Circuit Court for Baltimore City
Case No. 116229017-18

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1373

September Term, 2017

ADAM CURTIS

v.

STATE OF MARYLAND

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

JJ.

Opinion by Alpert, J.

Filed: November 16, 2018

Adam Curtis, appellant, was convicted by a jury sitting in the Circuit Court for Baltimore City of second-degree murder, use of a handgun in the commission of a crime of violence, and possession of a firearm after a disqualifying crime.[1] Appellant raises two questions on appeal, which we have rephrased for clarity:

I. Did the trial court abuse its discretion when it gave an eyewitness jury instruction even though no eyewitness identified appellant as the person who committed the crime?

II. Did the trial court abuse its discretion when it allowed the State during closing argument to make two improper and prejudicial comments?

For the reasons that follow, we shall affirm.

FACTS

The State's theory of prosecution was that around 2:00 a.m. on April 17, 2016, appellant shot and killed Antonio Washington outside the Tea Spot Bar and Restaurant in Baltimore City. The State's evidence came from testimony of those at the party and several responding police officers, as well as video footage from inside and outside the bar. The defense was lack of criminal agency. Appellant called no witnesses in his defense. The evidence elicited at trial was as follows.

The Tea Spot Bar and Restaurant was a two-story establishment in the 600 block of Duncan Street in Baltimore City. On each floor was a bar and a dance floor. Dontae Martin booked the upstairs to throw a birthday party for his mother on the night of April 16, 2016. Family and friends were invited. Appellant was a family friend.

[1] The jury acquitted appellant of first-degree murder. The court sentenced appellant to 30 years of imprisonment for second-degree murder, a consecutive 20 years for use of a handgun, and a concurrent 15 years for possession of a handgun.

Video from a Baltimore City closed circuit camera ("BCCC") located at the corner of Duncan and McElderry Street and video from cameras inside the bar were introduced into evidence. The BCCC rotated 360 degrees roughly every 50 seconds and during its rotation it panned up the street to the front of the bar and then across to the parking lot. Appellant is seen on video entering the bar shortly before 11:00 p.m. on April 16th. He had a short haircut and goatee, and was wearing a baseball cap and a red-shirt. The shirt had the word "Plug" written in white and cursive across the front and the number "125" written in white on the back.

Several persons present at the bar testified about two disagreements appellant had near the end of the party. The owner of the bar, Tiara Floyd, and her aunt Lenair Holland, testified that appellant argued with them about the downstairs bar "tab" that had been "run up." The two were trying to determine who had run up the tab, and appellant repeatedly told them it was not him. The incident, which was played for the jury, was caught on video shortly before 2:00 a.m. and lasted several minutes.

Several minutes after that incident, appellant had a second disagreement. Martin testified that appellant and Antonio Washington, the victim, were arguing outside the woman's bathroom on the second floor. Washington had worked as a bouncer for the bar for roughly two years, but he was present that evening socially, not as "security." Martin testified that appellant was trying to retrieve from the women's bathroom some photographs that had been taken at the party, and Washington was telling him that he could not go in there. Floyd likewise testified that she heard the "fuss," and she walked upstairs and spoke to Washington and appellant, who was loud, angry, and "very aggressive."

Kenneth Diggs, one of the bouncers that night, testified that while downstairs, someone told him that Washington and another man were "ready to fight" because Washington had stopped the man from "trying to get into the women's restroom." Within minutes of the altercation upstairs, appellant left the bar. As he walked out the front door, he told Diggs, "I ain't no bitch ass . . . ."

Several people testified as to what happened after the bar closed. Diggs testified that while standing outside the bar about 15 minutes after appellant had left, he heard a gunshot. Diggs walked toward the parking lot where he saw: two men running from Washington's truck, Washington fall to the ground, and the same two men jump into a car. Diggs testified that one of the two men was appellant. The car then sped away. Darryl Jarvis, a relative of the Martin family, testified that as he was walking from the bar to the parking lot, he heard a loud argument, and as he got into a car to leave, he heard a gunshot.

Martin testified that while he was outside the bar loading up a car after the party, he heard gunshots, but denied hearing anything before the shots were fired. When asked on direct examination if had ever told the police that he had heard men arguing prior to the gunshots, he said that was "a lie." The State then impeached Martin with his video recorded statement to the police on May 3, two weeks after the shooting. In the video, he told the interviewing officer that when he came out of the bar to pack up the car, "*they was* arguing down by the truck." He explained that "*they had* argued earlier," referring to the argument between appellant and Washington.

Video from the BCCC shortly before the shooting, shows a person matching appellant's description - having short hair, a goatee, and wearing a baseball cap and the

same distinctive shirt - walking away from the bar alone and across the parking lot to a car. Over the next few rotations, another man is seen walking across the parking lot to appellant, who is standing outside the car, and the two converse with appellant gesticulating purposefully with his hands. A few minutes later, Washington walks out of the bar and across the parking lot. As he approaches his truck, appellant walks toward him where again appellant gesticulates purposefully with his hands. The camera rotates away and when it returns the next three times, two other men are standing near Washington and appellant, who appear to be arguing.

When the camera returns, Washington can be seen opening the driver's side door of his truck, appellant is near him gesticulating, and the other two men are on the passenger side of the truck. The camera rotates away and when it returns, the other two men are still on the other side of the truck, and Washington and appellant are still arguing. Appellant then appears to reach his right hand into the front of his waistband and pull out an object that resembles a gun in shape. The camera rotates away and when it returns, a car with two people inside is speeding off from the parking lot, Washington is face down on the ground near his truck, and appellant is collecting something off the ground near the truck with his right hand and holding an object in his left hand. He is then seen walking to and getting into the car that he had stood next to earlier. The camera swings away from the scene and when it returns, Washington is on the ground alone, and the car and appellant are gone.

Washington was taken via ambulance to a hospital where he was pronounced dead. A subsequent autopsy revealed that he died from a single gunshot wound to the temple and there was evidence of stippling, meaning that the gun was fired at close range. A .45

cartridge casing was found at the crime scene and a .45 bullet was recovered during the autopsy, but no gun was recovered.

DISCUSSION

I.

Appellant argues on appeal that the trial court abused its discretion when it gave an eyewitness jury instruction. Appellant argues that the instruction was not generated by the evidence because not a single witness identified him as the person who committed the crime. The State responds that appellant has not preserved this argument for our review because appellant did not object to the instruction after the court instructed the jury. The State further argues that even if preserved, appellant's argument is without merit because, although Diggs did not testify that he saw appellant pull the trigger, his testimony combined with the video footage led to the inescapable conclusion that appellant was the shooter.

After both parties rested their case, they and the court discussed what instructions should be given to the jury. The parties and the court discussed the positive photographic police identifications made by some of the bar patrons identifying appellant as a person at the party, and the following colloquy occurred:

> [DEFENSE COUNSEL]: I don't have a problem with the means of identification, Your Honor. I think what I would like – what I would request though is that if he was identified as being in the bar. I think that's the only place that he was identified. I mean, I don't want to confuse the jury that he's been identified as being the person that committed this murder because he absolutely hasn't.
>
> * * *
>
> THE COURT: I'm asking you [State prosecutor] how is it appropriate that I include that second bracket [language in the instruction about] the

> identification of the defendant by a single eyewitness as the person who committed a crime? He hasn't been, has he? The video does it, in my opinion, which is why I denied the motion for judgment.
>
> [THE STATE]: Well, but – well, actually Mr. Diggs did. I mean, he identified [appellant] as the red shirt coming out of the bar and the red shirt having shot the victim.
>
> THE COURT: Okay. Okay. All right. [Defense counsel], do you disagree with that?
>
> [DEFENSE COUNSEL]: I don't recall Mr. Diggs identifying –
>
> THE COURT: [The State] asked – this is the testimony where she asked him do you have any doubt as to whether [appellant] is the person in the red shirt you saw shooting and he said he had some doubt and then said "I believe it was him."
>
> [DEFENSE COUNSEL]: I don't think that's an identification, Judge. I mean, that's –
>
> [THE STATE]: Well –
>
> THE COURT: I think that is an identification. So I'm going to give that bracket after that argument.

(Emphasis added.)

The State and the trial court, however, remembered Digg's testimony incorrectly. The State had asked Diggs on direct examination, "[Is there] any doubt in your mind today that the individual who made that comment as he was walking out the door with the red shirt on is the same person that you saw leaving from the area of the victim's truck after the shooting happened?" Diggs replied that he had no doubt. Diggs never testified that appellant was the shooter, as was suggested in the above colloquy. Interestingly, defense counsel never cleared up this point for the trial court.

After the above colloquy, the parties and the court discussed several other matters, including two other instructions and the proposed verdict sheet. After those discussions, the trial court instructed the jury and included the following instruction on eyewitness identification:

> You have heard evidence about the identification of the defendant as the person who committed the crime. You should consider the witness's opportunity to observe the criminal act and the person committing it, including the length of time the witness had to observe the person committing the crime, the witness's state of mind and any other circumstance surrounding the event.
>
> You should also consider the witness's certainty or lack of certainty, the accuracy of any prior description and the witness's credibility or lack of credibility as well as any other factors surrounding the identification.
>
> You have heard evidence that prior to this trial a witness identified the defendant by a photo array and/or in a photograph. The identification of the defendant by a single eyewitness as the person who committed the crime, if believed beyond a reasonable doubt can be enough to convict the defendant. However, you should examine the identification of the defendant with great care. It is for you to determine the reliability of any identification and give it the weight you believe it deserves.

The instruction given closely mirrors the pattern jury instruction.[2]

[2] The Maryland Pattern Jury Instruction on eyewitness identification provides:

> The burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the defendant was the person who committed it. You have heard evidence about the identification of the defendant as the person who committed the crime. You should consider the witness's opportunity to observe the criminal act and the person committing it, including the length of time the witness had to observe the person committing the crime, the witness's state of mind, and any other circumstance surrounding the event. You should also consider the witness's certainty or lack of certainty, the accuracy of any prior description, and the witness's

(continued)

Immediately following the trial court's instructions, the court called the parties to the bench and the following colloquy occurred:

> THE COURT: I saw from [defense counsel two]'s reaction that he noticed that I took out [the] number of witnesses [instruction]. Did you all want me to give that?
>
> [DEFENSE COUNSEL ONE]: I'll defer to [defense counsel two].
>
> [DEFENSE COUNSEL TWO]: Well, I don't know what you're talking about.
>
> THE COURT: Okay. I thought –
>
> [DEFENSE COUNSEL TWO]: I must have been interacting to something else.
>
> THE COURT: Okay. I took out [the] number of witnesses [instruction] and the reason I did that is I didn't want to highlight the fact that you didn't call any unless you want me to give it. If you want me to give it, I will.
>
> [DEFENSE COUNSEL ONE]: No, that's fine.
>
> THE COURT: Any other objections to the Court's instructions?
>
> [DEFENSE COUNSEL TWO]: No.

> credibility or lack of credibility, as well as any other factor surrounding the identification.
>
> [You have heard evidence that prior to this trial, a witness identified the defendant by _____.]
>
> [The identification of the defendant by a single eyewitness, as the person who committed the crime, if believed beyond a reasonable doubt, can be enough evidence to convict the defendant. However, you should examine the identification of the defendant with great care.]
>
> It is for you to determine the reliability of any identification and give it the weight you believe it deserves.

MPJI-Cr 3:30.

[THE STATE]: No.

THE COURT: Okay.

Preservation

Md. Rule 4-325(e), governing objections to jury instructions, provides: "No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. (emphasis added). It is axiomatic that "[t]he language of the rule plainly requires an objection after the instructions are given, even though a prior request for an instruction was made and refused." *Johnson v. State*, 310 Md. 681, 686 (1987). The long-standing Rule "'makes clear that an objection to a jury instruction is not preserved for review unless the aggrieved party makes a timely objection after the instruction is given *and states the specific ground of objection thereto*.'" *Taylor v. State*, 236 Md. App. 397, 411 (2018) (quoting *Gore v. State*, 309 Md. 203, 207 (1987) (emphasis in *Taylor*)). "There are good reasons for requiring an objection at the conclusion of the instructions even though the party had previously made a request . . . [for] a party initially requesting a particular instruction may be entirely satisfied with the instructions as actually given." *Johnson*, 310 Md. at 686–87 (citations omitted).

We note that a failure to object after the trial court has instructed the jury, may still preserve an instruction argument for our review, if there has been "substantial compliance" with the Rule. *Gore*, 309 Md. at 208-09. There are, however, several conditions one must meet to show substantial compliance: 1) there must be an objection to the instruction; 2) the objection must appear on the record; 3) the objection must be accompanied by a definite

statement of the ground for the objection, unless the ground for the objection is apparent from the record; and 4) the circumstances must show that renewal of the objection after the court instructs the jury would be futile or useless. *Id*. at 209. A finding of substantial compliance is rare. The Court of Appeals has explained:

> We make clear, however, that these occasions [of substantial compliance] represent the rare exceptions, and that the requirements of the Rule should be followed closely. Many issues and possible instructions are discussed in the usual conference that takes place between counsel and the trial judge before instructions are given. Often, after discussion, defense counsel will be persuaded that the instruction under consideration is not warranted, and will abandon the request. Unless the attorney preserves the point by proper objection after the charge, or has somehow made it crystal clear that there is an ongoing objection to the failure of the court to give the requested instruction, the objection may be lost.

Sims v. State, 319 Md. 540, 549 (1990) (citation omitted).

Appellant did not object, after the trial court instructed the jury, on the ground he now presents on appeal. Appellant argues, however, that when the trial court asked the parties at the end of its instructions if they had "any other objections," the court was "clearly referencing the earlier discussion[.]" Appellant argues, given the court's clear reference to their earlier discussion about the appropriateness of the eyewitness instruction, he was not required to object again. We disagree.

It is clear from a thorough reading of the relevant transcript as a whole that the trial court's "any other objections" comment refers to the parties' discussion immediately following the court's instructions to the jury, and not to appellant's objection to giving an eyewitness instruction 27 pages earlier. Therefore, because appellant neither objected after the jury was instructed, nor made it "crystal clear" that he had not relinquished his earlier

objection, he has failed to preserve his eyewitness instruction argument for our review. *Cf. Sims*, 319 Md. at 549 ("Unless the attorney preserves the point by proper objection after the charge, or has somehow made it crystal clear that there is an ongoing objection to the failure of the court to give the requested instruction, the objection may be lost.").

Moreover, appellant's argument that he substantially complied with the rule because "any further objection would have been futile" is devoid of merit. Appellant has presented no evidence that an objection would have been futile, and the record in no way suggests that the court would not have allowed appellant to place his objection on the record after the trial court instructed the jury. *Cf. Gore*, 309 Md. at 206 (stating that the futility requirement was met where defense counsel indicated that he would object if the court were to give a certain instruction, and the trial court replied: "You can object all you want, but I'm going to do it.").

II.

Appellant argues that the trial court abused its discretion when it allowed the State to make two allegedly improper and prejudicial comments during closing argument. Appellant argues that the first comment lowered the reasonable doubt standard, and the second comment denigrated defense counsel. Recognizing that he objected to the first comment but not the last, appellant cites *Lawson v. State*, 389 Md. 570, 599-605 (2005), and argues that we should nonetheless review the prejudicial cumulative effect of both comments and reverse. The State disagrees, as do we.

Counsel are generally afforded wide latitude to engage in oratorical flourishes during closing argument and to invite the jury to draw inferences. *Degren v. State*, 352 Md. 400, 430 (1999). We afford "liberal freedom of speech" during closing arguments. *Lee v. State*, 405 Md. 148, 163 (2008) (quotation marks and citations omitted). "There are no hard-and-fast limitations within which the argument of earnest counsel must be confined - no well-defined bounds beyond which the eloquence of an advocate shall not soar. . . . He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions." *Id.* (quotation marks and citation omitted). Whether counsel's argument is improper rests largely within the broad discretion of the trial court because it is in the best position to determine the appropriateness of the closing argument as it relates to the evidence elicited in the case. *Ingram v. State*, 427 Md. 717, 728 (2012) (citations omitted).

It is well-settled that not every improper remark made by a State prosecutor during closing argument necessarily mandates reversal for "what exceeds the limits of permissible comment depends on the facts in each case." *Beads v. State*, 422 Md. 1, 10–11 (2011) (quotation marks and citation omitted). Reversal is only required where "there has been an abuse of discretion by the trial judge of a character likely to have injured the complaining party." *Donaldson v. State*, 416 Md. 467, 496 (2010) (internal quotation marks, citations, and emphasis omitted). In making that determination, we must decide, upon our "own independent review of the record whether we are able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *Id*. (quotation marks and citations omitted). We consider several factors to determine whether prejudice occurred beyond a reasonable doubt, including: "the severity of the remarks, the measures

taken to cure any potential prejudice, and the weight of the evidence against the accused." *Id*. at 497 (quotation marks and citations omitted).

A. Puzzle piece remark

The State made the following remark during rebuttal closing argument:

> [THE STATE]: This is the way that I describe or explain reasonable doubt. This is the last thing. I promise I'll be done. I used to – you know, my mother grew up in the Depression and I was the youngest of six kids so we kept these puzzles, these old 100 piece puzzles that you – for kids. And we would keep them and hand them down.
>
> And being the youngest of six kids by the time I got to do these puzzles with my mother they'd be tattered and frayed and there invariably would be a piece – a couple pieces missing.
>
> So I had one puzzle in particular that was my favorite of a puppy and there would be – there were like two pieces missing from the body. There was a piece missing from the head and then one of the pieces missing some of the other pieces missing in the background. But when we put the puzzle together you could still see that it was a puppy.
>
> So that's really what reasonable doubt is. When you put – because putting a case together is like putting the pieces of a puzzle together.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [THE STATE]: It's like putting the pieces of a puzzle together. If you can see that do[g] in that picture and you still have completed that puzzle and it's still a dog in that picture, that little puppy.

Appellant argues that the State's puzzle analogy "minimized the exacting standard of establishing reasonable doubt . . . [by] suggesting that the jury could ignore all of the missing pieces if it could just make out the picture in the end." We disagree.

Although we do not think the puzzle remark improper, we are not a fan of the "puzzle piece" analogy in closing argument for it can easily veer into impermissible waters

by lessening the reasonable doubt standard depending on what is said about the number of pieces in the puzzle, the number that need to be completed, and the subject of the puzzle itself. Here, the State here did not tell the jury that reasonable doubt could be distilled to quantitative percentage, but at most suggested to the jury that a 98% percentage (two pieces missing from a 100-piece puzzle) equates to reasonable doubt. We do not think this lowered the reasonable doubt standard.

Even if the remark was improper, however, under the circumstances presented we are not persuaded that the error prejudiced appellant. Appellant does not complain that the trial court erred in its instructions to the jury on reasonable doubt or closing arguments. Moreover, the State's puzzle piece remarks were not pervasive, given the lengthy closing arguments which took up 65 pages of typed transcript. Moreover, the video was strong evidence that left little doubt that appellant committed the murder. Therefore, under the circumstances presented, even if the remark was improper, we do not believe that the remark constituted reversible error. *Cf. Bartlett v. Battaglia*, 453 F.3d 796, 798, 802 (7th Cir.) (State prosecutor's comments during closing argument that likened the standard for reasonable doubt to a puzzle and suggesting after 30% completion you know what the puzzle is about, was improper but not so prejudicial so as to deprive the defendant of his due process right to be convicted only by proof beyond a reasonable doubt), *cert. denied*, 549 U.S. 1038 (2006); *Lord v. State*, 806 P.2d 548, 552 (Nev. 1991) (State prosecutor's comment that having 90–95 percent of the pieces of a puzzle suffices to convict beyond a reasonable doubt was error but not prejudicial because trial court properly instructed the jury on reasonable doubt).

B. Distraction remark

Appellant also finds fault with the following remark made by the State in closing argument: "Now, an important thing to remember is Defense's job is to get up here and it's distraction, distraction, distraction. They don't want you to pay attention to the evidence in this case." Appellant recognizes that he did not object to this remark but argues that we consider the cumulative effect of both his preserved and unpreserved objection and reverse.

For unobjected to remarks during closing argument, we look to Md. Rule 8-131(a). That Rule provides: "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." (emphasis added). We have said:

> The purpose of Maryland Rule 8-131 is to allow the court to correct trial errors, obviating the necessity to retry cases had a potential error been brought to the attention of the trial judge. The Rule is also designed to prevent lawyers from "sandbagging" the judge and, in essence, obtaining a second "bite of the apple" after appellate review.

Sydnor v. State, 133 Md. App. 173, 183 (2000), *aff'd*, 365 Md. 205 (2001), *cert. denied*, 534 U.S. 1090 (2002). An appellate court should take cognizance of unobjected to error when it is "'compelling, extraordinary, exceptional or fundamental to assure the defendant of [a] fair trial.'" *Conyers v. State*, 345 Md. 525, 563 (1997) (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)). The standard is high: "Every error that, if preserved, might have led to a reversal does not thereby become extraordinary." *Perry v. State*, 150 Md. App. 403, 436 (2002).

Appellant clearly did not preserve for our review the State's distraction remark because he did not object below. Even if preserved, we would not reverse under the circumstances presented because any error was not likely to have misled the jury. The remark was isolated and did not pervade the State's closing argument. Further, defense counsel fired his own arrows regarding the honesty and truthfulness of the State's attorney when he began his closing argument by stating: "We're nearing the end. I promise. I'm going to be considerably more succinct and brief than the State's attorney was because quite frankly, the truth is easier to explain." (emphasis added). Additionally, a little more than half-way into his argument, defense counsel addressed the State's confusion remark, arguing:

> Now, the State's attorney said at the beginning of her closing argument that the Defense job is to confuse everybody that my job is to get up here and distort everything, confuse everything. Who's confused? Who's being evasive? Who's not being truthful and honest and forthcoming? Is it me and the Defense or is it Detective Jackson in your view of what went on in this courtroom?

As noted above, the trial court accurately instructed the jury on reasonable doubt and the purpose of closing argument. Moreover, the State's case was strong.

We find the cases of *Beads v. State*, 422 Md. 1 (2011) and *State v. Purvey*, 129 Md. App. 1, 25 (1999), *cert. denied*, 357 Md. 483 (2000), instructive.

In *Beads*, the State remarked in closing, among other things:

> [THE STATE]: You're now going to hear from the Defense attorneys, both of whom are fine attorneys. I caution you, that unlike the State, the Defense's specific role in this case is to get their Defendants off.
>
> [DEFENSE COUNSEL]: Objection.

> THE COURT: Overruled.
>
> [THE STATE]: It is their job, and they do it well, to throw up some smoke, to lob a grenade, to confuse.

Beads, 422 Md. at 8. In that case, the Court of Appeals held that the State's remarks about defense counsel, although inappropriate, were unlikely to have "misled or influenced the jury to the prejudice of the accused." *Id*. at 11 (quotation marks omitted). In *Purvey*, the State's Attorney asserted at least three times in closing that defense counsel was merely "blowing smoke" to "divert [the jury's] attention from the facts." *Purvey*, 129 Md. App. at 25. On appeal, we held that the remark "blowing smoke" was constitutionally permissible and that the remark was "an acceptable characterization of [defense counsel's] efforts to undermine the credibility of the State's evidence." *Id*.

Lastly, even if both remarks were preserved and we were to consider them together, we would not find that the cumulative effect of the two remarks prejudiced appellant because, as explained above, we are not persuaded that either remark misled the jury and prejudiced appellant.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.