Circuit Court for Harford County
Case No. 12-K-16-1541

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2123

September Term, 2017

TRAVIS DARNELL BISHOP, SR.

v.

STATE OF MARYLAND

Reed,
Fader,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, J.

Filed: September 19, 2018

A Harford County jury convicted Travis Darnell Bishop of six offenses associated with the possession and distribution of cocaine. In addition to challenging the sufficiency of the evidence against him, Mr. Bishop contends that the trial court erred in: (1) allowing certain testimony from a police officer who observed the events at issue and was also qualified as an expert; (2) failing to instruct the jury as to the definition of "possession"; and (3) allowing the State to discuss facts not in the record during its closing argument. We agree with Mr. Bishop that the court erred in permitting the State to discuss facts not in the record during its closing argument. Although we conclude that error was harmless with respect to Mr. Bishop's convictions for distribution, possession, and possession with intent to distribute, we reverse Mr. Bishop's conspiracy convictions and remand for a new trial on those counts. The remainder of Mr. Bishop's claims are without merit.

BACKGROUND

Factual Background

On the evening of September 21, 2016, the three members of a Havre de Grace Police Department counter-narcotics unit—Officer Francis Davidson, Corporal Joseph Cooper, and Officer Chad Smith—were conducting coordinated surveillance in the Battery Village neighborhood as part of a several-months-long investigation into an open air drug market. The object of their focus that evening was 431 Battery Drive, which they had identified as a distribution point for illegal narcotics trafficking. At approximately 10:30 p.m., Officer Smith saw Mr. Bishop and Andre Waiters leave 431 Battery Drive and walk toward Revolution Street. At the same time, Officer Davidson observed Kurt Porter,

known to the officer as a drug buyer and user, park his pickup truck on Bay Boulevard, near where Battery Drive intersects Revolution Street.

According to Officer Davidson's trial testimony, shortly after Mr. Porter parked, Officer Davidson saw Messrs. Bishop and Waiters come walking "in a tandem-like formation"—one in front of the other and a few feet apart—along Revolution Street toward Mr. Porter's truck. The two then separated, with Mr. Bishop approaching the truck and Mr. Waiters taking a position approximately 50 feet away, keeping line-of-sight with Mr. Bishop and "maintaining obvious vigilance." Mr. Bishop initially walked about a truck's length past Mr. Porter's vehicle before turning around, approaching the truck from the rear, and quickly tossing a small plastic baggie into the bed of the truck directly behind the driver's seat. Mr. Bishop continued walking up to the driver-side window, where Mr. Porter gave him "U.S. currency." Messrs. Bishop and Waiters then promptly resumed their tandem-like formation and walked out of Officer Davidson's sight in the direction from which they came. The two spoke to each other as they walked away, although Officer Davidson could not hear what they said.

While Officer Davidson waited for Messrs. Bishop and Waiters to leave (to avoid jeopardizing the broader investigation), he allowed Mr. Porter to drive away. Approximately two to three minutes later, Corporal Cooper, who had been alerted by Officer Davidson and knew where Mr. Porter lived, found Mr. Porter pulling his truck up to park by his house. At approximately the same time, Officer Davidson also caught up to Mr. Porter, although he initially stayed back to avoid compromising his unmarked vehicle.

Both officers observed Mr. Porter exiting his vehicle, looking nervous, and "frantically" moving things around in the bed of the pickup truck immediately behind the driver's seat—the same place where Officer Davidson had just seen Mr. Bishop toss the plastic baggie.

Upon approaching the truck, Corporal Cooper discovered a small plastic baggie containing a white substance, later confirmed as cocaine that had been mixed with wax, in a small, partially-unzipped cooler that was located immediately behind the driver's seat. Corporal Cooper also found several cold beers in the cooler. Although there was condensation on the cold beers, both officers observed that the baggie was dry. The officers seized the suspected cocaine and arrested Mr. Porter.

Procedural Background

Mr. Bishop was later charged and tried before a jury on six charges: possession of cocaine, possession with intent to distribute cocaine, distribution of cocaine, and conspiracy to commit each of those offenses. At trial, the jury heard testimony from Officer Davidson and Corporal Cooper as to the facts described above, along with expert forensic testimony that the substance recovered from Mr. Porter's truck was cocaine. In addition to hearing from Officer Davidson as a fact witness, the court also accepted him, without objection from Mr. Bishop, "as an expert in packaging, manufacturing, distribution, sales and valuation of controlled dangerous substances." Specific aspects of Officer Davidson's testimony are discussed further below.

The jury found Mr. Bishop guilty on all six counts. The trial court sentenced him to twenty years for distribution of cocaine, all but fourteen suspended, to be served

consecutive to another sentence he was already serving; another twenty years for conspiracy to distribute cocaine, all suspended, to be served consecutive to all other sentences; and five years' probation. The remaining four counts merged for sentencing purposes.

DISCUSSION

I. THE TRIAL COURT DID NOT ERR OR ABUSE ITS DISCRETION IN ADMITTING CERTAIN PORTIONS OF OFFICER DAVIDSON'S TESTIMONY.

Mr. Bishop argues that the trial court erred in three respects regarding the testimony of Officer Davidson, who testified as both a fact witness and as an expert. We review the trial court's decision to admit lay witness testimony for an abuse of discretion. *See Crosby v. State*, 366 Md. 518, 526 (2001). Similarly, "the admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal." *Roy v. Dackman*, 445 Md. 23, 38-39 (2015) (quoting *Bryant v. State*, 393 Md. 196, 203 (2006)). The trial court's decision "may be reversed if founded on an error of law or some serious mistake, or if the trial court has clearly abused its discretion." *Gutierrez v. State*, 423 Md. 476, 486 (2011) (quoting *Raithel v. State*, 280 Md. 291, 301 (1977)). A trial court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Levitas v. Christian*, 454 Md. 233, 243 (2017) (quoting *Neustadter v. Holy Cross Hosp. of Silver Spring, Inc.*, 418 Md. 231, 241 (2011)) (emphasis removed).

A. The Trial Court Did Not Abuse Its Discretion by Allowing Officer Davidson to Testify About His Observations of Mr. Waiters's Conduct.

Mr. Bishop contends that the trial court erred in allowing Officer Davidson to provide an expert opinion that Mr. Waiters was acting as a lookout during the transaction. In doing so, Mr. Bishop maintains, the court (1) erroneously allowed Officer Davidson to testify about something about which he had no personal knowledge and (2) improperly "invaded the province of the jury" by testifying as to an ultimate issue in the case. We disagree. Officer Davidson did not offer an expert opinion regarding Mr. Waiters's actions, nor did he testify as to an ultimate issue in the case. To the contrary, he offered only his own recollection of what he observed Mr. Waiters doing: initially walking in tandem with Mr. Bishop, breaking off while maintaining line-of-sight, "maintaining obvious vigilance," and then resuming his tandem formation with Mr. Bishop after the transaction.

Mr. Bishop's reliance on *Cook v. State*, 84 Md. App. 122 (1990), is misplaced. There, the trial court allowed a police officer to provide an opinion about the command structure of an alleged conspiracy and various roles within the conspiracy. *Id.* at 136-37, 142. Here, Officer Davidson merely described what he observed. The trial court did not err in permitting him to do so.

B. Mr. Bishop Did Not Preserve His Claim that the Court Erred in Not Striking Prior Testimony to Which No Objection Had Been Made.

Mr. Bishop next argues that the court erred when it did not retroactively strike testimony Officer Davidson had given regarding a distinctive aspect of the cocaine seized from Mr. Porter. As Mr. Bishop failed to preserve this claim, we will not consider it.

In the testimony that Mr. Bishop now argues should have been stricken, Officer Davidson testified that the cocaine seized from Mr. Porter was distinctive in that it had been cut with wax. Mr. Bishop made no objection to that testimony. Later, when Officer Davidson was asked about the next time he encountered a similar product, Mr. Bishop objected.[1] The court sustained that objection. Notably, however, Mr. Bishop did not then or at any other time ask the court to strike the earlier testimony. Having failed to object or ask that the testimony be stricken, Mr. Bishop waived this claim and we will not consider it here. *See Fallin v. State*, 460 Md. 130, 152 (2018) ("In a criminal trial, an objection to evidence is waived unless the party objects at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent.").

C. The Trial Court Did Not Abuse Its Discretion by Allowing Officer Davidson to Offer Expert Testimony.

Mr. Bishop's final argument concerning Officer Davidson's testimony is that the trial court erred in allowing the officer to opine about the rationale for two-step drug transactions. Specifically, in response to a question about the reason for "separating the transaction into two halves," by first delivering the drugs and then exchanging payment, Officer Davidson was permitted to respond that this (1) allows for a more streamlined transaction that minimizes the direct interaction between the participants and (2) limits the exposure of both parties to observation by law enforcement.

[1] As explained further below, Mr. Bishop objected to only one specific question about the next time Officer Davidson encountered a similar product, not the entire line of questioning. For purposes of this argument, however, it is sufficient to note that the court sustained the objection he made.

Mr. Bishop asserted that because Officer Davidson's primary experience with drug transactions was in Baltimore City, this testimony in a case about a transaction in Havre de Grace was mere speculation and not a proper expert opinion. This argument is meritless. Officer Davidson was proffered, and accepted without objection, "as an expert in packaging, manufacturing, distribution, sales and valuation of controlled dangerous substances."[2] As the trial court ruled, his testimony fell comfortably within the scope of that expertise. Moreover, Mr. Bishop did not identify any reason why this specific area of inquiry would differ in Havre de Grace as compared with Baltimore City or any other jurisdiction and he declined the trial court's invitation to explore that issue with Officer Davidson. We see no abuse of discretion in the decision to permit this testimony.

II. MR. BISHOP DID NOT PRESERVE HIS CHALLENGE TO THE COURT'S JURY INSTRUCTION.

Mr. Bishop contends that the trial court erred by leaving out the statutory definition of "possession" when it instructed the jury as to the elements of the crimes of which he was charged. As he acknowledges, however, he waived that claim when he failed to object to the instruction or to request that the court include the definition. *See* Md. Rule 4-325(e) (providing that "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the

[2] Officer Davidson testified that he had been a law enforcement officer for 26 years, had more than 240 hours of specialized training related to narcotics and firearms investigations, had participated in more than 1,500 narcotics-related arrests, had authored more than 100 narcotics-related subpoenas, and had observed more than 750 hand-to-hand narcotics transactions.

jury"); *Watts v. State*, 457 Md. 419, 426 (2018) ("This Court has consistently repeated that the failure to object to an instructional error prevents a party on appeal from raising the issue . . . .").

Mr. Bishop asks us to conduct plain error review of the allegedly erroneous instruction. We decline to do so. Rule 4-325(e) allows us to "take cognizance of any plain error in the instructions," but only if the error is "material to the rights of the defendant." Any error here falls well short of that hurdle. The trial court's instruction laid out each element of the crimes charged. Although the instruction did not include a definition of "possession," the conduct of which Mr. Bishop stood accused—carrying a baggie of cocaine from 431 Battery Drive to Mr. Porter's truck and then tossing it into the bed of the truck—constituted possession under any definition. Any error in omitting that definition thus did not "affect[] the outcome of the [trial] court proceedings" or "the fairness, integrity or public reputation" of those proceedings. *Givens v. State*, 449 Md. 433, 469 (2016) (quoting *State v. Rich*, 415 Md. 567, 578 (2010)) (second alteration in original); *see also Herring v. State*, 198 Md. App. 60, 87 (2011) (stating that "only instances of truly outraged innocence call for the act of grace of extending gratuitous process") (quoting *Morris v. State*, 153 Md. App. 480, 522-23 (2003)).

III. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO DISCUSS FACTS NOT IN THE RECORD DURING ITS CLOSING ARGUMENT; THAT ERROR WAS HARMLESS AS TO THE POSSESSION AND DISTRIBUTION CONVICTIONS, BUT NOT AS TO THE CONSPIRACY CONVICTIONS.

Mr. Bishop's next contention is that the trial court erred by allowing the State to discuss facts not in the record during its closing argument. We agree with Mr. Bishop that

the trial court erred in allowing the State to discuss facts as to which the court had sustained an objection. Although we conclude that the error was harmless beyond a reasonable doubt as to the distribution and possession convictions, we cannot say that it was harmless beyond a reasonable doubt as to the conspiracy convictions. We therefore reverse Mr. Bishop's conspiracy convictions and remand for a new trial as to those charges.

A. The Trial Court Erred in Allowing the State to Argue Facts Not in the Record During Its Closing Argument.

"Closing arguments serve an important purpose at trial. Counsel use that portion of the trial to 'sharpen and clarify the issues for resolution by the trier of fact in a criminal case' and 'present their respective versions of the case as a whole.'" *Whack v. State*, 433 Md. 728, 742 (2013) (quoting *Lee v. State*, 405 Md. 148, 161 (2008)). Accordingly, "counsel are afforded 'great leeway'" in making closing arguments, *Donaldson v. State*, 416 Md. 467, 488 (2010) (quoting *Degren v. State*, 352 Md. 400, 429 (1999)), and "may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom," *Fuentes v. State*, 454 Md. 296, 319 (2017) (quoting *Whaley v. State*, 186 Md. App. 429, 452 (2009)).

Counsel's leeway in making closing arguments is not unlimited, however; they may not "comment upon facts not in evidence . . . ." *Mitchell v. State*, 408 Md. 368, 381 (2009) (quoting *Smith v. State*, 388 Md. 468, 488 (2005)). "Arguing facts not in evidence is highly improper," *Fuentes*, 454 Md. at 319, as are "comments made during closing argument that invite the jury to draw inferences from information that was not admitted at trial," *Spain v. State*, 386 Md. 145, 156 (2005). "Because the trial judge is in the best position to gauge

the propriety of argument in light of such facts, . . . '[a]n 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.'" *Mitchell*, 408 Md. at 380-81 (quoting *Grandison v. State*, 341 Md. 175, 225 (1995)). Allowing comments on facts not in the record over opposing counsel's objection is an abuse of discretion. *See Whack*, 433 Md. 748-49 (noting several cases finding an abuse of discretion for doing so). "What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case." *Smith*, 388 Md. at 488.

To assess whether the trial court permitted the State to argue facts that were not in evidence here, we first consider the relevant testimony. On direct, Officer Davidson identified as a "distinguishing characteristic" of the cocaine seized from Mr. Porter that it had been mixed with wax. In his experience, mixing cocaine with wax was "unique." In fact, he had only encountered it three times. The first time was when he recovered it from Mr. Porter. The other two times were both in arrests made at 431 Battery Drive during the following weeks. Officer Davidson then testified that he had encountered Mr. Waiters at 431 Battery Drive on September 23, 2016, two days after the incident with Messrs. Bishop and Porter. Mr. Bishop did not object to any of that testimony.

Mr. Bishop did object, however, when the State then asked Officer Davidson whether on September 23 Mr. Waiters had in his possession "any substance with that distinguishing characteristic." At a bench conference about the objection, Mr. Bishop argued that testimony as to what Mr. Waiters had in his possession two days later was

irrelevant. The State responded that the testimony was relevant to the conspiracy, as "[t]he fact that they both sell that same type of cocaine speaks to the agreement between them." The trial court sustained the objection "out of an abundance of caution."[3] Recognizing that Officer Davidson had not answered the question, Mr. Bishop's counsel declined the court's offer of a curative instruction. Neither the fact nor the circumstances of Mr. Waiters's arrest on September 23 came up again during the trial.

In his closing argument, after discussing the unique wax-like quality of the cocaine recovered from Mr. Porter, the prosecutor stated that "[t]he next point in time that [Officer Davidson] became familiar with [that cocaine] was two days later when the warrant was served on 431 Battery. At that point in time he testified that he encountered Andre Waiters, the same individual that was acting as a lookout for Mr. Bishop." Mr. Bishop objected. In the ensuing bench conference, the State and the court both expressed their shared—but mistaken—understandings that (1) the reason the court had sustained Mr. Bishop's initial objection to testimony about Mr. Waiters's arrest was because the State had not established that Officer Davidson had personal knowledge of it, and (2) the testimony was later admitted once Officer Davidson established that he had personal knowledge.[4] As a result, the court allowed the prosecutor to resume his argument, which continued:

[3] We offer no opinion as to the trial court's decision to sustain Mr. Bishop's objection, which is not before us.

[4] The Court explained: "The question was that he had been told and then he said that he himself was familiar with it, because with the original way the question was posed was that he had been told that there had been this activity and then after I sustained the objection he followed up with the question and he had personal knowledge and he said he did have personal knowledge." Based on the transcript, that recollection was inaccurate.

> You heard [Officer Davidson's] testimony that on the 23rd when he was there for the service of the warrant on 431 Battery he encountered Andre Waiters and that a similar substance, crack cocaine with a waxy texture, was seized from that individual. That's the next point in time that he encountered it, the same individual that he was out there on the street with, the same individual that was acting as a lookout for him. This was a joint enterprise between the two of them.

As the State all-but-concedes, this argument referenced facts that were not only outside the record, but as to which Officer Davidson had been expressly precluded from testifying. Namely, Officer Davidson never testified (1) that Mr. Waiters had been arrested, (2) that his arrest had occurred at 431 Battery Drive on September 23, 2016, (3) that he was in possession of cocaine when he was arrested, or (4) that any such cocaine had the same unique characteristic as the cocaine recovered from Mr. Porter.

The State contends that even though the court had precluded Officer Davidson from offering this testimony directly, the prosecutor's statement was a permissible inference from testimony that was not excluded. Specifically, Officer Davidson testified that he had only encountered the same "unique" type of cocaine on two other occasions, both in arrests made at 431 Battery Drive, and that he had also "encounter[ed]" Mr. Waiters at 431 Battery Drive two days after the incident at issue. The State argues that it was a reasonable inference from this testimony that the police arrested Mr. Waiters when they encountered him on that date, and that they found the distinctive cocaine on him when they did so.

For two reasons, we disagree. First, the State's argument pushes past reasonable inference and into speculation. The timeframe over which Officer Davidson stated the other two arrests at 431 Battery Drive occurred was "three weeks," not two days. He also

testified that the police had identified that address as one of several "that were the root causes or distribution points of controlled dangerous substances," suggesting that there might be many more people involved than just Messrs. Bishop and Waiters. And although he testified that the same unique type of cocaine was recovered in arrests at that address, Officer Davidson never testified that they had arrested Mr. Waiters. Moreover, the prosecutor told the jury that Officer Davidson had actually testified to those facts, not that they were reasonable inferences that could be drawn from his testimony.

Second, this testimony was expressly precluded by the trial court. Even were it otherwise theoretically possible to draw a reasonable inference from Officer Davidson's allowed testimony as to the fact and particulars of Mr. Waiters's arrest, it was error to allow the State to claim that Officer Davidson had given testimony that the trial court had expressly precluded. We do not doubt that the error resulted from a good faith, if erroneous, recollection, but it was nonetheless an error.

B. The Error in Allowing the State to Comment on Facts Not in the Record During Its Closing Argument Was Harmless as to the Possession and Distribution Convictions But Not as to the Conspiracy Convictions.

"Not every improper comment by the prosecutor requires reversal, as error in closing argument is subject to harmless error review." *Fuentes*, 454 Md. at 321. To declare an error harmless, we must, "upon our 'own independent review of the record,'" be "able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *Donaldson*, 416 Md. at 496 (quoting *Lee*, 405 Md. at 164).

In making this determination, "we focus our attention on three factors: first, 'the weight of the evidence against the accused[;]' second, 'the severity of the remarks, cumulatively[;]' and third, 'the measures taken to cure any potential prejudice.'" *Fuentes*, 454 Md. at 321 (quoting *Lee*, 405 Md. at 165). The State bears the burden of proving that an error is harmless beyond a reasonable doubt. *Devincentz v. State*, ___ Md. ___, 2018 WL 3854532, No. 74, Sept. Term, 2017, at *17 (Aug. 13, 2018). For reasons that will become apparent, we will conduct our harmless error analysis separately with respect to the conspiracy convictions and the distribution/possession convictions.

1. The Error Was Harmless as to the Possession and Distribution Counts.

Factor 1: The Weight of the Evidence. The jury convicted Mr. Bishop of distribution of cocaine, possession with the intent to distribute cocaine, and possession of cocaine. As to these three counts, the evidence against Mr. Bishop was strong. *See Spain*, 386 Md. at 165 (indicating that the court should consider the error "in relation to the totality of the evidence" in determining whether it influenced the verdict). On the evening in question, the officers were investigating a "systemic ongoing open air drug market" in the Battery Village neighborhood with a focus on 431 Battery Drive, a known "distribution point of controlled dangerous substances." Officer Smith saw Mr. Bishop emerge from that address. Officer Davidson then saw Mr. Bishop walk toward, then past, and then back to, the truck occupied by Mr. Porter, who was known to the officers as a drug purchaser and user. He then observed Mr. Bishop throw a plastic baggie into Mr. Porter's truck and, seconds later, receive cash from him. Two to three minutes after that, two officers

encountered Mr. Porter and found a plastic baggie with cocaine in the same area of his truck that Mr. Bishop had just tossed the plastic baggie. Although the other contents of the cooler in which the plastic baggie was sitting were cold and had condensation on them, the plastic baggie was dry, suggesting that it had only recently been placed there. Moreover, the cocaine found in Mr. Porter's truck was both distinctive and identical in that distinctive respect to cocaine found twice more in arrests in the following three weeks at the same house from which Mr. Bishop emerged that evening.[5] Although Mr. Bishop raised some questions about this evidence—including whether the drugs may have come from a different source, what happened in the two to three minutes when Mr. Porter's truck was out of Officer Davidson's view, and why Officer Davidson did not put in his initial report that he saw money change hands—the evidence of Mr. Bishop's guilt was strong.

Factor 2: The Severity of the Remarks. When considering the severity of the inappropriate statements, we look at them "in the context of the prejudice that each of [them], and all of them together, created in the minds of the jurors." *Lee*, 405 Md. at 175. Severity, of course, can have elements of both quantity and quality. Here, the State correctly points out that the remarks were "isolated event[s] that did not pervade the entire trial." *Spain*, 386 Md. at 159. The prosecutor made only two statements about Mr. Waiters's arrest two days later with the distinctive type of cocaine, both in a portion of his

[5] As discussed above, Mr. Bishop did not object to Officer Davidson's testimony that the same distinctive cocaine was found twice more in arrests at the same address in the following three weeks. His objection was to testimony that this distinctive cocaine was found specifically on Mr. Waiters.

closing argument that was focused on conspiracy. After the second of these, he followed with a clear and direct link to the coordination between Messrs. Waiters and Bishop on the night in question, concluding that "[t]his was a joint enterprise between the two of them." The prosecutor never asked the jury to infer any link between that evidence and the distribution and possession charges against Mr. Bishop. As to these charges, the statements were not severe in either quantity or quality.

Factor 3: Measures Taken to Cure Prejudice. The court did not take any measures to cure any prejudice to Mr. Bishop because it did not recognize the error. To the contrary, the bench conference that followed Mr. Bishop's objection, after which the prosecutor was permitted to continue discussing the circumstances of Mr. Waiters's arrest, likely only called the jury's attention to those statements. *See Beads v. State*, 422 Md. 1, 13-14 (2011) (noting that an objection can "underscore[]" and "add[] greater impact to" improper comments, and the court's overruling can "emphasiz[e] to the jury the 'correctness' of the comments") (quoting *Curry v. State*, 54 Md. App. 250, 256 (1983)). [6]

Considering these factors together, we conclude that the court's error was harmless beyond a reasonable doubt as to the distribution and possession charges. The State's strong case as to distribution and possession, which was based primarily on Officer Davidson's

[6] Although the court twice instructed the jury that the "[s]tatements and arguments of counsel," including opening and closing, "are not evidence," such general instructions are of limited utility, *see State v. Stringfellow*, 425 Md. 461, 475 (2012) (noting that "the effect of general jury instructions" is "minimize[d] in our analysis" because of their "relatively attenuated curative effect"), especially where the court expressly permitted the State to discuss facts that were not in the record after an objection and a bench conference.

testimony regarding his direct observations, was not premised at all on the objected-to testimony. In light of the other evidence presented and the way in which the State raised it in closing, any additional credibility the circumstances of Mr. Waiters's arrest may have lent to the State's case against Mr. Bishop for distribution and possession was indirect and negligible. *See Poole v. State*, 295 Md. 167, 175 (1983) (finding no prejudice where the error "did not add to or subtract from" the evidence establishing the defendant's guilt). We therefore conclude that "the cumulative effect of [the improper comments] on the ability of a jury to render a fair and impartial verdict," *Donaldson*, 416 Md. at 497 (quoting *Lawson*, 389 Md. at 604-05), on the distribution and possession charges was harmless beyond a reasonable doubt.

2. The Error Was Not Harmless as to the Conspiracy Counts.

Whether the trial court's error in permitting the State to present argument regarding the circumstances of Mr. Waiters's subsequent arrest was harmless as to the conspiracy counts is a much closer question for two reasons. First, the evidence supporting the conspiracy counts was not as strong as the evidence supporting the distribution and possession counts. The State did not present any direct evidence of an agreement between Messrs. Waiters and Bishop to possess or distribute cocaine and no witness testified that she or he saw Mr. Waiters in possession of any cocaine or engaged directly in the exchange. The primary evidence supporting the conspiracy charges was Officer Davidson's description of Mr. Waiters walking in tandem with Mr. Porter before the transaction, maintaining line-of-sight and vigilance during the transaction, and then walking in tandem

with Mr. Porter after the transaction. The evidence supporting the conspiracy charge was thus weaker than that supporting the direct charges against Mr. Bishop. *See, e.g.*, *Whack*, 433 Md. at 755 & n.13 (noting that only circumstantial evidence supported the defendant's guilt and contrasting a Massachusetts case with overwhelming evidence).

Second, the error was more severe with respect to the conspiracy charges because the State expressly linked it to those charges. *See Jones v. State*, 217 Md. App. 676, 696-97 (2014) (noting that even an isolated remark, if relevant to a central issue, increases the prejudicial effect). After its inaccurate recitation of Officer Davidson's testimony, the State highlighted that Mr. Waiters was "the same individual that [Mr. Bishop] was out there on the street with, the same individual that was acting as a lookout for him. This was a joint enterprise between the two of them." The State thus linked its improper statements directly—and powerfully—to the conspiracy charges. By attracting even further attention to the improper comments, the bench conference that followed Mr. Bishop's objection gave even greater emphasis to them. *See Beads*, 422 Md. at 13-14 (noting that an objection can "underscore[]" and "add[] greater impact to" improper comments, and the court's overruling can "emphasiz[e] to the jury the 'correctness' of the comments") (quoting *Curry*, 54 Md. App. at 256).

Although we certainly cannot say that the jury would have acquitted Mr. Bishop of conspiracy without these improper comments, that is not the standard we are required to use. Based on the absence of direct evidence of Mr. Bishop's guilt on the conspiracy charges, the potentially significant effect of the fact that Mr. Waiters was found two days

later with the same "unique" cocaine compound, and the State's argument relying expressly on this statement to support the conspiracy charges, we are simply unable to conclude *beyond a reasonable doubt* that the court's error was harmless. As a result, we vacate Mr. Bishop's three conspiracy convictions and remand for a new trial on those counts. *Poole*, 295 Md. at 173-75 (reversing only those convictions that were prejudiced by the error).[7]

IV. A RATIONAL TRIER OF FACT COULD FIND MR. BISHOP GUILTY OF THE SIX CHARGES AGAINST HIM BASED ON THE EVIDENCE AT TRIAL.

Mr. Bishop's final argument is that the State failed to present sufficient evidence to sustain any of his six convictions. For reasons we have mostly set forth above, we disagree.

A sufficiency-of-the-evidence claim is reviewed to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Suddith*, 379 Md. 425, 429 (2004) (quoting *State v. Smith*, 374 Md. 527, 533-34 (2003)); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (establishing this standard as required by the Due Process Clause of the Fourteenth Amendment). We must view the evidence in the light most favorable to the State. *Spencer v. State*, 450 Md. 530, 549 (2016). "[G]reat deference" must be given "to the [jury's] 'finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Small v. State*, 235 Md. App. 648, 705 (2018) (quoting

[7] The trial court suspended all of the jail time that it imposed on Mr. Bishop for the conspiracy count. The only actual jail time the court ordered Mr. Bishop to serve was on the conviction for distribution of cocaine, which we affirm. As a result, our holding here does not disrupt the trial court's sentencing "package" and so we will not vacate the sentence imposed on the distribution count pursuant to *Twigg v. State*, 447 Md. 1 (2016).

McDonald v. State, 347 Md. 452, 474 (1997)). Finders of fact have broad discretion to make inferences from the evidence and a conviction can be based entirely on circumstantial evidence. *Suddith*, 379 Md. at 430. "We defer to any possible reasonable inferences the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *Fuentes*, 454 Md. at 308. In other words, we "do not re-weigh the evidence," *Suddith*, 379 Md. at 430, nor "undertake a review of the record that would amount to, in essence, a retrial of the case," *Fuentes*, 454 Md. at 308 (quoting *State v. Albrecht*, 336 Md. 475, 478 (1994)).

With respect to the three offenses for distribution or possession, Mr. Bishop contends that the evidence against him was insufficient because: (1) the officers lost sight of Mr. Porter's truck for two to three minutes and the baggie of cocaine they later found could have been in Mr. Porter's possession before his encounter with Mr. Bishop; (2) in his report written that night, Officer Davidson did not describe money changing hands between Mr. Bishop and Mr. Porter; and (3) the State failed to call Mr. Porter as a witness. Although each of these criticisms was a fair basis on which Mr. Bishop could attack the State's evidence at trial, none of them establishes that the evidence the State presented was insufficient to sustain a verdict. The Criminal Law Article prohibits any person from possessing a controlled dangerous substance, including cocaine, Md. Code Ann., Crim. Law § 5-601, possessing cocaine with an intent to distribute it, Crim. Law § 5-602(2), and distributing it, Crim. Law § 5-602(1). In conjunction with the forensic testimony that the

substance recovered from Mr. Porter's van was cocaine, Officer Davidson's testimony regarding his personal observations of Mr. Bishop's conduct, if believed by the jury, provided a sufficient basis to convict Mr. Bishop of all of these offenses. *See Fuentes*, 454 Md. at 308. Whether or not to credit Officer Davidson's testimony was for the jury to decide, and we must defer to that determination. *McDonald*, 347 Md. at 474.

Similarly, Officer Davidson's testimony as to the coordination between Messrs. Bishop and Waiters during the transaction at issue provided a sufficient basis for the jury's convictions on the conspiracy counts. The Court of Appeals "consistently has defined conspiracy as the agreement between two or more people to achieve some unlawful purpose or to employ unlawful means in achieving a lawful purpose." *State v. Johnson*, 367 Md. 418, 424 (2002). "The agreement at the heart of a conspiracy 'need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design.'" *Carroll v. State*, 428 Md. 679, 696-97 (2012) (quoting *Khalifa v. State*, 382 Md. 400, 436 (2004)). "[T]he State [i]s only required to present facts that would allow the jury to infer that the parties entered into an unlawful agreement." *Darling v. State*, 232 Md. App. 430, 467 (2017) (quoting *Dionas v. State*, 199 Md. App. 483, 532 (2011), *rev'd on other grounds*, 436 Md. 97 (2013)), *cert. denied* 454 Md. 655 (2017). Two individuals acting in concert in the execution of a crime is sufficient to establish an agreement between them to do so, and thus establish a conspiracy. *See Darling*, 232 Md. App. at 466-47 ("If two or more persons act in what appears to be a concerted way to perpetrate a crime, we

may, but need not, infer a prior agreement by them to act in such a way.") (quoting *Jones v. State*, 132 Md. App. 657, 660 (2000)).

As Mr. Bishop acknowledges, "the testimony of a single witness, if believed, is sufficient to convict," and "questions of credibility are for the fact-finder to resolve." Officer Davidson's testimony regarding the coordination between Messrs. Bishop and Waiters was sufficient for a reasonable jury to infer an agreement between them to possess, possess with the intent to distribute, and distribute cocaine. A rational juror could "reasonably infer that such a concert of action was jointly intended[,]" because "[c]oordinated action is seldom a random occurrence." *Darling*, 232 Md. App. at 467 (quoting *Jones*, 132 Md. App. at 660); *see also Jones*, 132 Md. App. at 661-64 (finding sufficient evidence to establish a conspiracy in testimony that two men emerged from an alley together and then approached and shot the victim).

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED IN PART AND VACATED IN PART. CONSPIRACY CONVICTIONS VACATED AND CASE REMANDED FOR A NEW TRIAL NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE SPLIT EVENLY.