UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 478

September Term, 2016

AWA DULLEH

v.

STATE OF MARYLAND

Beachley,
Shaw Geter,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: June 20, 2017

A jury in the Circuit Court for Montgomery County convicted Awa Dulleh, appellant, of two counts of robbery with a dangerous weapon and two counts of conspiracy to commit robbery with a dangerous weapon. Appellant was sentenced to a term of ten years' imprisonment on one of the robbery convictions and a consecutive term of ten years' imprisonment on the other robbery conviction. Appellant was also sentenced to a concurrent term of ten years' imprisonment on one of the conspiracy convictions and another concurrent term of ten years' imprisonment on the other conspiracy conviction. In this appeal, appellant presents the following questions for our review:

1. Did the trial court err in admitting evidence of the victims' level of certainty that appellant was their assailant?

2. Did the trial court err in limiting appellant's closing argument?

3. Did the trial court err in sentencing appellant on multiple conspiracy counts?

For reasons to follow, we answer questions 1 and 2 in the negative and question 3 in the affirmative. Accordingly, we vacate one of appellant's convictions and sentences for conspiracy. Otherwise, we affirm the judgments of the circuit court.

BACKGROUND

On March 13, 2014, Melanie Levy and her friend, Maria Shea, were at Levy's home when Levy received a text message from someone claiming to be "a friend." This "friend," later identified as Nikkoi Wiltshire, asked Levy if she "had any marijuana," and Levy responded that she did. Levy then provided Wiltshire with her home address and told him to contact her "when he was outside."

After a brief period, Levy heard a knock at the door and answered it. At the door was an individual, whom Levy did not recognize, dressed in "a tan work suit and a dark jacket." When Levy asked the individual "how can I help you," the individual, whom Levy later identified as appellant, responded that he was there "to check the furnace." After being invited inside, appellant went to where the furnace was located and tried to open it, but Levy's mother informed him that he needed a key. Appellant then stated that he "left the key in the truck" at which time he left the apartment.

Soon thereafter, Levy received another text message from Wiltshire, and the two agreed to meet at a nearby shopping center. Levy and Shea then left the apartment and drove to the shopping center. Upon reaching the shopping center, Shea, who was driving, parked her vehicle in the shopping center's parking lot, and Levy, who was in the vehicle's passenger seat, sent a text message to Wiltshire asking where he was located. Not long after, a Nissan Altima pulled into the parking lot and parked near Shea's vehicle, and Wiltshire emerged from the Altima's driver's side. Wiltshire then approached Shea's vehicle and got into the vehicle's backseat, at which time Levy gave Wiltshire a bag of marijuana.

As Wiltshire was inspecting the bag of marijuana, appellant approached the driver's side of Shea's vehicle and tapped on the window. When Levy looked up, appellant, who was brandishing a gun, told Shea to "roll down the window" and "open the door." After Shea opened the door, appellant leaned into the car, placed the gun against Shea's temple, and demanded that both Levy and Shea hand over their belongings, which they did. Wiltshire then got out of the car, and he and appellant ran back to the Altima, where they

met a third individual, later identified as Dimetri Frank, who had helped facilitate the robbery. The three men fled the scene in the Altima, absconding with Levy's purse and iPhone, Shea's purse and iPhone, and the bag of marijuana. Appellant was ultimately arrested.

At trial, both Frank and Wiltshire testified that the three men – Frank, Wiltshire, and appellant – had arranged the meeting with Levy and Shea for the purpose of robbing them. Both Frank and Wiltshire also testified that appellant was the individual who approached Shea's vehicle after Wiltshire had entered the vehicle's backseat, and Wiltshire testified that he and appellant, both of whom were brandishing guns, took the women's purses and the bag of marijuana.

Levy and Shea also testified, and both women identified appellant as the same individual who had come to Levy's home to "check the furnace" and who later robbed them at gunpoint. During his cross-examination of Levy, defense counsel exhaustively challenged Levy's recollection of events, all the while noting inconsistencies between Levy's trial testimony and statements she gave to police immediately after the robbery. At one point, defense counsel noted that Levy informed the police that the person with the gun was wearing a red shirt and asked whether she was "absolutely sure" that the person with the gun was wearing a red shirt. Defense counsel also questioned Levy about her in-court identification of appellant, noting that she had previously been shown a photographic array and had failed to identify the person who robbed her.

On redirect, the State questioned Levy about her level of certainty in identifying appellant at trial:

[STATE]: All right. And with respect to your identification of the defendant as the person with the long silver handgun, are you confident about that identification that that was him that day in the apartment and outside the car?

[WITNESS]: Yes.

[DEFENSE]: Objection.

THE COURT: Overruled.

During his cross-examination of Shea, defense counsel likewise challenged Shea's credibility by noting inconsistencies between her trial testimony and prior statements she had given relative to the robbery. Defense counsel also challenged the validity of Shea's in-court identification, noting that Shea had never been shown a photographic array and that she only identified appellant as the robber after seeing him at a prior court hearing.

On redirect, the State asked Shea about her in-court identification:

[STATE]: All right. And with respect to the person with the tan jumpsuit inside the apartment, and the person who was aiming the [revolver] at you, do you have any doubt whatsoever that that was the same person?

[DEFENSE]: Objection. Leading.

THE COURT: Overruled.

[WITNESS]: No doubt.

[STATE]: All right. And do you have any doubt whatsoever that the person that you just identified as a perpetrator who pointed the revolver at you is the person who pointed that revolver at you?

[DEFENSE]: Same objection.

THE COURT: Overruled. Go ahead.

[WITNESS]: Yes, sir.

[STATE]: Okay. You have no doubt?

[WITNESS]: No doubt.

Later, during closing argument, defense counsel commented on the fact that Levy's mother was not called as a witness:

> [DEFENSE]: And by the way…where is Melanie Levy's mom? According to Ms. Shea she got a pretty good chance after she had a conversation with this maintenance man or janitor, had a pretty good conversation. It sounds to me that she was pretty much the only adult in the real sense of the world [sic] and you are entitled to assume that the fat [sic] that she's not around because her presence would not have been –
>
> [STATE]: Objection.
>
> THE COURT: Sustained.
>
> [STATE]: I move to strike, Your Honor. Can we approach?
>
> THE COURT: No, keep arguing and talk about the evidence.

Defense counsel then continued with closing argument by moving on to a different topic. Appellant was ultimately convicted, and this timely appeal followed.

DISCUSSION

I.

Appellant first argues that the trial court erred in permitting Levy and Shea to testify as to their level of certainty in identifying appellant as the man who came to Levy's apartment and later robbed them. Appellant contends that such evidence "is of so little probative value as to be misleading to a jury." While recognizing that no Maryland court

has ever held that level-of-certainty testimony is inadmissible, appellant maintains that other authorities have suggested that the correlation between a witness's confidence and the accuracy of their testimony is "highly questionable."

The State counters that appellant's claim is not preserved for our review because the grounds on which defense counsel objected at trial are different from those raised in the instant appeal. The State maintains that when defense counsel objected the first time during Levy's testimony, he did so generally, which normally would preserve all grounds for review. The State notes, however, that when the exact same question was posed during Shea's testimony, defense counsel offered specific grounds, namely, that the question was "leading." The State avers, therefore, that appellant's claim of error "was waived with regard to Shea, and should be held harmless or waived with regard to Levy, when it was not presented two of the three times that [appellant] had the opportunity to raise it at trial." The State also avers, in the alternative, that the trial court did not abuse its discretion in admitting Levy and Shea's testimony as "appraisals by an eyewitness of his or her certainty or lack of certainty in making an identification go to the weight of the evidence and thus are properly admitted for the jury's consideration."

We agree, in part, with the State's waiver claim. "[W]hen particular grounds for an objection are volunteered or requested by the court, 'that party will be limited on appeal to a review of those grounds and will be deemed to have waived any ground not stated.'" *State v. Jones*, 138 Md. App. 178, 218 (2001) (internal citations omitted). During Shea's testimony, counsel stated that he was objecting because the State's question was "leading." When the State asked a similar follow up question, defense counsel made the "same

objection." At no time did defense counsel indicate that he was objecting because the question was irrelevant or prejudicial. Accordingly, that issue is not preserved for our review. *See* Md. Rule 8-131(a).

On the other hand, when defense counsel objected during Levy's testimony, he did not offer, and the court did not ask for, any grounds for the objection. Ordinarily, such a general objection is sufficient to preserve all claims of error. *See* Md. Rule 4-323(a). The State suggests, however, that appellant effectively waived this claim of error because, as previously discussed, defense counsel later provided specific grounds when objecting to the same question posed to Shea. In support, the State cites to the general proposition that an objection to evidence is waived if the same or similar evidence is presented to the fact-finder without objection at some other point of the trial.

We disagree with this portion of the State's argument. In each of the cases cited by the State, the Court of Appeals determined the issue to be unpreserved because counsel failed to lodge any objection when the same evidence was offered at some other point of the trial. *See, e.g., Yates v. State,* 429 Md. 112, 120 (2012) ("This Court has long approved the proposition that we will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury **without objection** through the prior testimony of other witnesses.") (quoting *Grandison v. State,* 341 Md. 175, 218-19 (1995) (emphasis in original); *DeLeon v. State,* 407 Md. 16, 31 (2008) ("Objections are waived if, at another point during the trial, evidence on the same point is admitted **without objection**.") (emphasis added); *Jones v. State,* 310 Md. 569, 588-89 (1987) (no prejudice found in the

admission of objected-to evidence where the same evidence had previously been admitted "**without objection**.") (emphasis added).

Here, defense counsel did not fail to object, but rather lodged a general objection to Levy's testimony and then offered specific grounds when objecting to Shea's testimony. In none of the cases cited by the State did the Court of Appeals hold that a particular issue was waived simply because counsel offered different grounds when objecting to the same or similar evidence at different points during a trial. In fact, this Court has held that a party does not automatically foreclose the possibility of appellate review of an initial objection if he later objects to the same piece of evidence on new or alternate grounds. *Bane v. State*, 73 Md. App. 135, 154 (1987). Accordingly, defense counsel's general objection to Levy's testimony was sufficient, under the circumstances, to preserve that issue for our review.

That said, we hold that the trial court did not err in admitting Levy's testimony. "It is frequently stated that the issue of whether a particular item of evidence should be admitted or excluded 'is committed to the considerable and sound discretion of the trial court,' and that the 'abuse of discretion' standard of review is applicable to 'the trial court's determination of relevancy.'" *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 619 (2011) (internal citations omitted). "Maryland Rule 5-402, however, makes clear that the trial court does not have discretion to admit irrelevant evidence." *Id.* at 620. Consequently, a trial court's evidentiary ruling encompasses both a legal and a discretionary determination, which in turn implicates two separate standards of review: (1) a *de novo* standard, which we apply to the trial court's legal conclusion that the evidence was relevant; and (2) an abuse of discretion standard, which we apply to the trial court's

determination that the probative value of the evidence is outweighed by any substantial prejudice. *State v. Simms*, 420 Md. 705, 725 (2011).

Evidence is relevant if it makes "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. In other words, evidence is relevant if it is both material and probative. "Evidence is material if it bears on a fact of consequence to an issue in the case." *Smith v. State*, 218 Md. App. 689, 704 (2014). "Probative value relates to the strength of the connection between the evidence and the issue…to establish the proposition that it is offered to prove." *Id.* (internal citations and quotations omitted). Generally, evidence that is relevant is admissible; evidence that is not relevant is not admissible. *See* Md. Rule 5-402.

Even if legally relevant, however, evidence may be excluded "if the probative value of such evidence is determined to be substantially outweighed by the danger of unfair prejudice." *Andrews v. State*, 372 Md. 1, 19 (2002). "We determine whether a particular piece of evidence is unfairly prejudicial by balancing the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case." *Smith*, 218 Md. App. at 705. On the one hand, evidence of a "highly incendiary nature" may be admissible if it provides significant aid to the jury's understanding of a fact in issue; on the other hand, similar evidence should not be admitted if the evidence's probative value is weak, particularly when the evidence "might produce a jury inference that the defendant had a propensity to commit crimes or was a person of general criminal character." *Id.* (internal citations and quotations omitted). "This inquiry

is left to the sound discretion of the trial judge and will be reversed only upon a clear showing of abuse of discretion." *Malik v. State*, 152 Md. App. 305, 324 (2003).

As noted, appellant argues that Levy's testimony was irrelevant and prejudicial because several authorities outside of Maryland have determined that the correlation between a witness's level of certainty and the accuracy of the witness's testimony is questionable. We find appellant's arguments unpersuasive. To begin with, we do not agree with appellant that our courts have yet to confront this issue. In *Mines v. State*, 208 Md. App. 280 (2012), we refused to grant plain error review under similar circumstances. In that case, a witness testified at trial that he told the police that he was "a hundred percent sure" that the defendant was the suspect. *Id.* at 302. On appeal, the defendant argued that the witness's degree of confidence had no correlation to the accuracy of his testimony, was not relevant, and was unfairly prejudicial. *Id.* In refusing to grant plain error review (the defendant failed to object at trial), we noted that "there was no error, much less plain error, in admitting [the witness's] testimony." *Id.* Citing prior cases from both this Court and the Court of Appeals, we explained that "[a] witness's degree of certainty is a proper consideration when evaluating his likelihood of misidentification." *Id.* (citing *Jones v. State*, 395 Md. 97, 109 n. 8 (2006); *James v. State*, 191 Md. App. 233, 253 (2010); *Turner v. State*, 184 Md. App. 175, 182 (2009)).

Moreover, Maryland Criminal Pattern Jury Instruction 3:30 expressly states that, when a witness has identified a defendant as the person who committed a crime, the jury should consider the witness's level of certainty:

> The burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the defendant was the person who committed it. You have heard evidence about the identification of the defendant as the person who committed the crime. You should consider the witness's opportunity to observe the criminal act and the person committing it, including the length of time the witness had to observe the person committing the crime, the witness's state of mind, and any other circumstances surround the event. **You should also consider the witness's certainty or lack of certainty**, the accuracy of any prior description, and the witness's credibility or lack of credibility, as well as any other factor surrounding the identification.

Id. (emphasis added).

In light of our discussion in *Mines* and the express language of MPJI-Cr 3:30, we hold that Levy's level of certainty was relevant and not unduly prejudicial. In fact, the "likelihood of misidentification" was especially probative in the instant case because Levy had not identified appellant prior to trial. *See Neil v. Biggers*, 409 U.S. 188, 199 (1972) (One factor in determining the reliability of an identification is "the level of certainty demonstrated by the witness **at the confrontation**[.]") (emphasis added). Moreover, defense counsel attacked the validity of Levy's identification during cross-examination, raising the inference that Levy may have been mistaken in identifying appellant as involved in the robbery. In response, the State asked Levy on redirect about her level of certainty. Therefore, Levy's level of certainty was also relevant as a result of defense counsel's raising of the issue during cross-examination. *See James*, 191 Md. App. at 254 (a witness's level of certainty may be implicated "when vigorously cross-examined.").

To draw support for his argument, appellant cites two cases: *United States v. Brownlee*, 454 F.3d 131 (3rd Cir. 2006) and *Brodes v. State*, 279 Ga. 435 (2005). Neither is applicable to the instant case. In *Brownlee*, the Court of Appeals for the Third Circuit

held that it was prejudicial error to disallow the defendant to present rebuttal evidence indicating that a witness's level of confidence was an unreliable indicator of the accuracy of an identification. *Brownlee*, 454 F.3d at 144. In *Brodes*, the Supreme Court of Georgia held that its trial courts should "refrain from informing jurors they may consider a witness's level of certainty when instructing them on the factors that may be considered in deciding the reliability of that identification." *Brodes*, 279 Ga. at 442. Although both courts discussed the scientifically unreliable nature of a witness's level of certainty, neither court addressed the issue of a trial court's admission of such evidence, and neither court held that such evidence is *per se* irrelevant.[1] *See, e.g.*, *Brownlee*, 454 F.3d at 144; *Brodes*, 279 Ga. at 442. Moreover, the holding in *Brodes* directly contradicts the procedures in Maryland, which, by way of MPCI-Cr 3:30, expressly permit a trial court to instruct the jury on a witness's level of certainty.

In sum, we are persuaded that Levy's level of certainty was, on its face, legally relevant and not unduly prejudicial. Accordingly, we hold that the trial court did not abuse its discretion in admitting the evidence. *See Mason v. Lynch*, 388 Md. 37, 48 (2005) ("The trial court's ruling on admissibility will not be overturned on appeal absent a **clear** abuse of discretion.") (emphasis added). For the same reasons, we refuse appellant's request to review the admission of Shea's testimony for plain error, as we are persuaded that no error was committed, plain or otherwise.

[1] The same could be said for the bevy of secondary sources cited by appellant, as these sources merely provide support for the proposition that the correlation between confidence and accuracy is questionable. None are offered by appellant as evidence that such testimony is legally irrelevant or unduly prejudicial.

II.

Appellant next contends that the trial court erred in limiting defense counsel's closing argument, in which he "sought to create reasonable doubt for the jurors" by highlighting "evidence not offered by the State, *i.e.*, testimony from Levy's mother." Appellant maintains that such argument was proper, as defense counsel's "plain intent was not to supplement or misstate the record but, as was quite proper, to argue to the jury facts that were in evidence and to relate those facts to the elements of the crimes." Appellant avers, therefore, that the trial court "had no discretion to preclude defense counsel from presenting relevant arguments that were within the bounds of the evidence" and that the trial court committed reversible error by "cutting off defense counsel's argument."

The State counters that the trial court acted within its discretion in interrupting defense counsel's argument and sustaining the State's objection. The State maintains that defense counsel's argument impermissibly suggested that the State's failure to call Levy's mother as a witness resulted in "a legal presumption that the witness's absence [had] special significance for one party or the other." The State avers that such a statement exceeded the bounds of acceptable argument. The State also maintains that the trial court's limited curtailment of defense counsel's argument was, under the circumstances, reasonable, given that the trial court "gave wide latitude to defense counsel to argue about deficiencies in the State's case."

"Closing arguments are an important aspect of trial, as they give counsel 'an opportunity to creatively mesh the diverse facets of trial, meld the evidence presented with plausible theories, and expose deficiencies in his or her opponent's argument.'" *Donaldson*

v. State, 416 Md. 467, 487 (2010) (internal citation omitted). "Counsel use that portion of the trial to 'sharpen and clarify the issues for resolution by the trier of fact in a criminal case' and 'present their respective versions of the case as a whole.'" *Whack v. State*, 433 Md. 728, 742 (2013) (internal citations omitted). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Id.* (internal citations and quotations omitted). To that end, counsel is usually afforded wide latitude in presenting closing argument to the jury:

> There are no hard-and-fast limitations within which the argument of earnest counsel must be confined – no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.

Wilhelm v. State, 272 Md. 404, 412 (1974)[2] (cited by *Anderson v. State*, 227 Md. App. 584, 589 (2016)).

Nevertheless, the scope of permissible argument is not boundless. Generally, "arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel[.]" *Lawson v. State*, 389 Md. 570, 591 (2005) (internal citations and quotations omitted). "Counsel is not permitted 'to state and comment upon facts not in evidence,' and comments 'that invite the jury to draw inferences from information that was not admitted

[2]Abrogated on other grounds as recognized by *Simpson v. State*, 442 Md. 446, 458 n. 5 (2015).

at trial are improper.'" *Donati v. State*, 215 Md. App. 686, 731 (2014) (internal citations omitted). In addition, "where there is no dispute as to the law, counsel will not be permitted to argue law even where the argument is 'consistent' with the court's instructions." *Tetso v. State*, 205 Md. App. 334, 410 (2012) (quoting *White v. State*, 66 Md. App. 100, 118 (1986)).

On the other hand, "a defendant has the right to raise a defense based on the lack of evidence presented by the State." *Atkins v. State*, 421 Md. 434, 452 (2011). As part of that defense, "[i]f the State fails to produce evidence that is reasonably available to it or fails to explain why it has not produced the evidence, a defendant is permitted to comment about the missing evidence in his or her closing argument to the jury." *Patterson v. State*, 356 Md. 677, 682 (1999). If the missing evidence is a material witness, a defendant may also argue that the State failed to call the witness because the witness's testimony would have been unfavorable to the State. *Id.* at 688. This is sometimes referred to as the "missing witness inference." *See Davis v. State*, 333 Md. 27, 48 (1993) (overruled on other grounds by *Pearson v. State*, 437 Md. 350, 367 (2014)) ("The failure to call a material witness raises a presumption or inference that the testimony of such person would be unfavorable to the party failing to call him[.]") (internal citations and quotations omitted).

Despite these general rules regarding the permissible scope of closing argument, "[t]he determination and scope of closing argument is within the sound discretion of the trial court." *Donati*, 215 Md. App. at 731. We defer to the judgment of the trial court because it "is in the best position to evaluate the propriety of a closing argument as it relates to the evidence adduced in a case." *Ingram v. State*, 427 Md. 717, 726 (2012). "As such,

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.* A trial court abuses its discretion when its ruling "either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective." *McLennon v. State,* 418 Md. 335, 354 (2011) (internal citations omitted). Stated another way, "[t]he 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…acts beyond the letter or reason of the law." *Brewer v. State,* 220 Md. App. 89, 111 (2014) (internal citations and quotations omitted).

Considering the above legal principles, we hold that the trial court did not abuse its discretion in sustaining the State's objection to defense counsel's closing argument. When defense counsel stated that the jury was "entitled to assume" something about the fact that Levy's mother was "not around," the State objected, and the trial court sustained the objection. The court then told defense counsel to "keep arguing and talk about the evidence." Apparently, the trial court felt that counsel's argument exceeded the scope of the evidence, which, as noted, is an appropriate ground on which to limit counsel's argument. Although defense counsel's comment may have been construed as a permissible comment on the State's lack of evidence, we perceive no abuse of discretion in the trial court's ruling, as there was nothing arbitrary or capricious about the court's decision, nor was the ruling illogical or beyond the reason of the law.

Appellant suggests that, because defense counsel's comment was a permissible comment on a missing witness, the trial court was required to permit the argument. We

disagree. First, we are not convinced, based on the record before this Court, that appellant's characterization of defense counsel's comment is accurate. Because the State interrupted defense counsel mid-sentence, and because defense counsel abandoned the argument following the court's ruling, we can only guess as to what, exactly, defense counsel was suggesting the jury was "entitled to assume." It certainly is possible, and perhaps even likely, that defense counsel was suggesting that the jury could draw certain inferences from the fact that Levy's mother did not testify; however, such a conclusion is mere conjecture. Moreover, the court's assessment of defense counsel's comment – that it was improper because it was beyond the evidence – was left uncorrected by defense counsel. In other words, defense counsel had ample opportunity to argue that his comment was a proper comment on a missing witness, rather than an improper comment beyond the scope of the evidence, but defense counsel failed to do so.

Furthermore, even if defense counsel was attempting to make the argument that the jury could draw certain inferences from the fact that Levy's mother did not testify, the trial court was not *required* to permit such an argument. *See Patterson,* 356 Md. at 688 ("When evidence is missing, apparently due to the act or omission of one of the parties, an inference that the evidence would have been unfavorable to that party **may** be appropriate.") (emphasis added). Although the failure to call a witness may raise a presumption that the witness's testimony would be unfavorable to a particular party, "there is no such presumption or inference where the witness is not available, or where the testimony is unimportant or cumulative, or where he is equally available to both sides." *Davis,* 333 Md. at 48 (internal citations and quotations omitted). In short, a missing witness does not

automatically result in a negative inference against a particular party, and whether a trial court's disallowance of such an argument is erroneous depends on the facts and circumstances of the case.[3] *Id.* at 51 (holding that the State's missing witness argument was appropriate because "[t]here was a sufficient factual predicate to permit the State to argue the missing witness inference to the jury.").

We further note that appellant erroneously relies on *Washington v. State*, 180 Md. App. 458 (2008), in support of the proposition that "by cutting off defense counsel's argument, the trial court committed reversible error similar in nature to error previously deemed reversible by this Court." In *Washington*, the defendant was arrested after the police witnessed him dispose of a handgun, which was later recovered. *Id.* at 462. At trial,

[3] We do not, however, agree with the State's position that defense counsel's argument was an inappropriate "instruction of law to the jury." As the Court of Appeals explained in *Patterson v. State*, 356 Md. 677 (1999), albeit in the context of a missing witness jury instruction, evidentiary inferences are generally questions of fact not law:

> Because most evidentiary inferences are questions of fact, not questions of law, missing evidence instructions can be distinguished from instructions on the elements of the crime that a defendant is charged with, instructions on the affirmative defenses that a defendant may utilize, and from evidentiary presumptions that the law recognizes but, without an instruction, a jury would not recognize. Elements, affirmative defenses and certain presumptions relate to the requirement that a party meet a burden of proof that is set by a legal standard. A trial judge must give such an instruction if the evidence generates the right to it because it sets the legal guidelines for the jury to act effectively as the trier of fact. An evidentiary inference, such as a missing evidence or missing witness inference, however, is not based on a legal standard but on the individual facts from which inferences can be drawn and, in many instances, several inferences may be made from the same set of facts.

Id. at 684-85.

the State introduced into evidence a police report, which stated that the handgun had been checked for fingerprints and that the results were "negative." *Id.* at 463. The State did not, however, present any evidence to definitively establish exactly what a "negative" result meant in terms of fingerprint analysis or in the context of the police report. *Id.* at 474-75. During closing argument, the State opined that the fingerprint test was "negative" because "no prints could be recovered from the gun because of the nature of the surface of the weapon." *Id.* at 473. During the defense's closing argument, counsel tried to argue a different theory, namely, that the police report indicated the test results were "negative" for the defendant's prints. *Id.* at 465. The State objected, and the trial court ultimately disallowed defense counsel's argument, concluding that the argument was not a "fair interpretation" of the report because, in the court's opinion, the "negative" result of the report meant that no fingerprints were found on the gun. *Id.* at 466-67.

On appeal, this Court held that the trial court's decision was erroneous because "there was no factual basis for the trial judge to declare, one way or the other, what the text of the report definitively meant[.]" *Id.* at 474. As a result, the trial court "invaded the province of the jury to evaluate and construe the evidence." *Id.* at 485. We further held that, because of this error, "[i]t follows that the court abused its discretion when it foreclosed [defense counsel's] closing argument with respect to the defense's interpretation of the report." *Id.* at 485. We reasoned that "[g]iven the failure of the prosecution to introduce foundational evidence that the test was negative in all respects, and its failure to adduce expert testimony to establish that no latent fingerprints could be recovered because of the nature of the gun's surface, the defense's theory as to the meaning of the report was

just as plausible as the State's, and defense counsel should have been permitted to so argue." *Id.* at 476.

Based on the above facts, *Washington* is easily distinguishable from the present case. Here, the trial court made no unsubstantiated conclusions regarding the evidence, so there was virtually no danger that the court's ruling would invade the province of the jury. Moreover, the State did not present any argument regarding Levy's mother's absence; therefore, unlike in *Washington*, we are not faced with a trial court that "made an impermissible decision of what was, and was not the…inference to be drawn from the evidence presented." *Id.* at 475.

Finally, even if we were to assume that defense counsel was attempting to make a permissible argument regarding Ms. Levy's absence and that the trial court erred in denying that argument, any error would be harmless. "[W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and reversal is mandated." *Dorsey v. State*, 276 Md. 638, 659 (1976). "In performing a harmless error analysis, we are not to find facts or weigh evidence." *Bellamy v. State*, 403 Md. 308, 332 (2008). Rather, once error has been assessed, reversal is required unless the trial court's error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Id.* (internal citations and quotations omitted). In other words, "the issue is not what evidence was available to the jury, but rather what evidence the jury, in fact, used to reach its verdict." *Dionas v. State*, 436 Md. 97, 109 (2013).

Despite this heavy burden, we are convinced beyond a reasonable doubt that any error in the trial court's decision to limit defense counsel's argument was inconsequential to the jury's verdict. Had defense counsel been permitted to make a missing witness argument – that is, had the jury been informed that it could infer from Levy's mother's absence that her testimony would have been unfavorable to the State – this inference would have, at most, impacted the credibility of Shea and Levy, at least as it related to their testimony regarding the events at Levy's apartment, since Levy's mother was not present at the scene of the robbery. In other words, there is no indication from the record that Levy's mother could have testified to anything other than the circumstances of appellant's presence at Levy's apartment prior to the robbery. And because these circumstances could not have established any of the elements of the crimes with which appellant was charged, there is little chance that any potential discrepancies in Levy or Shea's retelling of these circumstances would have had any discernible effect on the jury's verdict. Importantly, these potential discrepancies would have had no effect on the testimony of Wiltshire and Frank, both of whom testified, as did Levy and Shea, that appellant was the person who approached the women in the parking lot and robbed them of their purses and phones. In short, given that four witnesses gave relatively consistent accounts regarding appellant's involvement in the robbery, we are convinced beyond a reasonable doubt that any error committed by the trial court in curtailing defense counsel's argument was unimportant.

III.

Appellant's final contention is that the circuit court erred in sentencing him to two separate terms of ten years' imprisonment on the conspiracy convictions. The State agrees,

and so do we. "It is well settled in Maryland that only one sentence can be imposed for a single common law conspiracy no matter how many criminal acts the conspirators have agreed to commit. The unit of prosecution is the agreement or combination rather than each of its criminal objectives." *Tracy v. State*, 319 Md. 452, 459 (1990). Moreover, "[i]f a defendant is convicted of and sentenced for multiple conspiracies when, in fact, only one conspiracy was proven, the Double Jeopardy Clause has been violated." *Savage v. State*, 212 Md. App. 1, 26 (2013). Accordingly, when the State puts forth evidence of only one conspiracy and the jury is instructed accordingly, the proper remedy is to vacate both the sentence and the conviction of the cumulative conspiracy offense(s). *See, e.g.*, *id.* at 26-31.

The record makes plain that appellant was involved with Wiltshire and Frank in a single conspiracy to rob Levy and Shea. The record also makes plain that the State put forth evidence of only one conspiracy, and the jury was instructed accordingly. We therefore vacate one of appellant's two conspiracy convictions, along with its accompanying sentence.[4]

[4] Because the two conspiracy sentences are identical, it matters not which conviction/sentence is vacated. *See Wilson v. State*, 148 Md. App. 601, 641 (2002) (When a defendant is convicted and sentenced on multiple conspiracies where only one was proven, "the most severe sentence imposed for the crimes of conspiracy should remain.").

CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY WITH INSTRUCTIONS TO VACATE ONE OF APPELLANT'S CONSPIRACY COUNTS. JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY OTHERWISE AFFIRMED. COSTS TO BE PAID TWO-THIRDS BY APPELLANT AND ONE-THIRD BY MONTGOMERY COUNTY.