Circuit Court for Wicomico County
Case No. 22-K-80-010454

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 711

September Term, 2017

CHARLES EDWARD SIMMS

v.

STATE OF MARYLAND

Nazarian,
Shaw Geter,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: April 5, 2018

Appellant, Charles Edward Simms, was tried and convicted of first-degree murder by a jury in the Circuit Court for Wicomico County (Beckstead, J.), on March 27, 2017. On June 1, 2017, he was sentenced to life imprisonment. Appellant filed the instant appeal from this conviction, in which he raises the following questions for our review:

1. Did the trial court err in permitting the State to elicit, through a lay witness, testimony based on specialized knowledge, experience or training?

2. Must Appellant's conviction be reversed as a result of improper prosecutorial closing argument?

FACTS AND LEGAL PROCEEDINGS

The charge against Appellant arose out of the death of his wife, Darlene Simms, in May of 1980. On June 5th of the same year, the State charged Appellant with first degree murder in the Circuit Court for Wicomico County. A trial took place on August 11 and 12, 1980. Appellant was ultimately convicted of first-degree murder and, on September 2, 1981, this Court affirmed his conviction in a reported opinion, *Simms v. State*, 49 Md. App. 515 (1981).

On June 26, 2013, Appellant filed a Motion to Reopen Postconviction Proceedings, in which he argued that he was entitled to relief pursuant to *Unger v. State*, 427 Md. 383 (2012). The circuit court denied the motion on November 7, 2013 and Appellant filed an application for leave to appeal. On November 18, 2015, this Court granted the application and remanded the case to the Circuit Court to vacate his conviction and award him a new trial. *Simms v. State*, No. 2655, September Term, 2013, *cert. denied*, 449 Md. 430 (2016).

Appellant's new trial by jury was held on March 27–29, 2017 in the Circuit Court for Wicomico County (Beckstead, J., presiding).

The State's evidence consisted of a mix of live testimony by individuals who knew the victim or were involved in the investigation and Appellant's testimony from his trial in 1980. The first witness for the State was Diane Stoker. In 1980, Stoker and her then-husband, Gregory White, rented a house on Wainwright Avenue in Parsonsburg next to the residence of Ida Moore, the mother of the victim, Darlene Simms. In December of 1979, the victim and her three sons, Charles Jr., Craig and Kevin, moved in with Moore. Between the move and the victim's death in May of 1980, Stoker saw Appellant parked near Moore's house on an almost daily basis. Stoker did not observe Appellant go inside Moore's house. However, his children would come out to his car to talk to him or go places with him.

Stoker also testified to her recollection of three specific occasions. The first took place on a Wednesday evening in 1980 after the victim had begun living with her mother and perhaps a month or two prior to the victim's death. While Stoker was driving the victim and their children home from a social event, Appellant began following them in his car, eventually passing them on the road. When they reached an underpass by the Perdue plant, they saw Appellant standing outside his car, holding a shotgun. Stoker yelled for the passengers in her car to get down. Appellant then re-entered his car and followed them until they arrived at Wainwright Avenue. Stoker testified that she told her husband about the incident and it was reported to the police.

The second occasion took place in March of 1980 when Stoker and two other

women, Gloria Halfbill and Sylvia Meilhammer, took the victim out for a belated birthday celebration. After dinner, they went to the Sheraton Inn for drinks. Within a half hour, Appellant arrived and stood against a wall watching them. After a few hours, they left the Sheraton, and Appellant followed them to Halfhill's house, where the victim had left her car. Stoker and the victim waited until they could not see Appellant anymore before leaving. However, once they proceeded on the road, Appellant pulled behind them. Appellant then drove in front of them and stopped his car. When he got out and pointed something at them, the victim turned around and drove back to Halfhill's house. As before, Stoker told her husband what had happened.

The third and final occasion testified to by Stoker occurred on May 6th, the day of the victim's death. At around 4:30 p.m., Stoker received a phone call from the victim asking her to accompany Stoker to pick up some belongings from Appellant's trailer, located on Jones Hastings Road in Parsonsburg. When they arrived, Appellant invited his wife into the trailer, telling her that he would not hurt her but that Stoker could not come inside. Stoker told the victim to scream if anything happened. Shortly after the victim entered the trailer, Stoker heard her scream something and she ran to the trailer park office to get help. Stoker had only taken four or five steps when she heard two gunshots. She continued to the office, where she called the police. As she spoke on the phone, she looked out the window and saw Appellant emerge from his trailer with a shotgun. After pausing briefly, Appellant threw the shotgun in his car and drove off.

After she ended her conversation with the police, Stoker went back to Appellant's

trailer, where she found two men standing outside. Stoker told the men that the police were on their way, then went inside and found the victim lying on the floor with her hands across her chest and her glasses on and there was blood behind the victim's head. Stoker then went back outside and had the woman in the office call for an ambulance.

Gregory White, Stoker's husband in 1980, testified that his wife told him about the incident in which Appellant "ran her and [the victim] off the road." Sometime later, White went to speak with Appellant about it when Appellant was parked outside his mother-in-law's house. Appellant asked White if he wanted to go for a ride. During the ride, Appellant denied running Stoker and the victim off the road, and White told him that he was a liar. White also asked Appellant why he harassed the victim so much, to which Appellant replied that "he was waiting for the right time and the right place because he was gonna kill her." Appellant did not say how he planned to do this; however, when White asked Appellant if he wanted to go to jail, he responded that he would not because "he was gonna turn the gun on hisself [sic]." At that point, White told Appellant to take him back home.

Contrary to Stoker's testimony, White denied that his wife also told him about the incident at the Perdue plant. In addition, he testified that he did not call the police to report anything his wife or Appellant had told him.

Gary Mister testified that he became friendly with the victim in 1980 after she moved in with Moore. Mister worked for a company that cleared trees from utility lines. One afternoon, while he was working on Wainwright Avenue, he was approached by Moore, who recognized him from the church he used to go to as a child. Moore took Mister

to meet the victim, and the two began talking. Thereafter, the victim would come to see Mister while he was working or they would go out for a drink, although Mister denied that they were dating. Mister recalled an incident that took place one evening in early April of 1980 when he went to pick the victim up from the hospital where she was working. He saw her standing by the entranceway, but, before he reached the entrance way, a car driven by Appellant cut him off. When he looked at the entranceway again, the victim was gone, so Mister drove around looking for her. Appellant followed, honking his horn, flashing his high beams, and yelling at Mister, who eventually turned off into a parking lot. The two men then got out of their vehicles and, according to Mister, Appellant said that, if "you're gonna keep messing around . . . there's gonna be bad blood, I'm gonna kill both of you." Mister responded by calling Appellant a "fool" and telling him to leave.

Mister testified that he had another encounter with Appellant later that month. After going out with the victim for drinks, Mister drove her home. When they parked in the driveway, Appellant pulled in behind them. As Mister started to get out of his vehicle, Appellant pointed a shotgun at him and threatened to kill him. The victim got out and banged on the front door, screaming. Appellant then threatened to kill them both but left when Moore turned on the porchlight.

Concerned about calling the police because he had been drinking, Mister decided to confront Appellant while Appellant was working the next day. According to Mister, he approached Appellant and said, "[Y]ou're a bad man with a shotgun, but you ain't got it today, and there's a different deal when you don't have it." He then proceeded to "beat the

crap out of" Appellant, stopping only when one of Appellant's co-workers pulled Mister away.

Darrell Travis also testified about the events which occurred at Appellant's trailer. Travis, lived at the trailer park in May of 1980 when he was 14 years old. On May 6th, Travis was outside with a friend, Donny Wilkerson, working on Wilkerson's car, when the victim and another woman pulled up to Appellant's trailer. Travis overheard Appellant tell the victim's companion to stay outside. After a short time, he heard the victim scream "no, Edward, no," followed by the sound of a gunshot. Appellant emerged from his trailer holding a shotgun, paused to look at Travis and Wilkerson, and got in his car and drove away. Travis then entered Appellant's trailer, where he found the victim lying on her back in a puddle of blood.

Two of Appellant's children, Charles Simms, Jr. and Craig Simms, also testified for the State. Charles was 11 years old when his parents separated and he, his mother, and his siblings went to live with their grandparents. Despite the move, he saw his father every day when Appellant parked outside Moore's house. On weekdays, Appellant would meet Charles when Charles came home from school, around 3:30 or 4:00. According to Charles, at some point in their conversations, Appellant would point to a shotgun in his car and say "[t]hat's the gun I'm gonna use to shoot your mother." Appellant said that, up until the day before the victim's death. On various occasions, Appellant would also take Charles to the store to buy candy or to a place off the road to shoot cans. Charles did not recall his brothers accompanying them on these occasions.

Craig's recollection differed from the foregoing. Craig, who was younger than Charles, testified that Appellant would come by Moore's house when it was getting dark. Appellant would honk his horn, a signal for Craig and Kevin to go outside to meet him. Appellant often sent Kevin back in the house to see what their mother was wearing. The night before the victim was fatally wounded, Appellant told Craig he "was gonna shoot her with a shotgun." Charles did not come outside with Craig and Kevin. Craig also did not remember Appellant taking Charles anywhere without him and Kevin, and he testified that Appellant would buy candy for him and Kevin.

Live testimony about the investigation into the victim's death came from Troopers Wayne Lowe, Frank Sturgis, and John Altvater of the Maryland State Police. At around 5:20 p.m. on May 6th, Trooper Lowe responded to a call that Appellant wanted to turn himself in. He went to the residence of Appellant's sister, Doris Jones. Along with Trooper Sturgis, he placed Appellant under arrest. Appellant cooperated with the officers and, when Trooper Lowe asked him where the shotgun was, Appellant replied that "it was gone." Before Appellant was transported for processing, he asked the officers if the victim was dead. Trooper Lowe testified that Appellant had "a smirk on his face" when he asked this.

Trooper Sturgis was also responsible for taking Appellant to a holding cell at the barracks. According to Trooper Sturgis, while Appellant was under his watch, he said, without prompting, "I've had enough of it, I couldn't take it anymore, so I shot her."

Later that evening, Trooper Lowe received a call to go back to Jones' house. Upon his arrival, Jones showed him a loaded shotgun lying on a bed.

Trooper Altvater was assigned as the lead investigator into the victim's death. When he arrived at Appellant's trailer, emergency medical technicians were rendering assistance to the victim. He testified that he observed the door to the rear bedroom off its hinges and, over objection, described splintering to the door frame as "very fresh."

Trooper Altvater, who claimed to have "[s]ome familiarity with shotguns," also testified, over objection, to the manner in which Appellant's shotgun functioned. Specifically, the shotgun had a safety mechanism that engaged automatically when the bolt was pulled back and had to be manually disengaged before the gun could be fired. The shotgun could hold two shells in the magazine and a third in the chamber. The shells contained shot cups to hold the shot, wadding, and gunpowder.

On May 9, 1980, Trooper Altvater returned to the trailer to execute a search warrant. In the rear bedroom, he discovered two shotgun pellets on top of a dresser. Underneath a plastic bag on the bedroom floor was a hole that went into the ground beneath the trailer. Trooper Altvater testified that he found, in the hole, what he "believed to be human hair, flesh and blood."

As noted, the State also presented the testimony of a number of witnesses from Appellant's trial in 1980. Moore, the victim's mother, testified previously that Appellant and her daughter separated a number of times before the victim, Craig and Kevin came to live with her in December of 1979. Charles Jr. had already been living with Moore since October or November, 1979.

After the victim moved in, Moore saw Appellant every night parked outside her

house. She told him that she did not want him coming around and that she contacted the police about him. Appellant also followed the victim home from work and called the house several times a night. Nevertheless, Moore maintained that she and Appellant generally had friendly conversations.

Moore testified to an incident on March 10, 1980, when she went to pick her daughter up from work. She drove the victim to her car in the employees' lot, where they discovered Appellant lying on the floor of the victim's car. Appellant said he was just joking around, but Moore slapped him and reported him to security.

Moore also testified to the incident in April 1980 when the victim came home following a date with Mister. Appellant approached the victim and Mister with a gun in his hand, but left when Moore turned on the porchlight. Although the victim wanted to report this to the police, Moore convinced her not to.

On the afternoon of May 6th, Appellant came to Moore's house and told the victim that, if she did not come get her belongings from his trailer, he was going to throw them out. The victim asked Stoker to accompany her.

Gloria Halfhill testified at Appellant's first trial concerning the incident in March 1980 when she, Stoker, and Sylvia Meilhammer took the victim out for her birthday. Appellant followed them on their way to dinner, but they managed to elude him. When they went out for drinks, Appellant showed up and told the victim, "[I]f I catch you dancing with anybody I will blow your effing brains out." Appellant then sat at a table until the women left a few hours later. According to Halfhill, the police later had to escort the victim

and Stoker home.

Trooper Michael Bobenko testified previously that he responded to Appellant's trailer at around 5:00 p.m. on May 6th. While *en route,* he observed Appellant, but did not pursue him. In the trailer, Trooper Bobenko attempted unsuccessfully to communicate with the victim, who was having trouble breathing. The door to the bedroom appeared to have been torn from its hinges, although he could not say when that occurred. On top of a wall separating the kitchen from the living room, Trooper Bobenko found a bag containing shotgun shells.

Dr. James Spence had testified previously that he treated the victim at the hospital. When the victim arrived at the emergency room, she was alive and conscious but was suffering from a large wound to her head. There were shotgun pellets and bone fragments in her brain. When Dr. Spence removed hair and shotgun wadding from the wound, the victim died of blood loss.

Dr. Virginia Dolan testified previously that she supervised the victim's autopsy. In addition to the wound to the back of her head, Ms. Simms had smaller injuries to her upper back and right shoulder consistent with having been struck by shotgun pellets. Dr. Dolan opined that the gunshot that struck the victim's head had been traveling downwards while the victim was in "a somewhat crouching position with her head bent forward, in almost a fetal position."

The jury convicted Appellant of first degree murder and court sentenced Appellant to life imprisonment on June 1, 2017. The instant appeal followed.

DISCUSSION

I.

Appellant's first assignment of error is that the trial court erred in permitting the State to elicit testimony based on specialized knowledge, experience, training or education, *via* a lay witness. Appellant alleges that the State elicited testimony from Corporal Trooper Altvater concerning "specialized knowledge about crime scene investigations and firearms to support its theory that [Appellant] acted with premeditation and deliberation." Specifically, Trooper Altvater's testimony that he believed Appellant's trailer door had only recently been forcibly removed from its hinges, suggesting that Appellant was engaged in a prolonged attack on his wife before he shot her. In addition, the Trooper testified that Appellant's shotgun could only be fired "if someone intentionally" disengaged the safety mechanism. Appellant maintains that the State was able to present expert testimony, while circumventing the notice requirements of Md. Rule 4–263 and the foundation requirements of Md. Rule 5–702.

The State first responds that Appellant's claim is not properly before this Court. The State notes that, when Appellant "first objected to the Trooper's testimony as to the condition of the doorframe, he did so on the basis that the Trooper was 'giving his interpretation' of what he saw." The State further notes that, when Appellant "objected the second time . . . [Appellant] did not state the basis for his objection and did not alert the Court that the basis for his objection was the State's alleged failure to comply with the notice and designation requirements for expert testimony contained in Maryland Rule 4–

263." Furthermore, the State alleges that Appellant objected *before* Trooper Altvater's testimony concerning the shotgun shell and did not lodge a continuing objection. Therefore, his failure to object *during* Trooper Altvater's testimony, or immediately thereafter, waives our review of his claim.

If preserved, the State argues that the trial court properly exercised its discretion when it allowed Trooper Altvater to describe what he observed when he entered Appellant's trailer after the shooting and when he described the operation of the shotgun Appellant used.

Preservation

"Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" MD. RULE 8–131(a). "It is well established that a party opposing the admission of evidence 'shall' object "at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." *State v. Jones*, 138 Md. App. 178, 218 (2001) (citing Md. Rule 4–323(a)). "A proper objection is required so that the proponent of the evidence has an opportunity to 'rephrase the question or proffer so as to remove any objectionable defects, if possible.'" *Id.* (quoting *Hall v. State*, 119 Md. App. 377, 389 (1998)). "Maryland Rule 4–323(a) also provides that '[t]he grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs.'" *Id.* "But, when particular grounds for an objection are volunteered or requested by the court, 'that party will be limited on appeal to a review of those grounds

and will be deemed to have waived any ground not stated.'" *Id.* (citation omitted).

"Furthermore, objections must be reasserted unless an objection is made to a continuing line of questions." *Ware v. State*, 170 Md. App. 1, 19 (2006) (citing *Brown v. State*, 90 Md.App. 220, 225 (1992)).

The following testimony, provided by Trooper Altvater, concerned the condition of Appellant's bedroom door.

> [ASSISTANT STATE'S ATTORNEY]: And then as you approached the scene further, who or what did you see going on?
>
> [TROOPER ALTVATER]: I entered the trailer. And I went to the back bedroom, and I saw members of the Parsonburg Volunteer Fire Department giving medical assistance to a person who I later learned was Darlene Simms.
>
> [Q.]: What else did you see going on in there?
>
> [A.]: Well, there was a lot of commotion going on in the room, as you can imagine. So I kind of stayed out of it a little bit. I stayed in the door frame leading into the bedroom.
>
> And I observed a great deal of blood on the floor. Also as I was looking around I noticed that the door frame going into the bedroom had been damaged by the door, it looked like the door had been forcibly—
>
> [DEFENSE COUNSEL]: Object.
>
> THE COURT: Do you want to be heard?
>
> [DEFENSE COUNSEL]: *He's giving his interpretation of what he saw*, Your Honor.
>
> THE COURT: *Sustained as to his speculation. But he can certainly describe what he saw.*
>
> So why don't you follow-up with a question?

[ASSISTANT STATE'S ATTORNEY]: What did the door look like to you at the time?

[TROOPER ALTVATER]: Well, the door was actually laying against the east wall of the rear bedroom. The door frame had holes in it where the hinge of the door had been. The holes had splintered wood coming out of them; I believe the wood was similar to pine.

It was both at the top hinge and the bottom hinge. I looked at the splintering and it appeared to me to be very fresh.

[DEFENSE COUNSEL]: Object. Move to strike.

THE COURT: Overruled.

[TROOPER ALTVATER]: I say that because there was no dust, there was no dirt, there was no debris whatsoever on these little splinters coming out of the holes where the screws of the latch had been.

Also, there was no discoloration due to cigarette smoke or smoke of any kind.

I believe I photographed that damaged area of the door frame.

(Emphasis supplied).

Regarding the operation of the safety on the shotgun that Appellant used to shoot his wife, Defense counsel offered the following objections before Trooper Altvater's testimony:

THE COURT: Do you want to qualify him as an expert?

[ASSISTANT STATE'S ATTORNEY]: No, I just want him to explain the basics of what a shotgun shell consists of. He's going to testify he went back to the crime scene, investigated the trailer, he found pieces of wadding and pellets, which are part of the shotgun shell, in the trailer as well as underneath the floor, and it was also connected to, like, skin and hair, so that is helping to connect the dots between the shotgun and the shell and the victim.

THE COURT: So he's not offering an opinion.

> [PROSECUTOR]: No.
>
> [DEFENSE COUNSEL]: It's testimony from his training, knowledge and experience and I think *Raglan*[1] would prohibit him [from] testifying if that's the basis of his information.
>
> ***
>
> [DEFENSE COUNSEL]: My objection, well, I respectfully disagree with the Court. It's not his personal knowledge with regard to this case. It is—

Regarding Appellant's first allegation that Trooper Altvater's testimony was impermissible because he was not qualified as an expert witness, defense counsel objected on the grounds that the Trooper was "giving his interpretation of what he saw" concerning the doorframe. The court sustained the objection to the Trooper's speculation, but permitted the testimony regarding the Trooper's observations. Accordingly, Appellant has preserved review of this claim, on appeal, limited to the grounds of interpretation of what Trooper Altvater saw.

Regarding Appellant's second allegation, *i.e.*, Trooper Altvater's testimony concerning the shotgun shells, Appellant failed to make a timely objection during the admission of the evidence, *i.e.*, during the Trooper's testimony. Although Appellant did object *before* the testimony occurred, he failed to object *during* the testimony which waived review of his claim. *Ware, supra*. Therefore, we will only review the first allegation.

[1] *Ragland v. State*, 385 Md. 706 (2005).

Analysis

Md. Rule 5–701 governs lay opinion testimony and provides that, "[i]f the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." As the Court of Appeals held in *Ragland v. State*, 385 Md. 706, 725 (2005), Rule 5–701 "prohibit[s] the admission as 'lay opinion' of testimony based upon specialized knowledge, skill, experience, training or education[,]" which constitutes expert opinion testimony, governed by Md. Rule 5–702 and requires qualification by the court.

> The prototypical example of the type of evidence contemplated by the adoption of [Federal Rules of Evidence] relates to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences . . . . Other examples of this type of quintessential [Federal Rule of Evidence] testimony include identification of an individual, the speed of a vehicle, the mental state or responsibility of another, whether another was healthy, the value of one's property.

Ragland, 385 Md. at 718 (quoting *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3rd Cir. 1995)).

In *Ragland*, the Court of Appeals held that admitting police officer testimony as lay opinion testimony when it was based on their specialized knowledge, skill, experience, training or education was an abuse of the lower court's discretion.

> This testimony cannot be described as lay opinion. These witnesses had devoted considerable time to the study of the drug trade. They offered their opinions that,

> among the numerous possible explanations for the events on Northwest Drive, the correct one was that a drug transaction had taken place. The connection between the officers' training and experience on the one hand, and their opinions on the other, was made explicit by the prosecutor's questioning. Such testimony should have been admitted only upon a finding that the requirements of Md. Rule 5–702 were satisfied. In admitting the testimony under Md. Rule 5–701, the trial court abused its discretion.

Id. at 726.

However, "[t]he mere fact that a witness is a law enforcement officer does not automatically transform his testimony into expert testimony." *Prince v. State*, 216 Md. App. 178, 201 (2014). "In determining whether an opinion offered by a witness is lay opinion or expert testimony, it is not the status of the witness that is determinative. Rather, it is the nature of the testimony." *Id.* at 202 (quoting *In re: Ondrel M.*, 173 Md. App. 223, 244 (2007)).

In *Ondrel, M.*, this Court held that a police officer was not testifying as an expert concerning the identification of the smell of marijuana.

> While [the police officer] may have had the potential to be qualified as an expert because she possessed knowledge, skill, experience and education, she was not testifying as an expert when she identified the marihuana. Rather, she was testifying based on her firsthand sensory experiences.

Id. (quoting *Ondrel, M.*, 173 Md. App. at 244–45).

In the instant case, the State did not elicit the testimony from Trooper Altvater based on his specialized knowledge, skill, experience, training or education. Rather, the Trooper testified regarding his interpretation of what he saw during his investigation, *i.e.*, his firsthand sensory experience. Trooper Altvater testified that the splintering appeared "very

fresh" based on his observations that there was no dirt or dust collected on the splintered wood; nor were there any fading or discolorations. This testimony was based on the Trooper's observations, not his specialized knowledge, skill, experience, training or education. Therefore, the trial court properly admitted the testimony as lay opinion.

II.

Appellant's final contention is that his conviction must be reversed as a result of improper prosecutorial closing argument. According to Appellant, "the State argued to the jury that testimony by its witnesses that [he] told them he was going to kill his wife was 'uncontradicted.' Given that there were generally only two parties to the alleged conversations—[Appellant] and the witness—the State's comment can only be viewed as an exhortation to the jury to draw a negative inference from [his] failure to testify." Appellant maintains that the State's comments run afoul of the test articulated by the Court of Appeals in *Smith v. State*, 169 Md. 474, 476 (1936) ("[I]s the remark 'susceptible of the inference by the jury that they were to consider the silence of the traverser in the face of the accusation of the prosecuting witness as an indication of guilt.'"). However, in support of his Motion for Mistrial at trial, Appellant states that he argued "that the State's use of the term 'uncontradicted' 'alerts the jury and . . . shifts the burden to my client or the defense that we need to put on evidence to contradict testimony or facts from the State."

The State responds that "neither of the grounds [Appellant] currently relies on were presented to the trial court." The State maintains that, during the trial, Appellant's "basis for the mistrial, even as to the prosecutor's 'uncontradicted' comments, was not the same

one he raises on appeal." The State asserts that, at trial, Appellant argued that the prosecutor's comments referenced "burden-shifting." On appeal, however, the State notes Appellant's argument that the prosecutor's comments underscored his failure to testify.

The State also asserts that Appellant's claim fails on the merits. According to the State, Appellant's reliance upon *Smith, supra* is "misplaced" and that the prosecutor's comments were proper and based on the testimony of multiple witnesses, all subject to cross-examination.

Finally, the State argues that, even if the prosecutor's comments were improper, the trial court properly exercised its discretion when it denied Appellant's Motion for a Mistrial. The State notes that the comments were "isolated and fleeting" and the trial court, in an effort "to underscore the presumption of innocence," provided the jury with a written copy of the complete jury instructions, which included instructions on the burden of proof, a defendant's right not to testify, an admonishment to the jury not to consider the defendant's failure to testify and the presumption of innocence and reasonable doubt.

"Generally, the decision to grant or deny a mistrial is committed to the discretion of the circuit court." *Parker v. State*, 189 Md. App. 474, 493 (2009). Our review "is limited to determining whether there has been an abuse of discretion." *Id.* (quoting *Coffey v. State*, 100 Md. App. 587, 597 (1994)). "The Court of Appeals has held that a trial court's denial of a motion for mistrial will not be reversed 'unless the defendant was so clearly prejudiced that the denial constituted an abuse of discretion.'" *Id.* (quoting *Hunt v. State*, 321 Md. 387, 422 (1990)). "But the Court of Appeals has found reversible error in a trial court's failure

to grant a mistrial in cases in which there was a high probability that the improper reference influenced the jury's verdict." *Id.*

As a preliminary matter, we address the State's contention that neither of Appellant's claims have been preserved for our review. As discussed, *supra*, "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" MD. RULE 8–131(a). "It is well established that a party opposing the admission of evidence 'shall' object "at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." *State v. Jones*, 138 Md. App. 178, 218 (2001) (citing Md. Rule 4–323(a)).

In the instant case, in support of his Motion for Mistrial, defense counsel argued as follows:

> We move for a mistrial at this juncture, Your Honor. On two occasions during the State's closing, the State told the jury that the testimony of the witnesses, in one case the testimony of the Medical Examiner was uncontradicted. I would note for the record I put on no evidence. I think pointing out the fact that testimony is uncontradicted alerts the jury and points to the fact, shifts the burden to my client or the defense that we need to put on evidence to contradict testimony or facts from the State, and this is simply not the case or the law. I think it's prejudicial, and I'd ask the Court to grant a mistrial.
>
> After a prompt from the court, the State responded as follows:
>
> I only heard the first part of the argument which was the uncontradicted portion of it, which I believe is the only word that I'm allowed to use, it is cited in the jury instructions itself. And I was very cautious to only use the word uncontradicted. The defense had the opportunity to contradict the testimony in cross-examination. They are not obligated to put on a defense, I recognize that, but they could have contradicted the evidence *via* cross-examination testimony.

When the State indicated that it did not hear Appellant's "second argument" in support of his Motion for a Mistrial the following colloquy occurred:

THE COURT: I think that was the whole . . .

[APPELLANT'S TRIAL COUNSEL]: *That's the argument.*

(Emphasis supplied).

Patently, Appellant argued in support of his Motion for Mistrial that the prosecutor's remarks during closing argument shifted the burden of proof and improperly required Appellant to put on evidence. The record does not reflect the basis of Appellant's argument on appeal, *i.e.*, that the prosecutor's remarks, during closing argument, referred to a comment upon Appellant's failure to testify. Appellant does not argue, on appeal, that he made this argument in support of his Motion for Mistrial. As the record indicates, Appellant made only one argument in support of his Motion for Mistrial, *i.e.*, burden-shifting. Therefore, Appellant has failed to preserve the claim he now asserts on appeal for our review.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED;
COSTS TO BE PAID BY APPELLANT.