UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1109

September Term, 2014

MARK JAMES BELL

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Hotten,
Nazarian,

JJ.

Opinion by Nazarian, J.
Dissenting Opinion by Eyler, Deborah, S., J.

Filed: July 14, 2015

A jury in the Circuit Court for Worcester County convicted Mark Bell of one count of driving while under the influence of alcohol ("DUI") and one count of reckless driving. He was sentenced to a term of two years and fined $1,000 for DUI and $500 for reckless driving. During the trial, Mr. Bell moved twice for a mistrial, the circuit court denied both motions, and he challenges these rulings on appeal. We agree with him that the circuit court abused its discretion by denying the second motion, and therefore reverse and remand.

I. BACKGROUND

Three witnesses testified for the State and one witness for the defense at Mr. Bell's one-day jury trial.

Mr. Bell lived with his girlfriend, Kimberly Hinckley, and a roommate, Rick Mason, in a house at 11904 Back Creek Road, in Bishopsville, a town northwest of Ocean City near the Maryland/Delaware border. Kathy Morris lived nearby, at 11931 Back Creek Road, with her husband and her two daughters, Jessica, age 20, and Casey, age 14.[1] The Morrises were familiar with Mr. Bell, having lived near him for 20 years.

On the afternoon of March 2, 2014, Kathy and Jessica were inside their home watching television while Casey and her cousin, Abby, rode bikes outside on the driveway. Kathy and Jessica both heard the sound of screeching tires and went to the window to check on Casey and Abby. They saw a white truck turn left from Caterpillar Lane onto Back

[1] For ease of discussion, we shall refer to Kathy and her daughters by their first names.

Creek Road and continue westbound in the direction of their house with "screeching tires and dust flying." Kathy and Jessica recognized the truck as belonging to Mr. Bell.

Kathy and Jessica went outside and walked about halfway down their driveway. According to Jessica, "[the truck] then stopped in the middle of the road with a big screech." She could see Mr. Bell in the driver's seat and another man she did not recognize in the passenger seat. Jessica could see Mr. Bell and the other man punching each other and could hear "sounds of yelling" from inside the truck, but could not understand what was being said.

Kathy also identified Mr. Bell as the driver and a second man as the passenger in the truck. She observed the two men arguing with "hands flying," "going back and forth at each other."

After Mr. Bell and the other man stopped fighting, Mr. Bell "peel[ed] down the road" in the direction of his house, traveling 50 to 60 miles per hour. The speed limit was 40 miles per hour. Kathy and Jessica observed him pull into his driveway and park his truck. Jessica then called 911.

Deputy Steven Gulyas of the Worcester County Sheriff's Office testified that he responded to Back Creek Road approximately ten to twelve minutes from the time the 911 call was placed. He responded to the Morris residence first and spoke with Kathy and Jessica. Jessica told him that she had seen Mr. Bell driving his truck on Back Creek Road in a reckless manner. According to Deputy Gulyas's report, neither Kathy nor Jessica was able to state whether the passenger in the truck was a man or a woman.

Deputy Gulyas then went to Mr. Bell's house. He observed a white truck parked outside. He looked in the truck and saw empty beer cans and an empty bottle of whiskey. He could feel heat coming from the truck, which indicated to him that it had been run recently.

Deputy Gulyas knocked on the door and spoke with Mr. Bell. The odor of alcohol was "very strong, very prevalent as if it was consumed recently." Deputy Gulyas made the following observations about Mr. Bell's appearance: "I observed a black and blue left eye, dry blood under his right eye. Speaking with him I detected the bloodshot glassy eyes, slurred speech. And while he was standing in the doorway of his residence, he was using the actual doorframe to stay upright."

Deputy Gulyas asked Mr. Bell to step outside to perform field sobriety tests. He asked Mr. Bell how many alcoholic beverages he had consumed that day. Mr. Bell responded that he had consumed approximately ten beers. Deputy Gulyas testified that he gave Mr. Bell directions to stand with his feet side by side, hold his hands down by his sides, and look straight ahead and not move his head. Mr. Bell was not able to hold his head still. The second task Deputy Gulyas asked Mr. Bell to perform was the one-leg stand. He testified that Mr. Bell started the test early while he was still instructing him. Mr. Bell stood on his left foot for approximately two seconds and then put his right foot down and lifted his other foot and alternated feet. He swayed and used his arms for balance. The third test was the walk and turn test. Deputy Gulyas instructed Mr. Bell to place his right foot in front of his left foot and hold his hands down by his sides while he gave him instructions. Mr. Bell fell down four times while he was in that position. Mr. Bell [performed poorly on

the tests and] did not complete that [the last] test because he became adamant about going back into his house and started walking back to the house. Deputy Gulyas determined that Mr. Bell was refusing to complete more testing and placed him under arrest.

Ms. Hinckley testified for Mr. Bell. She explained that on March 2, 2014, between 2:00 and 3:00 p.m., she and Mr. Bell drove to Hemphill's Docks in his truck. Mr. Bell was intoxicated so Ms. Hinckley drove and Mr. Bell sat in the passenger seat. Once there, they played guitar and hung out. They did not drink alcohol there. They decided to go home because Mr. Bell was "starting to fall asleep."

Ms. Hinckley drove home with Mr. Bell, who still was intoxicated, in the passenger seat. On the way home, they stopped at Bayside Liquors and Mr. Bell purchased a 30-pack of beer.

As they neared Mr. Bell's house, they began to argue. After Ms. Hinckley made the left turn onto Back Creek Road from Caterpillar Lane, she looked away from the road for a second. When she turned her attention back to the road, she saw a dog in front of the truck. She braked and came to a screeching halt to avoid hitting the dog. After she stopped, she and Mr. Bell sat in the vehicle arguing for a few minutes. She saw their "neighbor" standing in the doorway of her house and a girl standing in the driveway. She told Mr. Bell, "well, I think maybe we should get home," and drove home.

Once home, she and Mr. Bell began drinking beer and vodka. Mr. Mason was upstairs in his bedroom. Ms. Hinckley consumed about nine drinks. Later, a police officer who was not Deputy Gulyas arrived and asked to speak to Mr. Bell. Ms. Hinckley was ordered to stay inside. A second officer arrived later. Neither police officer questioned Ms.

Hinckley or let her come outside. When Deputy Gulyas arrived, Ms. Hinckley was neither questioned nor allowed outside. On cross-examination, Ms. Hinckley acknowledged that she never reported to the police that she was the person driving the truck at the time of the incident.

The jury convicted Mr. Bell of DUI and reckless driving. Mr. Bell filed a timely appeal.

II. DISCUSSION

During the trial, Mr. Bell made two motions for mistrial. The first motion was made during the prosecutor's direct examination of Deputy Gulyas about his conversation with Mr. Bell prior to the administration of the field sobriety tests:

> [COUNSEL FOR THE STATE]: And did you have a conversation with [Mr. Bell]?
>
> [DEPUTY GULYAS]: I did.
>
> [COUNSEL FOR THE STATE]: What was it that you asked [Mr. Bell] initially?
>
> [DEPUTY GULYAS]: I was speaking with [Mr. Bell], *I asked him, you know, if he had been operating his truck earlier, and he told me yes*. And I asked him how many alcoholic beverages—
>
> [COUNSEL FOR MR. BELL]: Objection, Your Honor. If we may approach.
>
> (Whereupon, Counsel and [Mr. Bell] approached the bench and the following occurred out of the jury's hearing:)
>
> [THE COURT]: What's the nature of your objection?
>
> [COUNSEL FOR MR. BELL]: If I may have a moment, Your Honor. The State's Attorney asked the deputy whether or not

he had a conversation with [Mr. Bell]. The deputy, one of the things he said was he asked if he had been driving his truck, and he said yes. Now, whether or not that is or is not what actually happened, that particular statement he said that he had been driving his truck was not disclosed in discovery, that he said that he was the driver of the truck.

There were other statements that were disclosed, not that one in particular, and I think that one is extremely important and prejudicial and would have changed I think how [Mr. Bell] proceeded with the case if in fact that was what the officer was going to say, what was said.

[THE COURT]: What's the State's response to that?

[COUNSEL FOR THE STATE]: The State's response would be I think that the officer—and, no, it was not artfully conveyed—meant to say that he was driving earlier in the day. I don't think that anybody contends that he admitted to driving at the time in question. It is not in discovery. I'm looking through the police report now. And that would be the State's comments.

[COUNSEL FOR MR. BELL]: Even if he was driving earlier in the day, that's also not in discovery. Yes, I was driving—

[THE COURT]: That's the question. Was that statement disclosed in discovery?

[COUNSEL FOR THE STATE]: No, it was not.

[COUNSEL FOR MR. BELL]: Your Honor, because—I'm sorry if I'm [interrupting]. I apologize.

[THE COURT]: No. Go ahead.

[COUNSEL FOR MR. BELL]: Because that statement is so prejudicial, it's already been said. I don't believe that even a curative instruction or a striking it would do anything in this case. *What I would ask for at this point in time is a mistrial*.

[THE COURT]: State want to be heard?

> [COUNSEL FOR THE STATE]: Just that that would be the inappropriate remedy to this situation.
>
> [THE COURT]: Well, the request for a mistrial is denied. I'm convinced that a curative instruction is appropriate, and the Court intends to give one at this time. I'm going to direct specifically that the jury disregard the answer to the question. I am—that is, the witness' alleged statement that he had been operating the truck earlier in the day.
>
> Having said that, it seems to me appropriate to also advise the jury that the State would agree that any—I'm trying to think the best way to do it. It would be nice if the jury could be informed that that statement did not refer to the time frame in which these events allegedly occurred, but it's difficult for me to see how that could be done without making it worse than it already is.
>
> So I'm simply going to instruct the jury that they're to disregard the witness' testimony to the effect that the defendant made a statement in which he acknowledged having driven the truck earlier which I think was the witness' statement.
>
> [COUNSEL FOR THE STATE]: Yes, Your Honor.

(Emphasis added.) The trial court gave the following curative instruction:

> Ladies and gentlemen of the jury, the Court has heard an objection to the testimony of this witness. The Court has—agrees with and sustains the objection to the testimony of this witness to the effect that the witness had testified in response to a question from the State that in his conversation with the defendant, the defendant answered yes or acknowledged that he had operated the truck earlier in the day. That answer is stricken. The jury is directed to disregard completely and totally that answer. That part of the witness'[s] testimony strike it from your mind as if you had not heard it in the first place. Continue, please.

Thereafter, the trial judge asked the parties to approach again and warned the prosecutor to "be careful." The trial judge stated that he would "seriously consider[]"

granting a mistrial if there was any more testimony from Deputy Gulyas that conflicted with the information disclosed to Mr. Bell in discovery.

The second motion for mistrial was made during the prosecutor's cross-examination of Ms. Hinckley:

> [COUNSEL FOR THE STATE]: With respect to when you got home, you said you got home and you went right inside and you started drinking?
>
> [MS. HINCKLEY]: Yeah.
>
> [COUNSEL FOR THE STATE]: And you hadn't been drinking at all prior to that according to you?
>
> [MS. HINCKLEY]: That's correct.
>
> [COUNSEL FOR THE STATE]: Where did you get the alcohol from?
>
> [MS. HINCKLEY]: From the store.
>
> [COUNSEL FOR THE STATE]: Did you bring it back with you in the truck?
>
> [MS. HINCKLEY]: From the store, yes.
>
> [COUNSEL FOR THE STATE]: And did you buy that alcohol at the store?
>
> [MS. HINCKLEY]: No. My boyfriend did.
>
> [COUNSEL FOR THE STATE]: What store was it?
>
> [MS. HINCKLEY]: I believe we got it from the Bayside Liquors.
>
> [COUNSEL FOR THE STATE]: *Do you know if the Bayside Liquors has any cameras at that store*?
>
> [MS. HINCKLEY]: *I'm sure they do*.

[COUNSEL FOR THE STATE]: *Would it surprise you to learn that those cameras may have shown him driving and not you?*

[COUNSEL FOR MR. BELL]: Objection.

[THE COURT]: The objection is sustained.

[COUNSEL FOR MR. BELL]: Your Honor, may we please approach?

(Whereupon, Counsel and [Mr. Bell] approached the bench and the following occurred out of the jury's hearing:)

[COUNSEL FOR MR. BELL]: First of all, that was never disclosed in discovery. And I'm sure that—you know, cross-examination allows for a fishing expedition. However, I think even a reasonable person in a jury, not understanding how cross-examination works, would listen to that and think that there must be some evidence out there that he was on video caught driving, which never happened. *I'm going to have to move for a mistrial again*. I think that in combination with the prior statement that [Mr. Bell] said that he had been driving earlier, that he had been driving at all, is just too prejudicial for this trial to continue on.

[THE COURT]: What's your response, Mr. State?

[COUNSEL FOR THE STATE]: My response is that I asked the question whether or not she would be surprised. It's a credibility question. She proffered that she went to the store. She proffered that they had cameras. I simply was asking if she would be surprised if it showed. It's a permissible question.

[THE COURT]: No, it's not. It's an improper question. A, it assumes a fact not in evidence. B, her surprise or lack of surprise as to some event, even if it was shown, is not relevant in my judgment. The objection is sustained. Your request for a mistrial is denied.

I'm going to instruct the jury to disregard the State's Attorney's question and the witness' answer.

(Emphasis added.) The trial court gave the following curative instruction:

> The objection is sustained. Ladies and gentlemen of the jury, you are instructed to disregard the State's Attorney's question and the witness' answer to that question, the last question and the witness' answer to that question. Strike it from your mind. You cannot consider that question and answer whatsoever in this matter.

Mr. Bell contends the trial court abused its discretion by denying each motion for mistrial and that the denials "had the cumulative effect of depriving [him] of a fair trial by an impartial jury."[2] He asserts that the curative instructions given by the court were "inadequate to cure the prejudice." He emphasizes, moreover, that credibility was "the critical issue" in this case given that Kathy and Jessica testified that Mr. Bell was driving his truck at the time of the incident but Ms. Hinckley testified that she was the driver. In light of this conflicting testimony, he maintains that Deputy Gulyas's improper statement that Mr. Bell admitted to having been driving, coupled with the prosecutor's improper question suggesting the existence of surveillance camera footage outside the liquor store showing Mr. Bell driving, was highly prejudicial.

The State responds that the trial court did not abuse its discretion in declining to impose the "extreme sanction of a mistrial" in this case. It points out that the trial court

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[2] Mr. Bell phrased the Question Presented in his brief as follows:

> Did the court abuse its discretion in denying appellant's mistrial motions and, as a result, deprive appellant of a fair trial?

gave immediate curative instructions following each of the objected to statements and that the jury is presumed to have followed those instructions.

"It is well-settled that a decision to grant a mistrial lies within the sound discretion of the trial judge and that the trial judge's determination will not be disturbed on appeal unless there is abuse of discretion." *Carter v. State*, 366 Md. 574, 589 (2001). A mistrial is an "extraordinary remedy that should only be resorted to under the most compelling of circumstances." *Molter v. State*, 201 Md. App. 155, 178 (2011). "'In the environment of the trial the trial court is peculiarly in a superior position to judge the effect of any of the alleged improper remarks.'" *Simmons v. State,* 436 Md. 202, 212 (2013) (quoting *Wilhelm v. State*, 272 Md. 404, 429 (1974)). "The determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 594–95 (1989)).

In *Guesfeird v. State*, 300 Md. 653, 659 (1984), the Court of Appeals set forth a non-exclusive list of factors relevant to determining whether prejudice to a criminal defendant warrants a mistrial:

> The factors that have been considered include: whether the [improper] reference. . . was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists.

And when the trial court gives a "timely [and] accurate" curative instruction, the jurors are presumed to have followed it. *McIntyre v. State*, 168 Md. App. 504, 525 (2006).

Although different trial judges might have decided the first mistrial motion differently, we find no abuse of discretion in the court's decision to deny that one. Deputy Gulyas's testimony that Mr. Bell had said that he recently had driven his truck was a single, isolated reference. It was not solicited by the prosecutor, but was an unanticipated response. Deputy Gulyas was not the "principal witness" with respect to the identification of Mr. Bell as the driver of the truck. Kathy and Jessica were the principal witnesses on that issue as both knew Mr. Bell, having lived near him for 20 years, and both observed him driving the truck recklessly. And finally, the court gave a timely and accurate curative instruction directing the jurors to disregard Deputy Gulyas's improper testimony. The jurors are presumed to have followed that instruction, and were that the only such error, we would have affirmed the convictions.

We reach the opposite conclusion with regard to the second remark. The prosecutor's questions about the presence of security cameras and what they "may have shown"—which came after the court had warned the prosecutor to "be careful"—planted a seed in the minds of the jury that corroborative evidence not in the record did in fact exist, and that created prejudice substantial enough to warrant a mistrial. The State does not dispute that the prosecutor erred in asking Ms. Hinckley about security cameras at the liquor store—cameras whose existence was supported by no other testimony or evidence—nor does the State dispute that credibility lays at the heart of this case. Indeed, the State's sole justification for the question was the prosecutor's understandable desire to impeach

Ms. Hinkley's credibility. But the result of this line of questioning was that Ms. Hinckley, who couldn't deny the possibility of security cameras at the liquor store, was impeached by the *prospect* of footage showing Mr. Bell at the wheel when, so far as this record reveals, there was no admissible *proof* of such footage.

In a Deputy-said-neighbors-said-girlfriend-said case like this, the prospect of security camera evidence could loom large and independently persuasive. Yes, the court again gave a curative instruction, and a good one. But asking if Ms. Hinckley would be surprised to learn about phantom video footage is a little like asking a defendant when he stopped beating his wife. And instead of one isolated remark that prompted a curative instruction, this trial featured two such instances, both elicited by the prosecutor, and the second blatantly so. Under these circumstances, we find that the trial court erred in denying the second motion for mistrial, both in itself and based on the cumulative effect of the two inappropriate remarks, and we reverse and remand for further proceedings.

JUDGMENTS OF THE CIRCUIT COURT FOR WORCESTER COUNTY REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY WORCESTER COUNTY.

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Dissenting Opinion by Eyler, Deborah, S., J.

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I respectfully dissent from the majority's decision that the trial court abused its discretion in denying the appellant's second mistrial motion.

As the majority explains, on direct examination, Hinckley, the appellant's girlfriend, testified that she, not the appellant, was driving the truck and that they had stopped at a liquor store where the appellant had purchased alcohol. On cross, the prosecutor asked Hinckley, without objection, whether she knew if the liquor store had any cameras. Hinckley responded, "I'm sure they do." The prosecutor then asked, "Would it surprise you to learn that those cameras may have shown [the appellant] driving and not you?" Defense counsel immediately objected and the objection was sustained. He then moved for a mistrial. The court denied the motion but gave a curative instruction, telling the jurors that defense counsel's objection was sustained, that they were to strike the prosecutor's question from their minds, and that they "cannot consider that question and answer whatsoever in this matter."

I agree with the majority (and the trial court) that the prosecutor's question was improper. There was no evidence of cameras at the liquor store, much less that any camera may have or did show the appellant driving the truck. The prosecutor's question suggested that the liquor store had cameras that showed that the appellant was driving. The issue, then, is whether the prosecutor's question was so prejudicial to the appellant that the prejudice could not be cured by an instruction and the appellant no longer could receive a fair trial. If that were the case, it would have been an abuse of discretion to deny the mistrial motion.

Rainville v. State, 328 Md. 398 (1992), is a good example of circumstances in which the prejudicial effect of evidence improperly put before the jury was not susceptible of being cured by an instruction. There, the defendant had rented a room in a house in which a couple and their children lived. On the night in question, he invited the couple's nine-year-old brother, Michael, and seven-year-old daughter, Peggy, to his room to watch television with him. Their mother gave them permission to do so. Not long after that night, the defendant was charged with sexually abusing Michael and was arrested and taken to jail. Peggy then told her mother that the defendant had sexually assaulted her. A physical examination of Peggy showed an anal tear that could have been caused by sodomy but also could have had a benign cause. It was not clear that Michael had seen what the defendant had done to Peggy.

The defendant denied having had any sexual contact with either child. He was tried separately for the offenses against Peggy, and that trial went forward first. The defense moved *in limine* to preclude the State from making any mention of the offenses concerning Michael. The court decided to rule on the motion as the evidence came up. The State called Peggy's mother and asked her to describe Peggy's demeanor when she told her what the defendant had done to her. The mother responded that Peggy had told her that, because the defendant was in jail for what he had done to Michael, she was no longer afraid to tell her what had happened. The defense moved for a mistrial. The court denied the motion and gave a curative instruction, telling the jurors to disregard what the mother had just said.

On appeal after conviction, the defendant argued that the mother's testimony about his being in jail for what he had done to Michael was inadmissible prior bad act evidence

that was seriously prejudicial to him and that the prejudice could not be cured by a jury instruction. The case reached the Court of Appeals, which agreed. The Court observed: "It is highly probable that the inadmissible evidence in this case had such a devastating and pervasive effect that no curative instruction, no matter how quickly and ably given, could salvage a fair trial for the defendant." 328 Md. at 408. The Court took into account the non-exclusive list of factors in *Guesfeld v. State*, 300 Md. 653, 659 (1984), and found that, even though some of them militated in favor of denying the mistrial motion, the prejudice to the defendant was so severe that a curative instruction could not remedy it. The *Rainville* Court quoted the following passage from *Bruton v. United States*, 391 U.S. 123, 135 (1968):

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of the failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.

328 Md. at 411.

The case at bar stands in contrast to *Rainville.* It boiled down to a dispute over who was driving the appellant's truck – the appellant, who was drunk, or Hinckley, who claimed she was not drunk (and for whom there was no evidence that she had been drinking). The two witnesses for the State were the appellant's neighbors. They had known him for years and were familiar with him and his truck. They both testified that he was driving the truck at the time in question. They were standing in front of their house when they saw him drive recklessly down their street; come to a stop in front of their house for a brief interlude in which he engaged in a fistfight with the other occupant of the car, who was a male; after

the fistfight, recklessly speed off to his house, which was within their sight; park in his driveway; and get out. There was evidence that when the witnesses spoke to the police that day they could not say whether the passenger in the car was male or female. Fortunately, the events did not result in there being any victims, *i.e.*, people who suffered physical injury on account of the manner in which the truck was being driven.

Hinckley gave a rendition of events that had her driving the appellant's truck; stopping at a liquor store where he bought beer; screeching the brakes to avoid hitting a dog; getting into a physical fight with the appellant while they were still in the truck; and driving to his house, where they got out and went inside. She testified that the police did not question her. She acknowledged that she did not come forward on the appellant's behalf to tell the police that she, not he, had been driving the truck.

The prosecutor's questions about whether there may have been a camera at the liquor store that may have shown that the appellant, not Hinckley, was driving, suggested the existence of evidence contrary to Hinckley's story. (They also would have made any reasonable juror wonder why the State had not introduced the evidence, which suggested that it did not exist.) The notion that there might be such evidence was not the type of indelible, devastating "pervasively prejudicial" "fact" (or suggested fact) that would place the appellant in a negative light and that the jurors simply would not be capable of removing from their minds once heard. Nor was it the kind of "fact" that, once known, necessarily would have created such bias on the part of the jurors that they would not have been able to decide the case properly, by a fair exercise of credibility and other assessments, but would have been moved to decide it based on emotion and supposition.

As the prosecutor's question, though improper, was not such as to prejudice the jurors, so the appellant could not receive a fair trial, the court acted within its discretion to give a curative instruction. The curative instruction was properly emphatic and complete, and we should honor the presumption that the jurors followed it. I am confident that the appellant received a fair trial and was found guilty based on the substantial and properly-introduced evidence that supported the verdicts against him. Accordingly, in my view, the judgments should be affirmed.