Circuit Court for Frederick County
Case No. 10-K-16-059182

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1590

September Term, 2017

EUKPEEH IZAAC LLOYD

v.

STATE OF MARYLAND

Friedman,
Beachley,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: December 19, 2018

During the closing rebuttal of a child abuse trial in Frederick County, the prosecutor expressed her belief to the jury that "there are at least a couple nurses on this jury, and there's also a Child Protective Services professional."[1] The State then added that those certain jurors' experiences could be "helpful" to the other jurors in "understanding" whether appellant, Eukpeeh Lloyd ("Lloyd"), had used reasonable force when he struck and injured his thirteen-year-old ward with a metal broom and phone charger cord. Defense counsel promptly sought a mistrial, which the trial judge denied. The jury ultimately convicted Lloyd of second-degree child abuse and second-degree assault. We determine that although the State's comments (if true) were questionable at best, the trial court did not abuse its discretion by denying a mistrial. Therefore, we affirm.

BACKGROUND & PROCEDURAL HISTORY

In October 2016, Lloyd and his wife, Jennifer, had been the legal guardians of (then) thirteen-year-old B.D. for about four years.[2] Early in the morning of October 20, 2016, while B.D. was getting ready for school, Lloyd told him to clean his bathroom, a

[1] As we will explain further, we are not certain, based on our review of the record, whether there were, in fact, any nurses on the jury.

[2] Throughout the two-day trial, all parties understood that Lloyd was B.D.'s legal guardian. By the time of sentencing, however, defense counsel contended that, according to B.D.'s birth certificate, Lloyd is actually his father. Regardless, whether Lloyd is B.D's biological father or legal guardian does not affect Lloyd's conviction for second-degree child abuse.

Lloyd and Jennifer had been married for about five or six years by the time of the trial. In addition to their relationship with B.D., they have a biological daughter who was about one year and two months old at the time of trial.

typical chore. When Lloyd got mad with B.D. for how he cleaned the bathroom, for using the wrong towel (a good towel from the kitchen) to clean it, and for not telling him about a leaky faucet, he grabbed a metal broom and started striking B.D with it for about three-to-five minutes. Lloyd continued striking B.D. with the broom even after the broomstick broke; the exposed jagged edge caused wounds on B.D.'s arm and leg. (B.D. would eventually get 22 stitches in his knee.) Jennifer dressed the wounds with gauze and cortisone cream; by this point, B.D. would be staying home from school for the day. Then, according to the protective order petition that Jennifer would file shortly after the incident, around 11 a.m., Lloyd came downstairs and started yelling at B.D. again about the bathroom. Lloyd splashed a glass of water on B.D. and told him to go upstairs. Later, according to B.D., Lloyd came upstairs, took B.D. into Lloyd and Jennifer's bedroom, and hit B.D. in the back with a phone charger cord, causing further injuries.

Jennifer eventually told B.D. that he should leave the house if he did not feel comfortable: she recommended he walk through the woods to a nearby bus station,[3] and suggested that if he wanted to take a bus to Washington, D.C., she would get him later. B.D. did not end up taking a bus, and later in the day, Jennifer picked him up from the woods. They first went to a friend of Jennifer's home in the City of Frederick. Then,

[3] Jennifer stated that the bus station was across the street from the house. (She testified that she told B.D. to walk through the woods to the bus station, even though the station was "across the street" from the house, so that Lloyd would not see that he had left the house.) Later, when B.D. testified, he stated that although the bus station was across the street near the house, it was still about a ten-minute walk from the house.

around midnight, Jennifer took B.D. to the Law Enforcement Center in Frederick to report the incident as child abuse.

At the Law Enforcement Center, Deputy Stephen Kocevar of the Frederick County Sheriff's Office took photographs of the injuries on B.D.'s right arm, right knee, right wrist area, left tricep, and lower back. Deputy Kocevar testified at trial and the photographs were entered into evidence.[4] Jennifer and B.D. also testified at the trial, detailing the facts described above.[5]

Before closing arguments, the trial judge instructed the jurors that to convict Lloyd of second-degree child abuse, they must find, among other elements, that "the defendant caused physical injury . . . as a result of cruel or inhumane treatment or a malicious act." The trial court's instruction noted that a parent may use "reasonable physical force" to discipline a child, and that when determining whether the physical force was reasonable, the jury should look at "all of the surrounding circumstances," including "the extent and duration of the physical contact with the child, and the impact or injury to the child, if any, resulting from the use of force."

[4] The State stipulated that Deputy Kocevar did not have personal knowledge of how any of the injuries occurred.

[5] We note that the State granted Jennifer immunity to testify. In addition to the facts described above, Jennifer's trial testimony included the contentions that she did not recall Lloyd hitting B.D. with the cord; that it was a real challenge to get B.D. to do his regular chores; that she thought the extent of the injuries was an accident; and that "I don't know what happened in that incident." Notably, less than two weeks before the date that had originally been set for trial (in May 2017), Jennifer put B.D. on a bus and sent him to live with his assumed biological family in Ohio, despite knowing that the State desired his testimony at trial.

Conceding that "nobody's really challenging what injuries were sustained," defense counsel's closing statement centered on the argument that Lloyd's actions were reasonably disciplinary.[6] Defense counsel also advised the jury to take note that the State did not present any medical expert testimony about the extent of B.D.s injuries,[7] and suggested that the injuries might have grown or changed between the morning hours when they were inflicted and the time, after midnight, when they were photographed.[8]

In rebuttal, the State told the jurors that, having seen the photographs of the wound to the knee, they could see "how deep it is." The State then added: "You know, there are at least a couple nurses on this jury, and there's also a Child Protective Services professional. The Court told you that, in making your decision, you can build on your

[6] Defense counsel added during closing argument that "maybe [Lloyd] overreacted that day" and "Did [Lloyd] lose control? Yes, he might have lost control. Was he reckless? Yes, might have been reckless, but his intent was not to cause harm."

[7] The State attempted to have medical personnel who had attended to B.D. testify about the injuries. However, the trial court granted a *motion in limine* to exclude their testimony; the trial court found that they would be expert witnesses, and the State had not met Rule 5-702's notice requirements to the defense.

[8] Defense counsel stated: "We have no idea how that gash may have changed in time between the time that it was allegedly inflicted and the time of the 22 stitches. You think about it. How much time? More than 24 hours elapsed with [B.D.] going through the rest of his day, being sent out to hide in the woods, walking around, going to the police station, going here, going there, and, yet, there's no medical evidence to show that the gash is the gash that was accidentally inflicted by this defendant. There are a number of things that could have happened that changed the profile of that gash over time." Though Defense counsel focused on the time span between the injuries and the time when B.D. was taken to the hospital for treatment, the relevant time span for the jury's deliberations would be the time between the injuries and when Deputy Kocevar took the photographs that were entered into evidence.

life's experiences. These are people that will be helpful to you in understanding the evidence in this case."

We pause to note that the State's assertion might not, in fact, have been entirely correct. According to the *voir dire* transcript, a number of potential jurors identified themselves as being nurses, two more said they had EMT experience, and one potential juror described himself as having a background in radiology. However, none of these potential jurors were selected for the jury.[9] (An individual who worked for CPS in neighboring Washington County *was* selected for the jury.) It is possible that in the heat of closing rebuttal, the State conflated the broader venire with the resulting jury. Nevertheless, we are not certain that there were, in fact, any nurses on the jury. *See* Rule 4-312(c)(3) (unless offered into evidence, the jury list is not part of the case record).

In any event, defense counsel promptly responded to the State's comments by asking for a bench conference. Defense counsel told the judge: "I'm going to object to the rebuttal, and I'm going to ask for a mistrial at this point." After hearing the State and defense counsel's arguments on the matter—during the bench conference, defense counsel specifically asked for a mistrial three times, but did not otherwise seek a curative

[9] One juror who *was* selected worked at a treatment center for alcohol and substance abuse. However, this juror did not identify during *voir dire* as (or claim to be) a nurse, and the *voir dire* question that the juror responded to was not the question about having medical experience, but the question that asked: "Do you have any reason why you cannot give this case your undivided attention and render a fair and impartial verdict?" (The juror told the judge that he or she had initially thought that somebody involved in the trial might have been scheduled at the treatment center, but that, upon further reflection, he or she had mistaken the individual for someone else.)

instruction or move to strike the comments—the trial judge simply concluded, "All right. Your motion is denied." As soon as the bench conference ended, the trial judge dismissed the jury to begin deliberations.

The jury convicted Lloyd of two counts of second-degree child abuse and two counts of second-degree assault; it acquitted Lloyd of two counts of first-degree assault. At a subsequent sentencing, the court sentenced Lloyd to a total of thirty years, all but ten years suspended, followed by five years of supervised probation.[10] Lloyd timely appealed.

DISCUSSION

Lloyd claims that the State's closing rebuttal comments: (1) encouraged jurors to go beyond the evidence presented at trial and to rely on their own specialized knowledge in deciding the case; and (2) urged jurors to inordinately defer to the knowledge and opinion of the jurors with specialized knowledge, depriving Lloyd of his right to a unanimous jury.[11] Lloyd contends that this impropriety was "so grave that only the declaration of a mistrial could vouchsafe" his right to a fair trial. Though we agree that

[10] The court sentenced Lloyd to fifteen years, with five years suspended, for the first count of second-degree child abuse. The court sentenced Lloyd to a consecutive fifteen years, with all fifteen years suspended, for the second count of second-degree child abuse. The two counts of second-degree assault merged.

[11] Lloyd also argues that by commenting upon certain jurors' professions, the prosecutor violated Rule 4-312(c)(2)(B), which restricts disseminating information contained on the jury list. Though "[a]rguing facts not in evidence is highly improper," *Fuentes v. State*, 454 Md. 296, 319 (2017), the potential violation of Rule 4-312(c)(2)(B) here—were it a violation to refer to unspecified jurors' professions—would hardly merit vacating a criminal conviction.

the prosecutor's comments were inappropriate, they were not so substantially prejudicial as to deny Lloyd a fair trial. Thus, the trial court did not abuse its discretion in denying a mistrial.

I. The State's Closing Rebuttal Comments Were Improper.

The right to a jury trial guarantees "a fair trial by a panel of impartial, 'indifferent' jurors." *Jenkins v. State*, 375 Md. 284, 301 (2003) (quoting *Couser v. State*, 282 Md. 125, 138 (1978)). Moreover, Article 21 of the Maryland Declaration of Rights requires that a jury's guilty verdict be unanimous. The Court of Appeals has noted that "[t]he concept of unanimity . . . embraces not only numerical completeness but also completeness of assent, i.e., each juror making his or her decision freely and voluntarily, without being swayed or tainted by outside influences." *Butler v. State*, 392 Md. 169, 181 (2006) (quoting *Caldwell v. State*, 164 Md. App. 612, 635 (2005)) (Emphasis removed). "It is recognized that a juror should not be encouraged, requested or required to surrender his conscientious convictions for the purpose of reaching a verdict." *Burnette v. State*, 280 Md. 88, 93 (1977). Accordingly, the Court of Appeals has, for instance, disapproved a jury instruction that "implies that a 'good' juror acquiesces in a verdict rather than adheres to his or her own judgment." *Butler*, 392 Md. at 186 (quoting *Thompson v. State*, 371 Md. 473, 486 (2002)). Likewise, a juror should not be placed in a position where he or she "might understandably conclude that proper 'deference' to the opinions of the majority demands that he abandon his conscientious position." *Burnette*, 280 Md. at 100. Nor should a judge "tacitly affirm[] the 'intelligence' of the majority's

position," giving it "the gloss of acceptability." *Id.* As Justice Holmes noted, "Any judge who has sat with juries knows that, in spite of forms, they are extremely likely to be impregnated by the environing atmosphere." *Frank v. Mangum*, 237 U.S. 309, 349 (1915) (Holmes, J., dissenting).

Here, whether the State's comments might be characterized as effectively seeking to bootstrap certain jurors as *de facto* expert witnesses,[12] as "vouching" for those jurors,[13] or as singling out jurors to vouch for the strength of its case, the State should not

[12] Needless to say, "opinions based on a witness's 'training and experience . . . should only [be] admitted as expert testimony, subject to the accompanying qualification and discovery procedures.'" *Johnson v. State*, 408 Md. 204, 225 (2009) (quoting *Ragland v. State*, 385 Md. 706, 709 (2005)); *see* Rule 5-606(a) ("A member of a jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting."); *But cf. State of Maryland v. Balt. Radio Show*, 338 U.S. 912, 914 (1950) ("The jury is called upon to decide the facts as it hears them from the witness stand in the light of its past experience and, if you please, its past knowledge."); Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40, 40, 51 (1901) (describing that it was historically a trial practice to select "a jury of persons especially fitted to judge of the peculiar facts upon which the particular issue at bar turn[ed]," and then indicating that the modern phenomenon of expert witnesses is actually the anomaly: the expert witness "takes the jury's place" by inferring conclusions from the facts at hand); Elihu Samuel Riley, *The Ancient City: A History of Annapolis, in Maryland, 1649-1887* 44 (1887) (noting that, in 1656, defendant Judith Catchpole denied having been pregnant, so the Provincial Court of Patuxent [Calvert] County specially "ordered 'a jury of able women to be impaneled and to give in their verdict to the best of their judgment whether she, the said Judith, hath ever had a child, or not.'").

[13] *See U.S. v. Young*, 470 U.S. 1, 18-19 (1985) ("The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.")

have sent the message that certain jurors had a better understanding of the case and that other jurors could or should defer to them when forming an opinion. Here, had defense counsel sought a curative instruction or motion to strike the improper comments, the trial court would have done well to grant either. However, defense counsel only expressly sought a mistrial, which the trial court denied. In the specific context of this case, we do not conclude that the trial court abused its discretion in denying a mistrial.

II. The Trial Court Did Not Abuse its Discretion by Denying a Mistrial.

The Court of Appeals has emphasized that the trial judge is "in the best position to determine whether the information to which the jurors were exposed was prejudicial." *Butler*, 392 Md. at 190 (discussing *Bruce v. State*, 351 Md. 387, 718 (1998)). "The [trial] judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able to ascertain the demeanor of the witnesses and to note the reaction of the jurors and counsel to inadmissible matters. That is to say, the judge has [his or her] finger on the pulse of the trial." *State v. Hawkins*, 326 Md. 270, 278 (1992). Accordingly, given that trial judges are "in the best position to evaluate whether a defendant's right to an impartial jury has been compromised, 'an appellate court will not disturb the trial court's decision on a motion for mistrial . . . absent a clear abuse of discretion.'" *Summers v. State*, 152 Md. App. 362, 375 (2003) (quoting *Benjamin v. State*, 131 Md. App. 527, 541 (2000)).

An abuse of discretion occurs when:

> '. . . no reasonable person would take the view adopted by the [trial] court,' or when the court acts 'without reference to any guiding rules or

> principles.' It has also been said to exist when the ruling under consideration 'appears to have been made on untenable grounds,' when the ruling is 'clearly against the logic and effect of facts and inferences before the court,' when the ruling is 'clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result,' when the ruling is 'violative of fact and logic,' or when it constitutes an 'untenable judicial act that defies reason and works an injustice.'

Nash v. State, 439 Md. 53, 67 (2014) (quoting *Alexis v. State*, 437 Md. 457, 478 (2014)). An examination of whether there has been an abuse of 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)) (Internal quotation marks omitted). Importantly, as an appellate court, we will not reverse a ruling for an abuse of discretion "simply because [we] would not have made the same ruling." *Nash*, 439 Md. at 67 (quoting *Alexis*, 437 Md. at 478) (Emphasis removed). "The abuse of discretion standard does not provide for one outcome to be right while all other outcomes are wrong." *Cagle v. State*, ___ Md. ___, 2018 WL 6566026, No. 15, Sept. Term, 2018, at *5 (Dec. 13, 2018).

Intertwined with the stringency of the abuse of discretion standard is the fact that a trial judge should only declare a mistrial "under extraordinary circumstances and where there is a manifest necessity to do so." *Benjamin*, 131 Md. App. at 541 (quoting *Allen v. State*, 89 Md. App. 25, 42-43 (1992)). "The record must compellingly demonstrate clear and egregious prejudice to the defendant to warrant such a drastic measure." *Id.* (Internal quotation marks omitted); *see Nash*, 439 Md. at 68 (the abuse of discretion standard is flexible to the extent that its range "is dependent on the type of discretionary decision a

trial judge is called upon to make" and the particular circumstances of each case). When deciding whether a mistrial is necessary, "[t]he question is whether the prejudice to the defendant was so substantial that he was deprived of a fair trial," *Kosmas v. State*, 316 Md. 587, 594-95 (1989).

Here, under the particular facts of this case, we cannot conclude that *no* reasonable person would have taken the view adopted by the trial court, and we cannot discern such egregious prejudice to the defendant that it was untenable to deny the extraordinary remedy of a mistrial. Indeed, we find *Nash v. State*, 439 Md. 53 (2014) particularly instructive as to the high bar for reversing the denial of a mistrial. In *Nash*, the Court of Appeals determined that it was not an abuse of discretion to deny a mistrial when the trial court received a jury note that claimed a juror had said she was willing to change her position from not guilty to guilty if it meant that she could go home sooner. If the Court of Appeals did not consider that situation egregious enough to merit a mistrial, we are disinclined to view what occurred here as untenable.

As noted above, defense counsel acknowledged during closing argument that "nobody's really challenging what injuries were sustained," and the jury saw multiple photographs of the injuries caused by Lloyd's use of a metal broom and phone cord charger to strike his thirteen-year-old ward. As evidenced by the successful *motion in limine* that excluded the State's medical witnesses, expert testimony regarding the extent of B.D.'s injuries was not required to convict Lloyd of second-degree child abuse: rather, the State only needed to prove that Lloyd "caused physical injury" to B.D. by "a

malicious act," and that, as a result, B.D.'s "health or welfare was harmed or threatened." When determining whether the force used was reasonable, the jury instructions stated that the jury should look at "all" of the surrounding circumstances, including "the impact or injury to the child, *if any*, resulting from the use of force." (Emphasis added). In short, the jury did not need to rely on expert opinion regarding the scope of physical injury to determine whether B.D's "unchallenged" injuries were a result of unreasonable force. Moreover, the court had earlier instructed the jurors: (1) "[t]he verdict must be the considered judgment of each of you"; (2) "each of you must decide the case for yourself"; (3) "do not surrender your honest belief as to the weight or effect of the evidence only because of the opinion of your fellow jurors, or for the mere purpose of reaching a verdict"; and (4) "closing statements . . . are not evidence[]." *See Ferrell v. State*, 318 Md. 235, 251 (1990) ("[I]t must be assumed that the [] jury . . . logically and properly applied the instructions of the court . . ."). Additionally, we reiterate that the trial judge was in the best position to determine whether the statements had a prejudicial impact on the jurors, *Butler*, 392 Md. at 190, owing to her firsthand ability "to note the reaction of the jurors" to the State's comments. *Hawkins*, 326 Md. at 278.

In concluding that the trial court did not abuse its discretion in denying a mistrial, we make two further observations. First, the impropriety here—the prosecutor's comments during closing rebuttal—is not an instance of *juror* misconduct that would impose upon the trial judge "the duty to conduct *voir dire sua sponte* [] prior to ruling" on a mistrial motion. *Nash*, 439 Md. at 69; *see id*. at 76 (quoting *Butler*, 392 Md. at 189-

90) ("[t]he trial judge [] is not required to conduct *voir dire* every time there is an allegation that the jury is prejudiced."); *Nash*, 439 Md. at 79 ("Because the presumption [of prejudice] does not apply to the facts of the present case, the burden of proof as to the mistrial motion did not shift from [the defendant], and, thus, the trial judge did not inherit the responsibility to conduct a *voir dire sua sponte* (in the absence of a request for *voir dire* from either of the parties).").

Second, in considering the potential effect of the prosecutor's comments on the jury, we again note that the State's assertion might not have been factually correct. Though an individual who worked for CPS was on the jury, the prosecutor may have incorrectly conflated the venire with the resultant jury when she claimed, "there are at least a couple nurses on this jury." According to our review of the *voir dire* transcript, none of the potential jurors who identified themselves as nurses, or as having other medical training, were selected for the jury.

In sum, it was inappropriate for the prosecutor to send the message during closing rebuttal that certain jurors had a better understanding of the case and that other jurors could or should rely upon them when forming an opinion during deliberations. However, under the particular circumstances of this case, the trial court did not abuse its discretion in denying a mistrial.

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