UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0409

September Term, 2014

DARIUS SHEPPARD

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Hotten,
Nazarian

JJ.

Opinion by Hotten, J.

Filed: May 7, 2015

Following a jury trial in the Circuit Court for Baltimore City, appellant, Darius Sheppard, was convicted of first-degree murder, use of a handgun in the commission of a felony or crime of violence, and possession of a firearm after being convicted of a disqualifying offense. (*See* Md. Code (Repl. Vol. 2012), §§ 2-201 and 4-204 of the Criminal Law Article and Md. Code (Repl. Vol. 2011), § 5-133(c) of the Public Safety Article). The circuit court sentenced appellant to life imprisonment for first-degree murder, 20 years, consecutive, for use of a handgun in the commission of a crime of violence, and 5 years, consecutive, for possession of a firearm after being convicted of a disqualifying offense.[1]

Appellant filed a timely appeal and presents two questions for review, as follows:

> [I]. Was it error to deny the motion for mistrial, without allowing the defense to call the prosecutor as a witness, where the sworn testimony of a detective contradicted her proffer?
>
> [II]. Did the trial court abuse its discretion in failing to declare a mistrial, after the State commented in closing argument that the defendant lacked the courage to testify?

For the forgoing reasons, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

The charges in this case stem from the fatal shooting of Arthur Peacock ("Mr. Peacock") on September 30, 2010, in the 800 block of West Lexington Street in Baltimore

[1] For the weapons offenses, the first five years were to be served without the possibility of parole, pursuant to Criminal Law Article § 4-204(c)(1)(ii) and Public Safety Article § 5-133(c)(2)(ii).

City. That afternoon Mr. Peacock and his girlfriend, Artesha Bond ("Ms. Bond") were selling drugs, from the front porch of 808 West Lexington Street. Around 7:00 p.m., Ms. Bond heard two gunshots. She observed Mr. Peacock get shot and fall to the ground, but did not see who shot him. Thereafter, Ms. Bond called 911.

Tristan Morgan ("Mr. Morgan") also witnessed the shooting on September 30, 2010. Mr. Morgan was friends with Mr. Peacock and he knew appellant from the neighborhood. On the day of the shooting, Mr. Morgan was selling drugs in the 800 block of West Lexington Street, across the street from Ms. Bond and Mr. Peacock. Mr. Morgan testified that he saw appellant come out of an alley, walk up to Mr. Peacock holding a black gun, and shoot him in the head. Mr. Morgan heard multiple shots fired and then saw appellant walk back through the alley.

Detective Jonathan Riker testified that appellant was the victim of a non-fatal shooting that occurred on April 11, 2010 in the same block where Mr. Peacock was shot and killed. According to Ms. Bond, Mr. Peacock admitted that he shot appellant, but did not provide any additional details. Troy Nickerson ("Mr. Nickerson"), one of appellant's friends, gave a statement to police, stating that appellant told him that he was shot by Mr. Peacock. Appellant, however, never identified the person that shot him to police and he was very uncooperative during the investigation. Detective Riker explained that after Mr. Peacock's

death, the non-fatal shooting case was closed because Mr. Peacock was the prime suspect and could no longer be charged with the crime.

Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

DISCUSSION

I.

During the cross-examination of Detective Riker, appellant's counsel elicited testimony that police located a fingerprint at the scene of the April 2010 shooting that was a match to an individual by the name of Travis Bates ("Mr. Bates"). Detective Riker confirmed that, as a result, a flyer was created by the Baltimore City Police Department stating that Mr. Bates was wanted for questioning in connection with appellant's shooting. Appellant's counsel then asked whether there were any other suspects in appellant's shooting. Detective Riker stated that Mr. Peacock was also named as a suspect and explained: "There was a flyer that was put out to be cautioned of Mr. Arthur Peacock due to the violence in the area."

Thereafter, appellant's counsel requested to approach the bench and informed the court: "This is the first that the officer has ever stated that there was any additional flyers that were done and this has never been turned over to the Defense." The State responded that she had also never seen the Peacock flyer before and further, explained: "the State disclosed

everything, all of the progress reports, the State disclosed all the evidence, the State disclosed all the pictures. The State also made available if [appellant's counsel] wanted to review anything of the police department, both the non-fatal and the fatal. She never took the State up on that."

Appellant's counsel requested to question Detective Riker outside the presence of the jury regarding when he came into possession of the flyer, when it was created, and why it was never disclosed. The court granted counsel's request and Detective Riker explained that he found the flyer in the case folder and that he handed everything in the file to the State's Attorney, but he did not know whether the specific document was handed over. Detective Riker stated that he did not create the flyer and that he did not know when the flyer was generated.

When the jury returned to the courtroom, appellant's counsel continued her line of questioning regarding the Peacock flyer, and Detective Riker explained that if the Peacock flyer was in the case file, then it was forwarded to the State's Attorney. At this point, appellant's counsel requested to approach the bench and stated:

> Your Honor, his testimony when we had the recess was essentially that he was not certain, there were very many documents. Now he's saying unequivocally that in fact he turned over those documents prior to today to madame State. That essentially puts the Defense in a position where we cannot refute that without calling [State's Attorney] as to whether or not she received these documents prior to today.

The State's Attorney responded:

> Your Honor, in the last trial [appellant's counsel] tried to call the State's attorney as a witness. In this trial she's trying to [call] the State's attorney as a witness. I indicated, Your Honor, I don't have it. This case is three years old. Detective Riker has turned over many files. In fact, Your Honor, I have the file right here, everything I have and this is everything I turned over to counsel.

When the court asked the State's Attorney if she intended to use the document at trial, she responded that she did not, and the court denied appellant's counsel's request to call the State's Attorney as a witness. After the luncheon recess, appellant's counsel requested a mistrial for the alleged discovery violation and argued, as follows:

> . . . The Defense would move for a mistrial for the discovery violation. This particular piece of evidence was not previously disclosed not prior to this trial date, not prior to trial number two that occurred in February of 2013, not prior to trial number one that occurred in February of 2012.
>
> The State is under a continuing obligation to disclose information either it has knowledge of or should have knowledge of because it is in the possession of the Baltimore City Police Department, the law essentially recognizes that the State cannot go behind that we didn't know about it, but if it exists in the police and the police have possession of it.
>
> This particular point is crucial to the Defense, as it was in trial one and again in trial two. The State's motive has always been that this was a retaliation for a previous shooting. The Defense's position has been as in trial one, as in trial two that Mr. Sheppard did not have knowledge who shot him. And if anyone – and if he were to shoot someone, it would have been Mr. Bates because [he] was the person that the officers publicized as who they were seeking as a person of interest in regards to his shooting.

> That had never been disclosed previously that there had – was a flyer generated that prior to September 30[th] of 2010, prior to his death that he, Mr. Arthur Peacock had been a person of interest in the shooting. At this point the Defense has been totally sandbagged. Had we been aware that in fact, such a flyer existed or was generated, then the Defense would of had the opportunity to essentially alter, change or modify its theory.
>
> But we're at the point where now we are not only in the midst of trial, but we at the juncture that we are in trial three for an event that dated back to 2010 and the officers indicated that he did provide that to the State, which we have never received a copy

The State's Attorney, again, reiterated that she had never seen the flyer and also explained:

> Okay. And the flyer, Your Honor, the State wasn't using it. That would be one issue why the State would not have to turn it over. It is not exculpatory. Within the rules, Your Honor, the State has to turn over what's [sic] would be one, part of its case, what, if anything would be exculpatory.
>
> That would not be exculpatory. In fact, Your Honor, that would – it helps the State. I would of loved to have had that. I mean, that would have – it's not something I could have entered into evidence. It would have been hearsay.

Thereafter, the court asked the parties to discuss how, if at all, appellant was prejudiced due to the alleged discovery violation. The State argued that appellant suffered no prejudice because the State's theory of the case, from the beginning, was that appellant killed Mr. Peacock in retaliation because Mr. Peacock shot him in April of 2010. Appellant's counsel responded:

> Your Honor, the State cannot simply seek to circumvent the discovery rules by saying that we're going to essentially assert the contents of the documents, but not produce the document. Essentially the officer is testifying that prior to September 30[th] of 2010 that Mr. Arthur Peacock was a suspect in the shooting of Mr. Darius Sheppard.
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> That has never been previously disclosed and that is the essence of the information. The Defense essentially has developed its case based upon that information, that the person that was generated as a result of his shooting, the only person that was generated as a result of the shooting . . . [w]as someone other than Mr. Peacock.
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> * * *
>
> And now in the moment of trial that the officer is testifying that not only was that reduced to writing, but that was also provided to the State.

In denying the motion for mistrial, the court explained:

> Okay. The gravamen or the gist of the motion for a mistrial of the defendant rests on the truth of the fact asserted through the testimony of the detective presently who indicates and testified that he believes he turned everything that he had over to the State. The State has been queried by the court exhaustively as to the search, if any, of its records that were turned over to Defense.
>
> The court accepts the State's assertion as an officer of the court that it A; didn't have the document notwithstanding the testimony of the witness, B; from flowing from that had it, that it wasn't something that was left out and not turned over. For those reasons the motion for mistrial is denied and now we will resume.

The flyer, titled "Target for Enforcement," which was admitted into evidence as [appellant's] Exhibit 5, contained two pictures of Arthur Peacock AKA Tevin Hewlett, his

height, weight, date of birth, and the following text: "Target the above individual for enforcement. Same may live or frequent the area of POE HOMES. Same may be responsible for some violence in the area. May be armed, so approach with Caution!!! Contact DDU if arrested."[2]

Thereafter, appellant's counsel elicited testimony from Detective Riker that the Bates flyer was dated May 12, 2010 and specifically mentioned that Mr. Bates was a possible witness to appellant's shooting on April 11, 2010. The Peacock flyer, however, did not have a date, did not mention anything about a shooting, and did not give any specific contact information. Appellant's counsel also elicited testimony that Mr. Peacock was a known drug dealer in the Poe Homes area and that during drug deals, there was typically a gun in the vicinity. Finally, Detective Riker testified that there was no physical evidence connecting Mr. Peacock to the April, 2010 shooting of appellant.

Detective Riker, on re-direct, testified that he advised appellant's counsel that Mr. Peacock was a person of interest in appellant's shooting at the second trial. Detective Riker testified that he was not asked, and he did not mention, that a flyer was generated for Mr. Peacock at either of the two prior trials.

[2] Detective Riker testified that DDU was an abbreviation for District [D]etective [U]nit.

Maryland Rule 4-263 governs discovery procedures in circuit court and provides, in pertinent part:

> (c) **Obligations of the parties.**
>
> > (1) Due diligence. The State's Attorney and defense shall exercise due diligence to identify all of the material and information that must be disclosed under this Rule.
> >
> > (2) Scope of obligations. The obligations of the State's Attorney and the defense extend to material and information that must be disclosed under this Rule and that are in the possession or control of the attorney, members of the attorney's staff, or any other person who either reports regularly to the attorney's office or has reported to the attorney's office in regard to the particular case.
>
> (d) **Disclosure by the State's Attorney.** Without the necessity of a request, the State's Attorney shall provide to the defense:
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> * * *
>
> > (9) Evidence for use at trial. The opportunity to inspect, copy, and photograph all documents, computer-generated evidence as defined in Rule 2-504.3(a), recordings, photographs, or other tangible things that the State's Attorney intends to use at a hearing or at trial[.]

Appellant argues that the circuit court erred by accepting the State's Attorney's unsworn proffer that she never received the evidence in question, which was contradicted by the sworn testimony of Detective Riker that he handed over everything in his file. The State responds that "even assuming *arguendo* that there was some error in relying on the State's

proffer, any such error was harmless" because the prejudice, if any, was not so severe to warrant the extreme remedy of a mistrial.

Under Md. Rule 4-263(c)(2), the duty to disclose discovery information extends to persons that report to the State's Attorney's office, which includes Detective Riker. The State's Attorney, however, advised the court that she had never seen the flyer and that even if she had, she would have had no intention of using it at trial. The State's Attorney also stated that the State's file and the police files were made available to appellant's counsel, but counsel did not ask to see them.

Regardless of whether the State's Attorney knew about the flyer and/or had received the flyer prior to trial, under Md. Rule 4-263(d)(9), the only relevant inquiry is whether appellant's counsel had the opportunity to inspect, copy, or photograph evidence that the State's Attorney intended to use at trial. Accordingly, the relevant portion of the State's Attorney's proffer was not in dispute. It was within the court's discretion whether to accept the State's Attorney's proffer. *See Longus v. State*, 416 Md. 433, 460 (2010) (internal quotation marks omitted) ("[A] trial judge has the discretion to give credence to a plausible and undisputed proffer by an officer of the court[.]"). There is nothing in the record to suggest that the State's Attorney intended to use the flyer as evidence at trial. The disclosure of the flyer occurred during appellant counsel's cross-examination of Detective Riker and further, the State's Attorney explained:

> And the flyer, Your Honor, the State wasn't using it. That would be one issue why the State would not have to turn it over. It is not exculpatory. Within the rules, Your Honor, the State has to turn over what's [sic] would be one, part of its case, what, if anything would be exculpatory.

The court, therefore, did not abuse its discretion in crediting the State's proffer that she did not intend to use the evidence at trial.

"'[A] mistrial is generally an extraordinary remedy and . . . under most circumstances, the trial judge has considerable discretion regarding when to invoke it.'" *Whack v. State*, 433 Md. 728, 751-52 (2013) (quoting *Powell v. State*, 406 Md. 679, 694 (2008)). "Ordinarily, the exercise of that discretion will not be disturbed upon appeal absent a showing of prejudice to the accused, and [i]n order to warrant a mistrial, the prejudice to the accused must be real and substantial." *Wagner v. State,* 213 Md. App. 419, 462 (2013) (quoting *Washington v. State*, 191 Md. App. 48, 99 (2010)) (internal quotation marks omitted). "The determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 594-95 (1989)).

In the case at bar, the court denied the motion for mistrial on the basis that the State exercised due diligence in identifying any and all discovery material to turn over to the defense. In doing so, the court implicitly determined that there was no discovery violation and, as a result, denied the motion for mistrial. Under these circumstances where the flyer

was not part of the mandatory disclosures, the court did not abuse its discretion by denying the motion for mistrial in a situation where there was no discovery violation to remedy.

Further, the prejudice, if any, to appellant was not so substantial that he was deprived of a fair trial. At trial, appellant's counsel argued that "[h]ad we been aware that in fact, such a flyer existed or was generated, then the defense would of had the opportunity to essentially alter, change or modify its theory." Appellant, however, advanced no arguments at trial and presents no arguments on appeal explaining how the mid-trial disclosure of the flyer deprived him of a fair trial. For all these reasons, the court did not abuse its discretion in declining to grant a mistrial in this case.

II.

Appellant also contends that the circuit court abused its discretion by failing to declare a mistrial, *sua sponte*, where the State's Attorney made an improper comment during closing argument that was "unsolicited, deliberate, and repeated[.]" The State responds that appellant's claim is not preserved because he did not request a mistrial at trial and only objected "to one of the two comments that he now claims required a mistrial." The State contends that "even if properly before this Court, the lower court was acting within its discretion not to declare a mistrial, as the prosecutor's comments were unrelated to [appellant's] decision not to testify in his own defense in this case."

The comments at issue occurred near the end of State's Attorney's rebuttal closing argument and are, as follows:

> [STATE'S ATTORNEY]: . . . Ladies and gentlemen, from the very beginning, this was a case of revenge. This is a case in which on this street right here in April of 2010, Arthur Peacock shot [appellant]. And from that moment he plotted and planned to kill with a handgun, which we know was a handgun because of bullets recovered from the body of [Mr.] Peacock.
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> [Appellant] plotted to kill Arthur Peacock. And on September 30[th] he came around this alley to this area, shot him and walked way. He came out of this alley, shot him and walked away. The State, ladies and gentlemen, has presented medical evidence, ballistic evidence, photographic arrays, photographs. We have presented witnesses. *We have presented witnesses who were courageous enough to come forward, courageous enough to testify, to get up on that stand and do what was right. [Appellant] was not courageous enough to get up on that stand.*
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> [APPELLANT'S COUNSEL]: Objection.
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> COURT: Sustained.
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> [STATE'S ATTORNEY]: *[Appellant] would not go to the police. He wanted his own form of justice. He did not want the justice that was here. He did not want the justice in which he would have to testify.* He did not want to be labeled what Tristan Morgan had been labeled. He did not want done to him what has been done to Tristan Morgan. He wanted to do it himself and he did.
>
> This, ladies and gentlemen, should be a trial against Arthur Peacock, but it is not. We cannot speak to him. He does not get his day in court because his day in court was taken away from him by that man because that man on September 30[th], 2010 in close range shot him twice in the head because of revenge, because of anger because he wanted to do it himself.

(emphasis added).

At trial, appellant's counsel objected to the comment that "[appellant] was not courageous enough to get up on that stand." After the court sustained the objection, appellant's counsel did not ask for a mistrial, curative instruction, or any other relief. Appellant's counsel also did not request a continuing objection and failed to object to the second comment at issue on appeal. Under these circumstances, appellant's claim is not preserved for our review. *See* Md. Rule 4-325(e) ("No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection."); Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"); *Berry v. State,* 155 Md. App. 144, 172-73 (2004) (stating that after an objection has been sustained, "[i]n the absence of a request for relief, either in the form of a curative instruction or a mistrial, appellants have nothing about which to complain [ ]").

Even if, however, this argument were properly preserved for review and even if the State's Attorney's comments were improper, the court did not abuse its discretion in failing to declare a mistrial *sua sponte*. As discussed above, "'a mistrial is generally an extraordinary remedy and . . . under most circumstances, the trial judge has considerable discretion regarding when to invoke it.'" *Whack v. State*, 433 Md. 728, 751-52 (2013)

(quoting *Powell v. State*, 406 Md. 679, 694 (2008)). "The determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 594-95 (1989)).

Here, the State's Attorney's comments, taken in context, did not refer to appellant's decision not to testify in the instant case, but rather, referred to appellant's decision not to testify and cooperate with police in the investigation where he was shot in April of 2010. Because appellant was the victim in that case, the State's Attorney, in rebuttal closing argument, was not commenting on appellant's decision not to testify, as appellant contended. Under the circumstances, the above comments made during rebuttal closing argument were not so prejudicial as to deprive appellant of a fair trial.

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