UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2395

September Term, 2014

RICARDO CUNNINGHAM

v.

STATE OF MARYLAND

Meredith,
Kehoe,
Nazarian,

JJ.

Opinion by Meredith, J.

Filed: August 18, 2016

Following a five-day jury trial in the Circuit Court for Montgomery County, Ricardo Cunningham, appellant, was convicted of three charges stemming from a home-invasion robbery, namely, first degree assault, armed robbery, and use of a firearm in the commission of a crime of violence.[1] In this timely appeal, appellant raises several claims of error.

QUESTIONS PRESENTED

Appellant presents the following questions for this Court's review:

1. Did the trial court deprive Appellant of a fair trial by erroneously allowing the State to identify Appellant and introduce his statements?

2. Did the trial court err by allowing a lay witness to testify about cell phone tower data used to place Appellant at the crime scene?

3. Did the trial court violate Appellant's right to a fair trial by allowing the sheriff to follow Appellant to the bench for bench conferences?

4. Did the trial court err by allowing the State to call Charlette Tillman as a witness and to introduce the records of Appellant's jail calls after the State had failed to reveal in discovery that it would call her as a witness and utilize the records?

5. Did the trial court err in allowing the State to impeach Appellant with convictions that had not been disclosed to defense counsel in discovery?

6. Did the trial court err in admitting the recording of a 911 call?

7. Did the trial court err in allowing the State to make improper and prejudicial statements during closing argument?

8. Did the trial court's chastising of defense counsel and limitation of defense counsel deprive Appellant of his due process right to a fair trial?

[1] Appellant's associate, Sterling Hollis, was tried separately, and also was convicted.

We find merit in appellant's claim that the State withheld discovery of documents that it intended to use at trial (Issue No. 5), and, because we are unable to conclude that the trial court's error in finding no discovery violation was harmless beyond a reasonable doubt, we shall vacate the convictions and remand for a new trial.

FACTS AND PROCEDURAL HISTORY

The evidence at trial revealed the following. On the morning of June 21, 2013, there was a knock at the door of the apartment of Todzja Williams, which was located on Quince Orchard Road in Gaithersburg, Maryland. Ms. Williams was not home at the time, but her boyfriend, Byron Clarke, was inside the apartment. Mr. Clarke testified that, in response to the knock, he looked through the door's peephole and saw a man wearing a yellow or green construction vest. Because Mr. Clarke assumed that the man was "working outside . . . for the apartment complex," he opened the door. The man in the construction vest asked Mr. Clarke if "T" was home. ("T" is a nickname for Mr. Clarke's girlfriend, Todzja.) Mr. Clarke responded that she was not home. The man then asked if Mr. Clarke had any marijuana, and Mr. Clarke responded that he did not. Mr. Clarke began to close the door, but the vest-wearing man and a man in a ski mask, previously unseen by Mr. Clarke, rushed into the apartment.

The vest-wearing man produced a handgun from his back pocket, and aimed it at Mr. Clarke's face. The man in the vest demanded to know where Ms. Williams was, and yelled at Mr. Clarke to "give [him] all the money and the weed." When Mr. Clarke replied that he

had neither money nor weed, the man in the ski mask took the gun from the man in the vest and began beating Mr. Clarke about the head and face with it. The assailants then produced a bag of zip ties and ordered Mr. Clarke to his knees. Fearing that he was about to be executed, Mr. Clarke punched the mask-wearing man in the face and ran through a screen door to escape the apartment. At some point, Mr. Clarke dashed back inside to grab his phone, and when he did so, the man in the mask grabbed him again. Mr. Clarke was able to break free and run out the back door again. Shortly thereafter, he saw the two men leave the apartment.

Mr. Clarke then called Ms. Williams, and told her that he had been robbed. In her testimony at trial, Ms. Williams described this phone call as follows:

> [BY THE STATE]: Did there come a time that you got a call from Byron Clarke?
>
> [BY MS. WILLIAMS]: Yes, there was.
>
> Q. Do you know approximately around when that was? Morning, afternoon, evening —
>
> A. It was in the morning.
>
> Q. Okay, and what was his tone of voice when he called you?
>
> A. Like panicked. He was like in hysterics. He was worried.
>
> Q. What did he say happened?
>
> A. He said oh my god, oh my god I've been robbed.
>
> Q. And what did you do when he called you?

A. I answered the phone and I told him that he was playing. ["]Stop playing with me,["] you know, I didn't believe him. ["]You didn't get robbed["] because he's at my house.

Q. Okay, and then did there come a point where your opinion changed?

A. Yes, when I went home and walked up the sidewalk and saw him bleeding in my backyard.

* * *

Q. What was his demeanor like when you arrived at the house?

A. He was, he was like I don't know. He was beaten up. He was scared. He was trying to tell me over and over again that he got robbed and oh my gosh, like he was just all over the place. I'm trying to get him to calm down and sit down because there's blood everywhere and I could not decipher where the blood was coming from because it was so much, all over his face, his head, him in general.

Ms. Williams called 911 to summon medical assistance for Mr. Clarke. Ms. Williams described herself as "scared, upset and extremely frustrated" when she placed the 911 call, "because all I wanted was somebody to hurry up and figure out why he's bleeding and where he's bleeding from and [are] there internal injuries." The recording of the 911 call was played for the jury, over appellant's objection.

Officer Daniel McCarthy, of the Gaithersburg City Police, responded to the apartment. Officer McCarthy testified that Mr. Clarke was "still bleeding somewhat" when he arrived, and that he observed a three-inch laceration on Mr. Clarke's forehead. He described Mr. Clarke as "kind of in shock," and not "quick to respond to my questions," although Mr. Clarke did tell Officer McCarthy about his attackers. Officer McCarthy saw that the

apartment was in disarray, and noted a plastic bag of zip ties on the floor of the bedroom. Mr. Clarke described the assailants to Officer McCarthy, and Officer McCarthy broadcast the description of the suspects over the police radio. Mr. Clarke was transported to the hospital for treatment.

Detective John Gallagher, of the Montgomery County Police Department's Major Crimes Unit, interviewed Mr. Clarke in the emergency room, and took a buccal swab from inside Mr. Clarke's cheek for DNA comparison purposes. Mr. Clarke gave Detective Gallagher a description of the assailants, which Detective Gallagher incorporated into a statement that Mr. Clarke signed. Mr. Clarke described the vest-wearing assailant as an African-American man wearing a green vest with reflective tape on it, a gray t-shirt, a red and black baseball cap, and jeans. The vest-wearing man also had a silver semi-automatic type handgun with gold accents. Mr. Clarke described the masked suspect as an African-American man with shoulder-length dreadlocks, wearing a black v-neck shirt and jeans.

The lead detective assigned to this case was Detective Brian Dyer, of the Major Crimes Unit. Detective Dyer arrived at Ms. Williams's apartment at around 11:30 a.m. He observed that the apartment "looked a little bit disheveled as[] it looked like there was a struggle in there. The screen door was popped out on the ground. [S]ome furniture was moved like it was, you know, someone had just been in a struggle." Detective Dyer observed a plastic bag of zip ties on the floor. He began his interview of Ms. Williams by asking if she had any idea who might have done this, and she gave him two names: "Bishop" and "Bella."

As it turned out, Bishop was the nickname of Sterling Hollis, who was a friend of appellant. Bella resided elsewhere in the same apartment complex as Ms. Williams, and was Hollis's girlfriend.

During Ms. Williams's testimony at trial, she recounted that, on June 20, 2013, the day before the incident giving rise to this case, she was in her apartment when there was a knock on the door at about 9 a.m. Mr. Clarke remained in their bedroom, while Ms. Williams went to answer the door. It was Bishop (*i.e.*, Sterling Hollis), a person she had seen before. He was alone, and "looking for weed." Ms. Williams told him that she did not have any, and did not know anyone who had any, but she had money, and she, too, was interested in acquiring some weed. She knew Bishop to be the boyfriend of a friend of hers named Bella. She told Bishop that Bella owed her $10, and he gave Ms. Williams the money. Later, Bella called Ms. Williams, and informed her that she was upset that Ms. Williams had aired her business. Ms. Williams informed Detective Dyer that Bishop had dreadlocks past his shoulders, which he wore pulled back on June 20.

Detective Dyer then set about learning the identity of Bishop. During his interview with Ms. Williams, although not as a result of it, Detective Dyer learned that there had been a high-speed chase culminating in a bail-out and the abandonment of the vehicle at a Silver Spring parking garage. Two men were seen on surveillance video running away from the vehicle and leaving the vehicle — a tan Ford Explorer with DC tags — at the gate of the garage. Officers secured the Explorer, and it was eventually towed to a police facility.

Detective Dyer ran the plates of the abandoned Explorer, and learned that the vehicle was registered to Sterling Hollis. Detective Dyer found a phone number for Mr. Hollis and called him to inform him that his Explorer had been abandoned in a parking garage, but, as soon as Detective Dyer identified himself as a police officer, Hollis hung up. Although the police made further efforts to contact Hollis regarding his vehicle, Hollis never responded to their efforts, and the Explorer was never claimed.

When the police searched the Explorer, they found a gray t-shirt and a yellow traffic vest on the floor of the passenger side. These items were tested by Erin Farr, a forensic biologist with the Montgomery County Police Department. Ms. Farr testified as an expert in forensic biology and DNA analysis, with no objection from appellant. Ms. Farr testified that Mr. Clarke's blood was found on the exterior left sleeve of the gray t-shirt, and a DNA profile was extracted from the neck area of the t-shirt that belonged to neither Mr. Clarke nor Sterling Hollis. It was not until January 2014, that the police had a sample of appellant's DNA to compare with the profile from the neck of the gray t-shirt. It was a match. Appellant was arrested on January 21, 2014.[2]

Detective Michael Yu, a member of the Electronic Crimes Unit of the Montgomery County Police Department, testified as an expert witness in digital forensics, with no objection by appellant. Detective Yu testified that he sent Hollis's phone (an Apple iPhone

[2]Appellant was arrested pursuant to an arrest warrant that was issued after Mr. Clarke identified him as the vest-wearing assailant. However, that identification was suppressed pre-trial, and the jury never heard about it. It was upon appellant's arrest that his DNA was collected.

5) to Apple so that it could be unlocked. Apple provided Detective Yu with a thumb drive with the phone's data on it, and Detective Yu decoded it and ran it through a software program called Cellebrite. That enabled him to convert the data to a readable form, and produce a report. Among the contacts on Hollis's phone was an entry for a contact listed as "Ric," with the phone number 240-424-4048. Charlette Tillman, the mother of appellant's son, testified (reluctantly, pursuant to subpoena) that this was appellant's phone number.

Using the phone number he had located for Hollis, Detective Dyer determined that the phone was registered to a Tiffany Young, whom Detective Dyer learned was Hollis's wife. Detective Dyer was able to obtain a court order for "storable cell site data, and all calls made to and from the phone" for the time period surrounding the June 21 incident. Detective Dyer testified, over appellant's objection, that the cell phone records included location coordinates for each call, and the detective had used that information and Google Maps to determine that Hollis's phone was in the vicinity of the scene of the crime at the time the crime was being committed, and in downtown Silver Spring at the time the Explorer was abandoned.

Detective Scott Sube, of the Special Investigations Division of the Electronic and Technical Surveillance Unit of the Montgomery County Police Department, was accepted as an expert "in the area of cell tower operation and plotting," without objection by appellant. Detective Sube obtained the call detail records associated with appellant's phone from AT & T, and was then able to plot the locations of the cell towers that handled phone calls made during the time of the events in question by and between the phones of appellant and Hollis.

Detective Sube's testimony confirmed that appellant's phone was in the area of Ms. Williams's apartment at the time of the home invasion, and in the area of downtown Silver Spring around the time Hollis's Explorer was abandoned there.

Appellant testified in his defense. He admitted to having been with Hollis at Ms. Williams's apartment complex on the morning of June 21, 2013. He admitted that he was the "Ric" listed in Hollis's contacts, and that the 240-424-4048 phone number was his. He admitted to having been in the Explorer during the high-speed chase, and to being in the area of downtown Silver Spring when the vehicle was abandoned there. Appellant testified, however, that he was not a participant in, and had no advance knowledge of, the attack on Mr. Clarke. Appellant claimed that, days prior to June 21, he and Hollis, a friend for the past thirteen years, had exchanged vehicles. He testified that he decided to drive over to Hollis's house on the morning of June 21, unannounced, to exchange the vehicles back. Appellant claimed that, when he arrived at Hollis's house, Hollis and an unidentified man in a yellow construction-type vest came outside. Hollis got in the driver's seat, and the unidentified man got into the passenger seat. Appellant got in the back. Hollis then drove them to Ms. Williams's apartment complex. Hollis and the unidentified man went inside, while appellant sat in the back seat, playing a game on his phone. Appellant explained that he called his girlfriend while he was sitting in the Explorer, which is why his phone records would have placed him there at the time the home invasion was occurring. He testified that, after about ten minutes, he heard some yelling, and saw his friend Hollis, who was "real

angry," being pushed down the sidewalk away from the apartment by Hollis's other associate. Hollis was shirtless and bleeding.

Hollis then drove away from Williams's apartment complex. When police later tried to stop the vehicle, he commenced a high-speed chase during which appellant asked to be let out of the vehicle. Appellant claimed that he jumped out of the vehicle while it was still moving at some unknown location. Appellant admitted the gray shirt was his, but claimed that he did not have it on that day, and he did not see anyone else wearing it. After he jumped out of Hollis's vehicle, appellant ran for a while, and then started walking. He eventually caught a cab.

Appellant testified that he did not go into Ms. Williams's apartment with Hollis and the other man, although he had been "in the area but not to her house" before on three occasions with Hollis, because Hollis "was going to buy some weed." Appellant testified that he, himself, did not smoke weed, and, for that reason, he did not go inside.

On cross-examination, the State asked him about several prior convictions on charges relating to the possession and distribution of marijuana. He had claimed, on direct examination, not to know his best friend's phone number, but admitted on cross that that was a lie he had told because he did not want to be labeled as a snitch. He claimed not to know his mother's address, although he said he was living with her at some point, as he had to concede when asked. He claimed not to remember which side of the back seat he was sitting on during the high-speed chase. He was asked about his later interview with Detective Dyer,

in which he failed to mention the existence of the unknown man in the yellow vest. Appellant had never mentioned the presence of an unknown man until he testified at trial.

On cross-examination, the prosecutor questioned appellant about his failure to mention the unknown man during previous interviews with police:

> [BY THE STATE]: All right. So Detective Dyer specifically asked you numerous times about what happened up on 764 Quince Orchard Boulevard, didn't he?
>
> [BY APPELLANT]: I don't recall.
>
> Q. You don't remember?
>
> A. I don't recall.
>
> * * *
>
> [BY THE STATE]: Did you talk with Detective Dyer about being involved in a robbery with Sterling Hollis?
>
> [BY APPELLANT]: I have to see. I can't really recall —
>
> Q. Sir, it has nothing to do with the transcript [of appellant's interview with Detective Dyer, with which the State was impeaching him]. I'm asking if you remember speaking to him about being involved in a robbery —
>
> A. I spoke to him about — yes.
>
> Q. — with Sterling Hollis?
>
> A. Yes.
>
> Q. Okay. You told him, I don't know anything about it. Is that correct?
>
> A. Not no robbery, no.

Q. Okay.

A. I told him I don't know anything about a robbery.

Q. Okay. You were in the car when this happened, is that correct?

A. Not no robbery.

Q. When this fight apparently happened that —

A. When the incident —

Q. You have no idea what happened in that apartment, sir, according to your testimony, right? You weren't there.

A. I don't know — right, I didn't, I wasn't in there to see anything.

Q. Okay. You were in the car, right?

A. Yes.

Q. Wouldn't you have information to tell him about the mystery man in the yellow vest?

A. He asked me about a robbery.

Q. Uh-huh.

A. I didn't know anything about a robbery.

Q. Okay. But he also asked you about the fight —

A. So I don't, I'm not going to say something about something I don't know of.

Q. Okay.

A. Know anything about.

Q. You know that Sterling went into that apartment and came out bloody, right? Yes or no?

A. This was —

Q. Sir, yes or no.

A. This happened in June —

Q. Answer my question.

A. I got locked up six months later.

* * *

Q. You know that Sterling came out of that apartment bloody and that [was] followed by a high speed chase at speeds over 100 miles an hour down [I-]270, correct?

A. Later on I heard more about it —

* * *

I didn't know what happened — you keep saying a robbery.

Q. All right. Let's say an incident occurred that you know nothing about where Sterling came out of the apartment bloody. That's what we're talking about. Did you tell the police any of that?

A. That I knew about it?

Q. Uh-huh.

A. No, I did not.

Q. The police specifically brought up to you that one of the suspects was wearing a yellow traffic vest, right?

A. I don't recall that myself.

Q. Thank you. You don't recall Detective Dyer asking you about a man in a yellow traffic vest?

A. I don't recall.

Q. Directing your attention specifically to page 10, line 25, and the top of page 11.

A. Say what again?

Q. The detective says what?

* * *

A. [*From context, it appears that the witness is reviewing the document that has been provided by the prosecutor*.] He says, but I guess you were wearing a, wearing like a green safety vest.

* * *

Do you want me to read everything?

* * *

He said, he asked me was I wearing a green safety vest.

* * *

Q. Okay. Sir, wouldn't this clue you in that this is the perfect time to mention the mystery man that you're telling us about for the first time?

A. He asked me was I wearing something.

Q. Okay. And then you had extensive conversation about whether or not you were there and involved in a robbery or an incident —

A. Because he was saying —

Q. — wearing a green safety vest, isn't that correct?

A. He was saying I was in, like I said, I don't, I was not involved in any robbery.

Q. Okay. Sir, answer the question.

A. I had no idea of a robbery. Ask me again.

Q. Did he talk to you about an incident where one of the suspects is wearing a shirt with your DNA and a green safety vest?

A. Yeah. Yeah, he did.

Q. Okay. You never told him that there was a man in the front seat wearing a green safety vest with Sterling Hollis, correct?

[BY APPELLANT'S COUNSEL]: Objection.

[BY THE COURT]: Overruled.

[BY APPELLANT]: I never told him, I don't believe I told him anything about, later on anything about anything like that.

[BY THE STATE]: Okay. But you did know about it, right? Because you were there supposedly in the backseat?

A. He was speaking on a robbery.

Q. Sir, answer the question.

A. No.

Q. And there was a man, this mystery man in the front seat —

* * *

So you never told him about a man seated in the front seat wearing a green traffic vest, right?

A. Not that I recall.

The jury convicted him of armed robbery, use of a handgun in a crime of violence, and first-degree assault. After sentencing, this appeal followed.

DISCUSSION

Because we conclude that a new trial is required because of the discovery issue raised in Issue 5, we will review that issue first.

Appellant's Issue No. 5 -Discovery

Appellant contends that the State violated Maryland Rule 4-263(d)(9), because it did not provide him with copies of the certified records of convictions it intended to use for impeachment if he testified at trial.

Rule 4-263(d) addresses discovery that the prosecution is required to provide, and states: "Without the necessity of a request, the State's Attorney shall provide to the defense" various information. Subparagraphs (2) and (9) are pertinent to appellant's argument. Those subparagraphs require the State's Attorney to provide the defense:

> (2) *Criminal Record*. Prior criminal convictions, pending charges, and probationary status of the defendant and of any co-defendant; [and]
>
> * * *
>
> (9) *Evidence for Use at Trial*. The opportunity to inspect, copy, and photograph all documents, computer-generated evidence as defined in Rule 2-504.3 (a), recordings, photographs, or other tangible things that the State's Attorney intends to use at a hearing or at trial; . . . .

An issue regarding the State's intent to use prior convictions to impeach appellant was first raised at trial during appellant's opening statement. Because appellant's counsel was

describing facts that the prosecutor knew were not going to be adduced during the prosecution's case, the prosecutor objected, and the trial judge called for a bench conference. At that point, the following colloquy ensued:

> [BY THE STATE]: There's no evidence of any of this unless his client is going to testify. So is he going to say his client is testifying? If not, we would like him to stop along this line of questioning [sic].
>
> [BY THE COURT]: Is your client going to testify?
>
> [BY APPELLANT'S COUNSEL]: It's his decision Your Honor. At this point —
>
> [THE COURT]: Well –
>
> [APPELLANT'S COUNSEL]: — he plans to testify.
>
> [THE COURT]: It's not his decision with respect to evidence that isn't going to be produced. And if he wasn't there I'm not exactly sure who was telling Mr. Clarke —
>
> [APPELLANT'S COUNSEL]: It will be explained, Your Honor.
>
> [THE COURT]: All right, as long as you've got a good faith basis for believing it.
>
> [APPELLANT'S COUNSEL]: Oh, I do.
>
> [THE COURT]: There's no witness that's going to testify to it, so —
>
> [THE STATE]: **And just so Your Honor knows we have certified convictions of all of his priors.**
>
> [APPELLANT'S COUNSEL]: **Okay, can I get a copy of those —**
>
> [THE STATE]: **When he testifies.**
>
> [APPELLANT'S COUNSEL]: Then I think, okay, all right.

The bench conference concluded, and appellant's counsel resumed his opening statement, describing appellant's version of the events. When counsel began to describe a statement that appellant had made to police, the prosecution objected again, and another bench conference was held:

> [BY THE STATE]: We are not interested in the statement. He cannot once he testifies, if he continues we —
>
> [BY THE COURT]: That's absolutely totally correct counsel and you know that.
>
> [BY APPELLANT'S COUNSEL]: All right, he's going to testify, Your Honor.
>
> [THE STATE]: . . . He still can't put his own statement in.
>
> [THE COURT]: You can't introduce his statement. He can testify to it but you can't introduce his statement.
>
> [APPELLANT'S COUNSEL]: Okay.
>
> [THE COURT]: It's not going to be used, you know that [Mr. Defense Counsel], at least I hope you do.
>
> [APPELLANT'S COUNSEL]: I think they're going to try to impeach him with it maybe. Why wouldn't it be used?
>
> [THE COURT]: That doesn't mean –
>
> [THE STATE]: Doesn't mean you can use it in opening.
>
> [THE COURT]: Come on, [counsel], this isn't your first rodeo.
>
> [APPELLANT'S COUNSEL]: Your Honor, you're — okay, all right, fine.

The issue about evidence of appellant's convictions was raised again at the outset of the defendant's case. After the State rested its case, and the court denied appellant's motion for judgment of acquittal, the following colloquy occurred:

> [BY APPELLANT'S COUNSEL]: Your Honor, there is one other issue. I requested that the government provide me with his impeachables some time ago, and they told me they would not provide them to me until after he testified.
>
> [BY THE COURT]: I thought they said, is that after he testified or before he testified?
>
> [BY THE STATE]: I don't know, in the rules that say he's entitled to get them. [sic] The NCIC record has been provided, a complete NCIC record has been provided. So the defense —
>
> [THE COURT]: I was going to say, I thought you had to provide that in discovery?
>
> [THE STATE]: We did.
>
> [APPELLANT'S COUNSEL]: Your Honor, that still doesn't mean that what they believe to be as impeachables are actually his impeachables. That's why they typically provide you a list so that they don't accidentally say something that was actually a probation before judgment, or they're mistaken about. And that's why we're asking for a very simple list of his impeachables.
>
> [THE COURT]: All right. **Why don't you give it to him if you've got it?**
>
> [THE STATE]: **I would prefer not to at this time, Your Honor.** I would not approach the witness without it, without first getting a ruling from the Court.
>
> [THE COURT]: **All right. That sounds fair enough.**
>
> [THE STATE]: Thank you.
>
> [APPELLANT'S COUNSEL]: So you said you're not going to make a ruling?

[THE COURT]: She's not going to impeach him with anything without approaching the Court and determin[ing] whether or not it's impeachable. She's already given you his NCIC, so you have his record. **You have everything they have.**

[APPELLANT'S COUNSEL]: **I'm going to advise my client not to testify if they don't want to provide us with his record.**

[THE STATE]: His record has been provided.

[THE COURT]: The record's been provided.

[APPELLANT'S COUNSEL]**: I'm sorry; with the charges they plan to impeach him with.**

[THE COURT]: Well, you have it. You know what's impeachable and what's not.

[APPELLANT'S COUNSEL]: I know, Your Honor. **If that's the case, I'm going to ask for a recess so I can discuss it with my client** because we, well.

[THE COURT]: **What do you mean discuss it with your client?** Are you saying you haven't discussed with your client before he takes the stand, what offenses they could impeach him with?

[APPELLANT'S COUNSEL]: We have, Your Honor, but, no. I will say not at the level that I need to.

[THE COURT]: **Do you have anything that's not on his record that you've already disclosed on?**

[THE STATE]: **No.**

[THE COURT]: Okay.

[THE STATE]: Everything we have, we found on the record that was provided in discovery.

[APPELLANT'S COUNSEL]: Your Honor, I've never been to a jurisdiction where they don't disclose the impeachables they plan to use.

[THE COURT]: Well, you've been to one now.

[APPELLANT'S COUNSEL]: I sure have.

[THE COURT]: I don't understand what your problem is. You have his record. You have his criminal record. You have a client. Your client can tell you whether or not he was convicted or not convicted, what he was convicted of, and you can check it yourself. **If they've gone and gotten certified copies, that's a different story.** They don't have to have the certif[ied] copy to ask him the question. They have to have a good faith basis to believe that he has an impeachable offense. And [the State]'s already indicated that she's going to approach the bench if she has an offense that she believes she can impeach him with. If she has some question as to whether or not it's an impeachable offense. Now if you've got a record there that says he was convicted of robbery three years ago, or armed robbery and use of a handgun in a crime of violence or theft, I mean, you can ask your client about that.

[APPELLANT'S COUNSEL]: I just think that —

[THE COURT]: They've given you his record. **They don't have to give you anything more.**

[APPELLANT'S COUNSEL]: Your Honor, that wasn't my understanding but if that's the way you interpret the rule —

[THE COURT]: Well, show me a case that says they have to give you more than that. Show me a rule that says they have to give you more than that and I'll make them give it to you. That's just not my understanding. And I don't understand how in the world you ever for one second, before you even make your opening statement, not have discussed that with your client?

[APPELLANT'S COUNSEL]: Your Honor, we did discuss it. And —

[THE COURT]: Well, then you should know for a fact what the impeachable offenses are, and what the risk of putting him on.

[APPELLANT'S COUNSEL]: That's why I requested —

[THE COURT]: That's like square one.

[APPELLANT'S COUNSEL]: That why I requested —

[THE COURT]: And that's why you got his record. We're not going to play games here, [appellant's counsel].

[APPELLANT'S COUNSEL]: I'm not trying to play games, Your Honor.

[THE COURT]: You are trying to play games here. Well, I'm not going to put my witness on unless the State tells me what the impeachable offenses are when they've already given you his record. That's absolutely, positively playing games. Especially in light of the fact that when you made your opening statement, you said you were going to put him on the stand. And you made representations to this jury, with respect to evidence that was going to be coming from your side of the bench. And if you didn't, at that point and time, if you hadn't sat down, talked to your client, gone over the impeachable offenses and said look, here's what's going to happen if you take the stand, this is what they're going to impeach you with, then I just don't believe you.

[APPELLANT'S COUNSEL]: **That's why I asked for them, Your Honor. If you give them to me right now**, we can go. We can go forward right now.

[THE COURT] [sic]: **We're not giving them to you right now**.

[APPELLANT'S COUNSEL]: So it's not about whether or not you believe me. I'm telling you we're ready right now.

[THE COURT]**: They're not required to.**[3]

[3] In *Dallas v. State*, 413 Md. 569, 585-86 (2010), the Court of Appeals observed that, although there may be instances in which a court needs to defer ruling on the admissibility of criminal convictions until after hearing the defendant's testimony, there are many other instances in which the court should rule on the admissibility of convictions before the defendant elects to testify:

> [T]he trial court may deem it necessary in a given case to defer ruling on the admission (or exclusion) of prior crimes impeachment evidence until after the court hears the defendant's testimony.

(continued...)

[3](...continued)

That said, trial courts should rule on motions *in limine* as early as practicable, which often is before the defendant elects whether to testify or remain silent. *See United States v. Cook*, 608 F.2d 1175, 1186 (9th Cir.1979) ("remind[ing]" trial courts "that advance planning helps both parties and the court"), *cert. denied*, 444 U.S. 1034, 100 S.Ct. 706, 62 L.Ed.2d 670 (1980); *United States v. Oakes*, 565 F.2d 170, 171 (1st Cir.1977) (stating that a trial court "should, when feasible, make reasonable efforts to accommodate a defendant by ruling in advance on the admissibility of a criminal record so that he can make an informed decision whether or not to testify"); *Johnson v. State*, 666 So.2d 499, 502 (Miss.1995) (stating that early rulings on motions *in limine* are preferred "unless delay is absolutely necessary to a fair presentation of the issue"); *see also State v. Cole*, 142 N.H. 519, 703 A.2d 658, 660 (N.H.1997) (noting that, "although not absolutely required, trial courts should rule on the admissibility of prior convictions as impeachment evidence as early as practicable"); *State v. McClure*, 298 Or. 336, 692 P.2d 579, 583 (1984) (commenting that "it is not realistic or necessary for a defendant to have to wait until he is on the stand to find out whether he will be impeached with prior crime evidence," and noting that, although there may be circumstances in which the court may have reason to defer the ruling, "this should be a rare occurrence").

Many are the times when a trial court can and, therefore, should decide a motion *in limine* involving a Rule 5–609 issue before the defendant makes the election. For example, when it is clear that a prior conviction is ineligible for impeachment under Rule 5–609, the court need not hear the defendant's testimony to know how to rule on a motion to exclude that proposed impeachment evidence. Similarly, the trial court certainly can recognize when the risk of unfair prejudice of the proposed impeachment evidence far outweighs its probative value, no matter how the defendant might testify. Moreover, the court may be satisfied that it has a sufficient basis upon which to make an *in limine* ruling without hearing the defendant's direct testimony if the court has learned, through other means, how the defendant is likely to testify. For example, a court may hear admissions that the defense makes during the defense's opening statement, or the court may accept a proffer of the defendant's direct testimony. **In any of these circumstances, fairness to the defendant augurs in favor of the trial**

(continued...)

[APPELLANT'S COUNSEL]: Okay.

[THE COURT]: They're not required to.

[APPELLANT'S COUNSEL]: That's not my understanding of the rule.

[THE COURT]: You, on the other hand, you, on the other hand, are required to go over it with your client in advance and determine what convictions he has and what he's likely to be impeached with when you talk about, in opening statement, what he's going to testify to. **Now if you'd like another moment to speak to him with respect to the impeachable convictions or go over them in the event you haven't done it before, then I'll be happy to give you some time.**

[APPELLANT'S COUNSEL]: I would like some time, Your Honor.

[THE COURT]: Okay. We'll give you 10 minutes.

[APPELLANT'S COUNSEL] Thank you very much.

(Emphasis added.)

After a recess, the court inquired further of the prosecutors:

[THE COURT] . . . I'm looking at Maryland Rule 4-263-d2; it says criminal record. . . . And then it says prior criminal convictions, pending charges and probationary status of the defendant and of any co-defendant. Now I don't know what you gave to counsel in this case. I don't know if you just gave him a general arrest record. But if you all got an arrest record and went back and looked, and found out something that he was convicted of that's not obvious from looking at the record, then I think you have to give him that information.

---

[3](...continued)
court's ruling on the motion before the defendant elects whether to testify or remain silent.

(Emphasis added.)

> [THE STATE]: No, Your Honor. Everything that we found is in the NCIC.
> . . .
>
> * * *
>
> [THE COURT] And all I'm asking is have you given him, either by way of a record of his client, prior to trial, [Rule 4-263(d)(2)] says without the necessity [of a] request. Have you given him a record that shows all of the prior criminal convictions that he has on his record –

The prosecutor represented that all convictions had been previously provided even though defense counsel said that he "c[ould not] find it in the discovery they gave me," and the prosecutor could not "find a numbered copy" of the document the State believed had been provided. But, at this point in the proceedings, the prosecutor had "printed out a brand new one" and provided that document to the court and defense counsel. Defense counsel continued to maintain that he had not previously received this information. But, having reviewed it now, appellant elected to testify. At the bench, the court confirmed with counsel and appellant that appellant had been advised that "he doesn't have to testify," and had talked with counsel "about the tactical ramifications of not testifying and/or testifying" and "the risks of possible impeachment by prior convictions."

Defense counsel began the direct examination of appellant by addressing prior convictions:

> Q [APPELLANT'S COUNSEL] Mr. Cunningham, in 2001 you were convicted of possession with the intent to distribute marijuana, weren't you?
>
> A [APPELLANT] Yes.

Q And in 2004, in August of 2004, you were again convicted of distribution of marijuana. Correct?

A Yes.

Q And did you go to trial or did you plead guilty in those cases?

A Pled guilty.

Q And why did you plead guilty?

A I was in [sic] guilty.

Q And why aren't you pleading guilty in this case?

A Because I'm not guilty.

At the outset of the State's cross-examination of appellant, the prosecutor first asked appellant about the two convictions he had acknowledged during his direct examination. The prosecutor then continued to impeach appellant by asking: "And were you also convicted in April of 2006?" Defense counsel objected, and the following colloquy was held at the bench:

[APPELLANT'S COUNSEL] I'd like to see the impeachables she's using. So this is DOB?

[THE STATE] I don't know. **It's just a distribution certified copy of the conviction.**

[APPELLANT'S COUNSEL] Okay.

[THE STATE] And then while you're up here, we also [have] convictions for conspiracy distribution in Charles County and felony theft in Charles County, of which he was on probation at the time of the incident.

[APPELLANT'S COUNSEL] I didn't see any more here listed as guilty's, Your Honor. That's why we objected.

[THE STATE] **I have a certified of it at this time.**

[APPELLANT'S COUNSEL] That's why we requested them –

[THE STATE] It's in case search clear as day.

* * *

[APPELLANT'S COUNSEL] They indicated this is his record and the impeachables, the record they are planning to use. And now they are trying to, I guess, add stuff to it that they did not disclose to me. The whole reason they're supposed to disclose this record to me is so that I can prepare him, so that we can go through his impeachables.

[THE COURT]: Are you suggesting that you didn't know that he had been convicted of theft in Charles County? Was it theft?

[APPELLANT'S COUNSEL] If they're telling me he hasn't been, that it's not one of his impeachables and they're not going to use it, then of course I'm not going to bring it up.

[THE STATE] I am going to use it.

[APPELLANT'S COUNSEL] I specifically asked for his record. I specifically asked for impeachables and they did not disclose that.

[THE STATE] Your Honor, counsel on the record indicated he did a case search last night. And right on there, clear as day, is Ricardo Cunningham, Charles County, with these convictions. . . .

* * *

[THE COURT] There's nothing on his record with respect to a 2001 [sic] conviction?

[APPELLANT'S COUNSEL] I don't see it in here. No, and they just ran this today, apparently.

[THE STATE] I just ran it today but it's on case search. **We have the certified copy, Your Honor**.

[THE COURT] **Of what?**

[THE STATE] **His conviction for a felony theft and conspiracy drug distribution in Charles County.**

(Emphasis added.)

After hearing further argument from counsel, the court overruled appellant's objection, and the prosecution resumed its line of impeachment inquires, including asking appellant if he had also been convicted of distribution of marijuana in the District of Columbia in 2006, and convicted of felony theft and conspiracy to distribute marijuana in Charles County in 2007.

On appeal, appellant argues that "the trial court erred in allowing the State to impeach appellant with convictions that had not been disclosed to defense counsel in discovery." Although the record is somewhat foggy about the information that was included in the NCIC record that was provided to defense counsel during trial, the record reflects that the State had certified copies of the convictions it intended to use for impeaching appellant, and, based upon several comments the prosecutor made during trial, those documents were not provided to appellant prior to the time appellant had completed his direct examination testimony at trial.

That failure to disclose documents that the State intended to use for impeachment of the defendant at trial was a violation of the discovery obligation imposed upon the prosecution by Maryland Rule 4-263(d)(9), which requires the State to provide to the defense "[t]he opportunity to inspect, copy, and photograph all documents . . . that the State's

Attorney intends to use at a hearing or at trial." Defense counsel argued to the trial court that, if he had been provided copies of the convictions the State intended to use for impeachment, he would have covered those convictions on direct examination.

In *Williams v. State*, 364 Md. 160, 169 (2001), the Court of Appeals observed that Maryland Rule 4-263 "grants the defendant broad discovery rights to information held by the State," and the "State's compliance with these rules is never discretionary." *Id*. at 171.

We addressed discovery violations in *Thomas v. State*, 213 Md. App. 388 (2013), *cert. denied*, 437 Md. 640 (2014), in a case in which the defendant had resisted providing discovery of recorded statements the defense had obtained from two witnesses for the prosecution. At that time, the subsection that required the defendant to provide discovery of documents — in a manner analogous to the State's obligation under Rule 4-263(d)(9) — was Maryland Rule 4-263(e)(6), which required the defense to provide the State an "opportunity to inspect, copy, and photograph any documents, . . . recordings, . . ., or other tangible things that the defense intends to use at a hearing or trial." (This obligation is currently imposed by Rule 4-263(e)(7).) On appeal, Thomas argued that his attorney should not have been compelled to provide these documents to the State because they were attorney work product, protected by Rule 4-263(g) (which provides that "neither the State's Attorney nor the defense is required to disclose (A) the mental impressions, trial strategy, personal beliefs, or other privileged attorney work product").

We disagreed with Thomas's contention that the witness statements were work product, and held that discovery was required by Rule 4-263(e)(6). We explained counsel's intent to use the statements, if needed, for impeachment at trial was sufficient to mandate discovery pursuant to Rule 4-263:

> Here, the circuit court properly determined that the defense violated Rule 4–263(e)(6) by refusing to provide the recordings. **Contrary to appellant's claims on appeal, the record shows that appellant intended to use the statements of Mr. Jordan and Ms. Wilson if the witnesses testified to something different from what was stated in the recordings.** *See State v. Young*, 94 Or. App. 683, 767 P.2d 90, 93 (1989) ("**if defense counsel, even though not certain, can 'reasonably predict' that she will use certain exhibits to impeach a State's witness, she must give timely discovery to the prosecutor"**); *State v. Dunivin*, 65 Wash. App. 728, 829 P.2d 799, 801–02 (**a prosecutor "intends to use" a document for purpose of the discovery rule where the State is "aware of the document and there is a reasonable possibility that the document will be used during any phase of the trial"**), *review denied*, 120 Wash. 2d 1016, 844 P.2d 436 (1992). Thus, the trial court properly exercised its discretion to review the recordings in camera and then to order that the statements be disclosed to the State.

213 Md. App. at 402-03 (emphasis added).

In appellant's case, the prosecutor had obtained certified copies of convictions to use for impeachment purposes if appellant testified. Like the witness statements that defense counsel in *Thomas* intended to use for impeachment purposes "if the witnesses testified to something different from what was stated in the recordings," the certified copies the prosecutor had obtained of appellant's impeachable convictions were documents that should have been provided to defense counsel pretrial pursuant to Rule 4-263(d)(9). After it became clear that the prosecutor had withheld the certified copies of the convictions, the trial court

erred in overruling appellant's objections to the use of the undisclosed documents at trial. *Cf. Mulley v. State*, 228 Md. App. 364, (2016) (noting that "the discovery rules do not carve out an exception for facts known to the defendant," and finding reversible error in permitting the State to introduce evidence that had not been disclosed during discovery pursuant to Rule 4-263(d)(1)).

In *Williams, supra*, 364 Md. at 178, the Court of Appeals noted that the trial judge had made no finding of a violation on the part of the State, and "therefore he exercised no discretion in fashioning a remedy for the discovery violation." The present case is similar in that the trial court made no finding that the State's refusal to provide copies of the certified conviction records was a discovery violation, and therefore gave no consideration to fashioning a remedy. Under those circumstances in *Williams*, the Court of Appeals considered "whether that error was harmless," *i.e.*, whether the appellate court could "declare, beyond a reasonable doubt, that the error in no way influenced the verdict[. O]therwise reversal is required." *Id*. at 179. In *Williams*, the Court concluded: "The State's failure to provide Williams with complete and accurate information regarding the extent to which Trooper Wilson, *the only corroborating witness identification* of the defendant, could identify Williams is prejudicial and cannot be construed as harmless error." *Id*. at 179.

The State does not provide us a harmless error argument (arguing instead (1) that the issue was not properly preserved because defense counsel never said the number of the rule while complaining about the lack of discovery, and (2) that the prosecutor provided other

information about convictions at trial). In a case in which the defense hinged upon the jury's evaluation of the appellant's credibility as a witness, we are unable to declare, beyond a reasonable doubt, that the State's failure to provide complete discovery of this impeachment material in no way influenced the jury's verdict. As the Court of Appeals held in *Williams*, *id*. at 181: "When a reviewing court cannot declare, beyond a reasonable doubt, that the State's failure to comply with Rule 4-263[(d)] in no way influenced the verdict, reversal is required." *See also Dionas v. State*, 436 Md. 97, 110 (2013) ("[W]here credibility is an issue and, thus, the jury's assessment of who is telling the truth is critical, an error affecting the jury's ability to assess a witness'[s] credibility is not harmless error."). Accordingly, we shall remand the case for a new trial.

We will address some of the other issues that are likely to come up again on remand.

Appellant's Issue No. 1 - Identification

Appellant contends that the trial court erroneously allowed the State to "identify Appellant and introduce his statements." This contention flows from two pretrial suppression rulings made by the trial court. Prior to trial, appellant filed a motion to suppress both his pretrial identification by Mr. Clarke, and any in-court identification Mr. Clarke might be asked to make, on the basis of impermissible suggestivity. He asserted that the procedure the police used to obtain a pretrial identification by Mr. Clarke violated due process.[4]

[4]Instead of being shown a line-up or photo array, Mr. Clarke was texted single (continued...)

Hearings were conducted on all of appellant's pretrial motions on August 21, 2014, and September 3, 2014. Mr. Clarke was not present at the August 21, 2014, hearing on appellant's motion to suppress. He had not been subpoenaed. The court heard the testimony of Detective Dyer, and ruled that the pretrial photo identification of appellant by Mr. Clarke was unduly suggestive, and should be suppressed. The court advised the parties that it would revisit whether to permit Mr. Clarke to make an in-court identification later, and that it would permit the State to call Mr. Clarke at a second pretrial hearing to attempt to establish, by clear and convincing evidence, the existence of "some independent basis not tainted by that single photo spread" to support an in-court identification. That hearing occurred on September 3, 2014. After hearing the testimony of Mr. Clarke, the court ruled that the appellant's motion to preclude any in-court identification would be granted because of its finding that the State had failed to demonstrate that Mr. Clarke had an independent basis to make such an identification.

A discussion then ensued among the court and counsel as to the parameters of the ruling, and how it would affect the questioning of Mr. Clarke at trial:

> [BY APPELLANT'S COUNSEL]: There's a court — I don't have a Maryland case, but there's a New Hampshire case which essentially says that when the court held — the court held that the cross-examination at trial of an identifying witness about her failure to identify the defendant as the person

[4](...continued)
photographs of possible suspects by Detective Dyer over a period of months. The State conceded that, absent exigency that did not exist in this case, "[a] single photo is suggestive," but argued that it was not, in this case, unduly or impermissibly suggestive.

who robbed her did not open the door to the admission of a constitutionally defective lineup. And we would ask for the same ruling in this case.

[BY THE COURT]: What?

[APPELLANT'S COUNSEL]: That basically the cross-examiner's hands are tied and he does have that piece of, I guess, evidence available to cross — that we can't open the door by asking about the person's identification. I mean about the ID of the person.

[THE COURT]: Well, absolutely.

[APPELLANT'S COUNSEL]: Okay, I just wanted to make sure.

[BY THE STATE]: No, "absolutely," I think he's saying that he can say to the witness, "You've never identified him," and we can't bring up the photo.

[THE COURT]: Oh, no.

[THE STATE]: But if he asks, if he says, "You've never identified him," we get to — that's opening the door for the full photo [ ] and an in-court ID.

[APPELLANT'S COUNSEL]: That's exactly my first question.

[THE STATE]: Then don't open the door.

[THE COURT]: No, you can't say, "You've never made an identification of him," or "You were never shown a photo," or, "You never said, 'This is the guy.'"

[APPELLANT'S COUNSEL]: Okay.

[THE COURT]: Why would you do that?

[APPELLANT'S COUNSEL]: I'm sorry?

[THE COURT]: Why would you do that?

[APPELLANT'S COUNSEL]: I'm just telling you what this case I found says, that I —

[THE COURT]: The case out of Connecticut?

[APPELLANT'S COUNSEL]: It's a New Hampshire case.

[THE COURT]: Yeah, well, you better find one in Maryland.

[APPELLANT'S COUNSEL]: All right, I'll see what I can do before court. But also, Your Honor, I still should be able to cross-examine him about his identification of the person. Not the photo array, but his description of the person being 5'10" or 11 and the person being 220 pounds.

[THE COURT]: We're either going to do the identification or we're not.

[APPELLANT'S COUNSEL]: That's the description, not identification of a photo.

[THE COURT]: You've lost me.

[APPELLANT'S COUNSEL]: No, what I'm saying is I want to be able to — the witness gave a description of the person, not the photo identification. But I should be able to cross-examine him on what he said, the way he described the person to look. And that has nothing to do with the identification.

[THE COURT]: Well, I think you do that at your own peril, [appellant's counsel], and I'm not going to give you an advisory ruling. I'm telling you, if you get into the identification of whether or not he could make an identification in this case you may very well open the door.

[APPELLANT'S COUNSEL]: All right, I guess my question then would be —

[THE COURT]: And I don't know why you would want to do that?

[APPELLANT'S COUNSEL]: Because the description does not match my client, Your Honor. He's not 220 pounds, he's not 5'11".

[THE COURT]: Well, which description are you talking about? The one he just — other than the 220 pounds?

[APPELLANT'S COUNSEL]: Yes.

[THE STATE]: He's now given four descriptions.

[THE COURT]: Yes, there's —

[APPELLANT'S COUNSEL]: That's the one I'm referring to.

[THE COURT]: I don't understand. I'm just not —

[APPELLANT'S COUNSEL]: I guess it would be a motion in limine to exclude testimony — I mean, to allow me to include testimony regarding the descriptions, not the identifications of a photo, not an in-court identification, but I should be allowed to ask him about the description he gave to the police. And that description has nothing to do with the photo identification or an in-court identification. It's the description of what he saw that day.

[THE COURT]: Well, then why did we just go through this if it doesn't have anything to do with whether or not he had an independent basis —

[APPELLANT'S COUNSEL]: That had to do with —

[THE COURT]: — to make an in-court identification. All I'm telling you is, you go into that and you may wind up with the State being asked a question, "Is this the guy?" "Can you identify anybody that's sitting in the courtroom right now as the defendant in this case?" You want to take that chance, go ahead. Unless you've got some case law that says you can go ahead and ask him all those questions and they can't ask for an in-court ID.

[APPELLANT'S COUNSEL]: Okay, I will send you the case, Your Honor, if there's one that exists.

In his brief, appellant contends that the trial court subsequently abused its discretion in denying his request for a mistrial after the prosecutor, during the direct examination of Mr. Clarke, asked Mr. Clarke what the man in the vest said to him. When appellant's trial counsel objected on the grounds of hearsay, the State replied that the statements of the vest-wearing man should come in as "statements of the defendant." The court then admonished

the prosecutor not to refer to the vest-wearing man as the defendant, but otherwise allowed the questioning to proceed. Appellant contends that it was an error for the trial court to permit the State to assert (once, as noted) that the statements of the vest-wearing man were statements of the defendant, because that "ignored" the court's ruling suppressing any in-court identification of appellant. We disagree.

It was not a secret from the jury that it was the State's theory that appellant was, in fact, the assailant in the vest. That is why he was charged with the crimes committed by the vest-wearing man on June 21, 2013. The State told the jury in its opening statement that appellant was the man in the vest "who knocked on the door [and] barged his way into the apartment[,] committing these crimes[.]" Prior to the portion of the questioning at issue here, the State asked Mr. Clarke several questions about what the man in the vest said to him, without a hearsay objection being lodged. It was not until the State asked about what happened when the man in the vest produced the gun that appellant objected on these grounds.

Maryland Rule 5-803 provides, in relevant part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (a) Statement by party-opponent. A statement that is offered against a party and is:
>
> (1) The party's own statement, in either an individual or representative capacity.

Appellant's argument is that the State referred to the statement made by the vest-wearing man as a statement made by the defendant, and although he was the defendant, he was also claiming not to be the vest-wearing man. So he claims he was prejudiced. He contends that the State's question was equivalent to "identifying" him in court, which was prohibited by the court's earlier ruling on the motion to suppress.

But the focus of appellant's motion to suppress the in-court identification related expressly to the photographic identification by Mr. Clarke. The suppression court never curtailed the State's ability to make the case circumstantially that appellant was, in fact, the man in the vest. We find neither error nor abuse of discretion in the court's handling of this single, fleeting reference to appellant as the vest-wearing man.

Appellant's Issue No. 2 - Cell Phone Locations

Appellant contends that the trial court erred by allowing Detective Dyer to testify, in a non-expert capacity, as to his work plotting the coordinates of the cell-phone towers handling Hollis's phone calls on the date and time in question – namely, that he plugged the coordinates into Google Maps and generated a map showing that Hollis's phone was in the vicinity of the robbery at the time it occurred, and in downtown Silver Spring at the time the Explorer was abandoned there. Appellant likens this case to *Payne & Bond v. State*, 211 Md. App. 220 (2013), in which this Court held that it was reversible error for the trial court to have allowed a police detective to testify as a lay witness "regarding cell phone tower evidence in tracking of the location of appellants at the time of the murders." *Id*. at 242. The

opinion of the Court of Appeals in *State v. Payne*, 440 Md. 680 (2014), analyzing the need for expert testimony regarding certain cell phone location issues, was not filed until December 11, 2014, a few months after the conclusion of appellant's trial. Because counsel and the trial judge did not have the benefit of the Court of Appeals's guidance on this topic, this issue may not arise in the same manner at a new trial. Accordingly, we will not speculate regarding the presentation of evidence on this topic.

Appellant's Issue No. 3 - Courtroom Security

Appellant asserts that the court abdicated its responsibility for courtroom security by deferring to the preference of the sheriff's deputies. In support of appellant's claim that the trial judge abdicated his responsibility to decide courtroom security issues, appellant points to discussions with counsel and the sheriff's deputies:

> [BY THE COURT]: [Appellant's] Counsel had indicated[, d]eputies, that his client wanted to come up to the bench during the course of discussions, is that still the case, counsel?
>
> [BY APPELLANT'S COUNSEL]: Yes, Your Honor.
>
> [THE COURT]: All right, and [appellant's counsel] represented to me that you all had to get permission —
>
> [BY THE DEPUTY]: — use protocol for the defendant when he's in custody.
>
> [THE COURT]: Okay, do you want to get permission?
>
> [THE DEPUTY]: Or we will add a third deputy. You have the main one over there and then have two of us over here. So **it's up to Your Honor**, if that's what you would like done.

> [THE COURT]: Yes, I would like to have him come up and if you want to call and get clearance for that. I don't anticipate that we'll have any conferences at this point in time because we're just going to do jury instructions and opening, but —
>
> [THE DEPUTY]: **Just one of us has to be up there with him when he goes up.**
>
> [THE COURT]: Okay, all right, **any problem with that counsel?**
>
> [BY APPELLANT'S COUNSEL]: If they're going to follow him up every time he gets up, you know —
>
> [THE COURT]: Well —
>
> [APPELLANT'S COUNSEL]: — it's going to be obvious that he's in custody and again it would be the equivalent of putting him in an orange suit and shackles.
>
> [THE COURT]: Well I've got two things to say about that. **We have to be concerned with courtroom security. He's not in shackles and he doesn't have cuffs on** and he's not in an orange jumpsuit. And **he's in the sheriff's custody and I have to defer to them with respect to custody**. If your client doesn't want to come up to bench conferences ordinarily that's the protocol. If you want him to come up the sheriff says he's got to be up here. So it's your choice.
>
> * * *
>
> [APPELLANT'S COUNSEL]: **I understand**, Your Honor. I just want to make the record clear that if a sheriff follows my client up to the bench every time he comes up which is not done in any other jurisdiction that I practice in, it's going to make my client look like he's in custody.

(Emphasis added.)

As the Court of Appeals observed in *Bruce v. State*, 318 Md. 706, 718 (1990): "It is obvious that some security is necessary or desirable in most, if not all, criminal trials. It is

equally obvious that not all security measures will result in prejudice to the defendant." In *Bruce*, the defendant had objected to the presence of additional deputies in the courtroom and to the fact that one deputy was stationed in close proximity to the defendant. The Court of Appeals observed that security measures must be evaluated on a case-by-case basis, but concluded that the measures taken in Bruce's case were reasonable. The Court explained:

> Prior to jury selection, defense counsel objected to the single deputy sheriff stationed close to Appellant and requested that the deputy be required to stay on the other side of the rail. The trial judge first determined that the deputy could not overhear any conversations at the trial table. The deputy sheriff also indicated that, if he were separated from Appellant by a rail, a security risk would be posed. We believe permitting a single deputy sheriff to remain on the same side of the rail as the defendant, after ascertaining that the deputy could not overhear any conversations at the trial table, was a proper exercise of discretion.
>
> A short time later Appellant's counsel again raised the issue of security in the courtroom. Defense counsel pointed out that "I am counting at least four marshals that are in suits, plain clothes, in the courtroom, in addition to approximately two bailiffs that are in the courtroom."
>
> After the jury was selected and pre-trial motions were heard, Appellant again raised the issue of security. The complaints of courtroom security in close proximity to the defendant involved the presence of a uniformed sheriff's deputy in the courtroom and a bailiff. Counsel at that time did candidly acknowledge to the trial judge that "if we just were to limit it to this courtroom, what's going on in this courtroom right now, Your Honor, I would be the first one to admit that we would lose on appeal on this issue...." Counsel was correct.
>
> The issue of courtroom security arose a final time when handcuffs were being removed from Appellant as the jury was being led into the courtroom. This viewing of Appellant in handcuffs by the jury was clearly inadvertent. No cautionary instruction was requested, and no motion for mistrial was made. Instead, defense counsel merely asked the court to instruct the deputies to make sure that such an incident did not recur. The trial judge agreed to so

instruct the courtroom personnel. This one inadvertent viewing of Appellant in handcuffs clearly did not require the trial judge to take any action *sua sponte*, and did not result in any prejudice to defendant's right to a fair trial. *See Bowers v. State*, 306 Md. 120, 129 n. 2, 507 A.2d 1072, 1076 n. 2, *cert. denied*, 479 U.S. 890, 107 S.Ct. 292, 93 L.Ed.2d 265 (1986), citing *Dixon v. State*, 27 Md. App. 443, 451–52, 340 A.2d 396, 401, cert. denied, 276 Md. 741 (1975).

The determination of whether courtroom security measures violate a defendant's due process rights must be made upon a case-by-case basis. In *Holbrook*, the Supreme Court made it clear that the role of a reviewing court is to,

> look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over.

Id. at 475 U.S. 560, 572, 106 S.Ct. at 1347–48, 89 L.Ed.2d at 537.

In the instant case we are not confronted with an inherently prejudicial practice like shackling during trial, which can only be justified by compelling state interests in the specific case. *Id*. at 568–69, 106 S.Ct. at 1345–46, 89 L.Ed.2d at 534. We are also not confronted with an extensive security force so close to the defendant that it could "create the impression in the minds of the jury that the defendant is dangerous or untrustworthy." *Kennedy v. Cardwell*, 487 F.2d 101, 108 (6th Cir.1973), *cert. denied*, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974).

The courtroom security measures in this case were not unreasonable. Our inquiry is not whether less conspicuous measures might have been feasible, but whether the measures utilized were reasonable and whether, given the need, such security posed an unacceptable risk of prejudice to the defendant. *Holbrook* 475 U.S. at 572, 106 S.Ct. at 1347, 89 L.Ed.2d at 536. We find nothing in the record to indicate an unacceptable risk of prejudice in the security measures to which the jury panel may have been exposed, and

> therefore, we hold that the trial judge did not abuse his discretion in permitting the courtroom security utilized in the instant case.

Id. at 720-22.

We do not agree with appellant's assertion that the trial judge in appellant's case simply surrendered his responsibility for courtroom security to the deputies. Our reading of the transcript is that the court was understandably solicitous of the deputies' recommendations about securing the courtroom, but the trial judge did participate in discussions to try to accommodate appellant's concerns about impressions upon jurors.

As the State observes in its brief, a trial court's "broad discretion" regarding courtroom security measures "may not be delegated to courtroom personnel." *Lovell v. State*, 347 Md. 623, 638-39 (1997). The trial court's decisions regarding increased security measures in the courtroom must be based upon "an individualized evaluation of whether the State interest in the protection of persons in the courtroom outweighed the prejudice to [the defendant]." *Id*. at 649. *Accord Wagner v. State*, 213 Md. App. 419, 476 (2013) ("the decision must be made by the judge personally"). If the trial judge had simply deferred to the recommendations of the deputies, without any independent evaluation of the potential prejudice to the defendant, that would have been an abuse of discretion. But it is certainly prudent, and *not* an abuse of discretion, for a trial judge to solicit recommendations about courtroom security from personnel having expertise in such matters before making the final decision on courtroom security measures.

Appellant's Issue No. 4 - Disclosure of Witness

Appellant's fourth issue asserted that the trial court erred by allowing the State to call Charlette Tillman as a witness even though the State had not disclosed its intention to call Ms. Tillman as a witness until a few days prior to the first day of trial. Because there would be no surprise if this witness is called at a retrial, this issue is moot.

Appellant's Issue No. 6 - 911 call

Appellant contends that the court erred in admitting into evidence the 911 call made by Todzja Williams to report the injuries sustained by Mr. Clarke. A recording of the call was played for the jury.

Prior to trial, appellant had filed a motion to exclude the 911 call. The motion was heard on August 21, 2014, and denied. Appellant argued that the 911 call was "hearsay, in fact, it's double hearsay." He argued that, since the call was made an hour after the home invasion, it did not qualify as an excited utterance or a present sense impression. Appellant's argument focused on whether Mr. Clarke was still under the stress of the event when he made the call. Appellant argued that too much time had elapsed since the robbers fled for the call to qualify under either of those hearsay exceptions, noting that "he's [Mr. Clarke] not excited, and it's not a present sense impression."

But the State argued that it was Ms. Williams who initially made the call, and the evidence supported a finding that, when she made the call, she was still dealing with the stress of coming home to find her boyfriend bleeding profusely and her apartment in

shambles because of an invasion by armed robbers. The State argued that was sufficient foundation to admit the 911 call as an excited utterance. The court denied the motion to exclude the call, and ruled:

> [THE COURT]: I'm not aware of anything that says that he has to, in order for it to be a present sense impression or an excited utterance, that he has to call within a specific time limit. I think the test is whether or not he's still under the influence of the event. And I'm not exactly sure how, and again, I don't have any facts or any supplement that sets forth any of this for me, but it seems to me, if somebody comes in [and] pistol whips you, and you run out the front door, and you hide out, I mean, I don't know that you need to call. And I don't think there's any question that it appears as though they believed he was selling marijuana from the premises and maybe there might be some reluctance to call the police, I don't know?
>
> But I do know that, regardless, if you're selling marijuana or not, if somebody pistol whips you and you're afraid you're going to be executed or further beat up, and you happen to be able to escape by punching the guy and running out the door, that's a pretty unnerving situation. . . .
>
> But to suggest that you can't have a present sense impression or an excited utterance because there's a delay between the incident and the time that you called the police, I mean, if there's a burglary in your house and you come home, and you're upset and excited about it, but you start walking around the house and trying to find out what else the burglars stole or what else was going on there, and then you call the police an hour later and you report what was stolen and what happened, and your home's been broken into. And now you've looked and you see the front door's busted open, and the locks this, or the other thing, does that make it not an excited utterance?
>
> Are you not still under the influence of the event at the time the call is made? So I'm going to deny the request to suppress the 911 call.

We ordinarily review a court's decision on the admissibility of evidence for abuse of discretion, but whether evidence is hearsay in the first place is an issue of law we review *de novo*. *Gordon v. State*, 431 Md. 527, 533 (2013).

Maryland Rule 5-803 outlines hearsay exceptions for which it is not necessary to demonstrate the unavailability of the declarant. The exceptions at issue here are found at Maryland Rule 5-803(b)(1) and (2), which provide:

> (b) Other exceptions. (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
>
> (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

In this case, the jury heard Ms. Williams testify that, on the morning of June 21, 2013, she was at work when she received a phone call from her boyfriend, Mr. Clarke. He was "[l]ike panicked . . . in hysterics. He was worried." He said, "[O]h my god, oh my god I've been robbed." She initially did not believe him, but changed her mind when she got home "and saw him bleeding in my backyard." Ms. Williams was asked what Mr. Clarke's demeanor was at the time she found him:

> He was, he was like I don't know. He was beaten up. He was scared. He was trying to tell me over and over again that he got robbed and oh my gosh, like he was just all over the place. I'm trying to get him to calm down and sit down because there's blood everywhere and I could not decipher where the blood was coming from because it was so much, all over his face, his head, him in general.

Ms. Williams authenticated her voice on the 911 recording as it was played. In the course of the call, she asked the 911 operator for the police and an ambulance because she had just gotten home and found that her boyfriend had answered a knock on the door to find "[t]wo guys [who] ran in the house trying to rob him. They beat him up with a gun and they

left." She reported to the operator that Mr. Clarke was conscious, "but he's bleeding badly from his head." She said that Mr. Clarke was "bleeding a lot" and had been "beat[en] with a gun," and that she "need[ed] somebody here fast. I need an ambulance." She further reported that Mr. Clarke had "blood all over him. I think the main blood is coming from his head, from the border areas and his face seems bloodied." The dispatcher asked her how long ago it happened, and she asked Mr. Clarke, who can be heard on the recording saying that it happened an hour ago. Ms. Williams was then instructed to apply pressure to the head wound. The recording concluded shortly thereafter.

Ms. Williams testified that she was "[s]cared, upset and extremely frustrated" while making the 911 call, "because all I wanted was somebody to hurry up and figure out why he's bleeding and where he's bleeding from and [are] there internal injuries."

Appellant's counsel tried, on cross-examination, to get Ms. Williams to testify to a lengthy delay in calling 911 once she got home, but she testified that she would not characterize it as "quite some time . . . I cannot tell you I waited 20 to 30 minutes." The passage of time between the beating and the 911 call was the focus of appellant's argument at trial to keep the 911 recording out, and it is an argument he repeats on appeal. But in the analysis of whether the excited utterance exception to the hearsay rule applies, "the time interval between the event and the statement and whether the statement was made in response to a question are both factors a court can consider, but neither is dispositive." *Cooper v. State*, 434 Md. 209, 243 (2013). In *Cooper*, the Court of Appeals held that there was no error

in admitting a statement as an excited utterance even though "an hour had passed" before the victim made the statement to the investigating officer. *Id*. at 245.

In *Harmony v. State*, 88 Md. App. 306 (1991), the defendant was convicted of third-degree sexual offense against his fourteen-year-old niece. Among his contentions on appeal was that the trial court erred in admitting the testimony of the victim's sister, who testified to a conversation with the victim, in which the victim reported the assault approximately three hours after it occurred. The State laid a foundation demonstrating the victim's state of excitement at the time; namely, that she was "'crying hysterically' and could barely be understood." *Id*. at 318-19. Consequently, the passage of time — even three hours — did not preclude the introduction of the testimony as an excited utterance, as we observed in affirming the trial court:

> Maryland firmly endorses the principle of the "excited utterance" exception to the hearsay rule. *See Moore v. State*, 26 Md. App. 556, 566 (1975), for a list of cases upholding the use of the excited utterance exception. A statement may be admitted under this exception if "the declaration was made at such a time and under such circumstances that the exciting influence of the occurrence clearly produced a spontaneous and instinctive reaction on the part of the declarant . . . [who is] still emotionally engulfed by the situation. . . ." *Deloso v. State*, 37 Md. App. 101, 106 (1977) (citations omitted). Thus, the length of time between the declaration and the occurrence is a consideration not only of whether it was made spontaneously, but also of whether the declarant was "still emotionally engulfed." *Id.* Time, however, is *not* a conclusive factor.
>
> > The utterance need not be contemporaneous or simultaneous with the principal act. While it may be subsequent to it, it must be established that the exciting influence has not lost its sway or been dissipated by meditation. But the crucial factor is not so much the lapse of time or change of location but

> the continuance of a situation which insures that what is said is, in fact, a spontaneous reaction to the occurrence, rather than an independent, preconceived expression of the speaker's will.

Id. at 106 (citations omitted).

Appellant claims that because the declaration was made three hours after the incident, the victim "was not in the extreme condition of physical shock" but rather the "three hour period . . . makes it much more likely that reflective thought was involved." Appellant rests his argument on *Cassidy v. State* [74 Md. App. 1, 13 (1988)]. There, we commented in *dicta* that our previous decision of *Smith v. State*, 6 Md. App. 581 (1969) — where we upheld a time lapse of four-and-a-half to five hours — "seems to represent the extreme outer limit" of the excited utterance concept. *Cassidy*, 74 Md. App. at 20.

This dicta obviously does not require reversal here. So long as the declarant, at the time of the utterance, was still in the throes of the "exciting event" and therefore not capable of reflective thought, and sufficient foundation was laid to enable the trial court to reach this conclusion, the statement is [ ] admissible. *See id*. at 19. We hold that the facts surrounding the victim's statements to her sister clearly satisfied the requirements of the excited utterance exception. The victim was upset enough after the incident to lock herself in a bathroom, crying. When she called her sister she was still crying. Additionally, the call was made in the course of the same evening as the incident of abuse. Given this, it was unlikely that the "exciting influence" of the incident had subsided to the extent that she was capable of forethought or deliberate design in her conversation with her sister. The question of whether the statement is admissible lies entirely within the trial court's discretion. *Johnson v. State*, 63 Md. App. 485, 495 (1985). Under the circumstances of this case, the circuit court was presented with sufficient foundation to find that the statement was uttered spontaneously, and thus, did not abuse its discretion, in admitting the statement.

Harmony, supra, at 319-21.

As in *Cooper* and *Harmony*, a proper foundation was laid in this case to support the trial court's conclusion that Ms. Williams was "still in the throes of the 'exciting event'" at the time she called 911.

Appellant's Issue No. 7 - State's Closing Argument

Appellant contends that the court "erred in allowing the State to make improper and prejudicial statements at closing argument." Appellant asserts that, during the prosecutor's rebuttal closing argument, the prosecutor (a) made two improper burden-shifting arguments, and (b) improperly vouched for the credibility of Mr. Clarke and Ms. Williams, saying that "[t]here was absolutely nothing untruthful" those witnesses said. Appellant's objections to these three statements were overruled.

The State points out that the court has broad discretion to manage the flow of the trial, including closing arguments. In *Smith v. State*, 388 Md. 468, 488 (2005), the Court of Appeals made the following observations about legal principles governing closing arguments:

> Thus, during closing argument, counsel may "state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence," *Henry v. State*, 324 Md. 204, 230, 596 A.2d 1024, 1037 (1991), in addition to argue matters of common knowledge, *see Wilhelm* [*v. State*], 272 Md. [404] at 438, 326 A.2d at 728 [(1974)]. "Subject to the trial court's discretion, both the State's Attorney and defense counsel are given wide latitude in the conduct of closing argument, including the right to explain or to attack all the evidence in the case." *Trimble v. State*, 300 Md. 387, 405, 478 A.2d 1143 (1984), *cert denied*, 469 U.S. 1230, 105 S.Ct. 1231, 84 L.Ed.2d 368 (1985). Closing argument, however, is not without limitation, in that the court should not permit counsel to state and comment upon facts not in evidence or to state what he or she would have proven. *Wilhelm*, 272 Md. at

> 414-15, 326 A.2d at 714-15. What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case.

Although the prosecutor's argument regarding the credibility of its witnesses was getting close to the line that separates proper argument from the improper injection of personal opinion, we conclude that, in context, the argument should be understood as the prosecutor *urging the jury to find that* "There was absolutely nothing untruthful that Byron and Todzja told you on the stand." The trial court clearly viewed this to be the intent of the argument despite admonishing the prosecutor to "please say [']I submit to you[']" when urging the jury to make such findings.

The Maryland Lawyers' Rules of Professional Conduct ("MRPC"), codified in Maryland Rule 16-812, prohibit an attorney from expressing a personal opinion regarding the credibility of witnesses. MRPC Rule 3.4, captioned "Fairness to Opposing Party and Counsel," provides:

> **A lawyer shall not**:
>
> * * *
>
> (e) **in trial**, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or **state a personal opinion as to the justness of a cause, the credibility of a witness**, the culpability of a civil litigant **or the guilt or innocence of an accused**; . . . .

(Emphasis added.)

Because a trial attorney is not permitted to express a personal opinion as to the credibility of a witness, the trial court in this case admonished the prosecutor to preface argumentative commentary regarding the credibility of her witnesses with qualifying language to make it clear that the prosecutor is arguing what the jury should find based upon the evidence. It may be a fine distinction, but it is an important one; that is why MRPC Rule 3.4(e) classifies the expression of a trial advocate's personal opinion regarding a witness's credibility as a breach of standards of professional conduct.

Further, the Maryland common law prohibits trial advocates from vouching for the credibility of witnesses. *See Spain v. State*, 386 Md. 145, 153 (2005). The Court of Appeals made clear in *Spain* that, although there are generally no "hard and fast" limitations on closing argument, it is improper for a prosecutor to express a personal opinion as to the credibility of a witness:

> [O]ne technique in closing argument that consistently has garnered our disapproval, as infringing on a defendant's right to a fair trial, is when a prosecutor "vouches" for (or against) the credibility of a witness. *See, e.g., Walker v. State,* 373 Md. 360, 403-04, 818 A.2d 1078, 1103-04 (2003) (finding improper vouching to have occurred where a prosecutor made assertions, based on personal knowledge, that a witness was lying). Vouching typically occurs when a prosecutor "places the prestige of the government behind a witness through personal assurances of the witness's veracity . . . or suggests that information not presented to the jury supports the witness's testimony." *U.S. v. Daas*, 198 F.3d 1167, 1178 (9th Cir. 1999) (citations omitted). The Supreme Court recognizes that prosecutorial vouching presents two primary dangers:
>
> > Such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the

> defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

U.S. v. Young, 470 U.S. 1, 18-19, 105 S. Ct. 1038, 1048, 84 L. Ed. 2d 1 (1985).

Id. at 153-154 (citations omitted in original).

The *Spain* Court recognized that attorneys "frequently . . . comment on the motives, or absence thereof, that a witness may have for testifying in a particular way," and that such comments are permissible "so long as those conclusions may be inferred from the evidence introduced and admitted at trial." *Id.* at 155. But vouching can be grounds for reversal if "'it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.'" *Id.* at 158 (quoting *Degren v. State*, 352 Md. 400, 430-431 (1999)).

The Court of Appeals has also observed in *Walker v. State*, 373 Md. 360, 396 (2003):

> [T]he prosecutorial voucher rule prohibits a prosecutor from expressly vouching for the veracity of a witness's testimony. The bar against prosecutorial vouching makes it improper for a prosecutor to make suggestions, insinuations, and assertions of personal knowledge.

Because the prosecutor in the present case did not explicitly express her personal belief in the credibility of the witnesses, it is doubtful that the remarks of the prosecutor actually misled the jury. Nevertheless, we caution all counsel to be mindful of, and adhere to, the restrictions codified in MRPC Rule 3.4(e).

Appellant's claim that the State made improper burden-shifting arguments was based upon the following comments. In appellant's closing argument, defense counsel told the jury that Mr. Clarke "was not being truthful, and [this] was not a robbery." Appellant asserted that the incident was "some type of fight" between Mr. Clarke, Hollis, and the mystery man, in which appellant was not involved because he was sitting in the Explorer playing a game on his phone. In the State's rebuttal closing argument, the State pointed out that Mr. Clarke admitted that "[h]e didn't want to come to court. We had to subpoena him to bring him here." But then, the prosecutor added: "And let me remind you that the State does in fact have the burden of proof, but the Defense also has subpoena power." This drew an objection on the grounds of "burden shifting," which was overruled.

We do not perceive an abuse of discretion in the trial court's overruling of that objection. We view the prosecutor's remark, under the circumstances of this case, not as burden shifting, but as a fair comment on appellant's testimony and argument portraying Mr. Clarke as a lying drug user. As the State points out in its brief, if a defendant takes the stand and testifies contrary to the State's witnesses, it is not improper for the State to draw the jury's attention to the fact that there is no corroboration for the defendant's version of events. *Marshall v. State*, 213 Md. App. 532, 540, *cert. denied*, 436 Md. 329 (2013); *Mines v. State*, 208 Md. App. 280, 300-02, 306-07 (2012).

The State also argued in its rebuttal closing argument that appellant had lied during his testimony. The prosecutor pointed out that appellant did not have to talk to the police at

all, but urged the jury to find, based upon the testimony presented at trial, that appellant had lied to Detective Dyer: "He lied about the smallest of details. Wouldn't admit to knowing his best friend's phone number when it had nothing to do with the case. He told you on his direct examination that he didn't lie to Detective Dyer but he did." This too was a fair comment on the evidence, and was a permissible argument regarding appellant's credibility as a witness. Appellant took the stand and, admittedly, lied. The State was entitled to point that out.

Appellant's Issue No. 8 - Fairness of Trial Judge

Finally, appellant complained that the trial judge deprived him of a fair trial because the court was biased against appellant and his trial counsel, and favored the State. Among appellant's complaints is that the court evidenced its bias by "belittling" him at a motions hearing on July 30, 2014. At that motions hearing, the court chastised counsel for typographical errors and unpersuasive arguments in his motions, and told appellant's counsel: "[Q]uite honestly, your motion is an insult to the Court. And I can't even believe that you filed [it]." That comment prompted appellant's first request for the judge to recuse himself, which was denied.

Appellant also points to sixteen or so instances during trial when the trial judge denied defense counsel's requests to approach the bench to make comments outside of the hearing of the jury.

And appellant further points out that there "were multiple instances where defense counsel asked the trial court to stop acting as a second prosecutor." Appellant identifies several incidents during the trial when the trial judge seemed to be irritated by defense counsel's arguments, objections, and requests.

The State acknowledges that "the record evidences that Cunningham's trial was hard-fought and, at times, rancorous." But the State also asserts that "Cunningham was not denied a fair trial." The State asserts: "In the end, the record in this case evidences that while the court might have grown impatient with [defense] counsel, and the exchanges between the court and counsel might have been heated, the court's interactions with defense counsel in the jury's presence were restrained and civil and . . . the court did not present an appearance of impartiality [sic] or bias and did not deny Cunningham a fair trial."

Because we have already ruled that a new trial is warranted, the question of whether the trial judge was obligated to recuse himself at any point during the previous proceedings is now a moot point. It is always a difficult task for an appellate court to consider such questions based upon a written transcript, and, because the point is moot at this juncture, we decline to engage in further analysis of the issue.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED; CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY MONTGOMERY COUNTY.