

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2589

September Term, 2015

JEROME WILEY

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: September 2, 2016

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

This appeal arises from appellant, Jerome Wiley’s criminal conviction in the Circuit Court for Baltimore City. Wiley was tried before a jury and convicted of attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, first-degree assault, conspiracy to commit first-degree assault, attempted theft under \$1,000.00, and conspiracy to commit theft under \$1,000.00. On January 8, 2016, the circuit court sentenced him to 20 years for attempted robbery with a dangerous weapon; 20 years, concurrent, for conspiracy to commit robbery with a dangerous weapon conviction; 25 years, consecutive, for first-degree assault; and 25 years, concurrent, for conspiracy to commit first-degree assault. That same day, Wiley filed a timely appeal, presenting the following questions:

I. Did the trial court err in sentencing Appellant on more than one count of conspiracy?

II. Did the court err in imposing separate sentences for attempted robbery with a dangerous weapon and first-degree assault?

III. Must this Court vacate Appellant’s convictions due to the trial court’s error in admitting a video in violation of the discovery rules and improper authentication?

IV. Did the trial court abuse its discretion in allowing the prosecutor to shift the burden of proof during rebuttal closing argument?

BACKGROUND

On the night of March 13, 2015, Kelly Bakulski was with a friend at Max’s Tavern in Fells Point from 8:30 p.m. to 11:30 p.m. Afterward, Ms. Bakulski and her friend left Max’s Tavern and walked together along Fleet Street. The two friends later parted ways at the intersection of Fleet and Ann Street, and Ms. Bakulski continued

walking along Ann Street. As she walked, Ms. Bakulski noticed a man on a small red bicycle in the middle of the street. Ms. Bakulski observed that the man riding the bicycle was wearing a high school letterman's style jacket. At no time was Ms. Bakulski able to view the face of the person riding the bicycle.

Approximately six blocks later, Ms. Bakulski crossed Lombard Street and again saw the man on the bicycle in the middle of the street. Subsequently, the man rode over to the sidewalk and blocked Ms. Bakulski's way forward with his bicycle. As her path had become blocked, another man body slammed into Ms. Bakulski from behind, used his right hand to cover her mouth, and pinched off her nose. Ms. Bakulski could not see the person who was behind her but could feel that the person was larger and heavier than her. The second man attempted to use his left hand to grab for Ms. Bakulski's purse. Ms. Bakulski staggered toward an alleyway with the second heavier man on her back. During the struggle, Ms. Bakulski bit down on the thumb of the man on her back. When the heavy man released her mouth, Ms. Bakulski screamed and both men ran off. The man who had been on the bicycle never touched Ms. Bakulski. After the men left, Ms. Bakulski ran home. Ms. Bakulski later discovered she had several serious cuts on her fingers and wrist, necessitating a trip to Johns Hopkins Hospital for stitches. Ms. Bakulski called the police the next day.

Officer Michael White responded to Ms. Bakulski's call regarding the incident, while Detective Calvin Moss was also assigned to investigate. Ms. Bakulski detailed the sequence of events and gave a description of the suspects to Officer White and Detective Moss. Ms. Bakulski described the person on the bike as 15 to 16 years old, between five

feet eight inches and five feet ten inches tall, with light complexion and short black hair. Ms. Bakulski described the bike as a red BMX bike. The second suspect was described as a larger black male with short hair, approximately 17 years old, between five feet eleven inches and six feet tall, around 200 pounds, with a medium complexion. Ms. Bakulski stated that she did not catch a clear glimpse of the person behind her.

Detective Moss then reviewed CCTV camera footage near the scene of the armed robbery. Detective Moss was able to track the suspects as they panned from CCTV camera to CCTV camera, travelling through several blocks in downtown Baltimore. Detective Moss saw that the person riding the bicycle wore a jacket that had lighter sleeves and a darker body, and that the person that was not on the bike wore a puffy coat. Through camera footage, Detective Moss saw that the man on the bicycle had gotten rid of the bicycle after the armed robbery and had started walking behind the man in the puffy jacket as they continued down the street.

During his review, Detective Moss learned that the two men had been together around 10:30 p.m., before the robbery. The two suspects were also seen on Broadway in Fells Point prior to the robbery. In his review, Detective Moss saw that the red bicycle had originated from Perkins Homes, a public housing development located in between the Fells Point and Washington Hill neighborhoods. Later, at around 6:00 p.m. on March 19, 2015, Detective Moss went to Perkins Homes and found a small red bicycle sitting on the front porch of 263 South Ballou Court. A woman came outside the residence while he was photographing the bicycle, and Detective Moss left his business card with her.

Later, Detective Moss received a phone call from Wiley in response to him leaving his business card. Detective Moss arranged to meet with Wiley on Caroline Street. When Detective Moss arrived, Wiley was wearing a dark bodied letterman jacket with gray sleeves, jeans, and shoes. Detective Moss noted that Wiley's clothes were identical to the clothes he had seen on the CCTV footage of the man on the red bicycle during the armed robbery. Detective Moss photographed Wiley while they were together. After comparing the photograph taken of Wiley with additional video from a CCTV camera located in the Broadway Shop Express store, Detective Moss concluded that Wiley was the suspect on the red bicycle from the armed robbery. Detective Moss returned to Ballou Court on March 19, 2015, and took Wiley into custody. Detective Moss then recovered the red bicycle from the front yard of the Ballou Court address.

Detective Moss ultimately located the second suspect, Melvin Rouzer, on the street and placed him under arrest. At that time, Detective Moss recovered the puffy jacket, headgear – black hat and face mask, and the shoes that were worn during the robbery. In addition, a black handled folding knife was taken from Mr. Rouzer at the time of his arrest.

Additional facts will be included as they become relevant to our discussion, below.

DISCUSSION

I. Sentencing for Conspiracy

Wiley asserts the State incorrectly charged and convicted him of multiple conspiracies, and that the State failed to prove that there was a separate agreement for the other conspiracies. Further, Wiley contends that the jury instructions were inadequate as

they did not inform the jury that it could find multiple conspiracies nor did it instruct them on what, specifically, they would have to find to justify a second and third conspiracy verdict. In addition, Wiley maintains that at no point in the State’s opening or closing argument did it put forth an argument that multiple conspiracies existed. As a result of the circuit court’s error, Wiley asks this Court to vacate one of his conspiracy convictions and its accompanying sentence.

Agreeing in part, the State asks this Court to vacate Wiley’s sentence for conspiracy to commit robbery with a dangerous weapon, due to the lack of clarity in interpreting whether the jury concluded that there was more than one agreement between the assailants. Otherwise, the State asks the Court to affirm Wiley’s sentence for conspiracy to commit first-degree assault.

In Maryland, “only one sentence can be imposed for a single common law conspiracy no matter how many criminal acts the conspirators have agreed to commit.” *Tracy v. State*, 319 Md. 452, 459 (1990). The unit of prosecution for conspiracies is “the agreement or combination rather than each of [the conspiracy’s] criminal objectives.” *Id.* Further, “conspiracy remains one offense regardless of how many repeated violations of the law may have been the object of the conspiracy.” *Mason v. State*, 302 Md. 434, 445 (1985). If the State attempts to establish multiple conspiracies, the State “has the burden of proving a separate agreement for each conspiracy.” *Savage v. State*, 212 Md. App. 1, 15 (2013) (citation, footnote, and emphasis omitted). A single agreement constitutes one conspiracy even when the goal of the conspiracy is to commit multiple crimes and even when this conspiracy has subgroups and sub-agreements. *Id.* at 13 (citing *United States*

v. Broce, 488 U.S. 563, 570-71 (1989)). To justify a second conspiracy, the prosecution has the burden of proving a separate agreement and a separate meeting of the minds. *Id.* at 14-15.

In determining the possibility of separate sentences for multiple conspiracies, this Court has looked to the jury instructions given for direction. The *Savage* Court found that separate sentences would be disallowed “[w]ithout an instruction that the jury could not find appellant guilty of more than one count of conspiracy unless [it] was convinced beyond a reasonable doubt that [the defendant] entered into two separate agreements to violate the law.” *Id.* at 27 (citations omitted). Because the “State was not put to the test of proving separate conspiracies . . . it [could not] be allowed to obtain a sentencing advantage” from failing to prove separate conspiracies at trial. *Id.*

Here, Wiley’s conspiracy convictions all dealt with the same criminal objective, assault and armed robbery of the victim. The criminal acts were the result of a single agreement, not separate agreements at a later date. In addition, the jury instructions did not require the jury to determine whether each conspiracy conviction was predicated on a separate agreement or was one facet of a larger conspiracy. Because it is apparent that the jury did not base its separate conspiracy convictions on separate agreements, one of Wiley’s conspiracy convictions must be vacated.

When one out of several conspiracy sentences is vacated under the basis of a single overarching agreement, the sentence to be preserved is the sentence for the offense that carries the most severe penalty. *McClurkin v. State*, 222 Md. App. 461, 490-91 (2015); *Wilson v. State*, 148 Md. App. 601, 641 (2002). The maximum penalty for first-

degree assault and robbery with a dangerous weapon is 25 and 20 years, respectively. Therefore, Wiley’s sentence for conspiracy to commit first-degree assault shall be affirmed, and his sentence for conspiracy to commit robbery with a dangerous weapon is vacated.

II. Merging of Sentences

Wiley contends that the circuit court erred in imposing separate sentences for conspiracy to commit attempted robbery with a dangerous weapon and conspiracy to commit first-degree assault, and that the latter should be merged into the former. In support, Wiley argues that the attempted robbery and first-degree assault offenses were predicated upon the same act; namely, the other defendant, Mr. Rouzer’s, use of a knife to try and take the property of Ms. Bakulski.

In addition, Wiley avers that fundamental fairness mandates merger. Wiley insists that fundamental fairness precludes separate sentences because the evidence at trial established that there was one continuous sequence of events in which Wiley was alleged to have blocked Ms. Bakulski’s path with his bicycle while Mr. Rouzer grabbed her from behind in an attempt to rob her with a knife. Wiley asserts that because his conduct resulted in a single harm to a single victim, multiple punishments are fundamentally unfair even when multiple convictions may be warranted. Thus, Wiley contends that fundamental fairness would preclude the imposition of a consecutive 25-year sentence for the conspiracy to commit first-degree assault conviction because such a sentence piles on multiple punishments for the same crime.

In response, the State argues that Wiley’s sentences should be affirmed because first-degree assault and attempted robbery with a dangerous weapon both contain an element that the other does not, thereby clearing the required evidence test hurdle and deeming merger inapplicable. For the same reasons, the State rejects Wiley’s arguments as to the applicability of the rule of lenity or fundamental fairness with regard to Wiley’s sentences.

In Maryland, “[t]he court may correct an illegal sentence at any time.” Md. Rule 4-345(a). If an illegal sentence is imposed, the issue may be “reviewed on direct appeal even if no objection was made in the trial court,” and a defendant “does not waive forever his right to challenge that sentence” if he fails to object to it in the trial court. *Walczak v. State*, 302 Md. 422, 427 (1985) (citation omitted). A court may not impose multiple punishments for the same offense, *see Nicolas v. State*, 426 Md. 385, 400 (2012), and Maryland law recognizes three grounds for margining convictions: “(1) the required evidence test; (2) the rule of lenity; and (3) the principle of fundamental fairness.” *Carroll v. State*, 428 Md. 679, 693-94 (2012) (citations omitted). Though determinations of merger generally fall under the required evidence test, the test is not the exclusive standard, and “even where two offenses are separate under the required evidence test, there still may be a merger . . . based on considerations such as the rule of lenity . . . and fairness.” *McGrath v. State*, 356 Md. 20, 24-25 (1999) (citation omitted).

Under the required evidence test, “[i]f each offense requires proof of a fact which the other does not, the offenses are not the same and do not merge. However, if only one offense requires proof of a fact which the other does not, the offenses are deemed the

same, and separate sentences for each offense are prohibited.” *Dixon v. State*, 364 Md. 209, 237 (2011) (citation omitted).

The rule of lenity is a principle of statutory construction whereby any “doubt or ambiguity as to whether the legislature *intended that there be multiple punishments* for the same act or transaction will be resolved against turning a single transaction into multiple offenses.” *Marquardt v. State*, 164 Md. App. 95, 149 (2005) (quoting *Williams v. State*, 323 Md. 312, 321 (1991)) (emphasis added). The inquiry in determining the applicability of the rule of lenity is “whether the two offenses are of necessity closely intertwined or whether one offense is necessarily the overt act of the other.” *Id.* at 149-50 (citation omitted).

In this case, Wiley was convicted of conspiracy to commit first-degree assault with the intent to commit serious bodily harm and conspiracy to commit robbery with a dangerous weapon. Armed robbery “requires the taking of property of any value, by force, with a dangerous or deadly weapon.” *Bates v. State*, 27 Md. App. 678, 688 (1999) (citations omitted), *overruled on other grounds by Tate v. State*, 176 Md. App. 365 (2007). The crime of attempted robbery is established if, with intent to commit armed robbery, a defendant “engages in conduct which constitutes a substantial step toward the commission of that crime whether or not his intention is accomplished.” *Id.* (quoting *Young v. State*, 303 Md. 298, 311 (1985)). Here, the first count of the charges under the indictment states that Wiley “did attempt to rob the aforesaid Complainant of property and services with a dangerous weapon[.]”

In *Cooper v. State*, 128 Md. App. 257 (1999) as to criminal conspiracy, we stated:

The elements of a criminal conspiracy are (1) the combination of two or more persons; (2) to accomplish some unlawful purpose although the essence of a criminal conspiracy is an unlawful agreement, the State is not required to offer proof of any formal arrangement, rather, a conspiracy can be inferred from the actions of the accused. The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design.

To convict a person of first-degree assault, the State must prove: (1) that a person intentionally caused or attempted to cause serious physical injury to another, or (2) that a person committed an assault with a firearm. Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article (“CL”) § 3-202. The firearm portion is not applicable as Wiley did not possess a firearm. The third count stated, however, that he “did assault the aforesaid Complainant in the first degree[.]”

Wiley asserts that under the required evidence test, his convictions should merge, but his claim has no merit. The elements of the crime of conspiracy to commit first-degree assault are substantially different than that of attempted robbery with a dangerous weapon. Both conspiring to commit first-degree assault, of the intent to cause serious bodily injury variety, and the crime of attempted robbery with a dangerous weapon, contain a criminal element that the other crime does not. In this case, the jury was instructed that in order to convict for conspiring to commit first-degree assault, the State was required to prove that Wiley committed a second-degree assault, and that he intended

to cause serious physical injury in the commission of the assault. The required evidence test, therefore, is inapplicable.¹

We now turn to the application of a merger of sentence based on the rule of lenity.

We agree with the State that the rule of lenity is:

a rule of statutory construction whereby two crimes arising out of a single act, even if not merged under the required evidence test, will not be punished separately if it is unclear whether the legislature intended the crimes to be punished by one sentence or more. If the legislature's mandates are ambiguous, under the rule of lenity the defendant is given the benefit of the doubt and is punished by only one sentence.

Monoker v. State, 321 Md. 214, 218 n.3 (1990).

The policy behind the rule of lenity is to prohibit courts from “interpret[ing] a . . . criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what [the legislature] intended.” *Holbrook v. State*, 364 Md. 354, 373 (2001) (citation omitted). The rule of lenity, however, “serves only as an aid for resolving an ambiguity and it may not be used to create an ambiguity where none exists.” *Jones v. State*, 336 Md. 255, 261 (1994)

¹ In his brief, Wiley cites to several cases that suggest that first-degree assault and robbery with a dangerous weapon merge under the required evidence test. Unlike in this case, however, each of the cited cases involved the use-of-a-firearm modality of first-degree assault (rather than the intent-to-cause-serious-bodily-injury modality). *Morris v. State*, 192 Md. App. 1, 8-9 (2010); *Williams v. State*, 187 Md. App. 470, 473-74 (2009); *Gerald v. State*, 137 Md. App. 295, 299-300 (2001); *Thompson v. State*, 119 Md. App. 606, 609-10 (1998). This distinction makes a difference in this case. As explained above, first-degree assault of the intent-to-commit-serious-bodily-injury modality requires an element that robbery with a dangerous weapon does not. First-degree assault of the use-of-a-firearm modality, however, does not contain a distinct element; indeed, both offenses require an assault and the use of a dangerous weapon. Accordingly, the cases cited by Wiley are not controlling here.

(citations omitted). There is no legislative ambiguity as to the crime of conspiring to commit first-degree assault (of the intent to cause serious bodily harm variant) and that of attempted robbery with a dangerous weapon. When the legislature created the specific offense of first-degree assault, of the intent to cause serious bodily injury variety, the legislature intended to punish perpetrators who caused or intended to cause serious bodily injury, whatever their ultimate goals in their chosen use of force.

On the contrary, the crime of robbery with a dangerous weapon is focused on the use of the weapon itself, and not on whether the victim has suffered an injury in fact. The crime of first-degree assault with the intent to cause serious bodily injury is designed to prohibit conduct and harm. This is different than robbery with a dangerous weapon, where the prohibition is related to the use of the weapon itself as an aid in the commission of a crime. Because of the differences in the legislature's goals when prohibiting these specific offenses, Wiley's convictions do not merge under the rule of lenity.

It also follows that merger is not appropriate under principles of fundamental fairness. We note preliminarily that Wiley failed to object to his separate sentences on the grounds of a violation of fundamental fairness, and therefore, has failed to preserve that claim for appellate review. *See Pair v. State*, 202 Md. App. 617, 649 (2011) (concluding that a claim that sentences merge under the doctrine of fundamental fairness must be preserved in order to be reviewed on appeal).

Assuming *arguendo* that the issue was preserved, Wiley's claim is without merit. What the record shows is that the act in this case underlying the conspiring to commit

first-degree assault—the cutting of the victim—was a gratuitous violent act that served no other purpose but to inflict injury on the victim. Indeed, causing serious and gratuitous injury cannot be deemed “an integral component” of an attempted robbery with a dangerous weapon, and therefore, there is nothing fundamentally unfair about punishing Wiley separately for this additional act. *See Monoker*, 321 Md. at 223-24 (concluding that separate punishments would be fundamentally unfair where one offense is “part and parcel” and “an integral component” of another offense).

III. Discovery Violation

Wiley maintains the circuit court erred when it failed to remedy a recognized discovery violation by the State concerning the Broadway Shop Express surveillance video, and the State’s failure to provide the contact information of the witnesses intended to authenticate the video. Wiley also asserts that the State failed to properly authenticate the video from the Broadway Shop Express.

The State responds that no such discovery violation occurred because the State did not intend to call those specific witnesses to authenticate the video, but rather, planned to authenticate the surveillance video by a different means available to it. As the State did not intend to call the witnesses, the State argues that it was not a discovery violation. Alternatively, the State avers that even if a discovery violation occurred, the court properly exercised its discretion in declining to impose a sanction and responded appropriately to any violation by allowing defense counsel the opportunity to interview the witnesses prior to a hearing on the admissibility of the video.

On the first day of trial, defense counsel argued a motion *in limine* to exclude the video that police had obtained from the Broadway Shop Express. Defense counsel informed the circuit court that the video had yet to be certified as a business record, and that the defense had not received any notice from the State that they intended to call the shop owner as a witness. Defense counsel then stated that the video should be excluded because the State had ample opportunity to provide notice of the witnesses or provide a certificate that the video was a business record.

The State acknowledged that it had failed to provide the contact information but offered to have the witnesses at the courthouse just before lunch. The court stated, “[a]lright. We’ll see what she says after she’s done that.” Defense counsel protested the next day that five minutes to speak to the witnesses was not adequate preparation, on behalf of the defense, to properly cross-examine the witnesses. Defense counsel continued to object to allowing the witnesses to testify, arguing that the State had ample time to disclose the contact information of the witnesses to the defense. The court responded that the defense could have filed a motion to prevent the State from using the video, to which defense counsel replied that it was not her job to ask the State to provide a certification of the video. The State was permitted to call the relevant witnesses to testify as to the authenticity of the video. The court, after hearing argument, subsequently ruled that the video was what the State claimed it to be and admitted it into evidence over objection.

A criminal defendant has a right to discovery in order to “assist the defendant in preparing his defense, and to protect him from surprise.” *Hutchins v. State*, 339 Md. 466,

473 (1995) (citation omitted). The State must provide in discovery, per Md. Rule 4-263(d)(3), “each State’s witness the State’s Attorney intends to call to prove the State’s case in chief or to rebut alibi testimony: (A) the name of the witness; (B) . . . the address and, if known to the State’s Attorney, the telephone number of the witness; and (C) all written statements of the witness that relate to the offense charged[.]” If this discovery rule is violated, the trial court may “strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances.” Md. Rule 4-263(n). Any appropriate remedy for the discovery violation is “in the first instance, within the sound discretion of the trial judge.” *Raynor v. State*, 201 Md. App. 209, 227 (2011) (citation omitted). To that end, any remedy chosen by the trial court should be “the least severe sanction that is consistent with the purpose of the discovery rules.” *Francis v. State*, 208 Md. App. 1, 25 (2012).

In this case, there was a discovery violation when the State failed to disclose its witnesses and their contact information to defense counsel when a hearing regarding the authenticity of the Broadway Shop Express video was scheduled for the following day. The State argues that it was not a discovery violation because the State did not intend to call those witnesses to prove its case. We disagree, as once the circuit court determined that the State would need to use witnesses to authenticate the video, the video authenticating the witnesses became part of the State’s effort to prove its case and the video’s authenticity. Because a discovery violation occurred, we review the court’s remedy, or lack thereof, under an abuse of discretion standard.

The circuit court did not abuse its discretion when the court agreed that defense counsel would have time to speak with the witnesses during the lunch recess prior to conducting the motion on whether to exclude the video. The court implicitly acknowledged that the State acted inconsistently with its disclosure obligation, and the court responded appropriately by setting aside time during the next day luncheon recess for defense counsel to speak with the witnesses prior to conducting the motion to exclude the video.²

After speaking to the witnesses, defense counsel protested that five minutes was not enough time but that appears to be a self-imposed limitation. She gave no reason as to why she could not have taken the entire luncheon recess if she felt that was necessary. Despite her protests, our review of the cross-examination of the relevant witnesses shows nothing to indicate that defense counsel did not have adequate time to interview the witnesses belatedly disclosed to the defense.

The purpose of Md. Rule 4-263 is “to prevent a defendant from being surprised” and to give a defendant “sufficient time” to prepare a defense. *Jones v. State*, 132 Md. App. 657, 678 (2000). The court, as a remedy, gave the defense sufficient time to prepare its cross-examination of the witnesses. Other than the lateness of the disclosure, Wiley alleges no particular prejudice from the delay. Thus, it fell well within the court’s discretion to deny the motion *in limine*.

² This implicit finding is sufficient as judges are presumed to know and apply the law correctly. *State v. Chaney*, 375 Md. 168, 181 (2003).

Next, Wiley contends that the circuit court abused its discretion when it concluded that the video had been properly authenticated. Under Md. Rule 5-901(a), “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Md. Rule 5-901(a). Videotape evidence may be admitted in Maryland through the “silent witness” theory, which allows for authentication by “the presentation of evidence describing a process or system that produces an accurate result.” *Washington v. State*, 406 Md. 642, 652 (2008) (citations omitted). Surveillance video may be admitted when a “witness testifies to the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system.” *Id.* at 653 (citations omitted). Nevertheless, “the burden of proof for authentication is slight.” *Dickens v. State*, 175 Md. App. 231, 239 (2007) (citation omitted). The court “need not find that the evidence is necessarily what the proponent claims but only that there is sufficient evidence that the jury ultimately might do so.” *Id.* (citation and emphasis omitted). When a proponent makes a *prima facie* showing that a proffered piece of evidence is genuine, the item “comes in, and the ultimate question of authenticity is left to the jury.” *Gerald*, 137 Md. App. at 304 (citation omitted). This Court reviews a trial court’s determination as to the authenticity of a piece of evidence under an abuse of discretion standard. *Id.* at 305-06.

Wiley’s argument that the video from the Broadway Shop Express had not been properly authenticated is without merit. The circuit court did not abuse its discretion in

finding that it had been authenticated. There was sufficient evidence to conclude that the jury could have found the evidence to be what its proponent, the State, claimed it to be – footage of the front entrance of the store on the night of the robbery and assault. The State properly authenticated the video by presenting witness testimony as to the reliability of the recording equipment and the type of equipment used. The shift manager at the Broadway Shop Express testified that he was responsible for the camera system’s implementation, that it was always running and transmitting its recordings to a computer, and that he regularly checked to make sure the camera system was accurate. He testified that he was present when Detective Shores collected the camera footage. Detective Shores testified that he obtained the video from the store using a USB drive, and later moved the video from the USB drive to a CD which was then submitted to evidence control. This testimony provided a sufficient basis from which the jury could conclude that the video was authentic. The court did not abuse its discretion in concluding the video was admissible because the evidence presented by the State met the threshold for establishing the authenticity of the video from the Broadway Shop Express.

IV. Burden-shifting in Closing Arguments

Lastly, Wiley insists that the circuit court allowed the State to shift the burden of proof towards Wiley, when, during the State’s rebuttal closing argument, the State argued that Wiley could have called his mother as a witness. According to Wiley, the State’s argument had a tendency to mislead the jury into thinking Wiley had the burden of proof – when such burden falls to the State, and that because Wiley failed to present his mother in his defense, he must be guilty in the eyes of the jury. Wiley contends that the court

abused its discretion when it failed to correct this error. In response, the State argues that the comment did not shift the burden of proof to Wiley, but instead, was a permissible response to defense counsel’s own assertions in closing argument, and moreover, that the State’s comments did not exceed the broad scope of permissible closing argument.

“The regulation of argument rests within the sound discretion of the trial court.” *Grandison v. State*, 341 Md. 175, 224 (1995) (citation omitted). Generally, “[t]he prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom.” *Whaley v. State*, 186 Md. App. 429, 452 (2009) (quoting *Spain v. State*, 386 Md. 145, 152 (2005)). Nevertheless, reversible error occurs when the State’s remarks “actually misled or were likely to have misled the jury to the defendant’s prejudice.” *Wise v. State*, 132 Md. App. 127, 142 (2000) (citations omitted). In closing arguments, counsel may “discuss the facts proved . . . , assess the conduct of the parties, and attack the credibility of witnesses.” *Degren v. State*, 352 Md. 400, 430 (1999) (citation omitted).

Moreover, the “open door doctrine,” which is based on principles of fairness, “permits a party to introduce evidence that otherwise might not be admissible in order to respond to certain evidence put forth by opposing counsel.” *Mitchell v. State*, 408 Md. 368, 388 (2009) (citing *Conyers v. State*, 345 Md. 525, 545 (1997)). “[P]rosecutors may address during rebuttal issues raised by the defense in its closing argument.” *Degren*, 352 Md. at 433 (citation omitted).

In *Mitchell*, the Court of Appeals recognized that defense counsel “opened the door” to the State’s later counter-argument on the same subject matter, when defense

counsel argued the State had failed to call a particular witness, and that such failure hindered the jury. *Mitchell*, 408 Md. at 387. Defense counsel had “opened the door” to permit the State’s response under “fundamental principles of fairness.” *Id.* “Opening the door” on a particular topic allows opposing counsel to simply state, “[m]y opponent has injected an issue into the case, and I ought to be able to introduce evidence on that issue.” *Clark v. State*, 332 Md. 77, 85 (1993). The open door doctrine applies to both opening statements, *Terry v. State*, 332 Md. 329, 337 (1993), and closing statements. *Mitchell*, 408 Md. at 388.

During trial in this case, Detective Moss testified that, on March 19, 2015, he had recovered a bicycle matching the description of the one used during the robbery at a location identified by Detective Moss as Wiley’s mother’s house. A photograph of the bicycle at that location, taken by Detective Moss, was admitted in evidence. During closing arguments, however, defense counsel attempted to question the truthfulness of Detective Moss’s statements, including with regard to the photograph and the bicycle, and how Detective Moss could have known the bicycle belonged to Wiley specifically. The trial court transcript illustrates the dialogue surrounding the “open door” issue:

[DEFENSE COUNSEL]: How do you know that my client, Jerome Wiley ever touched, rode, owned, handled, moved or any—did anything with this bike? How do you know? How do you know? Was this bike ever tested for anything, for fingerprints, for anything at all? No. *You just have to take Detective Moss’s word for it that he recovered it from my client’s mother’s house. Did you hear from my client’s mother? . . . You have absolutely no evidence. Even if you were to believe that this is Ballou Court, what relevance does it have? Who has shown you that my client lives there?*

(Emphasis added).

In its rebuttal closing argument, the prosecutor argued:

[PROSECUTOR]: So you're being told essentially to just not believe for no reason, just don't believe and there's no evidence. Well, there is evidence. I mean, ladies- we went through the evidence before. The jacket, okay, that's recovered from the defendant. It fits the jacket of the individual that was there that day. *Now we also heard counsel say, well, the State could have of- you know, State could have called the mother. And the burden surely is on the State to, you know, prove the case, but you know what, the Defense could have call[ed] her too.*

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[PROSECUTOR]: *But they didn't*

(Emphasis added).

Here, defense counsel opened the door to the State's response – that Wiley also had the ability to call his mother, the same person the defense insisted the State had failed to call to prove Wiley's guilt. Defense counsel argued in closing that Detective Moss's testimony – that the bicycle had been recovered from Wiley's mother's house – was not credible. Such a statement invited the jury to conclude, from the State's failure to call Wiley's mother to testify to explain the bicycle, that her testimony would have contradicted Detective Moss's.

As in *Mitchell*, defense counsel opened the door to a specific reply by the State, when it suggested that Wiley's mother would have provided testimony that undercut or contradicted Detective Moss's testimony. *Mitchell*, 408 Md. at 375-77. Under the “open door” doctrine, the State properly made note of Wiley's ability to call his mother as a witness in order to contradict Detective Moss's testimony. The State's reply was specifically tailored and not excessive.

The jury in this case had been instructed by the circuit court prior to closing arguments from both parties that the State, and the State alone, bore the burden to prove Wiley’s guilt beyond a reasonable doubt.³ *Mitchell*, 408 Md. at 393. Additionally, the State, in its rebuttal closing argument, prefaced its counter-argument by stating that “the burden surely is on the State to . . . prove the case.” At no point did the State attempt to shift the burden of proof away from itself. The State’s response to defense counsel’s contention was proper because defense counsel opened the door to a reply on this specific issue. Therefore, the circuit court properly exercised its discretion in overruling defense counsel’s objection.

In sum, we affirm the judgments of the circuit court, with the exception of the sentence it imposed for conspiracy to commit robbery with a dangerous weapon. The sentence for that count is hereby vacated.

**JUDGMENTS OF THE CIRCUIT COURT FOR
BALTIMORE CITY AFFIRMED IN PART AND
VACATED IN PART. COSTS TO BE PAID AS
FOLLOWS: ¾ BY APPELLANT AND ¼ BY THE
MAYOR AND CITY COUNCIL OF BALTIMORE.**

³ The circuit court instructed the jury as follows: “The defendant is presumed to be innocent of the charges. This presumption remains throughout every state of the trial [and] is not overcome unless you are convinced beyond a reasonable doubt that the defendant is guilty. The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. This means that the State has the burden of proving beyond a reasonable doubt each and every element of the crimes charged.”