UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1106

September Term, 2014

TIMOTHY R. BRUMBLEY

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: January 15, 2016

On May 21, 2014, following a two-day jury trial in the Circuit Court for Wicomico County, Timothy R. Brumbley, appellant, was convicted of negligent homicide by automobile while under the influence of alcohol *per se*, negligent homicide by automobile while under the influence of alcohol, negligent homicide by automobile while impaired by alcohol, driving a vehicle while under the influence of alcohol *per se*, driving a vehicle while under the influence of alcohol, driving a vehicle while impaired by alcohol, reckless driving, negligent driving, failure to control vehicle speed on a highway to avoid a collision, and driving a vehicle in excess of a reasonable and prudent speed. The jury acquitted Brumbley of grossly negligent manslaughter by motor vehicle and criminally negligent manslaughter.

The circuit court sentenced Brumbley to five years of incarceration for his conviction for negligent homicide by automobile while under the influence of alcohol *per se*. The court merged Brumbley's other convictions with that sentence.

In his timely appeal, Brumbley raises five questions:

1. Did the trial court permit impermissible lay opinion testimony by allowing two witnesses who were not experts to testify to their opinions as to exactly how fast the car being driven by appellant was traveling, even though both witnesses only viewed the car coming[ ] towards them for mere seconds?

2. Did the trial court err in repeatedly restricting the direct examination of a defense expert witness?

3. Did the trial court err in admitting the results of the blood alcohol test?

4. Did the trial court err in admitting a statement [Brumbley] made to police while he was receiving treatment at the hospital following the accident?

5. Did the trial court err in permitting improper comments during closing argument?

Discerning no reversible error or abuse of discretion, we shall affirm.

FACTUAL AND PROCEDURAL HISTORY

Around 8:00 p.m. on Tuesday, February 19, 2013, a commercial tractor trailer driven by Daniel Allen Jr. broke down in the right-hand lane of Route 13 North in Delmar, Wicomico County, Maryland. Cpl. Keith Heacook of the Delmar Police Department responded to the report of the disabled tractor trailer. Tow truck operator, Joe Skeens Jr. was dispatched in his 50-ton wrecker to move the disabled tractor trailer from the roadway. Although it was fully dark outside, lights from a nearby gas station and car dealership illuminated the area near the disabled truck. Additionally, Allen, Skeens, and Cpl. Heacook took precautions to warn approaching drivers of the disabled tractor trailer that was blocking part of the right lane.[1] The speed limit was 45 miles per hour.

As Skeens was pulling into the left-hand lane to drive the tow truck around Allen's disabled tractor trailer, a Honda Civic, driven by Brumbley, attempted to pass the wrecker on the left side, driving partially on the grassy median. Brumbley's car collided with the driver's side of Skeens's wrecker and then careened into the left-side guardrail, coming to rest in the median between the northbound and southbound lanes. Witnesses

[1] Allen placed reflective triangles about 200 feet behind his disabled truck. Cpl. Heacook, who was parked directly behind Allen's tractor trailer, activated the flashing red and blue emergency lights on his marked police cruiser, and Skeens activated the yellow emergency lights on the front, top, and rear of his tow truck.

testified that Brumbley was driving between 45 and 55 miles per hour before the collision.

Cpl. Heacook immediately went to check on the occupants of Brumbley's vehicle. Inside there were three people: Brumbley was in the driver's seat; his brother, Mark, was in the front passenger seat; and Thomas Hitch was in the backseat on the passenger side. Brumbley appeared to be uninjured, but Cpl. Heacook could smell a "very strong odor of an alcoholic beverage coming from his breath and his person." Cpl. Heacook observed that Brumbley's speech was slurred, his eyes were dilated, and he seemed to be "disoriented[.]" Brumbley told Cpl. Heacook that he had seen the police car and the tow truck and that he was just trying to pass the tow truck when the accident occurred. Inside Brumbley's car, Cpl. Heacook saw an empty can of beer on the floor by the driver as well as multiple empty and full cans of beer in the back seat.

Brumbley's brother and Hitch were both unconscious. Both passengers had suffered serious head wounds, and Cpl. Heacook observed that there was "quite a lot" of blood coming from Mark Brumbley's wound.

Emergency personnel responded to the crash scene. After they cut open the passenger side of Brumbley's vehicle and removed Mark Brumbley and Hitch from the wreckage, an ambulance transported all three men to Peninsula Regional Medical Center, and Hitch was later airlifted to University of Maryland Shock Trauma facility for treatment

Around 9:30 p.m. on the evening of the collision, after completing his investigation at the crash scene, Cpl. Heacook went to the hospital. At the hospital he

took a brief statement from Brumbley, who was in a hospital bed being examined by medical staff. Cpl. Heacook asked Brumbley what happened, and Brumbley said that he saw the lights on the police car and the truck, "went to go around the tow truck . . . [and] hit the tow truck." Brumbley also said that the only reason he was driving was because his brother was "more messed up than he was." Brumbley was treated and released from the hospital.

Cpl. Heacook requested that one of the nurses draw a sample of Brumbley's blood for forensic testing. Subsequent analysis indicated that Brumbley's blood-alcohol content was 0.19 grams of alcohol per 100 milliliters of blood, more than twice the legal limit of 0.08. Md. Code (1974, 2013 Repl. Vol.), § 10-307(g) of the Courts and Judicial Proceedings Article ("CJP") (if "a person has an alcohol concentration of 0.08 or more . . . the person shall be considered under the influence of alcohol").

On February 24, 2013, five days after the accident, Hitch died as a result of medical complications caused by a spinal cord injury that he had suffered in the collision.

ANALYSIS

I. Lay Opinion Testimony

At Brumbley's trial, the State called two witnesses who testified regarding the speed of Brumbley's vehicle at the time when it collided with Skeens's wrecker.

Daniel Allen, Jr., the driver of the disabled tractor trailer, observed the collision while sitting in his vehicle, looking in the rear-view mirror. Allen testified that he had been a commercial truck driver for 20 years. Although he observed Brumbley's vehicle for only a few seconds, he estimated that Brumbley was driving at between 45 and 55

miles per hour before the collision. As previously stated, the speed limit was 45 miles per hour.

Renae Eisenhour testified that she was driving her car southbound on Route 13 before the accident. She observed Brumbley's car for about ten seconds as it approached the emergency scene and testified that it was traveling at a "very fast" rate of speed, "at least 50 miles an hour."

Brumbley contends that the circuit court erred by admitting the lay opinion testimony of Allen and Eisenhour regarding the speed of Brumbley's car before the collision. He asserts that neither Allen nor Eisenhour could testify competently regarding the speed of Brumbley's vehicle because "they were not experts, their testimony was not rationally based upon their perceptions, and their opinions amounted to mere conjecture."

Maryland Rule 5-701, governing the admissibility of opinion testimony offered by a lay witness, 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 that 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.

To be admissible, lay opinion testimony "must derive from personal knowledge, be rationally connected to the underlying facts[,] helpful to the trier of fact, and not prohibited by any other rule of evidence." *Rosenberg v. State*, 129 Md. App. 221, 255 (1999).

The admission of lay opinion testimony is a matter within the trial court's sound discretion. *Waddell v. State*, 85 Md. App. 54, 66 (1990). Absent an abuse of that

discretion, an appellate court will not overturn a trial court's determination regarding whether a witness has an adequate basis for giving an opinion. *Hunt v. State*, 321 Md. 387, 423 (1990).

It is well established that an experienced, licensed driver may give an opinion as to the speed of a moving automobile. *Peoples Drug Stores, Inc. v. Windham*, 178 Md. 172, 180 (1940) ("'An estimate of the speed at which an automobile, locomotive, or other object was moving at a given time is generally viewed as a matter of common observation rather than expert opinion, and it is accordingly well settled that any person of ordinary ability and intelligence having the means or opportunity of observation is competent to testify to the rate of speed of such a moving object'") (citations omitted); *United Rys. & Elec. Co. of Baltimore v. Ward*, 113 Md. 649, 664 (1910) ("It is the uniform practice to allow those who witness an accident . . . to testify to the speed of the train or car") (citations omitted).

Neither the short duration of the witness's ability to observe a vehicle nor the position of the witness relative to the moving vehicle are dispositive of whether the court should admit a witness's opinion regarding the vehicle's speed. *Tefke v. State*, 6 Md. App. 139, 145-46 (1969); s*ee also Mulligan v. Pruitt*, 244 Md. 338, 341-42, 344-45 (1966) (allowing admission of testimony by witness regarding speed of vehicle she had observed for only few seconds as it drove toward where she was sitting); *Lilly v. State*, 212 Md. 436, 444 (1957) (approving admission of bus passenger's testimony as to speed of automobile she observed coming directly at bus); *Miller v. Graff*, 196 Md. 609, 617 (1951) (noting in dicta that witness was qualified to testify as to speed although he was in

roadway in path of oncoming automobile). Instead, any questions regarding the length of time in which a witness had observed a vehicle or the angle from which he or she had observed it go only to the weight of the evidence. *Jackson v. Leach*, 160 Md. 139, 140-42 (1931); *Tefke*, 6 Md. App. at 145.

In this case, both Allen and Eisenhour testified that they observed Brumbley's vehicle before the collision for long enough to form an opinion regarding how fast his vehicle was traveling – in Eisenhour's case, about ten seconds. Because Allen and Eisenhour actually observed Brumbley's vehicle, their opinions were rationally based on their own perceptions as required by Md. Rule 5-701. Moreover, Allen's and Eisenhour's eyewitness testimony regarding the speed of Brumbley's vehicle immediately before the collision – as Brumbley approached the disabled tractor trailer, the police cruiser that was behind it, and the wrecker that was pulling into the left lane – would have been helpful in the jury's determination of whether Brumbley was driving recklessly or negligently, a fact at issue for several of the offenses with which he was charged. Under these circumstances, the trial court did not abuse its discretion by allowing Allen and Eisenhour to provide lay opinion testimony at Brumbley's trial.

II. Limitations on Direct Examination of Defense Expert

At Brumbley's trial, the defense called an expert witness, Janine Arvizu, to testify regarding the proper procedure for collecting, storing, testing, documenting, and analyzing blood samples to accurately determine their blood-alcohol content. In the course of defense counsel's examination of Arvizu, she testified at great length regarding the alleged documentary and procedural lapses pertaining to the collection, handling, and

testing of Brumbley's blood sample and how those lapses denigrated the integrity of the test result.[2] At no time, however, did defense counsel ask whether Arvizu had an expert opinion to a reasonable degree of scientific certainty. Consequently, whenever defense counsel attempted to ask Arvizu about her opinion on whether the results of the blood-alcohol test of Brumbley's blood sample were reliable, the prosecutor objected, and the court sustained the objection.

After sustaining several of these objections, the court invited counsel to a bench conference, at which the following exchange occurred:

THE COURT: What is her opinion?

[DEFENSE]: Her opinion, the bottom line, her opinion, you mean for —

THE COURT: Why are you calling her?

[DEFENSE]: Why am I calling her? To say that the test results were not reliable.

THE COURT: Okay. And have you asked that question?

[DEFENSE]: Not yet. But I'm trying to show the basis for it.

[2] For example, Arvizu was permitted to testify about the absence of any documentation that the nurse who collected Brumbley's blood sample had followed procedures necessary to prevent it from being contaminated with a bacteria that can create ethanol (*i.e.*, alcohol) in the sample. She also was permitted to testify that, to further protect the sample from contamination, it should have been refrigerated immediately, but that no one refrigerated Brumbley's sample until it reached the crime lab, many days after it was first collected. Arvizu testified, without objection, that the crime lab did not employ a "scientifically valid" method of calibrating its gas chromatograph and that the calibration method was inconsistent with the manufacturer's instructions and with the current recommendation of the Scientific Working Group for Forensic Toxicology. Finally, Arvizu testified that the crime lab's method of batching samples did not render accurate results because there was "no record of which controls were prepared when" and because the batch that included Brumbley's sample only had one blank sample and no "whole blood" control sample.

THE COURT: All right. Well, sustained. You could ask the question and then what would be the basis for it, but until you get the question [right] every time there's an opinion you're going to have to ask the question, as Counsel has objected correctly on multiple times and I keep sustaining them. If you're asking to elicit, or she begins eliciting expert testimony, but you have not qualified the question.

[DEFENSE]: She's been qualified as an expert.

THE COURT: Right.

[DEFENSE]: I'm trying to introduce —

THE COURT: That doesn't mean she can say anything now.

[DEFENSE]: I understand, but I'm trying to indicate why she's going to come to a conclusion on this particular . . .

THE COURT: Okay. That's fine, Counsel. I respect your position that you don't need to ask the questions the way, you know, we might require them. So, sustained. Ask another question.

Defense counsel declined to follow the trial court's guidance. After a five-minute recess, the direct examination continued as follows:

[DEFENSE]: After your review of the documents that were provided to you, were you able to reach an opinion about the reliability of the test results in Mr. Brumbley's case?

WITNESS: Yes.

[DEFENSE]: And what was your opinion?

[PROSECUTOR]: Objection.

THE COURT: Sustained.

[DEFENSE]: Can we approach?

THE COURT: No. Do you want to reframe the question?

[DEFENSE]:	Do you have an opinion about the reliability of the test results in this case based on your review of the evidence?
WITNESS:	Yes.
[DEFENSE]:	And what is your opinion?
[PROSECUTOR]:	Objection.
THE COURT:	Sustained.

Defense counsel continued to ask variations on the same question, but was foreclosed at every turn from eliciting the expert's opinion.

Brumbley asserts that the trial court "repeatedly erred in refusing to permit the defense's expert . . . to present the jury with her expert opinion as to whether the blood sample taken from [Brumbley] was handled, maintained, and tested properly, and whether the ultimate result of the test was reliable." Brumbley contends that the trial court retained the discretion to admit Arvizu's expert opinion even though his counsel did not ask her to offer it within a reasonable degree of certainty. He concludes that the court abused its discretion in failing to admit the expert's ultimate opinion.[3]

We review a trial court's decision to admit or exclude expert testimony for abuse of discretion. *Sippio v. State*, 350 Md. 633, 648 (1998).

[3] The State argues that, to preserve this issue for appeal, Brumbley had to proffer the contents and relevance of the testimony that he sought from Arvizu, but was unable to elicit. The State omits to note that, in one of the exchanges at the bench, Brumbley's counsel told the court what the expert would say – "the test results were not reliable." Because the substance of Arvizu's excluded testimony was reasonably "apparent from the context within which the evidence was offered," no further proffer was required. Md. Rule 5-103(a)(2).

Maryland Rule 5-702, addressing the admission of expert testimony, 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.

In Maryland, before a witness may render an expert opinion, she must testify that the opinion is sufficiently probable to be admitted in evidence, *i.e.*, that she has an opinion within a reasonable degree of certainty within the field of her expertise. *See Hines v. State*, 58 Md. App. 637, 670 (1984). If an expert witness "cannot, will not or does not render his opinion to a reasonable degree of probability within the field of his expertise, the opinion may be excluded from evidence." *Id.*; *see also Mitchell v. Montgomery Cnty.*, 88 Md. App. 542, 558 (1991) (holding that trial court should have excluded positive tests for cocaine and PCP where expert could not state with reasonable degree of medical certainty whether plaintiff was under influence of those drugs at time of accident).

In this case, Arvizu evaluated the available records and determined that the documentation from the hospital, the police, and the Maryland State Police Crime Laboratory were insufficient to demonstrate that the relevant personnel followed the proper procedures to collect, preserve, and test Brumbley's blood sample.[4] Arvizu could not conduct an independent scientific test of the blood-alcohol content of Brumbley's

[4] The State's witnesses described their usual procedures and verified that those procedures had been followed.

blood. It was particularly necessary in this case, therefore, for the defense to establish the extent to which Arvizu based her expert opinions on sound scientific principles. Because none of defense counsel's questions were properly phrased to ensure that Arvizu could express her expert opinions to a reasonable degree of scientific certainty, the circuit court did not abuse its discretion in sustaining the State's objections. *See* Joseph F. Murphy, Jr., *Maryland Evidence Handbook* (4th ed. 2010) § 1404, at 649 (pointing out that Maryland courts have not yet gone so far as to adopt the view that an expert's failure to express an opinion to a reasonable degree of scientific probability goes only to the weight, not the admissibility, of an expert's opinion); *Mitchell*, 88 Md. App. at 558.

III. Admission of Results of Blood-Alcohol Test

Before Brumbley's trial, the defense moved to suppress the results of the blood-alcohol test conducted on the sample of Brumbley's blood that was collected while he was in the hospital. In support of the motion to suppress, the defense asserted that the collection of Brumbley's blood constituted an illegal search because Cpl. Heacook did not obtain a warrant.

Following a motions hearing on May 8, 2014, the circuit court ruled that the warrantless seizure of Brumbley's blood for alcohol testing was justified by exigent circumstances. Brumbley contends that the circuit court committed reversible error when it denied his motion to suppress.

In reviewing a circuit court's ruling on a motion to suppress evidence alleged to have been seized in violation of the Fourth Amendment, this Court ordinarily considers only the evidence that was presented at the suppression hearing. *Crosby v. State*, 408

Md. 490, 505 (2009). "We extend great deference to the fact finding of the suppression court and accept the facts as found by that court unless clearly erroneous." *Wilkes v. State*, 364 Md. 554, 569 (2001); *accord Crosby*, 408 Md. at 504-05. Nevertheless, we "make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case." *State v. Williams*, 401 Md. 676, 678 (2007); *accord Crosby*, 408 Md. at 505.

The Fourth Amendment protects persons against unreasonable searches and seizures. *United States v. Arvizu*, 534 U.S. 266, 273 (2002). Taking a blood sample is a search, because it involves a compelled physical intrusion beneath a person's skin and into the person's veins to obtain evidence in a criminal investigation. *See Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013); *Schmerber v. California*, 384 U.S. 757, 770 (1966).

Subject to various exceptions, the Fourth Amendment generally requires that the authorities obtain a warrant before conducting a search. Under one exception, the authorities may conduct a warrantless search if there are exigent circumstances. *See*, *e.g.*, *McNeely*, 133 S. Ct. at 1558; *Dunnuck v. State*, 367 Md. 198, 204 (2001).

Exigent circumstances exist when police officers have probable cause to believe that illegal activity has occurred and reasonably believe that they have insufficient time to get a warrant before evidence is destroyed or removed. *Bellamy v. State*, 111 Md. App. 529, 535 (1996) (quoting *United States v. Campbell*, 945 F.2d 713, 715 (4th Cir. 1991)). The Supreme Court has recognized that the destruction of evidence because of the

metabolization of alcohol may give rise to an emergency that may, in turn, excuse the need for a warrant. *McNeely*, 133 S. Ct. at 1561; *Schmerber*, 384 U.S. at 770-71.[5]

Nonetheless, the metabolization of alcohol does not justify a categorical exception to the warrant requirement in all drunk-driving cases: "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *McNeely*, 133 S. Ct. at 1561. "[B]ecause a police officer must typically transport a drunk-driving suspect to a medical facility and obtain the assistance of someone with appropriate medical training before conducting a blood test, some delay between the time of the arrest or accident and the time of the test is inevitable regardless of whether police officers are required to obtain a warrant." *Id.* In some instances, an officer may be able to "take steps to secure a warrant while the suspect is being transported to a medical facility by another officer." *Id.* Still, "some circumstances will make obtaining a warrant impractical such that the dissipation of

[5] "[T]he percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Schmerber*, 384 U.S. at 770. "[A]s a result of the human body's natural metabolic processes, the alcohol level in a person's blood begins to dissipate once the alcohol is fully absorbed and continues to decline until the alcohol is eliminated." *McNeely*, 133 S. Ct. at 1560. Although blood-alcohol evidence "naturally dissipates over time in a gradual and relatively predictable manner" (*id.* at 1561), "a significant delay in testing will negatively affect the probative value of the results." *Id.*; *see also Brice v. State*, 71 Md. App. 563, 581-82 (1987) (noting that practice of excluding test results taken more than two hours after accused is apprehended (*see* CJP § 10-303(a)(2)) serves to prevent defense from securing "exculpatory bonus" from favorable test result to which it otherwise would not be logically and scientifically entitled).

alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." *Id.* 1561.

Cpl. Heacook testified at the suppression hearing that Brumbley's automobile collided with the tow truck at a little after 8:00 p.m. on February 19, 2013. Cpl. Heacook, who was at the site of the crash when it occurred, immediately ran to the median, where Brumbley's automobile had come to rest, so that he could check on the condition of the occupants. Although the passengers were seriously injured, Brumbley, in the driver's seat, was conscious and did not have any visible injuries. Cpl. Heacook observed that Brumbley's speech was slurred, his eyes were glassy and his pupils dilated, and there was a strong odor of alcohol coming from his breath and body. Cpl. Heacook also observed a number of empty beer cans on the floor of the car.

Cpl. Heacook was one of only two Delmar police officers working that evening. As he was on the scene of the accident when it happened, he was the lead investigator. He immediately called for an ambulance and back-up officers from the Wicomico County Sheriff's Department and the Maryland State Police. After learning that Hitch's injuries may be life-threatening, Cpl. Heacook also called for the Maryland State Police's fatal-accident reconstruction team from Baltimore.

Once the fire department cut the door off of the automobile, emergency personnel were able to remove Mark Brumbley and Hitch from the car, and all three men were transported by ambulance to the hospital for treatment. Cpl. Heacook remained at the scene of the accident for an additional 30 to 45 minutes, during which time he shut down the highway, rerouted traffic, and interviewed witnesses. After finishing his preliminary

investigation at the scene about one and a half to two hours after the accident, Cpl. Heacook went to the hospital in Salisbury, where he briefly interviewed Brumbley. At Cpl. Heacook's request, a nurse drew Brumbley's blood into an approved blood-alcohol kit at approximately 9:55 p.m. on February 19, 2013.

The facts in this case are similar to those of *Schmerber*, in which the Supreme Court upheld the warrantless blood-test of a person who was arrested, after a crash, for driving under the influence of alcohol. In reaching its decision, the Supreme Court reasoned that the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" *Schmerber*, 384 U.S. at 770. In view of the totality of the circumstances, including the natural metabolism of alcohol in the system, and the time necessary for the officer both to investigate the accident scene and to transport Schmerber to the hospital for the treatment of his injuries, the Court found it reasonable for the officer to conclude that there was insufficient time to find a magistrate and secure a warrant. *Id*. at 758, 770-71.

In this case, following the collision, Cpl. Heacook was busy obtaining emergency assistance for Brumbley and his passengers; closing the highway and redirecting traffic while emergency personnel extricated Brumbley and his passengers from the car and transported them to the hospital; calling for back-up officers to assist with traffic control while the rescue and investigation continued; contacting the fatal-response reconstruction team; and interviewing witnesses at the scene and Brumbley at the hospital. Cpl. Heacook, constrained by his competing duties at the crash site, was unable to collect any

physical evidence from Brumbley until almost two hours after the accident occurred. During that time, he had no reasonable opportunity to prepare an application for a warrant, communicate with a prosecuting attorney, or locate an available magistrate. Indeed, Cpl. Heacook testified that he was unaware of any procedures for obtaining a telephonic warrant and that it would have taken three to four hours to obtain a search warrant at that hour of the evening in Wicomico County.

Under these circumstances, Cpl. Heacook reasonably believed that any further delay occasioned by an attempt to obtain a warrant would jeopardize the State's ability to obtain reliable results from a blood-alcohol test.

Cpl. Heacook was not required to attempt to obtain a warrant in order to demonstrate that it was impracticable to get one in a timely manner. When, as in this case, an officer reasonably believes that attempting to obtain a warrant would be futile, he is not required to undertake an exercise in futility. *See McNeely*, 133 S. Ct. at 1568 ("cases will arise when *anticipated* delays in obtaining a warrant will justify a blood test without judicial authorization") (emphasis added). Nor was Cpl. Heacook, the primary investigative officer, required to delegate the responsibility for obtaining a warrant to another officer, especially one from a different agency.

This case differs from *McNeely*, where the Supreme Court declined to create a *per se* exception to the warrant requirement in all drunk-driving investigations. Unlike this case, *McNeely* involved no "special facts," "such as the need for the police to attend to a car accident." *McNeely*, 133 S. Ct. at 1568. To the contrary, McNeely appears to have been a routine drunk-driving case (*id.*), which involved no accident or injuries, and in

which an officer had simply stopped a driver after observing that he was speeding and repeatedly crossing the center line. *Id.* at 1556. Moreover, in *McNeely*, unlike in this case, the officer testified that he was "sure" that a prosecuting attorney was on call and that a magistrate was available to expedite a request for a warrant in less than two hours. *Id.* at 1567. Under those circumstances, the officer could have obtained a search warrant in a timely manner even though the arrest occurred in the middle of the night. *Id*.

Cpl. Heacook, however, did not have the same ability. He was constrained by his obligation to secure and investigate the scene of a serious automobile accident and by the unavailability of any mechanism to secure an expedited warrant in the evening. We, therefore, conclude that Cpl. Heacook's warrantless seizure of Brumbley's blood was justified by exigent circumstances.

Brumbley contends that, in rejecting his motion to suppress, the circuit court relied on Md. Code, § 16-205.1(c)(1) of the Transportation Article, which permits a warrantless seizure of blood in drunk-driving investigations in which a person "is involved in a motor vehicle accident that results in the death of, or a life threatening injury to, another person." Brumbley asserts that § 16-205.1(c)(1) amounts to an unconstitutional, per se exception to the warrant requirement. Because the warrantless seizure of Brumbley's blood was justified by exigent circumstances, we need not decide § 16-205.1(c)(1) is unconstitutional. The "strong and established policy is to decide constitutional issues only when necessary." *VNA Hospice of Md. v. Dep't of Health & Mental Hygiene*, 406 Md. 584, 604 (2008) (quotation marks omitted).

IV. Denial of Motion to Suppress Statements Made at Hospital

In addition to moving to suppress the blood test, Brumbley moved to suppress his statements to Cpl. Heacook when the Cpl. interviewed him at the hospital following the accident. The circuit court denied the motion. Brumbley contends that the circuit court erred in concluding that Brumbley was not in custody and, hence, that Cpl. Heacook was not required to provide *Miranda* warnings before asking Brumbley what happened.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court recognized the "inherently compelling pressures" of incommunicado, police-dominated interrogation and required officers to advise a suspect of certain rights before he or she could be subject to custodial interrogation. *See Maryland v. Shatzer*, 559 U.S. 98, 103 (2010) (quoting *Miranda*, 384 U.S. at 456-57, 467). Although there are "coercive aspects" to any police interview of a person suspected of a crime, *Miranda* warnings are required only in the context of a custodial interrogation. *State v. Thomas*, 202 Md. App. 545, 565 (2011) (quoting *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2401-02 (2011)), *aff'd*, 429 Md. 246 (2012).

When considering whether an interrogation was custodial, *i.e.*, whether a reasonable person would have believed that he or she was under arrest or that his or her freedom of movement was restrained to the degree associated with a formal arrest, a court must consider the totality of the circumstances. *Stansbury v. California*, 511 U.S. 318, 321-22 (1994). Relevant circumstances include when and where the interview occurred, how the suspect got to the interview, how long it lasted, how many police officers were present, what the officers and the suspect said and did, the presence of any

actual physical restraint on the suspect (or anything equivalent to actual restraint, such as drawn weapons or a guard stationed at the door), and whether the defendant was being questioned as a suspect or as a witness. *Owens v. State*, 399 Md. 388, 429 (2007). Other relevant circumstances include what happened before and after the interview, including how the suspect came to be interviewed by the police, and whether he or she left freely or was arrested at the conclusion of the interview. *Id*. The defendant has the burden of showing that the requirements of *Miranda* apply, *i.e*., that there was a custodial interrogation. *Thomas*, 202 Md. App. at 565.

In this case the evidence at the suppression hearing indicates that after the collision Brumbley was transported to the hospital by ambulance, unaccompanied by any police officers. The record does not reflect whether Brumbley was injured, but if he was, his injuries were not particularly severe.

Cpl. Heacook did not arrive at the hospital until shortly before 10:00 p.m., more than one and one-half hours after the collision. He was the only police officer present during the interview. While Cpl. Heacock questioned Brumbley, several civilian healthcare workers were monitoring Brumbley's vital signs. When necessary, Cpl. Heacook moved out of the healthcare workers' way so as not to interfere with Brumbley's treatment. No guard was posted outside Brumbley's room, and Brumbley was not physically restrained.

The interview itself was brief. The Corporal spoke in a soft-toned voice. He did not tell Brumbley that he was under arrest or that he was going to be arrested. Until the interview was over, he did not tell Brumbley that he would have to submit to a blood test

or advise him of his right to refuse to submit and the consequences thereof.[6] In fact, Brumbley apparently was permitted to leave the hospital when his medical treatment was completed. He was not charged until months later. "[T]here is rarely custody when the person questioned leaves the interrogation unencumbered, only to be arrested at a later time." *Minehan v. State*, 147 Md. App. 432, 442 (2002); *accord Cummings v. State*, 27 Md. App. 361, 378-80 (1975) (collecting authorities for the proposition that "where a suspect is not arrested and is allowed to remain free following the interview, the interrogation is," almost universally, "deemed to have been non-custodial").

Brumbley contends that he was not free to leave because, to do so, he would have had to have "ignored the medical staff treating him after a serious accident, walked past the armed police officer in uniform interrogating him, and left without his identification." As this Court has recognized, however, "the consensus of American case law is that the questioning of a suspect who is confined in a hospital but who is not under arrest is not a custodial interrogation within the contemplation of *Miranda*." *Cummings*, 27 Md. App. at 369-70 (collecting authorities); *see also Owens*, 399 Md. at 430 n.30 (stating that a hospital "remains a public place akin to a sidewalk or park for purposes of Fifth Amendment analysis"). Under all the circumstances, we are persuaded that Brumbley was not subjected to a custodial interrogation in the instant case.

[6] See § 16-205.1 of the Transportation Article for the consequences of refusing to submit to a blood test when a person has been detained on suspicion of driving or attempting to drive while under the influence of alcohol or while impaired by alcohol.

Although Cpl. Heacook had Brumbley's identification card, we do not believe that this transformed the interview into a custodial interrogation, as reasonable persons would not believe that they were under arrest simply because an officer who was investigating an automobile accident was in possession of their licenses.[7] It is not unusual for an officer to obtain the licenses of drivers involved in an accident whether the driver was at fault or not. *Willis v. State*, 302 Md. 363, 378 n.15 (1985) (noting that "the production of driver's license [after an accident] is an essentially neutral action").

Furthermore, while Brumbley may have wished to remain at the hospital to receive medical treatment, the police did not impose any restraints that impeded his ability to leave if he wanted to leave. *See Cummings*, 27 Md. App. at 375 (distinguishing between "internal circumstance[s]" that restrain one's desire to leave and "external restraint[s]" imposed by police that objectively interfere with one's freedom of movement to degree associated with an arrest). Similarly, while Cpl. Heacook subjectively suspected Brumbley of committing a crime and intended to obtain a blood sample from him, the corporal's subjective beliefs are immaterial because he never communicated them to Brumbley. *See*, *e.g.*, *Aguilera-Tovar v. State*, 209 Md. App. 97, 109 (2012) (stating that because "the test" for custodial interrogation "is objective" and "the subjective views of the officer . . . are irrelevant"). Moreover, nothing in Cpl. Heacook's demeanor or questioning would have suggested to a reasonable person in Brumbley's position that he or she was suspected of committing a crime or was not free

[7] The record does not reveal whether Brumbley even knew that Cpl. Heacook had his identification card during the interview.

to leave. The question of whether a suspect is in custody depends on the objective circumstances of the interview, not on the undisclosed subjective views of either the interrogating officer or the person being questioned. *Stansbury v. California*, 511 U.S. 318, 323 (1994) (per curiam).

The exchange with Brumbley was hardly the kind of inherently-coercive, police-dominated, incommunicado interrogation that *Miranda* was designed to remedy. This was a brief encounter in the presence of neutral observers. A reasonable person would not even conclude that he or she had been detained, much less arrested. When viewed in their totality, the objective circumstances of the interview indicate that Brumbley was not under arrest, nor was his freedom of movement restricted to the degree associated with an arrest when Cpl. Heacook questioned him at the hospital. As Brumbley was not in custody when the interview took place, *Miranda* warnings were not required. Accordingly, the circuit court properly denied Brumbley's motion to suppress.

V. Comments in State's Closing Argument

In the course of the State's closing argument, the prosecutor commented, "when you are a .19, your coordination is substantially impaired." Defense counsel objected, but the court summarily overruled the objection. Brumbley now contends that the trial court committed reversible error when it overruled his objection to the State's comment.

Attorneys are afforded "great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999). An attorney "is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Id.* at 429-30. Still, notwithstanding the wide latitude

afforded to counsel in closing argument, the scope of what may be said is not boundless. *Wilhelm v. State*, 272 Md. 404, 412 (1974); *accord Lee v. State*, 405 Md. 148, 164 (2008). A party is prohibited, for instance, from "comment[ing] upon facts not in evidence[.]" *Smith v. State*, 388 Md. 468, 488 (2005).

On the other hand, an improper remark by the State during closing argument does not automatically result in a new trial. *See Wilhelm*, 272 Md. at 431 (the "mere occurrence of improper remarks does not by itself constitute reversible error"); *accord Lee*, 405 Md. at 164. Reversal is required if it appears that the improper remarks "actually misled the jury or were likely to have misled or influenced the jury to the defendant's prejudice." *Donaldson v. State*, 416 Md. 467, 496-97 (2010) (quoting *Hill v. State*, 355 Md. 206, 224 (1999)). In determining whether an allegedly improper statement in closing argument constitutes reversible error, an appellate court considers: (1) the severity and pervasiveness of the remarks; (2) the measures taken to cure any potential prejudice; and (3) the weight of the evidence against the accused. *Donaldson*, 416 Md. at 497 (quoting *Lawson v. State*, 389 Md. 570, 592 (2005)).

Brumbley complains that the prosecutor argued facts not in evidence when he "stat[ed] as fact that someone's coordination would be 'substantially impaired' with a .19 blood alcohol content." He asserts that "numerous factors . . . dictate how alcohol can impact a person, none of which were presented during trial[.]" He concludes that "where the sole issue for the jury to decide was who caused the accident, the prosecutor's reference to facts not in evidence to attack appellant's level of coordination was extremely prejudicial and requires reversal."

Brumbley, however, does not dispute that the forensic sample indicated that, almost two hours after the collision, his blood-alcohol content was .19 grams of alcohol per 100 milliliters of blood. Nor does Brumbley dispute Cpl. Heacook's testimony that immediately after the accident, Brumbley smelled strongly of alcohol, his speech was slurred, and his eyes were dilated, both of which are signs that he was, in fact, impaired by the alcohol that he later admitted to having consumed that night.

The court appropriately instructed the jurors to consider this and all of the other evidence in light of their own experiences and to draw conclusions consistent with their own common sense. In particular, in accordance with CJP § 10-307(g), the court instructed the jury that "[a] person is under the influence of alcohol per se if the person took a test that showed an alcohol level at the time of .08 or more." Brumbley's blood-alcohol content, almost two hours after his collision, was .19, nearly 2.5 times the legal limit.

The State's comment did not come during the portion of closing that concerned the issue of substantial impairment – *i.e.*, the portion when the State argued that the jury should find Brumbley guilty of driving under the influence of alcohol and of negligent homicide by automobile. Rather the comment came during the portion of closing that concerned the element of reasonable care. In this context, it appears that the prosecutor was simply arguing that Brumbley failed to exercise reasonable care, an element of negligence, because a reasonable person would not drive after consuming so much alcohol that his or her blood-alcohol content was still well over twice the legal limit almost two hours after an accident. Even if the jury were to disregard their own common

sense and their common experiences, as well as Cpl. Heacook's testimony about Brumbley's evident impairment immediately after the accident, the statement that "when you are a .19, your coordination is substantially impaired[,]" was not an improper comment on facts not in evidence. *See Degren*, 352 Md. at 429-30 (stating that prosecutor "is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom.").

Even if the comment were improper, any error in overruling defense counsel's objection was harmless. The prosecutor's isolated remark, about a reasonable inference fairly drawn from a fact that was not in dispute, was not the kind of statement that was "likely to have misled or influenced the jury to the prejudice of the defendant." *Donaldson*, 416 Md. at 496-97 (quoting *Hill*, 355 Md. at 224). Moreover, earlier in the State's closing, Brumbley had failed to object to a similar comment that equated a blood-alcohol content of .19 with substantial impairment of one's coordination.[8] In light of the circuit court's admonitions that the jury was to decide the case based only on the evidence presented during the trial, and that opening and closing statements of the parties were not evidence, reversal is not warranted.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[8] The specific comment was: "A reasonable person would not consume so much that they become a .19. A reasonable person would not consume so much that they become under the influence and their coordination is substantially impaired."