UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 997

September Term, 2016

---

PHILIP DANIEL THOMAS

v.

STATE OF MARYLAND

---

Graeff,
Kehoe,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

---

Opinion by Kenney, J.

---

Filed: June 8, 2017

A jury in the Circuit Court for Wicomico County convicted Philip Thomas, appellant, of kidnapping, second-degree assault, false imprisonment, driving under the influence, and driving while impaired. Appellant was sentenced to a term of 15 years' imprisonment on the conviction for kidnapping, a consecutive term of three years' imprisonment on the conviction for second-degree assault, and a concurrent term of one year imprisonment on the conviction for driving under the influence.[1] In this appeal, appellant presents the following questions for our review, which we have reordered:

1. Did the trial court fail to properly exercise discretion and/or abuse its discretion in admitting into evidence statements made by appellant to police officers?

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

3. Did the trial court err in imposing separate, consecutive sentences for kidnapping and second-degree assault?

For reasons to follow, we answer questions 1 and 2 in the negative and question 3 in the affirmative. Accordingly, we vacate appellant's sentences and remand to the circuit court for resentencing in accordance with this opinion. Otherwise, we affirm.

## BACKGROUND

On December 19, 2015, Inger Lawson was on a date at a restaurant with appellant and two other individuals, a friend of appellant, Lorenzo Colic, and Colic's girlfriend, "Shonda." After eating, appellant and Lawson left the restaurant, got in Lawson's car, and Lawson drove to a nearby liquor store, where appellant purchased alcohol. They then traveled to Colic's house for drinks with Colic and Shonda. During the visit, Shonda told

[1] Appellant's conviction of false imprisonment was merged for sentencing purposes.

Lawson that she was glad to see appellant "with a black female." Lawson responded that appellant was her "friend" but was not her "man." Lawson later testified that appellant may have been offended by this comment.

After staying there for approximately 15 to 20 minutes, appellant told Lawson that he was "ready to go." He grabbed the keys to Lawson's car and told her that he was "just going to warm the car up." Lawson said goodbye to Colic and Shonda and followed appellant outside.

When Lawson reached her car, appellant was sitting in the driver's seat. She approached the driver's side and informed appellant that she "could drive or whatever." Appellant got out of the car stating: "That's why I don't fuck with black bitches." He then hit Lawson in the face multiple times, forced her into the car through the open driver's side door, pushed her over to the passenger's side, and got in the driver's seat. After being forced into the car, Lawson told appellant "numerous times" that she wanted to go home, to which appellant replied, "I'm gonna kill you," and drove away.

During the drive, appellant reiterated that he was going to kill Lawson "for disrespecting him." At one point, as the car was traveling approximately 50 miles per hour, Lawson tried to "get the door open," but "the wind was steady blowing the door." When she eventually forced the door open and got her feet outside the door, appellant grabbed her, pulled her back in the car, and told her, "you ain't getting out this easy" and "you gonna see what I got for you." Seeing "a stop sign coming up," Lawson managed to jump out of the car. After hitting the ground, she "got up" and "started walking" toward "colorful lights," which she observed were coming from a nearby police car.

About the same time, Maryland State Police Trooper Travis Workman, who was in his patrol vehicle traveling eastbound on Nanticoke Road, observed a vehicle, later identified as Lawson's, performing an "unsafe U-turn" and "driving quite recklessly." Trooper Workman initiated a traffic stop of the vehicle and made contact with the driver, whom he later identified as appellant. The trooper, having "detected the odor of an alcoholic beverage," performed a field sobriety test on appellant. While administering that test, Trooper Workman saw Lawson "walking up."

Maryland State Police Trooper William Shelter, who had arrived on the scene to assist Trooper Workman with the traffic stop, made contact with Lawson, who was "incredibly disheveled, bloodied, and appeared to be suffering from some injuries." Lawson reported the attack to the police and was treated for her injuries. Appellant was placed under arrest and transported to the Maryland State Police barracks, where he gave a written statement.

During Trooper Workman's subsequent trial testimony, the State introduced appellant's written statement into evidence. In the statement, appellant indicated that, on the night in question, Lawson was smoking "her weed" and taking "shots" of "moonshine." Appellant also indicated that he and Lawson had intended to have sex in her car "on a back road," but that Lawson started "freaking out" and "jumped out of the car."

After introducing the statement, the State asked Trooper Workman if appellant had made any other statements:

> [STATE]: Is there anything else that [appellant] said to you at any point, or does that cover it?

[WITNESS]: Well, aside from the written statement, he made several statements about not wanting to date black bitches because they don't listen. He was very adamant that he –

[DEFENSE]: I'm going to object. Move to strike. Primarily –

THE COURT: Basis?

[DEFENSE]: That information has not been disclosed to me in discovery, so I have to ask for a mistrial.

THE COURT: Overruled. Motion denied.

[WITNESS]: He, like I said, he was stating that he did not want to date black bitches because they do not listen. He said it several times in several different ways.

But that was essentially the gist of [appellant's], I guess, discord with the situation, he did not agree with black women.

[DEFENSE]: I just want to make clear, I've never heard anything about that until this very moment in time.

[STATE]: And you didn't follow up on that, what he meant by that or anything, did you?

[WITNESS]: No, I didn't ask anything about it. I didn't ask him any questions.

Later, the State called Maryland State Police Corporal David Grinnan as a witness. Corporal Grinnan testified that he was responsible for administering a blood alcohol test on appellant at the police barracks following his arrest. The State then asked Corporal Grinnan about the breath test:

[STATE]: Did anything unusual occur, or was anything unusual said during the breath test?

[WITNESS]: I recall a conversation with [appellant] during the breath test. He cooperated fully. He was polite and courteous during the testing.

But we did have a candid conversation about relationships; specifically in terms of dating and interracial dating and –

[STATE]: Specifically what did he say?

[DEFENSE]: I'm going to ask permission to approach, Your Honor.

THE COURT: Why?

[DEFENSE]: Because I have an objection as to this statement that's not previously been disclosed to me.

THE COURT: Well, that's your objection.

[DEFENSE]: That's my objection.

THE COURT: What's your motion?

[DEFENSE]: I'm moving to preclude any testimony on this subject.

THE COURT: All right.

[DEFENSE]: And strike the question.

[STATE]: The statement has been disclosed in the police report, in Ms. Lawson's written statement, and in Ms. Lawson's own testimony. He knows exactly what it's going to be, it's not a surprise.

THE COURT: All right. The objection is overruled.

The State then continued with its examination of Corporal Grinnan:

[STATE]: What did [appellant] say?

[WITNESS]: He stated that this is why he doesn't date nigger bitches.

[STATE]: Why?

[WITNESS]: Because they are crazy and they don't listen.

[DEFENSE]: Your Honor, in addition to the discovery violation, it is certainly more prejudicial than probative of any fact in consequence, so I –

THE COURT: Well…it can be both, probative and unduly prejudicial.

[DEFENSE]: Well, it's certainly more prejudicial than probative of any fact in consequence.

THE COURT: Well, if it's something your client said…none of that applies. That test does not apply. It's words from your own client, apparently.

[DEFENSE]: Your Honor, I'm making the objection.

THE COURT: All right. I previously overruled your objection.

[DEFENSE]: Well, I have to make clear what the grounds are that I'm objecting upon, and so I'm objecting upon the relevance of this statement, to the extent it's relevant it's more prejudicial than probative of any fact in consequence, and so –

THE COURT: The prejudice test would not apply because it's something allegedly generated by your client, not by a third party.

[DEFENSE]: The prejudice test applies if it's not relevant, and I can –

THE COURT: I think it's relevant. It certainly is relevant.

[DEFENSE]: Once the relevancy determination is made, the Court still has an obligation to exclude relevant evidence on the grounds –

THE COURT: All right.

[DEFENSE]: – that the prejudice outweighs any probative value.

THE COURT: All right. Your objection is overruled.

During cross-examination, defense counsel questioned Corporal Grinnan about appellant's statement and whether the statement was included in any of the police reports. Corporal Grinnan responded that he did not include the statement in any of his reports but that he believed that Trooper Workman had included it in his report because he was Trooper Workman's "supervisor" and had "looked his report over." When questioned further about whether he saw the statement in Trooper Workman's report, Corporal Grinnan responded that he did not "recall specifically" and that he was "not certain if it was or not." Defense counsel then presented Corporal Grinnan with several documents related to appellant's arrest, none of which contained any reference to appellant's statement. The State stipulated that appellant's statement was "not in any of the police reports."

Lorenzo Colic testified on appellant's behalf. Colic maintained that, when appellant and Lawson left his house on the night in question, Colic watched them get in Lawson's car and he did not observe anyone "get physical with anyone else." Colic also maintained that he did not observe Lawson consume any intoxicating substances other than alcohol. When asked how much alcohol Lawson consumed that night, Colic responded "not much."

Appellant also testified. Appellant claimed that he and Lawson left Colic's house because Colic and Shonda "wanted to spend some alone time." Appellant denied assaulting Lawson or forcing her into the car. According to appellant, the two were "laughing" and having "a good night," but during the drive, Lawson decided to jump out of the car on her own.

At the close of the evidence, the court instructed the jury on the crimes charged, including kidnapping and second-degree assault:

> In order to convict [appellant] of kidnapping, the State must prove that [appellant] confined or detained the victim against her will, that he used force or the threat of force to accomplish that confinement or detention, that he moved the victim from one place to another, and that he moved the victim with the intent to carry or conceal the victim or to confine her.
>
> That takes us to count 2, second degree assault. The State is proceeding under two theories, both of which constituted second degree assault. It's up to you to decide if the State has proven second degree assault beyond a reasonable doubt. The most basic form is what we used to call battery, and that would be where [appellant] causes physical harm to the victim, where the contact causing that physical harm was the result of an intentional or reckless act on his part and was not accidental and that such contact was not consented to by the victim and was not legally justified.
>
> Another theory is simply by intending to frighten someone. Someone may be guilty of second degree assault if he commits an act with the intent to place a victim in fear of immediate physical harm and that [appellant] had the apparent ability at that time to bring about that physical harm, and that the victim reasonably feared immediate physical harm, and that [appellant's] actions were not legally justified.

After the jury was instructed, the State presented its closing argument, during which it discussed Lawson's and appellant's testimony:

> And thank God she got out of that car, you know, and was just banged up and bruised up, and I'm grateful what happened to her didn't happen to me, but I'm glad she was here today to testify. I'm glad we don't have to find out what was going to happen.
>
> Then on the flip side of that, right, consistency, consistency, consistency, all the way through, I want you to think about, we got, you know, [appellant] over here, you're going to see, it's in evidence, it's his written statement, he brought his buddy in, lifelong friend, I'm sure, you know, he thought he was bringing his friend in, hoping that his friend would, you know, lie to help out Lying Thomas –

At this point, defense counsel objected, and the trial court overruled the objection. The State continued:

> – but his friend, his friend tells the truth. You know, nobody's drinking, nobody's smoking weed, I saw him go out the front door, I closed the door, that's the last that I saw. Yes, he dates a lot of women, you know, yeah, I know, he's got a temper with women. But he told the truth. But he was hoping that wouldn't happen, but it did. And I thank [him] for telling the truth.
>
> And then we have Lying Thomas's written statement that he's going to tell you what happened that night. I met [Lawson] about a week ago…we met up tonight, she smokes her weed, hold on, Lying Thomas forgot to say that today, didn't he? He didn't say that today, but he wrote it down, that she smokes her weed, which I'm cool with, because I don't smoke, but it was all cool until the homemade moonshine came out. Anybody hear any testimony about homemade moonshine today? Lying Thomas forgot that, but he wrote it that day, that was the best he'd come up with –

Defense counsel again objected "to this Lying Thomas repetition," and the trial court again overruled the objection. The State continued:

> Anyway, what turned into us about to have sex on a back road. Anybody hear any testimony about they were about to have sex on a back road? That's what Lying Thomas wrote that day….Next thing I know she jumped out of the car. I stopped and that was it. I saw the police. So says Lying Thomas that night, signed, dated, he told you he testified this is my statement. Is that at all what he told you today?

The jury ultimately returned a verdict of guilty on several charges, including kidnapping and second-degree assault. In returning its verdict, the jury did not specify which act or acts formed the basis for the kidnapping conviction, nor did it specify which act or acts formed the basis for the second-degree assault conviction. As previously noted, the court sentenced appellant to a term of fifteen years' imprisonment for kidnapping and

a consecutive term of three years' imprisonment for second-degree assault. This timely appeal followed.

## DISCUSSION

### I.

Appellant first contends that the trial court erred in admitting into evidence statements he made to police in which he revealed that he "did not want to date black bitches" and that he "doesn't date nigger bitches" because they "don't listen." Appellant maintains that the trial court, when ruling on the admission of the second statement, abused its discretion by refusing to consider the statement's prejudicial effect and instead applying a "hard and fast rule" that the statement was "not subject to weighing of prejudice against probative value." Appellant also maintains that the trial court should have excluded both statements because their probative value was outweighed by the potential for unfair prejudice, as there was an "extraordinary and obvious risk that these sentiments would communicate to the jury that appellant was a person who deserved punishment." Finally, appellant contends that the statements should have been excluded because the State failed to disclose these statements to defense counsel prior to trial.

The State counters that appellants' statements were properly admitted because "the probative value of the evidence was not substantially outweighed by its prejudice." According to the State, appellant's statements were probative because they corroborated Lawson's testimony that appellant told her "that's why I don't fuck with black bitches" prior to assaulting her. The State further maintains that the statements were not prejudicial because appellant did not use his words "to express racial prejudice towards Lawson or to

degrade her;" rather, according to the State, appellant, "who is black, used the words 'black' and 'nigger' interchangeably for the same purpose: to describe Lawson's race." The State also insists that, even if the trial court erred in admitting these statements, any error was harmless because appellant was not prejudiced by the statements' admission and, for the same reason, the State contends that any discovery violation committed by the State should not have precluded the statements' admission.

**A.**

We first address appellant's claim that the statements should have been excluded because their probative value was outweighed by the risk of unfair prejudice. Regarding appellant's first statement – that he "did not want to date black bitches" – we hold the issue to be waived. When, as in this case, counsel objects to the admission of evidence and the trial court requests that counsel provide a basis for the objection, "that party will be limited on appeal to a review of those grounds and will be deemed to have waived any ground not stated." *Leuschner v. State*, 41 Md. App. 423, 436 (1979). The sole grounds provided by defense counsel for his objection to that statement was that the statement had not been disclosed in discovery; counsel made no mention of the statement's relevance or prejudicial impact. Accordingly, this issue is not preserved for our review. Md. Rule 8-131(a).

As to appellant's second statement – that he "doesn't date nigger bitches" – we hold that the trial court did not err in admitting the statement. "It is frequently stated that the issue of whether a particular item of evidence should be admitted or excluded 'is committed to the considerable and sound discretion of the trial court,' and that the 'abuse of discretion' standard of review is applicable to 'the trial court's determination of relevancy.'" *Ruffin*

*Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 619 (2011) (internal citations omitted). But, Maryland Rule 5-402 "makes clear that the trial court does not have discretion to admit irrelevant evidence." *Id.* at 620. Consequently, a trial court's evidentiary ruling encompasses both a legal and a discretionary determination, which in turn implicates two separate standards of review: (1) a *de novo* standard, which we apply to the trial court's legal conclusion that the evidence was relevant; and (2) an abuse of discretion standard, which we apply to the trial court's determination that the probative value of the evidence is outweighed by any substantial prejudice. *State v. Simms*, 420 Md. 705, 725 (2011).

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." Md. Rule 5-401. In other words, evidence is relevant if it is both material and probative. "Evidence is material if it bears on a fact of consequence to an issue in the case." *Smith v. State*, 218 Md. App. 689, 704 (2014). Its "[p]robative value relates to the strength of the connection between the evidence and the issue…to establish the proposition that it is offered to prove." *Id.* (internal citations and quotations omitted). But, "[e]vidence is never excluded merely because it is prejudicial." *Alban v. Fiels*, 210 Md. App. 1, 24 (2013) (internal citations and quotations omitted). "Probative value is outweighed by the danger of 'unfair' prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case." *Id.* (internal citations and quotations omitted).

Even legally relevant evidence, however, may be excluded "if the probative value of such evidence is determined to be substantially outweighed by the danger of unfair

prejudice." *Andrews v. State*, 372 Md. 1, 19 (2002). "We determine whether a particular piece of evidence is unfairly prejudicial by balancing the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case." *Smith*, 218 Md. App. at 704. In other words, even evidence of a "highly incendiary nature" may be admissible if it significantly aids the jury in understanding a fact in issue, but such evidence should not be admitted if its probative value is weak, particularly when the evidence "might produce a jury inference that the defendant had a propensity to commit crimes or was a person of general criminal character." *Id.* (internal citations and quotations omitted). This balancing inquiry "is left to the sound discretion of the trial judge and will be reversed only upon a clear showing of abuse of discretion." *Malik v. State*, 152 Md. App. 305, 324 (2003).

In *Banks v. State*, 84 Md. App. 582 (1990), a case on which appellant relies, this Court held that photographs depicting the defendant holding a handgun, which were admitted for no purpose other than to identify the defendant, were minimally relevant and unduly prejudicial. *Id.* at 586, 589. In that case, the defendant was charged with distribution of cocaine. *Id.* at 583. At trial, a police officer, Richard Lyne, testified that the defendant sold him cocaine while Lyne was working undercover. *Id.* at 584. Lyne also testified that he did not discover the defendant's identity until after the transaction, when another officer showed Lyne two photographs, each of which depicted the defendant holding a gun. *Id.* at 584-85. The State then sought to admit these two photographs "to establish how Lyne confirmed that the person from whom he purchased cocaine was, in

fact, the person introduced to him as [the defendant]." *Id.* at 589. Over objection, the trial court admitted the photographs. *Id.* at 588.

We held that the trial court erred in admitting the photographs. *Id.* at 590. In so doing, we noted that the "critical issue in the case was [the defendant's] criminal agency" and that "neither possession nor use of a handgun was an issue in the trial." *Id.* at 589, 590. We further noted that the photographs were admitted not because they "depicted an event relevant to the case or because they were illustrative of Lyne's testimony[,]" but rather "to show how the officer identified the defendant and how they were obtained." *Id*. at 589. We concluded, therefore, that the photographs' probative value was low. *Id.* at 592. And, conversely, we determined that the photographs were "extremely" prejudicial and that "their prejudicial effect far outweighed their relevance, hence, their probative value." *Id.* We reasoned:

> Possession and, indeed, use, of weapons, most notably, firearms, is commonly associated with the drug culture; one who is involved in distribution of narcotics, it is thought, *a fortiori*, would be more prone to possess, and/or use, firearms, or other weapons, than a person not so involved….Because handguns and the distribution of cocaine, or other narcotics, go together, or at least are equated together, we reject the State's argument that the photographs are not prejudicial.

*Id.* at 591-92.

Guided by the above legal principles and the issues presented in this case, we are not persuaded that the trial court abused its discretion in admitting into evidence appellant's statement to police that he "doesn't date nigger bitches" because "they are crazy and they don't listen." The State's theory of the case was that appellant assaulted and kidnapped Lawson because she made comments that appellant construed as disrespectful. Appellant

contended that he never assaulted Lawson or forced her into her car; in fact, they were enjoying themselves when Lawson (because she was under the influence of alcohol and marijuana or for no reason) started "freaking out" and "jumped out of the car." The State's theory was supported by Lawson's testimony that appellant became upset after she told Shonda that appellant was not her "man." Lawson also testified that, just prior to poking her in the face and forcing her into the car, appellant stated "that's why I don't fuck with black bitches." Thus, appellant's statement to police was not only probative of the State's theory, but it also corroborated Lawson's testimony.

As for the statement's prejudicial effect, although there is little question that appellant's choice of words was inflammatory, we do not find that the statement's probative value, which was significant in light of the contending accounts of what happened, was outweighed by the danger of unfair prejudice. As previously noted, Lawson had already testified, without objection, that appellant had made a nearly identical comment to her prior to the assault and kidnapping. *See Grandison v. State,* 341 Md. 175, 218-19 (1995) (finding testimony not unfairly prejudicial where "the contents of that objectionable testimony have already been established and presented to the jury without objection through the prior testimony of other witnesses.") (emphasis removed). Even if appellant's sentiments may have resulted in some prejudice, this alone is not, as previously stated, grounds for exclusion. There is no indication that any resulting prejudice, if it existed, was unfair or needlessly injected into the case, and appellant's claim that these statements communicated to the jury that appellant "deserved punishment" is speculative at best.

For the same reasons, appellant's reliance on *Banks, supra,* is misplaced. Here, the probative value of appellant's statement was high, and any potential for prejudice inherent in appellant's comments was integral to the statement's probative value in an issue central to the case, namely, appellant's motivation for his actions against Lawson. In addition, in *Banks,* we determined that the evidence was prejudicial because, in part, it created a reasonable but unjustified association between the defendant and the underlying crime. Here, even if appellant's inflammatory language may have offended some or all of the jurors, it did not establish an unjustified link between appellant and the charged crimes.

Nor are we persuaded that the trial court abused its discretion in failing to make an on-the-record determination regarding the statement's potential for prejudice. "'There is no requirement that the trial court's exercise of discretion be detailed for the record, so long as the record reflects that discretion was in fact exercised.'" *Walker v. State,* 373 Md. 360, 391 (2003) (quoting *Beales v. State,* 329 Md. 263, 273-74 (1993)). Although the trial court did initially state that the prejudice test did not apply, the trial court followed this statement by indicating that it believed the statement was relevant. Then, after defense counsel stated that the trial court had "an obligation to exclude relevant evidence on the grounds…that the prejudice outweighs any probative value," the trial court acknowledged this obligation by stating "all right" and then overruling defense counsel's objection. This, in our view, indicates that the trial court did ultimately exercise the necessary discretion in overruling defense counsel's objection, despite the trial court's failure to expressly weigh the statement's probative value against the danger of unfair prejudice. *See Walker,* 373

Md. at 391 (finding no abuse of discretion where "the record was ambiguous as to whether the trial judge conducted such a balancing test[.]").

**B.**

Appellant also claims that the statements should have been excluded because the State failed to disclose the statements to defense counsel prior to trial. Appellant maintains that "defense counsel was plainly taken completely by surprise by these statements to the officers, which cast doubt upon appellant's character and to some extent corroborated Lawson's testimony." Appellant insists that, "had counsel known of this proof in advance of trial, his approach to plea bargaining and trial preparation may well have been entirely different." The State concedes that the statements were not disclosed prior to trial but contends that their admission was not an abuse of discretion because the belated disclosure did not prejudice appellant or impair his ability to prepare a defense.

To be sure, the State has an affirmative duty to provide to a criminal defendant "[a]ll written and oral statements of the defendant and of any co-defendant that relate to the offense charged[.]" Md. Rule 4-263(d)(1). Such disclosures shall be made "within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213(c)[.]" Md. Rule 4-263(h)(1). If the State fails to fulfill this obligation, "the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances." Md. Rule 4-263(n).

In determining whether to impose sanctions for a discovery violation, "the proper focus and inquiry is whether [the defendant] was prejudiced, and if so, whether he was entitled to have the evidence excluded." *Thomas v. State*, 397 Md. 557, 572 (2007). "Under Rule 4-263, a defendant is prejudiced only when he is unduly surprised and lacks adequate opportunity to prepare a defense, or when the violation substantially influences the jury." *Id.* at 574. "In assessing prejudice, the facts are significant." *Id.* at 572.

Nevertheless, Rule 4-263 "does not *require* the court to take any action; it merely authorizes the court to act." *Id.* at 570 (emphasis added). Rather, "the presiding judge has the discretion to select an appropriate sanction, but also has the discretion to decide whether any sanction is at all necessary." *Id.* In other words, "even if the State violates Rule 4-263, the question of whether any sanction is to be imposed is committed to the discretion of the trial judge." *Id.* at 572. "In exercising its discretion regarding sanctions for discovery violations, a trial court should consider: (1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances." *Id*. at 570-71 (citing *Taliaferro v. State*, 295 Md. 376, 390 (1983)).

Importantly, "[e]xclusion of evidence for a discovery violation is not a favored sanction and is one of the most drastic measures that can be imposed." *Id.* at 572. "[B]ecause the exclusion of prosecution evidence as a discovery sanction may result in a windfall to the defense, exclusion of evidence should be ordered only in extreme cases." *Id.* at 573. "Where remedial measures are warranted, a continuance is most often the

appropriate remedy." *Id.* This Court discussed discovery sanctions versus exclusion windfalls in *Jones v. State*, 132 Md. App. 657 (2000):

> Although the purpose of discovery is to prevent a defendant from being surprised and to give a defendant sufficient time to prepare a defense, defense counsel frequently forego requesting the limited remedy that would serve those purposes because those purposes are not really what the defense hopes to achieve. The defense, opportunistically, would rather exploit the State's error and gamble for a greater windfall.

*Id.* at 678; *See also Thomas*, 397 Md. at 575.

In the present case, we hold that the trial court did not err or abuse its discretion in refusing to exclude appellant's statements, despite the State's failure to disclose these statements in accordance with Rule 4-263. Appellant's only claim of prejudice resulting from the State's belated disclosure is that "had counsel known of this proof in advance of trial, his approach to plea bargaining and trial preparation may well have been different." We are not persuaded that such a speculative claim of prejudice is, under the facts of his case, sufficient to warrant the extreme sanction of exclusion. Defense counsel may have been surprised by the fact that appellant made such statements to the police, but he could not have been surprised by the statements themselves, as appellant made a nearly identical statement to Lawson during the attack. Moreover, upon learning of his client's statements to the police, defense counsel used the statements to impeach Corporal Grinnan, who testified that he believed the statements had been included in a police report, which turned out not to be true. In the end, although the statements were not included in the police reports, appellant's defense was not so irreparably prejudiced by the disclosure delay as to deny him a full and adequate defense. *See Francis v. State*, 208 Md. App. 1, 26-27 (2012).

Importantly, defense counsel only asked for the most extreme remedies. When he objected during Trooper Workman's testimony, defense counsel asked for a mistrial; when he objected during Corporal Grinnan's testimony, defense counsel sought exclusion. At no time did defense counsel ask for a continuance or other remedial measure. In fact, defense counsel did not even renew his objection after the State conceded that the statements were not included in any of the police reports, apparently satisfied with the situation following his impeachment of Corporal Grinnan.

**II.**

Appellant next contends that the trial court erred in permitting the State to repeatedly refer to him as "Lying Thomas"[2] during closing argument.[3] Appellant maintains that these references "improperly appealed to the passions and prejudices of the jury." According to appellant, the instant case "was a classic 'he said, she said,'" and the State's argument "might well have tipped the balance."

The State counters that the argument was appropriate, as "the prosecutor employed a rhetorical device – 'Lying Thomas' – during his closing argument to remind the jurors of

[2] Presumably, the "Lying Thomas" reference was an oratorical conceit or flourish based on "Doubting Thomas," a term often applied to the Apostle Thomas in the New Testament.

[3] The State argues that appellant's claim is "partly unpreserved" because the prosecutor referred to appellant as "Lying Thomas" on six occasions, yet defense counsel only objected to the first four. We disagree. During his second objection, defense counsel stated that he was objecting "to this Lying Thomas repetition," which the court overruled. Given the court's clear indication that it was permitting the reference, requiring appellant to lodge additional objections "would be to exalt form over substance." *Norton v. State*, 217 Md. App. 388, 396 (2014) (internal citations and quotations omitted).

the inconsistencies between [appellant's] testimony and the other evidence presented at trial." The State also maintains that "nothing in the remark appealed to the passions and prejudices of the jury" and that "there was no risk that the jury was misled or unfairly influenced to [appellant's] prejudice."

"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).

Generally speaking, "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[.]" *Lawson v. State*, 389 Md. 570, 591 (2005) (internal citations and quotations omitted). "[T]he fundamental limitation upon the remarks of attorneys is that they may not appeal to the passions or prejudices of the jurors." *White v. State*, 125 Md. App. 684, 702 (1999). We have explained the terms "passion" and "prejudice" as follows:

> First, considering passion, it is easy to state in an appellate opinion that an attorney's final argument should be an appeal to reason and not to passion or emotion, but there are emotional overtones in most criminal cases, especially when the crimes charged are violent….When prosecutors or defense attorneys accurately recount the evidence, even though the evidence arouses emotion, they do not trespass beyond the line that prohibits an unwarranted appeal to passion. The evil to be avoided is the appeal that diverts the jury away from its duty to decide the case on the evidence.
>
> * * *
>
> An appeal to prejudice can be an overture to jurors to decide a case using preexisting favorable or unfavorable opinions about certain groups of people based on perceived generalities or stereotypes. Although it is highly likely that some or all of the jurors may entertain some of the prejudices that exist in their communities, there can be no justification for prosecutors, or defense attorneys for that matter, to exploit those prejudices and subtly or to otherwise ask jurors to reach a verdict based in the slightest upon their prejudices….Appeals to prejudice by lawyers in closing argument run the danger of imploring the jurors to decide, not because they are persuaded by the evidence, but, instead, because of considerations that have no place in the courtroom.

*Id.* at 702-05

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

> 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)[4] (cited in *Anderson v. State*, 227 Md. App. 584, 589 (2016)).

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

For that reason, "we grant attorneys, including prosecutors, a great deal of leeway in making closing arguments." *Whack*, 433 Md. at 742. And, we generally defer to the judgment of the trial court, as it "is in the best position to determine whether counsel has stepped outside the bounds of propriety during closing argument." *Id.* "As such, we do not disturb the trial judge's judgement in that regard unless there is a clear abuse of discretion that likely injured a party." *Id.* (internal citations and quotations omitted). "[W]e do not consider that discretion to be abused unless the judge exercises it 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).

We hold that the trial court in the instant case did not abuse its discretion in permitting the State to refer to appellant as "Lying Thomas" during closing argument. The State's comment did not appeal to the passions and prejudices of the jury, as it did not divert the jury's attention away from the evidence, nor did it ask the jury to decide the case based on perceived generalities or stereotypes regarding certain groups. Rather, the State appeared to be indulging in the sort of rhetorical conceit or flourish sanctioned by our prior case law.

Importantly, each of the State's references was a commentary on appellant's credibility as a witness and either preceded or was preceded by direct references to the evidence. In other words, the prosecutor's comments did not suggest that she was privy to information or evidence not before the jury or serve to remove the credibility finding from the jury. During the first instance, the State theorized that appellant called his friend, Lorenzo Colic, as a witness to corroborate appellant's written statement, in which he

claimed that Lawson was intoxicated. According to the State, Colic ended up "telling the truth" rather than "help out Lying Thomas." The State then discussed several discrepancies between appellant's written statement to police and his trial testimony, noting that appellant gave no testimony regarding "homemade moonshine" or "sex on a back road," despite making such claims in his written statement. While pointing out these evidentiary discrepancies, the State made several more references to appellant as "Lying Thomas."

Appellant's case is distinguishable from *Lawson, supra* and *White, supra,* two cases on which appellant relies. In *White,* the Court of Appeals discussed closing arguments made by the prosecutor, who had referred to the defendant as "dangerous" and the "kind of person" to fear:

> As I told you yesterday [referring to his opening statement], this is an important case. The defendant is a dangerous person. He's the type of person who takes the property of another by force and fear…. I submit that [the defendant] is a dangerous person. He's the type of person that you read about in the papers, that you're afraid of. Going out at night, the kind of person who you're looking behind you at the ATM machine. He's a dangerous person.

*White,* 125 Md. App. at 705-06 (internal footnote omitted).

In analyzing the propriety of these comments, the Court noted that, by characterizing the defendant as "dangerous" and someone who might rob jurors at an ATM machine, the prosecutor ran the risk that the jurors might convict the defendant based on some past transgressions that were irrelevant to the case at hand. *Id.* at 706-07. The Court noted that the comments could also be viewed as "an appeal to passion and prejudice, a request for the jury to convict because of the kind of person the prosecutor characterized [the defendant] as being – an ATM robber." *Id.* at 707. Finally, the Court reasoned that

the comments could be deemed improper because "the prosecutor was asking the jurors to use [the defendant's] appearance to adjudge his guilt," which "ran the risk of calling for the jurors to scorn [the defendant] because of his appearance and to conclude from the way he looks that he belongs to a particular group of feared criminals." *Id.* at 708-09.

In *Lawson*, the Court of Appeals again addressed the propriety of statements made by the State during closing arguments. *Lawson*, 389 Md. at 575. There, the defendant was charged with various crimes related to the sexual abuse of a child and, during closing arguments, the prosecutor made several questionable comments, including that the defendant was a "monster" and "sexual molester:"

> What does a monster look like? Looks like different things to different people. What does a sexual molester look like? He looks like your uncle, your brother, your sister, your cousin. It's possible. But there is no certain way that someone who molests children looks. But they do ingratiate themselves. They make themselves indispensable. They are friendly, always there to watch.
>
> Not everyone is like that, but please don't misunderstand me because the important point here is that a child molester looks like anybody else. That's why they are able to do what they do, because they look like all of us, and we trust.

*Id.* at 596-97.

The defendant in *Lawson* was convicted and, on appeal, argued that these statements were inappropriate because they were "designed to inflame the jurors' prejudices against a hated class of individuals[.]" *Id.* at 597. The Court of Appeals agreed, likening the State's comments to situations in which the State implores the jury to convict a defendant in order to protect or preserve their community. *Id.* at 597-98. The Court also mentioned *Walker v. State*, 121 Md. App. 364 (1998), wherein this Court held that the State's references to

the defendant as an "animal" and a "pervert" were improper, in part because "the search for truth should not be hampered or obfuscated by extreme appeals to passion calculated to inflame the jury." *Lawson*, Md. at 598 (quoting *Walker*, 121 Md. App. at 380-81).

Turning our focus back to the instant case, we perceive none of the above dangers. There was little risk that the State's comments would cause the jurors to convict appellant based on past transgressions, particularly given that the State's comments were bookended by references to his statement to police and his actual testimony. Nor was there any likelihood that the jurors would improperly infer that appellant belonged to a group of "feared criminals," as the State's comments focused on the inconsistencies between appellant's statement to police and his testimony and not his physical characteristics or some alleged criminal conduct outside the incident before the court. Because commenting on a defendant's credibility falls well-within the bounds of acceptable argument, referring to appellant as "Lying Thomas" (although hardly necessary) was not an inflammatory appeal to passion, as discussed by the Court of Appeals in *Lawson.*

In sum, we hold that the trial court did not abuse its discretion in permitting the State to comment on inconsistencies between appellant's testimony and his statement to police by referring to him as Lying Thomas.

**III.**

Appellant's final contention is that his conviction for second-degree assault and his conviction for kidnapping should have merged for sentencing purposes. The State agrees and so do we.

"The merger of convictions for purposes of sentencing derives from the protection against double jeopardy afforded by the Fifth Amendment of the federal Constitution and by Maryland common law." *Brooks v. State*, 439 Md. 698, 737 (2014). "Merger protects a convicted defendant from multiple punishments for the same offense." *Id.* "[T]he general rule for determining whether two criminal violations…should be deemed the same…is the so-called 'same evidence' or 'required evidence' test[.]" *Whack v. State*, 288 Md. 137, 141 (1980). Under this test, two criminal violations are separate, and thus multiple punishments are permitted, when each violation "requires proof of an additional fact which the other does not[.]" *Id.* at 142 (internal citations omitted). On the other hand, if one of the offenses contains all of the elements of the other offense, that is, if only one of the offenses has a distinct element, the two offenses are deemed to be the same under the required evidence test and multiple punishments are prohibited. *Id.*

Moreover, "[m]erger occurs as a matter of course when two offenses are deemed to be the same under the required evidence test *and* 'when [the] offenses are based on the same act or acts[.]'" *Nicolas v. State*, 426 Md. 385, 408 (2012) (quoting *Holbrook v. State*, 364 Md. 354, 370 (2001)) (emphasis in original). In other words, if we conclude that two offenses are the "same" under the required evidence test, we must then consider "whether those offenses were based on the same act or acts committed by [the defendant.]" *Id.* If so, the two offenses should merge for sentencing purposes.

When determining whether two offenses are based on the same act or acts, a reviewing court resolves any factual ambiguities in favor of the defendant:

> In the case of *Nightingale v. State*, 312 Md. 699, 542 A.2d 373 (1988), [the Court of Appeals] discussed similar merger issues related to two petitioners, Nightingale and Myers. In reviewing both cases, [the Court] addressed whether the petitioners' convictions for child abuse and certain sexual offenses would merge under the required evidence test. After discussing the particular facts of each case and the elements of each offense, [the Court] determined, "Under these circumstances, we believe that each jury could have found the defendant before it guilty of child abuse based solely on evidence of a sexual offense in some degree. If that were done, then the sexual offense became, in effect, a lesser included offense of sexual child abuse, and…the offenses are the same for double jeopardy purposes." [The Court] concluded, however, the [it] could not decipher from the trial records whether the factual bases underlying the convictions of both petitioners were based on the same acts or on different acts committed by the petitioners. [The Court] held that the proper approach in such a situation was to resolve the ambiguity in favor of the petitioners and to merge the convictions for the sexual offense counts.

*Nicolas*, 426 Md. at 408-09 (some citations omitted).

In the present case, the trial court instructed the jury that, in order to convict appellant of kidnapping, the State needed to prove that appellant confined or detained the victim "by force or the threat of force." The court then instructed the jury that, in order to convict appellant of second-degree assault, the State needed to prove that appellant either intended to cause physical harm to the victim or intended to place the victim in fear of immediate physical harm. During closing argument, the State provided a myriad of bases on which the jury could convict appellant of kidnapping and second-degree assault:

> Or if you happen to believe what the victim in this case has told you, the police officers have told you, and the law demonstrates, she got in that car against her will, because she was being pushed, prodded, poked, shoved, legs lifted, if you believe any of that, and taken from one place to another, it doesn't even matter where it is, it could be around the block, then this is the consummate kidnapping case.
>
> * * *

> Second degree assault, there's so many of them I can't count. And you can advise, the judge told you, there's different types of second degree assault, he can be found guilty on any one of those theories that you all find him guilty on. When he grabbed her arm outside the vehicle, second degree assault. Unwanted touching when he poked her in the eye, second degree assault. Unwanted touching. When he gets her in the car and is driving at a high rate of speed, telling her he's going to take her out to kill her, second degree assault….When she tries to jump out of the car and he grabs her and pulls her back in, another second degree assault.

Under the State's theory, the "force" element of the kidnapping charge was based on the victim being "pushed, prodded, poked, shoved, legs lifted" against her will. Because any one of those acts would also constitute a second-degree assault, the two charges are the "same" under the required evidence test.

To be sure, the act or acts that served as the basis for the kidnapping conviction may have been different from the act or acts that served as the basis for the second-degree assault conviction because the State presented evidence of several instances in which appellant committed second-degree assault that could be considered separate and distinct from the kidnapping. Unfortunately, the jury did not specify which act or acts served as the basis for its verdict of guilty on either charge, so it is also possible that these bases were the same. Moreover, neither the State's argument nor the record provides any conclusive help in resolving this factual ambiguity, which we must resolve in favor of appellant. *See Gerald v. State*, 137 Md. App. 295, 312 (2001) ("[A]ny ambiguity in…how the jury understood the charges must be resolved in [the defendant's] favor."). Accordingly, appellant's conviction for second-degree assault and his conviction for kidnapping should have merged for sentencing purposes. We therefore vacate all of appellant's sentences and remand to the circuit court for resentencing, with instructions that the total of appellant's

new sentences not exceed the current total of 18 years' imprisonment. *See Twigg v. State*, 447 Md. 1, 30 (2016).

**APPELLANT'S SENTENCES VACATED. JUDGMENTS OTHERWISE AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR WICOMICO COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID TWO-THIRDS BY APPELLANT AND ONE-THIRD BY WICOMICO COUNTY.**