UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1953

September Term, 2013

WILLIAM JONES

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: July 21, 2015

Following a jury trial in the Circuit Court for Montgomery County, appellant, William Jones, was convicted of distribution of cocaine and possession with intent to distribute cocaine. The court sentenced appellant to 10 years for distribution of cocaine and 4 years, concurrent, for possession with intent to distribute cocaine.

Appellant's timely appeal presents three questions for review:

1. Did the trial court err in denying appellant's motion for a mistrial?

2. Did the trial court err in allowing improper rebuttal closing argument?

3. Did the trial court err in sentencing?

Because appellant's sentence for possession with intent to distribute should have merged with his sentence for distribution, we vacate appellant's sentence for possession with intent to distribute. We otherwise affirm the judgments of the circuit court.

BACKGROUND

In 2013, Officer Abraham Groveman arrested Paul Zeppos for possession of drug paraphernalia. Following his arrest, Zeppos agreed to assist police with a controlled drug purchase. In exchange, the police agreed to tell the State's Attorney at his trial that he was cooperative.

On April 8, 2013, around 6:30 p.m., Zeppos met Groveman at the Sixth District Police Station. Zeppos called appellant and made arrangements to purchase $100 worth of cocaine. Groveman, however, gave Zeppos only $60, hoping the dealer would "come out with $100 worth, and after only selling $60, he would still have $40 worth of cocaine on him." Both Zeppos and his car were searched at the police station and no drugs were found.

Thereafter, Groveman and another officer followed Zeppos to the location where the exchange was to take place. The officers set up at two different locations outside of the neighborhood and maintained their positions until after the transaction was completed. They observed Zeppos leaving the neighborhood and followed him to a nearby gas station where Zeppos handed over three rocks of cocaine that he purchased from appellant. The officers again searched Zeppos and his vehicle to verify that "he hadn't purchased more than we asked him to purchase, and that he hadn't – he didn't have it anywhere on his person."

Zeppos testified that he had known appellant a few years prior to April 8, 2013. On that evening, Zeppos called appellant to set up a drug deal for $100 worth of cocaine. Zeppos met with Groveman, who handed him three $20 bills, and he then went to meet appellant.[1] When Zeppos arrived at the agreed-upon meeting place, he called appellant, appellant came up to his car, and they "exchanged money for the drugs through the window." Zeppos told appellant that he had $60 and appellant handed him three bags, which were $20 each. Zeppos then left the neighborhood, met Groveman down the street, and handed him the drugs he purchased from appellant.

Thereafter, Officer Thomas Tippett arrested appellant after receiving a call on his radio that the drug transaction was completed. Tippett noticed that appellant's right hand was open, but that his left hand was clenched. While he was placing appellant in handcuffs,

[1] The bills were not physically marked, but photocopies of the bills were made before giving them to Zeppos. Following the transaction, the bills recovered from appellant matched the photocopies. The photocopies were introduced at trial.

Tippett saw three rocks, of what he believed to be cocaine, fall out of appellant's hand. The police searched appellant and recovered $414 in cash from appellant's pants pockets, which included the three $20 bills given to Zeppos by the police. Tippett picked up the suspected drugs, put the rocks into an evidence bag, and submitted the evidence to Corporal Neil Mohardt.

The contraband recovered from Zeppos and the rocks recovered from appellant were submitted to the crime lab for analysis. The crime lab concluded that the substances were .52 grams of cocaine and .51 grams of cocaine, respectively.

Additional facts will be discussed as they pertain to each question presented.

DISCUSSION

1. Mistrial

During the direct examination of Groveman, the prosecutor asked him why they selected the specific area for the arranged drug buy. The colloquy was, as follows:

> [PROSECUTOR]: And drawing your attention once again to April 8th, where was the transaction set to occur?
>
> [WITNESS]: In the 18700 block of Walkers Choice Road.
>
> [PROSECUTOR]: And why was that location selected?
>
> [WITNESS]: **[Appellant] lives in the 18800 block and is known to deal in that neighborhood.**
>
> [DEFENSE COUNSEL]: Objection. Move to strike.
>
> COURT: Sustained. Please disregard that –

[DEFENSE COUNSEL]: I ask to approach.

(Emphasis added)

The following conversation occurred at the bench:

[DEFENSE COUNSEL]: I specifically made the motion beforehand. I move for mistrial. Now he's labeling my client as a previous drug dealer which is known to deal in a particular area. I specifically had made that motion beforehand, counsel said that he had talked to this officer – this officer's an experienced officer, testified in hundreds of cases. He knows better. He knows better.

COURT: All right.

[DEFENSE COUNSEL]: I move for a mistrial.

COURT: All right, State?

[PROSECUTOR]: Your honor, I think the court can issue curative instructions, asking the jury to disregard the last statement of the police officer.

[DEFENSE COUNSEL]: That's like letting – like closing the gate after the horse is out. The horse is out there now.

COURT: Well, here's the problem. We've already got an agreement where this guy's going to call him and ask him to sell drugs. He's already indicated that this is the guy that sold him drugs. So I don't know that it's any big deal that he's known to sell them in that area.

I'm going to give them – I'm going to deny the motion for a mistrial. I'm going to give them a curative instruction, but I'm just not – I don't know what you told your officer, but there's no reason for him to get into that anyway. So do you want another opportunity to talk to him? Is there any confusion about what he's supposed to get into or not get into?

[PROSECUTOR]: Your honor, I didn't believe there was any confusion. If I could have a moment to speak with the officer again?

Thereafter, the court instructed the jury to "disregard not only that [appellant is] known to sell drugs in that area, but that he's known to sell drugs at all, in the past[.]"

Appellant argues that the trial court erred in refusing to grant his motion for mistrial because "the officer's assertion that appellant was a known drug dealer prejudiced appellant and denied him a fair trial." He further contends that the court's curative instruction did "not eliminate the great prejudice to appellant."

The State responds that the trial court properly exercised its discretion in denying the motion for mistrial because "Officer Groveman's objected-to testimony was a single, inadvertent and unsolicited incident; Officer Groveman was not the sole witness upon which the State's case relied; the trial court issued a prompt curative instruction; and the evidence was overwhelming."

Appellate courts "'review the denial of a motion for a mistrial under the abuse of discretion standard.'" *Johnson v. State,* 423 Md. 137, 151 (2011) (quoting *Dillard v. State*, 415 Md. 445, 454 (2010)). "Ordinarily, the exercise of that discretion will not be disturbed upon appeal absent a showing of prejudice to the accused, and [i]n order to warrant a mistrial, the prejudice to the accused must be real and substantial." *Wagner v. State,* 213 Md. App. 419, 462 (2013) (quoting *Washington v. State*, 191 Md. App. 48, 99 (2010)) (internal quotation marks omitted).

"The determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Kosh v. State*, 382

Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 594-95 (1989)). "In assessing the prejudice to the defendant, the trial judge first determines whether the prejudice can be cured by instruction." *Id.* "Unless the curative effect of the instruction ameliorates the prejudice to the defendant, the trial judge must grant the motion for a mistrial." *Id.*

Here, the objected-to testimony was a single statement over the course of a two-day trial, and the court issued a prompt and thorough curative instruction. Jurors are presumed to follow the instructions given to them by the trial judge. *See Jones v. State*, 217 Md. App. 676, 697-98 (2014) (quoting *Spain v. State*, 386 Md. 145, 160 (2005)) ("'Maryland courts long have subscribed to the presumption that juries are able to follow the instructions given to them by the trial judge, particularly where the record reveals no overt act on the jury's part to the contrary.'").

The court assessed the potential prejudice to appellant and determined that the prejudice was not so substantial to deprive him of a fair trial, because the officer already testified that it was appellant who sold drugs to Zeppos. Regardless of appellant's asserted past history of dealing in drugs, the evidence was more than sufficient to support his conviction for distribution of cocaine. The details of the drug transaction were well documented by Zeppos and several officers. When appellant was arrested, he was in possession of the money given to Zeppos for the purchase and the remaining cocaine that Zeppos did not purchase. On the record before us, any prejudice to appellant was not so

substantial as to deprive him of a fair trial. The court did not abuse its discretion by denying the motion for mistrial.

2. Closing argument

During rebuttal closing argument, the prosecutor commented: "[Defense counsel has] talked a lot about reasonable doubt, and you've heard the jury instruction on that, and a reasonable doubt is a doubt founded upon reason. Well that's not a very good definition, but another way to phrase that is, there needs to be a hypothesis of innocence, a reasonable –" Defense counsel objected and the court overruled the objection. The prosecutor continued: "In order to convict someone beyond a reasonable doubt, the State needs to negate every reasonable hypothesis. That makes sense." Defense counsel objected a second time, and the following colloquy occurred at the bench:

> COURT: All right, what's the basis of the objection?
>
> [DEFENSE COUNSEL]: The defense has no burden to prove any innocence. That the State –
>
> COURT: He didn't say that. He said the State had the burden. He never said the State, that the defense had any burden. Did you?
>
> [PROSECUTOR]: Well, I said that the State needs to negate every reasonable hypothesis of innocence.
>
> COURT: All right.
>
> [PROSECUTOR]: I believe it's the law.
>
> [DEFENSE COUNSEL]: And prior to that, he said that there has to be a, word–

> [PROSECUTOR]: A reasonable hypothesis of innocence.
>
> [DEFENSE COUNSEL]: A hypothesis of innocence. Now, I don't think there has to be a hypothesis of innocence. That's not what the law says. The law says that the state has to prove this case beyond a reasonable doubt.
>
> COURT: All right. Then they don't have to make every conceivable hypothesis of innocence.
>
> [DEFENSE COUNSEL]: Well, I don't think that's what the law says. I object.
>
> COURT: Well, that's what the instruction says.
>
> [DEFENSE COUNSEL]: Okay. I understand what you're saying, but when I say okay, I don't mean I agree. And let me make the record clear, I don't mean I agree. I mean I understand what you're saying, but I disagree.
>
> COURT: All right. I'm not sure why we're going through this, but okay. All right.

The prosecutor then argued to the jury that the defense's explanation of events, that Zeppos gave the drugs and money to appellant in order to set him up, was "[d]ispositively contradicted by all of the other evidence." Appellant argues that the trial court erred by permitting the prosecutor to make comments that shifted the burden of proof to the defense. Specifically, appellant contends that

> [t]he prosecutor's comment that for the jury to have reasonable doubt 'there needs to be a [reasonable] hypothesis of innocence' conveyed to the jury that appellant had to present a defense (or reasonable theory of innocence) in order to create a reasonable doubt in the minds of the jurors.

The State responds that the prosecutor's comments were "not improper as the effect of the State's argument would, in fact, heighten the State's burden of proof." The State further argues that any error was harmless beyond a reasonable doubt because the jury was

properly instructed on the burden of proof, and because appellant was in possession of three bags of cocaine at the time of his arrest.

During closing argument, "'counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom; the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly . . . on the nature of the evidence and the character of witnesses[.]'" *Mitchell v. State*, 408 Md. 368, 380 (2009) (quoting *Wilhelm v. State,* 272 Md. 404, 412 (1974)). "'What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case.'" *Id.* (quoting *Smith and Mack v. State*, 388 Md. 468, 488 (2005)).

On appeal,

> 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. This determination of whether the prosecutor's comments were prejudicial or simply rhetorical flourish lies within the sound discretion of the trial court. On review, an appellate court should not reverse the trial court unless that court clearly abused the exercise of its discretion and prejudiced the accused.

Beads v. State, 422 Md. 1, 10-11 (2011) (quoting *Degren v. State*, 352 Md. 400, 430-31 (1999)) (internal quotation marks omitted).

"'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.'" *Beads v. State*, 422 Md. 1, 13 (2011) (quoting *Spain v. State*, 386 Md. 145, 159 (2005)).

In the instant case, the prosecutor's comments did not shift the burden of proof to the defense. The prosecutor stated that negating any reasonable hypothesis of innocence was another way of explaining the State's burden to prove appellant's guilt beyond a reasonable doubt. The court correctly pointed out that the prosecutor said that it was the State's burden to negate every reasonable hypothesis of innocence, and never said that the defense was required to prove anything. Further, the court instructed the jury that the State had the burden of proving appellant's guilt beyond a reasonable doubt. The prosecutor's comments were within the bounds of permissible closing argument. The court did not abuse its discretion in this instance.

3. Merger

At the sentencing hearing, the court discussed with the parties whether appellant's convictions should merge for sentencing purposes:

> COURT: I think count two certainly merges into count one. Don't you, [defense counsel]?
>
> [DEFENSE COUNSEL]: Yes, your honor. If it's not in the rule, leniency should apply.
>
> COURT: All right. Well, I mean, I can give him concurrent time, so –
>
> [DEFENSE COUNSEL]: Yes, your honor.
>
> Thereafter, the court sentenced appellant, as follows:

> All right. The sentence of this court as to the count one, distribution of cocaine, is the sentence of the court that the defendant be sentenced to 10 years to the Department of Corrections. . . . As to the . . . possession with intent to distribute cocaine, I believe that merges into count one, distribution of cocaine. Nonetheless, the sentence of the court is four years to the Department of Corrections to run concurrent to the sentence of count one.

Appellant argues that the "court erred in imposing a separate sentence for possession with intent to distribute" and that it did not matter that "the sentences were made concurrent, rather than consecutive." The State concedes that appellant's sentence for possession with intent to distribute should be vacated because "the cocaine that [appellant] was found guilty of distributing and possessing with the intent to distribute were part of the same transaction."

We agree. In *Anderson v. State*, 385 Md. 123, 133 (2005), the Court of Appeals concluded that "possession and distribution [were] the same offenses for double jeopardy purposes." (internal quotation marks omitted). In doing so, the Court explained:

> [D]istribution occurs when a controlled dangerous substance is delivered, either actually or constructively, other than by lawful order of an authorized provider. It is not possible, under these statutes, to "distribute" a controlled dangerous substance in violation of § 5-602 unless the distributor has actual or constructive possession (dominion or control) of the substance. Thus, possession of the substance distributed is necessarily an element of the distribution. The crime of distribution obviously contains an element not contained in the crime of possession – the distribution – but there is no element in the crime of possession not contained in the crime of distribution.

Id. at 132-33. For the sentences to merge, however, the offenses must also be part of the same course of conduct. *See Anderson*, 385 Md. at 133 ("The issue thus becomes whether the possession offense charged in the District Court and the distribution offenses charged in

the indictments arose as part of the same course of conduct – whether they are the same in fact.").

Here, it appears that the court intended to merge the possession with intent to distribute count with the distribution count, but ultimately imposed a concurrent four-year sentence for possession with intent to distribute. Under the facts that we have reviewed, appellant's sentence for possession of cocaine with the intent to distribute should have merged with his sentence for distribution.

In light of Groveman's testimony, it is clear that appellant's possession of the cocaine at the time of his arrest was an element of the same course of conduct as the distribution. Accordingly, we vacate appellant's sentence for possession with the intent to distribute cocaine. *See Carroll v. State*, 202 Md. App. 487, 518 (2011) ("[W]here merger is deemed to be appropriate, this Court merely vacates the sentence that should be merged without ordering a new sentencing hearing.").

SENTENCE FOR POSSESSION WITH INTENT TO DISTRIBUTE COCAINE VACATED.
JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED IN ALL OTHER RESPECTS.
COSTS TO BE PAID ONE-HALF BY MONTGOMERY COUNTY AND ONE-HALF BY APPELLANT.