UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1943

SEPTEMBER TERM, 2014

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MATTHEW VONELLA

v.

STATE OF MARYLAND

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Eyler, Deborah, S.,
Arthur,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

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Opinion by Eyler, Deborah, S., J.

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Filed: October 13, 2015

A jury in the Circuit Court for Baltimore County convicted Matthew Vonella, the appellant, of one count of assault of Robert Bell and one count of assault of Michael Coolahan. It acquitted him of one count of assault of Michael Sullivan and one count of assault of Howard Heiland. The court sentenced him to 5 years' incarceration, suspend all but 1 year, for the assault of Bell, and 5 years, suspend all but 90 days, for the assault of Coolahan, with the sentences to run concurrently. The court also imposed terms of probation.

The appellant presents three questions for our review, which we have rephrased slightly:

I. Did the trial court err in denying the appellant's motion for a mistrial?

II. Did the trial court err in instructing the jury on accomplice liability?

III. Was the evidence legally sufficient to sustain the convictions?

For the following reasons, we shall affirm the judgments of the circuit court.

## FACTS AND PROCEEDINGS

Just before 2:00 a.m. on December 8, 2013, a fight broke out at Coolahan's Pub ("the pub") on Washington Boulevard in Halethorpe. Michael Coolahan, the owner; Michael Sullivan, a bartender; Robert Bell, a patron and member of a band playing at the pub that night; and Howard Heiland, a patron, all sustained injuries.[1] The appellant and

[1] The State originally charged the appellant with assaulting Coolahan, Sullivan, Bell, and one Todd Williams. On the morning of the second day of trial, the State moved to amend the charging document to substitute Heiland as a victim in place of Williams. Over

(Continued…)

one Mark Young both were arrested and charged with crimes arising from the fight. The appellant was charged with four counts of second-degree assault, each pertaining to one of the four victims. The charges against him were tried to a jury over two days in October 2014. We summarize the relevant evidence adduced at trial.

The State called four witnesses: Coolahan, Bell, Heiland, and Officer Connelly with the Baltimore County Police Department ("BCPD").[2] Coolahan testified that he owns the pub, but does not work there. The pub closes at 2:00 a.m. On December 8, 2013, he came to the pub around 1:30 a.m. to ensure that it was closing on time. He drank one beer after he arrived. He explained that after last call, he and his staff start telling patrons to leave. Coolahan stood by the front door, directing patrons outside. As he was opening the door to let someone out, at least two men, possibly more, burst through the door from the outside. They knocked him to the floor inside the pub and began kicking him in the ribs and around his head. Coolahan, who uses a cane, held it up around his face to protect his head. He was unable to identify his assailants.

Bell testified that his band played at the pub from approximately 9 p.m. on December 7, 2013, until 1:00 a.m. on December 8, 2013. He drank about three beers. Near closing time, a "gigantic ruckus" broke out. Bell saw the appellant and Young

(…continued)
objection, the court granted the motion. He does not challenge the substitution ruling. As noted, the appellant was acquitted of the assault charge pertaining to Heiland.

[2] The record does not contain Officer Connelly's first name.

beating up "Todd," who was a friend of Sullivan's. Bell was not planning to get involved, but then he saw the appellant and Young start to beat Coolahan. When Bell tried to push the appellant and Young off of Coolahan, the appellant "blindsided" him, knocking him to the ground. The appellant and Young then began beating Bell. He sustained "cuts all over [his] back, shoulders, face, [and] ear." He was transported to St. Agnes Hospital, where he received stitches on his face and ear.

On cross-examination, Bell was questioned at length about a statement he gave to police on December 8, 2013, which was admitted into evidence. In it, he stated that he "saw a commotion outside and it came inside the bar." He told the police that he was unable to identify or describe the two persons who attacked him and Coolahan inside the pub, explaining that it "happened so fast [he] could not give a description." He stated that there was a "black male with dreads that started everything outside (commotion)" and that Coolahan "knows the black [male]."[3]

Heiland is a frequent patron of the pub. He testified that he arrived a little after midnight on December 8, 2013. He drank about 3 beers in an hour and a half. Around closing time, he observed the fight break out inside the pub. He saw the appellant kicking Bell while he was down on the ground. He tried to intervene and was hit from behind. He did not know who hit him, but when he turned around, the first person he saw was the appellant.

[3] The appellant and Young both are Caucasian.

Officer Connelly responded to the pub around 2:15 a.m. While still inside his patrol car, he observed a "commotion" in the parking lot outside and a truck leaving at a "high rate of speed." Officer Connelly activated the lights and siren on his vehicle and stopped the truck to "see if [the occupants] were involved and what was going on." The appellant was driving the truck and Young was in the passenger seat. The appellant and Young both were "out of breath" and had "some scrapes and abrasions on their knuckles." Officer Connelly asked them if they had come from the pub. They replied that they had, but that they didn't know "anything that went on." Another officer on the scene brought Heiland over and he identified the appellant and Young as having been involved in the fight inside the pub. The appellant and Young were placed under arrest.

Officer Connelly later interviewed Bell, Coolahan, Heiland, Sullivan, and Williams. On his "Incident Report," he stated that each man was under the influence of alcohol.

The appellant testified in his case. He was a regular patron at the pub. On December 8, 2013, he drove his truck to the pub at 1:45 a.m. to pick up his friend's cousin, one Scott Lawson. Young and another man, Brandon Kruger, were with him. All three men went inside the pub. The appellant asked Sullivan for a napkin because he had "an abrasion on [his] hand." Sullivan gave him napkins as requested. The pub was very crowded, "shoulder to shoulder." The appellant went into the bathroom and cleaned off his hand. While he was in there, Sullivan came in and said it was closing time. The appellant, Young, and Kruger went outside to smoke a cigarette and wait for Lawson to

come out. Young was standing near the front door of the pub when Sullivan pushed open the door, hitting him. Sullivan said, "get the fuck out of the way" and pushed Young. Young replied, "what the fuck is your problem?"

The appellant tried to calm Young down, but then Bell exited the pub, and said "fuck you, bitch" to Young. Young asked him "what is your problem?" Bell responded, "I'll kick your ass," to which Young replied, "fuck you." Sullivan grabbed Young and the two men fell through the door, back inside the pub. Coolahan was standing inside the pub by the door and was knocked down.

The appellant went back inside the pub to try to help Young. He saw Young and Sullivan wrestling on the ground while Bell kicked Young in the back and head. The appellant pushed Sullivan away from Young. At that point, someone hit the appellant in the back of the head. He fell onto the bar, knocking beer bottles and mugs off of the bar and onto the floor. Some of them hit Coolahan, who still was on the floor.

According to the appellant, from that point on he and Young were under attack by Sullivan, Bell, and three or four other men he did not know. The men were "throwing blows" and "throwing bottles." The appellant picked up a metal bar stool and used it to defend himself. He was able to "push[] [his] way to the door" and then he dropped the bar stool and left the pub with Young. He explained that just before he went out the door, he saw Kruger on the ground being attacked by Bell. The appellant pulled Kruger up and the three men ran out the door. The appellant and Young jumped into the appellant's

truck, but Kruger stayed behind. As the appellant began to drive away from the pub, Officer Connelly signaled him to pull over.

The appellant said that when Officer Connelly asked him if he and his companions had been "fighting" at the pub, he replied, "No." He explained that he did so because he was "scared" that he would "get in trouble for fighting at the pub."

On cross-examination, the appellant was asked whether he had sustained any injuries that night. He replied that he had, but that because he was arrested, he was unable to take any photographs or otherwise document those injuries.

## DISCUSSION

### I.

### Motion for Mistrial

Bell testified on the first day of the trial. During defense counsel's cross-examination and the prosecutor's re-direct examination, he gave several non-responsive answers, suggesting that he had learned from third parties what had happened outside the pub on the night in question and that the appellant was involved in drug dealing and gang activity.

At the outset of the second day of trial, defense counsel moved for a mistrial, based on the statements made by Bell the day before. He argued that, in his testimony, Bell "various times" had "alleged that [the appellant] was a drug dealer, a gang member and that he [Bell] had heard from other people that [the appellant] was one of the assailants and they were afraid to come in [to court to testify] because of perhaps his [the

appellant's] gang membership or whatever untoward associations he had." Defense counsel acknowledged that, when he had moved to strike some of this testimony, the court had granted his motion and had given a curative instruction. He complained that the instruction was a "pro forma one line instruction to the jury to disregard what they had heard." He argued that the instruction had not "cured the taint" and that Bell's comments had been "so injurious and so prejudicial" that a mistrial was warranted.

The State opposed the motion. It argued that most of the challenged testimony had been elicited by defense counsel on cross-examination and that the court's curative instruction had been timely and accurate.

The court clarified with defense counsel whether he ever had requested a more detailed curative instruction during Bell's testimony. Defense counsel replied that he had not. The court advised defense counsel that it still would consider supplementing its prior curative instruction, but noted that that was a "strategic call." It then denied the motion for mistrial. Defense counsel did not ask that the court further instruct the jurors with respect to Bell's testimony.

The appellant contends the trial court abused its discretion by denying his motion for mistrial because the complained of testimony by Bell "amounted to highly prejudicial other crimes evidence, inadmissible under Md. Rule 5-404(b)." The State responds that the argument that Bell's testimony was "other crimes evidence" is not preserved for review and that, in any event, it lacks merit. The State asserts, moreover, that the trial

court did not abuse its broad discretion to deny the motion for mistrial when it already had given a curative instruction.

"It is well-settled that a decision to grant a mistrial lies within the sound discretion of the trial judge and that the trial judge's determination will not be disturbed on appeal unless there is abuse of discretion." *Carter v. State*, 366 Md. 574, 589 (2001). The grant of a mistrial is an "extraordinary remedy that should only be resorted to under the most compelling of circumstances." *Molter v. State*, 201 Md. App. 155, 178 (2011). "'In the environment of the trial the trial court is peculiarly in a superior position to judge the effect of any of the alleged improper remarks.'" *Simmons v. State,* 436 Md. 202, 212 (2013) (quoting *Wilhelm v. State*, 272 Md. 404, 429 (1974)). "The determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 594–95 (1989)).

In *Guesfeird v. State*, 300 Md. 653, 659 (1984),[4] the Court of Appeals set forth a non-exclusive list of factors relevant to determining if prejudice to a criminal defendant warrants a mistrial:

> The factors that have been considered include: whether the [improper] reference . . . was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and

[4] In *Guesfeird v. State*, 300 Md. 653 (1984), the improper testimony concerned a lie detector test. The Court of Appeals has since held that the factors identified in *Guesfeird* are relevant anytime a mistrial is sought based upon prejudicial testimony. *See Rainville v. State*, 328 Md. 398, 408 (1992).

> unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists.

When the trial court gives a "timely [and] accurate" curative instruction, the jurors are presumed to have followed it. *McIntyre v. State*, 168 Md. App. 504, 525 (2006) (internal quotation and citation and omitted).

***A. Bell's testimony on cross-examination***

Most of Bell's references to the appellant being involved in drug dealing and/or gang activity were made when he was being cross-examined by defense counsel. Defense counsel asked Bell whether he had been outside the pub at any time during the brawl. Bell replied that he had not. Defense counsel then asked Bell about the statement he gave to the police that a "black male with dreads" had "started everything" outside the pub. Bell confirmed that he had made that statement to the police. Defense counsel asked Bell how he possibly could have known who started the fight outside the pub if he had been inside the whole time. Bell responded that the pub had been having "a whole bunch of problems . . . with the drug dealing and everything else." In response to another question about the "black male with dreads," Bell stated that he was "just going from all the other stuff that [he] heard" and "all the stuff that [he] already [knew]." He then elaborated, testifying that for "years and years," the pub didn't have any problems and

> then all of a sudden this guy shows up, kick him out for drug dealing and then we got a street gang coming in bum rushing the place, you want to mention stuff like that? Okay? Because that's, all of a sudden, I've been going to this thing for fifteen years, and all of a sudden we got, kick out one person –

Defense counsel cut Bell off at that point and began asking him how many people he had spoken to about the case prior to testifying. Bell replied that there were witnesses who had "actually seen it" who were "scared to come and testify against these guys."

At no time during his cross-examination of Bell did defense counsel move to strike any non-responsive testimony. *See* Broun, Kenneth, *McCormick on Evidence*, § 52 at 349-50 (7th ed., 2013) (the remedy for a nonresponsive answer is to seek to have the nonresponsive material stricken from the record). Nor did he seek a curative instruction or move for a mistrial. By failing to seek any contemporaneous relief from the court, the appellant waived any contention of error with respect to this allegedly prejudicial testimony. *See Prince v. State*, 216 Md. App. 178, 194, *cert. denied*, 438 Md. 741 (2014) (while there is "no bright-line rule to determine when an objection should be made," it must "come quickly enough to allow the trial court to prevent mistakes or cure them in real time"); *Perry v. State*, 357 Md. 37, 77 (1999) (contemporaneous objection rule ensures fairness to both sides).

***B. Bell's testimony on re-direct examination***

On re-direct examination, the prosecutor attempted to have Bell confirm that he had no personal knowledge of what happened outside the pub on December 8, 2013. Bell continued to give non-responsive answers, however, stating at one point, "It's been known for the last couple months is [sic] what's been happening to that place." Defense counsel's objection to that response was sustained. A moment later, the prosecutor asked Bell to confirm that his statement about the "black male with dreads" was "not based on

[his] personal knowledge." Bell replied: "I definitely, between him and these other guys, I mean, I, we could go into the, their little street gang that they got." Defense counsel objected and moved to strike Bell's answer. The court granted the motion and instructed the jurors to "disregard the last statement by the witness."

The prosecutor admonished Bell to "please focus on [her] question" and "contain [his] answer to [her] question." She then asked Bell if he actually had seen the "black male with dreads" he described in his police statement. Bell responded "Yeah, he was outside hanging out, but he was already kicked off the property for dealing drugs. But yet he was still hanging –." Defense counsel objected and moved to strike. The court sustained the objection and the prosecutor advised the court that she had no further questions for Bell.[5] After Bell was excused, the State called one more witness and the trial was adjourned.

Bell's testimony on re-direct that the appellant was part of a "little street gang" and that a purported associate of the appellant's (the "black male with dreads") had been "kicked off the property for dealing drugs," was not different in any material respect from his testimony on cross-examination. As explained, the appellant waived any challenge to those statements by failing to move to strike that testimony or to seek any relief from the court, including failing to request a mistrial. Having waived any challenge to the

[5] The court did not rule on defense counsel's motion to strike. Defense counsel did not bring this to the attention of the court, however, nor did he ask the court to give a curative instruction.

statements on cross-examination, his challenge to the same testimony elicited on re-direct is similarly unpreserved. *See, e.g., Snyder v. State*, 104 Md. App. 533, 556-67 (1995) (a defendant waives his challenge to objectionable testimony when he fails to object or seek relief each and every time that testimony is given).

Even if the mistrial issue were preserved, and even if defense counsel had made an argument based on "prior bad acts" in moving for a mistrial (which he did not), we would hold that the trial court did not abuse its discretion by denying the appellant's motion for a mistrial premised on Bell's testimony. Bell gave two isolated non-responsive answers linking the appellant to criminal activity unrelated to the assault charges. Neither statement was solicited by the prosecutor, and, in fact, the prosecutor admonished Bell in front of the jury to confine his testimony to the questions asked. Bell was a principal witness for the State, but, as the trial court observed, his obstreperous behavior at trial, including giving non-responsive answers, *detracted* from his credibility. Moreover, with respect to Bell's reference to the "street gang," the court granted defense counsel's motion to strike and gave a timely curative instruction directing the jurors to disregard the statement. The jurors are presumed to have followed the court's instruction. Given the isolated and impromptu nature of Bell's remarks and the immediate and accurate curative instruction given, the trial court did not abuse its discretion in declining to grant the extraordinary remedy of a mistrial.

## II.

## Accomplice Liability Instruction

The trial court, over the appellant's objection, instructed the jurors as follows with respect to accomplice liability:

> The Defendant may be guilty of assault as an accomplice, even though the Defendant did not, did not personally commit the acts that constitute the crime. In order to convict the Defendant of assault as an accomplice, the State must prove that the assault occurred and that the Defendant, with the intent to make the crime happen, knowingly aided, counseled, commanded or encouraged the commission of the crime or communicated to the primary actor in the crime that he was ready, willing and able to lend support if needed. The mere presence of a Defendant at the time and place of the commission of the crime is not enough to prove that the Defendant is an accomplice. If presence at the scene of the crime is proven, that fact may be considered along with all the surrounding circumstances in determining whether the Defendant intended to, and was willing to aid a primary actor. For example, by standing as a lookout to warn the primary actor of danger and whether the Defendant communicated that willingness to the primary actor.

The appellant renewed his objection after the jury was instructed, as well as after the prosecutor's closing argument.

The appellant contends that accomplice liability was not generated by the evidence, and therefore the court erred in giving an instruction about it. He argues that there was no evidence that the appellant had "acted as an accomplice" and there was no testimony that it was "Young who assaulted Bell or Coolahan but with [the appellant's] aid, encouragement, or assistance."

The State responds that the instruction was generated by testimony that the appellant and Young acted in concert to assault Coolahan and Bell. Alternatively, it asserts that, even if the instruction was not generated by the evidence, any error in giving it was harmless beyond a reasonable doubt.

Pursuant to Rule 4-325(c), the court

> may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

A requested instruction must be given if it is a correct statement of the law, is not otherwise covered by the instructions, and there is "some evidence" generating it. *See generally Dykes v. State*, 319 Md. 206, 216-17 (1990); *Bazzle v. State*, 426 Md. 541, 551-52 (2012). Here, the question is whether there was some evidence that generated the instruction.

As set forth above, Coolahan testified that two people "had [him] on the ground" and were kicking him in the ribs and head. Bell testified that he observed the appellant and Young simultaneously assaulting "Todd" and then assaulting Coolahan while he was lying on the ground. According to Bell, after he intervened to help Coolahan, the appellant "blindsided" him and a second man joined in the attack. We think it plain that this amounted to "some evidence" from which reasonable jurors could infer that the appellant knowingly aided and encouraged Young in the assaults on Coolahan and Bell. To be sure, there also was evidence that the appellant was a principal in the assaults, but this does not render the giving of the accomplice instruction erroneous. We perceive no error by the court in instructing the jurors on accomplice liability.

## III.

## Sufficiency of the Evidence

The appellant contends the evidence was legally insufficient to sustain his convictions for second-degree assault against Coolahan and Bell. The State responds that this argument is unpreserved. We agree.

At the close of the State's case, defense counsel moved for judgment of acquittal, specifying that he was "not going to make the Motion as to Mr. Coolahan, nor will it be as to Mr. Bell." He then proceeded to argue the motion with respect to the counts relating to Heiland and Sullivan. The court denied the motion. At the close of all the evidence, defense counsel renewed his motion for judgment of acquittal, but did not make any further argument. His motion was again denied.

As discussed, the appellant was acquitted of the assault charges relating to Heiland and Sullivan, but was convicted of the assault charges relating to Coolahan and Bell. Having failed to make a motion for judgment of acquittal as to those counts, his argument that the evidence was insufficient as a matter of law to sustain his convictions is not preserved for review. *See* Md. Rule 4-324(a) ("The defendant shall state with particularity all reasons why [a motion for judgment of acquittal) should be granted."); *Reeves v. State*, 192 Md. App. 277, 306 (2010) ("on appeal, an appellant's sufficiency arguments are limited to the specific grounds stated in his motion for judgment at trial").

Even if preserved, the evidence plainly was sufficient for a rational jury to find beyond a reasonable doubt that the appellant assaulted Coolahan and Bell. We need look no further than Bell's testimony that he observed the appellant kicking and punching Coolahan and that when he (Bell) intervened to try to help Coolahan, the appellant

"blindsided" him, knocking him to the ground. This testimony alone was sufficient to support the appellants' convictions for second degree assault.

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