UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0957

September Term, 2014

TIMOTHY HASELDEN, JR.

v.

STATE OF MARYLAND

Zarnoch,
Leahy,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: September 17, 2015

The appellant, Timothy Haselden, Jr., was charged with having committed on June 1, 2013, (1) first-degree assault, (2) second-degree assault, (3) carrying a handgun, (4) theft of property of a value less than $1,000, and (5) use of a handgun in the commission of a crime of violence. On March 26, 2014, a jury in the Circuit Court for Prince George's County convicted the appellant of all charges. He was sentenced to thirty-five years incarceration, all but eight of which were suspended.[1] The court imposed a five year term of supervised probation upon release with the special condition that the appellant submit to psychological counseling, drug testing, and treatment. He presents a single issue for our review:

> "Did the trial court abuse its discretion when it overruled defense counsel's objections to a portion of the prosecutor's opening statement?"

We find no abuse of discretion and shall affirm.

Factual Background of the Issue

The issue arose on the first two sentences spoken by the prosecutor in her opening statement.

> "[PROSECUTOR]: There is an alarming trend, for lack of a better word, that is becoming more and more prevalent in today's society. There's a segment of individual[s] who believe erroneously that if they are angry, they are allowed to avenge their anger –

[1]The court sentenced appellant to twenty years incarceration with all but eight years suspended on the conviction for use of a handgun in the commission of a crime of violence. A consecutive fifteen years incarceration on the conviction for first-degree assault was suspended. He received a sentence of time served for theft.

"[DEFENSE COUNSEL]: Objection. Objection.

"THE COURT: No, overruled. Go ahead."[2]

In his very brief opening statement defense counsel told the jury that "[o]nly one person was in danger on June 1st, 2013, that you are going to be hearing about," and that "the only person Timothy Haselden, Jr. threatened to harm, the only person in danger that day, was himself" (and not the victim named in the indictment).

Thus, the fact issue for the jury was drawn.

[2]The prosecutor continued stating:

> "That they are allowed to avenge their anger through the use of violence. You've heard numerous times there's anger on the roadways. God forbid you don't let somebody get in your lane, or you purposely or accidently cut them off.
>
> "[DEFENSE COUNSEL]: May I have a continuing objection to this line –
>
> "THE COURT: Let's move onto the case here.
>
> "[PROSECUTOR]: Ladies and gentlemen, on June 1st, 2013, the defendant was angry."

Because the defense objection to the above-quoted statement was sustained, and because the defense did not request any other relief, the issue before us is limited to the first two sentences of the State's opening.

The Evidence

The victim specified in the indictment was the appellant's father, Timothy Haselden, Sr. (Mr. Haselden). The backdrop of the charges was the recent break-up of the appellant, then age twenty-four, and his former girlfriend.

Mr. Haselden had been employed as a police officer with the Metropolitan Police Department for over twenty years. At the time of trial he held the rank of lieutenant. On June 1, 2013, at approximately 6:00 a.m., Mr. Haselden returned home at the end of an overnight shift and promptly went to sleep. He was scheduled to begin another shift at 1:00 p.m. that afternoon and awoke around noon to get ready. As he was getting dressed, he felt a splinter in his foot and went to the bathroom to remove it. He left his clothes and service weapon on the bed in his bedroom. When he returned from the bathroom, he noticed that his service weapon was no longer in its holster.

He peered down the hallway that went from his bedroom to the living room where he observed his son, the appellant, "visibly shaking, red, crying and just – just shaking and staring down at the ground." Mr. Haselden, in his underwear, approached the appellant and asked what was wrong. He testified that the appellant replied, "Today is the day I'm going to finish all of this." He asked whether the appellant had his service weapon. The appellant confirmed that he did. Mr. Haselden testified that the appellant "wanted to go and kill ... his ex-girlfriend and her family and her boss and anybody else who was involved in breaking up their relationship." The appellant told Mr. Haselden, "that includes you. You had

interfered too." The appellant gestured with the gun for Mr. Haselden to sit down, and the two began conversing. Mr. Haselden advised the appellant that the gun was loaded and was not safe. Appellant acknowledged that he had his finger out of the trigger well. Mr. Haselden endeavored to talk the appellant out of going through with his plan to shoot a number of people.

At approximately 1:15 p.m., Stephen Haselden, the appellant's paternal grandfather, approached the side door of Mr. Haselden's house with phone in hand. He had received a call from Mr. Haselden's Lieutenant who wanted to know why Mr. Haselden had not reported for the start of his shift. The appellant permitted Mr. Haselden to open the door and to take the call. Stephen Haselden testified that when he entered the room, the atmosphere was "tense," as if Mr. Haselden and the appellant "had a problem they were trying to solve, something serious."

The call lasted approximately five minutes. Mr. Haselden did not feel he could use any of the "normal distress signals" because he "knew [his] son would know those." Instead, he "talked crazy," and gave unresponsive answers to the Lieutenant's questions in the hope that it would register with her that something was amiss. When the call was finished, Mr. Haselden gave the phone back to Stephen Haselden, who then walked back across the street to his own house.

The appellant told Mr. Haselden to drive the appellant to confront the individuals whom he believed to be responsible for ending his relationship with his ex-girlfriend,

beginning with her employer. Mr. Haselden inquired, "What if I don't want to go?" He testified that the appellant responded, "Well then you're just an obstacle," which Mr. Haselden "took to be a threat on [his] life."

The two men exited out of the front of the house and walked to the driveway where Mr. Haselden's car was parked. Mr. Haselden testified that he tried to get his son to sit in the front passenger seat and was planning to drive the car into "a telephone pole or something," so as "to not get where we were going." The appellant, however, insisted on sitting in the back seat. As the appellant started to sit down, Mr. Haselden fled from the vehicle. In the course of his flight he slipped, and turned to see the appellant approximately 150 feet behind him, screaming at him, and still holding the gun. Mr. Haselden got back on his feet and continued to flee. He leapt over two sections of six-foot privacy fencing in order to access an abutting field where he concealed himself by lying supine in a patch of reeds. He could still hear the appellant calling out for him, "Dad. Where are you, Dad?" Mr. Haselden eventually maneuvered out of the reeds and passed between several houses while scanning the area for the appellant. He was able to get the attention of a neighbor to call the police.

Stephen Haselden testified that he had stepped onto the porch of his house to smoke a cigarette when he witnessed Mr. Haselden "jump out of the driver's side of [a] car and run around his house." A few seconds later he saw the appellant "get out of the passenger rear area and run around the house in the same direction." Stephen Haselden testified that the

appellant reappeared. The grandfather approached the appellant, but he "didn't look right." The two were sitting on the front porch of Stephen Haselden's house when the appellant revealed that he had his father's gun. Shortly after this revelation, the police arrived.

Sergeant Joshua Brackett of the Prince George's County Police Department testified that he observed the appellant "on the front stoop of a residence holding a gun in his hand." Sergeant Brackett was posted at the location with a long rifle for approximately forty-five minutes to an hour before the appellant ultimately surrendered. The appellant placed the handgun on the stoop and walked out to the street where he was taken into custody. Sergeant Brackett recovered the handgun, which was test-fired and found to be functional.

The appellant was transported to a police station and placed in an interview room where he gave a statement to Detective Matthew Kaiser of the Prince George's County Police Department. Detective Kaiser testified that the appellant told him the following:

> "Earlier that morning he had – he advised that for the past couple of days he had trouble sleeping so he had fallen asleep earlier and *when he woke up he woke up almost like in a fit of rage*, his hands were shaking, he was sweating, he was confused. *He advised that he saw an opportunity, when he saw – or he observed his father's duty weapon in the room and grabbed for the gun*.
>
> "After that he told me that he was so angry with his, I guess, ex-girlfriend that he kind of used the gun as – in a way to get his father to take him over to her house to in his words kill [her]."

(Emphasis added).

Discussion

The appellant contends that the first two sentences of the prosecutor's opening statement "amounted to a thinly veiled invitation to the jury to protect their community from violence generally by convicting [the appellant]," and were improper under the Court of Appeals' rationale in *Hill v. State*, 355 Md. 206, 734 A.2d 199 (1999), and *Lee v. State*, 405 Md. 148, 950 A.2d 125 (2008).

The State responds that the comments were not improper because, unlike in *Hill* and *Lee*, the prosecutor here "did not urge the jury to convict [the appellant] in order to send a message." The State further suggests that even if the comments were improper, reversal is not required because the comments were an "isolated snippet" of the opening statement, they were discontinued when the trial judge instructed the prosecutor to move on to the facts of the appellant's case, and the evidence of the appellant's guilt was overwhelming. Ultimately, we agree with the State, and explain.

The Court of Appeals observed in *Wilhelm v. State*, 272 Md. 404, 411-12, 326 A.2d 707, 714 (1974), that "[t]he primary purpose or office of an opening statement in a criminal prosecution is to apprise with reasonable succinctness the trier of facts of the questions involved and what the State or the defense expects to prove so as to prepare the trier of facts for the evidence to be adduced." In delivering this apprisal, "[c]ounsel are entitled to make what rhetoricians call an exordium – that part of the opening intended to make the listeners heed you and prepare them for that which is to follow." *Id.* at 437-38, 326 A.2d at 727-28.

As with closing argument, counsel are afforded substantial leeway with respect to the content of an opening statement. *Id.* at 411, 326 A.2d at 713-14 (observing with respect to opening statement and closing argument that there is "sufficient similarity of the issues involved to permit generally the application of common principles.").

While the universe of permissible comment is vast, it is not limitless, and "there are 'depths into which the unfair argument of a too zealous advocate cannot be permitted to sink.'" *Holmes v. State*, 119 Md. App. 518, 527, 705 A.2d 118, 123 (1999) (quoting *Rhuebottom v. State*, 99 Md. App. 335, 342, 637 A.2d 501, 504 (1994)), *cert. denied*, 350 Md. 278 (1998). Generally, the prosecutor '"has an obligation to refrain from making any remark within the hearing of the jury which is likely or apt to instigate prejudice against the accused' or, in derogation of the defendant's right to a fair trial, is 'calculated to unfairly prejudice the jury against the defendant.'" *Wilhelm*, 272 Md. at 414-15, 326 A.2d at 715 (internal citations omitted).

However, not every improper remark merits reversal, *Wilhelm*, 272 Md. at 415-16, 326 A.2d at 716, and "[w]hat exceeds the limits of permissible comment depends on the facts in each case, even where the remarks may fall into the same general classification." *Id.* at 415, 326 A.2d at 715-16.

The Court of Appeals recently articulated the standard of review to be applied:

> "A reviewing court will not reverse a conviction due to a prosecutor's improper comment or comments 'unless there has been an *abuse of discretion* by the trial judge of a character likely to have injured the complaining party.'

> *Henry* [*v. State*], 324 Md. [204,] 231, 596 A.2d [1024,] 1038 [(1991)] (quoting *Wilhelm v. State*, 272 Md. 404, 413, 326 A.2d 707, 714-15 (1974)). We must determine, upon our 'own independent review of the record,' whether we are 'able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.' *Lee*, 405 Md. at 164, 950 A.2d at 134 (quoting *Dorsey v. State*, 276 Md. 638, 659, 350 A.2d 665, 678 (1976)). A prosecutor's improper comments influenced the verdict, and therefore require reversal, if it 'appears that the ... remarks actually misled or influenced the jury to the defendant's prejudice ....' *Hill*, 355 Md. at 224, 734 A.2d at 209."

Donaldson v. State, 416 Md. 467, 496-97, 7 A.3d 84, 101 (2010).

When evaluating whether an improper statement misled or was likely to have misled the jury, we look to "the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Lee*, 405 Md. at 165, 950 A.2d at 134 (quoting *Lawson v. State*, 389 Md. 570, 592, 886 A.2d 876, 889 (2005)).

Turning to the present case, we first address whether, as the appellant contends, the prosecutor's comments during her opening statement improperly invited the jurors to preserve the safety and quality of their community by convicting the appellant, as in *Hill* and *Lee*, both *supra*.

In *Hill,* the Court of Appeals granted certiorari to determine whether this Court had erred in holding that the denial of the petitioner's motion for mistrial based on the prosecutor's improper closing argument had not been preserved for appellate review. In the course of its discussion, the Court addressed "the insistence of the prosecutor, throughout the trial and over constant objection, on informing the jurors that they had a responsibility to keep their community safe from people like Hill." 355 Md. at 211, 734 A.2d at 202.

> "In a soup to nuts performance, the prosecutor, whether through inexperience or a more disturbing disdain for proper conduct, began his inappropriate remarks with the very first statement he made to the jury and did not end them until the very last statement he made, paying utterly no attention to the numerous objections that were sustained by the court."

Id.

The Court highlighted a representative sample of the remarks at issue:

> "[The State] commenced his opening statement by noting that his broken foot would mend but wondering if society would mend – '[s]ociety full of people like Mr. Hill who carry guns and drugs.' An objection to that remark was sustained. In the next breath, however, he continued, '[o]ne only needs to read the paper to know what that does to our community.' An objection to that also was sustained. After very briefly recounting the events leading to the officer's stop of the car, he told the jury, 'what happens next is why you are here *and why you've been chosen to send a message to protect our community*.' (Emphasis added)."

Id.

In remanding the case to this Court, the Court of Appeals emphasized that "appeals to jurors to convict a defendant in order to preserve the safety or quality of their communities are improper and prejudicial," *Hill*, 355 Md. at 225, 734 A.2d at 209, and that "[t]he Court of Special Appeals will also need to take account of the persistency of the prosecutor's conduct." *Id*. at 226, 734 A.2d at 210.

The prosecutor in *Lee* made similarly improper remarks. Lee was convicted of numerous offenses relating to an altercation which unfolded in the street of a Baltimore City neighborhood and during which Lee had discharged a firearm several times. In the course

of the State's rebuttal closing argument, the prosecutor made the following comments to the jury, over continuing objections by defense counsel which were overruled by the trial court:

> "[THE STATE]: Do the residents of that area have the right to be able to be safe in their environment? *I ask and those residents ask that you teach this defendant –*
>
> ....
>
> "[THE STATE]: *– teach this defendant that disputes aren't settled by the blast of a gun, teach the defendant that pulling a trigger doesn't make you a man, it makes you a criminal –*
>
> ....
>
> "[THE STATE]: – teach the defendant not to follow the laws of the streets of Baltimore, but to follow the laws of the State of Maryland."

Lee, 405 Md. at 158-59, 950 A.2d at 131 (emphasis added).

In assessing the propriety of these remarks, the Court of Appeals concluded that, by "asserting that the jurors should consider their own interests and those of their fellow Baltimoreans, and should clean up the streets to protect the safety of their community, the State clearly invoked the prohibited 'golden rule' argument." *Id.* at 172-73, 950 A.2d at 139.

On a factual spectrum of prejudice Hill and Lee are outliers compared to the statement by the prosecutor in the instant matter. In both *Hill* and *Lee*, the improper remarks suggested that the jurors in addition to deliberating on the evidence presented at trial, had a secondary obligation to preserve the safety and quality of their communities by convicting the defendants in those cases, and that they should consider their own personal

interests in arriving at a verdict. The comments of the prosecutor in the present case are not similarly susceptible to such an interpretation. As the State observes, a fundamental distinction between the comments of the prosecutor here, as contrasted with those in *Hill* and *Lee*, is that they "did not appeal to the jury to send a message with their verdict." Rather, the prosecutor's remarks in this case, referring to an "alarming trend" in "today's society" of angry persons seeking revenge through violence, properly alerted the jury to the State's theory of the recognizable motive for appellant's having assaulted his father.

Mr. Haselden testified at length that his son's motivation for taking his service weapon was the appellant's desire to harm those he believed responsible for the recent break-up of his relationship with his ex-girlfriend. Detective Kaiser further testified that when he interviewed the appellant at the police station following the standoff, that the appellant described waking up that morning "in a fit of rage," that he "saw an opportunity ... when he saw his father's duty weapon in the room," and that he had intended to use the gun to coerce his father into driving him to his ex-girlfriend's house and "in his words, kill [her]."

To the extent that the prosecutor's introductory remarks deviated from a strict factual recitation of what the anticipated testimony would show, they served as an "exordium," *Wilhelm*, 272 Md. at 437-38, 326 A.2d at 727-28, "intended to make the listeners heed you and prepare them for that which is to follow." *Id.* These comments did not "risk diverting the focus of the jury away from its sole proper function of judging the defendant on the

evidence presented," *Hill*, 355 Md. at 225, 734 A.2d at 206, were not improper, and the trial court did not abuse its discretion in overruling the appellant's objection.

Predicated on his contention of judicial error, appellant next argues that the error was prejudicial. Although we are not required to reach that issue, we hold, alternatively and beyond a reasonable doubt, that the first two sentences of the State's opening, if improper, did not mislead or influence the jury to the defendant's prejudice. *See Donaldson*, 416 Md. at 496-97, 7 A.3d at 101. The defense was lack of criminal intent. The jury was instructed that, to convict on assault, it must find that the appellant "committed an act with the intent to place [Mr. Haselden] in fear of immediate offensive physical contact or physical harm." Appellant did not testify before the jury. The uncontradicted and uncontroverted objective evidence was that appellant, for an extended period, restrained his father by brandishing a functioning Glock handgun that had no safety mechanism and which he refused to surrender to his father. At the first opportunity, the father ran for his life. We discern no prejudice.

For all of these reasons, we shall affirm.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED.

COSTS TO BE PAID BY THE APPELLANT.