Circuit Court for Montgomery County
Case No. 122950C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2460

September Term, 2018

NICCOLO ANDREI MANZANERO

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Wright, Alexander, Jr.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Wright, J.

Filed: December 12, 2019

The instant appeal presents this Court with its second opportunity to consider the conviction of appellant, Niccolo Manzanero. After a night of drinking that ultimately resulted in a physical confrontation with James Chronopoulos, Manzanero was charged with attempted murder in the first degree, attempted murder in the second degree, and assault in the first degree. The Circuit Court for Montgomery County found Manzanero guilty of attempted murder in the second degree, and sentenced him to thirty years in prison with five suspended and five years of probation upon release.

Manzanero subsequently filed an appeal to this Court, which affirmed,[1] and was denied a petition for writ of certiorari to the Court of Appeals. Manzanero then filed a petition for post-conviction relief. The circuit court granted Manzanero relief and the right to appeal as to one of his claims of reversible error, and denied relief as to two others. Manzanero filed an application for leave to appeal with this Court, which reversed the circuit court and allowed him to appeal a second claim of error. Consequently, Manzanero now presents two issues for our review:

> 1. Whether the trial court erred by refusing to allow Appellant to call Michael Velasquez as a witness[.]
>
> 2. Whether the trial court erred when it allowed the State to (a) elicit the degree of assault that [Jonathan] Lima pled guilty to committing and (b) use Mr. Lima's guilty plea as evidence of guilt[.]

There being no reversible error, we affirm.

[1] *Manzanero v. State*, No. 1623, 2015 WL 7454599 (Md. App. 2015) (hereinafter *Manzanero I*).

BACKGROUND

UNDERLYING INCIDENT

On April 25, 2013, Manzanero met with his friend, Jonathan Lima, at around 9:00 p.m. ahead of a night of drinking. Lima and Manzanero then picked up Michael Velasquez, another friend. The three began drinking vodka on their way to the BlackFinn bar in Bethesda and upon arrival continued drinking. Manzanero and Lima consumed mixed drinks while Velasquez drank beer. While at the BlackFinn, Velasquez met with a female acquaintance, and the two spent some time in conversation.

Shortly after midnight, Manzanero, Lima, and Velasquez left the BlackFinn with the intention of visiting another bar, Union Jack's. As they approached Union Jack's, the trio saw Chronopoulos coming out of the building accompanied by a bouncer and a group of people. Lima noted in his testimony that Chronopoulos had been seen speaking with the same woman Velasquez had engaged in conversation at the BlackFinn. She then approached Velasquez and began speaking with him again. At this point Chronopoulos began making threatening gestures toward Velasquez, Lima, and Manzanero. Chronopoulos also got into a verbal altercation with another unidentified male.

Eventually, Chronopoulos and the unidentified male made their way to an adjacent parking garage, ostensibly with the intention to fight. The two were followed by roughly a dozen other people, as well as Velasquez, Lima, and Manzanero. Upon reaching the garage, Chronopoulos and the unidentified male eventually swung on one another, though neither landed any blows. The two disengaged, and the crowd began to disperse.

At this point, as Lima and Velazquez prepared to leave, Manzanero stepped in between Chronopoulos and the unidentified male. Chronopoulos swung at Manzanero, hitting him in the mouth and knocking him to the ground. Lima and Velasquez then joined the fray and attacked Chronopoulos. Manzanero gathered himself, took off his glasses, and placed them on the trunk of a nearby car before joining Velasquez and Lima in their assault on Chronopoulos. Eventually, Chronopoulos fell to the ground and stopped moving. At this point, Lima and Velasquez relented.

However, Manzanero did not do so and continued with the assault, stomping on Chronopoulos' head as he laid on the ground unconscious.[2] A witness testified that Manzanero stated "he's definitely not getting up now" as he began to leave. Manzanero retrieved his glasses and left with Lima and Velasquez. Manzanero's brother, who met with the group following the incident, testified that Manzanero had a lump on his face and was significantly inebriated.

Responding officers eventually arrived at the scene and transported Chronopoulos to Suburban Hospital. Chronopoulos had significant injuries to the head, including fractures of his cheek bone, nerve damage to his face, and severe lacerations and bruising. Manzanero was eventually charged in connection with the evening's events, facing counts of attempted first degree murder, attempted second degree murder, and first degree assault.

[2] Notably, this final stage of the conflict was captured on video.

PRE-TRIAL AND TRIAL PROCEEDINGS

On January 13, 2014, a pre-trial motions hearing was held. At that time, Manzanero's counsel argued for a postponement of her client's trial in order to facilitate Velasquez' and Lima's appearance and testimony at the proceeding. Manzanero's counsel explained her position thus:

> The discovery that I've gotten in Mr. Velasquez' case is quite . . . voluminous and it also indicates him as our best witness to the fact that this crime requires a specific intent . . . . Our defense [is] intoxication. Mr. Manzanero was extremely intoxicated the night of this event. Mr. Velasquez tells the police and everyone else that Mr. Manzanero was extremely intoxicated. He also helps on the, I don't think it's a direct self-defense, but that Mr. Chronopoulos does in fact hit Mr. Manzanero first and [Velasquez] actually tells both the State's Attorney and the police that [Chronopoulos] knocks . . . [Manzanero] out cold.
>
> * * *
>
> I do know that Mr. Velasquez would be inclined to testify for Mr. Manzanero if his case was concluded. I think prior to sentencing he would be worried about how that would affect his sentencing. The other defendant is Jonathan Lima. He also was with my client.
>
> * * *
>
> I can obviously subpoena both individuals but I know that they're not going to be that they have a Fifth Amendment right not to testify pending their charges and their sentencing.

The circuit court found good cause for a postponement given the potential for Lima's and Velasquez' testimony.

Shortly thereafter, Lima and Velasquez both pled guilty and were sentenced and the period for appeal expired as to both. As Manzanero's case proceeded to trial, the only remaining items were a motion to reconsider for Lima and a motion for modification for Velasquez.

The circuit court inquired during trial as to whether Lima would testify, Lima's counsel expressed his belief that his client retained no Fifth Amendment privilege. Lima appeared personally and affirmed the position expressed by his counsel, stating that in light of the consultation with his attorney he did not believe that a Fifth Amendment privilege applied; that to the extent that he did have such privilege, he would waive it; and that he would be willing to testify in Manzanero's defense.

The inquiry as to Velasquez played out differently, however. The circuit court afforded Manzanero an opportunity to confer with counsel. Before consulting with his attorney, outside the presence of jury, Velasquez was called to the stand and the following colloquy ensued:

> COURT: Sir, what is your name?
>
> VELASQUEZ: Michael Velasquez.
>
> COURT: Okay, Mr. Krum is here. He is one of Mr. Jezic's partners, and so he is here to talk to you about your testimony here today. It's my understanding you're subpoenaed as a witness in this matter. Is that your understanding?
>
> VELASQUEZ: Yes.
>
> COURT: Okay. What I'm going to do in just a moment is have the courtroom cleared, except the deputies will remain, and Mr. Krum, to speak to you. I want to make certain that Mr. Krum is confident about all issues relating to any Fifth Amendment privilege you may or may not have, okay?

The court and all parties then vacated the room to allow Velasquez time to confer with Mr. Krum. The matter resumed a few minutes later, and the colloquy continued:

> COURT: Mr. Krum I know, as we said earlier, Ms. Smith was here earlier and she's now over in the district court. So she had a chance to speak with Mr. Velasquez. Is that your understanding?

KRUM: Yes, Your Honor.

COURT: And you've now had that opportunity?

KRUM: I have, and his position has not changed.

COURT: Which is what?

KRUM: Well, which is that he would like to invoke his Fifth Amendment right.

COURT: He wants to invoke his Fifth Amendment right?

KRUM: Yes, that's fair.

COURT: And you believe he has one?

KRUM: I do believe, Your Honor.

* * *

COURT: Okay. Okay, and Mr. Velasquez, have you had enough time to speak to both Ms. Smith this morning and Mr. Krum today about the issues surrounding your Fifth Amendment privilege?

VELASQUEZ: Yes, ma'am.

COURT: Is that yes?

VELASQUEZ: Yes.

COURT: Okay, and Mr. Krum is telling me that you do wish to invoke your Fifth Amendment privilege against self-incrimination and not testify about this matter?

VELASQUEZ: Yes.

COURT: And you understand this matter—when I'm saying this matter is the case of the State of Maryland versus Niccolo Manzanero?

VELASQUEZ: Yes.

After Velasquez' affirmed his desire to invoke his Fifth Amendment right, counsel for Manzanero challenged the invocation, arguing that there was no basis for him to do so. The circuit court declined to entertain those contentions and instead offered Manzanero's counsel the opportunity to explain why the privilege was applicable. At that point, Mr. Krum stated:

> Your Honor, honestly without disobeying any attorney-client privilege—I explained to my client obviously what could conceivably happen if some of his testimony conflicted with what the State believes the true facts were. And how that could damage him at every consideration hearing, or should he be released in violation of probation, it could certainly be used against him then. And so his testimony could certainly have lasting effects, not only at a reconsideration hearing but also in relation to a probation hearing. And I explained to him the decision is his, and he made the decision.

After hearing more argument from the defense, the circuit court finally made a ruling, explaining:

> Okay, well in this case, Mr. Krum is here representing Mr. Velasquez. He is here as an officer of the Court, as is Ms. Smith, who has been running back and forth all day to represent their clients' interests. Mr. Velasquez has been charged, prosecuted, and is presently serving a sentence under Judge Boynton's sentence in this matter from the same event. Mr. Lima is likewise serving Judge Jordan's sentence in this matter. And each of them has been represented by counsel. Both counsel have indicated to me that they continue to represent their clients throughout this matter, and we are here today in the trial of State of Maryland versus Niccolo Manzanero, not Mr. Lima, not Mr. Velasquez. Counsel have come here to the court. They have spoken to their clients independently, and I am relying on each of them as officers of the court to advise me whether they believe that their client has a Fifth Amendment privilege at this time that could in any way be a consideration of whether or not they wish to testify.
>
> * * *
>
> Mr. Velasquez is not Mr. Lima. He has been represented by counsel. Also, very competent and capable of assessing these circumstances, and has indicated to the court as an officer of the court, without breaching his

> attorney-client privilege, which I am not going to allow any counsel to ask anything that would even approach violating that confidence. That in discussing this issue with Mr. Velasquez, Mr. Velasquez has now decided that in light of his Fifth Amendment privilege and any potential issues that could stem from that. And understanding that the Court always takes a very broad, liberal view of one's Fifth Amendment privilege that Mr. Velasquez wishes to assert that privilege and does not wish to testify in this matter.
>
> So, he will not be testifying. We're not going to call him to the witness stand in front of the jury to announce that. And I'm not going to inquire of him any further, because I believe inquiring either of Mr. Krum, Ms. Smith, or the witness would be certainly crossing over into an area that breaches that confidence.
>
> So, I think the record is clear that he has been fully advised, and on the advice of counsel is electing to assert, Mr. Velasquez, that is, his Fifth Amendment privilege against self-incrimination. So on that issue, I think we're concluded.

As the proceedings continued, further issues arose with respect to the testimony elicited by the State. Specifically, the defense took issue with the State's reference to co-defendant Lima's plea to assault and more particularly to the State's reference to it being *first-degree* assault. This objection produced an extended exchange about the parameters of what would be permitted with respect to Lima's testimony, during which the defense proffered that perhaps only a reference to the plea of guilty, without reference to the charge, would be permissible. That exchange involved the following colloquy:

> [STATE:] You've been telling us the truth, everything that you said, right?
>
> LIMA: Yes.
>
> [STATE:] And today's not the first time that you've been in Court in association with this case, right?
>
> LIMA: Right.

[DEFENSE COUNSEL:] Objection, Your Honor, to anything further.

COURT: Come on up. (Bench conference ensues.) Objection to anything further about?

[DEFENSE COUNSEL:] Well, he was about to say (unintelligible). I don't mind, I don't mind the actual plea of guilty. That's fine. But I don't think, as I said before, that what the charge is or what his sentence is, is relevant.

COURT: I—Let me start out with I agree, nothing about the sentence is relevant.

[STATE:] I'll stay away from the sentence.

COURT: And I'm not allowing any of that. But tell me this. How is the charge not—just to say you pled guilty, period?

[DEFENSE COUNSEL:] Because this is a question for the jury, is what they should find him guilty of. It would be highly prejudicial for them to—

COURT: Okay, so let me ask you this question. Do you object to the State asking if Mr. Lima pled guilty to, in this event.

[DEFENSE COUNSEL:] No.

COURT: No, you don't object to that?

[DEFENSE COUNSEL:] I don't object to that.

* * *

[DEFENSE COUNSEL:] Because the charges in this case are a level of, it's the legal issue itself, of whether this rises from a second-degree assault to a first-degree assault. I don't have a problem with the State having (unintelligible) to assault. But I don't think the level of assault, second or first, should come into play, because that's a question for the jury in this case. We can't answer that for them by—

COURT: But that's in this case—

[DEFENSE COUNSEL:] Right.

COURT: —not his case.

[DEFENSE COUNSEL:] But they've seen the video and they know the facts. So we're basically answering it for them. If he—

COURT: How are we answering it for them?

[DEFENSE COUNSEL:] Well, because he, well, no—

COURT: I didn't plead guilty, he did.

[DEFENSE COUNSEL:] I agree, and that's my argument, but the jury is going to be prejudiced by, well, if this guy in this video said he—

COURT: But you called him.

* * *

[DEFENSE COUNSEL:] They're going to have other things that they're going to be able to say, sorry —

COURT: That's okay.

[DEFENSE COUNSEL:] —the level of the assault is not fair, because it takes away one of my arguments on a legal basis, of what a first- and a second-degree assault is, and it leads them to think the fact that this guy, I don't mind the proffer that he pled guilty to all these facts. I agree with Your Honor they have to—

COURT: Well, I think the facts alone don't make any sense, if they're not in context of, to a crime. 'I pled guilty.' They could think that was a civil suit, for all I know. I don't think that's appropriate.

In concluding the matter, the circuit court made the following ruling:

My inclination is that it would not be a true answer to leave out what he pled guilty to. And he's here subject to cross-examination, to have his memory and his perception tested, as any other witness. And given what he has testified to, to how much alcohol he consumed, and he later pled guilty to it, I think is another reason that the State is able to probe what he pled guilty to. I don't know how you ask somebody 'did you plead guilty,' and then not know what it was for. It could be for driving with your lights off.

> And nobody's going to—they're going to be left to speculate, which is not fair to anybody. Including your client.
>
> * * *
>
> [Counsel,] I will allow you to ask him if he pled guilty to first-degree assault. If—nothing about the sentence. And if you want to ask him about the facts contained in the proffer, without referencing the specific intent, because he will have already said yes to first-degree assault. I will allow that, but what I don't want is every question, 'and was it your specific intent to do X . . . .'
>
> * * *
>
> [Y]ou can ask him about whatever he did that night, and if it's different than what he told you, or somebody else. You can ask all of that, just not using the word 'specific,' 'specifically intended' with each question.
>
> * * *
>
> You can ask him whatever, I'm not going to tell you an example of a question, because I don't know what you're about to ask him. But you can ask him the questions about his participation, about anything you think is impeachable, just not using that term specifically intended or anything like that, within the actual questions, okay?

Both parties accepted the court's disposition, and defense counsel sought no continuing objection.

Finally, the case proceeded to closing arguments. During the State's closing, defense counsel objected at various points to the State's reference to Lima's intentions on the evening of the incident, each time being overruled. The jury ultimately returned its verdict finding Manzanero guilty of attempted second-degree murder.

PROCEDURAL HISTORY

Following the verdict in his jury trial, Manzanero appealed the conviction, raising several issues with regard to the trial court's: failure to issue an imperfect self-defense jury instruction; legal determination that voluntary intoxication defense was inapplicable; restriction of defense counsel's closing argument; handling of allegedly improper remarks by the State in closing arguments; and, response to questions from the jury during deliberations. Ultimately, this Court determined that there was no error with the circuit court and affirmed as to each issue in an unreported opinion.

Following that initial appeal, Manzanero first filed a Petition for Writ of Certiorari with a pro-se supplement, but the Court of Appeals denied review. Manzanero then filed a Petition for Post-Conviction Relief. In that petition, Manzanero made various arguments focusing on ineffective assistance of trial counsel. That first petition was supplemented, and effectively replaced, with an Amended Petition for Post Conviction Relief prepared by counsel. The amended petition, conversely, focused on ineffective assistance of both trial and appellate counsel, raising three grounds for reversible error:

> **(1)** Appellate counsel rendered ineffective assistance by not raising the preserved, meritorious claim that the trial court erred when it prevented Mr. Manzanero from calling Michael Velasquez. **(2)** Appellate counsel rendered ineffective assistance by not raising the preserved, meritorious claim that the trial court erred when it allowed the State to (a) elicit the degree of assault that Mr. Lima had pled guilty to and (b) use Mr. Lima's guilty plea as evidence of Mr. Manzanero's guilt. **(3)** Trial counsel rendered ineffective assistance by not filing a motion for modification of sentence.

(Emphasis in original).

After a hearing before the circuit court, Manzanero was granted relief and the right to appeal the trial court's failure to allow him calling Velasquez as a witness. The court did not, however, grant relief as to the second claim, with respect to the degree of assault Lima pled guilty to, and the use of his plea as substantive evidence. Both Manzanero and the State filed applications for leave to appeal—Manzanero to challenge the denial of his second ineffective assistance claim, and the State to challenge the grant of Manzanero's first ineffective assistance claim. The State's application was summarily denied. This Court reversed the circuit court's judgment as to Manzanero however, awarding him "relief in the form of the right to brief . . . questions related to whether the trial court erred in permitting the State to 'use the degree of assault the co-defendant pleaded guilty to.'" It is in this posture that the matter now comes before us. Additional facts will be added as they become relevant to our discussion below.

DISCUSSION

I.

Manzanero contends that he "was denied his Sixth Amendment right to compulsory process when the court refused to allow [him] to call Velasquez to testify." That denial, he contends, was based upon an erroneous decision by the trial court after it failed to conduct a proper inquiry into the basis for Velasquez' invocation of his Fifth Amendment right. Manzanero's arguments focus on both procedure and substance. Noting that the circuit court did not conduct its own inquiry but rather relied on the assertions of Velasquez' counsel, Manzanero argues that the circuit court may not

delegate its obligation to determine whether the Fifth Amendment privilege is properly invoked. Consequently, the erroneous determination, he avers, was based upon a procedural error by the circuit court. Moreover, he challenges the decision that a proper basis for the invocation of the privilege even existed. The State, conversely, maintains that the circuit court's decision was concerned not only with Velasquez' Fifth Amendment rights but also with the attorney-client privilege. Further, the State argues that the circuit court appropriately exercised its discretion in arriving at its determination following an evaluation of the totality of circumstances. In the alternative, the State argues that any error on the part of the circuit court was harmless.

The privilege against self-incrimination in criminal cases finds its foundation in both the Declaration of Rights of the Maryland Constitution and the Fifth Amendment. Generally, the right is "personal to the witness and, thus, must be exercised by the witness." *Bhagwat v. State*, 338 Md. 263, 271 (1995). It is to be construed broadly and "accorded a liberal construction in favor of the right that it was intended to secure." *Adkins v. State*, 316 Md. 1, 8 (1989).

The Court of Appeals, in *Richardson v. State*, 285 Md. 261 (1979), identified a procedure that should be followed when a party seeks to invoke the right. The Court stated:

> [t]he witness should first be called to the stand and sworn. Interrogation of the witness should then proceed to the point where he asserts his privilege against self-incrimination as a ground for not answering a question. If it is a jury case, the jury should then be dismissed and the trial judge should attempt to determine whether the claim of privilege is in good faith or lacks any reasonable basis. If further interrogation is pursued, then the witness should either answer the questions asked or assert his privilege, making this

decision on a question by question basis.

Id. at 265 (internal citations and quotations omitted). As the foregoing indicates, the gravamen of whether the privilege was properly invoked is "(1) whether there is a reasonable basis for the invocation of the privilege; and (2) whether the privilege is invoked in good faith." *Bhagwat*, 338 Md. at 272. In its inquiry, the trial court should be mindful of whether

> the witness has reasonable cause to apprehend danger from the answer . . . [and whether it is] evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

Choi v. State, 316 Md. 529, 538 (1989) (quoting *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951)).

However, there are some caveats. With respect to witnesses represented by counsel, "under some circumstances, the witness's counsel may focus the witness's attention to the privilege, or acting as the witness's agent, plead it on his or her behalf." *Bhagwat*, 338 Md. at 273. Indeed, "an attorney representing a witness by objecting to a question on the grounds that it may incriminate the witness, initiates and essentially invokes the witness's privilege, if the witness adopts the objection by refusing to answer the question." *Id.* Also, in cases where it is clear from the outset that a witness will be invoking their privilege and an indication of such is made on the record, *Richardson*'s "mechanical procedure of first calling the witness before the jury" is unnecessary. *Adkins*, 316 Md. at 8 n.7. Rather, an abbreviated inquiry may be conducted, where "the witness should be called and sworn, but without the jury being present, and questioned

before or by the court. In this way, the court is enabled to perform its function of determining whether the privilege has been invoked in good faith or has a reasonable basis." *Bhagwat*, 338 Md. at 273-74 (citing *Midgett v. State*, 223 Md. 282, 289 (1960)).

Turning to the instant case, we acknowledge that in a certain cursory manner, the trial court did comply with the authority discussed above. In this circumstance, as contemplated in *Adkins*, there was a clear indication that Velasquez would be invoking his Fifth Amendment privilege, even before taking the stand. As such, only an abbreviated inquiry was warranted, rather than the more involved procedure called for by *Richardson*. Velasquez was, in fact, questioned as to his desire to invoke his Fifth Amendment privilege, and he acknowledged his desire to do so. Likewise, his attorney was recognized by the court and spoke to the reasons underlying the invocation. However, while the circuit court may have made superficial compliance with the procedure above described, we nonetheless find its efforts wanting in two related respects.

We begin with the fundamental acknowledgment that the privilege against self-incrimination is personal to, and generally should be exercised by, a witness. In addition, the court's role in assessing the invocation of the privilege turns principally upon the consideration of whether it is supported by a reasonable basis. Guided by these principles, we must note that while the circuit court did inquire of Velasquez as to whether he wanted to invoke his privilege, the court's inquiry did not extend beyond that preliminary point. To inquire only as to whether a witness wishes to invoke their Fifth Amendment right is insufficient—rather, the court is compelled to look further and to

determine whether the witness's reasons for doing so are proper. *See Hoffman*, 341 U.S. at 486 ("The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. *It is for the court to say whether his silence is justified*." (Emphasis added)). In this instance, no inquiry was made of Velasquez as to *why* he was invoking his privilege, though the legitimacy of his basis was contested by defense counsel. In the absence of that further inquiry, there was, of course, no assessment of whether the assertion was reasonable. Under circumstances like those presented here, where the witness had already pled guilty, begun serving his sentence, and the time for appeal had lapsed, we believe additional investigation by the circuit court was warranted.

In considering this issue, we have not lost sight of the fact that Velasquez was represented by counsel, who provided reasons why the invocation may have been proper. We also remain cognizant that, in certain instances, counsel may invoke the right on behalf of the client. Assuming, *arguendo*, that the reasons supplied by Velasquez' counsel were valid, in this circumstance, it was nonetheless incumbent upon the court to inquire of Velasquez himself. It may well have been the case that Velasquez, upon questioning by the court, would have reiterated the same reasoning offered by his attorney. However, that remains at best speculation, and the court is not to make that assumption—particularly where the witness is readily available for questioning, as he was here. What is more, a surrogate assertion by counsel does not abdicate the court of its responsibility to ensure that the privilege was reasonably invoked. The circuit court noted that it was "relying on [Velasquez' attorneys] as officers of the court to advise me

whether they believe that their client has a Fifth Amendment privilege at this time that could in any way be a consideration of whether or not they wish to testify." By relying solely on the assertions of counsel in determining whether the Fifth Amendment applied, the circuit court inappropriately delegated its responsibility. While a court is certainly welcome to hear from counsel in making its decision, the circuit court here failed to make any inquiry into the legitimacy of the reasons offered; in so doing, the court failed to discharge its duty. *Cf. id.* at 487-90 (indicating that a witness's Fifth Amendment privilege was appropriately invoked after the court's "'careful consideration of all the circumstances in the case'"). However liberal a tribunal's view of the privilege, the court must nonetheless take at least some steps to ensure that an invocation falls within its broad contours.

As the Court of Appeals has recognized, "trial judges do not have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature . . . [and] 'a failure to consider the proper legal standard in reaching a decision constitutes an abuse of discretion.'" *Wilson-X v. Dep't of Human Res.*, 403 Md. 667, 675 (2008) (quoting *Pasteur v. Skevofilax*, 396 Md. 405, 433 (2007)). Here, the circuit court misapplied the law by failing, *first*, to ensure that Velasquez exercised his personal right by having him explain his reasons for exercising his Fifth Amendment privilege, and, *second*, for failing to investigate the adequacy of the reasons supporting it, both of which were required by controlling law. This amounts to an abuse of discretion and, consequently, we hold that the circuit court did err.

Nonetheless, we regard the circuit court's error here as harmless. We note that the

test for harmless error is well-established and provides:

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

Dorsey v. State, 276 Md. 638, 659 (1976).

In the record of the proceedings below, Manzanero's counsel identifies Velasquez' testimony as having value in two respects—to highlight Manzanero's intoxication at the time the underlying incident took place, and to indicate that Chronopoulos struck Manzanero, knocking him unconscious. In light of the offense for which Manzanero was convicted and the evidence presented to the jury, we do not see how the inclusion of Velasquez' testimony would have influenced the verdict. There was testimony from multiple witnesses attesting to Manzanero's intoxication. Further, the last stages of the underlying encounter were captured on camera, and the video was presented to the jury showing Manzanero stomping on the head of an unconscious Chronopoulos. What is more, testimony indicated that Manzanero had the wherewithal to remove his glasses, place them in a safe location, to engage with Chronopoulos, and then to retrieve them upon completion. In light of the evidence adduced, we find that Velasquez' testimony as to Manzanero's intoxication would have been merely cumulative. Likewise, evidence of any prior physical engagement with Chronopoulos could not overcome the plain fact that Manzanero continued to stomp on the head of an unconscious Chronopoulos who,

regardless of his previous conduct, posed no continued threat. As such, we hold that any error was harmless beyond a reasonable doubt.

II.

Manzanero next takes issue with the circuit court allowing the State to introduce information regarding the plea taken by his codefendant, Lima. Manzanero argues that the circuit court's admission of evidence that Lima pled guilty to *first-degree* assault was erroneous because it lacked relevance and was unfairly prejudicial. Noting that the circuit court failed to sustain his objections, Manzanero contends that the State "improperly invited jurors to use Lima's plea when evaluating [Manzanero's guilt] in ways the law does not permit." Next, in a related argument, Manzanero avers that the State unlawfully relied on Lima's plea during its closing arguments. The State responds by noting that, to the extent Manzanero claims otherwise, the appealable issue that remains for this Court is solely whether the *degree* of assault to which Lima pled guilty was admissible—not whether the fact of the plea itself was admissible. Further, the State avers that by failing to consistently object to the State's reference to the degree of assault, Manzanero waived his right to raise the issue on appeal. Lastly, the State argues that references to the plea were not improper during the State's closing remarks.

A. Regarding Testimony Elicited During Examination

As the issue of preservation was raised by the State, that is where we will begin our analysis. Returning to the circuit court proceedings, during a bench conference, counsel and the circuit court discussed the admissibility of information relating to Lima's guilty plea. In that exchange, defense counsel objected to the level of assault being

admitted on the grounds that the information was irrelevant and prejudicial, and embraced an ultimate issue for the jury. However, as is pertinent here and has been argued by the State, Manzanero's counsel failed to consistently register her objections to the proffered testimony.

Generally, pursuant to Md. Rule 8-131(a), appellate courts will not decide an issue unless "it plainly appears by the record to have been raised in or decided in the trial court." In addition, Md. Rule 4-323(a)[3] provides that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as grounds for objection become apparent. Otherwise the objection is waived." Lastly, and perhaps most significantly with respect to this case, this Court has long recognized that for "objections to be timely made and thus preserved for our review, defense counsel either would have . . . to object each time a question concerning [objectionable subject matter] was posed or . . . request a continuing objection to the entire line of questioning."

[3] The full text of Md. Rule 4-323(a) reads as follows:

> **(a) Objections to Evidence.** An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs. The court shall rule upon the objection promptly. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court may admit the evidence subject to the introduction of additional evidence sufficient to support a finding of the fulfillment of the condition. The objection is waived unless, at some time before final argument in a jury trial or before the entry of judgment in a court trial, the objecting party moves to strike the evidence on the ground that the condition was not fulfilled.

Brown v. State, 90 Md. App. 220, 225 (1992). In the absence of such efforts, "[defense counsel's] objection is waived, and the issue is not preserved for our review." *Id.*

Here, defense counsel originally objected specifically to the admissibility of the degree of assault to which Lima pled, as well as to the State's use of the language "specific intent." The circuit court passed on omitting the former but agreed to exclude the latter. The rationale underlying the defense's objection was that the admission of either would unfairly prejudice Manzanero and effectively "answer [the jury's question] for them." However, despite their initial challenge, defense counsel allowed the jury to hear multiple references to the degree of assault to which Lima pled to pass without objecting or requesting a continuing objection. For example, the following colloquy occurred immediately upon conclusion of the bench conference:

> STATE: Mr. Lima, so I think I was asking you about having been in Court earlier on a case, on your case that you were arrested for in connection with this.
>
> LIMA: Yes.
>
> [STATE:] Correct. And you remember that?
>
> LIMA: Yes.
>
> [STATE:] And you were honest with the Court during your guilty plea to first-degree assault, correct?
>
> LIMA: Yes.
>
> [STATE:] And you accepted responsibility for your part in a, in your part of the first-degree assault, correct?
>
> LIMA: Yes.
>
> [STATE:] You had a lawyer that worked with you in that case, correct?

LIMA: Yes.

[STATE:] And you were advised of the elements of first-degree assault, correct?

LIMA: Yes.

[STATE:] And you were advised of possible defenses against the first-degree assault, correct?

LIMA: Yes.

[STATE:] And you agreed that that, in court, that that is what you did, and that that was the role that you played in this event, correct?

LIMA: Yes.

As the foregoing exchange illustrates, defense counsel failed to consistently object and, thus, to preserve an argument as to the impact of the "first-degree" language for appeal.

To this we would add that even assuming, *arguendo*, an error here on the part of the circuit court, such error would be harmless. As we explained in Part I, *supra*, the evidence offered in support of conviction was more than sufficient, entirely independent of the jury being made aware of the nature of Lima's plea. Indeed, our conclusion from *Manzanero I* bears repeating:

> Contrary to Manzanero's claims, there was sufficient evidence to support the State's argument that Manzanero had the requisite intent to kill based on the surrounding circumstances of the evidence admitted. The requisite intent to kill can be inferred from the circumstances, including directing deadly force at a vulnerable part of the body. Here, there was testimonial evidence as well as two cell phone videos that Manzanero stomped on the head of Chronopoulos as he lay unconscious.

Id. at *8. Thus, any error was harmless.

B. REGARDING TESTIMONY ELICITED DURING CLOSING ARGUMENTS

The final point of contention centers on comments made by the State during closing arguments. Manzanero's reasoning here is consistent with the reasoning underlying his other challenges—the State improperly referenced Lima's guilty plea, relying on it as substantive evidence in support of Manzanero's guilt. Manzanero asserts that objections regarding Lima's plea should have been sustained and a curative instruction issued indicating that "Lima's plea was relevant only to the extent it impeached his testimony and that [the jury] was required to independently review the evidence . . . ."

We begin by acknowledging that "attorneys are afforded great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999). The bedrock statement of authority regarding closing argument may be drawn from the Court of Appeals decision in *Wilhelm v. State*, 272 Md. 404, 412-13 (1974) (citations omitted), where the Court explained:

> As to summation, it is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is afforded a wide range. Counsel is free to use the testimony most favorable to his side of the argument to the jury, and the evidence may be examined, collated, sifted and treated in his own way . . . . Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom; the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence support his comments . . . .
>
> While arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom,

> and to arguments to opposing counsel, generally speaking, liberal freedom of speech should be allowed. There 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 and 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.

Though counsel is afforded a wide berth in making their closing remarks, that is not to suggest there are no limits. For instance, prosecutors may not make statements meant only to provoke the jury, or comment on matters that have not been brought into evidence. *Hunt v. State*, 321 Md. 383, 435 (1990). As a general matter, however, "not every ill-considered remark made by counsel . . . is cause for challenge or mistrial[,]" and "the limits of permissible comment depends on the facts of each case . . . ." *Wilhelm*, 272 Md. at 415. What is more, "'reversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.'" *Degren*, 353 Md. at 431 (quoting *Jones v. State*, 310 Md. 569, 580 (1987), *vacated and remanded on other grounds*, 486 U.S. 1050 (1988)).

With regard to the standard of our review, it is established that "the permissible scope of closing argument is a matter for the sound discretion of the trial court, the exercise of which will not constitute reversible error unless clearly abused . . . ." *Thomas v. State*, 301 Md. 294, 316 (1984). Such abuse must also be "of a character likely to have injured the complaining party." *Grandison v. State*, 341 Md. 175, 225 (1995).

Though Manzanero contends that the State's remarks relating to Lima's plea were

improper, we cannot agree with his position. The State did reference the plea, but we find those remarks to be a justified rebuttal of argument first offered by the defense.

As the State properly points out, its initial closing remarks drew only passing reference to Lima's plea and were limited to the statement that Lima "[had] an interest in the outcome of the case because he's pled guilty to his involvement in this case." During the defense's closing, however, Manzanero's counsel referenced Lima on several occasions, and at one point specifically asserts that Lima "didn't intend to hurt [Chronopoulos] like that. He never intended to seriously injury him. He came in here to tell the truth." It was only after those remarks, during the State's rebuttal closing, that the State made any significant reference to Lima's plea, arguing as follows:

> Mr. Lima, he's the one that pled guilty to first degree assault. He was one of the first ones to stop. Mr. Velasquez kicked him more and Mr. Manzanero kicked him a whole lot more. But Mr. Lima came to court a few months ago and raised his right hand and said under oath, 'I'll plead guilty because I intended to cause serious physical injury.'

In arriving at our holding, we acknowledge that the Court of Appeals has recognized the right of a prosecutor to respond to comments made by the defense during their closing. *Degren*, 353 Md. 400, 431 ("This Court has held that, under certain circumstances, a prosecutor's argument during rebuttal and in response to comments made by the defense during its closing are proper."); *see also Blackwell v. State*, 278 Md. 466, 481 (1976). Here, the defense specifically asserted that Lima did not intend to harm Chronopoulos despite the fact that first-degree assault, by definition, entails the intent to cause serious physical injury. *See* Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article (1-101 to 7-318) § 3-202. Noting, in addition, the considerable leeway afforded

counsel in making their closing arguments, we hold that the State's remarks were proper and justifiable rebuttal to the assertions made by the defense. Consequently, there was no error on the part of the circuit court, and we affirm.

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