Circuit Court for Anne Arundel County
Case No. C-02-CR-16-000664

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2949

September Term, 2018

RICHARD BROOKS

v.

STATE OF MARYLAND

Friedman,
Shaw Geter,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: March 4, 2020

Richard Brooks and Mark Hatmaker were involved in a conspiracy to illegally purchase prescription pharmaceuticals. The day after their drug deal fell through, Hatmaker disappeared. While Hatmaker's body was never found, his blood was found on two motor vehicles: on the bumper of a U-Haul truck rented for Brooks in Anne Arundel County, and in Brooks's recreational vehicle ("RV"), which was parked in Anne Arundel County and later moved to Baltimore City. Brooks was charged and convicted in the Circuit Court for Anne Arundel County for Hatmaker's murder.

On appeal, Brooks presents three questions:

> 1. Did the motions court err in ruling that venue was proper in Anne Arundel County?
>
> 2. Did the trial court commit reversible error by allowing the State to comment on Brooks's silence during the rebuttal closing?
>
> 3. Did the trial court commit reversible error by instructing the jury on a theory of guilt by aiding and abetting?

We answer these questions in the negative and, therefore, affirm.

BACKGROUND

The only issue that requires much factual background is whether Brooks was tried in the proper venue. Our factual recitation will, therefore, focus—as the criminal venue statute does—on where Hatmaker was when the blow which killed him was delivered and, if that is not knowable, where his body parts—including his blood—were found. *See* MD. CODE, CRIMINAL PROCEDURE ("CP") § 4-201.

On the morning of November 24, 2015, Brooks called Hatmaker and arranged for them to meet with a third party to purchase prescription pharmaceuticals. Hatmaker left his house in Lansdowne, Baltimore County, around 10:00 a.m. to meet Brooks. He never returned.

During a police interview, Brooks stated that on November 24, he and Hatmaker met at the "Empire Towers" building in Glen Burnie, Anne Arundel County, to conduct the exchange. When the supplier did not show, Brooks "drove Hatmaker down Crain Highway to a side street" in Glen Burnie, near where Brooks's RV was parked. Then, according to Brooks, he drove Hatmaker back to his pickup truck, and followed him as he drove back to Lansdowne. Brooks claimed to have seen Hatmaker park his vehicle and then get into a pickup truck driven by another individual. That, according to Brooks, was the last time he saw Hatmaker.

Brooks returned to the Glen Burnie house where he lived with his fiancée, Terry Currier, "around lunchtime" that day. Currier described Brooks as "distraught." When Currier asked what was going on, Brooks answered: "[A]ll I can say is that there's a storm coming … and everything is going to cave in." He further informed her that Hatmaker was "missing."

At around 3:00 p.m., Brooks asked John Gaitley to rent a U-Haul truck for him. Gaitley and Brooks drove to a U-Haul rental facility in Glen Burnie, where Gaitley rented a truck at 3:36 p.m. While at the facility, Brooks purchased a tarp, trash bags, and tape. As part of their investigation into Hatmaker's disappearance, police later located the truck at

the Glen Burnie U-Haul facility and discovered drops of Hatmaker's blood on the rear bumper.

On November 26, Brooks drove to Main Avenue Southwest in Glen Burnie, where his RV had been parked for several months. He then drove the RV to Baltimore City, where it was later discovered by the police. Upon entering the RV, it "was immediately apparent [to police] that [they] were looking at a crime scene … because of the volume of blood that was present." There was "blood spatter on … the ceiling, floor, cabinets, table, top sides, bottom sides, pretty much everywhere[.]" The police further observed that the carpet and padding had been "cut out in sections" and removed from the RV. The surface of the RV's floor contained at least a liter of blood, which DNA analysis confirmed belonged to Hatmaker.

DISCUSSION

I. VENUE

Brooks first contends that the trial court erroneously ruled that venue was proper in Anne Arundel County. Brooks argues that because "it is impossible to determine where the actual [homicide of Hatmaker] occurred, the appropriate venue for the trial was where … parts of his body[] were discovered" and given that Hatmaker's blood was discovered in Baltimore City, Baltimore City was the appropriate venue in which to try his case. We disagree.

Venue refers to a "particular place or county in which a court of appropriate jurisdiction may properly hear and determine [a] case." *Guarnera v. State*, 23 Md. App.

525, 528 (1974). In a criminal prosecution, the defendant bears the initial burden of raising the issue of improper venue. *Smith v. State*, 116 Md. App. 43, 53 (1997). To satisfy that burden, the defendant must "produce some relevant evidence, direct or circumstantial, of improper venue." *Id*. at 55. The burden then shifts to the State to prove, by a preponderance of the evidence, that venue is proper. *Id*. at 56. In so doing, the State may rely on either direct or circumstantial evidence. *Id*. at 55.

The criminal venue statute provides two relevant provisions:

> (b) If a person is feloniously stricken or poisoned in a county and dies in another county of the same stroke or poison, a prosecution for the felony shall be brought in the county where the stroke or poison was given.
>
> * * *
>
> (i) Except as otherwise provided in this section, a prosecution of a person for [first-degree murder, second-degree murder, or manslaughter] may be brought in the county in which the crime occurred or, if the location of the crime cannot be determined, in the county in which the body or parts of the body were found.

CP §4-201(b), (i). The record of the motions hearing contains ample evidence from which the court could have reasonably inferred that the lethal blow to Hatmaker was struck in Brooks's RV. Specifically, the blood spatter, the volume of Hatmaker's blood found in the RV, and Brooks's systematic removal of the RV's blood-soaked carpet and padding support this inference. Defense counsel even conceded that "for the purpose of [the motions] hearing, we agree that it looks like a homicide occurred, [Hatmaker's] blood was in the RV."

The record further supports a finding that the fatal blow to Hatmaker was struck prior to Brooks driving the RV from Anne Arundel County to Baltimore City on November 26. By Brooks's own admission, when the drug supplier did not appear on November 24, Brooks drove Hatmaker down Crain Highway, in the direction of Main Avenue Southwest in Anne Arundel County, where Brooks's RV was parked. Although Brooks reported having witnessed Hatmaker return to Lansdowne after their meeting, at around lunchtime on November 24, he informed Currier that Hatmaker was "missing." Later that same afternoon, he and Gaitley rented a U-Haul truck and Brooks purchased a tarp, trash bags, and tape—items which would have been useful in disposing of a body. The truck was returned the day after Brooks relocated his RV to Baltimore City, and Hatmaker's blood was found on the rear bumper of that truck. Even if, as Brooks suggests, it is impossible to determine with certainty where Hatmaker's homicide occurred, that is not the proper burden of proof. Rather, the State must merely prove *by a preponderance of the evidence* that the lethal blow to Hatmaker was struck in Anne Arundel County. *See Smith*, 116 Md. App. at 55. This evidence, considered in light of the fact that Hatmaker was neither seen nor heard from again after November 24, lends itself to the inference that Hatmaker was, more likely than not, killed in Brooks's RV prior to it being driven out of Anne Arundel County. Accordingly, the circuit court did not err in denying Brooks's Motion to Dismiss for Improper Venue.[1]

[1] Although we are confident that the trial court did not err in finding venue proper under CP § 4-201(b), even if it did, venue was also proper in the Circuit Court for Anne Arundel County pursuant to § 4-201(i). Brooks concedes in his brief that blood is a "part

II. THE STATE'S REBUTTAL CLOSING ARGUMENT

Every Marylander has a right against compelled self-incrimination guaranteed by the Fifth Amendment to the United States Constitution and Article 22 of the Maryland Declaration of Rights. As part of that right, one has a right to remain silent, both in interactions with law enforcement and, if accused of a crime, at trial. To effectuate that right, the State is prohibited from commenting on a defendant's choice to exercise that right. *Simpson v. State*, 442 Md. 446, 448 (2015) (citing *Griffin v. California*, 380 U.S. 609 (1965); *Smith v. State*, 367 Md. 348 (2001)). Maryland is "highly protective" of a defendant's right to stay silent. *Smith*, 367 Md. at 355. The test is whether a remark by the State is "susceptible of the inference by the jury that they were to consider the silence of [the defendant] … as an indication of his guilt." *Id.* at 354. If a prosecutor makes any statement in a closing argument that could be understood as a comment on the defendant's choice not to testify, the prosecutor has, therefore, violated the defendant's constitutional right to remain silent. *Simpson*, 442 Md. at 461 (holding that the "injection" of such an inference "impinge[s] upon" one's right not to testify and violates a defendant's constitutional rights). That is what happened here.

At the end of its rebuttal closing argument, the State played an excerpt of Brooks's police interview wherein he requested that the police reduce their questions to writing and

of the body" and given that Hatmaker's blood was found in *both* Baltimore City *and* Anne Arundel County, venue would have been proper in either jurisdiction.

"give [him] two weeks to get [his] head together" prior to answering them. After playing the recording for the jury, the prosecutor argued:

> Give me two weeks, give me two weeks to get my head together. That's March of 2016. Give me two weeks to get my head together. Well, it's March of 2018, it's been two years. There was no answer then, there's absolutely no answer in March of 2016, as to how he can explain the victim being dead in his RV that he was uniquely in possession of. There is no answer then, and there's no answer now for how the Defendant--

Defense counsel objected to the statement, and the court overruled. The State then continued:

> There is no answer. The only answer that the evidence makes clear to you is that the Defendant lured him to the scene, robbed him, and killed him. Ladies and gentlemen, I'm asking you to go back, consider all the evidence, and then after you've done that, do justice --

Defense counsel renewed his objection. Once again, the court overruled the defense's objection. During a bench conference, defense counsel moved for a mistrial, arguing: "[T]he State, by implication, by playing first the tape of saying, 'Just give me two weeks to answer,' and then turning and pointing at him and saying March 2018 is commenting on the fact that he didn't testify." The State responded:

> Your Honor, that's absolutely not the implication, whatsoever. His statement was, "I need two weeks." What I said was there is no answer. I didn't say he didn't answer. He -- I -- I said there is no answer. The only answer is that the Defendant is guilty. That's the only thing that's supported by the evidence. That's not a commentary on the Defendant's silence.

The court denied Brooks's motion for a mistrial, stating: "I didn't … draw any conclusion that … it was a comment on his silence."

Later, Brooks filed a timely motion for a new trial, again alleging that the State improperly commented on his silence. The circuit court denied Brooks's motion, ruling that although the State improperly commented on Brooks's silence, the remark was harmless beyond a reasonable doubt.

The State's remark, coupled with Brooks's police interview was reasonably susceptible to the inference that the State was referring to Brooks's failure to provide an explanation on the witness stand. Rather than referring to the defense's failure to present exculpatory evidence, the State said that Brooks could not explain "the victim being dead in his RV[.]" By emphasizing that Brooks "was uniquely in possession of [the RV]," moreover, the State intimated that Brooks was uniquely qualified to explain how Hatmaker's blood came to be in his RV. The State pointing at Brooks while making the remark further drew the jury's attention to the fact that he did not take the stand. Read in context, the State's remark was reasonably susceptible of the inference that Brooks's failure to testify was indicative of his guilt. The prosecutor, therefore, violated Brooks's constitutional rights and the circuit court was correct in identifying that violation.

Having found a constitutional violation, we must now decide whether that violation warrants reversal. *Lee v. State*, 405 Md. 148, 164 (2008) (noting that "not every improper remark" requires reversal and whether a prosecutor "exceeded the limits of permissible comment depends upon the facts in each case"). "[R]eversal is only required where it

appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Degren v. State*, 352 Md. 400, 431 (1999). Whether counsel's "comments were prejudicial or simply rhetorical flourish lies within the sound discretion of the trial court." *Id*. *See also Jones-Harris v. State*, 179 Md. App. 72, 106 (2008) (stating that the trial judge "is in the best position to evaluate and assess—in the context in which the remarks are made and their relationship to other factors in the trial—whether they were in fact prejudicial"). Accordingly, we will only reverse upon a finding that the trial court "clearly abused the exercise of its discretion and prejudiced the accused." *Degren*, 352 Md. at 431. In determining whether an improper comment was prejudicial, we consider three factors: (1) the severity and pervasiveness of the remarks; (2) the measures taken to cure any potential prejudice; and (3) the weight of the evidence against the accused. *Donaldson v. State*, 416 Md. 467, 497 (2010).

Though the State's remark was isolated, it was severe. The remark was susceptible to the inferences that Brooks bore the burden of proof and that his failure to testify was indicative of guilt. Accordingly, this factor weighs in favor of a finding of prejudice.

While the court took no immediate remedial action, it had previously provided the pattern jury instructions on the presumption of innocence, the State's burden of proving guilt beyond a reasonable doubt, and the defendant's constitutional right not to testify. On balance, this weighs against prejudice—but far less so than a contemporaneous instruction would have.

Finally, we consider the strength of the State's case. In its Memorandum Opinion denying Brooks's motion for a mistrial, the circuit court adopted the State's recitation of facts, stating:

> [Brooks] was the individual [Hatmaker] set out to meet the day he disappeared. [Brooks] admitted to meeting [Hatmaker] immediately prior to his disappearance and driving with him in the direction of the RV that was found to contain a great deal of [Hatmaker's] blood. That particular RV was owned by [Brooks] and was moved by [Brooks] from its Glen Burnie location two days after [Hatmaker's] disappearance to a home belonging to a friend of [Brooks]. [Brooks] further rented a U-Haul truck the day of the disappearance[,] which was subsequently found to have [Hatmaker's] blood on it as well. [Brooks's] cell phone location confirmed his movement in these areas. [Brooks's] live-in girlfriend stated [that] he arrived home within a short time of [Hatmaker] going missing and stated "a storm is coming. Everything is going to change."

We agree with the circuit court that the circumstantial evidence in this case was "strong and convincing." *See Wilder v. State*, 191 Md. App. 319, 336-37 (2010) (noting that there is "no difference between direct and circumstantial evidence"). Concluding that this factor weighs against a finding of prejudice, we hold that the State's improper remark was harmless beyond a reasonable doubt. [2]

[2] While we find that Brooks's constitutional rights were violated but that no prejudice occurred, we still do not condone the State's behavior. This was not a casual slip of the tongue in the heat of the moment, which we might more easily forgive. Rather, this was the carefully orchestrated rhetorical flourish, with the audio cued up and ready to go, around which the rebuttal closing (to which Brooks would have no opportunity to reply) was written.

III. THE JURY INSTRUCTION ON ACCOMPLICE LIABILITY

Finally, Brooks contends that the trial court abused its discretion by instructing the jury on accomplice liability over defense counsel's objection.

At the conclusion of the evidence and prior to closing argument, the court instructed the jury as follows:

> Let me discuss with you accomplice liability. The Defendant may be guilty of murder, robbery, or theft as an accomplice even though the Defendant did not personally commit the acts that constitute that crime. [T]o convict the Defendant of murder, robbery, or theft as an accomplice, the State must prove that the murder, robbery, or theft occurred, and that the Defendant with the intent to make the crime happen knowingly aided, counseled, commanded, or encouraged the commission of the crime or communicated to a primary actor in the crime that he was ready, willing, and able to lend support if needed.
>
> A person need not be physically present at the time and place of the commission of a crime … to act as an accomplice. The mere presence of the Defendant at the time and place of the commission of a crime is not enough to prove that the Defendant is an accomplice. If presence at the scene of the crime is proven that fact may be considered along with all of the surrounding circumstances in determining whether the Defendant intended to and was willing to aid a primary actor, for example, by standing by as a lookout to warn the primary actor of danger and whether the Defendant communicated that willingness to any primary actor.

"An appellate court reviews for abuse of discretion a trial court's decision as to whether to give a jury instruction." *Hall v. State*, 437 Md. 534, 539 (2014). In determining whether a trial court has abused its discretion, we consider "(1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given." *Stabb*

v. State, 423 Md. 454, 465 (2011). A trial court abuses its discretion where its exercise thereof is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id*.

"[T]o generate an accomplice liability instruction, the State must present evidence that [the defendant] 'in some way participate[d] in the commission of the felony by aiding … [an] actual perpetrator.'" *Sweeney v. State*, 242 Md. App. 160, 175 (2019) (quoting *Pope v. State*, 284 Md. 309, 331 (1979)). Accordingly, "some evidence" must be admitted from which the factfinder could reasonably infer that someone other than the defendant was involved in the crime. *Id*. at 174-75.

The State contends that "[t]he evidence adduced at trial satisfied the low bar of 'some evidence' to warrant the issuance of an accomplice liability instruction." In support of this contention, however, the State primarily cites defense counsel's theory of the case and closing argument before the jury, neither of which constitutes evidence. *See Sweeney*, 242 Md. App. at 176 (noting that "closing arguments are arguments, not evidence"). The State further argues that the instruction was generated by "evidence demonstrat[ing] that Brooks lured Hatmaker … to Glen Burnie under the false pretense of a drug deal, and Brooks owned the RV in which the murder took place." While this is certainly circumstantial evidence of Brooks's guilt, it hardly supports a reasonable inference that someone else participated in Hatmaker's murder. Finally, Brooks cites the testimony of FBI Special Agent Fennern, who testified that at 12:52 p.m. and 12:54 p.m. on November 24, 2015, Brooks's cell phone was in a different location than Hatmaker's cell phone. That

fact does not, without more, support an inference that someone else participated in Hatmaker's murder. Because there was no evidence to support the accomplice liability instruction, the court erred in giving it.

An unwarranted jury instruction is often considered harmless surplusage which does not warrant reversal. *Perry v. State*, 150 Md. App. 403, 426-27 (2002) ("A rule requiring a necessary instruction does not forbid an unnecessary instruction."). In *Brodgen v. State*, however, the Court of Appeals noted that the *Perry* court "paints with too broad a brush in its conception that a superfluous jury instruction can never amount to error." 384 Md. 631, 645 n.6 (2005). When a superfluous instruction injects a "defense theory that was never raised at trial" and "mislead[s] [the jury] as to which party bore the ultimate burden of proof," it is prejudicial and reversal is required. *Id*. at 650. That is, however, not the case here. The superfluous instruction neither confused nor misled the jury and Brooks suffered no prejudice. Accordingly, the court's error was harmless beyond a reasonable doubt.

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