Circuit Court for Prince George's County
Case No.: CT140259X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 593

September Term, 2016

RONTE TRAVELL MUHYEE

v.

STATE OF MARYLAND

Leahy,
Reed,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: August 24, 2017

This case involves the shooting of two construction workers who were re-roofing an office building in Upper Marlboro, Maryland. After the shooting, Ronte Muhyee, appellant, fled the scene by jumping onto the side of a passing vehicle. He was later apprehended and ultimately convicted of first-degree murder; attempted first-degree murder; robbery; first- and second-degree assault; and two counts of use of a handgun in the commission of a crime of violence. Thereafter, appellant noted this timely appeal, presenting five issues for our review:

1. "Was the evidence sufficient to convict Appellant of First Degree Felony Murder?"

2. "Was Appellant denied effective assistance of counsel when his attorney told the jury in opening statement that Appellant 'did fire his gun. And that's not going to be in dispute' without a justification defense, and then arguing the previously conceded identification issue as the defense in closing, in a case where nobody identifies Appellant as the assailant?"

3. "Did the trial court err in denying Appellant's Motion for a New Trial?"

4. "Did the trial court err in allowing the Prosecutor to mischaracterize the testimony of Santos Machado?"

5. "Did the trial court err by amending the docket entry for Appellant's sentence without a hearing, with the effect of increasing Appellant's sentence?"

For the reasons discussed below, we shall affirm in part and reverse in part.

BACKGROUND

On Saturday, December 21, 2013, Santos Machado and Jonathan Nottingham were working at a construction site to re-roof an office building in Upper Marlboro, Maryland. Around 10:00 a.m., they needed to cut some plywood but could not find an outlet or electrical current to power their tools. Machado and Nottingham searched the building and

eventually gained permission to run an extension cord through one of the other units. Machado, positioned at the top of the building, fed the extension cord to Nottingham at a lower level. Nottingham grabbed the cord, and as he walked down the stairwell, he passed a black male in a grey hooded sweatshirt walking in the opposite direction.

The man continued up the stairwell and soon thereafter, Machado testified that he was attacked by a black male who took his phone, which was clipped to the back of his pants. The man started walking backwards away from him. Machado screamed and said, "give it back." At that point, Machado testified that Douglas Argueta, another worker at the construction site, approached to help. Machado and Argueta chased the man, who eventually threw the phone on the ground. Machado first "noticed that [the man] had the gun" when he threw the phone. The man then shot Machado once in the chest when Machado bent over to pick up the phone. Argueta continued to follow the man from the construction site to Old Marlboro Pike, at which point the man fatally shot Argueta.

Construction workers observed the man fleeing the scene immediately after the shooting by jumping onto the side of a passing SUV. The driver of the SUV testified at trial that the man banged on the top of her vehicle and tried to open the door. In an effort to shake him off, the driver stepped on the gas, sometimes going as fast as 40 miles-per-hour, then slammed on the brakes, and zigzagged through the street. The man eventually fell off the vehicle and was observed by Detective Patrick Killerlane, who was driving to work in an unmarked police car.

Detective Killerlane initially drove past the SUV, a black male walking away from the SUV, and a white pickup truck. He turned around, however, when he heard over his

police radio that one of the vehicles was believed to be involved in a shooting. Upon return, Detective Killerlane observed the white truck and a black male wearing the same clothing in the median on Suitland Parkway; the SUV was no longer around. Detective Killerlane stated that the man looked unusual because he did not have any shoes on, and he was approaching other vehicles, gesturing at drivers in the roadway. At that point, Detective Killerlane received a report that the man was involved in the shooting. He activated his emergency lights, pulled into the median, and placed the man under arrest. During the course of the arrest, Detective Killerlane asked the man, who was later identified as appellant, what he did with the weapon. Appellant responded that he "threw it in the woods." The gun and two fired cartridge casings were later recovered next to one of the trees at the scene of the crime.

The Prince George's County Police Department interviewed appellant the day of the shooting. Appellant stated that he was riding his bicycle near the construction site with earphones on, listening to music. He claimed that a brown Dodge approached him, and a black male got out of the vehicle and knocked him off his bike. Appellant indicated that the suspect had a gun and, after falling to the ground, a scuffle ensued. Appellant was able to free himself and fled the scene on foot. When the detective asked whether appellant had a gun that day, he responded "no." Appellant added that while he was running away, he heard two gunshots, and he believed the shooter was the same individual from the brown Dodge that attacked him. He denied shooting Santos Machado and Douglas Argueta.

Appellant's trial began on October 19, 2015. Jonathan Nottingham testified that after the individual passed him in the stairwell, he heard "a lot of commotion of somebody

obviously -- what sounded like somebody in distress." Nottingham looked up and saw Machado chasing someone, though he did not see the person being chased, and went around the other side of the building to prevent the individual from escaping. Nottingham lost sight of Machado and the person in the hoody for a few minutes as he went around the building, and during that time he heard multiple gunshots. When Nottingham got to the front of the building, he saw Machado on the ground with blood coming out of his chest. Nottingham testified that while he was next to Machado, he saw the person in the grey hoody standing on the running board of an SUV.

Miguel Melendez, one of the construction workers on site, testified that he saw a person point a gun at Argueta and that person was the same guy who rode by on the truck. Melendez did not witness the theft of the phone or the shooting of Machado. Eugenio Carenza, another construction worker, got in his white Ford truck after the first shot was fired to follow the shooter. Carenza stated that the man climbed onto the side of a passing car after the shootings and pointed a gun at him and the other workers. He followed the man from the construction site to Suitland Parkway and observed the arrest. Carenza testified that at no time did he lose sight of the individual.

During her opening statement, defense counsel told the jury that appellant "did fire his gun. And that's not going to be in dispute." At the conclusion of the State's case, defense counsel moved for judgment of acquittal based on an argument that the record did not show force or threat of force at the time Machado's phone was taken. The court denied the motion. The court also denied defense counsel's request for a self-defense instruction on the ground that there was no evidence to generate the instruction. The State did not

seek a willful, deliberate, and premeditated jury instruction regarding the first-degree murder charge—they asked for a felony murder instruction only. During closing argument, defense counsel did not mention any justification defense, instead arguing that the State had not proven the case beyond a reasonable doubt.

During deliberations, the jury sent a note to the court, asking "[f]or robbery [with a] dangerous weapon charge, does the victim need to have seen the gun[?]" The court responded, "[a]s far as the question regarding robbery with a dangerous weapon — (1) you must first decide what are the facts of this case, then (2) apply those facts to the jury instructions — as you understand them to be." The jury later sent a second note, asking "First Degree Felony Murder: item 1. Does this robbery apply to Douglas [Argueta]? Even though Santos [Machado] was robbed of his phone?" Over appellant's objection, the court answered, "[t]he concept of Felony Murder does not require that the victim of the robbery also be the victim of the murder. Please review the jury instructions provided." The jury ultimately convicted appellant of first-degree murder of Douglas Argueta; attempted first-degree murder of Santos Machado; robbery of Santos Machado; first- and second-degree assault against Santos Machado; and two counts of use of a handgun in the commission of a crime of violence.

Appellant hired a new attorney prior to sentencing and filed a motion for a new trial. The hearing on the motion and sentencing occurred on April 7, 2016. Appellant raised two arguments in support of his motion, both in connection with the jury notes. First, appellant argued there was potential confusion over the concept of felony murder. Appellant argued that the court's note to the jury was legally incomplete for failing to emphasize the

requirement that the conduct resulting in death has to be in furtherance of the common design of the felony itself. Appellant also challenged the court's second note, arguing that it improperly advised the jury that they were the judges of the law in violation of *Unger v. State*, 427 Md. 383 (2012). Finally, although appellant's written motion asserted that the verdicts were inconsistent, he did not argue this issue at the hearing. The State, on the other hand, argued the trial testimony indicated that appellant was guilty of continuing criminality for the robbery conviction, which then formed the predicate for his felony murder conviction. The State also argued that the court's first note to the jury was taken from a pattern jury instruction, and the other did not ask the jury to be judges of the law. The court summarily denied appellant's motion.

At the conclusion of the hearing, the court sentenced appellant to life, suspend all but sixty years for count one; life suspend all but thirty years for count two, consecutive to count one; ten years for count six, concurrent to count one; twenty years for count seven, consecutive to count one; and twenty years for count eight, consecutive to count two. The court merged the remaining counts. The docket entries indicate that on June 1, 2016, the court amended appellant's sentence to read: "Count 7 for a period of 20 years; Consecutive to Count 2," and "Count 8 for a period of 20 years; Consecutive to Count 7." This appeal followed.

DISCUSSION

I. Sufficiency of the Evidence

When reviewing the sufficiency of the evidence to support a conviction, we determine "whether, after viewing the evidence in the light most favorable to the

prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Smith*, 374 Md. 527, 533 (2003). Our role is not to retry the case: "[b]ecause the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185 (2010) (citations omitted). In order to preserve an insufficiency claim, however, a defendant must move for judgment of acquittal during the trial, specifying the grounds for the motion in accordance with Maryland Rule 4-324(a).[1] *Whiting v. State*, 160 Md. App. 285, 308 (2004). The language of Rule 4-324(a) "is mandatory, and review of a claim of insufficiency is available only for the reasons given by appellant in his motion for judgment of acquittal." *Id.* (citation omitted); *see also Starr v. State*, 405 Md. 293, 301–03 (2008); *Fraidin v. State*, 85 Md. App. 231, 244–45 (1991).

In his motions for judgment of acquittal, appellant argued that the State had not proven the force or threat of force element for the robbery charge. Appellant did not argue, either in the initial motion or in the renewal of the motion at the close of evidence, that the State had not proven criminal agency in the other crimes. Our review is therefore limited

[1] Maryland Rule 4-324(a) states "[a] defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment of acquittal shall be necessary. A defendant does not waive the right to make the motion by introducing evidence during the presentation of the State's case."

to the robbery conviction, and not whether, as appellant puts it, "there was evidence as to the agency of [him] in the commission of any crime."[2]

Concerning his robbery conviction, appellant argues that even if one accepts his criminal agency, the testimony at trial described the crime of larceny, rather than robbery. Appellant notes that what distinguishes larceny from robbery is the presence of force or threat of force, and he argues that Machado's testimony about the phone being taken is analogous to the larceny that occurred in *West v. State*, 312 Md. 197 (1988). Additionally, he argues that since the property had been returned prior to any violence, there is no nexus between the shooting and the theft to support his conviction. Appellee, on the other hand, cites *Ball v. State*, 347 Md. 156 (1997) for the proposition that a robbery may occur—even though there may be some asportation before the use of force—if the force enables the accused to retain possession of the property in the face of immediate resistance from the victim. Appellee argues that the record supports an inference that the robber used force to overcome resistance and that throwing the cell phone on the ground was a ruse to enable him to retain possession of the phone. Appellee also argues that Machado's testimony that he was "attacked" was sufficient to establish appellant's robbery conviction.

We disagree with appellee's first argument, that the robbery was proven by appellant's use of force to retain possession of the phone. Under Maryland law, robbery is

[2] We note appellant's testimony that he "threw [the gun] in the woods"; Machado's testimony about being "attacked"; the absence of other workers in the area; Melendez's testimony about the man with the gun being the same man that fled the scene; and Carenza's tailing appellant from the construction site to the arrest provided strong evidence of appellant's criminal agency.

defined as "the felonious taking and carrying away of the personal property of another from his person by the use of violence or by putting in fear." *Williams v. State*, 302 Md. 787, 792 (1985). At the time appellant shot Machado and Argueta, appellant had already lost possession of the phone by throwing it on the ground. The phone was not thrown somewhere where it might be hidden or inaccessible to Machado. It was thrown on the ground, with appellant's full knowledge that its rightful owner, the person demanding he return it, would easily and immediately be able to regain possession of it. After the shooting, appellant made no attempt to regain possession of the phone. Therefore, *Ball v. State* is distinguishable from this case, and there is insufficient evidence to infer that the shootings were the result of the "use of violence" for the purpose of "taking and carrying away" Machado's phone.

We do agree that Machado's testimony was sufficient to establish that appellant committed the crime of robbery, however. Specifically, a rational trier of fact could infer force or threat of force from Machado's statement that "[s]omebody attacked me. Somebody took my telephone that I had in my belt here." This case, moreover, is distinguishable from *West v. State*. In *West*, the victim testified that "[a]s we were walking across the field a man just snatched my purse from my hand and he ran, that's when I noticed my pocketbook was gone when he ran." 312 Md. at 199. Here, by contrast, Machado testified that he was attacked, and he was aware that his phone was taken. Finally, because the attack occurred before Machado's phone was taken, the conduct causing death was not a "mere coincidence," but rather "in furtherance of the design to

commit the felony." *Campbell v. State*, 293 Md. 438, 445 (1982) (citation omitted). We thus find that the evidence at trial was sufficient to establish appellant's robbery conviction.

II. Ineffective Assistance of Counsel

When considering an ineffective assistance of counsel claim, "the first question is whether we may address this issue on direct appeal." *Testerman v. State*, 170 Md. App. 324, 335 (2006). "[T]he most appropriate way to raise the claim of ineffective assistance of counsel" is through a post-conviction proceeding. *Mosley v. State*, 378 Md. 548, 558–59 (2003). "Post-conviction proceedings are preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel's ineffectiveness." *Id.* at 560. "[T]he trial record clearly must illuminate why counsel's actions were ineffective because, otherwise, the Maryland appellate courts would be entangled in 'the perilous process of second-guessing' without the benefit of potentially essential information." *Id.* at 561 (quoting *Johnson v. State*, 292 Md. 405, 435 (1982)). This second-guessing is especially egregious where, as here, "the alleged error is one of commission" because "the record may reflect the action taken by counsel but not the reasons for it." *Massaro v. United States*, 538 U.S. 500, 505 (2003).

Appellant argues that his ineffective assistance of counsel claim is appropriately raised on direct appeal because the critical facts are not in dispute, the record is sufficiently developed to permit a fair evaluation of the claim, and the trial record reveals counsel's ineffectiveness to be blatant and egregious. Appellant argues that he did not receive

effective assistance when his attorney stated that he "did fire his gun. And that's not going to be in dispute," but did not then argue any justification defense. Further, appellant argues that the statement by defense counsel conflicted with statements in which he previously denied being the shooter and, without any further explanation by counsel about this discrepancy, "[t]his is enough to undermine confidence in the verdict in this case."

Appellee argues that this court should not address the ineffective assistance claim on direct appeal because defense counsel's legal theories and tactics are uncertain and require further fact-finding. Appellee also argues that defense counsel did provide effective assistance by arguing the necessary elements of self-defense in opening and attempting to generate a self-defense instruction while questioning witnesses.

The record indicates that defense counsel was attempting to raise a self-defense claim when she told the jury that appellant "did fire his gun. And that's not going to be in dispute." During her opening statement, she argued that appellant "was scared" and that people "were fighting him." Defense counsel continued this theory throughout the case, and when requesting a self-defense jury instruction, she argued that appellant was trying to escape, that there were people chasing him, and that he had a cut on his hand.

What the record does not reveal, however, is why defense counsel chose to pursue a self-defense argument rather than some alternative theory. A claim of ineffective assistance of counsel must be brought in post-conviction when "[t]he appellate court [has] no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse." *Massaro*, 538 U.S. at 505. The error that appellant claims his trial counsel made that

rendered her assistance ineffective was one of commission. Because the record does not reflect why defense counsel took the action of stating to the jury that appellant "did fire his gun," his claim of ineffective assistance of counsel is not reviewable by this court on direct appeal.

III. Motion for a New Trial

Under Maryland Rule 4-331(a), a court may order a new trial "in the interest of justice" on a motion filed by the defendant within ten days after a verdict is entered. The standard of review of the denial of a motion for a new trial is abuse of discretion, *Jackson v. State*, 164 Md. App. 679, 700 (2005), which occurs where "no reasonable person would take the view adopted by the [trial] court." *Fontaine v. State*, 134 Md. App. 275, 288 (2000) (internal quotations and citations omitted). "Thus, where a trial court's ruling is reasonable, even if we believe it might have gone the other way, we will not disturb it on appeal." *Id.*; *see also Williams v. State*, 231 Md. App. 156, 196 (2016).

Appellant raises three arguments in connection with his motion for a new trial: he argues that the verdicts were inconsistent; and he challenges both of the court's notes to the jury, arguing that the first violated *Unger v. State*, 427 Md. 383 (2012) and the second was ambiguous, misleading, and confusing.

A. Inconsistent Verdicts

In order to preserve the issue of legally inconsistent verdicts for appellate review, "a defendant in a criminal trial by jury must object or make known any opposition to the allegedly inconsistent verdicts before the verdicts become final and the trial court discharges the jury." *Givens v. State*, 449 Md. 433, 438 (2016). "[A] verdict becomes final

when the trial court accepts the verdict after the jury has been polled—or, if the jury was not polled, when the trial court accepts the verdict after the jury has hearkened to the verdict." *Id.* at 470. In this case, appellant did not raise the issue of inconsistent verdicts until his motion for a new trial—that is, until *after* the verdicts became final and the court discharged the jury. Therefore, this issue has not been preserved for review.

B. Jury Notes

The Court of Appeals has made clear that a trial judge may not tell the jurors that its instructions on legal matters are "advisory" only. In *Unger v. State*, the judge instructed the jury that "anything which I may say about the law, including any instructions which I may give you, is merely advisory and you are not in any way bound by it. You may feel free to reject my advice on the law and to arrive at your own independent conclusions." 427 Md. at 392. The Court of Appeals held that "telling the jury that all of the court's instructions on legal matters were 'merely advisory,' [was] clearly in error," and it affirmed the post-conviction court's grant of a new trial. *Id.* at 417. Further, the court explained that advisory only jury instructions result in structural error, meaning a defendant's failure to object will not result in a waiver. *Id.* at 411.

Appellant argues that the trial court erred in denying his motion for a new trial because the instruction to the jury that they should apply the facts of the case "to the jury instructions — as [they] understand them to be" invited the jury to place their own interpretation on the law, rather than accept binding jury instructions. A proper understanding of the nature of the instructions regarding the elements of robbery, appellant argues, should have resulted in a not guilty verdict on the robbery count. Appellee, by

contrast, argues that this issue has not been preserved. Appellee notes that defense counsel's sole objection to the jury note was in response to an evidentiary issue. As a result, appellee argues that appellant failed to make a contemporaneous objection and further, appellant affirmatively indicated that he had no additional objection to the court's instruction. Appellee also argues that *Unger v. State* is distinguishable because in this case, the trial court told the jury that its instructions on the law were binding.

The jury's first note to the court contained the following questions:

> "Was the defendant's fingerprints on the gun? State's Exhibit # 15. Also, testing done on defendant's clothing for gun-powder? Where is the grey hood[y]? For [the] robbery [with a] dangerous weapon charge, does the victim need to have seen the gun[?] Was the defendant's fingerprints on the phone-case? Where [was the] jacket the defendant had on while on the black SUV? Needs [sic] Detective Patrick Killerlane's report."

The court thereafter went back on the record and the following colloquy ensued:

> THE COURT: All right. Court's response is as follows: You have been provided all of the admissible evidence in this case. Please base your verdict on what you have heard. As far as questions regarding robbery with a danger[ous] weapon, number one, you must first decide what are the facts of this case, comma, then, number two, apply those fact[s] to the jury instructions as you understand them to be. . . .
>
> [DEFENSE COUNSEL]: Your Honor, I would just ask maybe instead of saying admissible evidence, maybe, you've been provided with all the evidence. Obviously the evidence provided is admissible, but I don't want the jury to think there is additional evidence that the State didn't -- that they should be considering potentially.
>
> THE COURT: They are trying to consider those things, and I mean -- you have been provided all of the admissible evidence. They're asking about things that --
>
> [DEFENSE COUNSEL]: Right, they have been provided.

> THE COURT: And so they have to base their decision on what they have. Anything else?
>
> [PROSECUTOR ONE]: No.
>
> [PROSECUTOR TWO]: No.
>
> [DEFENSE COUNSEL]: No.
>
> THE COURT: Ok thank you very much.

The record makes clear that appellant's *Unger v. State* argument was not raised or decided in the trial court; therefore, absent structural error, this claim is waived. The court's note referred the jury to its previous instructions, which included a statement that "[t]he instructions that I give you about the law are binding upon you. In other words, you must apply the law as I explain it in arriving at your verdict." This instruction is the exact opposite of that in *Unger*, where the court stated "anything which I may say about the law, including any instructions which I may give you, is merely advisory and you are not in any way bound by it." 427 Md. at 392. Accordingly, even if appellant's claim was preserved—which it is not—we would find no error in the court's first note to the jury.

Next, during deliberations, the jury sent another note to the court, asking "First Degree Felony Murder: item 1. Does this robbery apply to Douglas [Argueta]? Even though Santos [Machado] was robbed of his phone?" Appellant argues that the trial court erred by responding "[t]he concept of felony murder does not require that the victim of the robbery also be the victim of the murder. Please review the jury instructions provided." Appellant notes that the shootings of Santos Machado and Douglas Argueta occurred in different places and claims that under these circumstances, the instruction would allow the

jury to find him guilty of felony murder even if they did not find that the killing of Argueta resulted from the perpetration of the robbery of Machado. Appellant thus argues that the court's note was ambiguous, misleading, and confusing to the jury. Appellee, by contrast, argues that this claim is not preserved because appellant failed to object at the time the parties discussed the note, and it is inconsistent with the argument he raised at trial. Appellee also argues that the note was based on a pattern instruction, and the court referred the jury to an earlier instruction that connected the felony murder to robbery and robbery with a deadly weapon.

We agree with appellee. The crux of appellant's argument on appeal is that the court's instruction should have emphasized that felony murder has to be committed in the "perpetration" of an enumerated felony. Yet during the trial, appellant was given this opportunity and clearly stated that such an instruction was not needed:

> [THE COURT]: [I]f you want me to, I can also give further clarification and say that only that the murder somehow be tied to foreseeability, I wasn't going to go that far and clarify that so --
>
> [DEFENSE COUNSEL]: I don't need that, Your Honor.
>
> * * *
>
> [THE COURT]: All right, thank you.

Accordingly, appellant's argument has not been preserved for review. *See* Md. Rule 8-131(a). We note parenthetically, however, that the trial court also told the jury to refer to its previous instructions, which explained that in order for the State to prove felony murder, "[t]he act resulting in the death of Romero Argueta [must have] occurred during the commission or the escape from the immediate scene of the robbery and/or robbery with

a deadly weapon." The court's instruction thus explained that felony murder has to be committed in the "perpetration" of an enumerated felony, and there would be no basis for us to conclude that the court erred in its second note to the jury.

IV. Closing Argument

It is well settled that attorneys have wide latitude in closing argument "to draw reasonable inferences from the evidence, and discuss the nature, extent, and character of the evidence." *Smith v. State*, 367 Md. 348, 354 (2001). The prosecuting attorney is free to "comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of witnesses which the prosecution produces." *State v. Gutierrez*, 446 Md. 221, 242 (2016) (quoting *Donaldson v. State*, 416 Md. 467, 488–89 (2010)); *see also Degren v. State*, 352 Md. 400, 430 (1999) (citations omitted) (noting that a prosecutor "may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses").

Closing argument is not boundless, however, "reversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Sivells v. State*, 196 Md. App. 254, 288 (2010). In making this determination, we apply the two-part test from *Sivells*. First, we assess "the severity of the remarks, cumulatively, the weight of the evidence against the accused and the measures taken to cure any potential prejudice." *Id.* at 289 (quoting *Lee v. State*, 405 Md. 148, 174 (2008)). In evaluating the potential prejudice, an important factor is "the strength of the State's case against the defendant. If

the State has a strong case, the likelihood that an improper comment will influence the jury's verdict is reduced." *Id.* Second, we consider "the nature of the prosecutor's remarks. In assessing this factor, we consider whether there was one isolated comment, as opposed to multiple improper comments, and whether the comments related to an issue that was central to a determination of the case or a peripheral issue." *Id.* at 290.

Appellant argues that the prosecutor engaged in improper argument when he stated the following in closing:

> [Machado] testified that when he turned around, he saw the defendant with his cell phone in his hand . . . . And he said the defendant started to walk backwards, all the while, trying to deprive him/depriving him of his cell phone, because he did not give it back.
>
> And he had no intention of giving it back, because [Machado] also told you that in the other hand, he saw the black handgun.

Defense counsel objected but the objection was overruled, with the court reasoning that "[i]t's the jury's memory that controls." Appellant argues that the prosecutor's comment was improper for a number of reasons: it incorrectly stated the timeline about the assailant's use of the gun in obtaining the cell phone; it conveyed that Machado's assailant used a weapon to keep and obtain his cell phone; and it indicated that the assailant did not return the phone. Appellee, on the other hand, notes Machado testified that the robber had a gun in his right hand, threw the cell phone down, and shot him when he tried to pick it up. Appellee argues it was reasonable to infer that the robber had the cell phone in one hand (the right hand) and the gun in the other (the left hand). Further, appellee argues that appellant's complaint goes beyond what he raised at trial, and the prosecutor did not say

anything about the use of the gun in obtaining the cell phone when appellant first attacked Machado.

While it is true that appellant's objection did not specifically relate to the hand in which the shooter held the gun, the purpose behind Maryland Rule 8-131, which governs the scope of review, is "to prevent the unfairness that could arise when a party raises an issue for the first time on appeal, thus depriving the opposing party from admitting evidence relating to that issue at trial." *Wilkerson v. State*, 420 Md. 573, 597 (2011). Because the issue plainly appears to have been decided by the trial court, and appellee was not deprived from admitting evidence on this issue at trial, we find that appellant's claim is preserved for review. Otherwise, however, we agree with appellee. During the trial Machado testified as follows:

> [THE PROSECUTOR]: And do you remember, can you describe -- did you see the gun?
>
> [MACHADO]: Yes.
>
> * * *
>
> [THE PROSECUTOR]: Do you remember what hand [the shooter] had it in?
>
> [MACHADO]: Yes.
>
> [THE PROSECUTOR]: What hand was it in?
>
> [MACHADO]: The right hand.
>
> [THE PROSECUTOR]: And was it a large gun or a small gun?
>
> [MACHADO]: I couldn't say. They're all the same. I guess there's some bigger, but . . .

> [THE PROSECUTOR]: Okay. Fair enough. And where was your cell phone?
>
> [MACHADO]: He had given it back. Well, he threw it down. When he threw it down, I wanted to pick it up. Get it back.
>
> [THE PROSECUTOR]: Okay. Now, did he throw the cell phone down before he shot you?
>
> [MACHADO]: Yes. And when I tried to pick it up, he shot at me.

Since Machado testified that the gun was in the shooter's right hand, it is reasonable to infer that the shooter threw the phone on the ground with his left hand. The prosecutor's statement that "in the other hand, [Machado] saw the black handgun" thus fell within the scope of proper argument. Next, the prosecutor's comments did not convey that the assailant used a weapon to obtain Machado's cell phone, nor did they incorrectly state the timeline about the use of the gun in obtaining the cell phone because they discussed a period in time *after* the robbery occurred. Finally, we agree that the prosecutor erroneously told the jury that the assailant did not return Machado's phone, and the comments could have conveyed that the assailant used force to keep the phone. The State, however, had a strong case, and the prosecutor's comments did not relate to "an issue that was central to a determination" at trial. *Sivells*, 196 Md. App. at 290. Therefore, the comments were not likely to have misled or influenced the jury to the prejudice of appellant, and reversal is not warranted for the court's failure to give a curative instruction.

V. Appellant's Amended Sentence

Following his jury trial, the court sentenced appellant to life, suspend all but sixty years for count one; life suspend all but thirty years for count two, consecutive to count

one; ten years for count six, concurrent to count one; twenty years for count seven, consecutive to count one; and twenty years for count eight, consecutive to count two. On June 1, 2016, the court amended appellant's sentence to read "Count 7 for a period of 20 years; Consecutive to Count 2," and "Count 8 for a period of 20 years; Consecutive to Count 7."

Appellant argues that the June 2016 amendment constitutes reversible error, as the court improperly extended the length of his sentence. Appellee agrees:

> [A]t the sentencing hearing, the trial court provided for a 110-year executed sentence: 60 years for murder, then 30 years for attempted murder, then 20 years for use of a handgun (Count Eight). The 20-year sentence for use of a handgun (Count Seven) would have been served at the same time as the 30-year sentence for attempted murder, and would not have increased the length of the overall sentence.
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> * * *
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> [The amended sentence] was a change from the sentencing hearing, where the sentence for Count Seven was consecutive to Count One, and the sentence for Count Eight was consecutive to Count Two. Thus, the amendment results in a 130-year executed sentence: 60 years for murder, then 30 years for attempted murder, then 20 years for use of a handgun (Count Seven), then another 20 years for use of a handgun (Count Eight). The State agrees that the amendment was inconsistent with Rule 4-345.

While Maryland Rule 4-345 provides a trial court with revisory power over, as pertinent here, 1) an illegal sentence; 2) a sentence in the case of fraud, mistake, or irregularity; and 3) an evident mistake in the announcement of a sentence (which must be made on the record before the defendant leaves the courtroom following the sentencing proceeding), none of those grounds are applicable in this case. Therefore, we agree with the parties that the court erred when it amended appellant's sentence on June 1, 2016.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED, EXCEPT AS TO SENTENCE. SENTENCE FOR COUNT EIGHT IS REVERSED AND VACATED, AND CASE IS REMANDED FOR IMPOSITION OF PROPER SENTENCE IN ACCORDANCE WITH THIS OPINION. COSTS TO BE PAID BY APPELLANT.