Circuit Court for Baltimore County
Case No. 03-K-19-000332

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1166

September Term, 2019

---

ADRIEN TERRELL WASHINGTON

v.

STATE OF MARYLAND

---

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

JJ.

---

Opinion by Sharer, J.

---

Filed: April 14, 2021

Appellant, Adrien Terrell Washington, was convicted by a jury in the Circuit Court for Baltimore County of a single count of possession of a regulated firearm after having been convicted of a crime of violence pursuant to Maryland Code (2003, 2018 Repl. Vol.), § 5-133(c) of the Public Safety Article.[1]

In his appeal appellant raises two questions for our review, which we have abridged:[2]

1. Did the trial court err in denying appellant's motion for a mistrial?

2. Did the trial court err in overruling his objection to the State's closing argument?

We have carefully reviewed the record. Because appellant raises no challenge to the sufficiency of the evidence, "[i]t is unnecessary to recite the underlying facts in any but a summary fashion because for the most part 'they [otherwise] do not bear on the issues we are asked to consider.'" *Teixeira v. State*, 213 Md. App. 664, 666 (2013) (quoting *Fitzpatrick v. Robinson*, 723 F.3d 624, 628 (6th Cir. 2013)).

[1] The jury failed to reach a unanimous verdict on companion counts of assault, reckless endangerment and use of a firearm in a violent crime, resulting in the court declaring a mistrial as to those counts. The court sentenced appellant to a term of eight years' incarceration, the first five to be served without possibility of parole.

[2] In his brief, appellant asks:

1. Did the trial court err in denying defense counsel's motion for a mistrial following the prosecutor's failure to properly edit video evidence to remove references to Appellant having been picked up from prison?

2. Did the trial court err in overruling defense counsel's objection when, during closing argument, the prosecutor referred to facts that were not in evidence and that the parties had previously agreed not to introduce?

## BACKGROUND

The events underlying the charges against appellant occurred on the evening of December 24, 2018 and into the early morning hours of December 25, at or near the home of the victims, Linda Quesada and her boyfriend, Alan Boyd, in Baltimore County. On that evening, gunshots were fired into Ms. Quesada's home. Appellant and Ms. Quesada had been acquainted for about one month and had discussed the potential purchase by Ms. Quesada of a vehicle owned by appellant. Due to mechanical problems with the vehicle, Ms. Quesada declined to consummate the sale which, the record suggests, may have angered appellant. During the investigation of the shooting, Ms. Quesada was equivocal in her identity of appellant as the shooter.

In an initial interview at the scene by Det. Mark Roche of the Baltimore County Police Department, the audio and video of which was recorded on his body-worn camera, Ms. Quesada confirmed that she met appellant when she "pick[ed] him up at (inaudible) Prison[.]" The morning of trial, counsel also relayed to the court that Ms. Quesada had informed them of recent incidents, that included having "a brick thrown through a windshield," that made her "very frightened." Pursuant to an agreement between the State and defense, in her trial testimony Ms. Quesada did not mention those two events.

However, when the video of her police interview was introduced, through Det. Roche, despite the State's efforts to redact such references, the jury heard the reference to

"Prison" when Det. Roche asked Ms. Quesada, "So, that, a month ago, you pick him up at (inaudible) Prison, --" and she answered "Um hm."[3]

**Motion for Mistrial**

After the video interview was played for the jury, defense counsel requested a bench conference at which the following ensued:

> [DEFENSE COUNSEL]: … [T]he other thing I wanted to comment on, counsel was really good about blocking out the part where she early on said she --
>
> THE COURT: Right. (inaudible).
>
> [DEFENSE COUNSEL]: -- picked him up at prison but --
>
> [PROSECUTOR]: I redacted it like four times. I heard it, I missed one.
>
> THE COURT: Okay. If you want me to give some curative instruction, I'm happy to do that. But (inaudible).
>
> [DEFENSE COUNSEL]: It highlights the issue, yeah.
>
> THE COURT: I was going to say, yeah, so.

Counsel then noted that several jurors appeared to note the "Prison" reference, and said to the court:

> [DEFENSE COUNSEL]: For that reason, I, I'm sorry, I don't know what the solution is but I am making a Motion for mistrial based on the prejudicial effect of that.
>
> THE COURT: Okay. I'm denying the Motion for a couple of reasons and, … I mean, the issue is preserved. I think it's a stray comment that in the context it was stated, she said picked him up at prison. Whether she picked him up because he was there, why he was there, how she picked him up, to me the, the reference was ambiguous. I understand and I think all of us reacted as soon as you hear the word because I think we're micro-sensitive

[3] The parties take "Um hm" to be the equivalent of "yes."

> to the word. I don't, I just think it was an ambiguous reference in an otherwise longer event that to me was not prejudicial and certainly doesn't warrant the grant of a mistrial. As I offered earlier, I, I'm happy to give any kind of curative instruction that you might wish to have given. But whether that highlights the issue or not, I, I leave to your judgment.
>
> [DEFENSE COUNSEL]: Okay. At this time, I would not be asking for a curative instruction.
>
> Appellant argues to this Court that the
>
> declaration of a mistrial was required after the admission of the reference to Mr. Washington having been picked up **from** prison.[4] In light of the tremendous prejudice to appellant from the improperly admitted evidence of his criminal past, he was denied the right to a fair trial. The court abused its discretion in denying Mr. Washington's motion for mistrial, as a mistrial was the only appropriate remedy.

(Emphasis added).

Appellant's concern of the jury being aware of his prior criminal convictions is understandable. But, the inadvertent admission of Ms. Quesada's information does not stand alone. Indeed, the court instructed the jury, in part:

> Lastly, the Defendant is charged with possessing a regulated firearm after having been convicted of a crime that disqualified him from … possessing a regulated firearm. In order to convict the Defendant, the State must prove first that the Defendant knowingly possessed a regulated firearm and second, that the Defendant was previously convicted of a crime that disqualified him from possessing a regulated firearm. And in this case, you heard a stipulation to that second element….
>
> The stipulation, as read into the record, provided:
>
> It is hereby stipulated and agreed by and between the State of Maryland and Adrien Washington, the Defendant, on trial under indictment number 03-K-19-0332, that the Defendant has previously been convicted of a crime that prohibits him from possessing a firearm in the State of Maryland….

[4] What Det. Roche asked in the interview with Ms. Quesada was "you pick him up **at** (inaudible) Prison," not **from** prison. (Emphasis added).

"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). To be sure, "[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). As such, "[w]e review the trial judge's refusal to grant a mistrial for an abuse of discretion[,]" *Wilder v. State*, 191 Md. App. 319, 335 (2010) (citing *Miles v. State*, 365 Md. 488, 569–70 (2001)), and "will not reverse a trial court's denial of a motion for mistrial unless it is clear that there has been prejudice to the defendant." *Molter v. State*, 201 Md. App. 155, 178 (2011) (quotation marks and citation omitted). Procedurally, "[i]n 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). Here, we need not consider the aspects of a curative instruction because one was not given. Although the trial court offered to give such an instruction, defense counsel declined the offer, based, presumably, on the likelihood that such instruction would serve only to highlight the inadvertent admission of the question and answer. Counsel clearly recognized, as was said in *Kosmas v. State*, 316 Md. 587, 597–98 (1989):

> "[T]he difficulty with this situation is that even in the face of such caution by the court [in offering a curative instruction] the poison … remains. It is akin to the placing of a nail in a board. The nail can be pulled out, but the hole made by the nail cannot be removed."

(Quoting *State v. Green*, 121 N.W.2d 89, 91 (Iowa 1963)).

Here, the trial judge concluded that appellant suffered no prejudice from the inadvertent admission of "Prison" because it was no more than a stray, ambiguous reference in an otherwise more involved event. That, the court concluded, did not rise to the level of prejudice that would support the declaration of a mistrial. It must be recalled that the error was one of omission. The prosecutor stated to the court that he reviewed the video carefully, made four redactions, but "missed" the one comment that was heard by the jury. That the omission was inadvertent and unintentional was accepted by the court and by defense counsel.

In *Rainville v. State*, 328 Md. 398, 408 (1992), the Court of Appeals reiterated the factors to be considered by the trial court in determining whether a mistrial is warranted:

> "whether the reference to [the inadmissible evidence] 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…."

(Quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)).

As we have reviewed, the "Prison" reference was a one-time, inadvertent violation of the agreement regarding its admissibility. Absent such agreement, it might well have been admissible. Applying the *Rainville* criteria, we agree with the trial court that the incident was not sufficiently prejudicial to warrant the extreme remedy of a mistrial. The reference was a single, isolated statement and was not solicited by counsel. Indeed, the comment came from an investigating officer in the form of an investigative question to a victim, not from a trial witness. Furthermore, in an effort to remedy the issue, the State

provided a further redacted version of the recording, omitting the prison reference, that was then admitted into evidence for the jury's review during deliberations in place of the version heard at trial. We agree with the trial court that the incident did not produce undue prejudice to appellant.

We find no abuse of the court's considerable discretion in denying appellant's motion, always keeping in mind this Court's observation in *North v. North*, 102 Md. App. 1, 14 (1994), that reversal under an abuse of discretion standard is appropriate only when the decision is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable."

**Closing argument**

Prior to her testimony, Ms. Quesada made known to the prosecutor that, at some time prior to trial, someone had thrown a brick through the windshield of her car. Despite the fact that she did not think that it had anything to do with appellant, it made her feel threatened and frightened. The parties agreed that Ms. Quesada would be admonished not to mention that event in her testimony and alerted the court to the agreement. Ms. Quesada abided by the admonition and did not mention the event in her testimony.

However, in the State's closing argument, the prosecutor said, in explaining inconsistencies in Ms. Quesada's testimony:

> A lot was going on in her life. She didn't get too specific, she was in fear. She was in fear. Is that so hard to grasp after your house has been shot up? That maybe you don't want to go through with this? **A rock had been thrown through her windshield recently.** She was in fear. She didn't want anything to do with this [trial].

(Emphasis added).

Defense counsel's contemporaneous objection was overruled by the court.

At the conclusion of the State's closing, appellant's counsel asked the court to instruct the jury to disregard the prosecutor's comment about the windshield incident. The court declined counsel's request, noting that it did not have a certain recall of the testimony and, further, that the court's electronic notes from the previous day had been lost due to a power outage. The following discussion ensued:

> THE COURT: And I'm certainly not giving a curative instruction to something I'm not sure (inaudible). If you want the curative instruction to say that there's no suggestion whether (inaudible).
>
> [DEFENSE COUNSEL]: I would, then I would ask for that curative instruction.
>
> [PROSECUTOR]: We need to be, she believes it's because of this crime, where he was behind it. She doesn't know, and doesn't necessarily believe, but it's, his larger (inaudible).
>
> THE COURT: Here's[ ] … my curative instruction. To the extent there was (inaudible) it's for you to decide whether that happened (inaudible). Okay.
>
> [DEFENSE COUNSEL]: Okay.
>
> The court then instructed the jury:
>
> Before [defense counsel] gives his closing argument, to the extent that there was a comment about whether a rock was or was not thrown is for you to decide whether the witness testified to that and whether that happened or didn't happen. In any event, there was never any suggestion in the testimony that Mr. Washington himself was responsible for that, all right? …
>
> Defense counsel responded, "Thank you."

While considerable latitude is permitted in closing argument, there are limitations. *Martin v. State*, 165 Md. App. 189, 208 (2005). "It is fundamental to a fair trial that the prosecutor should make no remarks calculated to unfairly prejudice the jury against the

defendant." *Reidy v. State*, 8 Md. App. 169, 172 (1969). That said, however, "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).

Appellant argues that the court failed to properly remediate the prosecutor's improper remarks, to his prejudice. It is not disputed that Ms. Quesada did not testify about a rock, or a brick, having been thrown through her car windshield. In that respect, the prosecutor's remark was an improper comment about a matter not in evidence. *See, e.g.*, *Lee v. State*, 405 Md. 148, 165–74 (2008).

The Court of Appeals has said, in considering whether reversable, or harmless, error results from improper statements in closing argument, "a reviewing court may consider several factors, including the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Spain v. State*, 386 Md. 145, 159 (2005) (citing *U.S. v. Melendez*, 57 F.3d 238, 241 (2nd Cir.1995)). The Court has also determined that "'[r]eversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.'" *Id*. at 158 (quoting *Degren v. State*, 352 Md. 400, 431 (1999)). Later, in *Lee v. State*, *supra*, the Court included in such cases a review of the court's remedial measures. 405 Md. at 176–79.

As noted earlier, when assessing potential prejudice to a defendant, the court "first determines whether the prejudice can be cured by instruction." *Kosh*, 382 Md. at 226. Of

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

Defense counsel made a contemporaneous objection to the prosecutor's comment, without stating a basis for the objection. Hearing none, the court overruled the objection. Later, following the State's closing, defense counsel requested a curative instruction which, as we repeated, *supra*, the court gave with defense counsel's approval.

Applying the *Carter* factors, we find the curative instruction to have been timely given. Although not given contemporaneously (recalling that counsel did not then articulate a basis for his objection), the instruction was given within a short time of the challenged remarks. As the State reminds us, the prosecutor spoke only an additional 140 words before the instruction was requested. The cases do not require unwaveringly that a curative instruction be given contemporaneously, but "timely." The court spoke clearly, briefly and accurately, relative to the subject matter of the instruction, to the point of appellant's request.

The limited context of the State's improper comment related solely to the State's explanation for the deviation in Ms. Quesada's testimony that had been elicited by defense counsel on cross-examination, wherein she conceded that she had met with both counsel about a month before trial and told them that she did not think it was appellant who had shot at her house, which she qualified was due to her "fear that something was going to happen to [her]." As the State remarked during its closing, that testimony, pertaining to statements made a month before trial, was her only deviation from what she had

consistently said in the 911 phone call recording, Det. Roche's body worn camera video, and on direct examination at trial.

That said, we observe that the court gave the epitome of an effective curative instruction to address appellant's concern that the jury might have thought of him as the person who damaged Ms. Quesada's vehicle. In instructing the jury, the court said "there was never any suggestion in the testimony that Mr. Washington himself was responsible for that[.]" In effect, the court told the jury, "he didn't do it!"

We conclude, as did trial counsel, that the instruction was an effective remedy. On this record, we find the court's curative instruction to have been timely and appropriate.

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