Circuit Court for Queen Anne's County
Case No.: C-17-CR-17-000598

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 242

September Term, 2018

DONNELL M. VANNISON, SR.

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: March 20, 2019

Appellant, Donnell M. Vannison, Sr., was convicted by a jury in the Circuit Court for Queen Anne's County, of one count of theft under $1,000. After he was sentenced to five years' incarceration, he timely appealed, presenting the following questions for our review:

1. Did the trial court err in allowing Sandy Lindenberger to testify as a lay witness where expert testimony was required?
2. Did the trial court err in admitting irrelevant evidence?
3. Did the trial court err in allowing the prosecutor to argue facts not in evidence?

For the following reasons, we shall affirm.

BACKGROUND

At approximately 2:45 p.m. on October 14, 2016, Diane Rosa, the store manager for the Famous Footwear outlet at the Queenstown Premium Outlets, noticed a man standing in the women's athletic shoe department, holding a "big, like, birthday gift bag." Rosa testified that the man, identified in court by her as appellant, "abruptly left" the store without stopping at the registers after they made eye contact.

Rosa then went to the women's department where appellant was standing and found an empty woman's Nike shoe box on the floor. Nearby, there was another empty shoe box shoved into a shelf.

Rosa then contacted the head of security for the mall, Sandy Lindenberger, and informed her about the incident, providing a description of appellant and the gift bag he was carrying. Rosa recounted that she found two empty shoe boxes, one for a pair of Nike Air Max Torch IV shoes, and another for a pair of Nike Air Max Invigor Print shoes. Rosa

checked the store point of sale system and verified that these specific shoes that were contained in these respective boxes were not sold that day. She later found four other empty shoe boxes and ascertained that their corresponding shoes had not been sold and were also missing.

According to Rosa, the first two pairs of Nikes were valued at $159.98. The remaining four pairs of shoes, also all Nikes, were valued at $374.94. On cross-examination, Rosa agreed that she never actually saw appellant take the shoes.

Sandy Lindenberger, the security director for the outlet mall, was in the security office at around 2:42 p.m. when she received a call from Rosa. Rosa informed her that an African-American male had just left her store carrying a large birthday gift bag with balloons printed all over it. Lindenberger got onto her Segway and went to the Famous Footwear store to get more details. She left shortly thereafter, and spotted a man matching the description run into the Under Armour outlet store, which was located approximately nine storefronts away from Famous Footwear. This man, identified by Lindenberger in court as the appellant, ran out of the Under Armour store with a full bag, and got into a red Lexus occupied by another African-American male and a three to five-year-old boy. Lindenberger wrote down the tag number for the Lexus and contacted the police. She identified the make, model and color of the car, the number of occupants, the direction it was leaving, testifying that it initially attempted to "go in the wrong direction out of the mall," and the fact that appellant was carrying a distinctive gift bag. Lindenberger agreed she never saw any shoes in appellant's hands.

Queen Anne's County Sheriff Deputy M.C. Jones responded to the Famous Footwear at around 3:15 p.m. where he took reports from both Lindenberger and Rosa. This information, including a description of the suspect and the vehicle, was then dispatched throughout the Queen Anne's County Sheriff's Office.

Corporal Gavin Seward, of the Maryland Transportation Authority, was working on patrol near the EZ Pass office located on the west side of the Chesapeake Bay Bridge when he heard a "Be On The Lookout" ("BOLO") for a certain vehicle that was suspected of being involved in a theft at the Queenstown outlet mall located on the other side of the bridge. A vehicle matching the description and license plate number from the BOLO crossed the bridge and passed Corporal Seward's location at around 3:05 p.m.

Corporal Seward got behind the vehicle, a red Lexus, and noticed that it was travelling over the posted speed limit. Accordingly, at around 3:08 p.m., the officer initiated a traffic stop on Route 50 near Bay Dale Drive. During the course of the stop, Corporal Seward ascertained that both the driver, who was not identified at trial, and his passenger, the appellant, had their driving license privileges suspended.

A number of other officers from Queen Anne's County arrived at the scene of the stop in Anne Arundel County. Upon his arrival, Queen Anne's County Sheriff's Deputy Ryan Davidson looked inside the Lexus and observed a large, empty birthday gift bag, decorated with balloons, laying on the floor of the vehicle in close proximity to appellant's

person.[1] In addition, following up on information relayed to him by Deputy M.C. Jones, Deputy Davidson found a pair of red or burgundy Nikes and a pair of gray and coral-colored Nikes in the trunk of the Lexus. Additional pairs of black and white Nike shoes and, which will be discussed further, other "multiple clothing items" from the Under Armour outlet store, were found inside the trunk.

After the stop, Rosa and Lindenberger both identified the birthday gift bag and confirmed it was the same one they saw appellant carrying on the day in question. Lindenberger also confirmed that the Lexus stopped by the police was the same one she saw parked at the mall. Finally, Rosa confirmed that the six pairs of shoes recovered from the Lexus were the same ones that were missing from her store.

We shall include additional detail in the following discussion.

DISCUSSION

I.

Appellant first contends the trial court erred in admitting Lindenberger's testimony that the balloon bag, lined with foil, was often used by shoplifters to evade detection, on the grounds that the testimony amounted to expert opinion. Appellant continues that, because Lindenberger was neither disclosed as nor qualified as an expert witness, her lay opinion testimony was inadmissible. The State responds that the testimony was admissible

[1] Deputy Jennifer Aaron was on the scene of the traffic stop at the time and confirmed that she also saw the empty balloon-decorated gift bag on the front seat passenger side floorboard.

as lay opinion and the trial court properly exercised its discretion. Additionally, the State argues that any error was harmless beyond a reasonable doubt.

The Court of Appeals has explained the standard for reviewing a circuit court's admission of evidence as follows:

> [O]rdinarily a trial court's ruling[s] on the admissibility of evidence are reviewed for abuse of discretion. A court's decision is an abuse of discretion when it is well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable. Further, even with respect to a discretionary matter, a trial court must exercise its discretion in accordance with correct legal standards. As such, we examine a trial court's admissibility determinations for an abuse of discretion.

Wheeler v. State, 459 Md. 555, 560 (2018) (internal citations and quotations omitted).

The pertinent exchange occurred during Lindenberger's direct examination. Lindenberger was asked about the bag and she began by noting that the bag was lined with foil. After appellant's objections on the lack of foundation were sustained, Lindenberger testified that she had been involved in the investigation of hundreds of thefts from stores at the outlets. She agreed she was familiar with "items used by those who may be secreting store items while they're attempting to leave the store," and that she had reviewed or examined approximately fifty bags used in such thefts. Lindenberger then continued:

> Q. And during your review and familiarization with those items, do you have occasion to familiarize yourself with the ways individuals or the types of bags individuals use?
>
> A. Yes.
>
> Q. And could you tell us a little bit about what you learned as to how those things are done? What is done to the bags?
>
> A. They line the bags with --

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Overruled. Go ahead.

THE WITNESS: Go ahead? They line the bags with foil and duct tape so when they go in and they take something that has a sensor, when they walk out the door it will not beep to alert the -- the employees that they have something in their bag.

THE COURT: Have you tried that yourself with any of those bags?

THE WITNESS: Yes, plenty of times.

BY [PROSECUTOR]:

Q. I almost don't want to ask if it works, but what, if anything, in the stores at the outlets are located at the -- the exit doors, on the inside of the -- inside of the store?

A. I guess they're just called sensor -- beep – we call them beepers or whatever. So, if something is removed and you can do -- if you've been there, you've bought a purse and they have sensors all over the place. If they don't get them all, you're walking out, it's going to beep. So, and then you just go back and remove it and then go.

Q. From your experience, what, if anything, happens when an item with a sensor is placed inside of a bag with some foil?

A. It will not beep.

[DEFENSE COUNSEL]: Objection. Asked and answered.

THE COURT: Overruled. All right. You can answer.

BY [PROSECUTOR]:

Q. So, if I could have you take a look at State's Exhibit No. l and see if you recognize anything in that bag?

A. Yes, it looks like it's lined with foil inside the bag.

The issue raised concerns Maryland Rules 5-701 and 5-702. Maryland Rule 5-701 provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Maryland Rule 5-702 provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

Admission of both types of evidence is subject to an abuse of discretion standard. *See Sissoko v. State*, 236 Md. App. 676, 712 (expert opinion), *cert. denied*, 460 Md. 1 (2018); *Paige v. State*, 226 Md. App. 93, 124 (2015) (lay opinion). The key difference between the two was explained by the Court of Appeals in *Ragland v. State*, 385 Md. 706 (2005). There, two police officers were permitted to testify as lay witnesses, over defense objection, that they believed they observed a drug transaction involving Ragland and another individual. *Ragland*, 385 Md. at 711–14. The Court accepted Ragland's argument that this amounted to expert testimony and the trial court erred in admitting the evidence as lay opinion. *Id.* at 716. The Court compared the aforementioned rules:

> Expert opinion testimony is testimony that is based on specialized knowledge, skill, experience, training or education. Expert opinions need not be confined to matters actually perceived by the witness. Lay opinion testimony is testimony that is rationally based on the perception of the witness.

Id. at 717.

The Court then clarified the distinctions between lay and expert opinion, explaining:

> [B]y permitting testimony based on specialized knowledge, education, or skill under rules similar to Md. Rule 5-701, parties may avoid the notice and discovery requirements of our rules and blur the distinction between the two rules. Accordingly, we will follow the approach as reflected in the 2000 amendment to Fed. R. Evid. 701 and hold that Md. Rules 5-701 and 5-702 prohibit the admission as "lay opinion" of testimony based upon specialized knowledge, skill, experience, training or education.

Ragland, 385 Md. at 725.

Therefore, the two officers' opinions in *Ragland* were not lay opinion because (1) the witnesses "had devoted considerable time to the study of the drug trade;" (2) "they offered their opinions that, among the numerous possible explanations for the events on Northwest Drive, the correct one was that a drug transaction had taken place;" and (3) "[t]he connection between the officers' training and experience on one hand, and their opinions on the other, was made explicit by the prosecutor's questioning." *Ragland*, 385 Md. at 726.[2]

Subsequent cases have addressed the difference in the types of admissible opinion evidence. *Compare State v. Blackwell*, 408 Md. 677, 691 (2009) (testimony about defendant's performance on the horizontal gaze nystagmus test, a roadside sobriety test, by a state trooper who had not been qualified as an expert, constituted expert testimony subject to the strictures of Maryland Rule 5-702) *with Perry v. State*, 229 Md. App. 687, 710 n. 5 (2016) (noting that expert testimony not required to describe a "muzzle flash" in a case where defendant allegedly fired upon police officers at night), *cert. dismissed*, 453 Md. 25 (2017); *see also In re: Ondrel M.*, 173 Md. App. 223, 243–44 (2007) (testimony of a police

[2] The Court also concluded that the error was not harmless because the only other witness was an impeached witness who was also a participant in the crime, and the remaining evidence was circumstantial. *Ragland*, 385 Md. at 726.

officer, who is capable of identifying marijuana by smell through past experience, that he/she smelled marijuana, is lay opinion testimony under Maryland Rule 5-701).

In *Prince v. State*, 216 Md. App. 178, *cert. denied*, 438 Md. 741 (2014), a police officer provided trial testimony concerning his placement of trajectory rods through bullet holes in a vehicle. *Prince*, 216 Md. App. at 186. Distinguishing *Ragland*, we held that "the process of sliding trajectory rods through existing bullet holes, taking photos of the result, and reporting [the officer's] actions does not require expertise or analysis grounded on an officer's particular training or experience." *Id*. at 200. In concluding that the officer's lay testimony was properly admitted, we stated:

> A police officer who does nothing more than *observe* the path of the bullet and place trajectory rods (in the same manner as any layman could) need not qualify as an expert to describe that process. Officer Costello relied on his own observations and placed the rods into the holes made by the bullet fired by Mr. Prince. He conducted no experiments, made no attempts at reconstruction, and "was not conveying information that required a specialized or scientific knowledge to understand."

Id. at 202 (emphasis in original, citation omitted).

We also addressed the differences in types of opinion evidence in *Fullbright v. State*, 168 Md. App. 168, *cert. denied*, 393 Md. 477 (2006). There, a case involving an assault with a knife, the responding police officer who directed the recovery of the bloody knife by the Crime Lab, was asked on direct examination whether he obtained fingerprints from the knife. *Id.* at 175. The officer replied no and then, over defense objection, testified that, based on his experience and training, it was "hard to get good prints off of blood." *Id.* at 176. The Court rejected Fullbright's argument that this was impermissible expert opinion and distinguished *Ragland*:

> First, Officer Bechtel's testimony that, based on his training and experience, it is hard to get good prints off wet objects, was not opinion evidence, expert or lay, because the State did not offer his testimony for its truth. Rather,

> Officer Bechtel was asked by the State to explain his conduct as the investigating police officer, i.e., why he did not submit the bloody knife for fingerprint analysis. He responded by referring to his knowledge of "recovering latent prints" gained from his "experience and training in the Police Academy."

Id. at 181.

Further, this Court also reasoned:

> Second, Officer Bechtel's opinion regarding the quality of latent fingerprints from wet objects was not introduced to prove an essential element of the offenses for which appellant was charged. Officer Bechtel's opinion did not directly relate to any element of the crimes of assault, possession of a deadly weapon, or burglary, but rather was directed to the issue of the adequacy of the police investigation.

Id. at 182.

Here, we are persuaded that Lindenberger's testimony did not amount to inadmissible expert opinion. Indeed, Lindenberger recounted a scenario that is familiar to most shoppers: "if you've been there, you've bought a purse and they have sensors all over the place. If they don't get them all, you're walking out, it's going to beep. So, and then you just go back and remove it and then go." Lindenberger's testimony that these sensors may be defeated by certain measures, including by foil-lined bags, did not require any specialized or scientific knowledge to understand. Further, as set forth above, her testimony was rationally based on her personal experience and was helpful to the jury. Moreover, Lindenberger did not opine that appellant actually took the shoes out of the store inside the foil-lined bag. The bag was, in fact, empty when it was recovered. Thus, her testimony did not directly relate to the theft itself.

Even if the court erred and Lindenberger did offer expert opinion, any error was harmless beyond a reasonable doubt. *See Dionas v. State*, 436 Md. 97, 108 (2013) ("An error is harmless when a reviewing court is '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'") (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). Here, the fact that the bag was foil-lined was not its primary defining characteristic. Instead, its external design, described as a birthday gift bag adorned with balloons, was the identifying feature that circumstantially connected the appellant to the theft. We are persuaded that appellant was not prejudiced by Lindenberger's opinion and any error was harmless.

II.

Appellant next asserts that the trial court erred in admitting a photograph of Under Armour clothing items, with their price tags attached, found in the vehicle's trunk along with the allegedly stolen shoes on the basis that admission was unfairly prejudicial. The State responds that this issue is unpreserved because appellant failed to object when similar evidence was elicited elsewhere during trial. The State also contends that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, as it was relevant to establish identity. The State also suggests that any error was harmless.

The following transpired during Deputy Davidson's redirect examination:

> Q. Deputy, I'm showing you what's marked for identification State's Exhibit No. 9. Do you recognize that?
>
> A. That's the Under Armour gray hoodie.
>
> Q. And what about the next page?
>
> A. Looks like sweat -- black -- black or gray sweatpants.
>
> Q. Do you recognize those items?

A. We recovered a pair of black sweatpants from the trunk of the vehicle that had Under Armour tags on it.

Q. Do those fairly and accurately depict those items?

[PROSECUTOR]: Move to enter State's Exhibit No. 9.

THE COURT: Any objection?

[DEFENSE COUNSEL]: Yes, Your Honor, I object. May I Approach?

THE COURT: Yes.

(Counsel and defendant approached bench, and the following occurred:)

THE COURT: Oops, something fell on the floor. When you get a chance. Okay.

So, are we talking about the suppression issues? That's why you object?

[DEFENSE COUNSEL]: Well, no, I mean, this particular item I don't think is relevant to the -- to the case at hand. I believe they're going to try to say that this was other stolen property that they recovered from the trunk of his vehicle. It has nothing to do with Famous Footwear. It's going to be prejudicial, highly prejudicial, in this particular case.

[PROSECUTOR]: I haven't asked anything about it being stolen.

THE COURT: No, I don't want to hear anything about that --

[PROSECUTOR]: Right, and I haven't.

THE COURT: -- so as long as he doesn't do that, I think it's okay. I mean, your relevance are, you know, I don't see that. Okay. I will overrule the objection. But we'd note that one issue.

[PROSECUTOR]: Yes.[3]

[3] State's Exhibit 9, the photograph of the contents of the trunk, was then admitted over objection.

Maryland's appellate courts ordinarily will not consider "any issue 'unless it plainly appears by the record to have been raised in or decided by the trial court.'" *King v. State*, 434 Md. 472, 479 (2013) (quoting Md. Rule 8-131 (a)). Pursuant to Maryland Rule 4-323(a), "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent." *See also Prince*, 216 Md. App. at 194 ("[T]he objection must come quickly enough to allow the trial court to prevent mistakes or cure them in real time . . ."). Here, the same evidence depicted in the photograph came in, without objection, when the witness testified that a pair of black Under Armour sweatpants, with the tags still attached, were found in the trunk. We agree that the issue was not properly preserved by a timely objection. *See also Fowlkes v. State*, 117 Md. App. 573, 587 (1997) ("[I]f opposing counsel's question is formed improperly or calls for an inadmissible answer, counsel must object immediately") (citing *Bruce v. State*, 328 Md. 594, 627–28 (1992)), *cert. denied*, 348 Md. 523 (1998).

Even if preserved, we are persuaded the evidence was relevant. "Generally, in order for evidence to be admissible, it must be relevant." *Thomas v. State*, 429 Md. 85, 95 (2012). "Pursuant to Md. Rule 5-401, evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* at 96 (internal quotation omitted). Having "any tendency" to make "any fact" more or less probable is a very low bar to meet. *Williams v. State*, 457 Md. 551, 564 (2018) (citing State v. Simms, 420 Md. 705, 727 (2011)). However, relevant evidence may be excluded "if it is unfairly

prejudicial, confusing to the fact finder, or a waste of time." *Decker v. State*, 408 Md. 631, 640 (2009).

In this case, Lindenberger testified that, after she received the incident report from the store manager at Famous Footwear, she saw someone matching the description enter and leave the nearby Under Armour store in haste. The fact that Under Armour merchandise was found in the trunk of the vehicle in which appellant was a passenger was probative on the question of identity. *See Hopkins v. State*, 352 Md. 146, 163 (1998) (observing that a witness' "testimony as to the identity of the assailant, therefore, was material to the outcome and, as such, highly relevant"). Indeed, to the extent that appellant is claiming that the Under Armour items may have been evidence of other bad acts, proof of identity may be specially relevant to undermine such a claim. *See generally*, *Emory v. State*, 101 Md. App. 585, 610–11 (1994) (quoting *State v. Faulkner*, 314 Md. 630, 637–38 (1989)), *cert. denied*, 337 Md. 90 (1995).

We also conclude that the fact that the Under Armour merchandise still had the price tags affixed was not unfairly prejudicial. "Evidence is prejudicial when it tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission." *Hannah v. State*, 420 Md. 339, 347 (2011) (citation omitted). However, under the rule:

> [E]vidence is never excluded merely because it is "prejudicial." If prejudice were the test, no evidence would ever be admitted. The parties have a right to introduce prejudicial evidence. Probative value is outweighed by the danger of "*unfair"* prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case. The line is not always easy to draw.

Murphy, *Maryland Evidence Handbook* 506 (B), at 209 (4th ed. 2010) (emphasis in original).

Although it was possible for the jury to infer that the Under Armour garments may have been stolen, there was no direct evidence presented to support any such inference. Therefore, even if prejudicial, we are persuaded that the evidence was not unfairly prejudicial and the trial court properly exercised its discretion.[4]

III.

Finally, appellant declares that the trial court erred by permitting the prosecutor to argue facts not in evidence during closing argument by suggesting that the Under Armour

[4] We note that the State relies on *Odum v. State*, 412 Md. 593 (2010). In that case, the Court concluded "evidence of the robberies that precipitated the kidnappings, the carjacking that facilitated the kidnappings, the murders that brought a tragic close to the kidnappings, and the subsequent use of the proceeds of the robbery to purchase drugs, arose out of the same criminal episode." *Odum*, 412 Md. at 611–13. The Court explained:

> [T]he strictures of "other crimes" evidence law, now embodied in Rule 5–404(b), do not apply to evidence of crimes (or other bad acts or wrongs) that arise during the same transaction and are intrinsic to the charged crime or crimes. We define "intrinsic" as including, at a minimum, other crimes that are so connected or blended in point of time or circumstances with the crime or crimes charged that they form a single transaction, and the crime or crimes charged cannot be fully shown or explained without evidence of the other crimes.

Odum, 412 Md. at 611.

We are not convinced that any alleged theft of the Under Armour garments was so intrinsic to the theft from the Famous Footwear outlet store as to be admissible under the *Odum* doctrine. But, we need not decide that issue because we conclude, even if preserved, the trial court properly exercised its discretion. We also decline to consider appellee's harmless error argument. *See Decker*, 408 Md. at 649 n. 4.

items found in the trunk were also stolen. The State responds that the remarks were within the scope of proper argument and that, in any event, reversal is not required.

The prosecutor's argument in this theft case was relatively brief. In pertinent part, he argued:

> . . . When you see a raincoat and an umbrella dripping wet, you know it's been raining. Ladies and gentlemen, when the defendant is seen with a bag with foil in it abruptly leaving the area of the women's shoes at Famous Footwear after the store manager comes over to him and then is later found to be in a car with those shoes, I submit to you it's the same exact thing.
>
> Ladies and gentlemen, as I said at the beginning, this case is extremely simple. The testimony as you heard was that Diane Rosa was working, she saw the defendant in the women's shoe section. She went over, she made eye contact with him and he abruptly left with this large bag. He didn't stop to pay, he walked right out. What does she see? The empty shoebox. She finds another empty shoebox. They hadn't been sold. The defendant didn't have permission to have them, he didn't pay for them. So, issue of theft, theft is stealing shoes.
>
> Sandy Lindenberger, who was on her Segway in the area, sees the defendant a couple of -- a couple of storefronts down, walking away from the red Lexus going into the Under Armour. And I submit to you what that tells you is that the defendant walked out of Famous Footwear, either got into the red Lexus, moved down, or he emptied the contents of the bag with the stolen shoes in it, put it in the trunk, went into Under Armour. She sees the defendant running out of Under Armour and then they take off.
>
> So, what do we have here? We have a defendant who everybody identified, everybody. We have the defendant identified by Diane Rosa abruptly leaving. We have the defendant identified by Ms. Lindenberger running to the car and then the vehicle leaving at a fast rate, trying to get out the wrong way. Then we have Corporal Seward pulling over the car, Deputy Davidson seeing the bag by the defendant's right leg and the door.
>
> Now, Ms. Lindenberger said that this was full when he ran out of Under Armour. It was empty. They found Under Armour items in the trunk where they also found the stolen shoes. It isn't raining, it's pouring, okay? This defendant stole not one pair, not two pair, not three pair, not four pair, he stole six pairs of shoes. The value of it was prepared by Ms. Rosa with a

> receipt when she found all the other stolen shoes to be a grand total of $397.44, which is on State's Exhibit No. 2. I submit to you that's less than 1,000.
>
> So, ladies and gentlemen, as I said, this case is very simple. The defendant was seen and he stole all of those items. . . .

Prior to the defense closing argument, counsel asked to approach the bench, and the following ensued:

> [DEFENSE COUNSEL]: Your Honor, I objected to (indiscernible) information coming in, the -- the evidence that I don't -- the -- the photos that were entered into evidence, State's. I didn't say anything about these --
>
> [PROSECUTOR]: They'd been stolen, I didn't say they were stolen.
>
> THE COURT: No, they're --
>
> [DEFENSE COUNSEL]: Now he's alluding to it in – in closing argument.
>
> [PROSECUTOR]: I didn't say they were stolen.
>
> [DEFENSE COUNSEL]: (Indiscernible.) It's not established.
>
> THE COURT: No, I don't think so.
>
> [DEFENSE COUNSEL]: It's just for the record (indiscernible.)
>
> THE COURT: Okay, I'll overrule the objection, but I understand, okay?

"The permissible scope of closing argument is a matter left to the sound discretion of the trial court. The exercise of that discretion will not constitute reversible error unless clearly abused and prejudicial to the accused." *Cagle v. State*, 462 Md. 67, 74 (2018) (quoting *Ware v. State*, 360 Md. 650, 682 (2000), in turn quoting *Booth v. State*, 306 Md. 172, 210–11 (1986), *vacated in part*, 482 U.S. 496, 107 S. Ct. 2529 (1987)). And:

> Generally, a party holds great leeway when presenting their closing remarks. "Counsel is free to use the testimony most favorable to his side of the argument to the jury, and the evidence may be examined, collated, sifted and treated in his own way. . . ." *Mitchell v. State*, 408 Md. 368, 380, 969 A.2d 989, 996 (2009) (quoting *Wilhelm v. State*, 272 Md. 404, 412, 326 A.2d 707, 714 (1974)). It falls "within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is afforded a wide range." *Id*. However, this leeway is not without limitation. As explained above, a trial court has broad discretion when determining the scope of closing argument. *Ware*, 360 Md. at 682, 759 A.2d at 781.

Cagle, 462 Md. at 75.

Appellant's argument is that, by suggesting that any Under Armour items found in the car were stolen, the prosecutor argued facts not in evidence. "Arguing facts not in evidence is highly improper." *Fuentes v. State*, 454 Md. 296, 319 (2017) (citing *Lawson v. State*, 389 Md. 570, 591 (2005), and *Spain v. State*, 386 Md. 145, 156 (2005)); *see also Lee v. State*, 405 Md. 148, 166 (2008) (observing that it is improper to make comments "that invite the jury to draw inferences from information that was not admitted at trial").

We have already determined that the court did not err in admitting certain evidence of the Under Armour items. Thus, to briefly employ a double negative, these items were not "facts not in evidence." Moreover, as appellant recognizes, the prosecutor did not explicitly state that these items were stolen. Appellant's argument, instead, is that the prosecutor clearly implied they were stolen. Although we do not disagree that the implication was there, it appears that the prosecutor's primary purpose in referring to the Under Armour items was to provide a link in the chain towards establishing appellant's

identity, considering that appellant was seen entering and leaving that outlet store with the distinctive birthday balloon gift bag.

In any event, even when a prosecutor's remark is improper, it will typically merit reversal only "'where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to prejudice the accused.'" *Lawson*, 389 Md. at 592 (quoting *Spain*, 386 Md. at 158–59). The "determination of whether the prosecutor's comments were prejudicial or simply rhetorical flourish lies within the sound discretion of the trial court . . . . On review, an appellate court should not reverse the trial court unless that court clearly abused the exercise of its discretion and prejudiced the accused." *Degren v. State*, 352 Md. 400, 431 (1999).

Here, the State's theory of the case was that, although no one actually saw appellant steal any items whatsoever: the Famous Footwear store manager, Rosa, saw appellant in an area of the store where empty shoe boxes were later found; appellant was holding a distinctive birthday bag; after he left Famous Footwear, the security officer, Lindenberger, saw a person matching Rosa's description entering the Under Armour store carrying an empty birthday bag; that same person then exited the Under Armour store, carrying a full bag, and entered a waiting red Lexus; the red Lexus was stopped a short while later based on the description of events provided by Lindenberger; appellant was a passenger in that vehicle; the distinctive birthday bag, as well as Famous Footwear and Under Armour items, were all found within the vehicle.

Had it been raised, we would have little difficulty concluding that this circumstantial evidence was sufficient to support the jury's determination that appellant stole the shoes

from the Famous Footwear outlet store. Thus, to the extent that the prosecutor improperly implied that appellant also stole items from the Under Armour outlet, we are unable to conclude that such an implication actually misled, or was likely to mislead, the jury in this case.

JUDGMENT AFFIRMED. COSTS TO BE ASSESSED TO APPELLANT.