UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1797

September Term, 2013

KYLE KNOX

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Kehoe,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: September 1, 2015

After a jury trial in the Circuit Court for Baltimore City, Kyle Knox was convicted of possession of a controlled dangerous substance ("CDS"), specifically, cocaine. The court imposed a sentence of two years' imprisonment. Mr. Knox has appealed and presents three issues, which we rephrased:

I. Did the trial court err by overruling appellant's objection to a portion of the prosecutor's rebuttal closing argument?

II. Did the trial court err by denying appellant's motion for a mistrial based on improper closing argument by the prosecutor?

III. Was the evidence legally sufficient to sustain appellant's conviction?

For the following reasons, we shall affirm the judgment of the trial court.

FACTS AND PROCEEDINGS

When viewed in the light most favorable to the State as the prevailing party, the evidence at trial showed the following:

In the early afternoon of February 12, 2012, Baltimore City Police Officers John Gorman ("Detective Gorman"), Harvey Martini ("Sergeant Martini"), and Charles Sills ("Detective Sills") were on patrol in an unmarked vehicle. Detective Gorman observed an individual, later identified as appellant, wearing a black Dickies-style hooded coat in the alley of 1900 Duncan Street. Detective Gorman saw the individual reach to the top of a fence on one side of the alley, retrieve a black plastic bag, open it, and look inside. Detective Gorman testified that, at the time he observed all of this, appellant was standing about 90 feet away. Believing that the individual was accessing a stash of narcotics, Detective Gorman told Sergeant Martini what he had seen and instructed him to circle the

block so that they might intercept the man as he emerged from the alley. As the officers approached the other end of the alley, they noticed another man walking towards it. The second man noticed the officers' vehicle—and perhaps the three men inside—and reversed his course. The man in the black coat then walked out of Detective Gorman's field of vision.

Detective Gorman then exited the automobile, walked into the alley to the spot where he had first noticed the man in the black coat, and found the black plastic bag. Inside the bag were fifty vials containing a white substance that the Detective believed—correctly—to be cocaine. Meanwhile, Sergeant Martini drove back around to the other side of the block and followed appellant to 2100 E. North Avenue, a nearby auto repair garage. As appellant entered the garage, Sergeant Martini pulled into the garage's parking lot and followed him inside. Sergeant Martini found that the door to the garage's bathroom was locked, but when he knocked on the door, appellant answered.

As Sergeant Martini entered the garage, Detective Gorman, who had since secured the bag of contraband, rejoined his companions at the garage. Appellant was placed under arrest. Following a search, appellant was found to have $248 in cash on his person.

Detective Sills, the third officer in the car, did not testify at the trial.

After the State's case was presented, appellant's counsel moved for a judgment of acquittal in which counsel simply asserted that there was "insufficient evidence" to convict appellant of "simple possession" of CDS. The court denied the motion. Appellant

then called Orrin Henry as his sole witness. Orrin Henry, an investigator for the Public Defender's Office, testified as to the length of the alley and the fence that ran alongside it. He agreed that Detective Gorman's estimate that the area where Detective Gorman recovered the drugs was about 90 feet away from the sidewalk was pretty fair and accurate.

After the close of appellant's case, his counsel made the following motion for judgment of acquittal:

> [APPELLANT'S COUNSEL]: All right. Well, at this point the defense will make a motion for judgment of acquittal based on totality of the evidence . . . In a light most favorable to the State, the defense contends that the evidence produced by the State is insufficient to reach a conclusion beyond a reasonable doubt that these officers saw this [appellant] [in the noted alley] from [their police vehicle] 173 to 204 feet away, not 90 feet away . . . factually, I think, it raises a question whether you'd see anything like that at all.
>
> It's the only time they're supposedly saying that [appellant] touched anything, if it's even the same person. Then two and a half minutes later or maybe only one and a half minutes later, but either way a substantial amount of time later without continuous observation another person is seen supposedly this [appellant], another person is caught at the end of the alley, definitely this [appellant] he's walking regularly into a garage, goes to the bathroom. [Sergeant Martini] [k]nocks on the door, [appellant] opens the door, [appellant is] frisked, put under arrest. It has nothing to do with any drugs on him whatsoever. End of story.
>
> I'll make a motion as to the . . . second count [CDS possession], same motion, same argument, insufficiency of evidence. Thank you very much.
>
> Again, the court denied the motion.
>
> During closing, defense counsel stated:

[APPELLANT'S COUNSEL]: Well, again you have to say, again, where is [Detective] Sills? He's in the right seat [of the officers' police vehicle], also. Why isn't he here telling us whether he saw something or saw nobody? . . . Bring the man in. He's not going to get docked in pay. He's going to get – he's going to be on pay when he's here. Pay him to be here and testify, finish the other half of his job.

The following occurred during the State's rebuttal:

[STATE'S ATTORNEY]: . . . Now certainly the burden is on the State to prove this case and there's no question about that, but earlier [appellant's] counsel asked, [[“]]I would have loved to hear from Detective Sills[[”]]. Well, [appellant's counsel] could have subpoenaed Detective Charles –

[APPELLANT'S COUNSEL]: Objection.

[STATE'S ATTORNEY]: Sills.

[THE COURT]: Overruled.

[APPELLANT'S COUNSEL]: May we approach?

[THE COURT]: Overruled.

[APPELLANT'S COUNSEL]: May we approach?

[THE COURT]: Nope.

[STATE'S ATTORNEY]: [Appellant's] Counsel could have subpoenaed Detective Sills.

[APPELLANT'S COUNSEL]: Objection, burden shifting. May we approach?

[THE COURT]: Overruled. You raised it multiple times . . . Overruled. Go ahead.

> [STATE'S ATTORNEY]: And counsel could have subpoenaed Detective Sills if he wanted him here. He asked everybody, ["]I wish I would have heard from him.["] Well, he didn't subpoena him. That's part of the misdirection here. . . .

Thereafter, appellant's counsel made a motion for mistrial which was argued and ruled upon as follows:

> [APPELLANT'S COUNSEL]: – [T]he defense [moves] for mistrial. It's the defense's contention that the State engaged in impermissible burden shifting in the course of its closing argument.
>
> * * *
>
> [APPELLANT'S COUNSEL]: . . . The defense has no affirmative defenses. The defense stipulated to certain evidence. And this defense has no affirmative burden to prove anything whatsoever and it's entirely on the State to engage in the burden of proof. If the State fails to call a witness, the defense is allowed to point that out to the jury. The defense is allowed to question why the State didn't call it.
>
> The State is not allowed to respond by saying, the defense could have called that witness. That is beyond –
>
> [THE COURT]: Any circumstance –
>
> [APPELLANT'S COUNSEL]: – and we move for mistrial.
>
> [THE COURT]: Any circumstance? You're not aware of any cases where the Court of Appeals has said that –
>
> [APPELLANT'S COUNSEL]: I am not.
>
> [THE COURT]: You're not?
>
> [APPELLANT'S COUNSEL]: I'm not.

[THE COURT]: Once you start presenting a defense, if you do present a defense, number one. Number two, if the witness is or might be cumulative, they don't have to call every potential witness that they – that is out there. And it's not their commentary to suggest that the defense – that the State is hiding someone or hiding something if it – if it's not a – well, in any event I'll pull up the case. I'll have it tomorrow morning.

* * *

[STATE'S ATTORNEY]: I just want to note for the record that I believe it was an invited response and that's in the –

[THE COURT]: It was.

[STATE'S ATTORNEY]: – doctrine. And additionally, that I prefaced it with that, the burden is completely on [the State] and that [appellant] had – and I said that . . . just so that the –

[THE COURT]: Right.

[STATE'S ATTORNEY]: – jury knew, but also the issue that I was responding to was [appellant's] counsel . . . [indicating] but ["]I would have loved to hear from [Detective Sills], where is [Detective Sills].["] I would have – and it went on for a while, which I thought you know, needed to be responded [*sic*]. And I made a, you know, I made a comment saying, well, . . . if [appellant's counsel] wanted to hear from [Detective Sills], like he said, he could have, you know, certainly requested.

* * *

[THE COURT]: And I'm going to deny the motion, but it's made on the record.

Ultimately, the jury found appellant guilty of possession of CDS. Additional facts will be provided below as our analysis requires.

DISCUSSION

I. and II. The State's Closing Argument

Appellant contends that it was improper to allow the State to comment "on the failure of the defense to produce a witness" because such comment "implied that the defense ha[d] a burden of proof" to satisfy. He asserts that the State's comment was not permitted by the "invited response doctrine" because it was not preceded by improper argument by appellant's counsel. Appellant insists that the error in allowing the noted portion of the State's rebuttal was not harmless and so reversal of his conviction is required.

With respect to the spectrum of permissible closing arguments, we acknowledge that counsel are given considerable license to "discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence." *Wilhelm v. State*, 272 Md. 404, 412 (1974). Counsel may order such commentary in a manner which focuses on the points which bolster their theory of the case and best suits their arguments. *Id*. In doing so, counsel are entitled to "liberal freedom of speech" in "discuss[ing] the facts proved or admitted in the pleadings, assess[ing] the conduct of the parties, and attack[ing] the credibility of witnesses." *Id*. Although there is a wide range of acceptable closing argument, it is not without limits; prosecutors are "not free to 'comment upon the defendant's failure to produce evidence to refute the State's evidence' because it could amount to an impermissible shift of the burden of proof." *Lawson v. State*, 389 Md. 570,

595 (2005) (quoting *Eley v. State*, 288 Md. 548, 555 n. 2 (1980)). Closing remarks not within the bounds of appropriate argument require reversal when they "actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused[.]" *Beads v. State*, 422 Md. 1, 10 (2011) (quoting *Degren v. State*, 352 Md. 400, 431 (1999)).

Simply stated, we are not persuaded that the indicated portion of the State's rebuttal closing amounted to argument which impermissibly shifted the burden of proof to the defense. We view the previously-quoted portion of defense counsel's closing argument as having "opened the door" for the rebuttal argument in question.

The Court of Appeals has explained this point of law as:

> The "opened door" doctrine is based on principles of fairness and permits a party to introduce evidence that otherwise might not be admissible in order to respond to certain evidence put forth by opposing counsel. *Conyers v. State*, 345 Md. 525, 545 (1997). "'[O]pening the door' is simply a way of saying: 'My opponent has injected an issue into the case, and I ought to be able to introduce evidence on that issue.'" *Clark v. State*, 332 Md. 77, 85 (1993).

Mitchell v. State, 408 Md. 368, 388 (2009) (internal parallel citation omitted).

The doctrine applies not only to the presentation of responsive evidence, but to counsels' opening and closing arguments as well. *Id*. (citation omitted).

In the instant case, appellant's counsel's closing highlighted the fact that the third officer involved in the arrest of appellant was not called as a witness by the State. Counsel went on to argue that testifying at trial was a part of the officer's job and that he

would have even received his normal wage for time spent in court. Moreover, appellant's counsel argued a theory of the case which relied upon casting doubt on the accuracy and consistency of the observations of Detective Gorman and Sergeant Martini. From there, counsel openly questioned the strength of the State's case by asking, rhetorically, "[w]hy isn't [Detective Sills] here telling us whether he saw something or saw nobody[,]" and by implying that the State should have "[brought] the man in."

Because counsel argued that the State should have called Detective Sills, counsel "opened the door" for the State's response. *See Mitchell*, 408 Md. at 388-89 (concluding that, where defense counsel's closing argument included remarks regarding the fact that several individuals were not called by the State as witnesses, the State's rebuttal "calling attention to [the defense's] subpoena power was fair comment.") (citation omitted). Simply informing the jury that the defense, like the State, had the power to subpoena Detective Sills was an appropriately tailored, and thus permissible, rebuttal. *Id*. at 389 (holding that rebuttal which merely called attention to the defense's subpoena power was a properly "tailored response to defense counsel's assertion that all the potential witnesses should have been brought into the courtroom[.]").

Appellant also contends that the trial court abused its discretion by denying his motion for mistrial which was also based on the State's closing argument. "Generally, the decision to grant or deny a mistrial is committed to the discretion of the circuit court." *Parker v. State*, 189 Md. App. 474, 493 (2009). As we explained, the argument in

question was proper. Because the prosecutor's comments were permissible closing argument under the circumstances, the trial court did not abuse its discretion in denying appellant's motion for a mistrial.

III. Sufficiency of the Evidence

Appellant contends that the evidence adduced at trial was not sufficient to sustain his conviction for CDS possession. He points out that Detective Gorman testified that he was in his police vehicle when he first observed appellant, approximately 90 feet away, in the alley of 1900 Duncan Street. Appellant notes that although Detective Gorman stated that he saw appellant near a wooden fence, "the overall length of the fenc[ing] [in the alley] was 202 feet" and "the wooden portion of it measured 31 feet." He asserts that "[g]iven the distances involved . . . Detective Gorman's observations may not have been accurate." Further, appellant insists that "[t]here were other deficiencies in the State's . . . case" such as: (1) Sergeant Martini, the officer who confronted appellant, did not see any criminal activity and did not see Detective Gorman recover the bag containing the vials of cocaine; (2) the only other individual seen approaching the subject alley was never apprehended; (3) no "drugs, weapons, or contraband" was found on appellant's person when he was arrested; (4) there was "no forensic evidence linking appellant to the [black plastic] bag found on the fence"; and (5) Detective Gorman did not wear gloves when handling the bag containing the narcotics and "did not request fingerprint analysis of the bag or its contents." As such, appellant argues that the evidence "fell short of establishing

that he had knowledge of, or exercised dominion and control over, the [subject] contraband" and so "his conviction for possession of cocaine should be reversed without retrial." The State asserts that appellant's final contention, *viz.*, that the evidence was insufficient to demonstrate actual or constructive possession, is not preserved. We agree.

Maryland Rule 4-324(a) provides:

> **Rule 4-324. Motion for judgment of acquittal.**
>
> (a) **Generally.** A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. *The defendant shall state with particularity all reasons why the motion should be granted.* No objection to the motion for judgment of acquittal shall be necessary. A defendant does not waive the right to make the motion by introducing evidence during the presentation of the State's case.

Appellant's motion for judgment of acquittal was only with respect to the fact that the evidence was not sufficient, given the possible inaccuracy as to the observations of the officers involved in appellant's arrest. As such, appellant failed to preserve any arguments related to the lack of other forensic evidence, the absence of contraband on appellant's person, and the failure to apprehend the only other individual said to have been seen near the alley where the narcotics were located. The contentions are not preserved for our review. *See, e.g. Starr v. State*, 405 Md. 293, 304 (2015) ("When ruling on a motion for judgment of acquittal, the trial court is not required to imagine all reasonable offshoots of the argument actually made."); *Claybourne v. State*, 209 Md.

App. 706, 750 (2013) ("It is a well established principle that our review of claims regarding the sufficiency of evidence is limited to the reasons which are stated with particularity in an appellant's motion for judgment of acquittal.") (citation omitted).

Looking past preservation, we are persuaded that the evidence was sufficient to show that appellant possessed the narcotics in question.

When reviewing evidentiary sufficiency we are charged with determining "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *See also Bordley v. State*, 205 Md. App. 692, 716 (2012). In doing so, it is not for this Court to retry the case by assessing witness credibility or resolving conflicts in evidence; such findings are the province of the fact-finder. *Id*. at 717 ("Because the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence.") (quoting *Smith v. State*, 415 Md. 174, 185 (2010)). "Instead, '[w]e defer to the [fact-finder's] inferences and determine whether they are supported by the evidence.'" *Id*. (citation omitted).

Detective Gorman saw a man, later identified as appellant, pick up a black plastic bag from the top of a fence in an alley, look inside it, and then return to bag to its hiding place. The man was wearing a black Dickies-style hooded coat and the alley was located

on 1900 Duncan Street. Detective Gorman observed the man in the black coat until he walked out of the alley and out of sight. Detective Gorman then walked into the alley to the location where he first observed appellant. At that location, the Detective recovered a black plastic bag containing fifty vials of cocaine. While Detective Gorman was in the alley, Sergeant Martini circled back around the block, saw the man dressed in the manner described by Detective Gorman, and watched as the man entered a nearby auto repair garage. Sergeant Martini proceeded to the garage and found the establishment's bathroom door closed; when he knocked, appellant emerged. Shortly thereafter, Detective Gorman arrived at the garage and identified appellant as the man he had seen handling the subject bag in the alley.

"The fact that drugs were not found on the person of the [accused] does not prevent the inference that the [accused] had possession and control of those drugs." *Archie v. State*, 161 Md. App. 226, 245 (2005) (citation omitted). In determining whether the evidence was sufficient to infer that appellant possessed the bag of drugs in question, we consider the following factors:

> (1) proximity between the [accused] and the contraband, (2) the fact that the contraband was within the view or otherwise within the knowledge of the [accused], (3) ownership or some possessory right in the premises or the automobile in which the contraband is found, or (4) the presence of circumstances from which a reasonable inference could be drawn that the [accused] was participating with others in the mutual use and enjoyment of the contraband.

Id. (quoting *Hall v. State*, 119 Md. App. 377, 394 (1998)).

As to the first factor, the record shows that appellant was seen handling the suspect bag which was later confirmed to contain cocaine. Shortly thereafter, appellant was located within walking distance from the site where the drugs were found. As to the second factor, it is clear that the drugs in question were within appellant's view and knowledge as he was seen handling the bag the drugs were in. Regarding the third factor, no evidence was offered as to the owner of the fence upon which the bag was found, but Detective Gorman testified that appellant's actions were consistent with those of a person hiding a stash of drugs. Lastly, there was no indication of mutual use of the drugs as appellant was the only individual seen in contact with them during the time of the incident in question.

Taking into account the pertinent factors, we are convinced that the evidence is sufficient to establish, beyond a reasonable doubt, that appellant constructively possessed the cocaine found in this case. *Burlas v. State*, 185 Md. App. 559, 569 (2009) ("'No greater degree of certainty is required when the evidence is circumstantial than when it is direct, for in either case the trier of fact must be convinced beyond a reasonable doubt of the guilt of the accused.'") (quoting *Nichols v. State*, 5 Md. App. 340, 350 (1968)). We are not persuaded by appellant's arguments to the contrary. It was for the jury to determine how much credit should be given to the testimony of the witnesses, as well as the weight to be assigned to the lack of forensic evidence, the absence of contraband on appellant's person, and the officers' failure to apprehend the only other individual

observed during the events in question. *See Sifrit v. State*, 383 Md. 116, 135 (2004) ("The jury was free to believe some, all, or none of the evidence presented in this case."). Accordingly, we cannot conclude that a rational jury could not have found that appellant possessed the drugs in question.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.