Circuit Court for Wicomico County

Case No. C-22-CR-18-000762

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1068

September Term, 2019

DARRELL LEONARD MAINOR

V.

STATE OF MARYLAND

Graeff,
Berger,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: November 5, 2020

Darrell Leonard Mainor, the appellant, was arrested and indicted in the Circuit Court of Wicomico County for 12 criminal counts, accusing him of committing a home invasion, burglary, and theft at the home of Francis McCrorey, as well as assault on both Ms. McCrorey and Shirley Donohoe. At a trial presided over by the Honorable W. Newton Jackson III on July 16 and July 17, 2019, the jury convicted appellant of home invasion, first degree burglary, third degree burglary, fourth degree burglary, first degree assault on Ms. Donohoe, second degree assault on Ms. Donohoe, and reckless endangerment. Immediately after the verdict, despite defense counsel's request for a delay of sentencing to conduct a Pre-sentencing Investigation, Judge Jackson sentenced appellant to 20 years for first degree burglary and 20 years for first degree assault, to run consecutive with the burglary sentence. The remaining counts were merged for sentencing purposes. This appeal timely followed.

FACTUAL BACKGROUND

On the morning of July 23, 2018, Shirley Donohoe, age 81, was visiting her longtime friend, Francis Joan McCrorey, age 90, at Ms. McCrorey's Salisbury home on Christopher Street. After Ms. Donohoe assisted Ms. McCrorey to the bathroom, the two women exited to find an unfamiliar man in the house demanding to know where the money is. When Ms. Donohoe responded that she did not know where the money is, the assailant struck her in the face twice, breaking her upper dental plate. The assailant continued to ask where the money is, and when Ms. Donohoe could not answer, he hit her at least four more times in the face, ultimately breaking her nose in two places and causing her to lose

consciousness. When she came to, she saw the assailant exit through the back door in the kitchen. Ms. Donohoe then called 911.

Officer Noah King of the Salisbury Police Department responded to Ms. McCrorey's home shortly afterward to find both women injured and emotionally shaken. The investigating officers determined that the assailant had likely entered the Christopher Street house through an open second-floor window, using the large oil tank behind the home to climb up to the second floor. They also found that both second-floor bedrooms had been ransacked and that fireproof safes had been emptied with some of their contents strewn across the beds. Ms. Donohoe described the assailant to the detectives as a dark-skinned African-American male, about 25 years old, with a height of around 5'10", and a weight of 180-200 pounds, wearing a grey sweatshirt. She gave a later description of the assailant as being approximately 5'7" and weighing 200 pounds.

While investigating the condition of Ms. McCrorey's house, Detective Jason Caputo swabbed the oil tank and windowsill from the second-floor window for potential DNA evidence belonging to the assailant. Those swabs ultimately provided sufficient DNA for the crime lab analyst to determine a match with DNA material taken from the appellant. The appellant was questioned and initially denied any knowledge of or involvement in the incident. He later stated, however, that he may have some information about the incident, but would not provide it without "making a deal." The appellant was arrested and charged in the incident.

Detective Caputo showed Ms. Donohoe a photo array containing a photo of the appellant. While she could not make a positive identification from the photo array, she specifically noted the photo of the appellant as the one looking the most like the assailant. In court, by contrast, Ms. Donohoe was able to identify the appellant as the man who assaulted her.[1] She also testified that she continues to have some breathing difficulties due to her nose having been broken in the incident.

During the trial, it came to light that due to a technical problem, the video-recorded footage of the police swabbing Mr. Mainor for a sample of his DNA at the jailhouse had been inadvertently deleted; however, there was uncontroverted testimony that this buccal swab had been performed. The DNA material obtained from the buccal swab confirmed the identity of Mr. Mainor as the perpetrator of the unlawful entry into Ms. McCrorey's home, theft, and subsequent assault on both women.

THE CONTENTIONS

On this appeal, the appellant raises the following four contentions:

1. The State's evidence was legally insufficient to sustain the convictions for 1) Home Invasion, 2) First-Degree Assault, and 3) Reckless Endangerment;
2. The court gave an erroneous jury instruction on the necessity for unanimous verdict;

[1] Ms. McCrorey passed away before the trial took place, and so was unable to provide testimony to the jury.

3. The court abused its discretion in overruling the defense objection to improper comment in the State's closing argument; and
4. The court abused its discretion in refusing to postpone sentencing

THE STANDARD OF REVIEW

In reviewing the sufficiency of the evidence supporting a criminal conviction, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Smith v. State, 415 Md. 174, 184 (2010)(quoting Jackson v. Virginia, 443 U.S. 307, 319 (1972)). The appellant challenges the sufficiency of the evidence to support the three convictions for 1) Home Invasion, 2) First-Degree Assault, and 3) Reckless Endangerment.

HOME INVASION CONVICTION

The first of these is Home Invasion, a latter-day statutory spin-off from the common law felony of Burglary. Maryland Criminal Law 6-202 specifically distinguishes the felony of Burglary in the First Degree from the felony of Home Invasion. The point of difference in the two offenses lies in the intent of the person who breaks and enters. Subsection 6-202(a), defining the crime of First degree Burglary, specifically states, "A person may not break and enter the dwelling of another with the intent to commit **theft**." Subsection 6-202(b), defining the crime of Home Invasion, mirrors the language of subsection (a) but with one divergence: "A person may not break and enter the dwelling of another with the intent to commit **a crime of violence**. In the present case, the appellant was charged with

and convicted of Home Invasion under 6-202(b), with First Degree Assault as the intended crime of violence.

In demonstrating the appellant's intent for the purpose of justifying the conviction for Home Invasion, the State mostly relies on the assault indeed committed by the appellant when he encountered the two occupants of the house as evidence of the appellant's intent to commit a crime of violence. The State's argument is that because the appellant indeed did commit an act of violence in the house (First Degree Assault), he must have had the intent to commit that act of violence, if necessary, when he unlawfully entered the house.

We agree. The appellant has chosen as the field of battle in this case not the ultimate actus reus perpetrated by the appellant but the antecedent mens rea that led to that actus reus. There is, to be sure, some necessary speculation involved as we, of necessity, infer from the ultimate actus reus back to the antecedent mens rea. In Smallwood v. State, 343 Md. 97, 104, 680 A.2d 512 (1996), Chief Judge Murphy explained for the Court of Appeals:

> An intent to kill may be proved by circumstantial evidence. "[S]ince intent is subjective and, without the cooperation of the accused, cannot be directly and objectively proven, its presence must be shown by established facts which permit a proper inference of its existence." *Earp, supra,* 319 Md. At 167, 571 A.2d 1227 (quoting *Davis v. State*, 204 Md. 44, 51, 102 A.2d 816 (1954)). Therefore, the trier of fact may infer existence of the required intent from surrounding circumstances such as "the accused's acts, conduct, and words." *State v. Raines*, 326 Md. 582, 591, 606 A.2d 265 (1992).

(Emphasis supplied)

In Davis v. State, 204 Md. 44, 51, 102 A.2d 816 (1954), the Court of Appeals had earlier recognized the inferential necessity of looking backward from the effect to the cause:

> [S]ince intent is subjective and, without the cooperation of the accused, cannot be directly and objectively proven, its presence must be shown by established facts which permit a proper inference of its existence.

See also State v. Earp, 319 Md. 156, 166-68, 571 A.2d 1227 (1990).

The particular antecedent spot when the appellant has chosen to pitch the battle is the intention necessary to raise what would otherwise be the misdemeanor of Second-Degree Assault to the felony of the first of the two modalities of First-Degree Assault. Criminal Law Article, Sect. 3-202(b)(1) provides that:

> A person may not intentionally cause or attempt to cause serious physical injury to another.

A conviction for Home Invasion requires an intention to commit a crime of violence. First-Degree Assault is such a requisite crime of violence. Second-Degree Assault is not. Thus, the legal sufficiency of the Home Invasion conviction depends upon the legal sufficiency of the First-Degree Assault conviction. We turn to it.

FIRST DEGREE ASSAULT CONVICTION

A conviction for First-Degree Assault under Criminal Law Article 3-202 requires the State to prove that a defendant intentionally caused, or attempted to cause, serious physical injury to another. The undisputed facts of this case are that the 81-year old victim, Shirley Donohoe, was intentionally struck in the face at least six times during the burglary, breaking her nose and dentures and causing a loss of consciousness. At the trial, Ms.

Donohoe testified that her nose was still broken and that she continued to have difficulty breathing properly because of it.

The appellant argues that the injuries suffered by Ms. Donohoe do not meet the definition of "serious physical injury" required for a First-Degree Assault. Criminal Law Article 3-201 provides the definition for the meaning of the term "serious physical injury" as used in 3-202.

(d) *Serious physical injury*. – Serious physical injury means physical injury that:

(1) creates a substantial risk of death; or

(2) causes permanent or protracted serious:

(i) disfigurement;

(ii) loss of the function of any bodily member or organ; or

(iii) **impairment of the function of any bodily member** or organ.

(Emphasis supplied.)

The easy answer here is that Ms. Donohoe's continued difficulties breathing due to her still broken nose more than a year after the incident meets the definition of a protracted serious impairment of the function of her respiratory system. We do not even need to make that finding. Criminal Law Article 3-202 only requires sufficient proof that the appellant **attempted to cause serious physical injury to another**, regardless of whether he actually succeeded in causing serious physical injury. A rational trier of fact could certainly find an intentional attempt to cause serious injury from the appellant repeatedly punching an octogenarian woman in the face with his fists with enough force to break both her nose and

her upper dental plate, leaving her bleeding and unconscious, while threatening her and demanding money. The fact that his attempt was successful is just an additional satisfaction of the definitional requirements.

The appellant spends an inordinate amount of time attempting to persuade us, as a matter of fact, that he did not intend to cause serious physical harm to Ms. Donohoe. Even if the appellant were successful in this attempt, it would be irrelevant because we are not the factfinders. In making an appellate assessment of legal sufficiency, we are not dealing with the burden of persuasion, as a matter of fact, but with the burden of production, as a matter of law. The satisfaction of the burden of production in this case is a no-brainer. The appellant caused serious physical injury to Ms. Donohoe. One of the most familiar permissible inferences in the criminal law is that the defendant intended to do the thing that the defendant ultimately did. Chilcoat v. State, 155 Md. App. 394, 403, 843 A.2d 240 (2004). That, ipso facto, is enough to satisfy the burden of production and to take the case to the factfinder. Whether we would draw the inference or not is immaterial. All that matters is that some factfinder somewhere could draw the inference. To wit, the evidence was legally sufficient to support a conviction for First-Degree Assault.

RECKLESS ENDANGERMENT CONVICTION

Reckless endangerment, under Maryland Criminal Law Article 3-204 provides in relevant part: "A person may not recklessly engage in conduct that creates a substantial risk of death or serious physical injury to another." We have already held that the appellant, indeed, inflicted "serious bodily injury" to Mrs. Donohoe. So much for the actus reus of

the crime. In terms of the mens rea of reckless endangerment, it is not necessary to find that the appellant intended to inflict the serious physical injury. It is enough to find that he did so recklessly, to wit, with indifference to the probable consequences of his actions. Without repeating our earlier discussion of the nature of his attack on a frail woman of 81 years of age, we hold that the evidence was sufficient to permit an inference of the required recklessness. So much for legal sufficiency.

JURY INSTRUCTION AS TO UNANIMITY

This contention is an instance of Triviality Triumphant. With respect to the requirement that the jury's verdict must be unanimous, Judge Jackson had instructed the jury:

> Your verdict has to be unanimous. Twelve of you will retire to deliberate. Your foreman will be signing a verdict sheet later. But as to each of the charges, you must be unanimous. It's not majority vote. It's unanimous. It has to be 12-0, whether it's guilty or not guilty. It doesn't mean the result has to be the same for each crime, but each block you check must be the result of a unanimous verdict.

At an ensuing bench conference, the appellant requested that Judge Jackson read verbatim both Pattern Jury Instruction: Criminal 2:02, dealing with Reasonable Doubt, and Pattern Jury Instruction: Criminal 2:03, dealing with Unanimous Verdicts. We must confess that we are at a loss to understand what this contention is all about. We are not at a loss to hold that it does not make a bit of difference.

The contention somehow arises from the fact that Instruction 2:03 refers to the considered judgment of **each** juror, whereas Instruction 2:02 refers to **each and every** element of the crime charged. We honestly cannot discern whether the appellant is

contending that Judge Jackson said **each and every** when he should have said **each**, or whether he said **each** when he should have said **each and every**.[2] The argument at the bench was almost a vaudeville routine.

> DEFENSE COUNSEL: I would just like the Court to read verbatim Maryland pattern jury instruction criminal 2:02 and 2:03
>
> With respect to the presumption of innocence instruction, my concern is that the Court altered the language with respect to the idea that the State has the burden of proving beyond a doubt each and every element of the crime charged, I don't know why the Court decided to –
>
> THE COURT: What did I say? I said each element.
>
> DEFENSE COUNSEL: You did say each.
>
> THE COURT: Well, each and every is redundant.

(Emphasis supplied.)

> We fully agree with Judge Jackson's subsequent comment:
>
> THE COURT: Well, I don't see why each and every is any different than each.

(Emphasis supplied.) Neither do we.

> After further argument that we find incomprehensible, defense counsel continued:
>
> DEFENSE COUNSEL: It doesn't mean if it, it doesn't matter if it's true. The idea is when you include that commentary in the context of the unanimous verdict instruction, when you're also eliminating language from the presumption of innocence instruction about each and every-

[2] In comparing each with each and every, the appellant does not tell us which is better or which he would prefer. He does not really have a preference. He simply tells us that they are different and that that should earn him a "Get Out of Jail Free" card. He does not presume to tell us how they are different. Could something apply to each juror without applying to every juror? What does each and every add to each, except perhaps a pleasant iambic trimeter? What does each alone subtract from each and every? How would any of this lead to a different verdict? Mercifully, we can defer this problem for another (far distant) day.

(Emphasis supplied.)

We find some solace for our incomprehension in Coby v. State, 225 Md. 293, 170 A.2d 199 (1961). In that case, the trial court had simply instructed the jury, "Whatever your verdict may be, it must be unanimous." The defendant had argued that that instruction had failed to satisfy Article 21 of the Maryland Declaration of Rights. The Court of Appeals, without undue anguishing, held simply:

> [W]e think that an instruction advising the jury that a defendant ought not to be found guilty without the unanimous consent of the juror…or words to that effect connoting the necessity of having the agreement and consent of all the jurors, as was done in this case, constitutes sufficient compliance with the constitutional guarantee.

(Emphasis supplied.) 225 Md. at 298-99.

Simply to cut the Gordian Knot, we do not hesitate to hold that whether Judge Jackson said **each** where he might have said **each and every** or whether Judge Jackson said **each and every** where he might have said **each**, the ostensible error, if any, was harmless beyond a reasonable doubt.

IMPROPER CLOSING ARGUMENT

In his third contention, the appellant argues that the State made an improper closing argument to the jury by vouching for its witnesses. With respect to vouching, the Court of Appeals has said in Spain v. State, 386 Md. 145, 153-54, 872 A.2d 25 (2005):

> [O]ne technique in closing argument that consistently has garnered our disapproval, as infringing on a defendant's right to a fair trial, is when a prosecutor "vouches" for (or against) the credibility of a witness. See e.g., *Walker v. State*, 373 Md. 360, 403-04, 818 A.2d 1078, 1103-04 (2003) (finding improper vouching to have occurred where a prosecutor made assertions, based on personal knowledge, that a witness was lying). Vouching typically occurs when a prosecutor "place[s] the

> prestige of the government behind a witness through personal assurances of the witness's veracity … or suggest[s] that information not presented to the jury supports the witness's testimony." *U.S. v. Daas*, 198 F.3d 1167, 1178 (9th Cir. 1999) (citations omitted).

(Emphasis supplied.)

The critical exchange at trial went as follows:

> THE STATE: Not one of those law enforcement officers did anything wrong. In fact, they graciously sat up there all day yesterday while [defense counsel] implied because they go to barbeques with each other or that they happen to frequent, see each other outside of work or compete for a detective's spot, that somehow they're going to put their jobs on the line and lose their jobs to frame Darrell Mainor. Not one person raised their voice. Not one person was snarky or contrite. Everybody answered the questions truthfully and honestly. Because nobody that testified yesterday has anything to hide.
>
> They don't need to. Darrell Mainor's DNA identifies him.
>
> DEFENSE COUNSEL: I would object, Your Honor, just as to vouching.
>
> THE COURT: Overruled.

(Emphasis supplied.)

With respect to a very similar argument, this court concluded in Sivells v. State, 196 Md. App. 254, 280, 9 A.3d 123 (2010):

> Although a single reference to police work as "honorable" might not be impermissible, the repeated references to the officers as "honorable men," and the ultimate statement that "they told the truth," crossed the line. The prosecutor's comments were not tied to the evidence in the case. Rather, as the trial court found, the prosecutor was expressing her personal opinion. Because the comments were not tied to the evidence presented, the comments violated the rule against vouching and were improper.

(Emphasis supplied.)

Commendably, the State concedes that vouching did improperly occur. In its brief, the State acknowledged, "The State agrees that these comments were improper." More fully, the State conceded:

> Maryland courts have held that prosecutors engage in vouching by arguing that police officers would not testify falsely because doing so could adversely affect their employment. *See Spain*, 386 Md. at 151-52, 156-58; *Sivells*, 196 Md. App. at 278-79. A prosecutor also vouches by personally guaranteeing the credibility of witnesses. *See Sivells*, 196 Md. App. at 280. ("[T]he repeated references to the officers as 'honorable men,' and the ultimate statement that 'they told the truth,' crossed the line."). The State therefore acknowledges that the prosecutor vouched by stating that detectives would not "put their jobs on the line and lose their jobs to frame Darrell Mainor" and that "[e]verybody answered the questions truthfully and honestly [ ] [b]ecause nobody testified yesterday as anything to hide."

(Emphasis supplied.)

HARMLESS ERROR

In this case, however, we are persuaded beyond a reasonable doubt that the improper argument did not contribute to the final verdict. The trial court's regulation of closing argument is subject to harmless error review. *See* Lee v. State, 405 Md. 148, 174, 950 A.2d 125 (2008). "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." Donaldson v. State, 416 Md. 467, 496, 7 A.3d 84 (2010). Reversal is therefore appropriate only if the prosecutor's remarks "actually misled the jury or were likely to have misled or influenced the jury to the defendant's prejudice." Francis v. State, 208 Md. App. 1, 19, 56 A.3d 286 (2012) (quoting Donaldson, 416 Md. at 496-97); *accord Whack v. State*, 433 Md. 728, 743, 73 A.3d 186

(2013) ("Only where there has been prejudice to the defendant will we reverse a conviction.").

The defense theory in the case revolved around the credibility of the investigating officers, alleging a fabrication of the DNA evidence purported to belong to the appellant. Relying on the missing video-recorded evidence of the officers swabbing the appellant for DNA, the defense argued that the appellant was being framed by the detectives investigating the case, motivated by the goal of clearing the case. During his brief closing argument, defense counsel argued:

> I don't know the motive. I wish I knew the motive. The law enforcement officers say they don't know Darrell Mainor. They need you to believe them. The law enforcement officers would say, never met him before, maybe heard his name. They need you to believe them.

To accept the defense theory of the case, the jury would have to find that the investigating officers lied about taking a buccal swab from the appellant and conspired to identify Darrell Mainor as the perpetrator in this case. The accuracy of the DNA science in this case was not challenged; the defense challenged only whether a DNA sample had ever actually been obtained from the appellant.

In Sivells v. State, Judge Graeff, writing for this Court, laid out the analysis to be done where there is a contention of improper prosecutorial vouching. In that case, the primary evidence against the defendant was the officers' testimony. Similar to the case before us, in Sivells, the credibility of the testifying officers was challenged by the defense. The State vouched for the officers, repeatedly describing them as "honorable men who told the truth" and arguing that the officers would not lie because they would have too much to

lose. After determining that the State's comments were indeed improper, the next step was to look at the potential prejudicial effect of the comments to assess whether those statement constituted reversible error.

Judge Graeff provided further guidance in Sivells by looking to the holding by the Court of Appeals in Lee v. State, 405 Md. 148, 950 A.2d 125 (2008), which set out the factors to be considered: 1) the severity of the improper remarks, 2) the weight of the evidence against the accused, and 3) the measures taken to cure any potential prejudice. We will look at each of these factors.

Although improper, the State's vouching here was not as incessant or repetitive as the vouching in Sivells. Defense counsel objected to only a single incident of the State attesting to the truthfulness of its witnesses. The vast majority of the State's argument focused on the reliability of the DNA evidence that identified appellant as the perpetrator and the injuries suffered by the victims. The State's argument dispensed with the appellant's attempted attacks on the officers' credibility quite quickly. While, again, the State's comment was improper, the level of severity was low.

The weight of the evidence against the accused was strong. The sole defense raised by the appellant was the theory the police had concocted a conspiracy to ensure the DNA evidence identified the appellant as the perpetrator, and pointed to a missing video-recording of the swabbing of the appellant as its proof. There was no motive offered to support the appellant's implication that the entire DNA analysis was a conspiracy among the police and laboratory technicians who analyzed the evidence. Once the jury dismissed

this conspiracy theory, the remaining case against the appellant was virtually airtight. There was no challenge as to the scientific procedures used in testing the DNA evidence. There was no challenge as to the cause or extent of Ms. McCrory's injuries. There was no dispute as to whether a theft took place at the Christopher Street house. We are persuaded that this error was harmless.

JUDGE'S REFUSAL TO POSTPONE SENTENCING

Shortly after the jury pronounced its verdict on each count, the trial judge informed the parties he intended to proceed immediately to sentencing. Defense counsel requested the court to postpone sentencing so that a PSI could be completed and so that the appellant's mother could be present to address the court on her son's behalf. Defense counsel made no proffer as to what a PSI would show or as to what relevant or mitigating information appellant's mother would provide. The trial court denied defense counsel's request for a postponement, stating it did not believe a PSI or a delay for appellant's mother's presence was necessary. The appellant now argues this decision was an abuse of the trial court's discretion warranting reversal of his convictions.

In determining whether a trial court has committed an abuse of discretion, we look to the information presented and the considerations made by the trial court in making its discretionary ruling. In the case before us, the trial court expressed its decision to sentence the appellant immediately after the jury was polled. Upon the appellant's request for postponement for the purpose of conducting a PSI, the trial court specifically inquired what a PSI would show the court. Rather than providing specific details of what he expected the

pre-sentence investigation to reveal, counsel for the appellant replied vaguely, "I do think it's important that the Court has some background information about my client in order to fashion an appropriate sentence." No proffer was made as to what "background information" counsel was referring to, nor were any specific facts mentioned that could arguably mitigate the appellant's sentence. Appellant pointed out that his mother was unavailable to be present in court at sentencing that day despite her previous attendance during the trial, but he never offered any information to the court as to her intention to testify on her son's behalf at sentencing and what said hypothetical testimony would entail. Instead, appellant's counsel went on to express a desire to resolve appellant's current case together with the appellant's two other probation violation cases as a means of "efficiency".

Appellant wants us to find an abuse of discretion in a situation where he provided the judge virtually no factors to weigh for the purpose of exercising his discretion. He notes in his brief that the only background information provided was the appellant's age, but no information was provided about "his family life, education, work history or the like." However, the only reason for the absence of this information was the appellant's failure to provide it. We cannot find the trial court abused its discretion for failing to consider information that was never offered.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.