Circuit Court for Howard County
Case No. C-13-CR-18-000001

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 486

September Term, 2019

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DAMIEN GARY CLARK

v.

STATE OF MARYLAND

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Graeff,
Nazarian,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Nazarian, J.

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Filed: June 29, 2020

A Christmas Day altercation in a convenience store resulted in the death of one customer and serious injuries to another. After a trial in the Circuit Court for Howard County, a jury convicted Damien Clark of attempted second-degree murder, two counts of second-degree assault, and voluntary manslaughter. On appeal, Mr. Clark contends that the circuit court made numerous errors during his trial. We affirm the convictions.

## I. BACKGROUND

On April 18, 2018, Mr. Clark was indicted by a Howard County grand jury and charged with second-degree murder of James Fallin, the attempted second-degree murder of Warner Jackson, and first- and second-degree assault of both Mr. Fallin and Mr. Jackson. A jury trial was held between February 11 and 19, 2019 and the jury convicted Mr. Clark of attempted second-degree murder, two counts of second-degree assault, and voluntary manslaughter.[1] He was acquitted on all remaining counts.

On the evening of December 25, 2017, Mr. Clark encountered Mr. Fallin and Mr. Jackson at the Trellis Center Quick Stop Food Mart.[2] During the physical altercation that we'll describe below, Mr. Clark pulled out a knife and swung it at Mr. Fallin and Mr. Jackson. Both sustained injuries, but Mr. Fallin's injuries were fatal. The medical examiner, Dr. Melissa Brassell, performed Mr. Fallin's autopsy and testified that his cause of death was homicide. Surveillance footage from the Quick Stop captured the whole

[1] The jury was instructed that "[i]f the defendant did not act in complete self-defense, but did act in partial self-defense, your verdict must be guilty of voluntary manslaughter and not guilty of murder."

[2] Some of the witnesses refer to the Quick Stop as the "Wawa" because it used to be a Wawa.

sequence of events. Mr. Clark does not dispute that he injured Mr. Jackson and killed Mr. Fallin—the dispute at trial centered instead around whether he acted in self-defense.

Mr. Jackson testified that he and Mr. Fallin had "left the house to go look for marijuana to smoke." According to Mr. Jackson, he and Mr. Fallin approached Mr. Clark outside the Quick Stop and asked Mr. Clark if he "kn[e]w where the grass at?" Mr. Clark responded, "I don't fuck with that shit." After the verbal interaction, Mr. Jackson and Mr. Fallin stood at the window of the Quick Stop and were looking at "[a] female" with "brown skin" and "pink hair" and looked at her "[b]ecause she looked good." Mr. Fallin asked Mr. Clark, "is this your woman?" to which Mr. Clark responded, "yeah, that's my wife. Fuck you asking about my wife for?" Mr. Jackson testified that he turned to Mr. Fallin and said, "bro, come on. Let's go. They trippin'," and at that point, Mr. Clark approached them and said "what n****? What n****? What you say n****?" and then "grabbed [Mr. Jackson] around [his] neck and threw [him] up on the counter." After he was thrown on the counter, Mr. Jackson "hit [Mr. Clark" with "[his] hands." He and Mr. Fallin ran out of the store "[b]ecause [Mr. Clark] was chasing" them.

Jocelyn Bogen, a customer at the Quick Stop, also testified for the State. She was visiting her family in Columbia and went to the Quick Stop to purchase cigarettes for her godmother. She testified that just as she entered the store, "an altercation was popping off":

> [THE STATE]: Could you explain to the ladies and gentlemen of the court or ladies and gentlemen of the jury the first time that you noticed anything unusual when you walked in the door you saw or heard?
>
> [MS. BOGEN]: As I was walking in as my daughter basically passed the register I was just behind her is when they started

tussling up against the cash register area.

[THE STATE]: And did you hear any words exchanged between any of those parties—

[MS. BOGEN]: Yeah, he said—

[THE STATE]: —either prior or during the struggle.

[MS. BOGEN]: Yeah, he said, N-word what?

Ms. Bogen identified Mr. Clark as the individual who said those words. She then explained how she perceived the altercation:

[THE STATE]: Ma'am, when you saw that tussle begin, what did you do at that point?

[MS. BOGEN]: I pushed my daughter out of the way and I told them to move.

[THE STATE]: And did you move?

[MS. BOGEN]: Yeah, we moved to the back of the store.

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[THE STATE]: And what was the purpose of that?

[MS. BOGEN]: To look for an exit because I didn't know what was going on.

[THE STATE]: Now, [were] you able to see from where you are at the back of the store what happened with the altercation from that point forward?

[MS. BOGEN]: I didn't see exactly at that point forward. When I returned to the end of the store, I could turn around and I was able to see they are tussling over by the deli area.

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[THE STATE]: Okay. Did you see any objects in anyone's hands?

[MS. BOGEN]: No, I did not.

[THE STATE]: [W]ith respect to the tussle itself how long did that go on? And I don't mean specifically, but seconds, minutes, hours, years.

[MS. BOGEN]: Maybe a minute and a half [m]ax.

Ms. Bogen testified that the two victims "ran out the store" while Mr. Clark remained, and she heard Mr. Clark "make a statement to his girlfriend when she was trying to calm him down" that "[h]e stabbed him good." During cross-examination, Ms. Bogen testified that Mr. Clark "appeared to be fighting back" and she thought "he was defending himself."

Mr. Clark's co-worker, William Venson, testified that the day after Christmas, while they were both at work, Mr. Clark described to him the physical altercation that occurred the day before:

> [MR. VENSON]: So I wasn't really looking at him, but I was listening to him. And I asked him how was your Christmas and he says, these youngins out here, they got no respect. And I said, yeah, you right. But I didn't know where this was going. And then he said to me, he was like, I had to teach some youngins a lesson. And I said what? What are you talking about? And he says, these youngins out here, man, they got no respect. And excuse my language, but he said, motherfuckers got to learn sometimes.
>
> And I said, what you talking about? I said, you got in a fight or something? And then I looked at him. And when I looked up at him I realized he had two black eyes and a scratch on his nose. And he said yeah, I had to yak them up. I was like, yak them? I said, what do you mean you had to yak somebody up? And he told me—he started to tell me that he was going into a store and some youngins tried to sell him some weed. And he looked at them and said, do I look like the type of motherfucker that smoke weed?
>
> And I said, yeah, but how did you end up stabbing them? And he said that one of them said something to his wife and then he started to choke him and that the other one hit him in the face with a pipe. I said, you got in a fight on Christmas? Who the hell does that? And he said, youngins ain't have no respect and I just started yakking them up.
>
> And then [] he pointed to his wrist and he said I had my little knife right here. The one that Steve gave us. I was, like, the knife that [] Bill gave us for Christmas. And I said, you stabbed

> somebody up on the Christmas Day? Are you freaking serious? And he said, yeah. One of them in critical and the other one is locked up.
>
> And I said, so did you talk to the cops? Did you stay there? And he said yeah, I talked to the cops. I said, so what they do? I mean, you did it so obviously they let you go. He said, yeah, they said it was self-defense and let me go.
>
> And I was like, dude, you stabbed somebody on Christmas? I was kind of taken aback for me because—I mean I then seen a lot of violence in my life, but you know, on Christmas day.

Mr. Clark testified on his own behalf. He told the jury that Mr. Fallin and Mr. Jackson "were noisy" and "real rowdy":

> [MR. CLARK]: And that's what drew my attention. I was walking straight out the store. And as rowdy and the way that they were acting, I couldn't help that it drew my attention because I had stopped right where the cars—like somewhere in between the cars and watched them. And I watched the one guy. He came out with both hands in his pocket. The other guy had a baseball cap over his head like he could disguise his face with a hoodie over it with it drawn down. Like the same type you would see somebody robbing a bank on TV.
>
> [DEFENSE COUNSEL]: So what, if anything, did you do?
>
> [MR. CLARK]: I saw the other guy come out. I ain't make too much of it because they're not there for me. It's not that. As long as I'm minding my business, you know, they'll leave me alone and I leave them alone. You know, they all the way on the other lot, but [they're] coming that way. The one guy had the black coat on, just kept his hands in his pocket. The whole time both his hands just was in his pocket. And I watched the two guys start walking down a lot.
>
> So as I started walking, they started screaming, weed, weed, weed, weed. Just start screaming it. So when I get by my car I noticed how they split up. I mean two guys walked, come together. You came to the store together. Why y'all splitting up?

He said that he continued to ignore them, but they kept asking him about weed. So he "got

kind of aggressive" and said "Bitch, do the fuck it look like I s[m]oke weed?" He got in his car and "watched [them]" because he "didn't feel too right about them." He felt "[v]ery uncomfortable" and began "worr[ying] about getting [his] wife out the store" because he saw Mr. Jackson and Mr. Fallin "harassing a lady getting out a black car." He got out of his car and began to go in the store, and testified that at that point, he heard Mr. Jackson tell Mr. Fallin "we need to go in there and fuck that n**** up."

Mr. Clark then described from his perspective how the altercation began:

> [MR. CLARK]: I watch as the guy in the black jacket started leading the one in fatigues back there. And then once they got back there, they switched places because the one in the black jacket was leading first. But the one in fatigues switched places where he conveniently let the one in the fatigues come in front of me. But he got his hand down his pants. And it made me feel uncomfortable because he got his hand down his pants and I saw his elastic and he had two pair of underwear like he was stashing something down there.
>
> [DEFENSE COUNSEL]: So his pants were low enough for you to see his underwear?
>
> [MR. CLARK]: Yup, you could see the top brim of the underwear. And you could see how he had his fist, the top of his fist like this. (Demonstrating.) Like he was reaching down in between the elastic of his underwear. You could see the top bands. Like he was reaching down there for something.
>
> [DEFENSE COUNSEL]: And then what happened?
>
> [MR. CLARK]: So once he came over he was laughing sarcastically saying, yeah, when you come outside you going to get fucked up. I told him, man—excuse my language.
>
> ***
>
> [DEFENSE COUNSEL]: What did you say?
>
> [MR. CLARK]: He told me when you come outside, you going to get fucked up.
>
> [DEFENSE COUNSEL]: And what did you respond?

> [MR. CLARK]: I told him you're not going to do shit to me. You ain't going to do a damn thing. So his friend came passed and called my wife a dick eating bitch. And I said, N****, what you say? And I moved him out the way. As soon as I moved him out the way, we made contact like right over here. []

He testified that one of the victims "spit in [his] face," "the ultimate form of disrespect."

At that point, the physical altercation began:

> [DEFENSE COUNSEL]: And what did you do?
>
> [MR. CLARK]: I went over there towards him. And as soon as I went over there, it was like I was being [] set up for a fight and I baited myself right into it because as soon as I went over there he turned his head and said, Scoot, come get him. And I grabbed him by the back of the neck. And when I grabbed him by the back of the neck, I grabbed him by like the shirt and I lifted him up.
>
> And as soon as I was getting ready to slam him on the counter, I get hit in the back of the head. But the hit, it's not like a normal hit. It kind of like run my belt a little bit, the hit. Damn. When I get hit, it's just not a normal hit.
>
> [DEFENSE COUNSEL]: What do you mean by that?
>
> [MR. CLARK]: It wasn't a fist. It was a fist, but it wasn't a normal fist that I got hit with. I got hit with something. Definitely something. It just wasn't normal. But it kind of—it was like a burning sensation when I got hit. But as soon as I got hit, I put my hands up because I knew it was going to be two against one fight.
>
> [DEFENSE COUNSEL]: And then what happened? You're hit in the back of the head and what happened?
>
> [MR. CLARK]: I got two guys in front of me and my wife stuck behind them. So my wife is trapped. She can go nowhere. She stuck behind them. I don't want to turn my head or nothing, but somebody comes in the door behind me so now I can't leave the door because somebody just came in the store behind me. I don't know who it is. I don't know if they with them or not, but somebody came in the store behind me. And I got my hands up thinking to myself, like, my wife trapped here. I got somebody behind me. I got two people in front of me. It's

> going to be a three on one fight. I'm just hoping during the fight my wife just run out the door once the fight break off. That's what I'm hoping. But I ended up getting hit. But when I end up getting hit, it's not like a normal hit the first hit.
>
> ***
>
> [DEFENSE COUNSEL]: As they're striking you, is there any way that you can make it out the door?
>
> [MR. CLARK]: No, it was no way because when I was trying to get to the door, it was like they was beating me away from it.
>
> [DEFENSE COUNSEL]: Okay. And what, if anything, happened at this point?
>
> [MR. CLARK]: I just remember I couldn't move my arms. Couldn't move my feet. Couldn't move nothing at the time. One-hit is like normal. (Demonstrating.) But the other hit is like just (Demonstrating.) And when I get hit, it's like a pain. But the other one I snapped out of it. One is normal. One is not.
>
> But I'm trying to snap out the hit. And I just remember when I got somewhere by the end of the, like, aisle, somewhere by the end, somewhere before the [] lottery area I just remember I got this one (Demonstrating.) hit. And that one-hit was getting ready to knock me out. It hit me so hard that my right just turn.
>
> But as soon as I turned and I was getting ready to go down, I saw my wife go to the floor. She went to the floor so hard where her head hit twice, like (Demonstrating). When she hit the floor that's when I came up out of it. Oh, my God. I got to save my wife. It was the first thing I had thought. But at the time my wife told me that the guy Jackson had put his hands on her. I didn't see it.

Mr. Clark described the moment where he pulled out his knife:

> [MR. CLARK]: So I'm trying to fight. I've got my finger like this. (Demonstrating.) I'm trying to fight and get to this knife. I'm trying to slide, slide. And I'm trying to do it in a way they don't see it or try to take it from me. So what I do is I slide and I get it up my sleeve?
>
> [DEFENSE COUNSEL]: Okay.
>
> [MR. CLARK]: And then I take my sleeve—well, I had my

> coat on. I had this side of my sleeve and that's when I moved it around inside my sleeve while I'm taking the this. And I took my finger and I slid it down like this. (Demonstrating). Once I slid it down, I had to wait for an opening because I'm on the ground. []
>
> [DEFENSE COUNSEL]: While you are on the ground, did you feel as though you could have retreated?
>
> [MR. CLARK]; I'm on the ground. How can I retreat?
>
> [DEFENSE COUNSEL]: Did you feel that you could have crawled out a little?
>
> [MR. CLARK]: No, one of them was kicking me in the back of the head and one of them was punching me. I couldn't retreat.
>
> [DEFENSE COUNSEL]: So at this point you pulled out your knife.
>
> [MR. CLARK]: I was trying to get it out. I didn't even get it out yet. I was working on getting it out. I got two guys attacking me on the ground. I just can't pull the knife out all crazy. I got to time it just right because I don't want them to take this knife from me.
>
> [DEFENSE COUNSEL]: So then what happened?
>
> [MR. CLARK]: So what I did was I pulled one of the guys in the left side somewhere in the thigh. Somewhere. I know it was on the left side in the [*sic*]. It didn't do nothing to him at all.
>
> [DEFENSE COUNSEL]: When you say it did nothing to him at all, you mean he did not stop striking you?
>
> [MR. CLARK]: He didn't stop hitting me or nothing. I'm still getting hit and kicked. They wouldn't stop.
>
> [DEFENSE COUNSEL]: Did you also use the knife to stab anyone else?
>
> [MR. CLARK]: Eventually, yeah.
>
> [DEFENSE COUNSEL]: What happened?
>
> [MR. CLARK]: Nothing. Nothing happened.

And then he described the fatal stabbing of Mr. Fallin:

> [MR. CLARK]: Well, I got Jackson behind me. Jackson

holding my wife against her will right behind him. And as I'm getting up, I'm stuck like in the middle. I got Fallin charging towards me fighting me. I got Jackson behind me and he's holding my wife so I'm swinging the knife [] wild because I'm trying to get my wife out this corner because Jackson is holding her against her will.

So some kind of way she gets up out of the corner. When she gets all the corner, now I'm stuck in the corner. So now I'm stuck in the corner. I end up fighting Fallin swing[ing] the knife trying to get Fallin away, but is like Fallin just won't stop. It's like he out of control.

So what I do is show the knife in front of him. I got a knife. Leave me alone. I'm like this with the knife. Leave me alone. But he goes into a fighting stance like a boxer.

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[DEFENSE COUNSEL]: What happened? You saw him in a boxing stance. And what, if anything, did you do?

[MR. CLARK]: My wife is right there, but he's trying to come towards me and take the knife. Like fight me. And I'm swinging trying to get him away. I got Jackson on the other side right here where if I go this way, I can't go nowhere because the front door is right there so I can't go out there because Jackson is right here on the corner. I got my wife right here beside Fallin and I'm trying to get him away from my wife.

So I ended up getting into a tussle and falling. We tussle fighting over the knife. So eventually Fallin, I chased him away. He runs towards this way in the coffee area. I get him out the way. But as soon as I start coming back I see Jackson sneak around the corner and try to attack my wife.

[DEFENSE COUNSEL]: Okay.

[MR. CLARK]: He tries to sneak up on my wife when I'm coming back around the corner. And as soon as my wife—she had her back turned, but my wife saw me charging around the corner because I seen him trying to attack my wife. And my wife didn't notice that because she seen me charging and that's when I went to chase after Jackson because I saw him try to sneak up on my wife and hit my wife from behind. So that's when I went to chase after him to get him out the way.

> My wife grabs me because I'm mad because you just tried to sneak—you already then hit my wife in the corner. You already had your hands on her before so now you're trying to sneak up behind her to attack her again? So I chased him out. I chased him like right here to like I'm still stuck in the deli area. I don't go passed it because I don't want to leave my wife in the store and there's only one way in and one way out. And Fallin is standing over there somewhere hiding.

After the physical altercation, while he was driving home, he "slung the knife out of the window."

Mr. Clark turned himself in to the police on December 27, 2017. After six days of trial, the jury found Mr. Clark guilty of attempted second-degree murder, two counts of second-degree assault, and voluntary manslaughter. He was sentenced to a total of fifty years' incarceration. Mr. Clark noted a timely appeal. We supply additional facts as necessary below.

## II. DISCUSSION

On appeal, Mr. Clark identifies several errors that, he says, occurred during the course of his trial.[3] *First*, he contends that the trial court erred in instructing him, while he

[3] Mr. Clark phrases his questions presented in his brief as follows:

> 1. Did the lower court's instruction to Appellant, not to discuss the case with his attorney, during an overnight recess, violate Appellant's Sixth Amendment right to counsel?
> 2. Did the lower court's evidentiary rulings prejudice Appellant's claim of self-defense?
> 3. Did the lower court err in permitting improper prosecutorial conduct during both cross-examination of Appellant and in closing argument?

The State phrases its questions presented in its brief as follows:

was on the stand during direct examination, that he could not speak with his attorney during the overnight recess. *Second*, he asserts multiple evidentiary errors. *Third*, he argues that the court erroneously allowed the State to cross-examine him about his religious beliefs. *Fourth*, he claims that the prosecutor made an improper comment during closing argument that prejudiced him. For the reasons we explain below, we affirm his convictions.

### A. Mr. Clark Didn't Preserve His Objection To The Court's Instruction That He Not Consult With Counsel.

At the close of his direct examination, when the court recessed for the day, the court instructed Mr. Clark, who was on the stand, that he could not talk to his attorney about his case during the overnight recess:

> THE COURT: And, Mr. Clark, before you do.
>
> [MR. CLARK]: Yes, sir.
>
> THE COURT: You can't talk to anybody about the case this evening even [your defense counsel].
>
> [MR. CLARK]: Okay.
>
> THE COURT: You can't talk to anybody. It sounds counter intuitive.
>
> [MR. CLARK]: Yes.
>
> THE COURT: You can't talk to your own attorney about the case.
>
> [MR. CLARK]: I understand, sir.

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1. Did Clark fail to preserve any challenge to the trial court's instruction that he not discuss the case with his attorney during an overnight recess?
2. Did the trial court act within its discretion in regulating the admission of evidence?
3. To the extent preserved, did the trial court properly regulate cross-examination and closing argument?

> THE COURT: Okay. You're welcome to step down. Go back to the trial table.

Defense counsel never objected.

Mr. Clark argues that the trial judge's order to him that he not consult his counsel overnight "denied [him] of his Sixth Amendment right to counsel at a crucial time in the proceedings, namely, during [his] testimony and cross-examination, and after a critical day of testimony that included the testimony of eight state witnesses and the admission of forty pieces of evidence." He argues further that the prejudicial effect is "obvious under the circumstances." The State responds that this issue "is not preserved for [our] review because Clark not only failed to object when the court imposed the restriction, he acquiesced to the court's instruction." Although we conclude that Mr. Clark's argument has merit, we are constrained to agree with the State that this argument is not preserved.

Mr. Clark argues that the facts of his case are "nearly identical circumstances" to *Geders v. United States*, 425 U.S. 80 (1976), and they are. In *Geders*, the court recessed for the night while the defendant was on the witness stand. *Id*. at 82. The prosecutor asked the trial judge to instruct the defendant not to discuss the case overnight with anyone, including his own attorney. *Id.* The Supreme Court held that the trial judge's instruction violated the defendant's constitutional right to counsel. *Id.* at 91. We see no principled distinction between the circumstances of *Geders* and this case and, to its credit, the State agreed when asked as much at oral argument, with one critical caveat.

The critical caveat is the dispositive procedural difference between the two cases: defense counsel in *Geders* objected to the instruction, *id.* at 83, and defense counsel here

didn't. To preserve an issue for appellate review, a party must object at the time the ruling is made. Md. Rule 4-323(c). If a party is given an opportunity to object but fails to do so, he has waived the objection, *Hill v. State*, 355 Md. 206, 219 (1999), and we generally "will not decide . . . any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." Maryland Rule 8-131. Counsel's decision, for whatever reason, not to object left the trial court with no opportunity to address the error.

Normally, unpreserved trial errors are best addressed through an ineffective assistance of counsel claim at post-conviction. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Mr. Clark asks us to skip that step and hold on direct appeal, as we can but rarely do, that the failure to object constitutes ineffective assistance of counsel as a matter of law. We confess that we cannot think of any reason why counsel would opt not to object to the trial judge's instruction that Mr. Clark not consult with his attorney overnight. But we also cannot eliminate the possibility, however slim, that counsel had a legitimate strategic or tactical reason for letting the instruction go, and there's no record on which we can evaluate the question. Mr. Clark will have the opportunity to develop that record on post-conviction.

**B. Evidentiary Issues**

From there, Mr. Clark challenges three decisions the trial judge made during his trial. He argues *first* that the court abused its discretion when it prevented him from introducing character evidence about Mr. Jackson's propensity for violence. *Second*, he contends that the trial court abused its discretion by admitting into evidence a hearsay

statement by Mr. Jackson. *Third*, he argues that the trial court abused its discretion when it allowed the State to introduce a photograph of Mr. Fallin taken during his autopsy. In each instance, we hold that the trial court did not abuse its discretion.

*1. Character evidence of Mr. Jackson*

During trial, defense counsel attempted to introduce evidence and testimony that Mr. Jackson had been in a physical altercation with someone else before his altercation with Mr. Clark:

> [DEFENSE COUNSEL]: Did you tell the detective about your hands hurting?
>
> [MR. JACKSON]: No, sir.
>
> [DEFENSE COUNSEL]: You never told the detective that you're [*sic*] hands were hurting?
>
> [MR. JACKSON]: I might have, but I can't remember.
>
> [THE STATE]: May we approach?

The State then objected to the line of questioning and the court sustained the objection. Later in the trial, defense counsel attempted to introduce a photograph of that same hand injury:

> THE COURT: With respect to Defendant's Number 4, did you want to do something?
>
> [DEFENSE COUNSEL]: What happened was I showed counsel that I was going to introduce it, but I never got an opportunity. Your Honor, ruled that I couldn't show it at all so it never went anywhere.
>
> THE COURT: But did you want to—it is marked.
>
> [DEFENSE COUNSEL]: I guess the clerk, she probably just put ID only.
>
> THE COURT: Yeah, ID only. Can I ask you this though? With respect to this photograph of Mr. Jackson hands.

> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: I cannot perceive any indications of injury on the hands although I do see some what looks like might be blood on the fingernail.
>
> [DEFENSE COUNSEL]: You're asking where the injuries are? On the videotape, I think the State would agree with me, I can't see exactly what he does. He tells the officer—he says right here is from where I was fighting and then he says over here that's not from that. That's when I got in a fight with my grandfather. And he, like, points to one part of his hand and then another part of his hand was something else.
>
> THE COURT: Okay. Well, so it's not for identification.
>
> [DEFENSE COUNSEL]: Uh-huh.
>
> THE COURT: Can I ask you though if it's not too much trouble? To give me the rule that you would be relying on in wanting to bring out that he had been in a fight with his grandfather?
>
> [DEFENSE COUNSEL]: Okay.

The court ruled that the photograph would not be admitted as evidence and found "that the danger of unfair prejudice outweigh[ed] any probative value."

Mr. Clark argues that this evidence was relevant to his defense and excluding it prejudiced his defense. The State's response is two-fold: (1) the trial judge properly exercised his discretion in concluding that the prejudicial effect of the evidence outweighed its probative value, and (2) under Maryland Rule 5-405, Mr. Clark was allowed only to prove Mr. Jackson's character for violence through reputation or opinion testimony, not through specific instances of conduct. We agree with the State.

Generally, character evidence is "not admissible to prove that the person acted in accordance with the character or trait on a particular occasion." Md. Rule 5-404(a)(1). An exception exists in criminal cases where "an accused may offer evidence of an alleged

crime victim's pertinent trait of character" when the trait is relevant to a contested issue at trial. Md. Rule 5-404(a)(2)(B). The manner in which a character trait may be proven is generally limited to "testimony as to reputation or . . . testimony in the form of an opinion." Md. Rule 5-405(a). And when "character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of relevant specific instances of that person's conduct." Md. Rule 5-405(b). "A trial court's decision to admit or exclude character evidence of the victim lies within its sound discretion." *In re Ryan S.*, 139 Md. App. 94, 115 (2001), *rev'd on other grounds*, 369 Md. 26 (2002).

Mr. Clark is correct that when self-defense has been raised, as it was here, the accused may recount prior violent acts by the victim to prove that the accused "had reason to perceive a deadly motive and purpose in the overt acts of the victim." *Thomas v. State*, 301 Md. 294, 307 (1984). "To use character evidence in this way, the defendant must first prove: (1) his knowledge of the victim's prior acts of violence; and (2) an overt act demonstrating the victim's deadly intent toward the defendant." *Id. See also Williamson v. State*, 25 Md. App. 338, 344, 347 (1975) ("On the issue of whether or not the accused had reasonable grounds to believe himself in imminent danger, he may show his knowledge of specific instances of violence on the part of the [victim]," but "questions regarding specific acts" should be precluded unless knowledge is shown first). Or the accused may proffer evidence of the victim's violent acts to "corroborate evidence that the victim was the initial aggressor." *Thomas*, 301 Md. at 307 (*citing Williamson*, 25 Md. App. at 345).

But we agree with the State that the evidence Mr. Clark sought to introduce was

excluded properly. Character evidence may be proven only through reputation or opinion testimony or through specific instances of conduct, not through a photograph depicting an injury that allegedly occurred in an unrelated physical altercation, which is what Mr. Clark sought to introduce. Because the proffered photograph took the wrong form, we don't reach the question of relevance—the court was well within its discretion in declining to admit it.

*2. Hearsay statement by Mr. Jackson*

During the trial, Officer Abigail O'Connell testified about her interaction with Mr. Jackson when she first arrived at the scene:

> [OFFICER O'CONNELL]: At that point when he got to the vehicle he notified me that he and his friend were hit. Now, as a police officer when I hear that somebody has been hit automatically I think that means somebody that's [] been shot so I had him clarify what hit meant. At that point he advised–
>
> [DEFENSE COUNSEL]: Again, objection. Renew objection.
>
> THE COURT: Overruled.
>
> [OFFICER O'CONNELL]: At that point he advised that he and his friend were both stabbed.

Mr. Clark argues that the statement made by Mr. Jackson "was clearly hearsay, as it was made outside of the court and testified to by Officer O'Connell." The State responds that the statement falls under the excited utterance exception to the rule against hearsay. We agree with the State.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). We review *de novo* whether a hearsay statement was admitted properly under an exception. *Bernadyn v. State*, 390 Md. 1, 7–8 (2005).

Maryland Rule 5-803(b)(2) allows the court to admit "[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." An excited utterance is a statement "made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy." *Morten v. State*, 242 Md. App. 537, 547–48 (2019) (*quoting* 6 Wigmore on Evidence Sect. 1747, at 195 (Chadbourn rev. 1976) (emphasis omitted). There are two requirements for admitting an excited utterance:

> First, there must be an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of an observer. Second, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought.

*Id.* at 548 (*quoting* McCormick on Evidence Sect. 297, at 854–55 (E. Cleary 3d Ed. 1984)) (emphasis omitted). In determining whether a statement qualifies as an excited utterance, we examine the totality of circumstances. *Marquardt. v. State*, 164 Md. App. 95, 124 (2005), *cert. denied*, 390 Md. 91 (2005). The most important factor is timing. *Morten*, 242 Md. App. at 548. If the statement is made while the event is in progress, we "have little difficulty finding that the excitement prompted the statement." *Id.* (*quoting* McCormick on Evidence Sect. 297, at 856 (E. Cleary 3d ed. 1984)) (emphasis omitted). "But as the time between the event and the statement increases, so does the reluctance to find the statement an excited utterance." *Id.* (*quoting* McCormick on Evidence Sect. 297, at 856 (E. Cleary

3d ed. 1984)) (emphasis omitted).

Mr. Jackson's statement to Officer O'Connell satisfies all of the requirements for an excited utterance. The stabbing of his friend Mr. Fallin undoubtedly startled him. Officer O'Connell testified that it took her approximately "[t]hree to four minutes to get [to the Quick Stop]" after receiving the call. And as soon as she arrived, Mr. Jackson told her that Mr. Fallin had been stabbed. Although the statement was not made while the event was in progress, *i.e.* at the time Mr. Fallin was stabbed, the statement was made very soon after with no time for reflective thought on the part of Mr. Jackson. Indeed, the statement couldn't have been made to police any more quickly. The trial court did not abuse its discretion in admitting the statement as an excited utterance.

*3. Photograph of Mr. Fallin during autopsy*

During trial, the State introduced into evidence a photograph of Mr. Fallin taken during his autopsy:

> [THE STATE]: And just to make sure we're clear. I'm going to show you a picture. I'm showing you a piece of evidence that has been marked as State's Exhibit Number [] 22. Can you tell me what this is first?
>
> [MR. JACKSON]: A picture.
>
> [THE STATE]: Okay. And what is depicted in the photo?
>
> [MR. JACKSON]: James Fallin.
>
> ***
>
> [THE STATE]: Okay. And is this the same James Fallin that we observed in the video?
>
> [MR. JACKSON]: Yes, ma'am.
>
> [THE STATE]: Does this provide a fair and accurate depiction of Mr. Fallin's face.

> [MR. JACKSON]: Yes, ma'am.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: I'll allow it. Overruled.

Defense counsel then explained the basis for his objection at a bench conference, and the judge overruled it:

> [DEFENSE COUNSEL]: This is a picture taken at the autopsy. He doesn't look like that and [the State] hasn't established what he looked like when he was on the scene. The blood is cleaned up. Is wiped off. It's all cleared up. It's even got a measurement marker there on the middle of the throat. He did not see him like that. And she has established that he saw he could see those injuries through the blood or things that might be on his face. So to me this is more appropriate to the autopsy and I don't think she's established that's what he looked like the last time that he saw him.
>
> [THE STATE]: I wasn't as specific as that. I don't know if that's what the objection is. I just said is this a fair and accurate depiction of Mr. Fallin's face.
>
> [THE COURT]: I'm going to overrule your objection.

Mr. Clark argues that "[t]he admission of the autopsy photograph through the testimony of [Mr. Jackson] did not satisfy the criteria either for authentication or the relevancy required for admission," but that even if it did, "the photograph had little, if any, probative value and presented significant prejudice to the case." The State responds that the photograph was authenticated properly through Dr. Melissa Brassell, who autopsied Mr. Fallin the day after the incident, and her testimony at trial. The State argues further that the photograph was not prejudicial because of "(a) the video evidence showing the stabbing, (b) Clark's testimony, and (c) undisputed fact that Fallin died because Clark stabbed him during the fight." We agree with the State.

Maryland Rule 5-901(a) requires "authentication or identification as a condition precedent to admissibility . . . by evidence sufficient to support a finding that the matter in question is what its proponent claims."

> A threshold requirement of admissibility of evidence is whether the authenticity of the evidentiary matter may be established. Authentication refers to a process of laying a foundation of the admission of such nontestimonial evidence as documents and objects. Underlying the process is the question of whether the evidence is what it is claimed to be. Authentication is integral to establishing the matter's relevancy. Conceptually, the function of authentication or identification is to establish, by way of preliminary evidence, a connection between the evidence offered and the relevant facts of the case.

*Jackson v. State*, 460 Md. 107, 115–16 (2018) (cleaned up).

"Photographs . . . may be authenticated through first-hand knowledge, or, as an alternative, 'as a "mute" or "silent" independent photographic witness because the photograph speaks with its probative effect.'" *Id.* at 116 (*quoting Washington v. State*, 406 Md. 642, 651 (2008)). In other words, "the pictorial testimony theory of authentication allows photographic evidence to be authenticated through the testimony of a witness with personal knowledge, and the silent witness method of authentication allows for authentication by the presentation of evidence describing a process or system that produces an accurate result." *Washington*, 406 Md. at 652.

The photograph in this case was authenticated properly, albeit after Mr. Jackson testified, through Dr. Brassell's personal knowledge:

> [THE STATE]: Now, does this, State's Exhibit Number 22, is that the photographs that either you or Dr. Bitting took during

> the course of the autopsy?
>
> [DR. BRASSELL]: It was taken during the course of the autopsy, but by a firm photographer. Not by either of us.
>
> [THE STATE]: And how do you know—what indication is on this photograph or on Mr. Fallin to indicate that this is for this particular case?
>
> [DR. BRASSELL]: It's marked with a case number that was assigned to Mr. Fallin.

From there, we determine whether it was admissible, which turns on whether it was relevant, *Bedford v. State*, 317 Md. 659, 676 (1989), and introduced for a "legitimate purpose." *Conyers v. State*, 354 Md. 132, 187, *cert. denied* 528 U.S. 910 (1999). "[A]utopsy photographs of homicide victims are often relevant to a broad range of issues, including 'the type of wounds, the attacker's intent, and the modus operandi.'" *Roebuck v. State*, 148 Md. App. 563, 597 (2002) (*quoting State v. Broberg*, 342 Md. 544, 553 (1996)). "Decisions regarding the admission of relevant evidence are 'committed to the sound discretion of the trial court[]'" and "we do not reverse those decisions 'unless there is a clear abuse of discretion.'" *Morris v. State*, 192 Md. App. 1, 27 (2010) (*quoting Thomas v. State*, 397 Md. 557, 579 (2007)).

Maryland Rule 5-403 provides that relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." We review a decision to admit relevant evidence deferentially: "The trial court's decision will not be disturbed unless 'plainly arbitrary,' . . . because the trial judge is in the best position to make this assessment." *Ayala*

*v. State*, 174 Md. App. 647, 679 (2007) (*quoting Broberg*, 342 Md. at 552).

The circuit court's decision was not "plainly arbitrary" here. The State introduced the photo to provide the jury a fair and accurate depiction of the deceased victim, Mr. Fallin, and plainly was relevant to the issues at trial. And the State is correct that the photograph was not unfairly prejudicial—overwhelming evidence demonstrated that Mr. Clark stabbed Mr. Fallin and was the initial aggressor, including the videotape and Mr. Clark's own admission during his direct examination. Under the circumstances, the trial court did not abuse its discretion in admitting the photograph.

### C. The Trial Court Properly Controlled The Scope Of The State's Cross Examination Of Mr. Clark.

Mr. Clark takes issue with two lines of questioning the State undertook in cross-examining him. The first line of questioning involved Mr. Clark's religious beliefs. During defense counsel's direct examination, the following colloquy ensued between defense counsel and Mr. Clark:

> [DEFENSE COUNSEL]: Now, that you've looked at that video. Having seen that video and having lived through it, how do you feel now about what happened?
>
> [MR. CLARK]: Well, I believe in God. And mentally this hurts me. And I feel like I got to make right with God for this. You know, death, you can't come back from that. And for me, you know, I'll just keep begging God for his forgiveness. And I'm just trying every day to just make right with God with this and just thanking God just to forgive me for this.
>
> [] You know, this is one of God's creations. One of God's children. And for me I'm trying to make right with the God so bad that this is something I will never forget. I will never ever forget. It's something that I could just never live with because I just beg and plead for God's forgiveness for this.

On cross, the State seized on what Mr. Clark had said on direct about his religious beliefs:

> [THE STATE]: Mr. Clark, yesterday you had mentioned that [] you believed in God and that murder was a sin, right?
>
> [MR. CLARK]: Yes.
>
> [THE STATE]: So just before we go forward I just want to make sure that I understand what[] you understand. And so [] you have the seven deadly sins which are pride, greed, lust, envy, gluttony, wrath and sloth, and then you have the ten commandments, right?
>
> [MR. CLARK] Yes ma'am.
>
> [DEFENSE COUNSEL]: Objection Your Honor.
>
> THE COURT: No I'll allow it.
>
> [MR. CLARK]: I mean, no disrespect but this is a murder, case what does religion have to do with this?
>
> ***
>
> [THE STATE]: My question to you is were you talking about the ten commandments where it's thou shall not commit murder or were you talking about the seven deadly sins?
>
> [MR. CLARK]: I'm just saying anything in general. Anybody whose ever been to church or period know that murder is a sin. Everybody knows that. . . .
>
> [THE STATE]: Giving false testimony is a sin?
>
> [DEFENSE COUNSEL]: Objection Your Honor.
>
> THE COURT: I'll allow it go ahead. You can answer sir. . . .
>
> [MR. CLARK]: It is a sin. I would believe it. . . .
>
> [THE STATE]: A person should not have any other idols other than focusing on God is that a sin that you're referring to?
>
> [DEFENSE COUNSEL]: Objection Your Honor, may we approach?
>
> THE COURT: Yeah, yes you can.

A bench conference ensued:

> [DEFENSE COUNSEL]: I don't think going through all ten commandments here is relevant to whether he committed a

> crime or whether he lied. I think it's irrelevant. I think it's meant to inflame my client. Now, he mentioned that he was religious. And I understand saying hey maybe that he's full of it and maybe they want to go at it, but going through each of the ten commandments and asking if he doesn't believe them is irrelevant and inflammatory.
>
> THE COURT: You did interject the issue of faith and God and sin in your direct examination. But I do agree that it would seem to be inappropriate to go through all of the deadly sins or all of the mortal sins or all of the commandments. How does that advance anything? I don't follow you.
>
> [THE STATE]: I'm just starting and then moving [] forward Your Honor. And first I just wanted to make sure that we were talking about the same thing so that when I continue—
>
> THE COURT: But this is not—
>
> [THE STATE]: [] I can jump back to it.
>
> THE COURT: —this is not a confessional, this is not a church.
>
> [THE STATE]: I understand.
>
> THE COURT: Alright thank you.

The second line of questioning involved questions about what Mr. Clark told the police in the presence of his attorney:

> [THE STATE]: Okay. Did you discuss the incident with anyone? Like what happened, what you were going to tell the police, is that a no, yes?
>
> [MR. CLARK]: No, no.
>
> ***
>
> [THE STATE]: So but no one—you didn't tell anyone or talk to anyone about what you were going to say when you met with the police officers?
>
> [MR. CLARK]: No ma'am.
>
> [THE STATE]: Okay. And you recall [your attorney] even telling you that there was a video and it's important that if you're saying A, B, C and the video–
>
> [MR. CLARK]: And he said then it should help you.

> [THE STATE]: Let me finish my—let me finish my question. And the video is showing X, Y, Z then that means you're in trouble?
>
> [MR. CLARK]: Nope.
>
> [DEFENSE COUNSEL]: Objection.

The following bench conference then ensued:

> THE COURT: I don't want to intrude on attorney-client privilege.
>
> [THE STATE]: No, Your Honor this was during the interview, and actually–
>
> THE COURT: In front of the officer?
>
> [THE STATE]: On video tape. Says, "alright, a picture worth a thousand words. If you tell them A B and C and they have X Y and Z on the video you got a problem, okay? Because you're married to what you say to them. I say you're in trouble, (indiscernible) you got a problem."
>
> THE COURT: And that's in front of the police officer.
>
> [DEFENSE COUNSEL]: And that's his lawyer saying that.
>
> THE COURT: I'm asking, but it's not clear.
>
> [DEFENSE COUNSEL]: His lawyer said that. If you say this and you're married to it, that's his lawyer speaking.
>
> [THE STATE]: That's what I said.
>
> [DEFENSE COUNSEL]: Okay. Withdrawn. I apologize. I'm just (indiscernible) his lawyer said that. So I must have misunderstood. I don't think his lawyer's comments should be—should come in but, or what his lawyer says at all should come in.
>
> THE COURT: Well—I'm just saying you have to be–
>
> [THE STATE] I will be.
>
> THE COURT: —you have to be crystal clear about that.

Mr. Clark argues that the first line of questioning was "inflammatory [in] nature, [and] the subject matter also had the ancillary effect of introducing the prosecutor's

personal opinions into the proceedings." The State argues that this argument is not preserved because Mr. Clark "did not contemporaneously object to either of these questions, nor did he move to strike [his] answers." The State argues that Mr. Clark's argument about the second line of questioning also was not preserved because "the defense withdrew the objection," and "[t]he prosecutor subsequently repeated the question and Clark answered it without objection from the defense."

The State is right about the second line of questioning, but not about the first. Under Maryland Rule 8-131, we "will not decide any [] issue unless it plainly appears by the record to have been raised in or decided by the trial court." An issue is not preserved when counsel withdraws his objection. *Nelson v. State*, 137 Md. App. 402, 419–20 (2001). Because defense counsel ultimately withdrew his objection, that argument is not preserved for our review. But as to the first line of questioning, defense counsel objected to each question the prosecutor asked Mr. Clark relating to his religious beliefs, so we will review his arguments about that line of questioning on the merits.

The "trial court has broad discretion in determining the scope of cross-examination, and we will not disturb the exercise of that discretion in the absence of clear abuse." *Cagle v. State*, 235 Md. App. 593, 609 (2018) (*quoting Martin v. State*, 364 Md. 692 (2001)). Although "such discretion is not unlimited, 'a cross-examiner must be given wide latitude in attempting to establish a witness' bias or motivation to testify falsely.'" *Id.* And as a threshold matter, "when a defendant takes the stand, he is 'subject to cross-examination impeaching his credibility just like any other witness.'" *Portuondo v. Agard*, 529 U.S. 61,

69 (2000) (*quoting Jenkins v. Anderson*, 447 U.S. 231, 235–36 (1980)).

Even so, the "scope of cross-examination is generally limited to the subject raised on direct examination." *Smallwood v. State*, 320 Md. 300, 307 (1990). The attorney conducting cross-examination "should be free to cross-examine in order to elucidate, modify, explain, contradict, or rebut testimony given in chief." *Id.* "It is also proper to cross-examine as to facts or circumstances inconsistent with testimony, and to bring out the relevant remainder or whole of any conversation, transaction, or statement brought out on direct questioning." *Id.* (cleaned up).

The line of questioning on Mr. Clark's religious beliefs was proper. During direct examination, Mr. Clark testified affirmatively about his belief in God:

> [DEFENSE COUNSEL]: [] how do you feel about what happened?
>
> [MR. CLARK]: Well, truths. I feel bad that a mother had to lose her son. I feel bad that a family had to lose a member. But for me it's all on me. Because I mean I believe in God and murder is like one of the biggest sins. And that's, like, one of the hardest things for me to like deal with.
>
> ***
>
> [DEFENSE COUNSEL]: Now, that you've looked at that video. Having seen that video and having lived through it, how do you feel now about what happened?
>
> [MR. CLARK]: Well, I believe in God. And mentally this hurts me. And I feel like I got to make right with God for this. You know, death, you can't come back from that. And for me, you know, I'll just keep begging God for his forgiveness. And I'm just trying every day to just make right with God with this and just thanking God just to forgive me for this.
>
> That's I mean I just really focus on, but I feel like I heard God because of this. You know, this is one of God's creations. One of God's children. And for me I'm trying to make right with

> the God so bad that this is something I will never forget. I will never ever forget. It's something that I could just never live with because I just beg and plead for God's forgiveness for this.

Because Mr. Clark raised his religious beliefs himself, the prosecutor was free to ask about them on cross. That right wasn't unlimited, of course, and the prosecutor overreached: the trial judge sustained defense counsel's objections to questions about the deadly sins that were irrelevant to this case, including adultery, coveting another's property, and having idols. But when it came to "relevant sins," such as committing murder and giving false testimony, the court overruled defense counsel's objections. Because Mr. Clark brought up his religious beliefs on direct examination, the trial judge did not abuse his discretion in allowing the prosecutor some latitude to cross-examine Mr. Clark about them.[4] *See Johnson v. State*, 232 Md. 199, 208 (1963) (holding that the prosecutor could cross-examine defendant on receiving a general discharge from the army for going "AWOL" when on direct examination, the defendant stated he received a general discharge).

### D. The Prosecutor's Comment During Closing Argument Was Not Improper.

At trial, the prosecutor made reference in closing argument that invoked images of the Travon Martin killing in Florida:

> [THE STATE]: Mr. Fallin and Mr. Jackson were wearing hoodie jackets on the 25th of December during the wintertime. They're African American males, and because of that and because of what Mr. Clark says he sees on TV as robbers, he believed that they were going to do something bad to them, to

[4] Mr. Clark also argued that the line of questioning introduced the prosecutor's personal opinions into the proceedings. But we have reviewed the testimony in full and find no instances where that occurred.

> him. That sounds like something from—in Florida a couple of years ago. An African American male, hooded—wearing a hooded sweatshirt—
>
> [DEFENSE COUNSEL]: Objection Your Honor.
>
> THE COURT: I'll allow it. Closing argument.
>
> [THE STATE]: The Defendant wanted to teach those youngins some respect. And he chose to do it with his hands and he chose to do it with his knife. And he intended to kill both of them. But luckily he did not kill Warner Jackson. The Defendant's guilty and I ask that you find that he is guilty. Thank you.

Mr. Clark argues that the court "permitted the prosecutor to impermissibly argue to the jury the irrelevant facts and inferences of the [Trayvon] Martin case during the State summation[,]" and that "bring[ing] up the [Trayvon] Martin case, universally portrayed in popular culture as standing for such issues as racial animosity in connection with violence and self-defense[] could not have been more prejudicial." The State responds that the comment was not improper because it "was an illustrative example or rhetorical flourish, and the Court was within its discretion to allow it." The State responds further that even if the comment were improper, "[t]he trial court instructed the jury that closing argument was not evidence that they must rely on," and "this one isolated remark did not affect the outcome of the trial."

The trial judge "is in the best position to evaluate the propriety of a closing argument. . . ." *Ingram v. State*, 427 Md. 717, 726 (2012) (*citing Mitchell v. State*, 408 Md. 368, 380–81 (2009)). We don't disturb the ruling at trial "unless there has been an abuse of discretion of a character likely to have injured the complaining party." *Grandison v. State*, 341 Md. 175, 243 (1995) (*citing Henry v. State*, 342 Md. 204, 231 (1991), *cert.*

*denied*, 503 U.S. 192 (1992)). The trial judge has broad discretion in evaluating the propriety of closing arguments. *See State v. Shelton*, 207 Md. App. 363, 386 (2012).

Attorneys have "great leeway" in making closing arguments. *See Lawson v. State*, 389 Md. 570, 608 (2005); *Degren v. State*, 352 Md. 400, 429 (1999); *Henry v. State*, 324 Md. 204, 230 (1991), *cert. denied* 503 U.S. 972 (1992). The prosecutor has "liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Degren*, 352 Md. at 429–30 (*quoting Jones v. State*, 310 Md. 569, 580 (1987)). Although arguments of counsel must be confined to the issues at trial, "fair and reasonable deductions" from the evidence "should be allowed." *Pietruszewski v. State*, __Md. App. __, __ No. 209, Sept. Term 2018, Slip op. at 24–25 (filed Apr. 7, 2020). Counsel may also "indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions." *Id.* at 25. Even if a prosecutor's remark is improper, reversal is only required "where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Lawson*, 389 Md. at 592 (*quoting Spain v. State*, 386 Md. 145, 158–59 (2005)).

Although risky, the prosecutor's comment did not represent reversable error. The visual reference to Trayvon Martin was a rhetorical flourish—perhaps a curious one, since the defendant in that slaying was acquitted. Regardless, the reference was an isolated one from which the prosecutor quickly moved on, and there were no other concerning remarks made during the prosecutor's closing argument. Had the prosecutor taken the analogy

further, *i.e.*, implored the jury to do the right thing in the way the Florida jury didn't, the statement quickly could have morphed into a forbidden Golden Rule argument and sought impermissibly to encourage the jury to decide the case on emotion rather than the facts and the law. But that's not what happened here, and we see no abuse of discretion in the court's handling of this potentially tricky line of argument.

**JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. APPELLANT TO PAY COSTS.**