UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 41

September Term, 2016

HARVEY CORDELL SPENCER

v.

STATE OF MARYLAND

Leahy,
Friedman,
Raker, Irma S.
(Senior Judge, specially assigned),

JJ.

Opinion by Raker, J.

Filed: July 3, 2017

Harvey Cordell Spencer appeals from his conviction in the Circuit Court for Dorchester County of theft under $1,000, and resisting arrest. He raises the following questions for our review:

> "1. Did the state improperly denigrate the role of defense counsel during closing argument?
>
> 2. Did the court err in denying counsel's motion for mistrial after the State improperly bolstered police witnesses and shifted the burden to the defense during closing argument?"

Finding no error, we shall affirm.

I.

Appellant was convicted by a jury in the Circuit Court for Dorchester County with theft under $1,000 and resisting arrest.[1] The court sentenced appellant to a term of incarceration of 18 months for theft and a consecutive term of incarceration of 3 years for resisting arrest.

The primary issues at trial were whether the State was able to link the stolen property to appellant, whether appellant resisted a lawful arrest, and whether he assaulted or attempted to disarm the officers. Ray Klekotka, the Walmart store's asset protection officer, testified that around 1:15 p.m. on June 29, 2016, he was on security duty at the

[1] The State also charged appellant with two counts of assault in the second degree on a law enforcement officer, one count of attempting to disarm a police officer, one count of malicious destruction of property having a value of less than $1,000, one count of trespass upon posted property, one count of disorderly conduct, and two counts of assault in the second degree. Appellant was acquitted of those charges.

Cambridge Walmart. He noticed appellant, who was wearing sunglasses and a long-sleeved jacket, pushing a shopping cart in a way that "looked a little odd." Klekotka followed appellant for about a half an hour, observing appellant adding merchandise into his cart without looking at prices. Appellant went to the electronics department where he "snatched a set of head phones." Eventually, appellant went into the pet products aisle, "pulled out some plastic Walmart shopping bags, concealed the selected merchandise inside the bags, left some of the merchandise in the cart," then hurried past the cash registers, and out the grocery exit of the store.

Accompanied by a store manager, Mr. Klekotka called out to appellant, asking him to stop and return to the store. After looking back, appellant walked "briskly" away. Mr. Klekotka told appellant that if he did not return, he would call the police. Appellant continued to run away, and Mr. Klekotka followed him. As Mr. Klekotka was following appellant, he called the police and asked for assistance. He described the subject as a "Number 1 male, approximately six, six two, probably about 180 pounds with a black jacket on and sunglasses." Mr. Klekotka went behind the store and saw that appellant had jumped across a ditch. After Mr. Klekotka again directed appellant to return to the store, appellant threw down a plastic Walmart bag, ran across the field, and jumped a fence. Mr. Klekotka retrieved the bag, which contained two pairs of shorts and a t-shirt.

Two Cambridge Police Department officers arrived at the scene. One of the officers, Officer Jessie Guessford, testified that when he drove behind the store, he saw a man wearing a "some kind of like sports coat" running from two men who appeared to be

loss prevention employees. Officer Guessford was wearing his full dress uniform and was traveling in a marked patrol car. He ordered appellant to stop running, but appellant continued running and the officer lost sight of him in the tree line. After a civilian alerted Officer Guessford that appellant had gone through a fence, onto an adjacent commercial property, the officer ran back across the field. He returned to his cruiser and drove towards the rear parking lot of the Sensata.

As the officer was coming through the Sensata gates, he saw appellant come out of the bushes "stripped down to just a pair of shorts." Officer Guessford drove next to appellant in his police car, and told appellant to stop, but he responded, "I can't" and "started jogging again." The officer, knowing that appellant could not exit the fenced property, continued driving alongside appellant as he ran, waiting for him to tire.

Detective Edward Howard entered the parking lot from the other direction. Both officers got out of their vehicles and ordered appellant to stop. When appellant did not stop, Detective Howard tackled him. Because appellant was slippery with sweat and did not have on a shirt, the detective slid over him. Appellant then climbed on top of the detective. Detective Howard, feeling "pulling and tugging" on his gun belt, placed his left hand over appellant's and rolled his body to pin the firearm beneath his body weight. A moment later, Officer Guessford hit appellant and knocked him off Detective Howard. During this struggle, Detective Howard yelled to appellant, "Get off my gun." To prevent appellant from unholstering the loaded revolver, which did not have a safety and could be fired simply by pulling the trigger, Detective Howard used his body weight to pin

appellant's arm underneath him. At this time, Officer Guessford took appellant's left arm and pinned it between his legs as he also yelled at appellant to stop pulling on the gun.

Fearing for their safety, Officer Guessford "strike [sic] [appellant] several times in the face with a closed fist." Detective Howard started "pushing down – on his throat" which caused appellant to release the firearm. Detective Howard received minor abrasions on his shoulder, forearm, and knee. He also had appellant's blood on his clothing. When Detective Howard went to the hospital to get checked out, they "tossed" the clothes he was wearing. The clothes had appellant's blood on them and were torn beyond repair.

The headset that Mr. Klekotka saw appellant put into his shopping cart was recovered from appellant's shorts. The total value of the two pairs of shorts, t-shirt, and headset was $113.48.

In closing argument, defense counsel focused on inconsistencies and implausibility of the testimony of the two police officers, arguing that they did not have probable cause to arrest appellant for theft. At the conclusion of his argument, defense counsel predicted that in rebuttal, the prosecutor "will say, 'Don't listen to him. Use your common sense.'"

The prosecutor began her rebuttal by responding to that remark. To provide context for our discussion of both assignments of error, we set forth the State's entire rebuttal argument, as well as the ensuing defense motion for a mistrial.

> **[PROSECUTOR]: Thank you, Your Honor. Let's be clear; [Defense Counsel] is a very good defense attorney. He's [sic] gets paid to confuse you and attempt to confuse you, ladies and gentlemen.**
>
> **[DEFENSE COUNSEL]: Object.**

THE COURT: Overruled.

[PROSECUTOR]: Mr. – just one example, [Defense Counsel] represented that you heard testimony today that Walmart to where [sic] the defendant was apprehended at Sensata/Airpax, that that was a quarter to a half mile. Ladies and gentlemen, I heard a half mile. Additionally, Officer Guessford did say that they seized headphones from him. He said they seized electronic headphones from him. He said that they seized electronic speakers and then he got to head phones. The headphones, yes, was what the police seized from the defendant.

Not only did the defendant precisely match the description given by Mr. K., but for – at the second time that Guessford saw him he had lost his jacket, he had no shirt on. He's perspiring. He's fleeing. He's refusing to submit to commands to stop. There's no one else – you heard no testimony that anyone else is in this location doing these things.

Ladies and gentlemen, probable cause is common sense. It's common sense. Do not leave your common sense out here with you. That's what the State's asking you.

What did the defendant say? Keep in mind too what the defendant said as Officer Guessford is riding, I think he testified like riding next to him trying to get him to wear down. And the defendant says, "I can't." I can't why? "I can't," I'd submit to you, "because I just committed a theft and I don't want to go to jail."

And do we rely on the testimony of these law enforcement officers? Ladies and gentlemen, these law enforcement officers put their lives on their – the line every day.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Move to strike.

THE COURT: That will be stricken. The jury will disregard.

[PROSECUTOR]: Yes, we do rely on their testimony. We do. Ladies and gentlemen, their testimony is uncontradicted.

[DEFENSE COUNSEL]: Object.

THE COURT: Sustained. The jury will make their own decision as to what's – what they believe and don't believe.

[PROSECUTOR]: Howard – there, there were no substantial changes. You all – it's your recollection of the testimony. There were no substantial changes in description. And Howard and Guessford's testimony are not inconsistent from one another. There's – that's your decision.

Keep in mind that Howard is the one that's experiencing the defendant, six foot four defendant, on top of him with both hands on his firearm. He's the one experiencing that. Guessford's not going to see the tugging of that. Howard is. It was not at an angle and it's probably not something that you would see.

This defendant, ladies and gentlemen, was the one that escalated a simple shoplifting, a simple shoplifting that put people at significant risk. Please use your common senses and please return a verdict of guilty on the four counts. Thank you.

[DEFENSE COUNSEL]: May we approach, Your Honor?

THE COURT: You want to come forward?

[DEFENSE COUNSEL]: Yes.

(Whereupon, counsel approached the bench and a conference was held.)

[DEFENSE COUNSEL]: I'm going to ask for a mistrial

THE COURT: Okay.

[DEFENSE COUNSEL]: I think the State's reference to the police officer's risking their lives followed by a reference to an uncontradicted testimony (inaudible words) uncontradicted testimony, but plus the fact my client didn't testify, nor did we present evidence.

THE COURT: Right.

[DEFENSE COUNSEL]: I think the cumulative effect of it goes to –

> THE COURT: Okay. Do you wish to be heard?
>
> [PROSECUTOR]: As to uncontradicted, Your Honor, there is case law, and I'm happy to take the time to find it, that that is not improper. I mentioned it once. It was not repeated. Your Honor sustained it. As to the officers risking their lives, that's, I mean that's just the fact of the matter.
>
> **THE COURT: Well, you objected and the court advised them to disregard. I think that's sufficient. So your Motion for Mistrial is denied.**

(Emphasis added.)

The jury convicted appellant of theft and resisting arrest. This timely appeal followed.

II.

Before this Court, appellant argues that the prosecutor denigrated the role of defense counsel improperly during closing argument by sending a message to the jury that the defense attorney's job is to trick them. Appellant contends that the impact of the prosecutor's statement was "both improper and devastatingly effective" when she told the jury that "[Defense counsel] is a very good defense attorney" and that "He gets paid to confuse you and attempt to confuse you, ladies and gentlemen." Appellant contends that this technique is improper, but effective because the defense attorney starts with a considerable disadvantage as it is counsel's responsibility to defend a person accused of deeds that are illegal. By suggesting that defense counsel is trying to trick the jury, appellant claims that the prosecutor's argument unfairly exploits societal suspicion of defense attorneys which encourages juries to reject defense counsel's arguments.

Appellant also argues that the court erred in denying counsel's motion for a mistrial after the State improperly bolstered police witnesses and shifted the burden to the defense during closing argument. The prosecutor stated to the jury, "And do we rely on the testimony of these law enforcement officers? Ladies and gentlemen, these law enforcement officers put their lives on their – the line every day." The court sustained defense counsel's objection, but the prosecutor continued, "Yes, we do rely on their testimony. We do." Appellant argues that a mistrial was necessary because the prosecutor was vouching for the credibility of the police officers, which has been condemned as prejudicial conduct. Appellant claims that the State shifted the burden of proof when the prosecutor stated, "Ladies and gentlemen, [the officers'] testimony is uncontradicted" because this faults appellant for failing to produce witnesses or testify in order to contradict the State's witnesses. The court again sustained defense counsel's objection, but appellant argues that reversal is the appropriate remedy.

The State concedes that the comment was improper and that the court abused its discretion in overruling defense counsel's objection when the prosecutor made the following statement:

> [PROSECUTOR]: Thank you, Your Honor. Let's be clear; [Defense Counsel] is a very good defense attorney. He gets paid to confuse you and attempt to confuse you, ladies and gentlemen.
>
> [DEFENSE COUNSEL]: Object.
>
> THE COURT: Overruled.

The State argues, however, that the error does not warrant reversal because it was an isolated comment that did not mislead the jury, and the arguments that followed made

it clear that the prosecutor was directing her comments at defense counsel's argument, not defense counsel personally. The State asserts it is enough that the court instructed the jury that opening and closing statements are not evidence, that they must consider and decide the case fairly and impartially, and that they should not be swayed by sympathy, prejudice, or public opinion. The State maintains that the State's case was very strong with overwhelming evidence of appellant's guilt. Even though the prosecutor's remarks were inappropriate, the State contends that the remarks did not prejudice appellant in any way because there could be no reasonable doubt that he committed the theft.

The State argues that the court did not abuse its discretion in denying appellant's motion for a mistrial because the trial court sustained almost all of defense counsel's objections, and appellant did not object to or request to add to the jury instructions. The State contends that the prosecutor did not vouch for the officers, but stated only that the evidence against appellant was uncontradicted. This argument was appropriate, the State maintains, because the statement would likely be interpreted to mean that the officers' testimony was not contradicted by the evidence presented in the trial, not a comment on the defendant's failure to testify. The State concluded that the jury's verdict was evidence that appellant was not prejudiced by the prosecutor's improper remarks because they acquitted appellant of the most serious charges.

III.

The United States Supreme Court has stated as follows:

> "While [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314, 1321 (1935).

We have often noted that "attorneys are afforded great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999). A prosecutor is allowed liberal freedom to make any comment that is warranted or reasonably inferred by the evidence. *Id.* at 429-30. Courts have deemed comments made during closing arguments improper when they invite the jury to draw inferences from information that was not admitted at trial. *See Spain v. State*, 386 Md. 145, 156 (2005); *Hill v. State*, 355 Md. 206, 222 (1999). It is up to the trial judge to decide whether a prosecutor's remarks were "prejudicial or simply rhetorical flourishes[.]" *Degren*, 352 Md. at 431. We do not reverse the trial court unless that court clearly abused its discretion and prejudiced the accused. *Id.* A new trial is only required if the prosecutor's remarks misled the jury or were likely to have misled the jury. *Id.*

Arguments that attack the character of defense counsel, accuse defense counsel of perjury, or attack counsel's role in the judicial system are improper. *See Beads v. State*, 422 Md. 1, 8, 11 (2011); *Reidy v. State*, 8 Md. App. 169, 172-73 (1969). Nonetheless, all errors do not require reversal, and may be harmless. *See Degren*, 352 Md. at 430. An accused has the constitutional right to a fair trial, not a perfect trial. *Bryant v. State*, 129 Md. App. 150, 161 (1999). If we find error, we must determine whether that error is harmless under the circumstances of the case. *Id.* To determine whether an error is

harmless, a reviewing court must be "able to declare a belief, beyond a reasonable doubt that the error in no way influenced the verdict[.]" *Dorsey v. State*, 276 Md. 638, 659 (1976). There are several factors to consider when determining if an improper statement made during closing arguments constitutes reversible error including the cumulative severity of the remarks, the weight of the evidence against the accused, and the measures taken to cure any potential prejudice. *Lee v. State*, 405 Md. 148, 165 (2008).

Here, as the State conceded, the prosecutor's statement that defense counsel, "gets paid to confuse you and attempt to confuse you," was improper and the trial court abused its discretion by overruling defense counsel's objection. We are satisfied, however, that the State's comments did not mislead or influence the jury in a manner that affected the verdicts.

The remark was not repeated and was followed by examples of where defense counsel had "confused" the evidence. This includes misstating the distance between Wal-Mart and Sensata as a quarter to a half mile as opposed to a half mile and using the term "electronic speakers" instead of the term Officer Guessford used which was "headphones." While the prosecutor's comment was a "foul one," it was linked to an argument which attempted to dispute defense counsel's statements. The trial court also mitigated any potential damage the comments may have made by the prosecutor's remarks by giving the jury general instructions that opening and closing arguments are not evidence. *See Spain*, 386 Md. at 160-61.

The State presented overwhelming evidence that appellant had committed the theft. The store's asset protection officer testified that he saw appellant add merchandise to his shopping cart, place some of the merchandise in a plastic Walmart bag, walk out the store without paying, and run away when confronted. Appellant was then arrested in possession of the headphones he was seen placing in the cart.

Because appellant was not prejudiced by the improper remarks and comments, the trial court's abuse of discretion in overruling the defense objection to that remark was harmless error and hence, does not warrant reversal.

"Despite the wide latitude afforded attorneys in closing arguments, there are some limits in place to protect a defendant's right to a fair trial." *Degren*, 352 Md. at 430. Among these are prohibitions are "vouching" and commenting on a defendant's failure to testify or to present any evidence. *See, e.g., Spain*, 386 Md. at 156-57 (2005) (arguments by State implying that a witness should be believed simply because he or she is a police officer improperly vouch for the veracity of that witness); *Wise v. State*, 132 Md. App. 127, 142-43, 148 (2000) (prosecutorial comment on a defendant's failure to testify is "impermissible" because it undermines the exercise of Fifth Amendment rights, and closing argument that "draw[s] the jury's attention to the failure of the defendant to call witnesses" may improperly "shift[] the burden of proof").

The State concedes that the prosecutor's remarks constituted improper vouching when she stated that "we rely" on the testimony of police officers because they "put their lives on the line every day." We agree that the comments were improper. As noted in the

colloquy above, although defense counsel did not object to this comment, the trial court, *sua sponte*, "sustained" one, prompting defense counsel to move to strike the remark. The court granted that remedy and instructed the jury to "disregard" it.

The prosecutor responded by advancing an alternative reason for the jury to "rely on their testimony," pointing out that the testimony was "uncontradicted." The trial court sustained defense counsel's objection and, again *sua sponte*, instructed the jury to "make their own decision as to what's — what they believe and don't believe." Defense counsel did not ask for any further curative instruction. Instead, after the State's rebuttal argument concluded, defense counsel moved for a mistrial, pointing to the cumulative effect of the prosecutor's two arguments about why the jury should credit the testimony of the two officers involved in the altercation with appellant. The trial court denied that motion, ruling that its instructions adequately prevented prejudice

With respect to the prosecutor's argument that the jury should rely on the testimony of the two police officers because it was "uncontradicted," we agree with the State that this remark was not an impermissible comment on appellant's right to remain silent. The State may not invite the jury to penalize a criminal defendant for exercising his Fifth Amendment right to remain silent, by commenting on a defendant's failure to testify or to talk with police. *See Smith v. State*, 367 Md. 348, 358-59 (2001). The test for whether an argument impinges on this constitutional right is whether the remark is "*susceptible of the inference* by the jury that they were to consider the silence of the [defendant] in the face of the

accusation of the prosecuting witness as an indication of his guilt." *Id.* at 354 (emphasis added in *Smith*; citation omitted).

In *Smith,* the Court of Appeals distinguished between permissible argument that "summarize[s] the evidence and comment[s] on its qualitative and quantitative significance" and impermissible commentary on the defendant's exercise of his Fifth Amendment rights. *Id*. at 354, 358. The State maintained that the defendant's unexplained possession of recently stolen goods established his guilt. *Id*. at 352. In closing argument, the prosecutor rhetorically asked the jury, "what explanation has been given to us *by the Defendant*," then answered, "zero, none[.]" *Id*. at 352. Rejecting the State's contention that the remark "was merely a comment on the lack of evidence to explain Smith's possession of recently stolen property[,]" the Court of Appeals pointed out that the remark referred directly to the defendant and insinuated that he had a duty "personally to offer an explanation for his possession of the property." *Id*. at 353, 359. By going "beyond any qualitative assessment of the evidence," the prosecutor "effectively suggested that he had an obligation to testify at trial." *Id*. at 359. Such "burden-shifting" the Court concluded, "is contrary to the basic tenets of our criminal justice systems, an accusatorial system, where the question is whether the government has met its burden of proof." *Id*.

We have applied this distinction between improper commentary on a defendant's failure to testify or present evidence, and permissible commentary on the evidence, in holding that a prosecutor may argue, without running afoul of constitutional constraints, that evidence presented by the State was "uncontradicted." In *Williams v. State*, 137 Md.

App. 444 (2001), a prosecution for cocaine possession, this Court held that a prosecutor's argument that "it is uncontradicted . . . the defendant had these items in his possession," was not "an improper attack on appellant's right not to testify[,]" because the jury could not have perceived it as such. *Id*. at 455, 458. That prosecution, like this one, was premised on testimony from two police officers regarding their encounter with the accused, and, as in this case, the defense theory was "that the officers' version of events . . . was implausible." *Id*. at 447, 458. We held that the prosecutor's description of the officers' testimony as "uncontradicted" was permissible commentary on the evidence, not impermissible comment on the defendant's exercise of his Fifth Amendment right. *Id*. at 458-59. We found it "significant" that the trial court had instructed jurors that the defendant had a constitutional right not to testify, that the fact he "did not testify must not be held against" him, that they should consider whether a "witness's testimony was supported or contradicted by the evidence you believe[,]" and that they "need not believe any witness even if the testimony is uncontradicted." *Id*. at 458 (emphasis omitted). Applying the presumption "that juries follow the instructions of trial judges[,]" we concluded that the remark was neither improper, nor prejudicial. *Id*. at 459.

In this case, the prosecutor, relying expressly on this case law precedent, argued that the jury should "rely" on the "uncontradicted" testimony of the two officers. We agree that this argument commented on the qualitative and quantitative significance of the evidence, without inviting the jury to infer guilt from appellant's failure to testify or to present evidence. *See Smith*, 367 Md. at 358. In contrast to *Smith*, the prosecutor did not call the

jury's attention to appellant's failure to offer any "explanation" for his possession of stolen merchandise or otherwise suggest he had an obligation to present evidence. As in *Williams*, the prosecutor did not mention appellant and, instead pointed to the absence of evidence contradicting the testimony of the police officers regarding their altercation with appellant. That was permissible comment on the evidence relating to whether the officers' testimony was credible enough to convict him of the most serious charges, assault and attempting to disarm a law enforcement officer.

Consequently, of the two remarks cited by defense counsel as grounds for a mistrial, only the argument that jurors should rely on testimony given by the two officers because they "put their lives on the line every day" was improper. We presume that jurors followed the trial court's *sua sponte* curative instructions to disregard that statement and to make their own determination of what to believe, as well as the general instructions given just before closing arguments, that they were not required to believe the testimony of any witness, even if it was uncontradicted; that they were not permitted to draw any inference of guilt from the fact that appellant exercised his constitutional right not to testify; and that "the weight of evidence does not depend upon the number of witnesses on either side[.]" *See Williams*, 137 Md. App. at 458.

Indeed, the verdicts confirm that the jury was not influenced by either the prosecutor's improper vouching or her previous denigration of defense counsel. The resisting arrest, assault, and disarming charges rested entirely on the testimony of the two police officers. The guilty verdict on the resisting arrest count and the acquittals on the

assault and disarming counts establish that the jury was not persuaded by the prosecutor's request that they "rely" on the "uncontradicted" testimony of the officer because they were police officers who "put their lives on the line every day." Nor did the prosecutor's denigration of defense counsel as someone "paid to confuse" the jury mislead or influence jurors, whose verdicts reflect that it considered and partially accepted the defense theory, in finding the testimony of the two police officers insufficient to establish that appellant assaulted them or attempted to disarm Detective Howard. On this record, the trial court did not abuse its discretion in denying appellant's motion for a mistrial.

JUDGMENTS OF THE CIRCUIT COURT FOR DORCHESTER COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.