Circuit Court for Wicomico County
Case No. C-22-CR-18-000550

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 596

September Term, 2019

DEAN ALLEN THOMPSON

v.

STATE OF MARYLAND

Reed,
Friedman,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: October 13, 2020

A jury sitting in the Circuit Court for Wicomico County convicted appellant, Dean Allen Thompson, of a single count of conspiracy to commit burglary in the second degree. After the court sentenced him to twelve years' imprisonment, Thompson noted this appeal, raising a single issue for our consideration: whether the circuit court erred in denying his motions for mistrial. Because we conclude that the circuit court did not so err, we affirm the judgment.

BACKGROUND

On the night of January 24, 2018, JT's Diner in Willards, Maryland was burglarized. The owner of the diner, Robert Molnar, was notified that a burglar alarm at the diner had been triggered. He drove to the scene to investigate but did not notice a breaking, and he therefore did not leave his vehicle to inspect the building.

The following morning, a woman named Colleen,[1] an employee of the diner, whose tasks included opening the diner for business that day, noticed that a locked filing cabinet was open and that most of the petty cash, stored inside, was missing.[2] She called Molnar to inform him and also notified police.

[1] Colleen did not testify, and her surname does not appear in the record. According to Molnar, she performed several tasks essential to his business, including cooking, baking, and serving tables.

[2] Molnar testified that the key was kept "underneath the cabinet," so that employees could readily gain access to the petty cash.

At the time of the January 24th burglary, Thompson was employed at the diner but did not have either a store key or an alarm code. Shortly after that incident, he quit his job at the diner.

After Thompson had quit, Molnar moved the petty cash to another location. Then, on February 24, 2018, one month after the previous burglary, JT's Diner was burglarized again. This time, when Molnar arrived at his diner after being notified by the alarm company, he observed that the glass in the rear door had been broken. He further noticed that approximately $170 was missing from the cash register and that the thief had to have been familiar with its operation in order to open it. Moreover, the filing cabinet, which previously had held the petty cash, was broken.

Deputy First Class Daniel Geesaman of the Wicomico County Sheriff's Office responded to the scene of the February 24th burglary. In canvassing the crime scene, he determined that a tenant lived in an apartment located directly above the diner. That tenant, Roy Bradley, told Deputy Geesaman that he had heard a loud noise and then observed "a white male in a red shirt and brown coat exiting the rear door of the diner and get into a darker colored Jeep-type vehicle with a white female and drive away[.]"[3]

In March 2018, Detective Daniel Schultz of the Wicomico County Sheriff's Office, the lead detective in the case, received information leading him to consider Timothy Byrd as a suspect in the February 24th burglary. He interviewed Byrd, and he then interviewed Jacqueline Bratten. Ms. Bratten informed him that she had overheard a conversation

[3] At trial, however, Bradley claimed that he had "seen a vehicle" but had "no idea" what type it was, nor was he able to describe anything about its occupants.

between Thompson, Byrd, and her husband, Calvin Bratten, in which Thompson and Byrd admitted to having burglarized JT's Diner and attempted to enlist Calvin Bratten to join them in committing additional burglaries. According to Ms. Bratten, her husband declined their offer.

Byrd was charged, by criminal information, with second-degree burglary, fourth-degree burglary, conspiracy to commit both second- and fourth-degree burglary, theft of property valued between $100 and $1500, conspiracy to commit theft, and malicious destruction of property, all involving the February 24th burglary.

Thompson was charged, by criminal information, with second-degree burglary, two counts of fourth-degree burglary, and theft of property valued between $100 and $1500, for the January 24th burglary; an identical set of charges for the February 24th burglary; and conspiracy and malicious destruction of property involving the February 24th burglary. The following March, Byrd entered into a plea agreement with the State, whereby he would plead guilty to a single count of conspiracy to commit second-degree burglary, and, provided that he testify truthfully at Thompson's trial, the State would recommend a sentence of seven years, all but one year and one day suspended.

Thompson's case proceeded to a two-day jury trial. After deliberating for approximately one-half hour, the jury acquitted him of all charges except conspiracy to commit second-degree burglary. The court thereafter sentenced Thompson to twelve years' imprisonment, and he noted this timely appeal.

DISCUSSION

Thompson contends that the circuit court erred on three different occasions when he moved for a mistrial and that his conviction must therefore be reversed. We begin by setting forth the circumstances surrounding each denied motion.

Mistrial Request During Testimony of Roy Bradley

During the State's direct examination of Roy Bradley, it became apparent that his in-court testimony was, in important respects, at odds with previous statements he had given to police. The prosecutor asked the court's permission to treat him as a hostile witness. In so doing, she proffered that Bradley recently had informed her that he had been receiving threats from Calvin Bratten, warning him not to testify, and she wished to examine Bradley concerning those threats. Because she did not attribute the threats to Thompson, the defense did not object, and the court granted the prosecutor's request.

When direct examination of Bradley resumed, the following took place:

> [PROSECUTOR]: Mr. Bradley, you called my office on Friday to confirm about trial, did you not?
>
> [BRADLEY]: Huh?
>
> [PROSECUTOR]: You called my office on Friday to confirm that you were needed today, did you not?
>
> [BRADLEY]: Yeah.
>
> [PROSECUTOR]: When you spoke, you spoke to a woman named Laurie Jones, do you remember speaking to her?
>
> [BRADLEY]: Yeah.
>
> [PROSECUTOR]: And she informed you that she was my assistant; correct?

[BRADLEY]: Yes.

[PROSECUTOR]: When you spoke to her, do you recall telling her that you were receiving threats about if you testified today?

[BRADLEY]: I had a couple phone calls, but I didn't, I didn't believe nothing they said, so I just let it go.

[PROSECUTOR]: Okay. And those threats were coming from an individual named Calvin Bratten?

[BRADLEY]: Yes.

[PROSECUTOR]: And what were those threats?

[BRADLEY]: Said that if, **if I testified today against the person,** they were going to beat me up.

[DEFENSE COUNSEL]: I have to object, Your Honor. Ask permission to approach.

THE COURT: Come forward.

(Emphasis added.)

A bench conference ensued. Defense counsel moved to strike Bradley's response and for a mistrial. He declared that the difference between the proffer and Bradley's actual response was unfairly prejudicial to Thompson.[4] Before ruling on the defense motions, the court allowed the parties to examine Bradley out of the jury's presence.

During that examination, Bradley stated that the threats had been relayed to him by his brother, who, in turn, had heard them from his co-workers, Calvin Bratten and his

[4] Defense counsel told the court that he did not want to be put into a position in which Thompson would be obligated to testify "in order to fairly respond to what's been said." (Thompson had prior impeachable offenses, similar in nature to those for which he was on trial.)

father. Bradley further averred that he did not believe the threats were genuine. Finally, Bradley clarified that he had been told that, if he testified, Thompson "was going to beat [him] up."

After that examination had concluded, the court denied the motion for mistrial, remarking that Bradley's unexpected response referred only to "the person" and not "the defendant," and it thereafter instructed the jury:

> You are instructed that Mr. Bradley's previous testimony regarding threats, that he received threats that he would be jumped if he testified and that the person making the threats was Calvin Bratten, you are allowed to consider that for the purposes of his credibility, and anything else that he stated along those lines is stricken from the record.

Mistrial Request During Direct Examination of Jacqueline Bratten

During the State's direct examination of Ms. Bratten, the prosecutor asked her how long her husband had known Thompson. Instead of responding with some length of time, she responded, "Since my husband was incarcerated last time, I think." The defense moved for a mistrial, claiming that the jury would necessarily infer that Thompson and Mr. Bratten previously had been incarcerated together.[5]

The court denied his motion, noting that Ms. Bratten's response was "an oblique reference to her husband's incarceration" and was "not so prejudicial" as to warrant a mistrial. Instead, the court struck the unexpected and offending response.

[5] Defense counsel conceded that the prosecutor's question was unobjectionable.

Mistrial Request During Re-direct Examination of Jacqueline Bratten

During direct examination, Ms. Bratten was asked to identify a transcript of a statement she had given during an interview, on May 22, 2018, with Detective Schultz.[6] She acknowledged that her chronic drug use adversely affected her memory but that she had told the truth in that interview.

Then, during cross-examination, defense counsel asked her to identify Detective Schultz, but she mistakenly identified a different person, Mike Daugherty, an investigator with the State's Attorney's Office who had helped prepare Ms. Bratten to testify at trial, acknowledging as she did so that she "[couldn't] remember." During re-direct, the prosecutor pointed to Daugherty and asked Ms. Bratten whether she recalled having spoken with him several days previously. She answered affirmatively. The prosecutor then asked: "Do you recall speaking with somebody different back in [the previous] May, this person here?" Ms. Bratten replied, "Yes."

Defense counsel moved for a mistrial, declaring that the prosecutor had "step[ped] to the side" when asking the witness to identify Detective Schultz, effectively coaching her as to the desired response. The trial court declared that she doubted "very seriously" that the jury "would think her moving around would make [Detective Schultz] more viewable." After hearing the prosecutor's explanation, the trial court declared:

> Okay. So the jury got to observe everything and you made your point very well on cross-examination. So to the extent that the jury may have perceived [the prosecutor] to have done anything by standing up and positioning herself

[6] In that statement, Ms. Bratten stated that she had overheard Thompson and Timothy Byrd acknowledge that they had burglarized JT's Diner.

> where she did, I don't believe that it was, I mean, they can draw whatever inference they wish. They are the judges of credibility. They saw everything that transpired. I don't believe there was anything improper in what she did. And I'm going to go ahead and deny your motion for mistrial.

Analysis

The grant of a mistrial is "an extraordinary remedy," which should be invoked "only if 'necessary to serve the ends of justice.'" *Klauenberg v. State*, 355 Md. 528, 555 (1999) (quoting *Hunt v. State*, 321 Md. 387, 422 (1990), *cert. denied*, 502 U.S. 835 (1991)). We review a trial court's denial of a motion for mistrial for abuse of discretion, and we "will not reverse the trial court unless the defendant clearly was prejudiced by the trial court's abuse of discretion." *Id.* (citing *Hunt*, 321 Md. at 422). A court abuses its discretion where its ruling is "violative of fact and logic," or "where no reasonable person would take the view adopted by the trial court." *Alexis v. State*, 437 Md. 457, 478 (2014) (quoting *North v. North*, 102 Md. App. 1, 13 (1994) (in banc) (cleaned up).

In reviewing a discretionary ruling, we will not reverse "'simply because [we] would not have made the same ruling'" as the circuit court. *Nash v. State*, 439 Md. 53, 67 (2014) (quoting *North*, 102 Md. App. at 14). Thus, to find an abuse of discretion requires that the ruling under review be "'well removed from any center mark imagined by [us] and beyond the fringe of what'" we regard as "'minimally acceptable.'" *Id.* (quoting *Gray v. State*, 388 Md. 366, 383 (2005)). Moreover, "the range of a trial judge's discretion when assessing the merits of a mistrial motion . . . is 'very broad,'" and such a ruling "'will rarely be reversed.'" *Id.* at 68-69 (quoting *Alexis*, 437 Md. at 478).

In reviewing the denial of a motion for mistrial predicated upon the prejudicial effect of purportedly improper testimony, we consider a number of factors:

> whether the reference to [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[.]

Guesfeird v. State, 300 Md. 653, 659 (1984). The ultimate question is whether the defendant was so unfairly prejudiced as to have been denied a fair trial. *Rainville v. State*, 328 Md. 398, 408 (1992).

As for the first motion for mistrial, the State correctly points out that Bradley's testimony about threats he had received warning him not to testify was admissible. In *Washington v. State*, 293 Md. 465 (1982), the Court of Appeals noted that "[e]vidence of threats to a witness, or attempts to induce a witness not to testify or to testify falsely, is generally admissible as substantive evidence of guilt when the threats or attempts can be linked to the defendant and not admissible as substantive evidence absent such linkage." *Id.* at 468 n.1. Moreover, the Court further observed that, "even if the threats or fear have not been linked to the defendant," such evidence is admissible in criminal cases "for credibility rehabilitation purposes[.]" *Id.* at 470.

In *Armstead v. State*, 195 Md. App. 599 (2010), we relied upon *Washington* to conclude that evidence that a witness "felt frightened and scared" was properly admitted so that the jury could assess his credibility. *Id.* at 643-45. Similarly, in *Brown v. State*, 80 Md. App. 187 (1989), we held that a trial court properly admitted evidence of threats to a

witness to explain their effect on her state of mind and to rehabilitate her credibility. *Id.* at 194-95.

In the instant case, the court admitted the testimony about threats only for the limited purpose of assessing Bradley's credibility, and it struck the portion attributing the threats to Thompson. Applying *Washington*, *Armstead*, and *Brown*, we conclude that there was no error, and therefore there was no ground for granting a mistrial. To the extent the defense may have been surprised by Bradley's unexpected response and its divergence from the State's proffer, the trial court took appropriate curative action.

As for the second motion for mistrial, we agree with the trial court that Ms. Bratten's single "oblique reference to her husband's incarceration," which did not expressly implicate Thompson and was not solicited by the prosecutor, did not result in sufficient unfair prejudice to rise to the level of a mistrial. As the State points out, evidence that Calvin Bratten had been incarcerated was not inadmissible. Although Jacqueline Bratten's statement could lead to an inference that Thompson had been incarcerated at the same time, that is not the only possible inference one could draw from her statement. Moreover, the mere inadvertent admission of other bad acts evidence does not necessarily require the drastic remedy of a mistrial. *See, e.g.*, *Hudson v. State*, 152 Md. App. 488, 522 (2003) (finding no abuse of discretion where, in response to "unsolicited comments" by a witness, implicating the defendant in the drug trade, the trial court denied a motion for mistrial in favor of giving a curative instruction); *Braxton v. State*, 123 Md. App. 599, 668-70 (1998) (finding no abuse of discretion in denying motion for mistrial following inadvertent admission of other bad acts evidence).

To reverse, we would have to conclude that no reasonable person would have made the ruling that the trial court made. *Alexis*, 437 Md. at 478. We cannot so conclude. Accordingly, we find no abuse of discretion by the trial court in denying the motion for mistrial and, instead, striking Ms. Bratten's unanticipated response.[7]

As for the third motion for mistrial, Thompson asks us, in effect, to act as a fact finder by reviewing video evidence of the trial[8] to conclude that the prosecutor coached the witness through the use of demonstrative body language. We decline his request, as it is not our role to act as a second fact finder, as the Court of Appeals has recently reminded us. *Estate of Blair v. Austin*, __ Md. __, No. 35, Sept. Term 2019, slip op. at 23 & n.8 (filed Jun. 2, 2020) (plurality op. of Hotten, J.); *id.*, slip op. at 12-13 (Watts, J., concurring in part). We cannot second-guess the trial court's decision that the purported offensive coaching occurred in the presence of the jury and that it was ultimately up to them to decide how much weight, if any, to give it and, for that matter, which witnesses to believe.[9] We find no abuse of discretion in denying the third motion for mistrial.

[7] Although the trial court could not have known how the jury would decide at the time it made this ruling, we cannot help but observe that the presumption that the jury followed the instructions it was given was amply confirmed, given that the jury acquitted Thompson of all but a single count.

[8] During the pendency of this appeal, we granted Thompson's "Unopposed Motion to Supplement the Record with Video of In-Court Trial Proceedings on May 5 and May 7, 2019."

[9] At most, even if we were to assume for the sake of argument that the prosecutor gestured in a manner that suggested the desired answer, such an act would be little more than leading the witness. Although a trial court could strike testimony under such a (continued)

As a fallback position, Thompson contends that the trial court abused its discretion, under Maryland Rule 5-403, in denying the defense's motion to strike Ms. Bratten's response to the purportedly coached testimony. Rule 5-403 permits a trial court to exclude otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" For essentially the same reason we found no abuse of discretion in denying the third motion for mistrial, we find no abuse of discretion in the trial court's weighing of probative value versus unfair prejudice. We are especially loath to substitute our judgment for that of the trial court under these circumstances. The trial court was in a far superior position than we to "read" the prosecutor's body language and any effect it may have had on the jury. But even if, for the sake of argument, this testimony should have been stricken, we are confident that it had no influence on the verdict. *Dorsey v. State*, 276 Md. 638, 659 (1976).

Even after we consider the cumulative effect of the purported errors in this case, we remain convinced that Thompson's right to a fair trial was not infringed.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.

circumstance, Md. Rules 5-403, 5-611(c), that is a far cry from the nuclear option of declaring a mistrial.