UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1328

September Term, 2013

DERRICK TOOMER

v.

STATE OF MARYLAND

Nazarian,
Reed,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: August 21, 2014

Derrick Toomer, appellant, was convicted in the Circuit Court for Baltimore City of first degree murder, conspiracy to commit first degree murder, use of a handgun in the commission of a crime of violence, and possession of a regulated firearm after having been convicted of a disqualifying crime. Before this Court he presents the following questions for our review:

> 1. Did the court err in denying appellant's motion to suppress his inculpatory statement made to a detective?
>
> 2. Did the court abuse its discretion in denying appellant's motion *in limine* to preclude the admission of a voicemail message into evidence?
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> 3. Did the court abuse its discretion in overruling appellant's objections to the admission of a handgun and ballistics evidence?
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> 4. Did the court err in allowing a detective to narrate what he saw on a surveillance video?
>
> 5. Did the court err in overruling appellant's objections to the prosecutor's closing argument that the DNA evidence points at appellant?
>
> 6. Was the evidence sufficient to convict appellant?

We shall hold that the trial court erred in overruling appellant's objections to the State's closing argument regarding the DNA evidence, and reverse. We shall address other issues raised by appellant in order to guide the trial court on remand, and we shall address sufficiency of the evidence because retrial is not permitted if the evidence is insufficient.

I.

Appellant was indicted by the Grand Jury for Baltimore City in three separate indictments with first degree murder, use of a handgun in the commission of a crime of violence, two counts of wearing and carrying a handgun, conspiracy to commit first degree murder, and possession of a regulated firearm after having been convicted of a disqualifying crime. The cases were consolidated for trial before a jury in the Circuit Court for Baltimore City.[1]

The jury convicted appellant of first degree murder, conspiracy to commit first degree murder, use of a handgun in the commission of a crime of violence, and possession of a regulated firearm after having been convicted of a disqualifying crime. The court sentenced him for first degree murder to life imprisonment, for conspiracy to commit murder, life imprisonment, concurrent, for use of a handgun, to a term of incarceration of ten years consecutive to the life sentence, and for possession of a regulated firearm to a term of incarceration of five years, concurrent to the use of a handgun sentence.

The following facts were elicited at trial. On July 30, 2008, the police found Ralph Hall dead in the parking lot of the KIPP Academy on Greenspring Avenue in Baltimore City. Mr. Hall ran a bail bonds business. James Nelson, a good friend of appellant, testified that Michael Hayes, a former business partner of Mr. Hall, wanted to kill Mr. Hall because Mr. Hall was planning to set-up Mr. Hayes to be robbed. Mr. Hayes hired appellant to kill Mr.

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[1]The State *nolle prossed* both counts of wearing and carrying a handgun.

Hall, and appellant in turn hired George Johnson as the trigger man. Mr. Hayes gave money to appellant before and after Mr. Hall was killed, and appellant gave money to Mr. Johnson after Mr. Hall was killed.

According to Mr. Nelson, Mr. Johnson left Mr. Hall a voicemail message asking to meet with him because he knew someone who could sell him insurance for his bail bonds business. The voicemail message was admitted at trial, and both Mr. Nelson and Detective Michael Moran identified Mr. Johnson as the caller. Mr. Nelson testified that appellant told him that he and Mr. Johnson drove in a blue vehicle to meet Mr. Hall and that Mr. Johnson shot Mr. Hall with a .38 caliber handgun. According to Mr. Nelson, appellant then gave the gun to his son, Kelly Toomer. The State recovered a .38 caliber handgun from Kelly Toomer when they arrested him. Although a firearms expert could not determine whether the bullets that killed Mr. Hall were fired from that particular gun, Mr. Nelson testified that appellant told him that it was the murder weapon. The court admitted the gun into evidence.

Detective Moran testified that when he was transporting appellant from the Central Booking facility in Baltimore City to the location where he was incarcerated, appellant said, "Moran, what do I have to do to get out of this? I've done some things in my past, but I didn't do this one. I drove him there, and that's it. I left. I don't know about no murder."

A surveillance video from the KIPP Academy the day of the murder was admitted at trial. In the video, two individuals got out of a dark four-door car, walked to a separate parking lot, entered a Ford Expedition, and a short time later, a body fell out of the driver's

side door. The jury viewed the video twice, and the second time, Detective Moran narrated the events of the video for the jury. Detective Moran also described the events in the video in his testimony, over defense counsel's objection.

The police found a Ford Expedition vehicle belonging to Mr. Hall the day after the murder a few blocks away from the crime scene. A DNA expert testified that appellant was excluded as a contributor to most of the DNA samples taken, but that there was one sample from which appellant could not be included or excluded.

Appellant did not testify at trial. Defense counsel argued, in closing, the lack of DNA evidence and the unreliability of the State's witnesses. The jury convicted appellant of all charges and the court sentenced appellant as noted above.

This timely appeal followed.

II.

We first address appellant's argument that the court erred in overruling his objection to the State's closing argument that the DNA evidence "points at" appellant. We hold that the court committed reversible error in overruling the objection and remand for a new trial.

Jennifer Ingriton, an expert in the field of DNA analysis, testified at trial. She examined several DNA samples that the police seized from Mr. Hall's Ford Expedition vehicle and compared them to known samples, including one of appellant's DNA. She explained that with respect to each sample, she could draw one of the following conclusions:

> "Well, we could draw a statement of inclusion where we have identified the person in the sample. There could be a statement of exclusion, where they're not in the sample. There could be a statement where they can't be excluded *and can't be excluded also would mean they can't be included*. It's kind of an area where we just can't tell if the person is truly there or not."

Ms. Ingriton later clarified as follows:

> "When I say it can't be excluded, *it also means that I can't include him either*. There is some genetic information that's consistent with his profile, *but there's just not enough*. It's kind of like this grey area where we have some information, not enough to exclude, but not enough to include so then we make this statement of cannot be excluded."

Ms. Ingriton testified that she determined that George Johnson contributed to three of the samples. She excluded appellant as a contributor from several of the DNA samples. She found no samples in which appellant was a contributor. She stated that appellant could not be excluded from Sample #15, a sample from the front passenger side door interior hold bar. Ms. Ingriton explained that appellant matched at eight locations in Sample #15, which meant that he could not be excluded as a contributor, but that it was not enough to include him. The minimum for including appellant as a contributor, according to Ms. Ingriton, was a match at ten locations, "but it could be nine as well." In response to a question from defense counsel, Ms. Ingriton testified that she could not determine whether someone had tried to wipe off DNA in the vehicle or not.

In closing, defense counsel and the State both referred to the DNA evidence. Defense counsel simply argued, "The bottom line is there is no DNA evidence to link [appellant] to this crime."

The State's references to the DNA evidence were far more extensive. In her initial closing argument, the prosecutor said: "We know that [George Johnson and appellant] met up later. How do we know they met up later? The DNA. James Nelson and the DNA." Defense counsel made a general objection, which the court overruled. Not long after, the prosecutor argued as follows:

> "[George Johnson] knew he didn't have to go very far because he knew [appellant] was going to help him wipe down that car. *And there's evidence of that wiping down*. How do we know that? Because what's interesting about the DNA is that it definitely shows that George Johnson was there, it definitely shows that Ralph Hall has been in his own car; but there are also places where there are—there's no DNA at all, there's no DNA at all of the victim's, and that's because they did a good wipe down job.
>
> *And [appellant], in his attempt to help wipe down the car, was wiping away some of his DNA; but not all of it, because the DNA cannot exclude [appellant] from being in that vehicle*."

Defense counsel did not object to the State's argument, but in its own argument, pointed out that there is not "one scintilla of evidence to suggest that anyone wiped anything down[.]"

On rebuttal, the State argued as follows:

> "Common sense tells you that [appellant] is the one who picked [Mr. Johnson] up, *but the DNA also points at [appellant], because there is one spot where they didn't erase the evidence*

> *well enough, where [appellant] left enough evidence that he couldn't be excluded*."

Defense counsel objected to the State's characterization of the DNA evidence, but the court overruled the objection, stating that the State's argument was a permissible inference. The State continued as follows:

> "I'm going to say it again, ladies and gentlemen, as the DNA expert told you, if there had only been three matches, he could have been excluded; but because there were eight, just short of the threshold where he could have been included, the DNA expert told you that there was enough DNA that [appellant] couldn't be excluded. They didn't quite do their job well enough."

A little later, the State argued to the jury without objection: "And then the detective continues to investigate. He finds out that *the DNA points to* George Johnson and [appellant]." The State then argued the following:

> "[Michael Hayes] corroborates James Nelson. *The DNA corroborates it.* James Nelson told the detectives that George Johnson and [appellant] committed this murder months before the DNA analysis had been done. Just a massive coincidence that George Johnson's DNA is present in the pockets and on the steering wheel *and that [appellant's] DNA can't be excluded from the passenger armrest*?"

Defense counsel made no objection to this argument either.

Appellant argues that the court should have sustained the objection at trial because the prosecutor's argument that the DNA "points at" appellant was not based on evidence introduced at trial. According to appellant, there was no evidence that he left DNA on the vehicle; Ms. Ingriton never stated that appellant was included. Appellant points out that the

State's arguments misled the jury and defense counsel had no opportunity to refute the improper remarks.

The State argues that the prosecutor's closing argument was a reasonable inference from the DNA evidence. The State explains that Ms. Ingriton testified that appellant matched eight out of thirteen locations on Sample #15, which was just short of the threshold for inclusion. The State argues alternatively that any error was harmless because appellant did not object to similar arguments the prosecutor made before and after the statement that appellant challenges on appeal.

Parties are typically afforded wide latitude in making closing arguments to the jury, and "may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Spain v. State*, 386 Md. 145, 152 (2005). The Court of Appeals held in *Wilhelm v. State*, 272 Md. 404, 412 (1974), as follows:

> "As to summation, it is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is afforded a wide range. Counsel is free to use the testimony most favorable to his side of the argument to the jury, and the evidence may be examined, collated, sifted and treated in his own way. Moreover, if counsel does not make any statement of fact not fairly deducible from the evidence his argument is not improper, although the inferences discussed are illogical and erroneous."

Not every improper remark is cause for challenge or mistrial, and whether reversal is warranted depends upon the facts of the case. *Id.* at 415. In deciding whether the trial court

abused its discretion in determining the propriety of counsel's arguments, we examine whether the jury was actually or likely misled by the improper remarks. *Id.* at 415-16. We will reverse a conviction only when the defendant was prejudiced. *Rainville v. State*, 328 Md. 398, 408 (1992). In assessing prejudice, a reviewing court considers several factors, including "the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Spain*, 386 Md. at 159.

The Court of Appeals addressed the prejudicial impact of closing arguments misconstruing DNA evidence. *Whack v. State*, 433 Md. 728 (2013). In *Whack*, the defendant was accused of murder. The defense's theory was that the defendant's cousin did it. All of the evidence against the defendant was circumstantial. A DNA analyst testified that she could not exclude the defendant as the source of the DNA recovered from the passenger door armrest of the vehicle in which the defendant was shot. In rebuttal closing argument, the prosecutor told the jury that the defendant left his DNA in the truck. The prosecutor also misrepresented the statistical analysis provided by the DNA analyst, claiming that the statement that the defendant could not be excluded was statistically similar to the statement that the victim's DNA was included. The trial court denied a motion for mistrial, but reminded the jury that its recollection of the evidence, not argument, controls.

The Court of Appeals reversed, addressing first the weight jurors give to DNA evidence:

> "DNA is a powerful evidentiary tool and its importance in the courtroom cannot be overstated. *See Maryland v. King*, _ U.S.

> _, 133 S.Ct. 1958, 1966, 186 L.Ed.2d 1 (2013) (observing that DNA technology is 'one of the most significant scientific advancements of our era' and its usefulness in the criminal justice system is 'undisputed'). DNA evidence can place a defendant at the scene of a crime, providing a firm scientific foundation for a prosecutor's case, particularly when other evidence may be lacking. Not surprisingly, jurors place a great deal of trust in the accuracy and reliability of DNA evidence. But this evidence has the potential to be highly technical and confusing in a way that could unduly affect the outcome of a trial."

Id. at 732. The Court noted that the public places a great deal of weight on the reliability of DNA evidence, but at the same time, it is a confusing topic, and a jury unfamiliar with DNA science may misinterpret the evidence without proper guidance. *Id.* at 747-48. The Court explained further as follows:

> "Accordingly, counsel have a responsibility to take extra care in describing DNA evidence, particularly when it comes to statistical probabilities. The prosecutor certainly has 'liberal freedom of speech' during closing argument, *see Spain*, 386 Md. at 152, 872 A.2d 25, but this commentary must be grounded in the evidence or reasonable inferences drawn from the evidence. Minor misstatements from counsel are inevitable in a trial, *but this was not a minor misstatement. The prosecutor wrongly asserted that Petitioner's DNA was definitely on the armrest when the evidence demonstrated only that it might be present*."

Id. at 748 (emphasis added).

The Court reversed, finding prejudicial error. *Id.* at 754. No one saw the defendant shoot the victim or saw the defendant at the scene of the crime. *Id.* at 752. The DNA evidence was a key part of the circumstantial evidence available, and the prosecutor misrepresented it by stating that the defendant's DNA was found in the truck, when "the

evidence showed only that [the defendant] could not be *excluded* as a source of DNA in the truck, i.e., he *might* have touched the armrest." *Id.* at 753 (emphasis in original).

Whack applies here.[2] In the case at bar, Ms. Ingriton stated only that appellant could not be excluded from Sample #15. This Court commented recently that a statement that a person could neither be "included or excluded" in a DNA analysis meant that the analysis was inconclusive, and "an inconclusive test is evidence of nothing." *Diggs & Allen v. State*, 213 Md. App. 28, 66 (2013). Thus, there was *no evidence* of appellant's DNA in the vehicle, but the State argued that the DNA "points at" appellant. This argument was not a legitimate inference, and likely confused the jury.

The error was not harmless. Although defense counsel objected only once to the prosecutor's incorrect argument, the error was both egregious and pervasive. *See Lawson v. State*, 389 Md. 570, 600 (2005) (explaining that "taken alone the statements may not affect the appellant's right to a fair and impartial trial, but their cumulative effect leads to a different conclusion."). Twice in rebuttal argument, the prosecutor argued that the DNA pointed to appellant, even though there was no DNA evidence pointing to appellant at all. Several other times, the prosecutor theorized that appellant's DNA could not be excluded

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[2]The State argues that *Whack v. State*, 433 Md. 728 (2013), does not apply because unlike in *Whack*, the prosecutor here made no erroneous claims regarding statistical probability. We acknowledge that *Whack* reversed in part because of the prosecution's erroneous statistical conclusions, but as we explained above, *Whack* focused also on the prosecutor's error in conflating an expert's inability to exclude with a statement of inclusion. *Id.* at 753. It is the Court of Appeals' disapproval of that blunder upon which we base our holding today.

from the sample because he did not do a good enough job wiping it away. Not only was there no evidence that appellant wiped away any DNA—Ms. Ingriton testified she could not draw such a conclusion—the prosecutor's argument took Ms. Ingriton's statement that appellant "could not be excluded" and turned it on its head. The prosecutor was saying essentially that appellant's DNA was *included* in the sample initially, but because he tried to wipe it away, the expert was able to determine only that appellant could not be excluded. The prosecutor misrepresented the evidence, creating a picture in which appellant, complicit in the crime, attempted to erase the evidence. The prosecutor's argument had no basis in fact. It is hard to say that the prosecutor's argument did not mislead the jury. *See Whack*, 433 Md. at 747-48 (noting that it is difficult for a jury to interpret DNA evidence).

III.

We address next appellant's contention that the evidence was insufficient to convict him of any of the charges. We address sufficiency because retrial is not permitted if the evidence was insufficient. *Dziekonski v. State*, 127 Md. App. 191, 194 (1999).

Appellant argues that while it is undisputed that George Johnson killed Mr. Hall, there was insufficient evidence to support his own involvement. He maintains that his purported statement to Detective Moran, the voicemail recording, and the gun should not have been admitted at trial. Appellant argues also that Mr. Nelson was not a credible witness, nor was

he an eyewitness to the crime. Finally, appellant claims that the police failed to investigate other suspects fully and that there was no forensic evidence linking him to the crime.

The State counters that even if evidence is admitted improperly at trial, upon appellate review, the reviewing court considers all of the evidence presented at trial in determining the sufficiency of the evidence. The State argues also that Mr. Nelson's testimony was sufficient to support appellant's convictions, and notes that appellant admitted that he drove the shooter to the murder scene.

We review sufficiency of the evidence to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see State v. Suddith*, 379 Md. 425, 429 (2004). It is not our duty to review the record to retry the case. *State v. Albrecht*, 336 Md. 475, 478 (1994). Rather, we defer to the jury's factual findings, as well as to any reasonable inferences fairly drawn from the evidence presented. *See Suddith*, 379 Md. at 446.

In this case, the evidence was sufficient to support the jury verdicts beyond a reasonable doubt. Mr. Nelson testified that appellant told him that Michael Hayes hired appellant to kill Mr. Hall and paid appellant for it. Mr. Nelson stated that appellant told him that he and Mr. Johnson drove together to do the killing and that Mr. Johnson pulled the trigger. Also, Detective Moran testified that appellant admitted that he drove the shooter to the scene. This evidence was sufficient for the jury to convict appellant of conspiracy to

commit murder, and to convict appellant of the other charges on a theory of accomplice liability.[3]

IV.

We turn to appellant's argument that the court should have suppressed his statement to Detective Moran to guide the trial court on remand. When reviewing the denial of a motion to suppress, we review the record of the suppression hearing, not the record of the trial. *Byndloss v. State*, 391 Md. 462, 477 (2006). The following facts were presented at the pre-trial suppression hearing.

Detective Moran testified that appellant asked for a lawyer immediately after his arrest on June 14, 2011, before he was advised of his *Miranda* rights. Detective Moran asked appellant no questions. On June 17, 2011, Detective Moran and another detective transported appellant from Central Booking to the North Branch Correctional Institution. Detective Moran did not speak to appellant other than to possibly ask him if he was hungry or wanted a drink. About ten minutes into the trip, appellant blurted out, "Moran, what do I have to do to get out of this? I've done some things in the past, but I didn't do this one. I drove 'em there and that was it. I left. I don't know about no murder." At that point, Detective Moran advised appellant that because he had requested an attorney, they could not speak about the case. Detective Moran explained at the suppression hearing, "There was no

[3] With regard to appellant's conviction for possession of a firearm after a disqualifying crime, the jury was instructed on a theory of indirect possession.

pause. There was no break. It was just a continued statement. . . . As soon as I could get a word in edgewise, I advised him that you have an attorney and we can't talk about this because you requested your attorney."

Appellant denied making any statement to Detective Moran. The court denied the motion to suppress, stating that the jury would decide whether appellant made the statement in question, but if it was made, there was no evidence that "it was coerced or induced or improperly obtained."

Appellant argues that Detective Moran should have prevented him from making the statement. In his brief, appellant states the following:

> "Appellant asks this Court to find that, where a criminal defendant in custody invokes his rights to remain silent and to have counsel, and where he or she initiates a conversation with a police officer while in custody, the police officer should take steps to interrupt and to remind the defendant of his constitutional rights previously invoked."

The State argues that appellant blurted out the statement and that it was not made in response to police interrogation. The State points out that appellant cites no authority for his claim that the police had a duty to interrupt his blurt; to the contrary, courts in other jurisdictions have rejected such arguments. We agree with the State.

Once the defendant invokes the right to counsel, the defendant cannot be deemed to have waived the right even if he or she responds to further custodial interrogation after having been advised of *Miranda* rights. *Edwards v. Arizona*, 451 U.S. 477, 484 (1981); *Maryland v. Shatzer*, 559 U.S. 98 (2010). *Edwards* prohibits only further custodial

interrogation. It does not apply when the accused initiates communication, particularly in the form of a "blurt-out." *Edwards*, 451 U.S. at 484. In the words of Judge Charles Moylan, Jr., writing for this Court, "There is no privilege against inadvertent self-incrimination or even stupid self-incrimination, but only against compelled self-incrimination." *Ciriago v. State*, 57 Md. App. 563, 574 (1984).

On appeal, appellant concedes that the alleged statement he made to Detective Moran was a blurt-out. He argues only that Detective Moran had a duty to interrupt him and remind him that he had requested counsel, and that the detective's failure to do so renders the statement inadmissible. Appellant, however, provides no support for his assertion. We have never placed a duty on the police to interrupt a defendant's freely offered confession. *Miranda* and *Edwards* place restrictions on compelled self-incrimination only. *Edwards*, 451 U.S. at 484.

Other jurisdictions have rejected the notion that the police have a duty to interrupt a defendant to stop him or her from talking. *See, e.g.*, *United States v. Wiggins*, 509 F.2d 454, 460 (D.C. Cir. 1975) ("There is no requirement that police stop a man from talking when he voluntarily and without solicitation says he wants to confess to a crime."); *People v. Pearson*, 403 N.W.2d 498, 501 (Mich. Ct. App. 1987) (rejecting an argument that the police should have interrupted the defendant and advised him of his *Miranda* rights). The court did not err in denying the motion to suppress.

V.

We turn next to appellant's argument that the court should not have admitted the voicemail message found on the victim's phone because it was not authenticated properly. At the pre-trial hearing, Detective Moran testified that he recovered Mr. Hall's business cellphone and retrieved a message left on July 29, 2009, which was the day before Mr. Hall was killed. The message was as follows:

> "It's G. Mike told me to give you a holler. He needs to (inaudible) some insurance. Mike, I mean, my brother don't do too much talking on the phone. But, I'll try to catch up with you, try to take [care] of that for him. I'll try to give you a call back later. (Inaudible) time. It's, um, – I'll give you a call back in the next hour or so. (Inaudible) I'll talk to you later."

Detective Moran testified that he did not recognize the voice in the message at first, but after having had several conversations with George Johnson once he was arrested, he realized that it was Mr. Johnson's voice.

Defense counsel objected to Detective Moran's identification of Mr. Johnson as the person who left the message. Defense counsel then stated that he would like to challenge Detective Moran's conclusions about the authenticity of the voicemail in front of the jury. The court agreed with defense counsel and ruled that if he planned to challenge Detective Moran's recognition of the voice in the message, that issue would be more appropriately resolved in front of a jury.

At trial, the State played the voicemail for its witness James Nelson, but it was not played audibly for the jury. Mr. Nelson testified that the caller was Mr. Johnson, although

he did not explain how he knew that it was Mr. Johnson's voice. Defense counsel did not object to Mr. Nelson's identification of the caller. During Detective Moran's testimony, the State played the voicemail for the jury. Defense counsel did not object. Detective Moran testified that he recognized the caller as Mr. Johnson after having had several conversations with him. Defense counsel did not object to Detective Moran's identification either.

Appellant argues that the voicemail recording should not have been admitted into evidence because it was not authenticated properly. Although Mr. Nelson testified that the voice was Mr. Johnson's voice, he never explained how he was able to recognize the voice. The State argues that there was sufficient evidence to authenticate the voicemail because both Mr. Nelson and Detective Moran testified that they recognized Mr. Johnson's voice.

Rule 5-901(a) provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." A voice, "whether heard firsthand or through mechanical or electronic transmission or recording" can be authenticated "based upon the witness having heard the voice *at any time* under circumstances connecting it with the alleged speaker." Rule 5-901(b)(5) (emphasis added).

There was sufficient evidence that Mr. Johnson left the voicemail message on Mr. Hall's phone. Both Mr. Nelson and Detective Moran testified that the voice was that of Mr. Johnson. It does not matter that Mr. Nelson did not explain how he recognized the voice or that Detective Moran did not recognize that Mr. Johnson was the caller until he met him

later. The basis for both Mr. Nelson's and Detective Moran's identification of the caller was clear to the jury.

VI.

Next we address appellant's argument that the court abused its discretion in admitting the .38 caliber handgun at trial and allowing Mr. Nelson to testify that it was the murder weapon.

Pre-trial, the State argued that the .38 caliber handgun was admissible as the murder weapon in part for the following reason:

> "[T]he State would proffer that Mr. Nelson, the State's witness, will testify that based on conversations with the two Defendants [appellant and Mr. Johnson], those two Defendants indicated to him that this firearm, which he observed [appellant], the father, give to Kelly Toomer, the son, that that was, in fact, the weapon that they had used in the homicide from a month earlier."

The following ensued when defense counsel argued against the gun's admissibility:

> [DEFENSE COUNSEL]: So, you're going to have a situation where they're going to elicit testimony from Mr. Nelson, who's going to say that our clients, you know, hearsay about what my client said to him about the gun.
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> THE COURT: Hearsay – hearsay –
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> [DEFENSE COUNSEL]: Mr. Nelson –
>
> THE COURT: Yeah.
>
> [DEFENSE COUNSEL]: – is going to testify that our clients told him –
>
> THE COURT: Right.

[DEFENSE COUNSEL]: – that this is the gun that was used.

THE COURT: That's not a statement against penal interest, or it's not a statement by a party opponent, or it's not several other exceptions to the hearsay rule?

[DEFENSE COUNSEL]: It's not – we don't have the ability to cross examine him. In other words, –

THE COURT: Well, your client makes a determination, after hearing the State's case and will then make a determination whether [he will testify] – he doesn't have to make that determination early, obviously.

[DEFENSE COUNSEL]: Right.

THE COURT: I am going to deny it as a motion in limine based on the proffer by the State.

[DEFENSE COUNSEL]: I mean, even – I'm sorry.

THE COURT: Go ahead.

[DEFENSE COUNSEL]: My brain is just catching up with my mouth. If they say it's a similar characteristic there's a lot of .38's out there.

THE COURT: Absolutely.

[DEFENSE COUNSEL]: So that doesn't cut it. So, then we have this piece that he's saying that that was the gun that was used, but he has no knowledge that that was the gun that was used. Clearly it's being offered for the truth of the matter.

THE COURT: Right, but there are exception – so, which would put it in the realm of hearsay, but then there are exceptions to the hearsay rule.

[DEFENSE COUNSEL]: Right."

During trial, defense counsel objected again, on hearsay grounds, to the admission of the gun as the murder weapon. He raised the same arguments yet again before Mr. Nelson testified, and objected when the gun was moved into evidence as well. The court overruled all of these objections.

Mr. Nelson testified the following about the gun:

> [PROSECUTOR]: Did [appellant] tell you about the gun they used – about the gun [Mr. Johnson] used to kill [Mr. Hall]?
>
> MR. NELSON: Yeah.
>
> [PROSECUTOR]: What did he tell you about it?
>
> MR. NELSON: Was a .38, that it was hot.
>
> [PROSECUTOR]: Were you familiar with that gun?
>
> MR. NELSON: Yeah.
>
> [PROSECUTOR]: Why?
>
> MR. NELSON: I seen it every day.
>
> [PROSECUTOR]: I'm going to show you what's been marked as State's 15; can you identify that?
>
> MR. NELSON: Yeah, it's a .38. *Yeah, that's the one*.
>
> [PROSECUTOR]: Is this the one that you've seen before?
>
> MR. NELSON: Yeah.
>
> [PROSECUTOR]: After [Mr. Hall] was killed did you see this gun?
>
> MR. NELSON: Probably once.

> [PROSECUTOR]: And how do you know this is the gun you saw?
>
> MR. NELSON: It's the only one that we had.
>
> [PROSECUTOR]: And what did [appellant] tell you about that gun?
>
> MR. NELSON: That it was used in a crime."

Appellant argues that the evidence never identified the gun definitively as the murder weapon. He explains that although Mr. Nelson identified the gun as the murder weapon, he had no personal knowledge of the facts of the crime as required by Rule 5-602. Further, appellant maintains that Mr. Nelson's testimony may have been biased because he provided information to the police only after he was arrested. Appellant points out that the firearms examiner could not determine that the bullets were fired from that gun.[4]

The State counters that Mr. Nelson's testimony that appellant told him the gun was used in the murder was sufficient to provide a foundation for its admission. The State explains that although Mr. Nelson had no personal knowledge that the gun was used in the murder, appellant did, and appellant told Mr. Nelson that the gun was the murder weapon. We agree with the State.

As we noted above, Rule 5-901(a) provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to

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[4] A firearms examiner testified that after testing the bullets recovered from the victim and the .38 caliber handgun, he "was not able to identify or eliminate that this bullet was fired with this firearm."

support a finding that the matter in question is what its proponent claims." Sufficient evidence includes the "[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be." Rule 5-901(b)(1). If the evidence is sufficient, the matter is admissible, and it is up to the jury to weigh the evidence and make the ultimate determination as to the truth of any assertion. *Grymes v. State*, 202 Md. App. 70, 104 (2011).

Appellant's arguments that Mr. Nelson was not a reliable witness go to the weight of the evidence, not its admissibility. Appellant does argue correctly that Mr. Nelson had no personal knowledge of the murder. Nonetheless, Mr. Nelson's lack of personal knowledge is irrelevant, because Mr. Nelson never testified that the basis for his identification of the murder weapon was that he saw the murder. To the contrary, Mr. Nelson testified that he believed the gun was the murder weapon because *appellant told him* that this was the gun he and Mr. Johnson used to kill the victim. The trial court was correct that the evidence was not hearsay as it was the admission of a party opponent. *See* Rule 5-803(a)(1). Appellant's admission that the .38 caliber handgun was the murder weapon was sufficient for the State to present the gun as such at trial. The court did not err in its denial of appellant's motions to exclude the gun.

VII.

Finally, we turn to appellant's claim that the court abused its discretion in allowing Detective Moran to describe what he saw on the surveillance video. We hold that the court should not have permitted Detective Moran to narrate his interpretation of the video.

Before Detective Moran testified about the contents of the video, defense counsel objected "to the detective testifying and telling the jury what he saw, because they each saw the video, and he's going to fill in things they didn't see based on his own testimony." Defense counsel added that Detective Moran "wasn't there," and that the "video speaks for itself." The State explained that it wanted Detective Moran to "give his interpretation of the video" and explain the significance of the video to his investigation. The court overruled defense counsel's objection.

Detective Moran testified about what he saw in the video as follows:

> "On the video, approximately 8:30, you see a dark four-door vehicle pull onto that side parking lot, this is camera number three, pull onto the side parking lot. It backs into a parking space. Two individuals get out of the vehicle, one out of the driver's seat, and one out of the passenger's seat. The passenger walks around the back of the vehicle, approaches the driver.
>
> The driver of the vehicle begins to walk away, almost towards the exit. The driver of the vehicle turns around, walks back to the –
>
> [DEFENSE COUNSEL]: Your Honor, objection. Can we approach?
>
> THE COURT: Overruled. Go ahead.
>
> DETECTIVE MORAN: The driver of the vehicle walks back to the passenger. There's a hand exchange, at which time the passenger of the vehicle gets into the driver's seat, now driver's seat. As the original driver now walks away towards the exit, the passenger is now in the driver's seat and drives the vehicle away and exits the KIPP Academy.
>
> The driver of the vehicle, the first driver of the vehicle walks down in front of the KIPP Academy and is picked up again on

> camera number seven. On camera number seven, now you see the driver of the vehicle walk down to the other parking lot by the recreational fields where the victim's vehicle is parked, the 2000 Ford Expedition.
>
> That, the driver gets into the passenger side of the vehicle. That vehicle then leaves that parking space and then goes back up the one-way back onto the original parking lot, which camera three picks up. The truck then pulls into that small parking lot and parks the vehicle.
>
> After several minutes, you see the door open up. You see a body fall out of the driver's seat. You then see an individual walk around the back of the truck, shuts the door, kneels down, and then appears to be going through the victim's pockets, rustling through the victim's pockets.
>
> At that time that person who got out of the passenger side of the vehicle and who just went rifling through their pockets, got into the driver's side of the truck and drove the vehicle out of the parking lot. And the victim laid there."

After Detective Moran described what he saw in the video, the State played the video for the jury, and Detective Moran narrated "to assist [the jury's] viewing of the video." On a few occasions, Detective Moran referred to the body falling out of the vehicle as that of Mr. Hall. The court sustained defense counsel's objections to Detective Moran's characterization of the evidence and struck those portions of his testimony.

Appellant argues that the court should not have permitted Detective Moran to testify as he did; he had no personal knowledge of the events in the video because he was not at the KIPP Academy at the time of the murder. In appellant's view, Detective Moran's narration

interfered with the jury's role as the trier of fact. Appellant argues also that Detective Moran's testimony was not relevant because the jury had watched the video.[5]

The State counters that on appeal, appellant objects to a substantial portion of Detective Moran's testimony regarding the video, but below, he objected to a much smaller portion and did not request a continuing objection. Thus, the State argues, appellant's claims about the rest of Detective Moran's testimony regarding the video were not preserved. The State maintains also that appellant's specific arguments regarding lack of personal knowledge, relevance, and interference with the jury's function as the trier of fact were not made below. The State argues alternatively that appellant cites no authority that Detective Moran's testimony constitutes reversible error, and in fact, his testimony was permissible. The State points out that while Detective Moran did not witness the murder, he did have personal knowledge of the murder scene and the appearance of the victim at the autopsy, and therefore, his testimony aided the jury who had not personally observed the murder scene or the victim's body. The State claims that even if the trial court erred in allowing the testimony, the error was harmless.

We need not decide whether appellant's claims were preserved. Because we reverse due to the improper closing arguments, our purpose here is to instruct the court on remand.

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[5]Detective Moran's narration of the video's contents was not relevant to explain the basis of his investigation because *why* he did what he did was not relevant to any issue in the case.

The court should not have permitted Detective Moran to describe the contents of the video or narrate it for the jury.

Rule 5-602 states that a lay witness "may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Rule 5-401 states that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence."

The video contained surveillance footage from the crime scene. Because Detective Moran was not at the scene of the crime, he had no personal knowledge of the events depicted in the video. Defense counsel is right—the video speaks for itself. Contrary to what the State argues, Detective Moran was not in a better position to interpret the video than were the jurors. He had no more knowledge of the video and what it showed than the jury did. Moreover, to the extent that the detective simply explained what anyone could see from the video, his narration added nothing to the case. Detective Moran's testimony was not relevant because it lacked all probative value. The court should not have allowed him to testify in the manner that he did.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED TO THAT COURT FOR A NEW TRIAL. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.