UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0286

September Term, 2015

PAUL ANDREW TATEM, JR.

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: March 10, 2016

Appellant, Paul Andrew Tatem, Jr., was charged in the Circuit Court for Wicomico County with murder in the first and second degrees, attempted murder in the first and second degrees, first degree burglary, theft, unlawful taking of a motor vehicle, possession of a firearm by a person previously convicted of a crime of violence, and two counts each of: assault in the first and second degrees, robbery, armed robbery, and wearing and carrying a dangerous weapon with the intent to injure. He was acquitted by a jury on all counts except illegal possession of a firearm. The court sentenced him to fifteen years' imprisonment, with the first five years to be served without the possibility of parole.

Appellant presents the following questions on appeal, which we have rephrased:[1]

> 1. Did the circuit court err or abuse its discretion in denying appellant's two motions for mistrial?
>
> 2. Was the evidence sufficient to support appellant's conviction for illegal possession of a firearm?

Finding no error, we affirm.

[1]The questions, as presented by appellant, are:

> 1. Did the lower court err in denying two motions for mistrial when the jury, on several occasions, heard highly prejudicial evidence that Mr. Tatem had committed prior bad acts?
>
> 2. Was the evidence insufficient to convict Mr. Tatem of illegal possession of a firearm, in light of the State's theory of the case and the jury's numerous acquittals?

BACKGROUND

On the evening of April 16, 2014, Donald Mariner died after being attacked and robbed in his home. His housemate, Creston Pumphrey, who had lived with Mr. Mariner intermittently over the last 20 years, awoke on the night of the murder to the sounds of Mr. Mariner gasping for breath as if he "was having a heart attack." When Mr. Pumphrey walked out of his bedroom and called to Mr. Mariner, he was attacked by "an individual swinging a bat." The assailant struck Mr. Pumphrey several times, causing him to fall to the floor, where he lay until he was able to call 911. Mr. Pumphrey described the assailant as a black male who was five-feet-seven-inches or five-feet-eight-inches tall[2] with "a build like the incredible hulk" wearing a "full mask" and "a very full" hooded sweatshirt.

Police arrived and found the back door ajar with a key in the lock. Mr. Mariner was found unresponsive in the bathroom with a "copious amount of blood around him and the floor." He had a partial amputation of the right ear, an open wound on his right temple, a laceration on his chin, and both of his eyes were bruised and swollen shut. He was pronounced dead at the scene.

The key found in the back door of the home contained the DNA of Mr. Mariner and Angel Brown ("Ms. Brown"). Police also discovered a poncho and hood outside Mr. Mariner's home, which were later confirmed to contain the DNA of appellant, Ms. Brown,

[2]The parties stipulated that appellant is between five-feet-ten and five-feet-eleven inches tall.

and an unidentified person. Mr. Mariner's wallet, cash, two televisions, and guns were missing from the home. His pickup truck was also missing.

Appellant and Ms. Brown were involved in a romantic relationship between November 2013 and March 2014. The relationship soured in February 2014 when appellant stole money from Ms. Brown. He again stole money from her in March and April 2014. Ms. Brown testified that appellant promised to repay the money because "one of [appellant's] friends knew of someone they could get money from or take money from." According to Ms. Brown, appellant left her apartment on April 15, 2014 with medical gloves. He returned in the early morning hours and told her that he went into a house, "tied the gentleman up" and began to rob him. When a second man appeared, he hit him "with something" until the man stopped getting up. Ms. Brown testified that appellant told her that he took two televisions and some guns from the house. He later told her that "the guns didn't have any firing pins." Ms. Brown denied knowing why her DNA was found at the crime scene.

When Corporal Sabrina Metzger of the Maryland State Police interviewed appellant, he told her that he had loaned his poncho to Brian Miles, and that when Miles returned the poncho the following day, Miles told appellant that he had committed the home invasion. Appellant denied any involvement in the home invasion, but he admitted to offering "to sell TVs and guns" to Walter Brinson, and that "he and [Miles] went down to Nanticoke area

and actually fired the handguns." Appellant told Corporal Metzger that there were three guns, one of which "actually didn't fire." According to Corporal Metzger, Mr. Brinson identified appellant from a photographic array as the individual who attempted to sell guns to him.

Mr. Brinson testified that appellant brought two or three "old" guns to Mr. Brinson's house. He described one of the guns as "a big long one" resembling one that "Wyatt Earp called the Buntline Special." Mr. Brinson, after being shown an empty gun case from Mr. Mariner's home, testified that the long gun that appellant showed him would fit inside the empty case. Mr. Brinson described a second gun that appellant brought as a "little 280 automatic, smaller . . . gun." Mr. Brinson purchased a television from appellant, but did not purchase the guns. The parties stipulated that appellant was prohibited under Md. Code (2003, 2011 Repl. Vol., 2013 Supp.) § 5-133(c) of the Public Safety Article ("PS § 5-133(c)") from possessing a regulated firearm.

DISCUSSION

I.

Denial of Motions for Mistrial

Appellant contends that several times throughout the trial, the jury heard testimony that appellant had committed prior bad acts, which resulted in significant prejudice to

appellant and denied him a fair trial. Appellant cites to prejudicial remarks made during Ms. Brown's testimony, including the following:

> [PROSECUTOR]: In the process of how [appellant] was going to pay the money back to you, what if anything, did he say about how he was going to do that?
>
> [MS. BROWN]: He said that he was - how do I want to put this? In April it happened again. He stole my money again. And I literally cut up all his clothes and I put him out.
>
> [PROSECUTOR]: Why did you cut up his clothes?
>
> [MS. BROWN]: I was mad. I literally physically can't fight a man so the only way to hurt them is their possessions. Hold on, where was I? So I cut his things up or whatever. I got an eviction notice. The eviction notice was for February and March and April. All the money I had he kept stealing, so I didn't have enough money to pay to stay in the place. *So he told me that the only way he knew how to get me the money is what he knew how to do.* (Emphasis added).

Defense counsel objected and moved to strike her response. The court instructed the jury to disregard the last question and answer.

Ms. Brown further testified:

> [PROSECUTOR]: Did [appellant] take anything with him when he left the apartment?
>
> [MS. BROWN]: Not that I recall.
>
> [PROSECUTOR]: Do you require medical treatment at home, by yourself, doing it by yourself?
>
> [MS. BROWN]: My medications.

> [PROSECUTOR]: Okay. Is there any reason that you would need to use medical gloves?
>
> [MS. BROWN]: Medical gloves, yes.
>
> [PROSECUTOR]: Can you tell us why?
>
> [MS. BROWN]: I can't - I kept - I kept going to the hospital because I kept getting pregnant and having miscarriages. And every time we would go to the hospital *he would steal gloves* so we could clean the house and stuff like that. The Defendant would go to the hospital with me and he would take the gloves to clean the house. (Emphasis added).

Defense counsel objected and moved to strike on the grounds that the statement was unresponsive and referred to prior bad acts. The court excused the jury and cautioned Ms. Brown against mentioning any prior record of appellant or previous acts of theft. The court then instructed the jury to disregard the question and answer regarding gloves.

"The erroneous admission of evidence ordinarily is not deemed prejudicial where it is subsequently stricken, or where the trial judge at the time the evidence was given instructed the jury to disregard it." *Veney v. State,* 251 Md. 182, 197 (1968). Here, the court instructed the jury to disregard Ms. Brown's remarks on both occasions, and appellant does not challenge the adequacy of the instruction. We presume that the jury followed the court's instruction, and its acquittal on all but the possession of firearm charge supports that presumption. *See Carter v. State*, 80 Md. App. 686, 691-92 (1989) ("The trial judge instructed the jury to disregard the remark immediately after it was made, and we must

presume the jury followed that instruction."). Defense counsel did not request a mistrial during Ms. Brown's testimony, but later referred to it as background in requesting a mistrial.

It was during Corporal Metzger's testimony that the motions for mistrial were made. The first motion for mistrial followed Corporal Metzger's reference to appellant's previous criminal history:

> [PROSECUTOR]: What was the purpose of the contact [with Ms. Brown] on July 1st?
>
> [CORPORAL METZGER]: On July 1st was the day that Mr. Tatem *was arrested for outstanding warrants*. He was at [Ms. Brown's] and/or outside of her apartment on Mitchell Road, the apartment there, and [Ms. Brown] was asked if she would come back to the office again for an interview. (Emphasis added).

Defense counsel objected and moved for a mistrial:

> [DEFENSE COUNSEL]: [I]'m going to ask for a mistrial at this point. I have not asked for a mistrial while many things that were objectionable [sic], and I thank the Court for the relief that was previously provided [during Ms. Brown's testimony] about putting information before the jury about Mr. Tatem's prior issues, record, bad acts. I don't want to draw the jury's attention to the information that was just put in front of them.
>
> THE COURT: I understand.

The court denied the motion for mistrial and instructed Corporal Metzger to avoid referencing appellant's criminal history. The court explained:

> All right. So we've had multiple days of testimony. I have given instructions to the jury on previous occasions due to the statements of lay witnesses. When I say lay, as opposed to a professional police officer. I've indicated they should disregard that. I understand from a tactical perspective, if I'm going to

> deny the motion for mistrial, I understand why the defense would be reluctant to have me do that. She didn't name what the arrest warrant was for.
>
> * * *
>
> I'm not convinced at this point that there's manifest necessity to grant a mistrial, and assuming that there won't be an error that's repeated. This is the last witness in a three day trial. It has been a complicated trial and there's been a lot of evidence. It is a circumstantial evidence case so I'm quite acutely aware of how important it is that this defense not be prejudiced. Notwithstanding all that, I'm still exercising my discretion to deny the motion at this point in time.

The court offered to issue a cautionary instruction to the jury, which defense counsel declined. The court agreed with defense counsel that "[y]ou don't want to underscore in the presence of the jury anything that's prejudicial and you've done a very good job of not doing that."

Appellant argues that despite the instruction to Corporal Metzger, she again referred to his criminal history by indicating that he had been in custody:

> [PROSECUTOR]: Have you had the ability to monitor phone calls between - well, let me just ask, yes or no, have you monitored phone calls between the Defendant and Angel Brown?
>
> [CORPORAL METZGER]: Yes.
>
> * * *
>
> [PROSECUTOR]: And how often would they speak?
>
> [CORPORAL METZGER]: Initially it was rather frequently *when he was locally here in the county.*

> [PROSECUTOR]: Just can you give me a number, like approximately every day, twice a day, three times a day?
>
> [CORPORAL METZGER]: Sometimes it was multiple times a day. (Emphasis added).

Defense counsel then moved for a mistrial for a second time:

> [DEFENSE COUNSEL]: [S]he used the expression when he was here locally in the county. That is an expression that I believe the vast majority of people would attach to the idea that someone is in custody. I acknowledge that it wouldn't be surprising for someone to be in custody for a serious charge, to have high bond or no bond. Under the circumstances I think I have to ask for a mistrial.
>
> THE COURT: Uh-huh.
>
> [DEFENSE COUNSEL]: So I'm going to start by doing that. It's prejudicial in context and again the way I have been trying to deal with the case I don't want to try to remedy it some other way because I don't think it can at this point. I think there is a large number of events piling up. That's the extent of my argument.

The court denied the second motion for mistrial, ruling:

> I have considered your motion. She's monitoring phone calls so it could have been distinguishing just here local as opposed to long distance. I'm not persuaded that it's prejudicial even in combination with the other references that requires a mistrial, and wishes to avoid that. And I think she was trying to avoid saying anything about the detention center.
>
> So I'll deny your motion.

Defense counsel again declined the court's offer of a curative instruction.

Appellant contends that, in light of Ms. Brown's comments, Corporal Metzger's reference to his outstanding arrest warrants and to the time when he was "locally here in the

county" resulted in the jury's exposure to inadmissible evidence of appellant's record or criminal history, and ultimately, in significant prejudice to him.

We note that "a mistrial is generally an extraordinary remedy and that, under most circumstances, the trial judge has considerable discretion regarding when to invoke it." *Whack v. State*, 433 Md. 728, 751-52 (2013) (quoting *Powell v. State*, 406 Md. 679, 694 (2008)) (internal quotation marks omitted). "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) (alteration in original) (quoting *Washington v. State*, 191 Md. App. 48, 99 (2010)) (internal quotation marks omitted).

With respect to Corporal Metzger's reference to the day appellant was arrested on outstanding warrants, that could best be described as a "blurt" or "blurt out" - a statement that was "inadvertent, uttered abruptly and impulsively with no nefarious intent." *State v. Hawkins*, 326 Md. 270, 277 (1992) (finding that a police officer's references to "polygraph" were non-prejudicial "blurts" where they were not solicited or pursued by the prosecutor). There is an established analytical framework for determining whether the prejudice resulting from a "blurt out" is "real and substantial enough" to warrant a mistrial. *Washington*, 191 Md. App. at 99-100. The analysis includes consideration of five factors:

> whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by

> counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists.

Rainville v. State, 328 Md. 398, 408 (1992) (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)); *accord Carter v. State*, 366 Md. 574, 590 (2001). "But, no single factor is determinative in any case, nor are the factors themselves the test . . . Rather, the factors merely help to evaluate whether the defendant was prejudiced." *McIntyre v. State*, 168 Md. App. 504, 524 (2006) (internal citations omitted).

With respect to appellant's second motion for mistrial regarding Corporal Metzger's reference to when the appellant "was here locally here in the county," appellant contends that the vast majority of people would infer from the statement that appellant was in custody. As the trial court noted, in the context of the police monitoring phone calls, Corporal Metzger could have been distinguishing between local as opposed to long distance calls. The court found that the witness was "trying to avoid saying anything about the detention center," and that the statement would support more than one inference and was not necessarily indicative of prior criminal history.

In considering whether Corporal Metzger's statements resulted in substantial prejudice to the appellant, we are mindful that appellant was acquitted of all charges except illegal possession of a firearm. Therefore, our evaluation of any prejudice to appellant will focus on the firearm conviction.

As the trial court observed, Corporal Metzger's statements were not responsive to the prosecutor's questions, nor were the responses solicited by the prosecutor. The court was in the best position to assess Corporal Metzger's testimony and evaluate any potential prejudice. As the Court of Appeals has stated: "The [trial] judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able to ascertain the demeanor of the witnesses and to note the reaction of the jurors and counsel to inadmissible matters. That is to say, the judge has his finger on the pulse of the trial." *Hawkins,* 326 Md. at 278.

As to the illegal possession of a firearm, appellant's conviction was not dependent on his personal participation in the invasion of Mr. Mariner's home, or, for that matter, any other criminal act. The issue was not how he came into possession of the firearm, but whether he did. Corporal Metzger was not the only source of evidence regarding the illegal firearm count, and her testimony regarding the appellant's possession of the firearms was supported by the transcript of her interview of appellant, in which he admitted attempting to sell guns to Mr. Brinson. Mr. Brinson confirmed that appellant brought guns to him, which he offered for sale. Ms. Brown also testified to what appellant had told her regarding his involvement with the stolen gun.

In short, we perceive no prejudice, much less real and substantial prejudice to the appellant, and hold that the court did not abuse its discretion in denying either of appellant's motions for mistrial.

II.

Sufficiency of the evidence

Appellant contends that his conviction for illegal possession of a firearm cannot stand because the State's theory of the case was that appellant stole the firearms during the home invasion, but the jury acquitted him on all counts related to the home invasion. Therefore, he should have been acquitted on the firearm count as well.[3]

In reviewing a claim of legal insufficiency:

> [W]e must determine whether, after viewing the evidence 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. We give due regard to the jury's finding of facts and its responsibility to weigh and resolve conflicting evidence, draw reasonable inferences from the evidence, and determine witness credibility.

[3]To the extent that appellant challenges the firearms conviction on the ground that it is inconsistent with the acquittals, such a challenge is unpreserved, as it was not raised in the trial court. *See Tate v. State*, 182 Md. App. 114, 136-37 (2008) (concluding that defendant failed to preserve objection to inconsistent verdicts when he "did nothing by way of objecting to the reception of the verdicts or by way of asking that the jury be sent back to resolve any alleged inconsistency in its verdicts"); *accord Price v. State*, 405 Md. 10, 40 (2008) (Harrell, J., concurring). And, as discussed above, because appellant's conviction for firearm possession was not dependant on his participation in the home invasion, we do not see the verdicts as functionally or legally inconsistent.

Brown v. State, 182 Md. App. 138, 156 (2008) (emphasis in original) (internal quotation marks and citations omitted).

Appellant stipulated that he was a person prohibited from possessing a firearm pursuant to PS § 5-133(c). The jury heard evidence from Mr. Brinson that appellant brought two firearms and tried to sell them to him. The jury also heard from Corporal Metzger that appellant admitted to attempting to sell the firearms to Mr. Brinson and to going to Nanticoke to fire the firearms, and learning that one did not fire. The evidence was sufficient to support appellant's conviction for violation of PS § 5-133(c).

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.