Circuit Court for Prince George's County
Case Nos. 18-0097X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3404

September Term, 2018

GREGORY MICHAEL BOWYER, JR.

v.

STATE OF MARYLAND

Kehoe,
Reed,
Kenney, III, James A.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Kehoe, J.

Filed: November 20, 2020

After a jury trial in the Circuit Court for Prince George's County, Gregory Bowyer, Jr. was convicted of second-degree murder. He raises five issues on appeal which we have rephrased:

1. Did the trial court abuse its discretion in denying Bowyer's motion for a mistrial because the victim's mother compared Bowyer to George Zimmerman and referred to an unrelated previous violent incident on Bowyer's part?

2. Did the State exceed the boundaries of proper closing argument by referring to Bowyer as "RoboCop," "Barney Fife," and a "vigilante" and thus deprive Bowyer of his right to due process in light of the victim's mother's "George Zimmerman" statement?

3. Did the State present legally sufficient evidence that Bowyer did not act in self-defense or imperfect self-defense?

4. Did the trial court err in its instructions to the jury and its answer to a juror's note?

5. Did the trial court abuse its discretion in admitting into evidence a video recording of a witness to the crime?[1]

---

[1] Bowyer frames the issues as follows:

> l. Did the trial court err in denying a mistrial after a principal State Witness called Bowyer "George Zimmerman" and improperly made statements about Bowyer allegedly being violent?
>
> 2. Did the State's improper closing argument, including calling Bowyer "RoboCop,""Barney Fife," and a "Vigilante," "pretending" to be a "police officer," reinforcing the prejudicial comparison to "George Zimmerman," deprive Bowyer of his right to due process and a fair trial?
>
> 3. Did the trial court err when it denied a motion for an acquittal on the grounds that the State failed to present sufficient evidence for conviction and that Bowyer did not act in self-defense, particularly imperfect self-defense?
>
> 4. Did the trial court err when it instructed the jury using confusing and erroneous instructions for self-defense?
>
> 5. Did the trial court err when it admitted a highly prejudicial hearsay statement in violation of the Confrontation Clause?

Several of Bowyer's contentions are not preserved for appellate review. The others are not persuasive. We will affirm Bowyer's conviction.

Background

On the morning of February 13, 2017, Bowyer drove his SUV into Nathaniel McKinnon, inflicting fatal injuries. The principal issue for the jury was whether Bowyer was acting in either perfect or imperfect self-defense and defense of his daughter, Kaila Bowyer ("Kaila"), who was a passenger in his car at the time. We set out the following summary of the facts in order to give context to the parties' appellate contentions. We will provide additional information in our analysis as needed.

The argument between Kaila Bower and Sean Dandridge

During the night of February 12, 2017, Kaila and her brother Gregory ("Greg") Bowyer, III went to a home on Waco Street in Rosaryville, Maryland. Their purpose was to retrieve money owed to Kaila by her ex-boyfriend, Sean Dandridge. When Kaila and Greg arrived at the Waco Street home, Dandridge came outside, accompanied by Nathaniel McKinnon. A heated exchange ensued between Dandridge, Kaila, and Greg, which ended when Dandridge drew an AK-47 and pointed the barrel of the firearm against Kaila's face and threatened to kill her and Greg. McKinnon drew a handgun and pointed it at Greg's face. Kaila and Greg returned to their vehicle, pursued by Dandridge, and drove off. As they sped away, Dandridge fired a round from the AK-47 in their general direction.

Kaila and Greg contacted their father, Bowyer, who dropped them off at the police station in Oxon Hill. There, Kaila and Greg each filed an incident report. In each report,

they identified the firearms (a handgun and an AK-47), and Dandridge as a suspect. Because Kaila and Greg did not know McKinnon's identity, they listed him as "Suspect #2."

The next morning

Between 6:00 and 7:00 a.m. on the next day, Bowyer picked up Kaila and Greg from the police station in his red Range Rover. After leaving Greg at their home, Bowyer and Kaila traveled to Pompey Street, which is located near Waco Street in the same neighborhood where the previous night's incident occurred. According to Kaila's trial testimony, they went there to drop off Bowyer's business card at the home of "Mr. Lawson," a Prince George's County police officer. Coincidentally (or not), Lawson's home on Pompey Drive is located across the street from Dandridge's home. Before Bowyer could drop off his card, Kaila saw a Range Rover parked at Dandridge's house. A woman, who turned out be Sheraina Parks-Jones, McKinnon's mother, exited the Range Rover, knocked on the front door of Dandridge's house, and returned to her vehicle. Minutes later, McKinnon came out of the house and got into the front passenger seat of Ms. Parks-Jones's Range Rover. McKinnon was carrying an AK-47 assault rifle in his waistband.

Kaila recognized McKinnon and told her father. Bowyer called the Oxon Hill Police Station and spoke with two detectives, telling them that he and Kaila had found the unnamed suspect from the previous night. Ms. Parks-Jones, with McKinnon in the passenger seat, drove out of the neighborhood and Bowyer and Kaila followed them. Shortly thereafter, Ms. Parks-Jones stopped at a traffic light. Passengers in another car told

her and McKinnon that they were being followed by a red Range Rover—Bowyer's vehicle. Ms. Parks-Jones then took a series of left and right turns that eventually brought them to a near-by shopping center. They were followed by Bowyer. Throughout this time, Bowyer was on the phone with police detectives, and continuously updated them on Ms. Parks-Jones's and McKinnon's whereabouts. One of the officers, Detective Kyndle Johnson, told Bowyer "on more than one occasion" to stop following Ms. Parks-Jones's vehicle, but Bowyer paid no heed to the advice. After the vehicles turned into the shopping center. Ms. Parks-Jones stopped her SUV in front of one store, and Bowyer stopped, but did not park, his vehicle in front of a Papa John's pizzeria a short distance away.

McKinnon's death: Kaila's version

Kaila testified that McKinnon exited the blue Range Rover and started walking towards her and Bowyer, who were sitting in their vehicle. As he approached them, McKinnon had his hands up in the air and stated: "Come here . . . what's up? Come here, what's up?" But as McKinnon came nearer, he dropped his hands to his waistband and lifted his shirt up, exposing an AK-47 rifle. Kaila saw the firearm, and, according to her, McKinnon started to lift it out of his waistband using the trigger guard. Kaila began tapping Bowyer on his shoulder, who was still on the phone, and told him that McKinnon was approaching with a gun. When Bowyer turned his head and saw McKinnon, he yelled "get down," pushed Kaila down with his right arm, and drove his vehicle into McKinnon, who died shortly thereafter.

McKinnon's Death: Ms. Parks-Jones's Version

Ms. Parks-Jones testified that, while they were being followed by the red Range Rover, McKinnon realized that Kaila was a passenger in that vehicle. McKinnon asked Ms. Parks-Jones to pull over so that he could "make sure she's good." For that reason, Ms. Parks-Jones turned into the shopping center where she parked so that McKinnon could speak to Kaila. McKinnon exited her vehicle, and Ms. Parks-Jones watched him walk towards the other Range Rover by using her mirrors. She testified that McKinnon kept asking Kaila if she "was good" and had his hands up "like this."[2] Then, Ms. Parks-Jones saw the red Range Rover accelerate towards McKinnon and strike him. Two bystanders, Olivia Ellison and Kierra Ross, testified that McKinnon did not have a gun in his hand when he was approaching the Bowyer vehicle. The State introduced video from some of the security cameras at the mall that supported Ellison's and Ross's version of events.

The conflicting versions of what happened next

According to Kaila, Bowyer exited his vehicle after the impact and put his hands up. Ms. Parks-Jones exited her vehicle and ran over to McKinnon's body, pushed the AK-47 back down into McKinnon's pants and shouted that McKinnon did not have a gun. Ms. Parks-Jones then proceeded to threaten and physically attack Bowyer. Next, according to Kaila, she returned to McKinnon's body and tried to pull the AK-47 from his pants.

[2] In her testimony, Ms. Parks-Jones stated that McKinnon's hands were up "like this." However, the record does not reflect what "like this" means in this context.

Because Ms. Parks-Jones was trying to remove the AK-47, Bowyer tackled her and pinned her to the ground until the police arrived. A deputy sheriff arrived on the scene, pulled the gun from McKinnon's waistband, and stated that it was loaded.

Ms. Parks-Jones's version was very different. She testified that she went to her son after the impact. Bowyer tried to flee in his vehicle but was forced to stop when she stood in front of his vehicle. Then, Bowyer exited his vehicle and told her that "he was the police" and that McKinnon "has a gun." Ms. Parks-Jones denied knowing that McKinnon was carrying a firearm. She testified that she first noticed the firearm when a bystander went over to McKinnon and lifted his shirt, exposing the AK-47, but she had noticed that the clip for the AK-47 was lying next to his body. At this time, Bowyer was still on the phone with the police department. Ms. Parks-Jones tried to grab Bowyer's cell phone, and Bowyer fought back. Then, Ms. Parks-Jones returned to McKinnon's body and tried to remove the AK-47 from his waist band. Ms. Parks-Jones explained she did so because "my thought process is when I get this gun, I'm going to shoot you. . . . If I could figure out how to get this gun together, you not going to be here." In response, Bowyer pinned Ms. Parks-Jones to the ground until the police arrived.

McKinnon's death was recorded by several security cameras at the shopping center. Bystanders who witnessed the incident and the aftermath testified at trial. Additionally, Trevor Young approached the scene and used his cell phone to record a statement by Kiera Ross, who told Young that McKinnon had not been reaching for a gun when he was struck by Bowyer's vehicle. Ross was not available for trial and the State introduced her recorded

statement as part of its case. Another bystander, Jimmie Harris, testified that Bowyer said to him that "I told that son of a bitch to leave my daughter alone."

The trial

Bowyer was charged with second-degree murder and voluntary manslaughter. Trial was held over six days in October 2018. As witnesses, the State called Ms. Parks-Jones, numerous bystanders to the incident, and several police officers. The defense called Kaila and Greg, as well as several law enforcement officers. Bowyer did not testify in his own defense. Bowyer did not deny killing McKinnon, but asserted that he was acting in self-defense because McKinnon was approaching him and his daughter with an AK-47.

At the close of the State's case, Bowyer moved for a judgment of acquittal and for a mistrial. The court denied each motion. After Bowyer presented his defense, he renewed his motion for a mistrial and moved for a judgment of acquittal. The court denied these motions as well.

The jury returned a verdict convicting Bowyer of second-degree murder. Bowyer filed a motion for a new trial, which the court denied in a written memorandum opinion which we will discuss in part 1 of our analysis. The court sentenced Bowyer to a term of incarceration of twenty-five years, with all but twelve years suspended.

Analysis

1. The motions for a mistrial

Bowyer challenges the trial court's denial of his motions for mistrial. The basis for the motion were two statements made by Ms. Parks-Jones during her testimony.

The first occurred during the State's direct examination of Ms. Parks-Jones. In describing her altercation with Bowyer after her son's death, she stated (emphasis added):

> [MS. PARKS-JONES]: He pinned me down to the ground. He punched me in my face. He punched me in my stomach. And his daughter came over, *who has been thrown down the steps by him many days*, and said that get off of her. Get off of her. That's all she could say, get off of her. That's all I'm hearing her say.
>
> All of the other young ladies, please get off of her. Her son is on the ground dead. He's dying. He's dead. Can you just get off of her and let her spend some time with her child? Get off of her. At this point, the police came and that was that.

Shortly thereafter, the prosecution finished its direct examination of Ms. Parks-Jones. Defense counsel then moved to strike the part of Ms. Parks-Jones's statement that we have italicized. At a bench conference, the following discussion took place:

> [DEFENSE COUNSEL]: The statement he has thrown—the statement that he has thrown his daughter down the steps many times, I'm not aware of any factual basis for that statement, but I want to hear from the State if there is because if there is not, I want to move to strike it. We didn't have any kind of notice about some kind of—
>
> [PROSECUTOR]: No objection. No objection. It was not intended to be elicited. I didn't know she was going to say that.
>
> THE COURT: You want me to inform the jury?
>
> [DEFENSE COUNSEL]: No, not at this time.
>
> THE COURT: I didn't think so. Okay.

Later in the trial, as defense counsel was cross-examining Ms. Parks-Jones, the following colloquy took place (emphasis added):

> [DEFENSE COUNSEL]: All right. Court's indulgence for a moment.
> [MS. PARKS-JONES]: *George Zimmerman*[3] *right now, huh? People killing us*?
>
> THE COURT: Wait for the next question, please.
>
> [DEFENSE COUNSEL]: Move to strike.
>
> THE COURT: Well, I'll strike whatever the witness just said.

After Ms. Parks-Jones stepped down, defense counsel moved for mistrial:

> [DEFENSE COUNSEL]: Your Honor, at this point, I need to move for a mistrial with respect to the George Zimmerman comment. It's incalculable how inflammatory [that] comment . . . was.
>
> The relationship to this case to Trayvon Martin is way over the line. I'm not alleging prosecutorial misconduct, but its inflammatory beyond calculation.
>
> THE COURT: The only person that heard the comment was you.
>
> [DEFENSE COUNSEL]: We have no way of knowing that.
>
> THE COURT: Okay. I'm telling you I did not hear the comment, so I'm not sure that the jury heard the comment, but we will note your objection.
>
> [DEFENSE COUNSEL]: Thank you, Your Honor.

Defense counsel moved for a mistrial again at the close of the State's case. Counsel reiterated that the George Zimmerman comment was "highly prejudicial," "volatile," and "inflammatory," and offered that Ms. Parks-Jones may have made the comment given the similarities between the Zimmerman case and this case. Additionally, defense counsel asserted that the comment may have had a greater effect on the jury than it might otherwise

[3] A reference to the 2012 homicide of seventeen-year-old Trayvon Martin in Sanford, Florida. George Michael Zimmerman was tried for Martin's murder and acquitted.

would have because the jury was predominantly African-American and the negative views that many African-Americans had of verdict in the Zimmerman trial.

Defense counsel noted that, although the court struck both statements by Ms. Parks-Jones, it did not give a curative instruction for either statement. But counsel indicated that he did not want a curative instruction because:

> [T]he genie's out of the bottle. Once you put the skunk in the jury box, it's hard to get it out. And I don't think there's a curative instruction for sure that can fix the George Zimmerman comparison. So because of that. I think there is a high degree of likelihood that Mr. Bowyer cannot get a fair trial in this case.
>
> * * *
>
> This is the classic dilemma that defense faces; [to] ask for a curative instruction which essentially ensures, to the extent a juror missed it, it's definitely brought to their attention at that point, or do you go without the curative instruction hoping not to sort of renew what might've been there in the event that it didn't happen and then sort of not speak about it at all?
>
> And then depending on the ruling of the Court if we move forward, I'm also stuck with in closing argument do I need to try and address the Trayvon Martin and George Zimmerman scenario. That's highly inappropriate, because to try to make that argument in this case, we'd just be digging a hole for ourselves and taking ourselves down a path that is not where we really ought to go. We really ought to be focusing on the merits.
>
> I think we have strong arguments with respect to the self-defense and defense of others claims, but that can be completely overshadowed by a statement like that and, you know, either I don't address it at all, which runs a very high risk, or I speak to it and potentially make matters worse. That's not the type of dilemma that we should be put in. Through no fault of our own. We didn't do anything to put ourselves there. The prosecution didn't either. So I'm not throwing rocks at the State, but for whatever reason we are where we are.

The prosecutor argued that a mistrial was uncalled for and that a curative instruction would suffice.

The court denied the motion for a mistrial. The court indicated that it did not hear the George Zimmerman comment, and that it did not believe that the jury heard it. The court did offer to give a curative instruction:

> I'm willing to entertain from either party some sort of curative instruction, whether it be very specific or very generic, to address it if that would help anyone. I'm in the belief as you indicated that—you meaning [defense counsel] for the record—calling repeated attention to things only reinforces what may or may not be a concern. So my reaction would be if there's something additional you want the court to instruct the jury, I will do it, but I don't believe a mistrial is appropriate.

Bowyer declined the court's offer for a curative instruction. On the following morning, the court and counsel determined that the recording clerk had heard the George Zimmerman comment. The court renewed its offer to provide a curative instruction to the jury, which defense counsel declined.

At the close of all evidence, defense counsel again renewed the motion for mistrial based on the "George Zimmerman" and the "throwing down the steps" comments.[4] The trial court once again denied the motion for mistrial, and again offered to provide a curative instruction to the jury. Once again, defense counsel declined.

A.

On appeal, Bowyer challenges the trial court's ruling denying his motion for mistrial based on the "George Zimmerman" and "steps" comments made by Ms. Parks-Jones.

[4] Defense counsel also referenced a statement made by Ms. Parks-Jones that a "5,000 pound truck" struck McKinnon. Bowyer does not address this statement on appeal.

Bowyer argues that, given the similarities between this case and the Zimmerman case, comparing him to George Zimmerman warrants a mistrial. Then, Bowyer argues that Ms. Parks-Jones's "George Zimmerman" comment was compounded by her statement that he had abused his daughter by throwing her down the steps. Bowyer contends that this latter comment prejudiced him because it showed that he had been violent in the past, and so he was compelled to introduce evidence of his nonviolent nature at trial.

Because of the prejudice from these comments, Bowyer requests that we apply the Court of Appeals' reasoning in *Rainville v. State*, 328 Md. 398 (1992), a decision that we will discuss later. He compares his situation to that of the defendant in *Rainville* and argues that we should reverse the trial court's decision denying him a mistrial based on factors identified by the Court of Appeals in *Rainville* for that purpose: (1) whether the statement was "inadvertent;" (2) whether the credibility of the witness who made the statement is crucial; (3) whether the witness making the statement was a principal witness; and (4) whether a great deal of other evidence exists. 328 Md. at 408.

As to these factors, Bowyer first asserts that Ms. Parks-Jones's statements were not inadvertent. He alleges that Ms. Parks-Jones did not offer the statements innocuously by responding to questions. Rather, in Bowyer's view, Ms. Parks-Jones uttered the statements on purpose in order to inflame the jury. Ms. Parks-Jones's purpose is evident by other statements she made during her testimony, specifically her statement that "I'm trying to put a murderer away."

Second, Bowyer argues that his credibility was a crucial issue at trial, a point which the trial court conceded in its order denying Bowyer a new trial, because the key issue at trial was not whether Bowyer killed McKinnon, but rather whether Bowyer acted in self-defense and/or the defense of others. Bowyer asserts that Ms. Parks-Jones's statements undermined his credibility.[5]

Third, Bowyer argues that Ms. Parks-Jones was a principal witness because, not only did the State call her first, but she was the victim's mother, drove McKinnon to the shopping center, and spoke with him in the time leading up to his death. Bowyer concedes that there is other evidence at play, namely, the camera footage and the bystander witnesses, but argues that this evidence was relevant to Bowyer causing McKinnon's death, and it did not pertain to whether he subjectively feared for his and his daughter's lives to act in self-defense. Bowyer maintains that it was the testimony of Ms. Parks-Jones, and only Ms. Parks-Jones, who supported the State's theory that Bowyer was acting out of a desire for revenge.

Fourth, Bowyer reiterates that, although a great deal of other evidence other than Ms. Parks-Jones's testimony exists, none of this evidence supported the State's theory that Bowyer was acting as a self-appointed police officer. Bowyer concedes that one of the

[5] In its memorandum opinion denying Bowyer's motion for a new trial, the trial court observed that "this Court agrees with defense counsel that the Defendant's credibility was a critical issue in this case." But Bowyer did not testify. What was critical was the credibility of the witnesses, principally Kaila, who presented Bowyer's version of events to the jury.

witnesses, Jimmie Harris, testified that, after the police had arrived, Bowyer said to him that "I told the son of a bitch to leave my daughter alone." But Bowyer maintains that Harris's testimony should not be credited, and, if it is, Harris's testimony could only speak to Bowyer's mental state *after* the incident, not the time Bowyer hit McKinnon with his SUV.[6]

[6] Bowyer also argues that, because of Ms. Parks-Jones's "steps" comment, the defense was compelled to introduce evidence that Bowyer was nonviolent. He points to testimony by his son, Greg, about an incident in the past where Bowyer did not act violently. That incident occurred in 2007, in which Greg and Calvin Lucas got into an argument at Bowyer's home. The argument became so heated that Lucas stabbed Greg with a knife he had been carrying. Bowyer came out of the house, drew his firearm, and ordered Lucas to drop the knife, which Lucas did. Bowyer allowed Lucas to retreat to his vehicle and leave, and thereafter Bowyer called 9-1-1.

The prosecutor objected to this testimony on relevancy grounds. Defense counsel responded that the evidence was admissible through Md. Rule 5-404(a)(1)(A) ("An accused may offer evidence of the accused's pertinent trait of character. If the evidence is admitted, the prosecution may offer evidence to rebut it.") Counsel explained (emphasis added):

> We're offering this *in direct response to the statement in opening* that Mr. Bowyer was essentially an executioner/assassin in hunting down Mr. McKinnon and intentionally killing him. *We also think this is relevant in response to the George Zimmerman comment* that the mother made. . . .

Over the prosecutor's objection, the court admitted the testimony.

It is clear that Bowyer had an independent reason for introducing the Calvin Lucas story. Bowyer was not compelled to introduce this testimony solely because of Ms. Parks-Jones's comments as he now asserts.

B.

Appellate courts "review a court's ruling on a mistrial motion under the abuse of discretion standard." *Nash v. State*, 439 Md. 53, 69 (2014). The *Nash* Court also explained the abuse of discretion standard:

> Abuse of discretion has been said to occur where no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles. It has also been said to exist when the ruling under consideration appears to have been made on untenable grounds, when the ruling is clearly against the logic and effect of facts and inferences before the court, when the ruling is "clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result, when the ruling is violative of fact and logic, or when it constitutes an untenable judicial act that defies reason and works an injustice.

Id. at 67 (cleaned up).

C.

Ms. Parks-Jones's comparison of Bowyer to George Zimmerman and her statement that Bowyer had thrown his daughter down a set of stairs were "blurts" or "blurt outs"—a prejudicial, nonresponsive statement made by a witness during his or her testimony. *See State v. Hawkins*, 326 Md. 270, 277 (1992); *Washington v. State*, 191 Md. App. 41, 100 (2010). In the first instance, the court offered to strike the testimony and give a curative instruction but defense counsel declined. In the second instance, the court struck the testimony and offered to issue a curative instruction, which counsel again declined.

Striking improper testimony when coupled with an appropriate instruction, is generally considered to be sufficient to cure any prejudice. *See, e.g.*, *Simmons v. State*, 436 Md. 202, 222 (2013) ("When curative instructions are given, it is generally presumed that the jury

can and will follow them . . . . the trial judge is in the best position to determine whether his instructions achieved the desired curative effect on the jury") (citation omitted).

This is the general rule. There are of course cases that reach different results, and Bowyer argues that one such case, *Rainville v. State*, 328 Md. 398 (1992), dictates a different result. We do not agree because the prejudice in *Rainville* was far more serious than any prejudice that could have resulted from Ms. Parks-Jones's blurts. In explaining why, we will start with an earlier decision of the Court of Appeals upon which the *Rainville* Court relied in reaching its result, *Guesfeird v. State*, 300 Md. 653 (1984).

Guesfeird involved a prosecution for child sexual abuse. In the course of her testimony, the victim, a middle-school-aged child, stated that she had taken a lie detector test. Defense counsel objected and asked for a mistrial on the basis that the jury would infer that she had passed the test. The trial court denied the request for a new trial and, without consulting counsel, instructed the jury to disregard any evidence of a lie detector test. *Id.* at 657. The victim's testimony was the only evidence of the defendant's guilt, and family members, including her brother and her mother, testified as to various reasons why the victim would have lied and to another incident when she accused another adult of assaulting her but later retracted the accusation. *Id*. at 358. In deciding that the trial court abused its discretion in denying the motion for a mistrial, the Court stated:

> Because credibility was the determinative issue in the trial, we must consider whether the trial judge committed reversible error when he denied appellant's motion for a mistrial after [the victim's] inadvertent and unsolicited reference to taking a lie detector test.
>
> * * *

> In determining whether evidence of a lie detector test was so prejudicial that it denied the defendant a fair trial, courts have looked at many factors. The factors that have been considered include: whether the reference to a lie detector was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; whether a great deal of other evidence exists; and, whether an inference as to the result of the test can be drawn. No single factor is determinative in any case. The factors themselves are not the test, but rather, they help to evaluate whether the defendant was prejudiced.

Id. at 358–59 (cleaned up).

In applying these factors, the Court concluded that the defendant was irredeemably prejudiced and that the trial court abused its discretion in denying the motion for a mistrial. *Id*. at 366–67.

Rainville was also a prosecution for child sexual abuse. During the course of her testimony, the victim's mother stated that the defendant was currently "in jail" for abusing the victim's sibling. 328 Md. at 399. Just as in *Guesfeird*, the trial court struck the testimony and gave a curative instruction. Additionally, virtually the only evidence of Rainville's guilt was the victim's testimony and there were inconsistencies between her trial testimony and other evidence presented by the prosecution. Applying the so-called "*Guesfeird* factors," the Court of Appeals concluded that:

> It is highly probable that the inadmissible evidence in this case had such a devastating and pervasive effect that no curative instruction, no matter how quickly and ably given, could salvage a fair trial for the defendant.

Id. at 411.

When we apply the relevant *Guesfeird* factors to the present case, we reach the following conclusions:

(1) There were two, but only two, improper statements made during the trial and they were both made by Ms. Parks-Jones.

(2) Neither statement was elicited by the prosecutor.

(3) Although Ms. Parks-Jones was an important witness for the prosecution, the State's case was by no means dependent upon her testimony.

(4) There was a substantial amount of other evidence of Bowyer's guilt. His claim of self-defense was based entirely upon his daughter Kaila's testimony and the fact that an assault rifle was found in McKinnon's possession after his death. But no one, other than Kaila, testified that McKinnon had made a move for his weapon while he was approaching Bowyer's vehicle. The bystanders' testimony on this score was consistent with the security camera footage introduced at trial. Detective Johnson testified that he told Bowyer "on more than one occasion" to stop following Ms. Parks-Jones's vehicle before the fatal confrontation. Finally, Jimmie Harris, testified that Bowyer said to him "I told that son of a bitch to leave my daughter alone."

Maryland appellate courts sometimes say that the discretion that we afford to trial court decisions in cases of this nature is based in part upon our belief that the trial judge has "his [or her] finger on the pulse of the trial." *Hill v. State*, 355 Md. 206, 221 (1999). Certainly, metaphors can sometimes obscure instead of illuminate. But not so in this case. The court addressed the same arguments made by Bowyer to this Court in its written decision denying

Bowyer's motion for a new trial. Regarding Bowyer's argument that he was prejudiced by Ms. Parks-Jones's blurts, the court stated:

> This Court is not convinced that the jury heard the comments nor is it convinced that the isolated comments registered with the jury in the same way that Defendant is arguing their implications had on the Defendant's defenses. The jury may have readily perceived that the Victim's mother was grieving for her son and her testimony and comments were, therefore, biased and not credible.

The trial court struck Ms. Parks-Jones's Zimmerman comment. The court offered to strike her statement that Bowyer had thrown Kaila down a set of stairs and defense counsel declined. On several occasions, the court offered to give a curative instruction to the jury but did not do so because defense counsel did not agree. Our application of the *Guesfeird* factors leads us to conclude that Ms. Parks-Jones's statements did not have the irreparable prejudicial effects that the statements did in those cases. Most significantly, and unlike *Rainville*, the prosecution's case did not depend upon the testimony of a single witness whose credibility was under attack nor was the State's case plagued by internal inconsistencies. In contrast to the earlier decisions, the prosecution's evidence in the current case was a relatively strong one. Ms. Parks-Jones's version of events was consistent with the testimony of all of the bystander witnesses as well as the security video recordings. We cannot say that the trial court's handling of these issues was an abuse of its discretion.

2. The State's Closing Argument

Bowyer asserts that the State's closing argument was improper. He argues that the prosecutor's statement that Bowyer was a "fake police officer," a "vigilante," and his characterization of Bowyer's conduct as being similar to "RoboCop" and "Barney Fife"[7] were grossly prejudicial and improper because "these prejudicial epithets kept the George Zimmerman image alive in the jury's mind." Bowyer also argues statements by the prosecutor to the effect that Bowyer planned to murder McKinnon were contrary to the evidence presented at trial.

Defense counsel did not object to any of these statements at trial. Bowyer concedes, as he must, that these contentions are unpreserved. He asserts that we should exercise our discretion under the plain error review doctrine to reach his contentions on their merits.

"Plain error review is a rarely used and tightly circumscribed method by which appellate courts can, at their discretion, address unpreserved errors by a trial court which 'vitally affect a defendant's right to a fair and impartial trial.'" *Malaska v. State*, 216 Md. App. 492, 524 (2014) (quoting *Diggs v. State*, 409 Md. 260, 286 (2009)).

The Supreme Court has set out four criteria that limit the scope of an appellate court's discretion to exercise plain error review:

[7] RoboCop was the fictional protagonist in a 1987 movie by the same name. A cyborg, RoboCop fought crime in a dystopian version of Detroit, Michigan. Barney Fife was a bumbling, albeit well-intentioned, fictional deputy sheriff in *The Andy Griffith Show*, played by Don Knotts.

> [P]lain-error review involves four steps, or prongs. First, there must be an error or defect—some sort of [d]eviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings. Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings. Meeting all four prongs is difficult, as it should be.

Puckett v. United States, 556 U.S. 129, 135 (2009). The *Puckett* formulation has been expressly adopted by the Court of Appeals. *See State v. Rich*, 415 Md. 567, 578–79 (2010); *see also Kelly v. State*, 195 Md. App. 403, 432 (2010).

Bowyer has satisfied the first step in the *Puckett/Rich* analysis in that he has presented issues which, conceivably, might lead to a conclusion that the trial court erred and he did not affirmatively waive them at trial. *Malaska*, 216 Md. App. at 525. However, Bowyer has not demonstrated that these errors were "clear and obvious, rather than subject to reasonable dispute."

Because of the importance that closing arguments can play in jury trials,

> counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom; the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of witnesses which the (prosecution) produces.
>
> [G]enerally speaking, liberal freedom of speech should be allowed. There are no hard-and-fast limitations within which the argument of earnest counsel must be confined—no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of

> witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.

Wilhelm v. State, 272 Md. 404, 412 (1974) (cleaned up).

When we apply these standards to the prosecutor's closing argument in the present case, we are do not conclude that that the trial court would have clearly abused its discretion in overruling hypothetical objections of the sort that Bowyer described in his brief. The prosecutor's description of Bowyer as a "vigilante" was warranted by the evidence in the case. The prosecutor's suggestion Bowyer had intended to kill McKinnon is a closer call but that motivation could be inferred from the fact that Bowyer drove directly at McKinnon. The "fake police officer," "RoboCop" and "Barney Fife" comments were examples of the "oratorical conceits" that trial counsel customarily employ. We cannot say that Ms. Parks-Jones's Zimmerman comment earlier in the trial changes any of this because, as the trial court noted in its opinion denying the motion for a new trial, it did not appear that the comment had registered with the jury. Finally, Bowyer's reliance on *Lawson v. State*, 389 Md. 570, 597–99 (2005), is misplaced. *Lawson* was a child sexual abuse case in which the prosecutor in closing characterized child sexual offenders as "monsters," asked the jurors to imagine themselves in the place of the victim's mother, and suggested that the defendant had already made arrangements to molest another young child if he were acquitted. The impropriety and prejudicial effect of the comments in *Lawson* are on an entirely different plane than those in the case before us.

3. Sufficiency of the evidence

Next, Bowyer contends that the evidence was insufficient to convict him of second-degree murder. This issue is not preserved for our review.

At the close of all evidence, defense counsel moved for a judgment of acquittal (as well as renewing the motion for a mistrial). Defense counsel, however, did not argue the merits or specifics of the motion for acquittal. Rather, defense counsel simply stated that he would "submit on the record" and focused his attention on the argument on the motion for mistrial. The court denied the motion for acquittal, reasoning "[T]he State has generated sufficient evidence where the fact finder believes the evidence is credible that they can find for the counts as indicted." With that, the discussion on the motion ended.

Maryland Rule 4-324 permits a criminal defendant to make a motion for acquittal at the close of the State's case and, in a jury trial, at the close of all evidence. Rule 4-324(a). When such a motion is made, the defendant "shall state with particularity all reasons why the motion should be granted." Rule 4-324(a). This requirement is mandatory. *See, e.g.*, *Darling v. State*, 232 Md. App. 430, 468 (2017), *cert. denied* 454 Md. 655 (2017); *Berry v. State*, 155 Md. App. 144, 180 (2004). Thus, "[g]rounds that are not raised in support of a motion for judgment of acquittal at trial may not be raised on appeal." *Jones v. State*, 213 Md. App. 208, 215 (2013); *accord Graham v. State*, 325 Md. 398, 417 (1992); *Starr v. State*, 405 Md. 293, 302 (2008). Because Bowyer did not state the specific grounds upon which his motion for acquittal was founded to the trial court, he has not preserved this claim on appeal. *See* Md. Rule 8-131(a).

4. The jury instructions

Bowyer's penultimate contention is that the court erred when it provided the jury with misleading and confusing instructions and an unclear response to a juror's note. As to the instructions, Bowyer argues that the instructions for complete and partial self-defense were absent from the second-degree murder instructions and were instead buried in the instructions for voluntary manslaughter. As a result, Bowyer contends that it was not clear to the jury that it could find him guilty of a lesser offense (voluntary manslaughter) by first finding that he acted in either complete or partial self-defense. Bowyer also argues that, in light of the way that the instructions were presented, a juror reading them would believe that self-defense operates differently for second-degree murder.

A.

Bowyer's argument that the court's self-defense and defense of others instructions were confusing is not preserved for appellate review.[8] The instructions in question were

[8] Bowyer argues that this appellate contention is preserved but it clearly wasn't. His transcript reference to support this assertion (October 10, 2018 at page 11) shows that defense counsel did note an objection, but that objection was not to the proposed instructions on the elements of, and defenses to, the murder and manslaughter charges. And, in any event, Bowyer did not object after the instructions were given. After the court finished its instructions, it asked each party if it was satisfied with the instructions as given:

THE COURT: Is the State satisfied with the instructions?

[PROSECUTOR]: Yes, Your Honor.

THE COURT: Is the defense satisfied with the instructions?

[DEFENSE COUNSEL]: Yes, Your Honor.

the Maryland Criminal Pattern Jury Instruction MPJI-Cr. 4:17.2.B (Second-Degree Murder), MPJI-Cr. 4:17.2.C (Voluntary Manslaughter (Perfect/Imperfect Self-Defense), and MPJI-Cr. 4:17.3 (Voluntary Manslaughter (Perfect/Imperfect Defense of Others. The problem identified by Bowyer on appeal is that MPJI-Cr. 4:17.2.C and MPJI-Cr. 4:17.3 use the terms "perfect" and "imperfect" in the caption to each instruction and "complete" and "incomplete" in the body of each instruction. (The entire texts of each instruction, including their captions, were given to the jury before it retired to deliberate.). Bowyer did not object to these instructions before or after they were given. Md. Rule 4-325(e) states:

> No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

Next, Bowyer contends that the court's answer to a juror note compounded the confusion. During deliberation, a juror sent a note to the court asking for the "definition of mitigating circumstances." The answer the court provided was:

> A fact or situation that does not justify or excuse a wrongful act or offense but that reduces the degree of culpability. Mitigating circumstances include imperfect self-defense and imperfect defense of others. Re-read concluding paragraph of voluntary manslaughter and perfect/imperfect defense of others.

The response was signed by the trial judge, the prosecutor, and defense counsel. Written under defense counsel's signature was "(objection noted)."

Bowyer's appellate contentions regarding the trial court's answer to the juror's note is also not preserved. In his brief, Bowyer's argument is that the trial court erred by using the term "imperfect" self-defense instead of "partial" self-defense in its response. Defense counsel did indeed object to the court's response to the jury question, but his objection was that the court's proposed response was unnecessary and redundant in light of the instructions previously given by the court. This is not the same as the concern Bowyer raises on appeal.

Alternatively, he argues that we should exercise plain error review. We decline to do so in this case. Bowyer does not argue that the court's original instructions were incorrect as a matter of law. Rather, he asserts:

First, that the instructions could have been and should have been more clearly worded and the imprecision may have confused the jury. Even if we accepted this premise, the trial court's decision to give criminal pattern jury instructions without modification does not raise to the level of the sort of "clear error" that is required for us to exercise plain error review.

Second, that the court's use of the term "imperfect" instead of "incomplete" in its response to the jury question added an additional layer of ambiguity. But as we have explained, the written copies of the instructions that were given to the jury used both terms. Assuming for purposes of analysis (but only for that purpose) that the court's response was an error, it fell very short of clear error.

5. The statement of Kierra Ross

Finally, Bowyer argues that the circuit court erred in admitting video footage of Kierra Ross. The video was taken by Trevor Young, who the State called as a witness. Young was at a nearby gas station when his attention was attracted by a "car screech" from the shopping center parking lot. He drove over and, as soon as he had a sense of what had just occurred, started to record the scene on his cell phone. In the video, Young exits his vehicle and approaches Kierra Ross, a bystander, and begins asking her questions:

> YOUNG: What happened?
>
> ROSS: [indecipherable] he [McKinnon] walked across the street and he [Bowyer] drove up and hit him.
>
> YOUNG: On accident or purpose?
>
> ROSS: I don't know. He [Bowyer] said he [McKinnon] was trying to pull out a gun, he got a gun on him, but it doesn't even look like it's been pulled out.
>
> * * *
>
> ROSS: His mom walked into pizza hut, he walked across the street, he did not pull out no gun, the man drove off and hit him.

Ross did not testify at the trial (the prosecution indicated to the trial court, during the discussion about the admissibility of this evidence, that a body attachment had been issued for Ross). Over the objection of defense counsel, the circuit court admitted the recording of Ross up until the moment the police arrived. The court permitted the video segment into evidence under the excited utterance exception, and did not address appellants' Confrontation Clause argument, stating only: "I'm going to overrule the objection as it relates to Ms. Ross and Ms. Ross only. So that the portion of the video where she is making

her observations and obviously very emotional can be played. The moment the police arrive on the scene it needs to be stopped."

On appeal, Bowyer challenges the admission of Ross's statements on two grounds. First, Bowyer asserts that Ross's statements are hearsay and Young's video of her statement does not fall within any of the exceptions to the hearsay rule. Second, he argues that admission of the recording over his objection was a violation of the Confrontation Clause.

A.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Generally, hearsay is not admissible at trial, unless an exception applies. Md. Rule 5-802. An excited utterance is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Md. Rule 5-803(b)(2). "'It requires a startling event and a spontaneous statement which is the result of the declarant's reaction to the occurrence.'" *Cooper v. State*, 163 Md. App. 70, 97 (2005) (quoting *Parker v. State*, 365 Md. 299, 313 (2001)).

What is important is that the out-of-court statement was "spontaneous rather than a result of reflection [and] "the exciting influence has not lost its sway or been dissipated by meditation.'" *Marquardt v. State*, 164 Md. App. 95, 124 (2005).

Whether a hearsay statements is admissible is a legal question that is reviewed *de novo* by an appellate court. *Gordon v. State*, 431 Md. 527, 536 (2013). However, in some cases

(and this is one of them), a trial court's decision to admit evidence as hearsay involves fact-finding. *Id.* Admission of a statement under the excited utterance exception requires the trial court to assess "the declarant's subjective state of mind to determine whether under all the circumstances, [she is] still excited or upset to that degree." *Id.* (quoting 6A Lynn McLain, Maryland Practice: Maryland Evidence State & Federal § 803(2):1(c) (2d ed. 2001)). A court may also be required to consider matters such as "how much time has passed since the event, whether the statement was spontaneous or prompted, and the nature of the statement, such as whether it was self-serving." *Id*. *Gordon* makes it clear that "[s]uch factual determinations require deference from appellate courts." 431 Md. at 536–37.

Bowyer contends that Ross's statements are not an excited utterance because, although Ross is crying in the video, her statements were not made "impulsively or spontaneously" and "without deliberation." *See Marquardt v. State*, 164 Md. App. 95, 128 (2005). Rather, suggests Bowyer, Ross was merely responding to Young's question and reflecting on events that had already passed. Bowyer highlights the fact that, at the time Ross made her statements, the fatal moment had passed and both Bowyer and Ms. Parks-Jones had left their vehicles and were wrestling on the ground. Bowyer also asserts that the present-sense impression exception does not apply.[9]

[9] The State contends that Bowyer did not preserve his arguments regarding the hearsay exceptions for appeal, because his objection at trial was limited to the Confrontation Clause. The State is incorrect. In addition to his Confrontation Clause objection, defense

In effect, Bowyer asks us to draw inferences from the evidence that are different from the inferences drawn by the trial court. But we are required to defer to the trial court's factual findings. We conclude that, based on the totality of the circumstances, Ross's statement fell within the excited utterance exception. Ross made her statement moments after Bowyer ran over McKinnon, an event which Ross witnessed. And although the incident had already occurred by the time Ross made her statements, there was a still an evolving situation before her. In the background of the video footage, Bowyer and Ms. Parks-Jones can be seen wrestling near McKinnon's body. Nearby, Kaila and other bystanders are shouting at Bowyer, as well as at each other. Thus, the intensity of the situation had not fully subsided when Ross was interviewed by Young as they were still "in the throes of the exciting event." *See West*, 124 Md. App. at 164 (internal quotation marks omitted). More importantly, Ross is visibly upset in the video. She is crying and, in the trial court's words, was "obviously very emotional." The court's finding in this regard is not clearly erroneous. In sum, the record demonstrates that Ross's statements were made while she under the stress of excitement caused by tragedy that had unfolded before her eyes.[10]

counsel clearly objected to the admission of the Ross video on the ground that it was neither an excited utterance, nor the record of a present sense impression.

[10] Bowyer also argues that Ross's statement could not "possibly be a present-sense impression." Because the trial court admitted Ross's statement under the excited utterance exception to the hearsay rule, there is no need for us to address parties' present sense impression contentions.

B.

Finally, Bowyer contends that the admission of Ross's statement violated his rights under the Confrontation Clause of the Sixth Amendment. According to Bowyer, the relevant question is "whether the statement was solicited under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Taylor v. State*, 226 Md. App. 317, 340 (2016). Notwithstanding that Ross was not being interviewed by a law enforcement officer as part of an investigation, Bowyer compares Young to an "amateur reporter" and asserts that an objective witness would reasonably believe that Ross's statement would be used at trial because she was answering Young's questions. This argument is not persuasive.

The Confrontation Clause of the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI; *see Crawford v. Washington*, 541 U.S. 36, 42 (2004); *Langley v. State*, 421 Md. 560, 567 (2011). Whether a witness's statement offends the Confrontation Clause depends upon the circumstances in which the statement was uttered, *i.e.*, if the statement is testimonial or non-testimonial. *See Crawford*, 541 U.S. at 53–54; *Derr v. State*, 434 Md. 88, 106 (2013) ("the Confrontation Clause only applies when an out-of-court statement constitutes testimonial hearsay.").

Testimonial statements are those made with "the primary purpose of accusing a targeted individual of engaging in criminal conduct" for later use in a criminal prosecution

and include "formalized statements such as affidavits, depositions, prior testimony, or confessions." *Derr v. State*, 434 Md. 88, 114 (2013) (internal quotation marks and citations omitted); *see also Crawford*, 541 U.S. at 52 ("[S]tatements taken by police officers in the course of interrogations are also testimonial.").

In contrast, statements made to a police officer are nontestimonial when the officer's objective, primary purpose for the interrogation is to assist and resolve an ongoing emergency. *See Langley*, 421 Md. at 571 (citing *Davis*, 547 U.S. at 822) Whether an emergency exists is a "highly context-dependent inquiry." *Langley*, 421 Md. 575 (citing *Michigan v. Bryant*, 562 U.S. 344, 363 (2011)). In *Bryant*, the Supreme Court explained:

> The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than proving past events potentially relevant to later criminal prosecution. Rather, it focuses them on ending a threatening situation.

Bryant, 562 U.S. at 361 (cleaned up).

Bowyer's Confrontation Clause argument is not persuasive because Young was neither a police officer nor a law enforcement investigator—he was an interested bystander. Accepting for purposes of analysis that Bowyer is correct that Young was acting as an "amateur reporter," reporters do not gather news to assist criminal investigations.

Moreover, Bowyer cannot have it both ways. If we assume for purposes of analysis that we should treat Young as an agent of the police for Confrontation Clause purposes, then Young's question to Ross—"What happened?"—is precisely the sort of inquiry that law enforcement officers should make to bystanders in the face of an ongoing emergency.

And what was ongoing in the parking lot was that one person was dead (with an assault rifle on the pavement next to him), two people were fighting one another, and several more people were shouting at one another. To repurpose a phrase from Justice Elena Kagan: "If that does not count as [an ongoing emergency,] we are hard pressed to know what would." *Chaidez v. United States*, 568 U.S. 342, 353 (2013).

THE JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.