UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0706

September Term, 2015

ROMER ROLANDO ORTUNO

v.

STATE OF MARYLAND

Krauser, C.J.,
Berger,
Reed,

JJ.

Opinion by Berger, J.

Filed: April 18, 2016

Appellant, Romer Rolando Ortuno, was indicted in the Circuit Court for Worcester County, Maryland, and charged with, *inter alia*, first-degree rape, first-degree burglary, and third-degree sex offense. After a jury trial, appellant was convicted of second-degree rape, first-degree burglary, and third-degree sex offense. He was sentenced to fifteen years, with all but eleven suspended, for second-degree rape and ten years concurrent for first-degree burglary. Appellant timely appealed and presents the following questions for our review:

1. Did the trial court abuse its discretion in permitting improper closing argument by the prosecutor?

2. Did the trial court abuse its discretion in not excluding a portion of Appellant's conversation with police?

3. Did the trial court abuse its discretion in denying the request for a mistrial?

4. Did the trial court abuse its discretion in denying Appellant's motion for a new trial?

For the following reasons, we shall affirm.

BACKGROUND

Jhoselin U., 22 years old at the time of trial, knew the appellant since she was nine or ten-years-old.[1] More recently, Jhoselin and appellant worked together at a restaurant near Springfield, Virginia. However, Jhoselin testified that appellant was primarily friends with her sister, Jenifer Salvador. Jenifer confirmed at trial that she previously had a sexual relationship with appellant.

[1] We shall refer to the victim by her first name. *See generally, Hajireen v. State*, 203 Md. App. 537, 540 n.1, *cert. denied*, 429 Md. 306 (2012).

On Memorial Day weekend in 2014, Jhoselin went to Ocean City, Maryland, to celebrate her 21st birthday with her sister and with another woman, Shirley Villaroel. They were accompanied by Villaroel's fourteen-year-old sister and four-year-old daughter.

Shortly before midnight, the group rented a single room, with two beds, in the Admiral Hotel. During the day, Jhoselin started drinking shots of Jägermeister, an alcoholic drink. After the children went to bed, the adults left the hotel room and took a bus to Seacrets, a popular Ocean City restaurant and bar, arriving at around 1:30 a.m. They happened to run into appellant and his friend, Daniel Moreno, leaving the bar, and convinced them to go back inside for last call. Jhoselin bought everyone more shots. Jhoselin testified that she then started feeling "very tipsy."

After Seacrets closed, Jhoselin and her friends got a ride from appellant and Daniel back towards their hotel. However, because appellant "was driving crazy," Shirley told him to pull over, and the three women then got out. After returning briefly to their hotel, Jhoselin, Jenifer, Shirley and appellant went to a nearby beach.

Thereafter, because Jhoselin was drunk and had gone into the water with her clothes on, the group returned to the hotel. Jhoselin needed help from Shirley and appellant in order to walk back to the hotel. Jenifer put Jhoselin to bed, removed her wet clothes, except for her shirt, her bra and her underwear, and then helped put on her pajamas. After placing some blankets over her, Jenifer joined Shirley and appellant outside the room, and the trio continued to drink.

Over the next half hour or so, appellant kept going in and out of the women's hotel room to use the bathroom, claiming that he needed to throw up. Eventually, Shirley announced that she wanted to go the beach to see the sunrise. Shirley left first, and Jenifer and appellant soon followed. Jenifer testified that she locked the hotel room door and made sure the windows were closed when they left, leaving her sister, Jhoselin, and the two children sleeping inside.

As Jenifer and appellant walked towards the beach to meet Shirley, appellant apparently changed his mind and told Jenifer he was going back to his own hotel, which was located less than a city block away. Jenifer watched him leave, then met Shirley on the beach. They remained there only a short while because it was too cold out.

When they returned to their hotel, Jenifer noticed that a window to their room was now open. Jenifer looked inside the room and saw a man's hands on her sister's breasts. And, Shirley saw that the covers were moving. They opened the locked door and found appellant laying under the blanket next to Jhoselin. Both appellant and Jhoselin had their pants and underwear down. However, Jhoselin still was "really drunk," and mostly unconscious at the time.

In response to this discovery, Shirley started hitting and yelling at appellant. Appellant put on his clothes and left the hotel room. As he made his way down the outside steps, Shirley continued to hit appellant with closed fists, demanding to know how appellant got back into the room and what he was doing. Appellant responded, "I didn't do anything."

At trial, Jhoselin testified that she awoke on her right side, like she was in a "dream" or a "nightmare," and felt "pressure" inside her vagina, and "hands all over my breasts." She knew that there was a person behind her, but she could "barely open my eyes," and "couldn't even talk." She agreed the pressure inside her was appellant's penis.

Looking around, Jhoselin saw that her pants and underwear were down. She heard a lot of yelling and then saw her sister, sitting on the bed, in "shock." Jhoselin felt scared, and started crying, "I didn't want that. I didn't want that." She did not give permission for appellant to enter the hotel room and did not consent to having sex with him. Jenifer also testified, without objection, that the contact between Jhoselin and the appellant did not appear consensual.

After reporting the incident to police, Jhoselin spoke to Officer Erika Specht and Detective David Whitmer, both with the Ocean City Police Department. Jhoselin told both officers that she woke up to find appellant's penis inside her vagina.

Based on further investigation, and after learning that the appellant left his cellphone in the women's hotel room when he fled, Detective Whitmer contacted appellant's friend, Daniel Moreno, via text message, asking Moreno to have appellant contact him. Detective Whitmer eventually spoke to appellant two days after the incident, and told him he was investigating and wanted "to get his side of the story." Appellant relayed that he was intoxicated at the time and did not remember much. Appellant also denied having "intimate relations" or raping Jhoselin. And, in response to Detective Whitmer's question, analyzed

in more detail in the discussion that follows, appellant told the detective that he did not believe his DNA would be inside Jhoselin.

At trial, the parties stipulated as follows:

> The State and the defense have agreed that on July 28th of 2014, Molly Rollo, a forensic scientist with the Maryland State Police, performed a DNA analysis on a cheek swab obtained from Romer Ortuno and sperm recovered from [Jhoselin's] vaginal swab. The results of the analysis show that the DNA profile of Romer Ortuno matches the minor contributor of the DNA profile obtained from the vaginal swab. A DNA profile of [Jhoselin] matches the major contributor of the DNA profile obtained from her own vaginal swab.
>
> Molly Rollo, if called upon to testify as an expert in the field of DNA analysis, would opine that to a reasonable degree of medical certainty Romer Ortuno is the source of the minor contributor DNA profile obtained from the vaginal swab of [Jhoselin].

The defense called Daniel Moreno who confirmed he was with appellant on the night in question. Moreno also knew Jhoselin and Jenifer, from high school. Moreno confirmed that appellant and Jenifer had a boyfriend/girlfriend relationship in high school and, again, more recently. To his knowledge, Moreno testified that their relationship was sexual in nature.

Moreno further testified that he had seen Jhoselin working at a restaurant in Springfield, Virginia from time to time. Appellant was with Moreno on those occasions. Moreno claimed that appellant and Jhoselin "were always flirting" at that restaurant.

Moreno also testified that appellant was flirting with both Jhoselin and Jenifer at Seacrets on the night in question.

We shall include additional detail in the discussion that follows.

DISCUSSION

I.

Appellant first contends that the trial court abused its discretion by permitting improper closing argument regarding the DNA stipulation. Specifically, appellant argues the State relied on facts not in evidence when it suggested that the stipulation proved that appellant raped Jhoselin. The State responds that appellant's reading of the remarks is "unreasonable," because the prosecutor was not suggesting that the parties agreed by stipulation that appellant raped Jhoselin. Instead, the State replies that "the prosecutor argued that the jury should find the *ultimate* fact of guilt for rape based on a number of factors, only one of which was the DNA stipulation." (emphasis in original). We agree.

During its initial instructions to the jury, the trial court reread the stipulation concerning the DNA evidence to the jury, as set forth above. In brief, the parties agreed by that stipulation that the results of Molly Rollo's forensic DNA examination was that "the DNA of Romer Ortuno matches the minor contributor of the DNA profile obtained through

the vaginal swab" of the victim. The court also instructed the jury, "[t]hese facts are not now in dispute and should be considered as proven."[2]

Thereafter, the State closed by explaining its theory of the evidence, including "[w]hat did actually fit and what makes more sense" through the witness testimony and the physical evidence admitted at trial. The State first asked the jury to consider whether appellant saw that Jhoselin was intoxicated. Intoxication, the State continued, was supported by the toxicology and witness testimony concerning Jhoselin's behavior. Next, the State noted there was a "window of opportunity," when Jhoselin was alone and the other occupants would be asleep. The State reminded the jury that appellant went in and out of the hotel room, that he started to go back to the beach with Jenifer and Shirley only to excuse himself, and that access to the room was gained via the hotel window.

Then, and pertinent to the issue raised here, the State argued as follows:

> [PROSECUTOR]: He then rapes Jhoselin as she's unconscious. The first thing obviously that tells us that is the DNA. I know it was a little confusing when I was reading that stipulation of facts, what all of that means. But really what the DNA tells us is that when Jhoselin was at the hospital, a swab was actually taken from her vagina and evidence is collected that way. They then collect evidence from Mr. Ortuno, and that's done just through a cheek swab. That's how they obtained his DNA.
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> [THE COURT]: Approach.

[2] Although it was received as an exhibit during trial, the trial court decided not to send the stipulation to the jury during deliberations.

(Whereupon, Counsel approached the bench and the following occurred out of the jury's hearing:)

[THE COURT]: What's your objection?

[DEFENSE COUNSEL]: The DNA has been stipulated that it's Romer. There's no argument about that. She's starting to make an improper inference that the DNA as presented shows that he committed a rape. The only evidence that was stipulated to just shows that sex indeed was committed. We don't dispute that. That's in the facts.

[THE COURT]: Do you want to be heard?

[PROSECUTOR]: I didn't really understand what counsel was objecting to. I was just explaining the process of the DNA being retrieved. So I'm not sure why there's an objection to that.

[THE COURT]: I'm not sure I understand either. The fact that a fact is stipulated to and is considered proven, it doesn't mean that the State's not free for [sic] argue whatever inferences arise from that. Your objection is overruled, sir.

[DEFENSE COUNSEL]: Thank you.

(Whereupon, Counsel returned to trial tables, and the following occurred in open court:)

[THE COURT]: The objection is overruled.

[PROSECUTOR]: As I was saying, the DNA is taken from him through a cheek swab. Once that comparison is done, there was – it's a little confusing where there's a major contributor and a minor contributor. When that swab was taken from Jhoselin, obviously the major contributor of that is Jhoselin herself from her fluids, or whatever it may be. So when there's two different DNAs that are found, it was not only Jhoselin's, which is the majority of that since it's coming from her body,

> the minor contributor was found to be Romer Ortuno's semen. So that's why there's that difference, and I know that's confusing. But the major was her from her own body, and the minor was identified as semen and was identified as Ortuno's DNA if that makes any sense.[3]

"A trial court is in the best position to evaluate the propriety of a closing argument." *Ingram v. State*, 427 Md. 717, 726 (2012) (citing *Mitchell v. State*, 408 Md. 368, 380-81 (2009)). Therefore, we shall not disturb the ruling at trial "unless there has been an abuse of discretion likely to have injured the complaining party." *Grandison v. State*, 341 Md. 175, 243 (1995) (citing *Henry v. State*, 342 Md. 204, 231 (1991), *cert. denied*, 503 U.S. 192 (1992)). Trial courts have broad discretion in determining the propriety of closing arguments. *See State v. Shelton*, 207 Md. App. 363, 386 (2012).

Counsel is generally given "wide range" in closing argument. *Wilhelm v. State*, 272 Md. 404, 412 (1974). Both the defense and prosecution are free to "state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence." *Id.* Even when a prosecutor's remark is improper, it will typically merit reversal only "'where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to prejudice the accused.'" *Lawson v. State*, 389 Md. 570, 592 (2005) (quoting *Spain v. State*, 386 Md. 145, 158-59 (2005)).

[3] The State continued its argument by noting: appellant was caught in the act when Jenifer and Shirley returned to the room, and that he denied having intercourse with Jhoselin to Detective Whitmer two days later.

Appellant asserts that the prosecutor's remarks were improper because they were based on facts not in evidence. The Court of Appeals has stated that:

> [C]ounsel may not "comment upon facts not in evidence or . . . state what he or she would have proven." It is also improper for counsel to appeal to the prejudices or passions of the jurors, or invite the jurors to abandon the objectivity that their oaths require.

Mitchell, 408 Md. at 381 (citations omitted); *accord Donaldson v. State*, 416 Md. 467, 489 (2010); *see also Lee v. State*, 405 Md. 148, 166 (2008) (observing that it is improper to make comments "that invite the jury to draw inferences from information that was not admitted at trial").

The facts that were before the jury, based on the stipulation, were that appellant's DNA profile matched a minor contributor to DNA evidence recovered from the victim's vagina. As best as we can tell, the appellant is not challenging this evidence. Instead, the appellant's argument is that the prosecutor either misused or mischaracterized that evidence when she asked the jury to draw an inference supporting its theory of the case, *i.e.*, that appellant raped Jhoselin.

This Court has explained that:

> "An inference need only be reasonable and possible; it need not be necessary or inescapable.... The possibility of raising conflicting inferences from the evidence does not preclude allowing the fact finder to determine where the truth lies."

Cerrato-Molina v. State, 223 Md. App. 329, 338, *cert. denied*, 445 Md. 5 (2015).

Rational inferences are permitted to be made from the evidence properly admitted. Indeed, that is the primary role of a fact-finder. As the Court of Appeals has explained:

> We stated in *State v. Smith*, 374 Md. 527, 534, 823 A.2d 664, 668 (2003), that the finder of fact has the "ability to choose among differing inferences that might possibly be made from a factual situation . . . ." That is the fact-finder's role, not that of an appellate court. Professor Douglas Lind explains that "[t]he term 'inference' refers to the logical process that takes place when, within the context of a group of propositions (i.e., an 'argument'), one proposition (the 'conclusion') is arrived at and affirmed on the basis of other propositions (the 'premises') that are accepted at the beginning point of the process." Douglas Lind, *Logic and Legal Reasoning* 4-5 (2001). In other words, "[a]n inference is a factual conclusion that can rationally be drawn from other facts." Clifford S. Fishman, *Jones on Evidence* § 4:1 (7th ed. 1992 & Supp. 2009-2010). "If fact A rationally supports the conclusion that fact B is also true, then B may be inferred from A." *Id.*

Smith v. State, 415 Md. 174, 183 (2010).

Appellant relies on *Whack v. State*, 433 Md. 728 (2013). There, Tommy Whack, Jr. was convicted of murdering George White, who was found fatally wounded next to his pick-up truck. The State's theory was that appellant borrowed his cousin's phone that evening to arrange a sexual encounter through a chat room; when Whack arrived at the meeting site to find that White was male rather than female, he shot him. *Whack*, 433 Md. at 733-35. There was only one DNA sample from White's truck that could have been contributed by Whack – part of a mix of four DNA sources found on the passenger armrest. *Id.* at 745. The State's DNA expert testified that based on a partial match of alleles, "one in 172 individuals in the African American population would also . . . potentially have a DNA

profile" like the sample source. *Whack*, 433 Md. at 737. In contrast, the DNA evidence recovered from the passenger headrest showed that there was only a "one in 212 trillion" chance that someone other than White was the source of DNA on the passenger headrest of the truck, which was sufficient to establish that White "was 'the only person' who could match the DNA" in that sample. *Id.* at 745.

In closing argument, defense counsel challenged the DNA evidence and theorized that it may have been the defendant's cousin who killed the victim and left his DNA on that arm rest. *Whack*, 433 Md. at 739-40. Counsel emphasized that, whereas "the probability of the DNA from the headrest matching someone other than White was one in 212 trillion," "when it came to the passenger door armrest, 'we aren't talking in probabilities of trillions, millions, thousands. . . . We are talking one in 172[,]'" and then posited that if the DNA of the defendant's cousin had been tested, it "might have been discovered in the truck.'" *Id.*

In rebuttal, the prosecutor theorized that it was the defendant who opened the passenger door before shooting the victim and asserted with respect to the armrest sample:

> "[W]e know it's [the defendant], when we add [the defendant] that is why the number is 172. It is statistics again. It is a statistical lawyer trick.
>
> [Defense counsel] wants you to say don't believe the statistics because the science says he is there, but this 172 is no less strong than that 212. [The defendant] is there. [The defendant] left that DNA."

Whack, 433 Md. at 741.

Defense counsel moved for a mistrial at the conclusion of closing arguments, arguing "that the State misrepresented the DNA evidence." *Whack*, 433 Md. at 741. The Court of Appeals held that given the evidence that "the DNA of one out of every 172 African Americans could be consistent with the DNA mixture found on the armrest," "the prosecutor went too far in stating emphatically that [the defendant's] DNA was present in the truck" and "compounded that error by . . . equating the odds of one in 172 with one in 212 trillion" when he argued that one was "no less strong" than the other. *Id.* at 746-47. Because "[t]he public places a great deal of weight on the reliability and accuracy of DNA evidence," "counsel have a responsibility to take extra care in describing DNA evidence, particularly when it comes to statistical probabilities." *Id.* at 747-48. A mistrial was warranted in that case because "[i]dentity was a central question for the jury to resolve," and "the prosecutor's statement that [the defendant's] DNA was conclusively found on the truck was incorrect based on the evidence presented at trial," and "[t]he prosecutor compounded the error by discussing the statistics behind the DNA analysis in a misleading manner." *Id.* at 752-53. Moreover,

> the DNA evidence offered the only direct evidence that [the defendant] might have been in [the victim's] truck. There was no eyewitness who saw him there, no murder weapon recovered, and no other traces of [the defendant's] presence at the scene. Setting the DNA aside, the remainder of the prosecution's evidence provided only circumstantial support for the assertion that [the defendant] killed White. As a result, we hold that the prosecutor's remarks likely misled the jury "to the

> prejudice of the accused" and order that [he] be granted a new trial.

Whack, 433 Md. at 754-55 (footnotes omitted).

Here, we are not persuaded that the prosecutor's argument materially misstated the DNA evidence in a manner similar to the mischaracterization warranting the reversal in *Whack*. It is clear that the prosecutor was setting forth the underlying factors that supported its theory of the case and the stipulated DNA evidence was relevant to proof of identity. On this record, we cannot say that "the prosecutor's remarks likely misled the jury 'to the prejudice of the accused.'" *Whack*, 433 Md. at 755.

II.

Appellant next challenges admission of his statement to Detective Whitmer that his DNA was not on the victim, asserting that the statement was irrelevant, unfairly prejudicial, and had insufficient foundation because he was not an expert in DNA. The State responds that the statement was not admitted as expert opinion evidence but instead, because it was relevant to challenge the appellant's consent defense. As will be explained, we conclude that the trial court properly exercised its discretion.[4]

Here, at a pretrial motions hearing, the court heard from Detective David Whitmer of the Ocean City Police Department. Detective Whitmer testified that, on May 25, 2014, he became involved in the investigation of this case and spoke to the victim and several

[4] Prior to trial, the appellant also argued that the statement was involuntary. That ground is not being raised on appeal.

witnesses. Based on that, he tried to contact appellant but was unable to do so because appellant left the residence where he was staying early that morning. Detective Whitmer did learn that appellant's permanent residence was in Northern Virginia.

Two days later, at around 1:08 p.m. on May 27, 2014, Detective Whitmer then sent a text message to one of appellant's friends, Daniel Moreno, asking Moreno to have appellant contact the detective about a complaint that was filed that same weekend. Appellant called Detective Whitmer at around 3:15 p.m. Because the detective was getting a hair cut at the time, appellant agreed to call him back, and, in fact, did so at 3:30 p.m. At that time, and while he was in his police car, the detective inquired where appellant was calling from, since the phone number was blocked. Appellant declined to specifically provide any address other than he was in Virginia at a friend's house.

Detective Whitmer then told appellant over the phone that "we had received a complaint from the victim. It was sexual in nature, and I was just calling to get his side of the story." Appellant told the detective that he was intoxicated at the time, that he had been drinking with the victim and other witnesses, and that he "had very little recollection of any details of the night." Detective Whitmer also testified at the motions hearing as follows:

> Q. Did you ask him any other questions at that time?
>
> A. I got more specific as to the allegations that he had raped the victim. He denied that completely. I remember him stating several times he was married, why would he do that, things like that.
>
> Q. And what else did you ask him?

> A. I asked him if we were going to find any of his DNA on or inside of the victim.
>
> Q. And what was his response?
>
> A. He responded, and I quote, I don't think so. No.

Detective Whitmer spoke to appellant on the phone for approximately fifteen minutes. He also confirmed that he did not threaten appellant, nor did he coerce him or make him any promises. And, appellant never stated that he wanted to get off the phone during the conversation. Detective Whitmer then informed appellant that the police had recovered his cell phone and wanted to return it to him personally. Appellant declined to provide his own address, suggesting the detective mail it to his parents' address. Detective Whitmer confirmed that he already had an arrest warrant for appellant when he spoke to him on the telephone. But, Detective Whitmer had no further contact with appellant after the phone call.

On cross-examination, Detective Whitmer agreed that he did not tell appellant that there was a warrant for his arrest. He also confirmed that, although he had worked on between a dozen and thirty rape or sex offense cases, most of which involved DNA evidence, that he was not an expert in DNA recognition. Cross-examination continued, as follows:

> Q. If someone is asked a question about DNA, there's certain types of questions they need to be an expert to answer; is that correct?

A. It would depend upon the question I would think.

Q. You admitted that you're not an expert in DNA, and you've admitted, as we've discussed here, that you would seek out, depending on the circumstances, an expert in DNA to be able to address certain issues. Why would you ask Mr. Ortuno about DNA knowing he's not an expert in DNA?

A. The fact that I'm not an expert in DNA doesn't mean that I don't know something about it. The use of DNA in criminal cases is commonplace. Anybody that's watched a TV show about police investigations know that the human body has specific DNA to each human individual. People know about DNA. People understand what DNA is.

Q. Did you ask Mr. Ortuno what his knowledge of DNA was?

A. I did not.

After Detective Whitmer testified, defense counsel argued the question and answer about DNA should be excluded because it called for an expert opinion. Further, counsel argued that the question "serves no purpose other than to really prejudice him to a jury when he's not capable of giving that expert opinion." Therefore, counsel argued the evidence was more prejudicial than probative.

The motions court disagreed:

> The police officer starts out with telling him that there was a complaint about sex. The defendant's response is that he had been in Ocean City, he had been drinking, didn't have a very good recollection of the details. So the police officer is more specific. At that point he tells the defendant that there's been a claim that the defendant raped the victim.
>
> Now, rape obviously refers to sexual intercourse. Presumably most people know that rape refers to sexual

> intercourse, and the defendant denies it. Says something I do that, I'm married. And then the police officer says, will we find any of your DNA inside the victim? You don't have to be an expert to know what DNA is. Not everybody knows what DNA is obviously, but you don't have to be an expert just like you don't have to be an expert to know what fingerprints are. The defendant's response was not, DNA, what's that? I never heard of that. I don't know what you're talking about. The defendant's response, according to the police officer is – he says two things. First of all, he says, I don't think so. And then – which is obviously somewhat ambiguous. And then he follows it with an unambiguous, no, according to the police officer.

The court continued:

> In terms of the relevance, if you will, and that's what really the defense's argument goes to with respect to the defendant responding to a question about DNA. It seems to me his answer is clearly relevant in the sense that it's probative. And is it prejudicial? Well, it amounts to a denial of having sexual intercourse with the victim.
>
> Without knowing what the other evidence is in this case or what it's going to be, the defendant obviously now says, well, yes, I did have sex with her, then that would be an inconsistency that would be obviously prejudicial to the defendant.
>
> If the defendant continued to deny, if he chose to, even if he chose to testify, for example, that he had sexual intercourse with her or physical contact with the intimate parts of her body, then it would not be prejudicial it doesn't seem to me.
>
> But there's – either way there's no basis to exclude it on grounds of relevance. And if one were to try to weigh its probative value against its prejudicial effect, that obviously cannot be done in advance of trial.
>
> . . . And the motion in limine on the grounds of relevance is denied as well. Thank you.

At trial, and over a renewed objection, Detective Whitmer testified that he specifically asked appellant if he had "sex with her," and appellant replied, "no, that he had not." The detective also testified as follows:

> Q. And what details do you remember him actually telling you?
>
> A. Well, I remember asking him specifically – the question I asked him was were we going to find any of his DNA on or inside of her, and he specifically told me, no – I don't think so, no.

On cross-examination, Detective Whitmer was asked the following:

> Q. Okay. Now, as to the question of whether or not Mr. Ortuno – whether he would have DNA inside of [Jhoselin], you don't have anything in your qualifications to think that Romer Ortuno knows how DNA works and whether it's left after sex or not, right?
>
> A. No, sir.
>
> Q. In your investigation you didn't uncover anything regarding that, right?
>
> A. Prior to that question?
>
> Q. During the investigation you didn't have any information that he's some specialist in DNA, right?
>
> A. No, sir.

On both redirect and recross-examination, Detective Whitmer agreed that the only direct quote he included in his police report was the reference to DNA evidence. The following testimony also was elicited during redirect:

Q. And, detective, would you consider yourself to be a DNA specialist?

A. No, ma'am.

Q. Do you have a basic understanding of what DNA is?

A. Yes.

Q. At any time during your conversation with Mr. Ortuno once you refer to DNA, did he ask you what exactly DNA was?

A. No, ma'am.

Q. Did he immediately respond to your question?

A. As if he knew exactly what I was talking about.

This Court has stated:

> Determinations regarding the admissibility of evidence generally are left to the sound discretion of the trial court. *Hajireen v. State*, 203 Md. App. 537, 552, cert. denied, 429 Md. 306 (2012). This Court reviews a trial court's evidentiary rulings for abuse of discretion. *State v. Simms*, 420 Md. 705, 724-25 (2011). *Accord Nixon v. State*, 204 Md. 475, 483 (1954) (reviewing trial court's ruling excluding evidence based on inadequate chain of custody for an abuse of discretion). A trial court abuses its discretion only when "no reasonable person would take the view adopted by the [trial] court," or when the court acts "without reference to any guiding rules or principles." *King v. State*, 407 Md. 682, 697 (2009).

Easter v. State, 223 Md. App. 65, 74-75, *cert. denied*, 445 Md. 488 (2015).

Appellant first asserts that his response to Detective Whitmer concerning whether DNA would be present on the victim was not relevant. Maryland Rule 5-401 provides that:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

In *Sifrit v. State*, 383 Md. 116 (2004), the Court of Appeals set forth the following:

> It is well established in this State that the admission of evidence is committed to the considerable discretion of the trial court. *Merzbacher v. State*, 346 Md. 391, 404, 697 A.2d 432, 439 (1997) (internal citations omitted). Relevant testimony is generally admissible and irrelevant testimony is not admissible. *Id.* (citing Md. Rule 5-402). Evidence is relevant if it has a tendency to establish or refute a fact that is at issue in the case. *Merzbacher*, 364 Md. at 404 (citing Md. Rule 5-401). "We are generally loath to reverse a trial court unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Merzbacher*, 346 Md. at 404-405, 697 A.2d at 439 (citing *White v. State*, 324 Md. 626, 637, 598 A.2d 187, 192 (1991)). In *Dorsey v. State*, 276 Md. 638, 643, 350 A.2d 665, 668-669 (1976), we discussed the test for admissibility of evidence in a criminal trial. We said:
>
> > The real test of admissibility of evidence in a criminal case is the connection of the fact proved with the offense charged, as evidence which has a natural tendency to establish the fact at issue . . . . Evidence, to be admissible, must be relevant to the issues and must tend either to establish or disprove them. Evidence which is thus not probative of the proposition at which it is directed is deemed irrelevant.
>
> (Internal quotations and citations omitted.)

Sifrit, 383 Md. at 128-29; *see also Smith v. State*, 218 Md. App. 689, 704 (2014) ("Evidence is material if it bears on a fact of consequence to an issue in the case") (citations omitted).

Here, the defense theory of the case was that this was a consensual sexual encounter between Jhoselin and appellant. Therefore, appellant's response to Detective Whitmer that he did not believe his DNA would be found on the victim was probative to an issue in the case.

Notwithstanding the apparent relevance of his response, appellant challenges its admission on the grounds that the evidence lacked sufficient foundation because he "was not a DNA expert in any way whatsoever." Appellant contends that the State "sought to introduce against Mr. Ortuno a statement he made that would normally only be made by an expert." As argued by the State, appellant "seemingly suggests that his status as a layman robbed his statement of any probative value as a false exculpatory because he could not possibly have understood what he was saying." The State disagrees with appellant's premise, arguing that whether appellant, as a lay witness, understood "what he was saying attacks the reliability of the statement, which in turn goes to its weight and not its admissibility."

At its core, the parties disagree over whether appellant's response called for expert opinion or whether it was proper testimony from a lay witness. The issue concerns the interplay between Maryland Rules 5-701 and 5-702. Maryland Rule 5-701 provides:

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

And, Maryland Rule 5-702 provides:

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

These rules were analyzed in *Ragland v. State*, 385 Md. 706 (2005). There, two police officers were permitted to testify as lay witnesses, over defense objection, that they believed they observed a drug transaction involving Ragland and another individual. *Ragland*, 385 Md. at 711-14. The Court accepted Ragland's argument that this amounted to expert testimony and the trial court erred in admitting the evidence as lay opinion. *Id.* at 716. The Court reasoned that the two officers's opinions were not lay opinion because (1) the witnesses "had devoted considerable time to the study of the drug trade;" (2) "they offered their opinions that, among the numerous possible explanations for the events on Northwest Drive, the correct one was that a drug transaction had taken place;" and (3) "[t]he connection between the officers' training and experience on one hand, and their opinions on the other, was made explicit by the prosecutor's questioning." *Ragland*, 385 Md. at 726.[5]

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

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

> First, Officer Bechtel's testimony that, based on his training and experience, it is hard to get good prints off wet objects, was not opinion evidence, expert or lay, because the State did not offer his testimony for its truth. Rather, Officer Bechtel was asked by the State to explain his conduct as the investigating police officer, i.e., why he did not submit the bloody knife for fingerprint analysis. He responded by referring to his knowledge of "recovering latent prints" gained from his "experience and training in the Police Academy."

Fullbright, 168 Md. App. at 181.

This Court explained:

> Opinion evidence, by definition, is "testimony of a witness, given or offered in the trial of an action, that the witness is of the opinion that some fact pertinent to the case exists or does not exist, offered as proof of the existence or nonexistence of that fact." Ballentine's Law Dictionary 893 (3d ed.1969); *see also* Black's Law Dictionary 598 (8th ed.2004) (defining "opinion evidence" as "[a] witness's belief, thought, inference or conclusion concerning a fact or facts"). In *Ragland*, the State introduced the officers' opinions that the events they observed constituted a drug transaction in order to prove that those events were in fact a drug transaction. By contrast, in the instant case, the State did not elicit Officer Bechtel's opinion to

> prove that it was in fact hard to get good fingerprints off of wet objects. Rather, the State sought his opinion for the sole purpose of explaining to the jury why Officer Bechtel, as the investigating officer, did not submit the bloody knife for fingerprint analysis. In short, the jury was not called upon to determine the truth or falsity of Officer Bechtel's opinion.

Fullbright, 168 Md. App. at 181-82.

Further, this Court also reasoned:

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

Id. at 182.

Similar to *Fullbright*, and because identity was not really an issue in this case, appellant's response was not offered by the State to prove or disprove an essential element of the offenses. Instead, the response related to appellant's consent defense and was used by the State to challenge his credibility. As argued by the State during its closing:

> What's also important, and you heard that today from Detective Whitmer, when the defendant was initially interviewed, that was about two days after the events happened on Tuesday, the interview only happened on the phone. His statements which clearly go against this revenge theory and the scorned lover theory are he denied initially that there was any intercourse. Actually he denied altogether that any sex occurred with Jhoselin. He said he had no recollection of that. And when he's clearly asked whether or not his DNA would be found on Jhoselin, his response was no – or I don't think so, no.

> Interestingly enough, about two months later, which is what was read into the stipulation of fact, the DNA results actually came out on July 28th. Those results clearly proved that there was some intercourse between the two of them, and then we find ourselves here today, the new revenge theory going along with consensual intercourse.

And:

> Who is the one person who lied about an essential part of this case which is the sex actually happening? That is the defendant himself. That is an essential piece of it all, and his statements two days after it happened were, I am married, and I would not have sex with her. I did not have sex with her. And denies that there would have been any DNA found of him on her.

We are persuaded that the court properly exercised its discretion in admitting this evidence. Moreover, we also conclude that appellant was not unfairly prejudiced by admission of this evidence. "Evidence is prejudicial when 'it tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission.'" *Snyder v. State*, 210 Md. App. 370, 394-95 (quoting *Hannah v. State*, 420 Md. 339, 347 (2011)), *cert. denied*, 432 Md. 470 (2013). In addition to appellant's response to Detective Whitmer concerning the presence of DNA, there was other evidence of appellant's initial denials admitted at trial. These included testimony from Detective Whitmer that appellant "told me that he had not been intimate with her" and that he had not had "sex" with her. When told that Jhoselin was accusing him of rape, Detective Whitmer testified that appellant "denied ever doing it." We conclude that, even if the court erred in admitting appellant's response concerning the presence of DNA in the victim, that appellant was not prejudiced, and any

error was harmless beyond a reasonable doubt. *See Dorsey v. State*, 276 Md. 638, 659 (1976) (error will be harmless when reviewing court, upon independent review, is able to declare beyond a reasonable doubt that there is no reasonable possibility that the error contributed to the verdict).

III.

Appellant next argues the court should have granted a motion for mistrial after the victim made two outbursts during defense counsel's closing argument. The State responds that the trial court properly exercised its discretion in denying the motion.

Generally, "appellate courts review the denial of a motion for a mistrial under the abuse of discretion standard, because the 'trial judge is in the best position to evaluate whether or not a defendant's right to an impartial jury has been compromised.'" *Dillard v. State*, 415 Md. 445, 454 (2010) (quoting *Allen v. State*, 89 Md. App. 25, 42-43 (1991)) (further citation omitted). In determining the propriety of a court's ruling on a motion for mistrial, we recognize that "'[a] mistrial is an extreme sanction'" which is appropriate only "'when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice.'" *Diggs & Allen v. State*, 213 Md. App. 28, 70-71 (2013) (quoting *McIntyre v. State*, 168 Md. App. 504, 524 (2006)), *aff'd*, 440 Md. 643 (2014). And, "[t]he determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 594-95 (1989)).

The defense theory in this case was that this was a consensual sexual encounter between Jhoselin and appellant. And, to support its theory, the defense asked the jury to consider inconsistencies in the evidence in order to find reasonable doubt. First, the defense challenged Jhoselin's memory, in pertinent part, as follows:

> [DEFENSE COUNSEL 2]: Now, it was May 25th, right in the beginning kind of like that later part of the summer. We haven't even got to the summer yet. Actually the spring. Later part of the spring, not yet the summer. They all said that it was kind of cold that week. You would think that if you get in the water, especially the water is really cold, you would remember that. Jenifer remembered it, but Jhoselin says that it didn't happen.
>
> [JHOSELIN]: I said not in the daytime.
>
> [DEFENSE COUNSEL 2]: Now, here's the other thing. And we're going to just kind of keep building up and showing this. Selective memory. . . .[6]

[6] Both Shirley and Jhoselin's sister, Jenifer, testified that, after they had been drinking, returned from Seacrets, and then went to the beach, Jhoselin went into the water wearing her clothes. During cross-examination, Jhoselin was asked the following:

> Q. The Court's indulgence, Your Honor. Kind of earlier towards the day, [Jhoselin], were you – did you go – you were obviously in Ocean City. Did you go to the beach at all, like, swim in the water or anything like that?
>
> A. No. We got there very late.
>
> Q. So you never got in the water for anything?
>
> A. No.

Later during argument, defense counsel contended that "[t]here were several times here where Jhoselin and Jenifer point-blank lied to the police, " including whether they told the police that they knew appellant. Defense counsel asserted there was a delay in reporting and that this delay allowed Jhoselin and Jenifer to create a story about a "scorned lover." And, counsel maintained that both sisters "would point-blank lie like they have in the past. They would just lie."

Defense counsel then continued:

> [DEFENSE COUNSEL 2:] Did you guys notice that there was a point where Tom, my co-counsel, was talking to Jenifer asking her questions and he asked her about her relationship with Romer? And he asked her, you know, did you have a sexual relationship? And you could tell that she felt kind of boxed in because you could tell she didn't want to admit it, but she also kind of didn't want to – she didn't know what to do. So what is it she said? Instead of saying, yes, I had a sexual relationship with Romer, what did she say? I was drunk at that time. I was drunk at that time.
>
> And then when he asked a second time later on about whether they had sex on another occasion, what did she do? What's her go to move. I was drunk at that time. I was drunk at that time. Trying to excuse it away. The very same thing that Jhoselin says. I was drunk at that time. I was really, really drunk. I didn't know what was going on.
>
> I mean, this isn't a game. This isn't a joke. You don't throw out stuff like that. You don't throw out rape and cry if it doesn't happen. It's a serious charge. And to just excuse the fact that you had sex with someone and say, oh, well, the reason I had sex with this person was because I was really, really drunk. I mean, it's almost like it's a game. Like, they don't get it.

> [JHOSELIN]: I didn't want this.
>
> [DEFENSE COUNSEL 2]: It doesn't make any sense. It doesn't make any sense.
>
> [JHOSELIN]: I didn't want this. I never said that I want this.
>
> [DEFENSE COUNSEL 1]: Your Honor, I move all those remarks be stricken.
>
> [THE COURT]: Folks, first of all, there's no need to strike anything because they're not a part of the record in this case. Having said that, the – [Jhoselin] obviously became very upset and emotional. She was not in control of herself. You should disregard anything that she said and indeed your observations of her emotional state. None of that is in evidence. The evidentiary portion of this case was concluded when the defense rested. So strike what – those observations from any consideration that you may give this case.

After the defense closing argument, and prior to the State's rebuttal, the appellant moved for a mistrial:

> [DEFENSE COUNSEL 1]: Your Honor, the defense would like to move – to call for a mistrial in this case.
>
> [THE COURT]: On what basis?
>
> [DEFENSE COUNSEL 1]: Your Honor, the outburst was from the accuser in the matter. It was not only just the nature of the outburst, but some of the things that were said. One thing went to a direct factual point as to the water –
>
> [THE COURT]: What did she say?
>
> [DEFENSE COUNSEL 1]: She said, I said not in the daytime, referring to whether she went into the water which is a factual point.

> Second of all, this goes particularly to the State's closing argument which was to watch demeanor. Watch certain things that could not be seen just from – I'm just going off what she said – to see her stand up angry and saying, it's not what I wanted twice I believe and in a very emotional state. Your Honor, obviously there can be disruptions to the flow of an argument. There can be objections and things like that, but it was the nature of her demeanor. It was the things that she said. We feel it was very prejudicial to my client getting a fair trial as far as the jury. I will turn to [Defense Counsel 2] to argue further.
>
> [DEFENSE COUNSEL 2]: Just very briefly, Your Honor.
>
> [THE COURT]: Gentlemen, I don't need two arguments on – arguments from two counsel.
>
> [DEFENSE COUNSEL 1]: The Court's indulgence, then. Your Honor, just one supplemental point. During the time when the outburst occurred co-counsel was talking about inconsistencies and lies, and at least the time when the outburst happened also I think it affected his argument regarding that. So for those reasons and based on the law – case law, we argue that a mistrial is appropriate.
>
> [THE COURT]: Does the State want to be heard?
>
> [PROSECUTOR]: Your Honor, the jurors were advised not to consider what they heard as evidence. To be honest, I didn't understand everything she said, so I'm not sure that they did. Irregardless, I think that everything that was said was not considered to be evidence. They were clearly advised of that. All she did was show that she was upset which she did on the stand as well. I don't know how this outburst would be prejudicial in any fashion at this point.

The court denied the motion for mistrial, ruling as follows:

> Well, I couldn't understand everything that she said either. Having said that, I don't find that the request for a mistrial is timely.
>
> Second, the Court immediately and sua sponte instructed the jury in the way that the record will reflect.
>
> And I add that I've watched this jury closely and was watching the jury closely when that event occurred. The jury paid – was paying close attention to counsel's argument. I didn't think that counsel missed a beat, frankly, as a result of that outburst. The Court gave the remedial instruction which I have every reason to believe that these jurors took to heart. I say that because almost to a person they were nodding their head yes when the Court instructed them to disregard what was said and explained that none of that was evidence, and that neither her reaction nor what she said was in evidence and was to be disregarded by them, not considered, because it's not evidence.
>
> So the Court declines to give – or to grant a mistrial. It seems to the Court that a mistrial is not warranted. That the request was not – in any event was not made in a timely way. But even if it had been made in a timely way, I don't think a mistrial would have been warranted. I think the Court's instruction to the jury was sufficient to deal with any of the issues that the defense feels may have been raised by this person's outburst. So your request for a mistrial is denied –or motion for mistrial is denied.

Initially, the court ruled that appellant's mistrial motion was untimely. This Court has stated that "[t]he failure to object when one should have objected is not ground for a mistrial." *Walker v. State*, 21 Md. App. 666, 672 (1974). However, we have also stated that untimely objections to an argument still may be sufficient to preserve the issue. In *Height v. State*, 185 Md. App. 317, *vacated on other grounds*, 411 Md. 662 (2009), this Court stated:

> We shall continue to hold that objections to improper argument are timely if interposed either (1) immediately after the allegedly improper comments are made, or (2) immediately after the argument is completed. We shall decline, however, requests to review "improper argument" objections that were not presented to the trial judge until after the jurors have been excused from the courtroom.

Height, 185 Md. App. at 337-38 (citation omitted)).

Under the circumstances, we conclude that this issue was not untimely such as would preclude appellate review. As for the merits, "[e]motional responses in a courtroom are not unusual, especially in criminal trials, and manifestly the defendant is not entitled to a mistrial every time someone becomes upset in the course of the trial." *Hunt v. State*, 312 Md. 494, 501 (1988). And, "[a] motion for mistrial, based on the behavior in the courtroom of a member of the victim's family, should only be granted under very extraordinary circumstances, and this determination lies largely within the discretion of the trial judge." *Parham v. State*, 79 Md. App. 152, 158 (1989) (citing *Hunt*, 312 Md. at 502-03).

Numerous out-of-state cases recognize that the issue is governed by trial court discretion, especially when, as here, a curative instruction is given:

> Absent clear evidence in the record that the outburst improperly affected the jury, only the trial judge can authoritatively determine whether the jury was disturbed, alarmed, shocked or moved by the demonstration or whether the incident was of such a nature that it necessarily influenced the ultimate verdict of conviction. The answer to those questions invariably depends upon facts and circumstances which a reviewing court cannot ordinarily glean from the record.

State v. Morales, 513 N.E.2d 267, 271 (Ohio 1987) (citation omitted); *see also State v. Kuhs*, 224 P.3d 192, 196-97 (Ariz. 2010) (en banc) (holding there was no abuse of discretion when trial court denied motion for mistrial following an outburst by victim's stepmother during the State's closing argument), *cert. denied*, 562 U.S. 899 (2010); *People v. Montgomery*, 743 P.2d 439, 442 (Col. App. 1987) (upholding refusal to grant mistrial when victim cried during closing argument) (cited in *Hunt*, 312 Md. at 502); *Messer v. State*, 330 So. 2d 137, 141 (Fla. 1976) (where victim's mother was "overcome with emotion" during defense counsel's closing argument and left the courtroom, no abuse to deny a mistrial, particularly where counsel referred to the outburst during argument to support theory that there was a revenge motive at play in the case); *Sheppard v. State*, 218 S.E.2d 830, 832 (Ga. 1975) (holding that it was unlikely that the mother of a murder victim's outburst "Oh my child" during closing argument prejudiced the defense); *Hill v. State*, 497 N.E.2d 1061, 1067 (Ind. 1986) (concluding the court did not err by issuing a curative instruction after an unidentified spectator interrupted closing argument by stating, "She killed my daddy"); *Madere v. State*, 794 So. 2d 200, 214-15 (Miss. 2001) (after rape victim said "Liar" during defense closing argument, no abuse of discretion to deny mistrial, noting that trial court "immediately restored order to the courtroom and admonished [the victim] of the impropriety before any jury and that any further outbursts would result in her removal from the courtroom"); *Com. v. Hawkins*, 292 A.2d 302, 308 (Pa. 1972) (no abuse of discretion to deny mistrial when, midway through defense counsel's closing argument, the brother of the victim stood up and

yelled "He murdered him. You are a bum"); *Ashley v. State*, 362 S.W.2d 847, 851 (Tex. Crim. App. 1962) (affirming denial of mistrial where victim's widow made an outburst during closing argument, noting that the statement did not contradict the appellant's testimony and the trial court promptly issued a curative instruction), *cert. denied*, 372 U.S. 956 (1963).

Here, we discern no abuse of discretion in the court's decision not to grant a mistrial based on Jhoselin's two outbursts during the defense's closing argument. This is especially true given that the court issued a curative instruction informing the jury to disregard Jhoselin's reactions because that was not evidence in the case. As this Court has reiterated:

> The fundamental rationale in leaving the matter of prejudice vel non to the sound discretion of the trial judge is that the judge is in the best position to evaluate it. The judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able to ascertain the demeanor of the witnesses and to note the reaction of the jurors and counsel to inadmissible matters. That is to say, the judge has his finger on the pulse of the trial.

Washington v. State, 191 Md. App. 48, 103 (quoting *State v. Hawkins*, 326 Md. 270, 278 (1992)), *cert. denied*, 415 Md. 43 (2010); *see also Spain, supra*, at 160 ("'Maryland courts long have subscribed to the presumption that juries are able to follow the instructions given to them by the trial judge, particularly where the record reveals no overt act on the jury's part to the contrary'").

Appellant also argues with respect to this issue that the court erred by not considering argument from both of his attorneys. Appellant does not provide us with any authority here,

nor, for that matter, in the similar argument in his fourth question presented, *infra*, that holds that a court's failure to permit argument from two attorneys for the same party amounts to an abuse of discretion.

In any event, "[t]he conduct of criminal trials falls within the sound discretion of the trial judge which will not be disturbed absent a clear abuse of discretion." *Hunt*, 312 Md. 494, 500 (1988). Furthermore, "[b]road discretion is entrusted to the trial judge to control the flow of the trial and the reception of evidence." *Muhammad v. State*, 177 Md. App. 188, 273-74 (2007) (citations omitted), *cert. denied*, 403 Md. 614 (2008). Under these circumstances, we conclude that the trial court properly exercised its direction.

IV.

Appellant argues the court erred in denying his motion for new trial. The State responds that this argument is similar to the argument raised in Issue III, and is also without merit.

In *Washington v. State*, 424 Md. 632 (2012), the Court of Appeals explained the extent of a trial court's discretion in denying a motion for new trial:

> Ordinarily a trial court's order denying a motion for a new trial will be reviewed on appeal if it is claimed that the trial court abused its discretion. Generally, we will not disturb a circuit court's discretion in denying a motion for a new trial. We have held that [t]he abuse of discretion standard requires a trial judge to use his or her discretion soundly and that discretion is abused when the judge exercises it in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law. A trial judge's discretion to grant or deny a motion for 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. Notably, [a] ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling.

Washington, 424 Md. at 667-68 (quotations and citations omitted).

Appellant filed a timely motion for new trial, pursuant to Maryland Rule 4-331 (a), contending that the trial court erred in denying the motion for mistrial based on the victim's outbursts in court during closing argument.[7] Prior to sentencing, the circuit court entertained argument on this motion at a hearing. A new defense counsel asked to call appellant's two trial attorneys of record to testify. The judge replied that not only did he preside over the trial, but also, there was a transcript of the trial available. Therefore, and after noting it would be "extraordinary" that appellant's lawyers would be called as witnesses while they still represented appellant, the court asked for an offer of proof before it would hear any testimony. The following then occurred:

> [DEFENSE COUNSEL 3]: Your Honor, I believe both of the attorneys had different views of what transpired during defense closing argument. [Defense Counsel 1] was able to observe the tone and the volume and the behavior of the outburst that had occurred. And [Defense Counsel 2], because he was in the middle of the closing argument, was able to observe the reaction of the jurors. And he was also – he would also testify to his

[7] Maryland Rule 4-331 (a) provides: "Within Ten Days of Verdict. On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial."

> own direct knowledge as to what the outburst did and how it affected his presentation of the case.

The court accepted a proffer from appellant's counsel, concerning the victim's outburst, as follows:

> [DEFENSE COUNSEL 3]: It's my understanding that both [Defense Counsel 1] and [Defense Counsel 2] observed the victim stand briefly during the first outburst, and then more fully when the Court observed her stand during the second outburst. And they would also – [Defense Counsel 2] would describe her volume level as screaming.

The court also accepted the following from the State:

> [PROSECUTOR]: And, Your Honor, if I may add. The victim coordinator [Christine Sharp], who was sitting with the victim, advises that she recalls her being seated for the second one and at least partially standing for the – seated for the first one, partially standing for the second.
>
> [THE COURT]: Well, I'm not sure what partially standing means, but –
>
> [PROSECUTOR]: I think she was in the midst of standing, and then –
>
> [THE COURT]: As she was speaking.
>
> [PROSECUTOR]: Yes. And then she was escorted, so she walked out.

After hearing argument, the court denied the motion for new trial. In part, the court made the following findings:

> I couldn't tell what was said. Obviously the court reporter could tell what was said. And that leads me to believe that other people in the courtroom might have been able to tell

> what was said. I have no explanation for why I couldn't understand what was being said, but it was clear that somebody had spoken out loud. And – but at the time that occurred, I'm watching [Defense Counsel 2] and I'm watching the jury. And I will relate my observations.
>
> First of all, I was impressed by the fact that [Defense Counsel 2] didn't miss a beat in his argument. Didn't – as near I could tell and recollect, he didn't even hesitate. He went right on with what he was saying. The jury was looking at him. And since the court reporter could hear what was – she said, then I assume that at least one or more of the jurors could hear what she said. But to this Court's observation the jurors did not react to it by way of surprise, shock or anything. They must have heard it, or some of them must have heard it, but they continued to listen to [Defense Counsel 2] as he related his argument.
>
> And nobody moved for a mistrial at that point and nobody asked for a curative instruction. It happened so quick and it was over. And the question in my mind was, if it was that big a deal then, I would have expected experienced counsel like [Defense Counsel 1] and [Defense Counsel 2] to have asked for some relief and they didn't.

Turning to the second outburst by the victim, the court continued:

> [Defense Counsel's] argument was quite lengthy and well reasoned. And later on in the argument, he is arguing a point, and the victim says, I didn't want that to happen, or words to that effect. Whatever it was that she said was reflected in the transcript.
>
> On that occasion, again, the Court was focused on [Defense Counsel 2] and the jury. And having heard what was said, the Court directed its attention to that general area. And the first thing that the Court saw was the victim standing up with someone else. Maybe it was her mother or sister or somebody – sister I want to say. But in any event, standing up, and after saying what she said, marching out of the courtroom or beginning to leave the courtroom. At that point [Defense

> Counsel 1] said what was indicated in the transcript, and the Court told the jury what was indicated in the transcript.
>
> And it was obvious to the Court when – when the victim stood up, said what she said, stood up, and started leaving the courtroom that the jury took notice of that. And there's every reason to believe that they took notice of – that they heard what it was that she said.
>
> But in terms of what happened after that, [Defense Counsel 1] picked up very, very quickly with his argument, and the jury refocused very, very quickly on his argument. And I was impressed that throughout his argument – and again, it was somewhat lengthy, but well reasoned, and the jury paid close attention to everything that he said as near as I could tell. And I was watching them and I was watching him at the same time.

The court then noted that appellant made his motion for mistrial during a break, after a recess in closing arguments. Reiterating that the motion had been denied, in part, because it was untimely, the court maintained that even a timely motion would have been denied. After finding that the victim did not "scream" when she made the second outburst, the court concluded as follows:

> But other than manifesting her disagreement with what the State's Attorney was – I mean what [Defense Counsel 2] was saying, her upset was – the only thing that could have been prejudicial to the jury – and her upset I would say certainly on the second occasion must have been manifested. She walked out of the courtroom. And I mentioned that to the jury and told them that they should disregard that, if my memory serves me correctly.
>
> So there's simply no basis for a mistrial. I think that the events were what they were. Their effect on the jury was not such as to warrant a mistrial under the circumstances. And

> there's no basis for the Court to grant a new trial in the interest of justice for that reason.

We discern no abuse of discretion in the court's ruling. Notably, the judge that denied the new trial was the same judge who presided over trial and considered these same arguments when ruling on the mistrial motion. The judge was in a much better position to see if the jury showed any sign they were prejudiced by the victim's outbursts.

Finally, the appellant also argues the court erred in prohibiting him from calling his two trial attorneys to testify at the motion for new trial hearing. As the trial court recognized, ordinarily, trial advocates can not be called as witnesses, subject to certain exceptions. *See* Maryland Rules of Professional Conduct, Rule 3.7. Lawyer as Witness.

In any event, although a criminal defendant is entitled to present witnesses in his defense, *see Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), that right is not absolute. *Taylor v. Illinois*, 484 U.S. 400, 410 (1988). And furthermore, a trial court has considerable discretion in determining what evidence to consider at a hearing on a motion for new trial. *See* Md. Rule 5-104 (a) (recognizing that the trial court determines preliminary questions of admissibility of evidence and may, in the interest of justice, decline to require strict application of the rules of evidence); *Campbell v. State*, 373 Md. 637, 645 (2003) (affirming denial of motion for new trial where, "rather than conduct an evidentiary hearing regarding the new evidence as to [a State's witness], as requested by Petitioner, the judge denied the motion for a new trial based on the proffer"); *Argyrou v. State*, 349 Md. 587, 599 (1998) ("A trial court has wide latitude in considering a motion for new trial and may consider a number

of factors, including credibility, in deciding it; thus, the court has the authority to weigh the evidence and to consider the credibility of witnesses in deciding a motion for a new trial"); *Couser v. State*, 36 Md. App. 485, 496 (1977) (concluding there was no abuse of discretion to prohibit testimony at a new trial hearing, and observing that "[t]he purpose of the hearing on the motion for retrial is not to retry the case"), *aff'd*, 282 Md. 125 (1978); *see also People v. Houston*, 130 Cal. App. 4th 279, 319 (Cal. Ct. App. 2005) (disagreeing with appellant's contention that a remand for an evidentiary hearing was necessary in order to determine if jury was prejudiced by alleged spectator misconduct). Again, we are persuaded that the trial court properly exercised its discretion in denying the motion for new trial.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.