Circuit Court for Prince George's County
No. CT12-1699A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1561

September Term, 2016

JERMAINE QUINTONIO HAILES

v.

STATE OF MARYLAND

Woodward, C.J.,
Nazarian,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: January 24, 2018

Jermaine Quintonio Hailes was convicted of first-degree felony murder, second-degree murder (with specific intent to kill), attempted robbery with a dangerous weapon, conspiracy to commit armed robbery, and several lesser-included offenses. The Circuit Court for Prince George's County sentenced Hailes to life imprisonment with all but 70 years suspended. He took this timely appeal. For the reasons that follow, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On November 22, 2010, Hailes made a plan with Ciree Petty and others to rob Melvin "Butter" Pate, a marijuana dealer. Petty used Hailes's cell phone to call Pate, ostensibly to arrange for the purchase of some marijuana. Pate drove to the apartment building where Petty lived to complete the anticipated sale.

As Pate waited in his car, he was approached by Petty and Hailes. Hailes went to the passenger side of Pate's car; Petty went to the driver's side, pulled out a gun, and announced the robbery. When Pate responded by pulling out his own gun, Hailes shot him in the face. The bullet travelled into Pate's neck, severing his spinal cord and paralyzing him from the neck down.

Pate was transported to the hospital and placed on medical life-support. He believed that his death was imminent.

Though unable to speak, Pate communicated with the investigating detectives by blinking to signify "yes." When shown a photo array on November 26, 2010, Pate identified Hailes as the person who shot him by blinking "yes." In a separate array

conducted days later, Pate used the same method to identify Petty, who testified against Hailes in this case.[1]

On December 17, 2010, Hailes was charged with attempted murder, assault, and the use of a handgun in the shooting. The court arraigned Hailes on January 7, 2011. Absent good cause, his trial was required to begin within 180 days, or by July 6, 2011. Md. Code (2001, 2008 Repl. Vol.), § 6-103(a)(2) of the Criminal Procedure Article ("CP"); Md. Rule 4-271(a)(1).

On April 8, 2011, the court granted the State's motion to continue the trial date because Pate's caregivers said that his medical condition made it unsafe to transport him to the courthouse. Following two further postponements on defense counsel's motion, the State moved for another continuance on June 10, 2011, because Pate had regained the ability to speak. The court set a new date of July 5, 2011.

On June 30, 2011, seven days before the 180-day deadline would run, the State filed a superseding indictment, adding attempted carjacking, armed robbery, and conspiracy to the list of offenses with which Hailes was charged. The State nol prossed the original indictment on July 5, 2011, the date on which Hailes was scheduled to go to trial on the charges in that indictment.

Hailes's arraignment for the new charges occurred on July 22, 2011. His trial based on the superseding indictment was required, absent good cause, to begin within 180 days, or by January 18, 2012. CP § 6-103(a)(2); Md. Rule 4-271(a)(1).

[1] Two other co-conspirators, Mark Anderson (the mastermind of the robbery) and Ramel Sanders (the getaway driver), also testified against Hailes.

On October 7, 2011, the State advised the court that Pate continued to undergo surgeries, that he would require special accommodations to testify in court, and that it was unclear whether he would be able to appear at all. The State explained that, because of his medical condition, Pate was particularly susceptible to infections. In order for the detectives to be in the same room as Pate, they were required to sign waivers and wear protective masks, as well as special "bunny suits."[2]

Recognizing the difficulty in bringing Pate to court, the State attempted to memorialize Pate's testimony via a deposition. To that end, the State contacted several firms that conducted depositions. But because of Pate's susceptibility to infections and the severity of his infections, no firm would agree to risk taking his deposition.

Regardless of whether Pate's condition improved enough to allow people into his room, the logistics of a potential deposition were complicated by Hailes's right to confront the witnesses against him. Hailes objected, as he had the right to do, to the State's proposal to obtain Pate's testimony through a deposition at which Hailes and Pate would not be in the same room. As a consequence of Hailes's objection, the State was required to find a way to get Hailes and Pate to the same place at the same time.

After speaking to hospital administrators and the hospital's head of security, the sheriff's department and the Department of Corrections decided that it was not feasible to

[2] Although it is unclear from the record before us, it appears that not only was Pate susceptible to infections, but that he was capable of transmitting virulent infections to others – hence, the need for waivers.

maintain the safety of Pate and others if Hailes were brought from jail, where he was being held, to Pate's hospital room for a deposition.

Once Pate's condition improved to the point that he could go home from the hospital, the State tried to arrange for a deposition at his residence in the District of Columbia. However, as Hailes refused to waive his right of confrontation, the deposition remained unfeasible. The sheriff's department, the Department of Corrections, the Prince George's County Police Department, and the Metropolitan Police Department in the District of Columbia would not allow Hailes into Pate's residence for a deposition.

The State considered a plan to move Pate to a neutral location for a deposition, but was required to scrap that plan as well. The State's Attorney's Office would have been required to pay for a nurse and a private ambulance to transport Pate to the deposition site. Additionally, Pate's doctors told the State that because of his unstable condition, he should not be moved and that moving him might result in his death.

The State also considered a plan to conduct a deposition via Skype. Because of technological limitations, however, it would not have been possible for Hailes to consult with his attorney during the deposition. Hailes's attorney was understandably hesitant to agree to such a deposition.

On January 17, 2012, the day before the 180-day deadline for the commencement of the trial under the superseding indictment, the State nol prossed that indictment. Unable to safely transport Pate to the courthouse without compromising his health and safety, the State told the court that Pate's condition was the reason for the nol pros. The State also told the court that it expected to file new charges if Pate's condition changed.

On November 11, 2012, Pate died as a result of complications related to the shooting. On December 11, 2012, the State indicted Hailes for murder and several lesser charges, and he was arraigned on January 9, 2013. Absent good cause, Hailes's trial was required to begin within 180 days, or by July 8, 2013. CP § 6-103(a)(2); Md. Rule 4-271(a)(1). However, on July 1, 2013, Hailes explicitly waived the 180-day requirement.

Following a hearing on November 1, 2013, the trial judge granted Hailes's motion to suppress a detective's testimony that, when Pate was hospitalized and unable to speak, he had identified Hailes as his assailant by blinking to signal "yes" after being shown Hailes's photograph. The court reasoned that Pate's identification of Hailes was testimonial hearsay, the admission of which would violate the Confrontation Clause of the Sixth Amendment. *See generally Crawford v. Washington*, 541 U.S. 36 (2004).

The State filed an interlocutory appeal; this Court reversed, *see State v. Hailes*, 217 Md. App. 212 (2014); and the Court of Appeals affirmed this Court's decision. *See Hailes v. State*, 442 Md. 488 (2015). In brief, the appellate courts reasoned that even though Pate did not die until almost two years after he had identified Hailes, he believed that his death was imminent when he made the identification; hence the identification was a dying declaration, to which the Confrontation Clause does not apply.

When the case returned to Prince George's County, the circuit court scheduled the trial to begin on Tuesday, May 31, 2016, the first business day after the Memorial Day weekend.

On the afternoon of Thursday, May 26, 2016, Hailes filed a written motion to dismiss. In that motion Hailes argued that, in nol prossing the superseding indictment for

attempted murder in January 2012 and later reindicting him for murder, the State violated his rights under CP § 6-103(a)(2) and Md. Rule 4-271(a)(1) to be tried within 180 days of his initial appearance on the attempted murder charges. He also argued that the State had violated his constitutional right to a speedy trial. The court denied the motion and ordered the trial to begin as scheduled.

At the end of the trial, the jury acquitted Hailes of premeditated murder and conspiracy to commit murder, but convicted him on all other counts, including first-degree felony murder, second-degree murder (with specific intent to kill), and attempted robbery with a dangerous weapon.

QUESTIONS PRESENTED

Hailes presents two issues, which we have rephrased for clarity:

1. Did the trial court err by denying Hailes's motion to dismiss when the State nol prossed charges in a prior case against him one day before the 180-day deadline and later indicted him on charges stemming from the same incident?

2. Did the trial court err by refusing to grant a mistrial after the State, during rebuttal closing argument, commented on objections made by defense counsel during the trial?[3]

[3] Hailes originally phrased the questions in the following manner:

I. Did the trial court err by denying Mr. Hailes's motion to dismiss after the state *nol prossed* the charges in a prior case against him immediately before the *Hicks* deadline?

II. Did the trial court err by failing to grant a mistrial after the state made impermissible comments on excluded evidence and defense objections in closing argument?

For the reasons set forth below, we answer both questions in the negative and affirm the trial court's judgment.

DISCUSSION

I. The 180-Day Rule

CP § 6-103(a)(2) states that "[t]he trial date" for the trial of a criminal matter in the circuit court "may not be later than 180 days after the earlier of" the appearance of counsel or the first appearance of the defendant before the circuit court. Similarly, Rule 4-271(a)(1) states that "[t]he date for trial in the circuit court . . . shall be not later than 180 days after the earlier of" the appearance of counsel or the first appearance of the defendant before the circuit court.

The appropriate sanction for failing to comply with CP § 6-103(a)(2) and Rule 4-271 is the dismissal of criminal charges. *See, e.g.*, *State v. Hicks*, 285 Md. 310, 318 (1979). "[F]or good cause shown," however, "the county administrative judge or that judge's designee may grant a change of a circuit court trial date," Md. Rule 4-271(a)(1), including a postponement beyond the 180-day deadline. *See, e.g.*, *Tapscott v. State*, 106 Md. App. 109, 122 (1995).

Notwithstanding the requirements of CP § 6-103(a) and Rule 4-271(a), it is generally permissible for the State to dismiss criminal charges before the 180-day deadline has run and to reinitiate them thereafter. "[W]hen a circuit court criminal case is nol prossed, and the [S]tate later has the same charges refiled, the 180-day period for trial prescribed by [CP § 6-103(a) and Rule 4-271(a)] ordinarily begins to run with the arraignment or first appearance of defense counsel under the second prosecution."

Curley v. State, 299 Md. 449, 462 (1984). "If, however, it is shown that the nol pros had the purpose or the effect of circumventing the requirements of [CP § 6-103(a) and Rule 4-271(a)], the 180-day period will commence to run with the arraignment or first appearance of counsel under the first prosecution." *Id.*

Hailes claims that the trial court erred by allowing the State to prosecute him for murder, because, he says, the State violated the 180-day rule when it dismissed the superseding indictment for attempted murder on the one hundred and seventy-ninth day and reindicted him for murder 10 months later, after Pate's death. According to Hailes, the nol pros of the superseding indictment on the one hundred and seventy-ninth day had the purpose and necessary effect of circumventing the 180-day rule. As a result, he argues, the 180 days continued to run, and the deadline expired years before he was ultimately brought to trial for murder in 2016.

Hailes's argument fails, first, because the State had good cause to request a postponement under the superseding indictment, but elected to nol pros the charges instead. Thus the 180-day period under the superseding indictment stopped, and a new 180-day period began with Hailes's arraignment for murder. Hailes consented to (and even requested) extensions of that 180-day period, and his trial occurred within that period, as extended. Moreover, by waiving his right to be tried within 180 days after his initial appearance on murder charges, Hailes necessarily waived any objection to the State's failure to proceed to trial within 180 days after his initial appearance on the attempted murder charges.

2. The Effect of the Nol Pros of the Superseding Indictment

"[W]hen an indictment or other charging document is nol prossed, ordinarily 'the case [is] terminated,'" *Curley v. State*, 299 Md. at 459 (quoting *Ward v. State*, 290 Md. 76, 84 (1981)), and the effect "is as if the charge had never been brought in the first place." *Id.* at 460. When a criminal case has been nol prossed and removed from the docket, and when the trial under the new prosecution is commenced within the deadline prescribed by CP § 6-103(a) and Rule 4-271(a), the 180-day rule's purpose, of "'further[ing] society's interest in the prompt disposition of criminal trials by providing an impetus to remedy court congestion,'" *id.* (quoting *State v. Frazier*, 298 Md. 422, 456 (1984)), "is ordinarily not violated." *Id.* at 460-61. "Ordinarily," therefore, "where criminal charges are nol prossed and identical charges are refiled, the 180-day time period for commencing trial, as mandated by § 6-103(a) and Rule 4-271(a)(1), begins to run anew after the refiling." *State v. Huntley*, 411 Md. 288, 293 (2009).

"Nevertheless," the 180-day period will begin to run anew "only where the earlier nol pros was not intended to or did not circumvent the requirements of [CP § 6-103(a) and Rule 4-271(a)]." *Curley v. State*, 299 Md. at 461. "Otherwise the [S]tate could regularly evade" the requirements of the statute and the rule. *Id.* If the State could dismiss a case, refile the same charges, and cause the 180-day period to start running anew whenever it wanted to postpone a case beyond the 180-day deadline, the requirements of the statute and rule "would largely be rendered meaningless." *Id.*; *accord State v. Huntley*, 411 Md. at 295.

"[A] nol pros has the 'necessary effect' of an attempt to circumvent the requirements of [CP § 6-103(a) and Rule 4-271(a)] when the alternative to the nol pros would be a dismissal of the case for failure to commence trial within 180 days." *State v. Brown*, 341 Md. 609, 618 (1996). Thus, for example, Maryland courts have identified violations of the 180-day rule when the State nol prossed the original charges because the prosecution was or would have been unprepared for trial on the one hundred eightieth day. *Curley v. State*, 299 Md. at 462-63; *Wheeler v. State*, 165 Md. App. 210, 232 (2005). The courts have also identified violations of the rule when the State nol prossed the original charges after the circuit court has found that the State lacked good cause for a postponement beyond the 180-day deadline. *State v. Price*, 385 Md. 261, 278-79 (2005); *Ross v. State*, 117 Md. App. 357, 369-70 (1997); *see also Alther v. State*, 157 Md. App. 316, 338 (2004) (identifying a violation of the rule when the State nol prossed charges to circumvent a scheduling decision).

By contrast, if the State has good cause for a postponement, but enters a nol pros instead, the nol pros does not have the necessary effect of circumventing the 180-day rule. *See State v. Brown*, 341 Md. at 620-21; *Baker v. State*, 130 Md. App. 281, 298 (2000); *see also State v. Huntley*, 411 Md. at 294 n.9. When the State has good cause, "the decision whether to enter a nol pros or to seek a postponement . . . is for the prosecuting attorney and not for an appellate court." *State v. Brown*, 341 Md. at 620. "**The possibility that the State might have** [obtained a good cause postponement] at the time the *nol pros* was entered negate[s] the conclusion that the *nol pros*, *ipso facto*, had

the **necessary effect** of circumventing the 180-day rule." *Baker v. State*, 130 Md. App. at 298 (emphasis in original).

The burden is on the defendant to establish that the purpose or necessary effect of the nol pros was to circumvent the 180-day rule. *Id.* at 289. In this case, Hailes could not meet his burden, because the State had good cause to request a postponement when it nol prossed the superseding indictment for attempted murder on January 17, 2012.

On several occasions, this Court has held that the unavailability of a witness is good cause to obtain a postponement. *Marks v. State*, 84 Md. App. 269, 278 (1990) ("continuances could be granted," beyond 180 days, "when a necessary witness is absent because the fact that a witness is missing constitutes an extraordinary cause for delaying a trial") (citing *Bethea v. State*, 26 Md. App. 398, 400 (1975)); *State v. Farinholt*, 54 Md. App. 124, 132 (1983) ("[t]he unavailability of a witness has been held to be a 'good cause' justifying a postponement" beyond 180 days) (citing *Bolden v. State*, 44 Md. App. 643, 655(1980)).

When it entered the nol pros in this case, the State was unable to transport the medically-unstable, quadriplegic victim to court. The State had made numerous, good faith efforts to secure the victim's testimony by other means, but had been unable to do so, in part because of the victim's fragile medical condition, in part because of the security concerns in transporting Hailes to and from the site of any deposition and in ensuring the safety of the participants while he was there, and in part because of technological limitations on the ability to conduct a deposition via Skype when one of the parties (Hailes) was in pretrial detention. In these circumstances, the victim was

unquestionably unavailable. *See Vielot v. State*, 225 Md. App. 492, 503 (2015) (holding that trial court did not abuse its discretion in determining that out-of-state witness unable to travel to Maryland because of injuries suffered in an unrelated car accident was unavailable for purposes of admitting her former testimony under Md. Rule 5-804(b)(1)); *White v. State*, 223 Md. App. 353, 396-401 (2015) (upholding determination by trial court that material witness was unavailable due to potential exacerbation of her medical condition by requiring her appearance in court). Thus, the State had good cause for a postponement in this case.

When it nol prossed the superseding indictment, the State still had sufficient time to obtain a postponement from the administrative judge. The State, however, was not required to request a postponement. Instead, because it had good cause, the State was entitled to nol pros the superseding indictment and to await changes (including potential improvements) in the victim's medical condition. Because the nol pros did not have the necessary effect of circumventing the 180-day rule, the 180-day deadline began to run anew when the State reindicted Hailes for murder after the victim's death.

For the same reason, it cannot legitimately be said that the purpose of the nol pros was to circumvent the 180-day rule. In informing the court of the nol pros, the State represented that it had dismissed the superseding indictment "based on the condition of the victim," who was unavailable to testify because of his dire medical condition. Similarly, on the first day of trial, when the court conducted a hearing on Hailes's belated motion to dismiss on account of the alleged violations of the 180-day rule, the prosecutor represented that the State "had no choice but to enter the case nolle prosequi" because

Pate "was still in and out of the hospital, and there was no medically safe way to bring [him] to the courthouse to testify."

According to Hailes, the State nol prossed the superseding indictment for attempted murder because Pate was still alive, and the State did not know when he would die. Citing *Spencer v. State*, 97 Md. App. 734 (1993), Hailes observes that had the State pursued the attempted murder charges and succeeded in convicting him, it could still have prosecuted him for murder after Pate died. Hailes's argument fails to recognize that that Pate's unavailability posed serious impediments even for an attempted murder prosecution. Even if there was no prospect of Pate's death, the State would have had good cause to nol pros the attempted murder charges because of his inability to testify.

Finally, Hailes argues that, at the hearing on his motion to dismiss, the prosecutor admitted that the State nol prossed the superseding indictment for attempted murder because it thought that Pate "was going to die." His argument does not accurately recount the context of the prosecutor's statements. The prosecutor did not say that the State entered the nol pros because it was waiting for Pate to die. When she mentioned the subject of Pate's possible death, the prosecutor does not even appear to have even been discussing the nol pros. Instead, she appears to have been responding to Hailes's argument, which he does not pursue on appeal, that he had been denied the right to a speedy trial. In response to that argument, the prosecutor explained that the State could not have brought the current indictment (for murder) until Pate had died and a medical examiner had determined that his death had resulted from the shooting. She did not

somehow admit that the State had an improper purpose in nol prossing the superseding indictment.

In summary, we are unconvinced that either the purpose or the necessary effect of the nol pros was to circumvent the 180-day rule. Consequently, the circuit court did not err in denying Hailes's motion to dismiss.

3. Consent to Violation of 180-Day Rule

Assuming for the sake of argument that the nol pros of the superseding indictment for attempted murder had the purpose or necessary effect of circumventing the 180-day rule, Hailes still cannot not prevail, because he expressly consented to a trial date more than 180 days after his initial appearance under that indictment. He therefore waived his right to challenge the State's actions under the rule.

In a per curiam opinion denying the State's motion for reconsideration in *Hicks*, the Court of Appeals wrote that the dismissal of an indictment was not a proper sanction for noncompliance with the 180-day rule "where the defendant, either individually or by his [or her] attorney, seeks or expressly consents to a trial date in violation of [the rule]." *State v. Hicks*, 285 Md. at 335. "It would," the Court wrote, "be entirely inappropriate for the defendant to gain advantage from a violation of the rule when he [or she] was a party to that violation." *Id.*

In light of the Court of Appeals' comments in *Hicks*, this Court has held that defense counsel can waive the 180-day rule by agreeing to a trial date that is beyond that 180-day deadline. *See State v. Lattisaw*, 48 Md. App. 20, 28-29 (1981). In *Lattisaw* the attorneys for the two co-defendants both agreed to a trial date that was nearly a week

beyond the 180-day deadline. *Id.* at 22. The attorneys did not move to dismiss the charges before the trial began, but on the day on which the trial was set to begin, the presiding judge observed that more than 180 days had passed since the first appearance of counsel. *Id.* The next day, defense counsel moved to dismiss the indictments. *Id.* The trial court granted the motions because the defense attorneys had not realized that the trial date fell beyond the deadline and, hence, had not knowingly and intelligently waived their clients' rights. *See id*. at 27, 28.

On appeal, this Court explained that "the [180-day] Rule was not intended solely to confer new rights upon defendants, but also to hold their feet to the fire." *Id.* at 27. Writing for this Court, Judge Wilner distinguished the right to be tried within 180 days from other procedural rights, such as the right of prompt presentment before a district court commissioner (*see* Md. Rule 4-212(e)), which "are personal to the accused and can only be waived by him [or her]." *State v. Lattisaw*, 48 Md. App. at 29. Unlike procedural rights that "are solely for [a defendant's] benefit and have no significant function other than to preserve underlying Constitutional rights that are also personal to him [or her]," "the 180-day requirement is not entirely for the accused's benefit, and can be waived by counsel." *Id.*

Here, even assuming that the State's entry of the nol pros on January 17, 2012, did not stop the running of the 180-day period, Hailes did not complain until May 26, 2016,

1,591 days after the 180-day deadline under the superseding indictment.[4] During that time, Hailes's defense counsel implicitly consented to a violation of the 180-day rule by requesting two continuances,[5] on April 5, 2013, and June 6, 2013, and he explicitly waived his rights during a postponement hearing on July 1, 2013.[6] Hailes cannot affirmatively waive being tried by July 8, 2013, the 180-day deadline under the murder indictment, but simultaneously insist that the charges be dismissed because he was not tried by January 18, 2012, the 180-deadline under the superseding indictment for attempted murder. As the State argues, Hailes's "agreement to be tried beyond July 8, 2013, necessarily encompasses an agreement to be tried beyond January 18, 2012." He is barred from taking advantage of a rule designed to promote judicial economy "'when he was a party to that [Rule's] violation.'" *Ashton v. State*, 185 Md. App. 607, 620 (2009) (quoting *State v. Brown*, 307 Md. 651, 658 (1986)).

[4] Approximately one-third of the 1,591 days fell between the State's interlocutory appeal in November 2013 and the Court of Appeals' issuance of its opinion in *Hailes v. State*, 442 Md. 488 (2015), on April 17, 2015.

[5] *See Ashton v. State*, 185 Md. App. 607, 619-20 (2009) (holding requirement of dismissal for violation of 180-day rule inapplicable where good cause continuance requested by defendant carries trial date beyond 180-day deadline).

[6] On June 6, 2013, when defense counsel requested a continuance, he told the court that his request "will take us beyond *Hicks*" – i.e., that it would result in a trial date more than 180 days after the initial appearance under the murder indictment. From counsel's comment, it appears that he was operating under the assumption that the 180-day period began to run anew when Hailes was arraigned on the murder charges on January 9, 2013.

Hailes argues that if an attorney agrees to waive the 180-day rule in a subsequent prosecution that follows a nol pros of the same charges, the attorney could never make a motion to dismiss on account of a violation of the 180-day rule. His concern is overstated. If the State brings a new criminal case after nol prossing the same charges, if the defendant waives the right to be tried within 180 days in the new criminal case, and if the State is unprepared for trial on the new trial date, there is no reason why the defense attorney cannot move to dismiss the charges. Furthermore, if Hailes or his attorney had believed that the State violated the 180-day rule by nol prossing the superseding indictment for attempted murder and reindicting him for murder some 11 months later, he could have moved to dismiss the murder indictment at the inception of that case, or at any time before he affirmatively consented to a trial date more than 180 days after his first appearance under the murder indictment. The failure to do so resulted in a waiver of his right to claim a violation of the 180-day rule as a result of the nol pros of the superseding indictment for attempted murder.[7]

[7] The State points out that the superseding indictment charged Hailes with attempted murder, but that he was ultimately reindicted for a different offense – murder – after Pate's death. Because the State did not simply "cause[] the same charge or charges to be refiled against the defendant" (*Curley v. State*, 299 Md. at 452) when it indicted Hailes for murder, it argues that a new 180-day deadline began to run upon Hailes's first appearance in connection with the murder charges. Hailes responds that even if the charges were technically different, they arose from the same transaction. Moreover, a number of the lesser charges (attempted robbery with a dangerous or deadly weapon, first-degree assault, conspiracy to commit murder, and conspiracy to commit robbery with a dangerous or deadly weapon) were common to both the superseding indictment for attempted murder and the subsequent indictment for murder. In view of our disposition of the case on other grounds, we need not reach the question of whether the 180-day deadline automatically began to run anew when the State brought murder charges after Pate's death.

II. Motion for Mistrial

In the rebuttal phase of its closing argument, the State asserted that defense counsel had interposed objections to prevent witnesses from testifying that Pate, after regaining the ability to speak, identified Hailes as his assailant. Defense counsel immediately objected and asked for a mistrial. The court declined to grant the motion, but issued a curative instruction. On appeal, Hailes complains that the court abused its discretion in denying his motion for a mistrial. We disagree.

During opening statements, defense counsel had told the jury that, after regaining his ability to speak, "not one time did [Pate] indicate my client was the one that shot him, or that he was even there."

When cross-examining Pate's girlfriend, Gloria Rainey, defense counsel established that Pate eventually regained the ability to speak and that he spoke to the police. On redirect, the State established that Pate had spoken to Ms. Rainey about the shooting and told her who shot him, but defense counsel objected to prevent her from testifying about what Pate said. Pate's mother, Felicia Pate, also testified that her son had told her who shot him, but defense counsel objected again to prevent her from testifying about what Pate said. The court correctly sustained both objections because the questions elicited inadmissible hearsay.

During closing argument, Hailes's attorney stated:

> No later identification [was] done with Butter, with Melvin Pate. So we have evidence that he lives from November 22nd, 2010 to November 7th, believe, 2012. Almost two years. And during that we hear from Gloria Rainey and his mother Felicia Pate, he regains the ability to speak. And you can see the videos from the November 25th of – to the November 27th

> video, he's more responsive. He's actually – you can hear him mouthing words at that point. He regained the ability to speak. **When he spoke, did he ever say, oh yeah, that's the guy, Jermaine Hailes, that was the guy that shot him? No, he didn't.** So we have instead, instead of an actual identification, we have a blink.

(Emphasis added.)

During rebuttal closing, the State responded:

> Ladies and gentlemen, [defense counsel] mentioned to you that you didn't hear about any other statements that Mr. Pate made before he died about who he identified as his killer. Well, I recall, and it's your memory that controls – I recall asking Gloria, first witness, first day of this trial, "Did he tell you who killed him?" "Did he tell you who shot him?" "Yes." "Who?" "Objection."
>
> I asked Felicia, Melvin's mom, "Did Melvin tell you who shot him?" "Yes." "Who?" "Objection."
>
> Ladies and gentlemen, who is trying to make sure you hear everything Melvin had to say? Who is trying to make sure you can't?

Defense counsel immediately objected and asked to approach the bench. During the bench conference that followed, Hailes's attorney argued that the State had improperly implied both that the witnesses would have identified Hailes as the shooter and that defense counsel's objections had prevented the jury from hearing the answers. When the judge asked what remedy he sought, defense counsel responded that a mistrial was the only remedy because the State's argument was "far afield of what rebuttal should be." Counsel argued that no curative instruction would be adequate to cure the prejudice caused by the State's comments.

The trial judge refused to grant a mistrial, but gave a curative instruction:

> Folks, let's disregard that last part, okay. Inadmissible or stricken evidence must not be considered or used by you. You must disregard questions I did

> not permit the witness to answer and you must not speculate as to their possible answers.

Hailes argues that he deserves a new trial because the trial court refused to grant a mistrial in response to the prosecutor's statements. He complains that the State improperly implied that, but for his counsel's objections, the witnesses would have identified Hailes as the shooter. He also complains that the State improperly denigrated defense counsel by suggesting that the defense was trying to ensure the jury could not hear everything that Pate had to say.

We do not reach the second complaint, of denigration. When objecting to the State's remarks, defense counsel complained only that the State implied what answers the witnesses would have given but for the objections. By failing to bring to the court's attention that he believed the State improperly denigrated defense counsel via its comments, defense counsel failed to preserve the issue for appellate review. *See* Md. Rule 8-131(a). We cannot fault the trial court for failing to address an alleged harm that no one asked the court to address.

Turning to the argument that Hailes did preserve, we note, first, that "[a] mistrial is no ordinary remedy[.]" *Cooley v. State*, 385 Md. 165, 173 (2005). Rather, it is "'an extraordinary act which should only be granted if necessary to serve the ends of justice.'" *Id.* (quoting *Jones v. State*, 310 Md. 569, 587 (1987), *vacated on other grounds*, 486 U.S. 1050 (1988)); *accord Rutherford v. State*, 160 Md. App. 311, 323 (2004) (stating that a mistrial is an extreme sanction to which "courts generally resort to only when 'no other remedy will suffice to cure the prejudice'" (quoting *Webster v. State*, 151 Md. App. 527,

556 (2003))). "The determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he [or she] was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 595 (1989)).

To determine whether a defendant was denied a fair trial, the Court of Appeals identified the following factors to be considered:

> [W]hether the reference to [the inadmissible information] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists. . . .

Rainville v. State, 328 Md. 398, 408 (1992) (alterations in original) (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)).

"[T]hese factors are not exclusive and do not themselves comprise the test." *Kosmas v. State*, 316 Md. at 594. Rather "[t]he question is whether the prejudice to the defendant was so substantial that he [or she] was deprived of a fair trial, and the enumerated factors are simply helpful in the resolution of that question." *Id.* at 594-95.

"'[A] request for a mistrial in a criminal case is addressed to the sound discretion of the trial court[.]'" *Cooley v. State*, 385 Md. at 173 (quoting *Wilhelm v. State*, 272 Md. 404, 429 (1974)). "'In the environment of the trial the trial court is peculiarly in a superior position to judge the effect of any of the alleged improper remarks.'" *Simmons v. State*, 436 Md. 202, 212 (2013) (quoting *Wilhelm v. State*, 272 Md. at 429).

> "The judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able . . . to note the reaction of the

> jurors and counsel to inadmissible matters. That is to say, the judge has his [or her] finger on the pulse of the trial."

Id. at 212 (first alteration in original) (quoting *State v. Hawkins*, 326 Md. 270, 278 (1992)).

An appellate court will not reverse a denial of a mistrial motion absent a clear abuse of discretion, *see Browne v. State*, 215 Md. App. 51, 57 (2013), and certainly will not reverse simply because it might have ruled differently. *Nash v. State*, 439 Md. 53, 67 (2014) (citations omitted). A trial court abuses its discretion when its ruling:

> is "clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result," when the ruling is "violative of fact and logic," or when it constitutes an "untenable judicial act that defies reason and works an injustice." . . . The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.

King v. State, 407 Md. 682, 697 (2009) (quoting *North v. North*, 102 Md. App. 1, 13-14 (1994) (internal citations omitted)).

"Closing arguments are an important aspect of trial, as they give counsel '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.'" *Donaldson v. State*, 416 Md. 467, 487 (2010) (quoting *Henry v. State*, 324 Md. 204, 230 (1991)). Generally, "attorneys are afforded great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999); *Henry v. State*, 324 Md. at 230. "'The prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom.'" *Degren v. State*, 352 Md. at 429-30 (quoting *Jones v. State*, 310 Md. at 580).

However, "counsel may not 'comment upon facts not in evidence or . . . state what he or she would have proven.'" *Mitchell v. State*, 408 Md. 368, 381 (2009) (alteration in original) (quoting *Smith & Mack v. State*, 388 Md. 468, 488 (2005)). "[I]t is unquestionably wrong for the prosecutor in his [or her] argument to the jury to refer to any matter not testified to by the witness or disclosed by the evidence in the case." *Wilhelm v. State*, 272 Md. at 415. "'Determining whether a prosecutor has crossed the line separating "oratorical conceit" from prosecutorial misconduct is initially within the discretion of the trial judge and should depend upon the facts of each case.'" *Howell v. State*, 87 Md. App. 57, 72 (1991) (quoting *Hunt v. State*, 321 Md. 387, 435 (1990)).

When a trial judge determines that inadmissible information has been presented to the jury, "it is within the discretion of the trial court to decide whether a cautionary or limiting instruction should be given." *Carter v. State*, 366 Md. 574, 588 (2001). "[A] trial judge must use his [or her] discretion to weigh the prejudice caused by an improper remark against the effectiveness of a curative instruction." *Simmons v. State*, 436 Md. at 219. "Whether a curative instruction is a reasonable alternative to a mistrial depends on whether the prejudice was so substantial as to deprive a party of the right to a fair trial and therefore warrant a mistrial." *Id.* "When a trial judge decides that the prejudice can be remedied by a curative instruction, and denies the mistrial motion and gives such an instruction, appellate review focuses on whether 'the damage in the form of prejudice to the defendant transcended the curative effect of the instruction.'" *Walls v. State*, 228 Md. App. 646, 668-69 (2016) (quoting *Kosmas v. State*, 316 Md. at 594).

In the circumstances of this case, we cannot say that the trial judge abused his discretion in giving a curative instruction instead of granting a motion for a mistrial. In the instruction, the court told the jury to "disregard" the "last part" of the prosecutor's comments. It reminded the jurors that they "must not" consider evidence that was "inadmissible" and evidence that had been "stricken." It directed the jurors that they "must disregard" questions that the court did "not permit the witness to answer." Finally, it directed the jurors that they "must not speculate as to" the "possible answers" to the questions that the court did not permit the witnesses to answer. On the cold, paper record before us, we have no basis to conclude that the curative instruction represented anything other than an appropriate response, by an experienced trial judge who had his finger on the pulse of the trial, to a single transgression by the prosecutor.

Hailes argues that the curative instruction did not go far enough, because the court did not expressly admonish the prosecutor for her misconduct and did not expressly inform the jury that the prosecutor's comments were improper. We cannot, however, say that the trial judge abused his discretion in going only as far as he did. In extraordinary circumstances, it might indeed be necessary for a court to take an offending attorney to task in front of the jury in order to ensure that the prejudice to the defendant does not transcend the curative effect of the instruction. *See, e.g.*, *Contee v. State*, 223 Md. 575, 582-83 (1960) (faulting a trial court, in dicta, for failing to caution a prosecutor to refrain from asking questions that appealed to racial prejudice). In other circumstances, it will suffice for the court implicitly to rebuke an attorney, as the court did in this case by sustaining an objection to her argument, directing the jury to disregard the argument, and

indicating why the argument was improper. Anyone who has ever tried a jury trial can appreciate the deleterious effect of such a rebuke on a lawyer's credibility, particularly when it comes just before the jury is about to begin its deliberations, as it did in this case.

Setting aside the adequacy of the curative instruction to dispel any prejudice that flowed from the prosecutor's comment, the factors relevant to the grant or denial of a mistrial in this case confirm that the trial court did not abuse its discretion. The improper comment amounted to a single statement, which the court immediately ordered the jurors to disregard. The prosecutor did not repeat her error, but moved on to other subjects.

Furthermore, the weight of the evidence was overwhelmingly against Hailes. Despite Hailes's contention to the contrary, it was never seriously in doubt that Pate had identified him as the assailant. The jurors saw a video of Pate, intubated in the hospital only days after his shooting, identifying Hailes as the person who shot him by blinking in response to a detective's direction to blink hard, once, if his answer was "yes." All three of Hailes's alleged co-conspirators identified Hailes as the assailant. A cellphone tied to Hailes was used to summon Pate to the location where he was shot. Finally, Hailes took hopelessly inconsistent positions, in that he asked the jury to disbelieve Pate's identification of him, but to believe that Pate had correctly identified Petty by blinking to signal "yes" in response to a detective's questions only a few days later.

Beyond identifying Hailes, all three of his alleged co-conspirators testified, at a minimum, that Hailes was armed with a handgun at the time of the attempted robbery. Ciree Petty testified that Hailes was involved in planning the robbery and that Hailes shot Pate. Mark Anderson, who conceived the plan to rob Pate, testified that Hailes was

involved in the conspiracy to commit armed robbery; that Hailes was armed with a handgun; and that Hailes participated in the attempted robbery. Ramel Sanders, the getaway driver, testified that he drove Hailes and others to the apartment complex to commit a robbery; that he noticed Hailes carrying a gun on his hip when he ran back to the car after the robbery; that he got the impression that the target of the robbery had been shot; and that he drove Hailes and Anderson away from the scene. Although Hailes argues that the co-conspirators' testimony was unreliable because they "all got deals" in exchange for their testimony, he fails to note that each implicated him in the crime long before the State entered into plea agreements with any of them.

In summary, in view of the immediate curative instruction, the isolated nature of the prosecutor's misconduct, and the weight of the evidence against Hailes, we conclude that the trial court did not abuse its discretion by denying the motion for mistrial.[8]

[8] The State argues in a footnote that the prosecutor's statements were proper under either the "invited response" doctrine or the "opened door" doctrine. We disagree. The "opened door" doctrine permits a party to introduce information that would otherwise have been irrelevant when an adversary has done something to make that information relevant – i.e., when the adversary has "opened the door" to it. *See id*. at 388-89. In this case, however, there was never any question about the relevance of what the witnesses would say about what Pate said about who shot him, but only about its admissibility in light of the general prohibition against hearsay. Because a party cannot open the door to inadmissible hearsay (*see Clark v. State*, 332 Md. 77, 87 (1993)), the "opened door" doctrine does not justify the State's argument. "[T]he 'invited response' doctrine applies only when defense counsel first makes an improper argument," *Mitchell v. State*, 408 Md. at 382, i.e., an argument that "goes outside the scope of permissible closing argument and 'invite[s] the jury to draw inferences from information that was not admitted at trial.'" *Id.* (quoting *Lee v. State*, 405 Md. 148, 166 (2008)). Defense counsel arguably made an improper argument when he asked the jury to infer that Pate "didn't" identify Hailes as his assailant after he had regained the ability to speak, even though two witnesses testified that Hailes actually had identified someone, but were prohibited (by defense

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. APPELLANT TO PAY ALL COSTS.

counsel's hearsay objections) from saying whom he had identified. Nonetheless, at trial, the State did not argue that defense counsel had invited the State's improper response through his own dubious gamesmanship in touting the State's failure to introduce evidence that he knew the rules of evidence prevented the State from introducing.