UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1797

September Term, 2014

JAMIE FAUNTROY

v.

STATE OF MARYLAND

Woodward,
Kehoe,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: August 10, 2015

On July 1, 2013, five men robbed Jose Portillo at gunpoint as he was leaving his place of employment in College Park. The State arrested appellant Jamie Fauntroy for that robbery and brought five counts against him: robbery with a dangerous weapon, robbery, first-degree assault, use of a handgun in the commission of a crime of violence, and conspiracy to commit armed robbery.

On August 7, 2014, in the Circuit Court for Prince George's County, a jury found Fauntroy guilty of all of the charges. The jury also found Fauntroy guilty of the lesser-included offenses of second-degree assault and theft.

For robbery with a dangerous weapon, the court imposed a sentence of 20 years, with ten years suspended and five years of subsequent supervised probation. For the use of a handgun in the commission of a crime of violence, the court imposed a sentence of 20 years, with all but five suspended, to be served consecutively to the first conviction. For the conspiracy to commit robbery, the court sentenced Fauntroy to 20 years, with all but five years suspended, to be served consecutively to the handgun count. The court merged the remaining convictions for sentencing purposes.

Fauntroy took a timely appeal.

QUESTIONS PRESENTED

On review, Fauntroy poses the following question:

> Did the court abuse its discretion in allowing repeated inappropriate statements by the prosecutor in closing argument and rebuttal closing argument that deprived appellant of a fair trial?

Because we see no prejudicial error, we shall affirm.

FACTUAL AND PROCEDURAL HISTORY

Jose Portillo testified that on July 1, 2013, he was walking home from his workplace in College Park. Five men, who were in possession of a gun, accosted him. They led him behind a building, where they assaulted him and took his cellular phone and $350. He went to a hospital, where he gave a statement to the police. Portillo later identified Fauntroy from a photographic array as the person who hit him with a gun and took his money.

Detective Tariq Hall of the Prince George's County Police Department testified that he communicated with Portillo's cellular phone company once Portillo told the detective his phone number. The company directed the detective to the apartment of Tanisha Williams in Temple Hills. On July 2, 2013, Williams consented to a search of her apartment, where Detective Hall found Fauntroy hiding under a bed. In a trashcan in the apartment, the detective also found a white Samsung cellular phone that contained the SIM card from Portillo's phone.[1] Portillo had testified that the police showed him a phone that was not his, but that it contained text messages from his girlfriend.

[1] "A Subscriber Identity Module (SIM) card is a portable memory chip used mostly in cell phones that operate on the Global System for Mobile Communications ("GSM") network. These cards hold the personal information of the account holder, including his or her phone number, address book, text messages, and other data. When a user wants to change phones, he or she usually can easily remove the card from one handset and insert it into another. SIM cards are convenient and popular with many users, and are a key part of developing cell phone technology." http://www.wisegeek.com/what-is-a-sim-card.htm (last viewed Aug. 3, 2015).

Tanisha Williams testified that Fauntroy had been staying with her in her apartment in Temple Hills for three to five months. She had purchased the white Samsung phone for him on July 1, 2013, but the phone did not function because it did not have a SIM card. She also testified that Fauntroy hid under the bed while the police searched her apartment. On cross examination, Williams testified that Fauntroy possessed an iPhone. Portillo's SIM card, however, did not fit into the iPhone.

Detective Jordan Sponger testified as an expert in cellular telephone technology. He explained that the SIM card is the "brain" in a cellular phone. The SIM card can be removed from one phone and inserted into another. When law enforcement officials track a cell phone, they are actually tracking a SIM card that has been inserted into a cell phone.

Detective Sponger testified that he examined the SIM card that the police had recovered from Williams's apartment. Using Cellebrite, a data-extraction technology for mobile and cellular phones, the detective extracted two text messages in Spanish from the SIM card. The detective also testified that the SIM card would fit into the Samsung phone that Williams had bought for Fauntroy, but would not fit into an iPhone.

After the police found Fauntroy hiding under the bed in Williams's apartment, they arrested him, and Fauntroy waived his rights and gave a statement. Among other things, he claimed to have bought the SIM card from an unidentified "black dude," to whom he referred only as "he" or "him."

During the State's closing argument, the following exchanges occurred:

[PROSECUTOR]: . . . Mr. Portillo, anybody notice the way Mr. Portillo testified? Stiff. He never looked over there. He is scared out of his mind. This happened to him walking home.

[DEFENSE]: Objection.

THE COURT: Counsel are free to comment on the facts. My instructions on the law will be what is binding upon you.

* * * *

[PROSECUTOR]: . . . Ms. Williams' testimony. Ms. Williams was also interesting to watch. She also is afraid of the defendant. Remember I asked her to point to him.

[DEFENSE]: Objection.

THE COURT: She is free to comment on the facts as she recollects them. Your recollection of the facts will be what governs here.

[PROSECUTOR]: Thank you. She sat like this on the stand. I said do you see him in the courtroom today? She nodded. Ms. Williams, you have to point to him. Do you remember that? You have to point to him. She did one of these, (indicating.) She is uncomfortable. She knew what happened that day.

[DEFENSE]: Objection.

[PROSECUTOR]: She told you the truth.

THE COURT: Overruled.

[PROSECUTOR]: She told you the defendant had been living with her for about three to five months. The white Samsung phone was hers. . . .

(T2. 40-41, 42-43).

Later, during the prosecutor's rebuttal closing argument, the following exchange occurred:

[PROSECUTOR]: Let's look at the description the defendant gives of the person who he bought the SIM card from. The dude at the carryout.

He is in there for so long he can't even tell the officers what the guy looks like.

[DEFENSE]: Objection.

THE COURT: Your recollection of the facts as I said will govern, not the lawyers['].

[DEFENSE]: May we approach?

[At the bench.]

[DEFENSE]: The problem I have is it is actually on the video, there is a description.

[PROSECUTOR]: It wasn't published.

[DEFENSE]: It is still in evidence.

THE COURT: You are saying what he says is not on the video?

[DEFENSE]: He did give a description.

[PROSECUTOR]: I never heard a description. I watched it three times.

[DEFENSE]: It is like a dude with dreads.

THE COURT: Do you want me to send them out and you can play it and if it is then I will strike what she just said?

[DEFENSE]: All right.

(T2. 51-52).

The court then dismissed the jury. However, defense counsel was unable to find the portion of the video wherein Fauntroy described the man from whom he claimed to have bought the SIM card:

[DEFENSE]: Judge, I can't find it. That is my recollection. I think it is also improper argument because this is rebuttal and I don't think it is proper to be raised in rebuttal.

THE COURT: Bring the jury back, please.

[DEFENSE]: It is also improper because the police never asked him that specific question.

[Jury present.]

THE COURT: You can take your seats again, please. We will pick up where we left off. Your recollection of the facts is what will be given in the case, and my instructions of the law. Madam State's Attorney, pick up where you left off.

The State then continued its rebuttal:

[PROSECUTOR]: Oldest excuse in the book, I bought it from somebody on the street. Bought it from some dude on the carryout. Speaking of descriptions, did you hear the defendant give a description of the guy? The dude at the carryout. If I were accused of robbery and stealing from somebody ---

[DEFENSE]: Objection.

THE COURT: Say it again.

[PROSECUTOR]: If I were accused of robbing and taking someone else's stuff and I bought it on the street, what's the normal reaction for a person to say?

[DEFENSE]: Objection.

[PROSECUTOR]: This is the person I bought it from.

THE COURT: You are free to comment on the fact[s]. Don't speculate.

[PROSECUTOR]: This is where I bought it. This is what the person looks look [sic] like. I will take you there. This is an innocent mistake, I bought it on the street . . . .

(T2. 53-54)

Thereafter, the jury found Fauntroy guilty on all counts against him.

STANDARD OF REVIEW

"A trial court is in the best position to evaluate the propriety of a closing argument." *Ingram v. State*, 427 Md. 717, 726 (2012) (citing *Mitchell v. State*, 408 Md. 368, 380-81 (2009)). Therefore, we shall not disturb the ruling at trial "unless there has been an abuse of discretion likely to have injured the complaining party." *Grandison v. State*, 341 Md. 175, 243 (1995) (citing *Henry v. State*, 342 Md. 204, 231 (1991), *cert. denied*, 503 U.S. 192 (1992)). Trial courts have broad discretion in determining the propriety of closing arguments. *See State v. Shelton*, 207 Md. App. 363, 386 (2012).

Counsel is generally given "wide range" in closing argument. *Wilhelm v. State*, 272 Md. 404, 412 (1974). Both the defense and prosecution are free to "state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence." *Id.* Even when a prosecutor's remark is improper, it will typically merit reversal only "'where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to prejudice the accused.'" *Lawson v. State*, 389 Md. 570, 592 (2005) (quoting *Spain v. State*, 386 Md. 145, 158-59 (2005)).

DISCUSSION

I. The Trial Court Did Not Err or Abuse Its Discretion in Allowing the Prosecutor's Statements that the State's Witnesses Appeared to Be Afraid

Fauntroy argues that the court erred in allowing the prosecutor's remarks that Portillo and Williams were afraid of Fauntroy. He cites the prosecutor's statement that that Portillo looked "[s]tiff," that Portillo was "scared out of his mind" during the

examination, and that the assault happened on Portillo's way home. Fauntroy also cites the prosecutor's assertion that Williams was "afraid" of Fauntroy and "uncomfortable" in pointing him out during her testimony. He argues that the prosecutor implied that Fauntroy had threatened the witnesses, an allegation for which the State adduced no evidence. We reject his argument, because the remarks concerned the demeanor of the witnesses while testifying, a proper subject of closing argument. *Bryant v. State*, 129 Md. App. 150, 156 (1999).

During closing argument, counsel may refer only to facts in evidence, except when such facts are common knowledge or those of which the court may take judicial notice. *See Wilhelm*, 272 Md. at 438. Nonetheless, an "[a]rgument that asks the jury to consider the demeanor of a witness when testifying is proper." *Bryant*, 129 Md. App. at 156. Such considerations are "consistent with the jury instruction given in this case to consider 'the witness's behavior on the stand and way of testifying; did the witness appear to be telling the truth.'" *Id.* In this case, the court instructed the jury to "consider such factors as, one, the witness's behavior on the stand and manner of testifying" and "[t]wo" whether "the witness appear[ed] to be telling the truth[.]"

The prosecutor's comments never strayed from the evidence presented to the jury. Counsel is free to "state and discuss . . . all reasonable and legitimate inferences which may be drawn from the facts in evidence." *Wilhelm*, 272 Md. at 412. This includes the witnesses' behavior on the stand, as well the fact that Portillo was attacked on his way home. Because the trial court was in the best position to judge the propriety of these

comments, *see Ingram*, 427 Md. at 726 (citing *Mitchell*, 408 Md. at 380-381), we defer to its decision.

II. The Prosecutor Did Not Improperly Comment on Fauntroy's Election Not to Testify, Nor Did She Shift the Burden of Proof to Fauntroy

In the recorded statement that he gave to the police, according to the prosecutor, Fauntroy claimed to have bought Portillo's SIM card from a "black dude" at a "carryout," but was unable to give any detailed description of him.[2] His attorney insisted that Fauntroy had given the police a description, but could not find one when the court replayed the recorded statement for him. Against this backdrop, the prosecutor stated, in rebuttal closing, that Fauntroy could not "tell the officers what the guy looks like."

Fauntroy argues that the court erred in overruling his objection to that statement, because, he says, it was an improper comment on his failure to testify, and because it shifted the State's burden of proof to him. We reject both of his arguments.

[2] The DVD of the interview, while frequently inaudible, contains the following passage, wherein Fauntroy describes his purchase of the cell phone containing Portillo's SIM card:

> Q: Around 2:00 you went to the carry-out. Alright, what happened out there?
>
> A: I just bought the phone from [inaudible] this black dude. It had a cracked screen [inaudible].
>
> Q: I don't know what the phone looked like, but ---
>
> A: It had a cracked screen. It was a HTC, and it had a cracked screen, it had like a dent on it. And then he was like, uh . . . he give it to me for 15 . . . [inaudible] . . . so I said alright, gimme that. I already knew she had a T-Mobile phone, she's got T-Mobile, I was gonna put the SIM card in her phone. That's what I did, put the SIM card in her phone, but I ain't never used it yet . . . [inaudible]. . . .

A prosecutor may violate a defendant's Fifth Amendment right to protection from adverse comment on the decision not to testify at trial by making a remark from which the jurors may infer that they are to consider the defendant's silence as an indication of guilt. *Smith v State*, 367 Md. 348, 354 (2001) ("*Smith II*") (quoting *Smith v. State*, 169 Md. 474, 476 (1936)). For example, in *Simpson v. State*, 442 Md. 446 (2015), the Court of Appeals held that a prosecutor impermissibly commented on the defendant's right not to testify by repeatedly referring, in opening statements, to what "the defendant will tell you." *Id.* at 460-61. Even though the prosecutor may have intended to refer only to what the defendant had said in his confession, the circuit court erred in allowing the comment because the jury could have interpreted her statements to mean that the defendant had an obligation to testify. *Id.*

Similarly, in *Smith II*, 367 Md. at 358, the Court of Appeals held that a prosecutor impermissibly commented on the defendant's exercise of his Fifth Amendment right not to testify when he posed the rhetorical question, "[W]hat explanation has been given to us *by the Defendant*[?]," and then answered his own question by saying "zero, none." By suggesting that the defendant had some obligation to testify, the prosecutor impermissibly shifted the burden of proof to the defense. *Id.* at 359.

This case differs markedly from cases like *Simpson* or *Smith II*. Here, when the prosecutor argued that Fauntroy could not "tell *the officers* what the guy looks like," she was plainly referring to the recorded statement that Fauntroy had given to "the officers," and not to Fauntroy's failure to testify. The prosecutor's unambiguous point was that Fauntroy's statement to "the officers" was unworthy of credence because of its utter lack

of detail. Even Fauntroy's lawyer understood the prosecutor to be referring only to Fauntroy's recorded statement to "the officers," because he asked to have the recording replayed in a vain effort to establish that his client had given some additional detail.

In these circumstances, the jurors could not have interpreted the prosecutor's remark to mean that Fauntroy had an obligation to testify or to mean that they could find him guilty because he failed to testify. Therefore, we find no error or abuse of discretion in the decision overruling the objection to that remark. *See Ingram*, 472 Md. at 726.

III. The Prosecutor Did Not Improperly "Personalize" the Case By Stating What She Would Have Done if She Were Accused of Robbery

In rebuttal argument, the prosecutor commented about what she would have done had she been accused of robbery and of stealing something that she had actually bought on the street. Citing the "normal reaction for a person," the prosecutor asserted that she would have given the police a description of the seller, told them where she bought the item, and offered to take them there. Fauntroy argues that these comments improperly "personalized" his case. [3]

Fauntroy relies primarily on *Leach v. Metzger*, 241 Md. 533 (1966), a civil case concerning the impropriety of the so-called "Golden Rule" argument. In such an argument, counsel asks the juror to "deal with counsel's clients as they would wish to be dealt with." *Id.* at 536; *see also Lawson*, 389 Md. at 594-95 (holding that prosecutor

[3] Fauntroy also asserts that the prosecutor improperly referred to matters outside of evidence. However, he failed to argue this point with the particularity required by Maryland Rule 8-504.

made improper personalizing comments by asking jury to "put [themselves] in the shoes" of relative of child claiming to have been sexually molested).

These cases are inapposite. While it would have been preferable for the prosecutor not to employ the first-person singular, she did not "invite jurors to disregard their oaths and to become non-objective," *Leach*, 241 Md. at 536, as the plaintiff's attorney did in *Leach*. Nor did she ask the jurors to put themselves in the position of the victim or the victim's family, as the prosecutor improperly did in *Lawson*. To the contrary, she merely asked the jury to evaluate Fauntroy's implausible explanation in light of a common sense estimation of (in her words) the "normal reaction for a person" who had been accused of stealing something that he or she had actually bought. In talking about what she would have done in those circumstances, the prosecutor was clearly referring to what a reasonable (or "normal") person would have done if the police had accused her of stealing a SIM card that she had purchased second-hand.

In essence, the prosecutor argued that if Fauntroy truly was the innocent, bona fide purchaser that he claimed to be, he would have explained where he bought the SIM card and what the seller looked like. He would have been able to say something more than that he bought the SIM card from a "black dude" in a "carryout" – an explanation that even his lawyer seemed to regard as inadequate, because it prompted the unsuccessful search for the additional detail that Fauntroy had failed to give. The court thus did not

abuse its discretion in overruling defense counsel's objection to the prosecutor's remark about what she would have done had she been wrongly accused in those circumstances.[4]

IV. Although the Prosecutor Improperly "Vouched" for a Witness, any Error, if Preserved, Was Harmless

Counsel may not "vouch" for witnesses, assuring the jury of the witness's credibility. *See, e.g.*, *Spain*, 386 Md. at 156-58; *see also Donaldson v. State*, 416 Md. 467, 489-94; *Walker v. State*, 373 Md. 360, 397-98 (2003); *Sivells v. State*, 196 Md. App. 254, 277-80 (2010). Fauntroy argues that the court erred in allowing the prosecutor to "vouch" for the State's witness (Williams) during rebuttal, when she told that Williams "told [them] the truth."

The State responds that Fauntroy failed to preserve the issue for review. In fact, Fauntroy made his objection before (albeit just before) the prosecutor said that Williams "told [them] the truth." Fauntroy's objection related to the prosecutor's comments on Williams's demeanor, which we have already held to have been proper. Nonetheless, after Fauntroy made his objection, but before the trial judge had an opportunity to rule,

[4] Fauntroy asserts that, in referring to what she would have done had she been accused of possessing stolen property, the prosecutor also commented improperly on Fauntroy's decision not to testify and shifted the burden of proof to defense. For the reasons stated in section II, above, we disagree. Simply put, the prosecutor was not commenting on Fauntroy's failure to offer an explanation at trial, but on the implausibility of the explanation that he voluntarily gave to the police before trial.

the prosecutor continued to speak. In the interval between the objection and the ruling, the prosecutor made the comment in which she allegedly vouched for Williams.[5]

Ordinarily, an objection cannot relate forward to comments that occur after the objection itself. On the other hand, the comments in this case occurred almost simultaneously with the objection. In addition, they preceded the court's actually ruling on the objection, and the court may have considered them when it made its ruling. Although it would certainly have been the better practice for Fauntroy to assert a second

[5] For ease of reference, we have reproduced the relevant exchange below:

[PROSECUTOR]:	. . . Ms. Williams' testimony. Ms. Williams was also interesting to watch. She also is afraid of the defendant. Remember I asked her to point to him.
[DEFENSE]:	Objection.
THE COURT:	She is free to comment on the facts as she recollects them. Your recollection of the facts will be what governs here.
[PROSECUTOR]:	Thank you. She sat like this on the stand. I said do you see him in the courtroom today? She nodded. Ms. Williams, you have to point to him. Do you remember that? You have to point to him. She did one of these, (indicating.) She is uncomfortable. She knew what happened that day.
[DEFENSE]:	Objection.
[PROSECUTOR]:	She told you the truth.
THE COURT:	Overruled.
[PROSECUTOR]:	She told you the defendant had been living with her for about three to five months. The white Samsung phone was hers. . . .

objection after the prosecutor had finished speaking, we shall proceed, in the unusual circumstances of this case, as though Fauntroy did enough to preserve his objection.

Even so, "isolated" remarks during closing argument that "did not pervade the whole trial" have not warranted reversal. *Spain*, 386 Md. at 159; *see also Wilhelm*, 272 Md. at 425-26. The prosecutor made only one brief remark in vouching for Williams.

In determining whether a court has committed reversible error during closing argument, we consider three factors: "the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Spain*, 386 Md. at 159. Stated differently, we take into account "'1) the closeness of the case, 2) the centrality of the issue affected by the error, and 3) the steps taken to mitigate the effects of the error.'" *Henry*, 324 Md. at 232 (quoting *Collins v. State, 318 Md. 269, 280, cert. denied*, 497 U.S. 1032 (1990)). The improper remarks are considered cumulatively to determine prejudice. *Lawson*, 389 Md. at 600.

Looking first at the weight of the evidence, it is readily apparent that this was not a close case. The victim, Portillo, identified Fauntroy as his assailant. The police traced Portillo's SIM card to Williams's apartment where Fauntroy had been staying. When the police searched the apartment, they found the SIM card in the white Samsung phone that Williams had purchased for Fauntroy (though when she purchased it, it had no SIM card). The police also found Fauntroy hiding from them under a bed, in what the jury could find was clear evidence of consciousness of guilt. Finally, Fauntroy gave the police an implausibly vague account of how he came into possession of the card. In view of this

evidence, it is unimaginable that the prosecutor's isolated remark could have affected the outcome of the case.

Nor was the remark particularly severe. It did not alter the burden of proof, invoke the golden rule and invite the jurors to abandon their objectivity, characterize the defendant as sub-human, or warn the jurors that they must find the defendant guilty in order to protect future victims. *See Lawson*, 389 Md. at 593-94. Here, we have but a single, isolated remark, in which the prosecutor curtailed her comments by asserting that Williams "told you the truth" rather than arguing that "*you should find* that Williams told you the truth." In the context of this case, the omission of those several words does not require reversal. *See Walker v. State*, 121 Md. App. 364, 376-77, *cert. denied*, 351 Md. 5 (1998), *cert. denied*, 525 U.S. 1071 (1999).

Lastly, the court took proper measures to limit the consequences of any error. The court repeatedly cautioned the jury that counsel could comment on the facts, but that the court's instructions would be binding on them. Both before and after closing argument, the court gave the jury the pattern jury instruction that counsel's statements are not evidence. In addition, the court gave the jurors a copy of the instructions for their review during deliberations.

In summary, even assuming that Fauntroy adequately preserved an objection to the prosecutor's assertion that Williams "told you the truth," we would not find reversible error. The isolated remark was not particularly severe, the court's instructions operated as an antidote, and the evidence against Fauntroy was compelling.

CONCLUSION

For the foregoing reasons, we hold that the trial court has committed no error or abuse of discretion, and we affirm the trial court's judgments.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.