Circuit Court for Montgomery County
Case No. 129742

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2606

September Term, 2016

JARAY ANTHONY TOULSON

v.

STATE OF MARYLAND

Woodward, C.J.,
Eyler, Deborah S.,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 8, 2018

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

A jury in the Circuit Court for Montgomery County convicted Jaray Anthony Toulson, appellant, of the distribution of marijuana and possession of cocaine. The court subsequently sentenced appellant to a prison sentence of five years, with all but two years suspended, for distribution and a consecutive four years, with all but one year suspended, for possession, to be followed by a three-year period of probation. Appellant noted this appeal and contends that the court erred in permitting the prosecutor to ask the defense's expert witness questions concerning his hiring by the New York City Police Department ("NYPD"). Additionally, appellant maintains that the court erred in permitting improper closing argument. For the reasons stated below, we affirm.

FACTUAL BACKGROUND

Around 2:00 P.M. on April 8, 2016, five officers from the Montgomery County Police Department were conducting surveillance of an apartment complex in the 3700 block of Bel Pre Road in Silver Spring. Officer Michael Hartman observed a gray Jeep Cherokee back-in to a parking space where there were few surrounding vehicles. After a few minutes, the front passenger rolled the window down and put his arm out of the window "as if he was signaling somebody." Officer Hartman observed a man approach the passenger window. The man and the passenger conversed for fifteen or twenty seconds, and the man appeared to take something from the passenger and place it in his right jacket pocket. The man walked away, and the Jeep drove in the opposite direction. Officer Hartman alerted other officers to a possible drug transaction, and he pursued the man.

Officer Hartman approached the man and asked him if he had purchased marijuana. The man responded that he had and directed Officer Hartman to his right jacket pocket.

Officer Hartman advised the other officers that there had been a drug transaction, and he issued a civil citation to the man.[1]

Meanwhile, Officer Kevin Moris stopped the gray Jeep for speeding. Officer Moris spoke with the driver, and Corporal Scott Smith and Officer Michael Graves spoke with the passenger, identified as appellant. Corporal Smith and Officer Graves both testified that they detected the odor of fresh marijuana in speaking with appellant. Police then arrested appellant, and a search of his person revealed a plastic bag containing marijuana, $410 in currency, and a digital scale with a white powder residue later determined to be cocaine.[2] A search of the vehicle revealed a bag of marijuana in the center console.[3] Officers did not find any packaging supplies, rolling papers, or pipes on appellant's person or in the Jeep. Appellant was tried and convicted as indicated above.

DISCUSSION

I. Defense's Expert Witness

The defense's theory of the case was that appellant was the buyer, not the seller, and he possessed the marijuana for personal use. As part of the defense case, appellant called

[1] Maryland Code (2002, 2012 Repl. Vol., 2016 Suppl.), Criminal Law Article ("C.L."), § 5-601(c)(2)(ii) provides that possession of under ten grams of marijuana is a civil offense. The man had purchased 1.78 grams of marijuana.

[2] Testing later determined that the small bag of marijuana recovered from appellant's person contained 0.32 grams of marijuana. There was also marijuana residue on the scale, in addition to the cocaine residue.

[3] This bag contained 6.42 grams of marijuana.

Deputy Inspector Cory Pegues, who had retired from the NYPD. The court accepted Deputy Inspector Pegues as an expert in the patterns of drug trafficking.

During the State's cross-examination of Deputy Inspector Pegues, the following occurred:

> [PROSECUTOR]: You wrote a book, and you've actually already admitted that you are a drug dealer from ages 13 to 18.
>
> [DEPUTY INSPECTOR PEGUES]: No, I did not admit I'm a drug dealer. I said I was a drug dealer from 13 to 18.
>
> Q: Right. You admitted you were a drug dealer from ages 13 to 18.
>
> A: Yes, sir.
>
> Q: Okay. And were you in a gang at that time?
>
> A: Yes.
>
> Q: Okay. And did you attempt to kill an individual?
>
> A: Yes.
>
> Q: Okay. While you were in that gang?
>
> A: No, I wasn't a part of the gang when I attempted to kill the gentleman. I wasn't then part of the gang then.
>
> Q: You went up to someone, an individual with a gun and pulled the trigger twice intending to kill them [sic], correct?
>
> A: Yeah, but I wasn't part of the gang then.
>
> Q: Okay. And you were at one time friends with David McClary, is that right?
>
> [DEFENSE COUNSEL]: Objection, relevance.
>
> THE COURT: Overruled. It's cross-examination. I'll give him some leeway.
>
> [DEPUTY INSPECTOR PEGUES]: Was I friends with David McClary?

[PROSECUTOR]: Yes.

A. Yes.

Q: Okay. And he actually shot and killed an officer in New York City, correct?

A: February 1988. He murdered –

[DEFENSE COUNSEL]: Objection.

[PROSECUTOR]: Now –

THE COURT: Well, hold on one second. If you could approach for a proffer.

(Bench conference follows:)

THE COURT: Why is this relevant?

[PROSECUTOR]: Okay. When he joined the force, he never disclosed any of this to the police department. Otherwise, he never would have been hired.

THE COURT: Okay.

[PROSECUTOR]: That's the last fact that I'm putting in.

THE COURT: Okay. Overruled. I'm going [to] allow him to ask him.

(Bench conference concluded.)

[PROSECUTOR]: When you were hired by [the] New York Police Department, you never disclosed any of these things to the police department, correct?

[DEPUTY INSPECTOR PEGUES]: Yeah, they never asked.

Q: If you had disclosed any of these things, you never would have been hired, correct?

A: Well the only disqualifying mark to be a police officer is being arrested and convicted of a felony, which I never was arrested and convicted of a felony. So no matter what I told them, it would not have disqualified me from

> becoming a police officer. I grew up around gangsters, pimps, and drug dealers in the 80s.

On appeal, appellant maintains that the court erred in permitting this line of questioning because it was irrelevant. This Court has noted that trial judges have "'wide latitude to establish reasonable limits on cross-examination,'" which we review for an abuse of discretion. *Gupta v. State*, 227 Md. App. 718, 745 (2016) (quoting *Pantazes v. State*, 376 Md. 661, 680 (2003)), *aff'd*, 452 Md. 103 (2017). "'Whether there has been an abuse of discretion depends on the particular circumstances of each individual case.'" *Correll v. State*, 215 Md. App. 483, 502 (2013) (quoting *Pantazes*, 376 Md. at 681). A court abuses its discretion where the ruling "'is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Smith v. State*, 232 Md. App. 583, 599 (2017) (quoting *Norwood v. State*, 222 Md. App. 620, 643 (2015)).

We are not persuaded that the court abused its discretion in this case. The State maintains that the questions were relevant to the jury's assessment of Deputy Inspector Pegues's credibility and honesty. "A witness generally may be cross-examined on any matter relevant to the issues, and the witness's credibility is **always relevant**." *Hill v. Wilson*, 134 Md. App. 472, 480 (2000) (emphasis added). This Court observed that "'any question which reasonably tends to explain, contradict, or discredit any testimony given by the witness in chief, or which tends to test his accuracy, memory, veracity, character, or credibility[]'" is proper. *Id.* (quoting *DeLilly v. State*, 11 Md. App. 676, 681 (1971)). The State's line of questioning as to Deputy Inspector Pegues's behavior and lack of disclosures

to the NYPD reflected on his credibility, and the court, therefore, did not abuse its discretion in permitting the questions.

II. Closing Argument

As part of closing argument, the prosecutor stated, in part, as follows:

> Now, you heard from the buyer, who is obviously, if you couldn't tell, very reluctant to testify. In fact, he tried to take the [F]ifth. He didn't have the Fifth Amendment privilege so, he was not allowed to and he had to testify. You could tell he did not want to testify. But, some of the things he said did corroborate what Officer Hartman said, such as I was stopped by the police. I had marijuana on me. I purchased marijuana. So, the things said by Officer Hartman are corroborated by his reluctant testimony, as well as, the actual marijuana that was recovered off of the individual. The buyer did not have any cash on him, he only had marijuana. As opposed to the defendant, who had cash on him and additional marijuana and a scale.
>
> * * *
>
> Now the buyer on the scene when he was stopped says, I bought marijuana. It's right here. He was honest. When the defendant was arrested, read his *Miranda*[4] rights and spoke with Officer Moris, what did he say? I went to the Fairway Apartments to smoke a j. Well there's no evidence of that. Again, there's no evidence of personal use items. A j being a joint, marijuana cigarette. There's no evidence of that. In fact, the officers indicate that the[y] smelled the odor of fresh marijuana, not burnt marijuana. He wasn't smoking it. He was selling it. Then he says, while he's talking to Officer Moris, white dude came up to the car and told them that they couldn't sit back there. So, he's not telling the truth, the buyer is telling the truth.
>
> * * *
>
> I want to talk briefly about – Judge Smith said a lot during the jury instructions but I want to highlight some of the jury instructions. This goes to credibility of witnesses. Does a witness have a motive not to tell the truth? Do they have an interest in the outcome of the case? Is their testimony consistent? Did it differ from a previous statement? Do they have a bias? And, you've heard from two defense witnesses.

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The first one was Shakenya Harris, the girlfriend of Jaray Toulson. They have a child in common. Of course she doesn't want him to go to jail. Of course she has a bias to say, oh the money was for rent. And speaking of the rent, I did my math. She said that $434 was owed and they were going to get a money order. Well, the police found $426, that's not enough to cover the rent. So, when I asked her about that on the stand, she said, I said, well you know, $410 was taken off Mr. Toulson. She said, no, that's not true, $436 was taken off Mr. Toulson. How does she know that? Why would she say – I mean she's completely contradicting what the police took off, put in the evidence bags. It makes no sense. And back on April 8th, 2016 they did not live together. So, why would he be holding the rent for her?

Well, today she said he was holding it because he was going, he was the one that was going to go into 7-Eleven to get the money order. But, in an earlier hearing she said, he was holding it because I spend money like its water. Today she said, no one approached her vehicle when they were parked and she didn't have a conversation with them. But when I cross examined her on the statement that she gave to Officer Moris once she was read her *Miranda* rights she stated, a male walked up to the car on the passenger side and said, why are you sitting here? You cannot believe her testimony. She's given contradictory statements at least twice. She also has a motive for her boyfriend she just had a child with not to get in trouble.

The other witness that the defense called was Corey, I'm probably going to say his name wrong, Pegues. Look, he has a lot of experience. He was a police officer in New York City for a long time. He served in the Army, but it's very obvious that his testimony has been summarized [sic] by money. If he didn't come here and say that Jaray Toulson was the buyer, not the seller, he wouldn't be getting $200 an hour to sit here. He wouldn't have gotten a flight for $600 to fly down here. The reason that he's saying Jaray Toulson is the buyer, not the seller is money. He needs money. He doesn't work anymore. He wrote a book. He's a motivational speaker. This is how he makes money now because he doesn't work for the Department anymore.

Speaking of which, there's an issue with his pension. I know he testified that he gets his pension now, but there are news articles that show that his injury, which he claims was on the job, may have actually been caused by him when he was at the office, falling off a chair. Additionally, he never should have been a police officer to begin with. He was a drug dealer from the time that he was 13 to the time that he was 18. He never disclosed that to the Department. He never disclosed that he attempted to murder someone. That he was good friends with a cop killer. If he had said any of this he never would have been hired.

> So, you can't believe his testimony, which is a little bit ridiculous. He read all of the discovery in this case. He read the statement of charges. For him to sit here and say that Jaray Toulson was the buyer after the seller says he bought marijuana and that he's using the scale to weigh out what he's buying in a high drug traffic area. So, they're in a high drug traffic area and you know, they know the cops are around. So, he's going to make this real quick transaction and then he's going to sit there, get his scale out, make sure he didn't get ripped off, but the other guy's gone. Does that make any sense? Or does it make more sense that he weighed out 1.78 grams to maximize his profit when he sold?
>
> You all have common sense and you're allowed to use it. You can't go back there and use your phones and your laptops, but you can use your common sense. What's going on here? His opinion is ridiculous.

As part of rebuttal closing argument, the prosecutor stated, in part:

> And the fact that Officer Hartman sat up here and said he couldn't remember some details just proves that he was giving honest testimony.
>
> Of course he could sit up here and say, yeah, oh yeah, I remember. Yeah we searched the car, we searched [the] buyer, he had no money on him. That'd be the easy way out, right? But he was honest and said he couldn't remember.

In each instance, at the conclusion of the prosecutor's arguments, defense counsel objected and argued that the prosecutor was vouching for the State's witnesses and against the defense's witnesses.

We have observed that attorneys are "'allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom.'" *Jones v. State*, 217 Md. App. 676, 691 (2014) (quoting *Lee v. State*, 405 Md. 148, 163 (2008)). Counsel may also "engage in rhetorical flourishes and [] invite the jury to draw inferences." *Ingram v. State*, 427 Md. 717, 727 (2012). The Court of Appeals has held that the "determination of whether a portion of counsel's argument is improper or

prejudicial rests largely within the trial judge's discretion because he or she is in the best position to determine the propriety of argument in relation to the evidence adduced in the case." *Id.* at 728.

Appellant fails to recognize, however, that objecting only at the conclusion of the prosecutor's arguments, and not when the objectionable statements were made, does not preserve the issue for review. *See Warren v. State*, 205 Md. App. 93, 132-33 (2012) (requiring objections to closing arguments be made during arguments). *See also Lawson v. State*, 389 Md. 570, 603 (2005) (explaining rationale for prompt objection during closing arguments so as to give the trial court the opportunity to take corrective action, if necessary).

Moreover, even if preserved, appellant's arguments have no merit. Although appellant is correct that prosecutors may not vouch for their own witnesses and against the defense's witnesses, *see Spain v. State*, 386 Md. 145, 153 (2005), the prosecutor was not vouching in this case. "Vouching typically occurs when a prosecutor 'place[s] the prestige of the government behind a witness through personal assurances of the witness's veracity . . . or suggest[s] that information not presented to the jury supports the witness's testimony.'" *Id.* (quoting *United States v. Daas*, 198 F.3d 1167, 1178 (9th Cir. 1999)). In this case, the prosecutor was commenting on the witnesses' credibility, which is permissible.

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