Circuit Court for Washington County
Case No. C-21-CR-18-000553

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 770

September Term, 2019

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RAHEEN EDWIN

v.

STATE OF MARYLAND

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Kehoe,
Wells,
Raker, Irma S.
(Senior Judge, Specially Assigned)
JJ.

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Opinion by Kehoe, J.

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Filed: July 24, 2020

After a jury trial in the Circuit Court for Washington County, the Honorable Brett R. Wilson, presiding, the appellant, Raheen Edwin, was convicted of various drug offenses. Edwin's appeal to this Court presents two questions for our review, which we have reworded:

1. Did the circuit court err in denying Edwin's motion to suppress incriminating evidence found on his person and in his vehicle during a warrantless search incident to his warrantless arrest?

2. Did the circuit court abuse its discretion by improperly limiting closing argument by Edwin's counsel?[1]

We answer no to both questions and affirm the circuit court's judgments of conviction.

## Background

The basic facts of this case are not in contention. The following narrative is derived from the findings of the circuit court and the testimony credited by the court in the suppression hearing.

This case began with a controlled narcotics buy organized by officers of the Washington County Narcotics Task Force. On April 19, 2018, these officers outfitted a "trustworthy" confidential informant with audio- and video-surveillance equipment and

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[1] Edwin's appeal presents the questions thus:

1. Did the Circuit Court err in denying Edwin's motion to suppress evidence from his warrantless arrest in violation of the Fourth Amendment?
2. Did the Circuit Court abuse its discretion in improperly limiting the closing argument of Edwin's counsel?

gave him $160 in marked bills. The informant was then sent, in his own car, to purchase heroin from Heather Dell, a "middleman" who was the subject of a task-force investigation.

At around 3:30 that afternoon, the informant parked his car near the Dagmar Hotel in downtown Hagerstown. He was on Summit Avenue, just south of its intersection with Antietam Street. From their own cars, also parked on Summit Avenue, about half a block behind the informant's car, task-force officers were listening in—and watching what they could.

The informant called Dell, and a few minutes later, Dell was sitting next to him in the front passenger seat of his car. Dell told the informant that her supplier—an unnamed "he"—had not yet arrived. She also said that she had to get hold of her "girlfriend." Dell called this girlfriend, later identified as Amy Coolahan. Coolahan approached the informant's car moments later. After some conversation, Coolahan told Dell and the informant that she would go get the heroin for them. So that Coolahan could pay for the heroin, the informant gave her $100 dollars of the marked currency provided by the task force. As collateral, Coolahan left behind her pocketbook and a knapsack she had been carrying.

Coolahan said she would return in a few minutes and left the car on foot. As she turned the corner to walk down Antietam Street, the officers monitoring the buy lost sight of her. That's when Officer Frank Toston, the lead agent on the case, directed Officers Bryan Teets and Mikhael Weaver to follow her in their car. Toston believed that Coolahan was taking the money to buy the heroin from the unnamed "he" that Dell had mentioned earlier.

Following Toston's orders, Teets and Weaver circled the block to get an eye on Coolahan. As Teets would later testify, it took the officers "[l]ess than a minute" to get to a spot where they could see her again. When they did see her, Coolahan was standing one or two feet away from an unknown black man wearing a gray hooded sweatshirt. This unknown man would later be identified as the appellant, Edwin. Coolahan and Edwin were facing each other when they were first spotted by police, but the pair almost immediately separated. Coolahan turned to walk back to the informant's car, and Edwin began to walk toward a nearby parking lot.

Critically, the officers never saw any physical contact or exchange between Coolahan and Edwin. Weaver would later testify that Coolahan and Edwin were "close together," positioned "as if they were conversing." But any apparent interaction was "very brief," Teets would testify. "By the time we got up to the intersection," Teets would say, "[it] looked like they had just finished whatever they were doing." But as it was happening, Teets and Weaver told Toston what little they saw, and Toston directed the officers to "maintain visual" on Edwin.

At the time, Toston was still parked behind the informant's car on Summit Avenue, listening to the informant and Dell. When Coolahan returned to the informant's car, she told Dell and the informant that she had the heroin. In exchange for two baggies "stamped with black Maltese crosses," the informant returned Coolahan's belongings. Dell then got out of the car, and the two women started to walk away.

Within a few seconds, Toston and another officer stopped the women for questioning. When Toston asked Coolahan where she got the suspected heroin, she said she got it from "a black male who was wearing a gray colored sweatshirt." She also said she knew this man as "Mike." Toston relayed this information to Teets and Weaver, who confirmed the man they were following—the man who they had seen face to face with Coolahan a few minutes before—was a black man in a gray sweatshirt. That's when Toston instructed Teets and Weaver to move in on Edwin.

By the time Teets and Weavers approached Edwin, Edwin was standing outside a blue Toyota SUV parked in a parking lot for employees of the District Court for Washington County. Teets and Weaver asked Edwin for his driver's license. And shortly after he reached into the center console of the SUV and handed the officers his learner's permit—revealing his name was not "Mike"—the officers, with Toston's go-ahead, arrested him under suspicion of narcotics distribution.

Incident to Edwin's arrest, Teets and Weaver searched Edwin's person and "the immediate area of his vehicle." On Edwin's person, they found $100 cash—later established to be the same buy money that the informant had given Coolahan minutes before—and a phone. In the center console of Edwin's car, police discovered a plastic bag with five small zip-lock bags inside, each containing an off-white powder substance. These bags were similarly marked with black Maltese crosses, although a later test of one of the bags showed it contained cocaine and not heroin.

As a result of these events, Edwin was charged with (1) conspiracy to distribute heroin, (2) distribution of heroin, (3) possession with intent to distribute cocaine, (4) possession of cocaine, and (5) use of drug paraphernalia to store cocaine. His effort to have suppressed the incriminating evidence found on his person and in his car was unsuccessful. And on the basis of this and other evidence, Edwin was convicted by a Washington County jury of all counts (save the drug-paraphernalia charge nolle prossed by the prosecution). The circuit court sentenced Edwin to 25 years' imprisonment.

Edwin filed a timely appeal to this Court, assigning as error the circuit court's denial of his pretrial motion to suppress and a limitation imposed by the circuit court during defense counsel's closing argument at trial. In our analysis below, we provide additional factual context.

## Analysis

### A. The denial of the motion to suppress

At a pretrial suppression hearing, Edwin asked the court to exclude as evidence the buy money and the phone found on his person, as well as the baggies of suspected cocaine found in his car.[2] He argued to the circuit court that police secured this evidence through a search conducted incident to a warrantless arrest not supported by probable cause, in

[2] With his pretrial motion, Edwin also sought to have suppressed an incriminating statement made to police after his arrest but before the officers read Edwin his rights, in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The prosecution apparently conceded this point, and the circuit court suppressed the statement. The suppression of this statement is not before us.

violation of the Fourth Amendment. That the arrest was unlawful made any search incident to that arrest—whether of Edwin's person or of the reachable area in his car—unlawful too. Insofar as the search of Edwin's car was considered separately as a warrantless automobile search under the doctrine of *Carroll v. United States*, 267 U.S. 132 (1925), and its progeny, Edwin argued, the evidence that search yielded should be excluded as "fruit of the poisonous tree" under the doctrine of *Wong Sun v. United States*, 371 U.S. 471 (1963).

Before ruling on the suppression motion, the circuit court heard the testimony of three witnesses—task-force officers Toston, Teets and Weaver—who relayed the events we outlined above. Edwin did not testify or call witnesses of his own. Based on this testimony, the circuit court sided with the prosecution.

In his findings, the judge pointed out weaknesses in the State's case. First, as the officers freely admitted in their testimony, police lost sight of Coolahan twice: "both when they went around the block and then when they went to follow [Edwin]." Coolahan was moving through the streets unseen by police for at least a minute or two. Second, police never saw any direct contact or exchange between Coolahan and Edwin. When Teets and Weaver spotted Coolahan and Edwin, the suspects were "face-to-face about one or two feet apart," but they then "immediately turned from each other and walked away." Additionally, the court found that Coolahan's description of her supplier had been "very, very slight."

Nevertheless, the court concluded, "based on the . . . totality of the circumstances," that once police confirmed that Edwin fit this "very limited . . . two-prong description of

black male and gray sweatshirt," they had probable cause to arrest Edwin for supplying heroin to Coolahan. The court explained (emphasis added):

> [T]his all happened *within just a very brief few moments*. . . . We know that . . . both Agents Teets and Weaver were very clear that when they came around the block, . . . *there were two people there*—there was the defendant and there is Ms. Coolahan *and there was no one else*. *They saw no one else walking away or towards Ms. Coolahan* even though they lost eyesight on Ms. Coolahan, both when they went around the block and then when they went to follow the defendant. At either time the testimony was that *there was no other people[] there that she could have met with*.
>
> [That police lost sight of Coolahan for a short period of time, that police never saw an exchange, and that Coolahan's description of her supplier was slight is] not sufficient to undermine the fact that *based on the short time period, based on the eyewitness testimony of the officers seeing the two persons together*, one person being the defendant, the, albeit slight, the description of the black male, gray sweatshirt, which was confirmed by the agents, and the fact that he was walking, again a short distance away from his contact with Ms. Coolahan, back to a vehicle which apparently by indications was his, and the fact that he was opening the door when he got to it, which would indicate again that he was in the area, that he had walked, I think the only inference you can draw is that he had left from the vehicle to walk towards the area where he had met with Ms. Coolahan at some point prior. *It's all consistent in time, it's consistent in statement from Ms. Coolahan that she had to meet her buyer, and it's consistent in action that they had met before separating and the drugs being recovered.*

Because police had probable cause to arrest Edwin, the circuit court concluded, the searches incident to that arrest—of Edwin's person and of the reachable areas of his car—were lawful. The search of the car could also have been permissible under the *Carroll* doctrine, the circuit court said. The court therefore denied Edwin's motions to suppress the evidence those searches yielded.

Edwin's first appellate contention is that the circuit court was wrong to deny his motion to suppress the evidence found when police searched his person and his car. These searches

were unlawful, he argues, because the arrest to which they were incident was not supported by probable cause. Edwin maintains that Coolahan's "spare description" of her supplier "falls well short" of what is required to give police probable cause to arrest someone. He also maintains that his "brief appearance" on the street near Coolahan would not suffice to establish probable cause absent any objective indication of Edwin's own illegal activity. Police might have had sufficient grounds to investigate Edwin further, Edwin concedes, but the information then known to officers was "wholly inadequate to arrest him." Edwin adds that the failure to suppress this evidence was also prejudicial "because there is no serious dispute that Edwin's convictions were based on the evidence derived from his warrantless arrest."

Although it uses different terms in its brief, the State's position is that Edwin's argument about the information known to police at the time of arrest misses the forest for the trees. Probable cause is assessed based on the "totality of the circumstances," the State says, and the totality of circumstances here—more than *just* a bare description from Coolahan or *just* a brief sighting with her—gave police the probable cause they needed to arrest Edwin. Because Edwin's arrest was lawful, the State argues, so were the searches of Edwin's person and his car made incident thereto. Therefore, says the State, the circuit court was correct to deny Edwin's motion to suppress.

We agree with the State.

At the outset, we note a limitation on the scope of the analysis that leads to our conclusion. As we have explained, courts ruling on a motion to suppress—or deciding an

appeal arising out of denial of that motion—should "evaluate the lawfulness of *each* search and seizure that led to the evidence sought to be suppressed." *Eusebio v. State*, 245 Md. App. 1, 24 (2020) (emphasis added). This is because, "under the fruit-of-the-poisonous-tree doctrine, even evidence resulting from a lawful search or seizure may still be subject to exclusion if the search or seizure was made possible only by some antecedent unlawful intrusion." *Id.* In this case, there were three searches and seizures that led to the discovery of the evidence Edwin sought to have suppressed: the initial investigatory stop, Edwin's subsequent warrantless arrest, and the warrantless searches performed incident to that arrest. But, before this Court, Edwin does not contend that police lacked the "reasonable suspicion" required to make a forcible investigatory stop. *Cf. Sizer v. State*, 456 Md. 350, 364 (2017) (discussing the quantum of proof needed to justify stops and frisks under the doctrine of *Terry v. Ohio*, 392 U.S. 1 (1964)). Nor does Edwin challenge the scope or timing of the searches performed incident to his arrest. *Cf. Pacheco*, 465 Md. at 323 (explaining that scope of search incident to arrest extends to "the arrestee's person and the area within his immediate control" (cleaned up)); *Conboy v. State*, 155 Md. App. 353, 364 (2004) (explaining that "as long as police have probable cause to arrest before they search the arrestee, it is not particularly important that the search precede the arrest" (cleaned up)). Edwin argues only that the arrest to which the searches were incident was unlawful. Accordingly, we consider the legality of only one link in the chain of searches and seizures: Edwin's arrest.

*1. The standard of review*

When this Court considers the denial of a motion to suppress evidence, "[w]e accept the trial court's factual findings unless they are clearly erroneous, but we review *de novo* the court's application of the law to its findings of fact." *Pacheco v. State*, 465 Md. 311, 319 (2019) (cleaned up). This means that "[w]hen a party raises a constitutional challenge to a search or seizure, this Court renders an independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case." *Id.*; *see also Howard v. State*, 112 Md. App. 148, 156 (1996) ("We do not consider whether the arresting officer had a substantial basis for concluding that probable cause existed. Rather, this Court must make its own *de novo* determination of whether probable cause existed in light of the not clearly erroneous first-level findings of fact and assessments of credibility." (cleaned up)).

In conducting this *de novo* review of probable-cause determinations, we limit ourselves to the record developed at the suppression hearing. *Moats v. State*, 455 Md. 682, 694 (2017). And we assess that record "in the light most favorable to the party who prevails on the issue that the defendant raises in the motion to suppress." *Norman v. State*, 452 Md. 373, 386 (2017). In this case, that party is the State.

*2. The Fourth Amendment warrant "preference" and the exception for felony arrests*

The Fourth Amendment to the Constitution, applied to the states via the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), protects against "unreasonable searches and seizures," U.S. Const. amend. IV. This right comes with its own remedy:

When a search or a seizure is determined to be unreasonable, the evidence it yields is subject to suppression under the Fourth Amendment exclusionary rule. *See Mapp*, 367 U.S. at 655; *Carter v. State*, 243 Md. App. 212, 226–27 (2019).

In evaluating the reasonableness of searches and seizures, courts interpreting the Fourth Amendment have found in its text a "strong preference" for warrants. *Stevenson v. State*, 455 Md. 709, 723 (2017) (quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983)); *see also Kentucky v. King*, 563 U.S. 452, 459 (2011). Courts have also generally held the quantum of proof required to justify searches and seizures is one of probable cause. *Michigan v. Summers*, 452 U.S. 692, 700 (1981). But there are exceptions to the warrant-plus-probable-cause constitutional default.[3] And one of those exceptions permits police to make warrantless arrests in public if police have probable cause to believe the arrestee has committed, is committing, or is about to commit a felony. *Bailey v. State*, 412 Md. 349, 374 (2010); *see also United States v. Watson*, 423 U.S. 411, 417–24 (1976) (recounting the history of this "traditional and almost universal" standard for warrantless arrests).

[3] *See*, *e.g.*, *Kentucky v. King*, 563 U.S. 452, 460 (2011) (exigent circumstances, with probable cause but without a warrant); *California v. Acevedo*, 500 U.S. 565, 580 (1991) (automobile searches, with probable cause but without a warrant); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (border searches, without probable cause and without a warrant); *Chimel v. California*, 395 U.S. 752, 762–63 (1969) (searches incident to arrest, without separate justification and without a warrant); *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 534 (1967) (administrative searches, with a warrant but without probable cause); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (investigative stops and frisks, with reasonable suspicion of criminal activity but without a warrant).

*3. Probable cause for a warrantless arrest*

A police officer has probable cause to make a warrantless arrest if, "the facts and circumstances within [the officer's] knowledge and of which [he has] reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested." *Elliott v. State*, 417 Md. 413, 431 (2010) (cleaned up). In other words, for a warrantless arrest to be lawful, the arresting officer must have, before the arrest is made, "a reasonable ground for belief of guilt . . . particularized with respect to the person to be . . . seized." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (cleaned up).

The existence of innocent explanations for a suspect's behavior will not necessarily prevent police from establishing probable cause. *See Williams v. State*, 188 Md. App. 78, 96 (2009). On the other hand, the discovery of incriminating evidence after an arrest cannot be used to justify the suspect's seizure. *Baziz v. State*, 93 Md. App. 285, 295 (1992) ("[T]he legality of [a suspect's] arrest may not be determined with the benefit of hindsight.").

Although it is meant "to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime," *Brinegar v. United States*, 338 U.S. 160, 176 (1949), the probable-cause standard does not set a "high bar" for police, *State v. Johnson*, 458 Md. 519, 535 (2018) (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018)). While the arresting officer must have something "more than bare suspicion," *Brinegar*, 338 U.S. at 175, he need not have proof sufficient to conclusively establish guilt beyond a reasonable doubt or even by a preponderance of the evidence, *Gates*, 462 U.S. at

235. All that is required is a "fair probability," *id.* at 244, or "substantial chance," *id.* at 243 n.13, of the arrestee's criminal activity. *See also Valente v. Wallace*, 332 F.3d 30, 32 (1st Cir. 2003) ("[T]he mercurial phrase 'probable cause' means a reasonable likelihood.").

There are also no "rigid rules, bright-line tests, [or] mechanistic inquiries" to which courts must resort to determine if police have satisfied the probable-cause standard. *Robinson v. State*, 451 Md. 94, 109 (2017) (quoting *Florida v. Harris*, 568 U.S. 237, 244 (2013)). This is because probable cause is a "practical, nontechnical conception" concerned with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *McCracken v. State*, 429 Md. 507, 519 (2019) (cleaned up). Courts analyzing the facts of a case to determine the existence of probable cause must take "a more flexible, all-things-considered approach." *Robinson*, 451 Md. at (quoting *Harris*, 568 U.S. at 244). The existence of probable cause "depends on the totality of the circumstances." *Johnson*, 458 Md. at 535 (quoting *Pringle*, 540 U.S. at 371).

To guide this Court in its all-things-considered review, Edwin points to three cases in which the reviewing courts found police did not establish probable cause to arrest: *Elliott v. State*, 417 Md. 413 (2010); *Baziz v. State*, 93 Md. App. 285 (1992); *United States v. Everroad*, 704 F.2d 403 (8th Cir. 1983).[4] Edwin contends that to conclude the police had

[4] In his brief, Edwin also mentions *Longshore v. State*, 399 Md. 486 (2007). We do not believe *Longshore* is apposite. The *Longshore* Court's determination that the circuit court erred in its probable-cause determination hinged in large part on the significance the Court placed upon a drug-sniffing dog's failure to alert to the presence of drugs in the defendant's car. *See Longshore*, 399 Md. at 530–35 (explaining that the failed sniff was "the crux of

probable cause to arrest him would be inconsistent with these cases. But each case is distinguishable on its facts.

In *Elliott*, police were told by a confidential informant that "a man named Winston" would deliver a large quantity of marijuana at a specific shopping center between 1 and 3 p.m. one afternoon. 417 Md. at 423. The informant had described the subject of the tip ("a slim, black male, approximately five feet eight inches tall, with a heavy Jamaican accent") and the car he would be driving (a black Nissan Maxima, license-plate number "3BBY2L"). *Id.* 423 & n.1. With this information, police set up surveillance in the shopping-center parking lot and waited for "Winston" to arrive. *Id.* at 423.

At around 1:20 p.m., Winston Elliott—whose name was not yet known to police—drove into the parking lot in a black Nissan Maxima. *Id.* When he parked his car and began to walk toward the shopping center, police arrested and searched him. *Id.* at 424. A post-arrest drug-dog sniff of Elliott's car confirmed he had marijuana in the trunk. *Id.*

Although it ultimately affirmed the trial court's denial of Elliott's motion to suppress the drug evidence found in his car, the Court of Appeals concluded Elliott's warrantless arrest had not been supported by probable cause. *Id.* at 434. The Court focused its totality-

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the case," as the failure would "significantly negate or neutralize" other factors that might have supported a determination of probable cause). Edwin is correct that another factor in the *Longshore* Court's probable-cause analysis was that the defendant had been seen meeting with a known narcotics offender. But we think this "mere association" concept is sufficiently covered by, and is more central to the analyses of, the other cases cited by Edwin and discussed in our opinion.

of-the-circumstances analysis on "the substance of the tip and the corroborative observation by law enforcement of the suspect's activities." *Id.* at 432 (quoting *Dixon v. State*, 133 Md. App. 654, 695 (2000)). While the tip had been "fairly specific" and had been sourced from an "apparently reliable" informant, *id.*, some of the information was inaccurate (Elliott was taller than the informant had suggested) and much of it had yet to be verified at the time of arrest (police did not know whether Elliott was "Winston," whether he had a heavy Jamaican accent or whether he was engaged in any illegal activity), *id.* at 433. "[A]ll the police knew at the time of arrest was that a man who was similar in description to the description provided by the [informant] had parked his car and was walking toward a mall." *Id.* This wasn't enough. "Absent police corroboration or specific information in the tip regarding future behavior," the Court said, "the remaining facts, that a slim black male would be driving a black Nissan Maxima, [were] not sufficient to provide probable cause." *Id.*

Properly understood, *Elliott* is distinguishable from the case before us. *Elliott*'s holding was not, as Edwin appears to suggest in his brief, that the suspect description in the informant's predictive tip had not been specific enough for police to develop probable cause for his arrest. Instead, the case is about the degree to which a predictive tip from a confidential informant *must be corroborated* before police develop probable cause sufficient to make a warrantless arrest. *Cf. Gates*, 462 U.S. at 268 (White, J., concurring in the judgment) (suggesting that the probable cause required to get a search warrant may be established "by independent police investigatory work that corroborates the tip to such an

extent that it supports both the inference that the informer was generally trustworthy and that he made his charge on the basis of information obtained in a reliable way" (cleaned up)). It is therefore not outcome-determinative, contrary to Edwin's argument, that Coolahan's description was "even more threadbare" than the description provided to police in *Elliott*. A spare description of a suspect combined with other evidence may be enough to develop probable cause. What matters is what police knew—the totality of the circumstances—at the time of arrest.

When police arrested Winston Elliott, "*all the police knew* . . . was that a man who was similar . . . to the description provided by the [informant] had parked his car and was walking toward a mall." *Elliott*, 417 Md. at 433 (emphasis added). That is, police knew only that Elliott was a slim black male in a black Nissan who had arrived at the shopping center, as predicted. Nothing the police had seen by the time of Elliott's arrest otherwise indicated that he was engaged in criminal activity; the criminality suggested in the informant's tip had yet to be corroborated in any way. By contrast, when police arrested Edwin, the fact that he matched the general description provided by Coolahan was not "all that police knew" about Edwin's potential involvement in criminal activity. Although police had not witnessed any exchange between Coolahan and Edwin, they had seen the two standing close together on the sidewalk in the critical minutes-long period in which Coolahan secured the drugs she later delivered to the informant. And, more significantly, police *had not seen anyone besides Edwin* in the area during this period. These facts increased the probability that Edwin was Coolahan's supplier. That Edwin matched

Coolahan's (concededly barebones) description only confirmed a suspicion based on what police already knew.

That the crime being investigated had already been consummated is another significant difference between this case and *Elliott* that increased the "substantial chance" of Edwin's criminality. In *Elliott*, the police were acting on the basis of a *predictive tip*, provided by a *confidential informant*, describing someone who *would be* engaging in criminal conduct that *had not yet come to pass*. But when police arrested Edwin, it was on the basis of a description provided by a *fellow criminal participant*, describing someone who *had just engaged in a crime moments before*. Coolahan was not prognosticating; she was figuratively pointing her finger, tying Edwin to a crime of whose commission police were all but certain.

*Baziz* and *Everroad* are distinguishable too. In *Baziz*, this Court held that police lacked probable cause to arrest suspected drug supplier Jack Baziz. 93 Md. App. at 302. Just before a controlled buy of cocaine from a dealer named Simon Alpert, police observed Baziz—then unknown to police—standing with Alpert in the hallway outside Alpert's apartment. *Id.* at 287. Baziz stayed back, apparently observing from a large window, when Alpert went down to the parking lot to meet the undercover officer waiting to make the purchase. *Id.* at 288. And when Alpert and the undercover officer drove away from the complex to make the sale, Baziz went inside Alpert's apartment. *Id.*

When Alpert and the undercover officer returned to the apartment complex seven or eight minutes later, Alpert returned to his apartment. *Id.* Ten minutes after that, Alpert and

Baziz emerged from the apartment together, got in Alpert's car, and drove to a nearby carwash, where Alpert dropped off Baziz. *Id.* at 288–89. Police arrested Baziz shortly thereafter. *Id.* at 289.[5]

At the time of Baziz's arrest, the Court noted, officers knew that Baziz had spoken with a known drug dealer and been in the dealer's apartment, where drugs had previously been sold; that he had been physically close to the site of the sale and appeared to be observing from afar; and that Alpert's most recent source of cocaine was incarcerated at the time of this controlled buy. *Id.* at 296. But these facts weren't enough to give police probable cause to arrest Baziz. *Id.* at 302. As this Court explained, "association with a known criminal, presence in that criminal's apartment, and physical proximity to a crime are insufficient to support a finding of probable cause to arrest." *Id.* at 298. The additional facts known to police might have given them adequate grounds to *supsect* Baziz's

[5] There were several seemingly critical occurrences between the time Alpert dropped off Baziz and the moment Baziz was arrested by police. *See Baziz*, 93 Md. App. at 289–92. Police and Baziz gave conflicting accounts of these events—differences that would have affected determinations about when Baziz was actually arrested and what police knew at that moment. But the circuit court in *Baziz* based its probable-cause determination solely on what happened before Baziz arrived at the car wash. *Id.* at 294–95. Everything after that point, the circuit court said, was "window dressing." *Id.* Without any "first-level" factual findings about the car-wash events, this Court concluded it had to determine whether Baziz's warrantless arrest was supported by probable cause "without considering events occurring after Alpert and [Baziz] left the Complex." *Id.*

Even though the information missing from the *Baziz* record limited the Court from deciding if Baziz's arrest truly was unlawful, the case is nevertheless useful as an example of what facts *do not* furnish probable cause to arrest.

involvement and investigate him further, but they did not provide police with probable cause to arrest. *Id.* at 298–99. [6]

In its analysis, the *Baziz* Court looked to *Everroad*, 704 F.2d 403, a decision by the United States Court of Appeals for the Eighth Circuit. In *Everroad*, an undercover narcotics agent arranged to purchase marijuana and cocaine at a Marshalltown, Iowa, restaurant from a known trafficker, Bob Bragg. *Id.* at 404. Shortly before the buy, police saw Bragg and a passenger, later identified as Garnet Everroad, driving through the restaurant's parking lot. *Id.* Police followed the men as they drove to a nearby motel, where they went inside for about fifteen minutes. *Id.* Bragg then returned to the restaurant; Everroad stayed at the motel. *Id.*

When Bragg met with the undercover agent at the restaurant, Bragg said the agent would have to pay first for the marijuana and that the cocaine would be delivered within

[6] In his reply brief, Edwin suggests that the fact that officers did not see any "visibly or obviously criminal" activity was "dispositive" in *Baziz*. We do not agree. That Baziz was not seen engaged in any visibly or obviously criminal conduct was surely a factor that led the Court to conclude police lacked probable cause for his arrest. *See Baziz*, 93 Md. App. at 298. But as Judge Charles Moylan has explained—in a case cited by the *Baziz* Court for this very proposition—innocent details may under certain circumstances become of sinister significance. *State v. Amerman*, 84 Md. App. 461, 490–94 (1990); *see also Gates*, 462 U.S. at 243 n.13 ("[I]nnocent behavior frequently will provide the basis for a showing of probable cause. . . . [T]he relevant inquiry is not whether the particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts."); 2 Wayne R. LaFave, *Search & Seizure* § 3.3(f) (5th ed. 2019) ("[I]t is not necessary that the events observed by the police supply probable cause by themselves or that they point unequivocally in the direction of guilt. It is sufficient that they are unusual and inviting explanation, though as consistent with innocent as with criminal activity." (cleaned up)).

thirty minutes of this transaction. *Id.* The agent agreed to these terms, and the men drove to a gravel road a couple of miles from the motel where Everroad had been seen with Bragg. *Id.* When Bragg removed several pounds of marijuana from the trunk, the agent arrested him. *Id.* at 405. No cocaine was found in a search of Bragg's person and his car. *Id.*

With Bragg in custody, police immediately went to arrest Everroad at the motel. *Id.* Post-arrest searches of Everroad's motel room and car yielded drugs and drug paraphernalia. *Id.* After a federal district court denied Everroad's motion to suppress this evidence, Everroad was convicted of various drug offenses. *Id.* at 404.

The Eighth Circuit reversed Everroad's convictions, concluding that police did not have probable cause to arrest him. *Id.* at 407. What police knew at the time they arrested Everroad boiled down to "only two basic facts," the court said. *Id.* at 406. First, police had seen Everroad with Bragg (known to be involved in a drug transaction) at the restaurant where the transaction had been arranged. *Id.* Second, police knew that Bragg planned to have the cocaine delivered within a half-hour of the marijuana purchase, and that Everroad's motel was within a half-hour radius of the gravel road where Bragg delivered the marijuana. *Id.* These facts were not enough to justify Everroad's arrest because "mere association with a known or suspected criminal" and "presence . . . in a location known to be frequently involved in narcotics sales or other crimes" do not establish probable cause of criminal activity. *Id.* Nor would "physical proximity to a crime combined simply with a brief association with a suspected criminal—when there is no other unlawful or suspicious conduct by any party involved— . . . support a finding of probable cause." *Id.* at 407.

The arrests in both *Baziz* and *Everroad* were made almost exclusively on the basis of the suspects' physical proximity to the crime being investigated and the fact that they had been seen with a known criminal just before or after the commission of that crime. In neither case did these known criminals provide police with a description of their accomplice (in *Everroad*) or supplier (in *Baziz*). By contrast, in the case before us, Coolahan told police (in very broad strokes) what her supplier looked like, more or less confirming for police that the only person she had been spotted with in the past few minutes was in fact the source of the heroin she had brought to the informant's car. This was one more fact increasing the likelihood of Edwin's involvement in the crime.

Additionally, we note differences in the nature of Edwin's proximity to the crime investigated by the task force compared to that of the suspect arrested in *Everroad*. Garnet Everroad was arrested, in part, because he had been seen with a known drug dealer *a half-hour* before a controlled buy and because it would have been physically possible for him to have delivered cocaine to the site of the controlled buy within the *thirty-minute window* specified by the drug dealer. By contrast, Edwin was spotted with Coolahan during the critical few minutes in which she obtained heroin, just a few feet away from her.

In short, that police are able to confirm a few wholly innocent details from a confidential informant's predictive tip is not enough, *standing alone*, to amount to probable cause of criminal activity. *Elliott*, 417 Md. at 433–34. Nor is a suspect's "mere association with" or "physical proximity to" criminals or criminal activity, *standing alone*, generally enough to make a warrantless arrest. *Everroad*, 704 F.2d at 406; *see also Baziz*, 93 Md.

App. at 298. But the case before us is not one in which a barebones suspect description or an apparently close temporal or physical relationship to the crime *alone* were used to support a probable-cause finding. This case involved a *combination* of the factors that by themselves were insufficient to support findings of probable cause in *Elliott*, *Baziz* and *Everroad*.

To establish that the present case is distinguishable from other cases in which probable cause was lacking is not to establish that police had probable cause for Edwin's warrantless arrest, however. This brings us to the case central to the State's argument on appeal: *Cooper v. State*, 128 Md. App. 257 (1999), *separate holding superseded by statute as recognized in Britton v. State*, 201 Md. App. 589, 243 (2011). In *Cooper*, as in the case before us, the Washington County Narcotics Task Force used a wired confidential informant to carry out a controlled buy of illegal narcotics in downtown Hagerstown. 128 Md. App. at 262. It took only a few minutes for the informant to secure the cocaine he was after. *Id.*

As the dealers walked away from the informant's car, marked money in hand, he relayed a description of the dealers' clothing to the officers listening in. *Id.* One man, he said, was wearing a white T-shirt and purple sweatpants. *Id.* The other, later identified as Cooper, was wearing "black pants with white thread" and an "ordinary" white T-shirt, the informant said. *Id.*

A member of the task force was hiding in a nearby alley when this description was relayed to him. *Id.* at 263. This officer, riding a bicycle, caught up with Cooper and the other man in "no more than five seconds," about fifty yards from the alley where he had

been hiding. *Id.* at 269. Cooper resisted the officer's attempts to arrest him, punching the officer repeatedly in the head. *Id.* at 263. Before the police could get Cooper in handcuffs, he struck another officer in the face. *Id.*

As it turned out, the informant's description of Cooper's attire was not completely accurate: His pants were dark blue (not black) and his "ordinary" T-shirt had a Penn State logo on the front. *Id.* at 263. On appeal from his conviction for resisting arrest, Cooper used this description discrepancy to argue that police had lacked probable cause for his arrest, entitling him to use force to stop the officers. *Id.* at 268. But this Court disagreed, holding that the information known to police at the time of Cooper's arrest—the informant's description, Cooper's presence in the vicinity of the crime, and the "extremely short elapsed time" between the moment of the sale and the time of Cooper's arrest—was sufficient to give the officers probable cause to believe Cooper was involved in the cocaine sale. *Id.* at 269. Any "slight" deviation between the informant's description of Cooper's attire and what Cooper was actually wearing, we held, was "overshadowed" by the other two factors, as well as the fact that Cooper "was accompanied by a person whose clothing perfectly matched the description given by the informant." *Id.* at 270.

Edwin maintains that *Cooper* is distinguishable. There are some differences between the cases, but Edwin overstates their significance. As in *Cooper*, one of the factors that led police to arrest Edwin was that he matched a description provided by someone involved in the crime they were investigating. Edwin argues that Coolahan's description of her supplier (black male, gray sweatshirt, known as "Mike") was "far less particularized" than the

description given to police by the informant in *Cooper* (black pants, white T-shirt, walking down Jonathan Street with someone in purple sweatpants). While the description in *Cooper* gave officers more information, Coolahan's description cannot be considered in a vacuum. Police did not use Coolahan's description to begin canvassing the downtown area for men who fit the specified criteria; the description was used to confirm that the one person with whom Coolahan had been seen in the past few minutes—and who was the only other person police saw in the area during that time—was in fact her supplier.

Edwin also points to the discrepancies in the descriptions provided, noting that the informant's description in *Cooper* contained only "marginal inaccuracies about the defendant's appearance" whereas Coolahan's description included "a completely different name than the one officers observed on Edwin's learner's permit immediately before arresting him." That Coolahan "knew [her supplier] by 'Mike'" perhaps made it more likely that his name would actually be Mike. But we are not convinced that police lost probable cause to arrest Edwin upon discovering that Edwin's legal name was not the same name that Coolahan "knew him by."[7]

As in *Cooper*, police never saw an actual exchange between Edwin and his buyer, Coolahan. But, as in *Cooper*, Edwin was spotted by police in the "immediate vicinity" of the drug transaction that police were investigating. *Cooper*, 128 Md. App. at 270.

[7] Edwin's argument would be more forceful if, for instance, Coolahan had told the police that her supplier was also her brother, whose legal name she would certainly know.

Moreover, unlike Cooper, Edwin was actually seen by police with the person to whom he had delivered drugs. This sighting was also during the critical few-minute window in which Coolahan secured the heroin she eventually delivered to the informant.

Edwin is correct that police were quicker to make their arrest in *Cooper* and that the lag between the sale and spotting Cooper may have been shorter than the lag between Edwin's exchange with Coolahan and the moment when police got a visual of the pair. (This is not certain; police spotted Coolahan and Edwin just as the pair began to separate and therefore may have missed the exchange by only a few seconds.) But this does not take away from the fact that the police sighting of Edwin and Coolahan was, in temporal and spatial terms, wholly consistent with the theory that Edwin had been Coolahan's supplier.

In sum, police knew when they arrested Edwin that he matched Coolahan's description of her supplier, that he had been spotted with Coolahan within moments of whenever she secured the heroin she was after, and that Edwin was the only other person police saw in the area during that critical time. This was not much. Police could not have been certain that Edwin was Coolahan's supplier. And there may have been innocent explanations for the apparent interaction between the two. But what was known to officers at the time of Edwin's arrest was enough to amount to probable cause of his involvement in the sale of heroin. Under the totality of the circumstances, there was a fair probability or reasonable likelihood that Edwin had sold the drugs to Coolahan. Therefore, we hold, Edwin's arrest was lawful, and so were the searches performed incident thereto.

B. The limits on Edwin's closing argument

Edwin's trial was held on April 16, 2019. The jury heard testimony from the police officers involved in the investigation and from the confidential informant who purchased the drugs from Coolahan and Dell. At the close of the prosecution's case, the defense rested without putting on any evidence.

In his closing argument, Edwin's counsel sought to emphasize what he saw as holes in the prosecution's case. The prosecutor objected to defense counsel's argument just after counsel made comments about fingerprint evidence not introduced and witnesses who had not taken the stand. This objection was sustained by the trial court. The most relevant portion of the exchange was as follows (emphasis added):

> [Defense]: [In this case, the police] didn't do the step that they should do . . . to protect our rights. . . . *It would have been a wonderful thing had the State fingerprinted the bags*. *I would have loved to have seen that.* . . . Loved to have seen whether it was Amy who was giving money to my client, when both people admit she was a prostitute on the street. That's the issue. *They didn't even bring her in to deny any of these things. And we know they could have.* Heather Dell, Amy Coolahan, those were the people as you look at the documents, those were the people, these two women were the people that they were after. And yet, at the police station, one of them gets all her items back and the other one gets let go, *neither of them are subpoenaed by the State to be here*, and—
>
> [Prosecution]: Objection.
>
> [Defense]: —what you're left with—
>
> The Court: Sustained. Approach.
>
> [Counsel approach for a bench conference out of the jury's earshot]

* * *

[Prosecution]: Your Honor, *those facts aren't in evidence*.

[Defense]: The facts that are in evidence is that *the State made no effort to call them*.

The Court: . . . [T]hat's the second time you're alternating as evidence things that are not—not testified, not added to it. . . . *There was no discussion about subpoenaing them* or not *or why they weren't here.* There is also no discussion or—I made a note of it somewhere. Well discount that. But you can't add things.

[Defense]: I can't what?

The Court: *You can't add things. The fingerprint. You never asked any question about the fingerprinting. . . . There's not a shred of testimony about fingerprinting. You can't just make it up now.*

[Defense]: But—

The Court: If you ask questions and they say, "We did not," absolutely fair game. But you didn't even do that. You can't just add things now. *You're adding testimony that was not given. You can't do it.*

[Defense]: May I just for the record, very briefly? . . . *The State's case, as it's presented or not, is fair game.* And this is the not part of the case.

The Court: *But you're . . . injecting testimony about the investigation that you never asked about* and you can't do that.

[Defense]: Well I was always taught you never ask a question you don't know the answer to, so—

The Court: I understand but we're not doing that here. So you have . . . to keep it to what was actually testified. . . .

[Prosecution]: *We're not going to object to him saying "Where are they?"* But [inaudible].

At this point, defense counsel requested a missing-witness instruction from the court. The court denied this request, and counsel proceeded with closing argument.

Edwin's second appellate contention is that the circuit court abused its discretion when, he says, it foreclosed argument about the absence of fingerprint evidence and key witnesses from the prosecution's case. Edwin argues that the court's intervention violated a long-held principle of Maryland law permitting defense counsel to highlight the prosecution's "failure to adduce certain critical evidence." He says that the circuit court's reasoning for limiting Edwin's closing argument—that Edwin had not made any inquiry into any fingerprinting done by investigators or into the absence of any witnesses—has been "squarely rejected" by the Court of Appeals. Edwin also maintains that the circuit court's error, stifling him at "the trial's most critical phase," was prejudicial.

The State counters that Edwin's claimed error results from a misinterpretation of the nature of the prosecution's objection and the circuit court's ruling in response to that objection. Defense counsel's closing argument, the State contends, improperly assumed facts that were not in evidence, and the circuit court rightly ruled this was improper. Even if the court erred, the State maintains, Edwin has not shown that his defense was prejudiced by the court's ruling, since Edwin's argument "repeatedly emphasized" the absence of critical witnesses Heather Dell and Amy Coolahan.

We agree with the State that the circuit court did not abuse its discretion.

*1. The standard of review*

We review a circuit-court judge's decision to restrict counsel's closing argument with deference. What exceeds the limits of "the broad scope of permissible closing argument," explained below, "depends on the facts of each case." *Mitchell v. State*, 408 Md. 368, 380 (2009) (cleaned up). "Because the trial judge is in the best position to gauge the propriety of argument in light of such facts, . . . an appellate court should not disturb the trial court's judgment absent a clear abuse of discretion by the trial court of a character likely to have injured the complaining party." *Id.* (cleaned up); *see also Cagle v. State*, 462 Md. 67, 74 (2018) ("The permissible scope of closing argument is a matter left to the sound discretion of the trial court. The exercise of that discretion will not constitute reversible error unless clearly abused and prejudicial to the accused." (quoting *Ware v. State*, 360 Md. 650, 682 (2000))). This means that, to warrant reversal, the trial judge must have exercised his or her discretion to limit closing argument "in an arbitrary or capricious manner" or "act[ed] beyond the letter or reason of the law." *Cooley v. State*, 385 Md. 165, 175 (2005) (quoting *Jenkins v. State*, 375 Md. 284, 295–96 (2003)). The defendant also must have been prejudiced by this abuse.

*2. The broad scope (and limits) of permissible closing argument*

The opportunity to present a summation at the close of evidence is guaranteed by the Sixth Amendment right to counsel, *Washington v. State*, 180 Md. App. 458, 471 (2008), extended to defendants in state criminal prosecutions through the Fourteenth Amendment,

*Herring v. New York*, 422 U.S. 853, 857 (1975).[8] Unless it is waived, this closing-argument right obtains no matter how "simple, clear, unimpeached, and conclusive the evidence may seem." *Id.* at 860 (quoting *Yopps v. State*, 228 Md. 204, 207 (1962)). The belief is that by giving the parties a chance "to present their respective versions of the case as a whole," closing argument will "sharpen and clarify the issues" before the jury. *Id.* at 862. It is only after all the evidence is in that the prosecution and the defense "can argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions." *Id.* Closing argument is also "the last clear chance" for the defense to try to instill reasonable doubt in the minds of the jurors. *Id.*

Recognizing the fundamental importance of the right, our case law has consistently affirmed that counsel should be given wide berth in closing argument. Generally,

> counsel has the right to make *any comment or argument that is warranted by the evidence proved or inferences therefrom*; the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of witnesses which the (prosecution) produces.
>
> While *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*, generally speaking, liberal freedom of speech should be allowed. There are no hard-and-fast limitations

[8] To be sure, there is no right to make a closing argument spelled out in the Sixth Amendment's text. *See* U.S. Const. amend. VI. But the Supreme Court has not given the Sixth Amendment "a narrowly literalistic construction." *Herring*, 422 U.S. at 857. The Sixth Amendment right to the assistance of counsel has instead been given a broad reading, ensuring criminal defendants "the opportunity to participate fully and fairly in the adversary factfinding process." *Herring*, 422 U.S. at 858. One of the "basic elements" of this process, the Court has held, is closing argument for the defense. *Id.*

> 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) (emphasis added). In addition to drawing from the facts in evidence, counsel may use summation to argue "matters of common knowledge" and "matters of which the court can take judicial notice." *Id.* at 438; *see also Smith v. State*, 388 Md. 468, 488 (2005).

In essence, "[c]ounsel is free to use the testimony most favorable to his side of the argument to the jury, and the evidence may be examined, collated, sifted and treated in his own way." *Wilhelm*, 272 Md. at 412.

Notwithstanding the "great leeway" afforded for closing argument, *Degren v. State*, 352 Md. 400, 429 (1999), there are certain boundaries that counsel may not cross. Somewhat obviously, given the above, counsel may not "state or comment upon facts *not in evidence* or . . . state what he could have proven." *Washington*, 180 Md. App. at 473 (emphasis added) (quoting *Wilhelm*, 272 Md. at 413). Counsel cannot "invite the jury to draw inferences from information that was not admitted at trial." *Lee v. State*, 405 Md. 148, 166 (2008). Additionally, counsel may not use summation to "appeal to the prejudices or passions of the jurors," *Mitchell*, 408 Md. at 381 (citing *Wood v. State*, 192 Md. 643, 652 (1949)), or to "invite the jurors to abandon the objectivity that their oaths require," *id.* (citing *Lawson v. State*, 389 Md. 570, 594 (2005)).

Even when counsel's closing argument remains within the substantive bounds drawn heretofore, the circuit court still retains "great latitude" to limit the duration and scope of argument. *Henry v. State*, 324 Md. 204, 231 (1991) (quoting *Herring*, 424 U.S. at 862). Argument that is repetitive, is redundant, or "stray[s] unduly from the mark" is not shielded by the Sixth Amendment against the circuit court's "broad discretion." *Id.* (quoting *Herring*, 424 U.S. at 862).

*3. Nonproduction of evidence, or comment on "gaps in the proof offered"*

Although counsel may not use closing argument to "state or comment upon facts not in evidence," *Washington*, 180 Md. App. at 473 (quoting *Wilhelm*, 272 Md. at 413), in some contexts, the nonproduction of evidence *is* one of the relevant facts subject to comment by counsel. There are several ways in which defense counsel may highlight for the jury the "gap[s] in the proof offered" by the prosecution. *Eley v. State*, 288 Md. 548, 555 (1980). From our reading of the case law, the various nonproduction arguments can be grouped under three broad headings: *missing*-evidence arguments, *spoliated*-evidence arguments, and *negative*-evidence arguments.

*a. Missing and spoliated evidence*

The rule for *missing* evidence is well covered by this excerpt from Professor Lynn McLain in her treatise on Maryland evidence law:

> When a party to a civil case (and, with certain limitations, a party to a criminal case) . . . fails to produce, without explanation, relevant, noncumulative, unprivileged evidence to which the party has superior access, the opposing party may argue to the jury (and, in the court's discretion, the jury may be instructed) that it may infer that the evidence would have been unfavorable to the party who had superior access to it. No inference arises

> when the evidence is equally available to both parties. The inference is also unavailable where there is good reason for not producing the evidence.

5 Lynn McLain, *Maryland Evidence State and Federal* § 301:4(c) (3d ed. 2013) (footnotes omitted).

Often, the missing-evidence rule is applied when counsel seeks to point to a "missing witness" or the fact that a party never took the stand. *See, e.g.*, *Harris v. State*, 458 Md. 370, 377 (2018) ("[I]f a witness likely could have given important evidence . . . and it was peculiarly within the power of one party to produce that witness but the witness was not called [or his] adequately explained, the jury may infer that the witness would have testified unfavorably to that party"). But the inference of unfavorability may also be drawn when a party fails to produce material tangible evidence particularly available to the nonproducer. *See*, *e.g.*, *Cost v. State*, 417 Md. 360, 370–72 (2010) (discussing the "missing evidence" inference in the context of a requested jury instruction); *Keyes v. Lerman*, 191 Md. App. 533, 538–39 (2010) (noting the conditions required "for the inference to apply to documents and other tangible evidence").

The rules for *spoliated* evidence cover a subset of missing evidence, absent from an opponent's case for reasons more nefarious than simple nonproduction of available evidence. *See Keyes v. Lerman*, 191 Md. App. 533, 539 (2010) (noting that while spoliation "is sometimes included in a more general discussion of missing witnesses or evidence," the term refers to conduct "more egregious and, to an extent, different in kind, than simply not producing available evidence"); *see also Cost v. State*, 417 Md. 360, 369–70 (2010) ("'[M]issing evidence,' . . . can include situations where the State *intentionally or*

*negligently destroyed*—or merely failed to produce—relevant evidence." (emphasis added)). Indeed, "spoliation" often refers to the loss or destruction of evidence, intentional or negligent, that renders the evidence *unavailable* for production. *Keyes*, 191 Md. App. at 540. The term may also refer to other types of evidence-spoiling misconduct, like the concealment, alteration or fraudulent creation of physical evidence, as well as witness tampering. *Id.* at 539.

The inferences permissibly drawn from the spoliation of evidence extend beyond the inference of unfavorability permitted for missing evidence generally. *Id.* "By resorting to wrongful devices, the party is said to provide a basis for believing that he or she thinks the case is weak and not to be won by fair means, or in criminal cases that the accused is conscious of guilt." 2 *McCormick on Evidence* § 265 (Robert P. Mosteller ed., 8th ed. 2020); *see also Keyes*, 191 Md. App. at 539; *Sewell v. State*, 34 Md. App. 691, 695 (1977) (noting that "attempts by the accused to prevent a witness from testifying" and the "destruction of evidence by the accused" are "evidence of the consciousness of guilt"). The guilty-conscience inference that arises from the spoliation of evidence by a criminal defendant is a permissive inference, not a mandatory one. *See, e.g.*, *Thomas v. State*, 372 Md. 342, 351 (2002) (explaining that guilt "may be inferred" from the destruction or concealment of evidence).

*b. Negative evidence*

Even without establishing what's necessary to make arguments about missing and spoliated evidence, counsel may still use summation to call the jury's attention to evidence

not produced by their opponents. These arguments about "*negative* evidence," *Ford v. State*, 73 Md. App. 391, 395 (1988) (emphasis added), require only that the failure to produce the evidence in question be unexplained. *Patterson v. State*, 356 Md. 677, 683 (1999). A negative-evidence argument is what is at issue in the present case.

The concept of comment upon negative evidence was introduced into our case law in *Eley v. State*, 288 Md. 548 (1980). In that case, Jonathan Eley was on trial for charges arising out of a shooting and the subsequent theft, at gunpoint, of a car used by the shooter to flee the scene. *Id.* at 549. Several testifying witnesses, all related to the shooting victim, identified Eley as the shooter. *Id.* But the victim of the carjacking was unable to identify Eley as the man who took her car. *Id.* at 549–50. Eley, for his part, denied having been present at the scene of the crimes charged. *Id.* at 550.

Although no witness had discussed whether police had ever searched for fingerprints on the stolen car, defense counsel attempted to point out in closing argument that the prosecution had not produced any fingerprint evidence in its case. *Id.* The circuit court refused to permit this argument, instructing counsel to "confine [him]self to . . . arguments about the evidence that existed" and avoid discussion about what had not been introduced. *Id.* This Court affirmed the trial judge. *Id.*

Reversing our Court, the Court of Appeals held that the trial court's limitations on Eley's closing argument amounted to an abuse of discretion. *Id.* at 556. The Court said that "where there is unexplained silence concerning a routine and reliable method of identification especially in a case where the identification testimony is at least subject to

some question, it is within the scope of permissible argument to comment on this gap in the proof offered." *Id.* at 555 (emphasis omitted). These comments, the Court said, go "to the strength of the prosecution's evidence, or more specifically, to the *lack of evidence*." *Id.* at 553 (emphasis in original). Pointed to what is missing from the prosecution's case, jurors may begin to harbor a reasonable doubt. *Id.* at 553; *see also Washington*, 180 Md. App. at 483 ("[I]t is the absence of evidence . . . that may provide the reasonable doubt that moves a jury to acquit." (quoting *United States v. Poindexter*, 942 F.2d 354, 360 (6th Cir. 1991)).[9]

The *Eley* Court also made clear that to make a negative-evidence argument, defense counsel need not have asked, at any point in the proceeding, about the evidence whose

[9] In his dissenting opinion, Chief Judge Robert C. Murphy suggested that the majority's approach left room for counsel to argue impermissible inferences not supported by the evidence:

> Clearly, the appellant in closing argument intended to suggest that fingerprint evidence *was available to the State* and that although it was a more reliable method of identification than the State's eyewitness testimony, the fingerprint evidence was *withheld by the prosecution* because it established that he was not at the crime scene. No such facts were in evidence to support such an inference and it was for this reason that the trial judge properly limited the scope of the appellant's closing jury argument under *Wilhelm*.

*Eley*, 288 Md. at 557–58 (Murphy, C.J., dissenting) (emphasis added).

Perhaps because of Chief Judge Murphy's concern, it does not appear that *Eley* has been interpreted to permit this kind of argument from defense counsel. Since *Eley*, the Court of Appeals has drawn a distinction between "negative" evidence of the sort at issue in this case and "missing" evidence whose absence may support the inferences discussed above. *See Mitchell*, 408 Md. at 384–86 (distinguishing between comments under *Eley*, intended to raise doubts about the sufficiency of the prosecution's evidence, and comments that support a "missing witness" inference).

absence they note. It is the prosecution's burden to put on evidence, and asking prosecution witnesses about evidence not put on "might well result in evidence adverse to [the defendant's] interest," the Court said. *Id.* at 554.

The negative-evidence rule laid down in *Eley* has been applied broadly by our appellate courts. The Court of Appeals has held that a case need not involve, as in *Eley*, a "significant question or dispute concerning identification of the defendant" for defense counsel to point the jury to missing identification evidence in closing argument. *Sample v. State*, 314 Md. 202, 207 (1988). And an argument about the nonproduction of evidence need not even relate to a "routine and reliable method of identification," like the fingerprinting at issue in *Eley*. *Henderson v. State*, 51 Md. App. 152, 155 (1982) (quoting *Eley*, 288 Md. at 555). Rather, the unexplained absence of *any possibly relevant evidence* may be used against the prosecution in closing argument. *Id.* at 153; *see also Patterson v. State*, 356 Md. 677, 683 (1999) ("The Court of Special Appeals correctly summarized our holding in *Eley* when it said, '[t]he message sounded by *Eley* is clear: Possible relevant evidence not introduced, or its absence explained, may be used against the State.'" (quoting *Henderson*, 51 Md. App. at 153)).

More recently, the Court of Appeals has said that negative-evidence arguments can also be made with respect to "certain potential witnesses that the [prosecution] did not call." *Mitchell*, 408 Md. at 371. In *Mitchell*, Anthony Mitchell was on trial for attempted murder and related offenses arising out a "scuffle" at a high-school graduation party. *Id.* at 371–73. After chaperones denied him access to the party, Mitchell allegedly fired a shotgun

toward a crowd of partygoers. *Id.* at 372–73. Although several testifying witnesses identified Mitchell as the shooter, defense counsel reminded the jury during closing argument of some people that it "never heard from": several eyewitnesses, Mitchell's alleged accomplices and another man initially thought to be involved in the shooting. *Id.* at 375–76. (This prompted the prosecutor to note in rebuttal that defense counsel "has subpoena power just like the State does" and "could have brought [those witnesses] in as well." *Id.* at 379.)

One of the issues the Court of Appeals had to decide in the case[10] was the propriety of defense counsel's references to the witnesses who never took the stand. *Id.* at 379–87. The Court held that defense counsel did not exceed the permissible scope of closing argument because counsel, under *Eley*, may comment on the absence of certain evidence at trial. *Id.* at 383–84. By noting the absence of certain witnesses, defense counsel was not implying that these witnesses would have testified unfavorably to the prosecution (an inference permitted for "missing" witnesses). *Id.* at 386. Rather, the Court said,

> defense counsel argued to the jury the sufficiency of the State's evidence, pointing to gaps in the State's case—notably a failure to corroborate the

[10] The issue in *Mitchell* was whether the prosecutor's reference to defense counsel's subpoena power improperly shifted the burden of proof away from the prosecution. *See Mitchell*, 408 Md. at 379–80. One of the State's counterarguments was that Mitchell's "improper" reference to the absent witnesses—improper either because the comments exceeded the scope of permissible argument or because they amounted to an impermissible "missing witness" reference—had cleared the prosecution to note defense counsel's subpoena power under the "invited response" or "opened doors" doctrines. *Id.* at 379–387. The Court concluded that the reference to the defendant's ability to subpoena witnesses fell into the latter category. *Id.* at 389.

> identification of Mitchell—and contending that additional evidence was necessary. Clearly, defense counsel suggested that the State needed to produce more witnesses to prove its case against Mitchell, thereby implying that every witness, whether material or not, no matter how cumulative the evidence might be, should have been heard or seen.

*Id.*

The upshot of cases like *Eley* and *Mitchell* is that just as defense counsel may pick apart the testimony and other evidence offered by the prosecution, counsel may also call the jury's attention to testimony and other evidence not part of the prosecution's case. This is permissible even if arguments about missing or spoliated evidence would not be warranted. The "clear purpose" of this kind of comment is to "create an inference that had the State introduced the non-produced or non-explained missing evidence, the introduction would be beneficial to the defendant," and that the unexplained evidentiary hole leaves the prosecution's case weaker. *Henderson*, 51 Md. App. at 153. Negative-evidence arguments are just one more way in which defense counsel may plant the seed of reasonable doubt.

It is important to note that *Eley* does not obviate the requirement laid down in *Wilhelm* that comments in closing argument must be based on what has been presented to the jury. Counsel may comment upon the evidence actually introduced and may note the fact that certain evidence was never put on during the trial. But counsel cannot use closing argument to introduce new facts into the record.

*United States v. Hoffman*, 964 F.2d 21 (D.C. Cir. 1992), best illustrates this point. In that case, John Hoffman was on trial for several narcotics offenses arising out of a search of his luggage aboard an Amtrak train. *Id.* at 22. Hoffman claimed the drugs belonged to

an unknown passenger who had been sitting next to him before police boarded the trian. *Id.* at 23. During the trial, none of the prosecution's witnesses made any mention of fingerprint evidence, and Hoffman's attorneys did not cross-examine any of the witnesses on this point. *Id.*

During closing argument, defense counsel advanced Hoffman's theory about who the drugs belonged to. He asked the jury, "If [the investigating officers] had told you the truth in this case, wouldn't he. . . have sent [the drugs] to be examined for fingerprints?" *Id.* Defense counsel then said, "I mean I wouldn't be here making any argument at all if this bag containing cocaine had been examined by the police lab like they should have done." *Id.* The federal district court sustained an objection by the prosecutor and instructed the jury that "counsel may only argue evidence in the case, and there is no evidence of fingerprints." *Id.*

On appeal, the federal circuit court rejected Hoffman's argument that the trial judge had improperly limited his closing argument. *Id.* at 24. The court reasoned (emphasis added):

> In this case, the only "evidence" on the fingerprint issue was purely negative—*i.e.*, the fact that the Government did not introduce any fingerprint evidence at all. As the Government concedes, *the absence of such evidence is a relevant "fact" which properly could have been argued to the jury*. Thus, *it would not have been improper for defense counsel to point out to the jury that the government had not presented any evidence concerning fingerprints*.
>
> The record reveals, however, that *Hoffman's attorney attempted to go far beyond merely pointing out the lack of fingerprint evidence and arguing that its absence weakened the Government's case*. . . .

> By making [his] assertions, *Hoffman's attorney moved from arguing fair inferences from the record to arguing the existence of facts not in the record—viz.*, *that the police did not look for fingerprints*, that fingerprints could have been obtained from the plastic bags containing the narcotics and that standard police procedure required fingerprint analysis. Because [counsel had not] laid any evidentiary foundation for those assertions—by, for example, asking whether the plastic bags were (or could have been) tested for fingerprints, and whether standard procedure required testing—Hoffman's argument was improper.

*Id.* at 24–25.

In the case before us, Edwin contends that the circuit court prevented him from making the kinds of closing arguments permitted by *Eley* and other negative-evidence cases. We note that several times throughout closing argument, Edwin's counsel did just what *Eley* permits: He pointed to what he called "gaps in the State's case as wide as the Grand Canyon." First, he reminded the jury that the prosecution did not put critical witnesses Heather Dell and Amy Coolahan on the stand (emphasis added):

> [Defense]: Reasonable doubt in this case is all over the place. But let me tell ya on[e] place where there are the two clearest factors of reasonable doubt—Amy Coolahan and Heather Dell. *The State could have called them to prove their case.* "Well, Ms. Coolahan, were you going over there to give Mr. Edwin something or for him to give you something?" . . . I submit to you that *the absolute and clear evidence in this case requires, necessitates the presence of the two people who were the actors in this matter.* There is no other way of slicing up the pie if Heather Dell and Amy Coolahan are not part of that pie. And that is reasonable doubt. Without question. . . . *By the inability of us to hear from the two actors in this case, that, Ladies and Gentlemen, is reasonable doubt beyond any question.*

Next, Edwin's counsel reminded the jury that the prosecution did not put on any evidence from the cellphone recovered by police during the search of Edwin's person and his car.[11] He said (emphasis added):

> [Defense]: The second question, as you ponder, *the total and complete absence of any evidence from the cellphones*. . . . Drug dealer's phone book. Drug dealers' addresses. Drug dealer's addresses. Drug dealer's frequent[] . . . calls. List goes on and on and on. All of those things are to be on someone's phone if they're drug dealers. . . . They've got to find something. *We don't know frankly, one, if they found anything; and two, what it is they found.* . . . [I]f he were a dealer, if he were dealing drugs, there would have been something in the phone. And all of the sudden we would have heard from witness after witness that this is what we found on his phone. . . . We would have heard that ad infinitum. *And you know what we heard, not a single thing?* Why? There was nothing on the phone. Why? Because my client here today [has] not been presented as a drug dealer beyond a reasonable doubt.

Edwin's counsel also reminded the jury that the police had not tested four out of the five baggies of drugs found in Edwin's car. The state had presented evidence only that one of the baggies contained cocaine.[12] He argued (emphasis added):

> [Defense]: *[Only] one of them was tested.* So you don't know beyond a reasonable doubt what was in the other four baggies . . . . [Y]ou're left with one baggie, period, that's tested. *Four of them are not tested. Why? I don't know.* But if you are going to charge somebody with [distribution], you better make sure that you got something you're positive [that he

[11] Edwin's counsel had actually asked about this gap in the prosecution's case when cross-examining Agent Toston.

[12] Edwin's counsel also had noted this gap in the prosecution's case when cross-examining Agent Toston.

> is] distributing with. *You don't have that.* That creates, to me, reasonable doubt.

So far, so good. But all these arguments differ from the arguments that prompted the objection from the prosecution and the subsequent limitations imposed by the circuit court. When Edwin's counsel told the jury that "[i]t would have been a wonderful thing *had the State fingerprinted the bags*" and that "neither [Dell nor Coolahan *were] subpoenaed by the State* to be here," he went beyond reminding the jury of the evidence missing from the prosecution's case: Edwin's fingerprints on the baggies delivered by Coolahan and testimony from Coolahan identifying Edwin as her supplier. Counsel instead argued the existence of facts not in the record, telling the jury that police had not even bothered to fingerprint the baggies given to the informant and that the prosecution had not even tried to get Dell or Coolahan on the stand. The record did not support these assertions.

Counsel was correct that "[t]he State's case, as it's presented or not, is fair game." And there is an admittedly fine distinction between telling the jury that certain witnesses were not subpoenaed and pointing out to the jury that certain witnesses never took the stand. But fine distinctions are distinctions nonetheless. And we cannot conclude that the trial court abused its discretion by noting this distinction and keeping defense counsel's closing argument within the bounds drawn by *Wilhelm* and *Eley* and illustrated in *Hoffman*.

## Conclusion

We conclude that the circuit court did not err in denying Edwin's motion to suppress because Edwin's arrest was, all things considered, supported by probable cause. What

police knew at the moment they arrested Edwin—that he matched a description provided by Coolahan, that he had been seen with Coolahan during the few minutes in which she acquired heroin, and that he was the *only* person seen in the area at this critical time—was enough to support a fair probability of Edwin's criminality. Because Edwin's arrest was lawful, so were the searches of his person and his car performed incident thereto.

We also conclude that the circuit court's limits on defense counsel's closing argument did not amount to an abuse of discretion. Edwin's counsel was free to comment on gaps in the proof offered by the state and to urge the jury to draw certain inferences favorable to him from the holes he identified in the prosecution's case. He was not free, however, to use closing argument to present to the jury facts that were not in the record: that police did not fingerprint the baggies delivered to the informant and that the prosecution had not subpoenaed Dell or Coolahan to testify in this case.

**THE JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY ARE AFFIRMED. APPELLANT TO PAY COSTS.**