Circuit Court for Anne Arundel County
Case No. C-02-CR-15-000112

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1467

September Term, 2016

MICHAEL LEE FOOT

v.

STATE OF MARYLAND

Meredith,
Friedman,
Pierson, W. Michel
(Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: December 5, 2017

Michael Lee Foot was convicted in the Circuit Court for Anne Arundel County of prohibited possession of a handgun, and possession of a firearm by a convicted felon. He raises two challenges to his conviction. In his first challenge, he argues that the trial court erred in denying his motion to suppress evidence of the handgun. In his second challenge, he argues that he was denied a fair trial after the State made improper remarks during his cross-examination. For the reasons that follow, we vacate Foot's conviction and remand the case for a new trial.

ISSUE I: MOTION TO SUPPRESS

A. FACTUAL BACKGROUND OF THE MOTION TO SUPPRESS

On June 24, 2015, Foot was traveling southbound on Richie Highway in Glen Burnie as a passenger in a car that belonged to his girlfriend, Tamika Jones. While driving, the brakes malfunctioned and Jones veered off the road into the parking lot of a nearby Walgreens Pharmacy. The car came to a stop after hitting three parked cars. After getting out, Jones handed Foot a white women's purse, and began talking to the owners of the cars that she had hit. Foot used his cell phone to call his brother, and then left to meet him at a nearby restaurant.

As Foot was walking away, Baltimore County Police Officer Keith Doyle spotted him. He noticed that Foot was carrying a women's purse and appeared to be leaving the scene of an accident. He followed Foot and stopped his car "six to eight feet" away, then got out and identified himself. Officer Doyle was driving an unmarked vehicle and was dressed in plainclothes, but had his police badge and firearm clipped to his waist.

Officer Doyle asked Foot if he had been involved in the accident. Foot stated that he was and that his girlfriend had been driving the car. Officer Doyle asked if "[Foot] was okay and if he needed the fire department." Foot said that he was fine and that he "wanted to go see his friend who was supposed to pick [him] up." When Officer Doyle asked Foot why he was leaving, Foot explained that he "may have violated [his] probation." When Officer Doyle asked for identification, Foot stated falsely that his name was "James Dylan Chavez." Officer Doyle next asked Foot if he had any open warrants for his arrest, and Foot responded that he wasn't sure. Officer Doyle asked if Foot "had any weapons on him," and Foot put down the purse while answering "no." Officer Doyle then "patted down" Foot to check for weapons and did not find any. Officer Doyle radioed that he "had a subject that was involved in the accident here, and to start more cars [his] way." Foot asked if he could sit on the street curb, and Officer Doyle replied that he could.

Officer Doyle then asked Foot whose purse he was carrying, and Foot answered that it belonged to his girlfriend, Jones. Officer Doyle asked "if there was anything in the purse that would be able to let me know that the purse was actually Tamika Jones's[,] [i]f there was anything in that purse that would have her name on it as far as ownership." Foot answered that "there should be." At that point, Officer Doyle reached down to grab one of the handles of the purse. As he pulled it towards himself, he "noticed the butt end of a handgun." Officer Doyle then arrested Foot. The entire encounter, from when Officer Doyle approached to when Foot was arrested, lasted about five minutes.

B. ANALYSIS OF THE MOTION TO SUPPRESS EVIDENCE OF THE HANDGUN

Prior to trial, Foot filed a motion to suppress seeking to prohibit the State from introducing evidence of the handgun found in the purse.[1] Foot argued that Officer Doyle did not have a lawful reason to stop him and did not inform him that he had the right to leave; therefore, he was detained without reasonable suspicion or probable cause in violation of the Fourth Amendment. The State responded that leaving the scene of the accident raised Officer Doyle's suspicions and the encounter between Foot and Doyle was a lawful investigatory stop. The trial court denied Foot's motion to suppress, finding that: (1) Officer Doyle's suspicions about Foot leaving the accident were reasonable; (2) Foot further raised suspicions when he stated that he had an open arrest warrant; (3) although Officer Doyle did not detain Foot when his suspicions were raised, he would have had a right to; and (4) Foot had been free to leave.

The Fourth Amendment prohibits police from conducting unreasonable searches and seizures,[2] however, not every interaction between a citizen and a police officer

[1] The State urges that because Foot does not own the purse, he has no standing to challenge the constitutionality of its search, nor standing to suppress the gun found inside it. We note, however, that Foot is not challenging the search of the purse but rather that he was unlawfully seized by the police. Because Foot argues that the police recovered the gun as a result of that unlawful seizure, he has standing to move for the gun's suppression as "fruit of the poisonous tree." *See Ott v. State*, 325 Md. 206, 225 (1992) (noting that physical evidence obtained as the result of an illegal seizure is suppressed under the fruit of the poisonous tree doctrine).

[2] Article 26 of the Maryland Declaration of Rights provides a similar guarantee, stating, in part, "[t]hat all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive." Md. Const. Decl. of Rts. art. 26. Although Foot mentions Article 26 generally, he has not argued that the sweep of

implicates the Fourth Amendment. *Swift v. State*, 393 Md. 139, 149 (2006). Maryland courts divide police interaction with citizens into three categories: (1) a full arrest; (2) an investigatory stop; and (3) a mere accosting. *Swift*, 393 Md. at 149-51. Our analysis will focus on the third category of encounter: the accosting.[3]

An accosting is a consensual encounter between a police officer and citizen. *Trott v. State*, 138 Md. App. 89, 98 (2001). "Typically, an accosting occurs when police officers approach a citizen and ask for information, usually one's name, address, date of birth, destination, point of origin, and contents of luggage or vehicle." *Reynolds v. State*, 130 Md. App. 304, 322-23 (1999). An accosting is "not only constitutionally permissible but plays a pivotal role in law enforcement." *Trott*, 138 Md. App. at 99. "[B]ecause an individual is free to leave during such an encounter, he or she is not 'seized' within the meaning of the Fourth Amendment." *Id.* (citations omitted). "Even when the officers have no basis for suspecting criminal involvement, they may generally ask questions of an individual so long as the police do not convey a message that compliance with their request is required." *Ferris v. State*, 355 Md. 356, 375 (1999) (quotation omitted).

To determine whether an interaction between a police officer and a citizen is a mere accosting, we consider the totality of the circumstances surrounding the encounter to decide

Article 26 is broader than that of the Fourth Amendment. In the absence of such an argument, we decline to reach the issue.

[3] Because neither party asserts that Officer Doyle arrested Foot prior to the discovery of the handgun, we will not discuss the first category. We do, however, discuss the second category—an investigatory or "*Terry* stop." *See infra* n.4.

whether an objective, reasonable person would have felt he was free to leave. *Trott*, 138 Md. App. at 100. The U.S. Supreme Court has presented examples of police conduct that would indicate to a reasonable person they are not free leave, such as the "threatening presence of several [police] officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). In the context of approaching an individual by car, the Supreme Court has added other factors, including whether an officer "activated a siren or flashers" or "operated their car in an aggressive manner to block [the individual's] course or otherwise control the direction or speed of his movement." *Michigan v. Chesternut*, 486 U.S. 567, 575 (1988). We use these factors to determine if, under the totality of the circumstances, an individual's encounter with the police amounted to a mere accosting or something more that should trigger constitutional protections.

To review the denial of a motion to suppress, we "apply a *de novo* standard of review, [and make] our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case." *Brewer v. State*, 220 Md. App. 89, 99 (2014). Here, we agree with the conclusions drawn by the trial court. Officer Doyle stopped his car at the curb, not in front of Foot or blocking Foot's path. Foot didn't accuse Officer Doyle of physically touching him to prevent him from leaving, or suggest that Officer Doyle spoke in a tone that would mandate compliance. Officer Doyle did not command Foot to stop, nor did he require Foot to answer any questions. When Officer Doyle asked Foot if he

could pat him down, Foot voluntarily consented. We further note that Officer Doyle radioed for more officers only after Foot had said he may have violated his probation or have an open warrant, and that during the interaction Officer Doyle did not place Foot in handcuffs or otherwise restrain his movement. Under these circumstances, Officer Doyle's actions did not rise to a restriction on Foot's freedom to leave the scene. We conclude that, viewed under the totality of the circumstances, the interaction between Officer Doyle and Foot was a mere accosting and did not implicate Foot's Fourth Amendment rights. We affirm the trial court's denial of Foot's motion to suppress.[4]

[4] Even if we were to agree that Officer Doyle detained Foot, we are persuaded that Officer Doyle would have had reasonable, articulable suspicion to seize Foot and conduct an investigatory stop, commonly referred to as a *Terry* stop, after the Supreme Court's decision in *Terry v. Ohio,* 392 U.S. 1 (1968). Under *Terry*, police may stop a person to investigate if they have "specific articulable facts which, taken together with rational inferences from those facts, create reasonable suspicion that the person has been or is about to be involved in criminal conduct." *Cox v. State*, 161 Md. App. 654, 669 (2005) (citations omitted). Reasonable suspicion has been described as "a particularized and objective basis for suspecting the person stopped of criminal activity." *Id.* (citations omitted). In determining if the police had reasonable, articulable suspicion to conduct a *Terry* stop, we again look to the totality of the circumstances. *Id.*

Here, Officer Doyle spotted an accident in a parking lot and a man carrying a women's purse who appeared to be walking away from that accident. Officer Doyle may have reasonably thought that Foot was unlawfully fleeing the scene of the accident or stealing property from the accident. Further, after some questioning, Foot remarked that he may have violated probation or have an open warrant. Those circumstances were enough to raise Officer Doyle's suspicions. Officer Doyle then lifted the purse to locate identification and spotted the handgun, giving him probable cause to arrest Foot. We conclude that, viewed under the totality of the circumstances, Officer Doyle had reasonable, articulable suspicion to conduct an investigatory stop of Foot.

ISSUE II: IMPROPER REMARKS

A. FACTS RELATED TO THE ALLEGATIONS OF IMPROPER REMARKS

After Foot's motion to suppress was denied, his case proceeded to trial. Foot testified in his own defense. During that testimony, defense counsel asked a series of questions that led Foot to mention that he suffered from Post-Traumatic Stress Disorder (PTSD):[5]

> [FOOT'S COUNSEL]: ... Now, as far as your mental state, what was your mental state after the accident?
>
> [FOOT]: It just—everything seemed like a blur, to be honest. Like, I was like how anybody would be in an accident, shooken up, you know? I got her, I got the baby in the car, you know. There's a lot of people out in the parking lot. First thing I'm thinking about is safety. So that's why I'm on the phone, you know, because I don't know much about this area. So, you know—
>
> [FOOT'S COUNSEL]: Well, I mean, was there anything in your background, too, that also made you shook up about it?
>
> [FOOT]: Well, my PTSD, definitely.

On cross-examination, the prosecutor questioned Foot about a telephone conversation he'd had from jail with his girlfriend, Jones. During that questioning, the

[5] PTSD is a trauma-related disorder that develops after exposure to events such as combat, physical or sexual assault, natural or man-made disasters, or severe motor vehicle accidents. Individuals with PTSD often have involuntary intrusive and recurrent memories, and commonly try to avoid stimuli that remind them of the event. *See* American Psychological Association, *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V), Trauma- and Stressor- Related Disorders (5th ed. 2013), https://perma.cc/U9AF-S8ZX.

prosecutor accused Foot of instructing Jones to forge medical records:

> [STATE]: [Y]ou talked a lot about how you were in the military and had PTSD.[6] [Didn't t]here c[o]me a point in time where you were instructing Tamika over the phone how to forge documents for the court [?]

Foot's counsel objected, and the following bench conference occurred:

> [STATE]: Your Honor, he's on jail calls and I advised Counsel ahead of time that I would go this route if they went this route. He is on jail calls having her forge documents from the VA hospital. We have never gotten documents other than what they provided after he told her how to forge them and how to have a friend print them out on a computer that verified the military service, that verified his PTSD, that verified anything about hospitalizations or anything of the sort. What I do know for a fact is that he forged those documents because he line-by-line tells her what to change in the documents.
>
> THE COURT: Your objection?
>
> [FOOT'S COUNSEL]: How is this relevant at all?
>
> [STATE]: I think it goes to credibility.
>
> * * *
>
> [FOOT'S COUNSEL]: The issue here is that he is on trial for possession of a firearm. It's clear that he was in the military and, I mean, as far as like these are things that occurred a while afterwards it's not part of the—

[6] This is an overstatement. Foot's only reference to PTSD is reproduced in its entirety above.

THE COURT: Well, he said he has PTSD on the stand. She's got evidence he forged or faked it[.] I'm going to allow it in. Overruled.

The trial court overruled defense counsel's objection, and allowed the prosecutor to try to elicit testimony to show that Foot was faking that he had PTSD, or that he had forged documents to show he had PTSD.

The prosecutor continued to question Foot about the jail conversation and make allegations that he had forged medical documents. In an attempt to refresh Foot's memory during the questioning, the prosecutor played parts of a recording of a telephone conversation between Foot and Jones. Foot's counsel objected several times. We set out the prosecutor's questioning of Foot, in part, and highlight the allegations of forgery as well as the objections by Foot's Counsel:

[STATE]: Sir, do you remember back in January having conversations with Tamika over the phone from the jail where you **were advising her how to change documents** and have a friend print them for you for the purposes of presenting them to the court regarding prior PTSD and mental -- or, issues with your brain?

[FOOT]: Not how to change them but how to print them, yeah.

* * *

[STATE]: **You don't remember telling her how to change them?**

[FOOT]: I mean, we're talking about January.

[STATE]: Is it hard to remember that?

[FOOT]: It's hard to remember a million phone calls from the jail, yes.

[STATE]: Do you - is it easier to remember the ones **where you're telling her how to forge a document**?

* * *

[FOOT]: I said nothing about forging a document.

* * *

[STATE]: Do you remember specifically telling her on January 31st—go down to where I was treated and take off the neuroendoscopy off of there[?] Do you remember telling her that?

[FOOT]: No.

[STATE]: You don't? Do you remember saying to her—do you remember her telling you that the friend that you were having print this documentation wrote the doctor's name as Beazer instead of Beaver. Do you remember her telling you that?

[FOOT]: No.

[STATE]: You don't? And do you remember her telling you, I guess I'll just have to do the paperwork again—having the friend print it out again. Do you remember all that?

[FOOT]: That was her telling me? Or me telling her?

[STATE]: You tell me. Do you remember?

[FOOT]: I'm asking. Can you repeat the question?

[STATE]: Do you remember -- I believe it's her telling you—but do you remember one of you saying, we'll have to do the paperwork over again because you can't have the doctor's name wrong?

[FOOT]: I don't remember specifically, no, I don't.

* * *

[STATE]: Do you remember her saying—his girl might let me

fix the paper at his house, this is what we did last night. And saying that she was going to take care of everything. Do you remember her telling you that?

[FOOT]: No, ma'am.

[STATE]: Do you remember saying to her—you gotta make sure the dates are right because the dates on the document you're working off of were wrong. Do you remember that?

[FOOT]: I would just like to listen to it, honestly.

[STATE]: You what?

[FOOT]: I said I would like to listen to it, honestly.

[STATE]: Would you? Okay.

[FOOT'S COUNSEL]: Once more, Your Honor, I would note my objection.

THE COURT: The Court is going to overrule the objection.

* * *

[STATE]: Let's start with taking off the neuroendoscopy.

[FOOT'S COUNSEL]: Your Honor, may we approach? There's also one other issue I'd like to mention.

THE COURT: Sure. Come on up.

* * *

[FOOT'S COUNSEL]: I am going to **renew my objection** but also note that this was provided late in discovery. It was only provided I'd say about a week or two weeks ago. So it—

[STATE]: It was longer than that because we talked about it.

THE COURT: In any event, the State can use it to impeach him if he's supplied or is testifying perjuriously. I am going to overrule.

[FOOT'S COUNSEL]: But this is not testimony though. The reason for this

is … that this is also not only that—I would also note that it has, once more, it has nothing to do with the facts in this case. The issue here is not about (indiscernible) and it is not about—

THE COURT: I have overruled. Okay?

(Counsel returned to the trial tables, and the following ensued in open court:)

THE COURT: All right. Go ahead, [prosecutor].

[STATE]: Thank you, Your Honor. Court's indulgence.

* * *

[STATE]: So that's you telling Tamika to remove where it says you were treated for neuroendoscopy off of a form, correct?

[FOOT]: Yes, ma'am.

[STATE]: And then you gave that form with the neuroendoscopy removed to your attorney later so that you could use it as an argument in the bail review, correct?

[FOOT]: No.

[STATE]: You don't remember your defense attorney presenting it to the Court and giving it to the State?

[FOOT]: No.

[FOOT'S COUNSEL]: Objection, Your Honor.

THE COURT: Sustained.

* * *

[STATE]: **So you were just forging it for no particular reason?** You already testified that you were having her do it for the purposes of bail review, correct?

[FOOT]: No, what I'm saying is that we gave the paperwork before I got locked up to my probation officer as I came out the hospital.

[STATE]: But that was from a different—

[FOOT]: And after that—

[STATE]: —incident, correct?

[FOOT]: Excuse me?

[STATE]: It was from a different incident, correct?

[FOOT]: No, I was hospitalized twice.

[STATE]: But this—what you're—the only documentation you've ever given of the second hospitalization **was after you instructed her how to change the form, correct**?

[FOOT]: No. I didn't—we didn't give anything to anybody after she changed the form.

[STATE]: Do you remember talking to her on the phone repeatedly about saying it has to go to the court?

[FOOT]: Yes, I do.

[STATE]: Because that was the purpose of this, right?

[FOOT]: It didn't go to the court, though.

[STATE]: You don't remember talking saying have you heard anything back after it was submitted?

[FOOT]: I'm telling you the only paperwork that we submitted was when I got locked up -- before I got locked up she gave my probation officer this paperwork. Because I had a warrant quashed because—

[STATE]: Okay. But your intention—and fair enough, and maybe I'm just misunderstanding—your intention in giving it to your probation agent was to get your

probation agent to tell the court that you weren't—you got locked up because you were in the hospital, correct?

[FOOT]: It was in November while I was in the hospital.

[STATE]: But your intention of having her change the form and give it to your probation agent was to try and get your probation agent to represent that to the court, correct? The information.

[FOOT]: Not at the time, no.

[STATE]: Then what was your intention?

[FOOT]: My intention was that she couldn't log into my E-Vet to print my paperwork off.

[STATE]: **So you were going to forge it instead.**

[FOOT]: No.

[STATE]: **Well that's what you're telling her how to do, right?**

[FOOT]: It was never turned in. It was never turned in so that's not a forgery.

[STATE]: But it was turned in to your probation agent.

[FOOT]: No. That was the real paperwork.

* * *

[STATE]: Okay, let's move on. So then later that same day do you remember saying to her, just make sure the dates, and her saying, I did, I did, I did like 1-3, 1-5, 1-6, 1-10. Do you remember that?

[FOOT]: No.

[STATE]: You don't? Okay.

(At 3:43 p.m., jail call is played until 3:45 p.m.)[7]

* * *

[STATE]: So that's you telling her to change the dates, right?

[FOOT]: That's not a change of date. I said—she said that the date is such-and-such and such-and-such. I didn't tell her to change the date.

[STATE]: This is on a form that she tells you she is going over to your buddy's house to have printed out on his computer.

[FOOT]: Which is also my friend … he's a veteran.

[STATE]: So he prints your documentation and changes the dates on the forms for you and that makes it okay?

[FOOT]: That's not changing the date. She was confirming the date. That's not a change.

[STATE]: Except that's not what she says, is it?

[FOOT]: Play it over.

[STATE]: All right. Do you think she—do you recall saying, make sure it's signed and her saying, I'm filling in everything, putting in different dates and taking out the neuro whatever you told me. Do you remember her saying that?

[FOOT'S COUNSEL]: Your Honor, I'm going to object to this.

THE COURT: Overruled.

* * *

[STATE]: Do you remember her saying that? Is that a no?

[FOOT]: No, I want to hear it.

[7] The jail calls were not transcribed and are not part of the record in this Court.

[STATE]: You just have to answer out loud because we're recording.

[FOOT]: I said I want to hear it, please.

[STATE]: Do you remember her saying that?

[FOOT]: No.

[STATE]: I'm just going to back it up a second, Your Honor.

(At 3:45 p.m., jail call is played until 3:46 p.m.)

* * *

[STATE]: So that's her telling you, I'm just filling in everything and putting in different dates, right?

[FOOT]: Exactly what you said. That's her telling me, not me telling her.

[STATE]: Okay. So it's—**you agree that it was forged but that she was doing it all by herself**.

[FOOT]: I'm not agreeing that it was forged.

[STATE]: You didn't know? By her telling you I'm just putting in different dates and filling out the rest.

[FOOT]: That's not agreeing.

[STATE]: Sorry?

[FOOT]: I said I'm not agreeing.

[STATE]: You're not agreeing to what?

[FOOT]: To it being forged. That's the question.

[STATE]: But you agree that she—

[FOOT]: It's agreeing that she told me the dates.

[STATE]: Do you agree that she called you in jail to tell you she's filling in everything, putting in different dates, taking out the neuro whatever you told her to.

[FOOT]:	She can't call me in jail, ma'am.
[STATE]:	You called her. You're right. Do you agree that's what she told you?
[FOOT]:	I agree that's what she told me.
[STATE]:	And do you agree that's what she did on the form?
[FOOT]:	You can't say that for a form that was never turned in.
[STATE]:	Okay. Now, do you remember saying the next day you all having a conversation where she tells you she called the judge's chambers to check on it and some lady answered? You don't remember that?
[FOOT]:	I—honestly, I don't remember these calls.
THE COURT:	You're a little far afield, [prosecutor].
[STATE]:	Okay.
THE COURT:	I've allowed it as it relates to the PTSD but we're getting far afield.

(Emphasis added). When the cross-examination resumed, the prosecutor asked Foot about the failure of the brakes on Jones's car. During that questioning, without any foundation the prosecutor accused Foot of dealing illegal drugs and hinted that a rival drug dealer might have sabotaged Jones's brakes:

[STATE]:	Now, sir, you testified that the car's brake line went out. Do you remember having a phone call with Tamika where you said you believe somebody cut the brake lines?
[FOOT]:	Uh-huh.
[STATE]:	And that was somebody that was in competition with you over **drug dealing**, is that correct?

(Emphasis added). Foot's counsel objected to the question. The trial court sustained the objection, instructed the jury to disregard the question, and cautioned the prosecutor. Foot's counsel then requested a bench conference to request a mistrial:

> [FOOT'S COUNSEL]: I'm going to be asking for a mistrial at this moment in time. I make a motion for a mistrial based upon that particular question that is clearly not relevant and was meant to simply prejudice Mr. Foot when there has been no allegation that he has been involved in drug dealing at all.
>
> [STATE]: It's on the phone call. It's a quote from the phone call.
>
> THE COURT: I'm going to deny the request for a mistrial. But, [prosecutor], I gave you some leeway on the PTSD stuff but I'm not going to get into all of these collateral matters.
>
> [STATE]: And that's—I understand.
>
> THE COURT: All right.

Thus, the trial court denied Foot's request for a mistrial, but warned the prosecutor to stop questioning Foot about collateral issues.

B. ANALYSIS OF THE ALLEGATIONS OF IMPROPER REMARKS BY THE STATE

In his second challenge, Foot argues that the prosecutor's improper questions and comments during his cross examination prejudiced him and denied him a fair trial. We agree.

Criminal defendants have a right to due process, which among other things guarantees the right to a fair trial by jury. *See* U.S. Const. amend. V.; Md. Const. Decl. of Rts. art. 24; *see also Frazier v. State*, 197 Md. App. 264, 284-287 (2011). In some

circumstances, improper remarks or name-calling by a prosecutor can deprive a defendant of a fair trial. *Lee v. State*, 405 Md. 148, 164 (2008). To determine whether the prosecutor's remarks deprive a criminal defendant of a fair trial, we engage in a three-step analysis derived from *White v. State*: *first*, we must determine whether the "remarks were improper and whether they involved a central issue [in the case]." 125 Md. App. 684, 705 (1999) (citation omitted). *Second*, "we ask whether the trial judge took steps to mitigate or eliminate the effect of the prosecutor's remarks." *Id. Third*, we ask how close the case was and "how profound was the harm to the defendant's right to a fair trial." *Id.* Thus, "we consider the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Donaldson v. State*, 416 Md. 467, 497 (2010) (citations omitted). Moreover, we will not reverse a conviction due to improper remarks unless the trial court's denial of a mistrial constituted an abuse of discretion. *Francis v. State*, 208 Md. App. 1, 15 (2012).

For the reasons that follow, we conclude that: (1) the prosecutor's questioning implying that Foot had committed "forgery" and was engaged in "drug dealing" were improper and involved a central issue in the case; (2) the trial court's attempts to mitigate the effects of these remarks were insufficient; and (3) there was harm to Foot's right to a fair trial. Our analysis will first discuss the inappropriateness of the prosecutor's remarks, and the trial court's mitigation efforts for each. We will then discuss the cumulative harm on Foot's right to a fair trial and why it constituted an abuse of discretion.

1. Improper Cross-examination

"[N]ot every ill-conceived remark made by counsel, even during the progress of the trial, is cause for challenge or mistrial." *Whaley v. State*, 186 Md. App. 429, 453 (2009) (quoting *Wilhelm v. State*, 272 Md. 404, 414–15 (1974)). Even where remarks are determined to be improper, if there is no risk that they "actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused," a mistrial is unnecessary. *Juliano v. State*, 166 Md. App. 531, 549 (2006). Whether comments "exceed[] the limits of permissible content depends on the facts in each case." *Whaley*, 186 Md. App. at 453 (quoting *Wilhelm*, 272 Md. at 414–15). Depending on the circumstances, a single improper remark may be harmful enough to require a mistrial. *See Lawson v. State*, 389 Md. 570, 598-99 (2005) (prosecutor's remark that the defendant was a "monster" warranted a mistrial); *Mouzone v. State*, 33 Md. App. 201, 210 (1976) (prosecutor referring to a defendant as a "killer" warranted a mistrial). In other circumstances, it is the cumulative effect of repeated remarks that prejudices a defendant. *Lawson*, 389 Md. at 608. "When … there are multiple inappropriate statements and the trial court fails to cure the prejudice created by the cumulative effect of those statements, the admissibility of such statements may amount to more than harmless error." *Id*.; *see also Lee v. State*, 405 Md. 148, 175 (2008) (explaining that "we must consider the statements in the context of the

prejudice that each of the statements, and all of them together, created in the minds of the jurors").

a. Forgery

To understand the impropriety of the prosecutor's line of questioning regarding Foot's alleged attempt to forge medical documents, it is necessary to understand how far afield the questioning strayed from the relevant issues in the case. Foot was charged with prohibited possession of a handgun. Md. Code Ann., Crim. Law § 4-203; Md. Code Ann., Public Safety § 5-133(c). As part of proving possession, the State had to show that Foot knew the gun was in the purse. *Parker v. State*, 402 Md. 372, 407 (2007) ("[A]n individual ordinarily would not be deemed to exercise 'dominion or control' over an object about which he is unaware. Knowledge of the presence of an object is normally a prerequisite.") (quoting *Moye v. State*, 369 Md. 2, 14 (2002)). Whether Foot has PTSD, however, is not a defense to the crime, nor particularly relevant to any contested issues in the case.

Nonetheless, once defense counsel had elicited the fact that Foot had been diagnosed with PTSD, it opened the door for the prosecutor to inquire *about that specific diagnosis*, and attempt to undermine Foot's credibility with regard to it. *See Mitchell v. State*, 408 Md. 368, 388 (2009) ("The 'opened door' doctrine is based on principles of fairness and permits a party to introduce evidence that otherwise might not be admissible…to respond to certain evidence put forth by opposing counsel."). The trial court attempted to draw precisely that narrow line, and the prosecutor was allowed to pursue a line of questioning and introduce

jail calls for the limited purpose of showing that there was "evidence [Foot] forged or faked" his PTSD.

Despite that limitation, the prosecutor did not restrict the line of questioning to Foot's PTSD diagnosis. Rather, the prosecutor asked questions suggesting that Foot had instructed Jones to make modifications to other medical records that, even if true, were wholly unrelated to PTSD. The prosecutor never made, or even attempted to make, a connection between PTSD on one hand and Foot's alleged instructions to Jones to modify his medical records regarding a neuroendoscopy and changing certain dates on the other. And we see no such connection. A neuroendoscopy is a "minimally invasive" surgical procedure in which a neurosurgeon "removes [a] tumor through small holes (about the size of a dime) in the skull or through the mouth or nose." Johns Hopkins Medicine, *Neurology and Neurosurgery*, https://perma.cc/79K4-85CK. PTSD is a psychological condition diagnosed by the "development of characteristic symptoms following exposure to one or more traumatic events"; there is no indication that a neuroendoscopy is part of the diagnostic method for PTSD. DSM-V, https://perma.cc/U9AF-S8ZX. The distinction is critical: the door was opened for the prosecutor to cross-examine Foot with respect to his PTSD diagnosis, not to make a general inquiry into all of his medical records. In the absence of a link between Foot's instruction to Jones to modify the medical records and Foot's diagnosis of PTSD, the line of questioning was irrelevant and improper.

b. Drug Dealing

The second episode at issue, when the prosecutor called Foot a drug dealer, presents an even clearer case of impropriety. There is no indication in the record that the prosecutor had evidence that Foot was a drug dealer. "A lawyer who has no reason to believe that a matter is subject to proof may not, by pursuing the matter in examining a witness … attempt to create the impression that the matter is factual." *Elmer v. State*, 353 Md. 1, 14 (1999) (quoting C. Wolfram, *Modern Legal Ethics*, § 12.1.2, at 623 (1986)). Even if the prosecutor had such evidence, it was, as the trial court noted, collateral and inadmissible in Foot's trial for prohibited possession of a firearm.

Regardless of whether there was a factual basis for the question, "[t]he problem is that whether the question is answered or not, the jury has been alerted to the fact [that] the question assumes." *Elmer*, 353 Md. at 14 (citation omitted). "It is misconduct for a lawyer to inject inadmissible matters before a jury by asking a question that suggests its own otherwise inadmissible answer, 'hoping that the jury will draw the intended meaning from the question itself.…'" *Id*. at 13 (citation omitted). A prosecutor may not ask questions that "convey the impression to the jury that the State has superior information of facts not in evidence before the jury" in an attempt to make implications that are otherwise inadmissible or unsupportable. *Id*. (cleaned up).[8] The prosecutor's question was completely improper.

[8] "Cleaned up" is a new parenthetical intended to simplify quotations from legal sources. *See* Jack Metzler, *Cleaning Up Quotations*, J. APP. PRAC. & PROCESS (forthcoming 2018), https://perma.cc/JZR7-P85A. Use of (cleaned up) signals that to

c. Central Issue

In addition to asking whether the remark was improper, the first White factor also asks whether the improper remark was related to a central issue in the case. *White*, 125 Md. App. at 705. An improper remark related to only a tangential issue is less likely to cause prejudice. Here, the central issue was Foot's credibility. He was the principal and only witness for his defense that he did not knowingly possess the gun. The jury's assessment of his credibility was of critical importance. Thus, the prosecutor's cross-examination was not only improper, but also involved the central issue before the jury.

2. Mitigation Efforts by the Trial Court

In the second step of the *White* analysis, we review the trial court's mitigation efforts. 125 Md. App. at 705.

After the questioning about Foot's alleged directions to Jones to "forge" medical records, the trial court cautioned the prosecutor that it had "allowed [questioning] as it relates to the PTSD but we're getting far afield." Although the trial court halted the line of questioning on its own initiative before the prosecutor strayed even further, the court did not attempt to minimize the impact of what the jury had already heard. With no guidance from the court, the jury potentially was left with the impression that Foot had committed, or at least had attempted to commit, the crime of forgery, and that he may have falsely

improve readability but without altering the substance of the quotation, the current author has removed extraneous, non-substantive clutter such as brackets, quotation marks, ellipses, footnote signals, internal citations or made un-bracketed changes to capitalization.

claimed to have been diagnosed with PTSD. There was no effort to mitigate the effects of the prosecutor's questioning.

Following the prosecutor's question claiming that Foot was a drug dealer, the trial court sustained the objection by Foot's counsel, instructed the jury to disregard the remark, and cautioned the State. Despite these actions, however, we conclude that the severity of the impropriety renders the mitigation efforts insufficient.

Characterizing Foot as a drug dealer played directly to the prejudices of the jury. *See White*, 125 Md. App. at 702 ("[T]he fundamental limitation upon the remarks of attorneys is that they may not appeal to the passions or prejudices of the jurors."). There is a well-acknowledged "nexus between drug distribution and guns." *Whiting v. State*, 125 Md. App. 404, 417 (1999); *see also Dashiell v. State*, 143 Md. App. 134, 153-54 (2002), aff'd, 374 Md. 85 (2003) ("Persons associated with the drug business are prone to carrying weapons."); *Banks v. State*, 84 Md. App. 582, 591 (1990) ("Possession and, indeed, use, of weapons, most notably, firearms, is commonly associated with the drug culture; one who is involved in distribution of narcotics, it is thought … would be more prone to possess, and/or use, firearms, or other weapons, than a person not so involved."). There is no reason to expect that members of a jury would not make the same cultural association that "a person involved in drug distribution is more prone to possess firearms than one not so involved." *Whiting*, 125 Md. App. at 417.

Under most circumstances, we presume that a jury can and will follow a trial court's instructions, including an instruction to disregard particular information. *Dillard v. State*,

415 Md. 445, 465 (2010). "Nevertheless … there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States*, 391 U.S. 123, 135 (1968). We are persuaded that in these particular circumstances, the effect of the prosecutor's remark could not be ignored by the jury. Despite the instruction to disregard, once the impression had been made, the risk that it influenced the jury's perception of Foot was too significant. We therefore conclude that a curative instruction could not sufficiently mitigate the effect of the prosecutor implying that Foot was a drug dealer.

3. Harm to Foot's Right to a Fair Trial

Finally, the third *White* factor requires us to consider the scope of the harm to Foot. Here, we determine that the prosecutor's improper remarks resulted in a profound harm to Foot's right to a fair trial.

The State's case against Foot was hardly overwhelming. The prosecution relied on Foot's possession of the purse within which Officer Doyle found the gun; Foot testified that the purse did not belong to him and that he did not know it contained a gun. Thus, the case hinged entirely on Foot's credibility.

When the prosecutor tenaciously pursued questioning intended to show that Foot had committed forgery, his credibility was improperly challenged. Although the prosecutor appeared to display a sense of incredulity to Foot's explanation of his instructions to Jones regarding his medical records, we read his answers as entirely plausible. But whether Foot

was prejudiced does not depend on how plausible his answers may have been. "Questions alone can impeach. … The most persistent denials, even from articulate adult witnesses, may not suffice to overcome the suspicion they can engender." *Elmer*, 353 Md. at 15-16 (citation omitted).

With Foot's credibility damaged, the prosecutor then made the unsubstantiated claim that Foot was a drug dealer. Standing alone, this comment was sufficiently harmful to warrant a mistrial; the cumulative effects of all of the prosecutor's improper remarks are even worse. The repeated improper comments harmed Foot's credibility, and he was denied a fair trial. Consequently, we conclude that the trial court abused its discretion in denying the request for a mistrial.

CONCLUSION

For the foregoing reasons, we vacate Foot's convictions and remand the case to the circuit court for a new trial.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY VACATED. CASE REMANDED FOR A NEW TRIAL. COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.