UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2773

September Term, 2014

ANTOINE M. DYSON

v.

STATE OF MARYLAND

Wright,
Graeff,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: January 4, 2017

Antoine Dyson, appellant, was convicted by a jury in the Circuit Court for Howard County of three counts of robbery, one count of assault in the second degree, and conspiracy to commit robbery. The court sentenced appellant to ten years' imprisonment for the robbery of Lee Inwan, consecutive terms of eight years' imprisonment for the robbery of Son Ok, the robbery of Aecha Olavarria, and conspiracy to commit robbery, as well as a concurrent term of two years' imprisonment for the second degree assault of Jessica Shin. It merged the remaining convictions for sentencing purposes.

On appeal, appellant presents four questions for this Court's review:

1. Did the circuit court abuse its discretion in declining to ask appellant's proposed voir dire question concerning expert witnesses?

2. Did the circuit court abuse its discretion in ruling that, if appellant testified, his prior conviction for armed robbery would be admissible to impeach his credibility?

3. Did the circuit court err in denying appellant's motion for mistrial based upon the prosecutor's comments in opening statement?

4. Was the evidence was sufficient to sustain appellant's convictions for robbery?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant's convictions were based on events that took place at the Oriental Spa in Elkridge, Maryland, at approximately 10:30 p.m. on September 3, 2013. The spa was equipped with three video surveillance cameras, but only one of those cameras, which was aimed at the parking lot, was operable that night. Video footage extracted from that camera indicated that, just before the crimes were committed, appellant entered the parking lot of

the Oriental Spa driving a rented Dodge Durango, with a person later determined to be Andre Hairston as a passenger. Two minutes later, appellant exited the vehicle and walked into the spa.

The evidence at trial indicated that appellant went inside and told Ms. Inwan, the receptionist, that he had an appointment for a massage. Appellant gave her a $100 bill for his $50 half hour session, and Ms. Inwan gave him change of two $20 bills and one $10 bill.

Ms. Shin, the massage therapist, entered room number five and met appellant, who asked her about sex. Ms. Shin told appellant that she did not "do any sex," that his fee would be refunded, and he would have to leave. She then returned to the office and told Ms. Inwan that they would have to refund appellant's fee because he wanted Ms. Shin to perform a sexual act.

After her conversation with Ms. Shin, Ms. Inwan entered room number five and appellant stated that he wanted his money back. Ms. Inwan offered him $50, but appellant demanded that she give him the $100 bill that he had used to pay his fee. Ms. Inwan returned to the office, retrieved the $100 bill appellant previously had given her, went back to room number five, and gave him that $100 bill, receiving, in exchange, the $50 she previously had given him.

As appellant was approaching the back door to leave, the front doorbell rang. Appellant said: "you have a customer, open the door." Ms. Inwan walked toward the front door, and appellant "pushed" Ms. Shin into the office. When Ms. Inwan opened the front

door, Mr. Hairston asked her whether it was too late to get a massage. Ms. Inwan told him that it was, and the spa was getting ready to close, but Mr. Hairston came inside, stating that there were police outside and he was "going to stay here for awhile."

Ms. Inwan and Mr. Hairston walked into the office, where appellant was standing with Ms. Shin. Appellant smiled and asked: "Where's the money?" Ms. Inwan stated that she had already refunded his money, but appellant replied: "No, I mean give me all you have here."

There were two other massage therapists in the building, Ms. Ok and Ms. Olavarria, in a break room. Appellant went to that room and asked the women for their purses, telling them not to call the police. Appellant took "about $300.00 to $400.00" from Ms. Ok and "[a]pproximately $200.00" from Ms. Olavarria. He then smiled, said that "nothing would happen, just don't call [the police]," and left the room.[1]

Meanwhile, in the office, Mr. Hairston told Ms. Inwan and Ms. Shin not to "make any noise," that appellant had a gun, and he, Mr. Hairston, did not want anything to happen to "the other ladies." Mr. Hairston then began rifling through the drawers in the office, finally finding two cash boxes, one black, the other red. Because no one knew where the key to the cash boxes was located, Mr. Hairston settled on a "small change box," "dumped it," and put its contents in his pocket. Then, after picking up each cash box and shaking it,

[1] Ms. Olavarria testified that appellant said "just don't call ambulance," but given her limited English proficiency as well as the context in which the remark was made (including the testimony of Ms. Ok), we interpret that remark as referring to the police.

Mr. Hairston took the red cash box and exited the building through the front door, calling out to appellant as he did so.

Appellant then came back to the office. Based on his "tight clothes," Ms. Inwan believed that he was not carrying a gun. Appellant told her to "stay in here," and before he left, he would "give [her] money back." Ms. Inwan pleaded with appellant to return the money he had taken from her, following him as she did so. Ignoring her plea, appellant "left [the] main entrance" and proceeded to the vehicle, where Mr. Hairston was already waiting in the driver's seat. As the two men drove off, Ms. Inwan looked at the license plate and "memorized" the number, which she then repeated to Ms. Ok, who wrote it down. Shortly thereafter, they called police.

Detective Thomas Seftick, a member of the Howard County Police Department, responded to the call. Based on the license plate number of the vehicle shown in the video surveillance, Detective Seftick determined that the vehicle had been rented to appellant by Avis Car Rental. He obtained a photograph of appellant from the Maryland Motor Vehicle Administration and identified appellant from the video surveillance as one of the two men who had driven the vehicle to the Oriental Spa and entered the building for sixteen minutes.

Detective Seftick obtained an arrest warrant for appellant and a search warrant for the vehicle. Mr. Hairston was in the vehicle when appellant was arrested and identified as the other participant in the robbery. During the execution of the search warrant, the police found two cell phones in the center console of the vehicle.

Detective Clate Jackson, a member of the Computer Crimes Division, performed a forensic analysis of the phones.[2] He extracted the data, including photographs, call and text history, web browser history, and user profiles.

Detective Jackson determined that one of the phones belonged to Mr. Hairston and the other to appellant.[3] The phones contained text messages exchanged on the night of September 3, 2013, as well as web browser history relating to the Oriental Spa within an hour of the robbery.[4] Additionally, appellant's phone contained a photograph of the Oriental Spa, taken on August 21, 2013, two weeks before the robbery.

DISCUSSION

I.

Appellant contends that the circuit court abused its discretion in declining to propound his proposed voir dire question: "Would any prospective juror give more weight to the testimony of an expert witness merely because that witness is called as an expert?"

[2] Detective Jackson is also identified in some parts of the record as "Detective Clate Moton-Jackson."

[3] Appellant claims in his brief that it was not "conclusively" determined that the other cell phone belonged to him. Because his cell phone was password protected, however, Detective Jackson was forced to resort to more elaborate measures to determine its ownership. Data extracted from the phone included a photograph of appellant in its user profile, as well as the email address: "antoinedyson34[@]gmail.com."

[4] Text messages sent from appellant to Mr. Hairston during the time when the robbery was taking place stated: "Its only 3 get them together I left. I'm outside"; another stated: "Money in here grab old lad[y.]" Those same messages were received on Hairston's cell phone.

He asserts that the question should have been asked because it was aimed at identifying bias relative to witnesses.

The State disagrees. It contends that the circuit court properly exercised its discretion in declining to propound appellant's requested voir dire question because that topic "was covered by the court's jury instructions and was duplicative of the other questions propounded to the potential jurors."

In Maryland, "the sole purpose of voir dire 'is to ensure a fair and impartial jury by determining the existence of [specific] cause for disqualification.'" *Pearson v. State*, 437 Md. 350, 356 (2014) (quoting *Washington v. State*, 425 Md. 306, 312 (2012)). Accordingly, "a trial court need not ask a *voir dire* question that is 'not directed at a specific [cause] for disqualification[or is] merely "fishing" for information to assist in the exercise of peremptory challenges.'" *Id.* at 357 (quoting *Washington*, 425 Md. at 315).

"The scope of voir dire and the form of questions propounded rest firmly within the discretion of the trial judge." *Washington*, 425 Md. at 313. We review a circuit court's conduct of voir dire for an abuse of discretion. *Stewart v. State*, 399 Md. 146, 160 (2007). Generally, a circuit court abuses its discretion when its ruling is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Thompson v. State*, 229 Md. App. 385, 404 (2016) (citations and quotations omitted).

Notwithstanding this general rule that the conduct of voir dire is a matter of a trial court's discretion, a trial court, upon request, must propound a voir dire question if that question "is 'reasonably likely to reveal [specific] cause for disqualification.'" *Pearson*, 437 Md. at 357 (quoting *Moore v. State*, 412 Md. 635, 663 (2010)). The Court of Appeals has identified two broad areas of inquiry that may reveal cause for a juror's disqualification: "(1) examination to determine whether the prospective juror meets the minimum statutory qualifications for jury service, and (2) examination to discover the juror's state of mind as to the matter in hand or any collateral matter reasonably liable to have undue influence over him." *Washington*, 425 Md. at 313. This latter category comprises "biases directly related to the crime, the witnesses, or the defendant." *Id.* (citation and quotations omitted).

We agree with the circuit court's observation below, and the State's argument on appeal, that the proposed voir dire question at issue here pertains to matters appropriate for jury instruction, as opposed to voir dire.[5] In that regard, the court gave the following instruction:

> An expert is a witness who has special training or experience in a given field. You should give expert testimony the weight and value you believe it should have. You are not required to accept any expert's opinion. You should consider an expert's opinion together with all the other evidence. In weighing the opinion of an expert, you should consider the expert's

[5] In declining to propound appellant's proposed voir dire question, the circuit court stated: "And I think that issue is properly resolved by the jury instruction, and the role of an expert testimony."

> experience, training and skills, as well as the expert's knowledge of the subject matter about which the expert is expressing an opinion.[6]

In *Wilson v. State*, 148 Md. App. 601 (2002), *cert. denied*, 374 Md. 84 (2003), we held that a trial court did not abuse its discretion in declining to give voir dire questions that "closely resemble[d] jury instructions," in light of the settled principle that "'it is inappropriate to instruct on the law at [the voir dire] stage of the case, or to question the jury as to whether or not they would be disposed to follow or apply stated rules of law.'" *Id.* at 660 (quoting *Twining v. State*, 234 Md. 97, 100 (1964)).[7] *Accord State v. Logan*, 394 Md. 378, 399 (2006) (attempts to use voir dire to solicit "whether prospective jurors would follow the court's instructions on the law" are "generally disfavored in Maryland," and court did not abuse its discretion in declining to propound such a question during voir dire); *Thompson*, 229 Md. App. at 404 (collecting "[n]umerous" Maryland appellate decisions

[6] This instruction was substantially the same as that set forth by MPJI-Cr 3:14 "Expert Opinion Testimony," which provides:

> An expert is a witness who has knowledge, skill, experience, education, or special training in a given field. You should consider an expert's opinion together with all the other evidence. In weighing the opinion of an expert, in addition to the factors that are relevant to any witness's credibility, you should consider the expert's knowledge, skill, experience, training or education, as well as the expert's knowledge of the subject matter about which the expert is expressing an opinion. You should give expert testimony the weight and value you believe it should have. You are not required to accept any expert's opinion.

[7] The questions at issue in *Wilson v. State*, 148 Md. App. 601, 656 (2002), *cert. denied*, 374 Md. 84 (2003), concerned whether prospective jurors would be capable of applying the reasonable doubt standard and the presumption of innocence, and whether they would be able, in a joint trial of multiple defendants, to judge each defendant solely on the evidence adduced against that particular defendant and not the others.

holding that "propounding *voir dire* questions concerning rules of law covered by jury instructions is inappropriate").

Here, we conclude that the circuit court did not abuse its discretion in declining to propound a voir dire question regarding an issue that would be addressed during jury instructions. The court's decision in this case was not "'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Thompson*, 229 Md. App. at 404 (quoting *Consol. Waste Indus., Inc. v. Standard Equip. Co*, 421 Md. 210, 219 (2011)).

II.

Appellant next contends that the circuit court abused its discretion in denying his motion in limine, which sought to prevent the State from impeaching him with his prior conviction for robbery with a dangerous weapon if he testified. In support, he notes that his prior conviction was almost 15 years old, and he asserts that, because the prior conviction was for a "similar" offense to that currently charged, "its probative value was substantially outweighed by its potential for unfair prejudice."

The State initially contends that appellant's claim is not preserved because he elected not to testify. In any event, it asserts that the circuit court properly exercised its discretion in ruling that the State would be permitted to impeach appellant with his prior conviction.

A.

We address first the State's preservation argument. In *Luce v. United States*, 469 U.S. 38, 43 (1984), the United States Supreme Court held that, to preserve a court's ruling permitting the government to impeach him with a prior conviction, a defendant must testify.

The Court determined that, in the situation where the defendant did not testify, a review of the decision to allow impeaching convictions would be too speculative. *Id.* It set forth several reasons for its holding, as follows: (1) the court could not balance the probative value of the prior conviction against its prejudicial effect without knowing "the precise nature of the defendant's testimony, which is unknowable when . . . the defendant does not testify," and the defendant's proffer of his testimony cannot cure this indeterminacy, as "his trial testimony could, for any number of reasons, differ from the proffer"; (2) the potential harm from the court's ruling "is wholly speculative" because the prosecution might not attempt (or ultimately be permitted) to impeach the defendant; (3) because a defendant's decision whether to testify is a matter of trial strategy, which "seldom turns on the resolution of one factor," a reviewing court cannot even assume "that the adverse ruling motivated a defendant's decision not to testify"; and (4) even if all of these obstacles could be overcome, harmless error analysis would be difficult to apply in practice, as "an error that presumptively kept the defendant from testifying" could never be deemed harmless, and, consequently, nearly every error of this type "would result in the windfall of automatic reversal." *Id.* at 41-42.

The Court of Appeals followed the rationale of *Luce* in *Jordan v. State*, 323 Md. 151 (1991). In that case, the Court held that the trial court's ruling that Jordan's prior statement to the police was voluntary was not preserved for appeal where Jordan failed to testify. The Court explained that it was not inclined "to review a trial court's decision authorizing the State to use particular evidence when, as a result of a tactical decision by the defendant, the State ultimately was precluded from utilizing that same evidence." *Id.* at 156. It found, as the Court did in *Luce*, that in that circumstance any injury was "speculative." *Id.*

Here, as in *Luce* and *Jordan*, appellant elected not to testify after the circuit court's ruling. Under these circumstances, appellant's claim that the circuit court abused its discretion in denying his motion in limine, which sought to preclude the State from impeaching him with his prior robbery conviction, is not preserved for our review.

B.

Even if the claim was preserved, we would agree with the State that it is without merit. Admissibility, for impeachment purposes, of a witness's prior conviction is governed by Maryland Rule 5-609, which provides, in part, as follows:

> (a) Generally. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.
>
> (b) Time Limit. Evidence of a conviction is not admissible under this Rule if a period of more than 15 years has elapsed since the date of the conviction.

Rule 5-609 "creates a three part test for determining whether a conviction is admissible for impeachment purposes." *Jackson v. State*, 340 Md. 705, 712 (1995). For a prior conviction to be admissible: (1) it "must fall within the eligible universe," that is, it must be either an "infamous" crime, or it must be a crime "relevant to the witness's credibility"; (2) "the proponent must establish that the conviction is less than fifteen years old"; and (3) "the trial court must weigh the probative value of the impeaching evidence against the danger of unfair prejudice to the defendant" and determine that the former outweighs the latter. *Id.* at 712-13 (citations omitted).

Appellant concedes, as he must, that his prior armed robbery conviction falls within the "eligible universe" of impeachable crimes. *Facon v. State*, 144 Md. App. 1, 47 (2002) (armed robbery is an infamous crime), *rev'd on other grounds*, 375 Md. 435 (2003). And his prior conviction occurred in 2001, approximately thirteen years before trial, so it was not excluded by the 15-year time limit. Accordingly, appellant's claim is that the circuit court abused its discretion in determining that the probative value of the conviction outweighed any unfair prejudice.

In *Jackson*, 340 Md. at 717, the Court of Appeals set forth factors to consider "in weighing the probative value of a past conviction against [its] prejudicial effect." These factors include: "(1) the impeachment value of the prior crime; (2) the point in time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility." *Id.* at 717.

Here, only the third factor, "the similarity between the past crime," robbery with a dangerous weapon, "and the charged crime," robbery, weighs against admissibility. Even where a prior conviction and the charged offense are the same, however, the Court of Appeals has eschewed a categorical rule of inadmissibility. *Id.* *See id.* at 711 (observing that, "[u]nder Rule 5-609, prior convictions for the same or similar offenses as the charged offense are not automatically excluded"); *accord Brewer v. State*, 220 Md. App. 89, 108 (2014) (observing that "[s]imilarity between the past and current offenses weighs against admission, but does not serve to automatically exclude such evidence").

Thus, we look to the other factors, which all support the court's ruling that the prior conviction would be admissible. First, as indicated, "[a]rmed robbery is an infamous crime and thus has impeachment value." *Facon*, 144 Md. App. at 47. Second, although the prior conviction was from 2001, close to the time limit prescribed by the rule, the court stated that this timeframe was imposed because, if too much time has elapsed, there would be less reason to believe that the character trait of dishonesty was still present. In this case, however, sometime after appellant was released from prison, "he again engaged in felonious criminal conduct," thereby "reaffirm[ing]" his propensity for dishonesty.[8]

With respect to the importance of appellant's testimony, it would have been important, given his defense that the evidence of intimidation was insufficient to sustain his robbery convictions. And finally, his credibility would have been "critical," as his trial

[8] Appellant also was convicted of possession with intent to distribute a controlled dangerous substance. He did not challenge the propriety of using that conviction to impeach him.

counsel acknowledged. Since four of the five *Jackson* factors weigh in favor of admissibility, we cannot say that the circuit court's ruling, permitting the State to impeach appellant with his prior armed robbery conviction if he testified, was "'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Thompson*, 229 Md. App. at 404 (quoting *Consol. Waste Ind.*, 421 Md. at 219). Accordingly, the circuit court did not abuse its discretion in so ruling.

III.

Appellant contends that the circuit court erred in permitting the State to make improper and prejudicial comments during opening statement and in denying his motion for mistrial based upon those comments. The State contends that the circuit court properly exercised its discretion in the conduct of the trial, stating that the "remarks were not improper, and if they were, certainly did not deny [appellant] a fair trial."

Prior to opening statements, the trial court told the jurors that "[o]pening statements are not evidence," and the jury "must base [their] decision only on the evidence presented in this courtroom." The State then gave its opening statement, as follows:

> [THE STATE]: A couple days ago on Saturday I was at home doing a couple errands that all of us have to do on the weekend and I was folding laundry and I was flipping around on the tv and I ended up stopping on the National [G]eographic [C]hannel for whatever reason. And they had a special on Africa and the Serengeti and they were talking about the [wildebeest] and the migration of the [wildebeest]. For whatever reason, I stopped and just continued folding laundry.
>
> And it moved onto lions and lion prides and how they work and how the female lioness is the woman that does the hunting because they are

stronger and they are bigger and they are fast. And I was just watching it for no apparent reason and a comparison came to my mind to what you're going to listen to over the next several days. You see lionesses work together. They in what I happened to be watching, was gazelles. They hunt something weaker than them, smaller than them, and they work together. And they cor[r]al their prey and they prey upon them, because they are weaker, because they are smaller and because the lioness is, to put it in human terms, so they can get away with it, know they can do it.

Ladies and Gentlemen, you will hear that on September 3rd of last year this man -

[DEFENSE COUNSEL]: Your Honor, I never do this but could I approach please?

THE COURT: Approach please.

At the ensuing bench conference, the following occurred:

THE COURT: She told us about how lionesses work and now she's going to start talking about September 3rd. And the objection is?

[DEFENSE COUNSEL]: The objection is she likened my client to a lion, a wild animal. And that she first, this is only to show what can be proved and what she intends to prove. The fact that she saw something on the Serengeti Plains and she is drawing a parallel to my client as being a lion who preys on the weak, weak gazelles, is improper opening statement.

THE COURT: I don't know that she characterized gazelles as weak.

[DEFENSE COUNSEL]: She said, preys upon the weak. And then she said, in this instance, it was gazelles.

THE COURT: The [a]llusion that I understood was teamwork, people working together to prey on others. I presume that we're done with that?

[THE STATE]: Yes.

THE COURT: I'll overrule[] it but we're now moving into more standardized opening?

[THE STATE]: Yes.

THE COURT: Overruled.

The State then resumed opening statement. Defense counsel proceeded to give his opening statement,[9] at the conclusion of which he moved for a mistrial based upon the State's initial comments. The court asked how the statements prejudiced appellant "and why a curative instruction if I felt that there was any damage, why a curative instruction wouldn't be sufficient." Defense counsel responded:

> First, I believe the damage is done by the State very graphically, likening Mr. Dyson to a wild animal hunting on the Serengeti Plains. And that is how she introduced her case and nothing could be further from the case. She also likened her victims as gazelles, who are fleeing the onslaught of wild animals, treating them as preyed and eaten. So I would suggest that certainly goes beyond the scope of proper opening statements. Because an opening statement is just to set forth what's to be proved. I would suggest that based upon the graphic aspect of the State's introduction, I would suggest that a curative instruction will not, cannot possibl[y] resolve the type of prejudice, the unfair prejudice that that transgression infused into the jurors[']' minds. So that would be the reasons, Your Honor.

The prosecutor responded that she "never called the Defendant a lion" or "said he was one." She continued:

> I never said the victims were gazelles. I never went into graphic detail as to what lions actually do with gazelles. I simply likened the fact lioness[es] are hunting animals and cor[r]al their victims or what they were doing and likened it to the fact that this Defendant and Mr. Hairston, also worked together and corralled their victims into place and took advantage of the situation. Didn't make any analogies to Defendant killing anything or anything that lionesses do. I don't think I even talked about that at all. I

[9] Although it is not pertinent to the issue before us, we observe that appellant's opening statement was itself improper. Defense counsel began by telling the jury that "the easiest way to find [the location of the robbery] is to of course look on Google. Everything's stored on our phones. You will –" The court then interjected to remind the jury that it had just been instructed not to consult the internet in deciding the case.

> think graphic is way too strong a word, [i]t was a simple analogy and the way to start talking about something and to get someone's attention.

The court then stated that, "as tempting as it is to declare a mistrial for any one of a number of reasons, including the Defense's opening argument to entreating the Jury to go on the Internet in violation of the Court's directive," it was "going to deny the Motion for a Mistrial." The court explained:

> I don't believe that – well number one, opening statements are supposed to be a display or a discussion of what you anticipate the evidence would generate. They always turn into opening arguments, it's unfortunately part of the way it is for the State, the argument was creating the image of teamwork to victimize people, which I think is a legitimate way to phrase how co-conspirators work in a robbery case. For the defense it was to argue that there's all these reasonable explanations for everything. There's reasonable explanations. That's argument, that's not what the evidence is going to be. That's not a statement of what it is. And then that it's reasonable. It's an argument. Both sides made arguments, and that's not right but that's the way it always works. I don't believe that the State's opening statement was intended to nor do I think that it had the effect of raising the passions of the jury. I don't believe that a reasonable interpretation or analysis of her opening statement is to compare and to declare and compare the Defendant to a wild animal and the victims to innocent, docile, weak creatures. I don't think the intention nor the effect was to put in their minds, not on the passion of the strong preying upon the weak. But that this particular Defendant is an animal among defendants. I don't think that that's the effect of it. I think that the purpose of it and the way that the effect it was on me was to give a comparison of teamwork in a way that was, unfortunately, argumentative. But as I say, unfortunately both sides engaged in argument in my opinion. But I don't think that the Defendant has been prejudiced to the extent of being deprived a fair trial and I deny the motion for a mistrial. Anything else?
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> [DEFENSE COUNSEL]: That's all.
>
> THE COURT: Did you want to request a specific curative instruction?
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> [DEFENSE COUNSEL]: No, Your Honor.

In *Wilhelm v. State*, 272 Md. 404 (1974), the Court of Appeals explained the purpose of opening statement and set forth general guidelines for determining what comments are proper in opening statement:

> The primary purpose or office of an opening statement in a criminal prosecution is to apprise with reasonable succinctness the trier of facts of the questions involved and what the State or the defense expects to prove so as to prepare the trier of facts for the evidence to be adduced. While the prosecutor should be allowed a reasonable latitude in his opening statement he should be confined to statements based on facts that can be proved and his opening statement should not include reference to facts which are plainly inadmissible and which he cannot or will not be permitted to prove, or which he in good faith does not expect to prove.

Id. at 411-12. Although "great latitude is given during opening and closing arguments," it is improper, in opening statement or in closing argument, to make appeals "to passion or prejudice." *Lawson v. State*, 389 Md. 570, 589-90 (2005). *Accord Lee v. State*, 405 Md. 148, 167 (2008) ("[P]rosecutors should not appeal to the passions and prejudices of a jury.").

"[N]ot every ill-considered remark made by counsel," however, "is cause for challenge or mistrial." *Wilhelm*, 272 Md. at 415.[10] When improper statements do not "'mislead or influence the jury *unduly to the prejudice of [the defendant]*,'" they constitute harmless error. *Lawson*, 389 Md. at 591 (quoting *Spain v. State*, 386 Md. 145, 154 (2005)).

Appellant relies on *Walker v. State*, 121 Md. App. 364, *cert. denied*, 351 Md. 5 (1998), *cert. denied*, 525 U.S. 1071 (1999), in support of his argument that the prosecutor's

[10] In *Simpson v. State*, 442 Md. 446, 458 n.5 (2015), the Court of Appeals stated that the test for prejudice set forth in *Wilhelm*, 272 Md. at 412, referred to a test of harmless error that did not apply after *Dorsey v. State*, 276 Md. 638 (1976).

comments here were improper. In *Walker*, the prosecutor, in closing argument, called the defendant, who was on trial for child abuse and second degree sexual offense, an "animal" and a "pervert." We concluded that those remarks were improper, but because a separate error in that case required a re-trial, we did not address whether those improper comments, standing alone, would have necessitated a new trial. *Id.* at 381-82. We did note, however, that "the better practice would be to characterize a defendant's actions, rather than to engage in name calling." *Id.* at 382.

In *Lawson*, 389 Md. 570, in a jury trial where the defendant faced charges of second degree rape and related offenses against a six-year-old girl, *id.* at 575, the prosecutor made the following comments during rebuttal closing argument:

> What does a monster look like? Looks like different things to different people. What does a sexual molester look like? He looks like someone you know. He looks like your uncle, your brother, your sister, your cousin. It's possible. But there is no certain way that someone who molests children looks. But they do ingratiate themselves. They make themselves indispensable. They are friendly, always there to watch.
>
> Not everyone is like that, but please don't misunderstand me because the important point here is that a child molester looks like anybody else. That's why they are able to do what they do, because they look like all of us, and we trust.

Id. at 596-97.

Although the prosecutor did not expressly state that the defendant was a "monster" or a "sexual molester," the Court of Appeals stated that it was "clear" that the prosecutor "intended to imply to the jury that [the defendant] was that monster and child molester." *Id.* at 599. Accordingly, the Court determined that those comments were improper.

In the instant case, the prosecutor likewise did not state that appellant was a "lion" or that the victims were "gazelles." But that was the unmistakable implication of her remarks. As in *Lawson*, it was not necessary that the prosecutor to "specifically name the defendant, in order for the jury to understand that a defendant is the person the prosecutor is describing." *Id.* We therefore conclude that the prosecutor's comments in this case, implying that appellant was a "lion," as well as referring to her personal experiences and the television shows she watched, were improper.

That does not, however, conclude our analysis. We must next assess the extent of any prejudice appellant may have suffered as a consequence of the prosecutor's improper comments.

In that regard, we note that the decision whether the prosecutor's comments were prejudicial "'lies within the sound discretion of the trial court.'" *Lawson*, 384 Md. at 592 (quoting *Spain*, 368 Md. at 158). This Court "'should not reverse the trial court unless that court clearly abused the exercise of its discretion and prejudiced the accused.'" *Id.* (quoting *Spain*, 368 Md. at 158-59).

In reviewing a trial court's decision that the prosecutor's comments were not unduly prejudicial, we consider three factors: (1) "the severity of the remarks"; (2) "the measures taken to cure any potential prejudice"; and (3) "the weight of the evidence against the accused." *Lee*, 405 Md. at 174. With respect to the first factor, the severity of the remarks, we note that the prosecutor's statements were an isolated event, taking place only once, near the beginning of trial. This is markedly different from what occurred in *Lee*, where

the prosecutor's improper comments were "repeated" throughout the trial, *id.* at 161, and the trial court "repeatedly" overruled defense objections to those comments. *Id.* at 170.

With respect to the second factor, the measures taken to cure any prejudice, the circuit court initially took no action other than overruling appellant's objection. Shortly thereafter, however, upon the conclusion of opening statements, the circuit court, after denying appellant's motion for a mistrial, offered to give a curative instruction. Appellant, however, declined that offer. Additionally, the court earlier had told the jury that opening statements were not evidence.

With respect to the third factor, the weight of the evidence against the accused, the evidence against appellant was overwhelming. Four different victims positively identified him as the perpetrator of the crimes. Video surveillance footage, created contemporaneously with the robberies, indicated that appellant was one of the two robbers. And the vehicle captured on the video was traced directly to appellant, and cell phones recovered from the vehicle contained additional damning evidence of appellant's guilt, including text messages, web browser history, and a photograph indicating that he had undertaken preparations for the crimes approximately two weeks earlier.

After reviewing these factors, we cannot conclude that the circuit court abused its discretion in finding that the comments did not unduly prejudice appellant. Accordingly, the circuit court did not abuse its discretion in denying appellant's motion for a mistrial.

IV.

Appellant contends that the evidence was insufficient to sustain his three robbery convictions because the element of force or threat of force was lacking. The State contends that the evidence was sufficient to show that appellant and Mr. Hairston robbed the victims by constructive force, i.e., intimidation.[11]

This Court set forth the applicable standard of review in determining the sufficiency of the evidence on appeal, as follows:

> The test of appellate review of evidentiary sufficiency 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.'" *State v. Coleman*, 423 Md. 666, 672 (2011) (quoting *Facon v. State*, 375 Md. 435, 454 (2003)). The Court's concern is not whether the verdict is in accord with what appears to be the weight of the evidence, "but rather is only with whether the verdicts were supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offense charged beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 479 (1994). "We 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference.'" *Cox v. State*, 421 Md. 630, 657 (2011) (quoting *Bible v. State*, 411 Md. 138, 156 (2009)). Further, we do not "'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Montgomery v. State*, 206 Md. App. 357, 385 (quoting *Morris v. State*, 192 Md. App. 1, 31 (2010)), *cert. denied*, 429 Md. 83 (2012).

[11] We are not persuaded by the State's argument that appellant failed to preserve this issue for review because he failed to state with particularity all reasons why his motion for judgment of acquittal should be granted. Appellant made clear his claim that the evidence was not sufficient to support the robbery convictions because the victims were not placed in fear. This was sufficient to preserve for review the claim he asserts on appeal.

Kyler v. State, 218 Md. App. 196, 215 (quoting *Donati v. State*, 215 Md. App. 686, 716 (2014)), *cert. denied*, 441 Md. 62 (2014).

"Robbery" is "the felonious and forcible taking from the person of another, of goods or money to any value, by violence, or putting him in fear," and it is the "putting in fear" that distinguishes robbery "from other larcenies." *Spencer v. State*, 422 Md. 422, 428 (2011). "Putting in fear" is identical to the "threat of force," also known as "intimidation." *See Coles v. State*, 374 Md. 114, 123 (2003) (explaining that the "hallmark of robbery, which distinguishes it from theft, is the presence of force or threat of force, the latter of which also is referred to as intimidation").

Appellant contends that the evidence was insufficient to show force or threat of force because it "fails to show that [he] personally took any actions that would tend to create apprehension on the part of the spa staff that [he] was about to apply force." We disagree.

Constructive force, or intimidation, may be shown by any "conduct [that] was reasonably calculated to produce fear." *Coles*, 374 Md. at 128. It is sufficient if it "'excite[s] reasonable apprehension of danger, and reasonably . . . cause[s] the owner to surrender his property." *Spence v. State*, 51 Md. App. 359, 361 (1982) (quoting *Giles v. State*, 8 Md. App. 721, 723 (1970)), *rev'd on other grounds*, 296 Md. 416 (1983). *See also Fetrow v. State*, 156 Md. App. 675, 689 (force is sufficient if it causes one to "places his money in another's hand for fear of consequences"), *cert. denied*, 382 Md. 347 (2004).

And, here, where the jury was instructed that appellant could be guilty of robbery as an accomplice to Mr. Hairston, the analysis is whether, through the actions of appellant **or** Mr. Hairston, the victims were placed in fear.

With respect to Ms. Inwan, appellant told her to give him all the money she had there. When he left to go to the room where the other massage therapists were, Mr. Hairston told Ms. Inwan that appellant had a gun, and he did not want anything to happen "to the other ladies, so be quiet." This evidence was sufficient to show intimidation. *See Dixon v. State*, 302 Md. 447, 463 (1985) (defendant exercised intimidation by conduct inferring possession of a weapon).[12]

With respect to Ms. Ok, she first saw appellant and Mr. Hairston in the office. She was "scared" at the sight of them. As Ms. Ok left and returned to the break room, appellant followed her, telling her, "let's go, let's go," as he pushed her into the break room. Immediately thereafter, appellant told her "not to call the police," and he took "about $300.00 to $400.00" from Ms. Ok's purse. This amount of force, was "sufficient to compel the victim to part with [her] property," *West v. State*, 312 Md. 197, 205 (1988) (citation and quotation omitted), which was sufficient to establish a robbery.

Finally, Ms. Olavarria was in the break room when appellant herded Ms. Ok into that same room. Upon entering the break room, appellant called out to Mr. Hairston, "oh, here are people too," letting her know that there was another person with him. At the sight

[12] That Ms. Inwan, **after** the money had been taken, concluded that appellant probably was not armed, is of no consequence.

of appellant, a "tall and pretty big" man, Ms. Olavarria became "very nervous," her "heart . . . pounding."[13] Appellant asked both women where their purses were, a request that the circuit court characterized as more akin to a "demand." After removing the cash from Ms. Ok's purse, appellant took the cash from Ms. Olavarria's purse. He then "smiled" and told them that "nothing would happen, just don't call [the police]." Under these circumstances, we conclude that an "ordinary, reasonable person" would have been placed in fear of bodily harm by appellant's actions, establishing sufficient evidence of intimidation. *Coles*, 374 Md. at 128 (citation and quotation omitted). The evidence was sufficient to support appellant's robbery convictions.

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

[13] According to the statement of charges, contained in the record, appellant stood 6 feet, 1 inch tall, and he weighed 281 pounds.