Circuit Court for Baltimore City
Case No. 116180016

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 889

September Term, 2017

DWAYNE DOUCETT

v.

STATE OF MARYLAND

Nazarian,
Reed,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: April 20, 2018

Following a three-day jury trial in the Circuit Court for Baltimore City, a jury convicted appellant Dawyne Doucett of robbery with a dangerous weapon; wearing, carrying, and transporting a handgun; use of a firearm in the commission of a crime of violence; and unlawful possession of a regulated firearm. The court sentenced appellant to ten years for robbery with a dangerous weapon; five years concurrent for unlawful possession of a regulated firearm; ten years concurrent for use of a handgun in a crime of violence; and merged the wearing, carrying, and transporting charge with the use of a firearm in the commission of a crime of violence charge. Appellant timely appealed and presents one issue for our review:

> Whether the trial court committed reversible error by allowing the prosecution, despite multiple objections, to state repeatedly that [appellant] admitted robbery when there was no such evidence in the record?

We hold that the trial court committed error, but that the error was harmless beyond a reasonable doubt. Accordingly, we affirm appellant's convictions.

FACTS AND PROCEEDINGS

At approximately 2:30 p.m. on June 8, 2016, Baltimore City Police Officer Sean Marsh, who was in his marked police vehicle, observed three males who appeared to be wrestling or fighting. Within seconds, Officer Marsh heard a gunshot coming from their direction. Officer Marsh activated his emergency lights and as he approached the three men, one individual, later identified as the victim, Donte Hopkins, began to sprint away from the scene. The other two men headed in the opposite direction. Officer Marsh observed that one of the men was wearing a puffy black jacket while the other—later

identified as appellant—wore a red shirt with the number ten in black on the back. The man with the puffy jacket made a left at an alleyway between two buildings and disappeared, but Officer Marsh followed appellant. Officer Marsh observed appellant place an object inside a garbage can near that same alleyway, and continue to flee.

Eventually, Officer Marsh determined that appellant had fled into a nearby Days Inn Hotel, and shortly thereafter, other responding officers detained appellant at the rear of the hotel. Officer Marsh returned to the garbage can where he had observed appellant place the object, and recovered a silver revolver-style handgun at the top of the trash. Only a few feet away from that same garbage can, Officer Marsh also located a puffy black jacket which contained three cellular phones. At trial, Hopkins confirmed that those three phones belonged to him.

Although police never found the man in the puffy black jacket, they eventually interviewed Hopkins.[1] During his interview, Hopkins told police that while walking to the subway, both appellant and the man in the puffy jacket grabbed him and began to fight with him. According to Hopkins, both of the men had guns, and appellant's gun was silver or grayish in color. After appellant and the man in the puffy jacket took Hopkins's three cellular phones, Hopkins wrestled with appellant until he heard appellant fire a shot at him.

While appellant was incarcerated awaiting his trial, he asked Officer Marsh what he

[1] Hopkins, who was called as a witness for the State during appellant's trial, did not cooperate. Instead, the State introduced into evidence Hopkins's recorded interview with police, wherein Hopkins told police the above-stated facts regarding his attack.

had found in the garbage can. Officer Marsh replied that he had found "a piece of crap gun, an old beat up gun." According to Officer Marsh, appellant replied, "You should see the nice shiny silver one I have at my house."

At the correctional facility, appellant made numerous phone calls. At trial, the State played several of these phone calls, which contained inculpatory statements made by appellant. We provide the pertinent excerpts from these jail calls below[2]:

- Exhibit 9B

MR. DOUCETT: They stuck a gun in a trash can and shit. But they said there was somebody else with me, and yo left his bubble coat, and all that shit, and he got out of there, and they ain't get him, you feel me. For real, I'm thinking about -- I'm thinking about -- I'm thinking about -- 'cause they saying -- they saying there was another n****r, I'm thinking about, you feel me, (indiscernible) there, I was getting out of there from that n****r (indiscernible).

MS. WILLIAMS: Yeah.

MR. DOUCETT: Can I do that? I can't do that?

MS. WILLIAMS: No.

MR. DOUCETT: Huh?

MS. WILLIAMS: You can't do what?

MR. DOUCETT: Do that.

(Pause.)

[2] Appellant filed an unopposed motion in our court to correct the record and provide a transcript that more accurately portrays the contents of the phone calls. We granted this motion, and rely on this "corrected" transcript.

MS. WILLIAMS: Huh?

MR. DOUCETT: Yeah. You know what I'm saying, I'm going to do that. I'ma do it like that. I'ma say, the dude that thing did, he was robbing all of us. But my - - shit. (Indiscernible) downtown got LA cameras, you feel me.

MS. WILLIAMS: Uh-huh.

MR. DOUCETT: So I got to see what they doing, you feel me. (Indiscernible) rights, though. Say if I get -- say if I get him -- saying I get (indiscernible) shit. Ahh, shit, Bae.

* * *

MR. DOUCETT: Yes. Shit wild. Double bad. I'm fried. I'm moving too -- I was moving too fast, for one, and I wasn't in a right frame of mind 'cause I was high, you feel me.

MS. WILLIAMS: Uh-huh.

MR. DOUCETT: Damn. (Indiscernible) broad daylight downtown, really kick you. All right. When I write you and tell you this shit, boy, you going to be mad as shit at me. I should have followed my little (indiscernible). You'll see, follow (indiscernible). I shouldn't have never went out (indiscernible), for real. That was stupid, yo. Hell yeah. I ain't even lying, Bae. Hey, Bae?

- Exhibit 9C

MR. DOUCETT: You know they reading my (indiscernible), right?

MS. WILLIAMS: I'm glad they ain't find that shit.

MR. DOUCETT: Yeah. It was outside.

- Exhibit 9E

MALE VOICE: What's that? What they got you for, (indiscernible)?

MR. DOUCETT: Armed robbery, shooting a gun, and all that type shit.

MALE VOICE: Oh, yeah?

MR. DOUCETT: Yeah.

MALE VOICE: How you -- how you think you're going to make out?

MR. DOUCETT: Man, I said -- I said I was - - I'm telling them that I was a victim, you feel me?

MALE VOICE: (Indiscernible).

MR. DOUCETT: All right. 'Cause me and the n****r was fighting for the gun, n****r tried to get me.

- Exhibit 9H

MR. DOUCETT: Hey, yo? Huh?

ROO: I didn't get no jiffy (phonetic), did they?

MR. DOUCETT: No who?

ROO: The jiffy.

MR. DOUCETT: No jiffies?

ROO: Yeah. They didn't get no joint, did they? Hello?

MR. DOUCETT: Yeah, it was in -- yeah, it was in the trash can.

ROO: Huh?

MR. DOUCETT: Yeah, they found that -- they found the jiffy in the trash can.

ROO: (Indiscernible).

MR. DOUCETT: Huh?

ROO: Huh?

MR. DOUCETT: I said they found something in the trash can.

ROO: But they didn't find that mother fucker on you.

MR. DOUCETT: Oh, hell no.

During closing arguments, the State, over objection, told the jury:

> And if you have any questions about this, [appellant], of course, confirmed it in the jail calls that that gun that the police got out of the trash can was, in fact, his, that he's shown someone, his female friend that he was speaking to, that he'd shown it to her before, referred to having two of them and --
>
> * * *
>
> And the other one, he said, as you heard from Officer Marsh, he had a much nicer one and you heard in the jail calls that when they raided his house, they didn't find it, because as he said, it was out back . . . by the trash can.

During rebuttal, the State, over objection, argued:

> Well, those were a lotta words and a lotta loud talking and a series of completely irrelevant questions, because at the end of the day, **what happened came out of his mouth. You heard it on the [j]ail calls**. . . . [Appellant] . . . himself said that he was one of the three people tussling and then his lawyer came in here and embraced for you the lie that the [appellant] on his, the jail calls . . . said hey, do you think that's gonna work? . . . In the call to his girlfriend, he says, I'm gonna tell 'em that I was . . . Do you think that's . . . gonna work? What do you think about that?
>
> Then, he tell, he try, he tested out that same theory on some of his other friends and associates. I'm saying that I was victim. That's what he says in the jail calls. But remember, initially, when he made that call, he says I -- I effed up. You're gonna be so mad at me when I write to you what happened, 'cause I don't wanna say too much on the phone, but of course, he did. And he told it all. . . .
>
> **But at the end of the day, it's him. He acknowledged it. He did some dumb S in broad daylight downtown, and that that gun was his.** They got it out of the trash can. . . .
>
> **At the end of the day, there is absolutely no doubt, and you heard it from the [appellant's] own mouth that he is the one who was there and robbed Mr. Hopkins. . . .**

> **[Appellant] on the jail calls admitted, in fact, that he was the one robbing them[. . . .]**
>
> At the end of the day, what matters is, these were the primary officers. They did all of the primary most important work and **then the [appellant] helped top it all off with his own admissions on the jail calls.**

(Emphasis added). The jury convicted appellant on all charges. We shall provide additional facts as necessary to resolve appellant's sole appellate argument.

DISCUSSION

Appellant contends that the trial court erred in allowing the State to argue during closing argument that, in the recorded jail calls, he admitted to robbing Hopkins. According to appellant, "the trial court permitted the prosecutor to erroneously assert that the State's case was supported by the most powerful direct evidence—a confession—that simply does not exist."

The Court of Appeals has stated the appropriate standard of review for the propriety of a closing argument as follows:

> Whether a reversal of a conviction based upon improper closing argument is warranted depends on the facts in each case. Generally, the trial court is in the best position to determine whether counsel has stepped outside the bounds of propriety during closing argument. As such, we do not disturb the trial judge's judgment in that regard unless there is a clear abuse of discretion that likely injured a party.

Whack v. State, 433 Md. 728, 742 (2013) (internal citations and quotation marks omitted). Accordingly, we review the trial court's decision to permit the State's closing argument for an abuse of discretion.

In *Fuentes v. State*, 454 Md. 296, 319 (2017) the Court of Appeals provided the appropriate lens for reviewing a closing argument:

> Generally, "[t]he prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Whaley v. State*, 186 Md. App. 429, 452, 974 A.2d 951, 964 (2009) (quoting *Spain v. State*, 386 Md. 145, 152, 872 A.2d 25, 29 (2005)). Nonetheless, "not all statements are permissible during closing arguments." *Donaldson v. State*, 416 Md. 467, 489, 7 A.3d 84, 97 (2010). "For instance, counsel may not 'comment on facts not in evidence or . . . state what he or she would have proven.'" *Mitchell v. State*, 408 Md. 368, 381, 969 A.2d 989, 997 (2009) (quoting *Smith and Mack v. State*, 388 Md. 468, 488, 880 A.2d 288, 299 (2005)).

The Court of Appeals' decision in *Whack* provides useful guidance. There, during Whack's trial, the State introduced into evidence two DNA samples: a DNA sample taken from a vehicle's armrest that contained a mixture of DNA from four individuals; and a DNA sample taken from that same vehicle's headrest which contained only one person's DNA. 433 Md. at 736. The State's DNA expert testified that the likelihood that the headrest DNA sample came from someone other than the victim was one in 212 trillion. *Id*. The DNA sample from the armrest, however, was less reliable because it contained four DNA profiles. *Id*. The State's expert testified that Whack's DNA matched with only eleven out of the fifteen tested locations in the armrest's DNA sample. *Id*. This meant that one in 172 African Americans, such as Whack, could have similarly matched with the sample on the armrest. *Id*. at 737.

During the rebuttal portion of its closing argument at Whack's trial, the State argued:

> Remember, [Whack] is the fourth sample, the only place where we have four samples. So if you remember, as [the State's expert] testified, that we know [the victim], one hundred percent [the victim], and [defense counsel] agrees is in that headrest sample, when I add two more 50 million times less. When we add [Whack], and we know it's [Whack], when we add [Whack] that is why the number is 172. It is statistics again. It is a statistical lawyer trick.
>
> [Defense counsel] wants you to say don't believe the statistics because the science says he is there, but this 172 is no less strong than that 212. [Whack] is there. [Whack] left that DNA.

Id. at 741. Whack moved for a mistrial, which the trial court denied. *Id*.

On appeal, the Court of Appeals held that the trial court erred in denying the motion for a mistrial, and remanded for a new trial. In reaching its decision, the Court explained that "the prosecutor went too far in stating emphatically that [Whack's] DNA was present in the truck." *Id*. at 746. Additionally, the Court stated that,

> The prosecutor compounded that error by overstating the statistical significance of the DNA evidence by equating the odds of one in 172 with one in 212 trillion. . . . The danger, though, was not that jurors might believe the two numbers were the same, but that the prosecutor stated the one in 172 figure was "no less strong" than the one in 212 trillion figure. The prosecutor's statement could have seriously misled the jury. The one in 212 trillion figure represented the odds that an African American *other than [the victim]* could have left a particular DNA profile on the passenger headrest, whereas the one in 172 figure reflected the odds that *any* randomly selected African American's DNA could be found in the total mixture on the armrest, including [Whack].

Id. at 746-47. The Court concluded, "In this case, the record does not contain testimony that [Whack's] DNA conclusively matched the sample from the truck." *Id*. at 749.

Here, when appellant's trial counsel first objected to the State's mention of the jail calls, the trial court overruled the objection, stating, "This is argument." While we acknowledge that a prosecutor is allowed liberal freedom of speech and may argue

anything in evidence or reasonably drawn from the evidence, *Fuentes*, 454 Md. 319, a prosecutor may not argue facts not in evidence. *Smith*, 388 Md. at 488.

Although the jail calls may have been incriminating evidence of appellant's intent to lie to the police, the calls did not contain any confession or admission of guilt that appellant committed the robbery. In Exhibit 9B, appellant told his girlfriend that he was contemplating telling the police that he was the victim rather than a robber, and asked her if he could do so. There are two ways to construe these statements: 1) that appellant was asking whether he could tell police the truth—that he was a victim; or 2) that appellant was asking whether he should lie. Neither interpretation constitutes an affirmative admission of guilt that appellant committed the robbery. Appellant also told his girlfriend that he was high, not in his right frame of mind that day, and that she would be upset with him—but none of these facts can be construed as an admission that he committed a robbery.

In Exhibit 9E, appellant told an unidentified male that he was telling the police that he was a victim in the robbery. Again, this is not an admission of guilt. Finally, in Exhibit 9H, appellant told another male named "Roo" that police found the "jiffy"—presumably the gun—in the trash can. Although this demonstrates appellant's awareness of the State's case against him, appellant's acknowledgment that the police found a gun in the garbage can does not equate to an admission of robbery.

In sum, while we acknowledge the incriminating nature of appellant's statements, they were not admissions that he committed the robbery. Like in *Whack*, where the Court of Appeals held that "the record does not contain testimony that Petitioner's DNA

conclusively matched the sample from the truck[,]" 433 Md. at 749, similarly here, the record does not contain any evidence that appellant confessed to committing the robbery.

By telling the jury that appellant admitted to committing the crime, the prosecutor improperly introduced facts not in evidence. In *Fuentes*, however, the Court of Appeals recognized that "Not every improper comment by the prosecutor requires reversal, as error in closing argument is subject to harmless error review." 454 Md. at 321 (citing *Lee v. State*, 405 Md. 148, 174 (2008)). "An error will be deemed harmless only if a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict[.]" *Id*. (internal quotation marks omitted).

In *Fuentes*, Fuentes was convicted of second-degree rape and third-degree sexual offense. *Id*. at 302. At Fuentes's trial, the State cross-examined Fuentes, and the following colloquy took place:

> [PROSECUTOR]: And on June 7, 2012, you were interviewed by Alex Roche from Marriott?
>
> [FUENTES]: Yes.
>
> [PROSECUTOR]: And you told him that you acknowledge and stated that you took advantage of [the victim] considering her mental state and diminished capacity, correct?
>
> [FUENTES]: No.
>
> [PROSECUTOR]: You did not say that?
>
> [FUENTES]: No.

Id. at 317. During rebuttal closing argument, the prosecutor referred to this June 7, 2012 interview stating,

> He [DEFENSE COUNSEL] will also have you believe that [Fuentes] doesn't speak enough English, and so when he was interviewed on June 7th by the Marriott security, he didn't understand and they made him sign it, and so when he said that he took advantage of [the victim's] mental diminished mental capacity—

Id.

On appeal to the Court of Appeals, Fuentes argued that "the trial court erred in allowing the State to inform the jury during rebuttal closing argument that Fuentes had admitting to taking advantage of [the victim's] 'mental diminished capacity' in an interview that was never admitted at trial." *Id*. at 315. In other words, Fuentes claimed that the court erred in permitting the prosecutor to argue, during rebuttal closing argument, facts not in evidence. The Court of Appeals held that the prosecutor's argument was improper, but concluded that the error was harmless beyond a reasonable doubt. *Id*. at 320, 323.

In affirming Fuentes's conviction, the Court considered three factors to determine whether the improper statements constituted harmless error: "first, the weight of the evidence against the accused; second, the severity of the remarks, cumulatively; and third, the measures taken to cure any potential prejudice." *Id*. at 321 (internal quotation marks omitted) (quoting *Lee*, 405 Md. at 174 (2008)). The Court focused on the first and third factors in its harmless error analysis. *Id*. The Court addressed the first factor by noting that there was no dispute that Fuentes had engaged in sexual contact with the victim, that

the State's case was very strong in demonstrating that the victim had a mental defect, and that Fuentes "reasonably should have known of it." *Id*. As to the third factor, the Court noted that shortly after Fuentes's objection, the trial judge provided the applicable pattern jury instruction for closing arguments, and instructed the jurors to rely on their own memory. *Id*. The Court of Appeals concluded that this instruction "ameliorated any prejudice that may have been caused by the prosecutor's improper argument." *Id*. at 323.

Our application of these factors here causes us to reach the same result. First, regarding the weight of the evidence against the accused, we note that Officer Marsh observed appellant in a red shirt and a man with a puffy jacket wrestling with Hopkins. Marsh heard a gunshot, and observed appellant run away and place an object later revealed to be a gun in a garbage can. Additionally, although Hopkins did not cooperate at trial, his recorded statement to police confirmed that a man in a red shirt with a silver gun and a man in a puffy black jacket with a black gun robbed him and stole his three cellular phones. Finally, although we held that the statements appellant made in his jail calls were not admissions of guilt to committing robbery, they were certainly incriminating in that he openly contemplated whether he should tell police that he was not the robber but the person being robbed. The weight of the evidence against appellant, therefore, was strong.

As to the severity of the remarks, cumulatively, we note that most of the prosecutor's statements were accurate representations of appellant's phone calls and statements to Officer Marsh. Only the following three statements from the prosecutor's rebuttal argument were inaccurate: (1) "At the end of the day, there is absolutely no doubt, and you

heard it from [appellant's] own mouth that he is the one who was there and robbed Mr. Hopkins"; (2) "[appellant] on the jail calls admitted, in fact, that he was the one robbing them"; and (3) "At the end of the day, what matter is, these were primary officers. They did all of the primary most important work and then [appellant] helped top it all off with his own admission on the jail calls."

The first statement correctly notes that appellant admitted he was present for the robbery—but incorrectly conveys that appellant admitted that he committed a robbery. The second and third statements incorrectly express that appellant admitted to committing robbery. We acknowledge that the prosecutor expressed to the jury several times during rebuttal that appellant admitted to committing the robbery. Notably, however, the prosecutor could have properly argued to the jury that it could *infer* appellant's guilt from his jail call statements. Although the prosecutor's comments constituted improper closing argument in the context of this case, the violation was not egregious.

Finally, as to the measures taken to cure any potential prejudice, we note that in overruling appellant's objection, the trial court stated "This is argument." "Although the trial judge did not acknowledge the comments as improper, nor did he explicitly instruct the jury to disregard the comments, he reminded the jury that the prosecutor's statements only should be considered as argument, not evidence." *Spain*, 386 Md. at 159. Additionally, prior to closing arguments, the trial court instructed the jury, "Opening statements and closing arguments are intended only to help you understand the evidence and to apply the law. Therefore, if your memory of the evidence differs from anything that

the lawyers or I may say, you must rely upon your own memories of the evidence. Guide yourselves accordingly." Such an instruction helped ameliorate any prejudice that may have been caused by the prosecutor's improper statements. *See Fuentes*, 454 Md. at 323; *Spain*, 386 Md. at 159-160. Finally, the court provided to the jury a computer as well as a DVD containing the telephone calls so that it could review the calls during deliberations.

Because (1) the evidence against appellant was strong; (2) the prosecutor's improper comments were not egregious; and (3) the court properly instructed the jury, and provided the jury with the ability to listen to the jail calls again during deliberations, we hold that any error was harmless beyond a reasonable doubt. Accordingly, we affirm appellant's convictions.

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