UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2725

September Term, 2013

LESTER BAILEY

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Kehoe,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: August 5, 2015

A jury in the Circuit Court for Baltimore City convicted Lester Bailey, the appellant, of possession of a firearm with a prior disqualifying conviction, carrying a handgun in a vehicle, and wearing and carrying a handgun. The court sentenced the appellant to a total of eight years' imprisonment.[1]

The appellant raises three issues for review, which we have reordered:

I. Did the circuit court abuse its discretion by asking an "anti-CSI effect" *voir dire* question?

II. Did the trial court err in permitting the State to play a recording of a phone conversation?

III. Did the trial court abuse its discretion by permitting improper prosecutorial argument?

We conclude that the trial court erred in asking the *voir dire* question, but that the error was harmless; and that the trial court did not err or abuse its discretion in allowing the challenged argument or admitting the challenged recording. Accordingly, we shall affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

The appellant was charged with illegally possessing a handgun that police recovered during a traffic stop of a car that was being driven by Kevin Ashe and in which the appellant was the sole passenger. The weapon was found in the zippered pocket of a jacket lying on

[1]The appellant is serving eight years on the firearm possession conviction, the first five without parole, and a concurrent three years for the carrying a handgun in a vehicle conviction. The remaining conviction was merged for sentencing.

the back seat. The circumstances leading to its discovery were largely undisputed. The only factual issue at trial was whether the gun belonged to the appellant.

On the morning of April 27, 2012, Baltimore City police received information about an anticipated drug transaction involving a burgundy Nissan Altima with a specific license plate number. In response, members of a police task force staked out the 3400 block of Bateman Avenue. As two detectives watched from an unmarked pickup truck, a car matching that description parked on the block. Ashe was in the driver's seat and the appellant was in the front passenger seat.

When a marked police patrol car drove into view of the Altima, Ashe leaned forward toward the steering wheel and made furtive movements downward, leading the detectives to believe that he might be hiding something under his seat. As the two detectives approached on opposite sides of the Altima, they observed a partially open driver's side window. One of the officers smelled marijuana. Based on that odor and Ashe's furtive movements, the detectives arrested and handcuffed both occupants of the vehicle.

One detective saw, in plain view behind the driver's seat, a small ziploc bag containing what appeared to be marijuana. A black Champion sweatshirt and a black Adidas zip-up style jacket were on the back seat of the car. These articles of clothing both were size 3XL, and they were "rolled" or "intertwined" together. When one of the detectives picked up the clothing bundle, he felt a solid heavy object. By its weight and shape, he immediately recognized the object as a gun. He found a black .45 caliber handgun in the zipped pocket

of the jacket. After announcing, "I have a gun," the detective removed the magazine, then placed the weapon and both articles of clothing on the roof of the Altima.

The Altima was a rental leased to Ashe, who is shorter and weighs less than the appellant. At trial, the detectives testified that Ashe was 5'3" to 5'7" in height and weighed 175 to 190 pounds. At the time of the arrests, Ashe was wearing jeans, a zippered jacket, and an electronic ankle monitor for home detention. They testified that the appellant was 6'1" to 6'4" in height, weighed 270 to 280 pounds, and was wearing shorts and a T-shirt.

As the two men sat on the curb awaiting transport, the appellant asked the police whether he could wear the Champion sweatshirt because he was cold. Detective Todd Moody testified:

> [PROSECUTOR:] And did there come a time where the Defendant at the scene made a statement regarding being cold?
>
> [DET. MOODY:] He did. We were waiting for the wagon to come. I was still standing there near the gun. I wouldn't – just to keep it secured. And Mr. Bailey stated to me, "I'm freezing. Can I get my sweatshirt?" And I was a little surprised by the statement at the time, and I turned around, and I said, "This sweatshirt?" And he said, "Yeah, that's mine, but the other one's not." And I said, "Okay." And it was chilly. So I did – I gave him the Champion sweatshirt, and he put it on over top. He was handcuffed at the time, but he did – we did put it on him.

The 3XL Champion sweatshirt was not collected as evidence or introduced at trial. Two photographs of the appellant wearing it were admitted into evidence. The first shows him wearing the sweatshirt in the parking lot outside the police station, and the second shows him wearing it when he was booked.

The gun was not tested for DNA. Det. Moody asked for latent fingerprint testing. The record does not reflect whether test results were obtained.

The appellant was charged with three handgun offenses. Ashe, who was not charged with any handgun offense, was subpoenaed for trial but did not appear. According to the prosecutor, Ashe was "scared, frightened, didn't want to testify."

In closing argument, the State linked the appellant to the handgun found in the jacket through circumstantial evidence that the sweatshirt and jacket both were size 3XL; the two articles of clothing were found together within his reach; he was significantly taller and heavier than Ashe; he was wearing only a T-shirt whereas Ashe was wearing a jacket; he claimed ownership of the sweatshirt; and, in a post-arrest phone call from jail, he accused Ashe of being a "snitch." Defense counsel argued that the State failed to prove beyond a reasonable doubt that the appellant had been in possession of the handgun because the circumstantial evidence was equivocal and the State did not introduce any fingerprint or DNA evidence linking the appellant to the handgun or the jacket.

We shall add pertinent facts in our discussion of the issues.

DISCUSSION

I.

"Anti-CSI Effect" *Voir Dire* Question

The appellant contends the trial court abused its discretion by propounding the following *voir dire* question:

> Is there any member of the jury panel who would be unwilling or unable to weigh the testimony of witnesses and decide this case fairly and impartially without scientific evidence, such as DNA or fingerprints[?]

The appellant argues that his convictions must be reversed because the *voir dire* question

> cast a "chilling effect" over the pool of prospective jurors, and asking it conflicted with the decision by the Court of Appeals in the consolidated cases of *Charles & Drake v. State*, 414 Md. 726 (2010). The asking of the question, moreover, also contravened recent decisions by the Court of Appeals in *Atkins v. State*, 421 Md. 434 (2011), *Stabb v. State*, 423 Md. 454 (2011), and *Robinson v. State*, 436 Md. 560 (2014) – cases in which the Court of Appeals found that the lower court committed reversible error by giving an "anti-CSI effect" instruction (otherwise known as a "scientific or investigative techniques" instruction).

(Parallel citations omitted.)

The State's response is threefold. First, the appellant failed to preserve and waived his anti-CSI effect argument. Second, his argument lacks merit because the *voir dire* question, as posed, used neutral language to assess whether potential jurors could fairly and impartially decide the case without scientific evidence. And third, any error was harmless beyond a reasonable doubt.

A. Preservation and Waiver

Just before *voir dire*, the trial court and counsel discussed the State's request for the *voir dire* question at issue, as follows:

> THE COURT: . . . Now, I didn't understand your question eight, Mr. [Prosecutor]. . . . It says, "Is there any member of the jury who would be unwilling or unable to weigh the testimony of witnesses and decide this case without scientific evidence, such as DNA or fingerprints?

[PROSECUTOR]: Your Honor, it comes from the Evans case,[2] and I don't have my jurisdiction [sic] right in front of me. But, in essence, the –

THE COURT: This is voir dire, not jury instructions.

[PROSECUTOR]: I understand. . . . **However, voir dire is designed to weed out anyone who has a bias and will not follow the instructions of the Court. DNA and fingerprint-type evidence is circumstantial evidence that the Court . . . will give an instruction to the jury on direct and circumstantial evidence is given the same weight in the eyes of the law. For some jurors, . . . as they walk in the room, they come in with a bias towards a specific type of evidence that they believe is giving [sic] greater weight. If they can't shift from that mental position, then the State would argue that that bias prohibits them from being a juror in this case**. . . .

[DEFENSE COUNSEL]: Your Honor, I disagree. I believe what Mr. [Prosecutor's] referring to is the actual jury instruction, and the jury won't receive that. **We ask plenty of questions that have to do with whether or not they can be fair,** and I believe Your Honor asks a residual, catch-all question, "Is there anything else?" And I believe that would cover it, Your Honor.

THE COURT: All right. I'll give the question in a different form.

(Emphasis added.)

During *voir dire*, the trial court asked the proposed question, without change:

I have one more question to ask you that I forgot to ask you. Is there any member of the jury panel who would be unwilling or unable to weigh the testimony of witnesses and decide this case fairly and impartially without scientific evidence, such as DNA or fingerprints. If your answer is "yes," to that question, please stand now. Let the record reflect that there is no response.

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[2] *Evans v. State*, 174 Md. App. 549, 562, 570-71 (2007) (holding that jury instruction that "there is no legal requirement that the State utilize any specific investigative technique or scientific test to prove its case" did not compromise the State's burden to prove guilt beyond a reasonable doubt).

The trial court proceeded with jury selection. As each prospective juror was called, the clerk asked defense counsel whether he or she was acceptable. Defense counsel exercised three peremptory strikes, but otherwise answered, "Acceptable." When twelve members of the venire had been seated, the clerk asked both defense counsel and the prosecutor whether "the panel [was] acceptable." Defense counsel again replied, "Acceptable." The prosecutor thereafter exercised a peremptory strike to excuse one of those twelve. The trial court reminded counsel that each side had one more peremptory strike. Defense counsel exercised the appellant's last strike on the next member of the venire. The clerk then called another number from the venire. When the clerk asked defense counsel whether that individual was acceptable, the court interjected, "No, the defense has no more strikes." The prosecutor found that juror acceptable. At that point, the clerk asked, "Is the panel acceptable to the State?" The prosecutor replied, "Acceptable." Neither the clerk nor the court asked whether the jury as finally empaneled was acceptable to the defense.[3]

The State contends the appellant's challenge to the *voir dire* question at issue is not preserved because the argument he advances on appeal is not the argument he advanced below. We disagree.

When the prosecutor requested the *voir dire* question, defense counsel opposed it, arguing, "We ask plenty of questions that have to do with whether or not they can be fair .

[3]Thereafter, the court selected an alternate. The alternate did not participate in deliberations.

. . [a]nd I believe that would cover it, Your Honor." Affording the appellant a broad reading of this objection, we conclude it was sufficient to preserve his appellate challenge. In *Atkins v. State*, 421 Md. 434, 441 n.5 (2011), for example, the Court addressed whether the content of an anti-CSI effect instruction was appropriate when, at trial, defense counsel objected because the instruction was not necessary, *i.e.*,"it[was] sufficiently covered by a pattern jury instruction." *See also Samba v. State*, 206 Md. App. 508, 529-30 (2012) (holding that defense counsel's objection to anti-CSI effect jury instruction "on the ground 'that the general [jury] instructions . . . cover that'" "provide[d] a sufficient basis for appellate review of the challenged . . . instruction" under anti-CSI effect jurisprudence).[4]

The State also contends the appellant waived his challenge to the anti-CSI effect instruction by accepting the empaneled jury. We disagree as well. To be sure, defense counsel accepted each of the first twelve venire members that were seated in the jury box,

[4] This argument by the State is inconsistent with its assertion that "it is debatable whether the question in this case is even properly characterized as an 'anti-CSI effect' question" because it "made no reference to television crimes [sic] dramas" and, "stripped of the 'anti-CSI effect' label bestowed upon it by [the appellant], the question was nothing more than a proper attempt to identify jurors who were unfit for jury service." In any event, as we made clear in *Samba v. State*, 206 Md. App. 508 (2012), in recounting the development of anti-CSI effect jurisprudence in Maryland, whether in the form of a *voir dire* question or a jury instruction, and whether referencing the CSI television show, another crime drama, or no crime drama, the essence of the message is to counteract the effect some believe these shows have had on the thought processes of millions in the American public: that reasonable doubt will exist unless the State puts on scientific evidence such as DNA or fingerprints. *See Atkins v. State*, 421 Md. 434, 458-59 (2011) (Harrell, J., concurring). *See also Robinson v. State*, 436 Md. 560, 570 n.11 (2014) ("The 'CSI effect' refers to a theorized link between television crime scene dramas and an expectation by jurors for forensic or scientific evidence, such as DNA, in most criminal cases.").

and also accepted that panel as a whole, without renewing his objection to the challenged *voir dire* question. The State then exercised a peremptory strike to excuse one of those twelve, however. After defense counsel exercised the appellant's final peremptory strike, the trial court seated a juror whom defense counsel was not given an option to accept because the appellant had no further peremptory strikes. Nor was defense counsel asked to accept the empaneled jury that included that juror. *Compare State v. Stringfellow*, 425 Md. 461, 465, 467, 472-73 (2012) (holding that defense counsel waived his previous objection to an anti-CSI effect *voir dire* question by accepting the empaneled jury without reservation). Thus, the appellant did not accept the jury as it was ultimately sworn. On this record, we resolve discrepancies against waiver and assume that the appellant preserved and did not waive his anti-CSI effect challenge to this *voir dire* question.

B. Merits

The Maryland anti-CSI effect jurisprudence began in 2007 and now encompasses jury instructions and *voir dire* questions. The jury instruction cases are *Evans*, 174 Md. App. at 570-71 (no error in giving anti-CSI effect jury instruction); *Atkins*, 421 Md. at 453 (reversible error in giving preemptive anti-CSI effect jury instruction); *Stabb v. State*, 423 Md. 454, 470-73 (2011) (same); *Samba*, 206 Md. App. at 532-35 (same); *Robinson v. State*, 436 Md. 560, 579-80 (2014) (same); and *Hall v. State*, 437 Md. 534, 540-41 (2014) (harmless error in giving preemptive anti-CSI effect jury instruction). The *voir dire* cases are *Charles and Drake v. State*, 414 Md. 726, 739 (2010) (reversible error in posing anti-CSI effect *voir dire*

question); and *McFadden and Miles v. State*, 197 Md. App. 238, 253-54 (2011) (same), overruled in part in *State v. Stringfellow*, 425 Md. at 472-74 (2012) (holding that error in asking anti-CSI *voir dire* question was both unpreserved and harmless).[5]

As relevant to this appeal, the anti-CSI effect cases hold that there can be no preemptive anti-CSI effect messages. Because there is not a sufficient factual basis to establish that the "CSI effect" exists, messages to the jury about the necessity and/or value of scientific evidence, whether referred to as "anti-CSI effect," "no duty," "scientific evidence," or "investigative techniques" messages, and whether communicated through jury instructions or *voir dire* questions, may not be given preemptively. *See Robinson*, 436 Md. at 570, 577, 579; *Stringfellow*, 425 Md. at 474 n.4. In other words, unless there has been some relevant misstatement of the law, a court should not pose an anti-CSI *voir dire* question or give an anti-CSI jury instruction. *See Hall*, 437 Md. at 540. Furthermore, an anti-CSI effect message is not warranted merely because a defendant argued, or intends to argue, that

[5]Two other *voir dire* decisions of this Court are no longer viable. In *Morris v. State*, 204 Md. App. 487 (2012), we held that the trial court did not abuse its discretion by asking a preemptive anti-CSI *voir dire* question. That holding is not consistent with the subsequent decision and rationale of the Court of Appeals in *Robinson*, 436 Md. at 577-79, concluding that there is insufficient evidence that the so-called "CSI effect" exists and disapproving preemptive anti-CSI effect jury instructions. In *Burris v. State*, 206 Md. App. 89, 141 (2012), this Court, in concluding that plain error review was not appropriate, determined that the challenged *voir dire* question about whether potential jurors "would require trace evidence" was "a content-neutral inquiry into the standard with which jurors would review evidence." That decision, which is also inconsistent with *Robinson*, was reversed on other grounds in *Burris v. State*, 435 Md. 370 (2013).

the lack of DNA or fingerprint evidence creates reasonable doubt. *See Robinson*, 436 Md. at 579-80.

In addition, in the exceptional case when an anti-CSI effect message is warranted, the language must be neutral. In other words, the message may not suggest to jurors that conviction is the only option and that they should disregard or discount a defense that is based on the State's failure to test for DNA or obtain fingerprint evidence. *See, e.g., Samba*, 206 Md. App. at 534 ("[T]he 'anti-CSI effect' instruction was fatally flawed for not advising the jury to consider the lack of forensic evidence in evaluating reasonable doubt."). A message that presents only the option to convict is not content-neutral. *See, e.g., Charles and Drake*, 414 Md. at 736-38 (holding that *voir dire* question asking whether jurors could "convict a defendant without 'scientific evidence'" was not neutral because it did not include an alternative to conviction).

In the case at bar, when the prosecutor requested the anti-CSI effect *voir dire* question, he made a generalized proffer that "some jurors . . . come in with a bias towards a specific type of evidence that they believe is giving [sic] greater weight." This was a request for a preemptive anti-CSI effect message, which the Court of Appeals has disapproved. *Robinson* and *Hall* teach that (1) there is inadequate empirical proof to conclude that the so-called "CSI-effect bias" exists among the general population of prospective jurors, *Robinson*, 436 Md. at 579; and (2) an anti-CSI-effect pronouncement should be made to the jury only as a curative instruction, if there is a misstatement of law -- for example, when the defense

"overreaches" by improperly suggesting that the State is required to present scientific evidence to prove guilt beyond a reasonable doubt. *See id*; *Hall*, 437 Md. at 540. Accordingly, we agree with the appellant that the trial court erred in propounding the challenged anti-CSI effect *voir dire* question.

C. Harmless Error

When the trial court erroneously propounds an anti-CSI effect *voir dire* question or jury instruction, to find harmless error, the appellate court must be able to declare beyond a reasonable doubt that the error did not affect the verdict. *See Hall*, 437 Md. at 540-41; *Stringfellow*, 425 Md. at 474. If the lack of scientific evidence was not material to a contested issue, an erroneous anti-CSI effect message may be harmless. *See, e.g., Hall*, 437 Md. at 540 (holding that, in armed carjacking case, error in giving an anti-CSI effect jury instruction was harmless because lack of scientific evidence could not possibly "shed any light on" the only contested issue, which was how the defendant gained control of the vehicle). Other relevant factors are the timing and content of the erroneous *voir dire* question; the timing and content of ameliorative instructions (including reasonable doubt and burden of proof standards); whether the accused had an unrestricted opportunity to assert a "failure to fingerprint" or analogous defense; and whether the State repeated the language of the anti-CSI effect message.

The harmless error analysis in *Stringfellow*, 425 Md. at 473-77, is instructive. In that case, the Court of Appeals held that the trial court erred in propounding an anti-CSI effect

voir dire question featuring language similar to the *voir dire* question challenged by the appellant, but the error was harmless beyond a reasonable doubt. The Court explained:

> Stringfellow claims that there were two impermissible effects flowing from the offending voir dire question: 1) that the jurors' "only option was to find Mr. Stringfellow guilty," and 2) that excusing the absence of scientific investigative techniques and/or scientific evidence, e.g., the failure to test the handgun for latent fingerprints, diminished the State's burden to prove him guilty beyond a reasonable doubt. . . .
>
> Assuming error in the present case, the error was not reiterated during jury instructions or other comments from the bench while the jury was present. While the error occurred during an important part of the trial process, the judge's management of closing argument ameliorated significantly any prejudice to Stringfellow. The judge permitted Stringfellow's attorney to make a closing argument, over the State's objection, about how the police officers' failure to request testing of the confiscated handgun for latent fingerprints created reasonable doubt. The judge overruled the prosecutor's objection immediately and in front of the jury. Empowered by the judge's overruling of the State's objection, Stringfellow argued to the jury that the officers had the ability to test the handgun, but failed to do so. The failure to request a fingerprint analysis became, in defense counsel's words, "a big issue because I submit to you if they had dusted, if they had tried to lift fingerprints, they would not have found Mr. Stringfellow's prints on that gun. . . . I think that's very, very important." Stringfellow's attorney concluded by imploring the jury to find Stringfellow "not guilty because there is doubt in this case . . . ." Thus, the judge's management of closing argument defused any prejudicial impact of the erroneously propounded voir dire question.
>
> Although of less weight in persuading us that the error was harmless, we observe that two jury instructions in particular contributed to alleviating the sting of the error. We assume that jurors follow a judge's instructions. We minimize in our analysis, however, the effect of general jury instructions because of our belief that they tend to have relatively attenuated curative effect. Further, even curative instructions, when not given contemporaneously with the commission of the error, are of diminished curative value potentially.

The judge propounded, contemporaneous with the erroneous voir dire question (whether merely fortuitously or as an intended "cure"), a conjoined instruction–question, which provided:

> If selected as a juror, you're required to render a fair and impartial verdict based upon the evidence presented in the courtroom and the law as I describe it to you in my instructions at the end of this case. Is there any member of the jury panel who feels as if as a matter of your own personal conscience you disagreed with the law, you would disregard the law and instead follow your conscience?

As a consequence of the affirmative response, the judge screened four venire members from serving as jurors. Additionally, toward the end of trial, the judge admonished the jury during his final instructions, "I may have commented on evidence or asked a question of a witness. You should not draw any inferences or conclusions from my comments or questions either as to the merits of the case or as to my views regarding the witness." He instructed the jury also that the State had the constant burden to prove that Stringfellow was guilty beyond a reasonable doubt and that "if you are not satisfied of the defendant's guilt to that extent, then reasonable doubt exists and the defendant must be found not guilty."

These instructions were correct statements of law. The judge gave the follow-on instruction/voir dire question immediately after the erroneous voir dire question. Although the final jury instructions were not given contemporaneously with the commission of the error, the judge gave them *after* he propounded the voir dire question. This is meaningful because . . . we [have] discredited general jury instructions that came *before* the error occurred. Therefore, the jury instructions here, although a limited kind of cure, assisted in dislodging any residual bits of potential prejudice concerning the weight of presented (or unpresented) evidence and reminded the jury of the State's fixed burden of proof. The most significant factor, however, that convinces us that the error did not contribute to the guilty verdicts in Stringfellow's case was the judge's allowance of Stringfellow's relevant closing argument.

Id. at 475-77 (citations omitted).

When the *voir dire* error in this case is measured against the record and rationale in *Stringfellow*, we are persuaded beyond a reasonable doubt that it, too, was harmless. Here, the error in asking whether any juror "would be unwilling or unable to weigh the testimony of witnesses and decide this case fairly and impartially without scientific evidence, such as DNA or fingerprints," was no more suggestive than the *voir dire* question in *Stringfellow (i.e.,* whether "any member of the panel believe[s] that the State is required to utilize specific investigative or scientific techniques such as fingerprint examination in order for the defendant to be found guilty beyond a reasonable doubt"). *Id.* at 466. As in *Stringfellow*, the erroneous query was not reiterated during jury instructions or in other comments made by court or counsel in the presence of the jury.

Most importantly, here, as in *Stringfellow*, defense counsel was afforded broad latitude to argue that the police had no fingerprint or DNA evidence linking the appellant to the gun or the jacket. Indeed, defense counsel introduced that important point in opening,

developed it through cross-examination, and emphasized it in closing.[6] And the State never disputed the absence of such evidence.

The nature and timing of the question further ameliorated the error. Generally, "[v]oir dire is less problematic than jury instructions in terms of burden lowering and judicial commentary – it comes at the beginning of trial rather than appearing to comment on recently concluded evidence, it takes the form of questions rather than instructions." Wyatt Feeler, *Can Fiction Impede Conviction? Addressing Claims of a 'CSI Effect' in the Criminal Courtroom*, 83 Miss. L. J. 1, 4 (2014) (reviewing anti-CSI effect jurisprudence in Maryland and Massachusetts).

As in *Stringfellow*, the trial court's other *voir dire* questions and jury instructions further diminished the impact of the anti-CSI effect *voir dire* question. Immediately after asking the anti-CSI effect question, the trial court asked if any member of the venire had "any other reason whatsoever that might affect your ability to render a fair and impartial verdict in this case," then reviewed affirmative responses and excused members who expressed bias.

[6]Defense counsel argued in closing, without objection or rebuttal by the State:

- "Ladies and gentlemen, the State has this tremendous burden and it's beyond a reasonable doubt. Okay? There's so many reasons to doubt this case. There is no direct evidence. My client, no fingerprints, no D.N.A."
- "The officers weren't consistent about the two most important parts of this case. There's no fingerprints. There's no D.N.A."

At the close of evidence, the court correctly instructed the jury on the State's burden of proof and its obligation to consider the evidence, without expressly mentioning fingerprint or DNA evidence.[7] And, like the trial court in *Stringfellow*, the court instructed the jury, "You should not draw any inferences or conclusions from my comments or questions either as to the

[7] Among the relevant pattern instructions given by the trial court were the following:

- "The State has the burden of proving the guilt of the Defendant beyond a reasonable doubt. This burden remains on the State throughout the trial. The Defendant is not required to prove his innocence."
- "Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs."
- "[I]f you are not satisfied of the Defendant's guilt to that extent, then reasonable doubt exists and the Defendant must be found not guilty."
- "[I]n making your decision, you must consider the evidence in this case. That is, the testimony from the witness stand [and] any physical evidence or exhibits admitted into evidence[.]"
- "In evaluating this evidence, you should consider it in light of your own experiences. You may draw any reasonable inference or conclusion from the evidence that you believe to be justified by common sense and your own experiences."
- "Now, there are two types of evidence. There's direct evidence and there's circumstantial evidence. The law makes no distinction between the weight to be given either direct or circumstantial evidence . . . . In reaching a verdict, you should weigh all of the evidence presented whether direct or circumstantial. You may not convict the Defendant unless you find that the evidence, when considered as a whole, establishes guilt beyond a reasonable doubt."

merits of the case or as to my views regarding the witness." All of these directions were given after the trial court asked the *voir dire* question, at a time in the trial that strengthened their curative effect.

We are satisfied beyond a reasonable doubt that the trial court's error in propounding the anti-CSI effect *voir dire* question was rendered harmless by its language and preliminary timing, as well as by the jury instructions, defense counsel's arguments, and the State's silence.

II.

Recorded Telephone Conversation

Before trial, the State moved *in limine* to allow evidence of a recorded "three-way" telephone call the appellant made from jail on May 14, 2012. The following are pertinent excerpts from the recording, with the statements the trial court ruled admissible shown in bold:

> **[FIRST FEMALE]: It's a cell phone, what's the number?**
>
> **[THE APPELLANT]: (410) 660-[xxx] [Kevin Ashe's cell phone number]**
>
> * * *
>
> [THE APPELLANT:] Alright, let me try Ke – let me try his phone one more time, see what's up. But he picked up earlier today, you know what I mean, and the bail bondsman like jumped straight into the conversation. This shit crazy, yo.
>
> [SECOND FEMALE]: He got a bail bondsman for you?

[THE APPELLANT]: Nah, see, my man, I ain't know he was using the bail bondsman. I told him to use a three way, I didn't know he was using a bail bondsman so when I get on the phone, baby I'm like "Kev, Kev", he like, "yo, who this?" I like, "yo, it's me Snoop."

* * *

Yo, I'm gonna try and see if I can get this nigga on the phone one more time man. If I can't then fuck it. You know what I mean? . . . Text a nigger and tell a nigger shit is real fucked up. He's sittin there playin bitch man.

* * *

I done helped that bitch ass nigga get out on bail. . . I done gave that nigga money I done gave that nigga money when he . . . got that car took from the back of the barber shop that nigga took, I gave that nigga $300, $350, put him back on his feet, and the nigga aint got the[] nerve to give me $50? $100?

[SECOND FEMALE]: That's sad.

[THE APPELLANT]: C'mon yo. This shit fuck crazy, all this shit I did . . .

[SECOND FEMALE]: He supposed to be workin now . . . .

Like I told you from the beginning, he's up to something. I don't trust him. I really don't even want to see this nigga's face, cuz I might spit in his face . . . .

[THE APPELLANT]: If you do, if you do it's on you and he better not jump out there. Straight up, if you spit in that bitch ass nigga's face . . . ya mean he better, he better stay in his lane. **Cause I'm tellin you he gonna get hurt when I get home. He sitting there ratted on me, for real. Straight up.**

[SECOND FEMALE]: Mm-hmm.

[THE APPELLANT]: **Nigga told man. That nigga fuckin told man**.[8]

[SECOND FEMALE]: You tell your cousin about him?

[THE APPELLANT]: My cousin already know, my cousin wanna go out there and hit his bitch ass, man. He wanna go out there and hit him bad. That's why I said, if he get out that house, grab everything under that motherfucker. Grab that TV, grab that flat screen, grab my PlayStation, grab what's under the PlayStation, I need that. It's in there. You feel me? Grab that and get it and go. . . if he start playing bent I'm tell you to give that to my little cousin, send him out there, or put him on that nigga cab, rob his dumb ass, yo. That's probably why his bitch ass ain't trying to let you come up, and won't answer the phone for you, cause he don't want you to come up there and go get it. He know what's up, man.

* * *

Damn man. . . . See that nigga, that nigga, answer earlier this morning, see, he know he got to go, I don't think he gonna answer. I, I don't know what's up with that though, I don't know.

[SECOND FEMALE]: Hmm.

[THE APPELLANT]: Pshh for real. Tho. This nigga gotta come out this frame yo . . . this nigger ain't tryin to sit here and beefing and catching these charges about 50 dollars this nigga said he was goin give me.

* * *

Yo this shit fucking crazy, yo. I swear to God, when I get off this phone with me yo, **I don't even care if you gotta text this nigga's phone all night. Text that nigga and let him know, like, he all the way out of order, yo all the way out of order.**

[SECOND FEMALE]: I already, everything you saying I already told this nigga. I not goin to keep repeating myself. He know he wrong. . . . And I

[8]The trial transcript transcribes "told" as "cold."

> keep blowin this nigga's phone up and he not answering, I mean, c'mon, it's self-explanatory LB, what more you want me to say or do? . . .
>
> I'm not gonna tell this nigga when I coming out there, I'm pop up out there.
>
> [THE APPELLANT]: **Nah, nah, you know what, fuck that. Yo, already sent that letter out. That statement he made? Yo, put that shit on facebook, and let everybody know this bitch ass nigga's a fuckin rat, yo. Sho nuff cause he got some peoples on there that's important, and when they see that, they gonna cut his dumb ass off and he not getting nothing out there no more. So all that shit he doing out there right now; All that shit getting ready to be dead, man I ready to assassinate this nigga's character; I am ready to shoot all that shit down, for real, that nigga's a fuckin snitch anyway, you know, straight up yo, ya know what I mean when I send that paperwork in the mail. Yo straight put that shit on Facebook, if he try, if he try and erase you off his page jump on my fuckin Budda page and keep posting that shit. I want you to post that shit like twice a, like twice a day. And let everybody know this bitch ass nigga's a fuckin rat yo. For real. He got some people on there that's real important, and they need to know because, to be for real, he snitched on me, he gonna snitch on them too**. Straight up. Straight up. And my lil man Moke, my lil man Moke, I ain't even know he, I ain't even know that cats . . . made a statement on me, I just went on . . . for the nigga who set us up right? . . . . (inaudible)
>
> *Machine Interrupts - You Have One Minute Left*
>
> [THE APPELLANT]: Anyway I went through my charge papers, and it says a tape statement, and it outlines it, and it showed me. I'm like "oh yeah?" That's, that's probably why his bitch ass ain't answering the phone, cause he know he snitched on me for real, and now he know I know."

(Emphasis added.)[9]

[9]At the hearing on its motion *in limine*, the State introduced a transcript of the call. At trial, the State did not introduce that transcript. Instead, the recording was transcribed from the open court proceedings, as set forth in a supplemental August 7, 2013 transcript. We shall rely on the transcript the State introduced at the motion hearing. The court based its ruling on that transcript and it contains fewer inaudible passages.

The State argued that portions of the recorded telephone call where the appellant repeatedly refers to Kevin Ashe as a "rat" and a "snitch," pejorative terms commonly referring to someone who has "turn[ed] informer" or "tattle[d]," *see Height v. State*, 185 Md. App. 317, 343 (citation omitted), *vacated on other grounds*, 411 Md. 662 (2009), showed consciousness of guilt.[10] In other words, the appellant, knowing that the gun belonged to him, believed Ashe had revealed that fact to the police.

Defense counsel opposed admission of the recording on hearsay grounds. The trial court pointed out that relevant statements made by a defendant are admissible as statements of a party. *See* Md. Rule 5-803(a)(1). Defense counsel then stated, "there's also probative prejudicial." The court asked if counsel was arguing that the recorded statements were more prejudicial than probative. The following ensued:

> [DEFENSE COUNSEL]: This is what I'm saying, Your Honor. The fact that [the appellant] says [Ashe] ratted on me, he snitched on me, doesn't mean that he told the truth to police. . . .

[10]Consciousness of guilt may be shown by any post-crime behavior making it more likely that the actor is guilty, including threatening or intimidating a witness who is aiding in the prosecution of the accused. *See Decker v. State*, 408 Md. 631, 640-41 (2009); *Thomas v. State*, 372 Md. 342, 351 (2002); *Copeland v. State*, 196 Md. App. 309, 316-17 (2010). As the Court of Appeals has explained:

> A person's post-crime behavior often is considered relevant to the question of guilt because the particular behavior provides clues to the person's state of mind. The reason why a person's post-crime state of mind may be relevant is because . . . the commission of a crime can be expected to leave some mental traces on the criminal.

Thomas, 372 Md. at 352 (citation omitted).

> Snitched and ratted means talking to the police. . . .
>
> So he snitched on me could easily mean he lied on me, could easily mean he talked to the police, or it could mean –
>
> THE COURT: But shouldn't the jury be permitted to make that decision?
>
> [DEFENSE COUNSEL]: But it's far too prejudicial, Your Honor. It's far too prejudicial. It would be one thing if he said, "The gun's mine." I wouldn't be standing up here, Your Honor. I mean, it would be one thing if he said, "I did it," but there's nothing like that. There's no direct statement that says that he's guilty, that he's confessing to whatsoever [sic]. . . .
>
> I'm afraid if you leave it up to the jury, that vagueness, the prejudicial aspect is going to severely outweigh the probative value.

The trial court ruled that it was up to the jury to decide whether the appellant's anger toward Ashe for "snitching" and "ratting" on him indicated that he believed Ashe had truthfully informed police that the gun belonged to him (the appellant). The court ruled that it would admit only specific excerpts from the recording.[11] Thereafter, defense counsel argued that, if any portion of the conversation was to be admitted, the entire recording should be played for the jury. *See generally Conyers v. State*, 345 Md. 525, 541 (1997) ("[C]ommon law doctrine of completeness . . . allows a party to respond to the admission, by an opponent, of part of a writing or conversation, by admitting the remainder of that writing or

[11] As noted, those portions we have emphasized in bold.

conversation."). Consequently, the full recording was admitted, over defense counsel's previously stated objection.[12]

In his final assignment of error, the appellant contends that "[u]nder Md. Rules 5-401 and 5-402, the phone call conversation should have been excluded as irrelevant. Assuming, *arguendo*, that the conversation did have probative value, it still should have been excluded under Md. Rule 5-403," because critical portions of it were more prejudicial than probative. We are persuaded that the telephone recording was relevant and was not unfairly prejudicial.

The appellant maintains that the telephone recording was not relevant "[b]ecause nothing in the phone conversation meaningfully linked it to the instant case." The State counters that the appellant did not preserve this relevance challenge because defense counsel argued only that the recording was "hearsay" and "more-prejudicial-than-probative," and that the recording was relevant in any event.

Under Rule 4-323(a), "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." This contemporaneous objection rule is designed to ensure that the trial court has "an opportunity to consider the issue, and rule on it first, in the context of the trial." *DeLeon v. State*, 407 Md. 16, 26 (2008). A party who,

[12] When the State first moved the recording into evidence, defense counsel said he had "[n]o objection" to its admission. After the recording was admitted, however, the trial court called the parties to the bench and allowed defense counsel to renew his previously stated objection.

at trial, asserts specific reasons that the challenged evidence is not inadmissible may not raise different reasons as grounds for appellate relief. *Id.* at 24-26.

In this Court, the appellant argues that, even though "the phone conversation established circumstantially that [he] was upset with Kevin Ashe and that he regarded Ashe as a 'snitch'/'rat,'" it contains nothing to indicate that he "was upset with Ashe concerning the *instant case*."

The State is correct that, in the trial court, defense counsel did not expressly argue that the telephone recording contained no link to the charged weapons offenses. However, he did argue that it did not contain an admission of guilt and that he would not be objecting to it if the appellant had "said, 'The gun's mine.'" Giving that objection a broad reading, we shall address the appellant's relevance challenge.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Subject to particularized exceptions not pertinent here, "all relevant evidence is admissible. Evidence that is not relevant is not admissible." Md. Rule 5-402. This Court reviews *de novo* whether evidence is relevant. *State v. Simms*, 420 Md. 705, 724-25 (2011).

In the appellant's view, the statements he made in the recorded telephone conversation were not relevant because they did not "reference the firearm charges or the particular facts in the present case (e.g., references to the Nissan Altima, Bateman Avenue, the date of their

arrest in the instant case, the clothing found in the car, the marijuana found in the car, etc.)." He maintains that "only pure speculation would enable one to link the phone conversation to the instant case for which [the appellant] was on trial."

We disagree. As defense counsel acknowledged in asking that the entire recording be played, the appellant's remarks must be viewed in context. He made these statements two and one-half weeks after he and Kevin Ashe were arrested, while he remained incarcerated awaiting trial on the weapons charges in this case. By then, Ashe had given the police a taped statement, which the appellant learned about by reviewing his charging documents. Ashe was not incarcerated, had not been charged with any weapon offenses, and was avoiding calls from the appellant and his friends. In the recorded telephone conversation, the appellant angrily identified Ashe as the "snitch"/"rat" who made "a statement," as evidenced by his "charge papers." The appellant threatened that Ashe was "gonna get hurt" upon his release, discussed a plan for his cousin to "rob" Ashe, and directed the woman he was conversing with to text Ashe "all night" and to use social media to let others know that Ashe had "snitched" on him. At trial, although Ashe was subpoenaed by the prosecution, he failed to appear and could not be located to testify against the appellant.

When the recording is considered in its entirety and in context, reasonable jurors could interpret the statements the trial court had ruled admissible (*i.e.*, the highlighted excerpts set forth above) as evidence that the appellant was angry with Ashe for talking to police about the gun and that the appellant was pressuring Ashe not to aid the prosecution. These

statements tended to show the appellant's consciousness of guilt with respect to the charged crimes. *Cf. Copeland*, 196 Md. App. 309, 316-17 (2010) (holding that consciousness of guilt may be shown by threats designed to intimidate prosecution witness). The trial court did not err in ruling that the statements were relevant.

Rule 5-403 states that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The appellant contends, "[t]o the extent the phone conversation had probative value, it was outweighed by the danger of unfair prejudice." He maintains that "portions of the conversation created a real risk of fostering unfair prejudice," citing the "discussion about the cousin and money owed by Ashe." In his view, that information was "highly inflammatory," "dwarfed" any minimal probative value the recorded conversation may have had, and "might [have] influence[d] the jury to disregard the evidence or lack of evidence regarding" the weapons charges against the appellant. (Citation and internal quotation marks omitted.)

As the State points out, the appellant's comments in the telephone conversation about money, debts, and his cousin were not among the portions of the recorded call that the trial court had ruled were admissible to show consciousness of guilt. Rather, these portions of the recording were admitted only because defense counsel invoked the doctrine of completeness.

The appellant cannot complain about prejudice caused by evidence that was admitted only upon his request.

With respect to the highlighted excerpts ruled admissible by the trial court, we are not persuaded that they were more prejudicial than probative. When weighing probative value and prejudice, "we keep in mind that 'the fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in Rule 5-403.'" *Odum v. State*, 412 Md. 593, 615 (2010) (quoting Lynn McLain, *Maryland Evidence State and Federal*, § 403:1(b) (2d ed. 2001)). Rather, evidence is unfairly prejudicial only when "'it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged.'" *Id.* (citation omitted). As the probative value of the evidence increases, the likelihood that it will be unfairly prejudicial deceases. *Id. See Burris*, 435 Md. at 392. *See generally* Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 506(B), at 209 (4th ed. 2010) ("Probative value is outweighed by the danger of '*unfair*' prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case.").

There is nothing unfairly prejudicial about the limited portions of the recorded telephone call the trial court ruled admissible. As discussed, the remarks made during the call that the court ruled admissible were relevant to show the appellant's consciousness of guilt with respect to the weapons charges. Because the challenged statements did not

improperly influence the jury "to disregard the evidence or lack of evidence regarding" the crimes for which the appellant was on trial, the trial court did not abuse its discretion in declining to exclude them under Rule 5-403.

III.

Closing Argument

The appellant next contends the trial court abused its discretion by allowing the prosecutor to argue, in rebuttal closing, a fact that was not in evidence, to-wit, that, while at Central Booking, the appellant could have removed the Champion sweatshirt. We conclude that the challenged remark was a fair comment on the evidence and a fair response to defense counsel's closing argument.

At trial, the State presented evidence that there were only two occupants of the car; that the gun was found in a jacket intertwined with the Champion sweatshirt; that both articles of clothing were size 3XL; that at the time of the arrests, the appellant was 6'1" to 6'4" and weighed 270 to 280 pounds, whereas Ashe was 5'3" to 5'7" and 175 to 190 pounds; that the appellant was wearing only shorts and a T-shirt in the cool April weather, whereas Ashe was wearing pants and a jacket; that the appellant said he was cold and asked to wear "my sweatshirt"; that detectives allowed him to put it on; and that he was still wearing that sweatshirt after he arrived at Central Booking. The State linked the appellant to the gun based on this circumstantial evidence, arguing that both articles of clothing were too large for Ashe but a perfect fit for the appellant.

At the outset of his closing argument, defense counsel challenged the State's "size and fit" theory as follows:

> [DEFENSE COUNSEL]: . . . First of all, we don't know if this is going to fit Mr. Ash[e] because where's Mr. Ash[e]? Who knows how tall he is? Who knows how much he weighs? And even if you find that this isn't Mr. Ash[e]'s jacket, it's big. It's big on me. My client's huge. I weigh 190 pounds. I'm about five seven and a half. It's a little big on me. My client is huge. Three X? He wears four, five, six X.

In rebuttal, the prosecutor responded:

> [PROSECUTOR]: . . . Defense counsel talks about . . . the zippered jacket. And there are pictures in evidence . . . . [T]he Defendant . . . in number two . . . is wearing the Champion pullover sweatshirt that he claimed was his. Defense argues in his closing that the sweatshirt couldn't fit. Remember they're the same size. That fits him perfectly.
>
> **Furthermore, when he's being booked, he can take the sweatshirt off. If he didn't want to wear what was put on him –**
>
> **[DEFENSE COUNSEL]: Objection, Your Honor.**
>
> **THE COURT: Overruled.**
>
> [PROSECUTOR]: **He can take the sweatshirt off.** When he's being booked he's wearing the same sweatshirt. Kept it on. Would you keep on something that wasn't yours? Would you keep on something that didn't fit?

(Emphasis added.)

In the appellant's view, the highlighted argument was improper "because no evidence indicated that Mr. Bailey, if he wanted to do so, could have taken off the Champion sweatshirt at Central Booking." The State counters that, "[a]lthough there was no direct testimony that Bailey could have removed the sweatshirt at Central Booking, the prosecutor's

argument was based on a reasonable inference from the evidence," and that, "even if the argument was improper, any error was harmless."

"[A]ttorneys are afforded great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999). Closing argument typically does not warrant appellate relief unless it "exceeded the limits of permissible comment." *Lee v. State*, 405 Md. 148, 164 (2008). "Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom" and, in doing so, to "indulge in oratorical conceit or flourish." *Wilhelm v. State*, 272 Md. 404, 412-13 (1974). As long as "counsel does not make any statement of fact not fairly deducible from the evidence his argument is not improper[.]" *Id.* at 412. "What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case." *Smith and Mack v. State*, 388 Md. 468, 488 (2005). Thus, the propriety of prosecutorial argument must be decided "contextually, on a case-by-case basis." *Mitchell v. State*, 408 Md. 368, 381 (2009).

Because "[a] trial court is in the best position to evaluate the propriety of a closing argument as it relates to the evidence adduced in a case," the trial court's exercise of its broad discretion to regulate closing argument will not be overturned "unless there is a clear abuse of discretion that likely injured a party." *Ingram v. State*, 427 Md. 717, 726 (2012). Thus, reversal is not warranted for "every improper remark," *Lee*, 405 Md. at 164, only "where it appears that the remarks of the prosecutor actually misled the jury or were likely to have

misled or influenced the jury to the prejudice of the accused." *Lawson v. State*, 389 Md. 570, 592 (2005) (quoting *Spain v. State*, 386 Md. 145, 158-59 (2005)) (internal quotation marks omitted).

We conclude that the challenged remark was fair comment that rebutted defense counsel's closing argument that the circumstantial evidence was too equivocal to establish beyond a reasonable doubt that the jacket, and therefore the gun, belonged to the appellant. The prosecutor responded to defense counsel's argument that the appellant was so large that he would likely find the 3XL sweatshirt uncomfortably small, by pointing out that the garment fit well enough that he kept it on after he arrived at Central Booking. That argument was based on a reasonable inference drawn from facts in evidence. In particular, one of the arresting officers testified that, after being arrested, the appellant claimed the sweatshirt was his, asked to put it on, and was helped to do so. It was reasonable for the prosecutor to infer that police officers, having granted the appellant's post-arrest request to put the sweatshirt on, also would allow (or assist) him to remove it after he arrived at Central Booking. The trial court did not err or abuse its discretion in overruling the appellant's objection.[13]

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

[13]Our conclusion that there was a sufficient evidentiary basis for the prosecutor's inference and argument materially distinguishes this case from the case cited by the appellant, *Jones v. State*, 217 Md. App. 676, 693 (2014) (holding that trial court abused its discretion in overruling objection to State's closing argument asserting a fact that was not in evidence or reasonably inferable from facts in evidence).