offenses—theft of property with a value of at least $1,000 but less than $10,000, and theft of property with a value less than $1,000.

The jury convicted Gardner of both theft of property with a value of at least $1,000 but less than $10,000 and malicious destruction of property with a value over $500; but it acquitted him of theft of property with a value of at least $10,000 but less than $100,000 as well as all of the burglary-related charges. Upon sentencing, Gardner then noted this timely appeal. Additional facts will be noted as pertinent to discussion of the issues.

## DISCUSSION

### I.

Gardner contends that the evidence was insufficient to establish that the value of the copper pipe stolen was at least $1,000. He does not otherwise challenge the sufficiency of the evidence to sustain either of his convictions.

The State counters that there was testimony that expressly established that the value of property stolen was at least $456.40 and that there was evidence from which the jury could infer that the value was at least $1,000.

The test we apply in determining whether the evidence was sufficient to sustain a conviction is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In making that determination, "we give great deference to the trier of facts' opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence." *Champagne*, 199 Md. App. at 675 (citation and quotation omitted). Specifically, we "defer to the jury's inferences and determine whether they are supported by the evidence." *Smith v. State*, 415 Md. 174, 185 (2010). The "inferences made from circumstantial evidence," however, "must rest upon more than mere speculation or conjecture." *Id.*

Under the Maryland consolidated theft statute, "theft . . . constitutes a single crime," Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article, § 7-102(a) ("CL"), "encompassing various common law theft-type offenses in order to eliminate the confusing and fine-line common law distinctions between particular forms of larceny." *Jones v.*

*State*, 303 Md. 323, 333 (1985) (interpreting substantively identical provision codified at former Art. 27, § 341); *accord Whitehead v. State*, 54 Md. App. 428, 445 (1983). The penalty subsection, CL § 7-104(g), establishes a series of escalating penalties depending upon the "value" of the goods or services stolen.[4] "The State bears the burden of proving," beyond a reasonable doubt, "that the property stolen has value and, if seeking an enhanced penalty, the value of the property stolen." *Hobby v. State*, 436 Md. 526, 551 (2014).

"Value" is defined as "the market value of the property or service at the time and place of the crime" or, "if the market value cannot satisfactorily be ascertained, the cost of the replacement of the property or service within a reasonable time after the crime." CL § 7-103(a). "The present market value of stolen property may be proven by direct or circumstantial evidence and any reasonable inferences drawn therefrom." *Champagne*, 199 Md. App. at 676.

In the case at bar, the only testimonial evidence of value was provided by Jason Soistman, the senior property manager for the former Giant Food warehouse. He testified that the value of the buckets Gardner used to carry the purloined copper pipe out of the warehouse was $138.10; that the value of the insulation which had to be replaced (and, in the light most favorable to the State, was attached to the stolen pipe and therefore also stolen) was $220.50; that the value of the two ball valves taken was $56.40; and that the value of the three stop valves taken was $41.40. Soistman further testified that the cost of

[4]As the Court of Appeals explained in *Jones v. State*, 303 Md. 323, 340 (1985), "the word 'steal' encompasses all categories of conduct by which theft can be committed under [CL § 7-102(a)]."

restoring the building "to its condition prior to the break-in" was approximately $22,000 to $24,000. As for the actual pieces of copper pipe, which Gardner had cut out of the ceiling and wall of the warehouse, Soistman, when asked what value, if any, those had "to [his] company in the current condition," replied, "None."

Further evidence of value was provided by photographs, introduced into evidence, depicting what the State characterizes as "numerous pieces of copper piping." Moreover, physical evidence, comprising one of the buckets, containing some of the stolen copper pipe, which were seized from Gardner when he was arrested for the theft at issue, was also admitted.

Unfortunately for the State, it failed to establish the scrap value of the stolen pipe. When attempting to introduce evidence of how much that pipe weighed, the State was foiled when the circuit court sustained a defense objection, apparently on the ground of hearsay, as Soistman had no first-hand knowledge of the weight of the stolen pipe. Thereafter, the State failed to call any other witness who could establish either the weight of the stolen pipe or the prevailing unit price paid for scrap copper pipe in Prince George's County at the time of the theft. Nor did the State introduce any evidence of the cost, per linear foot, of the finished copper pipe used in the building (which, undoubtedly, would have been greater than the scrap value), nor did it introduce any evidence of the number of linear feet of pipe required to restore the damage Gardner had done to the building.

The problem for the State is that the total direct evidence of value, even in a light most favorable to the State, is $456.40 (that is, the sum of $138.10, $220.50, $56.40, and $41.40). To fill the $543.60 gap between that total and the $1,000 statutory threshold, the

State asserts that a jury could reasonably infer that a fraction of the $24,000 restoration cost to which Soistman testified, and in any event at least $543.60, would be devoted to the purchase of copper pipe.

In support of that assertion, the State directs our attention to *Angulo-Gil v. State*, 198 Md. App. 124 (2011); *McCoy v. State*, 41 Md. App. 667, *rev'd on other grounds*, 286 Md. 444 (1979); and *Shipley v. State*, 220 Md. 463 (1959), cases in which theft convictions were upheld on the basis of reasonable inferences that could be drawn from the evidence presented. Those decisions do not, however, support the State's assertion.

In *Angulo-Gil*, 198 Md. App. 124, we affirmed a judgment of conviction for theft greater than $500[5] despite the absence of any direct evidence of the value of the stolen item. That item, however, was a one-year-old automobile, "an operable 2006 Ford Focus." *Id.* at 152. Applying a modicum of common sense, we merely held that "a jury reasonably may conclude that, in April 2007, a one-year-old operable Ford Focus was worth more than $500." *Id.* at 152-53.

Although we did not elaborate on our reasoning in *Angulo-Gil*, we think it fair to say that it was so patently obvious as to be regarded as common knowledge (and therefore within the ability of a reasonable jury to infer, without engaging in "mere speculation or conjecture," *Smith*, *supra*, 415 Md. at 185) that a late-model, operable car, in 2007, was

[5]At the time of the theft in that case, the penalty provision of the consolidated theft statute provided that, if the value of the stolen item was less than $500, the crime was a misdemeanor, but if that value was at least $500, the crime was a felony and carried a greater maximum sentence. Md. Code (2002), Criminal Law Article, § 7-104(g).

worth thousands of dollars and, in any event, far more than a mere $500. Here, in contrast, we think it far from obvious what fraction of the building restoration costs is attributable to the stolen copper pipe or, for that matter, how much copper pipe was required to complete that restoration or how much copper pipe costs per unit (none of which was introduced into evidence in this case), and we conclude that *Angulo-Gil* does not control the outcome of the matter before us.

In *McCoy*, 41 Md. App. 667, tried at a time when the threshold between misdemeanor and felony theft was $100, this Court held that, given the evidence that 218 cases of soft drinks had been stolen, the fact finder "could easily infer that the value of each of the 218 cases of drinks involved need only be 50¢ for the total to exceed $100." *Id.* at 675. Moreover, a lay witness, the night manager of the beverage distributor, from which the goods had been taken, "testified that the average value of a case of soft drinks was $2.88." *Id.* Under these circumstances, we concluded that, "[w]ithout any doubt, goods of a value in excess of $100 actually were stolen." *Id.* (citing *Shipley*, 220 Md. at 467). Once again, the inference that could be drawn from the evidence did not require "mere speculation or conjecture," *Smith*, *supra*, 415 Md. at 185, and, furthermore, there was actual testimony establishing a value of goods stolen that exceeded the statutory threshold, rendering the inference superfluous in any event. *McCoy*, likewise, does not control the outcome of the instant case.

Finally, in *Shipley*, 220 Md. 463, the Court of Appeals upheld a conviction of breaking and entering a storehouse with an intent to steal goods with a value of $100 or more, "where a portion of the stolen goods was before the trier of facts, together with a

detailed list of the other clothing stolen, and the goods stolen were ordinary articles of clothing." *Id.* at 467. The Court averred that

> the lower court could reasonably infer from the clothing before it and from the description of the other articles stolen, and from the fact that the average value of each article need be only $1.45 for the total to exceed $100, that goods of a value in excess of $100 actually were stolen.

*Id.*

In any event, explained the *Shipley* Court, the actual *value* of goods stolen did not have to be proven, because the crime charged required merely that the *intent* to steal goods of a certain value be proven. *Id.* That intent, declared the Court, could be inferred under the circumstances of the case before it, given that the burglars took 69 articles of clothing, which the Court characterized as "all the clothes they could carry away in their car," the value of which "was expected and intended to be in excess of $100." *Id.* at 467-68.

Once more, we note that the instant case is distinguishable from *Shipley*, given that, here, value must be proven and that, in ascertaining the value of goods stolen, the fact finder must do far more than merely guess a nominal value for each item taken and then multiply that nominal value by the *known* number of items taken. In this case, the jury must speculate to ascertain how much pipe was stolen, not merely how much each unit of pipe costs, and *both* factors are necessary to estimate either the scrap value of pipe stolen or the replacement cost of new pipe.

We conclude that the State has failed to adduce sufficient evidence to prove that the value of the goods stolen in this case was at least $1,000. Because theft of goods with a value less than $1,000 is a lesser included offense of theft of goods with a value of at least

$1,000 but less than $10,000, and, as Gardner concedes, all of the other elements of the lesser included offense were both adduced by the State and found, beyond a reasonable doubt, by the jury, we shall vacate the judgment of conviction for the greater offense, and we further direct that the circuit court enter a judgment of conviction for the lesser included offense and re-sentence accordingly. *See Champagne*, *supra*, 199 Md. App. at 677-78.

**II.**

Gardner complains that the circuit court erred in denying his motion for mistrial, which was prompted by the testimony of a State's witness, Detective Sheehan, regarding her prior contacts with Gardner. Those prior contacts, in turn, arose from conduct that had resulted in Gardner's prior convictions for theft offenses at the former Giant Food warehouse (that is, virtually identical offenses at the same location as in the instant case). To understand Gardner's complaint requires some background.

Immediately before trial, the State had moved in limine to admit police testimony regarding those prior contacts with Gardner, contending that, properly limited in place and subject matter, that testimony tended to prove that, previously, Gardner had committed crimes so similar to the offenses presently charged as to constitute "signature crime[s]." Thus, according to the State, such testimony regarding prior contacts with Gardner was admissible under the "identity" exception to the general prohibition against "other bad acts" evidence in Maryland Rule 5-404(b). The circuit court reserved ruling on that motion and would later deny it.

While the State's motion was still pending, during the State's direct examination of Detective Sheehan, the following colloquy took place:

> [THE STATE]: And Detective, where did you come in contact with the defendant?
>
> [DETECTIVE SHEEHAN]: **Previous investigations involving copper thefts from the Giant warehouse.**
>
> [THE STATE]: No, just --
>
> [DEFENSE COUNSEL]: Objection. May we approach?
>
> THE COURT: **We'll strike that and disregard that answer.**

(Emphasis added.)

Defense counsel repeated her request for a bench conference and then moved for a mistrial:

> [DEFENSE COUNSEL]: Your Honor, at this point I know, on your own, you struck that last answer that I objected to.
>
> I will move for a mistrial on the grounds that the bell has been rung, and striking that line does not unring it.
>
> Given that the Court has not ruled on the State's motion yet, the jury is now alerted that they've had prior contacts with copper thefts at the very same location, when the witness has been specifically instructed, my understanding is, not to be discussing at this point any prior contacts.

The circuit court, however, denied Gardner's motion for mistrial:

> THE COURT: She did not say that he'd been accused, arrested, charged or anything with any prior contact. My recollection is that she said that she had prior contacts with him with regard to the investigations of copper pipe theft.
>
> I've instructed the jury to disregard that. In as much as she did not say that he was arrested, charged or convicted in any prior cases[,] I'll note your motion and I'll deny the mistrial.

In sum, Gardner claims that Detective Sheehan's remark concerning "[p]revious investigations involving copper thefts from the Giant warehouse" resulted in the jury's exposure to inadmissible "other crimes" evidence. Moreover, he asserts, that purported "other crimes" evidence was so unfairly prejudicial that the trial court's actions, denying his motion for mistrial and, instead, striking the offending remark and giving a curative instruction to the jury, were inadequate to protect his right to a fair trial. Accordingly, Gardner maintains that he is entitled to a new trial.

"We note that a mistrial is generally an extraordinary remedy and that, under most circumstances, the trial judge has considerable discretion regarding when to invoke it." *Powell v. State*, 406 Md. 679, 694 (2008). "The decision by the trial court in the exercise of its discretion denying a mistrial will not be reversed on appeal unless it is clear that there has been prejudice to the defendant." *Wilhelm v. State*, 272 Md. 404, 429 (1974).

In *Rainville v. State*, 328 Md. 398 (1992), the Court of Appeals set forth a number of factors to be considered in determining whether a mistrial is required when an accused claims that his right to a fair trial has been infringed by the admission of inadmissible and prejudicial testimony:

> "whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists. . . ."

*Id.* at 408 (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)) (alterations in original).

Among the Maryland appellate decisions applying those factors under circumstances comparable to the present case are *Rainville*, 328 Md. 398, *Carter v. State*, 366 Md. 574 (2001), *State v. Hawkins*, 326 Md. 270 (1992), and *Jones v. State*, 310 Md. 569 (1987), *sentence vacated*, 486 U.S. 1050 (1988). In *Rainville* and *Carter*, the Court of Appeals held that a curative instruction was insufficient to cure the unfair prejudice to the defendants, whereas in *Hawkins* and *Jones*, the Court reached the opposite conclusion. We shall address these cases seriatim and conclude that the instant case is distinguishable from *Rainville* and *Carter*; and that the outcome, here, is controlled by *Hawkins* (and *Jones*)—that is, the circuit court, under the circumstances of this case, did not abuse its discretion in denying Gardner's motion for mistrial.

In *Rainville*, the defendant was accused of sexual assaults against two different victims: a seven-year-old girl, Peggy, as well as her nine-year-old brother, Michael. *Rainville*, 328 Md. at 399-400. "Separate indictments were returned against the defendant for the charges involving Peggy and those involving Michael." *Id.* at 401. At the ensuing jury trial on the charged assaults against Peggy, Peggy's mother testified about her daughter's demeanor upon her initial complaint of the assaults:

> "She was very upset. I had noticed for several days a difference in her actions. She came to me and **she said where [Rainville] was in jail for what he had done to Michael** that she was not afraid to tell me what had happened."

*Id.* at 401 (emphasis added). Defense counsel objected and moved for a mistrial, but the trial court denied that motion and, instead, gave a curative instruction, telling the jury that it "should not in any way consider" what the mother said and that it "should put it out of"

its mind and "forget about it." *Id.* at 402. Although Rainville was acquitted of rape and one count of second-degree sexual offense (anal intercourse), he was convicted of a second count of second-degree sexual offense (fellatio) as well as assault and battery. *Id.*

The Court of Appeals reversed and remanded for a new trial. It noted that, although the mother's remark was a single, isolated statement, not made by the principal witness, it was, nonetheless, in the defendant's words, "the only evidence which tended to corroborate Peggy's testimony." *Id.* at 409. Given that, as the Court put it, the State's case "rested almost entirely upon" Peggy's testimony; that Michael's testimony failed to corroborate Peggy's; that there was virtually no forensic evidence; and that there was "evidence of some antagonism between" Rainville and the mother, the Court declared that, under the circumstances, "informing the jury that the defendant was 'in jail for what he had done to Michael' almost certainly had a substantial and irreversible impact upon the jurors, and may well have meant the difference between acquittal and conviction." *Id.* at 409-10. Therefore, it concluded, the curative instruction did not "salvage a fair trial for" Rainville. *Id.* at 411.

In the instant case, as in *Rainville*, the offending remark was single and isolated and was not uttered by the principal witness.[6] The cases differ, however, in two crucial

[6]Although, to be sure, Detective Sheehan was the lead investigator in this case, her testimony comprised only ten pages out of sixty-four pages of testimony in the State's case-in-chief. Moreover, much, though not all, of the physical evidence was introduced through the testimony of Detective Smith, the officer who apprehended Gardner at the crime scene. Furthermore, virtually all of the evidence of the value of the items stolen, which is the principal issue in dispute in this appeal, was introduced through the testimony of Jason Soistman, the senior property manager for the former Giant Food warehouse.

respects. First, whereas, in *Rainville*, the victim's mother expressly stated that the defendant "was in jail for what he had done to" the alleged victim of a related but uncharged offense, in the instant case, Detective Sheehan's remark did not directly implicate Gardner in any crime; or, as the circuit court put it, Detective Sheehan "did not say that [Gardner] was arrested, charged or convicted in any prior cases." Second, whereas, in *Rainville*, the State's case "rested almost entirely upon" the victim's testimony, *id.* at 409, in the instant case, there was ample evidence, both direct and circumstantial, implicating Gardner in the theft at issue, namely, the stolen items found in his possession at the time of his arrest, as well as the fact that he had been observed within feet of the entrance to a vacant warehouse from which those stolen items originated. Thus, it was possible, in this case but not in *Rainville*, to cure any potentially unfair prejudice by means of a curative instruction.

In *Carter v. State*, *supra*, 366 Md. 574, the defendant, Carter, was charged with first-degree murder, armed robbery, and related handgun offenses for his role in the murder of Michael Pirner, an assistant manager of a pizza shop where Carter worked. During the first day of Carter's jury trial on those charges, a "veteran" policeman, Sergeant Bryant, who was the lead investigator in the case, *id.* at 590, testified that Carter, while being interrogated shortly after the murder, was "confronted with the fact" that he "had a prior arrest" and "admitted the prior arrest." *Id.* at 579. In response to a defense objection and motion for mistrial, the trial court denied the motion and, over defense objection, gave an instruction which, though no doubt intended to cure Sergeant Bryant's prejudicial remark, referred five separate times to Carter's prior "arrest." *Id.* at 580.

Then, on the following day of trial, James Douglas, an acquaintance of Carter, testified that, nearly a year after the murder, Carter confided in him that he had robbed the pizza shop but that the robbery had not gone according to plan. That plan, according to Douglas, was that Carter would leave the restaurant, and then a "crackhead who owed" Carter money would enter and rob Pirner. *Id.* When that "crackhead" failed to show up, Carter committed the robbery on his own and killed Pirner "because Pirner could identify him." *Id.* During cross-examination, Douglas was asked whether he had provided a name of Carter's purported co-conspirator to the police and replied, "Benny." Then, when defense counsel asked, "Who is Benny?", Douglas replied, "Some crackhead he sold crack to." *Id.* at 581.

Carter again moved for a mistrial, "arguing that evidence before the jury of two unrelated crimes was unduly prejudicial to" him. *Id.* Although the trial court agreed that Douglas's testimony was "unresponsive," it denied the motion for mistrial. *Id.* Instead, the trial court, over defense objection, gave an instruction, which referred to the witness's characterization of "Benny as a crackhead, as somebody the defendant had sold crack to before." *Id.* That instruction further informed the jury "to disregard that characterization of Benny as someone to whom the defendant has sold crack to before" and that Carter was "not on trial here today for selling crack." *Id.*

Carter was convicted of all charges, but the Court of Appeals reversed and remanded for a new trial. Observing that, though the references to other crimes evidence were "unsolicited by the prosecutor," they were, nonetheless, "not an isolated incident"; that credibility "was an important issue in the case inasmuch as" Carter had denied his

involvement in the crimes, whereas the State's witnesses "recounting [Carter's] inculpatory remarks had motives for testifying against him"; and that the purported curative instruction, given immediately after Sergeant Bryant had referred, in his testimony, to "other crimes" evidence, "mentioned the arrest four[7] times" and therefore "highlighted the inadmissible evidence and emphasized to the jury that [Carter] had been arrested previously," our highest Court concluded that, "considering the cumulative effect of the inadmissible evidence and the curative instructions actually given," Carter was unfairly prejudiced, and the trial court abused its discretion in refusing to grant a mistrial. *Id.* at 590-91.

In the instant case, unlike in *Carter*, Detective Sheehan "did not say that [Gardner] was arrested, charged or convicted in any prior cases." Nor, for that matter, was the curative instruction defective as were those given in *Carter*. In contrast with *Carter*, where both purported curative instructions "highlighted the inadmissible evidence and emphasized" it to the jury, *id.* at 591, in the instant case, the circuit court merely struck the offending testimony and instructed the jury to "disregard" it.

In *State v. Hawkins*, *supra*, 326 Md. 270, the defendant, Hawkins, was charged with first-degree murder and being an accessory after the fact. During her ensuing jury trial on those charges, two different police officers testified and inadvertently referred to the "polygraph" room, in which police had interrogated Hawkins during their investigation of

[7]As noted earlier, that purported curative instruction actually referred to Carter's prior arrest five times. *Carter*, 366 Md. at 580.

the murder. *Id.* at 274, 275. After the second reference to "polygraph," Hawkins moved for a mistrial, but the trial court ultimately denied that motion, reasoning that those references were "blurts," which caused "no irrefutable prejudice to" Hawkins. *Id.* at 275, 276-77.

The Court of Appeals affirmed in relevant part,[8] agreeing with the trial court that the police officers' references to the term "polygraph" were "inadvertent, uttered abruptly and impulsively, with no nefarious intent." *Id.* at 277. Because, reasoned the Court, "the references to 'polygraph' were not solicited or pursued by the prosecutor," and "[n]either officer stated that Hawkins had taken a polygraph test or had expressed her willingness or unwillingness to take it," it concluded that Hawkins had suffered no unfair prejudice, and, accordingly, it held that the trial court had not abused it discretion in denying Hawkins's motion for mistrial. *Id.* at 278-79.

Here, too, Detective Sheehan's remark was "not solicited or pursued by the prosecutor," as can be discerned from the prosecutor's response to her offending testimony, where the prosecutor told her, "No, just –." Nor do we discern any "nefarious intent," by either Detective Sheehan or the prosecutor. Moreover, in the instant case, the offending remark was, if anything, less prejudicial to the defense than the "blurts" in *Hawkins*; whereas, in that case, there were two separate instances of inadmissible testimony, both of which involved the toxic word "polygraph," in the instant case, there was only one isolated

[8]The Court of Appeals vacated Hawkins's judgment of conviction for being an accessory after the fact. *Hawkins*, 326 Md. at 295.

reference to information, which did not directly implicate Gardner in wrongdoing, as Detective Sheehan stated only that there had been "[p]revious investigations," without revealing what the outcome of those investigations may have been.

Finally, in the last of the four cases in our analysis of the mistrial issue, *Jones*, *supra*, 310 Md. 569, the surviving witness of a home invasion and murder, Linda Jordan, "made an in-court identification of Jones as the murderer." *Id.* at 587. The prosecutor then asked whether she had "ever seen the defendant before this day," to which she replied, "I had went to visit him with my husband at Lewisburg." *Id.* Defense counsel objected and moved for a mistrial, protesting that Ms. Jordan's reference to "Lewisburg" would be interpreted by the jury "to mean that at one time [Jones] was an inmate at the Lewisburg Federal Correctional Institution," but the trial court denied that motion. *Id.*

On appeal, Jones contended that Ms. Jordan's improper reference to his prior criminal record was "devastating" to his defense and that the trial court had abused its discretion in denying his motion for mistrial. *Id.* Rejecting that contention, the Court of Appeals, though acknowledging that "evidence of a defendant's prior criminal acts, unrelated to the case at trial, is inadmissible," deemed Ms. Jordan's "naked reference to Lewisburg" not so unfairly prejudicial as to require the "extraordinary" remedy of a mistrial. *Id.* at 587-88. The Court reasoned that, although it may be common knowledge that a federal prison is located at Lewisburg, Pennsylvania, "no mention was made of Jones's prior criminal record or that he had been an inmate at the prison." *Id.* at 588. Given that there was "insufficient prejudice to Jones," the Court concluded that the trial court had not abused its discretion in denying his motion for mistrial. *Id.*

The circumstances surrounding the offending remarks in both *Jones* and the instant case are comparable. As in *Jones*, so too, here, "no mention was made of [Gardner's] prior criminal record." *Id.* at 588. And, as in *Jones*, so too, in the instant case, the witness made a "naked reference," *id.*, which, indirectly, implicated the defendant's prior criminal conduct—in *Jones*, that "naked reference" was to a federal prison, whereas here, it was to "previous investigations." We conclude, as did the *Jones* Court, that, under the circumstances, Detective Sheehan's isolated "naked reference" to "previous investigations" was not so unfairly prejudice to Gardner as to require the "extraordinary" remedy of a mistrial.

**JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED IN PART AND AFFIRMED IN PART. CASE REMANDED TO THAT COURT FOR RESENTENCING CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.**