Circuit Court for Howard County
Case No. C-13-CR-19-000011

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 128

September Term, 2020

WINSTON ALFONSO COOK, JR.

v.

STATE OF MARYLAND

Fader, C.J.,
Kehoe,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: February 3, 2022

Winston Alfonso Cook, Jr., was convicted in the Circuit Court for Howard County of attempted second-degree murder and other crimes related to the kidnapping and non-fatal shooting of Shawn Green on February 1, 2018.[1] Mr. Cook noted a timely appeal and presents the following questions for our review:

I. "Did the circuit court abuse its discretion in granting a protective order regarding evidence about an ongoing investigation involving subject matter relevant to the instant case?"

II. "Did the circuit court abuse its discretion in declining to suppress evidence of a taser, which was purchased by someone other than the appellant?"

III. "Did the circuit court abuse its discretion by not permitting appellant to cross-examine the complaining witness regarding prior bad acts?"

IV. "Was the evidence in this case sufficient to sustain a conviction of the offenses for which the appellant was convicted?"

We hold that the circuit court did not abuse its discretion and that the evidence was sufficient to lawfully sustain his convictions. Accordingly, we affirm the decision of the circuit court.

[1] Mr. Cook was sentenced to 25 years of imprisonment for attempted second-degree murder; 20 years for kidnapping; 20 years for conspiracy to commit kidnapping; 20 years for first-degree assault; 10 years for conspiracy to commit first-degree assault; five years for use of a firearm in the commission of a felony; and five years for conspiracy to use a firearm in the commission of a felony. The sentences for attempted second-degree murder, kidnapping, and the use of a firearm in the commission of a felony were set to run consecutively for a total of 50 years. The remaining sentences for conspiracy to commit kidnapping, first-degree assault, and conspiracy to commit first-degree assault, and "the sentence for firearm use felony conspiracy" were concurrent.

BACKGROUND

The Indictment

Mr. Cook was indicted by a grand jury on January 9, 2019. He was charged with 13 counts: (1) attempted murder in the first degree; (2) conspiracy to commit first-degree murder; (3) attempted murder in the second degree; (4) kidnapping; (5) conspiracy to commit kidnapping; (6) assault in the first degree; (7) conspiracy to commit assault in the first degree; (8) use of a firearm in the commission of a felony; (9) conspiracy to use a firearm in the commission of a felony; (10) unlawful possession of a firearm with a felony conviction; (11) carrying a handgun; (12) false imprisonment; and (13) conspiracy to commit false imprisonment.

Pre-Trial Motions

On October 7, 2019, the State filed a motion for a protective order pursuant to Maryland Rule 4-263 to protect information relating to an "unrelated investigation by law enforcement." In its motion, the State requested that the trial court "review the information *in camera*," in accordance with Rule 4-263(m)(2), and determine if disclosure was required. The State noted that it would "arrange for a law enforcement officer who is knowledgeable about the investigation to appear[.]"

On October 10, 2019, Mr. Cook filed a motion in limine seeking the exclusion of testimony relating to the purchase of a taser in the name of Kelly Bennett, a romantic partner of Mr. Cook. In the motion, Mr. Cook also sought permission to cross-examine the victim, Mr. Green, about an accusation of mortgage fraud, which was nol prossed as

part of a plea agreement relating to Mr. Green's prior federal conviction of conspiracy to possess narcotics with the intent to distribute.[2]

On October 11, 2019, the circuit court held a hearing on the motions. At the hearing, the State asked the court if it could conduct an ex parte, in-camera hearing of testimony from a law enforcement officer in support of the State's motion for a protective order. The State also offered to make an ex parte proffer of the evidence to determine whether the evidence was discoverable.

Defense counsel opposed the State's request for ex parte review of the evidence. Counsel argued:

> If this matter concerns a separate investigation which is in some way connected with this case, which it appears that it does because if it were completely unrelated it wouldn't even be an issue here, that would be something which perhaps would be an alternate theory of who committed the crime or it could have to do with impeachment. I don't know because I don't know the details. But it sounds to me like it's discoverable at the very least and possibly *Brady*[ ] material.
>
> * * *
>
> Further, I would say that it could possibly run afoul of the Sixth Amendment confrontation clause if it has to do with the accusers of the defendant. And I would request that this information be turned over to the Defense or, in the alternative, that Mr. Cook and I both be permitted to be present during any hearing on this matter.

[2] The motion also sought to exclude as hearsay a collection of notes that the police had written on a map of the area in which the crime was committed, but that part of the motion is not before this Court on appeal.

The court decided to hear the State's proffer ex parte "just . . . to get some context, some idea of what we're talking about. . . . and then decide after that whether we are going to do the in camera [hearing of testimony.]"

After hearing the State's proffer, the court announced:

> So I have heard the State's proffer and I do at least have an understanding of the nature of the controversy and the reason they are seeking a protective order. And so that at least gives me something to go on. I think -- again, I haven't heard anything because the law enforcement person hasn't come in yet. All I heard while you were in the hallway was [the State's] proffer about what the nature of this was.
>
> I am satisfied that there is a ground for the State to seek this protective order at this point. I'm not saying there's proof or whatever but I am satisfied that they are making this application in good faith for what they believe is a substantial reason, and that their request for in camera review is something that the Court should do.

The court then cleared the courtroom and heard ex parte, *in camera* testimony from the State's witness.

Mr. Cook's counsel then returned to the courtroom, and the court relayed the following on the record:

> Okay. So I just heard from the law enforcement officer . . . and I am going to seal the record of his testimony before the Court.
>
> What I've heard I think persuades me that there is good cause to enter a protective order. And I am not -- I am leery of saying too much, but I think that the nature of what was revealed to me in camera is such that it would be not appropriate to reveal that information. Given the timing of what I heard related to the particular law enforcement investigation I don't think it is particularly relevant -- actually, I don't think it is relevant at all to the proceedings here because I think the conduct and the events and what was relayed to me all occurred well after the event or the alleged events that are the subject of this trial.

* * *

> So I know that's vague but particularly related to the timing, I think that the events that were described to me occurred well after this incident. And I am not sure that even if these things came out whether they would be admissible in court, probably not just given the timing of the events.

Mr. Cook's counsel objected, arguing that "[i]f there is an ongoing investigation that has to do with . . . this case or the parties involved," then the evidence would be discoverable, even if only for the purposes of impeachment. Counsel also offered that if she were given the information, she could withhold it from her client. The court denied this request, stating that revealing the information could compromise the law enforcement investigation even if it were shared only with counsel and not the defendant. Following the court's *in camera* review, the transcript and records were sealed.

The court next considered Mr. Cook's motion in limine seeking to exclude evidence related to the taser. Mr. Cook's counsel stated to the court that Mr. Green "was taken into a van, allegedly was tased, was shot, was kidnapped, and at one point escaped from the van. The State is alleging that Mr. Cook was a participant." Mr. Cook's counsel also stated that "Mr. Cook has a girlfriend by the name of Kelly Bennett," who "at one point purchased a taser online." Furthermore, although taser wires or taser confetti were found at the scene of Mr. Green's kidnapping, no taser was found.

In opposition, the State represented to the court that Ms. Bennett "will testify based on her statements to the police that she did not purchase the taser and that the defendant had access to her house to come and go as he pleased, and had access to her laptop." Furthermore, the State proffered that Detective Branigan "will testify that tasers are

serialized," and that the confetti discharged from the taser used against Mr. Green was marked with a serial number that matched the taser that was bought in Ms. Bennett's name and shipped to her address. Additionally, the State represented that "there will also be forensic evidence linking [Mr. Cook] to the van, DNA, surveillance of him being in the van shortly before the incident occurred. His phone was found in the van."

Mr. Cook's counsel argued, on the other hand, that although there was evidence that Ms. Bennett had recently purchased a taser, there was no direct evidence that the taser purchased was the taser found at the scene of the crime. She further argued that if the evidence was introduced, the danger of unfair prejudice would substantially outweigh any probative value of the circumstantial evidence connecting the taser to Mr. Cook.

The State contended that the evidence was relevant and not prejudicial. The State urged that Mr. Cook's "access to a fairly unique weapon like the one used in a particular crime in combination with all of the other circumstantial evidence placing him inside the vehicle when the crime was committed . . . would certainly rise above the level of speculation and is not likely to result in any unfair prejudice." The State underscored that the connection between the taser evidence and Mr. Cook was not speculative. "Proving that a weapon used in the abduction was sold to and shipped to a place where he had access is certainly relevant evidence."

The court ruled that the State had presented sufficient evidence that the taser could be connected to Mr. Cook, and that the prejudicial value of the taser evidence did not

outweigh the probative value. Therefore, the court denied the motion in limine with respect to the taser.

Finally, the court addressed Mr. Cook's motion seeking permission to question Mr. Green about his prior conviction in 2009 of conspiracy to possess with intent to distribute narcotics, and about the related investigation into Mr. Green's alleged mortgage fraud. Mr. Cook's counsel explained that the purpose of the questions would be to impeach Mr. Green's credibility on cross-examination.

The State opposed. Relying on *State v. Giddens*, 335 Md. 205 (1994) and *In re Gary T.*, 222 Md. App. 374 (2015), the State argued that the underlying facts of the conviction were inadmissible for impeachment purposes. The State also argued that Mr. Green's credibility was not essential to the case because he was not being asked to identify any of his attackers; he was only being asked to testify to his experiences of the attack against him, much of which could be corroborated by video evidence or the testimony of the police officers who responded to the scene.

In response, Mr. Cook's counsel argued that the evidence could be introduced to reveal the possibility of alternate suspects. She argued that introducing evidence of Mr. Green's convictions would show that he had "high level" involvement in the drug trade and had "swindl[ed] people out of millions of dollars of assets." As such, the evidence suggested the possibility that there were people, other than Mr. Cook and his cohorts, who had a motive to attack Mr. Green.

After considering the arguments of both parties, the court held:

> Okay. So the motion with respect to Mr. Green as I understand seeks to put forth facts related to his plea agreement including, most notably, the mortgage fraud that was nolle prossed; his forfeiting assets; and the facts related to a substantial amount of cocaine that was involved in the case.
>
> I think that that goes a little too far under the rules. I think it is distracting. Whether it is an infamous crime that can be admitted, that's another issue. But as far as the facts underlying a nolle [prosequi,] I don't think that that's admissible evidence and that we should restrict him being asked about it.
>
> As far as other acts that he committed and whether they are appropriate for cross-examination, I think I just have to reserve until trial and you can -- if there is an objection you can make a proffer out of the presence of the jury. I don't want to say that you can't get into anything specific about this man's background because there may be many things that are fair game. And until I hear specific things I don't want to exclude those.
>
> But in terms of the immediate concern about other facts related to his conviction on conspiracy, I'm going to deny the motion in limine but reserve as to your ability to go ahead and ask him other questions depending if there are objections to those.

The Trial

Mr. Cook was tried over four consecutive days in the circuit court, beginning October 15, 2019. He waived a jury trial. The following account is derived from the evidence presented at Mr. Cook's trial, viewed in the light most favorable to the State. *Molina v. State*, 244 Md. App. 67, 153 (2019).

The February 1, 2018 Incident

On February 1, 2018, Shawn Green arrived at his home in Columbia, Maryland after 11 p.m. As he began to walk towards the front door of his home, he noticed two men in black hoodies walking in his direction. Not long after he noticed two hooded figures, Mr. Green realized that the men were "crouching down [and] coming towards [him] fast."

Seeing this, Mr. Green turned around and ran toward the street. As he was running toward the street, he saw two more men wearing dark clothes approaching him in the opposite direction**.** The four men then "[t]ried to close in." Mr. Green attempted to get the attention of a passing car and "[s]tarted banging on the hood to get him to stop. To try to do some kind of diversion." That vehicle did not stop.

Mr. Green then tried to get the attention of another passing vehicle driven by Jordan Randall. Mr. Green ran up to Mr. Randall's car screaming "help, they've got a gun, they're going to kill me, let me in." Before Mr. Randall reacted, Mr. Green's attackers hit him in the back of the head with a gun, and Mr. Green ran away. Mr. Randall called the police shortly after.

After attempting to get help from Mr. Randall, Mr. Green turned to face his attackers and "had a small tussle with one." While Mr. Green was fighting one of his attackers, another attacker shot him in the leg. He was then grabbed from behind and pulled into a van. One attacker drove the van while another held Mr. Green down in the back. While the van drove away, Mr. Green stuck his feet outside the door of the vehicle to stop the men from closing the door completely. He hoped that bystanders would notice his feet hanging out of the van and realize that something was wrong.

When Mr. Green felt that the vehicle had slowed down to about twenty or thirty miles per hour, he bit the man holding him to break free of his grip, and jumped out of the moving vehicle. The impact from the fall broke two fingers on Mr. Green's left hand.

Despite his injuries, he was able to flee to a nearby parking lot of a childcare center where he hid underneath a vehicle until he believed that he was safe.

Mr. Green called his cousin to pick him up, who arrived about ten or fifteen minutes later. Soon after his cousin's arrival, several police cars arrived. When the officers began to question Mr. Green, they discovered that he had suffered multiple injuries. In addition to his gunshot wound, head injuries, and two broken fingers, the police informed Mr. Green that he had been hit with a taser in his neck. He did not realize that he had been tased at the time, but he was left with between four to six marks on his neck.

The Investigation

The investigation began on February 1, 2018, the evening of the incident. Officer Patrick Gipe was on patrol that evening when he received a call about a reported assault. As he approached the location of the incident, he saw an older model minivan driving fast with its headlights off and watched it run through a red light. He reported this to dispatch and immediately began pursuing the vehicle.

Corporal Michael Pickett also heard a call over the radio about the van. Corporal Pickett saw a van that matched the description and began to follow it. Following the van, Corporal Pickett noticed that someone's legs were hanging out of one of the doors. He also noticed wires, which he believed came from a taser, caught on the back-windshield wiper. Corporal Pickett then saw two men in dark clothing jump from the right side of the van while it was still moving. Because it was dark outside and raining, he could not see clearly enough to pursue the individuals. He continued to follow the van and eventually

located the van, abandoned, in the center of a road. When Corporal Pickett inspected the van, he found standard flex cuffs, plastic zip ties, black gloves, e-cigarettes, a plastic water bottle, a password-protected cell phone that was later identified as belonging to Mr. Cook, and "what appeared to be blood on the seat and in the back floor area."

Lyndsey Sanney, a forensic DNA analyst who the court qualified to testify as an expert in the field of DNA analysis, testified about the DNA samples that were taken from the items in the van. Ms. Sanney testified that a DNA test found that Mr. Cook was a major contributor to a DNA sample taken from the interior of one of the black latex gloves. Ms. Sanney also stated that Mr. Cook was a possible contributor to DNA samples taken from the e-cigarette, and "the partial profile [obtained from a swab of the water bottle found inside the minivan] was consistent with . . . Mr. Cook's buccal swab."

Mr. Cook's cell phone records from between February 1, 2018 and February 2, 2018 revealed that on those two days, Mr. Cook's phone connected with cell towers near his own residence in Baltimore City, as well as in Columbia, where the crime had occurred, and in Laurel near the home of Sabrina Foote, the owner of the van and a romantic partner of Mr. Cook. Call records also indicated that Mr. Cook's phone was connecting to towers near Mr. Green's home just before the attack was reported to the police. Additionally, Ms. Foote's call records showed an outgoing call made at around 12:41 a.m. on February 2, 2018 to Tauri Smith, the mother of one of Mr. Cook's children. The van was abandoned approximately 500 yards or less from Ms. Smith's home.

Officers also located footage from a surveillance system at a Columbia Exxon gas station that showed Mr. Cook and two other men leaving and returning to the van just hours before the van was used in the attack on Mr. Green.

When conducting a search of the area, the police discovered that the taser used against Mr. Green had deployed small pieces of confetti that contained two serial numbers associated with the device. Records from the companies that manufactured and sold that brand of taser confirmed that a taser with those serial numbers was sold on November 13, 2017 to Kelly Bennett, another romantic partner of Mr. Cook.

At trial, Ms. Bennett acknowledged that she had been in a relationship with Mr. Cook and that he was the father of her son. She also confirmed that she lived at the address where the taser had been shipped and that Mr. Cook had a key to her house. Although Ms. Bennett testified that she had never ordered a taser and was not aware of anyone ordering one in her name, she acknowledged that it would be entirely possible for someone to do so without her knowledge. She testified that her computer was in the common area of her home and that it had no password protection, making it possible for anyone who was present to use it. She also testified that she could have missed a purchase made by someone else in her name because she only infrequently checked her email and her bank account.

The Court's Ruling

On October 21, 2019, the court issued its ruling. The court determined that "the evidence is overwhelming that the [Mr. Cook] was involved in this criminal activity. The planning, preparation and execution of this criminal plot and the crimes actually

committed." The court found that there was no reasonable doubt the facts established that Mr. Cook "had opportunity and . . . that he was there, and he was involved in the plot against Mr. Green."

In response to Mr. Cook's argument that another individual likely had a motive to commit this crime against Mr. Green the court stated: "Mr. Green, for all we know, could be the worst person in the world but no one [else] had the series of remarkable strings of occurrences and coincidences . . . suggest[ing] [Mr. Cook's] involvement here." The court further explained:

> What's relevant is that the evidence clearly points to [Mr. Cook] here as to being involved in this crime. He got the taser. He got the van. The phone has tracked him and the planning and execution. There was a surveillance video. The phone tracked him afterward. There's DNA in the van. And he was heading toward his girlfriend's house. I think the evidence is overwhelming, again, as to the specific involvement of [Mr. Cook] here.

Based on these facts, the court found that Mr. Cook was guilty beyond a reasonable doubt of all the charges against him except for attempted first-degree murder and conspiracy to commit first-degree murder.[3] In sum, Mr. Cook was convicted of false imprisonment, conspiracy to commit false imprisonment, first-degree assault, conspiracy to commit first-degree assault, kidnapping, conspiracy to commit kidnapping, use of a

[3] The court explained that attempted first-degree murder and conspiracy to commit first-degree murder require a premeditated intent to kill, and the State did not meet its burden of production because there was reasonable doubt as to whether the original plan was to kill Mr. Green or only to kidnap him.

firearm in the commission of a felony, conspiracy to commit use of a firearm in the commission of a felony, and attempted second-degree murder.[4]

With regard to Mr. Cook's conviction for attempted second-degree murder, the court found that the State had proved an intent to kill beyond a reasonable doubt based on the shooting of Mr. Green and the testimony of Mr. Randall:

> I'm particularly struck by the video in the surveillance area around Natures Way -- Natures Road, I'm sorry. One of the assailants, we can't identify him by face, clearly is coming at Mr. Green with his gun raised in ready firing position, was shot, was subsequently fired, striking Mr. Green in the leg, his upper thigh, in an area which was perilously close to vital organs where he could have seriously . . . been killed.
>
> * * *
>
> [Mr. Randall testified] that Mr. Green said [], "Help. They've got a gun. They're trying to kill me." This is kind of a classic excited utterance. . . . I think that shows an intent. That shows that . . . the victim, himself, was convinced that they're trying to kill me. I think the conduct of the attack on Mr. Green, the coming at him in ready firing position with a gun, shooting him in the leg, in such an area, shows an intent to kill.
>
> * * *
>
> So, based upon the circumstances here, the reasonable inference is that Mr. Green was the victim of a plot, an attempt, to kill him. And the Court finds beyond a reasonable doubt that the Defendant is guilty, if not as the actual shooter, as an accomplice of the crime of attempted second-degree murder. And I find he's guilty beyond a reasonable doubt.

Mr. Cook filed a timely appeal.

DISCUSSION

[4] Because there were several assailants and it could not be determined which one was Mr. Cook, the court found that Mr. Cook was guilty of each of these offenses either as a principal or as an accomplice.

I.

The Circuit Court's Grant of the Protective Order

Mr. Cook contends that the circuit court abused its discretion in granting the State's request for a protective order. He asserts that "[c]learly, the evidence adduced at the *ex parte* hearing . . . had some bearing on the instant case," and that his counsel's preclusion from the hearing prevented him from "ascertain[ing] what this evidence was and [whether] to use it in [Mr. Cook's] defense." Relying on *Warrick v. State*, 326 Md. 696 (1992), he argues that this matter should be remanded for a new hearing with counsel present to determine whether he was prejudiced by this nondisclosure.

The State responds that the "record indicates that the circuit court complied with Md. Rule 4-263(m)" and that the court, through the State's proffer, found "good cause" for the *in camera* hearing. The State highlights the court's determinations that: (1) "the information was not relevant to Cook's trial and was of questionable admissibility"; (2) the material was not subject to disclosure pursuant to *Brady*; (3) "disclosure of the information . . . could compromise the ongoing law enforcement investigation"; and, (4) "Cook could receive a fair trial without the information." The State further avers that, because the circuit court recorded and sealed its *in camera* proceedings to allow appellate review and Mr. Cook "has not . . . made any attempts to have those proceedings unsealed to counsel for the purposes of appeal," he "waived any argument regarding his access to those materials."

Maryland courts have established that "[t]he privilege of the State to withhold certain matters from defendants in criminal cases has long been recognized, not only in

Maryland, but throughout the country." *Lancaster v. State*, 410 Md. 352, 378 (2009) (quoting *Coleman v. State*, 321 Md. 586, 602 (1991)). When granting protective orders that restrict evidence from criminal defendants, trial judges must "balance the public interest in protecting the flow of information against the individual's right to prepare a defense." *Id.* (*quoting Coleman*, 321 Md. at 602).

It is well-settled that, on appeal, the burden of establishing error in the lower court lies with the appellant. *Black v. State*, 426 Md. 328, 337 (2012). The appellant must "produce[] a 'sufficient factual record for the appellate court to determine whether error was committed." *Id.* (quoting *Mora v. State*, 355 Md. 639, 650 (1999)). The Maryland Rules delineate an appellant's responsibilities to ensure that the record on appeal contains the "docket entries," "transcript[s]," and "original papers" necessary for this Court to render a decision. Md. Rule 8-413(a) (listing the required contents of the record on appeal); Md. Rule 8-602(c)(4) (granting this Court and the Court of Appeals the discretion to dismiss an appeal when the record does not comply with Rule 8-413).

In this case, we do not have a sufficient factual record to determine whether the circuit court erred by hearing the officer's testimony *ex parte*. The records of the State's proffer and the officer's testimony remain under seal, and we cannot decide whether the circuit court erred by hearing the proffer or the testimony without knowing the content of the proffer. Mr. Cook had the burden of making those sealed records available to us by ensuring that the clerk of the circuit court transmitted them to this Court. *Winston v. State*, 235 Md. App. 540, 575-76 (2018) ("Rule 8-411(a)(1) requires an *appellant* to provide a

transcription of all the testimony that is necessary for the appeal."); *see also* Md. Rule 8-413(a) (listing the documents that must be included in the record on appeal); Md. Rule 4-263(m)(2) (requiring the preservation of sealed records so that they may be made available to the appellate court in the event of an appeal). Because it appears that Mr. Cook did not attempt to have these records provided to this Court or move to have the records unsealed, we hold that he failed to meet his burden under Rule 8-411(a), and he has therefore waived his challenge to the *in camera* proceedings. *Winston*, 235 Md. App. at 576 ("In view of [Rule 8-411(a)], [appellant] cannot ignore his obligation to secure a transcript and then use his own failure as a reason for us to rule in his favor."); *cf. Kovacs v. Kovacs*, 98 Md. App. 289, 303 (1993) ("The failure to provide the court with a transcript [of an arbitration proceeding] warrants summary rejection of the claim of error.").

II.

Taser Evidence

A. Parties' Contentions

Mr. Cook asserts that the circuit court abused its discretion by failing to suppress the evidence related to a taser which was used in the abduction of Mr. Green. He argues that although the taser was connected to Kelly Bennett, one of his girlfriends, the taser could have been purchased on her computer by anyone. Mr. Cook insists that because there was no physical evidence tying him to the taser, evidence about the taser was more prejudicial than probative, and should have been excluded under Maryland Rule 5-403.

The State responds that Mr. Cook waived the issue because, after the motion in limine was denied prior to trial, Mr. Cook's counsel failed to renew her objection to the evidence when the State questioned Ms. Bennett at trial. "Nor did [defense counsel] object when the State asked questions about how the taser could be connected to [Ms.] Bennett, as Det. Branigan explained, at length, how specific information about the taser sale was connected to [Ms.] Bennett." The State asserts, citing *Reed v. State*, 353 Md. 628, 638 (1999), that "a contemporaneous objection generally must be made pursuant to Maryland Rule 4-323(a) in order for that issue of admissibility to be preserved for the purpose of appeal."

If not waived, the State contends the evidence surrounding the purchase of the taser was properly admitted because it made facts related to trial more or less probable and because the evidence was not substantially more prejudicial than probative.

B. Analysis

While we review for abuse of discretion a challenge to the admission of evidence under Rule 5-403, *Rainey v. State*, 252 Md. App. 578, 588 (2021), the question of whether the challenge was preserved is a question of law that we review without deference, *Young v. State*, 234 Md. App. 720, 731 (2017).

Maryland Rule 4-323(a) states, in relevant part, 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." In *Reed v. State*, the Court of Appeals held that this preservation requirement applies even when a

party has made a pretrial motion on the same issue: "[w]hen a pretrial ruling results in the admission of evidence, the contemporaneous objection rule, Maryland Rule 4-323(a), shall continue to apply. Contemporaneous objections to the admission of evidence normally must be made when the evidence is offered at trial." 353 Md. at 643. This requirement follows logically when one considers that a trial court's pre-trial denial of a motion in limine to exclude evidence is subject to change as the case unfolds, "particularly if the actual testimony differs from what was contained in the defendant's proffer." *Dallas v. State*, 413 Md. 569, 578 (2010) (instructing that "a trial court possesses the discretion to alter its ***in limine*** ruling after hearing the testimony, even if 'nothing unexpected happens at trial.'" (quoting *Luce v. United States,* 469 U.S. 38, 41 (1984) (emphasis in original)).

Here, Mr. Cook did not preserve his objection to the admission of the evidence relating to the taser. Although he initially argued that evidence of the taser should be excluded from trial, he did not renew his objection when Ms. Bennett and Det. Branigan testified about the taser at trial. Our analysis stops here because clearly the issue was not preserved for this Court's review.

III.

A. Cross-Examination Based on Nolle Prosequi for Mortgage Fraud

Mr. Cook argues that the circuit court abused its discretion by not permitting him to cross-examine Mr. Green about prior bad acts. Mr. Cook alleges that Mr. Green was convicted in federal court in 2009 of conspiracy to distribute narcotics, and that other charges relating to mortgage fraud were dropped as part of the plea bargain in his drug

case. Mr. Cook intended to cross-examine Mr. Green about the substantive facts underlying the drug conviction and the mortgage fraud charges, both (1) for impeachment, and (2) to suggest the existence of other perpetrators, i.e., enemies that Mr. Green might have made through his past criminal activity.

The State argues that the circuit court properly exercised its discretion in limiting the cross-examination of Mr. Green. Relying on *Pantazes v. State*, 376 Md. 661, 680 (2003), the State avers that the scope of cross-examinations is "not boundless." The State points out that, based on the Maryland Rules and relevant case law, the circuit court properly allowed Mr. Cook to question Mr. Green about his conviction, but not about the underlying details. Finally, the State asserts that, even if the circuit court abused its discretion, any error was harmless.

Analysis

Our review of the circuit court's assessment of the admissibility of relevant evidence is for abuse of discretion. *Brooks v. State*, 439 Md. 698, 708 (2014).

Maryland Rule 5-403 grants a trial court the discretion to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 5-403 thus creates a balancing test, whereby the probative value of the evidence is weighed against the risk of prejudice. *Allen v. State*, 440 Md. 643, 664-65 (2014). If the risk of prejudice substantially outweighs the probative value, then the court may exclude the evidence. *Id.*

Rule 5-403 is frequently invoked when the introduction of evidence would lead to too much focus on an issue that is only tangential to the case at hand—in other words, when it would lead to an unnecessary "mini-trial." *Id.* at 665. For example, in *Taneja v. State*, the defendant sought to introduce evidence suggesting an alternate suspect, Deepinder Singh, in his murder trial. 231 Md. App. 1, 13 (2016). The defendant would have called Singh to testify and would have questioned him on a number of topics, including: Singh's lawsuit against the victim; Singh's statement about the victim that "someone should kill that b[itch]"; the fact that Singh lived in the area where the victim was murdered; and, Singh's familiarity with weapons. *Id.* at 18 (alteration in original).

We held that the trial court did not err by excluding this line of questioning because the defendant's attempt to suggest Singh as an alternate suspect "would have been, at best, only tangentially relevant and had a high probability of confusing, distracting, and misleading the jury." *Id.* The trial court in that case did not abuse its discretion because "the evidence Taneja sought to introduce through Singh was disconnected and remote. It had no other effect than to raise the barest of suspicion that Singh might have killed [the victim]." *Id.*

Here, the evidence relating to Mr. Green's case for alleged mortgage fraud, which was nolle prossed, raised even less of a bare suspicion than in *Taneja*. In *Taneja*, the defendant identified a specific, named suspect and identified reasons why that particular suspect might have been the true offender. *Id.* But here, Mr. Cook sought to raise only the vague suspicion that there may be unidentified persons with a reason to dislike Mr. Green.

This renders the facts underlying Mr. Green's nolle prosequi with very little probative value. Md. Rule 5-403. Additionally, because this line of questioning would have delved into unproven allegations of criminal behavior with no established connection to the present case, it is reasonable to think that it would have turned into a confusing and distracting mini-trial. *Allen*, 440 Md. at 665. Accordingly, we hold that the circuit court did not abuse its discretion by ruling that Mr. Green could not be cross-examined about the nolle prossed mortgage fraud case.

B. Cross Examination Based on Other Prior Bad Acts

1. The Missing Transcript

Unfortunately, the court's recording equipment malfunctioned, and Mr. Green's cross-examination and redirect were not recorded. This led to the following discussion between the court and trial counsel:

> [THE STATE]: Your Honor, my understanding from Madam Court Reporter is that the recording neglected to pick up Mr. Green's cross-examination and also Officer Gipe's testimony. With Officer Gipe still being in the courtroom and with us not having gotten far, the State believes that it is appropriate and I spoke with Defense counsel to proceed with Officer Gipe from the beginning. With the [c]ourt's permission.
>
> THE COURT: Yes, that's fine. What do we plan to do with the previous witness?
>
> [DEFENSE]: **I think recross examining him would be a bit strange. I guess we could put on the record that there were actually no objections made from either side during the direct or the cross. I don't know if that may help.** I would defer to the [c]ourt. I could

recross examine him if you want me to but I just -- I don't know. I've never had this happen.

THE COURT: Mr. Yaeger.

[THE STATE]: Your Honor, I'm comfortable with both -- his testimony is what his testimony is and what he said in court. And the [c]ourt's recollection of the testimony is what believe -- and including the cross -- is evidence in this case. And it just can't be recreated. I think for preservation issues it will be appropriate for both parties to articulate whether they had any objections to Mr. Green's cross that needs to be preserved for appellate review. **The State had no objections and it is my recollection that no objections were made by the Defense and that essentially all the testimony -- all the cross-examination questions just highlighted information that came out on direct and there weren't many new facts, if any, developed.** But I will defer to Counsel as to whether I have accurately stated what happened during cross.

[DEFENSE]: **Yes, I would agree that that is accurate, Your Honor.**

THE COURT: Okay. Obviously I heard the testimony and I took notes. Not as detailed as a court reporter would take transcribing but I do have, I think, a good grasp of what he said. And I don't recall any objections by either side, either. . . . I think if the parties are okay with proceeding with not recalling him for the cross-examination I'm fine with it. . . . So I don't have any problem with proceeding subject to counsel wishing to recreate. Otherwise I'm just going to go ahead and just go on with the officer and we can start him from the top, just because he just started. Is that okay?

[THE STATE]: Yes, Your Honor.

THE COURT: Is that okay on both sides?

[DEFENSE]: Yes. And thank you, Your Honor.

THE COURT: Okay. Thank you.

2. Analysis

To the extent that Mr. Cook challenges the exclusion of any other prior bad acts by Mr. Green—for example, Mr. Green's federal drug conviction—we conclude that his argument fails. When the circuit court addressed the issue during the pre-trial motions hearing, it expressly reserved a ruling on the admissibility of all prior bad acts other than the facts underlying Mr. Green's nolle prosequi. Mr. Cook's challenge on these grounds thus depends on whether the issue was revisited during Mr. Green's cross-examination.

Mr. Cook agrees that the fact that Mr. Green's cross-examination was not recorded makes the issue before us "further complicated." Relying on *Bradley v. Hazard Technology*, 340 Md. 202 (1995), Mr. Cook asserts that in such a situation, a retrial may be appropriate if there is a "specific allegation of error" which cannot be adequately addressed without the missing transcript.

The State responds that Mr. Cook waived any argument about the missing recording because "[Mr.] Cook's counsel argued against re-doing the cross-examination; acknowledged that there had been no objections made; and agreed with the prosecutor that few, if any, new facts developed during cross."

As correctly stated by Mr. Cook in his brief, the loss of a portion of a trial transcript does not automatically entitle the appellant to a new trial. *Bradley v. Hazard Tech. Co., Inc.*, 340 Md. 202, 204 (1995). To warrant a new trial, an appellant must "demonstrate that

the missing portion of the transcript is relevant to consideration of a specific allegation of error, and that no sufficient substitute for the missing transcript can be reconstructed." *Id.*

Mr. Cook fails both prongs of this test. First, Mr. Cook has failed to show that the missing transcript would be relevant to a specific allegation of error. He suggests that the missing transcript is relevant to his claim that the circuit court erred in excluding evidence of prior bad acts, but the record does not support this assertion. The parties agreed in the motions hearing that little to no new facts were developed in the unrecorded testimony, and no objections were made. Because the parties agree that the missing testimony was duplicative and unobjectionable, we struggle to imagine—and Mr. Cook does not explain—how the testimony could make a difference in our determination of whether the court erred with respect to the evidence of prior bad acts.

Second, Mr. Cook has failed to show that there is no adequate substitute for the missing transcript. Mr. Cook's counsel stated that there was no need to re-cross examine Mr. Green and agreed with the State that "all the cross-examination questions just highlighted information that came out on direct and there weren't many new facts, if any, developed." In doing so, Mr. Cook made a clear concession that the transcript of Mr. Green's direct examination is an adequate substitute for the missing record of his cross-examination and redirect.[5] Accordingly, we hold that the loss of part of the trial transcript does not entitle Mr. Cook to a new trial. *Bradley*, 340 Md. at 204.

[5] These statements by Mr. Cook's counsel could also be characterized as a waiver of his ability to seek a new trial based on the missing transcript.

We also conclude more generally that Mr. Cook was not prejudiced by the failure to record all of Mr. Green's testimony. Although we do not know everything that happened during Mr. Green's cross-examination, we do know from the transcripts that are available that counsel for both parties agreed that neither party made any objection during the cross-examination. This leaves us with two possibilities. First, if Mr. Cook did not attempt to ask Mr. Green about other prior bad acts, then the issue is waived. *Reed v. State*, 353 Md. 628, 634 (1999). Second, if Mr. Cook did ask Mr. Green about prior bad acts, then there is no adverse ruling for Mr. Cook to appeal because we know that the State did not object. *Cf. Brown v. State*, 373 Md. 234, 238 (2003) ("[A] party introducing evidence cannot complain on appeal that the evidence was erroneously admitted." (quoting *Ohler v. United States*, 529 U.S. 753, 755 (2000)). Either way, there is nothing for this Court to review.

IV.

Sufficiency of the Evidence

A. Parties' Contentions

Mr. Cook argues that the evidence introduced at trial was "insufficient generally to sustain a conviction for any of the offenses charged." He does not dispute the basic facts of the case; i.e., that Mr. Green was abducted against his will and that one of his assailants shot him when he resisted. Instead, Mr. Cook argues only that there was insufficient evidence to prove that he was the perpetrator, and that there was insufficient evidence to prove an intent to kill. With respect to all the charges except for attempted second-degree murder, his argument relies on his position that the case presented by the State was based

on "weak circumstantial" evidence. Mr. Cook contends that the circumstantial evidence of his involvement in the attack consisted of "records of taser codes which were not purchased by [Mr. Cook], a gas station video in the general vicinity [of where the crime occurred] but having nothing to do with the crime, and DNA evidence and a cellphone found . . . in a vehicle which was undisputedly the property of a girlfriend of [Mr. Cook.]"[6] With respect to the attempted second-degree murder charge, Mr. Cook contends that the evidence was insufficient to prove that he had the specific intent to kill.

The State concedes that the evidence presented throughout the trial was circumstantial. However, relying on *Molina v. State*, 244 Md. App. 67, 127 (2019), and other cases, the State asserts that circumstantial evidence "'may be just as relevant as direct evidence' and does not require any 'greater degree of certainty' than direct evidence, as either case requires that a trier of fact be convinced of guilt beyond a reasonable doubt." To support this argument, the State summarizes the evidence presented against Mr. Cook, highlighting evidence that placed Mr. Cook near the scene at the time of the crime, DNA samples found in the van, Mr. Cook's cell phone evidence, and the taser that was purchased on his girlfriend's computer. The State also argues that the evidence was sufficient to prove Mr. Cook's specific intent to kill Mr. Green because Mr. Green was tased in the neck and dragged into a van after being shot "in the upper thigh on his leg, which was 'perilously

[6] Mr. Cook also contends that "[t]he victim, Shawn Green, had a questionable past which likely would have left him with several enemies." This contention relies on the character evidence which we have already held was properly excluded. Accordingly, we do not consider it in our review of the sufficiency of the evidence.

close to vital organs' and could have led to Green's death." Because a person "intends the natural and probable consequences of his actions," the State concludes that Mr. Cook intended to cause Mr. Green's death, regardless of whether he pulled the trigger or acted as an accomplice.

B. Analysis

Under Maryland Rule 8-131(c), "[w]hen an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." We view the evidence in the light most favorable to the prosecution and consider "whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 479 (1994) (citation omitted).

A conviction may rest on circumstantial evidence alone "when the circumstances, taken together, do not require the trier of fact to resort to speculation or mere conjecture." *Morgan v. State*, 134 Md. App. 113, 124 (2000). "[C]ircumstantial evidence does not 'depend upon one strand, but is made up of a union and combination of the strength of all its strands.'" *Sewell v. State*, 239 Md. App. 571, 614 n.12 (2018) (quoting *Hebron v. State*, 331 Md. 219, 228 (1993)). Therefore, a factfinder need not be "satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt." *Id.* (citation omitted).

In the instant case, the circuit court addressed the elements of each individual charge brought against Mr. Cook. The court convicted Mr. Cook of all the charges brought against him except attempted first-degree murder and conspiracy to commit attempted first-degree murder. The record reflects that the court went through and explained all elements for each crime Mr. Cook was charged with. The court also explained how the facts of the instant case supported or did not support each of the charges brought against Appellant.[7]

Mr. Cook's Identity as One of the Assailants

The circuit court identified a significant amount of evidence linking Mr. Cook to the attack. Mr. Cook's DNA was found in the van, including on the interior of a latex glove. Mr. Cook's phone was found in the van, and the van belonged to one of Mr. Cook's girlfriends. Cell tower records confirmed that Mr. Cook's cell phone was present at the home of the girlfriend who owned the van, and then it was present at or near the site of the attack shortly before the attack was reported to the police. There was also surveillance footage showing Mr. Cook getting into the van used in the attack shortly before. Records showed that the taser that Mr. Green was shot with was delivered to the home of Ms. Bennett, one of Mr. Cook's girlfriends. We see no clear error in these factual findings by the circuit court, and we conclude that the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that Mr. Cook was one Mr. Green's assailants.

[7] Under a theory of accomplice liability, the circuit court found that Mr. Cook was guilty of assault and the use of a firearm in the commission of a felony even if he was not the one who pulled the trigger. Mr. Cook does not challenge this component of the circuit court's decision.

Kidnapping, False Imprisonment, Assault, and Use of a Firearm

First, Mr. Cook was charged with kidnapping under Maryland Code (2002, 2021 Repl. Vol.), Criminal Law Article ("CR") § 3-502, which states that "[a] person may not, by force or fraud, carry or cause a person to be carried in or outside the State with the intent to have the person carried or concealed in or outside the State." The uncontroverted evidence shows that Mr. Green was attacked with a taser, forced into a van, and then driven away. Given these facts, a rational trier of fact could have found beyond a reasonable doubt that Mr. Cook used force to cause Mr. Green to be carried away, and that these actions were done with the intent to carry or conceal Mr. Green. Accordingly, the evidence was sufficient to sustain Mr. Cook's conviction for kidnapping.

Second, Mr. Cook was charged with the common law offense of false imprisonment, defined as "the unlawful detention of a person against his will." *Paz v. State*, 125 Md. App. 729, 739 (1999). False imprisonment is a lesser included offense of kidnapping; "[i]f kidnapping is proved, false imprisonment is also proved." *Id.* Here, as with the kidnapping charge, a rational trier of fact could have found beyond a reasonable doubt that Mr. Cook caused Mr. Green to be unlawfully detained in the van against his will. Accordingly, the evidence was sufficient to sustain Mr. Cook's conviction for false imprisonment.

Third, Mr. Cook was also charged with first-degree assault, which, among other things, includes the "commi[ssion] [of] an assault with a firearm." CR § 3-202(b)(2). Assault "encompasses three types of common law assault and battery: (1) the 'intent to frighten' assault[;] (2) attempted battery[;] and (3) battery." *Snyder v. State*, 210 Md. App.

370, 379 (2013). The "battery" type of assault requires the State to prove "(1) that the defendant caused offensive physical contact with the victim; (2) that the contact was the result of an intentional *or* reckless act of the defendant and was not accidental; and (3) that the contact was not consented to or legally justified." *Pryor v. State*, 195 Md. App. 311, 335 (2010) (emphasis in original). Here, a rational trier of fact could easily conclude beyond a reasonable doubt that Mr. Cook intentionally caused a variety of offensive physical contacts with Mr. Green, including shooting him with a gun, firing a taser at him, hitting him in the head with a gun, and engaging in a "tussle" with him. Further, a trier of fact could conclude that Mr. Green did not consent to those contacts because he repeatedly attempted to escape from his assailants. Finally, a trier of fact could conclude based on Mr. Green's gunshot wound that the assault was committed with a firearm. As a result, the evidence was sufficient to sustain Mr. Cook's conviction for first-degree assault.

Finally, Mr. Cook was charged with the use of a firearm in the commission of a felony or violent crime. For the same reasons articulated with respect to first-degree assault, a rational trier of fact could have found beyond a reasonable doubt that Mr. Cook used a firearm in the commission of his assault against Mr. Green. Because first-degree assault is a felony, CR § 3-202, and a crime of violence, Maryland Code (2003, 2018 Repl. Vol.), Public Safety Article § 5-101(c)(3), we conclude that the evidence was sufficient to sustain Mr. Cook's conviction for the use of a firearm in the commission of a crime of violence or a felony.

Conspiracy

Conspiracy is "[t]he combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. The essence of a criminal conspiracy is an unlawful agreement." *Kohler v. State*, 203 Md. App. 110, 131 (2012) (quoting *Campbell v. State*, 325 Md. 488, 495-96 (1992)). A conspiracy may be proven through "circumstantial evidence, from which a common scheme may be inferred." *Molina v. State*, 244 Md. App. 67, 168 (2019).

The circuit court in this case concluded that the attack was the product of "a calculated, deliberate plan to perpetuate crimes against Mr. Green." The court found:

> It was conceived to avoid detection. There were latex gloves used to avoid putting fingerprints. There were plastic ties used, presumably to tie up and disable the victim. There were masks found in the van. The van was outfitted without a rear seat, apparently in attempt to have a place to put Mr. Green, to whisk him away swiftly from the scene as this plot to perpetrate crimes against him occurred. And the area where this incident happened was identified, apparently through stalking of Mr. Green's residence for several days at various times prior to the night this accident happened.
>
> * * *
>
> As to assault, it appears that the plan here was to at least disable Mr. Green. A gun was brought to the incident. A taser was brought to the incident. Mr. Green was physically harmed. It was the result of an intentional act. It was not an accident in this case. There was clearly a plot that you could see executed on the video to go after him, to confine him. And the plan was to injure him one way or the other. There was no reason to have a taser other than to injure somebody and disable them, to perpetrate physical harm. And we have a gun brought. A gun is brought to a situation like this and fired. There's no doubt that it was used to accomplish physical harm.

We find no error in the circuit court's conclusion that these facts proved the existence of a criminal conspiracy. We do not need a recorded agreement to conclude from

these facts that there was an agreement between the assailants; circumstantial evidence can be enough on its own. *Molina*, 244 Md. App. at 168. Here, given the overwhelming circumstantial evidence identified by the circuit court, there is more than enough evidence for a rational trier of fact to conclude that Mr. Cook and another person conspired to abduct Mr. Green and move him somewhere against his will, using a gun and taser to subdue him if necessary. Accordingly, we hold that the evidence was sufficient to convict Mr. Cook of conspiracy to commit false imprisonment, conspiracy to commit first-degree assault, conspiracy to commit kidnapping, and conspiracy to commit the use of a firearm in the commission of a felony.

Attempted Second-Degree Murder

Second-degree murder is defined as "killing another person with the intent to kill or the intent to inflict such serious bodily harm that death would be the likely result, or a killing resulting from the deliberate perpetration of a knowingly dangerous act with reckless or wanton unconcern and indifference as to whether anyone is harmed." *Kouadio v. State*, 235 Md. App. 621, 633 (2018). To be guilty of the crime of attempt, one must possess "a specific intent to commit a particular offense and carry out some overt act in furtherance of the intent that goes beyond mere preparation." *Harrison v. State*, 382 Md. 477, 488 (2004) (cleaned up). "For attempted second-degree murder, the State has the burden to prove 'a specific intent to kill—an intent to commit grievous bodily harm will not suffice.'" *Id.* (quoting *State v. Earp*, 319 Md. 156, 164 (1990)). A specific intent to kill may be inferred from surrounding circumstances, including the use of a deadly weapon

directed at a vital part of the body. *Baker v. State*, 332 Md. 542, 568 (1993); *see also State v. Earp*, 319 Md. 156, 161, 167 (1990) (stating that a fact finder "could have found that [the defendant] harbored a specific intent to kill" based on evidence of a non-life-threatening stab wound to the back).

In the case before us, after Mr. Green attempted to run from his assailants, video surveillance showed an attacker "coming at Mr. Green with his gun raised in ready firing position." The assailant shot Mr. Green in the upper thigh on his leg, which the court found was "perilously close to [Mr. Green's] vital organs" and could have led to his death. The court was also presented with Mr. Randall's testimony that he witnessed Mr. Green run towards him, yelling, "Help. They've got a gun. They're trying to kill me."

The court found that although the original plan might not have been to kill Mr. Green at the scene, the plan changed when Green resisted. Based on all the evidence presented, the court concluded that the shooting was done with an intent to kill, and that Mr. Cook either pulled the trigger or acted as an accomplice.

The circuit court's reasoning was sound, and its view of the facts was not clearly erroneous. The fact that Mr. Green's assailants were not successful in murdering him, but instead shoved him into a van after tasing and shooting him, does not mean that they lacked an intent to kill. Based on these facts, we conclude that a rational trier of fact could have found beyond a reasonable doubt that by the time Mr. Green was shot, his attackers had formed the specific intent to kill. *Albrecht*, 336 Md. at 479 (expressing the standard of

review for sufficiency of the evidence claims). We therefore hold that the evidence was sufficient to support Mr. Cook's conviction for attempted second-degree murder.

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.