Circuit Court for Montgomery County
Case No. C-15-CR-23-000321

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1924

September Term, 2023

DAVID LEE BROWN

v.

STATE OF MARYLAND

Wells, C.J.,
Albright,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Albright, J.

Filed: September 24, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

David Lee Brown, appellant, was tried by a jury in the Circuit Court for Montgomery County for attempted first-degree murder and other related charges stemming from an altercation at a bar that culminated in a shooting. Mr. Brown, who claimed self-defense, was ultimately convicted of attempted voluntary manslaughter, first-degree assault, and the use of a firearm in the commission of a crime of violence and a felony. Mr. Brown was sentenced to fifty-five years imprisonment with all but thirty-five suspended and five years of probation.[1] On appeal, he raises three issues for our consideration, which we rephrase[2] as:

I. Did the circuit court err in allowing the State to argue facts not in evidence during closing argument?

II. Did sufficient evidence support the jury's finding of Mr. Brown's intent to kill?

III. Did the circuit court properly consider an allegation that Mr. Brown committed a similar assault a week before the shooting in this case when the circuit court sentenced Mr. Brown?

[1] Mr. Brown received a ten-year sentence on his attempted voluntary manslaughter conviction, a consecutive sentence of twenty-five years with all but ten years suspended for his first-degree assault conviction, and a consecutive twenty-year sentence with all but fifteen years suspended on his conviction for use of a handgun in the commission of a crime of violence and a felony. Mr. Brown also received five years of supervised probation.

[2] Mr. Brown presents his issues as:

1. Did the trial court err in allowing the prosecutor to argue facts not in evidence during closing argument?
2. Is the evidence insufficient to sustain the conviction for the attempted voluntary manslaughter?
3. Did the trial court improperly consider, for purposes of sentencing, a bald allegation that a week before the incident at issue in this case Mr. Brown had committed a similar assault against another individual?

We only address Mr. Brown's first two questions. We answer the first question "yes," reverse Mr. Brown's convictions as a result, and remand his case back to the circuit court for proceedings not inconsistent with this opinion. Since Mr. Brown's Double Jeopardy rights are implicated by the outcome of the second question,[3] we consider it as well and find that the evidence was sufficient. We do not address Mr. Brown's third contention, as it may not necessarily recur on remand.

BACKGROUND

A. The Shooting

Police and emergency responders responded to a shooting at Clyde's, a bar and restaurant in Chevy Chase, Maryland, in the early morning hours of November 14, 2022. When the emergency responders arrived, they discovered a victim, Mame Faye, had been shot. Another individual at the scene, Eddie Guerrero, had sustained injuries to his face. Both men were taken to the hospital to receive medical treatment. Mr. Faye ultimately survived his gunshot wound.

A few months later, police arrested Mr. Brown in Atlanta, Georgia, in relation to the shooting. Mr. Brown was indicted on one count of attempted first-degree murder, one count of attempted second-degree murder, two counts of first-degree assault, two counts

[3] *See, e.g.*, *Scott v. State*, 454 Md. 146, 167 (2017) (Noting an exception to the general rule that "the Double Jeopardy Clause does not bar a second prosecution for the same offense after an appellate court reverses a conviction" applies "where the ground for the reversal of a conviction is insufficiency of the evidence").

of second-degree assault, and one count of the use of firearm in the commission of a crime of violence.

B. Mr. Brown's Trial

Mr. Brown was tried on September 18-20, 2023. The State called as witnesses Mr. Guerrero, Mr. Faye, Dawit Clemencia, Kelly Hacker, a nearby security guard who responded to the scene when he heard the gunshots, one of the bartenders, the bar manager, a police officer who responded to the 911 call, and an emergency medical technician. Mr. Brown testified in his own defense and called his uncle and a previous coworker as witnesses to speak to his character.

The relevant events to the shooting began in the late hours of November 13, 2022. Mr. Faye, Mr. Guerrero, Mr. Clemencia, and Mr. Hacker were all at the bar together with Sala Coleman. The five coworkers and friends frequented Clyde's after work shifts together at another nearby restaurant. Ms. Coleman was the only woman in the group. On November 13, 2022, Mr. Faye had arrived at Clyde's earlier in the day, with the others joining him between 11:30 p.m. and midnight. Shortly thereafter, the group was also joined by Mr. Brown, whom only Ms. Coleman knew prior to that evening.

Mr. Brown, apparently, exhibited signs of jealousy towards the others' social relationships with Ms. Coleman. Mr. Faye, Mr. Guerrero, Mr. Clemencia, and Mr. Hacker testified that Mr. Brown had repeatedly asked them about the extent of their relationships with Ms. Coleman and whether she was sleeping with any of them. According to them, however, Ms. Coleman was just a coworker and friend, and no one in

the group had been romantically involved with her. The group had already been drinking and tried to ease the situation by inviting Mr. Brown to take a shot of tequila with them.

Mr. Brown also had several conversations with Ms. Coleman throughout the night. According to Mr. Guerrero, Mr. Brown and Ms. Coleman "were just going back and forth, getting a little loud . . . in the bar." The bartender described that, although she could not hear what they were saying, Mr. Brown and Ms. Coleman were "bickering," Mr. Brown was "acting agitated," and Ms. Coleman "was pushing [Mr. Brown] a little bit[.]" As Mr. Brown described it, however, "[Ms. Coleman]'s just a loud person, so everybody might see her as being confrontational or anything, but that's her demeanor." At some point, Mr. Brown and Ms. Coleman went outside to continue their conversation.

The sequence of events that took place between Mr. Brown's and Ms. Coleman's exit and the shooting were disputed. Mr. Clemencia and Mr. Hacker testified that they followed Ms. Coleman outside to make sure she was okay, that they then saw Mr. Brown pull out a pistol and shoot into the air, and that they both then ran back into the bar. The bartender and bar manager both saw several individuals fighting and heard a gunshot, but never saw a gun. Along with the other staff members, they went to the basement of the bar after the first gunshot. Although the State introduced video camera footage from the Clyde's parking lot, it did not clearly show the shooting. Thus, the only individuals who directly witnessed the shooting of Mr. Faye were those directly involved—Mr. Guerrero, Mr. Faye, and Mr. Brown.

Mr. Guerrero testified that Mr. Brown assaulted him when he went outside to check on Ms. Coleman. As Mr. Guerrero described it, Mr. Brown approached him as soon as he stepped outside, said "[o]h, you're f***ing her[,]" and hit Mr. Guerrero in the face with a gun. Mr. Guerrero described the gun as a silver or black revolver. Mr. Guerrero went back inside, briefly, but went outside a second time whereupon Mr. Brown struck him in the face with the gun again. Mr. Guerrero and Mr. Brown then "tussled a bit[.]" Mr. Guerrero was "[p]retty scared at [that] point because [he] had a gun to [his] face." Mr. Guerrero testified that Mr. Brown dropped the gun as they were fighting, and that Mr. Guerrero and Mr. Brown both went to pick it up. As they were "wrestling for [the] gun on the floor," two shots were fired that both struck Mr. Faye, who was standing behind Mr. Guerrero.

According to Mr. Guerrero, Mr. Faye had been trying to deescalate tension between Mr. Brown and Ms. Coleman the entire night. Even when Mr. Guerrero and Mr. Brown were outside fighting, Mr. Faye "was getting swung at, but he wasn't swinging back. He was just trying to calm everything down, make sure no one got hurt."

After the shooting, Mr. Guerrero described that Mr. Brown ran back to his car with the gun. As Mr. Brown was driving off, Mr. Guerrero testified that he heard Mr. Brown say "something along the lines of, '[Ms. Coleman] don't snitch.'" Mr. Guerrero noted that Mr. Brown then offered Mr. Guerrero and Mr. Faye a ride to the hospital. When Mr. Guerrero declined, Mr. Brown drove away.

Mr. Faye corroborated portions of Mr. Guerrero's narrative. Mr. Faye explained that he had been preoccupied watching a football game on the bar's television for most of the evening, but eventually picked up on the fact that Mr. Brown "was kind of hostile" and decided to step in. Mr. Faye claimed that he calmed Mr. Brown down enough to walk him out to his car. Mr. Faye was "trying to make sure [Mr. Brown] just [got] home safely," and at that point, Mr. Faye "thought it was over."

But as Mr. Faye waited for Mr. Brown to drive away, "[Mr. Brown] charged back out of the car." According to Mr. Faye, Mr. Brown had a black handgun but the "gun flew out of his hand." Mr. Faye, Mr. Guerrero, and Mr. Brown all went for the gun. Mr. Faye saw Mr. Brown knock Mr. Guerrero down with the gun, and did not see that Mr. Guerrero ever had possession of the gun.

Mr. Faye explained that Mr. Brown then charged towards him, which led the two of them to be "on the ground tussling." Mr. Faye claimed that Mr. Brown had control of the gun, and that Mr. Brown shot Mr. Faye in the stomach when Mr. Faye was "on the ground" and Mr. Brown was on top of him. According to Mr. Faye, Mr. Brown was still on top of Mr. Faye when he shot him a second time in the chest at "point blank range."[4] Mr. Brown then left with the gun. Mr. Faye could not recall if Mr. Brown offered to take him to the hospital, as he "was half unconscious at that point."

[4] At trial, the prosecutor held a tissue box on the witness stand "within 12 inches of [Mr. Faye]" and asked him to confirm whether that was "how close Mr. Brown was the two times that he shot Mr. Faye." Mr. Faye confirmed that it was.

During his testimony, Mr. Faye was cross-examined on a previous conviction he had for conspiracy to commit bank fraud in April of 2017. As a result, Mr. Faye admitted that he knew he was prohibited from owning a firearm. Mr. Faye's medical records were also introduced into evidence and showed that on the night of the shooting, he had screened positive for the presence of cannabinoids in his system.

Mr. Brown, on the other hand, claimed the shooting occurred in self-defense and denied bringing the gun to Clyde's. Mr. Brown testified that he and Ms. Coleman "were on [their] way out" when the others followed them outside. Mr. Brown ended up smoking marijuana with the others when they came outside but got into a verbal altercation with Mr. Guerrero. According to Mr. Brown, the others "weren't trying to let [Ms. Coleman] leave with [him] or whatever." Mr. Brown acknowledged that he got into his car while Mr. Guerrero's friends were pushing Mr. Guerrero into the bar, but that Mr. Brown got back out of his car to go ask Mr. Guerrero "what's all the hostility about and all this?" Mr. Brown testified that when he confronted Mr. Guerrero, Mr. Guerrero had his hands in his pockets and Mr. Brown "thought [Mr. Guerrero] had a weapon."

Mr. Brown recounted that he hit Mr. Guerrero when he saw him "yanking his hand out [of] his pocket." "The last time that somebody yanked their hand out [of] their pocket," Mr. Brown explained, he had been "stabbed seven times." When Mr. Brown hit Mr. Guerrero, he claimed that Mr. Guerrero dropped a gun out from his pocket. At that point, both men went for the gun and "started wrestling, tussling for the gun." Mr. Brown also testified that Mr. Faye had run over and was punching Mr. Brown in the back of the

head. According to Mr. Brown, both he and Mr. Guerrero had their hand on the gun when it went off, but Mr. Guerrero dropped it at that point. Mr. Brown claimed that he ran back to his car, taking the gun with him so that Mr. Guerrero or Mr. Faye would not shoot him as he fled. According to Mr. Brown, he then offered to take Mr. Faye to the hospital and only drove away when his offer was declined by Mr. Guerrero. As he drove away, Mr. Brown noted that he threw the gun he had taken from Mr. Guerrero "out the window."

According to Mr. Brown, he traveled down to Atlanta for Thanksgiving to see some family. He then stayed there until the time of his arrest because he had gotten a job there.

During the first of the State's closing arguments, the prosecutor pointed to the circuit court's jury instruction about witness credibility[5] and urged the jury to credit the State's witnesses:

[5] Regarding whether a witness should be believed, the jury was instructed in part:

> In deciding whether the witness should be believed, you should carefully consider all the evidence as well as whether the witness'[s] testimony was affected by other factors. You should consider such factors as the witness'[s] behavior on the stand and the manner of testifying, whether the witness would appear to be telling the truth, the witness'[s] opportunity to see or hear the things about which testimony was given, the accuracy of the witness'[s] memory, whether the witness had a motive not to tell the truth, whether the witness had an interest in the outcome of the case, whether witness'[s] testimony was consistent, whether other evidence that you believe supported or contradicted the witness'[s] testimony, whether and the extent to which the witness'[s] testimony in court differ from statements made by the witness on any previous occasion, whether the witness has a bias or prejudice.

> [PROSECUTOR]: . . . one of the instructions that you have, that you'll have in your packet is the credibility of witness[] instruction. And it talks about the manner of people testifying, what they remember, essentially what they have to get out of this. These witnesses have nothing to get out of this. They don't know this defendant. They've never met him. They don't hang out with him. They don't know him. They have nothing to gain from coming here. They don't want to be here. They got subpoenaed to come here to testify, come here to tell you what happened.
>
> [DEFENSE COUNSEL]: Objection.
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> [THE COURT]: Overruled.
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> [PROSECUTOR]: But when Mr. Guerrero testified about going to help Mr. Faye and pulling his clothes up and trying to find if he had been hit, where he had been hit, and to try to put pressure on it to find where the wound was, did you see that he started to become emotional? It was an emotional thing for him. His friend had just been shot, and he's trying to put pressure on the wound, yelling for someone to call 911.

The jury acquitted Mr. Brown of attempted first-degree murder and attempted second-degree murder but convicted Mr. Brown of attempted voluntary manslaughter, first-degree assault, and the use of a handgun in the commission of a crime of violence and a felony.

DISCUSSION

I. Improper Statements in the Prosecution's Closing Argument

A. Parties' Contentions

Mr. Brown first asserts error in the circuit court's decision to allow the State to argue facts not in evidence during the State's closing argument. The comments that Mr. Brown identifies as being unsupported by the evidence were that the eyewitnesses who testified against him "don't want to be here" and that "[t]hey got subpoenaed to come [to trial] to testify[.]" Because there was no evidence admitted at trial supporting

these contentions, Mr. Brown argues, the comments were improper, and the circuit court should have sustained his objection. Moreover, Mr. Brown argues that the error was not harmless, as it bolstered the credibility of the only eyewitnesses to the shooting.

The State, on the other hand, contends that the evidence in the record supported the prosecutor's comments. The State argues that because Mr. Faye was asked on the stand about his prior criminal conviction and the presence of PCP in his system[6]—both of which "he was unlikely to have wanted to be aired in public"—that the record did reflect his lack of desire to testify. Additionally, the State disputes that the fact the witnesses had been subpoenaed would have bolstered their credibility. The State also notes that because the statements were made in the State's initial closing argument, Mr. Brown "had the opportunity to address them." Finally, the State argues that Mr. Brown "does not establish that the jury was misled or that he was prejudiced."

B. Analysis

"A trial court is in the best position to evaluate the propriety of a closing argument as it relates to the evidence adduced in a case." *Ingram v. State*, 427 Md. 717, 726 (2012). As such, "the decision of the trial court will not be disturbed unless there was a clear abuse of discretion that prejudiced the accused." *Small v. State*, 235 Md. App. 648, 697–98 (2018) *aff'd*, 464 Md. 68 (2019)). A trial court abuses its discretion when the challenged ruling is "well removed from any center mark imagined by the reviewing

[6] Despite this line of questioning, Mr. Faye's medical records from the night of the shooting appear to show that no PCP was detected in his system.

court and beyond the fringe of what that court deems minimally acceptable." *Devincentz v. State*, 460 Md. 518, 550 (2018) (quoting *North v. North*, 102 Md. App. 1, 14 (1994)).

Attorneys, including prosecutors, are generally afforded "great leeway" when presenting closing arguments to the jury. *Spain v. State*, 386 Md. 145, 152 (2005) (quoting *Degren v. State*, 352 Md. 400, 430 (1999)). Indeed, attorneys "may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions." *Id.* In short, "liberal freedom of speech" is permissible in closing arguments. *Id.*

One limitation that does exist on an attorney's closing arguments is that the argument must be based in the evidence adduced during trial. *Degren*, 352 Md. at 430. Counsel is permitted to argue and discuss "all reasonable and legitimate inferences which may be drawn from the facts in evidence," and "matters of common knowledge." *Smith v. State*, 388 Md. 468, 488 (2005). Counsel cannot, however, "comment upon facts not in evidence or state what he or she would have proven." *Mitchell v. State*, 408 Md. 368, 381 (2009) (cleaned up).

The particular technique of "vouching" has consistently been viewed with disapproval by Maryland courts. *See Spain*, 386 Md. at 153. "Vouching typically occurs when a prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity or suggests that information not presented to the jury supports the witness's testimony." *Id.* (cleaned up). In other words, a prosecutor engages in improper argument when they argue the truthfulness of a witness based on the prosecutor's own personal knowledge of facts not in evidence. *See id.* at 155. Vouching

presents two "primary dangers." *Id.* at 153. First, it may convey to the jury that the prosecutor knows additional facts beyond the evidence adduced at trial that supports the charges, thus jeopardizing a defendant's "right to be tried solely on the basis of the evidence presented to the jury." *Id.* at 153–54 (quoting *U.S. v. Young*, 470 U.S. 1, 18 (1985)). Second, a prosecutor's opinion "carries with it the imprimatur of the Government" and therefore runs the risk of inducing the jury to "trust the Government's judgment rather than its own view of the evidence." *Id.* at 154 (quoting *Young*, 470 U.S. at 18–19).

In *Spain*, the Court determined that a prosecutor impermissibly vouched for a police officer. 386 Md. at 154. The only witness against the defendant was the arresting police officer, and the defendant's only witness was his sister, who testified to provide an innocent explanation for the defendant's location that evening. *Id.* at 150. At trial, the defendant's theory of defense "hinge[d] on the contentions that [the police officer] was mistaken as to the encounter between [the defendant] and [the police officer] and that [the defendant] was in no way involved in the narcotics transaction that followed." *Id.* The following exchange occurred during the State's closing arguments:

> [STATE'S ATTORNEY]: Part of what you have to determine is the credibility of the witnesses. The defense put on a witness who testified, and the State put on one witness, the Officer in this case. You have to weigh the credibility of each individual. Who has a motive to tell you the truth. The Officer in this case would have to engage in a lot of lying, in a lot of deception and a conspiracy of his own to come in here and tell you that what happened was not true. He would have to risk everything he has worked for. He would have to perjure himself on the stand.
>
> [DEFENSE COUNSEL]: Objection.

> [THE COURT]: Basis?
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> [DEFENSE COUNSEL]: Reference to the Officer perjuring himself your Honor. It's as far as credibility.
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> [THE COURT]: Okay, well the jury understand[s] that this of course is closing argument, and that they will [consider the statements to be] lawyers' arguments. Overruled.
>
> [STATE'S ATTORNEY]: So basically you have to determine who has the credibility. Who's telling you the truth. Is the Officer coming here and making up a story? What's his incentive to lie and frame Mr. Spain? The reality is that this Officer—they attempted to sell this Officer drugs on the street. They didn't know he was a police officer. He was out there trying to enforce the law. But, you have to understand that Officer Williams has no motive to lie, because he has everything to risk in this case. Because he doesn't have to go out and make up drug arrests. Because he has plenty of legitimate drug arrests. There's absolutely no incentive for him to come in here and tell a story about Mr. Spain. So is Mr. Spain the victim of circumstance? He was just taken up in front of his house, trying to attend a Superbowl party? That's the defense's theory in the case. You will ultimately have to decide who you want to believe.

Id. at 151. Under these circumstances, the Court found that the prosecutor's vouching through facts not in evidence "transcended the boundaries of proper argument," namely, that the police officer was telling the truth because to do otherwise would expose him to the consequences from perjury when no evidence had been admitted to this effect. *Id.* at 154. *See also Sivells v. State*, 196 Md. App. 254, 280 (2010) (holding that prosecutor improperly vouched by stating that police witnesses would not be making things up because they would lose their jobs and pensions); *Donaldson v. State*, 416 Md. 467, 490–93 (2010) (determining the same where the prosecutor argued the police would not lie because "they want to keep their jobs").

Here, the prosecutor improperly vouched for the witnesses against Mr. Brown. During the State's closing argument, the prosecutor claimed that the State's witnesses,

i.e., the four friends and coworkers who testified about the events of that night, were credible because they had nothing to gain from their testimony and did not want to be in court. To support this argument, the prosecutor disclosed for the first time that "[t]hey got subpoenaed to come here to testify, come here to tell you what happened." The prosecutor's argument, then, was improper vouching because it used facts not in evidence to endorse, or bolster, the credibility of the witnesses who had offered a version of events that differed from Mr. Brown's. *See Sivells*, 196 Md. App. at 138 ("Because the comments were not tied to the evidence presented, the comments violated the rule against vouching and were improper.").

Having concluded that the trial court erred in overruling Mr. Brown's objection to the State's improper vouching, our next task is to determine whether that error is harmless beyond a reasonable doubt. *See, e.g.*, *Lawson v. State*, 389 Md. 570, 604 (2005). Reversal is not mandated by the mere existence of an improper remark by the prosecutor during closing arguments. *Spain*, 386 Md. at 159. Rather, "reversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Id.* (cleaned up). Whether an improper comment warrants reversal also depends on the facts of the specific case. *Id.* Although every impermissible comment by a prosecutor during a closing argument does not mandate reversal, "the State bears the burden of proving that an error is harmless." *Smith v. State*, 367 Md. 348, 360 (2001).

Mr. Brown contends that the improper vouching was not harmless beyond a reasonable doubt, as the fact that the witnesses had been subpoenaed would indicate a lack of motive to lie, thereby bolstering their credibility. Mr. Brown states that this case turned on whether the jury found the State's witnesses more credible than his, and that the case was narrowly decided as demonstrated by the split verdict, making the State's vouching not harmless beyond a reasonable doubt. The State provided no argument on harmlessness, instead stating that "[Mr.] Brown does not establish that the jury was misled or that he was prejudiced. Thus, he does not establish that reversal is warranted."

Spain notes several considerations for gauging the harmlessness of error during closing arguments. *See* 386 Md. at 158. "When assessing whether reversible error occurs when improper statements are made during closing argument, a reviewing court may consider several factors, including the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Id.* Applying these factors in *Spain*, the Court noted that the prosecutor's remark was not particularly severe because it "was an isolated event that did not pervade the entire trial." *Id.* at 159. Moreover, the improper argument bolstered the police officer's veracity whereas the defendant's theory posited that the officer was mistaken rather than testifying untruthfully. *Id.* at 161. As to the measures taken to cure any potential prejudice, the Court focused on the trial court's "contemporaneous reminder that [the closing arguments] were only an attorney's argument, not evidence[.]" *Id.* at 159. Although the Court did not consider the evidence of the defendant's guilt to be "truly overwhelming,"

it nonetheless concluded "beyond a reasonable doubt that the error in no way influenced the verdict." *Id.* at 161.

In *Lawson*, however, the Court concluded that erroneous statements made by the prosecutor were not harmless. 389 Md. at 604. There, the prosecutor had engaged in four different instances of improper statements during closing arguments. *Id.* at 593–600. Although none of the four instances constituted vouching, the Court applied the same framework for assessing the harmlessness of errors during closing arguments that was laid out in *Spain*. *Id.* at 590–600. Building to the conclusion that the erroneous statements were not harmless, the Court noted that "the weight of the evidence was not overwhelming[,]" the State's case "relied heavily upon the credibility" of the primary witness against the defendant, and the trial court "did not take sufficient steps and took no specific steps to ensure that the jury [gave] the appropriate consideration to the statements as only being the prosecutor's arguments and not evidence." *Id.* at 604. Under these circumstances, the Court could not find the improper statements to be harmless beyond a reasonable doubt. *Id.*

Considering the factors laid out in *Spain*, we cannot conclude that the State's vouching was harmless beyond a reasonable doubt. The prosecutor's remark went directly to the central defense theory presented by Mr. Brown—that the witnesses against him were not credible. *Cf. Whack v. State*, 433 Md. 728, 754 (2013) (finding reversible error where the prosecutor's remark "challenged the central theory of the case"); *Lawson*, 389 Md. at 600–01 ("[I]n respect to the central issue of this case, it was basically a 'she

said, he said' case. In our balancing analysis, this fact weighs more heavily on the side of prejudice because there is a higher probability, in the case *sub judice* than in *Spain*, that the prosecutor's statements had an improper impact in respect to the jury's decision."). To be sure, the fact that the remark was a single instance weighs against a finding of severity. *Cf. Beckwitt*, 249 Md. App. 333, 397 (2021), *aff'd*, 477 Md. 398 (2022) (finding an error to be harmless where the "appellant only cite[d] to [a] single instance in rebuttal argument as an example" of an improper remark); *Spain*, 386 Md. at 159 (noting the prosecutor's errant statement "was an isolated event that did not pervade the whole trial"). But here, the prosecutor's remark went to the heart of this credibility-driven case. Accordingly, we conclude that the potential for that remark to have impacted this case was serious, if not severe.

Second, the circuit court did nothing to cure the improper remark. To the contrary, the circuit court overruled Mr. Brown's objection altogether and effectively gave the circuit court's "imprimatur to the State's comment[.]" *See Smith*, 367 Md. at 361. Finally, the evidence that hinged on the credibility of the State's witnesses—namely what exactly occurred in the altercation on the sidewalk with the gun—was not otherwise "overwhelming." *See, e.g.*, *Spain*, 386 Md. at 161; *Lawson*, 389 Md. at 604.

Ultimately, the burden of proving that error is harmless beyond a reasonable doubt rests with the State. *Sewell v. State*, 239 Md. App. 571, 630 (2018) (citing *Dionas v. State*, 436 Md. 97, 108 (2013)). The State makes no argument in this regard. Instead, the State attempts to shift the burden to Mr. Brown by claiming that he "does not establish

that the jury was misled or that he was prejudiced." Under these circumstances, and given how central credibility was to the outcome of this case, we cannot conclude that the prosecutor's improper vouching was harmless beyond a reasonable doubt. Accordingly, we will reverse. Because, as we discuss below, we conclude that there was sufficient evidence to sustain Mr. Brown's attempted manslaughter conviction, we will remand for further proceedings not inconsistent with this opinion.

II. Whether the evidence is sufficient to sustain Mr. Brown's conviction for attempted manslaughter.

A. Parties' Contentions

Mr. Brown next argues that the evidence is insufficient to support his conviction for attempted manslaughter because "no rational juror could find beyond a reasonable doubt that Mr. Brown intended to kill [Mr.] Faye," as is required to sustain such a conviction. Although Mr. Brown acknowledges Mr. Faye's testimony that Mr. Brown had the gun and shot him in the stomach and then again in the chest at "[p]oint blank range," Mr. Brown raises several arguments as to why this testimony is insufficient to sustain an intent to kill necessary to support an attempted manslaughter charge. First, Mr. Brown argues that Mr. Faye had been drinking heavily, and that Mr. Faye knew that Mr. Faye was prohibited from possessing a firearm due to a prior conviction. Second, Mr. Brown argues that Mr. Faye's testimony was inconsistent with the testimony of Mr. Guerrero—the other eyewitness to the shooting itself. Finally, Mr. Brown asserts that the "undisputed" evidence that he offered to drive Mr. Faye and Mr. Guerrero to the hospital after the shooting "is inconsistent with an intent to kill."

The State disagrees. In the State's view, Mr. Brown's arguments related to the sufficiency of the evidence are "a variety of jury-type arguments" and do not establish that the evidence was insufficient to support an intent to kill. Moreover, the State points to evidence that Mr. Faye was shot at close range and evidence of Mr. Brown's jealousy, anger, and aggressiveness right before the shooting to support the inference that Mr. Brown had the requisite intent to kill.

B. Analysis

On appeal, the standard of review for evidentiary sufficiency is whether, after viewing the record 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. *Cain v. State*, 162 Md. App. 366, 378 (2005). As "weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder," we give "due regard to the [fact finder's] finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *Id.* (cleaned up). To that end, "we do not re-weigh the evidence, but we do determine whether the verdict was supported by sufficient evidence, direct or circumstantial." *Pinkney v. State*, 151 Md. App. 311, 827 (2003) (cleaned up).

Attempted voluntary manslaughter is a common law crime in Maryland which occurs when "an individual, engaged in an altercation, suddenly attempts to perpetrate a homicide caused by heat of passion in response to legally adequate provocation, and where the attempt results in something less than the actual wrongful killing." *Dixon v.*

State, 364 Md. 209, 300 (2001). Therefore, to find a defendant guilty of attempted voluntary manslaughter, the jury must find, beyond a reasonable doubt, that the defendant acted with an intent to kill. *Id.*

"Since intent [to kill] is subjective and, without the cooperation of the accused, cannot be directly and objectively proven, its presence must be shown by established facts which permit a proper inference of its existence." *State v. Earp*, 319 Md. 156, 167 (1990) (cleaned up). The intent to kill may be determined through a consideration of the defendant's acts, conduct, or words, and it is well established that "an intent to kill may be inferred from the use of a deadly weapon directed at a vital part of the human body." *State v. Raines*, 326 Md. 582, 591 (1992) (finding that the defendant's actions in directing a gun at a truck window, knowing the driver was on the other side, permits the inference that the defendant intended to shoot with the intent to kill as it is reasonable to assume that the defendant intended the victim's death as a natural and probable consequence of the defendant's actions).

Here, the arguments raised by Mr. Brown largely ask us to reweigh the record of evidence for ourselves rather than to determine sufficiency. Although Mr. Brown acknowledges that a close-quarters shooting is recognized by our case law as sufficient to demonstrate intent to kill, he seeks to emphasize other evidence which may support an alternative conclusion—such as Mr. Faye's intoxication, inconsistencies between the testimony of various witnesses, and Mr. Brown's offer to drive Mr. Faye to the hospital. However, the evidence includes Mr. Faye's testimony that Mr. Brown shot him in the

chest at "point blank range." This evidence, in and of itself, when compared to cases like *Raines*, is sufficient to establish that Mr. Brown acted with an intent to kill Mr. Faye. This Court is not tasked with reweighing the evidence, but merely with determining whether the prosecution presented sufficient evidence to persuade a reasonable jury beyond a reasonable doubt. Here, we find that Mr. Faye's testimony was sufficient to do so.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY MONTGOMERY COUNTY.