Circuit Court for Baltimore City
Case No. 121312007

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0401

September Term, 2023

JAMAL MCDANIEL

v.

STATE OF MARYLAND

Reed,
Albright,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Albright, J.

Filed: April 17, 2024

* This is an unreported opinion, and it may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

This case, which comes to us from the Circuit Court for Baltimore City, concerns a nonfatal shooting that was captured on video. Upon viewing the video, two law enforcement agents identified Jamal McDaniel (Appellant) as the shooter based upon their previous surveillance of him. After a hearing, the trial court denied a motion by Mr. McDaniel and ruled that the agents could disclose their jobs while testifying; nevertheless, the judge advised the agents to refrain from referring to Mr. McDaniel as the target of their prior surveillance.

Throughout the ensuing trial, Mr. McDaniel objected to the agents' testimony and the State's (Appellee's) characterization thereof. After each of Mr. McDaniel's objections, the court instructed the jury not to infer that Mr. McDaniel had been the target of a criminal investigation. Near the end of the trial, Mr. McDaniel moved for a mistrial, stating it was impossible to cure the cumulative harm of the agents' testimony and the State's statements. The court denied the motion for a mistrial.

The jury found Mr. McDaniel guilty of some counts and acquitted him of others.[1] Mr. McDaniel then filed a motion for a new trial, which the court also denied. Mr. McDaniel timely filed this appeal. He presents the following questions:

[1] Mr. McDaniel was originally charged with six counts. Of those, the jury found Mr. McDaniel guilty on three counts: first-degree assault, "use of a firearm in the commission of a felony in a crime of violence[,]" and possession of a firearm after being previously convicted of a disqualifying crime. It found him not guilty on two counts: attempted murder in the first degree and attempted murder in the second degree. The charge of second-degree assault merged into first-degree assault.

I. Was the trial court's denial of Mr. McDaniel's motion for a mistrial despite evidence that he was under surveillance before the crime an abuse of discretion?

II. Was the trial court's denial of Mr. McDaniel's motion for a new trial after assuming its instructions cured undue prejudice from other crimes evidence an abuse of discretion?

We answer both questions in the negative and affirm the judgments of the circuit court.

BACKGROUND

A. Facts

On June 5, 2021, a minor vehicle collision occurred on Boarman Avenue in Baltimore, followed by an argument between the two drivers. A Chevy Malibu had been parked on the side of the road when a silver Jeep scraped the Chevy while attempting to pass. Both drivers got out of their cars and started arguing. At one point, each driver took out a gun and started shooting the other. The Chevy driver received a nonfatal shot to his abdomen. The Jeep driver fled on foot.

Upon investigation, the police discovered video surveillance from a store directly across the street from the incident. They released the video to the public and discovered

The wording of these counts is based on the transcription of the jury verdict. However, the original indictment charged Mr. McDaniel not with "use of a firearm in the commission of a felony *in* a crime of violence" (emphasis added), but with "use [of] a firearm in the commission of a crime of violence, . . . *and* any felony[.]" (emphasis added). The statute under which Mr. McDaniel was charged criminalizes the "use [of] a firearm in the commission of a crime of violence, . . . *or* any felony[.]" Md. Code, Crim. Law § 4-204 (emphasis added). Mr. McDaniel does not make an issue of these differences.

that two law enforcement officers from a task force with the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") could identify the Jeep driver from the video. The two officers, Agent Jason DiPaola and Agent John Messick, viewed the video at the police department and identified the Jeep driver, who had shot the Chevy driver, as Mr. McDaniel. Agents DiPaola and Messick were sufficiently familiar with Mr. McDaniel to identify him because they had been surveilling the neighborhood where Mr. McDaniel lived for a separate investigation. During that investigation, they observed Mr. McDaniel multiple times.

Although the Jeep's tag was unreadable in the video, the police discovered that Mr. McDaniel owned the same Jeep model. From the video, they also identified damage to the Jeep that preexisted the accident. They compared this damage with previous images and video of Mr. McDaniel's car, and the damage matched.

A few months after the shooting, police arrested Mr. McDaniel.

B. Motion in Limine

In a Motion in Limine, Mr. McDaniel argued that Agents DiPaola and Messick should not be able to testify about their positions as law enforcement officers.[2] Before opening arguments, the court held a hearing on this Motion in Limine and two other

[2] The Motion in Limine is not a part of the record.

motions filed by Mr. McDaniel.[3] During that hearing, Mr. McDaniel presented testimony from Agents DiPaola and Messick; the State did not present any evidence.

At the hearing on the Motion in Limine, Mr. McDaniel argued that if the court was going to admit the agents' identification of Mr. McDaniel, the court should also establish a scope for the agents' testimony regarding the context of their knowledge. He argued that the court should preclude the agents from testifying concerning the purpose of their surveillance, the number of times they saw Mr. McDaniel, when they saw Mr. McDaniel, the length of contact they had with Mr. McDaniel, and that they were law enforcement officers. Mr. McDaniel claimed that these facts were irrelevant, and their prejudice would outweigh any relevance they did have.

The court denied the Motion in Limine, but it did establish limits for the agents' testimony. The court ruled that the agents could testify about their jobs; that for their jobs, they had been assigned to that area; that while working in that area, they saw Mr. McDaniel; and how many times they saw him. Thus, the court denied the part of the Motion in Limine that requested the officers not be allowed to identify themselves as law enforcement. However, the court agreed that the full context of the agents' knowledge of Mr. McDaniel was prejudicial because it was "404b evidence[,]" or other crimes

[3] The Motion to Suppress Identification and the other Motion in Limine are not at issue in this appeal.

evidence.[4] The court said the agents should avoid "impugning anything [Mr. McDaniel] had done" or "criminalizing it or laying anything at [Mr. McDaniel's] feet as far as any kind of criminal activity." It said the agents should avoid saying they were conducting a criminal investigation into Mr. McDaniel, that they were targeting Mr. McDaniel, or that they knew Mr. McDaniel had been previously arrested. It explained that the prejudicial nature of that testimony would far outweigh the probative value.

C. The Trial and Mr. McDaniel's Motion for a Mistrial

After the Motion in Limine, trial began. The State presented multiple law enforcement witnesses who testified about the investigation: three police officers from the Baltimore City Police Department and three agents from the ATF Task Force. The first witness to testify was Sergeant Roberto Rodriguez, who was a patrol officer at the time of the incident. Officer Rodriguez was one of the first officers on the scene of the shooting. He testified that he helped to stabilize the scene, including controlling the crowds and beginning to gather evidence. The State also presented video from Officer Rodriguez's body-worn camera, which showed the procedure the officers undertook to stabilize the scene.

Next, the State presented Sergeant Joshua Jordan, also a patrol officer at the time of the incident. When Officer Jordan arrived at the scene, he found the victim on the ground with a gunshot wound to the stomach. Officer Jordan began to render aid to the

[4] Under Maryland Rule 5-404(b), "Evidence of other crimes, wrongs, or other acts including delinquent acts . . . is not admissible to prove that character of a person in order to show action in the conformity therewith."

victim, until the ambulance showed up for transport to the hospital. Officer Jordan had also been wearing a body camera, which the State presented as evidence. That video corroborated Officer Jordan's recollection of arriving at the scene and rendering aid.

The State then presented three agents from the ATF task force, in succession. First, Agent Messick testified about his identification of Mr. McDaniel and his part in the arrest. He testified that he had seen Mr. McDaniel in the area the shooting occurred on previous occasions. He testified about the car Mr. McDaniel drove, including by verifying a video of the car the State introduced. He also watched the surveillance video of the shooting and made an in-court identification of Mr. McDaniel.

Then, Agent Eugene Thiesen testified. Agent Thiesen had taken the video of Mr. McDaniel's car that the State presented as evidence. He verified that he took the video and that it was a fair and accurate depiction of the car.

Next, Agent DiPaola testified about his identification of Mr. McDaniel and his part in the arrest. Like Agent Messick, Agent DiPaola had seen Mr. McDaniel in the neighborhood multiple times in the years before the shooting. In fact, Agent DiPaola had even seen Mr. McDaniel while a patrol officer with the Baltimore police, before he joined the ATF task force. Agent DiPaola said he saw Mr. McDaniel in person, on electronic surveillance, and through Instagram. He also confirmed that it was Mr. McDaniel depicted in pictures showing him getting into his Jeep. Like Agent Messick, Agent DiPaola also made an in-court identification of Mr. McDaniel. Agent Messick's and Agent DiPaola's testimony is discussed further below.

Finally, Detective Sean Marsh, the primary lead detective on the case, testified for the State. Detective Marsh described the crime scene upon arriving at it. He explained that he had found the surveillance video from the liquor store right next to where the shooting occurred. He testified that that video was "very helpful" to the investigation because "[i]t showed everything that happened start to finish." Once Detective Marsh had reviewed the surveillance video, he went to a Jeep dealership to determine what kind of car the shooter in the video had been driving. The Jeep dealership confirmed that the shooter had been driving a Jeep Compass. Detective Marsh also testified about the damage he observed on the Jeep Compass in the surveillance video of the shooting, which damage corresponded to the damage Detective Marsh observed in Agent Thiesen's video of Mr. McDaniel's Jeep Compass. Detective Marsh also determined that the tag on the Jeep Compass in the surveillance video was an Enterprise tag, which was the same type of tag on Mr. McDaniel's Jeep Compass in Agent Thiesen's video. The tag in Agent Thiesens' video was also the same tag under which Mr. McDaniel had received various parking enforcement tickets and for which Mr. McDaniel held a certificate of title.

Detective Marsh then testified that he released the surveillance video to the public and received a tip from Metro Crime Stoppers that prompted him to contact Agent DiPaola for assistance with identifying the shooter in the surveillance video. Detective Marsh then discussed Agents Messick's and DiPaola's identification of Mr. McDaniel, and the State introduced Detective Marsh's body-worn camera footage memorializing their identifications. Detective Marsh also explained how the casings from a shot would

land and how to extrapolate where the shooter was standing, and he labeled the casings found at the crime scene. He discussed arresting Mr. McDaniel at an apartment, where it appeared Mr. McDaniel was living. The State also submitted a picture of Mr. McDaniel taken from Detective Marsh's body-worn camera on the day of Mr. McDaniel's arrest, so the jury could compare the surveillance video to how Mr. McDaniel looked around that time.

The State then rested. The shooting victim (the Chevy driver) refused to testify at any point.

After the State rested, Mr. McDaniel moved for acquittal, a motion the judge denied. The court then advised Mr. McDaniel of his right to testify, which he waived, and the defense also rested. Each party presented closing arguments, and the case was submitted to the jury. The jury found Mr. McDaniel guilty of first-degree assault, use of a firearm in the commission of a "felony in a crime of violence[,]"[5] and possession of a firearm after being previously convicted of a disqualifying crime.

1. Agent Messick's Testimony

Mr. McDaniel contests statements from three different parts of the trial: Agent Messick's Testimony, Agent DiPaola's testimony, and the State's closing argument.

[5] Although this is what the transcription of the jury verdict says, the statutory crime with which Mr. McDaniel was charged was "use [of] a firearm in the commission of a crime of violence, . . . or any felony[.]" Md. Code, Crim. Law § 4-204. Again, Mr. McDaniel does not make an issue of this difference.

Mr. McDaniel identifies four instances during which he claims Agent Messick overstepped the trial court's pretrial instructions. First, when the State asked him how he became familiar with Mr. McDaniel, Agent Messick said, "In general, there was multiple surveillances talking to individuals, and then that was primarily the start of the investigation." At that point, Mr. McDaniel's counsel objected, and the court gave the jury the following instruction:

> Ladies and gentlemen, realize that the investigation he is referring to, can't consider it targeting Mr. McDaniel in any way, shape, and form, okay? There's an investigation. He's a criminal investigator. He does criminal investigations, but you are not to infer anything adverse as far as Mr. McDaniel goes from this agent's activities? Okay. Thank you.

Mr. McDaniel's counsel did not renew her objection to any of Agent Messick's testimony after the court's instruction.

Mr. McDaniel noted three other instances where, he argues, Agent Messick's testimony revealed more than permissible about his previous surveillance of Mr. McDaniel. The first instance was when the State asked Agent Messick, "And as part of your work investigating those types of crimes that you do [*sic*], when would you say is the first time that you ever became aware of Mr. McDaniel specifically?" Agent Messick responded, "[P]robably in September of 2019." Mr. McDaniel's counsel did not object at this point.

The next instance Mr. McDaniel highlighted was how frequently Agent Messick had seen Mr. McDaniel prior to identifying him in the surveillance video. The State asked Agent Messick, "As we look at this video, your familiarity with Mr. McDaniel at the time

that you watched this video [o]n September 27th, 2021, how many times had you physically seen Mr. McDaniel in person prior to watching this video [of the shooting] for the first time?" Agent Messick responded that "[p]rior to watching this video, [he] observed Mr. McDaniel approximately five to six occasions." The State then asked, "And if you recall, what were the times in terms of just month or year in which you physically saw Mr. McDaniel prior to watching this video?" Agent Messick responded, "It was approximately September of 2019 and then probably four to five times between January of 2021 and March of 2021 and then also another one to two occasions in May of 2021." Mr. McDaniel's counsel did not object to any of these statements during trial.

The final instance that Mr. McDaniel argues went beyond the permissible scope was Agent Messick's testimony that he "had another individual r[u]n the tag" from Mr. McDaniel's car. Regarding that instance, the State asked Agent Messick the context of his seeing Mr. McDaniel's car. Agent Messick responded, "I was in the area. I saw the vehicle. I ran the tag or I had another individual r[u]n the tag[.]"

2. Agent DiPaola's Testimony

Mr. McDaniel also challenges two things Agent DiPaola said. First, Agent DiPaola testified that he first met Mr. McDaniel before joining the task force, saying, "So I would say frankly 2015, 2016, that's the time frame when I met Mr. McDaniel just through the neighborhood. Just being, like I said, proactive policing." Second, Agent DiPaola said, "That was kind of your job is to know everybody that kind of was in that

area, who was going to be out there on a regular basis and, you know, involved in the day-to-day I guess. I don't want to say too much, but – "

At that point, Mr. McDaniel's counsel objected again. The court excused the jury and held a bench conference. After a discussion with Mr. McDaniel, defense counsel said they would not move for a mistrial at that time. Instead, Mr. McDaniel's counsel asked the court to specifically address Agent DiPaola about the scope of his testimony.

The court brought Agent DiPaola back into the courtroom and further explained what his testimony's scope should exclude. The court explained to Agent DiPaola that his statement "I don't want to say too much" could give rise to an inference that Mr. McDaniel was involved in criminal activity, which would be inadmissible under the rules of evidence. It warned him that giving inadmissible testimony could result in a mistrial or jeopardize future prosecution. Agent DiPaola said he understood.

The court brought the jury back in and gave it similar instructions as with Agent Messick's testimony. It said:

> This witness's interactions with Mr. McDaniel should not in any way give rise to an inference that there was anything criminal in his activity. As the TFO had indicated per his testimony, he was out and about doing his job getting [to know] the people of the area and there should be no more inference above and beyond that taken by you. All right? Thank you.

Mr. McDaniel did not identify any other instances where he believed Agent DiPaola's testimony to be inadmissible.

3. State's Closing Argument

Mr. McDaniel also takes issue with the state's closing argument. Specifically, when presenting its closing argument, the State said, "We showed you the two witnesses who knew the Defendant, who . . . had seen him many times, and in fact, who had him under surveillance because . . . don't forget about the electronic surveillance." Mr. McDaniel's counsel objected, and a bench conference ensued.

At that point, Mr. McDaniel's counsel moved for a mistrial. She said, "I feel like there has been too many of these types of errors that have been compounded[,]" and specifically referenced the two jury instructions. The court said that it had given those jury instructions to be "hypercautious[,]" whereas Mr. McDaniel's counsel argued those witness statements had been crossing a line. She claimed that cumulatively at that point, they were "beyond the point that we can repair this jury."

The court denied the motion for a mistrial. It explained that the three statements to which Mr. McDaniel's counsel objected were not sufficient to warrant a mistrial. It said, "I don't think cumulatively such that it would deny the Defendant a right to a fair trial and thus then manifest necessity in that being there for me to be able to grant that." It then gave another jury instruction:

> Ladies and gentlemen, I just want to say it again. The testimony was and if credited that at various points law enforcement agents surveilled Mr. McDaniel. You are to infer nothing adverse about the fact that from time to time however they viewed him at whatever medium, whether it was social media, whether it was City Watch cameras, whether it was physical person that they were doing it because of some suspected criminal activity. There was nothing in that. So the objection was he was under surveillance. He was surveilled if you credit the testimony of the officers. That doesn't

> mean that there was anything criminal going on for your consideration, okay?

After deliberation, the jury returned the above-noted verdicts of guilty.

D. Mr. McDaniel's Motion for a New Trial

After the verdicts, Mr. McDaniel timely filed a motion for a new trial. Mr. McDaniel argued that Agent Messick's and Agent DiPaola's testimony was "tantamount to 5-404(b) evidence." The court held a hearing on the motion and denied it. It held that its instructions to the jury had appropriately remedied any possible Rule 5-404(b) inference. It also noted that appellate courts presume juries follow the trial court's instructions. Therefore, it said, Mr. McDaniel was not prejudiced by any of the instances that his counsel raised, and it denied the motion.

DISCUSSION

The trial court did not abuse its discretion in denying Mr. McDaniel's motions for a mistrial or a new trial because the prejudice resulting from the contested statements was minimal, the court's curative instructions were sufficient to cure any prejudice resulting from the contested statements, and it is presumed that juries follow a trial court's instructions. We explain.

A. Standard of Review

We review both denial of a motion for a mistrial and denial of a motion for a new trial for abuse of discretion. *See Simmons v. State*, 436 Md. 202, 211-213 (2013) (motion for a mistrial); *Campbell v. State*, 373 Md. 637, 665-66 (2003) (motion for a new trial); *Jenkins v. State*, 375 Md. 284, 295-96 (2003) (motion for a new trial). Abuse of

discretion is a high bar and only occurs when "a trial judge exercises discretion in an arbitrary or capricious manner or . . . beyond the letter or reason of the law[,]" *Campbell v. State*, 373 Md. at 666, or when the "exercise of discretion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons[,]" *Simmons v. State*, 436 Md. 202, 212 (2013) (internal quotations omitted). We recognize that the trial judge is in a "superior position to judge the effect of any of the alleged improper remarks[,]" *id.* (internal quotations omitted).

Additionally, the scope of a trial judge's discretion may vary depending on the inquiry at issue:

> [I]t may be said that the breadth of a trial judge's discretion to grant or deny a new trial is not fixed or immutable; rather, it will expand or contract depending upon the nature of the factors being considered, and the extent to which the exercise of that discretion depends upon the opportunity the trial judge had to feel the pulse of the trial and to rely on his own impressions in determining questions of fairness and justice.

Campbell v. State, 373 Md. 637, 666 (2003) (quoting *Wernsing v. Gen. Motors Corp.*, 298 Md. 406, 420 (1984).

B. Denial of the Motion for a Mistrial

We hold that the trial court did not abuse its discretion in denying Mr. McDaniel's motion for a mistrial. The contested testimony and closing remark were not so prejudicial that no curative instruction could have salvaged Mr. McDaniel's right to a fair trial. Furthermore, the trial court timely gave curative instructions that minimized any prejudicial effect, and we presume the jurors followed those instructions.

To begin, Mr. McDaniel urges there were seven different instances during the trial that were problematic, even though his counsel did not object to each of the seven instances. He argues that taken together, the contested statements were so prejudicial that he was denied a fair trial. Conversely, the State argues that we should only consider the statements to which Mr. McDaniel objected contemporaneously at trial.

On the issue of which statements to review, we conclude that Mr. McDaniel "made it clear that his motion was based upon the *cumulative* impact of the statements." *Washington v. State*, 191 Md. App. 48, 108 (2010) (emphasis added) (considering all the contested statements preserved for review despite the State's argument that the defendant had not specifically mentioned each statement in his motion for a mistrial). Accordingly, we consider all seven of Mr. McDaniel's contested statements in our review. Further, we consider each statement in its relative context, rather than in isolation. *See id.* at 109 ("Comments made in closing argument must be weighed in their context.").

The seven statements that Mr. McDaniel contests are as follows:

Four during Agent Messick's testimony:

1. In response to the State asking how he became familiar with Mr. McDaniel, Agent Messick testified, "In general, there was multiple surveillances talking to individuals and then that was primarily the start of the investigation."

2. The State asked, "And as part of your work investigating those types of crimes that you do, when would you say is the first time that you ever became aware of Mr. McDaniel specifically." Agent Messick responded that he initially observed Mr. McDaniel "probably in September of 2019[.]"

3. The State asked, "As we look at this video, your familiarity with Mr. McDaniel at the time that you watched this video [o]n September 27th,

2021, how many times had you physically seen Mr. McDaniel in person prior to watching this video for the first time?" Agent Messick testified, "Prior to watching this video, I observed Mr. McDaniel approximately five to six occasions." The State then asked, "And if you recall, what were the times in terms of just month or year in which you physically saw Mr. McDaniel prior to watching this video?" Agent Messick responded, "It was approximately September of 2019 and then probably four to five times between January of 2021 and March of 2021 and then also another one to two occasions in May of 2021."

4. The State asked what the context was in which Agent Messick saw Mr. McDaniel's car. Agent Messick responded, "I was in the area. I saw the vehicle. I ran the tag or I had another individual r[u]n the tag" from Mr. McDaniel's car.

Two during Agent DiPaola's testimony:

5. When the State asked when he first interacted with Mr. McDaniel, Agent DiPaola testified, "So I would say frankly 2015, 2016, that's the time frame when I met Mr. McDaniel just through the neighborhood. Just being, like I said, proactive policing."

6. In the same response as above, Agent DiPaola testified, "That was kind of your job is to know everybody that kind of was in that area, who was going to be out there on a regular basis and, you know, involved in the day-to-day I guess. I don't want to say too much, but—"

One during the State's closing argument:

7. The State stated, "We showed you the two witnesses who knew the Defendant, who they had seen him [*sic*] many times, and in fact, who had him under surveillance because . . . don't forget about the electronic surveillance."

Mr. McDaniel argues specifically that these statements were or alluded to other crimes evidence under Maryland Rule 5-404(b). That rule states:

> Evidence of other crimes, wrongs, or other acts including delinquent acts as defined by Code, Courts Article § 3-8A-01 is not admissible to prove the character of a person in order to show action in the conformity therewith. Such evidence, however, may be admissible for

> other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident, or in conformity with Rule 5-413.

Md. Rule 5-404(b). This rule "is designed to prevent the jury from becoming confused by the evidence, from developing a predisposition of the defendant's guilt, or from prejudicing their minds against the defendant." *Sifrit v. State*, 383 Md. 116, 132 (2004). Mr. McDaniel asserts that from the seven contested statements, a reasonable juror could infer that Mr. McDaniel was the target of a criminal investigation and under surveillance for that purpose. He claims that this prejudiced the juror's minds against him so that it denied him a fair trial.

Although granting or denying a mistrial is within the discretion of the trial court, Maryland law provides factors to guide the inquiry. To grant a mistrial, a court must find that the contested evidence was "'so prejudicial that it denied the defendant a fair trial[.]'" *Rainville v. State*, 328 Md. 398, 408 (1992) (quoting *Kosmas v. State*, 316 Md. 587, 594 (1989)). In *Rainville*, our Supreme Court analyzed the case under the following factors:

> 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. (changes in original).

Rainville was based on a seven-year-old girl's accusations that a man, who had been staying with her family, sexually assaulted her. *Id.* at 409-10. The testimony at issue was that of the girl's mother, who said that the defendant had been in jail "for what he had done to [the girl's brother.]" *Id.* at 410. The defendant testified and denied the allegations. *Id.* at 409. The Supreme Court reversed the defendant's conviction due to the court's failure to grant a mistrial and remanded the case for a new trial. *Id.* at 411. It explained that because of the mother's statement, "[i]t was highly probable that the inadmissible evidence . . . had such a devastating and pervasive effect that no curative instruction, no matter how quickly and ably given, could salvage a fair trial for the defendant." *Id.*

As opposed to a motion based on inadmissible evidence, if a defendant's motion for a mistrial is based on statements made during a prosecutor's closing argument, our courts have provided a slightly different standard and set of factors. When based on a prosecutor's closing argument, a mistrial is only required when the statements "actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Lee v. State*, 405 Md. 148, 164 (2008) (cleaned up). In determining whether a prosecutor's closing remarks met this threshold, a reviewing court should consider "various factors, including the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Id.* at 165 (internal quotations omitted).

In the case before us, the contested statements were not so prejudicial to deny defendant a fair trial or to mislead the jury. Starting with the contested testimony, neither Agent Messick's nor Agent DiPaola's statements met the standard for a mistrial. Mr. McDaniel asserts that there were multiple instances of prejudicial statements, which means the first *Rainville* factor weighs in his favor. However, that factor does not offer much weight here due to the insignificance of each contested statement. Because of the minimal impact of each of the statements, even cumulatively, they do not so prejudice the jury as to deny Mr. McDaniel a fair trial. *See Gilliam v. State*, 331 Md. 651, 686 (1993) ("This is more a case of the mathematical law that twenty times nothing is still nothing.").

The statements have a minimal impact, first, because not all of the statements Mr. McDaniel contests even reference inadmissible or prejudicial evidence. For example, Mr. McDaniel claims the agents' testimony about how many times and when they saw Mr. McDaniel was prejudicial and should not have been admitted. However, these statements did not indicate that Mr. McDaniel was the target of a criminal investigation. Additionally, they were necessary to establish a basis for the agents' identification of Mr. McDaniel. *Cf. Woodlin v. State*, 254 Md. App. 691, 714 (2022) (explaining that some degree of detail about the defendant's prior conviction was necessary to establish a factual basis), *aff'd*, 484 Md. 253 (2023) (explaining that the need for certain evidence is a factor that a circuit court may take into account).

To the extent that the agents' other statements reference an investigation targeting Mr. McDaniel, the reference was so minimal that the jurors would not have understood it as such, and so the jury would not have been prejudiced. Agents Messick and DiPaola explained that their interactions with Mr. McDaniel were a part of "proactive policing[]" and getting to "know everybody that was kind of in that area[.]" These explanations provided the jury with context for the agents running Mr. McDaniel's license plate and observing Mr. McDaniel. Agent Messick's statement "that was primarily the start of the investigation[]" and Agent DiPaola's statement "I don't want to say too much" could have been harmful if the jury had prior knowledge that Mr. McDaniel was the target of the investigation. However, the agents and the court provided different, neutral context that disputed that inference. The court even told the jury not to infer that Mr. McDaniel was the target of an investigation.

Next, under the second *Rainville* factor, Agent Messick's and Agent DiPaola's contested statements were not elicited by counsel but inadvertent responses or "blurts." *Washington v. State*, 191 Md. App. at 100 ("Robinson's testimony was a 'blurt' or a 'blurt out'—an abrupt and inadvertent nonresponsive statement made by a witness during his or her testimony."). The State did not ask any improper questions, such as whether the agents were investigating Mr. McDaniel. *See Rainville v. State*, 328 Md. at 401 (finding the prosecutor's question appropriate but not the mother's response). Therefore, the second *Rainville* factor—whether the statement was solicited or inadvertent—weighs in the State's favor.

Regarding the third *Rainville* factor, Agents Messick and DiPaola were principal witnesses upon whom the State's prosecution depended. The agents made the identification that led the police to start investigating Mr. McDaniel as a possible suspect. They also provided a video of Mr. McDaniel's car. This factor weighs in Mr. McDaniel's favor because the agents were important to the State's case.

Mr. McDaniel maintains that the fourth *Rainville* factor—whether credibility was a crucial issue—also weighs in his favor. We disagree. This case is far different from *Rainville*, where the jury had to weigh a seven-year-old girl's recollection of events against the defendant's account of events. 328 Md. at 400-01. It is also different from *Kosmas v. State*, where the contested statement revealed the defendant refused to take a lie detector test, putting the defendant's credibility squarely at issue. 316 Md. at 592. Instead, here, the agents provided an identification that the police department used to further their investigation. Their identification was then corroborated by further evidence. Therefore, while their identifications were important in furthering the investigation, and they were principal State's witnesses, the resolution of the case did not hinge on *Rainville*-like divergent perspectives, with only the agents' identification on one side and Mr. McDaniel's account on the other. Instead, because the agents' identifications were corroborated and supplemented by other evidence, the outcome did not hinge on their credibility alone.

Additionally, the significant amount of other evidence here is such that Mr. McDaniel's case was not contingent on any one witness's credibility, a posture that

pushes the final *Rainville* factor—sufficiency of other evidence—in the State's favor. The State even provided the jury with a video of the shooting and a video of Mr. McDaniel around the time of the shooting, so the jury could have compared the two and made their own identification. The State also provided evidence that the car in the video was Mr. McDaniel's car, apart from what the agents provided. The State presented Detective Marsh's testimony stating that a Jeep dealership identified the model as a Compass. It showed that Mr. McDaniel was the registered owner of a silver Jeep Compass. And further, it showed that the tags on the Jeep were temporary tags from Enterprise, and that Mr. McDaniel had had temporary tags from Enterprise. Thus, a great deal of other evidence existed, upon which the jury could have convicted Mr. McDaniel, meaning the final *Rainville* factor weighs in favor of the State.

We turn to the State's remark during closing argument before considering the cumulative effect of all the statements. While the State's remark was not merely a witness's blurt, it was not likely to mislead "or influence the jury to the prejudice of the accused." *Lee v. State*, 405 Md. at 164. Once again, the factors weigh in favor of the State. *See id.* at 165 (listing the factors as the severity of the remarks, the weight of the evidence against the accused, and the measures taken to cure any potential prejudice). The State's remark was that Mr. McDaniel was "under surveillance . . . because don't forget about the electronic surveillance." The court gave a curative instruction to the jury to explain that the State had meant that if the agents were to be credited, Mr. McDaniel was surveilled, but the jury should not infer that anything criminal was going on. The

State's remark did not explicitly state that Mr. McDaniel was the target of a criminal investigation. While jurors could have drawn inferences from it, the statement did not direct the jurors to draw a negative inference. Thus, it was not especially severe. Also, as discussed above, a great deal of other evidence existed, indicating that the State's remark likely did not tip the scales in deciding the defendant's guilt.

Furthermore, the court swiftly and properly cured any prejudicial effect that may have existed from either the agents' testimony or the State's closing argument remark, and we presume jurors follow the trial court's instructions. *See Carter v. State*, 366 Md. 574, 592 (2001) ("[G]enerally[,] cautionary instructions are deemed to cure most errors, and jurors are presumed to follow the court's instructions[.]"); *Simmons v. State*, 436 Md. 202, 222 (2013) ("[W]hen curative instructions are given, it is generally presumed that the jury can and will follow them."). For an instruction to cure any prejudice, it must be timely, accurate, and effective. *Carter*, 366 Md. at 589.

The court's curative instructions were all timely. The court gave a total of three curative instructions (one of which defense counsel asked for) to the jury to not draw any inferences that Mr. McDaniel was involved in criminal activity. Immediately after the first statement that Mr. McDaniel contests, the court gave its first curative instruction. In the other two instances, the court called the parties' attorneys to the bench and held a conference to resolve the issue without the jury overhearing. Immediately following each bench conference, the court gave another curative instruction. These instructions were given as soon after the contested statements were made as possible and thus timely.

The court's instructions were also all accurate. The court accurately stated the instruction by telling the jury not to infer anything criminal in Mr. McDaniel's activities. The alleged harm in the contested statements is that they implied Mr. McDaniel was the target of a criminal investigation. The court's instruction not to draw that inference went directly to the heart of the harm that Mr. McDaniel argues.

Most important, perhaps, was that the court's instructions were effective. The court cured any prejudice that may have resulted from the contested statements by providing neutral context that helped explain the surveillance of Mr. McDaniel without implying criminal activity. The court's curative instructions explained that the agents were simply "out and about doing [their] job getting [to know] the people of the area."

Mr. McDaniel argues that his case is similar to *Carter v. State*, 366 Md. In *Carter v. State*, a witness mentioned the defendant's previous weapons charge, which was inadmissible evidence, and the trial court attempted to cure the prejudice that resulted. *Id.* at 579-82. Our Supreme Court found that those instructions did not effectively cure the inadmissible evidence because the instructions confirmed, repeated, and emphasized that the defendant had a previous weapons charge. *Id.* at 591-92. Conversely, here, where the inadmissible evidence was that Mr. McDaniel was the target of a criminal investigation, the contested statements never confirmed that Mr. McDaniel was the target of a criminal investigation. To the extent that an inference to that point was possible, the court cured any prejudice by telling the jury not to draw that inference. Further, the court provided a

neutral explanation for why the agents were surveilling Mr. McDaniel, repudiating inadmissible evidence instead of confirming it, as had the trial court in *Carter*. *See id.*

Therefore, even taken cumulatively, the contested testimony and closing remark were not so prejudicial as to mislead the jury or deny defendant a fair trial. To the extent that any prejudice did result, the court effectively cured it with curative instructions. Accordingly, the court did not abuse its discretion in denying Mr. McDaniel's motion for a mistrial.

C. Denial of the Motion for a New Trial

We also conclude that the trial court did not abuse its discretion in denying Mr. McDaniel's motion for a new trial. The contested testimony and argument were not so prejudicial that the trier of fact would have been affected.

The arguments for and against a new trial are largely the same as the arguments for and against a mistrial. Mr. McDaniel argues that the trial court abused its discretion when it denied his motion for a new trial. He claims that the trial court improperly applied the standard for 5-404(b) evidence and that the court's curative instructions did not effectively cure the prejudice from the contested statements.

To grant a motion for a new trial, a trial judge must find that it would be "in the interest of justice[.]" Md. Rule 4-331(a). That is, the judge must decide whether "there was a substantial or significant possibility that the verdict of the trier of fact would have been affected." *Yorke v. State*, 315 Md. 578, 588 (1989). A trial court abuses its

discretion in denying a motion for a new trial when it does so arbitrarily, capriciously, or beyond the letter of the law. *Campbell v. State*, 373 Md. at 666.

Mr. McDaniel contends that the court applied the improper standard for 5-404(b) evidence in admitting the "other crimes" evidence that Mr. McDaniel was the target of a criminal investigation. However, the court never admitted "other crimes" evidence because the contested statements never confirmed that Mr. McDaniel was the target of a criminal investigation. While it is possible that the jury could have inferred that Mr. Daniel was a target from the agents' statements, the court rejected that inference and offered a neutral explanation that effectively rebutted it. Thus, the inference was never admitted, and the court took steps to ensure the jury would not make such an inference. Therefore, since the court did not admit other crimes evidence in the first place, there was no need for it to apply the 5-404(b) standard.

As to Mr. McDaniel's repeated argument that the court's curative instructions did not effectively cure any prejudice that resulted from the contested statements, we reiterate our analysis above. The court timely, accurately, and effectively provided curative instructions. These instructions not only told the jury not to infer criminal activity (an instruction we presume the jury followed); the instructions also provided the jury with a neutral explanation that further minimized any possible prejudice. We thus conclude that the trial court did not abuse its discretion in denying Mr. McDaniel's motion for a new trial.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.