UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1926

September Term, 2014

DONNELL SMITH

v.

STATE OF MARYLAND

Meredith,
Hotten,
Nazarian,

JJ.

Opinion by Hotten, J.

Filed: December 22, 2015

After two trials which ended in mistrials, Donnell Smith ("appellant") was convicted on charges of second degree murder and use of a handgun in the commission of a crime of violence after his third jury trial in the Circuit Court for Baltimore City.[1] The circuit court sentenced appellant to serve a period of incarceration of thirty years for his murder conviction, and a consecutive term of eighteen years, the first five years to be served without the possibility of parole, for the handgun offense. In his timely filed appeal, appellant raises three questions for our consideration:

[I.] Did the [circuit] court err by ruling that testimony regarding drug dealing was admissible as evidence of motive?

[II.] Did the [circuit] court err by ruling that the former testimony of Tangela Smith was admissible?

[III.] Did the [circuit] court err by permitting the [State] to argue facts not in evidence during closing argument to the jury?

Discerning no reversible error or abuse of discretion, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

Around 2:00 p.m. on April 15, 2009, Erskine Evans ("Mr. Evans"), who was also known by the name "Man-man," was shot and killed on the front steps of 41 Gorman Avenue in Baltimore City, Maryland. Four spent shell casings were later recovered from the scene. Forensic testing confirmed that all of the 9mm casings were fired from the same handgun.

[1] The jury found appellant not guilty on the charge of first degree murder.

Mr. Evans and appellant were both drug dealers. Mr. Evans also made money by robbing other people. Several witnesses testified that, about a week prior to the shooting, appellant, who was also known as "DJ," got into a loud argument with Mr. Evans. Purportedly, appellant believed that, in contravention of a previous agreement between the two men, Mr. Evans had robbed a person who worked for appellant and appellant wanted Mr. Evans to give back what he had taken. Mr. Evans refused. Appellant's cousin, Ebony Dorsey later identified appellant in a photo array as the individual she saw engage in a verbal altercation with Mr. Evans about a week before Mr. Evans was shot. She told police that as appellant was walking away after the confrontation, he was yelling "[i]t ain't over. It ain't over with."

On April 15, 2009, State's witness Damon Leggins ("Mr. Leggins") was working on Gorman Avenue, advertising the sale of drugs on behalf of Mr. Evans. Mr. Leggins saw appellant walking up Gorman Avenue from Fayette Street, wearing a gray hoodie and blue jeans. As he approached, appellant took a gun from the pocket of his hoodie and shot Mr. Evans multiple times. Appellant then ran back down the street and turned onto Fayette Street. Mr. Leggins had known appellant for many years. In July of 2009, Mr. Leggins identified appellant in a photo array as the person who shot Mr. Evans.[2]

Although Mr. Evans' girlfriend, Tangela Smith ("Ms. Smith"), was not present at appellant's trial, her videotaped testimony from the first and second trials was played for the jury. In her taped testimony, Ms. Smith recounted that prior to the shooting she had

[2] At appellant's third trial, Mr. Leggins recanted his prior identification of appellant as the shooter.

been speaking to Mr. Evans through a window. She got up to get a cigarette and heard gunshots outside. She rushed back to the window and saw appellant, wearing a gray hoodie and blue jeans running toward Fayette Street. When he looked back, Ms. Smith, who knew appellant from around the neighborhood, was able to clearly see appellant's face. Later that night, Ms. Smith identified appellant in a photo array as the man she saw running away after Mr. Evans was shot.

In July of 2009, appellant was arrested and charged with the murder of Mr. Evans. Appellant was subsequently tried in April of 2011 and then again in April of 2013; both trials ended in mistrial. Appellant's third trial took place from July 7 to July 15, 2014. At the end of the trial, the jury found that appellant was not guilty on the charge of first degree murder, but guilty on charges of second degree murder and use of a handgun in the commission of a crime of violence. On October 16, 2014, the court sentenced appellant to serve thirty years in prison for second degree murder, and a consecutive eighteen years, the first five years to be served without the possibility of parole, for use of a handgun in the commission of a crime of violence. Appellant filed timely notice of the instant appeal on October 20, 2014.

ANALYSIS

I. Evidence of Motive

Prior to appellant's first trial, the State filed a motion seeking to admit other crimes evidence relevant to demonstrating appellant's motive for shooting Mr. Evans. The circuit court considered the motion at a hearing on April 11, 2011. The court heard testimony indicating that prior to the shooting, appellant and Mr. Evans had an understanding that

Mr. Evans would not rob the drug dealers on Bentalou Street who were working on behalf of appellant. At some point before the shooting, Mr. Evans robbed a drug dealer on Baltimore Street, taking drugs and money. Appellant confronted Mr. Evans, saying that the dealer Mr. Evans had robbed was one of his and that he wanted his stuff back. Mr. Evans refused, yelling at appellant to "[g]et the 'F' off my front. You ain't getting nothing." Appellant walked away from the argument, saying "[i]t ain't over. It ain't over with." A few days later, appellant shot Mr. Evans, who was sitting on the front steps of his home, causing his death.

Defense counsel argued that evidence concerning drug-dealing activities, the robbery of a drug dealer, and the argument between appellant and Mr. Evans should not be admitted because the probative value of the evidence was outweighed by the danger of unfair prejudice. The court determined that the evidence of the prior interactions between appellant and the victim was relevant to prove motive, that they were demonstrated by clear and convincing evidence, and that the probative value of the evidence was not outweighed by the danger of unfair prejudice. The court explained its ruling as follows:

> Okay. Then I'm prepared to rule. Ultimately it is up to the jury to decide what, if any, weight to give, and what to believe, how much to believe when it comes to all of the State's witnesses.
>
> The issue for this Court, in ruling on this motion, is whether the evidence regarding drug sales is admissible under Rule 5-404(b) which states evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action and conformity therewith. It may however, be admissible for other purposes. What's relevant here is proof of motive.
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> * * *

Okay. Well, I find the State has proven by clear and convincing evidence that through the testimony of Ms. Smith and Mr. Leggins and Ms. Dorsey, that the defendant and the victim argued and according to Mr. Leggins, he heard -- overheard two arguments.

Anything the defendant said and what's been testified to about what the defendant said during those arguments does establish motive. Clearly what he said to the victim establishes that he believed the victim had robbed him. And it's a normal inference to draw that the victim of a robbery would have some animus towards the person who robbed him.

The robbery wasn't direct. It was indirect. His people were robbed of the product. So the fact that the victim, that the defendant believed that the victim was robbing his workers of his product, established that ill will, or animus.

Now, I find under 5-404(b) that that sort of motive is highly relevant to this case because in any murder case, any fact finder is going to ask himself or herself, why would this person kill this victim? So evidence of motive in a murder case is highly relevant. And in this instance the fact that the defendant would bear ill will toward the victim because the victim had robbed his people of his product, is highly relevant.

Now, the fact -- first of all -- when -- and the conversations should be admitted to prove that. Now, the conversations implicitly lead to an inference that these people are talking about drug dealing, so you're three quarters of the way there just by the content of the language. "I don't care who[ ] you rob, just don't rob my people on Bentalou Street," whatever. The flavor is already there in the language.

Mr. Leggins adds all the details about how he actually sold drugs for the defendant, and on the day of the murder, was going to sell drugs for the victim. And he puts it all out there.

Now, I find that evidence regarding the drug dealing of these people is particularly relevant when it comes to motive. Now, I use the example of … landscaping. If one landscaper steals the tools or the rakes or the tractor of another landscaper, he has recourse. He can go to the police.

But when one drug dealer believes that he's being -- his people are being robbed by another drug dealer, there is no legal recourse. And self help, unfortunately, all too often appears to be the first and last resort.

> And therefore the fact that the robbery dealt with drugs enhances the proof of motive and the relevance of these robberies. So I find that this is the kind of evidence that is legitimately prejudicial. It's highly relevant. And it does not -- there's legitimate prejudice and there's unfair prejudice.
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> And in this instance, I find that this motive evidence presents compelling evidence that may create prejudice, but indeed it is legitimate prejudice, and its probative value far outweighs the prejudice to the defendant.
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> After all, while it's not -- the jury is not supposed to value the victim as whether he is worthy or unworthy, he is certainly being sullied in terms of his being not only a drug dealer, but a robber.
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> So, on the scale, I find that certainly this is not undue, unfair prejudice. And given these findings, [the State] will be permitted to introduce the other crimes' evidence.

On appeal, appellant concedes that the circuit court engaged in the appropriate three-part analysis required for the admission of "other crimes evidence" under Md. Rule 5-404(b). He maintains, however, that the court reached the wrong conclusion regarding whether the evidence was unfairly prejudicial.[3] Appellant asserts that the challenged evidence of appellant's other crimes and bad acts, "could have influenced the jury to believe that he has a criminal propensity," and therefore, his convictions should be reversed.

The State contends that because the same evidence about which appellant now complains was admitted without objection at other points during appellant's trial, this issue was waived for the purposes of appeal. The State further asserts that some of the

[3] Appellant does not challenge the circuit court's determinations that the proffered "other crimes" evidence was relevant to prove motive, or that appellant's involvement in the other acts was proven by clear and convincing evidence.

challenged evidence does not constitute "other crimes evidence" and, therefore, was not subject to the restrictions placed by Md. Rule 5-404(b). Finally the State maintains that the circuit court correctly determined that the probative value of the challenged evidence outweighed any unfair prejudice that accrued to appellant as a result of its admission, and was, therefore, properly admitted.

Assuming, *arguendo*, that this issue was properly preserved for appellate review,[4] we agree with the State that the evidence was properly admitted. We explain.

Generally, "[e]vidence of other crimes, wrongs, or acts including delinquent acts … is not admissible to prove the character of a person in order to show action in conformity therewith." Md. Rule 5-404(b). As the Court of Appeals has explained, "[e]vidence of other crimes may tend to confuse the jurors, predispose them to a belief in the defendant's guilt, or prejudice their minds against the defendant." *State v. Faulkner,* 314 Md. 630, 633 (1989) (citations omitted). There are exceptions to Md. Rule 5-404(b), however, allowing evidence of other crimes or bad acts to be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or

[4] If, as the State asserts, substantially the same evidence regarding appellant's drug dealing, the robbery of the drug seller, and the argument between appellant and the victim was admitted without objection at other points in appellant's trial, then this issue was waived for the purposes of appellate review. *See Klauenberg v. State,* 355 Md. 528, 545 (1999) (requiring "the party opposing the admission of evidence to object each time the evidence is proffered by its proponent.") (citation omitted); *Brown v. State,* 90 Md. App. 220, 225 (1992) (opining that to preserve an objection, a party must either "object each time a question concerning the [matter is] posed or … request a continuing objection to the entire line of questioning."); *DeLeon v. State,* 407 Md. 16, 31 (2008) (holding that "[o]bjections are waived if, at another point during the trial, evidence on the same point is admitted without objection.") (citing *Peisner v. State,* 236 Md. 137, 145-46 (1964)).

absence of mistake or accident." Md. Rule 5–404(b). "'[E]vidence of other crimes may be admitted … if it is substantially relevant to some contested issue in the case and if it is not offered to prove the defendant's guilt based on propensity to commit crime or his character as a criminal.'" *Merzbacher v. State*, 346 Md. 391, 407 (1997) (quoting *Faulkner,* 314 Md. at 634.)

Before a court may admit other crimes/bad acts evidence, it must engage in a three-part analysis:

> The first required determination is whether the evidence fits within one or more of the stated exceptions to Rule 5–404(b). This is a legal determination that does not involve any exercise of discretion. The second requirement is that the [circuit] court determine whether the defendant's involvement in the other act has been established by clear and convincing evidence. We review the [circuit] court's decision to determine if there is sufficient evidence to support its finding. Lastly, the [circuit] court must weigh the probative value of the evidence against any undue prejudice that may result from its admission. This determination involves the exercise of discretion by the [circuit] court.

Sifrit v. State, 383 Md. 116, 133 (2004) (internal citations omitted).

The Maryland Court of Appeals has provided the following guidance regarding what types of evidence trigger the need for an "other crimes" analysis for purposes of Md. Rule 5-404(b), stating, "a bad act is an activity or conduct, not necessarily criminal, that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit." *Klauenberg*, 355 Md. at 549. We are persuaded that the argument between appellant and Mr. Evans that occurred about a week before the shooting does not constitute "other crimes" evidence. The mere fact that appellant argued with the victim about returning property he believed Mr. Evans had stolen from him, does not

"impugn or reflect adversely upon" appellant's character. As such, the three-part analysis required for "other bad acts" evidence does not apply to this conduct.

We are further persuaded that the fact that appellant was a drug dealer, and employed other people to work for him selling drugs, was admissible under Md. Rule 5-404(b) to prove motive. To be admissible under the Md. Rule 5-404(b) motive exception, the other crime "must be committed within such time, or show such relationship to the main charge, as to make [the] connection obvious." *Wimbish v. State*, 201 Md. App. 239, 262 (2011), *cert. denied*, 424 Md. 293 (2012) (citation omitted). In this case, the witness testimony at the hearing established that both appellant and the victim sold drugs in the same neighborhood and that in the week or two immediately preceding the shooting, appellant believed that the victim had robbed money and drugs from one of his sellers that he refused to return to appellant, causing appellant to declare that the confrontation between the two of them "ain't over with." As the circuit court noted, when drug dealers are robbed they must resort to "self-help" in order to sustain their business and their reputations. On this basis, we conclude that the relationship of appellant's drug dealing to the murder of the victim was clearly relevant, and, therefore, was admissible to prove motive.

The court next appropriately concluded that there was clear and convincing evidence that appellant was a drug dealer and engaged in a disagreement with the victim. There was substantial testimony from three witnesses at the hearing regarding appellant's activities prior to the shooting. Appellant concedes that "there was ample evidence from

the testimony of three witnesses at the pre-trial hearing establishing the other crimes or bad acts."

Finally, the motions court appropriately exercised its discretion when it concluded that the probative value of the other crimes evidence outweighed the danger of unfair prejudice. At appellant's trial, no one testified that they saw appellant shoot Mr. Evans.[5] Thus, any evidence that established why appellant would have been at the scene of the murder and/or why he wanted the victim dead, was extremely probative. As the motions court opined:

> [I]n any murder case, any fact finder is going to ask himself or herself, why would this person kill this victim? So evidence of motive in a murder case is highly relevant. And in this instance the fact that the defendant would bear ill will toward the victim because the victim had robbed his people of his product, is highly relevant.
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> * * *
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> And therefore the fact that the robbery dealt with drugs enhances the proof of motive and the relevance of these robberies. So I find that this is the kind of evidence that is legitimately prejudicial. It's highly relevant. And it does not -- there's legitimate prejudice and there's unfair prejudice.
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> And in this instance, I find that this motive evidence presents compelling evidence that may create prejudice, but indeed it is legitimate prejudice, and its probative value far outweighs the prejudice to the defendant.

[5] Mr. Leggins previously testified that he observed appellant shoot the victim; however, he recanted his statement at trial. Mr. Evans' girlfriend, Ms. Smith, testified only that she saw appellant running away from the scene after the shooting.

It is clear that the circuit court carefully considered the value of this evidence prior to allowing its admission. Discerning no error or abuse of discretion in the circuit court's determinations, we decline to reverse appellant's convictions on this basis.

II. VIDEO TESTIMONY OF UNAVAILABLE WITNESS

After two previous jury trials ended in mistrial, appellant was convicted for shooting Mr. Evans at the conclusion of his third jury trial. Mr. Evans' girlfriend, Ms. Smith, testified under oath and was cross-examined at the first two trials, but failed to appear for the third trial. The circuit court ruled, over a defense objection, that Ms. Smith was "unavailable" for the purposes of Md. Rule 5-804, and allowed the State to play her recorded testimony from the second trial. Prior to playing this testimony, defense counsel argued that the jury should also be permitted to hear Ms. Smith's testimony from the first trial. The circuit court agreed and that testimony was played for the jury as well. Appellant now contends that the circuit court abused its discretion by allowing Ms. Smith's testimony from the first two trials to be played for the jury during his third trial. He concludes that he is, therefore, entitled to a new trial.

Generally, in Maryland, all individuals accused of a crime are entitled to confront the witnesses against them. *See State v. Breeden*, 333 Md. 212, 218-19 (1993) ("In all criminal prosecutions in the State of Maryland, the Sixth Amendment to the Constitution of the United States, applicable to the states through the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights command that the accused shall enjoy the right to be confronted with the witnesses against the accused.") (citations omitted). There are, of course, exceptions to the general rule, however, including cases "'where a witness

is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant.'" *Id*. at 220 (quoting *Barber v. Page*, 390 U.S. 719, 722 (1968)).

In Maryland, hearsay evidence is, generally, not admissible. *See* Md. Rule 5-802 (prohibiting the admission of hearsay evidence unless an exception is applicable). "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c).

Several exceptions to the general rule prohibiting the admission of hearsay evidence are set forth in Md. Rule 5-804, which provides that some of a declarant's out of court statements may be admitted, if the court determines that the declarant is "unavailable[.]" Md. Rule 5-804(b). Md. Rule 5-804(a)(5) defines "'[u]navailability as a witness'" to include situations in which the declarant "is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance … by process or other reasonable means." Md. Rule 5-804(a)(5). One type of statement that may be admitted pursuant to the Rule is "[f]ormer [t]estimony[,]" which is defined as:

> [t]estimony given as a witness in any action or proceeding or in a deposition taken in compliance with law in the course of any action or proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Md. Rule 5-804(b)(1).

A party asserting that it has utilized "other reasonable means" in its attempts to contact an unavailable witness must demonstrate to the satisfaction of the court that it

employed "good faith and due diligence to procure [the] attendance[]" of the witness. *Breeden*, 333 Md. at 222; *Cross v. State*, 144 Md. App. 77, 88 (2002) (citation omitted). "'The lengths to which the prosecution must go to produce a witness … is a question of reasonableness.'" *Breeden*, 333 Md. at 221 (quoting *Ohio v. Roberts*, 448 U.S. 56, 74 (1980)). What constitutes reasonableness varies depending upon the circumstances of the particular case. *United States v. Johnson*, 108 F.3d 919, 922 (8th Cir. 1997). A circuit court's determinations regarding whether a witness is "unavailable," including whether the party seeking admission of the statement has acted in "good faith" and with "due diligence" in its attempts to procure the witness's attendance, are reviewed for abuse of discretion. *Breeden*, 333 Md. at 215-16.

Under the circumstances of this case, we are persuaded that the circuit court's decision to admit the prior testimony of Ms. Smith, who was unavailable, did not constitute an abuse of discretion.

Here, the State proffered to the court that Ms. Smith appeared in person for appellant's previous two trials. After the second trial, Ms. Smith expressed her frustration with the process and said "she was trying to move on with her life." Since the conclusion of the second trial, appellant's case had been postponed multiple times, but, as each trial date approached, Ms. Smith contacted the State and expressed that she "was still available." At some point, however, the witness "moved out of state to Delaware." Approximately one week before the trial date, the State "called every number" it had to contact Ms. Smith. Some of the numbers were disconnected and others went to voicemail. The State left a message for Ms. Smith whenever that option was available.

Approximately fifteen to thirty minutes after leaving a message at one of the numbers, the witness called the State "from a blocked number indicating that someone who [the prosecutor] had called informed her that [he] was looking for her." Because the witness called from a blocked number, the State was unable to determine the number from which she was calling. Ms. Smith verified that she had moved to Delaware and stated, "I'm tired of this case. I've done my part twice. I've come in when you asked me to come in. You know, I've got to move on with my life. I don't want to be involved anymore." After the State explained to the witness how important her testimony was to the case, she responded, "I'll see what I'm going to do. I don't know what I'm going to do. I'll contact you." The State proffered that that was the last conversation it had had with the witness prior to appellant's trial. When questioned by the court concerning the issuance of a subpoena for the witness, the State conceded that it did not have the entire file, but informed the court that the witness "was summonsed for this trial date, yes, Your Honor. Absolutely, she was." When asked to what address the subpoena was sent, the State told the court that the witness "came into court and [it] had her sign here in Victim/Witness, [Room] 410." After reviewing the court file, the court ruled as follows:

> I have reviewed my notes of your arguments both in favor and against the utilization of prior testimony and against a finding of unavailability. The argument is that the complaining witness is no longer within the Maryland jurisdiction and her current address is unknown. The defense indicates that the State has failed to prove that the witness is unavailable. It would be futile to send a summons to an address at which the witness no longer resides and whose direct telephone number is unknown, was contacted in an indirect manner, did respond, but indicated ambivalent feelings about whether she was going to be available or not.

I don't know how I can reach any conclusion other than this witness is unavailable.

* * *

The rule, I think, is clear. There are conditions which must be met for certain of the reasons why prior testimony may be admissible. Unavailable is one that the [c]ourt need only find that the witness is unavailable and it is not through any wrongdoing on the part of the (unintelligible) since it's the State who wishes to procure that witness. None of those circumstances [*sic*].

The motion to admit the prior testimony of the unavailable witness, Ms. Smith, is granted.

The following morning, prior to opening statements, the State informed the court that Ms. Smith had called the State's office the previous night. The following colloquy occurred:

[THE STATE]: Okay. The second issue, yesterday, Your Honor, we had a hearing and the State moved forward on a motion pursuant to Maryland Rule 5-804.1(a), which was prior testimony. We had the hearing before Your Honor and you ruled that we could go forward with the prior testimony of Ms. []Smith. I wanted to let the [c]ourt know that yesterday evening Ms. Smith called my office when I was (unintelligible) session and I answered the phone and spoke with her, and she asked me do I still need her, and I responded, "Yes, we still need you." She said, "Well, I don't know if I'm coming. I'll see what I can do," and that was the last -- I said, "Well, we need you. Please come into the courthouse." I wanted to let the [c]ourt know because part of the elements of former testimony is essentially the witness cannot be -- the State cannot contact the witness and have any control over the witness. She is still, as far as I know, out of state and she still, as far as I know, someone that I can't get control of. She contacted me. I don't have a way of contacting her.

THE COURT: Find out where she lives and serve her with a summons.

[THE STATE]: But we don't know where she lives. She's out of state. She's in Delaware.

THE COURT: I understand.

> [THE STATE]: I don't have a means of sending an officer to a random -- there's no --
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> THE COURT: We can send the summons to Delaware, if we can get an address.
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> [THE STATE]: We don't have an address. We have no means of knowing where she's at because she purposely -- as I described yesterday, she purposely moved away. Not purposely. She moved away, not necessarily because of this case, but she's purposely not giving me information with which to contact her.
>
> THE COURT: I understand.
>
> [THE STATE]: I just want to let the [c]ourt know because it's my duty as an officer of the court to be candid with the [c]ourt with all information and update the [c]ourt with any changes. (Unintelligible) the matter is, is that I did receive contact with this witness yesterday. I asked her to come in. As far as I know, as of right now, I intend to go forward with 5-804.1(a) pursuant to our motions agreement. If she shows up, I'll obviously adjust.

Appellant challenges the circuit court's determination that Ms. Smith was unavailable for trial, asserting that there was no evidence that the witness was summonsed for trial, as the State proffered, and that there was no corroboration of the State's assertion that the witness had moved to a different state.

It is well established in Maryland, that a circuit court does not err or abuse its discretion by relying on a proffer from counsel regarding the unavailability of a witness. In *Commercial Union Ins. Co. v. Porter Hoyden Co*., 116 Md. App. 605, 642-43 (1997), the party seeking the admission of a witness's prior testimony "proffered a lengthy and very specific explanation as to why the witness was 'unavailable."' The circuit court accepted the proffer made by counsel, ruled that the witness was unavailable, and allowed

the admission of the witness's prior testimony. *Id.* at 643. On appeal, this Court considered whether the circuit court "acted improperly in relying on counsel's proffer as a basis for [its] decision." *Id*. at 643. This Court opined:

> As officers of the court, lawyers occupy a position of trust and our legal system relies in significant measure on that trust. We agree completely with [the circuit court's] handling of the situation:
>
> > I rely on counsel and if counsel makes a representation, as far as I am concerned, counsel's word is counsel's bond unless there is something to the contrary that the opponent can bring in.

Id. at 643.

At appellant's trial, the State proffered a very detailed explanation regarding Ms. Smith's unavailability. It was not error for the circuit court to rely on that information in reaching its decision that Ms. Smith was unavailable.[6] Moreover, as the court noted, appellant, who had retained the services of the same defense attorney throughout all three of his trials, had the opportunity to fully cross-examine Ms. Smith at each of appellant's previous trials and his motives in doing so remained the same throughout all three trials. We conclude, therefore, that Ms. Smith's prior testimony fell fully within the exception to the hearsay rule, and therefore, allowing the State to play the recorded testimony of Ms. Smith for the jury was not an abuse of discretion.

[6] To the extent there is no evidence in the record indicating that Ms. Smith was summonsed for appellant's third trial, we note that defense counsel did not raise this argument before the circuit court at appellant's trial. Furthermore, under these circumstances, even if the witness was, in fact, not summonsed, we would conclude that it was not unreasonable for the State to forgo the time-consuming and expensive process of obtaining an out-of-state summons for a witness without a known address.

III. STATE'S CLOSING ARGUMENT

During appellant's trial, the State's witness, Mr. Leggins, recanted his former identification of appellant as the individual who had shot Mr. Evans on April 15, 2009. Mr. Leggins testified that, although he had been certain that appellant was the gunman, he now realized that he was wrong and could no longer say that appellant had committed the crime. Mr. Leggins testified that he now believed that a man named "Cecil" was the person who shot Mr. Evans. Mr. Leggins did not know Cecil's last name, and stated that Cecil had been killed in January of 2014.

In the State's closing argument, the State asserted that, prior to appellant's third trial, Mr. Leggins had consistently identified appellant as the individual who shot Erskine Evans. The State then commented on Mr. Leggins' new testimony regarding a gunman named "Cecil," stating, in pertinent part:

> Now in court he [Mr. Leggins] conveniently mentions that he met with an individual named Cecil who gave him some information that changed his mind back in January. This information was never stated previously and he indicated, he testified that he never provided the information to the police or the State, but he's known it since January. It is July. And conveniently, this Cecil, the shooter is dead. *We couldn't -- we're not able to corroborate that fact.*

(emphasis by appellant). Defense counsel objected and moved to strike the State's comment, but was overruled.

Appellant contends that that the circuit court abused its discretion when it failed to sustain his objection and strike the offending portion of the State's closing argument. Specifically, appellant complains that the State argued facts not in evidence when it

commented on the fact that Mr. Leggins' assertion that Cecil killed the victim was not corroborated.

It is well-established that "attorneys are afforded great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999) (citations omitted). A "prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Id.* (citations omitted). Notwithstanding the wide latitude afforded to counsel in closing argument, the scope of what may be said in closing argument is not boundless. *Wilhelm v. State*, 272 Md. 404, 412 (1974). A defendant's right to a fair trial must be protected. *Degren*, 352 Md. at 430 (citation omitted). A party is prohibited, for instance, from "comment[ing] upon facts not in evidence or … stat[ing] what he or she would have proven." *Smith v. State*, 388 Md. 468, 488 (2005) (citation omitted). Nor may a party vouch for the credibility of a witness, *Spain v. State*, 386 Md. 145, 153 (2005), or "comment upon the defendant's failure to produce evidence to refute the State's evidence." *Eley v. State*, 288 Md. 548, 555 n.2 (1980).

It is not necessary, however, that every improper remark made by the State during closing argument result in a new trial. *See Wilhelm*, 272 Md. at 431 ("[T]he mere occurrence of improper remarks does not by itself constitute reversible error"). Reversal is only required if it appears that improper remarks "actually misled the jury or were likely to have misled or influenced the jury to the defendant's prejudice[.]" *Donaldson v. State*, 416 Md. 467, 496-97 (2010) (quoting *Hill v. State*, 355 Md. 206, 224 (1999)).

In determining whether an allegedly improper statement in closing argument constitutes reversible error, we consider the following factors: (1) the severity and pervasiveness of the remarks; (2) the measures taken to cure any potential prejudice; and (3) the weight of the evidence against the accused. *Id*. at 497 (quoting *Lee v. State*, 405 Md. 148, 165 (2008)).

Appellant contends that by commenting on the lack of corroboration of Mr. Leggins' testimony concerning Cecil, the State improperly argued facts not in evidence. He asserts that "[t]here was no evidence to support the [State]'s argument to the jury that 'we're not able to corroborate' the claim that Cecil was dead." Appellant does not contest the fact that Mr. Leggins was the only witness to testify about an individual named "Cecil." Nor does appellant contend that the State improperly recounted Mr. Leggins' testimony that Cecil was now dead.

In the absence of any evidence about efforts the State had made to corroborate Leggins' testimony regarding Cecil, the State's comment was improper. However, we conclude that any error committed by the circuit court in overruling defense counsel's objection was harmless. The remark by the State was isolated and mild. Furthermore, any possible prejudice that accrued to appellant as a result of the State's comment was cured by the circuit court's instructions to the jury indicating that it was their duty "to decide the facts[,]" and that "during [their] deliberations [they] must decide this case based only on the evidence that [they] heard together in this courtroom." In explaining to the jury what constitutes evidence, the circuit court also clearly instructed the jury that the parties' opening and closing statements were not evidence.

Finally, the State's isolated comment regarding the ability of the State to corroborate Mr. Leggins' testimony regarding an individual named "Cecil" was not the kind of statement that was "likely to have misled or influenced the jury to the defendant's prejudice[.]" *Donaldson*, 416 Md. at 496-97 (quoting *Hill*, 355 Md. at 224). At appellant's trial, the court properly instructed the jurors that, when they were evaluating the credibility of witnesses, they should consider "whether other evidence that you believe supported or contradicted the witness's testimony[.]" In other words, the jury was instructed, at the behest of both parties, that it should consider corroborating evidence, or the lack thereof, in determining a witness's credibility. We are persuaded that the State's comment merely emphasized that point and accordingly, we conclude that reversal is not warranted.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY ARE AFFIRMED. COSTS TO BE PAID BY APPELLANT.