UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2632

September Term, 2012

STEVEN MAURICE LEWIS

v.

STATE OF MARYLAND

Meredith,
Woodward,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: May 1, 2015

A jury in the Circuit Court for Kent County convicted Steven Maurice Lewis of robbery with a deadly weapon, attempted robbery with a deadly weapon, conspiracy and related offenses. In this appeal Lewis raises a variety of arguments to challenge his convictions.[1]

While we shall vacate several duplicative convictions and sentences, we otherwise affirm.

BACKGROUND

Although Lewis does not challenge the sufficiency of the evidence, we note some facts from the trial for context. *See Westray v. State*, 217 Md. App. 429, 434 n.2 (2014) (collecting cases). Moreover, we shall set forth relevant facts as we address the issues before us. Finally, regardless of the issues presented, we review the record as a whole to consider whether any error found is harmless beyond a reasonable doubt. *See Dorsey v. State*, 276 Md. 638, 659 (1976).

A reasonable jury could have found as follows.

[1] Lewis maintains that he should have been convicted of a single conspiracy. He raises two issues with respect to jury instructions, challenges the admission of a photo array that shows him in prison attire, complains that the trial court erred by limiting cross-examination of a prosecution witness, says that the court erred by denying his motion to suppress, and raises two hearsay arguments – the first challenging the trial court's allowance of certain cross-examination by the State and the second contesting the admission of hearsay statements by co-conspirators.

The genesis of the charges against Lewis is a home invasion/robbery shortly after midnight on March 31, 2011, in Chestertown, Kent County. The target residence belonged to Roger and Yolanda Brown. In addition to the Browns, some others, including individuals with special needs, were present at the house. Some of the occupants of the house were assaulted by the intruders, thought to number five men. The intruders demanded money and drugs, but left with far less because of a timely response by the police to a 911 call. Indeed, police responders saw three of the intruders fleeing from the house at different times. Lewis was arrested later that morning.

The prosecution primarily relied on the testimony of two witnesses, Dominic Pritchett and Timothy Brown, two of the participants in the robbery. Brown was recruited as a participant by his uncle, Clarence Cornish. In the afternoon of March 30, 2011, Brown met with Cornish and Pritchett during his lunch hour at Cornish's house in Cambridge to discuss the plan.

That evening Cornish, Brown and Pritchett met again at about 9:00 p.m. at a mini-mart in Cambridge. Jermaine (aka Brondale) Ancrum, who was unknown to Pritchett and Brown, joined them there and the four men proceeded to Chestertown, stopping briefly in Easton. They arrived at a McDonald's and waited for the arrival of the fifth participant – Lewis. Lewis joined them at the McDonald's and the group left for the Brown residence.

Pritchett testified that Lewis provided directions to the home; Lewis in turn had been instructed where to go by an acquaintance, Donte Emory.

Maryland State Police Sergeant Steven Hall participated in the response to the 911 call, and at about 6:00 a.m. discovered Ancrum, who was asleep in his vehicle about 200 yards from the Brown residence. Ancrum's vehicle, a Ford Escape, was parked near another car, a Ford Crown Victoria, containing documents associated with Timothy Brown. A cell phone and a man's wallet belonging to Pritchett were recovered from the glove box of the Crown Victoria. A number of items were found on Ancrum. Hall secured these in Ancrum's Ford Escape, and obtained a search warrant for the Escape and its contents. One of the items recovered from the Escape was a receipt from a McDonald's restaurant from about 11:30 p.m.

We shall recite additional facts to the extent they relate to the issues before us.

DISCUSSION

I. Limitations on cross-examination.

Lewis complains that the trial court "impermissibly restricted cross-examination of Timothy Brown concerning his eligibility for parole." The ruling complained of occurred in the following context during cross-examination:

> [DEFENSE COUNSEL:] Are you eligible for parole under that . . . in that . . . for that 10 years?

> [PROSECUTOR:] Objection.
>
> THE COURT: Sustain. Again, I'm not sure anybody really knows about that.

The right to cross-examine an adverse witness is a "right guaranteed by the common law[,]" *Myer v. State*, 403 Md. 463, 476 (2008), the Sixth Amendment, *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986), and by Article 21 of the Maryland Declaration of Rights. *See Martinez v. State*, 416 Md. 418, 428 (2010). In *Lewis v. State*, 71 Md. App. 402, 412 (1987), we emphasized that the "credibility of any witness is a proper subject of cross-examination[,]" especially where the "weight of the State's case rests almost exclusively upon the testimony of th[at] witness[.]"

Standard of Review

The determination of the scope of cross-examination is committed to the trial court's discretion, which we review for abuse. *See Martin v. State*, 364 Md. 692, 698 (2001). The trial court's discretion has its limits, because "a cross-examiner must be given wide latitude in attempting to establish a witness' bias or motive to testify falsely." *Id*. (citation and internal quotation marks omitted). A "trial judge may not exercise his discretion to control the limits of cross-examination *until* the constitutionality required threshold level of inquiry has been afforded the defendant." *Brown*, 74 Md. App. 414, 419 (1988) (emphasis added) (citing cases). This threshold is satisfied when the defense is afforded "sufficient leeway to

establish a reasonably complete picture of the witness' veracity, bias, and motivation." *United States v. Capozzi*, 486 F.3d 711, 723 (1st Cir. 2007).

Analysis

Lewis has not persuaded us that the trial court abused its discretion by limiting the cross-examination of Brown on the issue of whether, or when, he thought he would be eligible for parole. The trial court properly reasoned that the question could only have prompted speculation.

The cross-examination of Brown clearly met an adequate constitutional threshold. The jury heard testimony about his agreement with the State and the favorable treatment it entailed in return for his testimony. Further, the State's argument that Lewis failed to make an adequate proffer is well-taken. *See* Md. Rule 5-103(a)(2). *Cf. Merzbacher v. State*, 346 Md. 391, 416 (1997) ("formal proffer of the contents and relevancy of the excluded evidence must be made in order to preserve for review the propriety of the trial court's decision to exclude the subject evidence.").

In the final analysis, Lewis would have this Court reverse the convictions reached after a lengthy trial because the trial court refused to let defense counsel ask Brown to speculate about his parole eligibility. Indeed, Lewis's appellate claim is undermined by counsel's rhetorical flourish in closing argument that the State's key witnesses, Brown and

Pritchett, were "heavily impeached." The trial court did not abuse its discretion by limiting Lewis's cross-examination of Brown.

II. Admission of Lewis's Statement

Lewis, by counsel, sought to suppress statements he gave to investigators. On June 29, 2012, the motions court conducted a suppression hearing, and on July 3rd issued a Memorandum Opinion denying the motion to suppress. We take the relevant facts from the findings of the motions court:

> At 6:15 a.m. dispatch contacted Sgt. Linz requesting that he respond to a citizen report that a black male was observed running in a field between one and two miles south of the Broadneck Road house in the area of the intersection of Broadneck and Langford Road. At that time there still remained two suspects at large in the area. Sgt. Linz and Lieutenant Metzbower ("Lt. Metzbower") responded to the complaint in two separate vehicles. They arrived at the intersection of Broadneck and Langford Roads around 6:26 a.m. Sgt. Linz remained in the intersection to see if he could observe anyone from the roadway and Lt. Metzbower proceeded East down Langford Road. Lt. Metzbower located a black man walking east away from the Broadneck Road's intersection with Langford Road. The suspect was wearing white tennis shoes, dark blue jeans, and a grey hooded sweatshirt. The weather that morning was wet and cold with intermittent rain and Lt. Metzbower observed that the suspect's clothes were damp and his jeans and shoes were muddy.

Lt. Metzbower apprehended Lewis. Lewis was placed in handcuffs and informed that he was "being detained as a possible suspect in an ongoing investigation of an armed home invasion." A search of Lewis's pockets and waistband yielded "nothing of an illegal nature."

Ruling against Lewis, the motions court first concluded that Lewis had been arrested. Nonetheless, the court ruled, the arrest was supported by probable cause. The court explained that Lewis was encountered on a sparsely populated road in an "agricultural area," with no commercial establishments nearby. His clothing was wet and muddy and Lewis appeared to have spent time out in the elements. The officers were aware that a violent home invasion had taken place earlier that morning in the vicinity, and that two suspects, at the least, were still at large. Like the men who were seen fleeing the scene of the home invasion, Lewis wore dark clothing, and the officers did not recognize him as someone from the area.

The motions court then concluded:

> The Court, having examined the above-mentioned events leading up to the Defendant's apprehension and applying a common sense evaluation of the totality of the circumstances taken together with rational inferences from these facts finds that an objectively reasonable police officer would have reasonable grounds to believe that the Defendant had been involved in the home invasion. The Defendant's proximity in time and place to the home invasion, the mud on the pants and shoes suggesting that the Defendant could very likely have been the individual seen running through the fields, and the knowledge that a black male had fled from the scene of the home invasion, all taken together, create the grounds for reasonable belief of the Defendant's guilt. Lt. Metzbower

> testified that the Defendant's suspicious explanation for wandering in the area pre-dawn also made him suspicious. The Court finds that even without those statements, the officers had probable cause to arrest the Defendant and in fact did arrest Lewis before those statements were made.

Aggrieved by the motions court's action, Lewis asserts that the police lacked either probable cause or an articulable suspicion of wrongdoing when they detained him. We agree with Lewis that the officers did not have probable cause to arrest him that morning. Nonetheless, we consider the admission of the Lewis's statements at trial to be harmless beyond a reasonable doubt.[2]

Standard of Review

We confine our analysis to the evidence that was presented at the suppression hearing, as viewed in the light most favorable to the prevailing party on the motion. *Elliott v. State*, 417 Md. 413, 427-28 (2010). We scrutinize first level findings for clear error. *Wilkes v. State*, 364 Md. 554, 569 (2001). Legal rulings present mixed questions of law and fact and are reviewed de novo.[3] *Whiting v. State*, 389 Md. 334, 345 (2005).

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[2] The record does not reveal the State's rationale for wishing to introduce Lewis's non-incriminating statements.

[3] The State incorrectly suggests that appellate review of a circuit court's determination of probable cause is subject to review for clear error, urging that the "trial court's finding that the police had probable cause to arrest Lewis . . . was not clearly erroneous[.]" The motions court's *findings* of historical fact are reviewed for clear error. The "existence of probable cause *per se* is a mixed question of law and fact susceptible to (continued...)

Analysis

Lewis asserts that his statements to police should have been suppressed because they were derived from an unlawful arrest. The "Fourth Amendment to the U.S. Constitution prohibits unreasonable searches and seizures by the government, including seizures that involve only a brief investigative detention." *Crosby v. State*, 408 Md. 490, 505 (2009). Ordinarily, the appropriate remedy for a violation of this Amendment is the suppression of any evidence directly uncovered as a result of the illegal police conduct, *see Mapp v. Ohio*, 367 U.S. 643, 648 (1961), or derivative evidence – the "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). The Fourth Amendment is implicated because the disputed statements were, according to Lewis, derived from the primarily illegality of his arrest. *See Wong Sun v. United States*, 371 U.S. at 487-88.

We agree with the motions court that Lewis was arrested, but disagree that the arrest was supported by probable cause. The opinion in *Henry v. United States*, 361 U.S. 98 (1959) is instructive. Henry was convicted of illegal possession of radios. Federal agents were investigating a theft of whiskey from a terminal in Chicago that had occurred the previous day, when they saw Henry and a companion leave a tavern and enter a car. The agents knew

[3](...continued)
de novo review." *Patterson v. State*, 401 Md. 76, 119 (2007). *See Ornelas v. United States*, 517 U.S. 690, 696 (1996). *See also Boyd v. Cross*, 35 Md. 194, 197 (1872).

of rumors implicating Henry in illegal activity, and followed. The Supreme Court's opinion sets the scene:

> The agents . . . saw petitioner and Pierotti leave the tavern, get into the car, and drive off. The car stopped in the same alley as before; petitioner entered the same gangway and returned with more cartons. The agents observed this transaction from a distance of some 300 feet and could not determine the size, number or contents of the cartons. As the car drove off the agents followed it and finally, when they met it, waved it to a stop. As he got out of the car, petitioner was heard to say, "Hold it; it is the G's." This was followed by, "Tell him he (you) just picked me up." The agents searched the car, placed the cartons (which bore the name "Admiral" and were addressed to an out-of-state company) in their car, took the merchandise and petitioner and Pierotti to their office and held them for about two hours when the agents learned that the cartons contained stolen radios. They then placed the men under formal arrest.

Henry v. United States, 361 U.S. at 99-100. The Court concluded that the arrest was not supported by probable cause:

> Riding in the car, stopping in an alley, picking up packages, driving away – these were all acts that were outwardly innocent. Their movements in the car had no mark of fleeing men or men acting furtively.

Id., 361 U.S. at 103.

Lewis's activity that prompted the arrest was also "outwardly innocent." To be sure, officers were on the alert because the home invasion had taken place just a few hours earlier that morning. Lewis seemed out of place in the agricultural areas, and his clothing and shoes

were wet and muddy. An officer may well have suspected that Lewis had been wandering in the fields for five of six hours. Certainly, given the events earlier that morning, the police could reasonably have stopped Lewis to investigate his presence in the fields within one to two miles of the Brown residence. *See generally, Terry v. Ohio*, 392 U.S. 1 (1968).

Because we conclude that probable cause was lacking, the arrest was unlawful and any derivative evidence was due to be suppressed.[4] Notwithstanding, as we explain below, we consider any error in the admission of Lewis's statements to the police to be harmless beyond a reasonable doubt.

Statements made to Sgts. Dana Wenger and Sabrina Metzger

The disputed statements were made during Lewis's interview by two Maryland State Police Troopers, Dana Wenger and Sabrina Metzger, on the morning of his arrest.[5]

Wenger recalled that Lewis gave a statement:

[4] We do not have the occasion to consider whether the admission of Lewis's statements was sufficiently attenuated so that they were not obtained by exploiting the illegal arrest. *See generally*, *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975). We do note that, of the factors employed to determine whether Lewis's statements were the fruit of the illegal arrest, or whether they were obtained by "means sufficiently distinguishable to be purged by the primary taint[,]" *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963), the factor of the "purpose and flagrancy of the police misconduct" weighs in favor of the State.

[5] The motions court suppressed statements that had been made before Lewis was advised of his *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436 (1966). The "*Miranda* warnings are an important factor . . . in determining whether the [statements are] obtained by exploitation of an illegal arrest. But they are not the only factor to be considered." *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975).

> He told us that, on March 30th of 2011 last year just before midnight, that he met up with some . . . some guys at Fairlee Apartments in Chestertown. He said that he was drinking with these guys at a female friend's apartment, but he refused to provide the names of any of the subjects to us. He told us that, while he was at the apartment, he went with two unknown girls to buy some weed around midnight. He told us that he drove and . . . that the . . . the girls drove. He went in their car with them. He said that, while . . . while they were driving, he asked the unknown girls if they would pull over because he had to urinate. He said that, when he got out of the car to urinate, he told us that the girls pulled off and left him on the side of the road. He told us that his cell phone was still in the car so he didn't have any way of calling anyone for help, so he just started walking down the road.

During Lewis's interview, officers questioned another person of interest, Donte Emory, in the next room. Emory told them about Lewis's cell phone:

> While we were interviewing the Defendant, other investigators were also interviewing other suspects at the same time. The Defendant originally told us that his cell phone number was [xxx-xxx-xxxx]. However, we discovered that the Defendant was making calls to another –

At this point, defense counsel objected and moved to strike:

> [DEFENSE COUNSEL]: Your Honor, I believe it's evidence related to certain phone numbers and an individual which I already know, per an exhibit, that we've agreed upon that there's no record and/or proof of . . . that's gonna come into evidence of this other phone number, this other phone that was not seized, I believe, at this point related to Donte Emory. And none of those records are coming in and can come in.

After defense counsel noted that Emory was not going to testify, and implied that the questioning sought hearsay testimony, the trial court sustained her objection.

With the hearsay issue resolved, Wenger testified that she received information from a source that prompted her to confront Lewis about his claim that he had lost his cell phone. Lewis changed his story and recalled that he had the phone at one time. He also acknowledged that he knew Donte Emory, referring to this acquaintance as "Tay."[6]

Harmless Error

Any error in not suppressing Lewis's statements did not affect the verdict. We recognize that the "harmless error test is well established, and relatively stringent." *Dionas v. State*, 436 Md. 97, 108 (2013). The rule for harmless error analysis is well established:

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

Morris v. State, 418 Md. 194, 221 (2011) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976) (footnote omitted)). *See Hutchinson v. State*, 406 Md. 219, 227 (2008) (noting continued

[6] Senior Trooper Metzger's testimony does not elaborate significantly on the recollections of Sgt. Wenger, and adds little to the latter's testimony about Lewis's statements.

validity of standard articulated in *Dorsey*) (collecting cases). *See also Brooks v. State*, 439 Md. 698, 736 (2014). Thus, a judgment can be upheld on harmless error grounds if the admission of this testimony could not have "contributed to the rendition of the guilty verdict." *Taylor v. State,* 352 Md. 338, 347 n. 7 (1998) (citation omitted).

In *Younie v. State*, 272 Md. 233 (1974), the Court, looking to the application of harmless error in then recent Supreme Court cases, set forth the standard it would apply:

> What is of importance, from an examination of the cases which discuss harmless error, is the realization that if the error goes to a substantial constitutional right (*e.g.* right to counsel – sixth amendment, right not to self-incriminate – fifth amendment) then unless the State can prove beyond a reasonable doubt . . . that a tainted confession *in no way influenced the verdict* such that the defendant would undoubtedly have been found guilty even if that evidence had not been received, its employment will always be error. Conversely, if the State can show beyond a reasonable doubt that the violation was technical in nature, as well as that the erroneously admitted evidence was merely cumulative, and that there was other overwhelming and largely uncontroverted evidence properly before the trier of fact, then the error would be harmless.

Younie v. State, 272 Md. at 246-47 (citations and parallel citations omitted, emphasis in original). The Court in *Dorsey* extended the harmless error analysis that had been applied for constitutional error as set forth in *Younie v. State* to cases involving non-constitutional error. *Dorsey*, 276 Md. at 659.

Judged in light of these standards, we conclude that the admission of Lewis's statements through the testimony of his interrogators was harmless beyond a reasonable doubt. Lewis's statements to the officers are not incriminating.

Further, testimony about Lewis's cell phone was derived primarily from another source, who was interrogated at the same time as Lewis.

III. Admission of Photograph of Lewis in Prison Uniform.

Lewis complains of the trial court's unnecessary admission of a photo array that depicted him and others in prison clothing. Lewis asserts that with the trial court's action, "a blow [was] struck to the presumption of innocence." We disagree and find no abuse of the trial court's discretion.

The array containing the disputed photograph had been shown to Timothy Brown during his direct examination. Defense counsel objected, asserting that the admission of that photo array, especially where another array with Lewis in street clothes had already been admitted, was unduly prejudicial.[7] *See* Md. Rule 5-403. After considerable argument at a bench conference, the court overruled Lewis's objections.

The Court of Appeals has emphasized:

[7] The prosecutor certainly missed the point of the objection by conflating the issues of the admissibility of a photograph because the identification procedure was flawed with the admissibility of trial evidence as unduly prejudicial.

> Noting that, "[t]he right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment," the Supreme Court concluded that "[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." Compelling a defendant to stand trial in identifiable prison attire impairs that presumption because it serves as a "constant reminder" that the accused is in custody, and presents an unacceptable risk that the jury will consider that fact in rendering its verdict. In addition to running afoul of the fair trial requirement of the Fourteenth Amendment, compelling a defendant to stand trial in prison attire is "repugnant to the concept of equal justice embodied in the Fourteenth Amendment," in that usually only those who cannot afford to post bail prior to trial are so compelled.

Knott v. State, 349 Md. 277, 286-87 (1998) (quoting *Estelle v. Williams*, 425 U.S. 501, 503-06 (1976)). In *Estelle v. Williams*, the defendant appeared at trial in prison clothing. Although his request for civilian clothes was denied, he did not raise the issue at trial. The Supreme Court ruled that Williams was not entitled to relief on the facts before it because he was not "compelled" to appear at trial dressed as a prisoner. Notwithstanding, the Court emphasized that a compelled appearance in such clothing would undermine the presumption of innocence:

> The potential effects of presenting an accused before the jury in prison attire need not, however, be measured in the abstract. Courts have, with few exceptions, determined that an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system. . . . This is a recognition that the *constant reminder* of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The

> defendant's clothing is so likely to be a *continuing influence throughout the trial* that, not unlike placing a jury in the custody of deputy sheriffs who were also witnesses for the prosecution, an unacceptable risk is presented of impermissible factors coming into play.

Estelle v. Williams, 425 U.S. at 504-05 (emphasis added). *See Davis v. State*, 196 Md. App. 81, 106 (2010).

We are not presented with a scenario where a defendant appears at trial in prison clothing, subject to the lengthy, continuing, scrutiny by the jurors. An intermediate appellate court in Missouri pointed out the distinction between a defendant attending trial wearing prison clothing and the trial court admitting a photograph of the defendant in the same clothing:

> Such reference [to *Estelle*] is misplaced, however, as . . . cases [that condemn trials where the defendant wears a prison uniform] deal not with the admission of photographs depicting a defendant in prison garb, but with a defendant dressed in prison clothes *throughout the duration of the actual trial*.

State v. Snowden, 285 S.W.3d 810, 817 (Mo. Ct. App. 2009) (emphasis added). To the same effect is a decision from the Indiana Supreme Court, wherein that court observed:

> In addition we find no merit in appellant's contention the photograph is similar to defendants appearing in court wearing jail clothes. In *Estelle v. Williams* . . . the Supreme Court indicated a juror's judgment may be affected by the constant reminder of the accused's condition implicit in the wearing of jail clothing. The Court also spoke of the continuing influence of such clothing during the course of the trial. In the case at bar

> *there was no constant and continuing reminder to be found in the one time offering of an item of evidence*. For these reasons we hold the trial court did not err in admitting the photograph into evidence.

Kelley v. State, 460 N.E.2d 137, 138-39 (Ind. 1984) (emphasis added). *See State v. Smith*, 92 P.3d 1096 (Kan. 2004) (stating "[M]ost jurors would hardly be shocked to learn that a murder suspect was taken into custody for some period of time, the only information communicated by jail clothing."); *Coleman v. State*, 546 N.E.2d 827, 831 (Ind. 1989) (stating that "jury naturally would presume" defendant was arrested on instant charge).

The admission of photographic evidence is committed to the sound discretion of the trial court. *See Wimpling v. State*, 171 Md. 362, 373 (1937). As with other evidence, photographs must be relevant to be admissible, and their prejudicial effect must not outweigh their probative value. *See State v. Broberg*, 342 Md. 544, 552-53 (1996). The trial court balanced both the relevance and the potential for undue prejudice that admitting the photograph would entail. We find no abuse of the court's discretion. Lewis advances no convincing argument for appellate relief on this issue.

IV. Admission of Hearsay

We turn to Lewis's argument that the trial court "erred by admitting hearsay evidence relating to statements to Jermaine Ancrum by his attorneys." We see no merit to Lewis's

argument, primarily because, while the disputed question called for a hearsay response, the question itself was not hearsay.

Ancrum, a key defense witness and one of the participants in the home invasion, steadfastly refused to implicate Lewis, and claimed that he had been approached by the prosecutor who sought to have him testify against Lewis. The prosecutor attempted to establish that the State would never make a deal with Ancrum and that it was not interested in any cooperation from him. The State's cross-examination appears to imply that, if no written offer letter was produced, then Ancrum's version of events was not credible.

Ancrum testified on direct examination that he pleaded guilty to charges arising out of these events and expected a sentence of 20 years. He agreed that he had been offered a "plea deal to testify against Steven Lewis[,]" but declined to implicate Lewis because Lewis "wasn't there."

The cross-examination at issue evolved within the following context. Initially, defense counsel did not object.

> [PROSECUTOR:] Okay. And you were honest when you said that the State made you an offer –
>
> A Correct.
>
> Q – that, if you testify, you'd get a better deal?
>
> A Correct.

Q You're . . . you got a copy of that letter?

A Nah. You said it out your mouth right here sittin' at, well, sittin' right there.

Q Did you get a copy of the letter?

[DEFENSE COUNSEL]: Objection, Your Honor. He's not letting the witness answer the question.

THE COURT: Let him answer.

BY [PROSECUTOR]:

Q The State never makes an offer without a letter, ever.

[DEFENSE COUNSEL]: Objection, Your Honor. That is testimony.

THE COURT: Sustain.

The prosecutor then posed the question that is the basis for Lewis's appellate hearsay complaint:

BY [PROSECUTOR]:

Q Didn't . . . didn't your lawyers tell you that the State doesn't make an offer without it [being] in writing?

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Well, that's a fair question. I'll overrule.

Did your lawyers tell you that?

BY [PROSECUTOR]:

Q Did your lawyers – you had two – did they tell you that?

Ancrum sidestepped the question, because he neither confirmed nor denied that his attorneys told him that plea offers were always made in writing. He instead insisted that he would have rejected such an offer out of hand:

> A Well, it was never a question of they . . . goin' through with it, because I shot it down the times they came to me.
>
> Q Oh, you wouldn't take it?
>
> A So there was never a discussion to get into the formalities of it.

To place this issue in context, defense counsel engaged in vigorous re-direct examination, when she asked Ancrum to explain what supposedly took place between him and the prosecutor:

> BY [DEFENSE COUNSEL]:
>
> Q I just want to give you an opportunity to explain. What happened you said at this trial table with [the prosecutor]?
>
> A I didn't hear you.
>
> Q What happened? You were pointing and you weren't able to answer the question regarding this offer about your time. What happened at this trial table? You pointed right here.
>
> [PROSECUTOR]: Your Honor, may we approach?

THE COURT: Yeah.

(Counsel and Defendant approached the bench and the following ensued.)

[PROSECUTOR]: This silly lie forces the State's Attorney – and that's what's being designed here – to take the witness stand to deny. I never make plea offers directly to suspects without their lawyer and without their being in writing. *Now...of course, now, proffers have been made, and then we reduce it to a plea letter*, but never walking up to a defendant and say, "Hey. Come on. You testify." [Emphasis added]

* * *

[DEFENSE COUNSEL]: Your Honor, I talked to his attorney about what happened . . . at the trial table. And apparently [the prosecutor] approached the defendant with his attorney sitting there – it was technically after the plea but before sentencing – and asked ... and offered to reduce or cut time if he ... because, at that point, he'd already pled guilty. But, apparently, it was in between . . . plea and sentencing that [the prosecutor] did come to the trial table and approach the defendant.

* * *

(Counsel and Defendant returned to trial tables and proceedings resumed in open court.)

THE COURT: Alright. Restate the question.

Ancrum then insisted that a prosecutor approached him and his former attorney to inquire about testifying.[8]

[8] This could very well have been the type of "proffer" that the State would make to (continued...)

Standard of Review

"Generally, the scope of examination of witnesses is a matter left largely to the discretion of the trial court; we will not disturb the court's determination absent a clear abuse of discretion." *Daniel v. State*, 132 Md. App. 576, 583, *cert. denied*, 361 Md. 232 (2000). The "trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception, however, is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review. Accordingly, the trial court's legal conclusions are reviewed *de novo* but the trial court's factual findings will not be disturbed absent clear error[.]" *Gordon v. State*, 431 Md. 527, 538 (2013) (citations omitted).

Analysis

On appeal, Lewis complains that the prosecutor's question – "Didn't . . . didn't your lawyers tell you that the State doesn't make an offer without it [being] in writing?" – introduced inadmissible hearsay (Ancrum's attorneys' representations), and takes issue with the trial court's allowance of that query. On this record, we conclude that the question itself did not constitute a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule

[8](...continued)
ascertain whether a potential witness would be willing to testify for the State in return for favorable treatment.

5-801(c). *See Stoddard v. State*, 389 Md. 681, 688 (1996). Moreover, the fact that the question called for a "yes" or "no" response indicates that the expected answer itself would not be hearsay. *See United States v. Two Elk*, 536 F.3d 890, 900 (8th Cir.2008) (holding testimony did not amount to inadmissible hearsay where declarant but only answered "yes" or "no" and did not repeat the out-of-court statements).

The focus of such inquiry is prosecutorial misconduct in the form of the questioning that constitutes "prosecutorial testimony." In *Hagez v. State*, 110 Md. App. 194, 222 (1996), this Court "reversed a murder conviction because of the State's repeated, persistent, testimonial-like questions propounded to a witness[.]" *Bell v. State*, 114 Md. App. 480, 496 (1997) (discussing *Hagez*). In *Elmer v. State*, 353 Md. 1 (1999), the Court of Appeals considered whether the trial court erred by allowing the prosecutor's cross-examination of Elmer's co-defendant. *Elmer*, 353 Md. at 4. The Court ruled, first, that the statement sought by the examination was inadmissible hearsay, *id*., 353 Md. at 11, and then turned to the question of prosecutorial misconduct:

> Keeping in mind that the evidence which the prosecutor was attempting to elicit was inadmissible evidence as to both Elmer and Brown, we now turn to the conduct of the prosecutor during questioning. We must determine if the prosecutor's questions were improper, and if so, "we look at the remarks in the context of the entire record and determine whether the defendants were deprived of fair trials." *United States v. Robinson*, 8 F.3d 398, 415 (7th Cir.1993).

Elmer, 353 Md. at 12. The Court further stated that "[a]s to prosecutors, a prosecutor may not ask a question which implies a factual predicate which the examiner knows he cannot support by evidence[.]" *Id*., 353 Md. at 13 (citations and internal quotation marks omitted). The prosecutor in *Elmer* asked questions that he knew were based on facts that could not be proven. The *Elmer* Court condemned this practice, and concluded:

> The attempted impeachment of Brown with his alleged prior inconsistent statement that Petitioner was the shooter necessarily increased the possibility that Petitioner might be convicted on the basis of this unsworn evidence. The repeated questions of the prosecutor, accompanied by the unavoidable impression to the jury that Brown had made statements to the prosecutor that Elmer was the shooter, cannot be considered harmless error.

Id., 353 Md. at 16. *See Walker v. State*, 373 Md. 360 (2003), where the Court said:

> Walker contends that the assertions embedded in the prosecutor's questions likely were viewed by the jury with heightened credibility as she was an Assistant State's Attorney. The form of her questions allowed her to tell the jury that: (1) she met with Myrick in her office three days before trial; (2) Myrick told her he was afraid to testify; and (3) he had been threatened regarding his impending testimony.

Walker v. State, 373 Md. at 392-93. The Court then disapproved of the State's approach in that case, observing:

> The prosecutor in Walker's trial made prejudicial assertions of personal knowledge of facts not in evidence and engaged in improper cross-examination. Like the prosecutor in *Elmer*, the prosecutor here created a situation where the jury was

> required to weigh the prosecutor's "word" against the witness's "word."

Walker v. State, 373 Md. at 403.

In the case before us, the prosecutor did not engage in "persistent, testimonial-like questions." Assuming *arguendo* that the prosecutor proceeded in bad faith by asking the question of which Lewis complains, we nonetheless find that posing this question on a clearly peripheral issue did not impair Lewis's right to a fair trial, and the trial court did not abuse its discretion by overruling Lewis's objection. Ancrum did not give the prosecutor the answer he sought, and the prosecutor did not engage in a repeated course of improper cross-examination. In the final analysis, given the context of Ancrum's testimony, we consider Lewis has failed to demonstrate any entitlement to relief based on this issue.

V. Plain Error – Issues not preserved.

Lewis complains that the trial court's jury instructions constituted plain error. We decline to review this issue. *See Martin v. State*, 165 Md. App. 189, 195-206 (2005), *cert. denied*, 391 Md. 115 (2006).

The second issue is whether the trial court erred in admitting statements from co-conspirators, and certain text messages, that were communicated prior to Lewis's entry into the conspiracy. The State responds that Lewis's appellate challenge has not been preserved and, in any event, it is without merit. The State points out that Lewis fails to refer this Court

to specific statements at issue, and suggests that this Court should not entertain arguments that are "not presented in a brief or not presented with particularity[,]" or argument that challenges "an erroneous ruling in some specific regard." (quoting *Klauenberg v. State*, 355 Md. 528, 552 (1999) and *Fraiden v. State*, 85 Md. App. 231, 266, *cert. denied*, 322 Md. 614 (1991)).

In his brief, Lewis refers to the statement of facts, which in turn represents that "defense counsel reiterated her objection to statements by alleged co-conspirators, arguing that Mr. Lewis was by no account involved in the initial meetings with the perpetrators." The State, in its response brief, after reviewing the transcript, urges that "[t]here do not appear to be any questions about statements made by co-conspirators against which (1) Lewis lodged an objection (2) that was, in turn, overruled by the trial court. There is therefore nothing for this Court to review for the purposes of this claim of error." We agree.

In the final analysis, Lewis has failed to direct our attention to a specific ruling on the admission of statements by co-conspirators that we can review. Lewis also complains of the trial court's admission of certain text messages. His failure to cite to specific text messages is also fatal to his appellate claim. Lewis has advanced no basis for appellate relief on this issue.

Lewis also complains that the trial court erred in giving a supplemental jury instruction in its response to a jury question. The State urges that this issue is likewise not

before us for lack of a contemporaneous objection. The transcript provides the following exchanges after the jurors retired to deliberate:

> THE COURT: Okay. You may be seated.
>
> We have a note from the jury. "We have one stipulation in records. Are we not to have several? We would like to" . . . "We would like the one on Jamal Brown."
>
> Now, I guess there was only one written stipulation.
>
> [PROSECUTOR]: Others were verbal.
>
> [DEFENSE COUNSEL]: Remember I asked to produce a written one, which . . . because I read from a police report verbatim.
>
> THE COURT: Right.
>
> [DEFENSE COUNSEL]: And that's the one I asked to be in writing because they were going to have a problem that some were in writing and some weren't.
>
> THE COURT: What would your suggested answer be, [Defense Counsel], first of all? You would like to what?
>
> [DEFENSE COUNSEL]: I mean, that's where I, I mean, normally, you can't read back testimony to them. I would agree that that's normally not the case. This, we actually have the exact stipulation.

After the trial court invited both counsel to suggest a remedy, the following exchanges took place:

[DEFENSE COUNSEL]: Again, I. . .1.. .we have the ability to specifically answer that. That's why I wanted to send that lengthy one in just like they were gonna get back and have this problem. That's why I said we should send them in writing back.

THE COURT: Well, we're . . . we're past that point.

[DEFENSE COUNSEL]: I know.

[PROSECUTOR]: Yes, we are.

THE COURT: How do we cure it, I guess?

[PROSECUTOR]: Your Honor, the jurors need to be told that their collective recall and memory of both. . . all of the witness testimony as well as any stipulations read to them are what they have to go by. We can't open the case now and change the exhibits.

THE COURT: Do you agree with that?

[DEFENSE COUNSEL]: I'll defer to the Court, again, because I asked to have it changed before and the State objected. I anticipated this because I was reading clearly right from a paper that this . . . and I asked to submit that. I anticipated the problem, so . . . and I think it's a problem that can be cured, because it's a stipulation. This isn't recall of other testimony. It was –

THE COURT: What would you propose –

[DEFENSE COUNSEL]: – essentially a written stipulation that I read.

THE COURT: What . . . what would you propose we say to them in your opinion?

> [DEFENSE COUNSEL]: If . . . Your Honor feels that we can't give them that written stipulation, –
>
> THE COURT: Well, how long was it?
>
> [DEFENSE COUNSEL]: It's essentially three paragraphs. I mean, like single spaced.

Following more discussion, the trial court decided on the following course of action:

> THE COURT: Alright. So I'm gonna say, of the five stipulations mentioned in instructions, only one was reduced to writing. Your collective memory of the stipulations . . . stipulation . . . stipulations as read to you will have to suffice. I'm precluded from having them read again. This would include the one dealing with Jamal Brown.
>
> [DEFENSE COUNSEL]: Okay.
>
> THE COURT: Is that okay with the State?
>
> [PROSECUTOR]: Yes, sir.

The court then instructed the jury consistent with the above understanding.

As shown by the proceedings, defense counsel acquiesced in the trial court's action, and lodged no objection after the jurors were instructed. We discern no basis to review the trial court's supplemental jury instruction.

VI. Sentences

Lewis advances two separate sentencing issues. He first asserts that he was improperly convicted of, and sentenced for, four charges of conspiracy. The State concurs,

and maintains that we should vacate the sentences for conspiracy to commit burglary, assault, and use of a handgun in the commission of a crime of violence. Upon independent review, we shall vacate the convictions, and resulting sentences, for these three conspiracies.[9]

Lewis then urges that we should apply the doctrine of "fundamental fairness" to merge the sentences for attempted robbery with a deadly weapon and conspiracy to commit armed robbery. The State points out that this issue is not preserved because Lewis did not argue merger at sentencing. The State further posits that the Court of Appeals' decision in *Carroll v. State*, 428 Md. 679 (2012) is dispositive. We agree, and find no basis for further appellate relief on this issue.

JUDGMENTS OF CONVICTION FOR CONSPIRACY TO COMMIT BURGLARY, CONSPIRACY TO COMMIT ASSAULT AND CONSPIRACY TO USE A HANDGUN IN THE COMMISSION OF A CRIME OF VIOLENCE VACATED; REMAINING JUDGMENTS OTHERWISE AFFIRMED.

APPELLANT TO PAY 7/8 OF THE COSTS; THE REMAINING 1/8 TO BE PAID BY KENT COUNTY.

[9] Confession of error does not abrogate our duty to conduct an independent review. *See Chiarella v. United States*, 341 U.S. 946 (1951) (per curiam). *See also Imbesi v. Carpenter Realty Corp.*, 357 Md. 375, 380 n.2 (2000).