UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 277 and 575, September Term, 2016

RASHID MAYO
v.
STATE OF MARYLAND

No. 339, September Term, 2016

DEQUAN SHIELDS
v.
STATE OF MARYLAND

No. 455, September Term, 2016

EDDIE TARVER
v.
STATE OF MARYLAND

Eyler, Deborah S.,
Friedman,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: May 9, 2017

Rashid Mayo, Dequan Shields, and Eddie Tarver, the appellants, were tried jointly in the Circuit Court for Baltimore City for the murder of Carter Scott ("Carter") and the attempted murder of Rashaw Scott ("Rashaw").[1] The jury convicted each appellant of one count of first-degree murder, one count of first-degree attempted murder, one count of conspiracy to commit murder, and two counts of use of a handgun in the commission of a crime of violence. The court sentenced them to life in prison for murder; a concurrent term of twenty-five years for attempted murder; a consecutive term of twenty years for use of a firearm in the commission of the murder; and a concurrent term of thirteen years for use of a firearm in the commission of the attempted murder.

The appellants, collectively, present ten questions for review, which we have combined and rephrased as six:

Mayo, Shields, and Tarver:

I. Was the evidence legally sufficient to sustain their convictions?

Mayo and Shields:

[1] The appellants originally were tried in 2015 along with two other co-defendants: Cornell Harvey and Reginald Love. The jury returned a guilty verdict against Harvey and was hung on the charges against the appellants and Love. Harvey's conviction has since been vacated by this Court, on grounds unrelated to anything in this appeal, and his case has been remanded for further proceedings. *See Harvey v. State*, No. 1668, Sept. Term 2015 (filed Oct. 26, 2016).

In 2016, the State advised the circuit court that it would seek to introduce into evidence at the re-trial a newly discovered letter Love had written to a third party asking him to bribe jurors on his behalf and on behalf of the other defendants. The court ruled that this letter was admissible against Love but not against the appellants and granted their motion to sever. Love was tried and convicted of first-degree murder and related charges. He has noted an appeal to this Court, which remains pending.

II. Did the circuit court abuse its discretion by admitting into evidence an autopsy photograph depicting Carter's face?

Mayo:

III. Did the circuit court commit plain error by propounding a non-pattern jury instruction on transferred intent that was misleading and confusing?

Tarver:

IV. Did the circuit court err by admitting into evidence Mayo's recorded police interrogation that referenced Tarver, depriving Tarver of an opportunity to confront the witnesses against him, and/or abuse its discretion by denying Tarver's motion to sever?

V. Did the circuit court abuse its discretion by curtailing Tarver's cross-examination of an eyewitness and a police witness?

VI. Did the circuit court err by refusing to ask ten proposed *voir dire* questions?

For the following reasons, we answer the first question in the affirmative and the second and third questions in the negative and shall affirm the judgments against Mayo and Shields. We answer the fourth question in the affirmative, and shall reverse the judgments against Tarver and remand for further proceedings. We address questions five and six for guidance on remand.

FACTS AND PROCEEDINGS

On May 24, 2013, around 7 p.m., Rashaw was sitting in the driver's seat of his girlfriend's red car in a surface parking lot that is part of the Cherrydale apartment complex, in the Cherry Hill neighborhood of Baltimore City. Carter, his 16-month old son, was secured in a car seat in the back seat of the car. Three or four men wearing latex gloves approached the car and began shooting into it. Carter was killed and Rashaw

sustained serious injuries. Mayo, Shields, and Tarver (as well as Love and Harvey) were charged with first-degree murder, attempted first-degree murder, conspiracy to commit murder, and related charges. The State's theory of prosecution was that Harvey had lured Rashaw to the parking lot so the appellants and Love could ambush him. The appellants were tried over ten days in February 2016. The evidence adduced, viewed in a light most favorable to the State, showed the following.

The Cherrydale apartment complex is bordered by Cherry Hill Road to the south, Giles Road to the north and east, and a bus depot to the west. An approximately 6 foot fence surrounds the complex. There are two entrances: one on Cherry Hill Road and one on the north-south portion of Giles Road. The complex comprises multiple buildings, each having three floors with apartments on each level. Two residents of Cherrydale witnessed the shooting and testified at trial.

Tessa Simmons was in her apartment on the third floor of building 1114 giving her children a bath when she saw through the bathroom window four or five African-American men standing along Giles Road, outside the fence surrounding the complex. Simmons was suspicious of them because they all were wearing "white or tannish" "hospital gloves." As she watched, they began climbing over the fence. Simmons ran out of her apartment to the stairwell, where there was a large plate glass window overlooking the parking lot. From there, she saw at least two of the men open fire on a red car in the parking lot. She observed one man shooting into the car from the driver's side and one man shooting into the car from the passenger side. She ran downstairs and

out the front door of her apartment building, yelling that she was calling 911. The men all took off running, but she could not recall in which direction. The red car backed out of its parking spot and drove a short distance in the direction of the Cherry Hill Road exit, but then stopped.

Joyce Martin lived in an apartment on the second floor of building 1112. She was watching TV in her bedroom when she noticed a red car parked in the parking lot. A short man got out of the front passenger side and walked past the playground area of the complex. The red car remained parked for about 15-20 minutes. Martin went into her kitchen to make herself something to eat. When she returned to her bedroom, she saw three or four African-American men shooting into the red car. She observed at least three guns and heard at least ten gunshots. Two shooters were on the driver's side of the car and one shooter was at the back of the car. They all were wearing brown hooded sweatshirts. Martin also saw the man who had been a passenger in the red car run away after the shooting; he was not one of the shooters, however.

On the night in question, Baltimore City Police Department ("BPD") Officer John Zohios was in an unmarked patrol car with Officer Damion Williams.[2] He heard the gunshots at the Cherrydale apartments, and he and Officer Williams drove toward the crime scene. On the way, they encountered other officers at the bus depot, and they began assisting in the search for the shooters. At the rear of the Cherrydale complex,

[2] By the time of the trial, Officer Zohios was working for the New York City Police Department.

Officer Zohios saw an African-American man running and ordered him to stop. The man ignored the command, jumped the fence surrounding the complex, and hopped into the passenger side of a Toyota Solara parked in the 2500 block of Giles Road. The car had its engine running. The man climbed over into the driver's seat and sped off. Officer Zohios did not see whether anyone else was in the car. He subsequently identified Mayo from a photographic array as the man he saw running and getting into the Toyota.

Also on the night in question, BPD Sergeant Troy Blackwell and Officer James Brooks of the South District Operations division, which targeted high crime areas, were on patrol in an unmarked vehicle. As they traveled southeast on Cherry Hill Road past the Cherrydale apartment complex, Sgt. Blackwell, in the passenger seat, heard gunshots. He looked to his left and saw two men shooting into a "red vehicle with tints on it" in the parking lot. He directed Officer Brooks to turn left on Giles Road and then enter the apartment complex. He observed three men fleeing on foot toward the fence at the western side of the complex. Sgt. Blackwell knew there was a bus depot on the other side of that fence, so he and Officer Brooks drove to that location to try to cut the men off. At the bus depot, Sgt. Blackwell saw a man in a brown hooded sweatshirt fleeing on foot. He was unable to catch the man.

Sgt. Blackwell heard over the police radio that some of the shooters were believed to have fled in a Toyota Solara. Almost immediately, he and Officer Brooks saw a vehicle matching that description pass by them at a very high rate of speed. They gave chase, notifying "Foxtrot 1," the BPD police helicopter, which began following the

Toyota and video recording it. Sgt. Blackwell and Officer Brooks (along with other officers) pursued the Toyota through Federal Hill and into west Baltimore, where it crashed into a parked car in the 3700 block of Winchester Street. Two men bailed out of the Toyota and fled on foot.

BPD Officer Daniel Gogannon was operating Foxtrot 1 that night. He followed the Toyota until it crashed. He then followed one of the men who bailed out of the Toyota as he fled on foot. He saw another officer apprehend that man, who later was identified as Tarver. Officer Gogannon was unable to locate the second man, but a still frame from the video showing that man was introduced at trial.

BPD Officer Timothy Copeland drove one of the police vehicles that pursued the Toyota. He did not witness the crash, but arrived moments later. He chased after a man he saw running on foot toward a wooded area and found Tarver hiding in the bushes near the crash site. Tarver was wearing purple sneakers, a grey hooded sweatshirt, and a latex glove on one hand. In a search incident to Tarver's arrest, the police recovered a cell phone and a pair of headphones.

The Toyota was registered in the name of Breyon Cason, who is Mayo's girlfriend. BPD crime scene technician April Taylor processed the Toyota. She recovered latex medical gloves and cell phones from inside it. DNA swabs were taken from the steering wheel, the gear shift knob, a set of keys and a cell phone. Forty-seven fingerprints from the Toyota were sent for processing. Fingerprints lifted from inside the Toyota matched Shields and Love. Fingerprints taken from the outside of the car

matched Tarver. No prints were found that matched Mayo. A cell phone recovered in the car had Cason's number in it under the contact "Wifie."

BPD crime scene technician Nancy Morse processed the Cherrydale crime scene. She collected 16 shell casings from the vicinity of Rashaw's car and two shell casings from inside the car. She also recovered a blue sweatshirt, a brown sweatshirt, a knit cap, two yellow gloves, a piece of a yellow glove, two purple gloves, a Hi-point handgun, and a Kimber handgun from a grassy area between two apartment buildings near the crime scene. DNA recovered from the one yellow glove, the piece of the glove, and the brown sweatshirt matched Shields.

Two shell casings from the crime scene matched the Hi-point handgun. None matched the Kimber handgun, which was fully loaded. Seven shell casings at the scene had been fired from a .380 caliber gun and another nine from a .40 caliber gun. The State's firearms examiner opined that at least three weapons were used in the shooting.

BPD Detective Jonathan Jones was the primary detective assigned to the homicide investigation. He interviewed Rashaw on May 26 and 29, 2013, at Shock Trauma and in June 2013 after he had been released. During his initial interviews, Rashaw was cooperative. He identified Harvey from a photographic array and wrote on the back that Harvey, known to him as "Little Head," had "lured [him] into an apartment complex were [sic] [he] was shot and [his] son was killed." He said he only saw one shooter and was unable to give a description of that man. He was shown a photograph of Tarver and identified him as "Scoop." Rashaw identified Mayo from a photographic array as

someone he knew as "Dex" who hung out with Rashaw's cousin and brother and was dating "Breyon." He identified Shields and Love from photographic arrays as "Stix" and "Pickle," respectively, and said both men hung out with his brother as well.

Rashaw stopped cooperating with the police in the months after his release from the hospital. The court had to issue a body attachment to secure his presence at the first trial. At the second trial, Rashaw testified that he "kn[e]w nothing about" the events of May 24, 2013. Over objection, an audio recording of his testimony from the first trial was played, as was an audio recording of his first police interview. In his prior testimony and interview, Rashaw said he had picked up Harvey on May 24, 2013, and, at Harvey's request, had driven him to the Cherrydale apartments so Harvey could "holler at" a woman. Harvey got out of the car and went into an apartment building to speak with that person. While Rashaw was in his car waiting for Harvey to return, someone ran up and shot him. He did not see the shooter. He did not know Carter had been shot and killed until he awoke from surgery at Shock Trauma.

Rashaw denied knowing any of the appellants or Love, except that he had seen them around. He claimed that the street names he had used for them when signing the photographic arrays had been provided to him by the police.

Detective Jones interviewed Shields following his arrest in July 2013. He showed Shields a photograph of the crashed Toyota, and Shields said he had never seen that car before. Upon being told his fingerprints were found inside it, Shields changed his story

and told police that the Toyota belonged to his "friend's girl" and admitted having been inside it before.

Mayo was apprehended in Ruxton, Louisiana at the end of July 2013. Detective Jones interviewed him at a Louisiana jail on July 31, 2013. Mayo denied any involvement in the shootings. He admitted that he had been driving Cason's Toyota on the afternoon of May 24, 2013, but said it was stolen later that day. We shall discuss Mayo's statement to the police in more detail, *infra*.

The medical examiner testified that Carter sustained two gunshot wounds to his legs, possibly from one bullet. One of the wounds severed his femoral artery, causing massive blood loss. He died as a result of those injuries. As we shall discuss, six autopsy photographs of Carter were introduced into evidence at trial.

We shall include additional facts in our discussion of the issues.

DISCUSSION

I.

Sufficiency of the Evidence

(Mayo, Shields, and Tarver)

All three appellants argue that the evidence adduced at trial was legally insufficient to sustain their convictions. As this Court has explained:

> "The standard for appellate review of evidentiary sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Smith*, 374 Md. 527, 533, 823 A.2d 664 (2003) (citations omitted). "Weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact

> finder." *State v. Stanley*, 351 Md. 733, 750, 720 A.2d 323 (1998). In addition, we give "'due regard to the [fact finder's] finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Moye v. State*, 369 Md. 2, 12, 796 A.2d 821 (2002) (quoting *McDonald v. State*, 347 Md. 452, 474, 701 A.2d 675 (1997) (quoting *State v. Albrecht*, 336 Md. 475, 478, 649 A.2d 336 (1994))).

Larocca v. State, 164 Md. App. 460, 471-72 (2005) (*en banc*).

The appellants each were convicted of four crimes: first-degree murder, first-degree attempted murder, conspiracy to commit murder, and use of a firearm in the commission of a crime of violence. The jurors were instructed on first degree principal and second degree principal liability. *See Evans v. State*, 382 Md. 248, 263 n. 11 (2004) ("Under Maryland law, one may commit an offense as either a principal in the first degree, or a principal in the second degree[.]"). "A first degree principal is the actual perpetrator of the crime." *Owens v. State*, 161 Md. App. 91, 99 (2005) (citing Richard P. Gilbert & Charles E. Moylan, Jr., *Maryland Criminal Law: Practice and Procedure* § 21.0 (1983 & Supp. 1985)). "A second degree principal must be either actually or constructively present at the commission of a criminal offense and aid, counsel, command, or encourage the principal in the first degree in the commission of that offense." *State v. Raines*, 326 Md. 582, 593 (1992).

The jurors also were instructed on "transferred intent." "The doctrine of transferred intent is typically applied where a defendant, intending to kill A, shoots at but *misses* A and instead kills B, an unintended victim." *Poe v. State*, 341 Md. 523, 530 (1996) (emphasis in original). Thus, in the case at bar, the jurors could convict the

appellants of first-degree murder of Carter, an unintended victim, and first-degree attempted murder of Rashaw, the intended victim, if they found that the appellants shot into Rashaw's car *or* if they found that the appellants aided and abetted others in committing the shooting.

a.

Evidence Against Mayo and Shields

Viewed most favorably to the State, the evidence showed that on May 24, 2013, Harvey asked Rashaw to drive him to the Cherrydale apartment complex and wait for him until he returned to the car. While Rashaw was sitting in his car, four African-American men, all wearing latex gloves, jumped the fence surrounding the apartment complex and approached his car. Two or three of the men drew guns and began shooting into his car. They shot Carter at least once, severing his femoral artery, which caused his death. Rashaw was shot in his legs as well but survived his injuries.

Right after the shooting, Officer John Zohios saw Mayo fleeing the crime scene on foot. Mayo ignored Officer Zohios's order to stop, jumped into the Toyota, which appeared to have its engine running, and drove away. The Toyota, registered to Mayo's girlfriend, proceeded to engage in a long distance police chase and ultimately crashed in an area near where Mayo's family members lived. Two men bailed out at the crash scene, but the police only were able to catch one man, Tarver. Inside the Toyota, police found latex gloves and a cell phone linked to Mayo. The next day, Mayo traveled to Louisiana without telling anyone, including his mother. He remained there until he was

apprehended two months later. In his police interview, he admitted that he had been driving the Toyota on May 24, 2013, but claimed that he had parked it on the street on North Avenue, with the keys inside, and it had been stolen.

Mayo contends that Officer Zohios's identification of him, standing alone, is legally insufficient to link him to the shooting, especially since Officer Zohios only saw one man in the Toyota and other evidence established that there were two occupants. He argues, moreover, that the absence of his fingerprints or DNA in the Toyota negates any inference that he was the second man who bailed out of it. We disagree. From the evidence that Mayo was one of the men who fled the crime scene; that he ignored a police order to stop; that he was seen getting in the driver's seat of the Toyota, which was the getaway car and that immediately was involved in a police chase; and that the Toyota was registered to his girlfriend, a reasonable trier of fact could find that he was either a perpetrator or an accomplice in the shooting and that he had used a firearm in the commission of the crime.

The evidence showed that Shields's fingerprints were found in the Toyota and his DNA was found on a latex glove, a piece of a latex glove, and a brown hooded sweatshirt found at the crime scene at the Cherrydale apartment complex. Eyewitness testimony established that all the shooters were wearing latex gloves and several of the shooters were wearing brown hooded sweatshirts. Shields initially denied recognizing or ever having been inside the Toyota, but after learning that his fingerprints were found in it, he admitted that the car belonged to his "friend's girl" and that he had been inside it. This

plainly was evidence from which a rational trier of fact could find that Shields was a perpetrator or accomplice in the shooting and that he had used a firearm in the commission of the crime.

The evidence also was legally sufficient to show that Shields and Mayo conspired to murder Rashaw. A criminal conspiracy "'consists of the combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means.'" *Carroll v. State*, 428 Md. 679, 696 (2012) (quoting *Khalifa v. State*, 382 Md. 400, 436 (2004)). Evidence of concerted action by co-conspirators is evidence from which a reasonable factfinder may infer the existence of a prior agreement. *See Acquah v. State*, 113 Md. App. 29, 50 (1996) ("concurrence of actions by the co-conspirators on a material point is sufficient to allow the jury to presume a concurrence of sentiment and, therefore, the existence of a conspiracy"). In the case at bar, the eyewitness testimony of Simmons and Martin established that four or five men, all wearing latex gloves, jumped the fence at the apartment complex; that they all approached Rashaw's car at the same time; and that two or three of those men opened fire into the car. This plainly was evidence of concerted action from which a reasonable factfinder could infer the existence of a prior agreement to murder Rashaw.

b.

Evidence against Tarver

Tarver argues that the State failed to present evidence of "[j]urisdiction" because "[n]o one testified that the offenses happened in the City of Baltimore." This argument

lacks merit. The State introduced evidence that the crimes were committed in Maryland, specifically in the Cherry Hill neighborhood of Baltimore City. *See McBurney v. State*, 280 Md. 21, 31 (1977) ("a circuit court of this State has full common law jurisdiction in all criminal cases committed in Maryland except where limited by law"); *see also* Md. Code (1974, 2013 Repl. Vol.), § 1-501 of the Courts and Judicial Proceedings Article.[3]

Otherwise, Tarver's brief is devoid of any argument as to why the evidence against him was legally insufficient to prove that he committed first-degree murder, first-degree attempted murder, conspiracy to commit murder, or use of a handgun in the commission of a crime of violence. Ordinarily, because Tarver presents no argument, we would decline to consider the sufficiency issue at all. *See* Md. Rule 8-504(a)(6) (an appellate brief shall contain "[a]rgument in support of the party's position on each issue"). However, we will briefly consider it because we are reversing the judgments against him and remanding for further proceedings. The evidence that the shooters all were wearing latex gloves; that two of the shooters fled the scene in the Toyota; that Tarver bailed out of the Toyota after it crashed; that he was apprehended a short distance

[3] As the State points out, to the extent that Tarver is challenging venue in the Circuit Court for Baltimore City, that challenge was waived when he failed to raise it before trial. *See Smith v. State*, 116 Md. App. 43, 53-54 (1997). In any event, as already explained, there was evidence that the crimes occurred in Baltimore City.

away, hiding in the bushes; and that he was wearing a latex glove on one hand when he was apprehended was legally sufficient to sustain all his convictions.[4]

II.

Autopsy Photograph

(Mayo and Shields)

At trial, the court admitted into evidence six autopsy photographs of Carter. The photographs, which are in color, were taken by the Medical Examiner. One depicts Carter's face; one his entire body, clothed in a hospital gown; one a bullet wound to his right upper thigh; one a bullet wound to his left inner thigh; one a bullet wound to his left outer calf; and one a bullet wound to his right outer calf.

At the first trial, Mayo's counsel objected to the admission of the photograph of Carter's face because it was "not probative of anything" and was being offered only to provoke an emotional response from the jurors. The photograph shows Carter's face and bare shoulders. He is lying on his back with his eyes closed and his mouth partly open. He has no apparent injuries.

The prosecutor responded that that photograph was being offered to show the absence of injury to Carter's face and was probative of the fact that his death was caused only by the bullet wounds to his legs. The court overruled the objection, agreeing with

[4] Tarver also asserts the court erred by denying his motion for a new trial on this same basis. For the same reasons, that argument lacks merit.

the State that the photograph of Carter's face was probative of the locations of injuries to his body.

At the second trial, Mayo's counsel adopted the arguments made at the first trial. Shields joined in that argument. The court declined to revisit its ruling from the first trial, and allowed the photograph of Carter's face to come into evidence.

On appeal, Mayo and Shields contend the trial court abused its discretion in so ruling because the "up close facial photo" did not depict any injury to Carter and was not probative of any issue in the case. They maintain that even if the photograph was probative of the fact that Carter sustained no injuries to his face, its probative value was outweighed by the risk of undue prejudice.

The State responds that the court did not abuse its discretion by admitting the photograph into evidence because the photograph accurately depicted Carter; was probative of the location of his injuries; and was not unfairly prejudicial. We agree with the State.

The Court of Appeals has explained that

> the general rule regarding admission of photographs is that their prejudicial effect must not substantially outweigh their probative value. This balancing of probative value against prejudicial effect is committed to the sound discretion of the trial judge. The trial court's decision will not be disturbed unless "plainly arbitrary," because the trial judge is in the best position to make this assessment.
>
> Photographs must also be relevant to be admissible. We have found crime scene and autopsy photographs of homicide victims relevant to a broad range of issues, including the type of wounds, the attackers' intent, and the modus operandi. The relevancy determination is also committed to the trial judge's discretion.

State v. Broberg, 342 Md. 544, 552-53 (1996) (citations omitted) (footnotes omitted).

The photograph of Carter's face was relevant to show that there were no injuries to his head, such as from broken glass, which supported the State's position that his death was caused by the gunshot wounds to his legs. Its prejudicial effect, if any, was minimal. It was not graphic and appeared to show a sleeping child. The trial court did not abuse its discretion in ruling the photograph admissible.

III.

Transferred Intent Jury Instruction

(Mayo)

As discussed, the prosecution theorized that the appellants intended to kill Rashaw and, in carrying out that plan, wound up killing Carter. The court instructed the jury as follows with respect to transferred intent:

> The Defendants each are charged with the first degree murder of Carter Scott. You are instructed that the state of mind which one has when about to commit a crime upon one person is considered by law to be the state of mind to exist and to be equally applicable when the act causes harm to another person. The fact that the person actually killed was an unintended victim does not matter and the only issue is what would have been the degree of guilt if the intended result had actually been accomplished. The intent to kill the intended victim is transferred to the person whose death has been caused.
>
> If you find from the evidence and beyond a reasonable doubt the Defendant would be otherwise guilty of murder in the first degree of Rashaw Scott, and if you find further beyond a reasonable doubt that Carter Scott died as a result of a bullet or bullets striking him fired by the Defendant, then you should find the Defendant guilty of murder in the first degree.

Mayo did not object to that instruction.

Under Rule 4-325(e), "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." This Court may, however, "take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object." Md. Rule 4-325(e).

Recognizing that he failed to preserve this issue for review, Mayo contends the trial court committed plain error by propounding this non-pattern jury instruction because, as given, it was misleading and confusing. He maintains that the instruction was incorrect because it failed to tell the jurors that they only could find Mayo guilty of the first-degree murder of Carter if they found that he was acting with an intent to kill Rashaw at the time Carter was killed.

The State responds that the instruction as given was a correct statement of the law and was not confusing.

As pertinent, the pattern instruction on transferred intent provides:

> If someone [intends to kill] . . . one person, but by mistake or accident kills another person, the crime is the same as if the intended person had been killed.
>
> In this case, the State has offered evidence that the defendant [intended to kill] . . . a particular person . . ., but actually killed another person . . . .
>
> You may find that the defendant acted with [the intent to kill] . . . [the unintended victim] if you find that the State has proven:
>
> (1) That the defendant had [the intent to kill] . . . the intended person;

> (2) That the defendant was acting with that intent when [the unintended victim] was killed; and
> (3) That the defendant actually killed [the unintended victim].
>
> In other words, if the actual result that the defendant intended is different from what [s]he contemplated only because another person was killed, you may find that the State has proven that the defendant [intended to kill] . . . that other person.

Maryland Pattern Jury Instructions – Criminal 4:17.0.

The instruction actually given by the trial court, although not identical to the pattern instruction, covered the same information and was not confusing or misleading. Contrary to Mayo's assertions, the court *did* instruct the jurors that the relevant state of mind was the state of mind when the defendant was "about to commit a crime," *i.e.*, at the time of the shooting. The court instructed the jurors that if they found that, at the time of the shooting, Mayo had the intent to kill Rashaw and that, when acting with that intent, he caused the death of Carter, the jury should find Mayo guilty of the murder of Carter. This was a correct statement of the law and for that reason alone, there was no error, much less plain error.

IV.

Admission of Mayo's Statement to the Police

(Tarver)

Tarver contends the trial court erred by admitting into evidence the unredacted videotape of Mayo's interrogation by the police ("the statement" or "Mayo's statement"). He asserts that because he and Mayo were tried jointly, and Mayo did not testify, the admission of Mayo's statement deprived him of his Sixth Amendment right to confront

the witnesses against him. Alternatively, he contends that the court abused its discretion by not granting his motion to sever because Mayo's statement was not mutually admissible against him and caused him unfair prejudice.[5]

As discussed, the day after the shootings Mayo left Baltimore and went to Louisiana; and two months later he was apprehended there. Detective Jones traveled to Louisiana to interview Mayo. The interview, which took place on July 31, 2013, was videotaped.

Detective Jones asked Mayo what he knew about the shootings at the Cherrydale apartments. Mayo responded that he had heard that his "homeboy Rasha[w] got shot." Detective Jones asked whether he knew "some dude named Scoop?" Mayo said he did not. Detective Jones asked whether he had heard about "the guy that got locked up," referring to (but not mentioning) Tarver. Mayo responded that he had "seen it on the news" but that he did not know him.

Mayo told Detective Jones that on the night of May 24, 2013, he was at a strip club with a friend. He had been driving Cason's Toyota that day and left it parked on the street, with the keys in it, and it was stolen. Strongly suggesting that he found this story incredible, Detective Jones said:

> . . . Okay, . . . the best way we can do this is if we tear down our walls and fronts. And just be straight up with each other. . . . . Because I'm not trying . . . I think once you hear what I have to say, . . . you'd be like ["]you right . . . you right." Because . . . it's a possibility that maybe you

[5] Tarver also asserts that the court erred by denying his motion for a new trial on these bases.

> were there. *Maybe you know this dude named Spoon . . . Scoops . . . Scoop the dude that was locked up*. But maybe you do know him. And . . . but maybe you didn't do anything while you were there. Maybe . . . I don't know. If you were there with a group of people, that started shooting at a vehicle. If somebody is with a group of people and started shooting at a vehicle . . . let's say it's four cats . . . and four people show up to a location and do something and they just . . . three of them blindly start firing at a vehicle but one of them just looks in and says I'm not doing this . . . I'm just gonna stand. You know what bump, I ain't gonna fire. And decide not to, but then rolls out afterwards. Maybe they were just the driver. Maybe they were just driving the vehicle . . . bringing people there and rolling out. Maybe, that was all you did . . . maybe, I wasn't there, I don't know. I wasn't there. *But, we gonna start, we gonna start fresh. So, who is Scoop*?

(Emphasis added.) Mayo again denied knowing anyone named "Scoop." Detective Jones then showed him a photograph and, pointing to it, said, "See that's you. And that's Scoop." Mayo responded, "That's Eddie," adding a moment later, "I don't know about Scoop." Detective Jones asked Mayo why he had denied knowing the man who got "locked up." Mayo replied that there were a "couple people that got locked up. There was a dark skinned dude and a light skinned dude." Detective Jones said, "The light skinned dude is clearly Eddie." Mayo agreed, saying "Mhmm."

Detective Jones asked Mayo to tell him what he saw on May 24, 2013. Mayo continued to deny any knowledge of the shootings. He told Detective Jones that in the afternoon that day he and his "homeboy" (not identified) had driven Cason's Toyota to the vicinity of Mondawmin Mall, parking it on "Pop and North."[6] He left the keys inside the vehicle. He and his "homeboy" then walked to "Mondawmin and to see some girls"

[6] Mayo likely is referring to the intersection of North Avenue and Poplar Grove Street.

before heading to a strip club called Norma Jean's. Cason called him while he was at the strip club and told him that her car had been crashed. He told her he didn't know anything about that. He stayed at Norma Jean's until it closed, at 2 a.m. He "[g]ot drunk and high." He left with a girl he met there and went to her place, where they had sex. He went to his mother's house around 3:30 a.m. and went to sleep.

As Mayo was telling his story, Detective Jones began to play the videotape of the Toyota taken by Foxtrot during the police chase. He told Mayo that four people had approached Rashaw's vehicle, but only three people had shot into the car, suggesting that one of them had seen Carter in the backseat and had had a change of heart. He told Mayo that a BPD officer (*i.e.*, Officer Zohios) had identified him as one of the people who got in the Toyota right after the shootings. He showed Mayo a photograph of the crashed Toyota. Mayo identified it as Cason's Toyota and wrote on the back of the photograph.

Mayo asked if he could see the part of the video recording showing "somebody running or jumping out [of the vehicle] or anything?" Detective Jones replied, "Who said anything about that?" Mayo replied that it was just "common sense" that if the car crashed "[s]omebody gotta jump out."

Detective Jones then played for Mayo the part of the video showing the police chase. After Detective Jones pointed out the "gloves on the people's hands," the following exchange occurred:

> Detective Jones: Now what's interesting is that you know who we got getting out the car?
>
> Mayo: Who?

Detective Jones: *Your man Scoop*.

Mayo: *Damn*.

Detective Jones: *Yeah. Damn*. *You think Scoop talked to me*?

Mayo: *I don't know*.

Detective Jones: *What you think*?

Mayo: *I don't know*.

Detective Jones: *I mean I didn't get your warrant until after I talked to Scoop, right? And I got Scoop in that vehicle. Oh he's cutting*.

Mayo: Damn.

Detective Jones: Yeah. You were, you were doing some driving man.

Mayo: That wasn't me doing no shit like that man.

(Emphasis added.) Detective Jones observed that the Toyota crashed right near where Mayo's "people lived." He continued, "Cause Scoop don't live anywhere around there. . . . *I've got your girl's car with your man Scoop driving down the street. Scoop wasn't driving he was in the passenger seat*." (Emphasis added.)

Mayo denied that he was driving the car. He denied that the man bailing out from the driver's side of the Toyota looked anything like him. Detective Jones continued to press Mayo to admit that he was present during the shootings, saying: "*That was Scoop getting out, we caught Scoop right away. You were able to get away. How did you end up down here [i.e., in Louisiana]*?" (Emphasis added.) Mayo responded that he took a Greyhound bus with his friend Brandon.

Mayo then went through a detailed timeline of his day on May 24-25, 2013, with prompting from Detective Jones. He said he had learned from Cason that the police had a warrant for his arrest and that he had considered turning himself in.

Detective Jones showed Mayo a series of photographic arrays and asked him if he could identify anyone. Mayo said he could not identify anyone in three of the photographic arrays. He identified Cason from a fourth photographic array. Detective Jones ended the interview by asking Mayo if he was present at the shooting on May 24, 2013; if he had shot into Rashaw's car; if he knew anyone involved in the shooting; and if he knew why Cason's car was used as the getaway car. Mayo answered each question in the negative.

Before the second trial, Tarver moved to sever his trial from that of Mayo or, in the alternative, to redact all references to him in Mayo's statement.[7] He argued that severance was required under Rule 4-253 because Mayo's statement was not mutually admissible against him and its admission into evidence at their joint trial would prejudice him. Alternatively, he argued that the introduction of Mayo's statement in evidence would deprive him of his Sixth Amendment right to confront the witnesses against him.

At a hearing on February 1, 2016, Tarver's lawyer argued that the court should order all references in Mayo's statement to "Scoop" and "Eddie" redacted, as well as any references to "homeboy" or "pronouns such as he, such as they which could be references

[7] Tarver had made similar motions during the first trial.

to . . . Tarver." The prosecutor noted that she had not listened to Mayo's statement in some time and did not have a transcript of it. She could not recall whether Mayo had identified Tarver, but said that if he had, she "of course [would] redact that." The court denied Tarver's motion.

On February 8, 2016, midway through the trial, Tarver filed a renewed motion to redact and attached a transcript his lawyer had prepared of Mayo's statement with all of the requested redactions.[8] The court declined to revisit the issue at that time.

Mayo's statement was played for the jury in its entirety on the fifth day of trial, during the direct examination of Detective Jones. Counsel for Tarver renewed his objection to its admission. He did not request a limiting instruction with respect to the statement, and the court did not give one.[9]

-a-

The Confrontation Clause of the Sixth Amendment to the federal constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Confrontation Clause applies to

[8] During the February 1, 2016 hearing, the court had commented upon the absence of a transcript of Mayo's statement.

[9] MPJI-CR 3:09 provides:

> There are _____ defendants in this case. Some evidence was admitted only against [one defendant] [some defendants] and not against the other defendant(s). You must consider such evidence only as it relates to the defendant against whom it was admitted, as I told you during the trial. Each defendant is entitled to have the case decided separately on the evidence that applies to that defendant.

prosecutions in state courts as well as federal courts. *See Pointer v. Texas*, 380 U.S. 400, (1965).

In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that a limiting instruction is insufficient to protect a defendant's confrontation right when a statement by his co-defendant implicating him in the crime is introduced at a joint trial. At Bruton's trial for armed postal robbery, the postal inspector testified that Evans, Bruton's co-defendant, had confessed and named Bruton as his accomplice. The court instructed the jurors to only consider that testimony in assessing Evans's guilt, not in assessing Bruton's guilt. On appeal following Bruton's conviction, the Supreme Court reversed. It reasoned that because Evans had not testified and there was a "substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining [Bruton's] guilt," Bruton had been deprived of his Sixth Amendment right of confrontation. *Id*. at 126.

About two decades later, in *Richardson v. Marsh*, 481 U.S. 200, 202 (1987), the Supreme Court held that when a "codefendant's confession is redacted to omit any reference to the defendant, but the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial," the statement may be admitted at a joint trial without running afoul of *Bruton*. In that case, Clarissa Marsh was tried jointly with Benjamin Williams on charges arising from the assault of a woman and the murders of the woman's 4-year old son and her aunt. At trial, Williams's taped confession was played for the jury. In it, Williams implicated himself, Marsh, and the third co-defendant

(a fugitive at the time of the trial), saying that on the night in question the three of them had driven to the victims' home and on the way he and the third co-defendant had discussed their plan to rob and kill the victims. "The confession was redacted to omit all reference to [Marsh] —indeed, to omit all indication that *anyone* other than [the third co-defendant] and Williams participated in the crime." *Id*. at 203 (emphasis in original) (footnote omitted). When the confession was admitted, the jurors were instructed that they could not use it against Marsh. Williams did not testify, but Marsh did. She stated that she was in the car with Williams and the third co-defendant on the night in question; that she could see that they were talking, but could not hear them because the radio was playing loudly; and that she did not know anything about a plan to rob or murder anyone, and did not participate in such a plan.

The Supreme Court held that because Williams's confession "was not incriminating [to Marsh] on its face, and became so only when linked with evidence introduced later at trial ([Marsh's] own testimony)," the situation was unlike that in *Bruton*. *Id*. at 208. The Court reasoned that while "[s]pecific testimony that 'the defendant helped me commit the crime'" may be difficult for a juror to "thrust out of mind," evidence that may lead to "inferential incrimination" may be handled by means of an appropriate jury instruction. *Id*. The jury, having been instructed not to consider Williams's confession as against Marsh, was presumed to have followed that instruction.

-b-

Rule 4-253 governs joinder and severance in criminal cases. Under subsection (a), two or more defendants may be tried jointly "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Subsection (b) pertains to offense joinder, providing that a trial court may join separate, but related, offenses if the "defendant has been charged in two or more charging documents." Subsection (c), which applies to defendant joinder and offense joinder, provides:

> If it appears that any party will be prejudiced by the joinder for trial of counts, charging documents, or defendants, the court may, on its own initiative or on motion of any party, order separate trials of counts, charging documents, or defendants, or grant any other relief as justice requires.

Prejudice may arise from the introduction of non-mutually admissible evidence in a joint criminal trial, as the Court of Appeals recently addressed in *Hines v. State*, 450 Md. 352 (2016). There, a man and a woman in a truck were attempting to purchase heroin near Edmondson Avenue in Baltimore City when they were robbed by two men. The robbers shot into the couple's truck, killing the woman and wounding the man.

Over an hour before the shooting, BPD Officer Kevin McClean had seen the two men—Dorrien Allen and Tevin Hines—at a minimart. Officer McClean was familiar with them from his patrol. Allen was wearing a bright orange jacket and Hines was dressed in black. Twenty minutes later, Officer McClean saw Allen and Hines again, at a convenience store in the same area. About an hour after that, Officer McClean heard a call over the radio about the shooting, which was nearby, and responded to the scene.

The male victim told police that the man who shot him was wearing an orange jacket. Officer McClean advised that Allen was a possible suspect. Police located Allen on the street and brought him to the police station for questioning.

Two detectives participated in Allen's interview, which was recorded. Allen told the police that he had been at home until midday and then had gone to his friend "Mike's" house to record a music video. He said he did not know "Mike's" real name, but he knew that "Mike" lived in the 300 block of Lyndhurst Avenue. The detectives played surveillance footage from the convenience store for Allen. The footage showed him and a man who clearly was Hines together at the same time Allen was claiming to have been at home. Allen acknowledged that it was him in the video, but claimed not to know who the other man was. "Throughout the recorded interview, the detectives made statements of disbelief as to Allen's version of the events . . . ." *Id*. at 357.

Allen and Hines were charged with murder, attempted murder, and related crimes. The State sought to try them jointly. Hines moved to sever, arguing that the State intended to introduce Allen's recorded statement into evidence, that that statement was not mutually admissible against him, and that he would be prejudiced by its admission. Specifically, his counsel argued that the

> main part of the statement is, all of the commentary by the detectives about what they know, accusing Mr. Allen of you're lying, we know you're lying, we know about this other person that you're with, you're lying about the name of the other person that you're with, Mr. Allen saying his name is Mike. All of the commentary that we go through in this lengthy statement, and Mr. Allen's responses, however you want to characterize them, I don't think are admissible at all against Mr. Hines.

Id. at 357-58. Hines's lawyer further argued that Hines would be deprived of his Sixth Amendment confrontation right because Allen was not going to testify and he would not be able to cross-examine him about what he said during the interview.

The State responded that there was no *Bruton* issue because in his statement to the police Allen did not implicate himself or Hines in the shooting. To the extent the detectives implicated Hines by their questions and comments during the interview, that would not deprive Hines of his confrontation right because he could cross-examine the detectives about their statements.

The trial court ruled that part of Allen's statement to the police was admissible; denied the motion for severance; and agreed to give a limiting instruction advising the jurors that Allen's statement only was evidence against Allen and was not to be considered against Hines. Allen's statement was redacted to remove any reference to Hines and then was admitted. In the statement as admitted, Allen gave the police "Mike's" address and told them he went to "Mike's" house on the day of the shooting. One of the detectives then confronted Allen with the existence of the video from the convenience store, and the following colloquy ensued:

> DETECTIVE CAREW: Well, we have video that shows and the jacket and your face and you will get to see that at some point, but trust me that that's the case, and we knew where to go back to get the video because the officer saw you up there earlier and went in the store and he told us to go look, and we went and looked and there you were, but you weren't alone, you also had a friend with you. Who is the friend with you?
>
> MR. ALLEN: The only person I was out there with was Mike, sir.

> DETECTIVE CAREW: That's a lie. All right. In order for you to help yourself in any way, you got to find a way to tell the truth and you are not doing that.
>
> MR. ALLEN: I am, sir, you can't tell me I'm not telling the truth –
>
> DETECTIVE CAREW: I can tell you the truth when I have video . . . and we know who your other friend is and we know where he lives. *Can you just tell us where the friend lives that was with you*?
>
> MR. ALLEN: *I don't know where he lives*.
>
> DETECTIVE CAREW: *Try 301 Lyndhurst*.

(Emphasis added.)

The detective who interviewed Allen together with Detective Carew testified that when Detective Carew was asking Allen about his "other friend," they had been showing him the video and pointing to the man in the video they believed to be Hines. That detective further testified that Hines's address was 301 Lyndhurst Avenue. Neither Hines nor Allen testified at trial.

Hines appealed his convictions and his case ultimately reached the Court of Appeals. The Court addressed two questions: whether the trial court "err[ed] in denying a severance in accordance with Rule 4-253(c)" and whether "any error in admitting Allen's statement [was] harmless." *Id*. at 366. As a threshold matter, the Court considered whether the offense joinder analysis in *McKnight v. State*, 280 Md. 604 (1977), applies to joinder of co-defendants. Prior to *McKnight*, decisions to join offenses or defendants under the predecessor to Rule 4-253 were reviewed for abuse of discretion. In *McKnight*, the Court limited a trial court's discretion to join offenses when a defendant

had elected a jury trial and the "evidence as to each individual offense would not be mutually admissible." Subsequent decisions interpreted *McKnight* to create a "per se prejudic[e]" rule requiring severance as a matter of law when evidence on individual offenses was non-mutually admissible in a jury trial. *See Graves v. State*, 298 Md. 542, 545-46 (1984); *Wieland v. State*, 101 Md. App. 1, 10 (1994). Several decisions of this Court and the Court of Appeals also had stated, in *dicta*, that the offense joinder analysis in *McKnight* applied equally to defendant joinder. *See, e.g., Conyers v. State*, 345 Md. 525, 552 (1997).

The *Hines* Court held that the *McKnight* presumption of prejudice does not apply to defendant joinder cases. It emphasized, however, that the analysis to be used in defendant joinder cases does not differ dramatically from the *McKnight* analysis. A court confronting a "severance question" in the context of defendant joinder or offense joinder must "first determine whether there is non-mutually admissible evidence, and then must ask whether the admission of non-mutually admissible evidence results in any unfair prejudice to the defendant." *Hines*, 450 Md. at 374. In the context of offense joinder in a jury trial, non-mutually admissible evidence is presumptively prejudicial because of the risk of "improper propensity reasoning on the part of the jury." *Id*. at 375 (footnote omitted). In a defendant joinder case, by contrast, it is "foreseeable that in some instances, evidence that is non-mutually admissible may not unfairly prejudice the

defendant against whom it is inadmissible because the evidence does not implicate or even pertain to that defendant." *Id.* at 375-76.[10] Therefore, prejudice is not presumed.

The Court held that Hines had been "significantly prejudiced by the actual admission of evidence that, although admissible against Allen, was inadmissible against [him]." *Id*. at 383. Emphasizing that the trial court was aware of the prejudice to Hines when it denied his motion for severance, the Court explained that, in light of the denial of the motion to sever, the trial court was obligated to "adequately redact[] Allen's statement so that it would not implicate Hines." *Id.* at 383. It failed to do so. In the Court's view, the prejudice to Hines was clear:

> Even as redacted to omit any express reference to Tevin Hines, Allen's statement implicated Hines in a damaging way, which resulted in prejudice to Hines. The statements Allen made about "Mike" were played for the jury along with the detectives' statements of disbelief. This, coupled with the detectives' interest in "Mike" and questions about the man in the surveillance video (who was clearly Hines) unequivocally indicated to the jury that the detectives knew "Mike" to be fictional, knew that the man in the video and the man Allen claimed to have spent his morning with was in fact Hines, and were simply trying to get Allen to admit it. The statement further implicated Hines insofar that the jury heard separate testimony that Hines lives at 301 Lyndhurst. In the statement, Allen said "Mike" lives on

[10] The Court gave as an example of the latter *Ball v. State*, 57 Md. App. 338 (1984), *aff'd in part, rev'd in part sub nom. Wright v. State*, 307 Md. 552 (1986). There, three defendants were charged with committing a murder during an armed robbery at a convenience store. At their joint trial, the State called a witness who was incarcerated with two of the defendants to testify about a conversation he overheard between them. In that conversation, one defendant said he wasn't worried about a lineup because "they can't identify any of us, we had masks on"; and the other defendant replied, "I know, I ain't worried about it." *Id*. at 350. Wright, the third defendant, challenged the admission of that testimony, arguing that it would not have been admissible against him were he tried separately and it was prejudicial. We disagreed, holding that the "conversation did not implicate . . . Wright and did him no damage in any direct sense." *Id*. at 354.

> the 300 block of Lyndhurst and Detective Carew indicated that he knew "Mike" lived at 301 Lyndhurst. Finally, we note that this was all in the context of Allen's statements being lies that were obvious to the detectives and invariably, the jury.

Id. at 384 (footnotes omitted). The Court held that because Allen's statement would not have been admissible against Hines in a separate trial and because it prejudiced him, the trial court abused its discretion by denying Hines's motion to sever; and that error was not harmless beyond a reasonable doubt.

-C-

We return to the case at bar. Tarver argues that the admission of Mayo's statement deprived him of his Sixth Amendment right to confront the witnesses against him, in violation of *Bruton*. He maintains that the trial court abused its discretion by denying his motion to sever on that basis or, in the alternative, by denying his request that Mayo's statement be redacted to eliminate references to him. He further argues that even if *Bruton* is not implicated, Detective Jones's questions and commentary during the interview, coupled with Mayo's answers, were unfairly prejudicial to him, and therefore the trial court was obligated either to redact the statement to eliminate the prejudicial remarks or to grant the motion to sever. In Tarver's view, the failure to do either was an abuse of discretion.

The State responds that the admission of Mayo's unredacted statement did not infringe upon Tarver's confrontation right under *Bruton* because Mayo did not implicate Tarver. Moreover, this case can be distinguished from *Hines* because Tarver failed to show how he was prejudiced as a result of the admission of Mayo's statement. The State

emphasizes that Mayo never identified who he was with on the night of the shooting, except to say his "homeboy"; Mayo was not confronted with surveillance videotape showing him with Tarver; and Mayo "provided no circumstantial evidence that would allow the jury to conclude that he was connected to Tarver."

We agree with the State that Tarver's Sixth Amendment confrontation right was not infringed by the admission of Mayo's statement. Unlike in *Bruton* and *Richardson*, Mayo did not confess to any involvement in the crimes, nor did he point to anyone else, including Tarver. *See, e.g., Butler v. State*, ___ Md. App. ___, Nos. 1004/1104, Sept. Term 2015 (filed Feb. 2, 2017) (admission of an "'extrajudicial statement at a joint trial where the *declarant confessor* does not take the witness stand'" violates a defendant's confrontation rights) (quoting *Earhart v. State*, 48 Md. App. 695, 698 (1981)) (emphasis added). Because Mayo's statement to police was not "incriminating on its face," *Richardson*, 481 U.S. at 208, its admission was not a *Bruton* violation.[11]

Nevertheless, the trial court was obligated, under Rule 4-253(c), to determine whether Mayo's statement was non-mutually admissible evidence that would cause prejudice by its admission; and, if so, whether that prejudice could be cured by an adequate redaction or a cautionary instruction. *See State v. Payne*, 440 Md. 680, 718 (2014) (holding that although wiretapped phone recordings of one co-defendant making

[11] The *Richardson* Court held that an appropriate cautionary instruction is sufficient when a statement is only inferentially incriminating. As discussed, here, Tarver did not seek and the court did not give a limiting instruction. Tarver does not assign error to the court's not giving that instruction.

incriminating remarks were non-testimonial hearsay and, thus, did not implicate confrontation rights, their admission was nevertheless subject to the prejudicial joinder analysis under Rule 4-253(c)). The court did not engage in that analysis and instead admitted Mayo's statement in its unredacted form.

As the State appears to concede, Mayo's statement was not mutually admissible in evidence because it was inadmissible hearsay as to Tarver.[12] Thus, to the extent that its admission would prejudice Tarver, he was entitled to severance or to redaction that would eliminate the prejudice.

Earlier in the trial, Rashaw, in his first statement to the police, identified Tarver by the street name "Scoop." In Mayo's statement, it became clear from the questions Detective Jones was asking and Mayo's responses that the person Detective Jones was calling "Scoop" was the person Mayo knew as "Eddie" and that "Scoop" and "Eddie" were Tarver. Jurors watching the videotape of Mayo's statement would know that.

Detective Jones's comments to Mayo during the interview make plain that he thinks Mayo's story about Cason's Toyota coincidentally being stolen and crashed on the day of the shootings was a lie and that in fact Mayo drove the Toyota not just part of the day (as Mayo acknowledged) but the whole day, including in the police chase and crash.

In that context, while playing the videotape of the chase and crash, Detective Jones refers to the person bailing out of the front passenger seat as "Your [Mayo's] man

[12] It was admissible against Mayo as a statement of a party opponent. Md. Rule 5-803(a).

Scoop [Tarver]" and then tells Mayo he didn't get the warrant for his arrest until he talked to Scoop [Tarver]. ("I mean, I didn't get your warrant until after I talked to Scoop, right? And I got Scoop in that vehicle.") The obvious implication of that remark by the detective was that Tarver had confessed and fingered Mayo.

In fact, Detective Jones had not obtained a statement from Tarver. As a police tactic, he was permitted to lie to Mayo, and if his lie had led Mayo to incriminate himself, Mayo could not have complained. The lie clearly prejudiced Tarver, however. And we do not find merit in the State's position that Tarver's lawyer could have cured the prejudice by eliciting from Detective Jones that Tarver had not given him a statement and what he told Mayo was a lie. To do this, Tarver's lawyer would have had to bring to the jurors' attention that Tarver had invoked his right to remain silent. Detective Jones had made it plain that he would have wanted to speak to Tarver, and so the jurors would have understood that the interview did not happen because Tarver did not want it to happen. Any comment on a criminal defendant's invocation of the Fifth Amendment right to remain silent in the face of police questioning is not proper and this would be tantamount to such a comment.

In addition, Detective Jones's commentary throughout the interview made clear that he believed Mayo and Tarver conspired to kill Rashaw; that they both were present at the shooting; that they both jumped into Cason's Toyota and fled the crime scene; and that Mayo was lying about his lack of involvement. The jurors knew from other evidence that Officer Zohios saw Mayo running away from the crime scene and getting in the

Toyota and that Tarver was apprehended hiding in the woods near the crash scene on Winchester Avenue. This merely increased the prejudicial effect of Detective Jones's comment about Tarver's supposed statement. The prejudice to Tarver in this situation is similar to the prejudice to Hines caused by the remarks of the detective who interviewed Allen.

The court could have eliminated the prejudice to Tarver by redacting Mayo's statement so it only included Mayo's version of events on May 24, 2013. This would have served the purpose for which the statement ostensibly was being offered—to show Mayo's consciousness of guilt—without harming Tarver. The remark by Detective Jones about getting a statement from Tarver actually served no purpose. The court declined to redact Mayo's statement at all, however. In light of the prejudice to Tarver from the admission of the statement, we hold that the trial court abused its discretion by denying his request to redact (or to sever).[13]

V.

Curtailment of Cross-Examination

For guidance on remand, we shall address Tarver's contention that the trial court erred by curtailing his lawyer's cross-examination of Simmons.[14] As discussed,

[13] We note that even if we would have found a *Bruton* violation, the outcome for Tarver would have been the same.

[14] We decline to address Tarver's related contention that he was denied the opportunity to re-re-cross examine Detective Jones as to the basis of his belief that (Continued…)

Simmons was an eyewitness to the shootings. On direct examination, she was asked whether she wore eyeglasses in 2013, when the shootings happened. She said she did not, but that she had since begun wearing eyeglasses. On cross-examination by Mayo's lawyer, she said that she had started to wear eyeglasses in 2014 and still used the same prescription. On cross-examination, Tarver's lawyer asked her to remove her glasses and describe the "face of [a] man" in a painting hanging on the wall in the courtroom. The prosecutor objected and a bench conference ensued.

The prosecutor argued that defense counsel had not established that the distance between the witness stand and the painting was the same as the distance between Simmons's bathroom window and the location of the shooting. The court noted that defense counsel also had not "established anything with regard to [Simmons's] sight as of [May 24, 2013] unless there's someone to testify there is some relationship between someone's eyesight today [in 2016] and her eyesight three years ago." When defense counsel responded that he would "do a foundation," the court said that he could not question Simmons further on that issue because, absent expert testimony establishing some rate of decline in vision, Simmons's eyesight now was not relevant to show what her eyesight had been three years earlier. Defense counsel began to make a proffer of Simmons's expected testimony, but the court directed counsel to return to the trial tables.

(…continued)
Rashaw had not been shooting from inside the car at his assailants. This issue is unlikely to arise on remand.

Tarver argues that he should have been permitted to show the jury "how poor Ms. Simmons' eyesight was without her glasses." We perceive no error. While Simmons's eyesight in 2013 plainly was relevant to her ability to see then, her eyesight in 2016 was not. The court did not err or abuse its discretion by declining to permit defense counsel to test Simmons's vision because, even if her eyesight was demonstrated to be "poor," that would not have had "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. In addition, as the prosecutor pointed out, Tarver's defense counsel made no showing of a fair comparison between the distance from Simmons's window to the location of the shooting and the distance from the witness stand to the location of the painting Simmons was being asked to describe.

VI.

Voir Dire

Also for guidance on remand, we shall address Tarver's contention that the court should have asked ten proposed *voir dire* questions "that sought to elicit juror bias." Those questions were:

> 1. Does anyone believe that a person is probably guilty if he or she is charged with a crime?
>
> 2. Does anyone believe that it is unfair to require the state to prove its case beyond a reasonable doubt?
>
> 3. Would it be difficult for you to find Mr. Tarver not guilty, if he decides not to testify?

***

> 7. Mr. Carter Scott died from a gunshot wound. There will be bloody or gory photographs of Mr. Scott's injuries and autopsy. Do you think that hearing or seeing this evidence would make it difficult for you to be fair or impartial?
>
> 8. Has any member of your immediate family or any of your friends ever been murdered?
>
> 9. Have you, any member of your immediate family, or any of your friends ever been shot?
>
> 10. Have you ever witnessed a murder?
>
> 11. Have you ever witnessed a shooting?
>
> 12. If a fellow juror violates the judge's order about discussing the case, would you be able to report it to the court?
>
> 13. During deliberation, would you abandon your position on guilt or innocence just to reach a verdict?

None of the questions requested by Tarver (and that the court declined to pose) are mandatory under Maryland law. Many of the proposed questions essentially asked the jurors if they would abide by the trial court's instructions, a practice that is "disfavored" in Maryland. *Stewart v. State*, 399 Md. 146, 162-63 (2007). The court did not err by declining to ask these questions.

Questions eight through eleven all concerned whether the jurors had been a witness to or a victim of a crime. In *Pearson v. State*, 437 Md. 350, 359 (2014), however, the Court of Appeals held that the trial court is not obligated to ask if a member of the venire has been the victim of a crime. In that case, the defendant was charged with various drug related offenses. During *voir dire*, he excepted to the court's refusal to ask a

question proposed by his co-defendant concerning whether any of the prospective jurors, their families, or friends ever had been the victim of a crime. His appeal reached the Court of Appeals, where Pearson argued that the trial court abused its discretion by not asking that question, because it was "reasonably likely to reveal specific cause for disqualification" or to "facilitate the exercise of peremptory challenges." The Court of Appeals disagreed, holding that the trial court "need not ask during *voir dire* whether any prospective juror has ever been the victim of a crime" for three reasons. *Id.* First, the experience of a crime victim "lacks 'a demonstrably strong correlation with a mental state that gives rise to [specific] cause for disqualification.'" *Id*. (quoting *Curtin v. State*, 393 Md. 593, 607 (2006)). Second, the question may be too time consuming. *Id*. Third, the court is required to ask (if requested) whether any juror has "'strong feelings about' the crime with which the defendant is charged" and this question is better tailored to reveal bias. *Id*.

In the case at bar, the trial court advised the venire that the case involved the murder of a toddler and asked if any of them "h[e]ld such strong feelings regarding the traumatic death of a child that you believe it would affect your ability to serve on the jury?" That question was a reformulation of Tarver's proposed question number seven ("Mr. Carter Scott died from a gunshot wound. There will be bloody or gory photographs of Mr. Scott's injuries and autopsy. Do you think that hearing or seeing this evidence would make it difficult for you to be fair or impartial?"). Having asked the "strong feelings" question, the court was not required to also ask the "crime victim" questions.

JUDGMENTS AGAINST APPELLANT EDDIE TARVER REVERSED AND CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. JUDGMENTS AGAINST APPELLANTS RASHID MAYO AND DEQUAN SHIELDS AFFIRMED. COSTS TO BE PAID ONE-THIRD BY APPELLANT MAYO, ONE-THIRD BY APPELLANT SHIELDS, AND ONE-THIRD BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.