UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0844

September Term, 2014

---

GEORGE COLIN MURRAY

v.

STATE OF MARYLAND

---

Eyler, Deborah S.,
Wright,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

---

Opinion by Kenney, J.

---

Filed: February 26, 2016

Appellant, George Colin Murray, was charged with four counts of attempted first degree murder, Md. Code (2002, 2012 Repl. Vol.), § 2-205 of the Criminal Law Article ("CL § 2-205"), and related offenses. A jury in the Circuit Court for Cecil County convicted him of one count of attempted first degree murder; three counts of attempted second degree murder, CL § 2-206; and one count of possession of a firearm by a disqualified person, Md. Code (2003, 2011 Repl. Vol.), § 5-133 of the Public Safety Article ("PS § 5-133").

In this timely appeal, appellant presents three questions for our review, which we have reworded, as follows:

1. Did appellant receive ineffective assistance of counsel due to a conflict of interest when his trial counsel announced his intent to run for Cecil County State's Attorney nine days after the jury returned its verdict?

2. Did the trial court err in permitting one of the victims to identify appellant, for the first time, in court?

3. Did the trial court err in permitting a line of questions in which the State repeatedly asked appellant whether he was "mistaken?"

For the reasons that follow, we shall affirm the judgments of the circuit court.

## FACTUAL AND PROCEDURAL BACKGROUND

During the early evening of August 20, 2013, J.L. and his wife M.L. were preparing to leave their residence in Elkton, Maryland. As they were securing their two young children into the back of their family vehicle, a gray[1] sport-utility vehicle playing loud music approached and stopped behind them. When the driver rolled down his driver's-seat

[1] At trial, witnesses referred to the sport-utility vehicle as both "silver" and "gray." Because J.L. testified that the color of the vehicle was "gray" we will refer to it as "gray" for the purposes of this opinion.

window and asked J.L. "what [he] was looking at, . . . [and whether he] ha[d] a problem," a verbal exchange ensued. The driver exited the sport-utility vehicle, and a second individual standing in a nearby group of people started walking towards the driver carrying a bag.[2] Feeling threatened, J.L. got into his vehicle.

Once inside his vehicle, J.L. saw the individual carrying the bag hand a firearm to the driver. As M.L. was slowly pulling out of their parking spot, J.L. said "pull off. They got a gun." As they drove away, J.L. observed the driver chasing after the car with the firearm. When M.L. looked in her driver's-side mirror, she saw two men and "heard shots." As she drove away, bullets shattered the rear window and driver's-side front window. Once they had driven to safety at a nearby restaurant, J.L. called 911.

When police officers arrived at the restaurant, J.L. provided them with a description of the shooter. Detective Jonathan Pruett transported J.L. back to the scene of the shooting in an unmarked police car to see if that person was there and, if so, whether J.L. could identify him. At the scene, J.L. positively identified appellant. Both J.L. and his wife provided written statements to police describing the events.

A three day jury trial began on February 10, 2014. The State produced several witnesses including J.L., M.L., and several of the responding officers. Appellant testified in his own defense. According to his testimony, he was outside "shooting dice" with a group of about seven people when he observed a sport-utility vehicle come into Willow Court. He saw the vehicle "back up and then somebody was calling [his] name" and

[2] The record fails to indicate the nature or size of the bag.

directing him to an altercation that had broken out between J.L. and the driver of the sport-utility vehicle, whom he then realized was his brother. Appellant walked over to J.L. and said "[i]f you got a problem you want to come in the street and fight like a man[?]" His brother then exited the sport-utility vehicle and J.L. entered his residence. When J.L. came back out his "hands [were] between [his] body and [his] pants," which caused appellant to believe J.L. had "a gun or something." After J.L. returned to his car and rolled down the window, appellant heard a gunshot and took cover on the ground.

Additional facts will be included as they relate to our discussion of the issues.

**Conflict of Interest/Ineffective Assistance of Counsel**

On February 21, 2014, appellant's trial counsel announced his candidacy for Cecil County State's Attorney.[3] An article in an online news publication, cited by appellant in his brief, states that "one of the biggest changes that [counsel] would like to make at the state's attorney's office [sic] is in the relationship with law enforcement officers. [Counsel] said he believes officers don't currently trust the office." Prior to this appeal, appellant had not raised the issue of counsel's alleged conflict of interest, and it is unclear from the record when he became aware of counsel's candidacy. He now contends that he "received ineffective assistance of counsel who labored under a conflict of interest."

*Standard of review*

In reviewing a claim of ineffective assistance of counsel, we are mindful that such determinations are often mixed questions of law and fact. *State v. Jones,* 138 Md. App.

[3] The State does not dispute the date that counsel announced his candidacy.

178, 209 (2001). In such cases, "[w]e will not disturb the factual findings of the [trial] court unless they are clearly erroneous." *Id.* (quoting *Wilson v. State,* 363 Md. 333, 348 (2001) (internal quotation marks omitted)). We, however, exercise our own independent judgment concerning the reasonableness of counsel's conduct. *Whitney v. State*, 158 Md. App. 519, 529 (2004) (quoting *Jones*, 138 Md. App. at 209).

*Discussion*

Appellant argues that by running for Cecil County State's Attorney "on a platform of seeking to build a better, more trustworthy relationship with the county police department [trial counsel] create[d] a situation in which [he] owed conflicting duties to [appellant] and to not only the police department but the voters of Cecil County." He advances the view that an attorney who wants to maintain a positive working relationship with certain officers "may limit his cross-examination of those officers . . . to his client's detriment[,]" and he provides several examples to suggest "counsel's performance was affected by his hope of winning the election and maintaining a good relationship with the police department." The examples include: (1) "defense counsel['s] fail[ure] to object to when Deputy John Lines testified that he was 'familiar with' [appellant] from prior contacts; and, in fact, was 'very familiar with him;'" (2) defense counsel['s] fail[ure] to object when "Detective Terry Ressin improperly testified that Detective Jonathan Pruette [sic] gave Ressin [appellant]'s name 'because Detective Pruett[] was familiar with him;'" (3) defense counsel's "fail[ure] to object to numerous 'were they lying' questions asked by the prosecutor of [appellant] during cross examination;" (4) defense counsel's "cryptically

inform[ing] the court that he wished to call a witness that he had just learned about and thus, had not been provided to the state" but then failing to name that witness or provide the court with a proffer so that the court could make a more informed ruling; and, (5) defense counsel's failure to mention a "serious discovery violation" at appellant's sentencing hearing related to "evidence that someone other than [appellant] was identified as the assailant." According to appellant, counsel's "fail[ure] to disclose the divided loyalties between personal interest and those interests of the client in this serious matter is itself an indication of the actual underlying conflict . . . ." The State responds that the issue "was not [preserved because it was not] raised below . . . [and e]ven if addressed, [appellant] does not establish a conflict of interest."[4]

We address first the issue of preservation. Maryland Rule 8-131(a) states:

> Ordinarily, the appellate court will not decide an[] . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

"Under th[is] Rule, Maryland courts have held that a defendant in a criminal prosecution may not raise for the first time on appeal an objection that was available to him at trial but that he failed to raise below." *McCain v. State*, 194 Md. App. 252, 277 (2010).

Presumably, if the defense attorney, without advising appellant, did not file for Cecil County State's Attorney until nine days after the jury rendered its verdict, appellant could not raise the alleged conflict of interest at the time of trial. Also, we recognize that raising

[4] The State points out that "[t]he sole factual support for [appellant's] new claim is his citation of two newspaper articles[,]" which were not part of the record below.

the issue at the sentencing hearing when defense counsel was still representing appellant and arguing his motion for a new trial was problematic. Appellant claims that by not raising the conflict of interest issue at the sentencing hearing he was not intentionally waiving or otherwise relinquishing his right to representation by a conflict free counsel. And, he argues, "[i]t is not a necessary element to the claim of ineffective assistance of counsel [that the ineffective attorney raises the issue during a motion for new trial or similar proceeding], and [that] ineffective assistance of counsel can be heard on direct appeal."

But, even were we to assume preservation, we review ineffective assistance of counsel claims on direct appeal only when "[t]he trial record is developed sufficiently to permit review and evaluation of the merits of the claim, and none of the critical facts surrounding counsel's conduct is in dispute." *In re Parris W.*, 363 Md. 717, 727 (2001). Otherwise, "the adversarial process found in a post-conviction proceeding generally is the preferable method in order to evaluate counsel's performance, as it reveals facts, evidence, and testimony that may be unavailable to an appellate court using only the original trial record." *Mosley v. State*, 378 Md. 548, 562 (2003). This is especially true "where the trial record does not conclusively reflect how the conflict of interest adversely affected counsel's performance." *Id.* at 575 n.11.

In *In re Parris W.*, the Court of Appeals determined that an ineffective assistance of counsel claim was appropriate for direct review when a defense attorney failed to obtain subpoenas for five witnesses who would have testified as to the defendant's whereabouts on the day of the crime. *Id.* at 719-20. The *Parris* Court concluded that "counsel's single,

serious error of failing to subpoena the witnesses for the correct trial date did not constitute the exercise of reasonable professional judgment and that such failure was not consistent with counsel's primary function of effectuating the adversarial testing process in this case." *Id.* at 727.

In *Austin v. State* the Court of Appeals concluded that an ineffective assistance of counsel claim based on a conflict of interest was appropriate for direct review. 327 Md. 375, 393-94 (1992). In *Austin*, two law partners were representing codefendants, when one of the codefendants decided to testify against the other codefendant. *Id.* at 378. The administrative judge imposed a gag order that prevented the law partners representing the codefendants from talking to each other, which effectively "discharged one-half of Austin's defense team." *Id.* at 392-93.

Appellant's reliance on *Lettley v. State*, 358 Md. 26 (2000) is misplaced. In *Lettley*, defense counsel simultaneously represented both Lettley and another client who had not been charged and who allegedly confessed to the crime for which Lettley was charged. *Id.* at 29. The trial court denied counsel's request to withdraw and to permit Lettley to engage new counsel. *Id.* Prejudice resulted from counsel's inability to use information relevant to cross examination of witnesses in Lettley's case without breaching counsel's ethical obligation to maintain client confidences. *Id.* at 43. In *Lettley*, there was dual representation with a direct tie to an individual (the confessing client) who "would benefit from an unfavorable verdict for [Lettley]." *Id.* at 44 (citation omitted).

The "constitutional right to counsel, under the Sixth Amendment and Article 21 of the Maryland Declaration of Rights, includes the right to have counsel's representation free from conflicts of interest." *Duvall v. State*, 399 Md. 210, 221 (2007). Maryland Lawyers' Rule of Professional Conduct 1.7 provides similar protections:

> [A] lawyer shall not represent a client if the representation involves a conflict of interest. A conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

The commentary to Rule 1.7 explains:

> The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client.

Because the right to conflict free representation is paramount, prejudice is presumed when counsel is burdened by an actual conflict of interest. *Cuyler v. Sullivan*, 446 U.S. 335, 345–50 (1980). In the context of an ineffective assistance of counsel claim, "'[a]n actual conflict of interest,' mean[s] precisely a conflict that affect[s] counsel's performance—as opposed to a mere theoretical division of loyalties." *Duvall*, 399 Md. at 227 (alteration in original) (quoting *Mickens v. Taylor*, 535 U.S. 162, 171, 172 n.5 (2002)). But, prejudice is presumed only when counsel is actively representing conflicting interests

and that "conflict of interest adversely affected [counsel]'s performance." *Cuyler*, 446 U.S. at 345–50.

The existence of an actual conflict "must be determined by the facts and circumstances of each individual case." *Attorney Grievance Comm'n v. Kent*, 337 Md. 361, 379 (1995). To prevail on an ineffective assistance of counsel claim based on a conflict of interest, "a defendant must prove that his or her counsel's representation fell below an objective standard of reasonableness (commonly referred to as deficient performance)[.]" *Lettley*, 358 Md. at 34, *and see Taylor v. State*, 428 Md. App. 386, 390 (2012).

At the time of trial, counsel had not yet filed for the position of Cecil County State's Attorney. Appellant's conflict of interest claim rests on counsel's alleged "hope of winning the election and maintaining a good relationship with the [Cecil County] police department." That this "hope" created an actual conflict affecting counsel's performance in this case is speculative; that it created an alleged duty to "the police department" and "the voters of Cecil County" that could exceed beyond "a mere theoretical division of loyalties" is more speculative.

In fact, this Court in *Catala v. State*, 168 Md. App. 438 (2006), rejected similar conflict claims in a situation where this very same defense attorney had more direct ties to a State's Attorney's office than in the case now before us. The *Catala* Court concluded that "a mere theoretical conflict of interest, as opposed to an actual conflict[,]" existed when defense counsel had accepted a job with the State's Attorney's office while representing Catala, stating "it would be absurd to believe that . . . a licensed Maryland attorney would

give less than zealous performance on behalf of his client . . . merely because he had accepted future employment with the prosecutor's office." *Id.* at 449, 460.

Appellant asserts that he was prejudiced by defense counsel's failure to object to statements by testifying police officers that they were "familiar" with him because such statements imply that he had a criminal record. Yet, appellant testified that he "was on probation" at the time of the incident, that one of the officers had "pulled [him] over for driving without a license . . . many times," and he acknowledged that he had a 2006 conviction in Delaware for possession with intent to distribute narcotics. In addition, the jury was instructed that appellant had been convicted of a crime that disqualified him from possessing a firearm.

Appellant also points to counsel's failure to give the name of a defense witness whom he discovered on the morning of the second day of trial, or a proffer of that witness's testimony, as evidence of ineffective assistance of counsel, but it is not clear from the record that counsel knew the witness's full name[5] or the nature of his testimony, apart from the fact that "he was present at the scene where the incident occurred." But, in any event, defense counsel raised the trial court's ruling to exclude that witness as a basis for his motion for new trial.

That counsel "made absolutely no mention" at the sentencing hearing of the State's failure to provide in discovery evidence that a different witness to this incident identified

[5] On the morning of the second day of trial, appellant's counsel indicated that he "was just provided this witness name," who was previously afraid to testify, "and still probably is." But, no name was provided either at trial or at the sentencing hearing.

someone other than appellant as the shooter, appears to be contradicted by the record. Specifically, defense counsel stated at the sentencing hearing that he was "not going to argue [that issue from his] supplemental motion, which is the State witness who wasn't called who allegedly identified someone else to the police because [counsel was] unable to track that individual down."

Simply stated, we are not persuaded that the record has been developed sufficiently to establish an actual conflict of interest that adversely affected defense counsel's performance in this case and to permit a direct review of an ineffective assistance of counsel claim.[6]

**M.L.'s Identification of Appellant at Trial**

At trial, M.L. identified appellant as the individual with whom her husband had the verbal altercation and who pursued her vehicle:

> [State's Attorney:] When the vehicle initially drove by that contained -- or the individual who was arguing who had the altercation with your husband drove by your vehicle, you indicated his windows were rolled down?
>
> [M.L.:] Yeah. He rolled his window down. I don't know if it was rolled down prior because I was not looking at the car, but I know when I looked up, because I heard him ask my husband what he was looking at, I looked up, I could clearly see him in the driver's side with the window down.
>
> [State's Attorney:] Okay. And were you able to observe his facial features?
>
> [M.L.:] Yeah.

[6] We note the trial court's comment that the case was "[v]ery well tried on both sides."

> [State's Attorney:] Okay. That individual, if you remember, that individual who you saw in that vehicle at that time, do you see him in the courtroom today?
>
> [M.L.:] Yeah.
>
> [State's Attorney:] Okay. And just take your time. Take your time. We have to do this for the record.
>
> [M.L.:] He did have a little facial hair. . . .
>
> [State's Attorney:] Well, we'll talk about that in a second. For the record, can you identify that individual --
>
> [M.L.:] Yeah.
>
> [State's Attorney:] -- by pointing to him?
>
> [M.L.:] He's right there.
>
> [State's Attorney:] Let the record reflect, Your Honor, that this witness has identified [appellant].

Appellant's counsel asked the court to instruct the jury to disregard M.L.'s in-court identification of appellant:

> Your Honor, I'm going to ask you to advise the jury to disregard any of [M.L.]'s testimony regarding identification of my client. As of today there was no discovery provided to me that anybody other than [J.L.] had identified my client. And now she has clearly testified that she identified my client at the scene.

The State responded, stating: "[M.L.] didn't say she identified [appellant] at the scene," and the court overruled that objection:

> She identified him here in the courtroom, but there is no testimony that she went back to the scene and I.D.'d him there as [J.L.] did. But she definitely testified that she was able to look around the courtroom and identify the person as your client being the one that was outside.

Counsel again voiced his objection to the identification in his motion for a new trial at appellant's sentencing hearing:

> [A]t some point while [the prosecutor] was prepping the witness, at some point the State became aware that she was going to be able to make an in-court I.D. . . . I know that [the prosecutor] goes to the nth degree to prep his cases, so at some point in the prepping of this witness I'm sure it became aware [sic] to him she was going to be able to do in-court identification of the [appellant]. Even if it was eve of trial, even if it was during the trial, I think the discovery rules would require under the continuing disclosure rule that he disclose that to [the defense] . . . so at some point at least we would know that was coming, not be surprised by it as we were[.]

The State denied a pretrial identification of appellant by M.L.:

> There was no pretrial identification of [appellant] by that witness. . . . [I]n this particular case, as in all my cases, when I prepped this witness, I asked this witness whether or not she can describe [appellant]. She described to me what he was wearing or what she could observe that he was wearing and described to me what she was doing when the incident occurred. So for me, that meant she got a look at him. What I did during trial, if you recall, is that I didn't ask her to identify him at first. My question to her was, [a]re you able to identify that individual in the courtroom or do you see that individual in the courtroom today, before I asked about identification. And the reason for that is because, even if she did make a pretrial I.D., and she didn't in this case, not with respect to law enforcement during their interaction with her, and definitely not with me because in order for me to do that, I would have to show her a picture of [appellant]. If I do that, then [defense] counsel is all over that with respect to that particular identification when she makes it in court, if she's able to. So I don't do that. What I did was I asked whether or not she can recognize that individual. Once I heard from the stand, yes, yeah, it was a risk to ask whether or not she can point him out, but she was able to do that because if she couldn't make the I.D., then counsel would have more ammunition with respect to his argument. So with all due respect, there was no pretrial identification.

The circuit court agreed that there was no pretrial identification, and it denied the new trial motion:

> With regard to the in-court identification, as I think I noted during the trial, the Court does not find any violation of the discovery rules. [M.L.] did not make any pretrial identification of the [appellant], and it wasn't until the trial itself that she was asked whether she could recognize the individual whom she was testifying about, and she indicated she thought she could, and at that point did identify [appellant].

On appeal, appellant challenges the in-court identification.

*Standard of Review*

We review findings concerning discovery violations under an abuse of discretion standard. *Simons v. State*, 159 Md. App. 562, 576 (2004); *see Rosenberg v. State*, 129 Md. App. 221, 259 (1999) ("On appeal, we are limited to determining whether the trial court abused its discretion."). "If there is a violation under [Maryland Rule 4-263], the remedy is generally 'within the sound discretion of the trial judge.'" *Simons*, 159 Md. App. at 576 (2004) (quoting *Williams v. State*, 364 Md. 160, 178 (2001)).

*Discussion*

Appellant contends that "the trial court erred in admitting the identification testimony of M.L. when the identification had not been provided to the defense in discovery." The State responds that "the trial court found that the witness did not make a pretrial identification . . . [and appellant did] not challenge that finding on appeal (and indeed ma[d]e[] no reference to it)." Arguing that appellant failed to preserve the issue for appeal by objecting to that finding, the State, in our view, too narrowly construes appellant's argument by drawing a distinction between the circuit court's finding that there was no pretrial identification and defense counsel's objection to M.L.'s testimony regarding the identification of appellant. We are persuaded that appellant's request that

the trial court "advise the jury to disregard any of the [M.L.'s testimony regarding the identification of appellant because] . . . there was no discovery provided to [counsel] that anybody other than [J.L.] had identified [appellant,]" and his argument in his motion for a new trial that the State was aware prior to trial that M.L. could identify appellant during discovery sufficiently preserved the issue for appeal.

"[W]hen determining whether a discovery violation exists, we first look to the plain meaning of [Maryland Rule 4-263,]" *Williams*, 364 Md. at 171, which provides that the State's Attorney's office must disclose any "pretrial identification of the defendant by a State's witness." And, we are mindful of the underlying policies advanced by Rule 4-263: "facilitat[ing] informed pleas, ensuring thorough and effective cross-examination, . . . expediting the trial process by diminishing the need for continuances to deal with unfamiliar information presented at trial . . . and assist[ing] defendants in preparing their defense and . . . protect[ing] them from unfair surprise." *Simons*, 159 Md. App. at 571 (quoting *Williams*, 364 Md. at 171).

Appellant relies on *Williams*, which involved the question of "whether police surveillance observations are subject to the mandatory disclosure requirements of Rule 4-263." 364 Md. at 172. In *Williams*, defense counsel made several inquiries, prior to trial, whether a police officer testifying for the State could identify Williams beyond a reasonable doubt. *Id.* at 165-66. On each occasion, the State informed counsel that the officer's testimony would be only "to the general description of a man who entered the surveilled premises." *Id.* at 166. But, when the officer took the stand, he "distinctly"

identified Williams as the person who entered the premises. *Id.* at 168. The officer and an accomplice testifying subject to a plea agreement were the only individuals who identified Williams. *Id.* at 179. The *Williams* Court concluded that "the discovery process . . . not only failed to assist Williams with his defense, but it failed to protect Williams from unfair surprise." *Id.* at 178.

The facts in this case are distinguishable from those in *Williams*. Here, it was J.L. who was driven back to the scene "to see whether or not he could identify anyone . . . who was involved in the shooting," and who made a pretrial identification of appellant and also identified him at trial. He testified that appellant was the same individual whom he identified on that occasion. When M.L. was asked on cross examination whether she was taken back to the scene or "at any point during that evening . . . identif[ied appellant] as being the person who shot at [her]" she stated that she was not taken back to the scene and was not "asked to identify [appellant]." In her statement for the police, which was provided to defense counsel and used on cross-examination, she provided only a general description of the shooter and the individual who handed him the gun: "As I was nervously pulling away I could see a [guy] with a black shirt with white print and a [guy] with a white shirt running behind our car."[7] Moreover, as was the case in *Williams*, at no point did the State do anything to cause defense counsel to believe that M.L. would be unable to identify

[7] In the statement, the victim's wife had written that she saw a "gun with a black shirt" and a "gun with a white shirt." On redirect, she indicated that she meant to write "guy." The statement did not indicate which individual was the shooter.

appellant when she saw him in the courtroom. We perceive no error in the trial determination that there was no discovery violation.

**The 'Was the Appellant Mistaken?' Questions**

At trial, appellant testified that after the shooting, he changed out of the white t-shirt he had been wearing at the time of the incident and into a black t-shirt that he bought at a nearby corner store after the incident. He did so because he was on probation and he heard Deputy Lines say that "anybody out there with a white tee shirt on is a suspect." His testimony contradicted the testimony of Deputy Lines, who stated that he never told people gathered at the scene that everyone "with a white shirt on is a suspect." Appellant's testimony denying any involvement in the shooting also contradicted testimony of J.L. and M.L.

The State drew attention to these contradictions or inconsistencies during cross examination:

> [State's Attorney:] And when Detective Pruett asked you about the shooting, you didn't tell the truth at that time?
>
> [Appellant:] No, sir.
>
> [State's Attorney:] Okay. Because you actually lied to him?
>
> [Appellant:] I ain't lying. I didn't say nothing.
>
> [State's Attorney:] Okay. So he's mistaken when he says you said that [you told him that J.L. pulled a gun first]?
>
> [Appellant:] I never said nothing.
>
> [State's Attorney:] Okay. And is it your testimony you didn't tell him?

[Appellant:] Yes, sir.

[State's Attorney:] You didn't tell him -- well, did he tell you that [J.L.] pulled the gun out first?

[Appellant:] No. He told me they pulled the gun out first?

[State's Attorney:] No. Did you tell Pruett, and I'm going to quote this statement, so this is you talking to Detective Pruett, did he tell you, referring to the victim, that he pulled that gun out first?

[Appellant:] No, sir.

[State's Attorney:] You didn't tell him that either. So Detective Pruett is mistaken about that?

[Appellant:] Yeah.

[State's Attorney:] Okay. And [Deputy] Lines is mistaken about the fact that he never told anyone in that area that everyone with a white tee is a suspect? He's mistaken about that as well?

[Appellant:] Yes, sir.

[State's Attorney:] And the victim, [J.L.], is mistaken when he identified you as the shooter in this case?

[Appellant:] Yes, sir.

[State's Attorney:] And his wife, [M.L.], is mistaken when she identified you as the shooter as well in this courtroom?

[Appellant:] Yes, sir.

[State's Attorney:] You are the only one that's not mistaken. Correct?

[Appellant's Counsel:] Objection Argumentative.

The Court: Cross examination.

[State's Attorney:] Correct? You are the only one that's not mistaken?

[Appellant:] What you mean by that?

[State's Attorney:] About the shooter in this case?

[Appellant:]Yeah.

Both the State's Attorney and defense counsel brought up the conflicting testimony in closing. [8]

*Standard of Review*

"We review a circuit court's decision[] to admit or exclude evidence applying an abuse of discretion standard." *Norwood v. State*, 222 Md. App. 620, 642 (2015). "In a criminal context, we will not reverse for an error by the lower court unless that error is both manifestly wrong and substantially injurious." *Hunter v. State*, 397 Md. 580, 587 (2007)

[8] The State argued:

> The [appellant] wants you to believe that [J.L.] is lying when he makes that identification, the out-of-court identification, during the show up, as well as the in-court identification. He wants you to believe that [he] is either mistaken or [that it is] just an outright lie. He wants you also to believe that [M.L.] is either mistaken when she identified him as the shooter or she's lying. He wants you to believe that Deputy Lines is lying when Deputy Lines said he never, never tells anyone that anyone that anybody in a white tee shirt is a suspect. He wants you to believe he's lying. He wants you to believe that Detective Pruett is lying. When detective Pruett says he gave the [appellant] opportunity to make a statement regarding this shooting, and the [appellant] said to him, No, I don't want to make one, I have nothing to say, I wasn't there. . . . He also wants you to believe that Detective Pruett is lying when Detective Pruett says that the [appellant], after being told what his charges were, says to Detective Pruett, Well, did he tell you that he pulled out a gun first? He wants us to believe that's a lie. He wants us to believe everyone is lying except him.

Because appellant failed to raise any objections during the State's closing argument, move for a mistrial, or raise any objection on appeal, any issue regarding the State's closing argument is waived. Md. Rule 4-323(a).

(citation omitted) (internal quotation marks omitted). "[A]n error is not harmless unless, upon an appellate court's independent review of the record, it can say beyond a reasonable doubt that the error did not in any way influence the verdict." *Id.* at 581.

*Discussion*

Appellant contends that "the trial court erred in permitting the prosecutor to continually ask 'were they lying' questions," and, even if the issue was not preserved, it is subject to "plain error" review. The State responds, "[t]his claim is not preserved because at trial, [appellant] only objected to one question, and objected on the ground that the question was 'argumentative' rather than making the claim he makes on appeal. Plain error review is not warranted, nor is discretionary review under Rule 8-131 warranted." But, if addressed on the merits, the State contends that the circuit court properly allowed "the prosecutor to ask if witnesses were 'mistaken,' especially since defense counsel's theory was that the State's witnesses made a 'mistake.'"

Maryland Rule 4-323 provides that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." A party may request a continuing objection to a specific line of questioning, but such an objection is "effective only as to questions clearly within its scope." *Id.* In other words, to be preserved for appellate review, objections must be made each time a question is posed or counsel must request a continuing objection to the entire line of questioning. *Brown v. State*, 90 Md. App. 220, 225 (1992). In regard to "were they lying" questions, this Court has concluded

that a "single belated objection" is not sufficient to preserve the issue for appeal. *Parker v. State*, 189 Md. App. 474, 498 (2009).

We agree with the State that the argument now being made on appeal was not preserved. The only noted objection was to one question on the grounds that it was was "argumentative," and that objection was made after all but one of the challenged questions ("You are the only one that's not mistaken [about the shooter in this case]?") had been asked.

But, even if the matter had been properly preserved for review, appellant would fare no better. In determining whether questions are permissible, we consider both the content and context of a witness's testimony. *Tyner v. State*, 417 Md. 611, 617 (2011). In *Hunter v. State*, the Court of Appeals held that "were the other witnesses lying" questions are an improper form of cross examination, 397 Md. 580 (2007), because this form of questioning: (1) encroaches on the province of the jury by asking witnesses to make credibility determinations; (2) asks witnesses to stand in the place of the jury by resolving contested facts; (3) is overly argumentative; (4) creates the risk that in order to believe one witness jurors must find that another witness lied; (5) and is unfair because it is possible that neither witness intentionally misrepresented the truth. *Id.* at 595-96.

Here, the "were they mistaken" questions focused on clear testimonial inconsistencies that did not present the "evils" discussed in *Hunter*. The State's attorney did not ask appellant to judge the credibility of the other witnesses, but simply whether, in his view, they were mistaken. The questions did not ask appellant to resolve contested facts

and were not overly argumentative. In addition, these questions did not require the jurors to find that other witnesses had lied or intentionally misrepresented the truth.

The Maryland Evidence Handbook § 1303 (4th ed. 2010), in its discussion of the *Hunter* case, draws a distinction between "was the witness lying" questions and "do you dispute" questions, acknowledging that the former "is impossible to answer and unfair when employed *ad nauseam*," while the latter is "permissible" because it "does not ask the witness to read someone else's mind." The questions at issue were essentially "do you dispute" questions directed toward "calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." *Owens v. State*, 161 Md. App. 91, 109 (2005).

Under the plain error exception to the preservation requirement in Maryland Rule 4-323, we will review unpreserved arguments "only in instances which are compelling, extraordinary, exceptional, or fundamental to a fair trial." *Lawson v. State*, 389 Md. 570, 604 (2005) (citation omitted) (internal quotation marks omitted). In this case, there was no error, plain or otherwise.

## CONCLUSION

For the foregoing reasons, we shall affirm the judgments of the Circuit Court for Cecil County.

**JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.**