Circuit Court for Dorchester County
Case No. C-09-CR-18-000264

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 36

September Term, 2019

DAVID AARON THOMAS

v.

STATE OF MARYLAND

Arthur,
Shaw Geter,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: April 20, 2020

David Aaron Thomas was convicted by a jury sitting in the Circuit Court for Dorchester County of second-degree assault and unlawful taking of a motor vehicle.[1] Thomas was sentenced to a term of 15 years in prison, with all but 11 years suspended, and a period of probation thereafter.

In his appeal, Thomas asserts that the trial court erred by:

1. Permitting the State to improperly comment during closing argument on [his] post-arrest silence.

2. Admitting [the victim's] hearsay statements as an excited utterance.

Finding neither error nor abuse of discretion, we shall affirm.

FACTUAL BACKGROUND

Thomas does not present a challenge to the sufficiency of the evidence to support the guilty verdicts. Therefore, we provide only an overview of the events of the evening of September 30, 2018, which gave rise to the charges against him. *Payne v. State*, 243 Md. App. 465, 472 (2019) (citing *Whitney v. State*, 158 Md. App. 519, 524 (2004)).

At about 11:00 that evening, Rachael Smith appeared at the home of Gary Mills on Drawbridge Road in Dorchester County. Hearing what he described as "beating on the door" and a female "yelling for help," Mills testified that he answered the door and observed Smith "partially dressed, bloodied, extremely upset, [and] crying." He allowed her to enter the home and she stated that she had been attacked and that "he's going to kill

[1] Thomas was charged with first-degree assault, theft, unlawful taking of a motor vehicle, reckless endangerment, false imprisonment and several lesser included offenses. At the close of the State's case-in-chief, the court granted judgments of acquittal on the theft and false imprisonment counts.

me if he gets me." Mrs. Mills covered Smith with a blanket and called the police. Following the arrival of Maryland State Trooper Kyle Barfield, Smith was taken by ambulance to a hospital for treatment.

At trial, Smith testified that she and Thomas had been acquainted since their teen years and, in the three weeks before this event, had been seeing each other socially—"hanging out" as friends, but she described their relationship as also being sexual. On September 30, driving her own car, Smith agreed to pick up Thomas at his home. Thereafter, they went to a Wal-Mart where he entered the store as she waited in the car. In his absence, she went to a nearby Dominos to use the restroom. When she returned, Thomas was upset that she did not stay in the car as he had instructed.

They then drove, with Smith at the wheel, to a Royal Farms store and, while entering the parking lot, Thomas became agitated when the car struck a curb. After making several more stops, including two at a liquor store, Smith intended to return Thomas to his home and then go to her home in Denton. Instead, at Thomas' direction she drove on unfamiliar roads around Cambridge.

At some point, Thomas began driving her car "to an area [she] didn't know," where "there was nothing around [them]." Smith testified that, on two occasions, Thomas stopped and pulled her out of the car by her hair, choked her and threatened to kill her and leave her body where no one would find her. Eventually, she was able to get out of the car near two houses, and Thomas drove away in her car. Failing to find help at the first house she approached, she went to the Mills' house.

Trooper Barfield's testimony, which we summarize, was that when he arrived at the Mills' home, he saw "a young lady sitting on [the] couch[,] … crying profusely[,] … [with] various physical injuries about her person…." Describing those injuries, he "observed [Smith's] left eye to be black. She had various scrapes and scratches about her face and chest. She also had bruising on her chin and her left elbow was cut. Both of her knees were also cut as well." He also observed "her hand that was cut and appeared to be broken[,]" and "scrapes and bruising and red marks on her neck…." Smith advised Barfield that she had been assaulted by Thomas. He concluded that she appeared to be intoxicated, later clarifying that he had detected alcohol on her breath but that her speech was not slurred, and she was able to walk without stumbling.

We shall take up Thomas' assertions of error in chronological order, that is we first consider his contention that the court abused its discretion in admitting hearsay under the excited utterance exception.

Hearsay – excited utterance

Thomas argues that the trial court abused its discretion by permitting inadmissible hearsay through the testimony of Barfield. The State responds that the testimony complained of was properly admitted under the excited utterance exception to the rule against hearsay. *See* Rule 5-803(b)(2) (defining the "excited utterance" hearsay exception as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."). The State further posits that the error, if any, was harmless beyond a reasonable doubt.

Barfield described having been dispatched to the Mills' residence and described what he observed of Smith when he arrived there. When asked to describe her emotional state, he responded:

> [WITNESS]: Ms. Smith, like I said, she was crying, she was very upset, she was almost upset to the point where she was unable to convey the events that led up to her arriving at that house.
>
> * * *
>
> [PROSECUTOR]: As soon as you made contact with her in the house was there a delay in asking her what happened to her?
>
> [WITNESS]: No, there was not.
>
> [PROSECUTOR]: What did she tell you?
>
> [DEFENSE COUNSEL]: Objection.

There ensued a brief bench conference during which defense counsel expressed a desire to clarify the earlier hearsay argument. To that argument, defense counsel added "a confrontation objection under the Sixth Amendment."[2] In the end, the court overruled the objection generally, without specificity as to defense counsel's two-pronged approach.

We have often said that the admissibility of evidence is left to the sound discretion of the trial court. *Mines v. State*, 208 Md. App. 280, 291 (2012) (citing Rule 5-104(a), which provides that "[p]reliminary questions concerning … the admissibility of evidence shall be determined by the court[]…."). As such, "[w]e review the trial court's decision under an abuse of discretion standard." *Taneja v. State*, 231 Md. App. 1, 11 (2016) (citing *Sifrit v. State*, 383 Md. 116, 128–29 (2004)). However, a court "'has no discretion to admit

[2] Thomas has not pursued his confrontation objection in this appeal.

hearsay in the absence of a provision providing for its admissibility. Whether evidence is hearsay is an issue of law reviewed *de novo*.'" *Handy v. State*, 201 Md. App. 521, 538–39 (2011) (quoting *Bernadyn v. State*, 390 Md. 1, 8 (2005)).

We have indulged Thomas' hearsay argument and agree that the court did not abuse its discretion in overruling his objection to Barfield's testimony that Thomas argues is inadmissible hearsay.

An abuse of discretion occurs when the trial court rules in a manner "'where no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles.'" *Cobrand v. Adventist Healthcare, Inc.*, 149 Md. App. 431, 437 (2003) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997)). *Accord North v. North*, 102 Md. App. 1, 13 (1994) (internal quotations and citations omitted).

The standard for determining whether a trial error was harmless was established by the Court of Appeals in *Dorsey v. State*, 276 Md. 638, 659 (1976):

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of – whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict.

(Footnote omitted).

We cannot reach such a conclusion on the record before us.

In the end, however, his argument on this point is for naught, for the evidence elicited from Barfield was already before the court. Barfield's testimony regarding his

initial observations of Smith was no more than a reiteration of a description of Smith's appearance, condition, and apparent state of mind given by Gary Mills and testified to by Smith herself. It was cumulative of testimony already admitted—indeed, admitted largely without objection. Smith testified in considerable detail about the assaults and her injuries; Gary Mills testified to his observations of her appearance and condition and about her excited state as she attempted to describe the events while in his home; and, finally, the written statement given by Smith to police investigators in the hours shortly after the incident that was also admitted. We adopt a similar position to that expressed by the Court of Appeals in *Yates v. State*, 429 Md. 112, 124 (2012) ("We agree … that the admission of the hearsay evidence did not ultimately affect the jury's verdict given the cumulative nature of the similar statements offered at trial.").

The Court of Appeals has said:

> This Court has long approved the proposition that we will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury *without objection* through the prior testimony of other witnesses."

Grandison v. State, 341 Md. 175, 218–19 (1995) (emphasis in original) (citations omitted).

Having considered the testimony of both Mills and Smith, given before that of Barfield, we are satisfied that "there is no reasonable possibility that [that] evidence" influenced the verdict. *Dorsey*, 276 Md at 659. The error, if any, was harmless beyond a reasonable doubt.

Closing argument

It is beyond challenge that argument to a jury that includes comments about a defendant's post-arrest silence or failure to testify is objectionable. *Grier v. State*, 351 Md. 241, 252-62 (1998) (explaining various contexts in which comments about a defendant's silence may be inadmissible). At the outset, we observe that, while Thomas has challenged the court's adverse ruling on his objection to certain comments by the prosecutor in closing argument, he presents his appellate argument in the context that "the State may not introduce evidence of a defendant's silence." There is nothing in the record to suggest that the State, either in its case in chief, or in cross-examination of Thomas made any effort to comment upon, or introduce evidence of, Thomas's post-arrest, pre-trial silence.

Thomas testified in his own defense. He testified that he and Smith were together on September 30, at her suggestion; that they shared drugs; that she became intoxicated and encouraged him to drive her car. He told the jury that Smith, on several occasions that evening, initiated sexual activity, which he rejected. His testimony was that, as they were driving, she removed her shirt and pants and made several attempts to "grab [his] penis," all of which interfered with his driving. Finally, he contended that any physical contact by him was in response to her assault of him and that he merely pushed or slapped her to stop her from interfering with his driving. Explaining Smith's bleeding finger, Thomas said that, in an effort to get her to stop choking him as he was driving, he had bitten her finger, causing it to bleed. He further testified that the red marks depicted in photographs of Smith's throat were not caused by his hands, rather, from what he characterized as a "headlock" he had attempted to use to restrain her.

Commenting in closing argument about Thomas's version of events, the prosecutor said:

> He didn't go to the police to say he was the victim of a crime. He told a story here today after October, November, December, January, February, March, five months. You think about what kind of defense can I come up with. He knew what Rachael said, he knew what the Trooper said, he had time to look at things.

At that point, defense counsel objected, which was overruled by the court. The prosecutor continued her argument:

> He had time to study them, and he came up with the only defense that he could come up with is that it wasn't me, it was her. It was all her fault, she did it. But he doesn't have any injuries that are consistent with what he says happened. He has one black eye that is completely consistent with what she said happened.

We reiterate that our analysis is in response to a claim of impropriety in prosecutor's closing argument, not about any effort by the State to introduce evidence of Thomas' silence in potential violation of his Fifth Amendment rights. Juries in this State are routinely instructed, as was the jury in this case, that the "[o]pening statements and closing arguments of lawyers are not evidence[,] [t]hey are intended only to help you to understand the evidence and to apply the law…." MPJI-Cr 3:00 (What Constitutes Evidence).

We review challenges to closing argument under an abuse of discretion standard. An abuse of discretion is said to occur

> "where no reasonable person would take the view adopted by the [trial] court," or when the court acts "without reference to any guiding rules or principles." It has also been said to exist when the ruling under consideration "appears to have been made on untenable grounds," when the ruling is "clearly against the logic and effect of facts and inferences before the court," when the 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."
>
> [A] ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellant court would not have made the same ruling. 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….

North v. North, *supra*, at 13–14 (internal citations omitted).

Closing argument has been described as "a robust forensic forum wherein its practitioners are afforded a wide range for expression." *Davis v. State*, 93 Md. App. 89, 124 (1992) (citing *Wilhelm v. State*, 272 Md. 404 (1974)). In *Wilhelm v. State*, the Court of Appeals spoke to the scope of permissible closing arguments:

> As to summation, it is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is afforded a wide range. Counsel is free to use the testimony most favorable to his side of the argument to the jury, and the evidence may be examined, collated, sifted and treated in his own way. Moreover, if counsel does not make any statement of fact not fairly deducible from the evidence his argument is not improper, although the inferences discussed are illogical and erroneous. Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom; the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of witnesses which the (prosecution) produces….

272 Md. at 412.

Specifically, Thomas' objection was to the State's suggestion to the jury that, after hearing the testimony of Smith and Barfield, he developed the opportunity to "tailor" his testimony to the evidence produced by the State. Comments by counsel about "tailoring"

is not, *per se*, prejudicial. The Supreme Court, in *Portuondo v. Agard*, 529 U.S. 61 (2000), rejected a claim of unconstitutionality where the prosecutor called the jury's attention to the defendant's ability to tailor his testimony after hearing the testimony of the Government's witnesses. There, the Court reiterated the well-known principle that: "when [a defendant] assumes the role of a witness, the rules that generally apply to other witnesses—rules that serve the truth-seeking function of the trial—are generally applicable to him as well." 529 U.S. at 69 (quoting *Perry v. Leeke*, 488 U.S. 272, 282 (1989)). For support, the Court drew upon *Jenkins v. Anderson*, 447 U.S. 231, 100 (1980), for the proposition that, "[o]nce a defendant takes the stand, he is 'subject to cross-examination impeaching his credibility just like any other witness[,]'" and *Brooks v. Tennessee*, 406 U.S. 605 (1972), for the suggestion that "arguing credibility to the jury—which would include the prosecutor's comments here—is the preferred means of counteracting tailoring of the defendant's testimony." *Portuondo*, 529 U.S. at 70.

The *Portuondo* Court concluded that:

> In sum, we see no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate—and indeed, given the inability to sequester the defendant, sometimes essential—to the central function of the trial, which is to discover the truth.

529 U.S. at 73.

We find no abuse of discretion in the court's ruling on Thomas's objection to the State's closing argument.

JUDGMENTS OF THE CIRCUIT COURT FOR DORCHESTER COUNTY AFFIRMED; COSTS ASSESSED TO APPELLANT.