Circuit Court for Prince George's County
Case No. CT160843X

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0916

September Term, 2022

STEPHEN A. NURSE

v.

STATE OF MARYLAND

Wells, C.J.,
Zic,
Raker, Irma S.
(Senior Judge, Specially Assigned),

Opinion by Raker, J.

Filed: December 7, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, Stephen Nurse, was convicted in the Circuit Court for Prince George's County of first-degree murder. Appellant presents the following questions for our review:

1. "Did the circuit court err in denying appellant's motion to exclude the dog sniff as being unreliable under *Daubert/Roshkind*?
2. Did the circuit court err in denying objections to the State's closing argument?"

Finding no error, we shall affirm.

I.

Appellant was indicted by the Grand Jury for Prince George's County of first-degree murder. The jury found appellant guilty. The court sentenced appellant to a term of incarceration of life without parole.

On the morning of May 30, 2016, Ashley Solano was found dead in the laundry room of 7400 18th Avenue, Hyattsville, Maryland. Officer Mongomery of the Prince Georges County Police Department, an expert in bloodstain pattern analysis, concluded that she had been killed with multiple blows to the head while on the floor in the laundry room. The medical examiner confirmed that the cause of death was multiple blows to the head with a heavy object resulting in fractures to her skull and severe injuries to her brain. Ms. Solano's hands had been cut off.

Appellant was the father of Ms. Solano's son. When the police interviewed appellant they noticed that he had injuries to his right hand which he first claimed were the result of blood pressure medication and later claimed were the result of falling off his bicycle. Appellant admitted to having seen Ms. Solano the previous afternoon but denied

seeing her after 5:00 pm. Instead, appellant claimed to have gone to Silver Spring and to have met a woman named Renee. Appellant reported that he had proceeded from Silver Spring to his mother's house where he lived. In the morning, he claimed to have gone into Langley Park and then to his mother's hair salon. Appellant explained to the police that Ms. Solano had been seeking out a relationship with him, but he had turned her down.

The police discovered evidence that appellant had been with Ms. Solano later than he claimed. An eyewitness informed police that she had seen appellant with Ms. Solano around the intersection of Metzerott Road and New Hampshire Avenue at 10:30 p.m. on May 29. Recrnds from appellant's phone confirmed that appellant had made a series of three phone calls at 10:57 pm on May 29 from that area. Between 11:27 and 11:43 p.m. appellant made a series of phone calls from the Langley Park area near the building where Ms. Solano was found. The police officer who analyzed the phone records indicated that the location of the phone calls was not consistent with appellant being in Silver Spring as he had claimed. A final phone call at 1:17 am on May 30, indicated that appellant's phone was at appellant's mother's house.

The police recovered a pair of jeans from the employee area of appellant's mother's hair salon where appellant claimed to have been on the morning of May 30. The jeans tested positive for the presence of blood. A forensic analyst testified at trial that DNA from a blood stain on the jeans had two contributors. The DNA profile of the primary contributor was consistent with Ms. Solano's DNA profile with a 1 in 7.6 sextillion chance of the DNA belonging to an unrelated individual. The DNA profile of the second contributor was

consistent with appellant's DNA profile with a 1 in 1.57 million chance of the DNA belonging to an unrelated individual.

Particularly pertinent to the current appeal, however, was the police's use of a trained bloodhound to identify a trail at the crime scene. On May 30, 2016, the day the body was found, Trooper Christopher McCombs took his K-9, Copper, to the crime scene. The dog was presented with a scent article belonging to appellant. Copper indicated that he had a good trail, led officers half a mile down the road, and walked in a circle indicating the end of the trail. In the area where Copper stopped, police found a storm drain. Inside the storm drain, there was a pink shirt with a red stain, a black Bob Seger T-shirt, a purse, identification documents for Ms. Solano, cigarettes, $33.92 in cash, and a metal drain cover. The metal drain cover had blood on it. The DNA from that blood was consistent with Ms. Solano. The State used this evidence to argue that appellant had been at both the crime scene and the storm drain where Ms. Solano's belongings were found.

This dog-sniff piece of evidence was subject to a *Daubert* hearing. At that hearing, both parties presented evidence as to the reliability of dog-sniff evidence. The State presented the testimony of Agent Richard Kelly, the lead bloodhound trainer for the Special Operations Division of the Maryland State Police. Agent Kelley testified that Copper had been trained to match-to-sample, meaning that Copper had been trained to trail a scent presented to him on a "scent article." Copper was trained using games in which he needed to trail a scent on routes of increasing distance and with increasing numbers of turns. Agent Kelly testified that Copper's training "worked" and that there was nothing at all in Copper's training which would lead him to believe that Copper was unreliable.

Trooper McCombs, Copper's handler, testified that he had trained Copper starting when Copper was a 12-week-old puppy and had followed the above training protocol. Copper was trained on both single and multi-turn trails. He was trained in scent discrimination so that he could ignore other scents (including other human scents crossing the trail) and focus on the single human scent he had been asked to trail. He was trained also to follow aged trails. Trooper McCombs acknowledged, however, that the oldest trail Copper had been trained on was 1 hour old whereas, based on the medical evidence, the trial from Ms. Solano's residence was likely over twelve hours old. Trooper McCombs testified that, based on his experience, there was nothing that would have prevented Copper from following an older trail than the trails upon which he had been trained.

Copper was certified on June 11, 2015, and then again on November 9, 2015. During that certification, Copper was sent along a two-hundred-pace trail, which crossed over a hard surface and which turned once. During that certification test, the handlers were not aware of the trail the dog should be following. Trooper McCombs explained that this is called a "blind" trial. It is used to prevent the handler from accidentally cueing the dog. The certifications were not, however, conducted in a "double-blind" manner in which neither the handler nor the monitor knew the trial. Agent Kelly testified that this lack of double-blind testing did not undermine Copper's training or make him unsure of Copper's ability to succeed.

Trooper McCombs acknowledged that Copper did not have a perfect success rate in the field after certification. On November 8, 2015, Copper was deployed to track a missing child. Copper tracked the child to a neighbor's property, where it turned out the child had

been seen earlier that day, but Copper was not able to follow the child further to the neighbor's house where the child was later found. In a second missing child case, Copper trailed the child for some distance but was unable to locate the child and the child was found in a different location. In an arson case, Copper trailed the arsonist a short distance from the burned house but then lost the trail. The arsonist was later found dead inside the house.Trooper McCombs testified to the steps he took to ensure that Copper could produce a reliable trail on May 30. He waited until other canine units were out of the area. He gave Copper time to get acclimated to the scents in the area and to work out any excitement about being in a new space. He pushed back the media to ensure that Copper was not distracted by the cameras. Only then did Copper trail the scent to the storm drain cover where Ms. Solano's possessions were found.

Appellant presented the testimony of Doctor Mary Cablk, who runs a multi-million-dollar federally funded K-9 program. Doctor Cablk reviewed Copper's training records and testified that she was concerned about the lack of double-blind training for Copper. Doctor Cablk testified that the lack of double-blind training means that Copper might not be successful when nobody present knows the trail. Doctor Cablk pointed to the incidents in the deployment record in which Copper was unable to follow a trail his handler didn't know.

Doctor Cablk testified that Copper had been used outside the scope of his training. Scents can be fragile and degrade over time. They can get blown around or confused when other people walk through the area. This is particularly true on a hot or humid day, like May 30, 2016, because the heat and humidity can break down biological material.

Copper's training was to identify scents that were up to an hour old. He was used in this case to track a scent that was over twelve hours old. He was tested on trails extending up to two-hundred paces, sorter than the standard trailing testing of 800 yards, and much shorter than the half a mile he trailed in this case. Doctor Cablk acknowledged, however, that the standards to which she compared Copper were non-mandatory.

Finally, Doctor Cabalk testified that the circumstances of the crime scene might have affected Copper's ability to trail. Copper was a young dog and, therefore, susceptible to distraction. This was a distracting crime scene with many people, including many members of the press with camera equipment. Copper had demonstrated an aversion to the smell of human remains in the past, which was concerning given the presence of Ms. Solano's remains at the crime scene.

The trial court admitted the dog-sniff evidence over defense's objection at the end of the *Daubert* hearing, reasoning that the methodology was testable, the technique was subject to peer review, there were training records for Copper showing that he was successful 80 to 85 percent of the time, that using dogs to trail scents was a generally accepted technique, that the ultimate purpose of the tests with Copper was investigation rather than litigation, that Copper did what he was trained to do, that Trooper McCombs had appropriately considered alternative explanations for Copper's behavior in the field and had not jumped to any unfounded conclusions, that Trooper McCombs was a competent professional in the field, and that the dog scent trailing techniques used in this case were sufficiently reliable for admissibility. As a result of these findings, the dog-sniff evidence was presented at trial along with the other evidence described above.

During closing arguments, the State made two comments, which are relevant to this appeal. First, the State addressed the injuries to appellant's hands and appellant's changing stories about them, arguing that the injuries and appellant's attempt to hide them suggest that he got the injuries while doing something he shouldn't have been doing. The State argued that the injury must have happened close to the time of the crime based on witness testimony about when appellant's hand started to swell. The State then argued:

> So when asked what happened to his hands, he first said, I'm not – I have a blood pressure issue, causing my blood pressure issue. Well, why wouldn't that blood pressure issue happen with both hands? Why would it be limited to one?
>
> But then he changes his story from, oh, it must be blood pressure to oh, I fell off a bike. No information about how – I mean, excuse me, when that happened. You'll hear in later evidence there is no testimony or video evidence or anything about a bike that he was on.

At this point, appellant objected to burden shifting and the court overruled the objection. The State argued that there was evidence of the defendant taking other means of transportation on the night of the murder but not a bike, and that appellant had hidden his hands from detectives after telling them that he had been injured in a bike accident. The State argued that the implausibility of the story suggested that "[m]aybe he's making this story up on the fly."

Second, on rebuttal, the State addressed appellant's claim that there was no motive for him to commit this crime by saying

> [N]ow what is the reason for this case? Right? Defense says there's no motive. The motive is jealousy and resentment.

The State argued that appellant was a middle-aged man living at home while the much younger mother of his child was out partying. The State then argued:

> He explains to police officers that Ashley doesn't have a boyfriend, but she does tell him about all the sex she's having. He is jealous. He is a middle-aged man living with his mom, not his kid, and his baby moma is out living it up. She's young. She's partying. He has to make up and lie about getting the second [d]ate with a fictional lady. . . . She didn't want to hangout with him. It was Memorial Day weekend. She wants to go out and party and have fun. She doesn't want the hang out with him. Right? But they meet back up. They go to the laundry room and maybe he tried to get some.

At that point defense counsel objected to speculation arguing "[a]t this point, I mean, I kind of let it go a little. There's no evidence for any of this. There's no evidence to support this, just not." The court sustained the objection. The State continued as follows:

> Ashley doesn't have time for him. The motive in this case is jealousy and resentment. Those injuries are only caused by someone that had deep anger, a deep passion that is not the mark of professional killing. That is not the mark of a drug dealer.

At the conclusion of trial, the jury found appellant guilty. He was sentenced as described above. This appeal timely followed.

II

Appellant first argues that there was an insufficient factual basis to support expert testimony about dog scent trailing under Maryland Rule 5-702(3). In particular, appellant argues that Trooper McCombs should not have been permitted to testify about Copper's trailing on May 30, 2016. Appellant argues that Trooper McCombs' testimony about a specialized method like dog scent tracking is subject to Rule 5-702(3), and subject to an analysis under *Daubert v. Merrel Dow Pharms., Inc.*, 509 U.S. 579 (1993). Appellant

argues that the deficiencies in Copper's training made reliance on his trailing abilities improper. Appellant points to the mismatch between the type of trailing Copper was trained to do, *i.e.,* trailing two hundred paces on hour-old trails with someone present who knew the trail and no major distractions, and the trailing he did in this case, *i.e*., half a mile on twelve-hour-old trails with no handler who was aware of the trail and a large number of distractions.

Second, appellant argues that both of the above quoted excerpts from the State's closing argument were improper. Appellant argues that the State's reference to the lack of evidence that he had ridden a bicycle was burden-shifting. Appellant argues that the State is not permitted to comment on a defendant's failure to call certain witnesses or present certain evidence unless the defense has opened the door at trial. In this case, appellant argues that he did not open the door because he did not promise the jury any specific evidence about riding a bicycle at trial.

Appellant argues that the State's comments on motive in rebuttal were improper because they asserted facts not in evidence. Appellant argues that there was no evidence that appellant was jealous of Ms. Solano, no evidence that appellant resented Ms. Solano, no evidence that Ms. Solano did not want to hang out with appellant, and no evidence that appellant had tried to have sex with Ms. Solano in the laundry room and been rejected. Appellant argues that these allegedly unfounded statements were critical because one of the defense's key arguments was that there was no motive for this crime, and the State's comments unjustifiably undercut that argument.

It is the State's position that the circuit court was correct in admitting the scent trailing evidence. First, under Maryland jurisprudence, dog sniff evidence is admissible, without a *Daubert/Roshkind* analysis, as long as a proper foundation is laid. *See, e.g.*, *Terrill v. State*, 3 Md. App. 340, 358 (1968); *Briscoe v. State*, 40 Md. App. 120, 132 (1978). Second, even if *Daubert* is applicable, the State satisfied the *Daubert/Rochkind* factors.

As to the first argument, the State notes that Maryland courts have admitted evidence of tracking by trained dogs and the observations of their handlers about that tracking, provided that the ability of the dog to track and the circumstances pertaining to the tracking were shown. The State argues that the evidence presented about Copper's certification and previous ability to track, as well as Trooper McComb's long experience with him is sufficient and no further inquiry is needed. The State rejects the claim that a *Daubert* inquiry was required in the first place. The State relies on cases in which courts in other juristictions have eschewed a *Daubert* analysis into the reliability of dog-sniff evidence and, instead, have conducted an abbreviated inquiry into the reliability of the dog in question.

In the alternative, the State argues that, if the *Daubert* test applies, the use of Copper in this case met the *Daubert* threshold. The State argues that the trial court's factual findings about Copper's reliability were not clearly erroneous, nor was the decision to permit expert testimony on the subject an abuse of discretion. The State notes that Copper had passed several blind tests in which the handler did not know where the trail led, and had been certified to do the kind of work he was sent out to do. The State points to the testimony of Agent Kelly that Copper's training had been effective and that there was

nothing at all that would lead him to believe Copper would be unreliable. As to appellant's arguments that Copper was susceptible to distraction, the State notes that Copper had trained in areas with distractions and additional human scents and had been trained to indicate when he lost the trail rather than to follow a different trail. The State also notes that, while the defense expert testified that it would have been better to train Copper with older trails, longer trails, and double-blind methodology, she acknowledged that such techniques are non-mandatory. Thus, the State argues, it was not clearly erroneous to rely upon the State's witness' testimony that Copper was reliable.

As for the the comments in closing arguments, the State argues that it was permitted to comment on the lack of evidence of appellant riding a bicycle. The State argues that, while the State cannot comment on a defendant's decision not to testify or not to present evidence, it can comment on a shortage of evidence in general. The State argues that the lack of evidence of a bicycle wreck in conjunction with evidence that appellant used other means of transport suggests that he was not telling the truth about the bicycle wreck (and therefore had something to hide). This absence of evidence argument, the State argues is distinct from commentary on the defense's failure to produce evidence or failure to testify.

The State argues that appellant's contentions regarding the State's comments on motive are not preserved. Appellant objected to the State's closing on grounds that the statement, "[t]hey go to the laundry room and maybe he tried to get some" was not supported by the evidence. The court sustained that objection, and appellant asked for no further remedy. The State argues that he, therefore, waived all other potential review of

that statement on appeal. The State notes that appellant did not raise any other objections to the State's arguments regarding a motive.

The State further argues that appellant's motive-related contentions are not properly before the Court because appellant did not provide a transcript of the police interrogation that the State played for the jury during trial. This interrogation included most of the State's evidence regarding appellant's motive. The State argues that the court could only evaluate whether there was sufficient motive evidence on the record to support their statement's in closing after reviewing that transcript to see whether the relevant facts were contained therein. The State argues that this defect in the appellate record prevents us from properly considering appellant's contentions.

On the merits, the State argues that the comments were proper. The State argues that the defense opened the door to discussion of motive in closing argument. As a result, the State claims it could present a set of possible inferences the jury could draw from the evidence that would point to a motive. The State argues that the evidence that Ms. Solano was telling appellant about all the sex she was having while not sleeping with appellant was on the record. As a result, the State maintains the prosecutor could suggest that the jury should draw the inference that appellant might have been jealous.

III.

We consider the circuit court's decisions on the admissibility of expert testimony on an abuse of discretion basis. *Devincentz v. State*, 460 Md. 518, 550 (2018); *Rochkind v. Stevenson*, 471 Md. 1, 22 (2020). We reverse only when the decision to admit the expert

testimony "appears to have been made on untenable grounds" or is "violative of fact and logic." *Id.* We do not find an abuse of discretion simply because we would have decided otherwise. *Id.* Rather, the circuit court's decision must be "well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *Id.*

Insofar as the circuit court's decisions relied on factual findings about Copper, his proficiency, the reliability of the methods used to train him, or his handler's qualifications, we review those factual findings on a "clearly erroneous" standard. *Grimm v. State*, 458 Md. 602, 609 (2018). In evaluating factual findings for clear error, where there are competing rational inferences available to the fact finder based on the evidence presented, we do not second guess which inferences the fact finder chose to draw. *Smith v. State*, 415 Md. 174, 183 (2010). Nor do we second guess the trier of fact's evaluations of the credibility of witnesses. *State v. Morrison*, 470 Md. 86, 105 (2020).

In order for expert testimony to be admissible, it must be not only relevant, but reliable. *State v. Matthews*, 479 Md. 278, 307 (2022). The admissibility of expert testimony is governed by Rule 5-702, which provides as follows:

> 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.

The Rule requires that expert testimony be supported by a sufficient factual basis and must include evidence about a reliable methodology used by the expert in performing tests or forming conclusions. *Rochkind*, 471 Md. at 22. Maryland has adopted the *Daubert* test for determining whether experts meet the necessary standards for reliability. *Id.* at. 26.

In *Daubert*, the United States Supreme Court charged trial courts with assuming the role of gatekeeper and making a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." 509 U.S. at 592-93. In short, *Daubert* states that expert testimony is admissible if it is relevant and reliable. *Id.* at 589. Under the *Daubert* test, courts consider the following factors: (1) whether the method or technique can be and has been tested, (2) whether the method or technique has been the subject of peer review, (3) whether the method or technique has a known or potential error rate or standards controlling the technique's operation, (4) how any standards controlling the use of the technique are maintained, and (5) the degree to which the method or technique has been accepted in the relevant scientific community. *Daubert*, 509 U.S. at 593-94. In adopting *Daubert*, the Maryland Supreme Court suggested an additional five factors for courts to consider (6) whether the experts have developed the technique naturally out of research or tests they have conducted independent of litigation, (7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion, (8) whether the expert has adequately accounted for obvious

alternative explanations, (9) whether the expert is being as careful as the expert would be in the expert's regular professional work, and (10) whether the field of expertise is known to reach reliable results for the opinion the expert would give. *Rochkind*, 471 Md. at 35-36.

It is a matter of first impression in Maryland whether dog sniff evidence is required to be subjected to a *Daubert/Roshkind* analysis.[1] We need not answer this question here because, in this case, the trial court held a *Daubert/Roshkind* hearing and determined correctly that the proffered evidence was reliable and satisfied the requirements for admissibility.

Appellant does not clarify in his brief which of the ten *Daubert*/*Rochkind* factors he believes the court abused its discretion in weighing in favor of admissibility. He simply

[1] Prior to the 2020 adoption of the *Daubert* test in Maryland, both this Court and the Supreme Court of Maryland considered the admissibility of dog-sniff evidence. In *Terrell v. State*, 3 Md. App. 340, 358 (1968) this Court held that "[a]lthough such evidence should be limited to matters as to which it is likely to be reliable, it may be admitted in the exercise of sound judicial discretion." The trial court admitted evidence that a dog, whose qualifications and experience had been established trailed, without interruption, a scent at a site that had been protected until the dog arrived and led directly to the appellant. *Id. See also, Briscoe v. State*, 40 Md. App. 120, 133 (1978) (admitting evidence of dog tracking where the dog received monthly training on tracking persons and the handler had used dogs fifty times with "good success."). In *Roberts v. State*, 298 Md. 261, 274 (1983), the Supreme Court of Maryland agreed that a "line up" in which a trained scent dog smelled a pillowcase from the victim's apartment and then picked the defendant out of a group of men was sufficiently reliable because the dog's training had been sufficient and the handler was competent to interpret the dog's actions. This court has held that testimony about dog-sniff evidence is expert testimony under Rule 5-702(3). *Simpson v. State*, 214 Md. App. 336 (2013), *rev'd on other grounds* 442 Md. 446 (2015). Prior to the adoption of the *Daubert* test by the Maryland Supreme Court in *Rochkind*, this Court has applied the *Frye-Reed* test to dog-sniff evidence, but we have not decided whether such an application was necessary. *Clark v. State*, 140 Md. App. 540, 578-79 (2001). Nor have we decided whether the *Daubert* test applies post-*Rochkind*.

argues that the age of the trail, the lack of double-blind long-distance training and testing, and the presence of distractions rendered the method unreliable. We presume that appellant applies these concerns to the same *Daubert*/*Rochkind* factors he did in the initial hearing.

Appellant argues that the police's decision to use a dog that had only been certified and tested on hour-old trails to track a trail that was over twelve hours old defeats the first, third, fifth, and seventh factors—whether the method has been tested, whether it has a known error rate, whether it has been accepted in the scientific community, and whether the expert unjustifiably extrapolated from accepted principles to an unfounded conclusion. He argues that, while dog-sniff evidence, in general, may be well tested, accurate, and accepted as suggested by this court's previous precident on the subject, use of a dog on a trail as old as the one in this case is not.

The analysis of these factors turns on the factual findings of the trial court. If, as the circuit court found, using a dog on an older trail is a tested and accepted methodology and Copper did what he was trained to do, then the court's analysis of the first, third, fifth, and seventh factors cannot be an abuse of discretion. We must determine whether this factual finding by the circuit court was clearly erroneous.

Agent Kelly testified that the training and certification that his program used with Copper was a "very good gauge" of whether Copper could trail in the field on the type of trail he was used on in this case, and that the training "worked." He testified he had no reason to believe that Copper would be unrealiable. A rational fact finder could draw the inference that Copper was prepared to follow a trail like the one he was presented with in this case.

Trooper McCombs testified that he was familiar with the behaviors Copper exhibits when he is able to follow a trail. He testified that Copper was trained to signal when he lost a trail instead of simply following a new trail or heading off in a different direction. He testified that Copper exhibited strong trailing behaviors for the full extent of the trail he followed and then signaled when the trail ended. McCombs testified that he was confident Copper was on a good trail. A rational fact finder could conclude, based on Trooper McCombs' evaluation of Copper's behavior, that Copper was, indeed, able to follow appellant's trial on May 30 and that he did so. The circuit court's findings were not, therefore, clearly erroneous.

Similarly, appellant argues that the State's witnesses overlooked obvious alternative explanations for Copper's behavior, including inappropriate handler cues resulting from the lack of double-blind training and Copper's susceptibility to distraction while following a trail with many people, cameras, and human remains present. Thus, appellant argues, the State cannot satisfy the eighth factor. Once again, the analysis turns on whether the court's finding that the police adequately accounted for alternative possibilities with Copper's training was clerly erroneous. However, Agent Kelly and Trooper McCombs walked the court through the ways that training can account for these risks and prevent the dog from becoming distracted or misguided. They testified that Copper was trained to ignore other scents, including the scents of other humans crossing the trial. Copper was trained to follow a trail with other people present. It was not unreasonable to credit that testimony. Further, appellant's expert testified that the standards to which she was comparing Copper's training in her conclusion that it was deficient were non-mandatory.

We acknowledge that appellant's expert testified that Coppers' training was deficient and that the conditions of the trail prevented Copper from following it reliably. But, the State's witnesses disagreed with this testimony. Where there is conflicting testimony, it is the purview of the fact finder to resolve it. *Scriber v. State*, 236 Md. App. 332, 344 (2018). Here, the circuit court could, within its discretion, credit the testimony of the State's witnesses, and it did so. The factual findings of the trial court regarding Copper, his training, his abilities, and his handling supporting each of the *Daubert/Rochkind* factors were not clearly erroneous. Nor was it an abuse of the court's discretion to weigh those factors in favor of admitting the expert testimony. We find no error in the circuit court's decision to permit the State to present the dog-sniff evidence.

IV.

We next address the State's comments about the lack of evidence that appellant had been on a bicycle. Whether comments exceed the scope of permissible closing argument in any given case depends on the facts of that specific case. *Mitchell v. State*, 408 Md. 368 380-81 (2009). Because the trial judge is in the best position to gauge the propriety of the arguments in light of the facts, we do not disturb a circuit court's ruling on the permissibility of comments in closing arguments absent a clear abuse of discretion. *Id.* We further grant great leeway to attorneys in presenting closing arguments to the jury. *Degren v. State*, 352 Md. 400, 429 (1999).

It is beyond peradventure that the State is not permitted to draw the jury's attention to or comment upon the failure of the defendant to call witnesses or to testify. *Wise v.*

State, 132 Md. App. 127, 148 (2000). Nor is the State permitted to argue that the defendant is *required* to produce evidence to rebut evidence of the State. *Lawson v. State*, 389 Md. 570, 595 (2005). However, Maryland law differentiates between comment on a general lack of evidence on a particular subject and comment on the defense's failure to provide evidence or an explanation. *See Harrison v. State*, 246 Md. App. 367 379-80 (2020) (differentiating between "comments on a shortage of defense evidence" and speaking "directly to the defendant's failure to provide evidence"). Similarly, the State can ask the jury to draw inferences from the total lack of evidence or explanation on a particular point. *See Smith v. State*, 367 Md. 348, 359 (2001) ("We recognize that prosecutors and judges are permitted to argue or comment that the unexplained possession of recently stolen goods permits the inference that the possessor was a thief.").

Here, the State did not comment on the defendant's decision not to testify, defendant's silence, or the defense's decision not to present evidence. Rather, the State discussed appellant's shifting stories to police. The State commented on the fact that appellant had said first that his injuries were the result of blood pressure medication and then changed his story to one about falling off a bicycle. The State commented on the fact that there was no evidence before the jury corroborating the claim that appellant had been on a bicycle at any time in the days surrounding the crime, let alone fallen off one. The State contrasted this to the evidence that appellant had been using other forms of transportation. The State asked the jury to reason from the lack of evidence corroborating bicycle usage that appellant was lying when he said his injuries came from a bicycle accident. This argument no more shifts the burden than asking the jury to reason from the

lack of explanation for the presence of stolen goods that the appellant is a thief. The trial court did not abuse its discretion when it permitted this argument by the State in closing arguments.

V.

Finally, we address the State's comments on rebuttal regarding a potential motive for the crime. We agree with the State that these alleged errors are unpreserved. Ordinarily, we do not decide any issue unless it plainly appears by the record to have been raised in or decided by the trial court. Rule 8-131(a). A defendant must object to a prosecutor's statement in closing arguments to preserve the issue for appeal. *Shelton v. State*, 207 Md. App. 363, 385 (2012). Appellant, therefore, cannot argue on appeal that a statement to which he did not object at trial was improper. *Id.*

Appellant argues that there was no evidence to support the State's argument that appellant was jealous of Ms. Solano, no evidence to support the State's argument that appellant resented Ms. Solano, and no evidence to support the State's argument Ms. Solano did not want to hang out with appellant. The State made each of these arguments in rebuttal without any objection from appellant's counsel. Indeed, when appellant's counsel objected to the States's speculation that perhaps appellant had been trying to have sex with Ms. Solano in the laundry room, appellant's counsel said that he had let those statements go. Any objection to those statements was not preserved.

Appeallant's counsel did object to the statement, "They go to the laundry room and maybe he tried to get some." The trial court sustained the objection. Appellant's counsel

requested no other relief. As a result, appellant has waived any further form of relief on appeal. *Hyman v. State*, 158 Md. App. 618, 631 (2004) ("[A]ppellant did not request further relief at trial; he did not ask the court to strike the statement, that a curative instruction be given, or that a mistrial be granted. Having received the only relief he requested, appellant effectively waived all other potential review on appeal."). We decline to review appellant's claim that the State relied on facts not in evidence.

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

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0916s22cn.pdf