Circuit Court for Dorchester County
Case No. C-09-CR-19-032

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1187

September Term, 2019

ANGELO MARTEZ PATTERSON

v.

STATE OF MARYLAND

Reed,
Friedman,
Alpert, Paul E.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Reed, J.

Filed: May 4, 2021

After a jury trial in the Circuit Court for Dorchester County, Angelo Martez Patterson ("Appellant") was found guilty of possession with intent to distribute cocaine, possession of cocaine, and keeping and maintaining a common nuisance for the illegal distribution of cocaine. The court sentenced him to fifteen years for possession with intent to distribute cocaine and the remaining counts were merged. This timely appeal followed.

QUESTIONS PRESENTED

Appellant presents the following three questions for our consideration:

> I. Did the trial court err and/or abuse its discretion by admitting testimony referring to a warrant to search and seize Mr. Patterson's person?
>
> II. Did the trial court err by admitting opinion testimony regarding the relative size of a pair of pants and/or abuse its discretion by denying the motion for mistrial when later testimony indicated that the pants belonged to Mr. Patterson?
>
> III. Did the trial court err by admitting testimony regarding the Miranda warnings and Mr. Patterson's post-Miranda silence?

For the reasons set forth below, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In late 2018, Detective Stephen Hackett, of the Cambridge Police Department, conducted surveillance on an apartment located at 307 Bunker Street in Dorchester County. He observed Appellant in and around the residence and saw Appellant enter and leave the residence almost every time he conducted surveillance. According to Detective Hackett, about "99 percent of the time," Appellant just walked into the residence, although there might have been one time he knocked on the door. Every hour that Detective Hackett

conducted surveillance, he observed between five and ten different people enter the residence, stay only minutes, and then leave.

On December 13, 2018, Detective Hackett obtained a search and seizure warrant for Appellant and the residence. For one hour prior to the execution of the warrant, Detective Hackett conducted pre-raid surveillance and observed Appellant walk in and out of the residence and use a key to enter it. At 5:45 p.m., members of a Special Weapons and Tactics ("SWAT") team entered apartment number two. The SWAT team detained two women and two men in the living room and ensured that the residence was safe. One of the women detained was Shakeena Jones, to whom the apartment had been leased. One of the men was Appellant. Ms. Jones and Appellant were arrested and the other two people were released.

Once the apartment was secured, Detective Hackett and other law enforcement officers entered and photographed each room of the one-bedroom apartment. On the bedroom door, police located a purse containing Ms. Jones's identification. Appellant's identification was found in a wallet on a dresser. During the course of the search of the bedroom, Detective Hackett located, in plain view, two cell phones and $325 in "different denominations," including twenty, ten, five, and one dollar bills. Under a Chicago Bulls hat on a tall dresser, he located a clear plastic bag containing approximately 3.5 grams of suspected cocaine. Next to the bed, there was a clothes basket. When Detective Hackett lifted up a pair of men's jeans from the basket, he found a large clear plastic bag containing additional bags of cocaine. He also found a couple of bags of suspected cocaine in the pants pockets. In a smaller dresser in the bedroom, a large bag of cocaine was found under

one of the drawers. In addition, 44 baggies, a black digital scale with residue on it, and a razor blade with residue on it were also seized from the bedroom. Detective Hackett did not find any smoking device in the bedroom.

In the kitchen, police located a large clear plastic bag containing a white powdery substance that was not a controlled dangerous substance. In addition, "lots" of sandwich baggies were found in a drawer in the kitchen and on an outside porch. A third cell phone was also found. Police obtained a search warrant for the three cell phones but were unable to access any of them because they were password protected.

Police found a bag of clothing and a jacket belonging to the other man detained in the apartment. Detective Hackett testified that prior to the execution of the search and seizure warrant, he had observed that man at the apartment "maybe two" times.

A forensic chemist from the Maryland State Police analyzed the suspected controlled dangerous substances seized from the apartment and concluded that all of them, except for the large plastic bag found in the kitchen, contained cocaine. The bags of cocaine analyzed weighed .539 grams, 1.625 grams, .420 grams, and .041 grams.

Corporal Joseph Meier of the Maryland State Police, testified as an expert in narcotics evaluation, identification, investigations and common practices of users and dealers of controlled dangerous substances. He opined that the total value of the cocaine seized was between $440 and $660. According to Corporal Meier, cocaine can be packaged for street level users from .2 grams to 3.5 grams, which is known as an eight ball. Each .2 or .3 gram package would sell for about $20 to $30 in Dorchester County. Corporal Meier testified that cocaine users typically do not have more than one or two small baggies

on their person and that an eight ball would be a large amount for a daily user. In addition, typical users have some type of paraphernalia that is used to ingest, inject, or absorb the cocaine. Distributors, on the other hand, typically have paraphernalia to prepare and package the drugs. Corporal Meier opined that the digital scale and razor blade that appeared to have residue on them, the multiple empty plastic baggies in close proximity to the cocaine, and the multiple cell phones indicated an intent to distribute cocaine. Other factors also indicated an intent to distribute cocaine including the fact that the apartment was leased in the name of a female associate and that drug transactions are done quickly and secretively so as to avoid attracting attention from the public or law enforcement.

We shall include additional facts as necessary in our discussion of the questions presented.

DISCUSSION

All of the questions presented by Appellant for our consideration involve the propriety of the trial court's decisions to admit in evidence certain testimony. Our standard of review on the admissibility of evidence depends on whether the "ruling under review was based on a discretionary weighing of relevance in relation to other factors or on a pure conclusion of law." *Parker v. State*, 408 Md. 428, 437 (2009) (quoting *J.L. Matthews, Inc. v. Md.-Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 92 (2002)). Generally, the admission of evidence is committed to the sound discretion of the trial court. *State v. Young*, 462 Md. 159, 169-70 (2018); *Johnson v. State*, 457 Md. 513, 530 (2018) (citing *Hopkins v. State*, 352 Md. 146, 158 (1998)). However, we determine whether evidence is relevant as a matter of law. *State v. Simms*, 420 Md. 705, 725 (2011).

Evidence is relevant if it tends to prove or disprove a material fact in dispute, and relevant evidence is generally admissible. *See* Md. Rule 5-401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Md. Rule 5-402 ("Except as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. Evidence that is not relevant is not admissible."). Courts may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. Although trial judges have wide discretion "in weighing relevance in light of unfairness or efficiency considerations, [they] do not have discretion to admit irrelevant evidence." *Simms*, 420 Md. at 724-25 (2011). *See also* Md. Rule 5-402. Once a relevancy determination is made, appellate courts "are generally loath to reverse a trial court unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Merzbacher v. State*, 346 Md. 391, 404-05 (1997). The *de novo* standard of review applies "[w]hen the trial judge's ruling involves a legal question." *Parker*, 408 Md. at 437.

With these standards in mind, we shall review each question presented by Appellant and his contention that the errors, taken together, require reversal.

I.

Appellant contends that the trial court abused its discretion in admitting in evidence testimony by Detective Hackett that he had obtained a search and seizure warrant for both the person of Appellant and the residence at 307 Bunker Street. Prior to trial, defense counsel objected to any testimony regarding the warrant for Appellant because there was nothing found on Appellant's person, the existence of the warrant was not relevant and did not have any probative value, and it would prejudice Appellant. Defense counsel asserted that testimony about the warrant "would imply to the jury prior bad uncharged acts" by Appellant. The State countered that the fact that a warrant was issued for Appellant was "just a fact[.]" The trial court overruled the objection.

At trial, during the direct examination of Detective Hackett, the following exchange occurred:

> [PROSECUTOR]: And on December 13th of 2018, did you obtain a search and seizure warrant for the person of Angelo Patterson and the residence located at 307 Bunker Street?
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Overruled, but preserved.
>
> [PROSECUTOR]: I'm sorry, your answer?
>
> [DET. HACKETT]: That's correct. Yes, I did.

No evidence was presented about any items found on or seized from Appellant's person. During jury deliberations, the jurors sent a note to the judge asking: "Was Mr. Patterson searched and in possession of any drugs?"[1]

Appellant filed a motion for new trial in which he argued again that it was error to admit Detective Hackett's testimony that a warrant had been issued for Appellant's person. Defense counsel also asserted that the jury note confirmed that the testimony was unfairly prejudicial and confused the jurors. The motion for new trial was denied.

Here, Appellant argues that because no search of his person occurred, and the State did not admit any evidence resulting from a search of his person, Detective Hackett's testimony that he obtained a warrant for Appellant's person was not relevant and should have been excluded "as background information that [did] not make it more or less likely that [Appellant] was in legal possession of the cocaine found in the apartment." In addition, Appellant asserts that any probative value in the Detective's statement was substantially outweighed by unfair prejudice because it "implied that the police focused its investigation on" him. According to Appellant, the jurors' question indicated that they considered "the import of the warrant during their deliberations and likely concluded that the warrant indicated that the police had further evidence of [his] guilt."

[1] There is no mention in the trial transcript of the note from the jury or the response given. However, the jury note was entered on the MDEC docket. Handwritten on the note is what appears to be the court's response to the note: "[y]ou must rely on your own memory of the evidence."

The State concedes that the testimony about the search warrant for Appellant's person was irrelevant because no evidence was obtained from the search, but argues that the court's decision to admit the testimony was harmless. We agree and explain.

An error is harmless when "a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict[.]" *Dorsey v. State*, 276 Md. 638, 659 (1976). In *Porter v. State*, 455 Md. 220, 234 (2017), the Court of Appeals described the standard of appellate review for considering whether an error committed by the trial court requires reversal of a judgment of conviction:

> Harmless error review is the standard of review most favorable to the defendant short of an automatic reversal. When we have determined that the trial court erred in a criminal case, reversal is required unless the error did not influence the verdict. To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record. In other words, reversal is required unless we find that the error was harmless. We have explained that an error is harmless only if it did not play **any role** in the jury's verdict.

(Emphasis in original; internal quotation marks and citations omitted).

Stated otherwise, we must "be satisfied that there is no reasonable possibility that the evidence complained of . . . may have contributed to the rendition of the guilty verdict." *Dorsey*, 276 Md. at 659.

In the case at hand, we are satisfied that there is no reasonable possibility that Detective Hackett's testimony, that he obtained a search warrant for Appellant's person, may have contributed to the rendition of the guilty verdict. Detective Hackett's statement was a brief and isolated reference to both of the search warrants he obtained. The detective

did not make any additional reference to the warrant for Appellant's person and did not reveal why it was obtained.

Appellant's reliance on *Zemo v. State*, 101 Md. App. 303 (1994), is misplaced. In *Zemo*, the defendant was convicted of breaking and entering. *Zemo*, 101 Md. App. at 305. The trial court permitted the State to elicit detailed testimony from the lead detective pertaining to the measures he had taken during the course of the investigation. *Id.* at 305-06. That testimony was irrelevant, inadmissible, and highly prejudicial. *Id.* It included the detective's comments on the defendant's post-Miranda silence, and testimony about information received from a confidential informant that put the detective "on the trail of the" defendant. *Id.* at 306. The detective testified that parts of the information provided by the informant "were corroborated and turned out to be correct, and that, acting on the informant's information, he arrested the [defendant]." *Id.* In reversing the judgment of the trial court, we held that admission of the detective's extensive testimony, which put before the jury the testimony of a confidential informant who did not testify, was reversible error. We explained:

> It doesn't matter *why* [the detective] went where he went. It doesn't even matter *where* he went, regardless of why. Not only is it a matter of complete immateriality *why* [the detective] interviewed certain persons, it is equally immaterial that he, indeed, even interviewed those persons at all. The persons referred to, other than the appellant, all testified as witnesses. Their testimony was capable of standing or falling on its own right. It would only be in the eventuality that one of the parties sought to rehabilitate or to impeach testimonial credibility by offering the substance of the interviews as prior consistent or inconsistent statements that the very event of the interviews would take on any pertinence. That never happened. Where the event itself is immaterial, the reason for the event is doubly immaterial.
>
> * * *

> The jury, of course, has no need to know the course of an investigation unless it has some direct bearing on guilt or innocence. That an event occurs in the course of a criminal investigation does not, *ipso facto*, establish its relevance.

Id. at 309-310.

In *Zemo*, we included the following caution:

> As we begin to examine the tainted testimony of Detective Augerinos, it is important to note what we are *not holding* and what we are *not even suggesting*. We are not counseling an overreaction to every passing or random injection of some arguably prejudicial material into a trial. A few smudges of prejudice here and there can be found almost universally in any trial and need to be assessed with a cool eye and realistic balance rather than with the fastidious over-sensitivity or feigned horror that sometimes characterizes defense protestations at every angry glance. We are not talking about the expected cuts and bruises of combat. What we are objecting to in this case, rather, is a sustained and deliberate line of inquiry that can have had no other purpose than to put before the jury an entire body of information that was none of the jury's business. We are not talking about a few allusive references or testimonial lapses that may technically have been improper. We are talking about the central thrust of an entire line of inquiry. There is a qualitative difference. Where we might be inclined to overlook an arguably ill advised random skirmish, we are not disposed to overlook a sustained campaign.

Id. at 306.

In *Geiger v. State*, 235 Md. App. 102 (2017), we noted that "the dispositive flaw [in *Zemo*] lay not simply in the State's introduction of inadmissible and prejudicial material but in having done so deliberately and repeatedly." *Geiger*, 235 Md. App. at 128-29. The State did not do that in the instant case. There was no sustained and deliberate line of inquiry and there was no effort to corroborate the information provided by a non-testifying informant. The State did not make any reference to the warrant for Appellant's person during opening statement or closing argument and no reference was made of it during the

trial. Detective Hackett's single passing reference to the fact that he obtained a warrant for both Appellant's person and the residence was the type of evidence that we made clear in *Zemo* was not reversible error.

We are not persuaded by Appellant's argument that the mere fact that a warrant for his person had been obtained "implied that the police focused its investigation on" him alone. At trial, Detective Hackett testified that Shakeena Jones, the lease holder, was present in the apartment at the time the warrant was executed, claimed to be the sole occupant of the apartment, and was arrested along with Appellant. Evidence was also admitted that Jones's identification was found in a purse hanging from the door to the bedroom where the cocaine and paraphernalia was found. In addition, the State argued in closing that Jones and Appellant were in joint possession of the cocaine and paraphernalia seized from the apartment. This undermines Appellant's argument that Detective Hackett's testimony about obtaining a warrant for Appellant's person implied that the investigation was focused solely on him.

But even if Detective Hackett's testimony did suggest that the police investigation was focused solely upon Appellant, there was other testimony admitted in evidence without objection from which the jury could infer that Appellant was the target of the police investigation. Detective Hackett testified that during the month leading up to the execution of the search warrant, he conducted surveillance at the residence, and, almost every time, he observed Appellant "walk in and out" of the apartment and "maintain a presence in the area." About "99 percent of the time," Appellant "just walked right in" the apartment, although on one occasion Appellant was observed using a key. Foot traffic was noted at

the apartment and Detective Hackett testified that people stayed only a few minutes and left while Appellant was present in the apartment. In contrast, the other man who was present in the apartment when the search warrant was executed was seen at the apartment "maybe two" times, but "not consistently." From this evidence, the jury could infer that Appellant was the target of the police investigation.

Finally, we are not persuaded by Appellant's argument that the note from the jury "made clear that they were considering the warrant to search [Appellant] and wondering about facts not in evidence: whether the police found anything on [Appellant's] person." The jury's question did not mention the search warrant for Appellant's person and did not indicate any assumption on the part of jurors that Appellant was searched. As for Appellant's challenge to the trial court's response to the jury note, that the "court did nothing to remedy the jurors' consideration of facts not in evidence," the record does not reveal that Appellant lodged any objection to the court's response. As a result, that issue was not preserved properly for our consideration. *See* Md. Rule 4-323(c); Md. Rule 8-131(a).

II.

Appellant's second claim of error is that the trial court erred in admitting testimony regarding the size of the pants found in a laundry basket during the search of the bedroom. At trial, the prosecutor questioned Detective Hackett about the clothing as follows:

> [PROSECUTOR]: Okay. You indicated that the cocaine in the laundry basket was concealed within male clothing?
>
> [DET. HACKETT]: That's correct.

Q. Did you pull the clothing out?

A. I did, yes.

Q. Was the clothing and size consistent with what Angelo Patterson would wear?

[DEFENSE COUNSEL]: Objection.

[PROSECUTOR]: Your Honor, he observed the Defendant as well as the clothing. I think he can make an assessment.

THE COURT: Overruled.

[DET. HACKETT]: I would say definitively that it was appropriate size for the Defendant.

[PROSECUTOR]: Okay. You indicated that there were a pair of jeans with cocaine in the back pocket?

[DET. HACKETT]: That's right.

Q. Were they also a size consistent with what the Defendant would wear?

A. Definitively, yes.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

Later, the prosecutor showed Detective Hackett the photographs that he had taken during the search of the apartment. When asked to identify what was depicted in State's Exhibit 1E, the following occurred:

[PROSECUTOR]: Okay. And what is depicted in 1E?

[DET. HACKETT]: That is the Defendant's pants, the white pants that were found in the laundry basket.

[DEF. COUNSEL]: Objection.

THE COURT: Sustained.

[PROSECUTOR]: This is the pair of pants that had the cocaine in the pocket?

[DEFENSE COUNSEL]: Move – move – move to strike, Your Honor.

THE COURT: It will be stricken, the jury will disregard that.

[PROSECUTOR]: These are the pair of pants with the CDS in the pockets?

[DET. HACKETT]: That's correct.

A short time later, while there was a pause in the proceedings for Detective Hackett to open a sealed bag, counsel approached the bench and the following ensued:

[DEFENSE COUNSEL]: I didn't want to do this right away because I wanted to wait for a little bit of a lull not to emphasize it for a little bit.

THE COURT: Waiting for a little bit of law?

[DEFENSE COUNSEL]: I didn't –

THE COURT: Oh, a lull, okay.

[DEFENSE COUNSEL]: Because I didn't want to emphasize the point further by – a couple of minutes ago Detective Hackett testified that the pants seized from the clothes basket were the Defendant's.

THE COURT: That the what?

[DEFENSE COUNSEL]: Detective Hackett testified that the pants seized from the clothes basket which had the cocaine in it were the Defendant's.

THE COURT: Right, they're not, right.

[DEFENSE COUNSEL]: He testified that that was the Defendant's pants. Obviously that was wildly unacceptable, it's akin to basically saying the Defendant confessed to him.

THE COURT: Right.

[DEFENSE COUNSEL]: I know the Court sustained and instructed, but I don't see any way around me asking for a mistrial. I think that's just so prejudicial that – this is a possession case, like, this is a circumstantial case.

THE COURT: Okay.

[DEFENSE COUNSEL]: I think I have to ask.

THE COURT: All right. Well, I think certainly it's something that you can argue. I've given – I've ordered them to disregard and strike. I don't think there's a necessity to do this and we can talk about whether or not we need to give some sort of specialized instruction at the end. I'm not going to declare a mistrial, so I'll deny that.

The trial judge's instructions to the jury included the following:

> The following things are not evidence and you should not give them any weight or consideration. First, any testimony that I struck or told you to disregard and any exhibits that I struck or did not admit into evidence are not evidence. Any questions that the witnesses were not permitted to answer and the objections of the lawyers are not evidence. The charging document that I read from this morning is the formal method of accusing the Defendant of a crime. It is not evidence of guilt and it must not create any inference of guilt. If I did not permit the witness to answer a question, you must not speculate as to the possible answer. If after an answer was given I ordered that the answer be stricken, you must disregard both the question and the answer.
>
> * * *
>
> For instance, you heard Detective Hackett testify as to the ownership of pants found in the bedroom. I struck that testimony because it is not competent evidence for you to consider. The ownership or possession of any items in this case is a fact for you to decide and you cannot consider Detective Hackett's opinion as to that for any purpose.

After the jury was instructed, defense counsel renewed his objection to Detective Hackett's testimony regarding the pants and argued that the curative instruction was

inadequate and "the only adequate remedy" was a mistrial. The court noted Appellant's refusal to waive his request for a mistrial.

Appellant argues that the question posed to Detective Hackett about the pants required conjecture, that the detective's testimony that the pants were consistent with the size that Appellant would wear constituted impermissible lay opinion testimony, and that his testimony was "neither definitive nor 'rational and reasonably certain' enough to render it admissible as lay opinion testimony." Appellant also argues that the trial court abused its discretion by denying his request for a mistrial.

A. Lay Opinion Testimony

Maryland Rule 5-701 limits the testimony of a non-expert witness "to those opinions which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." "'The rationale for the standard set by [Maryland] Rule 5-701 is two-fold: the evidence must be probative; in order to be probative, the evidence must be rationally based and premised on the personal knowledge of the witness.'" *Paige v. State*, 226 Md. App. 93, 125 (2015) (quoting *State v. Payne*, 440 Md. 680, 698 (2014)). Lay opinion testimony is admissible when it is "'derived from first-hand knowledge, is rationally connected to the underlying facts, is helpful to the trier of fact, and is not barred by any other rule of evidence.'" *Walter v. State*, 239 Md. App. 168, 200-01 (2018) (quoting *Robinson v. State*, 348 Md. 104, 118 (1997)); *see also* Md. Rule 5-602 (a witness must have personal knowledge of the matter, and "[e]vidence to prove personal knowledge may, but need not, consist of the witness's

own testimony"). We review a trial court's decision to admit lay opinion testimony for abuse of discretion. *Paige*, 226 Md. App. at 124.

Based on our review of the record, the questions asked of Detective Hackett did not call for conjecture and his opinion was not speculative. The detective was asked whether the size of the jeans found in the laundry basket was "consistent" with what Appellant would wear. The use of the word "definitively" indicated the certainty of Detective Hackett's opinion, but did not render the opinion itself inadmissible. The opinion was based on Detective Hackett's observation of Appellant and the white jeans. A person's ability to gauge whether an item of clothing would fit a person with whom they are familiar is a matter of common sense. Here, the detective testified that he had observed Appellant when conducting surveillance in the month leading up to the day the search warrant was executed and Appellant was present in the apartment at the time the search was conducted. Detective Hackett picked up the white jeans from the laundry basket in the bedroom of the apartment. His testimony that the size of the white jeans was "consistent with" the size Appellant would wear is rationally based on his personal perceptions and was a matter within his knowledge.

The trial court distinguished Detective Hackett's prior testimony, that the size of the white pants was consistent with the size Appellant would wear, from his later testimony, that the jeans were, in fact, "the Defendant's pants," and acted properly in striking the later testimony and instructing the jury not to consider it.

B. Mistrial

Appellant challenges the trial court's denial of his request for a mistrial. We review a trial court's ruling on a motion for mistrial under the abuse of discretion standard. *Nash v. State*, 439 Md. 53, 66-67 (2014). "Our determination of whether a trial court abused its discretion 'usually depends on the particular facts of the case [and] the context in which the discretion was exercised.'" *Wardlaw v. State*, 185 Md. App. 440, 451 (2009) (quoting *King v. State*, 407 Md. 682, 697 (2009)). We remain mindful that because the grant of a mistrial is "an extraordinary measure, it should only be granted where manifest necessity[,] as opposed to light or transitory reason[ing], is shown." *Ezenwa v. State*, 82 Md. App. 489, 518 (1990).

In cases where the jury may have heard improper information or evidence, "the trial judge 'must assess [its] prejudicial impact . . . and assess whether the prejudice can be cured.'" *Walls v. State*, 228 Md. App. 646, 668 (2016) (quoting *Carter v. State*, 366 Md. 574, 589 (2001)). If the prejudice cannot be cured, then a mistrial is appropriate; but if "the prejudice can be remedied by a curative instruction," and the court denies the mistrial motion and gives a curative instruction, "appellate review focuses on whether 'the damage in the form of prejudice to the defendant transcended the curative effect of the instruction.'" *Id*. at 668-69 (quoting *Kosmos v. State*, 316 Md. 587, 594 (1989)). Here, where the trial court took curative measures instead of granting a mistrial, we "must determine whether the evidence was so prejudicial that it denied the defendant a fair trial; that is, whether the damage in the form of prejudice to the defendant transcended the curative effect of the instruction." *Coffey v. State*, 100 Md. App. 587, 597 (1994) (internal quotation marks and

citations omitted). We will not reverse a trial court's denial of a request for a mistrial unless Appellant can show that there has been "real and substantial" prejudice to his case. *Wagner v. State*, 213 Md. App. 419, 462 (2013).

Factors relevant to determining the prejudicial effect of improper testimony include:

> 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[.]

Rainville v. State, 328 Md. 398, 408 (1992) (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)).

"[T]hese factors are not exclusive and do not themselves comprise the test." *Kosmas*, 316 Md. at 594. The central question is "whether the prejudice to the defendant was so substantial that he [or she] was deprived of a fair trial, and the enumerated factors are simply helpful in the resolution of that question." *Id.* at 594-95.

In the case at hand, the reference to "the Defendant's pants" was a single, isolated statement. The trial judge sustained the objection and instructed the jurors to disregard the testimony. The prosecutor did not solicit the particular testimony, but merely asked the detective to identify what was depicted in the photograph. There is no question that Detective Hackett was a principal witness for the State, but the prosecutor also relied upon the testimony of others, including Detective Jarnell Foster, a member of the team of officers who made the initial entry into the apartment, the forensic chemist, and Corporal Meier. Appellant concedes that the credibility of Detective Hackett is not a crucial issue in this

case. Finally, there was a great deal of other evidence of Appellant's guilt. In light of these factors and the curative instructions given by the trial judge, we conclude that Appellant failed to demonstrate that the extraordinary remedy of a mistrial was necessary. The prejudice to Appellant was not so substantial that he was deprived of a fair trial.

III.

Appellant's final contention is that the trial court erred in admitting Detective Hackett's testimony, that he gave Miranda advisements to Appellant and the other individuals who were in the apartment at the time of the search, and the detective's reference to Appellant's post-Miranda silence. At trial, the following occurred:

> [PROSECUTOR]: When you entered the house was – were all of them Mirandized?
>
> [DET. HACKETT]: Yes, they were.
>
> Q. How did you Mirandize them?
>
> A. Verbally.
>
> Q. Okay. Do you carry a card with you or from memory?
>
> A. Typically no.
>
> Q. Okay. You just do it from memory?
>
> A. Yes, ma'am.
>
> Q. Did the people in the home, including Angelo Patterson indicate they understood their rights?
>
> A. Yes, they did.
>
> Q. Did they agree to speak?
>
> A. Not really.

[DEFENSE COUNSEL]: Objection.

[PROSECUTOR]: Did –

THE COURT: Overruled.

[PROSECUTOR]: Okay. I'll leave that alone.

As a preliminary matter, we consider several facts that will impact our resolution of the arguments presented by Appellant. The most significant is that Appellant did, in fact, make a statement to Detective Hackett. At the hearing on Appellant's motion for new trial, the prosecutor described the statement as "rather short and small." The prosecutor had spoken with defense counsel about the fact that Appellant made a statement. According to the prosecutor, she and defense counsel "were both surprised by the answer that came out of Detective Hackett's mouth." The existence of the statement, which was argued to the court at the hearing on the motion for new trial and included in the State's brief on appeal to this Court, was not challenged by Appellant. In addition, Detective Hackett did not testify that Appellant and the other people in the apartment remained silent. On cross-examination, the following exchange occurred:

[DEFENSE COUNSEL]: Shakeena Jones was the one who rented the residence?

[DET. HACKETT]: That's correct.

Q. Okay. Shakeena Jones said she was the only one who lives there?

A. That's correct, she did say that.

[PROSECUTOR]: Objection.

THE COURT: Overruled.

Later, on re-direct examination, the prosecutor asked if the people in the apartment agreed to speak, and Detective Hackett responded, "[n]ot really." That response, unexpected in light of the statement made by Shakeena Jones and the existence of the statement by Appellant, provided justifiable concern on the part of the prosecutor that the jury might think that Appellant's statement was involuntary. Accordingly, the prosecutor stated, "I'll leave that alone." No further inquiries about Appellant's statement were made during the trial and no mention of it was made during closing argument.

A. Preservation

Appellant's argument that the trial court committed reversible error in permitting Detective Hackett to testify that the four individuals in the apartment were read and understood their Miranda rights is not properly before us. Maryland Rule 4-323(a) provides, in relevant part:

> (a) **Objections to evidence.** An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise the objection is waived.

Similarly, Md. Rule 8-131(a) provides, in part, that ordinarily, we "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" As Appellant failed to lodge any objection with regard to whether Miranda warnings were given, that issue has been waived.

Even if that issue had been preserved properly for our consideration, reversal would not be required. In support of his argument that the trial court erred in finding relevant the

references to the Miranda warnings, Appellant directs our attention to *Zemo v. State*, *supra*, and *Dupree v. State*, 352 Md. 314 (1998).

In *Zemo*, a detective was permitted to testify that following Miranda warnings, the defendant chose to remain silent. *Zemo*, 101 Md. App. at 314-15. In addition to the caution about random interjections of argued prejudicial material into a trial, which we referenced *supra*, we wrote in *Zemo*:

> What legitimate relevance to the appellant's guilt or innocence, we ask initially, did it possibly have that [the defendant] had been "read . . . *Miranda*?" If he had given a "*Mirandized*" statement that the State were offering in evidence, then, to be sure, the State might have to show its compliance with *Miranda* at the very threshold of admissibility. Where no statement was being offered and tested for admissibility, on the other hand, the appellant's silence in response to the *Miranda* warnings was immaterial. Indeed, the very giving of the *Miranda* warnings was immaterial. Indeed, the very fact that the appellant had even been interviewed was immaterial. Nothing of any conceivable significance was being established by such references. What, moreover, was the possible downside? Every lawyer knows that *Miranda* warnings are required only when a suspect is in the throes of custodial interrogation. Every layman knows that the police give *Miranda* warnings to those whom they have arrested and whom they are about to question for involvement in a crime. The gratuitous reference to *Miranda* told the jury something about the appellant. In the world view of the laity, "good guys" don't get "*Mirandized*." At the very least, those who the police think are "good guys" don't get "*Mirandized*."
>
> So much for the gratuitous reference to *Miranda*.

Id. at 315-16.

In a footnote to that passage, we explained:

> Our mention of the gratuitous reference to the giving of the *Miranda* warnings is only for the purpose of placing in fuller context the subsequent gratuitous reference to the appellant's silence in response to those warnings. We are by no means intimating that a gratuitous reference to the giving of *Miranda* warnings would ever, in and of itself, constitute cause for reversal. Any citation of our remarks above as authority for such a proposition would

> be an erroneous citation as support for a principle for which this opinion does not stand.

Id. at 316 n.1.

In *Dupree*, the defendant was convicted of second-degree murder and use of a handgun in the commission of a crime of violence. *Dupree*, 352 Md. at 316. At trial, the investigating detective was permitted to testify, over repeated objections, that after the defendant was arrested, he was given Miranda advisements even though he made no subsequent statement to the police. *Id.* During closing argument, the prosecutor used Dupree's silence as evidence of his guilt, arguing "[w]hy doesn't he tell the officers I'm sorry, I had a gun, I saw a gun?" and "[w]hy didn't he tell the cops [that the victim] had a gun? Because he didn't [have a gun]." *Id.* at 321. The Court of Appeals held that when a defendant chooses to remain silent when questioned by the police after his or her arrest, the State may not elicit testimony that the police read the defendant his or her Miranda rights because such testimony bears no relevance to any issue in the case and is highly prejudicial. *Id.*

The Court also determined that the trial court's error in admitting the testimony of the defendant's Miranda advisements was not harmless beyond a reasonable doubt because, in offering the evidence and using it in closing argument, it was clear that the State "wanted the jury both to consider and to penalize Dupree for exercising his constitutional right to remain silent upon his arrest." *Id.* at 333-34.

Unlike *Zemo* and *Dupree*, in the instant case, Appellant made a statement to Detective Hackett. On cross-examination, defense counsel elicited the fact that Shakeena

Jones had also made a statement. Perhaps to show that Jones had been advised of her rights, and clearly to lay the groundwork for eliciting Appellant's statement, the prosecutor questioned Detective Hackett about the fact that all of the people in the apartment had been given Miranda advisements. Detective Hackett did not testify that Appellant remained silent nor did he assert that Appellant did not make a statement. When asked whether the four people in the apartment agreed to speak to him, he answered, "[n]ot really." Unlike *Dupree*, there was no mention, directly or indirectly, during the remainder of the trial or during closing arguments, that Appellant was given Miranda advisements. We conclude that, under the particular facts of this case, reversal would not be required.

B. Post-Miranda Silence

Appellant contends that reversal is required because reference to his post-Miranda silence was impermissible as substantive evidence of his guilt and the probative value of his post-Miranda silence was substantially outweighed by the unfair prejudice. He also argues that the references to his post-Miranda silence infringed on his constitutional right against self-incrimination. To be sure, evidence of a criminal defendant's post-Miranda silence cannot be introduced at trial. *Reynolds v. State*, 461 Md. 159, 180-83 (2018)(and cases cited therein). In *Grier v. State*, 351 Md. 241 (1998), the Court of Appeals wrote:

> Evidence of post-arrest silence, after *Miranda* warnings are given, is inadmissible for any purpose, including impeachment. *See Doyle v. Ohio*, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *Miranda v. Arizona*, 384 U.S. 436, 468n.37, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). As a constitutional matter, allowing such evidence "would be fundamentally unfair and a deprivation of due process." *Doyle*, 426 U.S. at 618, 96 S.Ct. 2240. As an evidentiary matter, such evidence is also inadmissible. *Younie v. State*, 272 Md. 233, 244, 322 A.2d 211 (1974); *Miller v. State*, 231 Md. 215, 218-19, 189 A.2d 635 (1963). When a defendant is silent following

> *Miranda* warnings, he may be acting merely upon his right to remain silent. *Younie*, 272 Md. at 244, 322 A.2d 211; *Miller*, 231 Md. at 218-19, 189 A.2d 635. Thus a defendant's silence at that point carries little or no probative value, and a significant potential for prejudice. *United States v. Hale*, 422 U.S. 171, 180, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975).

Grier, 351 Md. at 258.

In the instant case, the State did not elicit evidence of post-Miranda silence. When asked if the four individuals in the apartment agreed to make statements, Detective Hackett replied, "[n]ot really." At that point, presumably concerned that the jury might believe Appellant's statement was involuntary, the prosecutor abandoned her line of questioning. The evidence did not establish that none of the people in the apartment made a statement to the police. In fact, as we have already noted, Detective Hackett testified on cross-examination that Jones had made a statement. The detective's response of "not really" did not equate to a statement that Appellant remained silent and there was no other evidence that Appellant invoked his right to remain silent. Moreover, the State did not use the absence of evidence that Appellant made a statement as substantive evidence of his guilt. After Detective Hackett replied "[n]ot really," the prosecutor abandoned her line of inquiry and never returned to the subject, even in closing argument. This fact distinguishes the instant case from others in which the error was found not to be harmless. *See e.g.*, *Dupree*, 352 Md. at 333-34; *Grier v. State*, 351 Md. 241, 263.

Lastly, we reject Appellant's contention that the cumulative prejudicial effect of the three errors raised on appeal was harmful and requires reversal.

JUDGMENTS OF THE CIRCUIT COURT FOR DORCHESTER COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.