Circuit Court for Prince George's County
Criminal Trial No.: CT160547A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3397

September Term, 2018

MICHAEL DEANDRE FORD

v.

STATE OF MARYLAND

Berger,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: May 22, 2020

A jury in the Circuit Court for Prince George's County convicted appellant, Michael Deandre Ford, of second-degree murder of Detective Jacai Colson, eleven counts of first-degree assault, eleven counts of use of a handgun, two counts of illegal possession of a firearm, one count of wearing and carrying a handgun, one count of transporting a handgun, and multiple conspiracy counts. The trial court sentenced appellant to an aggregate sentence of 195 years of incarceration. On appeal, appellant presents the following questions for our review:

1. Did the circuit court fail to exercise discretion by declining to dismiss a juror before the start of deliberations?

2. Did the circuit court err in preventing defense counsel from cross-examining a police witness about a pending civil suit against him and about whether he expected or hoped to avoid criminal liability by testifying for the State?

3. Did the circuit court err in permitting the prosecutor to engage in improper rebuttal argument?

4. Did the circuit court err by instructing on second-degree depraved heart murder?

For the reasons explained herein, we affirm the judgments of the trial court.

FACTS AND LEGAL PROCEEDINGS

On the afternoon of March 13, 2016, appellant, armed with a semiautomatic handgun, opened fired on the Prince George's County District 3 police station in Landover, Maryland, shooting alternately at the police station, police officers, passing cars, and an ambulance. Appellant's brothers had driven him to the police station and recorded the attack on their cellphones. The cell phone videos were played for the jury and introduced into evidence at trial.

Corporal Jason Wells was standing inside the lobby of the police station when he observed appellant, who was standing on the street outside the station, point and fire a gun directly at him. Corporal Wells, Senior Corporal John Wynkoop, and Officer Matthew Scott were preparing to exit through the front lobby of the police station to confront the shooter when the glass doors of the lobby were shattered by gunfire. Corporal Wells, Senior Corporal Wynkoop and Officer Scott exited through a side door of the station and Corporal Wells observed appellant outside, "taking cover behind [a police] transport van." When appellant emerged from behind the van, Corporal Wells, Senior Corporal Wynkoop, Officer Scott and Detective Bryan Melius advanced toward him and fired.

Detective Melius arrived at the District 3 police station in a marked police cruiser. He was pulling into the parking lot when he encountered appellant, who began shooting at him. Detective Melius exchanged shots with appellant and observed appellant shoot at an ambulance and passing cars.

Sergeant Darin Rush was inside the police station when he heard a loud banging noise outside and a radio report of a "signal 13," which indicated that an officer was in harm's way. As Sergeant Rush reached the lobby of the station, shots were fired at him from the street.

Michael Nichols and Brittany Brown were both driving past the District 3 police station, when appellant shot at them and struck their cars with bullets. Ms. Brown's son, De'Kyii Brown, was also traveling in her car.

Noah Smith, a volunteer EMT for the Prince George's County Fire Department, was seated in the passenger seat of an ambulance driven by Bryce Mendez, when they

encountered appellant in front of the District 3 police station. Mr. Smith observed appellant point the gun toward the ambulance and shoot at him.

Jacai Colson, a Prince George's County undercover detective, dressed in plain clothes, responded to the attack and exchanged fire with appellant. Officer Taylor Krauss of the Special Operations Division retrieved his rifle and exited the police station to locate the shooter. Officer Krauss heard over the police radio that there was a black male, located by the transport van, shooting at the police station. Because Officer Krauss could not see the suspect initially, he moved locations and repositioned himself. As he approached Barlowe Road, Officer Krauss located a black male shooting at the station. Officer Krauss "locked down" on the man and fired three times before hitting the target. Officer Krauss subsequently learned that he had mistakenly shot and killed Detective Colson, whom he misidentified as the assailant.

Appellant testified that he opened fire on the police station because he was trying to provoke the police to kill him. Appellant stated that he fired twelve shots, stepped behind a police van to reload his gun, and continued shooting. Appellant stated that he did not intend to harm anyone; he shot at police officers and passing cars to get police to shoot him. He did not recall shooting at an ambulance. Appellant was ultimately shot by police and apprehended.

Senior Corporal Wynkoop and Corporal Wells remembered hearing a gunshot after appellant had been shot. Senior Corporal Wynkoop and Officer Scott recalled hearing appellant say that he wanted to die and that police should kill him. Volunteer firefighter Gaetano Leone responded to the shooting and treated appellant's gunshot wound. Mr.

Leone recalled hearing appellant say that he wanted to die. He also recalled that appellant stated that he wished he had brought more ammunition.

DISCUSSION

I.

Appellant argues that the circuit court failed to exercise its discretion in declining to dismiss juror number 22 prior to deliberations. Appellant asserts that the trial court's decision not to replace juror number 22 was based on the mistaken premise that it did not have the authority to dismiss the juror absent an agreement by the parties. Appellant argues that the circuit court's failure to exercise discretion constituted an abuse of discretion.

The State responds that the circuit court did not fail to exercise its discretion or misunderstand its authority to replace the juror. The State contends that the trial court exercised its discretion in finding insufficient cause for dismissal, and its willingness to consider dismissing the juror if the parties agreed, did not equate to a belief that the parties' assent was required. We agree with the State that the trial court exercised its discretion in denying appellant's request to replace juror number 22.

Juror number 22 explained to the court that he could not serve on the jury if the case continued to another day:

> THE COURT: I'm Judge Woodard. I'm just sitting in temporarily for Judge Hill. It's my understanding that you brought to the bailiff's attention that you cannot sit in any longer or at least no longer than today?
>
> JUROR NO. 22: No longer than today, that's correct.
>
> THE COURT: And for what reason?

JUROR NO. 22: I just – work obligations.

THE COURT: Work obligation?

JUROR NO. 22: Yes. I've been out for two weeks now.

THE COURT: You've been out for two weeks?

JUROR NO. 22: Yep.

THE COURT: And they're not going to pay you or something?

JUROR NO. 22: I don't get paid. Absolutely not.

THE COURT: You don't get –

JUROR NO. 22: Paid, no. I'm a contractor, and I have two contracts that I'm supporting yes, So I did it because of the time that they said the case was going to be, and done some extra work on top of that. So, yes, I'm just at a point where I can't forward to do this anymore.

Because defense counsel was concerned that the juror would rush to reach a verdict that day to avoid having to return to court, he requested that juror number 22 be replaced:

[DEFENSE COUNSEL]: Would ask to replace him with the first alternate. The reason is this verdict sheet alone is very long, it's a lot of evidence to go through, and I don't want to come to the situation where they don't reach a verdict today and then we come back Monday and there is an issue.

THE COURT: As long as you agree.

[THE PROSECUTOR]: Problem is, Judge –

THE COURT: That's not usually the reason you can do it.

[THE PROSECUTOR]: That is not a reason you can do it. I thought he was going to tell us that he had travel or something, and again we had a number of jurors during the selection process that gave us hardship reasons.

* * *

> . . . I don't think we can allow him to go based on that comment, because based on those reasons, because I'm sure there are a lot of jurors in the same place.
>
> And unfortunately, his desire is to no longer have to do this, because we went two days beyond the original date that the [c]ourt had indicated. So I'd ask he be sent out with the rest of the jurors.
>
> [DEFENSE COUNSEL]: Your Honor, I have a major problem with respect to that. I don't want a juror back in who is going to rush to a decision based on personal financial concerns, and that's what we are subjecting ourselves to … And right now it's a quarter to 2:00 on Friday.

* * *

> THE COURT: Let me just say then to the State if you agree, then I don't think it violates the rule, but let me know if you agree or if you don't agree.
>
> [PROSECUTOR]: We don't agree.
>
> THE COURT: They don't agree.

The court questioned juror number 22 again about whether his concerns about work would "affect his ability to render a fair and impartial decision." He ultimately responded that his work situation would not affect his ability to be fair and impartial:

> THE COURT: I have to ask you one more question. The fact that this will have [an] impact on your work, will that affect your ability to render a fair and impartial decision in this case?
>
> JUROR NO. 22: No, ma'am.
>
> THE COURT: It will not?
>
> JUROR NO. 22: (Shook head.)

THE COURT: You can still serve as a juror and render a fair and impartial verdict?

JUROR NO. 22: Yes, ma'am. However, if it goes past today, it will be a problem.

THE COURT: If we go until Monday?

JUROR NO. 22: Yes.

THE COURT: Will that affect your ability to render a fair and impartial verdict?

JUROR NO. 22: If we go past today.

THE COURT: Past today to Monday?

JUROR NO. 22: No, it will not.

THE COURT: Monday will be fine?

JUROR NO. 22: Monday will be fine. However, –

THE COURT: Past Monday would be a problem?

JUROR NO. 22: No, no, no. No, today is it? Today is it?

THE COURT: That's what I asked you.

JUROR NO. 22: No, today is it?

THE COURT: Because we never rush jurors.

JUROR NO. 22: I understand that, I understand that.

THE COURT: So what I'm asking you –

JUROR NO. 22: Mm-hmm.

THE COURT: – is if, in fact, you cannot render a decision today, will the fact that you may have to sit again on Monday for deliberations impact your ability to render a fair and impartial decision based on your work obligations?

JUROR NO. 22: If I have to sit Monday?

THE COURT: Yes, sir.

JUROR NO. 22: If I have to sit on Monday, no, it will not, it will not impact my decision.

THE COURT: It will not impact your ability to render a fair and impartial decision?

JUROR NO. 22: It will not.

THE COURT: So if it goes under, you can still sit as a juror?

JUROR NO. 22: I feel like you're asking a trick question.

THE COURT: It's not a trick question.

JUROR NO. 22: Maybe I'm just not understanding. What I'm saying is if I have to sit on Monday.

THE COURT: Yes.

JUROR NO. 22: – then it will be a problem. Period.

THE COURT: What kind of problem do you say it will be then? Maybe you could be more specific.

JUROR NO. 22: It's work-related. I have work obligations that I can no longer ignore. I have actually put aside these two weeks for.

THE COURT: Knowing you have those work obligations on Monday, and you may have to sit until Monday, would that affect your ability to render a fair and impartial decision?

JUROR NO. 22: No ma'am.

THE COURT: You just have to be honest[.]

JUROR NO. 22: No ma'am.

Following counsel's arguments, the court ruled that it would not replace juror number 22:

> He may be unhappy, but would still be fair and impartial. That's my problem. Look, I asked him like three or four different ways, because the bottom line is if you don't agree – it has to be that he's not going to be fair and impartial and make a decision based sole[ly] on the evidence and nothing else.
>
> * * *
>
> I'm no[t] saying it harms anyone to seat the alternate, I'm just say[ing that] normally to seat an alternate, for the [c]ourt there has to be a reason under the law **and** I have to consult with both the State and the defense as to that reason. And I have to – believe that in order to seat an alternate, **unless there is some compelling reason otherwise**, both the State and the defense need to agree. That's why I keep asking do you agree to seat Alternate Number 46. And they want to keep Number 22, correct?
>
> [THE PROSECUTOR]: Correct, Your Honor.
>
> THE COURT: Still to this point.
>
> [THE PROSECUTOR]: He didn't give a reason we believe is meritorious for him to be excused.
>
> THE COURT: I can't change.
>
> [DEFENSE COUNSEL]: Note my objection.

(Emphasis added). Later that same day, the jury rendered its verdict.

Maryland Rule 4-312(g)(3) provides that "[a]t any time before the jury retires to consider its verdict, the trial judge may replace any jury member whom the trial judge finds to be unable or disqualified to perform jury service with an alternate." A trial judge's ruling on a motion to replace a juror is discretionary. *Adams v. State*, 165 Md. App. 352, 443

(2005). We "give deference to the trial judge's determination and will not substitute our judgment for that of the trial judge unless the decision is arbitrary and abusive or results in prejudice to the defendant." *State v. Cook*, 338 Md. 598, 611 (1995). Nonetheless, we "will reverse a decision that is committed to the sound discretion of a trial judge if we are unable to discern from the record that there was an analysis of the relevant facts and circumstances that resulted in the *exercise* of discretion." *Maddox v. Stone*, 174 Md. App. 489, 502 (2007) (emphasis in original). A court's failure to exercise discretion is an abuse of discretion. *101 Geneva LLC v. Wynn*, 435 Md. 233, 241 (2013); *Gray v. State*, 368 Md. 529, 565 (2002); *Johnson v. State*, 325 Md. 511, 520 (1992).

In this case, the record demonstrates that the trial court considered the relevant facts and circumstances before deciding that it would not dismiss juror number 22. The court questioned the juror extensively, asking him "three or four different ways" if he would be able to render a fair and impartial decision if the trial continued for another day. The trial judge then made a finding that the juror was not unable or disqualified, explaining that though the juror, "may be unhappy, [he] would still be fair and impartial." The trial court's willingness, despite its own finding, to dismiss the juror with the parties' consent, was not a failure to use its discretion, but an exercise of that discretion. We perceive no abuse of discretion in its decision.

II.

Appellant argues that the circuit court erred in unfairly limiting defense counsel's cross-examination of Officer Krauss. Appellant sought to question Officer Krauss about a pending civil suit against him and whether he had hoped to avoid criminal liability by

testifying for the State. Appellant intended to argue that Officer Krauss's negligence, or gross negligence, was the cause of Detective Colson's death, as a defense to the charge of second-degree depraved heart murder.

The State responds that appellant did not preserve these challenges because he failed to articulate the substance and relevance of the testimony he expected to elicit from Officer Krauss. Even if preserved, the State argues that the circuit court did not err in limiting appellant's cross-examination of Officer Krauss because the expected testimony from Officer Krauss would not establish a motive to fabricate his trial testimony.

A criminal defendant's right to confront the witnesses against him is guaranteed by the Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. *Manchame-Guerra v. State*, 457 Md. 300, 309 (2018). "To ensure the right of confrontation, defense counsel must be afforded wide latitude to cross-examine a witness as to bias or prejudices." *Id*. (citations and internal quotation marks omitted). A defendant's right to cross-examination, however, is not without some limitations. *Pantazes v. State*, 376 Md. 661, 680 (2003). Trial courts may limit cross-examination "'when necessary for witness safety or to prevent harassment, prejudice, confusion of the issues, and inquiry that is repetitive or only marginally relevant.'" *Manchame-Guerra, supra,* 457 Md. at 309 (quoting *Peterson v. State*, 444 Md. 105, 122-23 (2015)). *See also Smallwood v. State*, 320 Md. 300, 307-08 (1990) (recognizing that a trial court may limit cross-examination that "obscure[s] the trial issues and lead[s] to the factfinder's confusion").

In *Pantazes*, 376 Md. at 681-82, the Court of Appeals reiterated the standard under which we review a trial court's restriction of cross-examination, as follows:

> The scope of cross-examination lies within the sound discretion of the trial court. This discretion is exercised by balancing the probative value of an inquiry against the unfair prejudice that might inure to the witness. Otherwise, the inquiry can reduce itself to a discussion of collateral matters which will obscure the issue and lead to the fact finder's confusion. An undue restriction of the fundamental right of cross-examination may violate a defendant's right to confrontation. Whether there has been an abuse of discretion depends on the particular circumstances of each individual case. On appellate review, we determine whether the trial judge imposed limitations on cross-examination that inhibited the ability of the defendant to receive a fair trial.

(Internal quotations and citations omitted).

The State moved in limine to preclude the defense from asking Officer Krauss about a civil suit filed against him by the family and estate of Detective Colson. Defense counsel argued that Officer Krauss's responses to questions about the civil suit could be used to mount a defense to the charge of depraved heart murder because the civil suit alleged that Officer Krauss's negligence was the cause of Detective Colson's death. Defense counsel asserted that Officer Krauss could have a motive to lie to at trial to limit his financial exposure in the civil case.

"Where evidence is excluded, a proffer of substance and relevance must be made in order to preserve the issue for appeal." *Pickett v. State*, 222 Md. App. 322, 345 (2015) (citation omitted). The proffer need not be extremely specific, but it must, at a minimum, be sufficient to show that cross-examination will elicit information "nominally relevant" to the issues at trial. *Grandison v. State*, 341 Md. 175, 208 (1995). "A simple assertion

that cross-examination will reveal bias is not sufficient to establish a need for that cross-examination; it is necessary to demonstrate a relevant relationship between the expected testimony on cross-examination and the nature of the issue before the court." *Id.* After hearing argument, the court took the motion under advisement. Later that day, the court asked defense counsel what, specifically, he planned to ask Officer Krauss about the civil lawsuit:

> THE COURT: [Defense counsel], in dealing with the motion. Did you just want to ask the witness are you the subject of a lawsuit, or what area specifically are you thinking of questioning him about?
>
> [DEFENSE COUNSEL]: Your Honor, to be quite candid I'm not sure exactly, it depends on how he testifies. Then I will inquire.
>
> THE COURT: Just talking about the lawsuit portion question. I imagine there is no dispute that his shot is the one that actually killed Officer Colson right?
>
> [DEFENSE COUNSEL]: Yes, I think that is undisputed.
>
> [PROSECUTOR]: Judge, counsel has the statement that the witness provided.
>
> THE COURT: I guess I'm not following you about the line of questions. As far as motive to lie, you don't expect him to lie and deny it was his shot that was the fatal shot. So what motive to lie –
>
> [DEFENSE COUNSEL]: I would ask the court to allow that to be fleshed out through direct and cross. Then –
>
> THE COURT: I would need to know before cross.

At the conclusion of the State's direct examination of Officer Krauss, the State renewed its motion in limine. Defense counsel argued that that the civil suit related to

Officer Krauss's "credibility," arguing that his testimony was "inconsistent" with his "previous statements," and he wanted to elicit what had "generate[d] that inconsistency" because Office Krauss may attempt to "minimize his exposure [for] being negligent or being found in gross negligence for the suit."

When pressed to identify the inconsistencies, defense counsel responded, "[y]ou may not know. It will be elicited through cross-examination. His testimony now is inconsistent … [with] the interview that he gave in July." The court granted the State's motion in limine, indicating that it would reconsider, if warranted, by the officers' testimony during cross-examination. Before moving on, defense counsel clarified the court's ruling:

> [DEFENSE COUNSEL]: To be clear, so I will make sure that there are no errors. The court is ruling that the – the court is saying that I cannot explore as a reason for his inconsistencies, or a reason for his testifying as if he did nothing wrong is because he is concerned about his civil suit, or one of the reasons is because he is concerned with the civil suit?
>
> THE COURT: At this juncture, yeah.

Officer Krauss testified during direct examination that he had fired three shots, and that the third shot had struck Detective Colson. The court permitted defense counsel to question Officer Krauss regarding a prior inconsistent statement that he provided to the State's Attorney's Office during a proffer on May 6, 2016, in which he stated that he had fired twice at Detective Colson. Officer Krauss testified that he did not remember saying that and that he "must have remembered it that way at the time."

At a subsequent bench conference, defense counsel requested permission to question Officer Krauss about facing potential criminal liability for Detective Colson's death because, he argued, "[i]t goes to his credibility" and "motive, bias, prejudice" The court asked defense counsel why it was relevant to refer to potential civil or criminal liability and he responded that "[i]t is the State's Attorney's office who decided not to prosecute [Krauss]. So he can feel as though he is garnering favor for the State quid pro quo. You don't prosecute me, I'll give a statement that is helpful to the prosecution of Mr. Ford, quid pro quo."

The court noted that there was no evidence that the State's Attorney's Office had made a determination that it would not prosecute Officer Krauss, nor was there evidence as to "whether [Officer Krauss's] actions rose to a criminal nature." The court permitted defense counsel to inquire as to prior inconsistent statements, but sustained the State's objection as to whether Officer Krauss believed he was under criminal investigation for the death of Detective Colson. The court also noted that the defense remained precluded from inquiring about the civil suit.

With respect to the State's preservation argument, we note that appellant's proffers provided little insight into the substance of the testimony he sought to elicit regarding the civil lawsuit and potential criminal liability, and the relevance of such evidence to the issues before the court. Though the proffers may have been sufficient to preserve the issues for appeal, we hold that the trial court did not err or abuse its discretion in refusing to permit the defense to cross-examine Officer Krauss about the civil suit or any potential criminal liability. *See Grandison*, *supra*, 341 Md. at 209 (concluding that defendant's proffer that

a witness's civil suit was evidence of bias "may have been sufficient to preserve the issue for appeal but was entirely insufficient to show even nominal relevance to the … proceeding at hand").

Rule 5-616(a)(4)[1] requires that, for any question "suggesting that a witness is biased or has a motive to testify falsely, there must be a factual foundation for the question." *Peterson v. State*, 444 Md. 105, 135 (2015) (citing *Calloway v. State*, 414 Md. 616, 638 (2010). We note that appellant was permitted to impeach Officer Krauss's credibility, as the trial court did not preclude appellant from introducing evidence of inconsistencies in Officer Krauss's testimony. Nonetheless, appellant failed to show any factual basis for his assertion that the civil suit, or potential criminal liability, demonstrated a motivation for Officer Krauss to fabricate his testimony.

This case is distinguishable from the case of *Machame-Guerra, supra*, 457 Md. at 319, cited by appellant, in which the Court of Appeals found that the trial judge improperly restricted defense counsel from asking a witness whether, in exchange for his testimony, he expected some leniency from the State with respect to pending criminal charges. The Court held that there was sufficient circumstantial evidence to establish a factual foundation related to the witness' pending charges, which had remained pending in the

[1] Md. Rule 5-616(a)(4) states that "[t]he credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at ... [p]roving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely."

same county for eighteen months, to permit questioning as to the witness' motive to testify. *Id*. at 320-21.

In *Cagle v. State*, 235 Md. App. 593, 616, *aff'd*, 462 Md. 67 (2018), we addressed a similar situation involving the restriction of cross-examination of a witness for potential bias. In *Cagle*, a police officer was charged with first-degree assault in connection with the shooting of a suspect following the suspect's apprehension. *Id*. at 602. At the time that Cagle shot the suspect, the suspect had already been shot by another officer on the scene. *Id*. at 601. At trial, Cagle attempted to show, by cross-examining the fellow officer as to whether he was aware of allegations that he was the officer who had shot the suspect, that the officer was biased and motivated by self-interest. *Id*. at 616. We concluded that there was an insufficient factual foundation for the questioning of the fellow officer, where the officer had admitted to firing the initial shots at the suspect, the statement implicating him was not in evidence, and he had not been charged in the shooting for which Cagle was on trial. *Id*. at 618. We also distinguished *Manchame-Guerra*, noting that, unlike *Manchame-Guerra*, the witness whom Cagle sought to impeach was not charged with a crime – related or unrelated – at the time of Cagle's trial. *Id*. at 619, n.7.

In the present case, there was no factual foundation for appellant's assertion that Officer Krauss may have been motivated to lie in order to limit his civil and criminal liability. There was no evidence of an agreement between Officer Krauss and the State indicating that Officer Krauss would benefit from testifying. Nor was there any agreement as to whether the State would charge Officer Krauss criminally or forgo charges, as the State had represented that no such decision had been made. There was also no dispute that

Officer Krauss had fired the shot that killed Detective Colson. Because an inquiry into collateral legal issues, existing and potential, would result in confusion of the issues, we perceive no abuse of discretion in the trial court's decision to refuse to allow appellant to inquire as to Officer Krauss's potential civil and criminal liability. *See Calloway*, 414 Md. at 638 (explaining that questions intended to probe a witness's bias should be prohibited when: "'(1) there is no factual foundation for such an inquiry in the presence of the jury, or (2) the probative value of such an inquiry is substantially outweighed by the danger of undue prejudice or confusion'") (quoting *Leeks v. State*, 110 Md. App. 543, 557-58 (1996)).

Even if the court's decision was erroneous, any error was harmless beyond a reasonable doubt. *Hall v. State*, 437 Md. 534, 540-41 (2014). Assuming appellant's cross-examination of Officer Krauss established that he was aware that he had potential civil and criminal liability, the inquiry would have no impeachment value and no relevance. Moreover, such a showing would have minimal effect on the fact that, though Officer Krauss had shot and killed Detective Colson, it was appellant who perpetrated the attack on the police department that prompted Officer Krauss's response, resulting in Detective Colson's death.

III.

Appellant contends that the trial court erred in permitting the State to argue facts not in evidence during rebuttal argument. He argues that the prosecutor's comment that Ford directed his brothers to record the assault "so they could post it on the internet" resulted in reversible error.

The State argues that the trial court acted within its discretion in controlling the scope of the prosecutor's rebuttal argument. The State contends that the prosecutor was permitted to respond to appellant's testimony, specifically appellant's version of events that he attacked the police station because he wanted to be killed by police and he did not intend to harm anyone. The State further contends that the prosecutor's remarks about appellant's brothers posting the attack on the internet was a fair comment on the evidence, and, even if improper, it did not merit reversal.

At trial, appellant testified that he shot at the police station because he wanted the police to kill him and he had not planned to hurt anyone. He testified that his brothers, Malik and Elijah, dropped him off near the police station before the shooting. Appellant explained that he exited the car and "[his] brother was recording it." Malik's cell phone video showed appellant walking in the wrong direction, initially, and Malik redirecting appellant toward the police station. Prior to the shooting, Elijah recorded a video of appellant explaining that he was giving away his possessions and that he loved his parents, which appellant described as his "last words." Appellant denied that Malik and Elijah recorded his assault at his direction or that their plan was to post the video on an internet site.

In closing argument, the defense argued that appellant was a troubled man who had simply wanted to die by police shooting. In rebuttal, the prosecutor sought to discredit appellant's version of events and his claim that the attack was simply a suicide mission:

> [PROSECUTOR]: Let me tell you when this suicide thing became a big thing. Once he was arrested and once he was on the ground and he had been shot and he was going to be placed

> in handcuffs, then all of [a] sudden this became this isn't an attack, this was a suicide. So this [is] an argument to tell you all. That's what this is. He just changed it. As things go, just like yesterday, this was an attack on police officers and civilians *with his brothers to record so they could post it on the internet.* That's what this was. They were going to –
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Excuse me?
>
> get enjoyment –
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Basis?
>
> [DEFENSE COUNSEL]: No evidence of that.
>
> THE COURT: Argument. Overruled.
>
> [PROSECUTOR]: They were going to get enjoyment from having this little event put on the internet.

(Emphasis added).

"Closing arguments are an important aspect of trial, as they give counsel an opportunity to creatively mesh the diverse facets of trial, meld the evidence presented with plausible theories, and expose the deficiencies in his or her opponent's argument." *Donaldson v. State*, 416 Md. 467, 487 (2010) (internal quotation marks and citation omitted). Generally, parties are permitted "'liberal freedom of speech'" during closing arguments and "'may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom.'" *Whaley v. State*, 186 Md. App. 429, 452 (2009) (quoting *Spain v. State*, 386 Md. 145, 152 (2005)). In rebuttal, a prosecutor is permitted to respond to the arguments made by defense counsel during closing argument. *See Degren v. State*,

352 Md. 400, 433 (1999) ("[P]rosecutors may address during rebuttal issues raised by the defense in its closing argument.") (citing *Blackwell v. State*, 278 Md. 466, 481 (1976)). Prosecutors may not, however, comment upon facts not in evidence. *Francis v. State*, 208 Md. App. 1, 15 (2012).

The determination of whether counsel's statements in closing were improper and prejudicial is within the sound discretion of the trial court to decide, and we "generally will not reverse the trial court unless the court clearly abused the exercise of its discretion and prejudiced the accused." *Sivells v. State*, 196 Md. App. 254, 271 (2010) (internal quotations and citations omitted). We generally defer to the judgment of the trial court because it "is in the best position to determine whether counsel has stepped outside the bounds of propriety during closing argument." *Whack v. State*, 433 Md. 728, 742 (2013).

The State's comments were a targeted response to refute the validity of appellant's proffered motive of suicide. The State was free to argue its theory of the evidence to the jury. *See Winston v. State*, 235 Md. App. 540, 574 (2018) ("Counsel is free to state and discuss all reasonable and legitimate inferences which may be drawn from the facts in evidence") (internal quotation marks and citation omitted). *Accord Donaldson*, *supra*, 416 Md. at 487-88 (noting that the purpose of closing arguments is to allow counsel to argue their respective versions of the facts and point out the inferences they want the jurors to draw from the testimony). Moreover, we note that the prosecutor's theory that appellant's attack was intended to be a "performance crime," a practice where people post videos of

crimes on the internet, though disturbing, is not a novel concept.[2] We conclude that the prosecutor's remarks were fair comment that was "warranted by the evidence or inferences reasonably drawn therefrom." *Degren*, 352 Md. at 430 (internal quotations and citation omitted). Accordingly, the trial court did not abuse its discretion in overruling appellant's objection to the prosecutor's remarks.

Even if the remarks were improper, we do not believe that the error would require reversal. *See Wilhelm v. State*, 272 Md. 404, 431 (1974) ("The mere occurrence of improper remarks does not by itself constitute reversible error"). Reversal is required only if it appears that improper remarks "actually misled the jury or were likely to have misled or influenced the jury to the defendant's prejudice[.]" *Donaldson*, *supra*, 416 Md. at 496-97 (internal quotation marks and citation omitted). In determining whether an improper remark constitutes reversible error, we consider the severity of the remarks, the measures taken to cure any potential prejudice and the weight of the evidence against the defendant. *Id.* at 497 (citation omitted). In this case, the prosecutor's comment on the intended use of the video recording was a peripheral issue in the case. There was no dispute that appellant opened fire on the police station and that his brothers recorded the event. The trial judge instructed the jury that closing arguments were not evidence. Even if the State's remarks

[2] *See* Ray Surette, *Social Networks Set Off a 'Performance Crime' Spree,* Newsweek, (January 30, 2016) https://www.newsweek.com/social-networks-set-performance-crime-spree-420826 (last visited May 20, 2020) (stating that in the context of a "celebrity culture, social media has resulted in offenders posting pre-crime confessions, videos of themselves committing offenses and post-crime footage holding evidence and bragging about their criminal acts").

were improper, we are persuaded that those remarks were not likely to have misled the jury or deprived appellant of a fair trial.

IV.

Appellant argues that the circuit court erred by instructing the jury on second-degree depraved heart murder because the instruction was not generated by the evidence. Specifically, appellant contends that Officer Krauss's actions in shooting Detective Colson were too far removed from appellant's conduct to warrant the instruction.

Maryland Rule 4-325(c) provides that "[t]he court may, and at the request of any party shall, instruct the jury as to the applicable law[.]" We review a trial court's decision to give or refuse to give an instruction for an abuse of discretion. *Bazzle v. State*, 426 Md. 541, 548 (2012). "[W]hether the evidence is sufficient to generate the desired instruction," however, "is a question of law for the judge.'" *Id.* at 550 (quoting *Dishman v. State*, 352 Md. 279, 292 (1998)). *Accord Page v. State*, 222 Md. App. 648, 668 (2015). A requested instruction is warranted so long as there is "'some evidence' that supports the requested instruction[.]" *Bazzle*, *supra*, 426 Md. at 551. The threshold of demonstrating "some evidence" is very low. *Id.*

"Second degree depraved heart murder requires 'the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not.'" *Owens v. State*, 170 Md. App. 35, 102-03 (2006) (quoting *Robinson v. State*, 307 Md. 738, 774 (1986). The crime arises from conduct "manifesting extreme indifference to the value of human life" and "can be committed with or without an intent to injure." *Id.* (citations omitted). It is the result of "wanton

indifference to the consequences and perils involved," and therefore, "is just as blameworthy, and just as worthy of punishment, when the harmful result ensues, as is the express intent to kill itself." *DeBettencourt v. State*, 48 Md. App. 522, 530 (1981).

Both parties argue that *Alston v. State*, 101 Md. App. 47 (1994), is instructive, though appellant contends that *Alston* is distinguishable from the facts in the present case. In *Alston*, a gang shootout in a residential neighborhood resulted in the death of two innocent bystanders who were attempting to escape the onslaught of gunfire. *Id*. at 52-53. Alston, one of the gunmen who participated in the shootout, argued on appeal that the evidence was insufficient to sustain his conviction for second-degree depraved heart murder. *Id*. at 55. This Court explained that because "the lethal conduct in this case was the shoot-out itself," it declined to separate the shooting into "discrete life-endangering acts," depending on which bullets were propelled from which guns. *Id*. at 58. We determined that "the conduct of the appellant, as well as the conduct of all of the other combatants, was conduct 'manifesting extreme indifference to the value of human life,'" and, as such, was sufficient to sustain his conviction for second-degree depraved heart murder. *Id*. at 59.

In this case, there was more than sufficient evidence to generate the instruction for second-degree depraved heart murder. Appellant incited a shootout with the police in front of a police station. Though appellant claimed that he did not intend for anyone else to get hurt in the attack, the evidence showed that appellant armed himself with a semiautomatic handgun and opened fire, expelling twelve bullets before taking cover behind a police van

to reload the weapon and continue his assault. Appellant fired, by his count, a minimum of nineteen shots, aimed at police officers, paramedics and civilians.

In the chaos that ensued as police attempted to locate and contain the shooter, Detective Colson, a black male dressed in plain clothes, firing a weapon in the direction of the police station, was mistaken for the shooter and killed. Appellant's deliberate perpetration of a shootout with police "trigger[ed] an escalating chain reaction creating a high risk to human life," *id*. at 49, which did not end the moment appellant was shot and disarmed. In sum, the second-degree depraved heart instruction was clearly generated by the evidence. We, therefore, affirm the judgments of conviction.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.