Circuit Court for Prince George's County
Case No.: CT170409A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3007

September Term, 2018

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BAYRON LEON-RAMOS

v.

STATE OF MARYLAND

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Graeff,
Arthur,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Graeff, J.

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Filed: August 19, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Bayron Leon-Ramos, was convicted by a jury in the Circuit Court for Prince George's County of felony murder and kidnapping. The court sentenced appellant to life imprisonment, all but 60 years suspended on the murder conviction and merged the sentence for kidnapping.

On appeal, appellant presents the following questions for this Court's review:

1. Was the evidence insufficient to sustain appellant's convictions for felony murder and kidnapping?

2. Did the circuit court err in allowing the State to make a speculative closing argument relying upon facts not in evidence?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

**BACKGROUND**

On January 21, 2017, the body of Juan Jose Gonzalez-Mejia ("the victim"), was discovered lying in a clearing in the woods beside Mattawoman Lane in Prince George's County. An autopsy revealed that the victim sustained multiple sharp force injuries and blunt force injuries around his neck and head, including a significant long cutting wound across the front of his neck. The medical examiner, Dr. Pamela Southall, opined that the victim was alive when his throat was cut, due to the significant amount of "associated blood in that surrounding soft tissue," as well as the fact that "a person can bleed out rapidly" from this type of injury. The cause of the victim's death was due to multiple sharp and blunt force injuries, and the manner of death was determined to be homicide.

Detective Zedrick DeLeon, a member of the Prince George's County Police Department, ascertained that the victim lived in a house located at 2284 Old Washington Road, Waldorf, Maryland, along with several other individuals, including appellant.

Appellant gave two statements to the police in connection with this case: one on January 22, 2017, in which he denied any involvement in the homicide; and another on January 25, 2017, where he stated that he was with Selvin Romero-Leon on the night in question, and Romero-Leon told him he assaulted the victim.

During the first interview on January 22, appellant stated that he had last seen the victim on January 17, when they were outside drinking beer with another friend, Daniel Rodriguez, a.k.a., "Beto." Appellant stated that Beto was challenging him to fight, so he left the victim and Beto, went back inside the residence, and fell asleep. Detective DeLeon asked appellant if he got along with the victim, and appellant stated that he never fought with him, but he admitted they would "jokingly . . . grab at each other" from time to time when they were drinking.

At the second interview, on January 25, appellant told the police that his cousin, Selvin Romero-Leon, a.k.a. "Lito," caused the victim's injuries. Appellant stated that he did not see Romero-Leon beat the victim, but while appellant was at Romero-Leon's residence, Romero-Leon told appellant that he had beaten and kicked the victim.

Appellant and Romero-Leon then went to appellant's residence, where the beating had occurred, and Romero-Leon "grabbed [the victim] and he just put him in the trunk." Romero-Leon told appellant that he was going to "get rid of" the victim and kill him. Appellant and Romero-Leon were alone when they took the victim away from the residence in the vehicle's trunk.

Appellant told the police that, after they arrived near the wooded area off Mattawoman Lane, he promptly left the scene. He explained that he "ran quickly up a hill

I left, I got out of the car. I didn't see – that's why I'm saying, I didn't see if he, how he beat him, or how he would kill him. I didn't see." When appellant was fleeing the scene, however, he thought Romero-Leon "struck [the victim] with the knife," but he stated that he did not see a knife that evening or see Romero-Leon beat or use a knife on the victim. Although appellant maintained that he "didn't see it," he stated that once Romero-Leon removed the victim from the trunk, Romero-Leon "had to finish it because he had already beaten him up."

Appellant explained that he was not more forthcoming at his first interview because Romero-Leon threatened to kill anyone who "would open their mouth." He stated: "I know I screwed up by hanging around with him. But that, I didn't do it I didn't do it."

The police recovered a pair of khaki shorts and other clothing, among other items, from appellant's residence at 2248 Old Washington Road. A DNA expert concluded that a bloodstain on the shorts found in appellant's bedroom belonged exclusively to appellant. A pair of black jeans tested negative for blood.

Police also searched Romero-Leon's Toyota Corolla. In the trunk, the police found a Pennzoil motor oil jug and a windshield washer fluid jug, two cell phones, and a black, microfleece hat. Blood stains belonging to the victim were found on the two jugs inside the trunk.

We shall include additional details, as necessary, in the discussion that follows.

## DISCUSSION

### I.

Appellant contends that the evidence was insufficient to support his convictions for kidnapping and felony murder. He makes three separate arguments in that regard. First, appellant argues that the evidence was insufficient for both convictions because the State failed to prove that he was more than merely present during the crime. Second, appellant argues that the evidence was insufficient to support the kidnapping conviction because the State failed to prove that the victim was alive when he was placed in the trunk of the car. Third, he contends that, if the Court disagrees with the first two arguments, the evidence was insufficient to support the felony murder conviction "because the death occurred after [a]ppellant left the scene and after the kidnapping."

The State disagrees. It argues that appellant's argument with respect to felony murder is partly unpreserved, and in any event, all of his arguments are without merit.

In considering a challenge to the sufficiency of the evidence, we ask "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." *Roes v. State,* 236 Md. App. 569, 582 (2018) (quoting *Grimm v. State*, 447 Md. 482, 494–95 (2016)). "[W]e give great deference to the fact finder, as they have the best 'opportunity to assess the credibility of the witnesses, weigh the evidence and resolve conflicts in the evidence . . . .'" *In re J.H.*, 245 Md. App. 605, 623 (2020) (quoting *Neal v. State*, 191 Md. App. 297, 314 (2010)). In doing so, the jury is free to "accept all, some, or none" of a

witness's testimony. *Correll v. State*, 215 Md. App. 483, 502 (2013) (quoting *Allen v. State,* 158 Md. App. 194, 251 (2004)), *cert. denied*, 437 Md. 638 (2014).

Further, "[w]e 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference.'" *Cox v. State*, 421 Md. 630, 657 (2011) (alterations in *Cox*) (quoting *Bible v. State*, 411 Md. 138, 156 (2009)). This Court has explained that, in this undertaking, "the limited question before us is not 'whether the evidence *should have* or *probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.'" *Smith v. State*, 232 Md. App. 583, 594 (2017) (quoting *Allen*, 158 Md. App. at 249).

**A.**

We address first appellant's argument that the evidence was insufficient to support his conviction because the State failed to prove that he was more than merely present when the crime occurred. "It is a universally accepted rule of law that mere presence of a person at the scene of the crime is not of itself sufficient to prove the guilt of that person, even though it is an important element in the determination of the guilt of the accused." *Fleming v. State*, 373 Md. 426, 433 (2003). "[T]he mere fact that a person witnesses a crime and makes no objection to its commission, and does not notify the police, does not make him a participant in the crime." *Silva v. State,* 422 Md. 17, 28 (2011) (alteration in *Silva*) (quoting *State v. Foster*, 263 Md. 388, 394 (1971)).

"Instead, the person must actually participate by 'assist[ing], support[ing] or supplement[ing] the efforts of another,' or, if not actively participating, then the person

must be present and 'advise or encourage the commission of a crime' to be considered an accomplice." *Id.* (alterations in *Silva*) (quoting *Foster*, 263 Md. at 393). As this Court has explained, "[w]hereas principals in the first degree 'commit the deed as perpetrating actors, either by their own hand or by the hand of an innocent agent,' principals in the second degree are 'present, actually or constructively, aiding and abetting the commission of the crime, but not themselves committing it.'" *Kohler v. State*, 203 Md. App. 110, 119 (2012) (quoting *Handy v. State*, 23 Md. App. 239, 251 (1974)); *see also Jones v. State*, 173 Md. App. 430, 446 (2007) ("'One may . . . encourage a crime merely by standing by for the purpose of giving aid to the perpetrator if necessary . . . Guilt or innocence . . . is not determined by the quantum of [the] advice or encouragement' of the abettor") (alteration in *Jones*) (quoting *Pope v. State*, 284 Md. 309, 332 (1979)).

Here, although appellant originally told the police that he had last seen the victim drinking beer on the evening of January 17, he provided a different story during his second interview. At that time, appellant stated that Romero-Leon told him that he had beaten the victim and was going to kill him and get rid of the body. Appellant then drove with Romero-Leon to appellant's residence, where the victim had been beaten. Romero-Leon put the victim in the trunk, and appellant got into the car and asked Romero-Leon: "Where do you want to toss it?"

Romero-Leon told him "by the Solara," and they then drove to "where he left it." Appellant stated that, when they got there, Romero-Leon took the victim out of the trunk of the car and threw him on the ground, explaining that Romero-Leon "had to finish it because he had already beaten him up." Appellant stated that, although he did not actually

see the victim die, Romero-Leon "struck him with the [jack]knife" after they arrived at the woods in the car.

This evidence, including that appellant, who knew that Romero-Leon was planning to kill the victim, got back into the car after Romero-Leon put the victim in the trunk of the car and asked "where do you want to toss it," was sufficient for the jury to infer that appellant was more than merely present. It was sufficient for the jury to find that appellant knowingly aided or encouraged the kidnapping and the resulting felony murder.

**B.**

Appellant next contends, that even if the evidence established more than mere presence, the evidence was insufficient to support his conviction for kidnapping (and the felony murder that followed) because the State failed to prove that the victim was alive when he was transported to the woods. The State contends that this contention is without merit, asserting that there was evidence that the victim was alive when he was placed in the trunk of the car.

Section 3-502 (a) of the Criminal Law Article provides that "[a] person may not, by force or fraud, carry or cause a person to be carried in or outside the State with the intent to have the person carried or concealed in or outside the State." Md. Code (2012 Repl. Vol.), § 3-502 (a) of the Criminal Law Article ("CR"). The offense of "[k]idnapping is, in essence, false imprisonment aggravated by carrying the victim to some other place[.]" *Johnson v. State*, 292 Md. 405, 432 (1982). "The elements of kidnapping are (1) a restraint of the victim's freedom (2) against his will (3) aggravated by carrying the victim to some other place." *Kearney v. State*, 86 Md. App. 247, 256, *cert. denied*, 323 Md. 34 (1991).

Consistent with the pattern instruction for kidnapping, *see* MPJI-Cr 4:19.1, the trial court instructed the jury as follows:

> The defendant is charged with the crime of kidnapping. Kidnapping is the confinement or detention of a person against that person's will accomplished by force or threat of force, coupled with the movement of that person from one place to another with the intent to carry or conceal.
>
> In order to convict the defendant of kidnapping, the State must prove that the defendant confined Juan Jose Gonzalez Mejia against his will; that the defendant moved Juan Jose Gonzalez Mejia from one place to another against his will; that the defendant used force or threat of force to confine and move Juan Jose Gonzalez Mejia; and that the defendant moved Juan Jose Gonzalez Mejia with the intent to carry or conceal Juan Jose Gonzalez Mejia. The movement must be for more than a slight distance. It must be more than the movement that occurred incidental to the commission of the crime of felony murder. The movement must be for some purpose independent of the crime of felony murder.
>
> In determining whether the movement of Juan Jose Gonzalez Mejia occurred during the commission – I'm sorry – in determining whether the movement of Juan Jose Gonzalez Mejia was slight or incidental, you should consider the following factors: How long Juan Jose Gonzalez Mejia was held; how far and where Juan Jose Gonzalez Mejia was taken; whether the movement was greater than was necessary to commit the underlying crime; whether the movement of Juan Jose Gonzalez Mejia was for a purpose other than to commit the underlying crime; and whether the movement and the confinement substantially increased the risk of harm beyond the risk of harm that was part of the condition of the underlying crime.

*See also State v. Stouffer*, 352 Md. 97, 113 (1998) (setting forth these factors and indicating that they should be considered under the totality of the circumstances).

The State, as in *Stouffer*, 352 Md. at 105, essentially concedes that a person "may not be convicted of kidnapping for carrying around a corpse." It argues, however, that the evidence supported a finding that the victim was alive when he was kidnapped.

The assistant medical examiner concluded that, based on his injuries, as well as the presence of blood around the neck area when he was found, the victim was alive before his neck was cut. *See Stouffer*, 352 Md. at 105 (accepting medical examiner's testimony that victim may have lived for a short while after the stabbing, there was a reasonable inference that the victim was alive when he was transported). She also testified that a person can "bleed out rapidly" from this type of wound. The limited quantity of blood in the trunk, as compared to about the victim's person, supported the conclusion that the victim's neck had not yet been cut when he was put into the trunk.

Appellant's statements also supported the inference that the killing occurred after the victim was transported into the woods. Romero-Leon told appellant, in future tense: "I'm going to kill him[.]" Appellant told the detective that he did not see Romero-Leon kill the victim, but Romero-Leon "had to finish it" because he had already beaten up the victim, and Romero-Leon "struck him with the [jack]knife" after they arrived at the wooded area. There was sufficient evidence for the jury to conclude that the victim was alive when he was transported to the wooded area in the trunk of Romero-Leon's car.

**C.**

Finally, and in the alternative, appellant contends that the evidence was insufficient to support his conviction of felony murder because, to be guilty of felony murder, the victim's death must have occurred during the commission of the kidnapping, but the evidence here showed that "the death occurred after the kidnapping had ended." The State contends that the argument that the murder was not in furtherance of the kidnapping was

not raised below, and therefore, it is not preserved for review. In any event, the State argues that appellant's contention is without merit.

We address the preservation argument first. The Court of Appeals has explained:

> Appellate review of sufficiency of evidence is available only when the defendant moves for judgment of acquittal at the close of all the evidence and argues precisely the ways in which the evidence is lacking. The issue of sufficiency of the evidence is not preserved when [the defendant]'s motion for judgment of acquittal is on a ground different than that set forth on appeal.

*Hobby v. State*, 436 Md. 526, 540 (2014) (alteration in *Hobby*) (quoting *Anthony v. State*, 117 Md. App. 119, 126 (1997)).

During argument on the motion for judgment of acquittal, defense counsel argued that the kidnapping was complete when appellant and Romero-Leon arrived at the woods, and the murder happened after the kidnapping was complete, after appellant's participation ended and he left the scene. The State responded that appellant participated with Romero-Leon in the kidnapping, the underlying felony, and that the victim's death occurred during the commission of that felony.

After a lunch recess, defense counsel again argued that appellant's alleged participation in the kidnapping ended when he left, and he was not liable for any subsequent acts by Romero-Leon. He argued that, "in the realm of felony murder, he terminated his involvement in the underlying felony, which means he is at that point no longer liable for future conduct of the co-defendant who continues on with the felony." The court disagreed, stating that was a "factual determination that the jury needs to decide if, indeed, that was a termination of the kidnapping at that point."

Based on this record, we conclude that appellant has preserved his argument for this Court's review. We thus turn to the merits.

As the Court of Appeals has explained:

> Felony murder is defined under Maryland common law as a criminal homicide committed in the perpetration of or in the attempted perpetration of a dangerous to life felony. The crime retains its common law definition, even though the General Assembly has divided murder into degrees of culpability for penalty purposes.

*Yates v. State*, 429 Md. 112, 125–26 (2012) (internal citations and quotation marks omitted). CR § 2-201 states, in pertinent part, that "murder is in the first degree if it is . . . committed in the perpetration of or an attempt to perpetrate . . . kidnapping under § 3-502 or § 3-503(a)(2) of this article[.]" Moreover, "a killing constitutes felony murder when the homicide and the felony are part of a continuous transaction and are closely related in time, place, and causal relation." *Yates*, 429 Md. at 128. As the Court of Appeals explained:

> At common law, a person's conduct bringing about an unintended death in the commission or attempted commission of a felony was guilty of murder. Wayne R. LaFave, SUBSTANTIVE CRIMINAL LAW § 14.5(a) 444 (2nd ed. 2003). That rule is known as the felony-murder rule, intended to "deter dangerous conduct by punishing as murder a homicide resulting from dangerous conduct in the perpetration of a felony, even if the defendant did not intend to kill." *Fisher* [*v. State*], 367 Md. [218,] 262, 786 A.2d [706,] 732 (2001)]. Underlying the doctrine is the recognition that in society's judgment, a felony committed intentionally that causes the death of another person is qualitatively more serious than an identical felony that does not. *See* David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 363 (1985). To obtain a conviction for felony-murder in Maryland, the State must prove the underlying felony and that the death occurred during the perpetration or in furtherance of the felony. *Newton v. State,* 280 Md. 260, 269, 373 A.2d 262, 267 (1977). "Without proof of the underlying felony, there can be no conviction for felony murder." *Hook v. State*, 315 Md. 25, 32, 553 A.2d 233, 236 (1989).

*State v. Jones*, 451 Md. 680, 696–97 (2017). "When there is a legitimate dispute over whether the killing was sufficiently in furtherance of the common enterprise to be chargeable to each of the co-felons, an issue of fact is presented for the jury, under proper instructions, to resolve." *Watkins,* 357 Md. 258, 266–67 (2000).[1]

Appellant relies on *Jones*, 173 Md. App. 430, in support of his contention that the evidence was insufficient to support his conviction for felony murder. In that case, Tione Blake called Jones and told him of a plan to rob partygoers at an apartment party. *Id*. at 437, 446. Jones drove Blake to the location, where he met Azaniah Blankumsee. *Id.* Blake and Blankumsee then proceeded inside and robbed two individuals at gunpoint, while Jones waited outside by a car. *Id*. at 437. Approximately five minutes after the robbery, the victim told other partygoers about the robbery, and several of them went outside to confront Blake and Blankumsee. *Id*. at 438. During the ensuing confrontation, Blankumsee fired his weapon, and Jones grabbed Blake's gun and fired it in the air. One of the partygoers was fatally wounded. *Id*.

On appeal, this Court reversed Jones' conviction for first degree felony murder. *Id*. at 449–450. We explained that the shooting or the use of the handgun by Jones was not in

[1] Consistent with the pattern instruction on felony murder, see MPJI-Cr 4:17.7, the court instructed the jury as follows:

> Felony murder. The defendant is charged with the crime of first degree felony murder. It is not necessary for the State to prove that the defendant intended to kill Juan Jose Gonzalez Mejia. In order to convict the defendant of first degree felony murder, the State must prove that the defendant committed the crime of kidnapping, that the defendant or another participating in the crime killed Juan Jose Gonzalez Mejia; and that the act resulting in the death of Juan Jose Gonzalez Mejia occurred during the commission of the kidnapping.

furtherance of the robbery because the robbery ended when the partygoer reported it. "The attenuation was such that the homicide could not have been conducted in furtherance of the robbery; therefore, the separate and completed crime of robbery will not support appellant's conviction for first degree felony murder." *Id.* at 449–50.

There was not the same clear separation between the felony and the killing in this case. Rather, this case is more similar to *Stouffer*, 352 Md. at 100.

In *Stouffer*, the victim's body was discovered in a ditch. *Id*. The State's theory, which was supported by the medical examiner's testimony, was that Stouffer and his co-conspirator kidnapped the victim in Hagerstown, took him to a field where they beat and stabbed him, then drove him to an area near an offramp, while still alive, and dumped the body. *Id*. Stouffer ultimately was convicted by a jury of kidnapping and felony murder based on the kidnapping. *Id*. at 104.

The Court of Appeals held that the evidence was sufficient to support appellant's convictions. *Id*. 114–116. With respect to felony murder, the Court noted that the issue was "simply whether the evidence sufficed to show that [the victim] was murdered 'in the perpetration of' a kidnapping." *Id*. at 116. The Court held that, "[b]ecause kidnapping is a continuing crime, remaining in effect until the hostage is safely released, the stabbing was necessarily 'in furtherance of the felonious undertaking.'" *Id*. at 117 (quoting *Campbell v. State*, 293 Md. 438, 446 (1982)).

Here, as in *Stouffer*, the victim was not released, and the kidnapping ended in his death. Accordingly, the jury could infer that the murder was in furtherance of the kidnapping of the victim.

Appellant's testimony that he went to the other side of the street while Romero-Leon stabbed the victim, even if believed, does not relieve appellant from liability. As one commentator has observed:

> One who has given aid or counsel to a criminal scheme sufficient to otherwise be liable for the offense as an accomplice may sometimes escape liability by withdrawing from the crime. A mere change of heart, flight from the crime scene, apprehension by the police, or an uncommunicated decision not to carry out his part of the scheme will not suffice. Rather, it is necessary that he (1) repudiate his prior aid, or (2) do all that is possible to countermand his prior aid or counsel, and (3) do so before the chain of events has become unstoppable.

LaFave, 2 *Substantive Criminal Law*, § 13.3(d) at 501–02 (3d ed. 2018) (footnotes omitted). Appellant's contention that the evidence was insufficient to support his convictions is without merit.

## II.

Appellant next argues that the circuit court erred in not sustaining his objection to the prosecutor's comment in closing argument. Specifically, he asserts that the prosecutor improperly relied on facts not in evidence in stating that appellant must have spoken to his friends between his first and second interview.

The State contends that the contention is not preserved for review and is without merit. It asserts that the prosecutor's argument was a fair inference from the evidence admitted at trial, and even if it was improper, it does not require reversal of appellant's convictions.

To put the closing argument in context, we note that, in appellant's January 25, 2017, statement, appellant told Detective DeLeon to check the shoes and the jacket he was

wearing on the evening in question, which he stated were located inside his closet at his residence. Appellant indicated that these would exonerate him, asserting that, if he had touched the victim, he would have messed up his jacket, pants, and shoes, and he maintained that there was no evidence on his clothing. Following the interview, the police obtained a search warrant for the house, and they executed it on January 25, 2017. Notably, the clothing was "still wet" when the police found it. A pair of black jeans found at appellant's residence did, as appellant suggested, test negative for blood.

During closing argument, the prosecutor discussed the pertinent chronology of the case, including that the crime happened on January 17, 2017, the victim was reported missing on January 19, and the victim's body was found on January 21. The prosecutor then discussed the different stories appellant provided to the police during his two interviews. In the first version, given on January 22, appellant stated that, on the night in question, the victim was outside his residence drinking with others, and appellant went to sleep without further incident.

At appellant's second interview on January 25, however, a time when the prosecutor stated that "he already knows they're accusing him of murdering [the victim,]" appellant gave a different story. He stated that Romero-Leon advised that he beat the victim up in the back of appellant's house, "he was going to get rid of [him,]" and appellant should "look for which bag to put him in." The prosecutor noted that appellant maintained during his statement that he did not touch the victim or anything in Romero-Leon's car, but he admitted: "I was the one who was in the car with him, and I was in the car with him until he was dumped." The prosecutor stated that appellant also told the detective that when

they got to the woods, he opened the door to Romero-Leon's car and left the scene almost immediately thereafter.

The prosecutor then argued, as relevant to the issue presented on appeal:

> [PROSECUTOR]: He planted evidence. He instructs the detective to go to his house. He tells him exactly where he could find the clothes that apparently are going to exonerate him and show how he was in the woods. He said my boots are there and my jacket's there, and so is my pants there from that day. And do you remember, because the detective said, oh, isn't it true that you had blood on your pants? And he said no. That's paint. He knows for sure. He knows it's not blood because, I will argue to you, that it's not from that day.
>
> It's the 25th. This happened on the 17th. You're gonna tell me that you have boots, your pants, your jacket from the 17th in the house and on the 25th they're still wet? Does that make any sense to you? Or it is that on the 22nd when the police interviewed you, you came up with your own plan. And on the 25th, when you were re-interviewed, you were like hey, I still have those pants and those boots and those jacket [sic]. You check those out. So he knew when they told him, oh, the blood on the pants? He knew Detective DeLeon was lying to him about that. He knew there was no blood on there because he put those pants there.
>
> Detective DeLeon confronts him with who had the problem with Pechuguita? You [sic] who lied to me? He said right. During that I had I would have – and excuse me for my language. I would have fucked up the jacket, the pants, the shoes because that really, that really can show you what you want. And I didn't grab him that way. A person has to touch him with and put what's there on the clothing. He knows what he's talking about. He's got a game plan.
>
> On the 22nd he just sat back and listened to what the detective had to say. What you got on me? You think on the 22nd when he was called in and he was released, then they interviewed Selvin. And they interviewed all these people. You don't think he talked to any of these people? We don't leave our common sense out there. We take it with us.
>
> [DEFENSE COUNSEL]: I would object, Your Honor. This is not in evidence.

> THE COURT: They have the instructions and the evidence is the evidence they heard from the witness stand. Continue.
>
> [PROSECUTOR]: Don't leave your common sense out there. He didn't leave it when he went into that interview room. That's why he's like, oh, my jacket, the one you're gonna find when I told you to find it, it would have been all messed up and my DNA would have – his DNA would have been all over those clothes. He knows what he's doing.

Appellant contends that the prosecutor's comments were improper because there was no evidence that appellant spoke with others between the police interviews. The State contends, initially, that the issue is not preserved because the court's response was, "essentially, a favorable ruling." It asserts that, when appellant objected, stating that this was "not in evidence," the court's response "effectively reminded the jury that the arguments of counsel were not evidence."[2] The State argues that, because appellant did not ask for additional relief, his claim is not preserved for this Court's review.

It is true that a party cannot appeal a decision made in its favor. *Rush v. State*, 403 Md. 68, 95 (2008) (A party "cannot appeal from a favorable ruling."). *Accord Adm'r, Motor Vehicle Admin. v. Vogt*, 267 Md. 660, 664 (1973) ("Generally, a party cannot appeal from a judgment or order which is favorable to him, since he is not thereby aggrieved.").

We agree with appellant, however, that this was not a favorable ruling. The court did not sustain the objection or tell the jury to disregard the prosecutor's statement. The issue is preserved for this Court's review.

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[2] As indicated, the court responded to the objection by stating: "They have the instructions and the evidence is the evidence they heard from the witness stand. Continue."

We thus turn to the merits of the argument. Generally, "[t]he permissible scope of closing argument is a matter left to the sound discretion of the trial court. The exercise of that discretion will not constitute reversible error unless clearly abused and prejudicial to the accused." *Cagle v. State*, 462 Md. 67, 74 (2018) (quoting *Ware v. State*, 360 Md. 650, 682 (2000)).

As the Court of Appeals has explained:

> Generally, a party holds great leeway when presenting their closing remarks. "Counsel is free to use the testimony most favorable to his side of the argument to the jury, and the evidence may be examined, collated, sifted and treated in his own way. . . ." *Mitchell v. State*, 408 Md. 368, 380, 969 A.2d 989, 996 (2009) (quoting *Wilhelm v. State*, 272 Md. 404, 412, 326 A.2d 707, 714 (1974)). It falls "within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is afforded a wide range." *Id*. However, this leeway is not without limitation.

*Id.* at 75.

There are, however, limitations. "Notwithstanding the wide latitude afforded prosecutors in closing arguments, a defendant's right to a fair trial must be protected." *Jones v. State*, 217 Md. App. 676, 691 (quoting *Lee v. State*, 405 Md. 148, 164 (2008)), *cert. denied*, 440 Md. 227 (2014). The Court of Appeals has held that "[a]rguing facts not in evidence is highly improper." *Fuentes v. State*, 454 Md. 296, 319 (2017). *Accord Mitchell*, 408 Md. at 381 ("[C]ounsel may not 'comment upon facts not in evidence.'"); *Whack v. State*, 433 Md. 728, 748 (2013) (internal citation omitted) ("The prosecutor certainly has 'liberal freedom of speech' during closing argument, but this commentary must be grounded in the evidence or reasonable inferences drawn from the evidence[.]")

Here, the evidence showed that the police interviewed appellant's housemates and his cousin on the date of appellant's first interview. We agree with the State that the comment that appellant likely discussed these interviews prior to his second interview was a fair inference from the evidence and common sense.

Even if the comments were improper, reversal is not required. As the Court of Appeals has explained, "reversal is only required where it appears that the remarks of prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Beads v. State*, 422 Md. 1, 10 (2011) (quoting *Degren v. State*, 352 Md. 400, 430–31 (1999)). In determining whether reversal is required, we look to several factors: (1) "the severity 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. 468, 497 (2010) (quoting *Lee*, 405 Md. at 165).

Here, the objected to comment was isolated, and the severity of the remark was low. Moreover, although the court did not sustain the objection, the court reminded the jury that, consistent with the instructions given, closing arguments were not evidence, and the evidence "is the evidence they heard from the witness stand."

Finally, although the weight of the evidence was not overwhelming, the comment was unlikely to mislead the jury, because, whether or not appellant spoke to others after he was questioned during his first interview, did not, as the State notes, "go to a critical, dispositive issue." Appellant's own statements showed that he knew that Romero-Leon beat the victim, and he went in the car with Romero-Leon as Romero-Leon transported the victim to the woods knowing that Romero-Leon intended to kill the victim. Accordingly,

to the extent that the prosecutor's remark was improper, we conclude that it was not so prejudicial as to require reversal of appellant's convictions.

**JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE ASSESSED TO APPELLANT.**

The correction notice(s) for this opinion(s) can be found here:

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