UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2710

September Term, 2014

MARCUS LILLY

v.

STATE OF MARYLAND

Krauser, C.J.,
Arthur,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: May 10, 2016

On October 5, 2005, a jury in the Circuit Court for Baltimore City convicted appellant Marcus James Lilly of first-degree assault, use of a handgun in the commission of a crime of violence, and possession of a regulated firearm. The circuit court imposed concurrent sentences totaling twenty-five years of imprisonment, the first five to be served without the possibility of parole. For reasons that are unclear from the record, Lilly appears not to have taken a direct appeal.

On September 4, 2014, Lilly filed a petition for post-conviction relief. With the State's consent, the circuit court entered an order permitting a belated appeal on October 21, 2014. Lilly filed this appeal on November 7, 2014.

ISSUES PRESENTED

Lilly presents three issues, which we have rephrased for clarity and concision:

I. Did the trial court abuse its discretion by refusing to grant Lilly's two motions for a mistrial?

II. Did the trial court commit plain error, and undermine the presumption of innocence and the State's burden of proof, by giving an erroneous introductory instruction at the outset of the case?

III. Was the evidence at trial insufficient to sustain convictions for use of a handgun in the commission of a crime of violence and possession of a regulated firearm?[1]

[1] Lilly originally phrased the questions in the following manner:

I. Did the trial court abuse its discretion by refusing to grant Appellant's two motions for a mistrial?

II. Did the trial court commit plain error by giving the jury a "binding" definition of proof beyond a reasonable doubt, using trivial examples that blur the concept of reasonable doubt and undermine both the State's burden of proof and the presumption of innocence?

(continued…)

For the reasons set forth below, we answer each question in the negative and shall affirm the trial court's judgments.

FACTUAL AND PROCEDURAL BACKGROUND

Lilly's trial concerned an assault that occurred in Baltimore in the early hours of September 3, 2004. LaTonya Kimber, who was 17 at the time, testified that at around 1:30 a.m. that morning she was in the backyard of her home on East Lanvale Street, conversing with her next-door neighbor, who went by the name of "Bull." Kimber heard something, and upon leaning over her side fence she saw a man in the adjoining alleyway, urinating on the side of her house. She asked him to stop, but "he said [she] couldn't tell him what to do."

The two began to argue, and the man approached Kimber from the alley. At this point Kimber recognized him as Lilly, also known as "Killer," a man she knew from the neighborhood. Lilly entered her backyard without Kimber's consent and produced what she described as "a small black handgun[,]" which looked like guns she had seen in the past. Lilly asked her if she knew "what [his] name is" and told her to "watch how [she] talk[s] to him."

Kimber read the written statement from the back of the police photo array from which she had first identified Lilly: "He pulled a gun out. At the same time he said I will

III. Was the evidence sufficient to sustain convictions for use of a handgun in the commission of a crime of violence and possession of a regulated firearm?

kill you." She continued: "[T]hat's all I remember. He left out and I was scared, I called the police."

Baltimore City Police Detectives Robert Cortina and Sandra Forsythe, the two lead investigators assigned to the case, testified at trial. Det. Cortina stated that Det. Forsythe drove Kimber to the police station, after which Kimber identified Lilly from a photo array and recounted her story in a recorded statement. Det. Cortina said that he applied for and was provided with a warrant for Lilly's arrest.

Det. Forsythe, as one part of her testimony, stated that upon his arrest Lilly gave a statement in which he alleged that Kimber had been shouting at him, that he entered her yard and apologized, and that when Kimber continued to berate him he poked her in the chest with his finger. According to Det. Forsythe, Lilly said that the next-door neighbor, Bull, witnessed the incident and, in support of Lilly, told Kimber to "just chill."

We shall recount additional facts as they become pertinent to the issues on appeal.

DISCUSSION

I. Motions for Mistrial

Lilly challenges the trial court's denial of his two motions for a mistrial. In the first motion, Lilly complained that, in the face of several objections sustained by the court, the State persisted in questioning the victim, Kimber, about whether and why she was fearful of testifying. In the second, Lilly complained that, in violation of a pretrial order, a detective obliquely referred to another investigation involving Lilly. We affirm the exercise of discretion in both instances.

A. Legal Standards

"A mistrial is no ordinary remedy[.]" *Cooley v. State*, 385 Md. 165, 173 (2005). Rather, it is "'an extraordinary act which should only be granted if necessary to serve the ends of justice.'" *Id.* (quoting *Jones v. State*, 310 Md. 569, 587 (1987), *vacated on other grounds*, 486 U.S. 1050 (1988)); *accord Rutherford v. State*, 160 Md. App. 311, 323 (2004) (stating that mistrial is "an extreme sanction that courts generally resort to only when no other remedy will suffice to cure the prejudice" to the defendant) (internal quotation marks and citations omitted). Put another way, "[t]he determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he [or she] was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 595 (1989)).

"'[A] request for a mistrial in a criminal case is addressed to the sound discretion of the trial court.'" *Cooley*, 385 Md. at 173 (quoting *Wilhelm v. State*, 272 Md. 404, 429 (1974)). "[T]he trial court is peculiarly in a superior position to judge the effect of any of the alleged improper remarks." *Wilhelm*, 272 Md. at 429.

> "The judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able . . . to note the reaction of the jurors and counsel to inadmissible matters. That is to say, the judge has his finger on the pulse of the trial."

Simmons v. State, 436 Md. 202, 212 (2013) (quoting *State v. Hawkins*, 326 Md. 270, 278 (1992)).

An appellate court will not reverse a denial of a mistrial motion absent clear abuse of discretion, *see Browne v. State*, 215 Md. App. 51, 57 (2013), and certainly will not

reverse simply because it might have ruled differently. *Nash v. State*, 439 Md. 53, 67 (2014) (citations omitted). A trial court abuses its discretion when its ruling:

> "is 'clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result,' when the ruling is 'violative of fact and logic,' or when it constitutes an 'untenable judicial act that defies reason and works an injustice.' . . . The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable."

King v. State, 407 Md. 682, 697 (2009) (quoting *North v. North*, 102 Md. App. 1, 13-14 (1994) (internal citations omitted)).

In light of these standards, we now address Lilly's two challenges.

B. The First Motion

During the direct examination of Kimber, the victim in the case, the prosecutor began a line of inquiry aimed at eliciting whether anyone had pressured Kimber into not testifying at trial. The prosecutor asked whether she was afraid to be in court, to which Kimber replied "yes." When Kimber was asked to explain why she was afraid, defense counsel objected. The trial court sustained the objection and, at the defense's request, announced that the question "will be stricken."

The prosecutor, however, continued with the line of inquiry:

THE STATE: Are you under any pressure at this time?

KIMBER: Yes.

[DEFENSE]: Objection.

THE COURT: Okay, she said yes, go ahead. Go ahead.

THE STATE: Where would that pressure be coming from? What would that pressure be related to?

KIMBER: Um, it's a few people who have been coming to me —

[DEFENSE]: Object, Your Honor, we need to approach.

THE COURT: No, you don't have to. It will be stricken, ask another question.

THE STATE: Has anyone tried to stop you from coming here today?

[DEFENSE]: Objection.

THE COURT: Sustained.

THE STATE: Can we approach, Your Honor?

THE COURT: Only if you can establish a nexus between this man and anything you'd like [Kimber] to testify to.

[Counsel approached the bench.]

THE STATE: At this point she's very apprehensive. I think she should be able to explain to the Court why.

THE COURT: I think what you think don't matter . . . .

[DEFENSE]: Your Honor, I also need to make a record. I'll make a motion for a mistrial at this time (inaudible).

THE COURT: Well, you could ask for it. You're being detained now because he didn't want to —

[DEFENSE] (inaudible) . . . constantly asking those types of questions (inaudible) continue on that path. I think it taints the jury's mind.

THE COURT: Okay, I don't think any harm has been done. I struck what you asked me to strike.

From this exchange, and from the State's further attempts to push this line of questioning,[2] Lilly argues that a mistrial was warranted and that the trial court abused its discretion in refusing to grant one. We disagree.

The prosecutor breached the limits of legitimate inquiry even after the trial court repeatedly admonished him to discontinue. However, the court sufficiently mitigated any prejudice from these improper questions by sustaining all but one of Lilly's objections and by striking two of the questions. The efficacy of the court's actions was bolstered by the court's pre- and post-trial instructions to the jury: "If I sustain an objection, the witness can't answer . . . . If a statement is made and I strike it, you must disregard that statement as if it was never said, as if the words were not spoken." In short, because the court promptly and properly sustained Lilly's objections, struck the objectionable responses, and instructed the jury not to consider those responses, the prosecutor's conduct did not warrant the "extreme sanction" of mistrial, to which courts resort "only when no other remedy will suffice to cure the prejudice." *Rutherford*, 160 Md. App. at 323 (quotation marks omitted).

In arguing for a contrary conclusion, Lilly cites *Contee v. State*, 223 Md. 575 (1960), for the proposition that the circuit court had an affirmative obligation to issue a curative instruction or to admonish the State for its conduct and, failing that, to grant a mistrial. *Contee* is inapposite.

[2] The prosecutor later asked, "Why didn't you show up to testify," and "Was there any pressure on you not to report this crime?" In each instance Lilly objected and the trial court sustained the objection before the witness answered.

Contee is a 1960 case in which the State charged an African-American man with raping a white woman. At trial the prosecutor questioned Contee as to whether he had had sexual intercourse with other "white girls." *Id.* at 582. The trial court sustained an objection, but denied a motion for mistrial and "failed to caution the State's Attorney to desist from further questioning along that line or to admonish the jury to disregard the reference to racial matters." *Id.* at 583. Later, when the prosecutor "unnecessarily and pointedly referred to the prosecutrix as a 'white girl,'" the court denied another motion for mistrial and failed to reprimand the prosecutor or to advise the jury to disregard the comment. *Id.* "Apparently encouraged by the rulings of the court," the prosecutor went on repeatedly to refer to "'white women'" or "'white girl[s],'" and the defendant, recognizing the futility of his position, failed to object or move again for a mistrial. *Id.*

Because the Court of Appeals had already determined to reverse the conviction on account of the trial court's failure to ask voir dire questions concerning racial bias (*Id.* at 581), the Court found it unnecessary to decide whether the court ought to have granted a mistrial. *Id*. at 584. Hence, *Contee* would appear to have little of substance to say about the propriety of the decision not to grant a mistrial in Lilly's case, or in any other case.

Nonetheless, Lilly highlights the Court's additional comment that, "while the granting or refusal of a mistrial is a matter lying within the sound discretion of the trial court, the court, nevertheless, in addition to sustaining an objection to an improper remark or misconduct, is also entrusted with a further responsibility to caution or reprimand the State's Attorney as the exigencies of the situation may require and to forthwith instruct the jury to disregard the unwarranted remarks and conduct of the

prosecuting attorney." *Id.* Lilly seems to argue that, because the court did not take it upon itself to issue a curative instruction or to admonish the State's attorney, it abused its discretion in denying the motion for a mistrial.

The short answer to Lilly's contention is that *Contee* does not establish a general rule requiring a trial court, on its own motion, and without any request from the defense, to give a curative instruction or to reprimand a prosecutor whenever the court denies a colorable motion for a mistrial based on improper questioning by the State. *Contee* concerns inflammatory racial remarks in a racially-charged prosecution at a time of heightened racial tensions. The prosecutor's questions in this case bear no resemblance to the prosecutor's repeated efforts to stoke racial prejudice against the defendant in *Contee*. In the circumstances of this case, therefore, the trial court had no obligation, on its own motion, to fashion a curative instruction or to chastise the State's Attorney.

C. The Second Motion

Before jury selection, Lilly moved *in limine* to prohibit the State from mentioning a separate case against him. Lilly's counsel expressed particular concern that testifying witnesses might mention a recorded statement in which Lilly, speaking to a police officer, had admitted to second-degree assault. The trial court granted the motion and instructed the State to inform its witnesses that they were not to mention any other alleged crimes or arrests for alleged crimes.

Later during trial, Det. Forsythe, when asked why she ran "any nickname checks" of "Killer," stated: "That was dealing with another investigation." A few questions later, she responded affirmatively when asked whether "Killer" was "[t]he person [she] got the

information from on the other case." Minutes later, when asked a similar question, Det. Forsythe explained that she pulled up nickname information from a file that "was in reference to another investigation." Lilly did not object to any of these statements.

Later, after being asked what occurred after she finished interviewing Lilly in connection with this case, Det. Forsythe replied that Lilly "was taped for another incident." At this time defense counsel asked to approach the bench. After excusing the jury, the court asked the State why it "shouldn't grant a mistrial?" The following colloquy occurred:

> THE COURT: That's the second time[3] there was reference to another incident. I don't know if you [counsel] caught it but I did.
>
> [DEFENSE]: I did but —
>
> THE COURT: I may look like I'm not paying attention but I know what everybody in this courtroom is doing and I hear every word that's testified to.
>
> . . . .
>
> [THE STATE]: The reason why I don't think this [*sic*] enough for a mistrial, Your Honor, is because she doesn't talk about in what regard he gave the statement, as a witness, a defendant, it's not —
>
> THE COURT: Oh, that's a good point.
>
> [THE STATE]: Your Honor, it was a minor slip on the detective's part.
>
> THE COURT: I don't think anybody heard it.
>
> [DEFENSE]: Well, Your Honor, unfortunately there's no way for us to know. My problem is this. As Your Honor said the first one I let go because it was quick, I think it was cured. I

[3] Actually, it was the fourth, though only the first to which Lilly objected.

> wasn't as concerned as the first one. . . . I made a motion in limine specifically on this point because I knew this was going to happen. . . . It happened throughout the motion and it happened once in the trial, I let that one go. This is the second time. The separate incident was not even to be mentioned.
>
> . . . .
>
> [THE STATE]: With regard to the motion for a mistrial, Your Honor, the State would argue that (1) they have no idea what this other statement was about; (2) they don't know if he was the subject of that interview, that statement, or how involved he was, the detective didn't even connect that statement with anything else. There's nothing about that statement. They don't even know if he was charged in that case. They know nothing about another statement that he may have given. There's no indication to suggest that it would be prejudicial —

After hearing further argument, the trial court brought the jury back into the courtroom and asked, "[D]id anyone among you hear testimony at any time today concerning a statement related [to] or concerning an incident unrelated to this incident? If so, raise your hand." After six of the jurors indicated that they had heard the statement, the court proceeded to issue an extemporaneous curative instruction. We reproduce the bulk of that instruction here:

> [I]n a prior pretrial ruling, I ordered the State to stay away from it because it had nothing to do with the this case and added no probative value to this case and was prejudicial in nature. Notwithstanding that, he asked questions which could have been answered by making reference to that statement. Totally improper. And total disregard to my prior order. And I've expressed dissatisfaction with him while you were in there.
>
> Now I am striking that from the record. . . . That statement could have been as a witness, could have been as a victim, could have been any number of things. It was purely prejudicial, you can not speculate

> with regard to what that statement was about. Does everybody understand that? And it really is troublesome that these witnesses were asked questions to which they could have answered making reference to the other statement.
>
> . . . You've got to base your decision . . . on the evidence . . . . [I] believe it was an honest mistake, I know this prosecutor, I've known him since he was a puppy and he's an honest, well intended person. I don't think there was anything intentionally done but professionally, he should have stayed away from any question which could have led to an answer the way it did only because you don't know nothing about that statement. It doesn't have anything to do with this case and this defendant could have been victim, witness, could have been any number of things. And you can't speculate with regard to what it was about or why it was asked . . . .
>
> Is there anyone among you who can't abide by my instruction to strike that, any testimony from your recollection and memory what I just said about it from your recollection and memory because it's just as bad me repeating it[?] But I don't know of any other way to find out if anybody has been biased or prejudiced and if anyone can't remove it from their minds to ensure this man gets a fair trial, if I don't mention it. You see the position I'm in? So I'm even striking everything I said about the other statement. . . .
>
> Is there anyone among you [who] is prevented from deliberating on the evidence that remains and arriving at a fair trial and impartial verdict in this case? If anyone is prevented from doing that, please raise your right hand. No response. . . .

Following further discussion, the trial court denied the mistrial motion, stating that its instructions were sufficient to address any prejudice. Lilly's counsel ambiguously stated, "Your Honor's instructions I think have fixed things but it also left the jury (inaudible) prejudice against my client (inaudible)."

In *Rainville v. State*, 328 Md. 398, 408 (1992), the Court of Appeals recited the factors trial courts shall consider when deciding "whether an accused's right to a fair trial

was adequately protected by a jury instruction following . . . inadmissible and prejudicial testimony." Those factors are:

> "whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists."

Id. (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)).

Under the *Rainville* factors, a proper curative instruction could have dispelled the need for a mistrial in the circumstances of this case. Lilly identifies four objectionable statements, but he objected only to one. He expressly concedes that the State did not solicit the statements. Det. Forsythe, who made the statements, was not the State's principal witness, and her credibility was not a crucial issue. Finally, in this relatively straightforward case, the State had ample evidence of Lilly's guilt if the victim's testimony were believed.

The *Rainville* Court cautioned, however, that "'these factors are not exclusive and do not themselves comprise the test.'" *Rainville*, 328 Md. at 408 (quoting *Kosmas*, 316 Md. at 594).

In *Carter v. State*, 366 Md. 574 (2001), the Court of Appeals was required to decide whether, as a result of the introduction of inadmissible and prejudicial testimony, "'the damage in the form of prejudice to the defendant transcended the curative effect of the [trial court's] instruction.'" *Id*. at 589 (quoting *Rainville*, 328 Md. at 408) (in turn, quoting *Kosmas*, 316 Md. at 594). During Carter's trial for first-degree murder and

related offenses, a police witness (the lead investigator in the case) testified that while being interrogated Carter was "confronted with the fact" that "he had a prior arrest," and he admitted the prior arrest."[4] *Carter*, 366 Md. at 579 (emphases removed). The trial court denied Carter's motion for mistrial, electing instead to give a curative instruction in which it referred five separate times to Carter's prior "arrest." *Id*. at 580.

The next day, a separate witness gave an unresponsive answer to the prosecutor's question by mentioning "Benny," a "crackhead [Carter] sold crack to" (*id.* at 581) and "who owed" Carter money. *Id.* at 580. After Carter again moved for a mistrial, but the trial court gave a curative instruction in which it repeated the toxic allegation of selling crack to a "crackhead." *Id.* at 581 (emphases removed). The instruction included an admonition to the jury to "disregard that characterization of Benny as someone to whom the defendant has sold crack to before" and that Carter was "not on trial here today for selling crack." *Id.* (emphases removed).

A sharply divided Court of Appeals reversed, finding an abuse of discretion. *Id.* at 592. Writing for the 4-3 majority, Judge Raker underscored the particularly harmful prejudice that can attend introduction of "other crimes" evidence, in contravention of Md. Rule 5-404(b). *Id.* at 591 (quoting *Streater v. State*, 352 Md. 800, 810 (1999)). In applying the *Rainville* factors, the majority concluded that the references to other crimes evidence were not isolated, even if they were unsolicited by the State (*id.* at 590), and that credibility "was an important issue in the case inasmuch as" Carter had denied

[4] Defense counsel objected just in time to prevent the investigator from identifying the charges in the prior arrest. *Id.*

involvement in the crimes alleged in his trial whereas the State's witnesses "recounting [Carter's] inculpatory remarks had motives for testifying against him." *Id.* at 591. In addition, the Court stressed that the purported curative instruction fanned rather than doused the flames created by the prejudicial testimony. *Id*. ("[R]ather than being curative, [they] highlighted the inadmissible evidence and emphasized to the jury that petitioner had been arrested previously").[5]

Lilly relies heavily on *Carter* to argue that that the trial court's "repeated references to the inadmissible testimony" and its "lengthy and confusing . . . instruction were more prejudicial than curative." Although the court's extemporaneous instruction was not a model of concision or clarity, we are not persuaded that it was inadequate to cure any prejudice.

First, the inadmissible evidence in this case does not remotely match the damaging statements from *Carter*. In contrast to the cumulatively toxic impact of, first, the reference to Carter's "prior arrest" (and his admission thereto), and second, the "other crimes" reference to Carter's having sold crack to a "crackhead," the jury here was briefly told that after being questioned about the crimes against Kimber, Lilly was then "taped for another incident." This general statement came after three earlier, equally

[5] Although Judge Raker authored the majority opinion to reverse the conviction in *Carter*, the three judges who joined in the decision to reverse – Chief Judge Bell and Judges Eldridge and Cathell – would have held "that the trial court erred in propounding curative instructions over the defense objections." *Id.* at 586-87. The three dissenters agreed that the court could propound a curative instruction over a defense objection, but would have held that the instructions in this case were adequate. *Id.* at 592-93 (Harrell, J., dissenting).

unspecific testimonial references by Det. Forsythe to another "investigation" – to none of which did Lilly's counsel object. At no point did the prosecutor or any of its witnesses explain the nature of this "incident," that Lilly was a suspect (and not just a witness or some other party), or that the key aspect of this "taped" discussion was Lilly's admission to a separate assault. The jury thus had no evidentiary basis to reach such conclusions, and we are left with a vague statement that likely had little discernible effect on the proceedings.

Lilly's assault on the instruction itself is better placed, but ultimately unpersuasive. Lilly correctly observes that, in the course of the meandering instruction, the court wound up having to instruct the jury to disregard its own comments about the inadmissible statements. Lilly also observes that the court came dangerously close to vouching for the prosecutor's honesty (albeit just after excoriating him for his "total disregard" of a "prior order" and informing the jury of its "dissatisfaction" with him). Still, the instruction did not harp on the inadmissible evidence, as did the toxic "curative" instructions in *Carter*. Instead, it promptly cautioned the jurors to disregard the inadmissible statement, directed them to base their decision only on the admissible evidence, and warned them not to speculate about the inadmissible evidence. The jurors unanimously agreed that they could follow the instruction. Although Lilly made an unspecific reference to continuing "prejudice," even he stated, ambiguously, that the instruction had "fixed things."

In these circumstances, the curative instruction was adequate to dispel any prejudice that resulted from the isolated and ambiguous remark about Lilly being "taped

for another incident." Consequently, the court did not abuse its discretion in denying the motion for mistrial.

II. Jury Instruction Challenge

Lilly argues that the trial court erred when, as part of its pre-trial, preliminary instructions to the jury, "it utilized trivial examples to blur the concept of reasonable doubt." Conceding that he failed to preserve this issue for appeal, as required by Maryland Rule 8-131(a), Lilly asks us to conduct "plain error" review. As we conclude that the trial court did not commit plain error, or even reversible error, we decline to do so.

A. Factual Background

After the selected jury was seated, the trial court gave a lengthy set of preliminary instructions. As relevant to our discussion here, the court stated:

> [Y]ou must apply the law as I explain it to you in arriving at your verdict and that includes these preliminary instructions. You have no discretion. I'm obliged to explain the law to you in language that allows you to do your job. . . . Don't hesitate to hold me to that task both now and during deliberation. If I'm not clear, if you've got any questions say judge, repeat it, or say in a different way that makes sense, or give us an example. Now, whenever I give you an example, that is not binding instruction on the law and does not bind you. If you find that any example is too vague to be of any use, disregard it. If you find the facts in any example are too confusing, disregard the example. If you find that an example contradicts or conflicts [with] a binding instruction of the law, disregard the example but feel free to ask another. . . .

Later during these instructions, the trial court elaborated on the concepts of "reasonable doubt," stating, for example, that it is "not proof beyond all doubt. The State

need not negate every conceivable circumstance of innocence. It's not proof to a mathematical certainty." The court continued to explain, as follows:

> . . . We each have and hold different things as being important in our personal or business affairs. We each have a different trigger point, that point at which we would act without reservation in an important [matter] in our own personal or business affairs. *Do I send my children to this school or that school? Do I buy a [sic] lease a home in this neighborhood or that neighborhood? Do I have surgery performed in that hospital by that doctor or this hospital by this doctor? Do I take this job or another job?* Whatever you find as being an important matter in your own personal or business affairs, the term beyond a reasonable doubt is that degree of proof or persuasion that would cause you to act without reservation in an important matter in your own personal or business affairs. It's not proof beyond all doubt, it's proof beyond all reasonable doubt.

(Emphasis added.)

Following these instructions, Lilly offered no objection to the court's discussion of reasonable doubt, or to its use of several hypotheticals (highlighted above) to illustrate its point. Notably, at the close of trial, immediately before jury deliberations, the court read a binding jury instruction on reasonable doubt (to which Lilly also did not object) that was mostly identical to the pattern jury instruction in Maryland Criminal Pattern Jury Instruction (MPJI-Cr) 2:02.

B. Legal Standards

In light of his failure to object, Lilly asks us to conduct plain error review. Plain error is error that "'vitally affects a defendant's right to a fair and impartial trial.'" *Diggs v. State*, 409 Md. 260, 286 (2009) (citation omitted). Maryland appellate courts, in "adhering steadfastly to the preservation requirement" (*Morris v. State*, 153 Md. App. 480, 508 (2003)), limit plain error review to circumstances that are "'compelling,

extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Miller v. State*, 380 Md. 1, 29 (2004) (quoting *State v. Hutchinson,* 287 Md. 198, 203 (1980)). "[A]ppellate review under the plain error doctrine '1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.'" *Hammersla v. State,* 184 Md. App. 295, 306 (2009) (quoting *Morris*, 153 Md. at 507). "[T]he plain error hurdle, high in all events, nowhere looms larger than in the context of alleged instructional errors." *Martin v. State*, 165 Md. App. 189, 198 (2005) (citation and quotation marks omitted).

The Court of Appeals has set forth four steps of analysis for addressing whether to grant a request for plain error review:

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

State v. Rich, 415 Md. 567, 578 (2010) (quoting *Puckett v. United States,* 556 U.S. 129, 135 (2009)) (internal citations and quotation marks omitted).

Put differently, even where the first three prongs are met, the appellate court retains discretion whether or not to proceed – discretion that "ought to be exercised only if," in satisfaction of the fourth prong's stringent standard, "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Rich*, 415 Md. at 578.

C. Analysis

The record reveals no basis for this Court to exercise its discretion to review for plain error. Lilly cannot demonstrate that by giving the preliminary instructions the trial court committed "clear or obvious error" – or even reversible error – or that any possible error both "affected the outcome of the [ ] court proceedings" and compels this Court to exercise its discretion in order to review an "error [that] seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Rich*, 415 Md. at 578.

The challenged instruction – which referred to a handful of "examples" intended to assist jurors with the meaning of "reasonable doubt" – occurred at the start of trial, not during the court's reading of the final, binding jury instructions. "Because preliminary remarks ordinarily do not perform the function of [final] jury instructions, such remarks cannot be considered to be jury instructions within the meaning of" the predecessors of Md. Rule 4-325 (Rule 757(b) and 757(d)). *Lansdowne v. State*, 287 Md. 232, 246 (1980) (noting that preliminary remarks, unlike jury instructions, are likely to be forgotten or misunderstood by the time of deliberations, and thus carry less weight).

Consequently, any confusion the trial court's original remarks might have engendered had likely dissipated by the time the court read the actual jury instructions. To the extent that any confusion remained, the court's final instruction on reasonable doubt, which was nearly identical to the instruction from MPJI-Cr 2:02, would have sufficiently erased it.[6] Lilly does not challenge that instruction, which one can only

[6] To illustrate, we reproduce the court's final instruction here:

(continued…)

assume the jury properly heeded. Of further note is that the trial court, as part of its preliminary remarks, told the jurors they were free to disregard any "examples" the court gave that were either confusing or that "contradict[] or conflict[] [with] a binding instruction of the law[.]"

We therefore decline to invoke our discretion to address this unpreserved claim. The trial court's minimally prejudicial remarks fall short of the high bar imposed on those seeking plain error review.[7]

III. Sufficiency of the Evidence

Lilly argues that the State's evidence was insufficient to sustain his convictions for use of a handgun in the commission of a violent crime, pursuant to Md. Code (2002, 2012 Repl. Vol.), § 4-204 of the Criminal Law Article ("CR"); and for possession of a

> The Defendant is not required to prove his innocense [*sic*]. However, the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty. Nor is the State required to negate every conceivable circumstance of innocense [*sic*]. A reasonable doubt is a doubt founded upon reason. It is not a fanciful doubt, a whimsical doubt, or a capricious doubt. Proof beyond a reasonable doubt requires such proof as would convince you of the truth to the extent that you would be willing to act upon such belief without reservation in an important matter in your own personal or business affairs. However, if you are not satisfied of the Defendant's guilt to that extent, then reasonable doubt exists and the Defendant must be found not guilty.

[7] Lilly's attempts to match the facts of this case with those of *Joyner-Pitts v. State*, 101 Md. App. 429 (1994), are also unavailing. First, that case concerned the actual jury instructions at the end of the case, while Lilly's challenge is to a preliminary instruction that became irrelevant after the court gave a perfectly suitable instruction when the jury retired to deliberate. Second, in *Joyner-Pitts* this Court did not conduct plain error analysis, as the defendant in that case (unlike Lilly) had preserved his challenge to the instruction. There is therefore no need to accept Lilly's invitation to conduct a strict comparison of the respective instructions.

regulated firearm by a disqualified person, pursuant to Md. Code (2003, 2011 Repl. Vol.), § 5-133 of the Public Safety Article ("PS"). We disagree.

A. Legal Standards

When reviewing whether evidence is sufficient to support a conviction, we do not ask whether we are persuaded that the evidence at trial established guilt. The appropriate inquiry is, "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Harrison v. State*, 198 Md. App. 236, 242 (2011) (quoting *Tichnell v. State*, 287 Md. 695, 717 (1980)) (emphasis in *Tichnell*). We "'give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference.'" *Burlas v. State*, 185 Md. App. 559, 568 (2009) (quoting *State v. Suddith*, 379 Md. 425, 430 (2004); *accord Winder v. State*, 362 Md. 275, 325 (2001) (appellate review of sufficiency of evidence must not involve "review of the record that would amount to a retrial of the case").

B. Analysis

Any distinctions among the meanings of "handgun," "firearm," and "regulated firearm," as variously found in CR § 4-204 and PS § 5-133(b), are immaterial here;[8] Lilly does not argue that he possessed a gun that fell outside any of these categories. Lilly argues, with respect to his convictions under *either* statute, that there was not

[8] In this regard, there is also no need to belabor any distinctions between the statutes as they currently exist and the statutes as they were written in 2004 (the date of the incident at issue), the latter of which would control in the analysis here.

enough evidence to support the State's theory that he possessed and used a gun of any kind during the alleged assault. He is incorrect.

Kimber's testimony, although not rich in detail, provided a first-hand, eyewitness account that was sufficiently descriptive to enable the jury reasonably to conclude that Lilly had committed the acts alleged. Kimber testified that she only "glanced" at the weapon, but she recounted that she saw "a small black handgun[,]" that "the front part of it . . . was small shaped." She said that she "remember[ed]" . . . what the gun looked like when [she] glanced at it." She also said that the gun "felt like it was hard[,]" and that Lilly "pulled a gun out" and "hit [her] in [her] chest with it."

Kimber conceded her limited knowledge of handguns ("I don't know anything about guns"). She asserted, however, that she had previously seen other guns, both on television and "right in [her] face" in "real life[,]" "[t]he same way that it was that night." She also asserted that the gun Lilly pointed at her "look[ed] like the guns [she] had seen in the past[,]" and that it was "like the guns [the police] carry[ ]" but unlike the one on the person of the deputy sheriff in the courtroom at trial.

This evidence would suffice for a rational jury to conclude, beyond a reasonable doubt, that Lilly possessed a "handgun" and a "regulated firearm" when he assaulted Kimber. *Reeves v. State*, 192 Md. App. 277, 306 (2010) (citing *Walters v. State*, 242 Md. 235, 237-38 (1966)) ("It is the well-established rule in Maryland that the testimony of a single eyewitness, if believed, is sufficient evidence to support a conviction"). Whether the State had produced the actual gun, or whether Kimber had had enough time to view the gun or could describe it in greater detail, are issues of evidentiary *weight* properly

reserved for the jury. Lilly already exercised his prerogative to attempt to persuade the jury that this evidence lacked strength and credibility. The jury saw otherwise. This Court will not stand in the jury's shoes to re-weigh that evidence, nor question its judgment.

CONCLUSION

Accordingly, for the foregoing reasons, this Court affirms the judgments of the trial court on all issues presented.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. APPELLANT TO PAY ALL COSTS.