Circuit Court for Prince George's County
Case Nos. CT180042X & CT190528X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1890 & 1893

September Term, 2019

HOWARD EDGAR THOMPSON, III

v.

STATE OF MARYLAND

Fader, C.J.,
Graeff,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: March 29, 2021

Following a jury trial in the Circuit Court for Prince George's County, the appellant, Howard Edgar Thompson, III, was convicted of criminally negligent manslaughter and negligent homicide by motor vehicle while under the influence of alcohol per se. The circuit court imposed concurrent sentences of two years' incarceration, all but twelve months suspended, and two years' supervised probation. Thompson timely appealed and presents the following three issues for our review, which we quote:

> 1. Did the trial court abuse its discretion when it overruled defense counsel's chain of custody objection and permitted the State to introduce Brooke Welsh's report, which contained the results of her blood alcohol analysis?
>
> 2. Did the trial court err and/or abuse its discretion when it permitted Ms. Welsh to testify about the results of her blood alcohol analysis, when her testimony was not relevant and was more prejudicial that probative?
>
> 3. Did the trial court abuse its discretion when it overruled defense counsel's objection to improper and prejudicial remarks the prosecutor made during her rebuttal closing argument?

We answer Thompson's questions in the negative and shall therefore affirm the judgments of the circuit court.

BACKGROUND

In the early morning hours of January 15, 2017, Thompson was driving Arden Hall, Tony Stratford, and himself home from Chapala's Restaurant, where they had consumed alcohol. When, at approximately 3:15 a.m., Thompson attempted to take the exit from eastbound Route 198 to northbound Interstate 95, he lost control of his vehicle, which veered off the roadway, struck several trees, and overturned. Hall, who had been sitting in the front passenger seat of the Jeep Cherokee that Thompson had been driving, was

partially ejected from the vehicle and pronounced dead at the scene. Although Stratford survived the collision, he sustained six fractured ribs and injuries to his knees.

Maryland State Troopers Jason Hill and Joseph Bagonis responded to the scene. Upon his arrival, Trooper Hill observed "fire board medical personnel assisting people who were still trapped in th[e] vehicle." Troopers Hill and Bagonis found Thompson sitting "away from the vehicle in the grass." As Troopers Hill and Bagonis asked Thompson what had caused the accident and how many occupants had been in the vehicle when the collision had occurred, they observed that his eyes were bloodshot and glassy, and that he spoke with a slur. They also detected a strong odor of alcohol on his breath. Trooper Bagonis further discovered multiple half-empty cans of "Ice" (an alcoholic beverage) on the ground, which, he testified, were "still cold to the touch."

Thompson was transported by ambulance to Prince George's County Hospital, where he was joined by Trooper Hill. At or around 6:43 a.m., approximately three and one-half hours after the collision, a hospital nurse drew a sample of Thompson's blood. Trooper Hill submitted that sample to the Chemical Testing for Alcohol Unit at the Maryland State Police Headquarters, where it was assigned a "chemical testing number" before being forwarded to the Maryland State Police Forensic Science Division. Brooke Welsh, a forensic chemist with the Forensic Science Division, tested the sample for blood alcohol concentration ("BAC"), which revealed that Thompson's BAC had been 0.08 grams of alcohol per 100 milliliters of blood at the time that the sample had been taken.

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

DISCUSSION

I.

Thompson contends that the trial court abused its discretion in admitting, over objection, a BAC report prepared by Ms. Welsh. Without introducing the "Blood Collection Report" on which Trooper Hill had written Thompson's name, the time and date of the blood draw, and the location at which it was performed, Thompson argues, the sample that Ms. Welsh tested could either have belonged to another "Howard Thompson" or have been drawn on a date other than January 15, 2017.[1] The State, on the other hand, maintains that it established a reasonable probability that the sample that Ms. Welsh analyzed was the same as that drawn from Thompson on the date of the collision. It asserts that Thompson's argument to the contrary is purely speculative and "attack[s] at best the weight to be given to the BAC report," and not its admissibility.

The Circuit Court Proceedings

At trial, Trooper Hill testified that after he and Thompson had arrived at Prince George's County Hospital, another state trooper brought him a "Maryland State Police blood kit." He averred that the kit appeared new with no indication that it had been tampered with. Trooper Hill explained that blood collection kits are kept at the Maryland State Police College Park Barracks and must be signed out prior to being used. To further

[1] The Blood Collection Report doubled as a chain of custody form.

ensure the integrity of blood samples, the cardboard mailing boxes in which the kits come—and in which they are sent to the lab—bear an expiration date.

Trooper Hill further testified to the following facts at trial: Upon receipt of the kit, he asked an emergency room nurse assigned to Thompson whether she would perform a blood draw. Once she agreed to do so, Trooper Hill handed her an iodine wipe, a syringe, and two glass vials from the kit. He then watched the nurse draw a sample of Thompson's blood. When the blood draw was complete, she handed Trooper Hill the blood-filled vials. Trooper Hill then affixed stickers "over top of the vials, covering the rubber seal to the vials." On those stickers, Trooper Hill had written Thompson's name and case number, as well as the date and time of the blood draw. He placed the vials in a "clamshell" container, which he then closed and sealed with evidence tape. Once the vials were secured in the clamshell, Trooper Hill filled out the top portion of a Blood Collection Report. On that form, Trooper Hill recorded the name of the police officer (his own), the name of the nurse who had conducted the blood draw, the name of the suspect ("Howard Thompson"), the time and date of the incident, as well as the time, date, and location of the blood draw. Trooper Hill used evidence tape to affix the Blood Collection Report to the clamshell container, which he then put in a biohazard bag. After sealing the bag with evidence tape, Trooper Hill placed it in a pre-addressed "cardboard mailing box," which he sealed with evidence tape and sent to "the lab" for testing.

Ms. Welsh clarified and supplemented Trooper Hill's testimony regarding the Maryland State Police Department's procedures for procuring, securing, storing, and identifying blood samples, testifying in pertinent part:

> [T]he person is taken to the hospital, blood is drawn, and that blood is then sent to the Chemical Testing for Alcohol Unit at the Maryland State Police Headquarters.
>
> From there, they give it a laboratory number, and then the kit is sent over to the Maryland State Police Forensic Science Division, where it is then stored in a secured location until we are able to actually go down and get the kit for analysis.

Once she is prepared to analyze a sample, Ms. Welsh continued:

> The kit comes back, and we verify what is on what is called a Form 34, which is just basically a sheet of paper stating that this blood came from so and so on this date, from this hospital, et cetera. That … form matches what is on the kit.
>
> The kit itself is sealed. I then open the kit up. Inside there is a clamshell that is also sealed, that is what actually contains the two blood tubes. I then open the clamshell, verify what is actually on the Form 34 is correct, again, identification of the actual blood tubes, the clamshell, and the kit.

Addressing the case at hand, Ms. Welsh confirmed that, on March 22, 2017, she received a sealed clamshell that was "marked as … belonging to Howard Thompson." Upon testing the blood sample contained therein, she testified, the "specimen was found to contain an alcohol concentration of 0.08 grams of alcohol per 100 milliliters of blood." Ms. Welsh was unable to produce the blood kit, as it was discarded pursuant to the Maryland State Police Forensic Science Division's standard operating procedure. She did, however, retain a report that she had written indicating the test results. When the State

moved to introduce that report into evidence, Thompson objected on chain of custody grounds. The State rejoined that it could establish chain of custody through Ms. Welsh's testimony that the clamshell containing the blood sample that she had tested bore the same case number that Trooper Hill had "put … on the outside of the … clamshell." The court conditionally overruled defense counsel's objection, stating: "[T]he court finds the bare minimum has been established subject to you establishing the sequence numbers that you said. If you establish that, then the court will admit the exhibit over the defense objections." Although the State was unable to elicit the proffered testimony, Ms. Welsh did confirm that Thompson's name had appeared on the Blood Collection Report that had been attached to the clamshell containing the blood sample at issue. Ms. Welsh further testified that, upon receipt of Thompson's clamshell, the Chemical Testing for Alcohol Unit assigned it a chemical testing number, which corresponded to the sample that she had tested. More generally, she averred:

> The information that is on the clamshell was verified, what was actually on the cardboard box when it was mailed to [the Chemical Testing for Alcohol Unit], but it's also verified on what is called the Form 34, which states again when the blood was collected. So that name, as well as the chemical testing number is actually put onto our run sheet[.]

Based on the foregoing testimony, the court admitted Ms. Welsh's report.

Chain of Custody

"'[O]rdinarily a trial court's ruling[s] on the admissibility of evidence are reviewed for abuse of discretion.'" *Wheeler v. State*, 459 Md. 555, 560 (2018) (quoting *Gordon v. State*, 431 Md. 527, 533 (2013)). Accordingly, we will not disturb such a ruling unless it

is "'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Id*. at 561 (quoting *Alexis v. State*, 437 Md. 457, 478 (2014)).

"For physical evidence to be admissible, 'the law requires the offering party to establish the 'chain of custody,' *i.e.*, account for its handling from the time it was seized until it is offered in evidence.'" *Johnson v. State*, 240 Md. App. 200, 211 (2019) (quoting *Lester v. State*, 82 Md. App. 391, 394 (1990)), *aff'd on other grounds*, 467 Md. 362 (2020). "In most cases, an adequate chain of custody is established through the testimony of key witnesses who were responsible for the safekeeping of the evidence, *i.e.*, those who can negate a possibility of 'tampering' ... and thus preclude a likelihood that the thing's condition was changed." *Easter v. State*, 223 Md. App. 65, 75 (2015) (quotation marks and citations omitted). The chain of custody need not be established beyond a reasonable doubt. The offering party need only establish a "'reasonable probability that no tampering occurred.'" *Johnson*, 240 Md. App. at 211 (quoting *Cooper v. State*, 434 Md. 209, 227 (2013)). Whether such a probability exists depends on the particular circumstances of each case. *See Easter*, 223 Md. App. at 75 ("What is necessary to negate the likelihood of tampering or of change of condition will vary from case to case." (citation omitted)). "The existence of gaps or weaknesses in the chain of custody generally go to the weight of the evidence and do not require exclusion of the evidence as a matter of law." *Id*. *See also Boston v. State*, 235 Md. App. 134, 161 (2017) ("Missing links from the chain of custody do not, as a matter of law, mandate exclusion of the evidence[.]").

In this case, Trooper Hill testified that the blood testing kit appeared new and showed no signs of having been tampered with. He watched as the blood was drawn, sealed the vials with stickers on which he had written Thompson's name and case number, as well as the time and date of the blood draw. After placing the vials in the clamshell, he sealed the container with evidence tape and placed it in a biohazard bag which he also sealed. After being delivered to the Chemical Testing for Alcohol Unit, it was assigned a unique chemical testing number. Thereafter, it was sent to the Forensic Science Division, where it was stored in a secure area until Ms. Welsh retrieved the still-sealed clamshell and verified the information on the Blood Collection Report affixed thereto.

Although the State was unable to produce either the Maryland State Police blood kit or the Blood Collection Report, Ms. Welsh's testimony, coupled with that of Trooper Hill, afforded adequate assurances that the sample that Ms. Welsh tested was the same as that drawn from Thompson at 6:43 a.m. on January 15, 2017. Any ostensible gap in custody went to the weight of the evidence and not to the admissibility thereof. *See Easter*, 223 Md. App. at 75. Accordingly, we perceive no abuse of discretion in the court's admitting Ms. Welsh's report.

II.

Next, Thompson asserts that the court erroneously permitted Ms. Welsh to testify as to the results of his blood test. He complains that "in the absence of testimony by a toxicologist who could explain the effect the three and a half hour delay between the accident and the blood draw may have had on the results of the analysis, the test results

were not relevant and thus were inadmissible." Alternatively, he claims that the court abused its discretion, arguing that the probative value of the test results was substantially outweighed by the danger of unfair prejudice. The State counters that the BAC test results were relevant notwithstanding the absence of additional expert testimony, arguing that "the topic of alcohol's dissipation over time … is a matter of common knowledge." It further rejoins that Thompson's alternative argument fails for want of a specific allegation of unfair prejudice that he incurred as a result of the court's admitting the test results. We agree with both of the State's counter-arguments.

Relevance

Maryland Rule 5-402 provides: "Except as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. Evidence that is not relevant is not admissible." Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. *See also Sifrit v. State*, 383 Md. 116, 128 (2004) ("Evidence is relevant if it has a tendency to establish or refute a fact that is at issue in the case." (citations omitted)). When assessing relevance, courts do not consider proffered evidence in a vacuum. *See Molina v. State*, 244 Md. App. 67, 128 (2019) ("To determine relevance, … we must not view a piece of circumstantial evidence in a vacuum, devoid of consideration of the other circumstances in the case." (quotation marks and citation omitted)). Rather, "the test of relevance is whether, in conjunction with all other relevant

evidence, the evidence tends to make the proposition asserted more or less probable." *Snyder v. State*, 361 Md. 580, 592 (2000).

"It is well established that expert testimony is not required 'on matters of which the jurors would be aware by virtue of common knowledge.'" *Exxon Mobile Corp. v. Ford*, 433 Md. 426, 490 (2013) (quoting *Hartford Accident & Indem. Co. v. Scarlett Harbor Assocs.*, 109 Md. App. 217, 257 (1996)). While the precise rate of alcohol dissipation in a particular person may well warrant expert witness testimony, the fact that blood alcohol concentration dissipates with time is a matter of common knowledge. *See Sites v. State*, 300 Md. 702, 718 (1984) ("[I]t is common knowledge that such content dissipates rapidly with the passage of time."); *Hasselhoff v. State*, 67 Md. App. 645, 648 (1986) ("'[I]t is generally agreed that a person's blood alcohol content decreases with the passage of time.'" (quoting *Willis v. State*, 302 Md. 363, 380 (1985))).

At trial, the State elicited testimony from two state troopers that following the accident Thompson's eyes were red and glassy, that he spoke with a slur, and that they detected a strong odor of alcohol on his breath. At the scene, Trooper Bagonis discovered multiple half-empty cans of an alcoholic beverage which were still cold to the touch. Trooper Bagonis further testified that during their discussion at the scene, Thompson said that "they were on their way home from a party, and that he had two drinks prior, *but he did not drink anything after the accident*." (emphasis added). Against this evidentiary backdrop and absent any evidence that he had consumed additional alcohol following the collision, the results of Thompson's blood alcohol test, administered over three hours after

the accident, plainly tended to make the existence of a fact in issue (*i.e.*, Thompson's BAC at the time of the accident) "more … probable than it would be without the evidence." Md. Rule 5-401. *See State v. Montoya*, 114 P.3d 393, 399 (N.M. Ct. App. 2005) ("[E]vidence of alcohol in Defendant's system four hours after the accident provided some evidence of alcohol in his system at the time of the accident inasmuch as there was no testimony of drinking after the accident.").

Maryland Rule 5-403

Although relevant, a court may, in its discretion, exclude evidence if the probative value thereof "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. "To justify excluding relevant evidence, the 'danger of unfair prejudice' must not simply outweigh 'probative value' but must, as expressly directed by Rule 5-403, do so 'substantially.'" *Newman v. State*, 236 Md. App. 533, 555 (2018). We review a trial court's Rule 5-403 determination for an abuse of discretion, and shall, therefore not disturb its ruling unless "no reasonable person would take the view adopted by the [trial] court," or the court acted "without reference to any guiding rules or principles." *King v. State*, 407 Md. 682, 697 (2009) (quotation marks and citation omitted).

In *Willis*, *supra*, the Court of Appeals addressed and squarely rejected the contention that the results of a belatedly administered blood alcohol test pose a danger of unfair prejudice. The Court explained:

> As the Supreme Court and this Court have observed, it is generally agreed that a person's blood alcohol content decreases with the passage of time. *See Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L.Ed.2d 908 (1966); *Moon* [*v. State*, 300 Md. 354 (1984)]. Because any delay in the administration of a chemical test ordinarily inures to the benefit of the accused, an accused suffers no prejudice.

302 Md. at 380. *See also Hasselhoff*, 67 Md. App. at 649 ("[A]ny unreliability of a blood alcohol test taken more than the optimum period after [an] accident would inure to the benefit of [a defendant], not to his detriment."). As in *Willis* and *Hasselhoff*, the delay in administering the blood alcohol test at issue could only have inured to Thompson's benefit, and did not, therefore, pose a danger of unfair prejudice.

III.

Finally, Thompson contends that the court abused its discretion by permitting the State to exceed the bounds of permissible argument. He argues that by characterizing defense counsel's summation as "smoke and mirrors" during its rebuttal closing argument, the State impermissibly denigrated defense counsel. Claiming that "the cumulative effect of [the State's] comments [were] unduly prejudice[ial]," Thompson concludes that reversal is required. The State counters that its "smoke and mirrors" remark was properly directed at defense counsel's closing argument and "was not an attack on the ethics or professionalism of counsel." We agree.

The Standard of Review

"'The permissible scope of closing argument is a matter left to the sound discretion of the trial court.'" *Cagle v. State*, 462 Md. 67, 74 (2018) (quoting *Ware v. State*, 360 Md. 650, 682 (2000)). The State enjoys great leeway when presenting its closing argument.

Donaldson v. State, 416 Md. 467, 488 (2010). In so doing, it is "'free to use the testimony most favorable to [its] side of the argument to the jury, and the evidence may be examined, collated, sifted, and treated in [its] own way[.]'" *Cagle*, 462 Md at 75 (quoting *Mitchell*, 408 Md. at 380). The State is likewise free to "'indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.'" *Winston v. State*, 235 Md. App. 540, 573 (2018) (quoting *Wilhelm v. State*, 272 Md. 404, 412 (1974)). The State's oratorical liberty is not, however, unbridled. *See Donaldson*, 416 Md. at 489 ("[N]ot all statements are permissible during closing arguments."). Its "liberal freedom of speech" notwithstanding, the State's closing argument "must be grounded in the evidence or reasonable inferences drawn from the evidence." *Whack v. State*, 433 Md. 728, 748 (2013) (quotation marks and citation omitted). The State is further prohibited from "appeal[ing] to passion or prejudice … which 'may so poison the minds of jurors that an accused may be deprived of a fair trial.'" *Lawson v. State*, 389 Md. 570, 590 (2005) (quoting *Eley v. State*, 288 Md. 548, 552 (1980) (quotation marks and further citation omitted)).

Not every improper comment, however, warrants reversal. Rather, "'reversal is only required whe[n] it appears that the remarks of [the] prosecutor actually misled the jury or were likely to have misled or influenced [it] to the prejudice of the accused.'" *Beads v. State*, 422 Md. 1, 10 (2011) (quoting *Degren v. State*, 352 Md. 400, 430-31 (1999)). In assessing whether a comment is sufficiently misleading or unfairly prejudicial as to require reversal, we consider "'the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused.'" *Donaldson*, 416 Md. at

497 (quoting *Lee v. State*, 405 Md. 148, 165 (2008) (quotation marks and further citation omitted)).

Denigrating the Defense

In addition to the above-delineated limitations on its summation, the State is prohibited from disparaging, denigrating, or otherwise impugning the ethics, integrity, or professionalism of defense counsel. *See Smith v. State*, 225 Md. App. 516, 529 (2015) ("[A] prosecutor may not impugn the ethics or professionalism of defense counsel in closing argument. When prosecutors cross the line, and defense counsel objects, trial courts should do something about it."), *cert. denied*, 447 Md. 300 (2016). *See also Reidy v. State*, 8 Md. App. 169, 172-79 (1969). The State is likewise prohibited from besmirching the criminal defense bar in general. *See Beads v. State*, 422 Md. 1, 11 (2011). Where, on the other hand, the State's remarks "were clearly directed to defense counsel's argument and did not impute impropriety or unprofessional conduct to defense counsel," such comments are both permissible and proper. *Smith*, 225 Md. App. at 529. *See also Degren v. State*, 352 Md. 400, 433 (1999) ("[P]rosecutors may address during rebuttal issues raised by the defense in its closing argument[.]"); *Blackwell v. State*, 278 Md. 466, 480 (1976) ("The prosecutor, in rebuttal, was merely responding to [defense counsel's] argument.").

The State's Rebuttal Closing Argument

We set forth the following challenged excerpt from the State's rebuttal:

> Were there some things missing that we could have seen yesterday and today? More pictures - - I don't remember the whole list, but whatever the list was that [defense counsel] just gave you. Oh, and officers taking notes on the scene. Things along those lines. Could there have been more?

In a perfect world, in an unlimited resources world, sure. But ask yourselves - - when you're answering the question about the clock, ask yourselves: Does any of that that he listed as missing make you question how this accident happened, why this accident happened, what happened in this accident? And if the answer is no, then the answer is guilty because that's all what they like to call smoke and mirrors. He's trying to get you to - -

[DEFENSE COUNSEL]: Objection.

[THE STATE]: - - look over here - -

THE COURT: Overruled.

[THE STATE]: - - and say, What's missing? Look at what they didn't do. This is what's missing, instead of looking at what we know, and we know a lot.

* * *

One of the missing pieces of evidence, missing pictures of the roadway. And Corporal Douglas said, I took those pictures. I don't know where they are. We don't have them here today.

Does not having those photos say that you don't how [sic] this accident happened? No. Because the defendant tells you exactly how this accident happened, which is exactly how Corporal Douglas told you it happened, and that is that he was in lane one, he cut over to 95 too fast, and went off the road.

So the missing pictures, again, smoke and mirrors.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

The State's remark was clearly directed at defense counsel's closing argument, wherein he repeatedly challenged the thoroughness of the police investigation and the

adequacy of the State's case.[2] *See Smith*, 225 Md. App. at 529 ("[T]he State's closing argument was not improper—the 'smoke and mirrors' comments were clearly directed to defense counsel's argument and did not impute impropriety or unprofessional conduct to defense counsel."); *Warren v. State*, 205 Md. App. 93, 138 (2012) ("The prosecutor's calling appellant's counsel's arguments 'red herrings' was 'oratorical conceit or flourish' that was well within the wide latitude granted to counsel in summation."); *State v. Purvey*, 129 Md. App. 1, 25 (1999) (holding that the State's assertion that defense counsel "was merely 'blowing smoke' to 'divert [the jury's] attention from the facts'" was "an acceptable characterization of [the defendant's] efforts to undermine the credibility of the State's evidence"). By thus rebutting defense counsel's characterization of the weight of the evidence, the State did not remotely impugn counsel's ethics, denigrate his professionalism, or disparage the defense bar in general. Rather, the State's comment was precisely the sort of rhetorical flourish one ought to expect from a zealous Assistant State's Attorney. *See Jones-Harris v. State*, 179 Md. App. 72, 104-106 (holding that the State's remark during rebuttal characterizing defense counsel's argument as "offensive," although harsh, constituted a fair comment, falling within the ambit of permissible rhetorical flourish), *cert denied*, 405 Md. 64 (2008).

[2] Among the investigative shortcomings cited by defense counsel were the State Troopers' failure to: (1) take contemporaneous notes of their conversations and observations at the scene; (2) preserve the blood testing kit; (3) conduct either a field sobriety test or a breathalyzer test of Thompson; (4) photograph Thompson's glassy, red eyes; (5) collect or photograph the cans of "Ice"; (6) process those cans for fingerprints; and (7) conduct an independent speed evaluation to corroborate that the vehicle had been traveling 94 miles-per-hour five seconds before the collision.

For the foregoing reasons, we affirm the judgments of the circuit court.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.