UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1330

September Term, 2015

ROBERT WAYNE MISS, JR.

v.

STATE OF MARYLAND

Berger,
Arthur,
Reed,

JJ.

Opinion by Berger, J.

Filed: September 30, 2016

Appellant, Robert Wayne Miss, Jr. ("Miss"), was indicted in the Circuit Court for Anne Arundel County and charged with attempted armed robbery and related offenses. A jury convicted Miss of attempted robbery, verbal extortion, and attempted theft less than $1,000. After his motion for new trial was denied, Miss was sentenced to fifteen years, with all but seven suspended, for attempted robbery, to be followed by five years' supervised probation. Miss timely appealed and raises the following question for our review:

> Whether the trial court abused its discretion in failing to grant the motion for new trial, in the interest of justice.

For the following reasons, we shall affirm.

BACKGROUND

In May 2014, Philip Balboni resided in a townhome in Crofton, Maryland, with his friend David Medford ("Medford"). Susan Pratt ("Pratt"), Balboni's girlfriend, used to live in the same residence, but had moved out due to financial problems. Relevant to the charges in this case, Balboni testified that he owned a 2008 Ford Ranger, which he obtained as a gift from Pratt. Balboni identified a copy of the title to the truck and testified that the title listed him as the sole owner. [1]

At around midnight on May 28, 2014, Balboni and Medford were home when there was a knock at the front door. Balboni went to the door and saw Chrissy Hawkerson, Pratt's daughter. Hawkerson said she needed some clothes, so Balboni let her inside.

[1] The title to that truck was admitted into evidence at trial. None of the exhibits are included with the electronic record on appeal.

Balboni then went upstairs to use the bathroom. When he emerged, he encountered the appellant, Miss, and Christopher Ruck ("Ruck") standing in the hallway.[2] Balboni knew Miss through Pratt, because Pratt treated Miss like a son. Balboni explained that she "took [Miss] in at a very young age," and "took him under her wing and took care of him pretty much most of his childhood."

Miss told Balboni that it was "[t]ime to sign the title over to your truck." After Balboni declined, Miss became "very angry looking like he was ready to beat up somebody," and, in fact, both threatened to and did assault Balboni. Miss also grabbed a cord and strangled Balboni to the point of unconsciousness. At one point during this assault, Ruck aided Miss by grabbing Balboni's pocket knife, opened it and "threatened to slit my throat if I tried anything funny or made any cries for help."

Miss kept demanding the title to the truck, and Balboni eventually told them he would sign it over but it was located at his "boss's house" in Edgewater, about ten to twelve miles away. Balboni admitted he was lying and was just trying to "buy some time." The three then drove to Edgewater in Pratt's car, with Balboni testifying that he was "taken by force." Hawkerson apparently drove Balboni's truck to the same location, after Miss took the keys from him.

While Miss and Hawkerson were attempting to locate the title, Balboni was left alone with Ruck. Feigning illness, Balboni then managed to escape, found a police officer and reported the incident.

[2] This individual was also identified as "Eric Ruck" and "Eric Rupp."

On cross-examination, Balboni testified that Pratt let him stay at the residence in Crofton, but that it was in foreclosure at the time. He also admitted that, within the last fifteen years, he had been convicted of giving a false statement to a police officer.

Medford testified he also lived in the residence with Balboni on the day in question. We will provide additional detail about Medford's testimony in the following discussion. It is sufficient for now to simply indicate that Medford was called to corroborate Balboni's version of events.

After he was convicted by the jury, Miss timely filed a motion for new trial, specifically citing Maryland Rule 4-331(a), and alleging 17 errors in his motion. These included, but were not limited to, an allegation of juror misconduct, error in responding to a jury note, improper closing argument by defense counsel, and "for such other and further reasons as may be argued at the hearing on this motion." These grounds, as well as an allegation that the court erred in permitting the State to use Medford's statement, were argued at a hearing on the motion, where Miss maintained that a new trial should be awarded "in the interest of justice" because he did not receive a fair trial. The court denied the motion, and Miss was sentenced as set forth above. We shall include additional detail in the following analysis.

DISCUSSION

Miss contends that the court abused its discretion in denying his motion for new trial on four specific grounds and asks that we grant a new trial "in the interest of justice." The State responds that the grounds raised were not properly preserved for our review and are without merit in any event.

There is no dispute that Miss timely filed his motion under Maryland Rule 4-331(a). That rule provides that "[o]n motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial." But, before we consider that motion, the State suggests that, to the extent they were not raised during trial itself, Miss's contentions are not properly before us.

We have discussed preservation of issues for appeal in new trial motions in earlier cases. In *Washington v. State*, 191 Md. App. 48, *cert. denied*, 415 Md. 43 (2010), Washington raised several issues in a motion for new trial, including, but not limited to, allegations that the court erred by: excluding evidence of a victim's prior convictions relevant to Washington's claim of self-defense; and admitting testimony from another victim that Washington was "looking for a fight," as a "present sense impression[.]" *Washington*, 191 Md. App. at 121. With respect to these two arguments, this Court noted:

> The first two grounds of the motion for a new trial raised alleged errors that were not preserved at trial. Raising trial errors for the first time in a motion for a new trial is not a substitute for preservation. *Torres v. State*, 95 Md. App. 126, 134, 619 A.2d 566 (1993) ("A post-trial motion cannot be permitted to serve as a device by which a defendant may avoid the sanction for nonpreservation.")

Washington, 191 Md. App. at 121 n. 22.

Moreover, we have stated that, if trial errors are "not preserved for appellate review by timely objection at trial, raising them in a Motion for New Trial and then appealing the denial of that motion is not a way of outflanking the preservation requirement." *Isley v. State*, 129 Md. App. 611, 619 (2000), *overruled on other grounds*, *Merritt v. State*, 367

Md. 17, 24 (2001). And,"[i]f we will not look at the non-preserved original, neither will we look at its reflection in the mirror of a New Trial Motion." *Isley*, 129 Md. App. at 620.

But, notwithstanding these principles, this Court has recognized that unpreserved claims may be raised in a motion for new trial. We explained: "[b]ecause a Motion for a New Trial appeals to the trial judge's subjective "sense" or "feel" as to whether a verdict was unfair or unjust, he may consider anything he wants to, preserved or unpreserved." *Isley*, 129 Md. App. at 622 (2000). Further:

> The non-preservation of the claim in this case could well serve as an unassailable reason for the trial judge, in his discretion, to reject the claim and to deny the motion. It does not serve, however, as a legal bar to the trial judge's consideration of the claim. Indeed, in the *Buck v. Cam's Broadloom Rugs, Inc*. case itself [328 Md. 51 (1992)] the Court of Appeals affirmed the granting of a new trial by the trial judge on the basis of a combination of alleged trial errors, some of which had not been preserved for review on direct appeal."

Isley, 129 Md. App. at 622 (internal citations omitted); *see also* Murphy, *Maryland Evidence Handbook*, § 100, at 3 (4th ed. 2010) ("Remember that arguments that were not preserved for appellate review can be presented in support of a motion for new trial").

Our reading of these cases leads us to conclude that, although unpreserved errors may be raised in a motion for new trial, the court may consider the lack of preservation in ruling on that motion, especially when considering a motion filed under Rule 4-331(a). *See Isley*, 129 Md. App. at 619 ("The non-preservation, moreover, is in and of itself an unassailable reason for the trial judge to deny the New Trial Motion, should he, in his discretion, choose to do so").

The standard of review of such a motion is as follows:

> It is a movant who holds the burden of persuading the court that a new trial should be granted. Whether to grant a new trial lies within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent an abuse of discretion. [*Argyrou v. State*, 349 Md. 587, 600 (1998)]. The abuse of discretion standard requires trial judges to use their discretion soundly, and we do not consider that discretion to be abused unless "the judge 'exercises it in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law.'" *Washington v. State*, 424 Md. 632, 667-68, 37 A.3d 932 (2012) (quoting *Campbell v. State*, 373 Md. 637, 665-66, 821 A.2d 1 (2003)). A trial court's discretion to grant or deny a new trial expands and contracts, depending upon the nature of the factors being considered, and its exercise "depends upon the opportunity the trial judge had to feel the pulse of the trial, and to rely on his or her own impressions in determining questions of fairness and justice." *Argyrou*, 349 Md. at 600, 709 A.2d 1194, *Washington*, 424 Md. at 668, 37 A.3d 932.

Brewer v. State, 220 Md. App. 89, 111 (2014).[3]

A. The Court Properly Exercised Its Discretion In Responding To The Jury Note.

The first issue raised herein concerns a jury communication during deliberations. The pertinent exchange was as follows:

[3] There is a second standard of review for denial of motions for new trial when an alleged error occurs during trial and "when the losing party or that party's counsel, without fault, does not discover the alleged error during the trial[.]" *Merritt v. State*, 367 Md. 17, 31 (2001). In such instance, the allegation is reviewed for clear error, and if error is found, then for harmless error. *Id.* (remanding for a new trial where an unredacted, and clearly prejudicial, exhibit was inadvertently included in the exhibits given to the jury during deliberations). Miss does not argue that this standard applies to any of the allegations in this case. Even were we to apply this standard, which arguably only might apply to the claim of juror misconduct, we are persuaded that Miss's claims would still fail. *See Merritt*, 367 Md. at 31-32 ("In the case at bar, the result would be the same whether the denial of the motion for a new trial is reviewed under an abuse of discretion standard or under an error standard.").

> THE COURT: Here he comes. So, we got a note. Mr. Miss is now present with his attorney, Mr. Cooke. The – I read the note to the attorneys. I didn't want to do anything until you got here, Mr. Miss. The note says, "What is the item of attempted theft on Verdict Sheet 7 – No. 7?" Number 7 on the Verdict Sheet is the charge of attempted theft. In the charging document, it alleges it was an attempted theft of title to a truck.
>
> [PROSECUTOR]: Truck.
>
> THE COURT: So, I'm inclined to just add that language unless anybody wants to be heard any further.
>
> [PROSECUTOR]: No. I mean, it is in the indictment, so I don't think that's inappropriate.
>
> THE COURT: Okay.
>
> They haven't decided anything.
>
> [PROSECUTOR]: They're just asking one question, that's all.
>
> THE COURT: I'm going to just write it exactly as it's set forth in the indictment then. Bear with me one second. I just want to see what the language is they use. "Title to a truck being the property of Philip Balboni."
>
> Okay. Then unless anybody wants to say anything further, I'm going to go ahead and send this back.
>
> [DEFENSE COUNSEL]: Okay.

This issue was raised in the new trial motion, and was discussed at the ensuing hearing wherein counsel suggested that the court should have just advised the jury "that those kind of questions are questions of evidence, and should be decided by the evidence." The court ruled as follows:

> As to that issue, I think I have a little bit of a different take on it. I have not had the benefit of listening to the recording of the actual trial, but the way I understood the note

> and the way I think I presented it to counsel is, I've read it directly to them, gave them both the opportunity to respond. It says, "What is the item of attempted theft on Verdict Sheet 7?" And then I responded, "Title to a truck being the property of Phillip Balboni."
>
> That is not suggestive to the jury that they find guilt or innocence as to that, just that's the item of alleged theft. And what I took at it as, I looked at – went back and looked at the Verdict Sheet. It simply says, "Do you find the defendant guilty or not guilty of attempted theft, less than $1,000.00?"
>
> It probably should have read originally, "Do you find the defendant guilty or not guilty of attempted theft of a title to a truck, being the property of Phillip Balboni," when it went back the first time. But all I did was clarify it, and the clarification that I made doesn't suggest to the jury one way or the other, how they ought to find. It is identical to the charge that was brought. I went back and looked at the Indictment and the Indictment actually reads, Count 9, "The Grand Jury charges the aforesaid Defendant on or about the aforesaid date that he did unlawfully attempt to steal a title to truck, being the property of Phillip Balboni, having a value of less than $1,000.00."
>
> So all I did was clarify as to what issue they weren't supposed to resolve. So the combination of that and the lack of any opposition from the defense, I'm going to decline to grant you a new trial on that ground.

Initially, we note, as did the court, that no objection was made during trial to the response to the jury note. The court did not abuse its discretion in taking that fact into account in denying the motion. *See Torres*, 95 Md. App. at 134 ("[T]he short answer to the claim is that the appellant has advanced no reason why he could not have raised at trial the issue he later raised in his motion for a new trial").

As for the merits, Miss is challenging the content of the court's response. Maryland Rule 4-325 allows for supplemental instruction, and our review of such an instruction is

whether the court abused its discretion. *See* Md. Rule 4-325(a), (c); *Sidbury v. State*, 414 Md. 180, 186 (2010) ("The decision of whether to give supplemental instructions is within the sound discretion of the trial judge and will not be disturbed on appeal absent a clear abuse of discretion") (citations omitted).

In this case, Miss was charged in Count 9 of the Indictment as follows:

> ATTEMPTED THEFT: LESS $1.000 VALUE
>
> THE GRAND JURY charges the aforesaid defendant, on or about the aforesaid date, did unlawfully attempt to steal a title to truck being the property of Phillip Balboni, having a value of less than $1,000, in violation of CR 7-104 of the Annotated Code of Maryland. (CR 7-104) (Penalty – 18 months/$500) (ATT. THEFT: LESS $1,000 VALUE '1A0621)

As the State reminds us, the court could have sent the exact same language back to the jury room had it sent the charging document instead. *See* Maryland Rule 4-326(b) ("Unless the court for good cause orders otherwise, the jury may also take the charging document and exhibits that have been admitted in evidence, . . . On request of a party or on the court's own initiative, the charging documents shall reflect only those charges on which the jury is to deliberate").

Nevertheless, Miss cites *Fields v. State*, 172 Md. App. 496, 513 (2007), for the proposition that the court should have responded that the jury was to "decide the case on the evidence." Actually, Miss cites to a portion of *Fields* where this Court primarily considered whether a jury communication was revealed to the parties on the record in open court, as is mandated by Maryland Rule 4-326(d), and not the contents of the court's response to that communication. *Id.* Regarding the contents, we are guided by the Court

of Appeals's decision in *State v. Baby*, 404 Md. 220, 263 (2008), where the Court explained that "a trial court must respond to a question from a deliberating jury in a way that clarifies the confusion evidenced by the query when the question involves an issue central to the case." *See also Appraicio v. State*, 431 Md. 42, 44 (2013) ("Any answer given must accurately state the law and be responsive to jurors' questions without invading the province of the jury to decide the case"). We are persuaded that the trial court's response, taken directly from the indictment, was a proper exercise of discretion and the motion court did not abuse its discretion in denying the motion for new trial on this ground.

B. The Court Properly Exercised Its Discretion In Denying The Motion For New Trial Based On Defense Counsel's Closing Argument.

Miss next argues a new trial is required based on trial counsel's closing argument. The pertinent portion of that argument is as follows:

> Members of the jury, I wasn't planning on drawing any pictures, but I want to keep my options open. These are extremely serious charges, very serious charges against Mr. Miss.
>
> The unfortunate thing for the prosecutor is that it is not backed up by serious evidence, in particular, the witnesses, and I draw attention to two of the witnesses. Mr. Medford and Mr. Balboni are not serious witnesses who offered testimony that is anywhere close to sufficient to convict a citizen in our society.
>
> Starting first with Mr. Balboni – because this case really does hinge on him and his credibility or lack thereof – *what do we know about Mr. Miss*? Well, he admits that – he essentially admits that he took advantage of Mr. Miss' mom, that she bought him this truck, that the intent was that he would work and pay her back, and that was not happening. He was living in a house that was being foreclosed upon, and he was not

> contributing anything to their relationship or to paying back his truck.
>
> *We know that Mr. Miss has been convicted of giving false statements to a law enforcement officer*. Think about that for a moment. He has been charged with and found guilty of lying to the police. And yet, so much of this case, when the State is asking you to find him – find Mr. Miss guilty beyond a reasonable doubt, hinges upon the testimony of someone who is guilty of lying to law enforcement.

And later:

> *What else do we know about Mr. Miss? He actually lied to you on the stand, and let me tell you why*. When I asked him directly, "I see you have a lot of pictures here today. Did you bring any pictures of your injuries," instead of saying, "No, there weren't any injuries," he said -- and I wrote this down -- "Maybe the police might have them."[4]

During the hearing on the motion, Miss's counsel argued that the jury should not have "heard without a correction" this improper argument. The State responded that, not only is closing argument not evidence, but also there was no evidence admitted during trial that Miss had any prior convictions. At most, this was a "misstatement" by Miss's trial counsel and was not a proper ground for a new trial. After hearing additional argument, the court deferred ruling until the sentencing hearing. At that time, the court denied the motion, stating, "What I told the jury and made it abundantly clear then, is that if their memory were to differ from anything that either of the attorneys might say to them, that they would have to rely on their own memory of whatever the facts were that were presented."

[4] Actually, Miss exercised his right not to testify.

We discern no abuse of discretion in this case. Notably, the prosecutor twice reminded the jury that Balboni had a prior conviction during closing argument. And, the trial court instructed the jury that, not only was closing argument not evidence, but also, "if your memory of the evidence differs from anything the attorneys might state to you, you must, in fact, rely on your own memory of the evidence." *See also* Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 3:00, at 229-30 (2012).

Our decision is supported by the fact that the motions court also presided over the trial, and given the well-established precept that "[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)). Further, "we do not disturb the trial judge's judgment in that regard unless there is a clear abuse of discretion that likely injured a party." *Id*.

Indeed, "[a]lmost anyone can make a slip of the tongue . . ." *Paige v. State*, 222 Md. App. 190, 199 (2015) (quoting *Reed v. State*, 225 Md. 566, 570 (1961)). Even if the jury were to have somehow given credence to this clear slip, we are persuaded that this unobjected-to incident was best left to the discretion of the circuit court. As this Court recognized in *Burks v. State*, 96 Md. App. 173, *cert. denied*, 332 Md. 381 (1993), the trial court has a "superior coign of vantage" in assessing the impact of any error:

> In considering whether, in the first instance, any of the remarks attributed to the prosecutor had the effect of unfairly creating prejudice against the defendant, recognition must be given to the fact that the trial judge, who presides in the arena where the forensic adversaries are engaged, is in the best position to evaluate and assess - in the context in which the

> remarks are made and their relationship to other factors in the trial - whether they were in fact prejudicial.

Burks, 96 Md. App. at 189-90 (quoting *Wilhelm v. State*, 272 Md. 404, 429 (1974)). The trial court did not abuse its discretion in denying the motion on this ground.

C. The Court Properly Ruled That There Was No Objection To Medford's Reading Of His Prior Statement And Did Not Abuse Its Discretion In Denying The Motion For New Trial.

Miss next challenges the court's ruling permitting the State to treat Medford as a hostile witness and then letting him read portions of his statement to the police. Acknowledging that trial counsel did not object on the latter grounds, Miss asks again that we grant him a new trial in the interest of justice.

At trial, Medford began his testimony by indicating that he was home at around midnight on the night in question. Then, the prosecutor handed Medford a copy of his prior statement to the police, without objection. Medford "refresh[ed] his recollection" by reading the statement, and agreed he signed the statement.

After he was asked whether he saw Miss on the night in question, Medford testified, "It had more – I want to say my statement is somewhat the beginning of it is wrong, because I did not witness them actually enter the house. I was sleeping at the time they entered the house." When asked what he told the police, Medford testified as follows:

> Q. Okay. You know, the statement that you gave, what did you tell the police happened on that day?
>
> A. I pretty much told them, you know, there was an argument over the keys and the title for the truck, you know, pretty much. You know, it was a pretty heavy argument. There was an altercation between the two. I mean, as far as I know. Like I

said, I was laying down sleeping at the time this was going on. I heard most of it and then, you know–

Q. Well, let me just ask you the question. Did – was Philip willing to give the keys?

A. No.

Q. Was he refusing to give away the keys and title?

A. Yes, sir.

Q. Okay. And when he refused to give the title, what did Robert Miss say?

A. Well, he was just trying to tell him to do the right thing, you know, to listen, because it's a long back story, but, I mean, at the time really the truck, in a way, was bought for Phil but in a way, I mean –

Q. But I want you to look at the statement that you gave the police on May 28th.

A. Yes, sir.

Q. What did you say – and did you have a chance to look at it?

A. Yeah.

Q. Okay. Did you tell the police that Robert Miss was threatened?

At this point, Miss's counsel objected that the prosecutor was leading the witness, and the prosecutor agreed to rephrase the question. Then, the following testimony ensued:

Q. How would you characterize the words that Robert Miss was directing at Phil and you?

A. I mean, I guess you could – he was angry somewhat, a little bit. Could understand the anger, where that was coming from –

Q. Okay.

A. – completely.

Q. And what did you see Robert Miss do to Philip at that point?

A. To be honest, I didn't see anything. I was laying down at the time – just what I heard. What I wrote down was pretty much was going – what I was hearing.

After Medford's prior statement to the police was marked for identification, the prosecutor asked Medford to read aloud the following from his statement, "Robert Miss began threatening Phil and eventually began to strangle him."[5] Before Medford could respond, Miss's defense counsel again objected on the same ground that the prosecutor was leading the witness, and the court sustained the objection. The prosecutor continued:

Q. What did you tell the police about Robert Miss's tone of voice and what Robert Miss did?

A. As in where? I'm sorry. Can you – just how he began threatening him and began to strangle him.

Q. What else did you tell him – tell the police about what they did?

A. I – they – from the point I know after most of that went on, you know, they were like, well, let's go get the title, you know.

Q. And when he refused to give them the title, what do they do?

A. They – well, they threatened to tie him up and throw him in the trunk.

Q. And then – and then what happened?

A. I put – and they began to strangle Phil again –

[5] The statement was not admitted into evidence.

Miss's counsel again objected, and a bench conference ensued:

> [DEFENSE COUNSEL]: I'm unclear is [sic] the State is trying to elicit his testimony as it being true or he's trying to impeach his prior – impeach him in a prior inconsistent statements. If he's trying to, you know, impeach him on a prior inconsistent statement, particularly (indiscernible) statement. I think that there's a way to do that. I don't think that this is quite it.
>
> [PROSECUTOR]: Well, (indiscernible) a 2.1. I mean, there's many ways we feel about this. I can ask him a question if he were – but I think at the same time I'm asking about a misstatement. I believe it is substantive evidence, you know?
>
> THE COURT: It's a little bit leading. It's a little bit trying to treat him as a hostile witness. It's a little bit trying to impeach him.
>
> [PROSECUTOR]: I would ask at this point to treat him as a hostile witness pursuant to 5.6.11. [sic]
>
> THE COURT: I have (indiscernible).
>
> [PROSECUTOR]: Sure.
>
> THE COURT: (Indiscernible). We'll (indiscernible) and treat him as a hostile witness.
>
> [DEFENSE COUNSEL]: All right. I just – objection.
>
> THE COURT: (Indiscernible) objection. You can treat him as a hostile witness (indiscernible) ask questions after that.

Thereafter, and without further objection, Medford gave a series of short "yes" or "no" answers that substantially agreed with the prosecutor's characterization of his prior statement. Medford testified that Miss entered the house with an unknown male. These two began asking Balboni for the keys and title to his truck. After Balboni refused, Miss threatened and strangled Balboni. Miss and the unknown male also threatened to tie

Balboni up and throw him into the trunk of a Nissan Altima. After Balboni again refused, the men held him down and took the keys to the truck from Balboni's pocket. When they could not find the title, the men forced Balboni to leave the house with them. Medford agreed that was the signed statement he gave to the police on the night in question.

On cross-examination, Medford agreed he was using a "lot of drugs" at the time, but he was not "high" that evening. He also agreed that "I didn't really want anything to do with this case whatsoever. I didn't even want to be here." He also testified that he was still on probation and was concerned that, if he was found to have given a false statement, that would be a violation of probation. Moreover, Medford clarified that the house was in foreclosure the night of the incident and that he was only going to remain there for about another week.

Turning to the motion for new trial hearing, there, for the first time, Miss's counsel challenged the use of Medford's prior statement because it tended to "substantiate the testimony beyond what he would just give in court." This amounted to improper bolstering of Medford's credibility and, to the extent that there was no objection by defense counsel, it was in the interest of justice to grant Miss a new trial.

The State responded by reminding the court that it permitted the State to treat Medford as a hostile witness and to ask leading questions. Although there was an objection to treating Medford as such, the State also noted that there was no subsequent objection to the questions asking Medford specific, leading questions about his prior statement. The court simply denied the motion on this ground because trial counsel did not "properly object to that."

As Miss acknowledges, trial counsel's objection to Medford's testimony was limited to the leading nature of the prosecutor's questions, which objections the court sustained, and to permitting the State to treat Medford as a hostile witness. Miss did not raise the claim of improper bolstering by the examination about Medford's prior statement. Again, we conclude the court did not abuse its discretion in denying the motion for new trial on these grounds when there was no similar objection offered during the trial. *See Isley*, 129 Md. App. at 619; *see also* Md. Rule 8-131 (a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court. . . ."); *Stewart-Bey v. State*, 218 Md. App. 101, 127 (2014) (limiting appellate review to "the ground assigned" in the objection during trial) (citation omitted).

Furthermore, even addressing the issue on the merits, Maryland Rule 5-607 provides that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." Moreover, Maryland Rule 5-611(c)(2) provides:

> The allowance of leading questions rests in the discretion of the trial court. Ordinarily, leading questions should not be allowed on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily, leading questions should be allowed (1) on cross-examination or (2) on the direct examination of a hostile witness, an adverse party, or a witness identified with an adverse party.

It is arguable that Medford was, at least, a difficult witness, if not completely a hostile one. As the State observed, Medford did testify that parts of his prior statement were wrong. Ultimately, we are persuaded that this is a discretionary call that is best left to the judge in the arena. *See generally, Scarborough v. State*, 50 Md. App. 276, 282 (1981)

(applying an abuse of discretion standard to a question whether a witness was a hostile witness).

We also conclude this was not a case of improper bolstering of a witness by the State. To the extent that Miss is really challenging the prior statement as a prior consistent statement that bolstered Medord's trial testimony, Maryland Rule 5-616(c)(2) permits rehabilitation of a witness whose credibility has been attacked by evidence of prior statements that are consistent with the witness's present testimony, "when their having been made detracts from the impeachment." The rule suggests three prerequisites prior to admission of a prior statement as nonsubstantive evidence concerning a witness's credibility: "(1) the witness' credibility must have been attacked; (2) the prior statement is consistent with the trial testimony; and (3) the prior statement detracts from the impeachment." *Hajireen v. State*, 203 Md. App. 537, 555, *cert. denied*, 429 Md. 306 (2012); *see also Thomas v. State*, 429 Md. 85, 97 (2012) (Under this rule, "a witness's prior consistent statements are admissible, not as substantive evidence, but for nonhearsay purposes to rehabilitate the witness's credibility").

Miss's challenge to Medford's credibility began in his opening statement, when trial counsel observed "there will be evidence of Mr. Balboni's credibility and Mr. Medford, if the State calls him, on his credibility or lack thereof in this case." Counsel continued his theory of the case against Miss as follows, "And so essentially what the State's going to offer you is the testimony of two liars, and ask you to convict beyond a reasonable doubt on that, and I'm going to ask you at the end to find that that is nonsufficient and that what they are saying is not true." Under these circumstances, we are persuaded that Medford's

prior statement could be used for the limited purpose of anticipatory rehabilitation of his credibility.

Finally on this issue, we conclude, even if there was error in the trial court's ruling, any error was harmless beyond a reasonable doubt. *See Dionas v. State*, 436 Md. 97, 108 (2013) (An error is harmless when a reviewing court is "satisfied that there is no reasonable possibility that the evidence complained of -- whether erroneously admitted or excluded -- may have contributed to the rendition of the guilty verdict") (citations omitted). Although Medford was called to corroborate Balboni's account, ultimately, this case rose or fell with Balboni's testimony. Medford was primarily a cumulative witness. *See Dove v. State*, 415 Md. 727, 743-44 (2010) ("Evidence is cumulative when, beyond a reasonable doubt, we are convinced that "there was sufficient evidence, independent of the [evidence] complained of, to support the appellant['s] conviction[]") (citation omitted).

Notably, Medford offered similar evidence as that being challenged now. During his testimony, Medford testified generally about what occurred, even without the State's specific reference to the statement. Before the State was permitted to treat Medford as a hostile witness, Medford confirmed that "there was an argument over the keys and the title for the truck, you know, pretty much. You know, it was a pretty heavy argument. There was an altercation between the two." The jury also heard, during Medford's initial testimony, that Balboni refused to provide the keys and title to the truck. We conclude the court properly exercised its discretion in denying the motion for new trial based on Medford's testimony.

D. The Court Did Not Abuse Its Discretion In Denying The Motion Alleging Juror Misconduct.

Finally, Miss asserts that the court abused its discretion in denying the motion because one of the jurors knew him and had employed Miss on a prior occasion. The State responds that any misconduct was a result of Miss's own doing by failing to inform the court of this information, and there was no demonstration that Miss was prejudiced by the juror's inclusion on his jury.

This issue did not develop until after trial, when Miss filed and argued his new trial motion. At the motions hearing, Miss's counsel informed the court, for the first time, that a "seated juror actually knew the Defendant" and "had done business with the Defendant as recently [sic] the month before, during the month prior to this trial . . ." Counsel clarified that the business was "contracting to do work on homes, put roofs on homes, stuff like that," and suggested that "[a]nd is often typical, the relationship was not completely amicable, Your Honor." Miss's counsel then argued "[w]hat I think is a significant issue, is that you had a juror with questionable motives, we'll never know, but you had a juror lie to the Court about not knowing the Defendant."

Miss's counsel also stated "This juror was excused and brought back, Your Honor." The court inquired further about this information:

> THE COURT: What do you mean he was excused and brought back? You lost me there for a minute.
>
> [DEFENSE COUNSEL]: Apparently, defense counsel excused him and then decided no, juror number is [sic] acceptable and he ended up being seated.

> THE COURT: That was after a discussion with the Defendant. The Defendant wanted it.
>
> [DEFENSE COUNSEL]: Exactly.[6]

Defense counsel continued:

> [DEFENSE COUNSEL]: So the bottom line is that this juror lied to the Court saying he didn't even know the Defendant and then he was allowed to be seated, when in fact he did not just know him, but he had financial dealings with him as ear – as close as a few days before the trial.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: And going back at least a year, significant financial dealings in a contractor, contractee type relationship with some issues therein, that he never disclosed to the Court. So I could argue that the defense attorney mishandled it and certainly that's a – probably a whole another motion about how that was mishandled.
>
> THE COURT: How do we know now that he knew your client? Because your client says he knew him?
>
> [DEFENSE COUNSEL]: Correct.
>
> THE COURT: Your client says he knew the juror. So the only one who would have been – assuming that's true, that would have been in that position to know that in advance or at the time of jury selection, would be your client.

The prosecutor responded, in part, as follows:

> [PROSECUTOR]: Your Honor, my recollection is this. The way it played out is that there was a – there was a – we had discussed something with the juror, and if I'm thinking about the correct juror, and I assume that I am at this point, there was a statement that he gave and you said at that point, "I'm going

[6] We note that Miss was represented by different counsel at the motions hearing and at trial.

> strike juror," number whomever, "for cause." And then as he was being sent away, there was – and I wasn't privy to the conversation defense counsel was having with his clients.
>
> THE COURT: Nor was I.
>
> [PROSECUTOR]: You were up there. You were up –
>
> THE COURT: No, I mean they talked privately. I didn't hear what they were saying.
>
> [PROSECUTOR]: They talked privately, that's correct.
>
> THE COURT: Right. We were all at the bench, I got it.
>
> [PROSECUTOR]: And they said – they said, no –
>
> THE COURT: We don't – we don't want him stricken for cause.
>
> [PROSECUTOR]: – we don't want to strike him. And defense counsel even made a comment to me, "I don't believe my client really wanted that juror on the panel." I don't know, Your Honor. But in any event, the Defendant lacks clean hands in this. The State would have absolutely no way of knowing there was any relationship whatsoever. You can't then get buyer's remorse and complain that you didn't speak up at the time when you knew something was wrong.
>
> THE COURT: All right.
>
> [PROSECUTOR]: Just as it would be wrong for the State to sit on information that they know a juror that doesn't step up and say "hey, I know these people."
>
> I don't know one way or the other, Your Honor. There's no real testimony on the record under oath that there was any real relationship. But even if it's taken at face value, that's not a basis to invalidate the verdict of 12 jurors.

After this, defense counsel maintained that the juror lied to the court by not informing the court that he knew Miss. The court replied there was no evidence that the

juror lied under oath. But, defense counsel continued to suggest that there were recent business dealings between this juror and Miss involving putting a "whole roof [on] the guy's pool house a year before, with similar issues related to the quality of work and the price[.]" Counsel also insisted that the juror hired Miss "[t]o move construction materials from one location to another inside his private house on a construction site[.]"

At one point, counsel then suggested that he could call the juror as a witness. But, he also immediately questioned his own suggestion when he stated that would be "fairly inappropriate."[7] Without any actual evidence, the court replied that it could only speculate about the relationship, and that his recollection was that the juror did not say he knew Miss, to which defense counsel agreed.

The court deferred ruling on this ground until sentencing. At that subsequent hearing, the court found as follows:

> I did go back – a couple of comments. I went back and listened to the recording of the proceedings when we were selecting the juror. I was told it was Juror No. 8. That person was actually Panel Juror No. 15. That juror was originally stricken for cause. (buzzing noise) If you have a phone, can you turn it off? Thank you – stricken for cause the request of defense counsel, Mr. Cooke. When that juror approached the bench and said something along the lines of he was more likely to believe the testimony of a police officer when compared to that of a lay witness and I granted the request made by defense counsel. At 11:05 a.m. and 40 seconds, I marked down the time, you could hear Mr. Cooke and the Defendant whispering. You couldn't, you could not hear exactly what they were saying, and I toyed with the recording as best I could. I did respond to the next juror, the one who was approaching the

[7] Although defense counsel identified the name of the juror he alleged committed misconduct, the juror was not called to testify on the motion.

> bench, to hold off, meaning not to approach the bench. Mr. Cooke, after about 30 to 45 seconds of whispering with his client, asks me if Juror No. 15, Panel No. 15, had been stricken for cause. I said yes, and I reiterated why he had been stricken for cause. Mr. Cooke then indicated he wanted to withdraw his request to strike that juror for cause, and specifically, that he did not want that juror stricken. The State indicated it had no objection. I used the words, "All right, No. 15 is back in play," meaning that juror is now available, he's not stricken for cause. I then asked Mr. Cooke if he wanted to reconsider any of the others that we had stricken for cause, and he said, no.
>
> So again, the only evidence I have is that which was placed on the record. I had no idea the Defendant alleges that he knows that juror through counsel. I have no way of knowing for certain whether that juror knew the Defendant. But it's abundantly clear to me that something happened, and based on that argument that was presented for, the Defendant did in fact know that juror.

The court then continued:

> So I did a little research and basically what my research seems to suggest is that by the Defendant – you know this is a juror who was originally stricken for cause, "The Defendant waives his right to complain about the verdict when he knew the juror in advance and he failed to disclose that information to the Court." Meaning the Defendant is as or more responsible than anyone for the juror being on that – getting to – the Panel Juror getting onto the actual trial jury.
>
> If there was a relationship or an adverse relationship, the Defendant certainly could have notified the Court. He chose not to. He rolled the dice and took a chance with that juror, and unfortunately, things didn't work out for him.
>
> So the motion for new trial based on that is denied as well. Had that issue been brought up prior to the jury returning a verdict, I may have felt differently. I could have replaced that person with an alternate. But the Defendant waited until after the verdict was reached, and I think he's waived his right to complain about that.

Okay. So overall, the motion for new trial is denied.

A criminal defendant's right to be tried by an impartial jury, "is one of the most fundamental rights under both the United States Constitution and the Maryland Declaration of Rights." *Dillard v. State*, 415 Md. 445, 454 (2010) (quotation marks and citation omitted); *see also Jenkins v. State*, 375 Md. 284, 300 (2003) ("In summary, we have long recognized that these provisions of the United States Constitution and the Maryland Declaration of Rights guarantee that a criminal defendant requesting a trial by jury will be tried fairly by an impartial jury"). "Implicit in the right to an impartial jury trial is the right to have the jury's verdict be 'based solely on the evidence presented in the case." *Johnson v. State*, 423 Md. 137, 148 (2011) (quoting *Couser v. State*, 282 Md. 125, 138 (1978)). "Because a trial judge is in the best position to evaluate whether or not a defendant's right to an impartial jury has been compromised, an appellate court will not disturb the trial court's decision on a motion for mistrial or a new trial absent a clear abuse of discretion." *Allen v. State*, 89 Md. App. 25, 42-43 (1991); *see also Jenkins*, 375 Md. at 298-99 (applying abuse of discretion standard to allegation of juror misconduct); *Eades v. State*, 75 Md. App. 411, 420 (1988) ("The trial judge's discretion extends to matters concerning juror misconduct or other such irregularity in the conduct of others which may affect the jury"), *cert. denied*, 313 Md. 611 (1988).

Miss cites *Scott v. State*, 175 Md. App. 130 (2007), and we agree that case is instructive. There, the alleged misconduct was the juror's failure affirmatively to respond when, on *voir dire*, the court asked the prospective jurors whether anyone knew the defendant. At the close of the evidence, the accused had intimated to his counsel that he

knew the juror. *Id.* at 138. Defense counsel did not bring this to the attention of the court at that time, although, when the motion for a new trial was heard, he acknowledged that he should have done so. *Id.* at 139. After the verdict was rendered adversely to Scott, the juror misconduct issue was raised for the first time by motion for a new trial. Citing numerous cases in support of its ruling, this Court held:

> The failure of *voir dire* to disclose potentially disqualifying information does not, in all cases, entitle the defendant to a new trial. When a defendant is aware that a prospective juror has failed to disclose information that is sought by *voir dire*, and fails to alert the trial court of that fact until after the verdict, he has waived the right to later complain. We find no abuse of discretion in the trial court's denial of Scott's motion for a new trial.

Id. at 146-47; *see also United States v. Desir*, 273 F.3d 39, 43 (1st Cir. 2001) (underlying the waiver principle is the policy that any other rule would allow the accused to "sandbag the court").

Here, none of the prospective jurors indicated that they knew Miss. There was also no response when the court asked if any prospective juror knew anything about this case, had formed an opinion about Miss's guilt, or felt that the nature of the case would prevent them from being fair and impartial.

As for the specific juror of concern, the court identified that juror by number as Juror Number 15. Juror Number 15 informed the court, during the *voir dire*, that he had been the victim of a crime, namely the theft of $8,000 worth of tools. This juror also stated that he knew a lot of police officers and that he would tend to believe a police officer before other witnesses.

Later, towards the end of *voir dire*, when the court was summarizing who should be struck for cause, the following transpired:

> UNIDENTIFIED ATTORNEY NO. 2: Are you talking about 15, whether he was struck?
>
> THE COURT: I don't recall who 15 was, and now we're up to 28, but you asked that he be stricken for cause.
>
> UNIDENTIFIED ATTORNEY NO. 2: Yes.
>
> THE COURT: Because you said (indiscernible) of a police officer, but –
>
> UNIDENTIFIED ATTORNEY NO. 2: I would have no objections to withdrawing that.
>
> THE COURT: So you do not want 15 stricken for (indiscernible)?
>
> UNIDENTIFIED ATTORNEY NO. 1: (Indiscernible).
>
> THE COURT: Do you want to talk about that in (indiscernible)?
>
> UNIDENTIFIED ATTORNEY NO. 2: No, Your Honor.

The court again later confirmed that Miss's request to strike Juror Number 15 was withdrawn. Then, during jury selection, the following ensued:

> THE COURT: Juror No. 15, have you formed or expressed an opinion as to the guilt or innocence of the Defendant?
>
> JUROR No. 15: No, I have not.
>
> THE COURT: Do you believe you could render a fair and impartial verdict in the case?
>
> JUROR No. 15: Yes, I can.
>
> THE COURT: State?

[PROSECUTOR]: Acceptable juror.

[DEFENSE COUNSEL]: Acceptable, Your Honor.[8]

Here, we are not persuaded that the court abused its discretion in denying the motion for new trial on this ground. There was no showing in the record that the juror knew Miss. Further, the juror stated he could be fair and impartial. The only concern this juror had, which was the cause for the original, but withdrawn, motion to strike, was his acknowledgment that he might favor the testimony of a police officer. Although police officers testified in this case, their testimony was secondary to Balboni's, and unlikely to prejudice Miss to such extent that he was denied a fair trial. We conclude that there was no abuse of discretion in the court's decision to deny Miss's motion for a new trial.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[8] Miss's counsel stated that he was satisfied with the jury as selected.