Circuit Court for Baltimore City
Case No. 117205032

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3239

September Term, 2018

WILLIAM MASON

v.

STATE OF MARYLAND

Wells,
Wright,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: September 8, 2020

Appellant William Mason was convicted by a jury in the Circuit Court for Baltimore City of first-degree murder and use of a firearm in the commission of a crime of violence. Appellant presents the following question for our review:

> "Did the trial court abuse its discretion when it overruled defense counsel's objection to the prosecutor's improper closing argument?"

Finding no abuse of discretion, we shall affirm.

I.

Appellant was indicted by the Grand Jury for Baltimore City on charges of first-degree murder and use of a firearm in the commission of a crime of violence. The jury convicted him of both charges. The court sentenced him to a term of incarceration of life for first-degree murder, and for use of a firearm a consecutive term of twenty years, the first five to be served without parole.

The charges arose from an incident on June 21, 2017. At 12:33 a.m., Towanda Brogden, a resident of the apartment complex at 3916 Liberty Heights Avenue, called 911 and reported hearing multiple gunshots and a woman yelling. Baltimore City Police Officer Jahcobie R. Browne responded and canvassed the area, found no one discharging a firearm, and left.

At around 1:45 a.m., Officer Browne returned to the apartment complex in response to another call[1] and saw appellant sitting on the steps of the building. Appellant had

[1] The nature of the second call is not clear from the record.

multiple lacerations on his face and arms and was wearing a bloody sock. A technician with the Mobile Crime Unit arrived and recovered appellant's bloody sock and sent a swab of it for DNA processing. Police took appellant to Sinai hospital. According to medical records, appellant explained that he sustained his injuries after jumping through a window. Appellant did not provide an emergency contact or mention a girlfriend, nor did he mention that anyone else was injured. Hospital records indicate that appellant was released to central booking but returned to the hospital for further medical treatment.[2]

Later that day, Ms. Brogden, who reported the gunshots initially, left her apartment for work and noticed that the door was ajar to Apartment T1, the basement apartment. She also observed what appeared to be blood leading from the apartment to the front door of the apartment complex. When she returned home from work that evening, Ms. Brogden made the same observation. Her boyfriend called 911 and stated that there were gunshots the night prior, the door to Apartment T1 had been open all day, and there was a blood trail outside of the apartment.

Police went to the apartment at approximately 8:45 p.m. and found a blood trail and bloody footprints outside of Apartment T1. In the bedroom, they found the body of a woman on the floor, later identified as twenty-three-year-old Khaya Lambert, clad only in underwear and covered with a blanket. Near the victim's body, police recovered two bloody handguns and matching shell casings. Police noticed what appeared to be a "foot

[2] The medical notes stated as follows: "[Patient] here early this AM for jumping through window with multiple lacs. Discharged to central booking. Central booking sent [patient] back reporting hypertension (181/118), 'sutures still bleeding,' & acting erratic."

or sock impression" in the blood on the floor. They saw evidence of a struggle in the bedroom, including a "bunch of broken glass," but no evidence of struggle elsewhere in the apartment. Police learned that Ms. Lambert and appellant had been in a romantic relationship for approximately two years, jointly leased Apartment T1, and had returned recently from a vacation in Miami. Police obtained a search warrant for appellant's DNA and obtained his sample.

An autopsy of Ms. Lambert's body indicated that she was pregnant and had sustained four gunshot wounds as well as multiple contusions and abrasions, including twenty-six sharp force injuries to the scalp, eight cutting wounds to the upper back, two cutting wounds to the right arm, and multiple cuts to her hands.

Although no fingerprints were found on the two handguns recovered from the scene, lab analysis revealed Ms. Lambert's DNA on both handguns and appellant's DNA on one of them. Swabs taken from the floor of Apartment T1 and appellant's bloody sock contained DNA from appellant and Ms. Lambert.

During closing argument at trial, defense counsel argued that the State had not proven that appellant had a motive to kill Ms. Lambert, arguing as follows:

> "Why would he do it? *What is it about him that you've seen*, that you've heard *that would leave you with the impression that he would do it*, even against his worst enemy? What evidence have you heard that can help answer the question why would he do that; that would convince you that he would, in such a savage fashion, kill his fiancée and the mother of his child? What is it about him that we have seen?"

The State responded in its rebuttal closing argument as follow:

> "So, . . . defense counsel . . . starts out asking, 'Why? Why did all this happen?' . . . We don't know, and the State does not have a burden to prove or to provide you a motive. For the State to provide you a motive, we would have to get into the mind of every person who murdered someone in this city. It's just not a possibility. It's just not realistic.
>
> So, defense counsel says, you know, 'Have you seen anything here?' Well, I don't know. *The fact that he's been smiling through most of the trial is a little something—*"

Defense counsel objected to the prosecutor's statement, and the court overruled the objection. Thereafter, the State continued as follows:

> "—including while his counsel was making the argument. I don't know. We don't know what his character is and defense counsel trying to vouch for his credibility isn't enough. There is no evidence of his credibility. We don't know anything about him other than what we have seen from these crime scene photos in an apartment that he shared, that has his DNA on it, his blood, his DNA on a handgun."

Appellant was convicted and sentenced as noted above. This timely appeal followed.

II.

Before this Court, appellant argues that the trial court erred in overruling defense counsel's objection to the prosecutor's comment in its closing argument: (1) because customarily, a prosecutor may not remark to the jury on a defendant's non-testimonial courtroom demeanor, especially when the defendant did not testify; and (2) because the comment was not premised on evidence admitted at trial. There was no evidence in the record that appellant was smiling at trial. Appellant contends that the prosecutor implied improperly that appellant's smile was evidence of guilt and "bad character," which in turn

was evidence that he had killed Ms. Lambert. The error was not harmless, argues appellant, because the State's evidence against him was weak.

In response, the State argues that the prosecutor's comment was not improper. The State contends that the comment was proper because of its context; the prosecutor was responding directly to defense counsel's rhetorical question and immediately reminded the jury that "[w]e don't know what [appellant's] character is" and that the record contained no evidence of appellant's credibility. In the State's view, the prosecutor did not imply that appellant's courtroom behavior was indicative of his guilt; on the contrary, the prosecutor reminded the jury to decide the case based on the evidence, not on perceptions about appellant's "character." Even if the prosecutor's comment was improper, the State maintains that it was harmless error given its isolated utterance, the overwhelming evidence against appellant, and the curative effect of the court's instructions to the jury to decide only on the basis of evidence and that closing arguments were not evidence.

III.

We review a trial court's ruling on the impropriety of a closing argument for abuse of discretion. *Degren v. State*, 352 Md. 400, 431 (1999) ("[D]etermination of whether the prosecutor's comments were prejudicial or simply rhetorical flourish lies within the sound discretion of the trial court.").

As a general rule, attorneys enjoy great leeway in presenting opening and closing arguments. *Id.* at 429. An attorney "may indulge in oratorical conceit or flourish and in

illustrations and metaphorical allusion" and is "free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments." *Wilhelm v. State*, 272 Md. 404, 413 (1974). But attorneys are not "permitted by the court, over proper objection, to state and comment upon facts not in evidence or to state what [they] could have proven." *Id.* While closing argument may include "fair comment on the demeanor of witnesses while they are on the stand," when a defendant declines to testify it is generally improper for counsel to comment during closing argument on defendant's non-testimonial courtroom demeanor. *Bryant v. State*, 129 Md. App. 150, 158–60 (1999), *cert. denied*, 358 Md. 164 (2000).

This Court addressed the impropriety of the State's remark on a defendant's non-testimonial demeanor in *Bryant.* During the State's closing argument, the prosecutor asked the jurors rhetorically whether they had noticed that the defendant "kept looking down and couldn't look at" the State's key witness while she testified. *Id*. at 156. The State attributed the defendant's evasive gaze to his knowledge that the witness was testifying truthfully, stating as follows: "He couldn't sit up and look her in the eye because he knew she was telling the truth. He knew she was telling the truth." *Id.* On appeal, we held that by remarking on "the passive courtroom demeanor of a non-testifying defendant," the State argued impermissibly a fact not in evidence. *Id*. at 161. We distinguished a defendant's "passive" behavior from "intentional conduct . . . calculated to influence the jury." *Id.* at 160.

In the instant case, as in *Bryant*, the State commented improperly on appellant's

non-testimonial demeanor. While smiling is not "entirely passive" like avoiding eye contact, it is not ordinarily "intentional conduct . . . calculated to influence the jury." *Id.* Therefore, the comment upon appellant's non-testimonial demeanor was an improper reference to an irrelevant fact not in evidence. The trial court erred in overruling defense counsel's objection.

Although the trial court erred, we hold that the error was harmless beyond a reasonable doubt. Every improper remark by a prosecutor in closing does not necessarily require reversal. *Evans v. State*, 333 Md. 660, 679, *cert. denied*, 513 U.S. 833 (1994). Reversal is warranted only when the remark misled the jury or was likely to have misled or influenced the jury against the accused. *Spain v. State*, 386 Md. 145, 158 (2005). In determining whether an improper comment is likely to have prejudiced a defendant, "we consider the severity of the remark, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Donaldson v. State*, 416 Md. 467, 497 (2010).

The Court of Appeals, in *Jones v. State*, 310 Md. 569, 579–81 (1987), *judgment vacated and remanded on other grounds*, 486 U.S. 1050 (1988), *sentence vacated on other grounds*, 314 Md. 111 (1988), considered the following comment that a prosecutor made in closing argument: "with the coolness and calmness that [the non-testifying defendant] displays here today and has displayed for the last three days." The Court of Appeals held that the comment did not warrant reversal, because the jurors had the opportunity to observe the defendant at trial and were "free and able to make their own independent

evaluation of [defendant's] appearance" and because the trial court had instructed properly that closing argument is not evidence. *Id.*; *see also Oken v. State*, 327 Md. 628, 675–76 (1992) (holding that the State's comment in closing argument that "[the defendant] sat over here for two weeks taking notes, talking to his lawyer, smugly looking at all of us" furnished no ground for reversal).

Similarly, the State's comment in the case at bar does not warrant reversal of appellant's convictions. The State's comment was not severe; the jury instructions by the court cured any potential prejudice; and the evidence against appellant was significant.

In assessing the severity of the State's comment, we consider whether there was one isolated comment or multiple improper comments and whether the comment related to an issue central to the case or peripheral. *Sivells v. State*, 196 Md. App. 254, 290 (2010), *aff'd*, 421 Md. 659 (2011). Here, the State's remark was a brief and isolated comment. Moreover, in contrast to the prosecutor's remarks in *Bryant*, the State did not explicitly ask the jury to draw any particular inference from appellant's demeanor. The jury was free to independently determine what, if any, inference it might make. *See Jones*, 310 Md. at 581; *Oken*, 327 Md. at 675–77*; Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974) ("[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations."). .

We next consider the measures taken by the court to cure any prejudice caused by the improper comment. Immediately before the State's closing argument, the court

instructed the jury that it was to decide the case based exclusively on the evidence presented at trial and that "[o]pening statements and soon to be heard closing arguments are not evidence." The court instructed the jury on the presumption of innocence and burden of proof. Under these circumstances, the court's instructions were sufficient to inoculate the jury against any prejudice that the State's remark may otherwise have caused. *See Spain*, 386 Md. at 160 ("Maryland courts long have subscribed to the presumption that juries are able to follow the instructions given to them by the trial judge, particularly where the record reveals no overt act on the jury's part to the contrary."); *State v. Moulden*, 292 Md. 666, 678 (1982) ("[O]ur legal system necessarily proceeds upon the assumption that jurors will follow the trial judge's instructions.").

Finally, in considering the weight of the evidence against appellant, we agree with the State that there was substantial circumstantial evidence of appellant's guilt. *See Hebron v. State*, 331 Md. 219, 226 (1993) (noting that "Maryland has long held that there is no difference between direct and circumstantial evidence."). A trail of bloody footprints led from appellant's apartment to the exterior of the apartment complex, where appellant was found approximately one hour after Ms. Brogden reported hearing multiple gunshots. When Officer Browne encountered appellant, appellant was wearing a bloody sock containing the victim's DNA. At no point during his encounter with Officer Brown or at the hospital did appellant report that Ms. Lambert had been shot. The blood on the murder weapons contained only Ms. Lambert's and appellant's DNA.

Considering the relative lack of severity of the prosecutor's comment, the court's

instructions to prevent any prejudice, and the substantial evidence against appellant, we hold that the error was harmless beyond a reasonable doubt. *See Dorsey v. State*, 29 Md. App. 97, 107–109.

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