Circuit Court for Baltimore City
Case Nos. 118071009 - 010

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 800

September Term, 2019

DAVID WISE

v.

STATE OF MARYLAND

Kehoe,
Gould,
Salmon, James P.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: January 20, 2021

After a jury trial in the Circuit Court for Baltimore City, David Wise, appellant, was found guilty of two counts of first-degree murder; two counts of use of a handgun in the commission of a crime of violence; two counts of wearing, carrying, and transporting a handgun; and two counts of conspiracy to commit first-degree murder. In case number 11871009, appellant was sentenced to life for the first-degree murder conviction; a concurrent term of five years without the possibility of parole for use of a handgun in the commission of a crime of violence; a concurrent term of three years for wearing, carrying, and transporting a handgun; and a concurrent term of life for the conspiracy conviction. In case number 11871010, appellant was sentenced to life for the first-degree murder conviction, to run consecutive to the life sentence imposed in case number 118071009; a concurrent term of 5 years for use of a handgun in the commission of a crime of violence; a concurrent term of three years for wearing, carrying, and transporting a handgun; and a concurrent term of life for the conspiracy conviction. All the sentences were consecutive to a sentence appellant was serving in the federal system. This timely appeal followed.

QUESTIONS PRESENTED

Appellant presents the following questions for our consideration:

> I. Did the trial court err by asking a *voir dire* question about bias against defense witnesses, where the defense did not have any witnesses and objected to the question?
>
> II. Did the trial court err by admitting a disc containing alleged surveillance video that was not properly authenticated?
>
> III. Did the trial court err by allowing the State to argue a fact not in evidence?

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

This case arises out of the shooting deaths of twenty-year-old Anthony Daniels and fifteen-year-old Quindell Ford on February 20, 2016. The shootings occurred at the corner of Lafayette Avenue and Bentalou Street in Baltimore City. On the day of the shooting, Gina Clay-Harcum was working at the Raven Mart, located on Lafayette Avenue near Bentalou Street, when she heard more than four gunshots. She dropped to the floor and, after a short time, walked toward the front door and looked out. She saw someone wearing an "all gray" sweatsuit with a hoodie covering his face. The person was standing near the hood of a car and the driver's door was open. She saw a body in the passenger's seat. The person wearing the gray sweatsuit "ran off." Clay-Harcum called the police and reported a shooting.

When the police arrived, they found a green 1998 Honda Accord parked in front of the Raven Mart and the two shooting victims, Daniels and Ford. One victim was found in the front seat of the Honda and the other was found less than a block away. An ambulance was called, but both victims died. Police observed a revolver in the Honda between the seat and the console and later recovered a black mask from the trunk. Baltimore City Police Detective Lee Brandt downloaded video from the Raven Mart's surveillance camera. A portion of that video was played at trial.

An assistant medical examiner who testified as an expert in the field of forensic pathology, performed autopsies on Daniels and Ford. During the autopsies, bullets were recovered and given to the police. The assistant medical examiner opined that the cause of Daniels's death was gunshot wounds to the head and back and the manner of death was

homicide. The cause of Ford's death was multiple gunshot wounds to the chest, back, and hip, and the manner of death was homicide.

Police recovered bullets and bullet fragments from the crime scene. Forensic examiner Christopher Faber, who testified as an expert in the field of firearms examination, identification, and operability, testified that none of the bullets or bullet fragments he examined were fired from the .22 caliber revolver recovered from the crime scene. He could not determine if the bullets or bullet fragments were all fired with the same unknown firearm.

Clarence Coleman witnessed the shooting as he was driving on Bentalou Street. According to Coleman, a friend was in the car with him at the time of the shooting, but that person had since died. Coleman observed four or five people one of whom was wearing gray clothing and shooting a gun. Coleman testified that he saw smoke coming from the gun. When Coleman heard the gun shots, he sped up to avoid being hit by a bullet. Another vehicle attempting to get out of the way of the shooting almost collided with him. Coleman did not immediately contact the police because he did not know that someone had died. Some time later, after he saw something about the shooting on television, Coleman contacted the police because he "thought [he] might get a reward or something[.]" Coleman did not receive a reward, but, on February 25, 2016, he met with detectives, viewed photographs, and identified two photographs as men who looked alike and looked like the man he saw shooting a gun on February 20, 2016. Neither of those photographs depicted appellant, but one of them depicted Troy Bradner.

A year and a half later, on November 27, 2017, detectives showed Coleman a different photographic array. He selected a photograph of appellant and identified him as the person he saw "in the middle of the street shooting at someone with a handgun out running after him with gun out shooting at them on February the 20th." At trial, Coleman identified appellant as the shooter.

Troy Bradner was charged with, and pleaded guilty to, the murders of Daniels and Ford. He testified for the State pursuant to a plea agreement in which he agreed to testify at appellant's trial in a manner consistent with a February 2016 proffer session with the prosecutor and a detective, and a December 12, 2017 recorded statement he provided to police. In exchange, Bradner received a sentence of life with all but forty years suspended and five years of probation. Contrary to his agreement, at appellant's trial, Bradner testified that he did not know appellant, did not speak with him on the day of the shooting, and lied in his 2017 recorded statement. In response to Bradner's testimony, the State played his 2017 recorded statement for the jury. In that recorded statement, Bradner stated that he and appellant shot Daniels and Ford in retaliation for a prior robbery the victims had committed.

Baltimore City Police Detective Christopher Kazmarek testified that Bradner's sister, Lakeira Hall, reported that Bradner was responsible for the shootings. She provided police with text messages exchanged between her and Bradner. Those text messages were admitted in evidence. In them, Bradner wrote, "I did it Cara, but don't tell mommy." When his sister asked why he did it, Bradner responded, "[t]hey robbed me." Bradner's sister texted that "[b]oth the boys died," and Bradner responded, "I know."

Bradner admitted that he had a .9-millimeter gun on his waist at the time of the shootings but stated that he did not fire it and did not know who was shooting. A photographic array in which Bradner identified appellant as the shooter was admitted in evidence.

We shall include additional facts as necessary in our discussion of the questions presented.

DISCUSSION

I.

Appellant contends that the trial court abused its discretion by asking a *voir dire* question about bias against defense witnesses when he did not have any witnesses and objected to the question. Prior to trial, defense counsel objected to a proposed *voir dire* question, "Question 11, Subsection C," on the ground that it "creates the inference that the Defense has witnesses, should have witnesses. It's in no way the burden of the Defense to live [sic] witnesses. At this point in time, there'd be no witnesses for the Defense so for that reason I think that the Court would be comfortable in striking 11(c) and I don't think it would have a substantial effect on the case itself." The State objected, arguing that "the intent is to bring up whether or not a juror has bias. If somebody's going to say, yeah, you know, I believe the Defense witness more than a state witness or that – that's the whole point of the question because there are people that would stand up to answer that question if they felt that bias[.]" The court denied appellant's request stating, "[t]hese questions are to find individuals' biases. We can ask questions when they come up, and I'll allow you to ask questions when you come here."

During *voir dire*, the judge questioned potential jurors as follows:

> This question has three parts so please listen carefully. Do not stand until I've read all three parts of the question. First, would any member of the jury panel be inclined to give either more or less weight to the testimony of a police officer than any other witness in this case merely because the witness is a police officer? Second, would any member of the jury panel be inclined to give either more or less weight to the testimony of a witness for the prosecution merely because he or she is a prosecution witness? Or three, would any member of the jury panel be inclined to give either more or less weight to the testimony of a witness called by the defense merely because he or she is a defense witness? If so, please stand.

When the judge finished questioning the jurors, defense counsel renewed his objection concerning Question 11, Subsection C. No juror responded affirmatively to the question pertaining to defense witnesses. After the members of the jury were selected, the trial judge asked both the prosecutor and defense counsel if the jury was acceptable and both responded in the affirmative.

A. Standard of Review

In Maryland, "the sole purpose of *voir dire* 'is to ensure a fair and impartial jury by determining the existence of [specific] cause for disqualification[.]'" *Pearson v. State*, 437 Md. 350, 356 (2014) (quoting *Washington v. State*, 425 Md. 306, 312 (2012)). To that end, "[o]n request, a trial court must ask a *voir dire* question if and only if the *voir dire* question is 'reasonably likely to reveal [specific] cause for disqualification[.]'" *Id*. at 357 (quoting *Moore v. State*, 412 Md. 635, 663 (2010)). The decision to pose a requested *voir dire* question is entrusted to the sound discretion of the trial judge. *Id.* at 356 ("An appellate court reviews for abuse of discretion a trial court's decision as to whether to ask a *voir dire* question."). A requested *voir dire* instruction must be asked when it is "relevant to the

facts or circumstances presented in a case which assists the trial judge in uncovering bias[.]" *Moore*, 412 Md. at 662 (citations omitted). The relevance of some *voir dire* questions varies from case to case, but others are warranted no matter the facts and circumstances at issue. In *Kazadi v. State*, 467 Md. 1 (2020), the Court of Appeals held that, "on request, during *voir dire*, a trial court must ask whether any prospective jurors are unwilling or unable to comply with the jury instructions on the long-standing fundamental principles of the presumption of innocence, the State's burden of proof, and the defendant's right not to testify." *Kazadi*, 467 Md. at 35-36. Such requested questions are necessary in order to reveal venire members' prejudicial partialities.

B. Preservation

In the instant case, the issue of whether the trial court abused its discretion in questioning the venire about defense witnesses was not preserved for our consideration. We addressed this issue in *Foster v. State*, 247 Md. App. 642 (2020), when we held that to preserve a claim involving a trial court's decision to propound a *voir dire* question "a defendant must object to the court's ruling. In addition, if the claim involves the court's decision to ask a *voir dire* question over a defense objection, the defendant must renew the objection upon the completion of jury selection." *Foster*, 247 Md. App. at 647-48.

Our decision in *Foster* was based, in part, upon the Court of Appeals' holding in *State v. Stringfellow*, 425 Md. 461 (2012), where the Court observed that, "[g]enerally, a party waives his or her *voir dire* objection going to the inclusion or exclusion of a prospective juror (or jurors) or the entire venire if the objecting party accepts unqualifiedly the jury panel (thus seated) as satisfactory at the conclusion of the jury-selection process."

Stringfellow, 425 Md. at 469. In contrast, an objection "that is incidental to the inclusion/exclusion of a prospective juror or the venire is not waived by accepting a jury panel at the conclusion of the jury-selection process; rather, such an objection is preserved for review on direct appeal." *Id.* at 469. In *Foster*, we explained:

> *Stringfellow* set forth examples of claims that fit into the two categories. Among the former, which is waived by unqualified acceptance of the empaneled jury, is a claim, such as the one before the Court in that case, that the trial court erred in asking a voir dire question requested by the State, thereby biasing the venire members against the defense. Among the latter, which is not waived by unqualified acceptance of the empaneled jury, is a claim, such as the one before us, that the trial court erred in refusing to ask a voir dire question requested by the defense.
>
> The two categories are treated differently for preservation purposes because only the former involves a claim that "'is directly inconsistent with'" the unqualified acceptance of the empaneled jury. "A prejudicial voir dire question, when propounded, may inject the very prejudice that voir dire attempts to filter out." Therefore, an objection to such a question "relates directly to the composition of the jury." On the other hand, an "unpropounded voir dire question, like a defused bomb, cannot likewise prejudice the venire." Therefore, no additional objection is required when the jury is empaneled.

Foster, 247 Md. App. at 649-50 (internal citations and footnotes omitted).

The argument before us is that the question asked by the judge, over appellant's objection, biased the venire members against the defense. There is no doubt that defense counsel objected as required by Md. Rule 4-323(c)[1], but the record reveals that the

[1] Maryland Rule 4-323(c) provides:

> (c) **Objections to other rulings or orders**. For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action
>
> (continued)

empaneled jury was accepted without qualification. After the jurors were selected, and immediately before the alternate jurors were selected, the judge asked counsel if the jury panel was acceptable, and no objection was lodged. Accordingly, the issue was not preserved properly for our consideration.

Even if the issue had been preserved, reversal would not have been warranted because any error would have been harmless beyond a reasonable doubt. An error is harmless if "a reviewing court, upon its own independent review of a record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict[.]" *Dorsey v. State*, 276 Md. 638, 659 (1976). Here, no member of the venire responded affirmatively to the disputed question about defense witnesses. Moreover, even if a member of the venire inferred from the *voir dire* question that appellant bore the burden of producing witnesses, the jury instructions given by the court made clear that appellant was not required to prove his innocence. The jury instructions included the following:

> The Defendant is presumed to be innocent of the charges. This presumption remains throughout every stage of the trial, it is not overcome unless you are convinced beyond a reasonable doubt that the Defendant is guilty. The State has the burden of proving the guilt of the Defendant beyond a reasonable doubt.
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> * * *

(continued)

> of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

> This burden remains on the State throughout the trial. The Defendant is not required to prove his innocence.
>
> * * *
>
> The weight of the evidence does not depend upon the number of witnesses on either side. You may find the testimony of a smaller number of witnesses for one side was more believable than the testimony of a greater number of witnesses for the other side. The Defendant has [an] absolute constitutional right not to testify. The fact that the Defendant did not testify must not be held against the Defendant, and must not be considered by you in any way, or even discussed by you.
>
> * * *
>
> The burden is on the State to prove beyond a reasonable doubt that the offense was committed, that the Defendant was the person who committed it.

For these reasons, we conclude that even if the trial court erred in propounding the challenged *voir dire* question, any error would be harmless beyond a reasonable doubt.

II.

Appellant next argues that the trial court erred by admitting alleged surveillance video in evidence without requiring the State to lay a foundation as required by Md. Rule 5-901.[2] He maintains that the trial court committed reversible error when it allowed a disc containing surveillance video from the Raven Mart to be authenticated by Clay-Harcum, even though she had not viewed the video prior to trial, witnessed the scene it depicted at

[2] Maryland Rule 5-901, which governs authentication and identification, provides, in part:

> (a) **General provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

the time the event happened, or provided any information about the process or system by which the Raven Mart surveillance video system operated.

At trial, the State questioned Clay-Harcum about the surveillance video as follows:

> [PROSECUTOR]: Okay. Now, does Raven Mart maintain security cameras?
>
> [CLAY-HARCUM]: Yes, we do. We have one actually pointing directly out the front door.
>
> Q. And did there come a point in time when homicide detectives asked you to – asked if they could look at it and potentially retrieve that video footage?
>
> A. Yes, they did. They looked at it, then they said they have to call one of their specialists to download it because they would not let me leave the store at all.

Clay-Harcum signed a form permitting the police to retrieve the video footage. She testified that a detective "just stuck a little device into our camera system. I guess downloaded wherever it went to. And then they, you know, left out and that was it. Then they started their investigation. . . . You know, looking at, you know, where we had cameras outside and inside the store." The prosecutor showed Clay-Harcum a disc, marked as State's Exhibit 22, and the following occurred:

> [DEFENSE COUNSEL]: I'm going to object on two bases. One, is that I don't know that Ms. Harcum considered it's a fair and accurate representation of anything that she didn't observe. Two, without the custodian records [sic], the keeper of the records, you can't get to the authenticity of the video. There's no foundation. Essentially, she's not – she's the store manager but she hasn't testified that she maintains control in the sense of having anything to do with security file. It sounds like police came in, looked at the system and locked up the store, so I don't know if there's a proper foundation (indiscernible – 9:53:47).

[PROSECUTOR]: Actually, I did ask her if they maintained security footage. She is the manager of the store. She is custodian of records and she knows Raven Mart.

[DEFENSE COUNSEL]: I don't think she's (indiscernible – 9:53:56).

[PROSECUTOR]: And I'm also putting on Detective Lee Brandt as well and Detective – he's going to go on after this and actually retrieved it, but she also recognizes those footage because she works in Raven Mart store. Video footage of the Raven Mart store.

THE COURT: But did she ever say that she saw the footage of it?

[PROSECUTOR]: Well, she was there when it happened.

THE COURT: But she just testified that she didn't see anything which she was –

[PROSECUTOR]: I know but she was in the store when it happened.

THE COURT: Okay. Well, she's in the store. How is she going to say that – how is she going to talk about this video that she's never said, "I've seen this video. I saw what happened."?

[PROSECUTOR]: Well, she was there. I mean, the video footage is – it's [] pretty short. I mean, the only time really I'm really concerned is the time frame when the incident happens and you can see people running. I'm just going to show – do you recognize what this – obviously, she's going to recognize what Raven Mart store is because she works inside the store.

THE COURT: So the video will show Raven Mart store and what else?

[PROSECUTOR]: And the time. I mean, you can't actually see the incident happen because the wall, the door, that you see people, you know, running.

THE COURT: I'm going to deny your request, counsel. I going [sic] to find the video is reliable and that she authenticated it. So I'm going to deny your motion.

The video was then played for the jury and admitted in evidence.

Appellant argues that the trial court erred in finding that State's Exhibit 22 had been authenticated properly. In support of his argument, he points out that "for purposes of admissibility, a videotape is subject to the same authentication requirements as a photograph." *Jackson v. State*, 460 Md. 107, 116 (2018). In *Washington v. State*, 406 Md. 642 (2008), the Court of Appeals discussed two rules for authenticating a photograph:

> "Photographs may be admissible under one of two distinct rules. Typically, photographs are admissible to illustrate testimony of a witness when that witness testifies from first-hand knowledge that the photograph fairly and accurately represents the scene or object it purports to depict as it existed at the relevant time. There is a second, alternative method of authenticating photographs that does not require first-hand knowledge. The 'silent witness' theory of admissibility authenticates a photograph as a mute or silent independent photographic witness because the photograph speaks with its own probative effect."
>
> Thus, 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 (internal quotation marks and citations omitted).

In the case at hand, although the surveillance video was the perfect illustration of evidence admissible under the silent witness theory, the State failed to lay the proper groundwork for the admissibility of it through the testimony of Clay-Harcum. The premature introduction of the video does not, however, warrant reversal because the error was harmless beyond a reasonable doubt. *Dorsey*, 276 Md. at 659. Immediately following Clay-Harcum's testimony, the video was authenticated by Detective Lee Brandt who testified as an expert in video and image data examination, storage, and retrieval. He testified that after receiving permission to retrieve the surveillance video from Clay-

Harcum, he examined the recording system, checked the date and timestamp and determined that it was one hour and nine minutes faster than real time, examined the picture quality, and noted that there was no evidence that the video recording system had been tampered with. He inserted a USB flash drive into the recording system and exported the requested camera angles. After returning to his office, Detective Brandt placed the video recording on a secure server and made a copy for the primary detective on the case. After the prosecutor played the surveillance video, Detective Brandt testified that the footage showed the "customer area of the Raven's Mart just inside the doorway" and that it was the footage he had retrieved and stored on the secure server.

Detective Brandt's testimony satisfied the silent witness theory for authenticating the surveillance video. Accordingly, any error in admitting the video during Clay-Harcum's testimony was harmless.

III.

Appellant's final contention is that reversal is required because the State was permitted to argue, over objection, that appellant had "never worn glasses before" when there was no evidence presented at trial about his use of, or need for, corrective lenses. During closing argument, the prosecutor played the surveillance video for the jury and then argued, in part:

> [PROSECUTOR]: See those two guys walk by? That's – that's David Wise and Troy Bradner. Now, it's hard to see because it's very brief, David Wise is the one up here (indicating), Troy Bradner is the one that walked by back here. One of the things you have to keep in mind is, you know, a funny thing, people come into trial and they look – they try and make themselves look different. It's natural. David Wise has never worn glasses before.

[DEFENSE COUNSEL]: Objection.

[PROSECUTOR]: But the interesting thing –

THE COURT: Overruled.

[PROSECUTOR]: -- but the interesting thing though is their body types have, kind of, flip-flopped, because Troy Bradner was thinner before. Did you see how he looked in the first interview? And now he's put on quite a bit of weight. Well, David Wise weighed a lot more back then the, sheets – the pictures that you get are – let's see here. See the weight is a little bit cut off here, but if you see the attachment on the back, his weight was 250 pounds back then. Even in his first statement, Troy says, "You know, he was – he was bigger than me. He was heavier than me." So the interesting thing about this case, they've actually flip-flopped in their physical appearance.

In considering a challenge to closing argument, we are mindful that attorneys are afforded "considerable leeway in closing argument, and that regulation of closing arguments falls within the sound discretion of the trial court." *Frazier v. State*, 197 Md. App. 264, 283 (2011). "Closing argument typically does not warrant appellate relief unless it 'exceeded the limits of permissible comment.'" *Anderson v. State*, 227 Md. App. 584, 589 (2016) (quoting *Lee v. State*, 405 Md. 148, 164 (2008)). In general, "counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom and, in doing so, to indulge in oratorical conceit or flourish." *Id.* at 589 (quotation marks and citation omitted). There are, of course, limitations. The Court of Appeals has explained that counsel may not comment on facts not in evidence, claim what he or she would have proven, appeal to the prejudices or passions of the jurors, or invite the jurors to abandon the objectivity that their oaths require. *Mitchell v. State*, 408 Md. 368, 381 (2009).

What exceeds the limits of permissible commentary during closing argument "'depends on the facts in each case.'" *Degren v. State*, 352 Md. 400, 430-31 (1999) (quoting *Wilhelm v. State*, 272 Md. 404, 415 (1974)). Thus, the propriety of prosecutorial argument must be decided "'contextually, on a case-by-case basis.'" *Anderson*, 227 Md. App. at 589 (quoting *Mitchell*, 408 Md. at 381). "Because the trial judge is in the best position to gauge the propriety of argument in light of such facts," we will not disturb the trial court's ruling absent a clear abuse of discretion "of a character likely to have injured the complaining party." *Mitchell*, 408 Md. at 380-81. Even if counsel makes improper remarks during closing argument, reversal is only merited if the comments "'actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.'" *Spain v. State*, 386 Md. 145, 158 (2005) (quoting *Degren*, 352 Md. at 431).

In the instant case, it is at least possible that the prosecutor intended to argue that the surveillance video and appellant's photograph did not show that appellant had worn glassed before the trial. On the other hand, the jurors could have interpreted the prosecutor's remark to mean that she knew that appellant did not normally wear glasses. Even assuming that the jurors adopted the latter interpretation, we conclude that the error was harmless beyond a reasonable doubt. *Dorsey*, 276 Md. at 659. Clearly, no evidence was admitted that specifically related to appellant's prior need for, or use of, glasses. The jurors were instructed to decide the case based on the evidence admitted and the testimony of the witnesses, and that opening statements and closing arguments were not evidence. The single, isolated reference to whether appellant previously had worn glasses was not central to the case. In his statement to police, Troy Bradner identified appellant as the

shooter, and Clarence Coleman identified appellant as the shooter in both a photographic array and at trial. Moreover, appellant could be seen walking in front of the Raven Mart in the surveillance video taken around the time of the shooting. For these reasons, any error in allowing the prosecutor's remarks during closing argument was harmless beyond a reasonable doubt.

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