Circuit Court for Wicomico County
Case No. 22K16-000314

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2164

September Term, 2016

THOMAS LURIE

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: April 10, 2018

Thomas Lurie was convicted of first-degree burglary and attempted robbery by a jury in Wicomico County. He now challenges those convictions, arguing that the circuit court should have granted a mistrial after the State asked him improper questions regarding his prior criminal history. In the alternative, he argues that there was insufficient evidence to support his conviction for the attempted robbery of Virginia Powell. We affirm the convictions.

FACTUAL AND PROCEDURAL BACKGROUND

a. The Crime

In the early morning of August 3, 2009, two assailants broke into the home of Irving and Virginia Powell, an elderly couple living in Salisbury, Maryland. The couple's three teenaged great-grandchildren, Ashley, Zachary, and Melissa, were also asleep inside the home at the time of the break-in. Zachary and Irving awoke when they heard several loud bangs, and entered the hallway to investigate the noise. There, they encountered two men wearing black sweatshirts with the hoods pulled up and sunglasses who had entered the house by smashing a front window. The assailants pushed past Virginia, who had been asleep on the couch, knocking her to the ground, and entered the hallway. The assailants demanded Zachary and Irving to get down, saying "we want the money" and "we have guns." Zachary and Irving refused. When one assailant attempted to push Irving to the floor, Zachary tried to defend Irving, tackling the assailant to the ground and throwing punches. As the struggle between Zachary and the assailant continued, the assailant instructed his partner to shoot. Instead, the partner picked up a handmade antique coffee grinder from a nearby table and threw it at Zachary. The coffee grinder missed Zachary

and instead hit Irving in the head. In a remarkable coincidence, the throw caused a small drawer in the coffee grinder to open, spilling cash onto the floor. Without collecting any money, the burglars fled the scene.

The police arrived at the home minutes later and transported Irving, who suffered a fractured skull, to the hospital. While investigating the scene, the police recovered a portion of a latex glove under a towel in the hallway and a second portion of a glove outside the house near the driveway. The police collected a total of four pieces of latex glove in and around the home and conducted DNA testing on each sample. Though the police interviewed and collected DNA samples from several suspects, none of their samples positively matched the DNA recovered from the latex gloves.

Six years after the home invasion, police obtained information leading them to suspect that Appellant, Thomas Lurie, took part in the crimes. In November of 2015, police arrested and charged Lurie and collected samples of his DNA. DNA testing confirmed that Lurie was a partial match to two of the latex glove samples recovered at the crime scene. The State theorized that Lurie left behind the portions of the gloves at the time of the home invasion. The defense, however, provided an innocent explanation for why Lurie's DNA was found at the Powell home: Lurie was a former employee of William Young, Irving and Virginia Powell's son-in-law. As part of his employment with Mr. Young's construction company, Lurie performed a variety of work for the Powells between March 2007 and September 2008, including painting, dry wall installation, and carpet replacement inside the home. He also rebuilt a truck engine in the Powells' garage. Lurie maintained,

throughout the investigation and trial, that he wore latex gloves as part of this work, and that is how his DNA arrived at the crime scene.

b. The State's Cross-Examination

Lurie was the only witness to testify in his defense at trial. At a bench conference held before calling Lurie to the stand, Lurie's attorney asked the State whether it intended to question Lurie about any impeachable convictions. The State responded that it had obtained a "list" showing a conviction for fraud in 2003 in Florida, but conceded that it did not have any public record or certified copy of the conviction with which to prove its existence. Lurie's counsel informed the trial court that while Lurie remembered that there had been an allegation of fraud against him, he believed that he had never been convicted, and that if asked, he would deny it. The trial court asked the prosecutor, "Is it the State's position that you plan to challenge the Defendant on the prior possible conviction?" The State responded, "I'll probably ask him about it. He can deny it. The jury can make their own conclusions." The trial court verified with the Defendant that he still wished to testify and that he understood that the State could question him regarding the potential conviction, but that he could deny it ever happened. Lurie confirmed that he wished to testify.

During the State's cross examination of Lurie, the following colloquy occurred:

[STATE]: Isn't it true that you were convicted in the state of Florida for fraudulent use of personal identification of another?

[LURIE]: Identification?

[STATE]: Yes.

[LURIE]: No.

> [STATE]: Would it surprise you that on your criminal history it indicates that you were convicted on November 17, 2003?

At that point, Lurie's counsel objected, moved to strike, and asked permission to approach. At the bench, Lurie's counsel asked for a mistrial, stating that the State's second question was inappropriate. Lurie's counsel argued that once Lurie denied the conviction, the State was required to move on unless it had a certified document to introduce, which, as revealed in the bench conference before Lurie's questioning, it did not have. The trial court admonished the State, saying "Well, I tried to avoid this before the jury came in … by inquiring as to what the State was going to do and how you were going to respond. So let me hear from you." The State responded:

> [STATE:] I think that you could just … give an instruction to the jury and tell them to disregard the question and the answer. I don't think that at this point it's a situation for a mistrial.
>
> [COURT]: All right. I'm going to deny the motion for mistrial.
>
> [COURT]: Ladies and gentlemen, the State's Attorney asked the Defendant whether he had ever been convicted of the crime of fraud in Florida. He said no. The State then asked would it surprise him if his record showed one, something or other, and I'm instructing you to disregard the comments about what his records show. She asked if he was convicted of fraud. He said no. That's where we are.

Lurie's counsel did not object to the trial court's decision to give a curative instruction, nor did he object that the curative instruction, as given, was insufficient.

At the conclusion of the three day trial, the jury returned a verdict finding Lurie guilty of burglary in the first degree, burglary in the third degree, assault in the first degree,

attempted robbery of Irving Powell, and attempted robbery of Virginia Powell. Lurie noted this timely appeal.

ANALYSIS

Lurie raises two distinct challenges on appeal: *first*, that the trial court erred in denying his motion for a mistrial and *second*, that there was insufficient evidence on which to base his conviction for the attempted robbery of Virginia Powell.

I. MOTION FOR MISTRIAL

Lurie first argues that the trial court erred in denying his motion for a mistrial because (1) the prejudice caused by the State's improper questions regarding his prior criminal history was substantial, and (2) the prejudice was not cured by the trial court's curative instruction. Thus, he contends that the trial court abused its discretion by failing to declare a mistrial.

We review the denial of a motion for mistrial for abuse of discretion. *Kosh v. State*, 382 Md. 218, 226 (2004). "A mistrial is an extraordinary remedy and is appropriate only when it is the only way to serve the ends of justice and is a manifest necessity." *Malik v. State*, 152 Md. App. 305, 328 (2003). A mistrial should only be granted when "the prejudice to the defendant was so substantial that he was deprived of a fair trial." *Kosmas v. State*, 316 Md. 587, 594-95 (1989). Here, we conclude that the circuit court did not abuse its discretion by denying the motion for a mistrial because, although the State's improper prior criminal history questioning resulted in prejudice to Lurie, the circuit court issued a timely and effective curative instruction that ameliorated the prejudice. *Kosh*, 382 Md. at 226.

a. The Improper Questioning

Lurie's motion for a mistrial was premised on the State's question regarding Lurie's prior criminal history. This question violated Maryland Rule of Evidence 5-609 and was therefore improper. Rule 5-609 provides that a party may attack the credibility of a witness by evidence of the witness's prior conviction of a crime "if elicited from the witness or established by public record during examination of the witness." Md. Rule 5-609(a). Under Maryland Rule 5-609, a witness may only be impeached by evidence of a prior criminal conviction if that crime "was an infamous crime or other crime relevant to the witness's credibility." Md. Rule 5-609(a). Fraud, as an offense that involves "some element of deceitfulness, untruthfulness, or falsification bearing on the witness's propensity to testify truthfully" can thus serve as the basis for impeachment under the rule. *Beales v. State*, 329 Md. 263, 269-70 (1993).

Because the categories of offenses that can be used to impeach a witness bear directly on whether the witness's testimony should be believed, Rule 5-609 protects a witness from baseless accusations of these crimes by requiring an attorney to produce a public record to prove the conviction if the witness denies it in his or her testimony. *See Cook*, 225 Md. at 609 (questions that imply that a defendant has been convicted are "highly improper in the absence of the State being able to establish that the defendant has been convicted."). Thus, here, once Lurie denied being convicted of a crime, the State was required to cease all questioning on that topic, unless it could prove the conviction with a public record. *Woodell v. State*, 2 Md. App. 433, 439 (1967) (questioning a witness on prior

convictions without offering appropriate evidence of the conviction such as a public record "may result in an appellate reversal of the conviction").

Before Lurie took the witness stand, the State disclosed that it did *not* have a public record reflecting that Lurie had been convicted of fraud. Moreover, the discussion before Lurie's testimony made crystal clear that without documentary evidence to back it up, the State was permitted to ask Lurie *only one question*: whether he had a conviction. Nevertheless, the State went beyond the permissible, initial question of whether it was true that Lurie was convicted in Florida for fraudulent use of personal identification of another. After Lurie denied the conviction, the State's follow up question referenced both Lurie's "criminal history" and supplied a date for the purported conviction. These details strongly implied to the jury that, not only did Lurie have a criminal history, but that it included a conviction for fraud, and that Lurie had just lied about that conviction under oath. *See Med. Mut. Liab. Ins. Soc. of Md. v. Evans*, 330 Md. 1, 20 (1993) (questions referring to inadmissible prior "bad acts" are "clearly improper"). As such, this question was, without a doubt, impermissible.

b. Prejudice

Due to the highly improper form of the State's prior criminal history questioning, we conclude that the question resulted in prejudice to Lurie. We consider several factors when evaluating prejudice, including:

> [1] whether the [improper statement] was repeated or whether it was a single, isolated statement; [2] whether the [improper statement] was solicited by counsel, or was an inadvertent and unresponsive statement; [3] whether the witness making the [improper statement] is the principal witness upon whom the

> entire prosecution depends; [4] whether credibility is a crucial issue; [and] [5] whether a great deal of other evidence exists….

Guesfeird v. State, 300 Md. 653, 659 (1984). Not all factors must be satisfied, and no one factor determines whether the prejudice to the defendant is so substantial as to require a mistrial. *Id.*; *Kosmas*, 316 Md. at 594. The two most important factors, though, "are the questions of whether credibility of the defendant was a crucial issue in the case, and whether the strength of the State's case was otherwise such that the prejudice resulting from the improper [remark] may be considered insubstantial." *Kosmas*, 316 Md. at 596.

Applying these factors here, we conclude that the prejudice to Lurie from the State's improper questions regarding his prior criminal history was significant. Although the State's improper question was an isolated incident, and the prosecutor did not mention Lurie's potential fraud conviction at any other point during the trial, the question was not an inadvertent disclosure. Rather, it was a statement made *directly by the State* during cross-examination. Though Lurie was not a principal witness upon whom the prosecution depended, he was the only witness to testify in his defense. Because the State's questioning implied the existence of a conviction for fraud, it could certainly have damaged Lurie's credibility in the eyes of the jury. Moreover, the State built its case around a six-year-old DNA sample on a scrap of latex glove that revealed multiple DNA contributors. Lurie was a partial match to the profile but the other contributors were never identified. We do not suggest that the State had insufficient evidence to support a conviction, but based on our reading of the transcript, if the jury believed Lurie's testimony, the State's case was otherwise relatively weak. *See, e.g.*, *Kosmas*, 316 Md. at 598. Thus, after a review of the

five factors, we conclude that the State's improper questioning resulted in prejudice to Lurie.

c. Curative Instruction

We cannot discount the gravity of this misconduct on the part of the State. The duty of this Court, however, is to review the actions of the trial judge, not the trial lawyers. *Burks v. State*, 96 Md. App. 173, 187 (1993). We must emphasize, therefore, that the focus of our review "is not on whether the prosecutor was guilty of an impropriety or even whether the prosecutor was guilty of a *deliberate* impropriety, but only on what the appropriate sanction should be." *Burks v. State*, 96 Md. App. 173, 187 (1993) (emphasis added). In considering whether to grant a mistrial, the trial court must only do so if no other remedy exists to cure the prejudice. *Malik*, 152 Md. App. at 328. As such, a mistrial is an extraordinary remedy, and "is not a sanction designed to punish an attorney for an impropriety." *Burks*, 96 Md. App. at 187. Before granting a motion for a mistrial, the trial court must first decide whether the prejudice can be cured by giving an instruction. *Kosh*, 382 Md. at 226. The trial court is in the "best position to evaluate any prejudicial effect" that improper statements have on the jury, and we typically defer to its judgment as to whether the prejudice can be cured by issuing an instruction. *Malik*, 152 Md. App. at 329 (quoting *Hunt v. State*, 312 Md. 494, 500-01 (1988)). Our role as the reviewing court, therefore, is limited to assessing "whether the damage in the form of prejudice to the defendant transcended the curative effect of the instruction." *Med. Mut.*, 330 Md. at 19

(cleaned up).[1] Whether we would have granted a mistrial if we were in the trial judge's shoes is irrelevant. *Nash v. State*, 439 Md. 53, 67 (2014) ("A ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling."). We will only reverse the decision by the trial court to deny the mistrial and issue a curative instruction if that decision was "well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *Id.*

We conclude that the trial court's curative instruction following the State's improper questioning of Lurie on cross-examination sufficiently ameliorated the prejudice and that, as a result, the trial court did not abuse its discretion by denying Lurie's motion for a mistrial. *Id.* As reported above, the trial court issued the following curative instruction:

> Ladies and gentlemen, the State's Attorney asked the Defendant whether he had ever been convicted of the crime of fraud in Florida. He said no. The State then asked would it surprise him if his record showed one, something or other, and **I'm instructing you to disregard the comments about what his records show**. She asked if he was convicted of fraud. **He said no. That's where we are.**

(emphasis added). The purpose of a curative instruction is "to guide the jury in its receipt of the evidence and to eliminate any confusion that irrelevant and prejudicial evidence

[1] "Cleaned up" is a new parenthetical intended to simplify quotations from legal sources. *See* Jack Metzler, *Cleaning Up Quotations*, J. APP. PRAC. & PROCESS (forthcoming 2018), https://perma.cc/JZR7-P85A. Use of (cleaned up) signals that to improve readability but without altering the substance of the quotation, the current author has removed extraneous, non-substantive clutter such as brackets, quotation marks, ellipses, footnote signals, internal citations or made un-bracketed changes to capitalization.

might have caused in the minds of the jury." *Carter v. State*, 366 Md. 574, 587 (2001). The trial court specifically referred to the irrelevant and prejudicial evidence—the State's comments regarding Lurie's alleged criminal record—and deliberately instructed the jury not to consider that evidence. *Id.* Further, by pointing to the State's improper question about Lurie's records, reiterating that Lurie denied the conviction and stating, "That's where we are," the trial court effectively communicated to the jury that Lurie, in fact, had not been convicted of the crime.

"Jurors are presumed to follow the court's instructions." *Id.* at 592. Because this instruction directed the jury not to consider Lurie's prior criminal history in any way, and we presume that the jury followed this instruction in its deliberations, the dangers associated with the State's intimation that Lurie committed fraud were eliminated. Thus, we conclude that the trial court's careful curative instruction effectively cured the prejudice to Lurie that resulted from the State's improper questions. *See, e.g., Cook*, 225 Md. at 609-10 (denying motion for mistrial after "highly improper" prior criminal history questions due to "the care with which the trial court explained the matter to the jury"). Because the extraordinary remedy of a mistrial is only appropriate "when such overwhelming prejudice has occurred that *no other remedy* will suffice to cure the prejudice" and here the curative instruction sufficed, we hold that the trial court did not abuse its discretion by denying Lurie's motion for a mistrial. *Burks v. State*, 96 Md. App. at 187 (1993) (emphasis added).

II. ATTEMPTED ROBBERY OF VIRGINIA POWELL

Lurie next contends that the evidence was legally insufficient to support his conviction for the attempted robbery of Virginia Powell. "The critical inquiry on review of

the sufficiency of the evidence to support a criminal conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Corbin v. State*, 428 Md. 488, 514 (2012) (cleaned up).

Lurie was charged under Section 3-402 of the Criminal Law article, which provides that "[a] person may not commit or attempt to commit robbery." Md. Code Criminal Law ("CR") § 3-402(a). Robbery is defined as "the felonious taking and carrying away of the personal property of another from his person by the use of violence or by putting in fear." *Hall v. State*, 233 Md. App. 118, 138 (2017) (quoting *Metheny v. State*, 359 Md. 576, 605 (2000)). Attempted robbery is a specific-intent crime, meaning that the State must prove that a defendant had a larcenous intent when attempting the robbery. This intent "may be inferred as a matter of fact from the actor's conduct and the attendant circumstances." *Young v. State*, 203 Md. 398, 306 (1985). The State must also show that, "with intent to commit [robbery], [the defendant] engage[d] in conduct which constitutes a substantial step toward the commission of that [robbery] whether or not [the defendant's] intention be accomplished." *Id.* at 311.

Lurie contends that Virginia Powell was merely a bystander to the robbery because neither assailant demanded money from her directly, nor did they take any property from her. He argues that the evidence, therefore, was insufficient to show that Virginia was a victim of attempted robbery. We disagree.

A rational trier of fact could certainly have found the essential elements of attempted robbery with respect to Virginia based on the evidence presented at trial. *Corbin*, 428 Md.

at 514. First, the assailants took a substantial step toward the commission of the robbery by breaking into the Powells' home in the middle of the night and demanding money from the occupants of the home. *Young*, 303 Md. at 311. Second, it would be reasonable for a jury to infer, from these actions, that the assailants intended to steal money from the homeowners, including Virginia. *Id.* at 307. Third, Zachary testified that the assailants pushed Virginia along the hall and down to the floor as they demanded money, which shows that the assailants used violence and fear in their attempt to take personal property from the Powells. *Hall*, 233 Md. App. at 138. Moreover, the fact that one perpetrator instructed the other to shoot, combined with using the coffee grinder as a weapon against Zachary and Irving had the intended effect of frightening the other victims that they, too, might be the next targets of violence. Because each element of the crime could be found by a rational trier of fact, we hold that the evidence was sufficient to support Lurie's conviction for the attempted robbery of Virginia Powell. *Corbin*, 428 Md. at 514.

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