UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1406

September Term, 2014

KINDALL D. NEALE

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Meredith,
Berger,

JJ.

Opinion by Berger, J.

Filed: May 20, 2015

Following a jury trial in the Circuit Court for Charles County, Kindall Neale ("Neale"), appellant, was convicted of various counts of attempted murder, attempted robbery with a deadly weapon, conspiracy to commit first-degree assault, conspiracy to commit armed robbery, and multiple handgun offenses.

On appeal, Neale presents three issues for our review, which we have rephrased as follows:

1. Whether the trial court erred by rejecting Neale's request to discharge his counsel.

2. Whether the trial court erred by declining to propound Neale's requested jury instruction on self-defense.

3. Whether the trial court abused its discretion in its regulation of the prosecutor's closing argument.

For the reasons stated herein, we shall affirm the judgments of the Circuit Court for Charles County.

FACTS AND PROCEEDINGS

In the early morning hours of May 30, 2013, brothers Brian and Cory Proctor sat with a friend, Anthony Cutchember, in a car parked outside the Proctors' home in Indian Head, Maryland. Before arriving at the Proctors' home, the Proctors and Cutchember had been at the Dash-In, a nearby convenience store. At the Dash-In, Brian Proctor saw Neale, with whom Brian was casually familiar. Brian saw Neale leave the Dash-In in a black Lincoln Navigator, accompanied by a second person.

After the Proctors and Cutchember arrived at the Proctors' residence, they remained in the vehicle smoking marijuana. Cory Proctor sat in the driver's seat, Cutchember sat in

the front passenger seat, and Brian Proctor sat in the rear passenger seat on the driver's side of the vehicle. While the Proctors and Cutchember sat in the vehicle, Brian Proctor "heard footsteps like running up" and saw "somebody in a black shirt hold a gun to my brother." The man who approached Cory Proctor's window said something to the effect of "give it up" or "put your hands up." Brian Proctor identified this man to police as Neale.[1] A second man, wearing a gray shirt, approached Cutchember on the passenger side of the car, opened the door, and ordered Cutchember to the ground. According to Cutchember, the man in the gray shirt tried to take his cell phone and hat but dropped them during the subsequent shooting.

After Neale demanded that Cory Proctor "give it up" or "put [his] hands up," Brian Proctor picked up a .25 caliber handgun from his lap and attempted to shoot Neale, but the weapon jammed. Brian Proctor picked up a second gun, a .38 caliber revolver, and "just started shooting out the window." Neale ran into the street and fired shots back at the vehicle as he ran away. Thereafter, the Proctors and Cutchember ran into the Proctors' residence, where Beverly Proctor, Brian and Cory's mother, called 911.

Multiple shell casings from two different weapons were discovered around the scene of the shooting. In addition to the recovered shell casings, police found two handguns and a large amount of marijuana in a sandbox on the Proctors' property. One of the handguns

[1] At trial, Brian Proctor testified that he told police that he had "heard" it was Neale but that he did not actually tell police that Neale was the person who had tried to rob him.

matched the type of unspent bullet found in the Proctors' vehicle, and the other handgun matched spent casings that were located near the vehicle.

Initially, the Proctors and Cutchember told detectives that they did not know who had attempted to rob them. At trial, Cory Proctor and Cutchember maintained that they did not know who had robbed them. Brian Proctor, however, eventually implicated Neale in a third interview with the police.[2] Police arrested Neale on June 14, 2013, in the apartment of Latrease Frazier in Dahlgren, Virginia. Frazier gave the police permission to search her home and Neale was found hiding in a closet. Police also found a handgun located next to a makeshift bed in the living room, where Neale had been sleeping that night. The police also discovered a pair of jeans which contained Neale's wallet and a black ski mask. The handgun was matched to some of the spent casings discovered at the scene of the shooting.

[2] Neale devotes several pages of his brief to an attempt to discredit Brian Proctor. To be sure, Brian Proctor's story changed over time. In an initial interview with police, Brian Proctor provided a basic description of the alleged robber but did not identify him as Neale. In a second interview, Brian Proctor told police that the alleged robber drove a black Lincoln Navigator and that he had been told by friends that it was Neale's car. In a third interview, after the police discovered the weapons and drugs in the sandbox, Brian Proctor identified Neale as the alleged robber.

At trial, defense counsel argued that Brian Proctor's testimony was not credible due to various inconsistencies. Defense counsel further argued that the physical evidence, as well as the Proctors' and Cutchember's alleged attempts to obstruct justice by hiding weapons and drugs in a sandbox, suggested that the Proctors and Cutchember had attempted to rob Neale during a pre-arranged drug transaction, and Neale had simply attempted to defend himself.

Following Neale's arrest, the police interrogated Neale. Neale admitted to having been at the Dash-In convenience store on the relevant date, but denied knowing Brian Proctor and denied any involvement in a robbery. Neale claimed that a person known as "Pooh Bear" was responsible for the robbery. Frazier testified that no one by the name of "Pooh Bear" had ever been in her apartment.

At trial, Ollie Darby testified that he knew Neale because Neale was Darby's girlfriend's cousin. Darby testified that on June 28, 2013, he was approached by Barbara Allen ("Allen"), whom he knew to be Neale's girlfriend. Darby testified that Allen had asked him, on behalf of Neale, to reach out to "Proc" for the purpose of "squash[ing]" the conflict between them.

Allen testified that she was dating Neale at the time of the incident. Allen explained that, in late May 2013, Neale told her that shots had been fired at him near Indian Head, "that he could have been killed, and something about a gun jamming, and when the second round came it dodged his head." Allen further testified that when she asked Neale about it further, Neale "said it wasn't him, it was his cousin."[3] Allen confirmed Darby's testimony that Neale had asked Allen to contact Darby to tell "Proc" to "just leave . . . everything alone." Allen further testified that an acquaintance had relayed a message from Neale the week before trial asking her "not to testify."

[3] Charles Shorter, Neale's cousin, was also in Frazier's apartment with Neale. Shorter denied any involvement.

The jury found Neale guilty of three counts of attempted second-degree murder, three counts of first-degree assault, three counts of second-degree assault, three counts of attempted robbery with a deadly weapon, three counts of attempted robbery, three counts of theft of less than $1,000, three counts of reckless endangerment, one count of wearing, carrying, or transporting a handgun, one count of conspiracy to commit robbery, one count of conspiracy to commit first-degree assault, and nine counts of use of a firearm in the commission of a crime of violence. Neale was sentenced to 75 years' incarceration, with fifteen years to be served without the possibility of parole. This appeal followed.

Additional facts will be included as necessitated by our discussion of the issues.

DISCUSSION

I.

Neale's first contention is that the trial court committed reversible error by denying his request to discharge counsel and be appointed new counsel. We are unpersuaded.

Although a request to discharge counsel is generally governed by Maryland Rule 4-215(e), the rule does not apply once "meaningful trial proceedings" have begun.[4]

[4] Rule 4-215(e) provides:

> If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that

(continued...)

Barkley v. State, 219 Md. App. 137, 162 (2014) (citing *State v. Brown*, 342 Md. 404, 426 (1996)). "Once meaningful trial proceedings have commenced, the decision of whether to permit the discharge of counsel is entrusted to the discretion of the trial judge." *Id.* The Court of Appeals has discussed the required consideration of a defendant's request to discharge counsel mid-trial, explaining as follows:

> When a defendant makes a request to discharge counsel at a time when Rule 4-215(e) does not apply strictly, "[t]he court must conduct an inquiry to assess whether the defendant's reason for dismissal of counsel justifies any resulting disruption" and rule on the request exercising broad discretion. *Brown*, 342 Md. at 428, 676 A.2d at 525. The court's burden in making this inquiry is to provide the defendant the opportunity to explain his or her reasons for making the request; in other words, the court need not do any more than supply the forum in which the defendant may tender this explanation. *See* [*State v.*] *Campbell*, 385 Md. [616, 635 (2005)] (stating that "the trial judge was not required to make any further inquiry" after the defendant made clear his reasons for wanting to dismiss his counsel); *Brown*, 342 Md. at 430, 676 A.2d at 526 (describing court's burden as duty to "provide an opportunity for [the

[4] (...continued)

> if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a)(1)-(4) of this Rule if the docket or file does not reflect prior compliance.

> defendant] to explain his [or her] desire to discharge counsel" (emphasis added)).
>
> If the court provides this opportunity, how to address the request is left almost entirely to the court's "sound discretion." *Brown*, 342 Md. at 426, 676 A.2d at 524. According to *Brown*, the court should consider six factors in exercising its discretion in this regard:
>
> > (1) the merit of the reason for discharge; (2) the quality of counsel's representation prior to the request; (3) the disruptive effect, if any, that discharge would have on the proceedings; (4) the timing of the request; (5) the complexity and stage of the proceedings; and (6) any prior requests by the defendant to discharge counsel.
>
> 342 Md. at 428, 676 A.2d at 525. All six of these factors, however, may be considered in a brief exchange between the court and the defendant about the defendant's reasons for requesting the dismissal of defense counsel.

State v. Hardy, 415 Md. 612, 628-29 (2010) (footnote omitted). The Court further explained that "it is the defendant's duty to explain fully the reasons for the request after this opportunity has been provided, rather than there being a continuing burden on the trial judge to probe the defendant with questions until the defendant has given a fuller answer." *Id.* at 628 n. 10. The Court concluded, based upon these principles, that "trial courts abuse their discretion when they fail to allow a defendant any opportunity to explain his or her request at all, thus making it impossible to consider the six factors in *Brown*." *Id.* at 629.

With this analytical framework in mind, we turn to Neale's request to discharge counsel in the present case. Neale requested to discharge his counsel on the final day of a four-day trial, when only jury instructions and closing arguments remained prior to the jury's deliberation. The following exchange occurred:

> KINDALL NEALE: Your Honor, I want my [attorney] fired today. I don't want him representing me no more. He lied to me, and he continued to lie to me, and I don't want him on my case no more.
>
> [THE COURT]: Do you have another lawyer in line to take over?
>
> KINDALL NEALE: I'm going to have to do what I can do to find one, but I ain't got to-
>
> [THE COURT]: Well, you are not getting a continuance at this point. We have a jury waiting to deliberate.
>
> KINDALL NEALE: Well, he's lying to me. I don't want him representing me on my case if he is lying to me. I can throw my own life away.
>
> [THE COURT]: If you want to represent yourself, that's your other choice.
>
> KINDALL NEALE: I need another attorney. I don't want . . . I don't want him to represent me if he is lying to me.
>
> [THE COURT]: Mr. Neale. You need to listen. We are in the middle of a jury trial. This is day number four.
>
> KINDALL NEALE: I understand that.
>
> [THE COURT]: If you want to discharge your attorney, you need to be prepared to represent yourself. There is no possibility of continuing your case at this point.

KINDALL NEALE: So I am supposed to continue with a lawyer lying to me?

[THE COURT]: No.

KINDALL NEALE: That's what you [are] basically telling me.

[THE COURT]: I am going to advise you that you do have a right to have an attorney represent you. An attorney is trained in the law of Maryland, has been in practice for a number of years-

KINDALL NEALE: But he is misguiding me.

[THE COURT]: Listen. He can be very helpful to you, as he has been so far, in cross-examining witnesses, presenting evidence for you, if there is any evidence to present, advising you as to your constitutional right to remain silent, organizing closing statements for you because that is where we are in this trial.

KINDALL NEALE: I understand all that.

[THE COURT]: Keep listening. Have you had any training in the Maryland Rules and Procedure?

KINDALL NEALE: I have been studying.

[THE COURT]: Have you? Okay.

KINDALL NEALE: Yes, and I know most of it is common sense. And this guy . . . and I have been asking him questions, and he has been misleading me the wrong direction.

[THE COURT]: Okay.

KINDALL NEALE: And I am not going to state it on record, the things that I asked him, but I know for a fact-

[THE COURT]: Let me stop-

KINDALL NEALE: -what I studied, and he's lying to you.

[THE COURT]: Let me stop you. He is representing you in a trial. I don't know what advice you are referring to at this point, but we are about to do-

KINDALL NEALE: Certain . . . certain stuff that has is being used [sic] in my trial, I have asked him questions about certain things that he lied to me, in know [sic] for a fact. I looked it up, and I have been studying.

[THE COURT]: Okay, anything that has happened during the course of the trial may be a basis for filing an appeal, or a post-conviction.

KINDALL NEALE: I want to fire my lawyer and get a new lawyer.

[THE COURT]: Listen. I am going to tell you again.

KINDALL NEALE: I'm telling you again.

[THE COURT]: No, I'm telling you again.

KINDALL NEALE: I don't want this lawyer.

[THE COURT]: Are you going to proceed on your own?

KINDALL NEALE: It don't matter. I can do that testifying on my own behalf.

[THE COURT]: You have already stated-

KINDALL NEALE: He stated, I ain't opened my mouth.

[THE COURT]: Why not? He is saying that you did not-

KINDALL NEALE: Because he is here to represent me and talk on my behalf. I don't want this dude.

[THE COURT]: Listen, he has stated that you did not want to testify. Is that not correct?

KINDALL NEALE: I told him I wanted to testify.

[THE COURT]: Okay, we are going to take a recess while you discuss that with your attorney. The case is closed. The evidence is closed.

KINDALL NEALE: So you are telling me you going to let me continue with this attorney, I'm telling you I want to fire?

[THE COURT]: No, I'm telling you that your option is to continue with the attorney that you have-

KINDALL NEALE: And I don't want him.

[THE COURT]: Or to represent yourself.

KINDALL NEALE: Alright.

[THE COURT]: And I am going to give you a few minutes to discuss that.

KINDALL NEALE: There ain't nothing to discuss. I already told you want [sic] it is.

[THE COURT]: (Inaudible)

COURT CLERK: All rise.

[OFF THE RECORD]

BAILIFF: The Circuit Court for Charles County is now in session.

[THE COURT]: You may be seated. Good morning, again?

STATE'S ATTORNEY: Good morning, Your Honor.

COURT CLERK: Criminal 13-657, State of Maryland v. Kindall Neale.

STATE'S ATTORNEY: [Prosecutor], on behalf of the State.

[DEFENSE COUNSEL]: [Defense counsel] on behalf of Mr. Neale.

[THE COURT]: Okay, and how are we going to proceed, Mr. Neale.

KINDALL NEALE: If you're not going to give me another attorney, I'm going to continue (inaudible).

[THE COURT]: Okay, it is not within the Court's power to give you another attorney. You have one assigned to you.

KINDALL NEALE: If you're not going to appoint me another attorney, I am going to keep [defense counsel].

[THE COURT]: At this point, we are ready to do the jury instructions and closing arguments. If you would like to state on the record your reasons for discharging your attorney, I will consider it, but it is entirely within the Court's discretion as to whether I discharge [defense counsel] or not.

KINDALL NEALE: I know it's up to your discretion.

[THE COURT]: It is not within the Court's power at this point, to appoint an attorney for you. If you have an attorney that you have already retained, that is willing, and I will say foolish enough, to step in at this point of trial and continue your representation, I could consider that. But I have already informed you that if we discharge [defense counsel], you will be continuing on your own.

KINDALL NEALE: I informed you that I don't have the money to get another attorney right now, and if you [are] not going to give me one, I'm gonna keep [defense counsel].

[THE COURT]: Okay then, are we ready to proceed?

STATE'S ATTORNEY: The only thing that needs to be cleared up for the record is Mr. Neale claiming he wasn't permitted to testify, but that was a lie. I think we need to clear that issue up before we go any further.

[THE COURT]: Well, I was going to ask [defense counsel] to put on the record as to how you advised him, and-

[DEFENSE COUNSEL]: I advise all my clients of their [right] to testify, and tell them my opinion, tell them it's their choice, and then I convey their decision to the Court, all my cases.

[THE COURT]: Okay. Mr. Neale, is it correct, did you have that conversation with [defense counsel]?

KINDALL NEALE: Something like that. I don't know, I guess . . . if that's how he wants to state it, but we didn't state it like that, (inaudible).

[THE COURT]: Okay, is there some misunderstanding about what was said?

KINDALL NEALE: We can continue. I ain't going to testify. I'm going to listen to him.

[THE COURT]: Okay, are you saying today that it is your choice not to testify?

KINDALL NEALE: Yeah, I'm going to listen to him, I'm not going to testify.

[THE COURT]: Okay, and you have been advised that you have a right to remain silent, is that correct? Have you also been advised that anything you testify to is subject to cross-examination by the State's Attorney?

KINDALL NEALE: From my lawyer?

[THE COURT]: I'm telling you, are you aware of that?

KINDALL NEALE: Yeah.

[THE COURT]: Are you also aware that if you have a criminal record, your record could be used to impeach you, that that record could be used by the State's Attorney to impeach your testimony, as it was for some of the other witnesses who have testified?

KINDALL NEALE: Right.

[THE COURT]: It is entirely your choice as to whether or not you do testify. Have you had that conversation with your attorney?

KINDALL NEALE: I just stated, I am going to listen to him, and I'm not going to testify.

[THE COURT]: Okay, your attorney has given you advice about it, correct?

KINDALL NEALE: He asked me.

[THE COURT]: Has your attorney given you advice about your choice to testify or not?

KINDALL NEALE: He didn't get into detail, I'm just saying to you, he asked me if I wanted to testify.

[THE COURT]: Okay, and I am telling you this morning that you do have a right to testify if you choose.

KINDALL NEALE: I don't want to testify, I just said that.

[THE COURT]: But you also have a right to remain silent. No one can make you testify. You already know we have selected a jury instruction that advises the jury that they are not going to consider that factor at all. I am also telling that if you did testify, you are subject to cross-examination.

KINDALL NEALE: Okay.

[THE COURT]: And anything in your criminal record could be used by the State to impeach your testimony. So that information about your background would also be presented to the jury. Considering all of those things, are you choosing not to testify?

KINDALL NEALE: I just said I wasn't going to testify.

[THE COURT]: Okay, and you understand that if [defense counsel] were discharged, you would be having to represent yourself? So at this point, are you choosing to have [defense counsel] continue to represent you?

KINDALL NEALE: Yes, if you are not going to give me another attorney I will keep [defense counsel].

[THE COURT]: Okay.

KINDALL NEALE: So this means I'm going to keep [defense counsel] since you're not going to give me no new attorney.

[THE COURT]: The Court does not run the Public Defender's Office. It is a separate agency. You have an attorney who has been assigned to represent you, and has been working with you for weeks. Okay, anything else?

STATE'S ATTORNEY: I think also, just to make it clear to Mr. Neale that he does have the right to represent himself if he so chooses.

[THE COURT]: Absolutely, I have already said that.

STATE'S ATTORNEY: Okay. And with that, Your Honor, I think we are ready to move forward.

Our review of the record indicates that the trial court properly exercised its discretion during the colloquy with Neale. The trial court allowed Neale the opportunity to explain

why he was dissatisfied with his attorney and permitted Neale to explain why he believed that his attorney was "lying" to him. Furthermore, the trial court asked various questions in order to determine the source of Neale's dissatisfaction.

On appeal, Neale argues that the trial court did not ask Neale why he wanted to discharge his attorney. Neale further complains that the trial court interrupted Neale on multiple occasions. The various interruptions about which Neale complains, however, were attempts by the trial court to discern the source of Neale's dissatisfaction, as well as admonitions to Neale that the decision to discharge counsel should not be made lightly.

During the colloquy, Neale was able to express various reasons he wished to discharge counsel -- because counsel "lied to" him, because Neale "didn't want [defense counsel] representing [him] on [his] case if he is lying to [him]," and because counsel was "misguiding" him. When Neale made vague references to his attorney having misled him, the trial court explained that it "[didn't] know what advice [Neale was] referring to," and permitted Neale to clarify his complaints. Again, Neale provided ambiguous responses, referring to "certain stuff" that defense counsel "used in [his trial]" that indicated defense counsel had "lied to [Neale]."

Certain comments Neale made to the trial court suggested that he was dissatisfied that his attorney had recommended that Neale not testify. The trial court attempted to clarify whether Neale, in fact, wished to testify, and Neale answered that he had informed defense counsel that he did wish to testify. At that point, the trial court recessed and afforded Neale

the opportunity to confer with his attorney in order to resolve any conflict related to whether Neale would testify. When the trial court reconvened, Neale was again afforded the opportunity to place on the record the reasons he previously wished to discharge counsel. The trial court expressly told Neale, "If you would like to state on the record your reasons for discharging your attorney, I will consider it[.]"

The colloquy, taken as a whole, indicates that the trial court afforded Neale "the opportunity to explain his or her reasons for making the request" to discharge counsel. *Hardy*, *supra*, 415 Md. at 628. Having permitted Neale to provide his explanation, the trial court was not required to "do any more than supply the forum in which the defendant may tender this explanation." *Id*. By providing an opportunity for Neale to explain the reasons for his dissatisfaction, and by asking clarifying questions in order to determine the underlying basis for Neale's dissatisfaction, the trial court evaluated Neale's request to discharge counsel. Accordingly, we hold that the trial court did not abuse its discretion by denying Neale's request to discharge counsel and be appointed a new attorney.

II.

Neale's next contention is that the trial court erred by denying his request for a jury instruction on self-defense. Maryland Rule 4-325(c) provides that "[t]he court may, and at the request of any party shall, instruct the jury as to the applicable law[.]" With respect to the appellate standard of review of a trial court's decision whether to propound a requested jury instruction, the Court of Appeals has explained:

> We consider the following factors when deciding whether a trial court abused its discretion in deciding whether to grant or deny a request for a particular jury instruction: (1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given.

Stabb v. State, 423 Md. 454, 465 (2011) (citing *Gunning v. State*, 347 Md. 332, 351 (1997)). "The burden is on the complaining party to show both prejudice and error." *Tharp v. State*, 129 Md. App. 319, 329 (1999), *aff'd*, 362 Md. 77 (2000).

When determining whether the trial court abused its discretion by declining to give a particular jury instruction, we consider the following:

> Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order [of the trial court] is a matter of discretion it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

Bazzle v. State, 426 Md. 541, 549 (2012) (quoting *Stabb*, *supra*, 423 Md. at 465 (quoting *In re Don Mc.*, 344 Md. 194, 201 (1996))). "Whether the evidence is sufficient to generate the desired instruction is a question of law for the judge." *Id.* at 550 (quoting *Dishman v. State*, 352 Md. 279, 292 (1998)). On appeal, our task "is to determine whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired." *Id.*

Neale argues that a self-defense instruction was generated by the evidence for two reasons. First, Neale avers that the jury could have inferred that Neale was not the initial aggressor when he approached the Proctors' vehicle.[5] Second, Neale avers that even if the jury found that Neale had been the initial aggressor and had attempted the robbery, the jury could have found that Neale fired in self-defense after having abandoned the robbery, in response to gunshots by Brian Proctor. In response, the State contends that the only reasonable conclusion, based upon the evidence, is that Neale's gunshots occurred during the same fluid confrontation that he initiated.

The pattern jury instruction on self-defense sets forth the particular elements that must be satisfied in order to find that a defendant acted in self-defense:

> (1) the defendant was not the aggressor [[or, although the defendant was the initial aggressor, [he] [she] did not raise the fight to the deadly force level]];
>
> (2) the defendant actually believed that [he] [she] was in immediate and imminent danger of bodily harm;
>
> (3) the defendant's belief was reasonable; and
>
> (4) the defendant used no more force than was reasonably necessary to defend [himself] [herself] in light of the threatened or actual harm.

Maryland Criminal Pattern Jury Instructions ("MPJI-Cr") 5:07 (2nd ed., 2012). *See also Haile v. State*, 431 Md. 448, 471-72 (2013) (setting forth the elements of self-defense). An

[5] Defense counsel argued in closing that Neale approached the vehicle for a pre-arranged drug sale, but thereafter, Brian Proctor tried to rob Neale.

initial aggressor "may become a victim, acquiring a right of self-defense, simply by withdrawing in good faith from the encounter, taking reasonable steps to notify the victim." MPJI-Cr 5:07, comment at 928.[6] *See also* Wayne R. LaFave, Substantive Criminal Law § 10.4 (2d ed.) ("[A]n aggressor who in good faith effectively withdraws from any further encounter with his victim (and to make an effective withdrawal he must notify the victim, or at least take reasonable steps to notify him) is restored to his right of self-defense.").

The trial court denied Neale's request for a self-defense instruction on the basis that the evidence did not support a conclusion that Neale was not the aggressor. The court explained:

> I get stuck on the first [element] that the defendant is not the aggressor, and all of the evidence indicates that [Neale] came up to that vehicle with a gun pulled. I haven't heard anything to the contrary.

[6] We have held that self-defense is only available to initial aggressors who have withdrawn when the initial aggressor is a "nondeadly aggressor." *Cunningham v. State*, 58 Md. App. 249, 255 (1984) (quoting W. LaFave and A. Scott, *Criminal Law* (1972), at 395). In *Cunningham*, we held that the appellant in that case was foreclosed from asserting self-defense because he had "advanced with a loaded gun." *Id. See also Newman v. State*, 156 Md. App. 20, 68 (2003) ("To overcome her first aggressor status, appellant would have had to demonstrate that she . . . was a nondeadly aggressor and that she, in good faith, effectively withdrew from any further encounter with the victim."), *rev'd on other grounds*, 384 Md. 285, 863 A.2d 321 (2004).

Neale asserts that our holdings in *Cunningham* and *Newman* were incorrect, arguing that both cases misconstrued the treatise upon which they relied for the principle that nondeadly aggressors cannot claim self-defense when they withdraw. In light of our determination that the facts do not support a conclusion that Neale effectively withdrew, we need not address our previous holdings in *Cunningham* and *Newman*.

In response to defense counsel's argument that Neale's act of running away while shooting constituted an abandonment of the robbery and that Neale had become a victim, the court found that any alleged abandonment did not "overcome[] the fact that the person standing beside the car, even at 5 feet away, was the first one displaying deadly force."

We agree with the trial court that the evidence did not generate a self-defense instruction because there was no evidence to suggest that Neale withdrew from the encounter and notified his victims of the withdrawal. Furthermore, the evidence established that Neale was the initial aggressor. The evidence presented at trial demonstrated that one continuing affray occurred between Neale, the Proctors, and Cutchember. The only evidence presented suggested that Neale approached the Proctors while brandishing a gun and demanding that the individuals sitting in the vehicle "give it up." This constituted a threat of imminent deadly force, rendering legal Brian Proctor's response of similar force. *See Sydnor v. State*, 365 Md. 205, 220 (2001) (determining that a robbery victim has the right to employ deadly force in self-defense when "deadly force is then and there necessary to avoid imminent danger of death or serious bodily harm to the victim of the offense"). Brian Proctor did not, as Neale asserts, become "the aggressor in a new confrontation." Rather, Proctor was entitled to respond to Neale's threat of deadly force with deadly force in self-defense.

Moreover, the evidence suggested that as Neale ran from the Proctors' vehicle, he continued to fire shots towards the Proctors and Cutchember. Even when Neale was running

away, he continued to shoot at his victims. This was not an instance where the increased distance between Neale and his victims eliminated the threat of force, at least while Neale remained within firing range. Moreover, even if Neale subjectively intended to withdraw, any withdrawal was ineffective because Neale failed to take reasonable steps to communicate his withdrawal to the victims. *See* MPJI-Cr 5:07, comment at 928. Neale emphasizes that none of the six .40 caliber casings were recovered in the car's immediate vicinity, but rather they were recovered across the street from where the car was parked. Critically, there is no indication that the location where the casings were recovered was further than firing range from the Proctors' vehicle. Furthermore, Neale's attempt to analogize the facts of this case to *Sydnor*, *supra*, 365 Md. 205, is unavailing. In *Sydnor*, a robber attempted to rob the appellant. The appellant took the robber's gun and subsequently shot the robber as the robber attempted to flee. The Court of Appeals held that, after the appellant took the robber's gun, the robber was no longer an imminent danger and, accordingly, the appellant's act of shooting the robber as he fled was not self-defense. *Id.* at 218-20. Contrary to appellant in *Sydnor*, Neale retained his firearm and continued to shoot as he fled.[7]

[7] Neale's reliance upon *Corbin v. State*, 94 Md. App. 21 (1992), is similarly misplaced. In *Corbin*, the appellant was the initial aggressor. The appellant testified that she stopped attacking the victim after her husband pushed her away from the victim. The appellant testified that she attempted to back away and apologize to the victim. Thereafter, the victim began kicking the appellant. It was at this point -- after apologizing -- that the appellant ultimately used a knife to inflict a fatal blow. *Id.* at 24-25. We explained that,
(continued...)

The record supports the trial court's conclusion that a self-defense instruction was not generated by the evidence because no evidence "overc[ame] the fact" that Neale "even at 5 feet away, was the first one displaying deadly force." As such, we hold that the trial court properly exercised its discretion by denying Neale's request for a self-defense instruction.

III.

Neale's final claim is that the trial court abused its discretion by improperly regulating the prosecutor's closing argument. Specifically, Neale contends that the State improperly vouched for Brian Proctor's credibility by suggesting that the State had decided to prosecute Proctor. We are unpersuaded by Neale's claim.

Attorneys are afforded "great leeway" in presenting closing argument to the jury. *Spain v. State*, 386 Md. 145, 152 (2005) (citing *Degren v. State*, 352 Md. 400, 429 (1999)). In *Degren*, the Court of Appeals explained:

> The prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom. In this regard, [g]enerally, . . . the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of

[7] (...continued)
"appellant's testimony indicate[d]" that "the victim was in a position of safety and appellant was no longer the aggressor" at the time the second confrontation began. *Id.* at 27. Unlike in *Corbin*, in which the appellant specifically testified that she had backed away and apologized to the victim, there is no evidence in the present case to suggest a second confrontation. Rather, all of the evidence suggests that this case involved a continuing affray.

> the evidence and the character of witnesses which the [prosecution] produces.
>
> * * *
>
> While arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel, generally speaking, liberal freedom of speech should be allowed. 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 discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.

352 Md. 429-430. The regulation of closing argument is a task for the trial judge. "Determining when [the] boundaries [of appropriate] have been crossed is the task of the trial judge. And that determination shall stand on appeal unless, in making that determination, 'there has been an abuse of discretion by the trial judge of a character likely to have injured the complaining party.'" *Miller v. State*, 151 Md. App. 235, 251 (2003) (quoting *Wilhelm v. State*, 272 Md. 404, 413 (1975)).

With this framework in mind, we consider Neale's assertion that the trial court abused its discretion in regulating the prosecutor's closing argument. A brief discussion of relevant testimony is necessary to provide context. During Brian Proctor's cross-examination, Proctor testified that he had not been charged with any crimes in relation to the May 30, 2013 incident. Proctor testified that he had been told that he "still could be charged." Proctor testified that he remained worried about being charged at some point in the future.

Detective Jack Austin also testified about whether a decision had been made with respect to whether to charge Brian Proctor. Detective Austin testified that Brian Proctor had not been charged "[b]ecause he [was] the victim of this incident," but that he had not promised Proctor that he would not be charged. Detective Austin explained that the decision as to whether Brian Proctor would be charged would be made by himself and the State's Attorney, and that the decision had not yet been made.

In closing argument, defense counsel suggested that Brian Proctor's testimony was not credible because Proctor testified against Neale in order to avoid facing charges himself, arguing as follows:

> And finally, Brian Proctor's demeanor on the stand, his testimony, which is really what matters, his testimony from the stand. What is the simplest explanation for how he was on the stand? He knows he lied repeatedly. As long as he shows up and never admits what really happened, he is never going to get charged with anything.
>
> You all know it. He knows it. It's almost a year later. He is never going to get charged with a thing, no gun charges, no drug charges, no shooting charges. He has been off the hook since June 14, 2013.

In rebuttal, the prosecutor responded:

> [Defense counsel] calls what the State put on here today "sideshows." Sideshows? I told you at the beginning of this case and I told you at the end of this case, it does not rise or fall on the word of Brian Proctor. And I warned you, [defense counsel] was going to get up here, and he was going to talk a whole lot about how you can't trust Brian Proctor. What did I ask you to do? Don't trust him any further than you can throw him, and don't believe him any further than you can corroborate

> what he is telling you, because his credibility is suspect, absolutely . . . absolutely.
>
> He is found with two handguns, a huge bag full of marijuana, and he is on probation for conspiracy to distribute. You better believe his credibility is suspect. Has anyone tried to hide that? Well, Mr. Proctor did, on the stand, here. They may have initially told the officers, "Yeah," I mean, he actually admits to firing the guns. He admits to possessing them. That is certainly against his own interest, and that is going to be evidence that can be used against him later. He denied possessing the marijuana, he denied now that these are his guns. He says, he uses them, but "They are not mine." Why is he going to deny that? You want to know why? Because he knows he is still facing charges. He knows he can still be charged for having that marijuana, for having those guns.
>
> [Defense counsel] wants to make a mountain out of a molehill about the fact that Brian Proctor hasn't yet been charged? Ladies and gentlemen, we are going to deal with the attempted murder first. We will deal with the guys' (inaudible) later.
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE COURT]: Overruled.
>
> STATE'S ATTORNEY: Brian Proctor knows, and he told you at least twice, he is afraid he is going to get charged for that. I asked Detective Austin on the stand, "Why hasn't Brian Proctor gotten charged, why not?" Because Detective Austin was investigating a robbery and a shooting, he wasn't investigating a drug offense. He said, that is a decision to be made by him and the State, and it is one that hasn't been made yet. That is making a mountain out of a molehill. Brian Proctor can still be charged.

On appeal, Neale asserts that the trial court abused its discretion by overruling defense counsel's objection. Neale claims that by saying, "We will deal with the guys'

(inaudible) later," the prosecutor implied that the State had already decided to prosecute Brian Proctor, which would give Proctor no incentive to lie. The State responds that the comment referring to "deal[ing] with" Proctor's "(inaudible) later" was a reference to "dealing with" making the decision whether or not to prosecute Proctor later.

It is, at best, ambiguous precisely what the prosecutor intended its reference to "deal[ing] with the guys' (inaudible) later" to be. We are unpersuaded, however, that the trial court abused its discretion when overruling defense counsel's objection. First, we emphasize that the trial court was in a much better position to assess defense counsel's objection than we are, on a cold record, with a segment of the comment missing due to the transcriptionist's inability to hear. Furthermore, the record reflects that it was made exceedingly clear to the jury that a decision whether to charge Brian Proctor with any crime had not yet been made. Neale's characterization of the prosecutor's comment is nonsensical in light of the testimony and argument that was presented to the jury. Accordingly, we hold that the trial court properly exercised its discretion by overruling defense counsel's objection.

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