Circuit Court for Wicomico County
Case No. C-22-CR-19-000153

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1305

September Term, 2019

AZIZ NALLA SECK

v.

STATE OF MARYLAND

Kehoe,
Friedman,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: May 11, 2022

In the Circuit Court for Wicomico County, a jury found Aziz Nalla Seck, appellant, guilty of possession with intent to distribute cocaine and possession of cocaine. As to the possession with intent to distribute conviction, the court sentenced appellant to five years of imprisonment, with all but three years suspended and eighteen months of supervised probation. The possession of cocaine conviction was merged for sentencing purposes. Appellant raises two questions for our review:

1. Did the trial court err in denying the motion to strike and motion for mistrial?

2. Did the trial court err in allowing the prosecutor to make improper closing argument?

For the reasons to be discussed, we shall affirm the judgment of the circuit court.

BACKGROUND

In January 2019, Officer Joseph Doyle stopped at a Wawa store in Salisbury to use the restroom. When he walked into the restroom, he noticed two men huddled around a solo urinal. He identified the men as appellant and Randall Allen Boyd. At that time, Boyd began "act[ing] as if he was using the urinal[,]" and appellant "looked at [Officer Doyle] almost like a deer in the headlights[.]" Both appeared nervous upon seeing Officer Doyle.

Because of the way that appellant and Boyd were huddled around a solo urinal, Officer Doyle thought that they were trying to conceal a drug transaction. As a result, Officer Doyle asked them to step away from the urinal. At that time, Officer Doyle observed "wax paper with trace amounts of crack cocaine" inside the urinal. Officer Doyle tried to seize the suspected drugs from the urinal, but the urinal automatically flushed and carried away some of the substance. Officer Doyle seized what remained and searched the

bathroom. Under the trashcan near where appellant had been standing, Officer Doyle found "a plastic bag containing an amount of crack cocaine with a preliminary weight of 1.07 grams." That bag had not been on the floor before Officer Doyle's interaction with Boyd. And Officer Doyle did not observe Boyd toss anything on the floor.

Officer Doyle arrested Boyd and appellant. Officer Doyle searched appellant and found $393.02 and two cell phones on his person. Officer Doyle found nothing on Boyd's person. Officer Doyle's body camera recorded the incident.

Under an agreement with the State, Boyd testified in appellant's case.[1] Boyd testified that he was living in a halfway house in January 2019 after he had finished a drug treatment program for addiction to cocaine and heroin. On the day of the incident, Boyd walked to Wawa to get coffee. Appellant approached Boyd near the Wawa and asked Boyd if he wanted to buy crack. Boyd responded in the affirmative, but he planned to take the drugs from appellant without paying. Appellant and Boyd went into the Wawa bathroom, and appellant dropped a bag of drugs into Boyd's hand. Officer Doyle then walked in the bathroom, and Boyd dropped those drugs into the urinal.

A chemist for the Maryland State Police, Jessica Taylor, provided expert testimony about the substances that Officer Doyle recovered from the Wawa bathroom. One item weighed .067 grams and the other item weighed .365 grams. Taylor testified that both items tested positive for the presence of cocaine.

[1] The State charged Boyd with possession of a controlled dangerous substance: not marijuana. The State offered to place that case on the stet docket if Boyd agreed to testify truthfully in appellant's case.

Michael Daugherty, a special investigator for the Wicomico County State's Attorney's Office, reviewed the case and testified as an expert in "narcotics valuation, identification, investigations, and common practices of users and dealers of controlled dangerous substances[.]" Daugherty stated that Officer Doyle's body camera video showed that a drug distribution had occurred. Daugherty's testimony also referenced the following. Officer Doyle recovered .067 grams of cocaine from the urinal and .365 grams of cocaine from the bathroom floor. Daugherty noted appellant's proximity to the cocaine on the floor. On appellant's person, Officer Doyle recovered two phones and cash in various denominations. Boyd had no money on him. Daugherty testified that the circumstances showed that Boyd possessed cocaine for personal use and appellant was the seller. Additional facts will be discussed below.

DISCUSSION

I. Officer Doyle's Testimony

A. Appellant's Evidentiary Objection

Officer Doyle testified on cross-examination that appellant "normally does not have nice words to [say[2]] towards law enforcement[.]" Defense counsel objected to that testimony and moved to strike and for a mistrial. The trial court denied the motion for mistrial. The full exchange, including defense counsel's objection, is as follows:

> [DEFENSE COUNSEL]: Officer Doyle, you indicated that both of the individuals appeared nervous to you?

[2] The transcript states that Officer Doyle said: "A combination of both. Mr. Seck normally does not have nice words to stay towards law enforcement[.]" Both parties' briefs acknowledge that Officer Doyle said "say" instead of "stay."

[OFFICER DOYLE]: That's correct.

[DEFENSE COUNSEL]: Was that just demeanor, was that words that are being said, what is it that causes you to --

[OFFICER DOYLE]: A combination of both. Mr. Seck normally does not have nice words to [say] towards law enforcement --

[DEFENSE COUNSEL]: I'm going to object, Your Honor, and ask permission to approach.

(Counsel approached the bench and the following occurred. [Appellant] is not present.)

[DEFENSE COUNSEL]: I have to say the words I move to strike and ask for a mistrial, I'm just going to say the words.

THE COURT: All right. Denied.

[DEFENSE COUNSEL]: Thank you, Your Honor.

THE COURT: Hopefully the witness will --

[DEFENSE COUNSEL]: Do you deny the motion to strike as well?

THE COURT: You may move to strike his comment.

Hopefully the witness will not engage in that anymore.

(Counsel returned to trial tables[.])

As discussed later in this opinion, defense counsel did not then move to strike Officer Doyle's statement.

Appellant makes three arguments. First, the testimony was irrelevant under Maryland Rule 5-402. Second, the testimony was far more prejudicial than probative under Rule 5-403. Third, the testimony was inadmissible evidence of other crimes, wrongs, or

acts under Rule 5-404(b). The State responds that "Officer Doyle's comment was not irrelevant, substantially more prejudicial than probative, or propensity evidence and, thus, the trial court did not have to sustain [appellant]'s objection or grant him a remedy."

We address the relevancy of Officer Doyle's testimony first. The determination of relevance is a matter of law that we review de novo. *State v. Simms*, 420 Md. 705, 725 (2011). Rule 5-401 defines "relevant evidence" as evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." As the Court of Appeals stated in *Williams v. State*, "[h]aving 'any tendency' to make 'any fact' more or less probable is a very low bar to meet." 457 Md. 551, 564 (2018). "'The proper inquiry is whether the evidence *could* support an inference that the defendant's conduct demonstrates a consciousness of guilt. If so, the evidence is relevant and generally admissible."' *Simms*, 420 Md. at 727 (quoting *Thomas v. State*, 397 Md. 557, 577 (2007).

Officer Doyle's testimony meets the "very low bar" for relevancy. *See Williams*, 457 Md. at 564. The challenged testimony stemmed from defense counsel's open-ended cross-examination question. On direct examination, Officer Doyle testified that appellant had appeared nervous and "looked at [Officer Doyle] almost like a deer in the headlights" when Officer Doyle entered the Wawa bathroom. During cross-examination, defense counsel asked Officer Doyle why he believed that appellant was nervous when the officer entered the Wawa bathroom. Defense counsel specifically inquired about whether it had been "just demeanor" or "words" that were said that caused the officer's belief. The officer testified that it was a "combination of both" and that appellant "normally does not have

nice words to [say] towards law enforcement[.]" Although defense counsel did not anticipate Officer Doyle's answer, that answer was responsive to defense counsel's question and was clearly relevant to Officer Doyle's explanation for the basis of his observation that appellant appeared nervous.

Next, we examine whether the trial court erred by failing to exclude the testimony under Rule 5-403. Rule 5-403 states, in relevant part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Such determination is left to the sound discretion of the trial judge, and an appellate court will only reverse upon a clear showing of abuse of discretion. *Malik v. State*, 152 Md. App. 305, 324 (2003). Moreover, "a trial court is given significant deference in its determination that probative evidentiary value outweighs any danger of prejudice." *CSX Transp., Inc. v. Pitts*, 203 Md. App. 343, 373 (2012) (quotation marks and citation omitted).

We, however, do not weigh the probative value against prejudice generally. *Newman v. State*, 236 Md. App. 533, 548-49 (2018). Instead, we consider only *unfair* prejudice. *Id*. at 549. That is because '"all competent and trustworthy evidence offered against a defendant is prejudicial."' *Id*. (quoting *Oesby v. State*, 142 Md. App. 144, 165-66 (2002)) (emphasis omitted). In the context of Rule 5-403, unfairly prejudicial evidence "tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission." *Smith v. State*, 218 Md. App. 689, 705 (2014) (quotation marks and citation omitted). This Court has clarified the meaning of "unfair prejudice":

> The "unfair" component of the prejudice is not the tendency of the evidence to prove the identity of the defendant as the perpetrator of the crimes. **What is "unfair" is only the incremental tendency of the evidence to prove that the defendant was a "bad man." As we balance, therefore, the emphasis must be not on the noun "prejudice" but on the qualifying, and limiting, adjective "unfair."**

Oesby, 142 Md. App. at 166 (emphasis added). We also have explained that "[p]robative value is outweighed by the danger of 'unfair' prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case." *Newman*, 236 Md. App. at 550 (quoting Joseph F. Murphy, Jr., *Maryland Evidence Handbook* (3d ed., 1999), § 506(b)) (quotation marks omitted).

Appellant argues that Officer Doyle's testimony led to an "inescapable conclusion" that appellant "is a difficult and incorrigible criminal." We disagree. It is unclear what Officer Doyle may have meant and the basis for his comment. The bottom line is that Officer Doyle did not say nor imply that appellant had ever been arrested, convicted, or even investigated by police before this incident. Rather, Officer Doyle said that appellant "normally does not have nice words to [say] towards law enforcement[.]" Even if that testimony was vaguely prejudicial, we cannot say that it "produce[d] such an emotional response that logic [could not] overcome[.]" *Id.* (quotation marks and citation omitted).

Finally, we address appellant's argument that Officer Doyle's comment was propensity evidence under Rule 5-404(b). *Somers v. State*, 156 Md. App. 279 (2004), is instructive. Somers and Johnson robbed a liquor store in Hancock, Maryland and fled in a pickup truck. *Id*. at 284-85. After the store clerk called the police, an off-duty state trooper learned about the call and the description of the truck. *Id*. at 285. The trooper then spotted

a truck that matched that description with two people inside, and the passenger stared at the trooper. *Id*. at 312-13. At trial, the trooper identified that passenger as Johnson. *Id*. at 313. The State asked the trooper at trial whether he was familiar with Somers. *Id*. The trooper responded as follows: "I've seen him, and I know the name from other cases." *Id*. On appeal, Somers argued that the statement — "I know the name from other cases" — was inadmissible other crimes evidence. *Id*. at 313-14. This Court rejected that argument:

> It was a statement that the trooper previously had heard Somers's name in connection with other cases, which does not necessarily mean cases against Somers; the testimony just as well could mean that Somers was a witness, a victim, or otherwise peripherally involved in other cases, without having been accused or found guilty of any crime.

Id. The issue here is even less problematic: Officer Doyle did not say that appellant was involved in any other court cases or crimes. He merely noted that appellant normally lacked "nice words to [say] towards law enforcement[.]" Such testimony does not suggest that appellant was more likely to engage in criminal behavior. Under the circumstances of the instant case, the law did not require the trial court to sustain appellant's objection to Officer Doyle's testimony.

B. Appellant's Motion for a Mistrial

Even assuming, *arguendo*, that Officer Doyle's statement was improper, we reject appellant's argument that the court erred in refusing to grant a mistrial. We have said that "the granting 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). The decision as to whether to grant a mistrial lies within the sound discretion of the trial court. *Winston v. State*, 235 Md. App. 540, 570, *cert. dismissed*, 461 Md. 509

(2018). "Ordinarily, the exercise of that discretion will not be disturbed upon appeal absent a showing of prejudice to the accused, and in order to warrant a mistrial, the prejudice to the accused must be real and substantial." *Wagner v. State*, 213 Md. App. 419, 462 (2013) (cleaned up).

We recognize that the trial court is in a superior position to assess the effect of any improper testimony. *Howard v. State*, 232 Md. App. 125, 161, *cert. denied*, 453 Md. 366 (2017); *accord State v. Hawkins*, 326 Md. 270, 278 (1992). The Court of Appeals has explained the process for determining whether a mistrial is warranted:

> When a party makes or introduces an improper statement at trial, "[t]he trial judge must assess the prejudicial impact of the inadmissible evidence and assess whether the prejudice can be cured. If not, a mistrial must be granted. If a curative instruction is given, the instruction must be timely, accurate, and effective."

Simmons v. State, 436 Md. 202, 219 (2013) (quoting *Carter v. State*, 366 Md. 574, 589 (2001)). We focus our review on the '"key question[:] . . . whether the defendant was so prejudiced by the improper reference that he was deprived of a fair trial."' *Howard*, 232 Md. App. at 161 (quoting *Parker v. State*, 189 Md. App. 474, 494 (2009)).

To help evaluate whether a defendant was prejudiced and whether a mistrial was warranted, we consider these factors: (1) "whether the reference to the inadmissible evidence was repeated or whether it was a single, isolated statement;" (2) "whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement;" (3) "whether the witness making the reference is the principal witness upon which the entire prosecution depends;" (4) "the timeliness of the curative instruction;" and (5) "whether a great deal of other evidence exists." *McIntyre v. State*, 168 Md. App. 504, 524-25 (2006).

In the instant case, we recognize that Officer Doyle's statement was a single, isolated statement. The statement also was responsive to defense counsel's open-ended cross-examination question. Last, Officer Doyle was not a "principal witness upon which the entire prosecution depend[ed,]" and a "great deal of other evidence" existed to support the convictions. *See id*.

Indeed, the State moved into evidence Officer Doyle's body camera footage that depicted the incident. The camera recording showed that Officer Doyle interrupted a drug transaction in the Wawa bathroom and that appellant was the seller. Boyd testified that he was a recovering addict, that appellant had offered to sell him crack cocaine, and that they entered the Wawa bathroom to engage in a drug transaction. After Officer Doyle had retrieved drugs from the urinal, he found a bag of drugs under a trashcan. That bag was not there when Officer Doyle entered the restroom, and appellant was the only person who could have dropped the drugs there. Officer Doyle found nothing on Boyd, but did find two cell phones and nearly four hundred dollars in cash in various denominations on appellant. Therefore, we conclude that the trial court did not abuse its discretion when it denied appellant's motion for a mistrial.

C. Appellant's Motion to Strike

Appellant also argues that the trial court erred in denying his motion to strike Officer Doyle's statement. When defense counsel first approached the bench, he moved to strike and for a mistrial. The court said: "Denied." Defense counsel then asked whether the court was "deny[ing] the motion to strike as well[,]" and the court responded: "You may move to strike his comment." As a result, the court's ruling related only to appellant's motion

for a mistrial. The court invited defense counsel to move to strike Officer Doyle's statement. Defense counsel did not respond to the invitation and instead chose to return to counsel table and continue his cross-examination.

Perhaps defense counsel made a tactical decision to not further highlight Officer Doyle's testimony for the jury. Whatever the reason, appellant's motion to strike was never properly raised or decided by the court. Appellant's claim that the trial court erred in failing to strike Officer Doyle's statement thus is unpreserved for our review. *See* Md. Rule 8-131(a) ("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[.]"). *See also Chaney v. State*, 397 Md. 460, 468 (2007) (Ordinarily, all challenges should "be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.").[3]

[3] Even if the admission of Officer Doyle's statement was error, we conclude that it was harmless beyond a reasonable doubt. Among the factors that should be considered in the harmless error analysis "are the nature, and the effect, of the purported error upon the jury, the jury's behavior during deliberations, including the length of those deliberations, and the strength of the State's case, from the perspective of the jury." *Rainey v. State*, 246 Md. App. 160, 185, *cert. denied*, 468 Md. 556 (2020) (cleaned up). The jury's behavior during deliberations supports our conclusion. The jury began deliberating at about 2:17 p.m., paused to review the body camera footage, endured a power outage, and still arrived at a unanimous verdict at 3:25 p.m. Also, the State's case was strong. Officer Doyle's body camera footage caught appellant in the middle of a drug transaction. Boyd, the intended buyer, confirmed that he was in the bathroom to obtain drugs from appellant. The circumstantial evidence also showed that appellant was the seller.

II. Appellant's Objections to the Prosecutor's Closing Argument

Appellant next contends that the trial court erred in overruling his objections to the prosecutor's closing argument. During closing argument, the prosecutor stated three times that he believed Boyd had been "brutally honest" when testifying, and defense counsel objected to two of those statements. On appeal, appellant argues that the prosecutor improperly vouched for Boyd's credibility. The State responds that the prosecutor engaged in permissible argument by merely commenting on Boyd's credibility.

The relevant parts of the prosecutor's closing argument are as follows:

> [THE STATE]: Mr. Boyd testified, I think, very truthfully, because I mean, he was brutally honest, and you are the evaluators of what's credible in this case and you saw his demeanor, you saw how he answered questions, I mean, I think at one point he even implicated himself in some wrongdoing in another crime even. And he was just pretty much the most brutally honest person I think I've seen testify in a long time.
>
> [DEFENSE COUNSEL]: I have to object, Your Honor.
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> THE COURT: Overruled.
>
> [THE STATE]: But, again, it's for you to consider and you are the judge, judges of credibility in this case.
>
> * * *
>
> Now, I want to talk a minute about Mr. Boyd. And, again, he was brutally honest in his testimony, I think.
>
> [DEFENSE COUNSEL]: Object.
>
> THE COURT: Overruled.
>
> [THE STATE]: Due to all of the attendant facts. I don't think it's been contradicted that he has a serious drug problem. I think [defense counsel] even questioned him regarding his drug usage.

Parties have great latitude in their presentation of closing arguments. *Ingram v. State*, 427 Md. 717, 727 (2012). Regulation of closing argument is within the sound discretion of the trial court. *Degren v. State*, 352 Md. 400, 431 (1999). The exercise of that discretion should not be disturbed "unless there is a clear abuse of discretion that likely injured a party." *Ingram*, 427 Md. at 726.

Improper vouching occurs when a prosecutor "places the prestige of the government behind a witness through personal assurances of the witness's veracity or suggests that information not presented to the jury supports the witness's testimony." *Spain v. State*, 386 Md. 145, 153 (2005) (cleaned up). But "[t]he rule against vouching does not preclude a prosecutor from addressing the credibility of witnesses in its closing argument." *Sivells v. State*, 196 Md. App. 254, 278 (2010). Indeed, when '"a prosecutor argues that a witness is being truthful based on the testimony given at trial, and does not assure the jury that the credibility of the witness [is] based on his [or her] own personal knowledge, the prosecutor is engaging in proper argument and is not vouching[.]"' *Spain*, 386 Md. at 155 (quoting *United States v. Walker*, 155 F.3d 180, 187 (3rd Cir. 1998)).

Appellant claims that the prosecutor "improperly lent the prestige of his office to vouch for … Boyd in order to bolster its circumstantial case" and invited the jury to draw inferences from information that was not admitted at trial. We disagree.

When the prosecutor first said that he thought Boyd was "brutally honest" in his testimony, the prosecutor reminded the jury that they were "the evaluators of what's credible in this case" and then pointed the jury to Boyd's demeanor while testifying and to his testimony. The prosecutor said: "you saw his demeanor, you saw how he answered

questions, I mean, I think at one point he even implicated himself in some wrongdoing in another crime even." The prosecutor's argument is clearly proper. *See Spain*, 386 Md. at 155.

The prosecutor's second reference to his belief that Boyd was "brutally honest" in his testimony is, at first blush, problematic. Immediately after the above reference to Boyd's demeanor and testimony, the prosecutor said that Boyd was "pretty much the most brutally honest person I think *I've seen testify in a long time.*" (Emphasis added.) The prosecutor's statement suggested his personal knowledge of Boyd's credibility based on information not presented to the jury, namely, the prosecutor's knowledge of the testimony of witnesses in other trials and a comparison of Boyd's testimony with that of those witnesses. When, however, appellant objected and the trial court overruled the objection, the prosecutor immediately told the jury that they were the "judges of credibility in this case." Given the context of the prosecutor's remark – between a reference to Boyd's demeanor and testimony and a reminder to the jury of its role in assessing credibility – we hold that the prosecutor did not cross the line into improper argument.

The prosecutor's final reference to his belief in Boyd's brutal honesty in his testimony generated an immediate objection from appellant. When the trial court overruled the objection, the prosecutor pointed the jury to Boyd's testimony. The prosecutor said: "Due to all of the attendant facts. I don't think it's been contradicted that he has a serious drug problem. I think [defense counsel] even questioned him regarding his drug usage." Because the prosecutor addressed the credibility of Boyd by referring to Boyd's own testimony, the prosecutor engaged in proper argument and was not vouching. *See id.*

In sum, the prosecutor argued that Boyd was "brutally honest" in his testimony based on what the jury could observe at trial: Boyd's testimony and demeanor while testifying. The prosecutor also told the jury two times that they were the judges of the credibility of the witnesses. Accordingly, we conclude that the trial court did not abuse its discretion when it overruled appellant's objections to the prosecutor's closing argument.[4]

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

[4] Even assuming, *arguendo*, that the prosecutor's remarks were improper, those remarks would not amount to reversible error. *See Spain*, 386 Md. at 158 ("Reversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.") (cleaned up). The court instructed the jury that they were the sole judges of whether any witness should be believed, and then the prosecutor twice reminded the jury of that instruction during closing argument. Considering these reminders, the prosecutor's statement that he thought Boyd was "brutally honest" was unlikely to have misled or influenced the jury to the prejudice of appellant.