Circuit Court for Washington County
Case No.: C-21-CR-19-000024

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 890

September Term, 2019

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DAJAN LANDLE LANE

v.

STATE OF MARYLAND

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Arthur,
Gould,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Sharer, J.

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Filed: February 2, 2021

Appellant, Dajan Landle Lane, was convicted by a jury in the Circuit Court for Washington County of a single count of possession of a regulated firearm by a disqualified person.[1] He was sentenced by the court to a term of incarceration of 15 years, the first five years without the possibility of parole.

In his timely appeal, appellant presents two questions:

1. Did the lower court err in allowing the State to introduce a hearsay statement, made by an anonymous 911 caller, that a suspect dropped a handgun while running from a police officer?

2. Did the lower court err in failing to declare a mistrial after the State's Attorney argued, in rebuttal closing argument, that if the jury was aware of "what I know, this would've been a much shorter process[.]"?

We shall affirm.

## BACKGROUND[2]

The State's only witness was Hagerstown Police Department Officer Steven Lucas who, on October 4, 2018, was dispatched to "look for" Dajan Lane.[3] Prior to beginning his assignment, Officer Lucas viewed photos of Dajan Lane to familiarize himself with the person upon whom he was to serve the arrest warrants. He then went to the location

[1] *See* Md. Code Ann., Public Safety § 5-133(b) and Criminal Law § 5-622.

[2] The following factual recitation is taken from appellant's brief, to which the State takes no exception.

[3] The purpose for Officer Lucas's assignment to "look for" appellant was to serve outstanding arrest warrants. In granting appellant's motion *in limine*, the trial court ordered that in his testimony Officer Lucas not mention that he was dispatched to serve arrest warrants.

specified – 526 Church Street, in Hagerstown – where he found appellant on the porch, together with Dorothy Jones. In response to Officer Lucas's inquiry, appellant identified himself as Dajan Jones. When Officer Lucas asked "Mr. Jones" to come down from the porch, he "jumped off the back of the porch and ran away." Officer Lucas gave chase and, as he did, he "heard a sound of something dropping on the pavement." Appellant eluded Officer Lucas, who then returned to where the chase had begun. There, he found a handgun on the sidewalk.

Officer Lucas was equipped with a body camera, on which his interaction with appellant, and the foot chase, was seen. A portion of the film footage revealed that, as the chase continued, Officer Lucas "received a communication" from his dispatcher about "an anonymous phone call that as he was chasing this individual, the guy, the individual dropped a gun." "Mr. Jones" eluded Officer Lucas who gave up the chase after "a minute to two minutes." After ending the chase, Office Lucas retraced his route to 526 Church Street. As he did so, he observed and retrieved the handgun from the sidewalk. Appellant was subsequently arrested and charged with its possession.

With that brief background, we turn to appellant's first assignment of error.

**The Hearsay Objection**

Asserting that the audio portion of the body camera video presenting the voice of the dispatcher's message about the anonymous caller's observation was inadmissible hearsay, appellant moved, *in limine*, that it be excluded. The State responded that the statement, if hearsay, was admissible under the present sense impression exception to the

rule against hearsay. Relevant to the question before us, Md. Rules 5-802 and 5-803 provide, in part:

> Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible.

Md. Rule 5-802.

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (b) Other Exceptions.
>
> (1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Md. Rule 5-803.

Appellant asserts that the trial court erred in admitting the statement by the anonymous caller as a present sense impression. He argues:

> In recognizing this hearsay exception, however, the Court of Appeals has required a strict temporal connection between the event described and the statement. Thus, while "precise contemporaneity is not always possible" and there might be "a slight delay" between the event and the statement, because the admissibility of such statements "flows from the fact of spontaneity, the time interval between observation and utterance must be very short. The appropriate inquiry is whether, considering the surrounding circumstances, sufficient time elapsed to have permitted reflective thought." … Ultimately, absent special circumstances, "there should be no delay beyond an acceptable hiatus between perception and the cerebellum's construction of an uncalculated verbal description." … Additionally, the declarant "must speak from personal knowledge" and the content of the statement, or extrinsic evidence, must satisfy this "threshold" requirement. … Last, the statement should be a "shorthand fact description," and not an opinion of the declarant.

For this standard, appellant relies on *Booth v. State*, 306 Md. 313, 324-27 (1986).

Appellant concludes his argument: "A present sense impression is admissible precisely because the celerity between the event and the declaration describing the event does not allow for cognitive interference between the two phenomena. Here, there was time for reflective thought, and the State – as proponent – failed to establish that the declarations made by the anonymous 911 caller were present sense impressions." We are not persuaded.

We agree with the State that the temporal requirements of the Rule were satisfied by the evidence. The time that elapsed before the 911 call was dispatched to Officer Lucas was brief. For purposes of determining the time lapse, we look to the instant that the chase began, after "Mr. Jones" leapt from the porch and began to run. The only evidence of the time interval was Officer Lucas's testimony that he gave up the chase after, at most, "a minute to two minutes." The dispatcher's call came within that time span, in which we must also account for the time that elapsed between the anonymous call to 911 and the dispatcher's relay of that information to Officer Lucas. In the circumstances, we do not find two minutes, at most, to not satisfy the temporal requirements of the exception.

As to the personal knowledge of the declarant, the State also refers us to *Booth*, *supra*. "When the statement itself, or other circumstantial evidence demonstrates the percipiency of a declarant, whether identified or unidentified, this condition of competency is met." 306 Md. at 325. The declarant reported seeing a gun drop onto the sidewalk from appellant's possession; Officer Lucas found a gun as described by the

declarant, which authenticates the reliability of the declarant's message. We find no error in the trial court's ruling.

Moreover, we would find any error to be harmless. A summary of the State's evidence to establish that "Mr. Jones" was, in fact, appellant, reveals that Officer Lucas had, prior to the encounter, familiarized himself with appellant's appearance; Officer Lucas was unshaken in his testimony that he had "no doubt whatsoever" that "Mr. Jones" was, in fact, appellant; that he heard the handgun drop as the chase began; that, within minutes, he located the handgun on the route of the chase; that the body camera video, and still photos, showed the handgun being dropped. In all, while helpful to the State, the anonymous 911 call was essentially cumulative.

**The State's Closing Argument**

"Once again, what I know, doesn't matter. If it was what I know, this would've been a much shorter process." Those were the words spoken by the prosecutor in his closing rebuttal argument that led to defense counsel's motion for a mistrial, which was denied, and which has given rise to appellant's second assignment of error.

Initially, we take up, and deny, the State's suggestion, relying on *Shelton v. State*, 207 Md. App. 363 (2012), that the issue has not been preserved because defense counsel did not object until after the prosecutor's rebuttal argument had been concluded, rather than at the time of his statement. We choose not to penalize appellant for his trial counsel's exercise of good manners.

At the conclusion of the prosecutor's rebuttal argument defense counsel asked for permission to approach and, at the bench, moved for a mistrial. After hearing the arguments of counsel, out of the presence of the jury, the court stated:

> I don't think [defense counsel's earlier] reference to [the prosecutor's] being all-knowing invited any type of inference that there is other information the jurors are not allowed to hear and that they don't know. And -- that it -- if they knew, that it would be a shorter trial. So I don't think there is any issue of that. **I think that it was a poor choice of words.** … [A]nd, I can certainly understand [defense counsel's] concern that it -- at least an implication that there is information that you have that they don't have. … [A]t the same time, I don't think that it rises to the level -- to manifest for the necessity of a mistrial.

The court further observed, speaking to the prosecutor, **"I don't think that you did it intentionally."** (emphasis added).

After further discussion the court gave a supplemental instruction, saying to the jury:

> Ladies and Gentlemen, there may have been a portion of the State's closing argument implying knowledge of other information. You may only consider information and evidence that has been presented in this courtroom. You must not speculate about any information that was not presented in this courtroom.

Neither the State nor the defense objected to the supplemental instruction. In fact, the wording was agreed to during the bench discussions with the court.

We, therefore, must consider (1) whether the prosecutor's inappropriate comment to the jury generated a manifest necessity for a mistrial; (2) whether the court abused its discretion in its denial of the motion for mistrial; and (3) the sufficiency of the court's supplemental instruction.

Appellant asserts that the prosecutor's comment was "manifestly improper" and clearly "conveyed the impression to the jury that he had superior information of facts not in evidence before the jury." From that, appellant argues that the prosecutor thus urged the jury "to draw inferences from information that was not admitted at trial." In all, appellant argues, "[t]he comment was improper because it encouraged the jury to resolve the case based on evidence *dehors* the record and not tested through the crucible of adversarial fact-finding."[4]

We have often said that considerable latitude is permitted in closing argument. *Ware v. State*, 360 Md. 650, 681-82 (2000); *Jones v. State*, 217 Md. App. 676, 691 (2014). Nonetheless, there are limitations. We said, in *Reidy v. State*, 8 Md. App. 169, 172 (1969) that "It is fundamental to a fair trial that the prosecutor should make no remarks calculated to unfairly prejudice the jury against the defendant." In closing argument counsel may not be permitted to "state and comment upon facts not in evidence or to state what he could have proven." *Eley v. State*, 288 Md. 548, 551 (1980) (quotation marks and citation omitted). "The rule is designed also to prevent counsel from suggesting evidence which was not presented at trial thereby providing additional grounds for finding a defendant innocent or guilty." *Id*. at 552.

Indeed, a slightly more expansive view may be taken regarding rebuttal arguments which, by their nature, are created in somewhat *ad hoc* circumstances to respond to

[4] For readers not conversant in French, including the author, *dehors* is a legal term defined as, "other than, not including, or outside the scope of." New Oxford American Dictionary (2001).

defense counsel's closing. "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974). Finally, even if improper, reversal is not mandated unless the comment "actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Beads v. State*, 422 Md. 1, 10 (2011) (quotation marks and citation omitted).

We cannot find in this record any definable effort by the prosecutor, in his closing, and particularly in the challenged sentence, to comment on facts not in evidence or to suggest that there was other evidence, not admitted, to prove guilt. We agree with the trial court that the prosecutor's comment, while inappropriate, was not improper under the standard established in *Eley v. State* and succeeding cases.

"The declaration of a mistrial is an extraordinary act which should only be granted if necessary to serve the ends of justice," *Simmons v. State*, 208 Md. App. 677, 690 (2012) (quotation marks and citation omitted), and "[a] request for a mistrial in a criminal case is addressed to the sound discretion of the trial court and the exercise of its discretion[.]" *Cooley v. State*, 385 Md. 165, 173 (2005) (quotation marks and citation omitted).

Procedurally, "in assessing the prejudice to the defendant, the trial judge first determines whether the prejudice can be cured by instruction." *Kosh v. State*, 382 Md.

218, 226 (2004); and, if given, a curative instruction must "be timely, accurate, and effective." *Carter v. State*, 366 Md. 574, 589 (2001).

The curative instruction given by the court was timely. The challenged words spoken by the prosecutor came nearly at the end of his argument (the balance of his argument consumed only 45 lines of transcript); the defense promptly requested a bench conference; and, after a brief discussion, the court offered its curative instruction. The instruction also satisfied the accuracy standard. The court spoke briefly and directly to the point of appellant's objection. Finally, we conclude, as did counsel in their acquiescence, that the curative instructive was an effective remedy.

On this record, we cannot say that the court's denial of appellant's motion for mistrial was an abuse of discretion, nor can we say that the curative instruction was not appropriate.

**JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED; COSTS ASSESSED TO APPELLANT.**