UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0664

September Term, 2016

DAVON ROBESON

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed:

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

A jury in the Circuit Court for Baltimore City convicted Davon Robeson, appellant, of conspiracy to commit armed robbery, conspiracy to commit armed carjacking, conspiracy to commit carjacking, and conspiracy to commit robbery. Appellant was sentenced to a total term of thirty years' imprisonment, with all but five years suspended. In this appeal, appellant presents the following questions for our review, which we rephrase:[1]

> 1. Did the trial court err in refusing defense counsel's request to limit the scope of the State's cross-examination of a witness?
>
> 2. Did the trial court err in refusing to grant a mistrial after the State utilized a previously excluded transcript during closing argument?
>
> 3. Did the trial court err in precluding defense counsel from impeaching a witness with the witness' prior statements, in which the witness made drug-related references?

[1] Appellant phrased the questions as:

> 1. Did the lower court err in allowing the State to exceed the scope of direct-examination, and elicit facts outside the witness' personal knowledge, in its cross-examination of Donte Robinson's recalled testimony?
>
> 2. Did the lower court err in failing to declare a mistrial after the State utilized an unofficial transcript, prepared by the State and containing facts not in evidence, during closing argument?
>
> 3. Did the lower court err in failing to permit Mr. Robeson to impeach the State's key witness with statements about purchasing drugs after the witness testified he had a different "lifestyle" from another witness, who was an admitted drug dealer?

For reasons to follow, we answer appellant's questions in the negative and affirm the judgments of the circuit court.

BACKGROUND

Several years ago, Dustin Ray and Donte Robinson, two friends who "used to sell drugs together," began discussing plans to rob a pharmaceutical delivery truck. Ray and Robinson eventually enlisted the help of several more individuals, including Chad Davis and Pat Samuels. Over the course of several face-to-face meetings, the group formulated a plan to perpetrate the robbery. At a few of the meetings, Samuels brought with him another individual, later identified as appellant, with whom Samuels had discussed the robbery and who agreed to help Samuels arrange the robbery. The group ultimately agreed to commit the robbery on December 13, 2010.

On the morning of the robbery, Ray and Robinson drove to a parking lot a few blocks away from a pharmacy where the targeted pharmaceutical truck was parked and its driver was making a delivery. At some point, Samuels and appellant arrived at the scene in the same vehicle, at which time one of the men got out of the vehicle and had a conversation with Robinson. Samuels and appellant then left the scene, and Ray and Robinson remained. A short time later, an unidentified male approached the pharmaceutical truck, put a gun to the driver's head, and pushed him down in the back of the truck. A second unidentified individual then entered the back of the truck with the driver and the man with the gun, while a third unidentified individual got in the truck's driver's seat and drove the truck away.

After the robbers secured the driver in the back of the pharmaceutical truck and drove away, Ray and Robinson followed in a separate car.[2] The robbers drove the truck to a predetermined location, where they met Davis, who was driving a U-Haul truck. The robbers then unloaded items from the pharmaceutical truck and loaded them into the U-Haul truck. After the U-Haul truck was loaded, Davis drove the truck to a different location, and Ray and Robinson, who had remained in their vehicle during the transfer, followed. When he arrived at the location, Davis parked the U-Haul truck, gave the key to Robinson, and stated that "his job was finished." Robinson then drove the truck to a friend's house, where he and Ray unloaded the stolen pharmaceutical supplies. After separating out "some of the more marketable drugs," Robinson then reunited with Samuels and appellant, at which time Robinson paid the men some money.

That same day, Baltimore City Police Officer Arthur Hood was on patrol when he received a report of a possible abduction involving a vehicle. Officer Hood eventually located the vehicle, a box truck, which was parked in an alley. When he approached the truck, Officer Hood observed that the truck's rear lift gate was "open three or four inches." After opening the gate, Officer Hood discovered a male victim, later identified as Yigsas Demsas, bound at the hands and standing in the rear of the truck. Demsas, who was employed by a pharmaceutical company as a driver and was operating the pharmaceutical truck in that capacity at the time of the robbery, reported that he had been making a delivery when he was robbed.

[2] The record is unclear as to who actually committed the robbery.

A year later, in 2011, Ray was implicated in an unrelated conspiracy to distribute cocaine and was eventually charged in federal court. Ray ultimately entered into a plea agreement with the Federal government and, as part of that agreement, disclosed his involvement in the robbery to agents with the Drug Enforcement Administration. DEA Special Agent James Weekes, who was part of a task force investigating the robbery, was informed of Ray's disclosure and later contacted him for information.

Then, in 2013, Robinson was arrested on unrelated federal charges and subsequently agreed to speak with Agent Weekes about the robbery. Through Robinson, Agent Weekes learned of Samuels's and appellant's involvement in the robbery, upon which Robinson agreed to engage in several recorded conversations with Samuels. Agent Weekes then met with Samuels, who agreed to engage in a face-to-face recorded conversation with appellant at appellant's apartment. Not long after his meeting with Samuels, appellant was charged in connection with the robbery.

At trial, Robinson testified as to his involvement in the robbery. As part of that testimony, Robinson claimed that Samuels originally agreed to be the "muscle" during the robbery but later backed out and told Robinson that "he was going to . . . let somebody else do it." Robinson also testified that, although appellant was present at some of the meetings and on the day of the robbery, he never had any discussions with appellant about the robbery.

Samuels also testified. As part of that direct testimony, Samuels claimed that he and appellant discussed the robbery in detail, including how the robbery was to be carried out and how they were to be compensated. Samuels also claimed that, on the day of the

robbery, appellant informed him that they "would be okay" because appellant had "found somebody else that could carry out the act." According to Samuels, appellant then had a "meeting" with Robinson and the three individuals who committed the robbery, after which Samuels and appellant left the scene in their vehicle. Samuels also testified that when he and appellant met with Robinson after the robbery, Robinson handed some money to directly to appellant.

Also during Samuels's direct testimony, the State played for the jury portions of the recorded conversation Samuels had with appellant at appellant's home. Throughout its playing of those portions of the conversation, the State stopped the recording at various times to ask Samuels questions about who was speaking and the content of the conversation:

(A recording is played in open court from 1:18:30 p.m. until 1:19:47 p.m.)

[STATE]: Sir, where were you at this point in the recording?

[WITNESS]: At [appellant's] home.

[STATE]: Okay. Who else was in the room? Who, if anybody, do you hear at this point other than yourself?

[WITNESS]: Just he and I.

* * *

(A recording is played in open court from 1:25:04 p.m. until 1:28:39 p.m.)

[STATE]: Mr. Samuels, at this point, can you hear what the conversation is about?

[WITNESS]: Yes.

[STATE]: So what did you – what did you last hear in that conversation? What were you talking about?

[WITNESS]: We were talking about the gentlemen the [sic] robbed the truck.

[STATE]: And did you hear anything about checking up on somebody?

[WITNESS]: That was me.

[STATE]: What did you say?

[WITNESS]: I was asking what their names was so I could get my lawyer to run their names.

[STATE]: Okay.

[WITNESS]: Check up on them and see where they were.

[STATE]: And what did you mean by run their – by check on them? What do you mean by that?

[WITNESS]: We were having a conversation about – the conversation is saying – what the agents wanted me to do was get the names of the guys or have a conversation about the names of the guys who actually carried out the act and –

[STATE]: And did you hear any names in that conversation that – pertaining to this event?

[WITNESS]: Yes.

[STATE]: Which names?

[WITNESS]: The conversation led into the names of the other defendants, Khalid somebody named Man (phonetic throughout) or something.

[STATE]: Khalid and Man? Who said Khalid and Man in that conversation?

[WITNESS]: [Appellant]

* * *

(A recording is played in open court from 2:10:18 p.m. until 2:32:18 p.m.)

[STATE]: Mr. Samuels, if you can, what do you recall talking about at this specific moment?

[WITNESS]: Telling Davon not to say anything to the three guys that robbed the truck.

* * *

(A recording is played in open court from 2:34:01 p.m. until 2:34:30 p.m.)

[STATE]: What were you saying there, sir? Who was saying what as far as what we're hearing?

[WITNESS]: We were discussing the acts. I'm saying I didn't know it would play out that way.

[STATE]: Is there a term that you were using or that someone was moving [sic]?

[WITNESS]: [Appellant] said yeah, it was like Mission Impossible.

[STATE]: And why was he referring to that if you know?

[WITNESS]: Because when we heard of the – well, when we heard of the acts of it, it was – it was way more overblown than we thought.

Later, during its redirect examination of Samuels, the State questioned Samuels about his recorded conversations with Robinson, during which the two discussed

committing a different robbery and enlisting the help of appellant. The State also asked Samuels if he could explain why he could not remember more details about his discussions with Robinson regarding the robbery of the pharmaceutical truck:

[WITNESS]: No, I don't have an explanation. It was a long time ago.

[STATE]: It was a long time ago. Sir, were you and [Robinson] close friends?

* * *

[WITNESS]: Yes.

[STATE]: And in what context, if there is any context, would these discussions come up with [Robinson] about the pharmaceutical truck robbery?

[WITNESS]: In casual conversation. If he came to my home or something.

[STATE]: Okay. Sir, was it uncommon for you to have these types of conversations generally with [Robinson]?

* * *

[WITNESS]: No.

[STATE]: Can you explain further, sir?

* * *

[WITNESS]: [Robinson] trusted me. We may have lived different lifestyles but I didn't judge him so we talked about, we talking [sic] about any and everything. Whether there was something that was wrong or right we talked about everything. So any conversation that he would have with me was just normal, a normal relationship with he and I.

Then, prior to re-cross examination, defense counsel requested a bench conference and asked that she be permitted to impeach Samuels with the recorded conversation between him and Robinson. Specifically, defense counsel wanted to question Samuels about his and Robinson's discussion of "a new robbery." In addition, defense counsel wanted to question Samuels about other portions of the recorded conversation, during which Samuels made several unrelated references to drugs, including that "all the drugs he's been getting [were] diluted as shit" and whether Robinson was "having the same luck." Defense counsel argued that the drug-related statements were relevant impeachment evidence based on Samuels' claim that he and Robinson "lived different lifestyles." The court granted defense counsel's request to impeach Samuels with his references to the new robbery but denied her request regarding the drug-related references, explaining that the new robbery had "clearly been opened but not the lifestyle part."

Later, the defense recalled Robinson as a witness. During his testimony, Robinson claimed that Samuels, not appellant, got out of their vehicle on the morning of the robbery and that neither Robinson nor the actual robbers ever spoke with appellant at the scene. Robinson also claimed that appellant was not present when the items from the pharmaceutical truck were unloaded into the U-Haul and that Robinson never gave money to appellant after the robbery.

During its cross-examination of Robinson, the State asked him: "Is it your understanding the defendant had a role in the robbery you planned?" Before Robinson

could answer, defense counsel objected and requested a bench conference, during which the following colloquy ensued:

> [DEFENSE]: Okay. So, A, this is outside the scope of the very specific questions I asked Mr. Robinson and secondly we've already been through this. Mr. Robinson already told us that anything that he knew about my client's role in it was through Pat Samuels. So he has not testified that he has any direct knowledge meaning I guess a conversation with, I mean, it can't be something he heard from somebody else. And I think it's beyond the scope anyway. I mean, the State already had him on the stand and we've been through this part of testimony.
>
> THE COURT: Well I think it's, I think it's within the scope. I think the scope of the direct examination is to show or imply that [appellant] was not involved in this. And, therefore, I think the question is within the scope.
>
> [DEFENSE]: Actually it wasn't. It was to impeach . . . . I mean it was a very specific question. It is not to, I'm not showing how anything. I'm impeaching a witness who said something that contradicts this witness. That's all I did. Was impeach Mr. Samuels in this case. So I mean . . . . I think the State has to be limited to that very narrow –
>
> THE COURT: I disagree. I'm going to overrule the objection.
>
> [STATE]: Thank you, Your Honor.

Before the bench conference concluded, defense counsel asked that the State rephrase its question because, according to defense counsel, "it's an inappropriate question under any circumstance to ask him what his understanding was." The trial court disagreed, stating that "this case involves alleged conspiracy and [Robinson's]

understanding as to who was involved is . . . not just relevant but from whatever the source . . . would be admissible." The State then continued its cross-examination of Robinson:

[STATE]: What, if anything – what, if any role did [appellant] have in relation to the execution of your plan to rob the truck on December 13, 2010?

* * *

[WITNESS]: My understanding, my direct contact was through [Samuels]. And [Samuels] said that [appellant] knew some guys. That's all, that's all I know.

[STATE]: And the guys who robbed the truck came from [appellant]?

* * *

[WITNESS]: I don't know.

[STATE]: And when you met at the bar to discuss the robbery of the truck, prior to the day in question, was [appellant] present?

* * *

[WITNESS]: Yes.

* * *

[STATE]: All right. Now, Mr. Robinson, is it true you met with [appellant] and Patrick Samuels on three occasions prior to the robbery?

[WITNESS]: That sounds about right.

[STATE]: And on the day of the robbery, after it had occurred, you went and met with [appellant] and Patrick Samuels, correct?

[WITNESS]: Yes.

[STATE]: And at that point in time, you dispersed money for the robbery, is that correct?

[WITNESS]: Yes.

[STATE]: All right. Now, the initial plan that you came up with, when you initially thought this robbery out, involved Dustin Ray, yes?

[WITNESS]: Yes.

* * *

[STATE]: And at that juncture, the person who you believed was going to take the pharmaceutical truck was the, was Patrick Samuels, correct?

[WITNESS]: Yes.

[STATE]: Now, on the day of the robbery, you learned that Patrick Samuels was subbing that job out; is that correct?

[WITNESS]: Yes.

[STATE]: That he wasn't doing it himself. And on that day you also learned that it was [appellant] who was going to get people to actually take the truck . . . is that correct?

[WITNESS]: Maybe.

The State then confronted Robinson with a recorded statement he had given to the police regarding the robbery. Following a brief bench conference, the court permitted the

State to refresh Robinson's recollection by having him listen to the recorded statement. Upon his doing so, the State asked Robinson "now that you've had your memory refreshed, what do you recall, what is your recollection of your knowledge about [appellant] on the day of the incident?" Robinson responded "that [appellant] was going to get the guys." The State then questioned Robinson about his meeting with Samuels and appellant following the robbery:

[STATE]: When you, Mr. Robinson, when you went to, after the robbery of the truck took place, when you went to meet with [appellant] and Patrick Samuels, you had with you approximately $2,500?

* * *

[WITNESS]: Somewhere around that.

[STATE]: And that money was being used to pay for the actual commission of the crime, correct?

[WITNESS]: No.

[STATE]: That money was for what? Well, strike that. That money was being paid – well, when you had that money, you were making a payment and you were meeting with [Samuels] and [appellant], correct?

[WITNESS]: Yes.

* * *

[STATE]: And that payment was for getting the guys, because, getting the guys who committed the crime, correct?

[WITNESS]: Yes.

Appellant also testified, denying all involvement in the robbery. As part of that testimony, appellant claimed that several other individuals were at appellant's home at the time of the recorded conversation with Samuels. Appellant also claimed that Samuels can be heard talking to these other individuals during the recording.

At the close of all evidence, the court instructed the jury on the relevant law. As part of those instructions, the court informed the jury that certain things were not evidence and should not be given any weight or consideration, including opening statements and closing arguments from the lawyers. The court further stated that these arguments were intended only to help the jury understand the evidence, and that if the jurors' memory of the evidence differed from the lawyers' comments, then the jurors must rely upon their own memory.

Following the court's instructions, the parties presented their respective closing arguments. As part of appellant's closing argument, defense counsel discussed the recorded conversation between appellant and Samuels at appellant's home. In so doing, defense counsel argued that several unidentified individuals can be heard on the recording and that some of these individuals can be heard making certain comments. Defense counsel went on to attribute certain comments to these unidentified individuals.

The State then presented a rebuttal closing argument, during which it replayed for the jury the recorded conversation between Samuels and appellant. As the recording was playing, the State displayed, on a screen that was visible to the jury, an unofficial transcript of the recording, which the court had previously ruled to be inadmissible

because the parties disagreed as to the accuracy of the transcript. Defense counsel asked that the screen be turned off, and the court convened a bench conference:

> [DEFENSE]: Judge, I'm asking for a mistrial. They're showing a transcript up there after we – I mean, that – that's what's playing up there. Judge, I mean –
>
> THE COURT: What if he were to play a section and then tell the jury, you just heard . . . . Samuels say this.
>
> [DEFENSE]: -- what am I – I've been sitting here not realizing the whole time and he's putting his version of what he – I mean, they've . . . watched it now.
>
> THE COURT: But couldn't he have put his version in if he didn't have it on the screen. Couldn't he just say –
>
> [DEFENSE]: Judge, no. He can't show them in a transcript. We've already been through – I mean, he – no. He – you – Judge, why now would he be able to show them something that wasn't admissible during the trial?
>
> THE COURT: Because now he's arguing what's being said . . . . [H]e couldn't do it in the trial as substantive evidence that it happened and use it because there was a disagreement as to whether it's accurate or not. But the – there can be disagreement as to his interpretation of whether it's accurate or your interpretation of whether it's accurate.
>
> [DEFENSE]: Judge, I think it's fair for him to comment on it. For him to show it like it – this is the way it is – and I would – if the Court isn't going to grant a mistrial in this case I would ask you to at least instruct them that they have to make their own decision about what is being said. And I would ask that you not let him show that up there.

The court agreed to give the curative instruction but allowed the State to continue using the transcript. The court then informed the jury:

> Okay. Ladies and gentlemen, what you're seeing on the screen is part of the State's argument. Once again, this is the State's interpretation of what's on the audio. It is not evidence. What you heard or what you believe was said, that is what the evidence is going to be in this case. So I just want you to know this is not an official transcript or anything like that.

The State then resumed its rebuttal argument, but defense counsel quickly objected and requested another bench conference. At said bench conference, defense counsel argued that there was "no evidence" as to who was speaking on the recording. The court responded that the jury did hear testimony identifying certain speakers' voices. While agreeing that the State had laid the proper foundation as to who was involved in the conversation, defense counsel argued that the State failed to identify which individuals were speaking at every point of the recording. The trial court disagreed that such a foundation was necessary, at which time defense counsel asked that the court "remind the jury that the decision about who is speaking at which time is for them to determine." The court refused to instruct the jury again. The State then continued its rebuttal argument, using the unofficial transcript to ascribe some of the recorded statements to appellant.

DISCUSSION

I.

Appellant first argues that the trial court "erred in permitting the State to go beyond the limited scope of [defense counsel's] examination of Mr. Robinson, and elicit from Robinson matters which were outside his personal knowledge." Appellant

maintains that defense counsel "conducted a brief and focused examination of Robinson, to elicit only five points which created a direct conflict with Mr. Samuels' testimony." Appellant avers that the State's query into Robinson's "understanding" of appellant's role in the robbery exceeded the bounds of permissible cross-examination because it was not related to the subject matter raised during Robinson's direct examination. Appellant also avers that the State's inquiry delved into matters beyond Robinson's personal knowledge, and that the trial court should have excluded the testimony on that ground as well.

The State counters that the trial court did not abuse its discretion in regulating the scope of the State's cross-examination of Robinson. The State maintains that its inquiry "was squarely within the scope of appellant's direct examination – which was aimed at minimizing his involvement in the crime." The State further maintains that Robinson's testimony regarding his understanding of appellant's role in the robbery was derived from his personal knowledge, as it was based on statements made by Samuels to Robinson prior to the robbery.

Maryland Rule 5-611 provides, in pertinent part, that "cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." Md. Rule 5-611(b)(1). On the other hand, the Rule also provides that, "[e]xcept for the cross-examination of an accused who testifies on a preliminary matter, the court may, in the exercise of its discretion, permit inquiry into additional matters as if on direct examination." *Id.* Therefore, while cross-examination is generally limited to matters raised on direct examination, "[t]he scope of the cross-examination inquiry is subject to the trial judge's sound discretion." *Coates v. State*, 90

Md. App. 105, 111 (1992) (citation omitted). "This discretion is exercised by balancing 'the probative value of an inquiry against the unfair prejudice that might inure to the witness. Otherwise, the inquiry can reduce itself to a discussion of collateral matters which will obscure the issue and lead to the fact finder's confusion.'" *Wagner v. State*, 213 Md. App. 419, 468 (2013) (citations omitted).

Here, we hold that the trial court did not abuse its discretion in permitting the State to inquire into Robinson's understanding of appellant's role in the robbery. As the trial court correctly noted, the subject matter of Robinson's direct testimony was appellant's role in the robbery. On this point, defense counsel attempted to impeach Samuels's claims that appellant had an active role in the robbery by introducing rebuttal testimony from Robinson, who claimed that he never spoke with appellant about the robbery, that appellant was not present at the scene of the transfer, and that he never handed any money to appellant. Based on that evidence, the State was well-within the scope of acceptable cross-examination when it asked Robinson to expound on his understanding of appellant's role in the robbery.

Citing Md. Rule 5-611(a) and a series of cases in which either this Court or the Court of Appeals held that a trial court did not abuse its discretion in limiting the scope of cross-examination, appellant avers that the State in the instant case should not have been permitted to ask questions on cross-examination that exceeded the precise purpose and specific content of defense counsel's direct examination. We do not, however, read that Rule or those cases as being so restrictive. To begin, Md. Rule 5-611(a) does not state that cross-examination *must* be limited to the exact focus of the questions asked during

direct examination; rather, the Rule provides that cross-examination *should* be limited to the *subject matter* raised during direct examination. Moreover, in each of the cases cited by appellant, the appellate court held that it was not an abuse of discretion for the trial court to limit cross-examination to the subject matter raised during direct examination. *See, e.g.*, *Bruce v. State*, 318 Md. 706, 727 (1990); *Ashton v. State*, 185 Md. App. 607, 624 (2009); *Coates*, 90 Md. App. at 111; *Dove v. State*, 33 Md. App. 601, 607-08 (1976). In none of those cases did the appellate court hold, or even suggest, that a trial court abuses its discretion by permitting a party to exceed the subject matter raised during direct examination. Accordingly, appellant's reliance on these cases is inappropriate.

A more suitable line of cases can be found starting with *Williams v. Graff*, 194 Md. 516 (1950). In that case, the plaintiff, Cyrus Williams, sued the defendant, Theodore Graff, after Williams was struck by a taxicab owned by Graff. *Id.* at 520. At trial, a police officer who investigated the accident testified on direct examination as to certain observations he made at the scene following the accident. *Id.* at 523. On cross-examination, the officer testified that he saw skid marks on a certain part of the road, a fact that contradicted Williams's version of the accident. *Id.* at 520-21. The jury ultimately rendered a verdict in favor of Graff. *Id.* at 521.

On appeal, Williams argued that "the testimony of the police officer as to skid marks was erroneously admitted on cross-examination because skid marks had not been inquired into on his direct examination." *Id.* at 522. Although the Court of Appeals agreed that, where a witness is called to testify on a particular point, the adverse party in

the cross-examination of the witness is restricted to the point on which he testified and cannot question him in regard to other issues in the case. *Id.* at 523. The Court reasoned:

> [O]ur rule does not go to the extent of restricting the cross-examination of the witness to the specific details inquired into on direct examination, but permits full inquiry into the subject matter entered into. Where a general subject has been entered upon in the examination in chief, the cross-examining counsel may ask any relevant question on the general subject. In our judgment the rule limiting cross-examination to the general facts stated on direct examination should not be so applied as to defeat the real object of cross-examination, *i.e.*, to elicit all the facts of any observation or transaction which has not been fully explained.

Id. at 522-23 (citations omitted).

The Court of Appeals readdressed this issue in *Shupe v. State*, 238 Md. 307 (1965). There, the defendant, William Shupe, was charged with larceny after some money, which was kept in a cigar box, was stolen from an unlocked storeroom of a gas station. *Id.* at 309. At trial, two employees of the gas station testified that they had placed the money in the cigar box on the night of the theft, and that Shupe was at the gas station that night and had access to the box. *Id.* at 308-09. During Shupe's cross-examination of one of the employees, counsel attempted to ask the employee "whether there had been any shortages of money at the station in the past." *Id.* at 310. The State objected, and the trial court sustained the objections before the employee could answer. *Id.*

On appeal, Shupe argued that the trial court erred in unduly limiting his cross-examination of the employee. *Id.* Citing *Williams*, *supra*, the Court of Appeals agreed with Shupe, explaining that the testimony of the State's witnesses "showed a loose,

slipshod method of handling and protecting station receipts. Therefore, a question on cross-examination exploring the possible consequences of such methods was properly within the scope of the direct, and relevant to the case." *Id.* at 311. The Court further noted that, "[a]lthough defense counsel apparently did not know what the answers to the questions would be, 'exploratory' type questions are well recognized, and to prohibit their use under certain circumstances may be prejudicial[.]" *Id.* (citations omitted).

Several years later, this Court addressed the permissible scope of cross-examination in *Robinson v. State*, 18 Md. App. 678 (1973). There, the defendant, Bernard Robinson, who was on trial for murder, testified in a very limited capacity as part of defense counsel's strategy to "avoid exposure to cross-examination, except on the very limited basis of the direct examination." *Id.* at 698-99. Despite this strategy, the trial court permitted the State to ask questions on cross-examination that exceeded the scope of direct examination,[3] which, on appeal, Robinson claimed was erroneous. *Id.* This Court disagreed and held that, under both *Williams* and *Shupe*, the "trial court did not err in allowing the State's cross-examination of [Robinson] to exceed the scope of very limited direct examination." *Id.* at 699-700.

We later revisited the issue in *Rollins v. State*, 172 Md. App. 56 (2006). In that case, the defendant, Ivan Rollins, was arrested following the stabbing-death of a woman in her apartment. *Id.* at 59-60. Prior to his arrest, Rollins told the police that he had gone

[3] Although this Court appears to have agreed that the State did in fact exceed the scope of the defendant's direct examination, we did not specify exactly how that scope was exceeded, as the details of the State's cross-examination of the defendant were not included in our published opinion.

to the victim's apartment, at which time he heard her screaming, entered her apartment, and found her "lying face down in a pool of blood." *Id.* Rollins later changed his story and claimed that he and the victim were arguing prior to the attack, that she was "always mean," that she attacked him with a knife, and that he stabbed her in self-defense. *Id.* at 59. At trial, Rollins testified that his initial statements to the police were true but that his latter statements were false. *Id.* at 60. During its cross-examination of Rollins and its case-in-rebuttal, the State presented evidence that the victim once had Rollins "locked up," that Rollins carried a knife in his car, and that he had made prior threats against the victim. *Id.* at 60, 72.

On appeal, Rollins claimed that he was "unfairly prejudiced" by the State's evidence, which Rollins characterized as impermissible "other bad act evidence." *Id.* at 72. As part of that argument, Rollins claimed that "the prosecutor broached those subjects on cross examination" despite the fact that "the vast majority of defense counsel's direct examination focused on [Rollins's] account of the events surrounding [the victim's] death." *Id.* Rollins also claimed that he never testified about his and the victim's relationship in general, nor did he testify as to "whether he had ever harassed the [victim] or left threatening messages on her answering machine." *Id.*

This Court disagreed with Rollins and held "that the circuit court did not err or abuse its discretion in concluding that the State was entitled to (1) cross-examine [Rollins] about the details at issue, and (2) in its case-in-rebuttal, offer rebuttal extrinsic evidence that contradicted [Rollins's] account of his relationship with the victim." *Id.* at 73. We noted that "[u]nder Maryland's 'scope of cross-examination' cases, which are

entirely consistent with the 'subject matter' limitation set forth in Md. Rule 5-611(a), 'the cross-examination of [a] witness [is not restricted] to the specific details inquired into on direct examination, but permits full inquiry into the subject matter entered into.'" *Id.* at 72-73 (quoting *Williams*, 194 Md. at 522). We explained that Rollins's direct testimony "created the logical inference that he and the victim had a good relationship." *Id.* at 73. As a result, we concluded that "the State was entitled to present evidence that rebutted, *i.e.*, contradicted the inference that [Rollins] and the victim had a 'good relationship.'" *Id.*

In light of the aforementioned case law and the lack of pertinent authority to the contrary, we are persuaded that the trial court in the instant case did not abuse its discretion in permitting the State to question Robinson about appellant's participation in the robbery. Although appellant claims that Robinson's direct testimony "focused on highlighting critical discrepancies between Samuels's and Robinson's testimony," the clear inference from this testimony was that, of the two, Samuels was the primary conspirator while appellant was a mere bystander. Thus, as previously discussed, the "subject matter" of Robinson's direct testimony was appellant's role in the robbery, regardless of appellant's purported intent in calling Robinson as a witness. Moreover, even if Robinson was called for the discrete purpose of impeaching Samuels's testimony, during which Samuels suggested that appellant had a more active role in the robbery, the State certainly had a right to impeach Robinson's testimony by cross-examining him about that very matter. That the State had previously called Robinson in its case-in-chief

is irrelevant, as Robinson's rebuttal testimony raised additional inferences which were then the proper subject of cross-examination.

Finally, we disagree with appellant's claim that Robinson's testimony on cross-examination was outside of his personal knowledge, and thus inadmissible, because Robinson's "understanding" of appellant's role in the robbery came from Samuels. Md. Rule 5-602 provides that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." If the witness is a non-expert, any testimony "in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Md. Rule 5-701. "The personal knowledge prerequisite requires that '[e]ven if a witness has perceived a matter with his senses,' he must also have, 'the experience necessary to comprehend his perceptions.'" *Rosenberg v. State,* 129 Md. App. 221, 255 (1999) (citations omitted). "The rational connection prerequisite requires that there 'be [a] rational connection between [the] perception and the opinion.'" *Id.* (citations omitted).

Here, Robinson testified that he met with Samuels and appellant on three occasions prior to the robbery, and that Samuels told him that appellant "was going to get the guys." Robinson also testified that he met with Samuels and appellant after the robbery to disperse money and that this money was compensation for "getting the guys." From this, it is clear that Robinson did have personal knowledge of appellant's role in the

robbery, and that this personal knowledge was sufficient for Robinson to opine as to his "understanding" of appellant's participation. Accordingly, the trial court did not err in permitting such testimony.

II.

Appellant next contends that that trial court erred in failing to declare a mistrial after the State, during its closing argument, utilized an unofficial transcript of Samuels's recorded conversation with appellant. Appellant maintains that the transcript, which had previously been excluded as evidence by the trial court because it contained certain factual disputes regarding the identity of the speakers, should not have been shown to the jury during closing argument for the same reason. Appellant avers that the State's use of the transcript "was improper because it highlighted an argument which was not based on facts in evidence, *viz.*, the identity of the speakers of each statement in the recording."

The State counters that the trial court properly exercised its discretion in refusing to grant a mistrial. The State avers that the use of the transcript was proper, as the State was "free during closing argument to present its interpretation of the recorded conversation, and it was not required to have a witness identify every statement made on the recording in order to attribute statements to specific speakers." The State further avers that any impropriety in its use of the transcript was cured by the court's cautionary instruction to the jury.

"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) (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) (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.* (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) (citation omitted)[4] (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) (citations and quotations omitted). "Counsel is not permitted 'to state and comment upon facts not in evidence,' and

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

comments 'that invite the jury to draw inferences from information that was not admitted at trial are improper.'" *Donati v. State*, 215 Md. App. 686, 731 (2014) (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)).

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 (citation omitted). 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) (citation omitted). "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.* (citation omitted).

Likewise, "[i]t is well-settled that a decision to grant a mistrial lies within the sound discretion of the trial judge and that the trial judge's determination will not be disturbed on appeal unless there is an abuse of discretion." *Carter v. State*, 366 Md. 574, 589 (2001) (citations omitted). "The possible prejudice that a defendant may suffer as a result of alleged misconduct forms the threshold for the decision whether to grant a mistrial." *Cooley v. State*, 385 Md. 165, 173 (2005). "The trial judge must evaluate the circumstances of the case and '[i]n assessing the prejudice to the defendant, the trial judge first determines whether the prejudice can be cured by instruction.'" *Id.* (citations

omitted). "If a curative instruction is given, the instruction must be timely, accurate, and effective." *Carter*, 366 Md. at 589. "Unless the curative effect of the instruction ameliorates the prejudice to the defendant, the trial judge must grant the motion for a mistrial." *Kosh v. State*, 382 Md. 218, 226 (2004) (citation omitted).

Nevertheless, "[a] mistrial is not a sanction designed to punish an attorney for an impropriety." *Choate v. State*, 214 Md. App. 118, 133 (2013) (quoting *Behrel v. State*, 151 Md. App. 64, 142 (2003)). Rather, a mistrial is "an extreme sanction that sometimes must be resorted to when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice." *Id.* As such, a denial of a motion for a mistrial will be reversed "only where 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Id.* (citation omitted). Moreover, such prejudice "must be shown as a 'demonstrable reality' and not as a 'matter of speculation.'" *Baldwin v. State*, 5 Md. App. 22, 28 (1968) (citation omitted).

Thus, while it is generally improper for the prosecution to make remarks unsupported by the evidence or calculated to prejudice the defendant, "the fact that a remark made by the prosecutor in argument to the jury was improper does not necessarily compel that conviction to be set aside." *Wilhelm*, 272 Md. at 415 (citation omitted). "[U]nless it appears that the jury were actually misled or were likely to have been misled or influenced to the prejudice of the accused by the remarks of the State's Attorney, reversal of the conviction on this ground would not be justified." *Id.* at 415-16 (citations omitted). "The applicable test for prejudice is whether we can say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole,

that the judgment was not substantially swayed by the error." *Id.* at 416 (citations and quotations omitted). "The decisive factors are the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error." *Id.* (citations omitted).

Again, "[t]rial court judges are entitled great deference in declaring a mistrial based on their assessment of the prejudicial impact of improper argument and, accordingly, shall be reversed only for an abuse of discretion." *Quinones v. State*, 215 Md. App. 1, 17 (2013) (citations omitted). Like with decisions regarding the propriety of closing argument, our deference is due primarily to the fact that "the trial court 'is ordinarily in a uniquely superior position to gauge the potential for prejudice in a particular case.'" *Id.* at 18 (citation omitted). As the Court of Appeals has explained:

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

State v. Hawkins, 326 Md. 270, 278 (1992).

In the present case, we hold that the trial court did not err in denying appellant's request for a mistrial. First, we are not persuaded that the State's use of the transcript during closing argument was improper or outside the bounds of acceptable argument. When the recording was first admitted into evidence, Samuels testified that the recorded conversation had occurred in appellant's home. When the State asked Samuels if anyone else could be heard, Samuels responded that it was "just he and I." From there, Samuels

went on to ascribe certain statements to himself and certain statements to appellant. Although Samuels did not identify exactly who was speaking after every audible comment, his identification of his and appellant's voice was sufficient foundation for the jury to infer who was making each comment. *See* Md. Rule 5-901(b)(5) (stating that evidence may be authenticated by "[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, based upon the witness having heard the voice at any time under circumstances connecting it with the alleged speaker."). Consequently, Samuels's testimony provided equally sufficient foundation for the State to argue, *via* the transcript presented during closing argument, that certain comments could be attributed to appellant. In short, appellant's claim that the State's argument was not based on facts in evidence is unsupported by the record.

Moreover, appellant cites no statute, rule, or case to support his proposition that the State was required to establish the identity of the speaker for each and every audible comment before it could comment on the identity of the speaker during closing argument. That there happened to be factual disputes regarding admitted evidence, *i.e.*, the identity of the speakers on the recording, does not bar the State from arguing its theory of the case or its interpretation of the evidence to the jury. Rather, such factual disputes are, as previously discussed, directly within the scope of acceptable argument. *See Donati*, 215 Md. App. at 730 ("As to summation, it is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence[.]") (Citation omitted).

Assuming, *arguendo*, that the State's use of the transcript was improper and caused some minimal prejudice to appellant, such prejudice was sufficiently cured by the court's instructions to the jury. In deciding the sufficiency of a curative instruction following an improper comment by the State, "[w]e look at the trial judge's actions as a whole in reference to the statements." *Lawson*, 389 Md. at 602. As the Court of Appeals has explained, "a significant factor in determining whether the jury were actually misled or were likely to have been misled or influenced to the prejudice of the accused is whether or not the trial court took any appropriate action, as the exigencies of the situation may have appeared to require[.]" *Wilhelm*, 272 Md. at 423-24.

Here, during its general instructions to the jury, the trial court informed the jury that opening and closing arguments were not evidence, that such arguments were intended only to help the jury understand the evidence, and that if the jurors' memory of the evidence differed from the lawyers' comments, then the jurors must rely upon their own memory. Then, when the State's use of the transcript was brought to the court's attention, the court issued a more specific instruction to the jury, stating that the transcript was "part of the State's argument" and was "the State's interpretation of what's on the audio." The court then reminded the jury that the transcript was not evidence, that it was not "an official transcript or anything like that," and that what the jury believed was said on the recording was "what the evidence is going to be in this case." Given that the court's latter instruction was timely and specific, and given that it reiterated the court's prior instruction regarding the fact that arguments by the lawyers are not evidence, any prejudice suffered by appellant by the State's use of the transcript was effectively

ameliorated. At the very least, the circumstances did not warrant a mistrial, and the trial court did not abuse its discretion in refusing to take such a drastic step.

III.

Appellant's final contention is that the trial court erred in denying his request to confront Samuels with certain drug-related comments he made during his recorded conversation with appellant. While conceding that these comments "would not have been initially relevant," appellant maintains that the comments became relevant after Samuels "opened the door" by claiming, on direct examination, that he and Robinson "lived different lifestyles." Appellant contends that Samuels' testimony "made it less likely that he secured the actual robbers, and made it more likely – as the State contended – that [appellant] was involved in that aspect of the conspiracy." Appellant avers, therefore, that "Samuels's conversations about purchasing drugs, and complaints about their quality, would directly undermine his claim of a 'different lifestyle,' and make it more likely – as defense contended – that Samuels secure the robbers, and utilized [appellant's] innocent presence as leverage to reduce his culpability."

The State counters that the trial court properly exercised its discretion. The State maintains that Samuels did not "open the door" to the admission of this evidence because his comment regarding he and Robinson's "different lifestyles" was open to a broad interpretation and did not necessarily imply that Robinson was involved in criminal activity and Samuels was not. The State also maintains that even if the "door were opened, Samuels' drug activity was a purely collateral matter, which, if relevant at all,

went only to his general credibility and not the truthfulness of his testimony about the events in question."

The "open door" doctrine "'permits a party to introduce evidence that otherwise might not be admissible in order to respond to certain evidence put forth by opposing counsel.'" *Khan v. State*, 213 Md. App. 554, 573 (2013) (quoting *Mitchell v. State*, 408 Md. 368, 388 (2009)). "'Opening the door' is a rule of expanded relevancy; it allows the admission of evidence that is competent but otherwise irrelevant, in order to respond to evidence introduced by the opposing party during its direct examination." *Sivells v. State*, 196 Md. App. 254, 282 (2010) (quoting *Conyers v. State*, 345 Md. 525, 545 (1997)). "Whether the opponent's evidence was admissible evidence that injected an issue into the case or inadmissible evidence that the court admitted over objection, once the 'door had been opened' a party must, in fairness, be allowed to respond to that evidence." *Id.*

This doctrine, however, "is applicable only in limited and well-defined circumstances to combat a particular inequity." *Conyers*, 345 Md. at 545. Thus, the doctrine should be construed narrowly, "and a response to the issues injected by the adverse party should be tailored appropriately." *Khan*, 213 Md. App. at 574 (citation omitted). Furthermore, even if a party opens the door to the admission of otherwise irrelevant evidence, a trial court may still exclude the evidence if it finds that the evidence's probative value is substantially outweighed by the danger of unfair prejudice. *Id.* (citing Md. Rule 5-403).

We hold that the trial court did not err in precluding defense counsel from questioning Samuels about his drug-related comments. Just prior to his testifying that he and Robinson "lived different lifestyles," Samuels had testified that he and Robinson had discussed committing another robbery. The State then asked Samuels about his discussions with Robinson regarding the pharmaceutical truck robbery and whether it was uncommon for the two to have "these types of conversations." Samuels responded that such conversations were not uncommon because Robinson trusted him and, even though they "lived different lifestyles," the two "talked about everything."

From this, we are persuaded that Samuels's testimony did not "open the door" to the admission of evidence about his drug-related activity. The record makes plain that the State was questioning Samuels specifically about certain planned robberies, including the pharmaceutical truck robbery, and that Samuels, in commenting on his and Robinson's "lifestyles," was expounding upon the circumstances that led to his discussions with Robinson regarding said robberies. At no time did Samuels expressly state, or even suggest, that either he or Robinson were involved in drug-related activity, nor did he suggest that his reference to their "different lifestyles" encompassed drug activity or criminality in general. Permitting defense counsel to interject Samuels's wholly unrelated and somewhat vague comments about drug activity would have exceeded the limited and well-defined boundaries in which the "open door" doctrine operates. The trial court appears to have recognized this limitation, as it did permit defense counsel to ask Samuels about his comments concerning the other robbery. Given the context of Samuels's direct testimony, the comments concerning the other robbery

were significantly more probative than his comments regarding drug-activity and achieved the same result, *i.e.*, impeaching Samuels. Any additional probative value in admitting the drug-related comments would have been minimal and far outweighed by the danger of unfair prejudice.

In sum, the trial court did not err in finding that Samuels's testimony did not "open the door" to the introduction of his irrelevant comments regarding drug-activity, and the trial court did not abuse its discretion in refusing to admit such prejudicial comments into evidence.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.