Circuit Court for Charles County
Case No. 08-K-17-000083

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2146

September Term, 2019

MIGUEL ANGEL SANTANA

v.

STATE OF MARYLAND

Reed,
Wells,
Gould,

JJ.

Opinion by Wells, J.

Filed: January 15, 2021

A jury empaneled in the Circuit Court for Charles County heard evidence that appellant, Miguel Angel Santana, participated with two others in the killing of a third man. At the close of the State's case and at the close of all the evidence, Santana moved for a judgment of acquittal on the basis that the State's case rested on the uncorroborated testimony of an accomplice. The trial court denied both of Santana's motions.

The jury convicted Santana of (1) conspiracy to commit first-degree murder and (2) illegal possession of a firearm by a disqualified person. The jury failed to reach a verdict on the remaining four counts: first-degree murder, use of a firearm in a violent felony, wearing, carrying, and transporting of a handgun on the person and wearing, carrying, and transporting of a handgun on a public road. The court declared a mistrial on those counts. The court sentenced Santana to life in prison on December 12, 2019.

Santana filed a timely Notice of Appeal to this Court on December 3, 2019 and moved to stay retrial pending this appeal. The trial court granted the motion. Santana presents three questions for our review, which we reprint verbatim:

I. Did the State fail to corroborate the testimony of Santana's alleged accomplice and, thus, fail to present evidence that Santana conspired to commit first-degree murder or possessed a firearm?

II. Did the State unlawfully secure a conviction on the basis of false testimony, where key witnesses for the prosecution gave testimony that was acknowledged by the State and the trial court to be unfounded or false?

III. Did the State's assertion of facts not in evidence during its closing argument, and the court's failure to issue a curative instruction to the jury, potentially influence the verdict?

For the reasons we discuss, we hold that the State sufficiently corroborated the accomplice's testimony, which thus made sufficient evidence on which to base Santana's

convictions. The State did not secure either of Santana's convictions from false or unfounded testimony. The prosecutor's comments during closing argument did not create reversible error. We, therefore, affirm.

FACTUAL BACKGROUND

Lydell Wood was shot and killed on January 6, 2016 in Waldorf, Maryland on Rooks Head Place. Although witnesses were unable to immediately identify the shooters, based on interviews with Wood's family and friends, the Charles County Sheriff's Office generated multiple suspects, including individuals who had ongoing feuds with Wood and his family. The State's theory was that the appellant, Miguel Santana, went looking for a man named "Molly G," who had shot at Santana during an altercation one afternoon. Later that same afternoon, Santana sought revenge against Molly G, but unable to find him, Santana instead shot Wood under the mistaken belief that Wood was Molly G's associate.

A. Events Leading up to Wood's Murder

The events that occurred prior to Wood's death explain the State's theory of why he was killed. On the afternoon of January 6, 2016, Wood was with Donald Savoy. Both men were walking with a man identified in the record only by the sobriquet "Molly G." According to Savoy's trial testimony, at one point during their walk, Molly G got into an argument with two other men. The argument led to a scuffle, and Molly G shot at the men with whom he was arguing. Molly G then ran toward Rooks Head Place. According to Savoy, Wood was standing behind Molly G when Molly G fired at the two men. The State contended that Santana was one of the two men and was Molly G's intended target.

After this shooting, Savoy and Wood visited Wood's cousin, Trayvon Douglas, who lived in the same neighborhood as Wood. According to Douglas's testimony, he and Wood began to argue. Wood and Savoy left to avoid escalating the dispute. Soon thereafter, Douglas went back to Rooks Head Place to meet up with Wood, when he was approached by a stranger who asked him where Molly G was. According to Douglas, the man was about 6'2" tall and wore a black hoodie/jacket and blue pants. Douglas told the man that he did not know where Molly G was.

B. Wood's Shooting

After the Molly G incident and after visiting with Douglas, Savoy and Wood visited Wood's mother, Gail Fenwick, at a relative's home on Rooks Head Place. While everyone was talking on the front porch, Fenwick saw someone pacing nearby, wearing what she described as a bluish or black jacket with fur around the hood. The hood was up and covered the person's face. Fenwick testified that this man, who the State contended was Santana, took several steps and then a second individual "pop[ped] up beside him," wearing a grey jacket and hat. Fenwick testified that the man in the grey jacket was "a little bit taller" than her height of 5'6," and the one in the dark jacket was "shorter than the other one." Wood signaled "what's up" to the men. The men both pulled out guns; the man wearing the jacket with a fur-lined hood had a black gun and the taller man had a silver gun. Fenwick told Wood to run and she ran into the house. She heard gunshots. She went back outside, and she saw her son, Wood, lying on the porch of a nearby home. Wood had been shot in the torso and died.

Edith Johnson, Santana's neighbor, who lived at 2641 Rooks Head Place, testified that while talking with her daughter outside of her home, she saw three men heading towards Wakefield Circle, heard three gunshots, and went inside. The State theorized that the three men were Molly G, Wood, and Savoy. When Johnson came back outside, she saw two other young men, one of whom she identified as Santana, walking from the direction of the gunshots and laughing. When Ms. Johnson asked what happened, one of the men said that they were "just around there showing off." Within an hour after that encounter, Ms. Johnson again heard gunshots and called 911. The State claimed that the second round of gunfire was the shooting in which Wood was killed.

Following Wood's shooting, Lloyd Turner, a neighbor on an adjacent street, Upbrook Court, told police that earlier in the afternoon, he saw three men running down the street who "looked like they were shooting at somebody." Turner described the shooters as African American men and wearing dark hoods. As it turned out, Turner had two security cameras outside of his house which captured some portion of the first shooting involving Molly G. Based on the time stamp on Turner's security video, the State argued that the first incident occurred around 1:07 p.m. and that the word "Molly" was audible in the footage, thus confirming that on the day of the shooting, Molly G. was on or near Wakefield Circle.

Another neighbor, Lawrence Dotson, heard an argument and heard Fenwick scream. Dotson saw Wood and another man right behind him wearing all black with his face concealed by a hood and carrying a black gun. Dotson said another man was right behind the first shooter but turned and left.

C. Police Investigation

Police and forensics experts arrived at the scene around 2:05 p.m. Sergeant Clarence Black of the Charles County Sheriff's Office saw Santana walking on Wakefield Circle and stopped him because he matched the description of the shooter broadcast by police. Although it was the middle of January, and "cold and windy," Black testified at trial that Santana was wearing a shirt and pants, but no coat. Having at that moment no reason to detain Santana, Sergeant Black let him go.

From the investigation, the police recovered video surveillance footage from two homes in the vicinity, one of which was the video footage given to police by Dotson. The second video, from nearby Oakley Drive, showed a man pacing. Minutes later, it showed a gold car, which a neighbor saw leaving the area after hearing gunshots. According to the State, the man pacing was Santana. The video also showed another man, who the State argued was Santana's associate, Antonio Owens, walking from Wakefield Circle and going to the same gold car.

A few days after Wood's murder, police received an anonymous tip about Santana's involvement. Although detectives went to Santana's home on Rooks Head Place several times over the next few days, they never found him there. The case then went cold for the following two months.

D. Brawner's Testimony

Rashaad Brawner was arrested on March 28, 2016 in connection with an unrelated shooting on Gittings Court in Waldorf. After his arrest for the Gittings shooting and seven months after Wood's murder, Brawner implicated Santana in Wood's death. Brawner

admitted to the full extent of his involvement in Wood's shooting after he was confronted with video footage from a security camera on Oakley Drive that showed Antonio Owens, getting into Brawner's gold Mercury Sable near the scene of Wood's murder. Faced with this evidence, Brawner entered into an agreement with the State in which he would plead guilty to manslaughter in the Gittings shooting, in exchange for a sentence of ten years' incarceration, with all but five years suspended. The agreement was contingent upon Brawner testifying truthfully in "any case" against Santana.

During an interview with police on August 5, 2016, Brawner told police that he had driven Santana and Owens around Waldorf but left shortly before Wood's shooting to get his car repaired. At trial, Brawner admitted that much of that story was either false or misleading and that he had lied to the police at that time to minimize his role in Wood's death. Despite this, Brawner directly implicated Santana in Wood's murder.

Brawner explained that he was at Santana's house on the afternoon of the shooting. As Brawner was leaving Santana's house, he saw three men, including Molly G and Wood, walk up to Rooks Head Court and get into an argument with Santana in front of his house. As the group continued the argument while walking around the corner, Brawner heard gunshots and said that Santana came running back and went into his house. Santana came back out wearing a dark coat and carrying a black handgun. Santana told Brawner, "Molly G just shot at me." According to Brawner, he and Santana then drove around Waldorf looking for Molly G. While they were driving, Santana used Brawner's phone to call Antonio Owens. After Owens joined them in the car, the three men found Molly G.

According to Brawner, Owens got out of the car to shoot Molly G, but his gun jammed. Owens got back into the car and the trio continued driving.

Immediately thereafter, they saw Wood walking on the street. Brawner testified that Santana and Owens exited the car and followed Wood onto Rooks Head Place. Brawner maintained that he stayed in the car, and when he heard gunshots, he pulled off. But, according to Brawner, he soon picked up Owens, who was frantic and shaking. Owens said, "He's dead, bro." Brawner drove off with Owens.

Around 2:20 p.m., Brawner said he got a call from Santana asking Brawner to come pick him up. According to Brawner, Santana called him from "a random 240 number," which police identified as the cell phone number of a social acquaintance and former neighbor of Brawner. Santana asked Brawner to retrieve his jacket from a trash can behind Brawner's former house on Yarmouth Court, another street located within Wakefield Circle. Brawner located the trash can, retrieved Santana's coat with a gun in the pocket and returned it to Santana later that day. Brawner testified that approximately a week after the shooting, Santana admitted that he had shot Wood.

E. The Trial

During the trial, the State called thirty-six witnesses over six days. Only Brawner testified that he had personal knowledge that Santana shot Wood. The State presented a gun that had been found when the police executed a search warrant on a Southeast, Washington D.C. apartment. An expert testified that this gun fired some of the bullets found at the scene of Wood's shooting. There was no witness testimony that Santana had ever handled this gun.

At the close of the State's case, the defense moved for a judgment of acquittal on the grounds that Brawner's testimony went uncorroborated. The trial judge denied the motion and sent the case to the jury. The jury convicted Santana of conspiracy to commit first-degree murder and illegal possession of a firearm by a disqualified person. The jury was unable to reach a verdict on all the other counts, including first-degree murder.

On December 12, 2019, the court sentenced Santana to life in prison for conspiracy to commit first-degree murder, and to 1,017 days for possession of a regulated firearm by a disqualified person. Santana noted this timely appeal.

DISCUSSION

I. The Court Did Not Err in Denying the Motion for Acquittal Because the State Presented Sufficient Corroborating Testimony to Meet the Accomplice Corroboration Rule.

A. Parties' Contentions

Santana contends that the State did not satisfy the accomplice corroboration rule. He argues that the State relied solely on the testimony of Rashaad Brawner to gain the convictions without presenting any independent evidence to establish that he was with Brawner or Antonio Owens on the day of the Rooks Head shooting. Santana asserts that the only pieces of evidence connecting him with the crime were a popular type of winter coat and a neighbor's indirect reference to him in her testimony. Further, Santana contends that on the day of the shooting, Sergeant Black stopped him, and the evidence was that he was not wearing a coat.

Additionally, Santana argues that the State's theory, that he retaliated against Wood because of an earlier incident with Molly G, was not corroborated by any of the trial

witnesses. It was only Brawner, Santana posits, who suggested that the two shootings were connected. Santana contends that the State only proved that two people wearing coats on January 6 shot Wood. Thus, Santana contends that, as a matter of law, the trial court should have granted his motion for acquittal and the case never should have gone to the jury.

The State contends that independent and circumstantial evidence established that Santana was at the scene of Wood's homicide and that this evidence was sufficient to sustain both convictions. First, the State argues that circumstantial evidence from Santana's neighbors and video evidence placed him at the scene of the crime. Second, the State contends that Sergeant Black's testimony demonstrated that Santana was in the area before and after the crime. Third, the State asserts that Brawner's recovery of Santana's parka from a nearby trash can matched the description given by eyewitnesses at the scene of a similar coat worn by the shooter. Therefore, the State contends that the accomplice corroboration rule is satisfied because independent and circumstantial evidence corroborated Brawner's testimony and placed Santana and Owens with him on the day of the shooting, near the scene of the crime.

B. Analysis

1. Accomplice Corroboration Rule

The accomplice corroboration rule requires that accomplice testimony be independently verified to sustain a conviction. *State v. Jones*, 466 Md. 142, 145 (2019). A person accused of a crime cannot be convicted solely on the uncorroborated testimony of an accomplice. *Brown v. State*, 281 Md. 241, 246 (1977). The purpose of the accomplice corroboration rule is to ensure that the trier of fact views the testimony of an

accomplice with "great suspicion and caution" as it is the testimony of a person "admittedly contaminated with guilt, who admits his participation in the crime for which he particularly blames the defendant." *Id.* at 244. An accomplice's testimony is not required to cover every detail and may even rely upon circumstantial evidence. *Ayers v. State*, 335 Md. 602, 638 (1994). The jury may "credit the accomplice's testimony even with respect to matters as to which no corroboration was adduced." *Id.*

In *Wright v. State*, the Court of Appeals elaborated on the meaning of "sufficient corroboration." 219 Md. 643, 644 (1959). The Court explained that corroborative evidence "need only support some of the material points of the accomplice's testimony." *Id.* at 646-47. "Corroborate means to strengthen not necessarily the proof of any particular fact to which an accomplice has testified, but the probative, criminating force of his testimony. 'Material facts' corroborative of the accomplice are facts of criminative character or tending to connect accused with commission of the offense charged." *Id.* at 649 (citation omitted). Without corroborative evidence relating to substantial facts, a conviction cannot be sustained. *Id.* The Court explained that corroborative evidence "must support the accomplice's testimony as to some material facts tending to show that the accused was either identified with the perpetrators of the crime or had participated in the crime itself." *Id.* at 650. It noted, however, that sufficient corroboration is fact-dependent and depends on inferences deducible from the facts and circumstances of a particular case. *Id.* at 650.

In *Wright*, both accomplices testified that they had been with the defendant on the night of an arson moments before the fire started to visibly burn. *Id.* at 651. The

accomplices testified that they drove with the defendant to the ice-skating rink and that the defendant removed a can of oil from the vehicle and carried it towards the rink. *Id.* at 645. They also testified that the defendant took a tire iron with him. *Id.* at 646. The non-accomplice testimony included the discovery of the tire iron in the back seat of the defendant's car and a can of oil found in his backyard. *Id.* at 646. The State acknowledged that the evidence was "not as strong as might be desired." *Id.* at 646. Nonetheless, the Court held that sufficient corroborative evidence existed that showed the defendant with the accomplices on the night of the crime in the vicinity of the crime. *Id.* at 651. The accomplices testified to material facts that connected the defendant "with commission of the offense charged." *Id.* at 650.

In *State v. Jones*, the Court of Appeals affirmed this Court's conclusion that the accomplice corroboration rule was not satisfied. 466 Md. 142 (2019). There, the trial court denied a defense motion for a judgment of acquittal because it found that a group photograph taken on the accomplice's cell phone at a party, a few hours before the shooting, was sufficient corroboration of the accomplice's testimony. *Id.* at 151. While the State argued the photograph met the required independent corroboration, the Court of Appeals held that independent corroboration does not exist if it relies on the testimony of an accomplice. *Id.* at 152; *see also Turner v. State*, 294 Md. 640, 647 (1982) (noting that the accomplice corroboration rule would be "eviscerated . . . if an accomplice was allowed to corroborate himself").

The role of the court is to determine whether "the corroborative evidence was legally sufficient to warrant submission of the case to the jury." *Jones*, 466 Md. at 151 (citing

Wright, 219 Md. at 652). The court's role is limited to ascertaining whether there is any independent evidence that tends "either (1) to identify the accused with the perpetrators of the crime or (2) to show [his] participation in the crime." *Ayers*, 335 Md. at 638. While the corroboration need only be slight, it may not be "wholly speculative." *Jones*, 466 Md. at 155 (citing *Jones v. State*, No. 1988, 2016 Term, slip op. at 11-13, 2018 WL 3770206 (Md. Ct. Spec. App. Aug. 8, 2018)). The reviewing court's focus is on "whether that evidence, once admitted, is sufficiently corroborated to "sustain a conviction." *Id.* at 152.[1]

Brawner's Testimony was Corroborated in Satisfaction of the Accomplice Corroboration Rule.

Santana argues that Brawner's testimony went uncorroborated at trial. He contends that the State's theory of the case merely rested on inconsistent witness statements and vague descriptions of Santana's alleged clothing on the day of the shooting. Santana thus concludes the State failed to meet its evidentiary burden that he was guilty of the crimes alleged beyond a reasonable doubt.

[1] In 2019, the Court of Appeals in *State v. Jones* abrogated the accomplice corroboration rule and held that the jury is entitled to weigh the sufficiency of the evidence without the need for independent corroboration provided the jury is instructed on the possible unreliability of the accomplice testimony. *Id.* at 145. The Court explained that a blanket rule requiring corroboration of an accomplice's testimony "intrudes too far into the jury's constitutional role as factfinder and unnecessarily and arbitrarily deprives the jury of the opportunity to assess and decide the credibility of potentially highly relevant evidence." *Id.* at 162. The Court of Appeals noted that its holding applied prospectively to all trials "commencing with the date of our mandate in the instant case." *Id.* at 169. Therefore, the new rule outlined in *Jones* is inapplicable here because the trial occurred prior to the *Jones* decision.

We agree that the State relied heavily on Brawner's testimony and recognize that its case rested primarily on this testimony However, as we see it, the State introduced sufficient independent evidence to establish Santana's direct involvement in the crime or that he was with the perpetrators of the crime on the day of the shooting. *See also Wright*, 219 Md. at 646 (finding sufficient corroboration for the accomplice corroboration rule even where the State had acknowledged "that the corroborative evidence was not as strong as might be desired").

a. Winter Parka

The State posited that a man wearing a dark-colored winter parka with fur trim was responsible for Wood's death, or, in the alternative, was a conspirator in the shooting that led to Wood's death. At trial, the State presented evidence that Santana was wearing a dark-colored winter parka with fur trim near the crime scene around the time of the shooting. The State's main witness, Brawner, testified that Santana asked him to retrieve his parka from a trash can behind Brawner's former residence after the shooting. In response, Santana argued, as he does here, that the State's evidence as it relates to the parka is insufficient to prove that Santana was wearing the parka during the shooting. Primarily, Santana contends that Brawner's testimony about retrieving the jacket cannot be corroborated by the other evidence. He argues that this is particularly true considering that Sergeant Black testified that around the time of the shooting, he saw Santana not wearing a coat.

Evidence of possession of an object before and after the event with which the object is associated "creates, in turn, a reasonable inference of possession of the object during the

event." *Govostis v. State*, 74 Md. App. 457 (1988). In *Govostis*, this Court held that possession of the murder weapon at the time of the arrest did not corroborate the accomplice's testimony or connect the defendant with the crime because the gun may have been given to him after the murder. This Court elaborated that the fact the defendant was in the company of the accomplice eleven days after the crime and arrested with the murder weapon did not corroborate the purported accomplice or, in itself, connect the defendant with the crime. *Id.* at 469. However, we highlighted that "the corroborating testimony of the [victims] and the arresting officers tend[ed] to establish that [the defendant] was in possession of the murder weapon two days before as well as eleven days after the murder." *Id.* at 466.

In *Govostis*, the mere possession of the murder weapon was not enough to corroborate the accomplice's testimony. Here, one might argue that the same could be true of the parka, which the police found after they executed a search warrant at Santana's residence, because it is possible that Santana could have acquired the parka after the shooting. *See Id*. at 469. But, like as in *Govostis*, where the other corroborating evidence linked the defendant to the crime aside from the recovered gun, here, the State presented independent and circumstantial evidence that tended to establish that Santana was in possession of the parka before, during, and after the crime. *Id.* at 466. The parka matched the description given by Brawner in his testimony and matched the description of the individual Gail Fenwick saw shooting her son, Wood. Fenwick's testimony that she saw two men, one wearing a black fur-trimmed parka with a black gun and one with a silver gun, created a reasonable inference that the two men were Santana and Owens. Fenwick's

testimony supported a "material fact" of Brawner's testimony, which was that Santana was wearing a parka on the day of the shooting and carried a black gun and was in the company of Owens, who carried a silver gun. *See id.*; *Wright*, 219 Md. at 649.

Even though Sergeant Black stopped Santana minutes after the shooting while not wearing a jacket, this does not negate the likelihood that Santana discarded the jacket immediately after the shooting and then, later, retrieved it from Brawner. Even so, "a reasonable inference of possession" existed and thus, the jury was entitled to give its own weight to and ascertain the importance of the parka in connection with Brawner's testimony. *Govostis*, 74 Md. App. at 457; *Dawson v.* State, 329 Md. 275, 281 (1993) (explaining that "it is the jury's task, not the court's to measure the weight of evidence and to judge the credibility of witnesses"); *McMillian v.* State, 325 Md. 272, 290 (1992) ("[I]t is the exclusive function of the jury to draw reasonable inferences from proven facts."). The discovery of the parka combined with Fenwick's testimony, sufficiently corroborated Brawner's accomplice testimony.

b. Eyewitness Testimony

Aside from Santana's possession of the parka, the State also presented eyewitness testimony that corroborated Brawner's testimony that Santana was associated with Owens in Wood's slaying or showed that Santana was a direct participant in the crime. Legally sufficient corroborative evidence consists of independent evidence that corroborates the accomplice's testimony "that the accused was in the vicinity of the crime at the time it was committed or that he was in the company of the perpetrator either shortly before or shortly after the crime." *Wise v. State*, 8 Md. App. 61, 63-64 (1969). First, Fenwick's testimony

corroborates Brawner's testimony that Santana and Owens were together at the time of the shooting. *Wright*, 219 Md. at 650. Fenwick testified that she saw two men, one of whom was wearing a dark jacket with a fur-lined hood and carrying a black gun and the other man was wearing a grey jacket with a hat and carrying a gray or silver gun. Fenwick's testimony as to the description of the shooters is independent evidence that relates to a "material fact" of the accomplice's testimony. Brawner testified that Santana and Owens were together at the time of the shooting in the vicinity of the crime. *Wright*, 219 Md. at 650 (explaining that corroborative evidence "must support the accomplice's testimony as to some material facts tending to show that the accused was either identified with the perpetrators of the crime or had participated in the crime itself").

Second, video footage from a home on Oakley Drive showed a gold Mercury Sable, identified as Brawner's vehicle, driving onto Wakefield Circle around the time of the shooting. The video footage also showed an individual pacing back and forth, who the State identified as Santana, and Fenwick testified she saw an individual pacing back and forth before the shooting. The video footage and Fenwick's testimony go to a "material fact" of Brawner's testimony by placing Santana in the vicinity of the crime. Additionally, according to the State, the video showed Santana's associate, Owens, making his way to Brawner's vehicle after the shooting. Brawner testified that after the shooting Owens got into Brawner's vehicle and said, "He's dead, bro." The circumstantial identifications of Santana and Owens near the scene and at the time of the crime sufficiently corroborated Brawner's testimony and related to substantial facts that tended to connect Santana with the crime. *Wright*, 219 Md. at 649; *see also Jeandell v. State*, 34 Md. App. 108, 112 (1976)

(stating that non-accomplice testimony must identify the defendant with the accomplices at or near the time of the crime).

Third, Edith Johnson's testimony that she saw Santana with an individual she did not recognize about an hour before the shooting tended to place Santana in the company of Brawner within the time frame of the shooting. Johnson's identification tends to corroborate Brawner's testimony that earlier in the day he and Santana got into a scuffle with Molly G. *See Wise*, 8 Md. App. at 63-64 ("Independent evidence corroborating the accomplice's testimony that the accused was in the vicinity of the crime at the time it was committed or that he was in the company of the perpetrator either shortly before or shortly after the crime constitutes legally sufficient corroborative evidence."). Johnson's testimony corroborates evidence going to a "substantial fact" of Brawner's testimony, which is that Brawner and Santana were together within an hour of the shooting. *Wright*, 219 Md. at 649.

Relying on circumstantial evidence and the facts deducible therefrom, the State introduced sufficient evidence that "with some degree of cogency, either identif[ied] [Santana] as a perpetrator of the crime or showed that [Santana] participated." *McCray v. State*, 122 Md. App. 588 (1998). Therefore, we conclude that the court did not err in denying the motion for judgment of acquittal. The State provided sufficient non-accomplice testimony and circumstantial evidence to corroborate Brawner's testimony that Santana either committed the crime or participated with the others in Wood's murder.

II. Santana's Conviction Should Not Be Reversed Because He Did Not Preserve an Objection to the Alleged False Testimony at Trial, and Even If He Had Raised an Objection, the State Did Not Procure False or Misleading Testimony from Any Witness.

A. Parties' Contentions

Santana contends that the State knowingly relied on false testimony in violation of the Fourteenth Amendment. He maintains that Rashaad Brawner and Lead Detective John Elliot both gave false testimony that the State knew or should have known was false, the State failed to correct the witnesses, and this failure was material to the outcome of the trial.

First, Santana argues that the State failed to correct Brawner's mistaken understanding of the plea agreement he entered into with the State in return for his testimony at trial and the failure to correct Brawner allowed the jury to take an "unfounded view of Brawner's credibility—the foundation of the State's case against Santana."

Second, Santana argues that the State's introduction of Brawner's phone records clearly contradicted Brawner's testimony as it related to the three phone calls that Brawner received from Santana following the shooting, and thus, the State had an obligation to investigate that contradiction and to correct it. Santana contends that the testimony surrounding the phone calls is material because of their importance in establishing the timeline of the afternoon's events and implicating Santana.

Third, Santana contends that the State failed to correct errors in Detective Elliot's testimony that related to whether the Charles County Courthouse had surveillance cameras in the parking lot. Santana argues that Detective Elliot was aware that one potential

suspect, Anthony Dotson Jr. had been seen in the Charles County Courthouse parking lot with an associate threatening someone that they would "end up like your friend," referring to Lydell Wood. During cross-examination, defense counsel asked the detective if he ever reviewed video footage of the incident. During a bench conference, the trial judge informed counsel there was no video surveillance in the parking lot. Following the bench conference, the defense asked if the detective reviewed any video footage. The detective claimed that he did review video footage but did not include it in his report. Santana argues that the presiding judge's statement as to the lack of video surveillance in the parking lot created a duty in the prosecutor to correct the testimony. Santana contends this testimony is material because it suggests that Detective Elliot followed up on information about an alternative suspect, which could have affected the jury's judgment as to the robustness of the investigation.

The State contends that Santana's arguments as to the false testimony are not reviewable on appeal because Santana did not raise these issues at trial, thus his objection is not preserved. The State also contends that even on the merits, Santana cannot show that any of the testimony was false or that the evidence was material and favorable to Santana.

As for the plea agreement, the State contends that it was not false or misleading because the State presented the terms of the agreement and Santana extensively questioned Brawner about the terms of the agreement. Regarding the phone calls, the State contends that the phone records were extensively covered on cross-examination with the witness and Santana did not raise these issues at trial. Finally, the State contends that it was not "duty bound" to correct Detective Elliot's misstatement, especially concerning tangential

matters, such as with the cameras in the parking lot. The State argues that correcting this misstatement would not have been favorable to Santana because the testimony indicated that someone else had been investigated and that there was video evidence of the fight, which supports Santana's argument that the officers did not adequately investigate the case.

B. Analysis

1. Rule 8-131

Maryland Rule 8-131 governs the scope of review for the Court. The Rule provides that the Court may only decide issues that appear plainly on the record or were raised in or decided by the trial court, unless on appeal, the issue must be decided to avoid the expense of another appeal or to properly guide the trial court. Specifically, Rule 8-131 states:

> (a) Generally. The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

The purpose of the Rule is to ensure a fair and orderly administration of justice by "requiring counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceeding." *Robinson v. State*, 410 Md. 91, 103 (2009). As Santana is contesting the trial court's ruling, he must have made a timely objection at trial otherwise he is barred "from obtaining review of the claimed error as a matter of right." *Id.* at 104; *see also Basoff v. State*, 208 Md. 643, 650 (1956) (explaining that where the party has the option to object at

trial, the failure to object "while it is still within the power of the trial court to correct the error is regarded as a waiver" thus preventing review on appeal).

The Rule necessarily requires that "'the 'issue' must 'plainly appear' by the record to have been 'raised in' the trial court or 'decided by' the trial court." *Ray v. State*, 435 Md. 1, 20 (2013). In *Ray*, the Court of Appeals explained that the petitioner did not "raise" the issue either before or during the suppression hearing and that the petitioner did not attempt to use cross-examination of the State's witnesses to advance his argument that the State lacked probable cause. *Id.* The Court explained that at no point did the defense contest whether the police had probable cause to arrest the defendant. *Id.* at 21. The Court noted that to address an issue on appeal that was not litigated in the trial court "depriv[ed] the State of any opportunity to introduce additional evidence or advance a new theory in opposition" to the defendant's argument. *Id.* at 23. The Court explained that appellate courts should rarely exercise discretion to hear on appeal issues that were not raised before the trial court. *Id.*

Here, when Santana moved for a judgment of acquittal, he exclusively focused on whether the State met its burden to satisfy the accomplice corroboration rule. While the record plainly indicates the trial court's decision as to the accomplice corroboration rule, the issue of the purportedly false testimony of Detective Elliot and Rashaad Brawner does not "plainly appear . . . to have been raised in the trial court or decided by the trial court." *See Ray*, 435 Md. at 20. As in *Ray* where the petitioner failed to raise the issue during the motions hearings or cross-examination, here, Santana did not advance an argument about the falsity of either witness' testimony during trial and did not question whether either

witness' testimony was false. *Id.* at 21. Without raising these issues at trial, Santana necessarily deprived the State of the opportunity to respond to these arguments or to present countering evidence. Consequently, under Rule 8-131, we conclude that Santana's assignments of error related to Brawner's plea agreement, the testimony about Brawner's phone records, and Detective Elliot's testimony, are not preserved because they were neither raised in nor decided by the trial court.

2. If Reviewed, Reversal is not Required Because the State Did Not Present False Testimony

Even if we determined that Santana's alleged errors were preserved for review, after examining the merits of each of his arguments, we nonetheless would conclude that reversal is not required because in each instance the State did not present false testimony.

Reversal of a conviction on the grounds of false testimony requires a defendant to meet two conditions. First, the defendant must demonstrate that the State knowingly presented false evidence or testimony at trial. *United States v. Agurs*, 427 U.S. 97, 103 (1976); *Lyde v. Warden*, 1 Md. App. 423, 427 (1967) (explaining that the applicant bears the burden of proving that the State "knowingly used perjured testimony" to secure a conviction). The government is not required to have elicited the testimony as it is sufficient for the State to allow the evidence to go uncorrected when it comes up. *United States v. Griley*, 814 F.2d 967 (4th Cir. 1987). Not only must the State refrain from producing false testimony, but it must also "correct statements, known to be false, even if unsolicited." *Hall v. Warden of Md. House of Correction*, 222 Md. 590, 593 (1960). Second, the defendant must demonstrate that the falsehood was material and that a reasonable

likelihood exists that the false evidence or testimony could have affected the jury's verdict. *Agurs*, 427 U.S. at 103.

The State's "knowing use of material, false evidence" in a criminal trial violates due process and affects the "constitutional concept of fairness." *See Giglio v. United States*, 405 U.S. 150, 153 (1972); *Hall*, 222 Md. at 593; *see also Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (noting that where the State secures a conviction through testimony known to be perjured, the conviction "is . . . inconsistent with the rudimentary demands of justice"). The State's obligation to not present false testimony applies as equally to a witness's credibility as it does to a defendant's guilt. *See Napue v. People of State of Illinois*, 360 U.S. 264, 269 (1959).

a. Plea Agreement

In *Napue*, the United States Supreme Court held that the government's use of false testimony to secure the petitioner's conviction may have affected the outcome of the trial. 360 U.S. at 272. In *Napue*, the petitioner argued that a key witness for the government gave false testimony and that the government knew the testimony was false. *Id.* at 267. The government's witness falsely testified that he received no promise of consideration in exchange for his testimony and the government failed to correct the testimony, despite promising consideration. *Id.* at 265. The Court explained that if the jury had been aware of the promise, then it may have concluded that the witness "had fabricated testimony in order to curry the favor of the very representative of the State who was prosecuting the case in which [the witness] was testifying, for [the witness] might have believed that such a representative was in a position to implement (as he ultimately attempted to do) any

promise of consideration." *Id.* at 270. Additionally, the government, itself, on re-direct even sought to establish to the jury "that no official source had promised [the witness] consideration." *Id.* at 270; *see also Giglio*, 405 U.S. at 151 (holding that given the importance of the witness's credibility to the issues, "evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it"); *Jones v. State*, 8 Md. App. 405, 413 (1970) (citing *State v. Taylor*, 231 A.2d 212, 221 (1967) (noting that where a co-defendant's plea agreement requires truthful testimony about the other defendant in exchange for leniency, "such promise or understanding should be fully, fairly and honestly disclosed")).

Santana contends Brawner's understanding as the extent of his plea agreement equates to the false testimony that existed in *Napue*. We disagree. Unlike in *Napue* where the plea agreement was not disclosed, here, the State disclosed the plea agreement and entered a written copy of it into evidence. On direct examination, the State questioned Brawner about the plea agreement. Therefore, the jury was aware of the terms of the plea agreement, unlike in *Napue* where the jury was unaware of the terms of *any* potential plea agreement. *See Napue*, 360 U.S. at 269. In this case, the jury could determine "the truthfulness and reliability" of Brawner's testimony because the jury had the plea agreement, it was disclosed to Santana, and Santana thoroughly cross-examined Brawner on the terms of the agreement. *Id.* at 269 (noting that the jury's estimation of a witness's reliability "may well be determinative of guilt or innocence and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

Based on a review of the transcript of Brawner's testimony, we think that Brawner misunderstood the scope of the plea agreement. He thought the agreement granted him immunity from prosecution in this case, when, in fact, it did not. This misunderstanding was not a product of the State eliciting false testimony. While Brawner testified that a former State's Attorney had told him he would not be prosecuted for Wood's murder, the prosecutor in this case stated at a bench conference during the trial that the State had disclosed to Santana everything related to the plea agreement. The prosecutor explained that the deal was not what Brawner thought it was, but the terms of the agreement were as they had been disclosed to Santana. We conclude that the State fully disclosed the terms of the plea agreement to both Santana and the jury. *Giglio*, 405 U.S. at 155 (explaining that "evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it"); *Wilson v. State*, 363 Md. 333, 352 (2001) (noting that had the jury known about the extent of leniency the witnesses received, there was "a substantial possibility that the outcome would have been different"). The jury had the opportunity to assess Brawner's credibility as the details of the plea agreement were revealed on direct and cross-examination.

Santana's cross-examination of Brawner as it pertained to the plea agreement spread over 100 pages of the trial transcript. The State's disclosure of the plea agreement enabled Santana to question Brawner as to his understanding of the plea agreement, which could demonstrate his bias and credibility for the jury. *See Ware v. State*, 348 Md. 19, 50 (1997) (explaining that evidence of plea agreements or deals with witnesses "provide[] powerful impeachment evidence against a witness and enable[] a defendant to attack the motive or

bias of a witness" who may have an incentive to falsify testimony); *United States v. Payne*, 63 F.3d 1200, 1210-11 (2nd Cir. 1995) (concluding that "under the rigors of the vigorous cross-examination by defense counsel, any bias or prejudice underlying her testimony was surely demonstrated to the jury, thus the jury was able to weigh the truthfulness adequately"); *DeLoach v. State*, 308 Ga. 283, 294 (2020) (noting that the witness "amply demonstrated his questionable credibility at trial," thus there was "no reasonable likelihood that [the witness'] false testimony about his plea agreement could have affected the jury's assessment" of the witness's credibility).

We hold that Santana's argument on the merits is not compelling. The State did not knowingly present false testimony about Brawner's plea agreement. *See Giglio*, 405 U.S. at 153. Instead, the State fully complied with the demands of justice by "fully, fairly and honestly disclos[ing]" the extent of the plea agreement to both Santana and the jury. *Jones*, 8 Md. App. at 413.

b. Phone Records

Santana contends the State knowingly presented false testimony when it introduced Brawner's cell phone records. Those records contradicted Brawner's testimony of the events that happened after Wood's murder—a central element of the State's case. Santana claims that the State's introduction of these records, which Brawner's testimony contradicted, amounted to the introduction of false testimony. We disagree.

First, Santana has not shown that the State knew or participated in giving false testimony. *Conyers v. State*, 367 Md. 571, 597–98 (2002). A prosecutor's possession of evidence that is contradictory to the witness's testimony is not necessarily the knowing use

of false testimony. *See United States v. Payne*, 940 F.2d 286, 292 (8th Cir. 1991) (explaining that inconsistencies may come out in trial testimony and that the defendant had access to the information which revealed contradictions with what the witness told investigators). "Mere inconsistences in testimony by government witnesses do not establish the government's knowing use of false testimony." *Griley v. United States*, 814 F.2d 967, 971 (4th Cir. 1987). Thus, even though the State's evidence was contradictory that "inconsistent testimony [was] for the jury to weigh; it does not establish [the witness's] perjury." *Id.*

In *Griley*, a government witness testified that he had not previously firebombed phone booths. 814 F.2d at 971. The defendant argued that the government witness's statement amounted to perjury because a second government witness had testified that he had helped the first witness firebomb phone booths. *Id.* The trial court declined to find that the first witness's testimony was perjury, instead noting that these were merely inconsistencies in the government's evidence. *Id.* Similarly, here, Brawner and Officer Austin gave inconsistent testimony. Brawner's testimony about where he claimed to be at a certain time may have been temporally impossible, but Brawner's testimony and his contradictory cell phone records merely created "inconsistent testimony for the jury to weigh." *Id.*

Second, even if the evidence was in fact false, it was still not material or favorable to Santana. *Agurs*, 427 U.S. at 103. The inconsistencies are not material because the jury was presented with all the relevant testimony as Santana's trial counsel specifically asked Officer Austin whether Brawner had to be lying for the timeline to make sense.

> [DEFENSE COUNSEL]: Now you, you also know from talking to Mr. Brawner that this call is important because he claims that after he received this call, he then called Andarius Conner to tell him to go pick up Miguel Santana, right?
>
> [OFFICER AUSTIN]: Correct.
>
> [DEFENSE COUNSEL]: So it's an important part of the chronology, because basically Mr. Brawner receives this call from this 240 number and then Mr. Brawner calls Mr. Conner right?
>
> [OFFICER AUSTIN]: Correct.
>
> [DEFENSE COUNSEL]: And I apologize if I'm sort of stating the obvious here, but I just want to make sure it's clear. Mr. Brawner calls, told you he called Mr. Conner about picking up Mr. Santana so this call, this 2:18 call from this random 240 number, it has to be Mr. Santana for Mr. Brawner's story to make sense right, because then Mr. Brawner calls Mr. Conner and says please go pick up Miguel, right?
>
> [OFFICER AUSTIN]: Correct.

The jury had ample opportunity to assess Brawner's credibility by examining his testimony and the conflicting phone records. Indeed, Santana's trial counsel spent over 150 transcript pages cross-examining Officer Austin and Brawner as to the chronology of events presented in the phone records. Thus, the jury had an opportunity to explore discrepancies in the evidence. *See Wilson*, 363 Md. at 352 (explaining that the "jury's assessment of the credibility" of the witnesses "was most likely a determining factor in the guilty verdict"). Even if Brawner's testimony was false, that testimony regarding the phone records was not material.

We hold that the State did not introduce false testimony by producing Brawner's cell phone records. Even if one could say that Brawner's testimony about what he did after the shooting was false, as the phone records contradicted that testimony, we think the

contradiction was not material. Santana had Brawner's phone records, the records were produced for the jury, and Santana's trial counsel spent considerable time cross-examining Brawner and the police officer who introduced the records about the inconsistencies between the phone records and Brawner's testimony. The jury was charged with resolving contradictions in the evidence and did so in this case.

c. Detective Elliot's Testimony

Santana contends that the State knowingly introduced false testimony when Detective Elliot testified that he reviewed video surveillance of a confrontation between Anthony Dotson and another individual. According to a comment the trial judge made during a bench conference, video footage of such an event probably did not exist, because, according to the judge's recollection, there were no video cameras surveilling the courthouse's parking lot. Santana argues that because of the judge's statement, the State knew that Detective Elliot's testimony was false. We disagree.

In *United States v. Basham*, the defendant contended that the prosecutor introduced testimony that they knew or should have known was false. 789 F.3d 358, 376 (4th Cir. 2015). The court explained that the "prosecution 'did not vouch for the accuracy of Basham's statement,' and that 'the government did not advance an argument to the court or the jury that Basham was the one who used the strap to strangle [the victim].'" *Id.* at 377. Further, while the prosecution presented the officer's testimony to the grand jury, the prosecution did not adopt that testimony as the theory of its case. *Id.*

In *United States v. Abebayo*, the court found that the defendant failed to present evidence that the perjured testimony was part of the government's case. 985 F.2d 1333,

1342 (7th Cir. 1993). The court elaborated that the defendant's attorney elicited the perjured testimony from the witness. *Id.* The government's aim on direct was to ensure the topics were expressly limited to specific topics "to ensure that [the witness] would say nothing that the government considered untruthful." *Id.* However, the defendant's attorney, "elicited from [the witness] his perjurious assertion that he was unaware of the contents of the heroin packets." *Id.* Therefore, the court concluded that the perjured testimony was not only not part of the government's case but also the government had no way of knowing that the witness would present perjured testimony. *Id.*

Just as in *Basham* and *Abebayo*, where the government did not present perjury or advance an argument that supported a witness's perjurious assertion, the State neither presented nor advanced any such argument in Santana's case. During his direct examination, the State questioned Detective Elliot about an incident with Anthony Dotson Jr. which had occurred at the courthouse. The State did not ask any questions about whether the incident had been recorded or if the detective had reviewed a recording of the incident. In fact, the issue of a video recording only came up on cross-examination. In this case, we cannot say that the State elicited the witness's testimony, whether false or not. *See Abebayo*, 985 F.2d at 1342 (finding that the defense elicited the claimed "perjurious assertion," which had not been part of the Government's case). Further, after Santana's trial counsel asked a question about whether Detective Elliot had seen video footage of the incident, at a bench conference the judge informed counsel that there were no surveillance cameras in the parking lot, and that the Detective may or may not know that. After resuming cross-examination, Santana's counsel continued to ask the detective whether any

video recordings of the incident existed and if so, whether their existence was noted in the detective's report regarding the incident. Our review of the record reveals that Santana's trial counsel created the controversy they now claim that the State should have remedied. *Cf. Basham*, 789 F.3d at 376 (explaining that the government did not advance an argument to the court or the jury that Basham was the one who used the strap to strangle [the victim]").

Here, the State did not introduce or fail to correct false testimony. The testimony at issue was introduced by Santana's counsel. Even if addressed, we find no merit in Santana's contention that the State allegedly procured false testimony.

III. The Prosecutor's Comment During Rebuttal Closing Was Not Prejudicial, and Even if It Was, It Was Harmless Beyond a Reasonable Doubt.

A. Parties' Contentions

Santana contends that his conviction should be reversed because the State asserted facts about a call sheet during the rebuttal portion of their closing argument, which Santana claimed were not in evidence. Santana contends that his trial counsel's objection was neither sustained nor overruled, which prejudiced Santana. Santana contends reversal is warranted because the State's case against him is thin, the prosecutor's remark was materially misleading, and the trial court undertook no measures to cure. The State contends that the prosecutor's remark was proper and that any error was harmless because the same type of statement had been made in the State's initial closing argument and in Santana's counsel's closing argument.

1. Preservation

As we have previously discussed, under Rule 8-131(a), a defendant must object during closing arguments to preserve an issue for appeal. *See Shelton v. State*, 207 Md. App. 363, 385 (2012); *Icogren v. State*, 103 Md. App. 407, 442 (1995) (declining to find an issue preserved for appeal when the defendant failed to make an immediate or belated objection at any point during the prosecution's closing argument). An issue is preserved for appeal if the party objects to that portion of the prosecutor's closing argument. *Stevenson v. State*, 94 Md. App. 715, 730 (1993).

While the State argues that Santana failed to preserve the issue of the propriety of the prosecutor's comment during closing, we do not agree. Santana's trial counsel objected as soon as the prosecutor made the comment. Based on Santana's prompt objection to the comment, we find that the issue is preserved. *See Shelton*, 207 Md. App. at 385.

2. Merits

Given that the issue was preserved for appeal, we examine what the prosecutor said on rebuttal that Santana found objectionable. In the State's initial closing argument, the prosecutor recounted the events that occurred after the shooting. The prosecutor observed that Sergeant Black had stopped Santana around 2:14 p.m. "give or take a few minutes given the chaotic situation with the dispatcher and all that's going on." The prosecutor also highlighted that this "isn't going to be an exact time, right" because there was so much going on at the time. Further, the prosecutor said: "the fact [that] you have a dispatcher typing in what's happening after the information is coming to them, which it would be after the time it actually happened." In his closing argument, defense counsel asserted that

"these dates, these times come from CAD, the computer-aided dispatch report from the Charles County emergency response system."

In response to this statement in the State's rebuttal closing, the prosecutor asserted that "[t]here's no testimony, no evidence as to how that is created. It ain't a verbatim as you talk it comes in; it's entered in, entered in after it happens." Defense counsel objected and the trial judge called the parties to a bench conference. After hearing argument about the defense objection to the State arguing facts not in evidence, rather than rule on the objection, the judge simply told the prosecutor to "move on." We conclude that the trial court had the discretion to rule on the objection but did not exercise it. That omission constitutes error. *Thompson v. State*, 167 Md. App. 513, 526 (2006) (noting that if the court fails to exercise discretion "when the court indeed has discretion to do so is an abuse of discretion").

We now consider whether the trial court's error was harmless. Improper comments made during closing are subject to harmless error review. The prosecution has the burden of establishing beyond a reasonable doubt "that the error did not contribute to the verdict—and is thus truly 'harmless.'" *Dorsey v. State*, 276 Md. 638, 658 (1976). An error is harmless if "a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *Fuentes v. State*, 454 Md. 296, 279 (2017) (citing *Simpson v. State*, 442 Md. 446, 457 (2015)) (internal citations and quotations omitted).

An appellate court reviews "the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused" to determine

if a remark necessitates reversal. *Lee v. State*, 405 Md. 148, 165 (2008). On review, we consider the statements "in the context of the prejudice that each of the statements, and all of them, created in the minds of the jurors." *Id.* at 175. "Not every improper remark, however, necessitates reversal." *Id.* at 164. Reversal is only required if the prosecutor's remarks "actually misled the jury or were likely to have misled the jury or influenced the jury to the prejudice of the accused." *Degren*, 352 Md. at 431; *Henry v. State*, 324 Md. 204, 230 (1991) (stating that reversal is not justified unless the "jury were actually misled or were likely to have been misled or influenced to the prejudice of the accused by the remarks of the State's Attorney").

Here, the State's comment was not severe, even though Santana claims it relates to a key aspect of the State's timeline of Wood's murder. Contrary to what Santana argues, the prosecution did not "introduc[e] specific misleading evidence" because similar comments had already been made in both Santana's counsel's closing and the prosecution's initial closing argument. *See Wilhem v. State*, 272 Md. 404, 427 (1974) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974)). Thus, the comment could not have misled the jury as both parties essentially argued their point as to why the call sheet time was either correct or incorrect. *See Henry*, 324 Md. at 232 (finding that when examining the comment "in its entire context" the prosecution's comment did not warrant reversal because the comment was a direct response to the defense's closing argument); *see also Shelton*, 207 Md. App. at 363 (explaining that reversal was not warranted because the defendant "had an opportunity to address the facts omitted in the prosecutor's closing argument").

While Santana contends that the trial judge's failure to rule on the objection or provide a curative instruction prejudiced him, we disagree. In *Degren*, the trial court did not provide a curative instruction following the prosecutor's comments but had instructed the jury on the role of closing arguments and on the role of the jury in evaluating the case prior to closing arguments. 352 Md. at 433. Here, the trial court also gave the jury their instructions prior to closing arguments, thus the jury was aware of the purpose of closing arguments. The jury had been instructed that closing arguments were not evidence. *See Spain v. State*, 386 Md. 145, 160 (2005) (explaining that jury instructions can be "ameliorative of any prejudice result[ing] from the improper comments"); *Henry*, 324 Md. at 232 (noting that "the judge properly instructed the jury on the applicable law, including the State's burden of proof," thus the prosecutor's comments "could not have misled or prejudicially influenced the jury").

While Santana contends that the weight of the evidence mandates reversal, we do not agree. The weight of the evidence is also considered in determining the prejudicial impact of a prosecutor's comment. *Spain*, 386 Md. at 161. In *Spain*, the Court of Appeals concluded that while sufficient evidence existed of the defendant's guilt, it was not "truly overwhelming." *Id.* Here, as discussed, the State presented accomplice testimony, eyewitness testimony, videotape evidence, and other circumstantial evidence that pointed to Santana's guilt. Although the evidence was not overwhelming, the fact that the jury could not reach a verdict on first-degree murder, use of a firearm in a violent felony, wearing, carrying, and transporting of a handgun on the person and wearing, carrying, and transporting of a handgun on a public road, shows that the prosecutor's comment on

rebuttal closing did not "infect [Santana's] trial with unfairness and was not likely to have prejudiced him." *Hill*, 355 Md. at 209. Under these circumstances reversal is not required.

JUDGMENTS OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.