Circuit Court for St. Mary's County
Case No. C-18-CR-17-54

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 981

September Term, 2018

MARK STEVEN GARNER, II

v.

STATE OF MARYLAND

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

JJ.

Opinion by Eyler, James R., J.

Filed: October 23, 2019

Mark Garner, appellant, was charged, in the Circuit Court for St. Mary's County, with second-degree murder, manslaughter, reckless endangerment, and conspiracy to distribute heroin. Prior to trial, appellant filed a motion to suppress statements he had made to the police following his arrest. That motion was denied. A subsequent bench trial was held, and appellant was convicted of conspiracy to distribute heroin and reckless endangerment. The Court sentenced appellant to a term of 20 years' imprisonment, with all but ten years suspended, on the conviction of conspiracy, and a concurrent term of five years' imprisonment on the conviction of reckless endangerment. In this appeal, appellant presents three questions for our review:

1. Did the suppression court err in denying appellant's motion to suppress?

2. Did the trial court err in allowing a State's witness to "narrate" two surveillance videos that had been admitted into evidence?

3. Was the evidence adduced at trial sufficient to establish: (a) a conspiracy to distribute heroin; (b) the requisite mental state for reckless endangerment; or (c) that the chosen venue, St. Mary's County, was proper?

For reasons to follow, we hold that the suppression court did not err in denying appellant's motion to suppress. We also hold that the trial court did not err in allowing the State's witness to testify as to what he saw in the two surveillance videos. Finally, we hold that the evidence adduced at trial was sufficient to sustain both convictions. Accordingly, we affirm the judgments of the circuit court.

BACKGROUND

On August 31, 2016, Barbara Sneden was found deceased in her home. A State Medical Examiner later determined that Ms. Sneden's death was caused by "heroin intoxication." Appellant, who had provided Ms. Sneden with heroin prior to her death, was ultimately arrested and charged.

Suppression Hearing

Prior to trial, appellant filed a motion to suppress statements he had made to the police around the time of his arrest. At the hearing on that motion, Detective Andrew Mohler of the Calvert County Sheriff's Office testified that, in the early morning hours of September 30, 2016, he participated in the execution of a search-and-seizure warrant at appellant's residence. Detective Mohler testified that, upon executing the warrant at appellant's home, he came in contact with appellant while appellant was handcuffed and sitting on the toilet in one of the home's bathrooms. Upon coming in contact with appellant, Detective Mohler identified himself as "a detective with the sheriff's office." Detective Mohler then read to appellant an "Advice of Rights and Waiver" form, which advised, among other things, that appellant had a right to remain silent; that he had a right to an attorney; and that, if he chose to answer questions without an attorney, he could stop answering questions at any time. Detective Mohler then asked appellant if he understood his rights and if he wanted to make a statement without an attorney present. Appellant responded, "yes," to both questions. Detective Mohler also asked appellant if he had been

promised anything or threatened to make a statement or if he was under the influence of drugs or alcohol. Appellant responded, "no," to both questions.

Detective Mohler testified that, after appellant signed the waiver form, the two spoke "for approximately four to five minutes about a related investigation." During that conversation, Detective Mohler informed appellant that the officers "were there because of alleged CDS activity out of that house." Detective Mohler also told appellant that there were "other detectives" who were "interested in speaking with him" about "their investigations as well." Detective Mohler asked appellant "if he was amenable to that," and appellant responded that "he was."

Detective Mohler testified that, after the other detectives had spoken with appellant, he then spoke with appellant a second time "for approximately 15 to 20 more minutes." Following that second conversation, Detective Mohler asked appellant whether anyone had "beaten, threatened, or intimidated [him] in any manner in order to obtain this statement" and whether he wanted "to make any changes or corrections in [the statement]." Appellant responded, "no," to both questions. Detective Mohler also asked appellant if his statement had been made voluntarily; if appellant had read his statement; and if his statement was the truth. Appellant responded, "yes," to all three questions.

Detective Mohler testified that, during his conversation with appellant, appellant "appeared to be alert," was "awake" and "participatory" in the conversation and was not "impaired." Detective Mohler also testified that appellant appeared to understand what the detective was saying and that there were "no problems with communication." Detective

Mohler testified that approximately one and a half hours had passed between his initial contact with appellant and the end of their second conversation.

Regarding the circumstances of the conversation, Detective Mohler testified that his "general practice is to interview people in a bathroom" because "it's quieter" and because "it's an area that's easy to search quickly to make sure there's no weapons in there." Detective Mohler explained that appellant, who was dressed in shorts and a T-shirt, sat on "the toilet seat lid," that being "the only seat," while Detective Mohler, who was dressed in cargo pants, an outer vest carrier, and a mask, "squatted beside him." Although appellant had initially been handcuffed, Detective Mohler "believ[ed] he was unhandcuffed" for their conversation.

Detective Anthony Whipkey of the St. Mary's County Sherriff's Officer testified that he was at appellant's residence at the time of the execution of the warrant and that, while there, he interviewed appellant in the bathroom at appellant's residence. Detective Whipkey testified that the bathroom "wasn't small" and was bigger than "the interrogation rooms at the sheriff's office." At the time, appellant "was seated on the closed toilet" while Detective Whipkey "spent most of the time sitting on the corner of the sink near [appellant]." According to Detective Whipkey, Detective Mohler was present during the interview "a good amount of the time." Detective Whipkey recalled that another officer was in the bathroom when the interview began, but he could not remember if "he stayed the entire time." Detective Whipkey testified that he began interviewing appellant at 5:54 a.m., or approximately nine minutes after Detective Mohler began reviewing the "Advice

of Rights" form with appellant, and that the interview lasted approximately 20 minutes. Detective Whipkey recalled that appellant "was alert and talkative"; that he appeared "awake and alert"; that he did not appear to be "under the influence of either drugs or alcohol"; and that he did not appear to have any problem understanding the detective's questions.

At the start of his interview with Detective Whipkey, which was recorded, appellant acknowledged that he understood his "*Miranda*[1] rights"; that he consented to speak with the police; that he had not been promised anything or threatened; and that he had not been "tricked" into giving a statement. Following that acknowledgment by appellant, Detective Whipkey informed appellant that he was there "to talk about Barbara." Appellant then stated that he had met with Ms. Sneden the day before she died and had given her some heroin.

About midway through the interview, appellant asked Detective Whipkey, "What exactly are you trying to figure out?" Detective Whipkey responded that he was "trying to figure out what happened to Barbara the day before she died" and "trying to give the family some closure on what happened to their daughter." Appellant then continued discussing the circumstances of Ms. Sneden's death with Detective Whipkey. At some points during the recorded interview, appellant can be heard crying. Appellant also stated during the interview that he was having trouble with his memory because he had "been really heavy, using."

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Deputy Nikki Gilmore of the Calvert County Sheriff's Office testified that she was present during the execution of the warrant at appellant's residence on September 30, 2016. Deputy Gilmore stated that appellant "was under arrest for specific charges at 6 a.m." based on "some things" that were found in appellant's residence upon the execution of the warrant. Deputy Gilmore also stated that appellant had visible track marks on his arms but that he did not appear to be under the influence.

Appellant testified on his own behalf, stating that, when the police executed the warrant at his house on September 30, 2016, he had not slept "for quite a while"; that he "was distraught about some recent events that had happened"; and that he had "been using" heroin, cocaine, and marijuana "consistently." Appellant testified that the police, upon entering the home, ordered him to the ground, handcuffed him, and then escorted him to the bathroom. Once appellant was in the bathroom, he "was forced to strip" for a "strip search." Appellant testified that he was "confused" and "humiliated."

Appellant testified that he remembered being advised of his "*Miranda* rights" by Detective Mohler and that, prior to that advisement, Detective Mohler stated that he wanted to talk to appellant about "Big Jesse." Appellant stated that he was never advised that Detective Whipkey "was investigating a homicide" and that, had he been so advised, he "probably would have kept quiet" and "would have never even attempted to waive [his] rights." Appellant also stated that he was "struggling to stay awake" and that he felt "worn down," "upset," and "distraught."

At the conclusion of appellant's testimony, defense counsel argued that any statements made by appellant to Detective Whipkey should be suppressed as involuntary. Defense counsel also argued that the statements should be suppressed because Detective Whipkey's representation that he was seeking "closure for Ms. Sneden's family" undermined the prior *Miranda* warnings.

Ultimately, the suppression court denied appellant's motion to suppress the statements. The court found that "*Miranda* appear[ed] to have been complied with"; that Detective Whipkey's comments were not "an undue inducement"; that "it look[ed] like [appellant] wanted to talk to the police given the very bad situation he was in"; that appellant "may not have known precisely what they were interested in, but he doesn't have a right to know that"; and that the police "Mirandized him properly." Regarding appellant's mental state, the court found that appellant "appear[ed] to be pretty aware"; that he was "pretty candid, pretty talkative"; that he was "emotional, upset and crying"; and that the evidence did not support a finding that he was "under the influence."

Trial

Appellant was thereafter tried, by way of a bench trial, with four counts related to Ms. Sneden's death: second-degree murder; involuntary manslaughter; reckless endangerment; and conspiracy to distribute heroin. At that trial, Monica Harding, a clinical manager at Walden Sierra Center, a drug rehabilitation center, testified that, in August of 2016, Ms. Sneden attended the facilities' "partial hospitalization program" and lived at one of the facilities' housing units (the "Dockside house"). Ms. Harding stated that, in the

morning hours of August 31, 2016, she arrived at the facility to begin her work day and found Ms. Sneden, unresponsive, in her room at the Dockside house. Emergency personnel were called, and Ms. Sneden was pronounced dead at the scene. A dollar bill with "suspected heroin" was found on a bedside table in Ms. Sneden's room. A State Medical Examiner later determined that Ms. Sneden's death was caused by "heroin intoxication."

Alex Mills, who lived at Walden Sierra Center in August of 2016, testified that, on August 30, 2016, he and Ms. Sneden "hook[ed] up" and "planned to use heroin." Mr. Mills explained that, on the evening in question, he and Ms. Sneden drove in his vehicle to "the Food Lion in Solomons" in the hopes that they would be "getting heroin." Mr. Mills testified that he went to the Food Lion because "that's just where [Ms. Sneden] told [him] to go."

Mr. Mills testified that, upon their arriving at the Food Lion, Ms. Sneden made a phone call and then received a text message. Around the same time, Ms. Sneden got out of the vehicle, went inside the store, and then came back outside carrying "like a dollar bill" that was "folded up with heroin inside." When Ms. Sneden got back in Mr. Mill's vehicle, the two "split most" of the heroin contained inside of the bill, such that "only a little bit" was "left in the bill," which Ms. Sneden folded back up and then put "away." After he and Ms. Sneden ingested their respective shares of the heroin, Mr. Mills drove back to the Walden Sierra Center, where the two parted ways. Mr. Mills testified that he did not speak with Ms. Sneden after the two returned to Walden Sierra Center. Mr. Mills testified that he had "no idea" how much heroin was originally in the bill or how much was

left after the two used their respective shares, although he added that the leftover portion "might have been enough for one person." Mr. Mills also stated that he "knew that she was spending 50 dollars."

Detective Whipkey of the St. Mary's County Sherriff's Office testified that, in investigating Ms. Sneden's death, he went to the Food Lion in Solomons and subsequently reviewed the store's surveillance footage from August 30, 2016 (hereinafter the "Food Lion video"). Detective Whipkey testified that, in that video, Ms. Sneden and appellant can be seen inside of the Food Lion "hugging" and, following that, Ms. Sneden can be seen "walking towards the exit." Detective Whipkey testified that he also reviewed surveillance video from the Dockside house at Walden Sierra Center, the residential facility where Ms. Sneden lived. Detective Whipkey stated that, in that video (hereinafter the "Dockside video"), Ms. Sneden can be seen entering and exiting the facility at various times on August 30, 2016.

During Detective Whipkey's testimony, the State introduced appellant's recorded statement, which had been the subject of appellant's motion to suppress. In that interview, which was admitted into evidence, appellant admitted meeting with Ms. Sneden at the Food Lion on August 30, 2016. Appellant explained that he had received a text message from Ms. Sneden about "a sale" for "the boy Alex." Appellant told Detective Whipkey that he could not remember "how much she bought," but later stated that it was "not even half a gram." Appellant also stated that he could not remember "how it was packaged" but that it was "possible" that "it was folded up in a dollar bill." Appellant admitted that, although

he was not "a major drug dealer," he did regularly sell drugs to maintain his "health." Regarding his own drug use, appellant stated that he was "addicted" and that he needed "serious" substance abuse treatment. Appellant also stated that he had "close friends … die from heroin" and that it was difficult to stop using because the drug "controls everything" and because "you don't have a choice" and "need to feel better."

Regarding Ms. Sneden, appellant told Detective Whipkey that, although Ms. Sneden "seemed like she was doing really well," appellant knew "she had started, she had used before her death." Appellant also stated that he was "not sure exactly her reasons for, for what she did" and that "she just may have thought that she could use like she … used before." When Detective Whipkey asked appellant if Ms. Sneden got "anything from anybody else," appellant stated that "a bunch of the guys in there were getting stuff" and that there was "all kinds of stuff going through that house." Although appellant initially told Detective Whipkey that he would not have sold the heroin to Ms. Sneden had he known she was going to use it, he added that he knew "Alex was getting high" and "if she was with him, which she was, that they were both getting high."

The trial court ultimately found appellant guilty of reckless endangerment and conspiracy to distribute heroin.[2] This timely appeal followed.

[2] The trial court also found appellant guilty of involuntary manslaughter, but it later vacated that conviction.

DISCUSSION

I.

Appellant first contends that the suppression court erred in denying his motion to suppress the statements he made to Detective Whipkey following the execution of the warrant at his residence. Appellant maintains that the statements should have been suppressed because the State failed to establish that the statements were voluntary. Appellant also claims that the statements should have been suppressed because any valid waiver of his *Miranda* rights during the interview was vitiated by Detective Whipkey's representation that "he sought only to give Ms. Sneden's family closure."

"In reviewing the denial of a motion to suppress evidence, 'we confine ourselves to what occurred at the suppression hearing,' which we view 'in a light most favorable to the prevailing party on the motion.'" *Ford v. State*, 235 Md. App. 175, 185 (2017) (quoting *Lee v. State*, 418 Md. 136, 148 (2011)), *aff'd* 462 Md. 3 (2018). Moreover, "[w]e extend great deference to the findings of the hearing court with respect to first-level findings of fact and the credibility of witnesses unless it is shown that the court's findings are clearly erroneous." *Daniels v. State*, 172 Md. App. 75, 87 (2006). "We give no deference, however, to the question of whether, based on the facts, the trial court's decision was in accordance with the law." *Seal v. State*, 447 Md. 64, 70 (2016). "The constitutional question of voluntariness is a mixed question of law and fact and, therefore, subject to *de novo* review on appeal." *Ford*, 235 Md. App. at 185-86.

"'In Maryland, when the State intends to use a confession or admission given by the defendant to the police during custodial interrogation, the prosecution must, upon proper challenge, establish by a preponderance of the evidence that the statement satisfies the mandates of *Miranda v. Arizona*, and, that the statement is voluntary.'" *Id.* at 186 (quoting *State v. Tolbert*, 381 Md. 539, 557 (2004)). In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court held that the police must "advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation." *Lee*, *supra*, 418 Md. at 149 (citations and quotations omitted). Those rights may be waived, however, if "'the totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension.'" *Ford*, 235 Md. at 186 (citing *Lee*, 418 Md. at 150). That is, in order to be valid, the relinquishment of a suspect's *Miranda* rights must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception" and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Lee*, 418 Md. at 150 (citations omitted). Moreover, once a suspect receives proper *Miranda* warnings and waives his *Miranda* rights, "the interrogator may not say or do something during the ensuing interrogation that subverts those warnings and thereby vitiates the suspect's earlier waiver by rendering it unknowing, involuntary, or both." *Id.* at 151.

In addition, "[o]nly voluntary confessions are admissible as evidence." *Bellard v. State*, 229 Md. App. 312, 349 (2016), *aff'd* 452 Md. 467 (2017). "Under federal and

Maryland constitutional law, a statement is involuntary if it results from 'police conduct that overbears the will of the suspect and induces the suspect to confess.'" *Ford*, 235 Md. App. at 187 (quoting *Lee*, 418 Md. at 159). "Under Maryland non-constitutional law, a statement is involuntary when a suspect 'is so mentally impaired that he does not know or understand what he is saying, or when the confession is induced by force, undue influence, improper promises, or threats.'"[3] *Id.* (citing *Rodriguez v. State*, 191 Md. App. 196, 224 (2010)). When assessing voluntariness, we look to the totality of the circumstances, including "where the interrogation was conducted; its length; who was present; how it was conducted; its content; whether the defendant was given *Miranda* warnings; the mental and physical condition of the defendant; when the defendant was taken before a court commissioner following arrest; and whether the defendant was physically mistreated, physically intimidated, or psychologically pressured." *Bellard*, 229 Md. App. at 350. That said, "it is the rare and extreme case in which a court will find that a suspect confessed involuntarily." *Lee*, 418 Md. at 159.

Here, we hold that the State established by a preponderance of the evidence that appellant's statements to Detective Whipkey were voluntary. That evidence showed that appellant was interviewed by Detective Whipkey for a mere 20 minutes and that the interview began not long after the police executed the warrant at appellant's residence. The interview was conducted in the home's bathroom, which Detective Whipkey described as

[3] The State avers that appellant did not raise a claim under Maryland common law and that, as a result, his argument is "limited to federal constitutional voluntariness." We do not reach the same conclusion, as we could find no support in the record to indicate that appellant's claim was so limited.

bigger than "the interrogation rooms at the sheriff's office." Although there were multiple officers present during the interview, only one of them, Detective Whipkey, participated in the interview in which appellant provided the incriminating statements. And, as the suppression court found based on the evidence presented at the hearing, not only was appellant "aware" and "talkative" during the interview, but it appeared as if he "wanted to talk to the police given the very bad situation he was in."

Importantly, prior to the interview, appellant was advised of his *Miranda* rights, which he waived in writing. In so doing, appellant acknowledged, both verbally and in writing, that he understood his rights; that he wanted to make a statement without an attorney present; that he had not been promised anything or threatened to make a statement; and that he was not under the influence of drugs or alcohol. Then, at the start of his interview with Detective Whipkey, appellant again acknowledged that he understood his *Miranda* rights; that he consented to speak with the police; that he had not been promised anything or threatened; and that he had not been "tricked" into giving a statement. Finally, following the interview, appellant confirmed that he had not been beaten, threatened, or intimidated; that his statement had been made voluntarily; and that the statement was the truth.

To be sure, there was no evidence as to when, or if, appellant was taken before a court commissioner following his arrest.[4] We do not, however, find that factor to be

[4] Maryland Rule 4-212(f) states that, "[w]hen a defendant is arrested without a warrant, the defendant shall be taken before a judicial officer of the District Court without unnecessary delay and in no event later than 24 hours after arrest." When such a delay (continued)

significant, given that appellant was formally arrested on specific charges at 6 a.m., or several minutes *after* he had waived his *Miranda* rights and then begun his 20-minute interview with Detective Whipkey. *See Odum v. State*, 156 Md. App. 184, 202 (2004) ("[B]ecause the concern is with delay in presentment that affects the voluntariness of a statement given during custodial interrogation, a delay that can have no effect on the voluntariness of a statement is immaterial to suppression."); *See also Williams v. State*, 375 Md. 404, 433 (2003) (noting that the length of the delay between the arrest and the confession is one factor to be considered when determining how much weight should be given to a violation of the right to prompt presentment). And, although appellant presented testimony at the suppression hearing suggesting that he may have been under the influence at the time, the suppression court did not credit that testimony, as the court found that appellant was "aware" during the interview and that there was a lack of evidence to find that appellant was under the influence at the time.

Based on the totality of the circumstances, we are persuaded that appellant's statement was voluntary. That is, we cannot say that appellant was so mentally impaired that he did not know or understand what he was saying, nor can we say that his statement was induced by force, undue influence, or any other police conduct that induced appellant to provide a statement to Detective Whipkey. Accordingly, the suppression court did not err in denying appellant's motion to suppress on those grounds.

occurs, and when the delay is "deliberate and designed for the sole purpose of soliciting a confession, it must be given very heavy weight." *Williams v. State*, 375 Md. 404, 416 (2003).

We also hold that the validity of appellant's *Miranda* waiver was not undermined by Detective Whipkey's comment that he was "trying to give the family some closure on what happened to their daughter." Nothing about that statement could reasonably be construed as subverting the prior *Miranda* warnings. That is, appellant was told, multiple times, that anything he said could be used against him in court, and Detective Whipkey's comment neither expressly nor implicitly contradicted that warning or otherwise indicated that appellant's statement would be kept confidential. For that reason, appellant's reliance on *Lee v. State* is misplaced. *See Lee*, 418 Md. at 156-57 (officer's comment to defendant that conversation was "just between you and me" implied confidentiality "and thereby directly contradict[ed] the advisement that 'anything you say can and will be used against you in a court of law.'"). Accordingly, the suppression court did not err in denying appellant's motion to suppress on those grounds.

II.

Appellant's second contention concerns Detective Whipkey's "narration" of the Food Lion and Dockside videos. At trial, the issue was initially raised when the State introduced the Food Lion video during Detective Whipkey's direct testimony:

[STATE]:	Now, Officer, did you, in fact, review this surveillance tape?
[WITNESS]:	Yes, sir.
[STATE]:	And at any point in time did you observe Barbara Sneden on it?
[WITNESS]:	Yes, sir.

[DEFENSE]: Objection. The video speaks for itself, so his view of what's on the video is not admissible.

THE COURT: Overruled. Go ahead.

[STATE]: At any point in time did you observe Mr. Garner on that video?

[DEFENSE]: Same objection.

THE COURT: Overruled.

[WITNESS]: Yes.

[STATE]: Now with that I'd ask … if the Officer could get down and narrate the, what he observes.

[DEFENSE]: I'm going to object to him narrating what's on the video, that's not permissible testimony.

THE COURT: Okay. What you can do is pause it and you want to ask him questions, you can ask him questions.

[STATE]: Could you, at this point in time, point out whether or not you observed at any point in time Ms. Sneden come in to the Food Lion store?

[WITNESS]: During this video will I see her walk in the store? Is that what you're asking?

[STATE]: Yes.

[WITNESS]: Yes, sir.

[DEFENSE]: Please note my continuing objection to him testifying about what is on the video.

THE COURT: Okay.

[DEFENSE]: The video speaks for itself.

THE COURT: That's noted.

The State then played the Food Lion video and asked Detective Whipkey various questions about what he saw in the video. In response to those questions, Detective Whipkey identified appellant and Ms. Sneden as being in the video and testified that Ms. Sneden could be seen walking into the store, hugging appellant, and then walking out of the store a short time later.

On cross-examination, Detective Whipkey admitted that, during his investigation, he had also reviewed the Dockside video, which had been derived from surveillance footage from the Dockside house where Ms. Sneden lived. Detective Whipkey explained that, because the surveillance footage from the Dockside house "could not be downloaded," he made a recording of the video using "a camcorder with a tripod." On redirect examination, the State introduced the Dockside video, and the court, over objection, admitted the video into evidence. The State then played the video for the court and asked Detective Whipkey to "tell us what you observe." Defense counsel then offered a continuing objection to the officer "narrating the video." Following that objection, Detective Whipkey testified that the Dockside video showed Ms. Sneden walking to and from the Dockside house at various times in the hours leading up to her death.

Appellant now contends that the trial court erred in allowing Detective Whipkey to "narrate" the Food Lion and Dockside videos. Relying on *Ragland v. State*, 385 Md. 706 (2005) and *Payton v. State*, 235 Md. App. 524 (2018), appellant maintains that, because Detective Whipkey was a lay witness and did not personally observe the events depicted

in the videos, "his interpretation of that visual evidence was not admissible as lay opinion evidence."[5]

Maryland Rule 5-701 provides that testimony by a lay witness "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." Expert testimony, on the other hand, is "based on specialized knowledge, skill, experience, training, or education…[and] need not be confined to matters actually perceived by the witness." *Ragland*, 385 Md. at 717. Before a witness may give expert testimony, however, the witness must be qualified as an expert by the trial court. Md. Rule 5-702. In so doing, the court must 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." *Id.*

The Court of Appeals discussed the difference between lay opinion testimony and expert testimony in *Ragland v. State.* In that case, Jeffrey Ragland was arrested and charged with distribution of a controlled dangerous substance after members of the

[5] The State argues that appellant's claims are unpreserved because his objections at trial "were grounded on different legal theories than the one he relies upon in this appeal." The State also argues that appellant's claims regarding the Dockside video should be rejected because he "opened the door to the challenged testimony." We reject both of the State's arguments. Appellant's continuing objections, in which he specifically mentioned Detective Whipkey's narration of the videos, were sufficient to preserve the issue. Moreover, whether defense counsel "opened the door" to the admission of the Dockside video has little bearing on whether the court erred in permitting Detective Whipkey to narrate the videos after they had been admitted into evidence.

Montgomery County Police Special Assignment Team ("SAT") observed Ragland and several other individuals involved in what they believed to be a drug transaction. *Ragland,* 385 Md. at 709-10. At trial, two members of the SAT team testified regarding the events leading up to Ragland's arrest. *Id.* at 711, 713. Neither was called as an expert by the State nor qualified as an expert by the court under Maryland Rule 5-702. *Id.* Nevertheless, both officers testified that, based on their training and experience in the investigation of drug crimes, what they observed was a "drug transaction." *Id.* at 712-14. Ragland was ultimately convicted of distribution of a controlled dangerous substance. *Id.* at 715.

On appeal, Ragland argued that the officers' conclusions constituted expert testimony and should have been excluded by the trial court. *Id.* at 716. The Court of Appeals agreed, noting that both officers "devoted considerable time to the study of the drug trade [and] offered their opinions that, among the numerous possible explanations for the [observed events], the correct one was that a drug transaction had taken place." *Id.* at 725-26. The Court further observed that "[t]he connection between the officers' training and experience on the one hand, and their opinions on the other, was made explicit by the prosecutor's questioning." *Id.* The Court concluded that "[s]uch testimony should have been admitted only upon a finding that the requirements of Md. Rule 5-702 were satisfied." *Id.*

Against that backdrop, we hold that the trial court did not abuse its discretion in allowing Detective Whipkey to testify as to what he saw in the Food Lion and Dockside videos. *See generally Warren v. State,* 164 Md. App. 153, 166 (2005) ("The decision to

admit lay opinion testimony is vested within the sound discretion of the trial judge."). Unlike the officers in *Ragland,* Detective Whipkey did not rely on any specialized experience or cite to any specific training when proffering his testimony. Instead, Detective Whipkey merely provided a factual recitation of what he saw in the two videos, and any opinions he may have provided were rationally based on those perceptions and helpful to the factfinder in understanding the context of the videos. *See Paige v. State*, 226 Md. App. 93, 130 (2015) (lay witness's opinions about events in surveillance video were permissible, as they were "rationally based on [her] perceptions and were helpful to the jury to understand the facts at issue."). Moreover, given the fact that Detective Whipkey investigated Ms. Sneden's death and, in so doing, visited the two locations and became familiar with both Ms. Sneden's and appellant's appearances, Detective Whipkey was in a better position than the court to identify both individuals in the video and to indicate their respective positions as shown in the video. *See Moreland v. State*, 207 Md. App. 563, 572-73 (2012) (holding that the trial court did not err in permitting a lay witness to identify the defendant in a video recording where the witness was familiar with the defendant and had intimate knowledge of his appearance). Under the circumstances and based on the record before us, we cannot say that the court abused its discretion or failed to exercise caution in permitting Detective Whipkey's testimony. *See Payton v. State*, 235 Md. App. 524, 540 (2018) (noting, in dicta, that "caution should be exercised by the trial court when determining whether to permit a police officer to narrate a video when the officer was not present during the events depicted therein.").

Assuming, *arguendo*, that the trial court erred in permitting Detective Whipkey to "narrate" the two videos, any error was harmless beyond a reasonable doubt. *Dorsey v. State*, 276 Md. 638, 659 (1976). In his statement to Detective Whipkey, appellant admitted being at the Food Lion with Ms. Sneden around the time that he was depicted in the Food Lion video meeting with Ms. Sneden. That statement, along with the video, was admitted into evidence and reviewed by the court. Thus, we fail to see how Detective Whipkey's "narration" could have had any discernible impact on the court's verdict, given that the officer's testimony was cumulative to that other evidence. *See Dove v. State*, 415 Md. 727, 743-44 (noting that the erroneous admission of evidence may be harmless where that evidence is "cumulative," in that it "tends to prove the same point as other evidence[.]"). Regarding Detective Whipkey's "narration" of the Dockside video, we are convinced that that testimony, which merely indicated the times Ms. Sneden could be seen entering and exiting Dockside house prior to her death, was of no consequence in determining whether appellant conspired with Ms. Sneden to distribute heroin and whether he was culpable in her death.

III.

Appellant's final contention is that the evidence was insufficient to sustain his convictions, for three reasons. First, appellant maintains that the evidence was insufficient to sustain his conviction of conspiracy to distribute heroin because Ms. Sneden was not a co-conspirator in distributing heroin to Mr. Mills but rather was "acting merely as a conduit for the substance." Second, appellant maintains that the evidence was insufficient to

sustain his reckless endangerment conviction because the State failed to establish the requisite *mens rea* for the crime. Third, appellant claims that the evidence was insufficient to sustain either conviction because the State failed to establish that either crime occurred in St. Mary's County.

"When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence." Md. Rule 8-131(c). We "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and [we] will give due regard to the opportunity of the trial court to judge the credibility of witnesses." *Id.* For legal conclusions, however, we apply a *de novo* standard of review. *State v. Neger*, 427 Md. 582, 595 (2012). "Whether the defendant was tried by a judge or jury, the evidence must be such as would permit a rational fact finder to find, beyond a reasonable doubt, every element of the charged offense." *Id.* That standard applies to all criminal cases, "including those resting upon circumstantial evidence, since, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eye-witness accounts." *Neal v. State*, 191 Md. App. 297, 314 (2010). Moreover, "[t]he test is 'not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.'" *Painter v. State*, 157 Md. App. 1, 11 (2004) (citations omitted) (emphasis in original).

A.

We first address appellant's claim that the evidence was insufficient to sustain his conspiracy conviction because Ms. Sneden was not a co-conspirator but rather was "acting merely as a conduit for the substance." A conspiracy occurs when two or more persons combine or agree "to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means." *Savage v. State*, 226 Md. App. 166, 174 (2015). "When the object of the conspiracy is the commission of another crime, … the specific intent required for the conspiracy is not only the intent required for the agreement but also, pursuant to that agreement, the intent to assist in some way in causing that crime to be committed." *Mitchell v. State,* 363 Md. 130, 146 (2001). The essence of a criminal conspiracy is the unlawful agreement, and the crime "is complete when the agreement to undertake the illegal act is formed." *Savage*, 226 Md. App. at 174. "The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design." *Townes v. State*, 314 Md. 71, 75 (1988). "A conspiracy may be shown through circumstantial evidence, from which a common scheme may be inferred." *Hall v. State,* 233 Md. App. 118, 138 (2017).

The "unlawful purpose" in the instant case was the distribution of a controlled dangerous substance, namely, heroin. *See, e.g.*, Md. Code, Crim. Law § 5-602(1) (proscribing the distribution of a controlled dangerous substance); Md. Code, Crim. Law §§ 5-101 and 5-402 (defining "controlled dangerous substances" to include heroin). "'Distribute' means, with respect to a controlled dangerous substance, to deliver other than

by dispensing." Md. Code, Crim. Law § 5-101(m). "'Dispense' means to deliver to the ultimate user or the human research subject by or in accordance with the lawful order of an authorized provider." Md. Code, Crim. Law § 5-101(l)(1).

We hold that the evidence adduced at trial was sufficient to establish that appellant and Ms. Sneden conspired to distribute heroin to Alex Mills. Prior to Ms. Sneden and Mr. Mills obtaining the heroin, appellant and Ms. Sneden had a text conversation in which Ms. Sneden told appellant, a confessed drug dealer, that "she had a sale." Ms. Sneden and Mr. Mills thereafter drove to Food Lion at Ms. Sneden's direction and for the express purpose of obtaining heroin. Upon arriving at the Food Lion, Ms. Sneden went inside of the store, where she met appellant, who gave her some heroin, which appellant thought was for "Alex." Ms. Sneden then left the Food Lion and got back into Mr. Mills's vehicle, where she distributed some of the heroin to Mr. Mills. From those facts, a reasonable factfinder could conclude that appellant and Ms. Sneden formed an agreement to distribute heroin to Mr. Mills.[6] *See Heckstall v. State*, 120 Md. App. 621, 626-27 (1998) ("[A] conspiracy to distribute heroin requires evidence that two or more persons agreed to 'distribute' the heroin to others.").

[6] Because the evidence in the present case showed that appellant and Ms. Sneden agreed to distribute heroin to a third-party, appellant's reliance on *Heckstall v. State* is misplaced. In that case, the "conspiracy" was between the seller and a single buyer, who was "simply purchasing a small amount of heroin for her personal use[.]" *Heckstall*, 120 Md. App. at 625-27. In holding that such a "buyer-seller" transaction ordinarily does not constitute a conspiracy, we noted that evidence of the transaction, "combined with evidence of a coconspirator, would be evidence of the completion of an agreed upon unlawful purpose." *Id.* at 627 n. 4. In the present case, as noted, evidence of a coconspirator, *i.e.*, Ms. Sneden, was present.

B.

We next address appellant's claim that the evidence was insufficient to sustain his reckless endangerment conviction because the State failed to establish the requisite *mens rea* for the crime. Section 3-204(a) of the Criminal Law Article of the Maryland Code states, in pertinent part, that "[a] person may not recklessly engage in conduct that creates a substantial risk of death or serious physical injury to another[.]" The elements of reckless endangerment are: "1) that the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another; 2) that a reasonable person would not have engaged in that conduct; and 3) that the defendant acted recklessly." *Holbrook v. State*, 364 Md. 354, 366-67 (2001) (citing *Jones v. State*, 357 Md. 408, 427 (2000)).

For a defendant's actions to be "reckless," that is, for the defendant to have acted with the requisite *mens rea* of reckless endangerment, "[t]he State must demonstrate wanton and reckless disregard for human life," which can generally be described as "a gross departure from the conduct of an ordinarily careful and prudent person and a disregard or indifference to the rights of others." *State v. Thomas*, 464 Md. 133, 160 (2019) (internal citations and quotations omitted). Stated another way, "[t]he state of mind of recklessness … is variously described as an attitude wherein the criminal agent, conscious of the life-endangering risk involved, nonetheless acts with a conscious disregard of or wanton indifference to the consequences." *Pryor v. State*, 195 Md. App. 311, 333 (2010) (citing *Williams v. State*, 100 Md. App. 468, 474 (1994)). In assessing whether a defendant's actions met this standard, we look at whether the actions were "more

or less likely at any moment to bring harm to another, as determined by weighing the inherent dangerousness of the act and environmental risk factors." *Thomas*, 464 Md. at 160-61 (internal citations and quotations omitted). "This weighing must amount to a 'high degree of risk to human life' – falling somewhere between the unreasonable risk of ordinary negligence and the very high degree of risk necessary for depraved-heart murder." *Id.* at 161.

In *State v. Thomas*, the Court of Appeals considered "under what circumstances the dangers of heroin would justify holding a dealer liable for involuntary manslaughter for supplying the means by which his customer fatally overdoses."[7] *Id.* at 139. There, the defendant, Patrick Thomas, was charged with several crimes, including reckless endangerment and involuntary manslaughter, following the overdose death of a 23-year-old heroin user. *Id.* at 140-41. At trial, the following facts were adduced: that the victim, a heroin user for approximately four-and-a-half years, was found, deceased, in the bathroom of his home; that a white wax paper bag was found in the victim's hand and three identical bags containing trace amounts of heroin were found on the ground of the bathroom; that, in the hours leading up to his death, the victim called Thomas, a known heroin dealer, 27 times; and that, during that same period, the victim sent text messages to Thomas asking for four bags of heroin. *Id.* at 141-45. The evidence also showed that,

[7] The *mens rea* of gross negligence involuntary manslaughter, which is the type of involuntary manslaughter at issue in *Thomas*, is more or less the same as the *mens rea* of reckless endangerment. *Pagotto v. State*, 127 Md. App. 271, 335-37 (1999). At the very least, if the evidence "is not legally sufficient to support a conviction for involuntary manslaughter … it is *ipso facto* legally insufficient to support [a conviction] for reckless endangerment." *Id.* at 337.

following the victim's death, a search warrant was executed at Thomas's residence, which revealed, among other drug paraphernalia, 60 individual wax paper bags of heroin that were identical to the bags found in the victim's bathroom. *Id.* at 145-46. A statement from Thomas to the police following his arrest was also admitted and indicated that Thomas had regularly sold large quantities of heroin; that Thomas had sold heroin to the victim "a few times" before his death; that Thomas knew the victim was "a young boy" who had recently been incarcerated; that Thomas had in fact sold four bags of heroin to the victim prior to his death; that Thomas thought it was "weird" that the victim was looking for heroin at that time of night; that Thomas did not think that the victim could have overdosed "off what [Thomas] sold him"; and that Thomas was also a heroin user and had been for some time. *Id.* at 148-50. Finally, evidence was adduced showing that the region of Maryland where the victim had died had "been consumed with heroin overdoses, some resulting in deaths, and that these overdoses [had] resulted in an acute awareness of the dangers of heroin." *Id.* at 147.

Thomas was ultimately convicted of all charges, including involuntary manslaughter, and he later challenged that conviction in this Court, arguing that the evidence was insufficient to sustain the conviction. *Id.* at 150. After this Court reversed that conviction on those grounds, the Court of Appeals granted *certiorari* and reversed, holding that the evidence was sufficient to sustain Thomas's conviction of involuntary manslaughter. *Id.* 151, 180. In so doing, the Court noted that "a *per se* rule providing that all heroin distribution resulting in death constitutes gross negligence involuntary

manslaughter [was] unwise" and that, instead, a reviewing court "must consider the inherent dangerousness of distributing heroin with the attendant environmental risk factors presented by each case." *Id.* at 167. The Court also noted that "the defendant, or an ordinarily prudent person under similar circumstances, should be conscious of this risk." *Id.*

Regarding the "environmental risk factors" involved in Thomas's case, the Court stated that it was "undisputed that Thomas was knowingly engaged in the unregulated selling of a CDS with no known medical benefit – an addictive and useless poison – to customers in a region suffering from an epidemic of heroin and opioid abuse and deaths." *Id.* at 167. The Court also stated that it was reasonable to infer that Thomas knew about the overdose risks of heroin given his comments to the police that the victim "couldn't have overdosed off what [Thomas] sold him." *Id.* at 168. The Court concluded that "[w]hen some quantity of heroin will kill, but variable circumstances render that quantity unpredictable, a person takes a large risk in distributing any amount above an exceedingly *de minimis* threshold." *Id.* at 168-69.

The Court of Appeals further determined that Thomas's case did not involve "the mere act of distributing heroin" but rather included additional facts showing a wanton and reckless disregard for human life. *Id.* at 169-71. The Court explained that, given the victim's age, his history of heroin use, and the inordinate number of times he contacted Thomas prior to his death, a reasonable person in Thomas's position would have known that the victim "was desperate for heroin" and "might well ingest the entire four bags of

heroin immediately." *Id.* at 169-70. The Court also noted that it was reasonable to infer that Thomas, an experienced heroin user and distributor, "was aware of the risk to life posed by consistent heroin abuse, cognizant of its ill-effects, and, yet, continued to sell the drug notwithstanding its danger." *Id.* at 170. The Court concluded:

> Thomas sold heroin to a desperate young man, knowing that the consumption of heroin could be deadly. He had extensive experience with heroin … and was knowledgeable of its dangers. Yet, he either willfully failed to obtain the necessary information to help reduce the risks of his behavior, or he was indifferent to mitigating these risks. Either way, his conduct posed a high degree of risk to those with whom he interacted.
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> * * *
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> Thus, we hold that the record contained sufficient evidence of gross negligence to support a conviction for gross negligence manslaughter beyond a reasonable doubt.

Id. at 171-72.

Here, we hold that the evidence adduced at trial was sufficient to sustain appellant's conviction of reckless endangerment. First, a reasonable factfinder could conclude that appellant knowingly engaged in the selling of heroin and that he was aware of the overdose risks of heroin. Appellant, a regular heroin dealer and "serious" heroin user, admitted giving heroin to Ms. Sneden, a known drug abuser. Appellant also admitted that he had "close friends" who had died "from heroin." Moreover, the amount of heroin appellant gave to Ms. Sneden, approximately $50 worth, was more than an exceedingly *de minimus* amount, as it was enough for Ms. Sneden and Mr. Mills to share, with enough left over that, according to Mr. Mills, "might have been enough for one person."

The evidence further showed that appellant was not engaged in the mere act of distributing heroin but rather was acting with a wanton and reckless disregard for human life. Appellant knew that Ms. Sneden was struggling with her addiction and that, when he gave her the heroin, she may have tried to "use like … she used before." Appellant, as an addict himself, was also familiar with the struggles of addiction, which, according to appellant, "controls everything" because "you don't have a choice" and "need to feel better." Appellant also knew, or should have known, that Ms. Sneden had access to other drug sources, given appellant's comments that "a bunch of the guys in [the treatment facility] were getting stuff" and that there was "all kinds of stuff going through that house." Finally, although appellant insisted that he thought the heroin was "for the boy Alex," he also admitted that "if [Ms. Sneden] was with him, which she was, that they were both getting high." From those facts, a reasonable inference can be drawn that appellant "was aware of the risk to life posed by consistent heroin abuse, cognizant of its ill-effects, and, yet, continued to sell the drug notwithstanding its danger." *Id.* at 170.

In sum, appellant's conduct represented "a gross departure from the conduct of an ordinarily careful and prudent person and a disregard or indifference to the rights of others." *Id.* at 160. Thus, the record contained sufficient evidence of the *mens rea* of reckless endangerment to support appellant's conviction.

C.

Appellant's final argument is that the evidence was insufficient to sustain his convictions because the State failed to prove that either crime occurred in St. Mary's

County. We disagree. "In Maryland, territorial jurisdiction is not an element of the offense for which the defendant is on trial, so as to require that it be proven in every case." *Jones v. State*, 172 Md. App. 444, 453 (2007). "However, 'when evidence exists that the crime may have been committed outside Maryland's territorial jurisdiction and a defendant disputes the territorial jurisdiction of the Maryland courts to try him or her, the issue of where the crime was committed is fact-dependent and thus for the trier of fact.'" *Id.* at 453-54 (quoting *State v. Butler*, 353 Md. 67, 79 (1999)).

Here, appellant does not claim that the crimes were committed outside of Maryland, only that the crimes were committed outside of St. Mary's County. Moreover, appellant cites no case in which this Court or the Court of Appeals held that the evidence was insufficient solely because the State failed to prove that a particular county in Maryland, as opposed to some other county in Maryland, was the appropriate venue. Accordingly, we reject appellant's claim.

JUDGMENTS OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.