Circuit Court for Baltimore City
Case No. 116091022-24

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 995

September Term, 2017

NATHANIEL GREEN

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Friedman,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: July 9, 2018

Nathaniel Green, appellant, was convicted by a jury sitting in the Circuit Court for Baltimore City of one count of first-degree premeditated murder, two counts of attempted first-degree premeditated murder, and three counts of use of a handgun in the commission of a crime of violence.[1] Appellant presents five questions on appeal, which we have slightly rephrased:

I. Did the trial court err in admitting video footage taken at the time of the shooting because the video was allegedly not properly authenticated?

II. Did the trial court err in admitting an out-of-court identification of appellant because the court failed to rule on the defense's pre-trial motion to suppress the identification or because the identification constituted inadmissible hearsay?

III. Did the trial court err in denying the defense's motion for judgment of acquittal as to the counts involving the shooting of Juan Henderson?

IV. Did the trial court err when it sustained two objections by the State during the defense's closing argument and overruled an objection by the defense during the State's rebuttal closing argument?

V. Did the trial court err in denying the defense's motion for a new trial based on newly discovered evidence?

For the reasons that follow, we shall affirm.

FACTS

The State's theory of prosecution was that around noon on February 19, 2016, appellant shot Sharnelle Arrington and her mother, Sheila Jordan, in the head and Arrington's boyfriend, Juan Henderson, in the buttocks. Jordan died; Arrington and

[1] Appellant was sentenced to life imprisonment for each of his three murder convictions and 20-year terms of imprisonment for each of his three handgun convictions. All sentences are to be served consecutively.

Henderson survived. The State's evidence came primarily from Arrington and appellant's girlfriend, Taharra Moore, both of whom identified appellant as the shooter. The theory of defense was lack of criminal agency. The defense presented no testimonial evidence.

At the time of the shooting, Arrington, her mother, and Henderson, Arrington's boyfriend of about 20 years, lived at 2300 Aiken Street, located at the corner of Aiken Street and Darley Avenue in Baltimore City. At the same time, appellant and his sister were living at his girlfriend's home at 1240 Darley Avenue, about a half a block away. Arrington's family and appellant's family were close and had known each other for over 25 years. Arrington's mother and appellant's mother were best friends, and appellant was Arrington's "little brother's best friend."

On February 18, 2016, the day before the shooting, Arrington went to Moore's house to confront appellant for "beating" up her son. Appellant was not home but Moore was, and she and Arrington got into a heated argument. The police were called and Arrington was directed to go home, which she did. At some point around the time of the argument, Arrington broke the windows of Moore's car and the windows of the truck belonging to appellant's father. After Arrington went home, Moore walked to Arrington's house where she was arrested for disorderly conduct by a police officer, who had been stationed in the neighborhood after the argument.

Later that evening, appellant and Arrington spoke. Arrington told appellant that she was upset that he had hurt her son – apparently appellant had fractured her son's elbow – and told him that she "needed a phone call from him . . . before he put his hands on my son[.]" Appellant admitted that he had "beat [] up" her son but explained that he had not

beaten him as bad as Arrington had thought. After their conversation, Arrington thought it was "something that could be resolved . . . something that was going to slowly mend because . . . we've had arguments and differences in the past as family[.]"

The next day, Arrington went to the corner store around 11:00 a.m. As she walked home from the store, she saw appellant's sister on Moore's front porch. The two spoke for about 15 minutes about the events of the day before. Arrington testified that they raised their voices, but they were not "hollering" at each other. Arrington then walked home, and about 15 minutes later, she, Henderson, and her son waited for a taxi to run an errand.

While Arrington, her mother, and Henderson were outside their home, Arrington saw a gray SUV belonging to appellant's sister stop in front of Moore's house. Appellant and Moore got out and exchanged a few words. Appellant then returned to the SUV, drove to the corner, and stopped. He exited the SUV and, as he came around the back of it, he had a revolver in his hand. Appellant started shooting, and Arrington fell to the ground. Henderson ran into the house, and appellant ran past Arrington and tried to "bust" down the door of her house. Unable to gain entry, he walked over to Arrington and her mother, Jordan. Jordan told appellant, "[Y]ou better not shoot my daughter[.]" Appellant, however, did just that, shooting Arrington in the back of the head. He then shot Jordan in the head. He returned to the SUV and fled the area. The police and ambulance were called.

Baltimore City Police Officer Scott McKelvey, the first officer to respond to the scene of the shooting, testified that when he arrived he observed Henderson bleeding from his groin area. Henderson told him he had been shot. Arrington had been shot in the head but was conscious. Jordan was dead. She died from a gunshot wound to the left side of

her head that had evidence of stippling, which the medical examiner testified meant that the gun was fired about two feet from her head. Both Arrington and Henderson were taken to a hospital for their injuries.

Twelve hours after the shooting and while at the hospital, Arrington spoke briefly to the police about the shooting but did not identify the shooter. She explained at trial that she withheld appellant's identity "[o]ut of fear." The police arrested appellant the day after the shooting and transported him to the police station for questioning. Appellant waived his *Miranda*[2] rights and made a statement to the police, which was recorded and played for the jury. In his statement, appellant denied any involvement in the shooting. He said that he had been at his sister's house when Moore called and told him that there had been a shooting in the neighborhood.

Less than a week after the shooting Arrington spoke to the police a second time. She again did not identify the shooter. She explained at trial that she was afraid because appellant knew everything about her and her family. In the months following the shooting, the police repeatedly asked Arrington to come to the police station to make a statement. She declined, but eventually did in September 2016, about seven months after the shooting. She informed the police that appellant was the shooter, and she reviewed video footage taken at the time of the shooting from a Baltimore City camera located near the corner of Darley Avenue and Aiken Street.

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

The video footage was admitted into evidence and played for the jury while Arrington narrated.[3] She testified as to what was shown on the video, which was similar to her trial testimony: her walking to the corner store, which was next door to appellant's house; the exchange between she and appellant's sister at Moore's house; Arrington's mother walking over to join the conversation; Arrington and her mother returning to their house; a gray SUV stopping in front of Moore's house and Moore getting out; the SUV proceeding to the corner of Darley Avenue and Aiken Street where it stops and appellant gets out; and a short while later appellant returning to the SUV and leaving the area. Because of its rotating feature, the video did not record the shooting.

Moore testified for the State, and her testimony was somewhat similar to Arrington's testimony. Moore testified that the day before the shooting, Arrington and her mother had come to her house and "busted" the windows of her car and flattened her tires. After spending the night in jail for disorderly conduct, appellant picked her up the next morning in his sister's grayish SUV, dropped her off at her house, and then went to pick up his sister from work. A short time later, Arrington and her mother had a verbal altercation in Moore's yard with appellant's sister. After Arrington and her mother left, appellant returned to Moore's house, spoke to his nephew, and then drove down to the corner. Moore testified that she never saw appellant with a gun, but she also testified that

[3] The video camera operated on a rotation sequence -- rotating a full 360 degrees but pausing for a few seconds during each approximate minute rotation at four fixed vantage points, one of which was looking from Darley Avenue toward Aiken Street where Arrington lived. There are 14 segments looking down Darley Avenue for a total of about three minutes of video depicting the events relevant to the shooting.

she saw appellant's hand "go like this and I saw Ms. Shirley, the mother, fall[.]" At that point, Moore went inside her house and did not see anything else. She then left for appellant's sister's house with her children.

The State asked her about a photographic array she made at the police station in which she identified appellant as the shooter. Moore testified that the day after the shooting she was transported to the police station and shown three photographs. She testified that she chose appellant's photograph and was "told" to write under the photograph: "I recognize this person as the person who ran in the yard on Aiken Street and did [the] shooting. His name is Nathaniel Green." The photograph and her written statement were admitted into evidence. She further testified that the police told her to "pick the right person or I was going to go to jail for conspiracy" or "lose my children[.]"

Detective Brian Lewis of the Baltimore City Police Department conducted the photographic identification and contradicted Moore's testimony. He testified that prior to Moore's identification, he read a photographic array instruction sheet to her that she initialed. The instruction sheet, which was admitted into evidence, stated, among other things, that the detective was not involved in the investigation other than to show the photographs to her; that the person who committed the crime(s) may or may not be in the photographs; and that after viewing the photographs the detective would ask her if she recognized anyone, and if she did, which person and what role that person played. He then showed her a six-person photographic array. According to Detective Lewis, Moore chose appellant's picture and stated: "He shot 'em." He then asked her to write "in her own

words" what role appellant played. He denied telling Moore what to write and denied threatening or coercing her in any way during the identification process.

DISCUSSION

I.

Appellant argues that the trial court erred when it admitted video footage taken from a Baltimore City camera of the events that occurred around the time of the shooting. Appellant argues that the video was not properly authenticated. The State disagrees, as do we.

Md. Rule 5-901(a), governing the authentication of evidence, provides that authentication, a condition precedent to admissibility, "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." "[T]he burden of proof for authentication is slight, and the court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so." *Johnson v. State*, 228 Md. App. 27, 59 (quotation marks, citation, and emphasis omitted), *cert. denied*, 450 Md. 120 (2016). Thus, once a *prima facie* showing of authenticity is made, the ultimate question of authenticity is left to the jury. *See* 2 McCormick on Evidence § 227 (John W. Strong ed.1999). We review a trial court's decision regarding authenticity for an abuse of discretion. *Miller v. State*, 421 Md. 609, 622 (2011).

In *Washington v. State*, 406 Md. 642 (2008), the Court of Appeals explained two methods for authenticating video evidence: the "pictorial testimony" method and the "silent witness" method. Under the pictorial testimony method, a video is admissible to

"illustrate testimony of a witness when that witness testifies from first-hand knowledge that the [video] fairly and accurately represents the scene or object it purports to depict as it existed at the relevant time." *Washington*, 406 Md. at 651-52 (quotation marks and citation omitted). The silent witness method, which does not require first-hand knowledge, "allows for authentication by the presentation of evidence describing a process or system that produces an accurate result." *Id.* (citations omitted). Under the pictorial testimony theory, the video is considered "illustrative evidence" that is used to support the testimony of an eyewitness while under the silent witness theory the video itself is considered probative evidence. *Id*.

In *Washington*, the video at issue was created by an unknown person from "eight surveillance cameras," and there was no eyewitness to the events. *Id*. at 655. Because the State had offered the videotape as evidence in itself, and not as illustrative evidence in support of the testimony of an eyewitness, the Court looked to the silent witness method to determine if the trial court had erred in admitting the video. *Id*. The Court found that the video was not properly authenticated and that the trial court had erred in admitting it because the State failed to elicit testimony about the "process used, the manner of operation of the cameras, the reliability or authenticity of the images, [and] the chain of custody of the" video to enable the trial court to find that the videotape reliably depicted the events without manipulation or distortion. *Id*. at 655-56.

We turn now to the facts of this case. During the testimony of Arrington, the State played less than a minute of video taken from a Baltimore City CCTV camera at the time of the shooting that was mounted at the intersection of Harford Road and Darley Avenue.

The State asked her if she recognized the "area," and she replied that she did. She further agreed that it fairly and accurately represented the events at the time of the shooting on February 19. The State moved to admit the video into evidence and defense counsel objected on the grounds that it was not properly authenticated. The judge overruled the objection, and the video was admitted into evidence. The video was then played for the jury with Arrington narrating, as related above.

The following day, the trial judge described in detail why she overruled defense counsel's objection, explaining that she wanted to incorporate her reasoning for denying the same objection defense counsel raised at appellant's first trial into the record.[4] The judge then spoke extensively about *Washington* and the two methods for authenticating video. The judge concluded: "The Defense in this case seems to believe that this is a silent witness situation. The Court finds it is simply a pictorial testimony theory where the witness in this case, Ms. Arrington, has first-hand knowledge of the incident that is depicted on the video[.]"

On appeal, appellant argues that the trial judge erred when she denied his objection and admitted the video. Appellant spends much of his time arguing that the video was not properly authenticated because the State failed to provide sufficient testimony regarding the camera process used to record the images. The trial judge, however, clearly admitted the video under the "pictorial testimony" method, not the silent witness method.

[4] The same judge proceeded over both of appellant's trials. Appellant's second trial began three days after his first trial ended in a mistrial when the jury was unable to reach a unanimous verdict.

Appellant's only argument as to the pictorial testimony method is to claim, without citation to any authority, that Arrington's testimony that she was "in" the video footage was insufficient to authenticate the video. The State points out, however, that Arrington not only testified that she was in the video, but she also testified that she had previously reviewed the video footage while at the police station, and that she recognized the video from the portion that the State played for identification purposes, confirming that it "fairly and accurately" represented the events surrounding the shooting. Under the circumstances, this was sufficient to meet the "slight" burden of proof necessary for the pictorial testimony method of authentication, and therefore, we find no abuse of discretion by the trial court in admitting the video.

II.

Appellant argues that the trial court erred when it admitted Moore's out-of-court identification of him as the shooter. Appellant's argument is two-fold: the trial court erred by failing to rule on his pre-trial written motion to suppress the out-of-court identification, and the identification constituted inadmissible hearsay. The State responds that appellant has waived both arguments – he failed to pursue his written motion and he never argued below that the photograph contained inadmissible hearsay. We agree with the State.

A. Pre-trial written motion to suppress out-of-court identification

After Moore testified on direct examination as to how she chose appellant's picture and that she wrote underneath his picture that he was the shooter, the State moved to enter appellant's photograph into evidence. Defense counsel objected. At the ensuing bench conference, defense counsel stated that the photograph was inadmissible because Moore

"testified she was told what to write." The trial court responded, "that's why you have cross-examination. That has nothing to do with admissibility. It goes to weight." Defense counsel then added that the photographic array "still has to be found to be . . . reliable." The trial court replied: "[Y]ou didn't object to any out-of-court identifications of your client. We did not do any motions on that. We didn't do any suggestiveness about this[.]" When defense counsel advised the court that she had filed "a motion to suppress the photo array . . . of Ms. Moore," the court replied:

> Nobody brought it to my attention.
>
> * * *
>
> Listen. When I asked you on the 21st [the first day of appellant's first trial], "You have any motions?" You said you had a bunch of motions in limine. We started again on the 27th [the first day of appellant's second trial] and you went over a few extra motions in limine that you had. You said nothing whatsoever about any motion to suppress any out-of-court identification.
>
> * * *
>
> [T]hat's what you said. Now, you may not have said that because you didn't know [the State prosecutor] was going to have Ms. Moore, but we have her now.

The court then overruled the objection and admitted the photograph into evidence.

Md. Rule 4-252 delineates between mandatory and permissive motions in criminal circuit court cases. Mandatory motions, including an allegation claiming an unlawful pre-trial identification, "shall be raised by motion" that "shall be determined before trial," and "if not so raised are waived." Rule 4-252(a), (g). However, to avoid waiver, a defendant must do more than simply file a suppression motion and sit back – the motion must be

brought to the attention of the trial court. *See Carroll v. State*, 202 Md. App. 487, 510 (2011) (stating that a defendant waives a pre-trial motion to suppress when the defendant files the motion but fails to pursue it) (citations omitted), *aff'd*, 428 Md. 679 (2012). *See also Joyner v. State*, 208 Md. App. 500, 518 (2012) (same). The right to have pending motions decided carries with it "a commensurate responsibility." *White v. State*, 23 Md. App. 151, 156 (1974), *cert. denied*, 273 Md. 723 (1975). A party "may not take advantage of an obscurely situate, undecided motion and stand mute in the face of repeated requests by the judge for all pending motions to be decided." *Id*. Otherwise, an unresolved motion could be "set as a trap for an unwary judge." *Id*.

A brief history of appellant's pre-trial motion to suppress is critical to our conclusion that he waived his motion by not pursuing it. More than a month before appellant's first trial, appellant filed a pre-trial motion to suppress Moore's identification of him, and he requested a hearing. This was sufficient to avoid waiver under Md. Rule 4-252(a). This, however, does not end our analysis.

On the first day of his first trial, the trial court asked appellant for all his motions in limine. Appellant raised five pre-trial motions, and the court ruled on each of those. Appellant did not raise his suppression motion. The parties then discussed the witnesses expected to testify and the State requested a body attachment for Moore because it was unclear whether she would appear at trial. Before breaking for lunch, the trial court once again inquired: "So anything else that we need to discuss before we go?" Defense counsel remained silent. After the jury had been selected, the trial court and the parties engaged in a lengthy discussion about issuing a body attachment for Moore. Again, appellant did not

mention his suppression motion. When the jury was unable to reach a unanimous verdict, the court ultimately declared a mistrial.

Three days later appellant was re-tried. Immediately after the jury was selected and before lunch, appellant advanced some additional motions, none of which related to appellant's motion to suppress. After the trial court ruled on those, the court asked, "Anything else?" Defense counsel replied, "No." After the lunch break, the trial court again inquired, "So is there anything else we need to discuss before we get the jury?" Again, defense counsel said nothing. The following morning, the State requested and obtained from the court a body attachment for Moore. At no time did defense counsel say anything about suppressing Moore's pre-trial identification of appellant.

Under the circumstances presented, we are persuaded that the trial court properly concluded that appellant waived his pre-trial motion to suppress Moore's out-of-court identification of him when he repeatedly failed to bring it to the trial court's attention in a timely manner.

B. Hearsay

Appellant also argues that defense counsel's single use of the word "reliable" was sufficient to preserve a "hearsay" argument to Moore's pre-trial identification of him as the shooter. *See* Md. Rules 5-800 *et. seq*. (defining and setting forth the rules on hearsay evidence). Appellant's argument is baseless.

Although an appellant may present an appellate court with a more detailed version of an argument made at trial, the Court of Appeals has refused to require trial courts "to imagine all reasonable offshoots of the argument actually presented to them before making

a ruling on admissibility." *Starr v. State*, 405 Md. 293, 304 (2008) (quotation marks and citation omitted). *Cf. Sifrit v. State*, 383 Md. 116, 136 (2004) (when the defendant's theory of relevance on appeal was different from the theory he presented to the trial court the Court of Appeals held that the theory advanced on appeal was not preserved). *See also Jeffries v. State*, 113 Md. App. 322, 340-42 (appellate argument that evidence was unduly prejudicial and improper other crimes not preserved where objection below was only that evidence was irrelevant), *cert. denied*, 345 Md. 457 (1997).

Arguing that defense counsel's single use of the word "reliable" constituted a hearsay argument, notwithstanding the trial court's clear explanation to appellant that she was overruling his objection because he failed to pursue his pre-trial motion to suppress, is a "spin" of prodigious proportion. Moreover, we note that defense counsel never corrected the trial court's reasonable understanding that defense counsel was objecting to the photograph based on appellant's pre-trial motion to suppress. Accordingly, appellant has not preserved his hearsay argument for our review.

III.

Appellant argues that the trial court erred when it denied his motion for judgment of acquittal as to his two convictions involving Juan Henderson: attempted first-degree murder, and use of a handgun in the commission of a felony. Specifically, appellant argues that the State failed to prove that Henderson was shot or that appellant acted with the specific intent to murder Henderson. Appellant points out that Henderson did not testify at trial, no medical records were introduced into evidence, and Arrington's testimony

regarding Henderson's wounds was too limited to support his convictions. The State disagrees, as do we.

The standard for appellate review of evidentiary sufficiency is "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Derr v. State*, 434 Md. 88, 129 (2013) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)), *cert. denied*, 567 U.S. 948 (2014). "That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Smith v. State*, 415 Md. 174, 185 (2010) (citation omitted).

"Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence." *State v. Suddith*, 379 Md. 425, 447 (2004) (quotation marks and citation omitted). This is because weighing "the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact." *In re Heather B.*, 369 Md. 257, 270 (2002) (quotation marks and citations omitted). Thus, "the limited question before an appellate court 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." *Allen v. State*, 158 Md. App. 194, 249 (2004) (quotation marks and citation omitted). We are mindful that the testimony of a single eyewitness "needs no corroboration" and if believed is "legally

sufficient to convict." *Branch v. State*, 305 Md. 177, 183 (1986) (quotation marks and citations omitted).

The elements of first-degree premeditated murder are as follows:

> "For a killing to be 'wilful' there must be a specific purpose and intent to kill; to be 'deliberate' there must be a full and conscious knowledge of the purpose to kill; and to be 'premeditated' the design to kill must have preceded the killing by an appreciable length of time, that is, time enough to be deliberate. It is unnecessary that the deliberation or premeditation shall have existed for any particular length of time."

Wagner v. State, 160 Md. App. 531, 564-65 (2005) (quoting *State v. Raines*, 326 Md. 582, 589, *cert. denied*, 506 U.S. 1029 (1992) (quoting *Tichnell v. State*, 287 Md. 695, 717-18 (1980))). It is the willful element that appellant challenges here.

Because intent is a "subjective concept and, without the cooperation of the accused, cannot be directly and objectively proven, its presence must be shown by" facts and inferences from those facts. *Buck v. State*, 181 Md. App. 585, 641 (2008) (quotation marks, brackets, and citations omitted). *See also Burch v. State*, 346 Md. 253, 273 ("Absent an admission by the accused, [an intent to kill] rarely can be proved directly.") (citation omitted), *cert. denied*, 522 U.S. 1001 (1997). It is well-established that "an intent to kill may be inferred from the use of a deadly weapon directed at a vital part of the human body." *Buck*, 181 Md. App. at 642 (quotation marks and citations omitted). This is because "[i]t is permissible to infer that one intends the natural and probable consequences of his act[ions]." *Id.* (quotation marks and citations omitted) (some brackets added). Moreover, specific intent may be inferred by considering "the accused's acts, conduct and words." *State v. Raines*, 326 Md. 582, 591 (citation omitted), *cert. denied*, 506 U.S. 945 (1992).

Arrington testified that as appellant came around the side of the SUV, he was holding a handgun, that he started shooting, that Henderson ran into the house, and that as appellant ran past her and her mother, he attempted to "bust" into her home "like he's trying to shoot somebody in there too." When appellant could not get into the house, he came down the stairs and shot Arrington and her mother in the head. Arrington testified that she cared and continues to care for Henderson who suffered "a gunshot wou[n]d to the buttocks that came through the buttocks, went through his testicles. He lost a testicle and it was enlodged (sic) in his penis. So he had to have a couple surgeries." She testified that Henderson was "still healing" a year after the shooting. In addition to Arrington's testimony, the responding police officer testified that when he arrived on the scene Henderson told him he had been shot and Henderson was "bleeding from the groin area."

Under the facts presented above, a rational juror could conclude that Henderson was shot and that appellant was the criminal agent responsible for the shooting. Contrary to appellant's argument, Henderson was not required to testify that he was shot, nor was the State required to introduce Henderson's medical records to prove that he had been shot.

We are also persuaded that a rational juror could conclude beyond a reasonable doubt that appellant intended to kill Henderson. Appellant's actions of firing a deadly weapon near Henderson's vital organs, and shooting both Arrington and her mother in the head at close range within seconds after firing his gun at Henderson was sufficient to support an inference of an intent to kill. *Cf. People v. Blue*, 55 A.D.3d 391, 391 (N.Y.App.Div. 2008) (holding that an intent to kill was established by evidence that after attempting to rob one of his victims, the defendant fired two shots at the victim, striking

him in the groin and thigh); *Com. v. Wyche*, 467 A.2d 636, 637 (PA 1983) (a juror could infer the specific intent to kill where appellant shot victim four times, three of which hit the victim, where the fatal shot entered the victim through the buttocks). Accordingly, we find no error by the trial court in denying appellant's motion for judgment of acquittal.

IV.

Appellant argues that the trial court erred when it sustained two objections by the State during defense counsel's closing argument and when it overruled an objection by defense counsel during the State's rebuttal closing argument. The State counters that the trial court properly exercised its discretion in each instance and did not err.

The general rules in Maryland regarding the scope of permissible closing argument have been often stated:

> As to summation, it is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is afforded a wide range. Counsel is free to use the testimony most favorable to his side of the argument to the jury, and the evidence may be examined, collated, sifted and treated in his own way.... Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom; the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of witnesses which the prosecution produces.

Mitchell v. State, 408 Md. 368, 380 (2009) (quotation marks and citation omitted). S*ee also Degren v. State*, 352 Md. 400, 429 (1999) (noting "the general rule that attorneys are afforded great leeway in presenting closing arguments to the jury") (citations omitted).

"What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case." *Smith v. State*, 388 Md. 468, 488 (2005).

"An appellate court should not disturb the trial court's judgment absent a clear abuse of discretion by the trial court of a character likely to have injured the complaining party." *Grandison v. State*, 341 Md. 175, 225 (1995), *cert. denied*, 519 U.S. 1027 (1996). *See also Henry v. State*, 324 Md. 204, 231 (1991) (noting that "[t]he inference of any impropriety occurring in closing arguments must of necessity rest largely in the control and discretion of the presiding judge[.]") (quotation marks and citation omitted), *cert. denied*, 503 U.S. 972 (1992). Nevertheless, we have acknowledged certain boundaries that counsel may not exceed, including commenting upon facts not in evidence, *Smith*, 388 Md. at 488; appealing to the prejudices or passions of the jurors, *Wood v. State*, 192 Md. 643, 652 (1949); or inviting the jurors to abandon the objectivity that their oaths require, *Lawson v. State*, 389 Md. 570, 594 (2005). In assessing whether the complaining party was prejudiced, we consider "the severity of the remarks, cumulatively, the weight of the evidence against the accused and the measures taken to cure any potential prejudice." *Lee v. State*, 405 Md. 148, 174 (2008) (citations omitted).

A. Defense counsel's closing argument

The first comment during defense counsel's closing argument to which appellant directs our attention was as follows:

> [DEFENSE COUNSEL]: A witness [Moore] who was threatened and a witness [Arrington] who told you herself she lied. That's the evidence that the State has presented to you. That is the only evidence they have linking [appellant] to this crime, a witness who was threatened and a witness who told you herself she lied.

> *And the detectives in this case, think about what they would do, the lengths that they would go. The interrogations, the threatening, the bullying* --
>
> [THE STATE]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: -- in order to get statements against [appellant] in this case and they did that because they had no other evidence.
>
> THE COURT: Ladies and gentlemen of the jury, you are to disregard that comment. You are only to rely on your memory of the evidence.

(Emphasis added.)

Appellant argues that it was perfectly legitimate for defense counsel to refer to the "interrogations, the threatening, the bullying" given that Moore testified that the police threatened to send her and her children to jail and that she would lose her children if she did not identify appellant as the shooter. The State agrees that this was proper argument, but argues that the trial court's ruling went to defense counsel's broader argument when she asked the jury to speculate about what else the police might have done, stating: "think about what they would do, the lengths that they would go."

We are persuaded that the State was not objecting and the trial court did not rule on the "threatening" and "bullying" language used by defense counsel, but that the State was only objecting and the trial court was only ruling on defense counsel's language that went beyond that argument to encourage the jury to speculate about what else the police might have done.

Additionally, we agree with the State that the speculation argument by defense counsel suggested to the jury that the police engage in "unsavory interrogation tactics,"

which played on stereotypes of police interrogations and encouraged the jurors to decide the case based on facts not in evidence. Accordingly, we find no error in the trial court's ruling sustaining the State's objection.

The second remark to which appellant directs our attention was as follows:

> [DEFENSE COUNSEL]: [Moore] told you they told her they would take her children away. She told you about her foster son, that they told her they would take him away. So they pushed her until they got what they wanted. *They lied to her*. They told her she was going to –
>
> [THE STATE]: Objection.
>
> THE COURT: Come up.

At the ensuing bench conference, the State advised that it was objecting "because there's no evidence that they lied to her." The following colloquy occurred:

> [DEFENSE COUNSEL]: Your honor, they told her that she was on camera and that there were witnesses that placed her at the scene.
>
> THE COURT: Well, she was on camera.
>
> [THE STATE]: Yeah.
>
> THE COURT: So you know whether –
>
> [DEFENSE COUNSEL]: Detective Fuller hadn't –
>
> THE COURT: Listen, listen. I can't allow you to misstate the evidence. Now, you can say to the jury – you can suggest to them that they can decide whether the police were being accurate, or whatever, but you can't just make blatant statements that didn't come out in evidence.

When the parties returned to their trial tables, the court instructed the jury: "I'm going to sustain as to the police lie. That's for you to decide. You're the ones to decide the evidence, not Counsel."

Appellant argues that defense counsel properly argued to the jury that the police lied to Moore because Moore testified that the police told her she was "on camera" watching the shooting, even though Arrington never testified, as she narrated the video, that she saw Moore on the video. The State responds that there is no evidence that the police lied, and because of the lack of evidence that they did, the trial court did not abuse its discretion in limiting defense counsel's argument as to what the evidence showed.

We agree with the State and its reasoning, particularly in light of the fact that after the trial court sustained the objection and admonished the jurors, defense counsel was not prevented from *suggesting* to the jury that the police lied, arguing:

> [DEFENSE COUNSEL]: You can decide whether the police lied to Ms. Moore. They spoke to her on February 19th. She told you about what Detective Fuller did and Detective Fuller told you that he hadn't reviewed the camera footage until February 20th, but he told her they had her on camera. She was told, "Pick the right person or go to jail." She told you they told her what to write and that's what she did.
>
> Now the State brought in Detective Lewis to try and fix the parts of Ms. Moore's testimony they didn't like –
>
> [THE STATE]: Objection.
>
> [DEFENSE COUNSEL]: -- they're [sic] own witness.
>
> THE COURT: Overruled. It's argument.
>
> [DEFENSE COUNSEL]: And Detective Lewis said he spoke to Ms. Moore on February 20th. He didn't speak to her on February 19th, when she was first brought down to Homicide. He wasn't there when detectives told her, "Come back the next day and bring your kids." He wasn't there in the interview room when she was questioned and interrogated. He wasn't there when she was spoken to, when she was transported.
>
> She told you she was scared. She didn't want to have her children taken away. She didn't want to go to jail. Even though she told you she

never saw Mr. Green with a gun, she wrote down what they told her to write down.

B. The State's rebuttal closing argument

Moore testified on cross-examination that she never saw appellant with a gun and she was forced by the police to write on appellant's picture that appellant was the one who "did [the] shooting[.]" On re-direct, she recounted the shooting and testified that she saw appellant's "hand go like this and I saw Ms. Shirley, the mother, fall[.]"

During rebuttal closing argument, the State made the following argument:

> [THE STATE]: . . . [Moore testified that she] saw them going down the street and she sees this Defendant in that gray SUV pull up to the side of the house and get out, goes like this and Ms. Jordan falls to the ground. (Indicating.)
>
> [Moore] said that and, you know what, [the detective] told you that in court yesterday. There was no threatening her, no one coercing her, nothing. She told you that out of her own mouth yesterday in court. There was no detective hovering over her.
>
> The State asked her a simple question, "Did you see him with a gun?" "No. I didn't, but I saw him go down to 2300 Aiken. I saw him get out of his vehicle and go like this. I saw Kelly run and I saw Ms. Jordan, the older lady, fall." That was out of her mouth. That's the evidence. That's the facts and she wasn't under duress yesterday and *she came in here and told you the truth*.
>
> *She also told the truth –*
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE STATE]: -- on the 20th.
>
> THE COURT: Overruled.
>
> [THE STATE]: She also told you what happened on the 20th, when she identified the Defendant.

Appellant argues that the State's comment constituted impermissible "vouching." The State responds that the State prosecutor's argument was not vouching because the State prosecutor did not make any assertion based on her *personal knowledge* that Moore was telling the truth. We agree with the State.

"Vouching" refers to an argument in which "a prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity . . . or suggests that information not presented to the jury supports the witness's testimony." *Spain v. State*, 386 Md. 145, 153 (2005) (quotation marks, brackets, and citation omitted). The danger of vouching is two-fold: 1) conveying the impression that information not known to the jury but known to the prosecutor supports the charges against the defendant, and 2) inducing the jury to trust the government's judgment rather than its own views on the evidence. *Id*. at 153-54 (citation omitted).

The rule against vouching, however, "does not preclude a prosecutor from addressing the credibility of witnesses in closing argument." *Small v. State*, 235 Md. App. 648, 698 (2018) (quotation marks and citation omitted). Asking the jury whether a certain witness has a motive to lie or arguing that a witness does not "testify like someone that [is] speaking truthfully and honestly" is not vouching. *Id*. at 695, 698. It is vouching, however, to repeatedly assert that the detective witnesses "are honorable men," and that "they told the truth" where the argument is not tied to the evidence presented. *Sivells v. State*, 196 Md. App. 254, 279-80 (2010) (quotation marks omitted). Therefore, "where a prosecutor argues that a witness is being truthful based on the testimony given at trial, and does not assure the jury that the credibility of the witness based on his own personal knowledge, the

prosecutor is engaging in proper argument and is not vouching." *Spain*, 386 Md. at 155 (quotation marks and citation omitted).

We are not persuaded that the State's brief remark that Moore was telling the truth constituted vouching. The State prosecutor did not provide any personal assurances that Moore was telling the truth nor did the prosecutor place the prestige of the government behind Moore as a witness. On the contrary, the State asked the jury to consider that her testimony was truthful based on the evidence presented, i.e., that Moore was not under duress by the police when she testified at appellant's trial, and that, as appellant's girlfriend, she had no motive to falsely implicate him. Accordingly, we find no abuse of discretion by the trial court in permitting the argument.

V.

Lastly, appellant argues that the trial court erred when it denied his motion for a new trial based on "newly discovered" evidence. Appellant argues that the newly discovered evidence was the fact that the trial judge who presided at both his trials had represented him in an unrelated, second-degree assault case nine years earlier when the judge was in private practice. Appellant argues that this newly discovered evidence created the "potential for bias," and argues, somewhat inexplicably, that this potential was "realized" when the trial judge in his second trial refused to grant his attorney a continuing objection to Arrington's narrative of the videotape, "requiring defense counsel to lodge a series of objection that only could have alienated the jury[,]" even though the trial court had granted a continuing objection on the same issue at appellant's first trial. The State responds that the trial court did not err in denying appellant's motion for a new trial because the

previously unnoticed conflict of interest on the part of the trial judge was not "newly discovered" and appellant failed to show that there was a "substantial or significant possibility" that the verdict would have been different.

Md. Rule 4-331(c) governs motions for new trials based on newly discovered evidence. The Rule provides that a court shall grant a motion for a new trial "on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial" within ten days after the verdict. Md. Rule 4-331(c). We review a denial of a motion for a new trial under an abuse of discretion standard. *Campbell v. State*, 373 Md. 637, 665 (2003) (citations omitted). The Court of Appeals has said:

> the breadth of a trial judge's discretion to grant or deny a new trial is not fixed and immutable; rather, it will expand or contract depending upon the nature of the factors being considered, and the extent to which the exercise of that discretion depends upon the opportunity the trial judge had to feel the pulse of the trial and to rely on his own impressions in determining questions of fairness and justice.

Merritt v. State, 367 Md. 17, 30 (2001) (quotation marks and citations omitted).

In *Argyrou v. State*, 349 Md. 587, 600-01 (1998), the Court of Appeals set forth four requirements a defendant must satisfy before a trial court shall grant a motion for a new trial based on newly discovered evidence under Rule 4-331(c). First, the evidence must not have been discovered by the exercise of due diligence within ten days after the jury returned its verdict. *Argyrou*, 349 Md. at 600-01 (footnote omitted). This concept of due diligence has both a temporal component and a good faith component, and thus, "contemplates that the defendant act reasonably and in good faith to obtain the evidence, in light of the totality of the circumstances and the facts known to him or her." *Id.* at 605.

Second, the motion "must have been filed in the circuit court, within the later of one year after the imposition of sentence or the issuance of a mandate by the appropriate appellate court." *Id*. at 601 (citation omitted). Third, the evidence "must be material to the result", meaning that the evidence be "more than merely cumulative or impeaching." *Id*. (quotation marks and citations omitted). Fourth, the trial court must determine that the "newly discovered evidence may well have produced a different result, that is, there was a substantial or significant possibility that the verdict of the trier of fact would have been affected." *Id*. at 601 (quotation marks and citation omitted). The first and third requirements, due diligence and materiality, are threshold determinations that must be resolved before the significance of the evidence may be weighed. *Id*. at 602.

On April 13, 2017, about six weeks after the jury rendered a verdict in this case and before sentencing, defense counsel spoke with appellant and learned that the judge at trial had represented appellant in a criminal case in 2008 when the judge was a private attorney. Appellant was ultimately found guilty in the 2008 case and was sentenced to a one year sentence. On April 14, the day after they had spoken, defense counsel filed a motion for a new trial based on "newly discovered evidence."

A hearing on appellant's motion was held on May 12, 2017. At the hearing, defense counsel proffered that appellant's father remembered the prior representation and recalled that the judge had "indicated in that representation that [she] believed that [appellant] had committed the assault, but that [she was] going to do the best that [she] could." Judge Phinn stated that she had no recollection of having previously represented appellant, and had she recalled the representation, she would have advised counsel. She further denied

that she would have made such a statement about appellant's guilt. She denied the motion for a new trial, finding that the evidence was not "newly discovered," and even if it was, the evidence would have had no effect on the verdict.[5]

Appellant argues on appeal that the judge's ruling was in error. Without mentioning when he remembered the prior representation, he argues that he acted diligently in informing his counsel after his trial because he "is not trained in the law and cannot reasonably be expected to have understood the legal signification of Judge Phinn's prior representation[,]" or that it "could have had an effect on the outcome of his trial." Appellant also argues it was not reasonable to expect defense counsel to question him prior to trial about whether the trial judge had represented him in a prior case.

Appellant has failed to shoulder his burden to meet the threshold determination that the evidence was newly discovered. As to the temporal component, one would assume that appellant knew of his prior representation by Judge Phinn, and appellant does not argue to the contrary -- we note that appellant does not state when he remembered the prior representation but states only that he informed his attorney about the prior representation when they spoke on April 13, 2017, to prepare for sentencing. *See Furda v. State*, 194 Md. App. 1, 73 (2010) (holding that a defendant's prior medical records are not "newly discovered evidence" because the defendant knew of their existence at the time of trial, even though he obtained the records after trial), *aff'd*, 421 Md. 332 (2011), *cert. denied*,

[5] The judge did grant defense counsel's motion for recusal as to appellant's sentencing.

566 U.S. 991 (2012). *Cf. Lee v. Murphy*, 41 F.3d 311, 315 (7th Cir. 1994) (ruling that "newly remembered" is not the same as "newly discovered" in the context of upholding a denial of a new trial motion where appellant claimed that allegedly exculpatory statements he made to family at the time of the crime was newly discovered evidence because appellant "'should remember what he said.'"), *cert. denied*, 514 U.S. 1007 (1995).

Additionally, appellant has also failed to shoulder his burden of showing that he acted with due diligence. The test is "whether the evidence was, in fact, discoverable and not whether the appellant or appellant's counsel was at fault for not discovering it." *Jackson v. State*, 164 Md. App. 679, 690 (2005), *cert. denied*, 390 Md. 501 (2006). Moreover, the burden is on the defendant to show due diligence by demonstrating that he or she "act[ed] reasonably and in good faith to obtain the evidence, in light of the totality of the circumstances and the facts known to him or her." *Argyrou*, 349 Md. at 604-05. Under the circumstances presented, the prior representation was clearly discoverable by appellant and his counsel. Accordingly, we shall affirm.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.