UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1755

September Term, 2015

HENRY CARTER

v.

STATE OF MARYLAND

Leahy
Friedman
Raker, Irma S.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Raker, J.

Filed: August 23, 2017

Appellant, Henry Carter, was convicted in the Circuit Court for Baltimore City of second degree murder, attempted second degree murder, first degree assault, two counts of the use of a firearm in the commission of a crime of violence, and wearing, carrying, or transporting a handgun. The trial court sentenced appellant to a total of thirty-five years in prison. Appellant presents three questions for our review:

> "1. Did the trial court err by allowing the prosecution to introduce prior statements from two witnesses?
>
> 2. Did the trial court err by permitting the prosecutor to argue facts not in evidence?
>
> 3. Did the trial court err by denying Appellant's motion for a mistrial after juror became distraught during deliberations?"

We shall hold that the circuit court erred by allowing the prosecution to introduce prior statements from two witnesses without making a fact-finding determination regarding the witnesses' credibility, but any error was harmless. Further, we shall hold that any error in permitting the prosecutor to argue facts not in the evidence resulted in harmless error, and thus the circuit court was correct in denying appellant's motion for a new trial. Finally, we shall hold that the trial court did not err by denying appellant's motion for a mistrial after a juror became distraught during deliberation. Accordingly, we affirm.

I.

Appellant Henry "Tank" Carter was indicted by the Grand Jury for Baltimore City for the offenses of murder in the first degree, attempted murder in the first degree, murder in the second degree, attempted murder in the second degree, assault in the first degree, and three handgun violations. A jury found him guilty of murder in the second degree, attempted murder in the second degree, assault in the first degree, and the three handgun violations. The jury acquitted appellant of first degree murder and attempted first degree murder. The court imposed concurrent sentences of thirty years for murder in the second degree and twenty-five years for attempted murder in the second degree. The court also imposed consecutive sentences of twenty and fifteen years, with all but five years suspended for two handgun violations. The court merged the third handgun violation and assault in the first degree for sentencing purposes. In total, the court sentenced appellant to thirty-five years of executed incarceration.

The following facts were elicited during the trial: Gerald Jones-Bey testified that at approximately 2:00 p.m. on September 19, 2013, he and Ricky Price parked their vehicle at the intersection of North Port Street and East Lafayette Avenue in East Baltimore. As they walked to visit Mr. Jones-Bey's girlfriend's home near the 1800 block of North Milton Avenue, Mr. Jones-Bey heard two gunshots and the pair were struck once each in their backs. They attempted to flee towards North Milton Avenue, but Mr. Price indicated that he could not continue. Mr. Jones-Bey was treated and released from Johns Hopkins

Hospital. Mr. Price died from his injuries. Police discovered Mr. Price's body on the steps of 1734 North Milton Avenue. Mr. Jones-Bey did not have any knowledge of where or from whom the bullets originated.

Following Mr. Jones-Bey's testimony, the prosecution presented four witnesses to the shooting on September 19, 2013. The first witness, Albert Johnson, testified that he had no recollection of the events on September 19th or any statements he made to police in 2013. Mr. Johnson testified that he was a heavy drug user but had never been examined by health professionals for any medical conditions affecting his memory. He also testified that he recognized appellant from his "travels" throughout Baltimore City, but did not know his name.

The State requested to play to the jury a videotaped recording of Albert Johnson's statements made to Detective Robert Ross on October 3, 2013. The following colloquy between the trial judge and counsel took place with regards to Mr. Johnson's recorded statement:

> "THE COURT: It's a record. But so it's -- okay. Okay. Well, it's a videotaped statement. Tell me about the statement, what's offered? Why should I not allow it?
>
> [DEFENSE COUNSEL]: He hasn't contradicted anything.
>
> [THE STATE]: What was his --
>
> THE COURT: I know. But hold it. We're talking about two different things.

> [DEFENSE COUNSEL]: Well, you're going to find that he was purposely -- he is --
>
> THE COURT: Wait a minute. Hold it. Hold it. You're talking about the *Nance Hardy* situation.
>
> [DEFENSE COUNSEL]: Correct.
>
> [THE STATE]: That's (a).
>
> THE COURT: Yeah. That's different. This is whether he doesn't remember the statement. This doesn't deal with contradiction. The whole -- the *Nance* -- this is not a *Nance Hardy* situation. Okay. Well, what do you want to do?
>
> [THE STATE]: And I understand under (e) the actual video does not go into the record.
>
> THE COURT: Yeah. They can't have it. They can't have it.
>
> [THE STATE]: But they can see it.
>
> THE COURT: Well, what are you going to do now?
>
> [THE STATE]: Play a statement from September 19th of -- I mean from October 30, 2013.
>
> THE COURT: Are you objecting?
>
> [DEFENSE COUNSEL]: Yes, sir.
>
> [DEFENSE CO-COUNSEL]: We're objecting.
>
> THE COURT: All right. Overruled. Okay."

The court allowed the State to play the recorded statement of Mr. Johnson before the jury, pursuant to Md. Rule 5-802.1(e).

In the recording, Mr. Johnson stated that he witnessed "Tank" shooting at several individuals with a silver and black gun near the intersection of Lafayette and Port Streets. Mr. Johnson quickly identified appellant from a six-person photographic array and noted the following: "I saw [T]ank come out of the alley after having words with the guy Love about coming down a one way street. Love came back and Tank started shooting at him and the two guys that was in the car with him." At trial, Mr. Johnson stated that he did not recall making any of the statements from the recording.

The State next called as a witness Tonya Tynes, who testified that nothing unusual occurred and she did not hear any shots fired on the day of the shooting. Ms. Tynes testified that she spoke to Detective Robert Ross on October 4, 2013 regarding an individual named "Hank" or "Tank," but that she did not witness any shooting firsthand. Ms. Tynes also testified that she was "trying to get medicated" when she made her statements to Detective Ross and may have written or said anything to receive treatment at the methadone clinic.

The State introduced into evidence a videotaped recording of Tonya Tynes's statements made to Detective Robert Ross on October 4, 2013. The trial judge explained his decision to allow the introduction of the recording, under both Rule 5-802.1(a) and (e), as follows:

> "THE COURT: Well, okay. Here's what I'm -- I'm going to -- whether -- at this point I'm sustaining the objection. However, I will allow you to ask one or two of those questions and if she continues to state that, an inconsistent statement, then I will allow you to play the tape.

***

> [THE STATE]: Your Honor, I'm asking that the statement be played. It qualifies now under [Rule 5-]802.1(A) as an inconsistent statement, also as [Rule 5-]802.1(E) her memory loss.
>
> THE COURT: I agree with you. Is there an objection?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Overruled."

In the recording, Ms. Tynes identified appellant from a photo array and described seeing him retrieve a gun from an alley. At the time of the recording, on the back of one of the photographs she had noted the following: "That's Tank and he stood out there in broad day light and killed someone son. He shot in day light on Montford and Lafayette pointing toward Milton Avenue about coming [down] a one[-way] street." At trial, Ms. Tynes explained that her statements from the recordings and notes on the back of the picture were all fabricated in an attempt to secure her methadone treatment.

During a recess at trial, Deputy Martin Washington notified the court and parties of a potential instance of impropriety between Tonya Tynes and the appellant. During a brief hearing, Deputy Washington testified to hearing Ms. Tynes say to the appellant, "Don't worry about it, Tank. We'll get you out of this." Ms. Tynes also testified, but denied making any statements outside the courtroom.

The State's next witness, Janol Greene, testified that she received treatment at the Turning Point methadone clinic, located one block away from the shooting, on September

19, 2013. Ms. Greene testified that she saw appellant shoot a gun, but did not see him shoot at anyone. She also did not recall how many shots were fired. At the time of the shooting, she was high and mistakenly believed that an individual named "Reds" was shot. Ms. Greene was questioned by Detective Ross on two occasions, October 2013 and February 2014, and she identified appellant from a photo array in both instances.

The State's last eyewitness, Mary Fulwood, testified that she was also at the Turning Point methadone clinic on the day of the shooting. She recalled hearing gunshots and seeing two men running towards Milton Avenue, away from what she believed was a gunman. Ms. Fulwood eventually walked to Milton Avenue, where she saw the decedent on the ground. She did not make any positive identification with regards to the shooter.

Detective Ross testified to interviewing all four of the State's eyewitnesses. He also testified that on the day of the shooting, he spoke with an individual named Jerome Speddin[1]. Speddin, seen taking off a jacket near the site of the shooting, was initially detained and questioned as a potential suspect. Detective Ross cleared Speddin of any involvement and released him after further investigation.

During Detective Ross' testimony, the State requested that the videotaped recording of Albert Johnson's statements made to Detective Robert Ross be admitted into evidence.

"THE COURT: Okay, all right, what is your present issue?

[1] Also spelled as "Spiven," "Speedent," "Speedin," "Spedent," and "Spedden" at different points in the record.

> [DEFENSE COUNSEL]: Well, Your Honor, this is the video that was only admitted because Mr. Johnson had no memory at all. It is my understanding that it would be –
>
> THE COURT: It was under the [Rule 5-802.1(e)].
>
> [DEFENSE COUNSEL]: It was under E for identification purposes only but not admitted as substantive evidence.
>
> THE COURT: That's right, the video physical doesn't come in –"

The State explained that it wanted the tapes to be admitted into evidence so the jury could have a physical copy to play during deliberation. The court stated that under Rule 5-802.1(e) the tapes could not be admitted into evidence unless they were offered by the adverse party. The State argued that in instances of "feigned memory loss" by a juror, the statements could be admitted into evidence under Rule 5-802.1(a) as prior inconsistent statements. The court summarized the issue as follows:

> "It's been played. They heard the videotape. They saw the videotape. The only difference that exists here, you want to physically to put that into the record so maybe they can play it again."

The circuit court admitted the tape into evidence under Rule 5-802.1(a) as a prior inconsistent statement, but declined to make a factual finding that the witness' "lack of memory was deliberate." The circuit court admitted the video statement of Ms. Tynes under the same exception.

During the State's closing argument, the following exchange took place:

"[THE STATE]: We know that they thought they had a suspect, Mr. Jerome Speddin. And this poor man was a suspect and a victim all in the same day. Obviously, he was close enough to the shooting to be there, to be linked to it, somehow. And the only link as a suspect, is that he gave his jacket to Ms. Martinez.

[DEFENSE COUNSEL]: Objection.

THE COURT: This is closing argument. If it's not evidence, you know, the jury can weight this.

[THE STATE]: Thank you, Your Honor.

THE COURT: Excuse me. Approach. We're going to get this straightened out now.

(BENCH CONFERENCE)

THE COURT: I don't like interruptions. However --

[DEFENSE COUNSEL]: Neither do I.

THE COURT: -- nobody said that he gave his jacket to Ms. Martinez.

[THE STATE]: Your Honor, Detective Ross, when I asked him questions about how Mr. Speddin was eliminated as a suspect, he said, well the only reason why he was a suspect is because he had given his jacket to someone. And I can make a reasonable --

THE COURT: Okay. Here's the thing. I don't want to have this come up. They heard all the evidence. And I don't want this back and forth. But Ms. Martinez, I don't recall anybody saying that.

But I mean, it's not -- okay. I don't think -- that's not going to change the outcome of the case, I don't think. Do you want me to tell them, ignore this? What do you want me to do?

> [DEFENSE COUNSEL]: Well, I'd ask the Court to tell them that, their recollection. I heard nothing about --
>
> THE COURT: I cannot make a finding of fact.
>
> [DEFENSE COUNSEL]: No, no. Yeah. I move to strike that comment, because I don't think there was evidence of that --
>
> [THE STATE]: I can re-word, that they can --
>
> THE COURT: Re-word it, re-word it --
>
> [THE STATE]: Yes, Your Honor.
>
> THE COURT: -- re-word it.
>
> (BENCH CONFERENCE ENDS)
>
> [THE STATE]: You heard from Detective Ross, when asked, why Jerome Speddin was eliminated as a suspect -- or why he was even called to be a suspect in this case. And he had said that he had information that he had given his jacket to someone. And then I asked him, who did you speak with to eliminate Mr. Speddin as a suspect? He said, I spoke with a Ms. Martinez and a Ms. Tynes (phonetic) --
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled. The jury will decide what they heard."

Afterwards, the parties continued and concluded their closing arguments without any significant disputes.

During jury deliberations, the jury requested a "written copy of the transcripts" of the videotaped recordings of Mr. Johnson's and Ms. Tynes's statements to Detective Ross.

The court, the State, and defense counsel debated whether transcripts should be submitted to the jury. Defense counsel expressed concerns that a transcript provided by the Baltimore City Police Department could contain bias in interpreting ambiguous parts of the recording that may have been difficult to hear and that a written document could be weighed by the jury more heavily than the tape recordings themselves. The court asked defense counsel if there were any sections of the transcript that she thought were ambiguous and that were interpreted against her client. While the court, the State, and defense worked to excise portions of the transcript, the jury wrote in a note that it no longer needed the transcript. As such, the circuit court did not provide the jury with a transcript of the tapes.

On the second day of jury deliberations, jurors two, four, and five notified the court of an incident from the previous evening. According to the jurors, while leaving the courthouse together, they noticed several of the appellant's acquaintances following them in a vehicle for approximately one city block. The jurors recalled that one of the acquaintances had a cast on his arm and was present in the courtroom during the trial. Although juror five was initially upset and crying, following inquiry by the court, she affirmed her ability to be a fair and impartial juror. The judge questioned the other jurors individually, who each affirmed his or her ability to be fair and impartial during deliberations.

Appellant filed a motion for a mistrial based on these jury disruptions, which the circuit court denied. The court also denied appellant's motion for a new trial on grounds that the State's prosecutor made improper comments during closing argument.

Appellant noted this timely appeal.

II.

Before this Court, appellant presents three arguments: first, that the circuit court erred in allowing the State to introduce prior statements from Albert Johnson and Tonya Tynes into evidence; second, that the circuit court erred by permitting the State to present arguments to the jury based on facts not in evidence during closing argument; and third, that the circuit court abused its discretion by denying a motion for mistrial after a juror became distraught and disrupted deliberations.

Appellant argues that at trial, "some of the most incriminating evidence introduced against" him did not come from any testimony under oath, but rather from two previously recorded statements of witnesses Albert Johnson and Tonya Tynes. It is undisputed that the two out-of-court recordings of Mr. Johnson and Ms. Tynes were hearsay. These hearsay statements are typically inadmissible unless they fall within a statutory exception. Appellant contends that under Maryland law, the circuit court erred in admitting these statements into evidence for two reasons.

Appellant argues that under Md. Rule 5-802.1(a), prior statements are admissible only if they are inconsistent with a witness's trial testimony. A prior statement is inconsistent when a witness feigns forgetfulness to avoid testifying at trial, but not if the witness has a genuine lack of memory. Appellant contends that *Corbett v. State*, 130 Md. App. 408, 425-26 (2000) requires the trial court to make a factual finding of whether a witness's forgetfulness is feigned or genuine before admitting a prior inconsistent statement. Appellant submits that the trial court's declaration "It is not my function to declare that his [Albert Johnson's] lack of memory was deliberate," along with a similar ruling regarding Tonya Tynes's statement, represented a failure to make this factual finding. Appellant argues that without this finding, the court had no discretion to admit the prior statements of Mr. Johnson and Ms. Tynes under 5-802.1(a) for a lack of any inconsistency.

Second, appellant argues that the recordings should not have been admitted under a "past recollection recorded" exception to the Hearsay Rule, codified at Rule 5-802.1(e), for two reasons. Appellant contends that as the proponent of hearsay evidence, the State bore the burden of proving its admissibility, and by relying entirely on Rule 5-802.1(a), should be "estopped from offering an alternate theory on appeal." Even assuming, however, that this alternate exception is allowed, appellant contends that the plain language of subsection (e) precluded admission into evidence of the recorded statements.

Appellant also contends that the trial court erred in permitting the State's comments in closing arguments and denying a new trial motion because the comments were improper arguments, based on facts not in evidence. He argues that under factors set forth in *Lee v. State*, 405 Md. 148, 165 (2008), including "the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused," the State's improper argument warrants a new trial. Appellant contends that: (1) the State's statement was severe because it was direct, pointed, and unsupported by evidence when no individual named Ms. Martinez testified at trial; (2) the trial court exacerbated any potential prejudice from the State's comments by overruling appellant's objections and denying his motion to strike; and (3) the outcome of the case was close and depended highly on findings of credibility and the possibility of an alternate suspect.

Appellant's last issue on appeal relates to the trial court's denial of his motion for a mistrial after a juror became distraught during final deliberations. Appellant argues that the trial court abused its discretion when it did not grant a mistrial, thus violating his right to an impartial jury guaranteed under the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. Appellant contends that juror number five's fear and hesitancy arising from her contact with third parties associated with appellant likely created undue prejudice.

The State counters that the circuit court properly admitted the two prior statements by Albert Johnson and Tonya Tynes because the trial judge expressly found them to be

inconsistent with the witnesses' trial testimony. The State distinguishes *Corbett* from the case *sub judice*, arguing that the judge is not required to place on the record a factual finding regarding "the bona fides of the witness's claim of memory loss" when there is an explicit finding of inconsistency between statements.

As to the propriety of the prosecutor's closing argument, the State does not dispute that there was no specific testimony at trial that Jerome Speddin gave his jacket to an individual named Ms. Martinez. The State submits, however, that because Detective Ross testified to an interview with Christina Martinez in connection to Speddin's release from police custody, the prosecutor's closing statements were reasonable commentary upon the evidence and the trial court did not commit reversible error by overruling appellant's objection. Accordingly, the State referred to evidence presented at trial, and invited the jury to draw inferences from the evidence. Finally, under the *Lee* factors, the State argues that: (1) the prosecutor's remarks were not severe because they simply added a name to the previously anonymous recipient of Mr. Speddin's jacket; (2) the trial judge cured any potential prejudice by instructing the jury to draw its own inferences and conclusions from the evidence and that the prosecutor's argument was not evidence; and (3) the weight of the evidence was heavily against the appellant, as the trial judge did not "think this was a close case."

The State challenges appellant's post-conviction right to appeal the trial court's denial of a mistrial, arguing that appellant delayed unduly his request for a ruling on a

motion for a mistrial after a juror became distraught during deliberations. By waiting until after the verdict, the State contends, appellant left open the possibility of an acquittal, while retaining his options for post-conviction relief. According to the State, even with two bites at the apple, appellant is not entitled to a mistrial because the court found every juror to be able to continue in a fair and impartial manner.

III.

We address first the evidentiary question. The circuit court's determination of whether evidence is hearsay and, if so, whether it is admissible under an exception is a legal conclusion, which we review *de novo*. *Bernadyn v. State*, 390 Md. 1, 8 (2005). We review, however, any factual findings necessary to the circuit court's determination for clear error because the trial judge is in the best position to evaluate the credibility of the witnesses. *See, e.g.*, *Gordon v. State*, 431 Md. 527, 538 (2013), *In re Tariq A-R-Y*, 347 Md. 484, 488 (1997).

Md. Rule 5-801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 5-802.1 excepts certain prior statements by witnesses from the rule excluding hearsay and provides as follows:

> "The following statements previously made by a witness who testifies at the trial or hearing and who is subject to crossexamination concerning the statement are not excluded by the hearsay rule:

> (a) A statement that is inconsistent with the declarant's testimony, if the statement was
>
> (1) given under oath subject to penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
>
> (2) reduced to writing and was signed by the declarant; or
>
> (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement."

The rule codified the Court of Appeals' holding and doctrinal shift in *Nance v. State*, 331 Md. 549 (1993). In *Nance*, the Court addressed directly the perennial issue of the "turncoat witness." Prior to *Nance*, Maryland adhered to the orthodox rule prohibiting use of witnesses' prior inconsistent statements as probative evidence, instead only allowing for impeachment purposes. *Id.* at 564. After a comprehensive survey of case law, the Court adopted an intermediate approach, allowing for the substantive use of an inconsistent extrajudicial statement when "the statement is based on the declarant's own knowledge of the facts, is reduced to writing and signed or otherwise adopted by him, and he is subject to cross-examination at the trial where the prior statement is introduced." *Id.* at 569.

Where a witness testifies and is subject to cross-examination at trial, and the prior statement meets the other requirements of Rule 5-802.1(a), the only question that remains is inconsistency. In addition to clear contradictions, the *Nance* Court also found that "[w]hen a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied." 331 Md. at 564, n.5. Additionally, partial testimony or omissions in testimony

imply inconsistency because it may be inferred that a witness "has the ability to testify fully but is unwilling to do so." *Corbett*, 130 Md. App. at 425. By contrast, an actual, complete lack of memory may indicate that a witness is unable, but not necessarily unwilling, to testify.[2] *Id.* at 426. In *Corbett*, this Court found that the admissibility of a prior inconsistent statement depends on a preliminary, demeanor-based credibility finding by the trial court of whether a witness's purported lack of memory is feigned or actual. *Id.*

[2] When an individual "actually lacks memory of an event he once knew about, and thus is unable to testify about it, the past recollection recorded exception (footnote continued . . .) to the rule against hearsay will apply . . ." *Corbett v. State*, 130 Md. App. 408, 426 (2000). The past recollection recorded exception, Md. Rule 5-802.1(e), reads as follows:

> "A statement that is in the form of a memorandum or record concerning a matter about which the witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, if the statement was made or adopted by the witness when the matter was fresh in the witness's memory and reflects that knowledge correctly. If admitted, *the statement may be read into evidence but the memorandum or record may not itself be received as an exhibit unless offered by an adverse party*."

Id. (emphasis added). As the video testimony of both witnesses was played for the jury and offered into evidence by the State, the non-adverse party, the videos could not be admitted properly under this Rule. The circuit court correctly admitted the videos under both 5-802.1(a) and (e) when it played the videos for the jury, but then correctly only admitted the videos later under 5.802.1(a) when the State requested that videotapes be admitted into evidence.

Rule 5-802.1(a), however, does not require that this finding be placed explicitly on the record. *See McClain v. State*, 425 Md. 238, 252-53 (2012) (distinguishing Md. Rules 4-222(c), 4-314(a)(3), and 4-342(g), each of which requires explicitly the court to place factual findings on the record). Importantly, in *McClain*, the trial court made a finding that the prior statement was inconsistent. *Id.* at 252. The Court of Appeals explained that based on this finding it could "presume . . . that the court recognized its obligations to satisfy itself of the existence of the two prerequisites for admission of the statement under that Rule." *Id.*

Here, the circumstances are similar to *Nance*, where witnesses made statements to the authorities that incriminated the defendant, but later at trial failed to identify or link the defendant to the alleged crimes. Although the trial court ultimately admitted the prior statements of Albert Johnson and Tonya Tynes under Rule 5-802.1(e), by playing the video recording of the statements for the jury, and then admitted the actual tapes into evidence, by request of the State, as inconsistent with their trial testimony under 5-802.1(a), the judge declined to make a finding of credibility, stating as follows:

> "It is not my function to declare that his lack of memory was deliberate. However, I don't believe that the law of Maryland requires a finding by the trial judge that the lack of memory must be deliberate."

The State repeated its request for a factual finding by the circuit court, which the circuit court denied, stating as follows:

> "[THE STATE]: Secondly, Your Honor, I would ask that you make a finding that Mr. Johnson was feigning his memory when --
>
> THE COURT: Whoa, whoa, whoa, I'm going to, I'm supposed to make that -- that's something for the jury to decide."

We held in *Corbett* that this credibility finding "is within the *sound discretion* of the trial court to make" and cannot be made "from the cold record." 130 Md. App. at 426 (emphasis added). If the circuit court made a finding of inconsistency and left its remarks at that, our inquiry would be at an end, as we could imply that the judge made the prerequisite finding as "judges are presumed to know and, properly to have applied, the law." *Davis v. State*, 344 Md. 331, 339 (1996). In the case *sub judice*, however, we cannot make this assumption because of the court's explicit statement that it would not make a credibility finding. The finding need not be on the record, but we hold that the circuit court erred in declining to make a required finding on the authenticity of the memory loss to determine inconsistency.

Despite this error, we disagree with appellant and find harmless error. The standard in Maryland for evaluating harmless error was set forth by the Court of Appeals in *Dorsey v. State*, 276 Md. 638, 659 (1976):

> "[W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of --

> whether erroneously admitted or excluded -- may have contributed to the rendition of the guilty verdict."

The standard remains unchanged today. *See Robinette v. State*, 2017 Md. LEXIS 145 at *7 (2016); *State v. Hines*, 450 Md. 352, 386 (2016); *State v. Hart*, 449 Md. 246, 262-63 (2016). Here, both prior recorded statements were played to the jury properly under Rule 5-802.1(e).[3] At most, the circuit court's error resulted in the jury having the tapes to review during deliberation. However, there is no direct evidence in the record that the jury had a tape player to play the tapes in the jury room, and the record does not indicate why the jury asked for a transcript of Mr. Johnson's and Ms. Tynes's statements. Given that the substance of the tapes had been played to the jury, there is no reasonable possibility that having the tapes during deliberation may have contributed to the guilty verdict.

IV.

Turning to appellant's objection to the State prosecutor's closing arguments, we have often noted that "attorneys are afforded great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999). We do not reverse the trial court unless that court clearly abused its discretion and prejudiced the accused. *Id.* at 431. It is

[3] As described earlier, the circuit court initially admitted Mr. Johnson's recorded statement under Md. Rule 5-802.1(e) and Ms. Tynes's recorded statement under Md. Rule 5-802.1(a) and (e).

up to the trial judge to decide whether a prosecutor's remarks were "prejudicial or simply rhetorical flourish[.]" *Id.* *See also Lawson v. State*, 389 Md. 570, 591 (2005).

The United States Supreme Court has stated as follows:

> "while [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Berger v. United States, 295 U.S. 78, 88 (1935). A prosecutor is allowed liberal freedom to make any comment that is warranted or reasonably inferred by the evidence. *Degren*, 352 Md. at 429-30. Courts have deemed comments made during closing arguments improper when they invite the jury to draw inferences from information that was not admitted at trial. *See Spain v. State*, 386 Md. 145, 156 (2005); *Hill v. State*, 355 Md. 206, 222 (1999).

Even if the remarks by counsel were improper, "[n]ot every improper remark, however, necessitates reversal." *Lee v. State*, 405 Md. 148, 164 (2008). Both parties rely upon *Lee*, in which the Court of Appeals addressed the propriety of closing arguments in the context of a harmless error analysis. Applying the *Dorsey* harmless error standard to improper statements made during closing arguments, the *Lee* Court considered "several factors, including the severity of the remarks, cumulatively, the weight of the evidence against the accused and the measures taken to cure any potential prejudice." 405 Md. at

174. Following this multi-factor test, we agree with the State and find that the circuit court correctly denied appellant's new trial motion.

First, the severity of the prosecutor's statement was not so severe as to prejudice the appellant. Prior to closing argument, the jury heard testimony regarding Jerome Speddin's attempt to transfer his jacket. Although Christina Martinez was not mentioned in direct connection to the jacket, Detective Ross recited her name with regards to Speddin's investigation and release. We find that associating a name with the recipient of his jacket, particularly in an ancillary issue such as this one, was unlikely to create prejudice or appeal to the jurors' inherent biases or passions.

Second, we consider the weight of the evidence against appellant on the whole. *See Spain*, 386 Md. at 161; *Wilhelm v. State*, 272 Md. 404, 427 (1974) ("Another important and significant factor where prejudicial remarks might have been made is whether or not the judgment of conviction was 'substantially swayed by the error,' or where the evidence of the defendant's guilt was 'overwhelming.'"). In light of the evidence presented in this case, the result was not, as the trial judge put it, "a close one." The State presented four witnesses at trial, three of which independently identified appellant and were familiar enough to know his nickname, "Tank." It was entirely reasonable for a rationale jury to reach their verdict notwithstanding the prosecutor's comments at closing argument.

Third, we find that the trial judge's instructions were sufficiently curative because they "contemporaneously and specifically" addressed the issue in a way that the jury

understood that the prosecutor's remarks were not evidence. *Lee,* 405 Md. at 177-78. Upon defense counsel's objections, the trial judge immediately reminded the jury that the comments were only the attorney's argument and instructed the jury to draw its own conclusions: "This is closing argument . . . .[t]he jury will decide what they heard." Here, we find that the trial court did not abuse its discretion in giving a curative instruction *in lieu* of a mistrial. *Dillard v. State*, 415 Md. 445, 465 (2010) ("Jurors generally are presumed to follow the court's instructions, including curative instructions…").

Therefore, even if defense counsel's statements in closing argument were improper, the trial court acted within its discretion in regulating the State's closing argument and denying appellant's motion for a new trial.

V.

We turn next to whether the circuit court erred by denying appellant's motion for a mistrial after a juror became distraught during deliberations. The question of whether to grant a motion for a mistrial is left to the sound discretion of the trial court. *See, e.g.*, *Klauenberg v. State*, 355 Md. 528, 555 (1999). The grant of a mistrial is considered an extraordinary remedy and should be granted only if necessary to serve the ends of justice. *Carter v. State*, 366 Md. 574, 589 (2001) (quoting *Klauenberg*, 355 Md. at 555). Our review on appeal is limited to whether the trial court abused its discretion in denying the motion for mistrial. *White v. State*, 300 Md. 719, 737 (1984), *cert. denied*, 470 U.S. 1062

(1985). A reviewing court should not reverse a trial court unless there is clear prejudice resulting from the trial court's abuse of discretion. *Hunt v. State*, 321 Md. 387, 422 (1990).

A new trial is not necessarily required whenever a juror encounters a potentially compromising situation. The Court of Appeals explained its reasoning in *Jenkins v. State*:

> "[I]n a criminal prosecution, when a juror and a witness have significant and intentional mid-trial personal conversations and contact in violation of court orders, such as having lunch together, there is an inherent, and given the constraints of Maryland Rule 5-606, virtually irrefutable, prejudice to the defendant when, as in the case *sub judice*, the misconduct is concealed until after the verdict has been rendered and accepted and the jury discharged. . . . As this misconduct was left uncorrected, petitioner did not receive an impartial jury trial as mandated by the United States Constitution and the Maryland Declaration of Rights."

375 Md. 284, 340-41 (2003). In ruling on a motion for a new trial, we extend great deference to the trial court "to evaluate the degree of probable prejudice and whether it justifies a new trial." *Wernsing v. General Motors Corp.*, 298 Md. 406, 420 (1984). We find that the trial court did not abuse its discretion in denying appellant's motion for a new trial. None of the alleged juror interactions were intentional by the jurors or concealed, and the trial judge corrected any sense of impropriety prior to the verdict through individual inquiries. We decline to substitute an alternate assessment of the jurors' credibility for that of the trial, where each juror affirmed his or her ability to be fair and impartial during deliberations, including juror number five.

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