UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 215

September Term, 2015

WAYDE ANDREW SMITH, JR.,

v.

STATE OF MARYLAND

Krauser, C.J.,
Graeff,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: January 12, 2017

After a one-day jury trial in the Circuit Court for Washington County, Appellant, Wayde Andrew Smith, Jr., was convicted of a third degree sexual offense.[1] He was found not guilty of the charge of second degree assault. Charges of second degree rape and fourth degree sexual offense were entered nolle prosequi during the course of the trial. On appeal, he presents three questions, which we have modified slightly:

1. Did the trial court err in allowing improper closing argument by the prosecutor?
2. Did the trial court err in denying the motion for mistrial?
3. Did the trial court err in admitting irrelevant evidence of Appellant's accusations of sexual assault against the victim's father?

For the reasons that follow, we answer those questions in the negative and affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On December 20, 2013, Appellant, the victim's father, and the victim's father's boyfriend Brian went out to a bar for some drinks. Afterwards, the victim's father invited Appellant to return to his apartment and spend the night. Prior to that evening, Appellant had been to the apartment "two (2) or three (3) times," including the previous Thanksgiving. At the apartment, the three of them, along with the victim and others, continued to "hang out" and relax.[2]

At some point, the victim, who was fourteen, and Appellant were left alone in the living room. The victim stated that Appellant provided her with alcohol, which she

[1] Maryland Code (2002, 2012 Repl. Vol.), § 3-307(a)(5) of the Criminal Law Article provides that an individual may not "engage in vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 21 years old."
[2] The victim's sister, the victim's sister's boyfriend, and Brian's cousin were also present.

consumed. The victim also stated that Appellant, who was sitting next to her, "kisse[d her] twice" on her lips and then started "touching her leg," but she moved his hand away because she did not "want to go that far." She then "sat up and . . . said, 'I'm going to bed," whereupon Appellant followed her. When she asked Appellant "What are you doing?" he kissed her again "and it continued and then he and then [she] fell on the bed" where he "pulled down [her] pants and then he undid his and then began oral sex." Afterwards, he "sticked his penis in [her] vagina and . . . started kissing [her]" and asked if he was "hurting" her. When she responded affirmatively, he got off. She told him "I don't want to do this" and they both pulled up their pants. They both went "downstairs" and "smoked two cigarettes."

Appellant was arrested on January 31, 2014, following an audio/video recorded conversation with the victim's father, which included potentially incriminating statements by Appellant:

> [APELLANT]: I disrespected you . . . . And I know I disrespected you.
> [FATHER]: That tells you me there you all did do it. But what she's telling me is the truth.
> [APELLANT]: What she tell you?
> [FATHER]: She told me you all had sex. She said it started out here and then you all ended up in the bedroom. Am I right? I don't know really what to say I mean. I know I couldn't trust you around her. And you know that's going to make a big deal because I told you that in the beginning. That that was a no no. That's one thing you don't do is you don't mess with my kids.
> [APELLANT]: I'm sorry . . . . I really am.
> [FATHER]: Well I wish it would have came out sooner because I don't like the lie.
> [APELLANT]: I wanted to tell you. She told me not to. She said you'd kill me.
> [FATHER]: Well she told me that you told her not to tell to keep it a secret. Did it happen any other time or just once?

[APELLANT]: Just once. Never happened again. We talked. It wasn't supposed to happen at all.
[FATHER]: But you were drinking. And then (unintelligible) she told me you gave her drinks too after I went to bed.

* * *

[FATHER]: Hum. I mean, what do you expect me to do? I mean I can't trust you to come around here or even be around her. Because I'll be afraid that you'll do it again. You're too old for her. Way too old.
[APELLANT]: We've talked about that. We can only be friends because of her age.
[FATHER]: Yea but how can you like a fourteen year old?
[APELLANT]: We were sitting down and were talking about, you know, when she's eighteen and all that things just led up one to another. I mean it wasn't supposed to happen. That's why never really went through with it. I mean, in a way it did, but in a way, you know.
[FATHER]: And she said you followed her to the room or did she ask you to come to the room with her?
[APELLANT]: We went to the room together.
[FATHER]: You went to the room together. I'm really disappointed and pissed off that it happened. I really wish it didn't because I enjoyed your friendship. I don't, I can't trust you whenever I have them even come around here for awhile. That's my thing. I mean you got to respect me on that. You know I appreciate you admitting it.
[APELLANT]: I didn't, I didn[']t take her virginity or anything.
[FATHER]: She was a virgin, She what? She said she had sex with somebody else before?
[APELLANT]: Two other people.

A criminal information was filed on March 11, 2014, charging Appellant with four counts: rape in the second degree (Maryland Code (2002, 2012 Repl. Vol.), § 3-304(a)(1) of the Criminal Law Article ("CL § 3-304(a)(1)")), sexual offense in the third degree (CL § 3-307(a)(5)), sexual offense in the fourth degree CL § 3-308(b)(1); and assault in the second degree (CL § 3-203).

On May 27, 2014, Appellant filed a motion in limine seeking to exclude "any evidence, in any form, regarding (1) the [Appellant's] May 3, 2012, conviction for sex

offense in the third degree . . . ; (2) any description of or reference to the facts underlying the prior conviction; (3) the fact that the [Appellant] was previously accused or charged of having committed a sex offense; (4) the fact that the [Appellant] is required to register as a sex offender as a result of his prior conviction."

Trial began on August 28, 2014. Following jury selection, defense counsel pointed out that two motions he had filed, including the motion in limine and his request for a hearing regarding the motion in limine, were then pending. The prosecutor acknowledged that there had been a stipulation:

> The only – there is at the – in the recording of the meeting between the victim's father and the [Appellant], the one that is, is a clear issue – be at approximately the seven minute fourteen second mark, there was a question about what the [Appellant's] worried about concerning talking with the father. And the [Appellant] responds – cops, going back to jail. And that's immediately after that. So there's about a five to seven minute – or second se – se[ct]ion there that the State would agree to skip over when playing the recording, which is an audio/video recording.

The State conceded that "the statement – cops, going back to jail – would be . . . – more prejudicial than probative in this case," and the court ruled that "in terms of the statement – cops, going back to jail – the Court will rule that that's not admissible pretty much by stipulation."

Following pretrial matters and opening statements, the State called Detective Casey Nogle of the Washington County Sheriff's Office, the victim, and the victim's father, in that order. During the direct testimony of the victim's father, the video recording of his conversation with Appellant on January 31, 2015, was played for the jury with the agreed upon sections omitted.

[APELLANT]: I'm just trying to figure out, like you know –
[FATHER]: It's all right.
[APELLANT]: Trying to figure out why you, uh –
[FATHER]: Why I want to talk about it?
[APELLANT]: Yeah.
[FATHER]: Because it's my daughter.
(Whereupon State's Exhibit 1 was paused.)
[PROSECUTOR]: Just a couple seconds.
(Whereupon State's Exhibit 1 continues to be played in open court:)
[FATHER]: I (unintelligible).
[APELLANT]: I want to talk to you. I really do.
[FATHER]: Then talk. I'm not leap at ya or hurt ya nothing don't worry.
[APELLANT]: I'm not worried about you leaping.
(Whereupon State's Exhibit 1 was paused.)

Following the victim's father's testimony the State rested.

When defense counsel moved for Judgment of Acquittal on all counts, the State, commenting that the victim's testimony "was imprecise at best as to what points she changed her mind and what exactly happened thereafter," agreed to "nolle prosse" the second degree rape count "based on [the victim's] testimony." The prosecutor also agreed to "nolle prosse" the "Sexual Offense in the Fourth Degree" count because the victim's testimony "wasn't as detailed today as [it] had been previously." The court denied defense counsel's motion with respect to the other counts, after "viewing the evidence in the light most favorable to the State."

Following the State's case, defense counsel also asked, and the State agreed, that the jury not be given the recorded conversation between Appellant and the victim's father to view in the jury room "given that there were portions that they shouldn't be allowed to view based on what was, you know, agreed upon and stipulated to by the State." And, "if they wanted to view it again, we would simply view it, or play it for them." The court

agreed that, if the jury wanted to see the video, it would be played in the courtroom to "make sure that they didn't see any portions they're not supposed to see."

Appellant, took the stand in his own defense. He stated that on December 21, 2013, he "went out to a bar" with the victim's father and the father's boyfriend. They returned to the victim's father's apartment where he continued "hanging out and carrying on" with the victim's father and the boyfriend, the victim's sister and her boyfriend, the victim, and the father's boyfriend's cousin. After a while, Appellant and the victim were the only two left in the living room. They were watching a movie on the couch "talking about [their] famil[ies] and her life and [the victim] wanted to listen to music and continue [the] conversation so [they] went into [her] bedroom." Inside her bedroom, they "were s[i]tting on the floor listen[ing] to music" and talking about how her mother was in the hospital. According to Appellant, the victim was "very upset" and stated that she wanted to move back to her old home and return to her old school. At some point, the victim "tried to kiss [him] and [he] turned [his] cheek and she kissed [him] on [the] cheek." As he tried to pull away, "she tried to pull [him] back down."

He then "advised [the victim] that, that this couldn't go on, that, you know, as much as, you know, [they] like[d] each other there's, it can only be friends" because he "was over the age of eighteen and she was young." He told her to "keep her mind focused on school," and then went to smoke a cigarette outside. "[H]alfway through that cigarette" the victim joined him. When he finished the cigarette, he went upstairs and "laid down on the sofa" in the living room.

During cross examination, the State sought to introduce evidence that Appellant had "filed charges" against the victim's father alleging that the victim's father had raped him. Defense counsel objected on the grounds that the proposed evidence was not relevant, went beyond the scope of direct examination, and was highly prejudicial. The court concluded that the allegations of sexual assault against the victim's father were "relevant to [Appellant's] credibility," overruled the objection, and permitted the inquiry but without "get[ting] into more detail." The State proceeded to ask Appellant whether, after he had been arrested, he had filed sexual assault charges against the victim's father for alleged conduct that occurred on the morning of December 21, 2013. Appellant responded in the affirmative, and when asked whether, during the videotaped conversation, he brought that up, he stated that he did not. After Appellant's testimony, the defense rested and renewed its motion for judgment of acquittal, which the court denied.

The circuit court then instructed the jury. Of particular relevance to this appeal, the court instructed the jury that some of the charges described at the beginning of the case "are no longer part of this case" and that the jury "should not consider those charges or the reasons that those charges are no longer before you."

The State began its closing argument with the following:

> [PROSECUTOR]: Ladies and gentlemen, at this point, and I know several of you have been through this, these are closing arguments at the point where we get to take the facts, apply the law and try to argue to you what inferences, assumptions or presumptions you should be drawing to apply those facts and to come to your decision. In this case I'll try to start a little bit different tact. As the Court told you the State nolle prossed certain

> charges. And that means dismissed. And this case particularly the charge, particularly interested is the top charge, the Second Degree Rape charge was dismissed. And the reason for that is very simple. That the testimony as it came out went a little bit back and forth as to whether the basic elements of that charge had be met, been met.
> [DEFENSE COUNSEL]: Objection, Your Honor.
> THE COURT: Alright. Approach.
> (Whereupon counsel and Defendant approach the bench and the following occurs outside of the hearing of the jury)
> [DEFENSE COUNSEL]: The charge was dropped to say that the evidence went back and forth seems to suggest oh well maybe he could have been guilty in that therefore at least find him guilty of something. I mean I think they were dropped. I mean they shouldn't be considered in either way.
> THE COURT: Well he's asking that he be found guilty of something.
> [DEFENSE COUNSEL]: The instruction is they shouldn't be considered in any way. And there shouldn't be discussion of you know proof back and forth. That (unintelligible) is inappropriate.
> THE COURT: They're told they're not to speculate as to why – I think [the prosecutor] is saying the testimony didn't support –
> [PROSECUTOR]: It didn't support so we got rid of it.
> [DEFENSE COUNSEL]: Well if that's what it was then I would, you know –
> THE COURT: I'll overrule the objection.
> [PROSECUTOR]: I'm not going into it or anything.
> [DEFENSE COUNSEL]: Okay.
> THE COURT: Okay. Alright, thank you.
> (Whereupon counsel and Defendant return and closing argument by [prosecutor] continues:)
> [PROSECUTOR]: So at the end of the case where we are now not believing there was enough to support that particular charge in some of the specific elements it was dismissed so that we can give you the charges that [we] truly believe [Appellant] is guilty of as he sits before you.

After closing arguments concluded, the jury retired to the jury room to begin deliberations.

During deliberations, the jury requested to view the audio/video recorded conversation between Appellant and the victim's father. The following excerpt was played for the jury:

> [APELLANT]: I'm just trying to figure out, like you know
> [FATHER]: It's all right.
> [APELLANT]: Trying to figure out why you, uh - -
> [FATHER]: Why I want to talk about it?
> [APELLANT]: Yeah.
> [FATHER]: Because it's my daughter.
> (Whereupon State's Exhibit 1 was paused for a few seconds then resumes:)
> [FATHER]: When I asked you not to do it.
> [APELLANT]: I want to talk to you. I really do.
> [FATHER]: Then talk. I'm not leap at ya or hurt ya nothing don't worry.
> [APELLANT]: I'm not worried about you leaping. It's not you I'm worried about doing the leaping.
> [FATHER]: *What are you worried about?*
> [APELLANT]: *Cops, coming back to jail.*
> (Whereupon State's Exhibit 1 was paused for a few seconds then resumes:)
> [FATHER]: Anything like that.
> [APELLANT]: [Someone] said you already called the cops.
> [FATHER]: I already called the cops? I didn't call them.
> [APELLANT]: That's what he said.
> [FATHER]: [He] don't know nothing. [He] haven't even been up here. I haven't seen [him] and the only time I seen him was outside.
> [DEFENSE COUNSEL]: Your Honor, may we approach?
> THE COURT: Not right now. Keep going.

(Emphasis added). Once the jury returned to the jury room, the following discussion ensued:

> THE COURT: . . . Now, I will note that [defense counsel] tried to get my attention. He asked if he could approach so to I'm sure lodge an objection. I asked him to wait because I simply don't want to call attention to the, to the matter but certainly I –
> [DEFENSE COUNSEL]: I was unsure but didn't want to risk not making a timely objection for the record, Your Honor, so I –
> THE COURT: No, that's why I'm mentioning this on the record that had you approached, were you intending to object?
> [DEFENSE COUNSEL]: I am intending to object.
> THE COURT: Okay. So because I asked you not to approach so as to not to call attention to it –
> [DEFENSE COUNSEL]: I understand.
> THE COURT: – I believe it's a timely objection now. Do you want to be heard?

[DEFENSE COUNSEL]: Thank Your Honor, I would like to be heard.
THE COURT: Okay.
[DEFENSE COUNSEL]: It appears that portion of the tape was played was agreed would not be played pursuant to the Motion in Limine I made regarding other bad act 5-404(b). And the reference that was played to the jury was [Appellant], saying, "I'm not afraid of you I'm afraid of cops going back to jail." That certainly is information that is prejudicial and not, it has no probative value. That is certainly to the State's case, that certainly is information that that could color the jury's view of [Appellant] and his credibility. The fact that he has been in jail is afraid of going back to jail. It might lead to confusion and speculation as to well why was he in jail and then that could, you know, lead to a line of improper character reasons. It is exactly the kind of thing that I objected to in my Motion in Limine and now it's injected I believe into the proceedings, Your Honor.
THE COURT: Thank you. Do you want to respond?
[PROSECUTOR]: Well first, Your Honor, I used the same time marks used earlier. Not sure why this time it didn't do it. But I'll tell you this, the same time just as I spoke earlier . . . Defense way over infers from this little snippet. When he says he's not going to jail or not going back to jail it's showing that he knows what he did is illegal. It does not show that he did it before. And that's what the real concern is. The fact is that he acknowledges they're out there talking about police, he doesn't want cops in the other room jumping out on him. He's worried about cops. He knows that it's criminal for him to have had sex with a fourteen year old. From the State's point of view that's all that comes out. The, it doesn't mention what if anything and quite frankly I'd ask to replay from the court reporter the actual recording to see exactly how clear it is that comes out. [Defense counsel], just like myself, have heard this tape many times so it's very clear in our ears what we hear because we've heard it so many times. A jury sitting never hearing it before and a snippet, probably about half a second too much I disagree that it really carries any weight of material.
THE COURT: Okay. Well when it was played this time I heard the word back, going back to jail. Having said that, there were other points in the tape where police were mentioned. And he, you know, I think, it could certainly be concluded then that, you know, he's worried about police, he was worried about whether they're there. He's worried about cops. That was played before. I don't think that that word back, which is really the only addition that we didn't have before, I don't think that that word back unfairly prejudices [Appellant's] case. I don't think it leads to jury confusion. I think that in the context of what else they've heard I don't think it would lead the jury to speculate or conclude that he's had a prior

> similar conviction or any such thing. So I'm going to overrule your objection noting your exceptions to that.
> [DEFENSE COUNSEL]: Thank Your Honor. And I guess for the record I make a Motion for a Mistrial at this point.
> THE COURT: Indeed. I'm going to deny the motion for mistrial.
> [DEFENSE COUNSEL]: Thank you.
> THE COURT: Based upon my prior ruling I don't think there's manifest necessity for a mistrial. I just don't think that it's, I'm not sure it's at all prejudicial to the Defendant but if at all it's minor. And I don't think it's going to lead to confusion or speculation on the part of the jury based upon the contexts that they already had. So that is denied as well.

Later that evening, the jury returned its verdict of guilty on the charge of sexual offense in the third degree and not guilty on the charge of assault in the second degree. Appellant was sentenced to ten years for the sexual offense in the third degree on March 17, 2015. He filed an Order of Appeal to this Court on April 7, 2015.

DISCUSSION

Improper Closing Argument

Standard of Review

"[A]ttorneys are afforded great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999). There are no "hard-and-fast limitations" to circumscribe the arguments that an earnest counsel may advance, no "well-defined bounds" to confine "the eloquence of an advocate." *Wilhelm v. State*, 272 Md. 404, 413 (1974). Nevertheless, the State "is not at liberty to strike foul [blows]." *Berger v. United States*, 295 U.S. 78, 88 (1935).

The limits of permissible argument depend upon the facts of each particular case. *Hill v. State*, 355 Md. 206, 223 (1999). Courts must act as sentinels and guard a

defendant's right to a fair trial against any incursions by a prosecutor who oversteps the bounds of the wide latitude afforded. *See Degren*, 352 Md. at 430–31. Because the trial courts are the first line of defense, they are "in the best position to evaluate the propriety of a closing argument." *Ingram v. State*, 427 Md. 717, 726 (2012) (citing *Mitchell v. State*, 408 Md. 368, 380–81 (2009)). We will not disturb the trial court's ruling "unless there has been an abuse of discretion of a character likely to have injured the complaining party." *Grandison v. State*, 341 Md. 175, 243 (1995) (citing *Henry v. State*, 342 Md. 204, 231 (1991), *cert. denied*, 503 U.S. 192 (1992)).

"Not every improper remark, however, necessitates reversal." *Lee v. State*, 405 Md. 148, 164 (2008). "[R]eversal '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.'" *Id.* (quoting *Lawson v. State*, 389 Md. 570, 592 (2005))

Contentions

In his brief, Appellant contends that the State's closing comments said to the jury that "the charges that were dismissed should help to inform [its] verdicts on the remaining counts." He equates the State's argument with submitting dead counts to the jury, asserting that it was "improper for [the] jury to consider charges that have been dismissed." In support, he cites cases including *Sherman v. State*, 288 Md. 636, 642 (1980), for the proposition that "the potential prejudice arising from the submission to a

jury of counts that have earlier been eliminated [is] sufficient to warrant . . .” the withholding of those counts from deliberations under any circumstances.

Appellant also contends that when the State said to the jury that it was submitting only “the charges that [we] truly believe [Appellant] is guilty of as he sits before you,” it was “permitted to improperly interject [its] opinion concerning the guilt of the [Appellant].” That, “standing alone,” he argues, was an “improper argument.” He further argues, quoting *United States v. Young*, 470 U.S. 1, 18-19 (1985), that the circuit court’s failure to sustain his objection implied that the prosecutor’s opinion as to Appellant’s guilt was “before the jury not only with the full ‘imprimatur of the Government,’ but also of the court.” In his view, “reversal is required because the trial court failed even to recognize the nature of the improper argument and did nothing to cure it.”

The State responds that the circuit court “properly exercised its discretion” because defense counsel’s primary concern, that “the prosecutor was saying that there was evidence that supported the charges that were dismissed,” was addressed when the prosecutor “expressly stated that he did not believe there was enough evidence to support the dismissed charges.” And, according to the State, “it was not incumbent on the trial court to give a curative instruction without a request for such an instruction.” According to the State, the prosecutor’s admission that the State had brought charges for which there was insufficient evidence to convict Appellant actually prejudiced the State because it may have led the jurors to wonder “whether the same was true of the remaining counts.”

The State also contends that Appellant's reliance on *Sherman* is misplaced because *Sherman* relates to the submission of a charging document, which contained "dead counts," to a jury during its deliberations while this case involves a statement made by the prosecution during closing argument. This distinction, it argues, is important because the presentation of evidence and argument is foreclosed once deliberations begin. At that point, the attorneys can no longer present arguments to counter an error, view the jury to assess impact of the error on the deliberations, or limit the jury's time of exposure to any improper evidence that has been submitted for its review.

The State also points out that any "claim regarding [the prosecutor's] alleged opinion about [Appellant's] guilt was not raised below" because the "specific objection" with respect to the dismissed charges was limited to the statement "that the evidence went 'back and forth.'" That objection, which came after the court overruled the objection concerning the dismissed charges, "cannot reasonably be construed as encompassing" the prosecutor's personal opinion of Appellant's guilt. But, even if the issue was preserved, the State's comment was proper because the prosecutor's statement did not imply that there was evidence known to the prosecutor but withheld from the jury and it was "evident from the context that the prosecutor was referring to whether the evidence met the elements [of the remaining crimes], not expressing a personal opinion."

Analysis

We first consider whether the circuit court erred by permitting the State to argue to the jurors that the evidence related to the nolle prossed charges "went a little bit back and

forth," and failing to give a curative instruction once it had done so. Three factors inform our determination: "the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Spain v. State*, 386 Md. 145, 159 (2005). In other words, we consider "'1) the closeness of the case, 2) the centrality of the issue affected by the error, and 3) the steps taken to mitigate the effects of the error.'" *Henry*, 324 Md. at 232 (quoting *Collins v. State*, 318 Md. 269, 280, *cert. denied*, 497 U.S. 1032 (1990)).

Just prior to closing argument the court instructed the jury:

> at the beginning of the trial I described the charges against [Appellant]. Some of those charges are no longer part of this case. And I mentioned the Second Degree Rape and the Fourth Degree Sexual Offense. You should not consider those charges or the reasons that those charges are no longer before you. The only charges left for you to consider are the Third Degree Sexual Offense, and Second Degree Assault.

The alleged impermissible remarks in this case related to the charges that had been nolle prossed, rather than charges pending against Appellant, particularly "the top charge" of second degree rape. And, according to the prosecutor, the testimony regarding the charge "went a little bit back and forth as to whether the basic elements of that charge had . . . been met." The State's comment was hardly central to the issue of whether Appellant had committed the remaining charges, and therefore, was not particularly egregious. *Compare Donaldson v. State*, 416 Md. 467, 498 (2010) (concluding that argument that the jury should convict defendant to combat Baltimore's drug problem and the prosecutor's improper vouching for the credibility of witnesses could have influenced

the jury), *and Sivells v. State*, 196 Md. App. 254, 280 (2010) ("Although a single reference to police work as 'honorable' might not be impermissible, the repeated references to the officers as 'honorable men,' and the ultimate statement that 'they told the truth,' crossed the line."), *with Spain*, 386 Md. at 159, (concluding that a single instance of improper vouching that did not pervade the entire trial did not warrant reversal), *and Mitchell v. State*, 408 Md. 368, 383–84 (2009) ("[I]t is within the scope of permissible closing argument for counsel to draw inferences from the evidence admitted at trial, which includes the ability to comment on an absence of such evidence[.]").

In addition, the State, following defense counsel's objection, sought to clarify any confusion by stating that "at the end of the case[,] where we are now[,] not believing there was enough to support that particular charge in some of the specific elements it was dismissed." Defense counsel did not object to that remark and did not seek a curative instruction.

We do not agree with Appellant that the State's comments were "*tantamount* to submitting to the jury so called 'dead counts.'" (Emphasis in original). It is generally accepted that most of the harm associated with submitting "dead counts" to a jury, arises from the secretive nature of deliberations and the potential for the jury to discover previously unknown charges. *See Sherman*, 288 Md. at 642. The relative lack of severity of the prosecutor's remarks, the instruction given by the trial judge, and the unobjected to clarification by the prosecutor lead us to the conclusion that, even if the argument was

improper, it did not mislead or confuse the jury. In short, we do not perceive any prejudice that would warrant reversal of his conviction.

Regarding Appellant's argument that the prosecutor improperly "interject[ed] [his] opinion concerning the guilt of the [Appellant]" by stating "so that we can give you the charges that [we] truly believe [Appellant] is guilty of . . ." defense counsel failed to object to the prosecutor's statement, and therefore, did not properly preserve that issue for our review. *See* Maryland Rule 8–131(a); *Shelton v. State*, 207 Md. App. 363, 385 (2012) ("We have repeatedly held that pursuant to Rule 8–131(a), a defendant must object during closing argument to a prosecutor's improper statements to preserve the issue for appeal."). But, even if the argument had been preserved, the result would be the same.

Although it is improper for a prosecutor to assert his or her personal belief or conviction concerning the guilt of an accused when predicated upon anything besides the evidence in the case, a prosecutor "has the right to state his [or her] views, . . . as to what the evidence shows." *Cicero v. State*, 200 Md. 614, 620–21 (1952) (alteration in original). In this case, the prosecutor explained that the second degree rape and fourth degree sexual offense charges were nolle prossed "so that [the State] can give you the charges that [it] truly believe[s] [Appellant] is guilty of as he sits before you." He then went on to discuss the elements of third degree sexual offense, and the evidence that demonstrated how Appellant's conduct satisfied those elements. Notably, the jury declined to convict Appellant of the charge of second degree assault.

Moreover, and even if the remarks were improper, our independent review of the record persuades us, beyond a reasonable doubt, that Appellant has failed to demonstrate that the jury was misled or influenced by the State's closing argument. *See Toomer v. State*, 112 Md. 285, 293 (1910). Absent such a showing, we will not reverse Appellant's conviction. *See Donaldson*, at 496–97.

Denial of the Motion for Mistrial

Standard of Review

Generally, we 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)); *Jenkins v. State*, 375 Md. 284, 295–96 (2003). The reason being that "[t]he grant of a mistrial is considered an extraordinary remedy and should be granted only 'if necessary to serve the ends of justice.'" *Carter v. State*, 366 Md. 574, 589 (2001) (alteration in original) (quoting *Klauenberg v. State*, 355 Md. 528, 555 (1999)). Stated differently, a mistrial should only be granted "when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice." *Burks v. State*, 96 Md. App. 173, 187, *cert. denied*, 332 Md. 381 (1993).

Because a trial court is in the best position to determine the degree, if any, of prejudice, "its decision should not be reversed unless it is clear that there was prejudice." *Lusby v. State*, 217 Md. 191, 195 (1958). A reviewing, court, "upon its own independent review of the record," must "be satisfied that there is no reasonable possibility that the

evidence complained of . . . may have contributed to the rendition of the guilty verdict." *Dorsey v. State*, 276 Md. 638, 659 (1976).

Contentions

Appellant contends that the trial court's failure to grant his motion for mistrial after the playing for the jury of the excluded portion of the audio-video conversation between Appellant and the victim's father was in error. Quoting *Hurst v. State*, 400 Md. 397, 407 (2007) (citations omitted), he argues that "there are few principles of American criminal jurisprudence more universally accepted than the rule that evidence which tends to show that the accused committed another crime independent of that for which he is on trial, even one of the same type is inadmissible." According to Appellant, the portion of the recorded conversation in which he "references his fear of going back to jail" is precisely the type of evidence that is recognized as inadmissible.

By playing the "previously excised portion of the [video] to the jury during its deliberative phase," the court "allowed the jury to speculate on Appellant's credibility and whether [he] was a 'bad person' who had committed 'other crimes,' [and] thus[,] invit[ed] the jury to convict him of 'something.'" The cumulative effect of the recording and the prosecutor's closing argument, he asserts, "cannot be dismissed as harmless." In Appellant's view, there was no way for the court to assess or cure any prejudice resulting from the exposure to "inadmissible evidence in the midst of its deliberations."

The State responds, citing *Rainville v. State*, 328 Md. 398, 408 (1992), that the circuit court "properly exercised its discretion in denying the motion" because the

inadmissible statement was a "single, isolated statement," that was not deliberately solicited by the State. According to the State, the taped statement from which the inadmissible evidence was derived did not "constitute[] the principal evidence" in the case because the victim and Appellant both testified about the alleged encounter at trial. In the State's view, Appellant's statement that he was worried about "Cops, coming back to jail" might not even qualify as "other crimes" evidence because an individual "can be in 'jail' without having been convicted of a crime" and there was no evidence that Appellant had committed any particular crime. In addition, the State points out, citing *Hudson v. State*, 152 Md. App. 488 (2003), that "this Court has held that a mistrial is not necessarily mandated whe[n]ever other-crimes evidence has erroneously been placed before the jury."

Analysis

It is undisputed that Appellant's comment, during a recorded conversation with the victim's father, that he was worried about "Cops, coming back to jail," was not properly before the jury. The trial court was not persuaded that the statement was "at all prejudicial to [Appellant]," but if it was, any prejudice was only "minor" in the context of the case before the jury.

The Court of Appeals has set forth several factors to be considered in determining whether a mistrial is required following the introduction of inadmissible evidence: whether the reference to the inadmissible evidence was an isolated statement; whether it was solicited by counsel; whether it came from the principal witness upon whom the

entire prosecution depends; whether credibility is a crucial issue; and whether ample evidence, apart from the inadmissible evidence, exists. *See Guesfeird v. State*, 300 Md. 653, 659 (1984). But, these "factors are not exclusive and do not themselves comprise the test." *Kosmas v. State*, 316 Md. 587, 594 (1989). Instead, we must determine "whether the prejudice to [Appellant] was so substantial that he was deprived of a fair trial." *Id.* at 594–95.

The improperly admitted statement in this case was an isolated occurrence. No reference to Appellant's prior incarceration had been made at any time during trial. Nor did the statement indicate that Appellant had been incarcerated for a particular, much less a similar, offense. During the earlier playing of the video recording, the prosecutor properly omitted the "back to jail" statement, and indicated that "the same time marks" were used when he played the video during deliberations.

To be sure, credibility was important in this "he said, she said" case. The "back to jail" statement came from Appellant, whose credibility was obviously crucial to his defense. On the other hand, the prosecution's case depended on the credibility of the victim's testimony that Appellant "kisse[d her] twice" on her lips, "touch[ed] her leg," "pulled down [her] pants and then he undid his and then began oral sex," and later "sticked his penis in [her] vagina." The State introduced the conversation between Appellant and the victim's father to support the victim's testimony. During that conversation, Appellant, responding to questions from the victim's father made what could be understood as incriminating statements.

We shall assume, without deciding, that the "back to jail" statement constituted other crimes evidence. When we excise it from the record, there is, in our view, still sufficient evidence to convict Appellant of the third degree sex offense. This case is distinguishable from *Rainville v. State*, 328 Md. 398 (1992), in which a mistrial was warranted. In *Rainville*, the State's case "rested almost entirely upon the testimony of a seven-year-old girl." *Id.* at 409. In addition, the girl's mother testified that the defendant was in jail "for what he had done to [the mother's nine-year-old son]." *Id.* at 401. The "back to jail" statement in this case did not relate to any offense at all, much less an offense similar to the ones charged; and the testimony of the fourteen-year-old victim in this case had some support in the recorded statement of Appellant. *See United States v. Veteto*, 701 F.2d 136, 139–40 (11th Cir.) (stating that a witness's remark that a co-defendant had "been in prison before" did not warrant a mistrial because the defendant "failed to show that the remark so influenced the trial's outcome as to constitute plain error," even though "use of such words as 'jail,' 'prison,' 'arrest' are generally to be avoided.") (citations omitted), *cert. denied*, 464 U.S. 839 (1983).

Based on our independent review of the record, we perceive no prejudice so substantial as to deprive Appellant of a fair trial, and we are "satisfied that there is no reasonable possibility that the evidence complained of . . . contributed to the rendition of the guilty verdict" for the third degree sex offense. *Dorsey*, 276 Md. at 659. As noted previously, the jury convicted Appellant of only one of the two charges that went to the jury.

Admission of Irrelevant Evidence

Standard of Review

Ordinarily, "[w]e review a circuit court's decision[] to admit or exclude evidence applying an abuse of discretion standard." *Norwood v. State*, 222 Md. App. 620, 642 (2015). But, "[e]vidence that is not relevant is not admissible." Md. Rule 5-402. Yet, "once a trial court has made a finding of relevance, we are generally loath to reverse [the] trial court unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Decker v. State*, 408 Md. 631, 649 (2009) (alteration in original) (citation omitted).

Contentions

Appellant challenges the trial court's admission of evidence that, following his arrest, Appellant "filed a criminal complaint against the complaining victim's father, . . . wherein Appellant alleged that [the victim's father] had sexually assaulted him." The trial court concluded that the evidence was "relevant to Appellant's credibility" and therefore it was "admissible as impeachment evidence." Appellant contends that his filing of the criminal complaint had no bearing on his credibility and its subsequent dismissal "failed to demonstrate that [his] claim was not true or that [he] was somehow not credible."

The State contends that the circuit court properly admitted this evidence because it "was relevant to show that [Appellant] was trying to retaliate against the victim's father for his role in the charged offenses in this case." The State argues that a trier of fact could reasonably conclude that Appellant's accusations of a serious crime "was an attempt to

intimidate [the victim's father] and induce [him] not to testify or otherwise provide evidence against [Appellant]."

Analysis

The circuit court, based on its relevance to credibility, permitted the State during cross examination of Appellant to inquire into "sexual assault charges" that Appellant had filed "against [the victim's father]." The court did not, however, permit the State to "get into more detail" about the alleged conduct. Appellant confirmed the accusations, and acknowledged that he did not broach the subject during his videotaped conversation with the victim's father.

Under Maryland Rule 5-401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "Generally, evidence is relevant and admissible if it tends either to establish or disprove issues in the case," *Thomas v. State*, 143 Md. App. 97, 111 (2002), and a "witness's credibility is always relevant." *Reese v. State*, 54 Md. App. 281, 286 (1983). Thus, a trial court may permit "any question which reasonably tends to explain, contradict, or discredit any testimony given by [an essential witness], or which tends to test his accuracy, memory, veracity, character or credibility." *DeLilly v. State,* 11 Md. App. 676, 681 (1971). The scope of such interrogation is within the sound discretion of the trial court. *Hill v. Wilson*, 134 Md. App. 472, 480 (2000).

Here, Appellant's sexual assault allegations against the victim's father were offered by the State to "show[] retaliation." And, in the court's view, the allegations, which occurred after the date of Appellant's alleged criminal actions, could "bare on upon [his] credibility," and thus were not without some relevance. Although the relationship between the filing of charges against the victim's father and Appellant's credibility could be considered somewhat attenuated, we are not persuaded that the evidence was so plainly inadmissible as to constitute either error or an abuse of discretion.

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