UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 955

September Term, 2015

ANTHONY W. BROWN A/K/A ANTHONY MARTIN

v.

STATE OF MARYLAND

Arthur,
Reed,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: March 15, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Tried by a jury in the Circuit Court for Montgomery County, appellant, Anthony W. Brown, a/k/a Anthony Martin, was convicted of first-degree assault.[1] After receiving a sentence of 25 years in prison without the possibility of parole,[2] appellant noted this timely appeal, presenting the following questions for our consideration:

1. Did the trial court err in admitting prejudicial expert testimony from a lay witness?

2. Did the trial court err in allowing the State to make improper and prejudicial statements at closing argument?

For the reasons that follow, we shall affirm the judgment of the trial court.

FACTS AND LEGAL PROCEEDINGS

In November 2009, Toney Pickett[3] was involved in a romantic relationship with Angela Martin, appellant's sister.[4] On November 10, 2009, Angela called Pickett and asked

[1] The jury acquitted appellant of conspiracy to commit first-degree assault.

[2] The State sought imposition of a mandatory sentence, as required by Md. Code (2012 Repl. Vol.), §14-101(d) of the Criminal Law Article, for a third time offender for a crime of violence.

[3] Pickett admitted to impeachable offenses of misdemeanor theft and conspiracy to distribute controlled dangerous substances. He further admitted that, at the time of the assault, he "had a problem" with alcohol.

[4] Because Angela Martin has the same surname as appellant's alias, we will refer to her as "Angela" for clarity.

By the time of trial, Angela had ended the relationship with Pickett.

her to meet him at a bus stop on Rockville Pike, Montgomery County.[5] Once there, the two argued, and Pickett left Angela at the bus stop.

Later that evening, Angela again phoned Pickett, asking him to come to her home in Silver Spring, Montgomery County. To Pickett, it seemed as though she was inviting him "to have a good time or whatever." When he arrived at her ground floor apartment, Angela was outside; she asked him why he had hit her.[6] Angela walked Pickett around the building to the back entrance to her apartment, where he was "ambushed," that is, "[s]lammed to the ground and stabbed" and hit by Angela, appellant, and an unknown black male.

After the attack, Pickett returned to the parking lot in front of Angela's apartment building and screamed for help. Angela's next-door neighbor, Angela James ("James"), called 911. Pickett told the responding police officer that he did not know the person who stabbed him. At trial, he clarified that he knew he had been assaulted by appellant, Angela, and an unknown man, but he was unsure which of the three had actually stabbed him.

Pickett was transported from the scene by ambulance and taken to Suburban Hospital; he sustained one stab wound to each leg and two stab wounds to his back.

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[5] In the trial transcripts, the date of the incident is alternately referred to as November 10 and November 20, 2009. The police reports and Pickett's hospital records confirm that the incident occurred on November 10, 2009.

[6] Pickett denied having hit Angela. He claimed her question acted as a signal to appellant and another man to begin their attack.

Emergency room personnel closed his wounds with staples and released him from the hospital approximately four hours after his arrival.[7]

At the April 2015 trial, Pickett remained scarred from the stabbing. Although at the time of the stabbing he believed his wounds to be serious, he admitted that he had written a letter to the State's Attorney's Office in November 2009, in which he stated that his wounds were not serious. He testified, however, that he wrote the letter because he wanted to help Angela with her criminal case and because his main concern at the time was his belief that his assailants had robbed him of his wallet and keys.[8]

James testified that in November 2009, she and Angela were close friends. She also knew Pickett and appellant slightly from their visits with Angela.

On the night of November 10, 2009, James heard someone calling for help. She looked out her bedroom window and saw Pickett bent over and staggering in the parking lot. When she went outside to help him, Pickett was "upset, hurt, and scared." He told her that Angela's brother had stabbed him and "that they tried to kill him."

James called 911.The recording of the 911 call was played for the jury and transcribed on the record. On the recording, a man identified as Pickett can be heard saying, "I'm going to bleed to death." James is also heard warning Angela to stay away from her;

[7] Pickett's medical records from his visit to Suburban Hospital were admitted into evidence as State's exhibit 10.

[8] He later found out that those items had not been taken by the assailants but by the police and held for him at the police station.

James believed that Angela, who was "really in [her] face," had tried to intimidate her into hanging up the phone.

James said she saw appellant leaving the apartment complex that evening. She later identified him from a photo array. She also made an in-court identification of appellant as both Angela's brother and the man she had seen leaving the apartment complex on the night in question.

Montgomery County Police Officer Dean Skiba responded to James's 911 call on November 10, 2009. The call for a stabbing, he said, was a "priority call," so he got there as quickly as possible.When he arrived, the victim was "covered in blood" and required immediate attention for stab wounds to his back and legs.

Skiba administered first aid to Pickett and tried to determine what the crime was, ultimately assigning a charge of first-degree assault. When Skiba asked who had injured him, Pickett said, "[T]hey set me up," but he professed not to know the names of the people who had attacked him. He did, however, provide a description of one of the men—black male, about six feet tall and 300 pounds, bald head, wearing a leather jacket.

Mark Frederickson, Montgomery County Fire and Rescue Firefighter/Rescuer III EMT, also responded to the scene for an "ALS 1 stabbing," which he described as advanced lifesaving priority, because a stabbing is considered a life threatening injury. Frederickson observed wounds to Pickett's legs and back, which raised concerns of "[p]otential death." Pickett was transported to Suburban Hospital because that was the nearest trauma center.

On November 20, 2009, appellant was arrested for his part in the attack on Pickett; the police released him for unknown reasons.[9] At the time of his 2009 arrest, appellant identified himself as Anthony William Brown.

On October 30, 2014, appellant was arrested for shoplifting. When the arresting officer asked him for identification, appellant referred him to his Washington, D.C. driver's license, which was in the name of Anthony William Martin. Other cards in his possession at that time, however, were in the name Anthony Brown.[10] Upon this arrest in 2014, police officers discovered an outstanding arrest warrant for the 2009 event involving Pickett.

At the close of the State's case-in-chief, the court denied appellant's motion for judgment of acquittal. Appellant did not put on any evidence, and the court again denied his renewed motion for judgment of acquittal at the close of all the evidence.

DISCUSSION

I.

Appellant contends that the trial court erred in permitting Mark Frederickson, a lay witness, to testify about the severity of Pickett's injuries, which testimony provided the only evidence that the wounds created a serious physical injury or risk of death so as to

[9] Angela was also arrested and charged as a co-conspirator. She was ultimately convicted and sentenced to time served.

[10] It was the State's theory that appellant created the alias after the incident involving Pickett because he was aware the police were looking for him.

support a conviction of first-degree assault.[11] Although the State may not have been required to present expert testimony to prove the elements of the crime, appellant contends, once it elicited testimony regarding the seriousness of the injuries based on Frederickson's training and experience as an EMT, the witness was required to be qualified and accepted as an expert in order to testify in that manner. In appellant's view, the court therefore erred in admitting the prejudicial expert testimony in the guise of a lay opinion.

Frederickson testified that he was employed by Montgomery County Fire and Rescue as a "Firefighter/Rescuer III EMT," which meant he was "trained in rescue from vehicle crashes, trench rescue, high angle rescue, and . . . also trained as an emergency medical technician," able to perform "basic lifesaving skills, CPR, rescue breathing, control of bleeding, breaks, fractures, traumatic injuries." Then participating in a paramedic program, he was in the process of being trained in advanced lifesaving skills, to include "the administration of drugs, cardiac lifesaving, cardiac rescue, cardiac monitoring, and administration of drugs . . . and other respiratory therapies."

Frederickson said he responded to James's 911 call on November 10, 2009, for an "ALS 1 stabbing," which he defined as "an advanced lifesaving priority given to the type of injury. Because it is a stabbing it is considered a life threatening injury." He found Pickett in bloody clothes, his pants soaked through, with wounds to his legs and back. The

[11] Pursuant to Md. Code (2012 Repl. Vol.), Crim. Law § 3-202, a person commits a first-degree assault when he "intentionally cause[s] or attempt[s] to cause serious physical injury to another," or when he commits an assault with a firearm. There was neither allegation, nor evidence presented, that appellant or his conspirators employed a firearm in the attack on Pickett.

wound to his back, Frederickson said, created the potential life threat of a hemothorax, or collapsed lung. In addition, the injuries to his legs created the potential of "bleeding out."

During Frederickson's testimony, defense counsel made no specific objection that the lay witness was providing expert opinion testimony, although he did offer a general objection on three occasions—when Frederickson: (1) testified that inspection of the victim revealed wounds not only to his legs but to his back as well; (2) stated that a stabbing is considered a life-threatening event; and (3) was asked what medical concerns he had as an EMT when encountering the type of wounds Pickett had suffered.

In his motion for judgment of acquittal, defense counsel specifically argued, for the first time, that Frederickson was not an expert and his opinions should not be accepted as expert testimony: "[H]e's not an expert and his opinions shouldn't be accepted as those coming from an expert. His opinions are just that, the opinions of a lay person, and they shouldn't be accepted. He's not offered as an expert and he's not an expert." In denying the motion, the court stated:

> And in looking at the two charges and the charge of first degree assault requires as part of it that the defendant intended to cause serious physical injury in the commission of the assault. It's not a matter of whether in fact there was serious injury. But in this case there also, the modality chosen, taking the evidence in a light most favorable to the State, was by multiple stabbings, some in the legs and then again in the back. These areas of the body that with the level of assault that occurred in this case caused profuse bleeding, according to the lay testimony in this case from the officers who got on the scene as well as from the other eyewitness to this case who responded to the cries outside, and according [sic] I do believe that based upon this test and based upon the evidence that's been adduced so far, including the testimony of Fire Rescue Frederickson and

> the medical records in this case, that a case of first degree assault has been made out.

Frederickson's testimony was later referenced during closing arguments. First, the prosecutor reminded the jury how the EMT testified he

> initiated trauma protocol, injuries that created a substantial risk of death, and they were life-threatening injuries. He told you about all the things that could go wrong, the pneumothorax, the collapse[d] lung, internal hemorrhaging, internal organ damage, internal bleeding. He as a veteran EMT says these were my concerns. These were my concerns when I arrived at the scene and when we initiated advance life-saving protocol. When we took Mr. Pickett, we stripped him down pursuant to our trauma protocol to inspect his wounds more closely because we couldn't see it through those blood-soaked clothes. We put him in the ambulance and we took him to Suburban, the closest trauma center in Montgomery County.

Then, in his own closing argument, defense counsel declared:

> The State raises the issue of the seriousness of the wounds. They tell you they're very serious. There's no doctor here. There's no nurse here. There's no one from the hospital here. We have no report from emergency medical people. . . . [T]here are no bloody clothes here for you to see. There are no pictures of wounds. There's no doctor. There's no nurse. The burden of proof is here. Mr. Pickett himself, and I asked him about this, I know you were paying attention. I asked him did you write in your letter I was released from the hospital less than two hours; my wounds wasn't serious. My wounds wasn't serious.
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> * * *
>
> And the State's Attorney points out Mark Frederickson as a witness who supposedly knows whether something is a serious injury or life-threatening, but he's not put to you as an expert. He tells you what his procedure is. He gets there, sees a lot of blood, he takes a lot of procedure. He does what he's told to do procedurally. There is no nurse. There is no doctor.

Finally, in her rebuttal closing argument, the prosecutor added:

> And the evidence you have is that Mark Frederickson, who is a 17-year veteran of his profession, I would submit to you if your choice was me, Mark Frederickson, or [Defense counsel] to operate on your [sic] or to help you out if you were in a medical [sic] you'd pick Mark Frederickson.
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> [DEFENSE COUNSEL]: Objection.
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> THE COURT: Overruled.
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> [PROSECUTOR]: He doesn't have to be an expert. He knows what he's talking about. He's trained. He has a copious amount of training. He's going through training to go the next level [sic]. And he's telling you in his training how this creates a serious risk of death, serious physical injury. There's no requirement that the State put on experts. There's no requirement for doctors or nurses. There's no requirement for pictures.

In general, a trial court has wide discretion to rule on the admission of evidence. *State v. Simms,* 420 Md. 705, 724 (2011) (citing *Ruffin Hotel Corp. of Md., Inc. v. Gasper,* 418 Md. 594, 619 (2011)). The decision to admit lay opinion testimony lies within that sound discretion. *Bey v. State,* 140 Md. App. 607, 623 (2001). We will not overturn a trial court's decision to admit such evidence unless the trial court abused its discretion. *Thomas v. State,* 183 Md. App. 152, 174 (2008), *aff'd*, 413 Md. 247 (2010).

Maryland Rule 5–701 governs the admission of opinion testimony by a lay witness, and provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Md. Rule 5-702, governing the admission of expert testimony, provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

In *Ragland v. State*, 385 Md. 706, 717 (2005), the Court of Appeals explained the difference between expert and lay opinion testimony: expert opinion testimony is that which is "based on specialized knowledge, skill, experience, training, or education . . . [and] need not be confined to matters actually perceived by the witness," while lay opinion testimony is that which is "rationally based on the perception of the witness." The Court pointed out, however, that it is possible for some opinions to fall into both categories. "A witness who has personally observed a given event may nonetheless have developed opinions about it that are based on that witness's specialized knowledge, skill, experience, training, or education." *Id*. at 718.

"The question then becomes whether the fact of personal observation will permit admission of the opinion by a lay witness under Rule 5-701, or whether the 'expert' basis of the opinion will require compliance with Rule 5-702 and admission as expert testimony." *Id.* at 718. After all, "expert opinion testimony may not be offered in the guise of lay opinion testimony. [Maryland] Rules 5–701 and 5–702 prohibit the admission as 'lay opinion' of testimony based upon specialized knowledge, skill, experience, training or

education." *Warren v. State,* 164 Md. App. 153, 167 (2005) (citing *Ragland*, 385 Md. at 725).

In this matter, however, whether Frederickson's testimony comprised lay or expert opinion testimony makes no difference to the outcome of the appeal. We explain.

Central to appellant's argument is the claim that Frederickson should not have been permitted to offer his purportedly expert opinion that Pickett's wounds were life threatening in the guise of lay opinion testimony. As noted above, defense counsel made three general objections during Frederickson's direct examination and, the following day, after the State had rested its case, a specific objection during his motion for judgment of acquittal. We first must determine whether these objections were sufficient to preserve the issue for appeal.

Maryland Rule 4-323(a) requires that, for purposes of review on appeal of any ruling on the admission of evidence, the objecting party must object to the admission of the evidence "at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." As the Court of Appeals explained in *Perry v. State*, 357 Md. 37, 77 (1999),

> [t]he requirement of a contemporaneous objection is a necessary and salutary one, designed to assure both fairness and efficiency in the conduct of trials. A party cannot be permitted to sit back and allow the opposing party to establish its case, or any part of its case, through unchallenged evidence and then, when it may be too late for the opposing party to recover, to seek to strike the evidence.

Defense counsel's general objections were to the following three questions posed to Frederickson by the prosecutor:

1. Did a closer inspection of Mr. Pickett ever reveal wounds elsewhere besides his legs?

2. You had mentioned you initiated a trauma protocol. Why were you using this type of protocol to treat Mr. Picket?[12]

3. What medical concerns do you have as an EMT when you use these types of wounds?

It is well-settled that, "[i]f neither the court nor a rule requires otherwise, a general objection is sufficient to preserve all grounds of objection which may exist." *Boyd v. State*, 399 Md. 457, 476 (2007) (quoting *Grier v. State*, 351 Md. 241, 250 (1998)). Therefore, because defense counsel objected to every question he believed would solicit expert-quality testimony from Frederickson, the issue of whether the court erred in admitting expert testimony from a lay witness is preserved for our review. Nevertheless, we shall hold that, for a number of reasons, the court did not err in refusing to exclude any portion of Frederickson's testimony.

First, evidence of the severity of Pickett's injuries was introduced by several other means at trial, without objection. We have made clear that "'[w]hen evidence is received without objection, a defendant may not complain about the same evidence coming in on another occasion even over a then timely objection.'" *Wilder v. State,* 191 Md. App. 319, 346 (2010) (quoting *Williams v. State,* 131 Md. App. 1, 26 (2000)). *See also Dove v. State,* 415 Md. 727, 743 (2010) ("In considering whether an error was harmless, we also consider

[12] The objection to this question technically came halfway through Frederickson's answer, right after Frederickson uttered: "Because a stabbing is considered a life threatening event -- "

whether the evidence presented in error was cumulative evidence"). Pickett himself testified that he was "[s]lammed to the ground and stabbed" in each leg and his back, and that he was "pretty messed up" and bleeding before being taken to the hospital, where his wounds required multiple staples to close. James confirmed that Pickett was hurt and scared after the incident and that he told her "they tried to kill him." During her 911 call, which was played for the jury, Pickett can be heard saying that he had been stabbed and was "going to bleed to death." Officer Skiba stated that he had been dispatched on "a priority call" for a stabbing to Pickett's location and that when he arrived, Pickett was "covered in blood" from wounds to his back and legs and "needed immediate attention." In attempting to stanch the blood flow, Skiba was "freaking out" and hoping that Pickett did not die before medical help arrived because he was aware that "nick[ing] something important in the legs" can lead to death. Finally, Pickett's medical records from Suburban Hospital were introduced into evidence. Those records detailed that Pickett, a crime victim, arrived in the emergency room complaining of multiple stab wounds to his back and legs, which required repair with multiple staples. Consequently, appellant may not complain that the admission of Frederickson's opinion testimony regarding the severity of Pickett's injuries prejudiced him unfairly when other sources of that information were admitted without objection.

Second, as the trial court correctly pointed out in its ruling on appellant's motion for judgment of acquittal, a conviction of first-degree assault does not turn on a finding that the victim actually suffered a serious bodily injury at the hand of the defendant; rather, the jury must find that the defendant *intended* to cause serious physical injury in the

commission of the assault. Frederickson was not called upon to offer his opinion as to the assailant's intent in causing Pickett's injuries; his testimony was directed to the required treatment of Pickett's injuries based on what Frederickson observed when he arrived at the scene. Therefore, his testimony was not introduced to prove an essential element of the crime of first-degree assault. *See Fullbright v. State*, 168 Md. App. 168, 182 (2006). Based on the undisputed testimony that appellant was present at the scene of the stabbing and stabbed—or was an accomplice in stabbing—Pickett, the jury amply could have inferred, through its own knowledge and experience, that by stabbing Pickett on his torso near vital organs and on his legs where major arteries could have been severed, causing a fatal loss of blood, appellant or his accomplice intended to cause Pickett serious physical injury, irrespective of Frederickson's testimony. *See*, *e.g., Brown v. State*, 182 Md. App. 138, 179 (2008) (intent requirement of assault may be amply inferred from the fact that the defendant shot at the victim).

Third, and finally, even had Frederickson's testimony been admitted in error, any such error would be harmless beyond a reasonable doubt, as Pickett's testimony, standing alone, if believed by the jury, was sufficient to prove first-degree assault. First-degree assault requires intentionally inflicted serious physical injury or attempt to cause serious physical injury. Md. Code (2012 Repl. Vol.), Crim. Law ("CL") §3-202(a)(1). "Serious physical injury," as defined by CL §3–201(d), includes physical injury that creates a substantial risk of death OR causes permanent or protracted serious disfigurement. "Disfigurement," under CL § 3–201(d), means "'an externally visible blemish or scar that impairs one's appearance.'" *Brown*, 182 Md. App. at 177 n. 20 (quoting *Thomas v. State,*

128 Md. App. 274, 303 (1999)). Pickett testified that, at the time of trial, approximately six years after the stabbing, scars remained on his back and both legs. Therefore, no testimony regarding the severity of Pickett's injuries, through Frederickson or another witness, was necessary to prove first-degree assault, and the admission of Frederickson's testimony cannot be said to have unfairly prejudiced appellant.

II.

Appellant also complains that the trial court erred in failing to take any curative action when the prosecutor: (1) denigrated defense counsel; and (2) erroneously argued the law during her closing argument. In his view, the effect of the improper remarks, cumulatively, influenced the jury and denied him a fair trial, notwithstanding his lack of objection to them below.

The State first raises a preservation argument, asserting that appellant made no objection to the comments that allegedly denigrated defense counsel. Therefore, the State continues, we should only consider the propriety of the single remark to which appellant did object, and that remark was within the bounds of acceptable closing argument. Indeed, even were we to review all the remarks, the State concludes, they did not rise to the level of plain error.

During his closing argument, defense counsel declared that Pickett, a thief, drug user, and alcoholic, was not worthy of belief. In addition, he continued, all the evidence provided by the State had "something wrong with [it] in terms of proving this case beyond a reasonable doubt." Counsel pointed to the fact that the State had produced only Frederickson—no doctor or nurse—to explain the severity of Pickett's wounds, but the

medical records showed that he stayed in the hospital only four hours and walked out under his own power, belying any claim of serious injuries. Moreover, Pickett had sent a letter to the State's Attorney's office confirming that his injuries were not serious and claiming not to know who stabbed him, although he changed his story during his trial testimony.

During her rebuttal closing argument, the prosecutor began by saying, "[Y]ou didn't hear a lot of facts in [Defense Counsel]'s closing. What you heard was a lot of misdirection, but that is characteristically what a good defense attorney does. So a lot of misdirection." During the course of her argument, the prosecutor referred to defense counsel's "misdirection" regarding his interpretation of the evidence on at least ten additional occasions.

Although appellant did not object to a single instance of the prosecutor's assertion that he had employed "misdirection" in discussing the evidence,[13] he now avers that we

[13] On one occasion, the prosecutor discussed defense counsel's claim that Pickett lied about the theft of his wallet on the night of the stabbing:

> So he was mistaken. His was [sic] missing his wallet, he was missing the contents of that wallet, he'd been stabbed four times in a traumatic situation, went to the hospital and realized that his wallet wasn't there. So he thought, what is a natural thought, they must have taken my wallet. And what does he say? I was told by the police three days later, I go down there, there's my wallet, it has my 20 in it, and I was mistaken. Never said he lied about that because he didn't lie about that. [*Defense counsel*] *has another point of misdirection. There's no picture, there's no clothes, there's no nurse, there's no doctor. Mr. [Defense counsel] wants you to focus on everything you don't have. That's not how a trial works. You focus on the evidence you do have and you make your decision--"*

(Emphasis added). It was at that point that defense counsel objected.

should invoke our discretion under Md. Rule 8-131 to employ the extraordinary remedy of plain error review to find that the continued use of the term denigrated defense counsel to the point that appellant was denied a fair trial. We decline to do so.[14]

Appellant also complains that the prosecutor improperly argued the law during her rebuttal closing argument. As mentioned in footnote 13, *supra*, the prosecutor stated:

> There's no picture, there's no clothes, there's no nurse, there's no doctor. Mr. [Defense counsel] wants you to focus on everything you don't have. That's not how a trial works. You focus on the evidence you do have and you make your decision—
>
> [DEFENSE COUNSEL]: Objection.

Although the objection follows an instance of the prosecutor's use of the word "misdirection," it does not directly follow it, and, in our view, the objection more accurately relates to the prosecutor's statement that a trial does not focus on the lack of evidence, a comment about which appellant also complains on appeal. *See* Md. Rule 4-323(c), which requires that for purposes of review on appeal of any ruling other than the admission of evidence, the objecting party makes known to the court the action the party desires the court to take or the objection to the action of the court "at the time the ruling or order is made or sought."

[14] Were we to consider the issue of the propriety of the prosecutor's claim of defense "misdirection," appellant would not prevail. The main issue before the jury was whether appellant committed a first-degree assault upon Pickett. When defense counsel raised the issues of appellant's alias and the lack of expert medical evidence regarding the severity of Pickett's injuries, the prosecutor acted within permissible boundaries when she criticized the apparent attempt by the defense to divert the jury from the evidence of appellant's intentional acts supporting the charged crimes. In our view, the complained-of comments regarding "misdirection" amounted not to improper denigration of defense counsel but to permissible "oratorical conceit or flourish," *Wilhelm v. State*, 272 Md. 404, 413 (1974), *abrogated on other grounds by Dorsey v. State,* 276 Md. 638 (1976), which was warranted by the evidence or inferences reasonably drawn therefrom. *Degren v. State,* 352 Md. 400, 429-30 (1999). Even if the comments were inappropriate, they were unlikely to have "'misled or influenced the jury to the prejudice of the accused.'" *Beads v. State*, 422 Md. 1, 10-11 (2011) (quoting *Degren*, 352 Md. at 431).

> [PROSECUTOR]: --determinative of the evidence you do have.
>
> THE COURT: Overruled.

The prosecutor's statement that the jury should not consider the absence of evidence in reaching its verdict, appellant avers, was "flatly and prejudicially wrong and served to only relieve the State of its burden of proof."

In general, attorneys are afforded great leeway and liberal freedom of speech in presenting closing arguments to the jury. *Lee v. State*, 405 Md. 148, 163 (2008) (citing *Degren,* 352 Md. at 429-30). Such wide latitude is permitted because "'[s]ummation provides counsel with an opportunity to creatively mesh the diverse facets of trial, meld the evidence presented with plausible theories, and expose the deficiencies in his or her opponent's argument.'" *Id*. at 162 (quoting *Henry v. State*, 324 Md. 204, 230 (1991)). Therefore,

> [t]here are no hard-and-fast limitations within which the argument of earnest counsel must be confined—no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.

Wilhelm, 272 Md. at 413.

Despite this wide latitude, however, there are limits on what a prosecutor may say in closing arguments so that a defendant's right to a fair trial is protected. *Degren*, 352 Md. at 430. What exceeds the limits of permissible commentary during closing argument depends on the facts of each case. *Id.* at 430-31 (citing *Wilhelm*, 272 Md. at 415). Even if

an improper remark is made during closing argument, reversal is only required when "'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.* at 431 (quoting *Jones v. State*, 310 Md. 569, 580 (1987)).

The first step in our analysis is a determination of whether the prosecutor's comment during rebuttal closing argument—"Mr. [Defense counsel] wants you to focus on everything you don't have. That's not how a trial works. You focus on the evidence you do have and you make your decision . . . determinative of the evidence you do have"—standing alone, was improper. *Carrero-Vasquez v. State*, 210 Md. App. 504, 510 (2013). We conclude that it was not, which ends our analysis.

Appellant argues, in his brief, that "the State told the jury that they could not consider the absence of evidence in reaching its determination of guilty," and that the incorrect statement of the law "served only to relieve the State of its burden of proof."[15] The prosecutor did not, however, advise the jury that it *could not consider* evidence it did not have; instead, she asked the jury *not to focus on* information it did not have, but to decide the case "determinative of the evidence you do have."

In directing the jury to consider the evidence before it, rather than focusing on, for example, the lack of a doctor's testimony regarding Pickett's injuries, the prosecutor did

[15] Appellant also argues that the prosecutor told the jury it *could* rely on Frederickson's testimony, based not on his expert status but on his "copious amounts of training," that the injuries suffered by Pickett created a risk of death or serious physical injury. Because defense counsel interposed no objection to the prosecutor's statement, we do not consider the propriety of that remark.

not misstate the law, nor improperly shift the burden of proof to appellant. We conclude that the comment about which appellant complains was permissible and that the prosecutor's single comment made during rebuttal closing argument did not serve to deprive appellant of a fair trial, especially in light of the court's instructions that closing arguments were not evidence and that the jury was required to both apply the reasonable doubt standard of proof and base its verdict solely on the evidence. The court, which had the benefit of hearing counsel's arguments and observing the jury, did not determine that the statement went beyond the acceptable boundaries of closing argument, and we cannot say that the court abused its discretion in so finding.

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