UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1736

September Term, 2016

JAMES McGRUDER

v.

STATE OF MARYLAND

Woodward, C.J.,
Graeff,
Berger,

JJ.

Opinion by Berger, J.

Filed: August 4, 2017

A jury in the Circuit Court for Prince George's County convicted James McGruder, appellant, of second-degree assault, fourth-degree burglary, and violating an ex parte protective order. Appellant was sentenced to a term of ten years' imprisonment, with all but three years suspended, on the conviction of assault, a consecutive term of three years' imprisonment, all suspended, on the conviction of burglary, and a term of 90 days' imprisonment on the conviction of violating a protective order. In this appeal, appellant presents the following questions for our review:

1. Did the trial court err in limiting appellant's cross-examination of a State's witness?

2. Did the trial court err in permitting allegedly improper closing argument by the State?

For reasons to follow, we answer appellant's questions in the negative and affirm the judgments of the circuit court.

BACKGROUND

On March 19, 2015, Theresa Essel was at her home with her boyfriend, Dewayne Sellers, and the eldest of her four children. At some point that morning, Sellers left the home to go to work, and Essel closed and locked the door behind him. After taking "a few steps" away from the front door, Essel heard a knock, so she went back to the door and opened it. Standing at the door was appellant, the father of Essel's four children and against whom Sellers had an active order of protection.

When Essel tried to push the door closed, appellant pushed back, and Essel eventually "kind of let go." Appellant then entered the home and pushed Essel, who began "backpedaling" towards her bedroom, which was located in the back of the home.

Appellant followed Essel into the bedroom, eventually pushing her onto the bed. Appellant then got on top of Essel, who was lying on her back, held her down, and penetrated her vagina with his penis.

Around the same time, Sellers returned to the home to retrieve something. Upon entering the home, Sellers heard "noises" emanating from Essel's bedroom. When Sellers walked to the bedroom and pushed the door open, he observed appellant lying on top of Essel with his pants down. Sellers asked appellant what he was doing, and appellant apologized and implored Sellers not to call the police. Sellers then went to his car to "get a weapon," and appellant left the scene. Sellers returned to the home, and Essel called the police. Appellant was ultimately arrested.

At trial, both Essel and Sellers testified to the above events. During cross-examination of Essel, defense counsel questioned her about her 9-1-1 call to the police, which had yet to be admitted into evidence:

> [DEFENSE]: Now, you said you called 9-1-1?
>
> [WITNESS]: Yes.
>
> [DEFENSE]: And told them that you were getting raped, correct? That's what you said to Madam State?
>
> [WITNESS]: Yes.
>
> [DEFENSE]: Do you remember saying to 9-1-1, "He tried to rape me?"
>
> [WITNESS]: I believe I said that I was getting raped.
>
> [DEFENSE]: Did you talk to Madam State this morning about what you had said?

[WITNESS]: You said Madam State?

[DEFENSE]: Madam State. The State's Attorney.

[STATE]: Objection, Your Honor.

THE COURT: Objection. So what she said to her, I'm going to sustain that objection.

[DEFENSE]: I wasn't asking what – What Madam State said to the witness, but whether they talked this morning.

THE COURT: Whether they talked or had any conversation, I'm going to sustain that.

[DEFENSE]: All right.

Later, during closing argument, the State discussed Sellers' testimony:

[STATE]: So let's think about this. If this was some consensual thing, if [Sellers] didn't see that, if he didn't hear all that, why is he going to be here? Why is he going to have to come in here and testify and cross-examine [sic] and everything else if this was something consensual? If he didn't see what he saw, why would he do that?

[DEFENSE]: Objection, Your Honor.

THE COURT: Overruled. It's just closing. It's not evidence.

[STATE]: Why would he do that? I would suggest, he'd be long gone if he walked in on some consensual act. No, he walked in on [appellant] raping [Essel].

Appellant was ultimately convicted, and this timely appeal followed.

DISCUSSION

I.

Appellant first argues that the trial court erred in limiting defense counsel's cross-examination of Essel regarding whether she had a conversation with the prosecutor about

her 9-1-1 call. Appellant maintains that defense counsel's question was within the bounds of permissible cross-examination because it was germane to Essel's credibility. Specifically, appellant avers that, had Essel responded to defense counsel's question in the affirmative, "defense counsel could have argued to the jury, at the very least, that Essel was potentially coached by the State and did not have a trustworthy, independent recollection of what happened on March 19, 2015."

The State counters that the issue is not preserved for our review because defense counsel "did not make a proffer regarding the excluded testimony." The State further avers, in the alternative, that the trial court's decision to restrict defense counsel's cross-examination was a proper exercise of the court's discretion.

We agree with the State that the issue is not preserved for our review. Maryland Rule 5-103 provides, in pertinent part, that appellate error may not be predicated upon a ruling that excludes evidence unless "the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered." Md. Rule 5-103(a)(2). Thus, "a formal proffer of the contents and relevancy of the excluded evidence must be made in order to preserve for review the propriety of the trial court's decision to exclude the subject evidence." *Merzbacher v. State*, 346 Md. 391, 416 (1997). "The purpose of the preservation rule is to 'prevent[] unfairness and require[e] that all issues be raised in and decided by the trial court, and these rules must be followed in all cases[.]'" *Peterson v. State*, 444 Md. 105, 126 (2015) (quoting *Grandison v. State*, 425 Md. 34, 69 (2012)). "The preservation rule applies to evidence that a trial attorney seeks to develop through cross-examination . . . [and] when challenged, counsel must be

able to describe the relevance of, and factual foundation for, a line of questioning." *Id.* at 125.

Here, when defense counsel asked Essel whether she had spoken with the prosecutor the morning of trial, the State objected, and the court sustained the objection as to "what she said to her." When defense counsel clarified that she was not asking about the content of the conversation but merely "whether they talked this morning," the court again sustained the objection. Counsel then continued with her cross-examination of Essel by moving on to a different line of questions. At no time did defense counsel make any proffer, formal or otherwise, as to the content and materiality of the excluded testimony. Accordingly, the issue is not preserved for our review. *See Tetso v. State,* 205 Md. App. 334, 401 (2012) (holding that claim of error was not preserved for review because "counsel continued cross-examination without offering a formal proffer of the content and materiality of the excluded testimony.").

The Court of Appeals faced a similar situation in *Merzbacher v. State, supra.* There, the defendant, John Merzbacher, a Catholic school teacher, was charged with multiple sex-related offenses after a former student accused Merzbacher of sexually abusing her when she was eleven years old. *Merzbacher*, *supra*, 346 Md. at 396. At trial, during his cross-examination of an Archdiocese official, Merzbacher attempted to elicit testimony "concerning whether or not complaints had been lodged against Merzbacher during his tenure as a teacher." *Id.* at 416. The State objected, and the court sustained the objection before the witness could answer the question. *Id.*

On appeal, Merzbacher argued that the trial court erred in limiting his cross-examination of the Archdiocese official. *Id.* The Court of Appeals ultimately held the issue to be waived:

> Ordinarily, a formal proffer of the contents and relevancy of the excluded evidence must be made in order to preserve for review the propriety of the trial court's decision to exclude the subject evidence. Merzbacher concedes that no such proffer was made, but asserts that his failure to do so should be excused because the answer he was seeking was apparent from the question. We are not so convinced. The Archdiocese official could have answered the question in any number of ways, and we are in no position as an appellate court to discern what that answer may have been, whether favorable or unfavorable to the defense.

Id. at 416 (internal citations omitted).

As was the case in *Merzbacher*, although the nature of defense counsel's question in the instant case is clear, the record is devoid of any indication as to how Essel might have responded. As a result, we can only guess as to the nature, factual foundation, and relevance of the evidence sought. Such guesswork, as explained by the Court of Appeals in *Merzbacher*, is inappropriate during appellate review.

Assuming, *arguendo*, that appellant's claim of error was preserved, we perceive no abuse of discretion. "A criminal defendant's right to confront witnesses is guaranteed by the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights." *Ashton v. State*, 185 Md. App. 607, 621 (2009). "'Central to that right is the opportunity to cross-examine witnesses.'" *Id.* (internal citations omitted). "Moreover, '[i]t is well settled law in this State that exploratory questions on cross-examination are proper when they are designed to affect a witness' credibility, test

his memory or exhibit bias.'" *Leeks v. State*, 110 Md. App. 543, 554 (1996) (internal citations omitted).

"However, the defendant's right to cross-examine is not limitless, as judges 'have wide latitude to establish reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Ashton*, *supra*, 185 Md. App. at 621 (internal citations omitted). "Thus, the scope of the cross-examination lies largely within the discretion of the trial judge." *Id.* "Whether there has been an abuse of discretion depends on the particular circumstances of each individual case." *Pantazes v. State*, 376 Md. 661, 681 (2003). "An abuse of discretion occurs when the trial judge imposes limitations on cross-examination that 'inhibit [] the ability of the defendant to receive a fair trial.'" *Gupta v. State*, 227 Md. App. 718, 745 (2016) (internal citations omitted).

Under the facts and circumstances of the instant case, the trial court was well-within its discretion in precluding defense counsel from asking Essel whether she had a conversation with the prosecutor prior to testifying. To begin with, whether such a conversation occurred had no reasonable bearing on any relevant fact, including Essel's credibility. That is, the simple fact that Essel may have spoken with the prosecutor prior to trial did not make it more or less probable that Essel was a credible person or that she was telling the truth at trial. *See* Md. Rule 5-401 (Evidence is relevant if it makes "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); *Kantor v. Ash*, 215 Md. 285, 290 (1958) ("[T]his Court has adopted the general rule in American courts that a

witness…may be cross-examined on such matters and facts as are **likely** to affect his credibility[.]") (emphasis added).

Moreover, regardless of whether Essel responded to the question in the affirmative or the negative, appellant presents no evidence to suggest that either answer would have been false. Rather, appellant argues that *had* Essel answered in the affirmative, then defense counsel *could* have argued that Essel was potentially coached by the State and did not have a trustworthy recollection of events. Again, appellant presents no evidence that any such "coaching" occurred. In short, appellant's argument that the excluded evidence was relevant to Essel's credibility or recollection of events has no basis in fact and is unsupported by the record. *See Clark v. State*, 364 Md. 611, 657 (2001) ("[A] party seeking to admit impeachment evidence is in no way relieved of the obligation to show that the evidence is relevant to the witness's ability to perceive or to remember the events about which he is testifying.").

We faced a similar situation in *Simpson v. State*, 121 Md. App. 263 (1998). There, the defendant, Kevin Simpson, was arrested and charged with various drug offenses after a police officer, Raymond Yost, entered a residence without a warrant and found drugs in a bedroom in which Simpson was located. *Id.* at 272-73. Officer Yost, who was surveilling the residence on suspicion of drug activity, justified the warrantless entry by claiming that, prior to the officer's entry, an unidentified individual had become aware of the officer's presence and had gone into the residence to potentially "warn those in the house that the police were nearby." *Id.* at 272.

At trial, Simpson posited that Officer Yost "invented the story to create an exigent situation and allow him to make a warrantless entry into the residence[.]" *Id.* at 286. During his cross-examination of Officer Yost, Simpson "sought to impeach the officer's credibility by suggesting that the officer fabricated the story." *Id.* at 286. In so doing, Simpson asked Officer Yost: "Now, in your experience, the many, many search warrants you've done and the many cases you've been involved with, when you go into a house . . . without a warrant and . . . the entry is determined to be illegal . . . the result is that usually the case gets dismissed because the evidence recovered from that house is suppressed, isn't that what happens?" *Id.* at 287. The State objected, and Simpson argued that the question was appropriate because he was "trying to create a motive for the officer's fabrication of the exigent circumstances." *Id.* The trial court sustained the objection, and Simpson was ultimately convicted. *Id.*

On appeal, Simpson argued that his question to Officer Yost was proper and that the trial court erred in precluding the officer from answering. *Id.* We disagreed, holding that the trial court acted within its discretion in sustaining the State's objection. *Id.* at 288. We reasoned:

> The question that [Simpson] asked . . . was confusing. It suggested that the result of an unlawful search was always that the evidence would be suppressed and that Officer Yost knew this. Furthermore, the question implied that Officer Yost had previously made illegal entries into houses and had had cases dismissed for that reason. Thus, the jury could have taken the question as suggesting that Officer Yost's judgment and credibility were suspect even if they believed that the officer testified truthfully in the present case.

> The question was also improper because there was no evidence that Officer Yost had previously made illegal entries into a house and had had cases dismissed for that reason. Thus, the question assumed facts not in evidence.

Id.

Here, appellant had no evidence that Essel and the prosecutor had a discussion prior to Essel's testimony, nor did appellant have any evidence that the prosecutor had "coached" Essel's testimony. Accordingly, the question posed by appellant, along with the intended implication regarding Essel's credibility, assumed facts not in evidence and was therefore improper. *See Clark*, *supra*, 364 Md. at 655 ("The witness may be asked about anything [on cross-examination] that tends to show an inability to recall and to testify accurately, **provided counsel has a good faith basis for the question**.") (emphasis added) (internal citations omitted). Moreover, permitting defense counsel to imply, without any evidence in support, that there was some sort of collusion between Essel and the State regarding Essel's testimony would have certainly caused confusion for the jurors and unfair prejudice to the State. *See Reynolds v. State*, 98 Md. App. 348, 370 (1993) ("If the introduction of a particular item of evidence would be likely to cause confusion or unfair prejudice, the trial judge has discretion to exclude it, notwithstanding the fact that it would provide an additional means for impeaching the witness.").

Finally, defense counsel's inquiry into Essel's alleged conversations with the prosecutor appears to have been based on apparent inconsistencies between Essel's trial testimony, during which she stated that she told the 9-1-1 operator that she "was getting raped," and the actual recording, during which, according to defense counsel, Essel stated

that "he tried to rape me." Had such inconsistencies existed -- that is, had Essel made statements during her 9-1-1 call that conflicted with her trial testimony -- defense counsel could have simply confronted Essel with the 9-1-1 recording, which was ultimately admitted into evidence. In other words, there was no need for defense counsel to attack Essel's credibility with unsubstantiated allegations of "coaching" by the prosecution, as defense counsel had more appropriate means of impeachment at her disposal. As a result, the trial court's limitation of defense counsel's cross-examination did not inhibit appellant's ability to receive a fair trial.

Not surprisingly, appellant cites no case in which this Court or the Court of Appeals held that unsubstantiated allegations of collusion between the State and a witness were within the bounds of appropriate cross-examination. Instead, appellant relies on two cases, *Calloway v. State*, 414 Md. 616 (2010), and *Carrero-Vasquez v. State*, 210 Md. App. 504 (2013), for the general proposition that a trial court "must not let its own take on the evidence substitute for the potential interpretation of the evidence by the jury." Neither case is applicable here.

In *Calloway*, *supra*, the defendant, Leon Calloway, was charged with second-degree assault. 414 Md. at 619. Prior to trial, Nicholas Watson, Calloway's former cell-mate, placed a telephone call to the State's Attorney and "offered to testify about several inculpatory statements that [Calloway] had allegedly made to him." *Id.* At the time of the call, Watson was facing multiple charges in separate cases and was being held on a $10,000 cash bond that he was unable to post. *Id.* Following the call, the State requested that Watson be released on "personal bond," and the State ultimately "nolle prossed" several of

Watson's pending charges. *Id.* The State then filed a motion *in limine*, in which it asked that Calloway be prohibited from cross-examining Watson about "whether he had volunteered to testify for the State in the hope that he would receive some benefit in the cases that were pending against him when he contacted the prosecutor's office." *Id.* The court granted the motion and found that, under the circumstances, Watson's decision to testify was not motivated by any hope or expectation of benefit from the State. *Id.* at 631.

On appeal, the Court of Appeals held that the court's decision was erroneous. *Id.* at 639. In so doing, the Court noted that Maryland Rule 5-616(a)(4) "grants the criminal defendant the right to question a State's witness about facts that are of consequence to the issue of whether 'the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely.'" *Id.* at 633. On this point, the Court reasoned that there was sufficient circumstantial evidence from which the jury could infer bias on the part of Watson:

> The record clearly shows that, after he made his phone call to the State's Attorney's Office, (1) Mr. Watson was released from the Montgomery County Correctional Facility, and (2) the charges pending against him were nolle prossed. Moreover, as of the date on which Mr. Watson testified in the case at bar, even though it is clear that he entered a guilty plea that constituted a "Rule 4" violation of probation, no violation of probation charge had been filed against him. Under these circumstances, we hold that the issues of whether Watson placed the . . . phone call in the hope of being released from detention, and whether he was testifying at trial in the hope of avoiding a violation of probation charge, should have been decided by the jury rather than by the Circuit Court.

Id. at 637.

In *Carrero-Vasquez v. State*, *supra*, the defendant, Juan Carlos Carrero-Vasquez, borrowed a vehicle from a friend, Veronica de Luna, and was later stopped by the police for speeding and intentionally skidding. *Id.* at 508. During the stop, the police recovered a stolen handgun from inside of the vehicle, and Vasquez was charged with various offenses, including several gun-related charges. *Id.* At trial, de Luna, who was an illegal immigrant, testified that she did not own the handgun found inside of her car and that she had never seen her children's father, who also had access to the car, in possession of the gun. *Id.* at 517. Prior to de Luna's testimony, the State moved to preclude Vasquez from cross-examining de Luna "about her immigration status and the effect that a gun conviction would have on that status[.]" *Id.* at 516. The court granted the motion, and Vasquez was ultimately convicted. *Id.* at 509, 516.

On appeal, Vasquez argued that "his right of confrontation was violated by the trial court's ruling, which had the effect of preventing him from cross-examining Ms. Luna as to a motive that she had to testify falsely." *Id.* at 519-20. This Court agreed with Vasquez and held that the trial court erred in "prohibiting the defense from cross-examining the State's principal witness about the effect a criminal conviction might have on her immigration status[.]" *Id.* at 508. We reasoned that, under the circumstances, de Luna's immigration status was not "merely a collateral issue, likely to confuse and mislead the jury," but rather "an obvious reason that an important witness for the prosecution might have to testify falsely." *Id.* at 522. We explained that Vasquez's inquiry, along with the related inferences regarding de Luna's motive to testify falsely, were supported by a sufficient factual foundation, as de Luna testified that "she was both illegally in the United

States and aware of the potential deportation consequences if she were convicted of possessing the stolen handgun at issue." *Id.* at 527. We further explained that "evidence that Ms. Luna had a motive to testify falsely was not outweighed at all, much less substantially so, by the danger of confusion to the jury or unfair prejudice to the State." *Id.* (internal citations and quotations omitted).

Both *Calloway* and *Carrero-Vasquez* are distinguishable from the instant case. In those cases, the factual support for the subject inquiry was well-established and undisputed, and the inferences sought from these facts were reasonable under the circumstances. In the present case, however, there was no factual support for appellant's inquiry, as appellant has failed to even establish whether Essel had a conversation with the State regarding her testimony, much less whether that conversation resulted in "coaching." Thus, the trial court's preclusion of appellant's inquiry did not, as appellant suggests, result in the trial court substituting its interpretation of the evidence for that of the jury. Instead, the trial court's ruling prevented appellant from presenting to the jury an unsubstantiated and improper exploration into "what extent, if any, the State coached the witness about matters material to the State's case." Under the circumstances, such an exploration was wholly unreasonable and unfairly prejudicial to the State, and the trial court did not abuse its discretion in disallowing appellant's inquiry.[1]

[1] Appellant also posits that, if the trial court based its ruling on hearsay grounds, as it seemingly did when defense counsel first objected, such a ruling was legally erroneous. We need not address these claims, however, because there is no indication that the court excluded the evidence on hearsay grounds.

II.

Appellant also contends that the trial court erred in overruling defense counsel's objection to the State's closing argument, in which the State commented on Sellers' credibility and his motivation for testifying. Appellant maintains that such comments constituted improper vouching by the State. The State counters that the comments were not improper vouching, but instead were an appropriate commentary on a witness' credibility. We agree with the State.

"Closing arguments are an important aspect of trial, as they give counsel 'an opportunity to creatively mesh the diverse facets of trial, meld the evidence presented with plausible theories, and expose deficiencies in his or her opponent's argument.'" *Donaldson v. State*, 416 Md. 467, 487 (2010) (internal citation omitted). It provides counsel with an opportunity "to 'sharpen and clarify the issues for resolution by the trier of fact in a criminal case' and 'present their respective versions of the case as a whole.'" *Whack v. State*, 433 Md. 728, 742 (2013) (internal citations omitted). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Id.* (internal citations and quotations omitted).

To that end, our appellate courts have long held that the parameters within which counsel must confine themselves during closing argument are vast:

> While arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel, generally speaking, liberal freedom of speech should be allowed. There are no hard-and-fast

> limitations within which the argument of earnest counsel must be confined – no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.

Wilhelm v. State, 272 Md. 404, 412 (1974)[2] (cited in *Anderson v. State*, 227 Md. App. 584, 589 (2016)).

"Despite this lack of 'hard-and-fast limitations' on closing arguments, one technique in closing argument that consistently has garnered our disapproval, as infringing on a defendant's right to a fair trial, is when a prosecutor 'vouches' for (or against) the credibility of a witness." *Spain v. State*, 386 Md. 145, 153 (2005). "Vouching typically occurs when a prosecutor 'place[s] the prestige of the government behind a witness through personal assurances of the witness's veracity . . . or suggest[s] that information not presented to the jury supports the witness's testimony.'" *Id.* (internal citations omitted). Generally speaking, prosecutorial vouching is improper because: 1) it can convey the impression that evidence known only to the prosecutor supports the charges against the defendant; and 2) it carries with it an implied seal of approval from the State, which may "induce the jury to trust the [State's] judgment rather than its own view of the evidence." *U.S. v. Young*, 470 U.S. 1, 18-19 (1985).

[2]Abrogated on other grounds as recognized by *Simpson v. State*, 442 Md. 446, 458 n. 5 (2015).

That said, comments by the State regarding a witness's credibility do not automatically constitute prosecutorial vouching and may be appropriate depending on the circumstances:

> No one likely would quarrel with the notion that assessing the credibility of witnesses during a criminal trial is often a transcendent factor in the factfinder's decision whether to convict or acquit a defendant. During opening and closing arguments, therefore, it is common and permissible generally for the prosecutor and defense counsel to comment on, or attack, the credibility of the witnesses presented.
>
> Part of the analysis of credibility involves determining whether a witness has a motive or incentive not to tell the truth. Attorneys therefore feel compelled frequently to comment on the motives, or absence thereof, that a witness may have for testifying in a particular way, so long as those conclusions may be inferred from the evidence introduced and admitted at trial.

Spain, 386 Md. at 154-55 (internal citations omitted).

"The determination whether counsel's remarks in closing were improper and prejudicial, or simply permissible rhetorical flourish, is within the sound discretion off the trial court to decide." *Sivells v. State*, 196 Md. App. 254, 271 (2010) (internal quotation and citations omitted). We generally defer to the judgment of the trial court because it "is in the best position to determine whether counsel has stepped outside the bounds of propriety during closing argument." *Whack*, *supra*, 433 Md. at 742. "As such, we do not disturb the trial judge's judgment in that regard unless there is a clear abuse of discretion that likely injured of a party." *Id.* (internal citations and quotations omitted). An abuse of discretion occurs when a trial judge exercises his or her discretion "in an arbitrary or

capricious manner or when he or she acts beyond the letter or reason of the law." *Brewer v. State*, 220 Md. App. 89, 111 (2014) (internal citations and quotations omitted).

Against this backdrop, we hold that the trial court in the instant case did not abuse its discretion in overruling appellant's objection during the State's closing argument. In commenting on Sellers' credibility and motive for testifying, at no time did the State give any personal assurances that Sellers was telling the truth, nor did the State imply that its conclusions regarding Sellers' testimony were based on evidence known only to the State. Rather, the State's rhetorical questions to the jury regarding Sellers' motives for testifying were appropriate commentaries on Sellers' trustworthiness, as they provided the jury with a reasonable explanation of why Sellers would have no reason to lie. Importantly, these commentaries, along with the reasons given by the State regarding Sellers' lack of incentive to lie, were based on the evidence presented. In other words, the State did not suggest that Sellers testified truthfully because the prosecutor knew something that the jury did not; instead, the State merely asked the jury whether it believed Sellers would have given the testimony he did (and subjected himself to cross-examination) had he simply "walked in on some consensual act."[3]

For these reasons, appellant's case is distinguishable from *Sivells*, *supra*, on which appellant relies. In that case, the defendant, Bryan Sivells, was arrested and charged with various drug offenses after several police officers witnessed him engage in an apparent

[3] This comment was likely a response to inferences raised by the defense during its cross-examination of Sellers and Essel that the sexual act between Essel and appellant was consensual.

drug transaction. 196 Md. App. at 263. At trial, the officers testified as to what they witnessed, and Sivells responded by attacking the officers' credibility. *Id.* at 271. During its rebuttal closing, the State addressed these attacks by claiming: that the police officers were risking their pensions and jobs if they gave false testimony; that they were "honorable men" because of their profession; and that they were "honorable" because "they told the truth." *Id.* at 278-79.

On appeal, Sivells argued that the State's comments constituted improper vouching. *Id.* at 278. This Court agreed and held that the State's arguments violated the rule against vouching. *Id.* at 280. We explained that the first comment was improper because "there was no evidence to support the prosecutor's statement that the police would lose their pensions or their livelihood if they 'made things up.'" *Id.* We also noted that "the repeated references to the officers as 'honorable men,' and the ultimate statement that 'they told the truth,' crossed the line" because "the prosecutor was expressing her personal opinion" and because "the comments were not tied to the evidence in the case." *Id.*

In the present case, however, the State was not expressing a personal opinion, nor was the State relying on matters not in evidence. Rather, the State asked the jury to draw its own conclusions regarding Sellers' credibility based on the content of his testimony and the circumstances under which it was given. Such comments are not improper and not at all similar to the comments at issue in *Sivells.* Thus, appellant's claim that "the State committed the same error committed in *Sivells v. State*" is erroneous.

The State's comments in the instant case are more akin to certain comments at issue in *Spain v. State*, *supra.* There, the defendant, Jesse Spain, Jr., was arrested based on his

participation in a drug transaction involving an undercover police officer. *Spain*, *supra*, 386 Md. at 148-49. The State's sole witness at trial was the undercover officer, who testified "as both a fact witness and an expert on the packaging, identification, and distribution of street level narcotics[.]" *Id.* at 149-50. The defense responded to this testimony by claiming that the officer was mistaken and that Spain was not involved in any drug transaction. *Id.* at 150. During closing argument, the State made several comments regarding the officer's credibility, including that the officer "did not have a motive to testify falsely."[4] *Id.* at 154.

On appeal, Spain claimed that this comment constituted improper vouching. *Id.* The Court of Appeals disagreed:

> The prosecutor's comments about [the officer's] absence of a motive to lie did not implicate any information that was outside the evidence presented at trial. When a prosecutor argues that a particular police officer lacks a motive to testify falsely, such comments do not bear directly on a defendant's guilt or innocence, but are merely an allusion to a lack of evidence presented by the defendant that the officer in this case possessed any motive to lie or devise a story implicating the defendant in criminal conduct. The prosecutor's invitation for the jury to consider whether the officer had a motive to lie did not amount to improper vouching because the comments did not express any personal belief or assurance on the part of the prosecutor as to the credibility of

[4] The State also commented that the officer "had a motive to testify truthfully because to testify falsely would expose him to the penalties of perjury and lead to adverse consequences to his career as a police officer." *Spain*, *supra*, 386 Md. at 154. Spain objected to this comment as well, and the Court of Appeals ultimately found the comment to be improper. *Id.* Like this Court in *Sivells*, *supra*, the Court of Appeals found the State's comment improper because it drew upon information not in evidence and implied that a police officer was more credible simply because he is a police officer. *Spain*, *supra*, 386 Md. at 156-58. In the present case, however, neither of these issues is evident; thus, the Court's analysis of this argument is not germane to the instant case and has been omitted.

> the officer. Nor did such comments, in isolation, explicitly invoke the prestige or office of the State or particular police department or unit involved.

Id. at 155-56 (internal citations omitted).

In our view, the Court's reasoning in *Spain* is wholly applicable to the instant case, for the reasons previously discussed. In short, the trial court did not err in permitting the comments because the comments were not improper. For this reason, we need not address appellant's remaining claims regarding the lack of a curative instruction, the weight of the evidence, and the harmlessness of the court's alleged error.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.