UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0162

September Term, 2015

RODNEY BALLENTINE

v.

STATE OF MARYLAND

Meredith,
Nazarian,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: February 23, 2016

On November 20, 2014, a jury in the Circuit Court for Howard County convicted Rodney Ballentine, the appellant, of robbery, second-degree assault, and theft. On February 19, 2015, he was sentenced to eight years of incarceration for the robbery conviction. The remaining convictions were merged. He presents a single issue for our review:

> "Did the trial court err in allowing improper prosecutorial comment during closing argument?"

We find no error and shall affirm.

Factual Background

At approximately 7:30 p.m. on July 13, 2013, Christian Perez, the victim, was at the Oakland Mills Village Center (the shopping center) on Stevens Forest Road in Columbia, Maryland. He entered a "Sam's Mart" to purchase a soda when he noticed the appellant standing outside of the store. After making his purchase, Perez walked behind the shopping center to a dirt path which led to a nearby apartment complex where he lived with his father.

Perez testified that as he was walking along the path the appellant rode up behind him on a bicycle and knocked him to the ground with a closed fist. The appellant then dismounted the bike, advanced toward Perez, and hit him a number of times around the head and face as Perez "curled up" in an effort to protect himself. The appellant took a white iPhone 5 that had been in Perez's pocket then got back onto the bicycle and rode off.

Once the appellant departed, Perez retreated to the front of the shopping center where he was able to flag down a police patrol car driven by Officer Kevin Hussel. Officer Hussel

testified that Perez had an injury to the side of his face and that his right ear was swollen where an earring had been torn out. Perez, who speaks primarily Spanish, was able to communicate with Officer Hussel "for the most part" in English. He recounted to Officer Hussel what had transpired, provided a physical description of the robber, and indicated that the robber rode off in a westerly direction across Stephens Forest Road toward the Forest Ridge apartment complex. Perez informed Officer Hussel that someone in the area told him that a person fitting the robber's description went by the nickname "Goochy."[1] Eventually a Spanish-speaking officer arrived, to whom Perez gave a written statement. The statement was read aloud at trial by an interpreter:

> "I had been walking towards the apartment where I live when a person with dark skin came close to ask if I would allow him to make a call, and I answered, 'No.' And he got off of his bicycle and threw me to the ground and hit me two times and took my telephone out of my pocket. He is tall and a bit heavy, and was wearing a polo type shirt, which was red (burgundy) with light brown shorts."

Perez testified that a few days after the robbery he returned to the shopping center and again saw the appellant outside of the Sam's Mart. He called 911 to notify the police.

Detective Corporal Jim Zammillo was tasked with investigating the robbery. He interviewed Perez at his residence on July 16, 2013. In the course of the interview, Perez identified the appellant in a photo array and provided Detective Zammillo with the serial

[1]In the record, the spelling of the nickname alternates between "Gucci" and "Goochy." The latter spelling, which we have adopted, is how it appears in the appellant's brief.

number and IMEI number (collectively, the identification numbers) for the stolen phone. Detective Zammillo requested an arrest warrant for the appellant.

The appellant was arrested the following day, July 17, 2013, in the Forest Ridge apartment complex by Detectives Matthew Mehrer and Corey Nolan – members of the Howard County Police Department assigned to the Warrant and Fugitive Unit. Importantly for purposes of the present appeal, Detective Mehrer testified regarding the appellant's demeanor at the time of the arrest:

> "He made several statements, he was angry toward us, and *made a statement to the effect of the police can't come into his neighborhood, he owns the neighborhood*, and a variety of other statements."

(Emphasis added).

The appellant was subsequently transported to the Howard County Detention Center. Detective Zammillo monitored phone calls made by the appellant from the detention center and noted two calls in which the appellant referred to himself as "Goochy." Recordings of both calls were introduced at trial.

Meanwhile, Detective Zammillo provided the identification numbers for the stolen phone to Detective Corporal Dan Branigan. At the time, Detective Branigan was responsible for reviewing transaction sheets from Eco ATMs, which are automated kiosks for selling small electronics such as phones or tablets.[2] By matching the identification

[2]As explained at trial, a "transaction sheet" is a compilation of all of the data obtained (continued...)

numbers of the stolen phone to an Eco ATM transaction sheet, Detective Branigan determined that Perez's iPhone had been sold for $238 at a kiosk in the Columbia Mall on July 13, 2013, at 9:40 p.m. – just hours after the robbery. The transaction sheet identified the seller as an individual named Donte Lee, and included scanned images of Mr. Lee's driver's license and thumb print. However, photographs taken by the kiosk depict two individuals standing at the machine at the time of the sale and defense counsel conceded in closing argument that the appellant was with Mr. Lee.

The defense did not present any witnesses. The defense theory was mistaken identification.

Closing Argument

The prosecutor's closing argument was framed as a response to defense counsel's claim during opening statement that there was "more to the case than meets the eye." Toward the end of her argument, the prosecutor alluded to the appellant's statement at the time of his arrest that he "owned the neighborhood." The issue in this appeal stems from the prosecutor's subsequent comment that "today is the day" to tell the appellant that he, in fact, "doesn't own that neighborhood."

[2](...continued)
in the ordinary course of an Eco ATM transaction including, *inter alia*, the identification numbers of the item being sold, photographs of the item, photographs of the individual selling the item, and scanned images of the seller's government issued photo ID and thumb print.

"[PROSECUTOR]: Good morning ladies and gentlemen, in his opening statement to you Defense Counsel told you that there was more to this case than meets the eye. Well, was there.

"What else is there than a lone victim walking through a Columbia neighborhood, with a slice of pizza, and a soda, who gets assaulted and robbed of his one month old cell phone. What more is there to this case, other than that same cell phone being sold two hours later at an Eco ATM device at the Columbia mall, with the Defendant standing there in front of the machine?

"What else is there, other than the victim, Christian Perez, looking at every single photograph in this photo array, and then immediately pointing to the picture of the Defendant saying, 'That's him'? In addition to his in court identification of the Defendant, Rodney Ballantine[,] as his assailant.

"Christian Perez also provided a nickname to the police that he had thought he had heard of his assailant using. What more is there other than that very nickname being used in two recorded jail calls, located through the diligence of the Howard County Police Department?

"The area in which Christian Perez told you the direction of flight of his assailant towards the Forest Ridge Apartment complex. The very apartment complex in which the Defendant is located by the warrants detectives. What else could there possibly be to convince you beyond a reasonable doubt?

"Not beyond all doubt, but beyond a reasonable doubt that the assailant of Christian Perez is the Defendant. The defendant is the one who robbed, assaulted, and stole from Christian Perez. Robbed because Rodney Ballantine took that cell phone by force from Perez. Assaulted because clearly he committed multiple offensive touchings of Christian Perez by hitting him in the head in order to take that cell phone. And theft because he took Christian Perez's property without permission, and with the intent to deprive it.

"And if it weren't for, again, the due diligence of the Howard County Police Department doing the transaction checks on those Eco ATM sheets, who knows where that iPhone would be today? The phone, the transaction, the photo array identification, the in court identification, the calls, there is

> nothing else to this case. Nothing else but an angry *Rodney Ballantine who thought that he owned that neighborhood and could take whatever he wanted.*
>
> "*And today is the day to tell them that he doesn't own that neighborhood.*
>
> "[DEFENSE COUNSEL]: Objection.
>
> "THE COURT: Overruled.
>
> "[PROSECUTOR]: On behalf of the citizens of Howard County, the State asks you to hold him accountable for his actions against Christian Perez, and find him guilty of robbery, assault, and theft."

(Emphasis added).

Defense counsel argued that (1) Perez's multiple identifications of the appellant were unreliable, (2) that the State failed to establish the appellant was ever actually in possession of the stolen phone, and (3) the fact that the appellant was with Mr. Lee who sold the phone just hours after the robbery was an "unfortunate" coincidence.

Discussion

The appellant's sole contention is that the prosecutor's comment "today is the day to tell [the appellant] that he doesn't own that neighborhood," improperly invited the jury to convict the appellant in order to "preserve the safety of their community." In support of his position, appellant relies primarily on the Court of Appeals' decisions in *Hill v. State*, 355 Md. 206, 734 A.2d 199 (1999), *Lee v. State*, 405 Md. 148, 950 A.2d 125 (2008), and *Beads v. State*, 422 Md. 1, 28 A.3d 1217 (2011). He argues that reversal is required in this case because "[w]hile the evidence presented may be sufficient to sustain the convictions, it is not

so overwhelming that an inherently prejudicial comment of the kind at issue here can be deemed harmless beyond a reasonable doubt."

The State responds that the comment was not improper because, unlike in the cases relied upon by the appellant, the prosecutor here "did not call upon the jurors to convict [the appellant] based on a generalized fear of crime or criminals or to protect the neighborhood." Instead, the State suggests, the remark was a reference to facts in evidence; to wit, the appellant's own, albeit arrogant, declaration that he "owned the neighborhood" where he was arrested. Alternatively, the State argues that even if the comment could be considered improper, reversal would not be required on that basis because it was an isolated remark of minimal severity and the evidence of the appellant's guilt was overwhelming. Ultimately, we agree with the State, and explain.

Counsel are afforded significant leeway with respect to the content of their closing argument. In *Wilhelm v. State*, 272 Md. 404, 326 A.2d 707 (1974), the Court of Appeals endeavored to articulate the somewhat nebulous boundaries of this vast license:

> "[I]t is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is afforded a wide range. Counsel is free to use the testimony most favorable to his side of the argument to the jury, and the evidence may be examined, collated, sifted, and treated in his own way. Moreover, if counsel does not make any statement of fact not fairly deducible from the evidence his argument is not improper, although the inferences discussed are illogical and erroneous. Generally, 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 speak fully, although harshly,

> on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of witnesses which the (prosecution) produces."

Id. at 412, 326 A.2d at 714.

Beyond the content of the argument itself, the Court went on to discuss the similarly wide latitude counsel are afforded with respect to the manner in which that content is delivered:

> "While arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair reasonable deductions therefrom, and to arguments of opposing counsel, generally speaking, liberal freedom of speech should be allowed. There are no hard-and-fast limitations within which the argument of earnest counsel must be confined – no well-defined bounds beyond which the eloquence of an advocate shall not soar. *He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions*."

Id. at 413, 326 A.2d at 714 (emphasis added).

However, although the universe of permissible comment is vast, it is not limitless, and "there are depths into which the unfair argument of a too zealous advocate cannot be permitted to sink." *Holmes v. State*, 119 Md. App. 518, 527, 705 A.2d 118, 123 (1998) (quoting *Rhuebottom v. State*, 99 Md. App. 335, 342, 637 A.2d 501, 504 (1994)), *cert. denied*, 350 Md. 278, 644 A.2d 488 (1998). As the Court of Appeals explained in *Mitchell v. State*, 408 Md. 368, 381, 969 A.2d 989, 997 (2009):

> "[C]ounsel may not 'comment upon facts not in evidence or ... state what he or she would have proven.' It is also improper for counsel to appeal to the

> prejudices or passions of the jurors, or invite the jurors to abandon the objectivity that their oaths require."

(Citations omitted).

With respect to prosecutors, moreover, there is an "'obligation duty to refrain from making any remark within the hearing of the jury which is likely or apt to instigate prejudice against the accused' or, in derogation of the defendant's right to a fair trial, is 'calculated to unfairly prejudice the jury against the defendant.'" *Wilhelm*, 272 Md. at 414-15, 326 A.2d at 715 (citations omitted). Ultimately, "[w]hat exceeds the limits of permissible comment depends on the facts in each case, even where the remarks may fall into the same general classification." *Id.* at 415, 326 A.2d at 715-16.

Even if, in a particular case, comments of the prosecutor are held to be improper, reversal of a conviction on that basis is by no means automatic. See *Wilhelm*, 272 Md. at 415, 326 A.2d at 715 ("Of course, not every ill-considered remark made by counsel, even during the progress of the trial, is cause for challenge or mistrial."); *Hill*, 355 Md. at 223, 734 A.2d at 208; *Lee*, 405 Md. at 164, 950 A.2d at 134. The Court of Appeals recently articulated the standard of review to be applied in this regard:

> "A reviewing court will not reverse a conviction due to a prosecutor's improper comment or comments 'unless there has been an *abuse of discretion* by the trial judge of a character likely to have injured the complaining party.' *Henry* [*v. State*], 324 Md. [204,] 231, 596 A.2d [1024,] 1038 [(1991)] (quoting *Wilhelm v. State*, 272 Md. 404, 413, 326 A.2d 707, 714-15 (1974)). We must determine, upon our 'own independent review of the record,' whether we are 'able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.' *Lee*, 405 Md. at 164, 950 A.2d at 134

> (quoting *Dorsey v. State*, 276 Md. 638, 659, 350 A.2d 665, 678 (1976)). A prosecutor's improper comments influenced the verdict, and therefore require reversal, if it 'appears that the ... remarks actually misled ... or influenced the jury to the defendant's prejudice ....' *Hill*, 355 Md. at 224, 734 A.2d at 209."

Donaldson v. State, 416 Md. 467, 496-97, 7 A.3d 84, 101 (2010). In evaluating whether an improper comment, or series of comments, misled or were likely to have misled the jury we look to "the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Lee*, 405 Md. at 165, 950 A.2d at 134 (quoting *Lawson v. State*, 389 Md. 570, 592, 886 A.2d 876, 889 (2005)).

Turning to the present case, we first address whether, as the appellant suggests, the prosecutor's remark was improper because it urged the jury to convict the appellant in order to protect their community.

In *Hill*, 355 Md. 206, 734 A.2d 199, the Court of Appeals was asked to determine whether this Court erred in holding that Hill had failed to preserve the issue of the trial court's denial of his motion for mistrial based on improper comments of the prosecutor. In the course of its discussion, the Court addressed "the insistence of the prosecutor, throughout the trial and over constant objection, on informing the jurors that they had a responsibility to keep their community safe from people like Hill." *Id.* at 211, 734 A.2d at 202. The Court did not equivocate in its assessment of the prosecutor's behavior:

> "*In a soup to nuts performance, the prosecutor*, whether through inexperience or a more disturbing disdain for proper conduct, *began his inappropriate remarks with the very first statement he made to the jury and did not end them*

> *until the very last statement he made*, paying utterly no attention to the numerous objections that were sustained by the court."

Id. (emphasis added).

> The Court highlighted a representative sample of the remarks at issue:
>
> "[The State] commenced his opening statement by noting that his broken foot would mend but wondering if society would mend – '[s]ociety full of people like Mr. Hill who carry guns and drugs.' An objection to that remark was sustained. In the next breath, however, he continued, '[o]ne only needs to read the paper to know what that does to our community.' An objection to that also was sustained. After very briefly recounting the events leading to the officer's stop of the car, he told the jury, 'what happens next is why you are here *and why you've been chosen to send a message to protect our community*.' (Emphasis added). Objection sustained. Undeterred, he completed his opening statement by telling the jury that, '*[i]n the end, we're going to ask you to do the just thing, the right thing, the thing that protects all of us and keeps this community safe*.' Objection sustained."

Id. (emphasis added).

The prosecutor's closing argument was saturated with similar improper remarks and perforated by a steady stream of sustained objections. In remanding the case to this Court – having reached a contrary holding on the issue preservation question – the Court of Appeals emphasized that "appeals to jurors to convict a defendant in order to preserve the safety or quality of their communities are improper and prejudicial," *id.* at 225, 734 A.2d at 209, and noting that "arguments of that kind ... risk diverting the focus of the jury away from its sole proper function of judging the defendant on the evidence presented." *Id.*, 734 A.2d at 209-210. The Court added that this Court, "will also need to take account of the persistency of the prosecutor's conduct." *Id*. at 226, 734 A.2d at 210.

In *Lee*, 405 Md. 148, 950 A.2d 125, the improper remarks were made in the course of the prosecutor's rebuttal argument. Lee had been charged with numerous offenses relating to an altercation that unfolded in the street of a Baltimore City neighborhood and in the course of which Lee discharged a firearm several times. Richard Cotton, the victim, was shot three times. Cotton was called as a defense witness and testified that Lee was not the person who shot him and that he did not recall having a heated argument with Lee the day before the shooting. In closing, defense counsel argued that it would be against nature for Cotton to lie about who shot him. On rebuttal, the prosecutor sought to explain Cotton's "unnatural" dishonesty by suggesting, over numerous defense objections, that Cotton was abiding by "the law of the streets" in refusing to aid police by identifying his attacker. From there, the prosecutor's comments shifted to an appeal for community safety, in the face of additional defense objections:

> "[STATE]: Now, the defendant has a lot of rights, as well he should, as well he should, and pay attention to them all, but who else has rights?
>
> ....
>
> "[STATE]: Do the residents of that area have the right to be able to be safe in their environment? *I ask and those residents ask that you teach this defendant –*
>
> ....
>
> "[STATE]: *– teach this defendant that disputes aren't settled by the blast of a gun, teach the defendant that pulling a trigger doesn't make you a man, it makes you a criminal –*

....

> "[STATE]: – teach the defendant not to follow the laws of the streets of Baltimore, but to follow the laws of the State of Maryland."

Id. at 158-59, 950 A.2d at 131 (emphasis added).

The Court of Appeals concluded that the prosecutor's remarks regarding the "law of the streets" were improper because they referenced matters not in evidence, *id.* at 168, 950 A.2d at 136, and that by "asserting that the jurors should consider their own interests and those of their fellow Baltimoreans, and should clean up the streets to protect the safety of their community, the State clearly invoked the prohibited 'golden rule' argument." *Id.* at 172-73, 950 A.2d at 139. The Court held that "the cumulative effect of the prosecutor's comments was sufficiently prejudicial to deny Lee a fair trial." *Id.* at 179, 950 A.2d at 143.

The appellant also cites to *Beads v. State*, 422 Md. 1, 11, 28 A.3d 1217, 1223, a case that involved a neighborhood shootout which left one bystander dead and two others injured. During opening statement, the prosecutor described how Beads entered the neighborhood armed at night and ambushed the victims:

> "[A]s a result, Mr. Johnson, 44 years old, a father, a grandfather, a working man, a husband, someone who had nothing to do with the business that these men set out to take care of, is dead and today, ladies and gentlemen, *it's time for someone to say, 'Enough. Enough.*'"

Id. at 6, 28 A.3d at 1220 (emphasis added).

The phrase "say enough" was revived in the course of the prosecutor's rebuttal argument:

> "So I show you this to remind you what this is about and *to say to you enough. Say enough. Like some of the courageous women in this cases said*."

Id. at 9, 28 A.3d at 1222 (emphasis added).

The Court of Appeals concluded that "the 'say Enough!' exhortation implored the jurors to consider their own personal safety and therefore violated the prohibition against the 'golden rule' argument." *Id.* at 11, 28 A.3d at 1223.

In his brief, the appellant suggests that the prosecutor's comment here, like the comments at issue in the cases discussed above, "was an improper appeal to the jurors to convict [the appellant] in order to protect their community" because it "asked the jury to view the evidence not objectively, but consonant with the juror's personal interests." We are simply not persuaded. When viewed in the context of the appellant's trial, the prosecutor's comment that "today is the day to tell [the appellant] that he doesn't own that neighborhood," was a "rhetorical flourish" based on facts in evidence. The comment directly referenced appellant's own words manifesting his extraordinary justification for the strong arm robbery, namely, a misconceived notion that he owned the neighborhood and was beyond the reach of law enforcement. Appellant's statement, made at the time of his arrest, certainly could be construed as a "blurt" against penal interest. It was not improper argument to use the statement, and the trial court did not abuse its discretion by overruling defense counsel's objection.

We further agree with the State that even if, *arguendo*, the prosecutor's comment could be construed as improper, any error resulting from the comment would have been harmless. In terms of severity, the comments at issue in *Hill* and *Lee* are distant outliers when compared with the present case. Moreover, the comment here, mild as it was, was an isolated snippet of the prosecutor's closing argument which was never repeated. Finally, the evidence of the appellant's guilt included multiple consistent identifications by the victim, the use of a known alias in recorded calls made from the detention center, and the appellant's presence with the eventual seller of the stolen property just hours after the robbery took place. Based on this Court's independent review of the record, we are confident beyond a reasonable doubt that the single challenged remark in no way influenced the jury's verdict.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED.

COSTS TO BE PAID BY THE APPELLANT.