Circuit Court for Anne Arundel County
Case No. C-02-CR-19-000406

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 294

September Term, 2019

SHAMAR TERRENCE HAMM

v.

STATE OF MARYLAND

Berger,
Arthur,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: June 23, 2021

A jury sitting in the Circuit Court for Anne Arundel County convicted appellant, Shamar Terrence Hamm, of felony murder, and related charges in addition to two charges of wearing and carrying a handgun. He was sentenced to life imprisonment for felony murder, twenty years for robbery with a dangerous weapon to be served consecutive to the felony-murder sentence, fifteen years for conspiracy to commit robbery, and three years for each of the wearing and carrying counts, the latter three sentences to be served concurrently.

In this appeal, he presents four questions for our review:

I. Did the circuit court err in declining to ask prospective jurors whether they had strong feelings about interracial relationships?

II. Did the circuit court err in preventing the defense from eliciting from the lead detective that the co-defendant made a statement against interest under Md. Rule 5-804?

III. Did the circuit court err in permitting the State to elicit evidence of other crimes/prior bad acts?

IV. Did the circuit court err in imposing separate sentences for robbery with a dangerous weapon and for both counts of wearing & carrying a handgun?

FACTUAL AND PROCEDURAL BACKGROUND

During a robbery by Mr. Hamm and Dwayne Stephen Commock in the Waugh Chapel area of Gambrills on January 28, 2018, Mr. Commock shot Andrew Kolta. Mr. Hamm's defense was that he was with Mr. Commock for the purpose of breaking into cars but not to rob anyone.

The State's primary witness to the shooting of Mr. Kolta was Celeste Maureen Long,[1] who was the person who drove Mr. Commock and Mr. Hamm to and from the robbery. Ms. Long had entered a plea under a plea agreement to plead guilty to "manslaughter, robbery with a deadly weapon, and use of a handgun in a violent crime" with the understanding that her potential sentence was "15 to 20 years." She acknowledged her obligation to tell the truth and expressed her hope that the sentencing judge "will consider [her] cooperation in this case when imposing sentencing."

Ms. Long testified that Mr. Hamm "was [her] boyfriend" and that, for several days before that incident, they had been living in her vehicle. After driving Danielle Ray and Mr. Commock to a pawn shop to sell "a stolen watch" and "a gold ring," they returned to Ms. Ray's house where Mr. Commock got his "gun and bullets" and then went "shooting for fun" out the window of Ms. Long's car while she was driving.

They later dropped Ms. Ray off at her home, and Mr. Commock, Mr. Hamm, and Ms. Long then drove "around" to "kill time." They arrived at the Waugh Chapel Shopping Center "about 11 o' clock" and parked in the Wegman's parking lot. There, Mr. Hamm put on a bandana to cover his face and Mr. Commock put on a mask and they then approached a vehicle. Their intent was "to get money out of the ladies" in that vehicle, but it was unsuccessful.[2]

[1] The State also relied on statements that Mr. Hamm made to the police in that regard.

[2] Lisa Brogdon testified that around 11:00 p.m. on January 28, 2019, she accompanied her mother to the Wegmans supermarket in the Waugh Chapel Towne Centre. While in

They then drove to an apartment complex "to find something to steal or hopefully some money." Ms. Long parked the car and Mr. Commock and Mr. Hamm got out of it wearing a "mask and the bandana," respectively. When a man got out of "a large SUV" they approached him. That man was Mr. Kolta and, when he tried to run, Mr. Commock "grabbed his jacket" and "pushed him back." Mr. Kolta "got loose and started trying to run again," and Mr. Commock shot him. After he fell, Mr. Commock "grabbed the man's wallet."[3]

According to Ms. Long, neither Mr. Commock nor Mr. Hamm were "at all phased" or seemed to "care about what had just happened." When they got in the car, they were laughing and Mr. Commock "was kind of joking because he had thought that the man had gotten shot in the butt."

On cross-examination, Ms. Long stated that it was "Mr. Commock's idea" to find some money by "breaking into" cars. And that it was Mr. Commock who put his hands on Mr. Kolta and "went after him" and who "pulled out the gun . . . and shot him," none of which she knew that he was going to do.

Other facts will be added in the discussion of the questions presented.

(…continued)
their vehicle, two men wearing face coverings approached and asked them for money. After they said twice that they didn't have any money, the two men left. The next day, after learning that "somebody was killed" in or near the shopping center, Ms. Brogdon called the police regarding the incident.

[3] The wallet had $17.00 in it. They used that money to buy gas and cigarettes.

DISCUSSION

I.

"Strong Feelings about Interracial Relationships"

Ms. Long is white; Mr. Hamm, as is Mr. Commock, is black. Prior to jury selection, one of the *voir dire* questions proposed by the defense was: "Does any member of the panel have strong feelings toward interracial relationships [such] that they would not be able to render a fair and impartial verdict[?]" The trial court denied the request stating that it was "fairly covered by the general question about bias[4] and "the catchall question at the end."[5]

Standard of Review

"An appellate court reviews for abuse of discretion a trial court's decision as to whether to ask a voir dire question." *Pearson v. State*, 437 Md. 350, 356 (2014). We review the trial judge's rulings "on the record of the *voir dire* process as a whole." *Washington v. State*, 425 Md. 306, 313-14 (2012). "The standard for evaluating a court's

[4] The court asked:

> Question 15, jurors cannot allow a bias for or against the person because of their race, ethnicity, age, culture [sic] heritage, gender, gender identification, sexual orientation, or religion to influence your verdict in any way. Is there any member of the prospective jury panel who is unable to follow this principle of law?

[5] The catch-all question was:

> Question 21, does any member of the jury panel have any reason that I have not gone into why you believe you could not sit as a juror in this case and return a fair and impartial verdict base[d] solely on the law and the evidence presented at trial in this case?

exercise of discretion during the *voir dire* is whether the questions posed and the procedures employed have created a reasonable assurance that prejudice would be discovered if present." *White v. State*, 374 Md. 232, 242 (2003).

Contentions

Mr. Hamm contends that the circuit court committed "reversible error" in denying his request for the proposed question, which is a question that was, in his view, "likely to elicit disqualifying information" by identifying juror that might hold his relationship with a white woman and committing "alleged crimes with her" against him. Quoting *Moore v. State*, 412 Md. 635, 664 (2010), he argues that failing to ask that question "taint[ed] the objectivity and thus impartiality of the jury, with negative impactions for [his] right to a fair trial." He asserts that the proposed question was "status based" in that a juror might have biases against persons "in an interracial relationship." He cites a study from the University of Washington and reports from Psychology Today, CBS, and Associated Press that indicate "prejudice against interracial relationships still exists." He further contends that the "catch-all question" and the question regarding racial bias in addition to ethnicity, age, cultural heritage, gender identification, sexual orientation, and religion did not "fairly cover interracial relationships" and were "not an adequate substitute for properly framed questions designed to highlight specific areas where potential jurors may have biases that could hinder their ability to fairly and impartially decide the case."

The State first contends that Mr. Hamm did not sufficiently preserve the issue for review by providing the trial court with a "timely" basis "for concluding that a question

regarding interracial relationship was actually 'directly related' to any issue in this case." More specifically, it argues that Mr. Hamm did not present to the trial court his contention that the proposed *voir dire* question "directly concerned" his relationship with Ms. Long, who was a "critical witness" for the State, when the court was considering what *voir dire* questions to ask.

The State, citing *Pearson v. State*, 437 Md. 350, 357 (2014), further contends that the Court of Appeals has concluded that *voir dire* inquiries were "designed to uncover biases *directly related* to the crime, the witnesses, or the defendant," but that there is no precedent that compelled an inquiry into "any and all areas of potential bias, even those which are only indirectly related to the actual issues in the case." It recognizes that Ms. Long was a "critical" witness, but argues that the only reference to their relationship was her testimony that Mr. Hamm was her boyfriend and that he had stayed with her in her car prior to the commission of the crimes at issue. In the State's view, her testimony did not spring from a "'romantic' quality of her past relationship" but from her personal observations regarding the commission of the crimes and was, at most, "*indirectly* related to the issues in this case."

Analysis

A criminal defendant has a right to "an impartial jury" under the Sixth Amendment and Article 21 of the Maryland Declaration of Rights. *Voir dire* serves to

implement that right by uncovering specific causes of disqualification. *Pearson*, 437 Md. at 356-57. As the Court of Appeals has recently explained:

> [O]n request, a trial court must ask a *voir dire* question if and only if the *voir dire* question is reasonably likely to reveal specific cause for disqualification. There are two categories of specific cause for disqualification: (1) a statute disqualifies a prospective juror; or (2) a collateral matter is reasonably liable to have undue influence over a prospective juror. The latter category is comprised of biases that are directly related to the crime, the witnesses, or the defendant.
>
> On request, a trial court must ask *voir dire* questions that are reasonably likely to reveal a cause for disqualification involving matters that are liable to have undue influence over a prospective juror. Such matters may be comprised of biases related to the crime or the defendant.

Kazadi v. State, 467 Md. 1, 44–45 (2020) (citation omitted).

Before discussing the merits of Mr. Hamm's claim that the trial court erred in declining to ask whether the prospective jurors held strong beliefs about interracial relationships, we will first address the State's argument that the issue was not adequately preserved. In short, we are not persuaded.

Not only was the trial court probably familiar with the individual participants in the events leading to the death of Ms. Kolta from presiding over Mr. Commock's and Ms. Long's guilty-plea hearings but prior to *voir dire*, the court would have also seen that Mr. Hamm is black. More particularly, however, was the court's explanation of why it rejected the request without pursuing the issue of the proposed question's relevance. The court indicated that it was "fairly covered by the general question about bias," including racial bias, and "the catchall question at the end." In addition, the court further explained later that a question about interracial relationships was "potentially a more cogent,

relevant question in a different kind of case . . . perhaps a domestic violence case or something else." This indicates that the trial court understood the basis for the request, but as it stated, it did not "find it to be particularly relevant" and even if it was, it considered it to be "fairly covered in the questions that were asked."

That said, and leaving aside the compound nature of the requested question, we perceive no error or abuse of discretion in the trial court's rejection of Mr. Hamm's request for a *voir dire* question regarding "strong feelings toward interracial relationships." The off-and-on relationship between Ms. Long and Mr. Hamm as girlfriend and boyfriend had no direct relationship to or bearing on the crimes involved. In the context of this case, we view their joint involvement in those crimes and Ms. Long being a witness and Mr. Hamm a defendant to be, at most, an indirect relationship. Her testimony was based on her observations as a participant in the crimes and which, as the State points out, "corroborated [Mr.] Hamm's own recorded statements to police regarding his involvement in the robbery and death of [Mr.] Kolta." We agree with the trial court that the interracial relationship was not "particularly relevant" and was "fairly covered" in the questions asked.

II.

Statement Against Interest

During cross-examination, Detective Adrian Lewis, a member of the Homicide Unit of the Criminal Investigation Division of the Anne Arundel County Police Department, was asked about an interview with Mr. Hamm. On two occasions, however, he was asked whether Mr. Commock had said 'that it was all his fault'" and had admitted to Detective Lewis "that he did it." Both times, the State objected and both times the trial court sustained the objection.

Standard of Review

We have explained:

> For a statement to be admissible under Rule 5–804(b)(3), the proponent of the statement must convince the trial court that "'1) the declarant's statement was against his or her penal interest; 2) the declarant is an unavailable witness; and 3) corroborating circumstances exist to establish the trustworthiness of the statement.'" *Stewart v. State*, 151 Md. App. 425, 447 (2003) (quoting *Roebuck v. State*, 148 Md. App. 563, 578 (2002)). "The proponent of the declaration has the burden 'to establish that it is cloaked with 'indicia of reliability [,]' . . . mean[ing] that there must be a showing of particularized guarantees of trustworthiness.'" *Id.* (quoting *West* [*v. State*], 124 Md. App. [147,] 167) (other citations omitted).
>
> "The trial court's evaluation of the trustworthiness of a statement is 'a fact-intensive determination' that, on appellate review, is subject to the clearly erroneous standard." *Id.* (quoting *State v. Matusky*, 343 Md. 467, 486 (1996)) (citing *Powell v. State*, 324 Md. 441, 453 (1991); *Wilkerson v. State*, 139 Md. App. 557, 576–77 (2001)). Then, like other exceptions to the hearsay bar, "'admissibility is a question addressed exclusively to the discretion of the trial judge.'" *Wilkerson*, 139 Md. App. at 577 (quoting *Jacobs v. State*, 45 Md. App. 634, 653 (1980)).

Jackson v. State, 207 Md. App. 336, 348–49 (2012).

If we were to determine that the court erred, the next inquiry would be whether the error was harmless. An error is harmless where "a reviewing court, upon its own

independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *Dorsey v. State*, 276 Md. 638, 659 (1979). "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Dionas v. State*, 436 Md. 97 (2013) (quoting *Taylor v. State*, 407 Md. 137, 165 (2009)).

Contentions

Mr. Hamm contends that the court erred in sustaining the objection because Mr. Commock's statements were statements against interests under Md. Rule 5-804(b)(3)[6] and "germane to the defense theory that [he] only wanted to break into cars and that [Mr. Commock] decided on his own to rob and shoot [Mr.] Kolta." For that reason, he argues, the error was "not harmless beyond a reasonable doubt." Citing *Roebuck*, 148 Md. App. at 578, he argues that Mr. Commock's statement was against his penal interest; that he was unavailable and the "corroborating circumstances" established the trustworthiness of his statement.

[6] Md. Rule 5-804(b)(3) defines a "Statement Against Interest" as:

> A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest, so tended to subject the declarant to civil or criminal liability, or so tended to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The State contends that, under Md. Rule 5-611(b), cross-examination is to be limited to "the subject matter of direct examination and matters affecting the credibility of the witnesses."[7] And that the questions objected to "went beyond the scope of direct examination." It argues that the prosecution, in direct, had elicited that Mr. Commock had also been interviewed during the investigation, but that did not "open the door" to leading questions "regarding the substantive content of [Mr.] Commock's statements." And that, even if the trial court erred, "any error would have been harmless."

Analysis

The State does not contend that Mr. Commock's statements were inadmissible on hearsay grounds, and we are not persuaded that they were. And, we will assume, without deciding, that the questions did not extend beyond the scope of direct examination. We will focus instead on whether, on this record, precluding the admission of Mr. Commock's statements "that it was all his fault" and that "he did it" was harmless beyond a reasonable doubt.

In a harmless error review, which is most favorable to the defendant, we do not "find facts or weigh evidence." *Bellamy v. State*, 403 Md. 308, 332 (2008). We will consider an error "harmless only if it did not play any role in the jury's verdict." *Id.* To make that determination, we must find that the omission of Mr. Commock's statements

[7] The State posits the "prosecutor's general objections to the questions were sufficient to preserve any ground for objecting that could have existed at the time," and, citing *State v. Sewell*, 463 Md. 291, 318 n.8 (2019), that we could affirm the trial court for "any reason adequately shown by the record."

was "unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Id.* (citations and quotation marks omitted).

Mr. Hamm was convicted on felony murder, armed robbery, conspiracy to commit robbery, and two handgun charges. As to the felony murder, the trial court instructed the jury:

> In order to convict [Mr. Hamm] of first degree felony murder the State must prove, one, that [Mr. Hamm] or another participating in the crime with [Mr. Hamm] committed a robbery. Two, that another participating in the crime killed Andrew Kolta. Three, that [Mr. Hamm] had the intent to commit the robbery before or at the same time as the act causing the death of Andrew Kolta. And, for, that the act resulting in the death [of] Andrew Kolta occurred during the commission of the robbery.

That Mr. Commock was the shooter and that the gun used during the robbery was his were not contested issues. Mr. Hamm's defense was directed at the felony murder charge. It was his position that he had agreed and only intended to "go into cars to get credits cards . . . or money," but Mr. Commock "changed the agreement." And, that when Mr. Commock shot Mr. Kolta, he tried to leave.

The record reflects that, before Mr. Hamm and Mr. Commock got out of the car, they intended to "find someone" and that his role in that encounter was to make it more intimidating. When Mr. Kolta was shot, Mr. Hamm was there with a mask on behind Mr. Commock "the whole time." And, when Mr. Commock "took the wallet," he, followed by Mr. Commock, "ran to the car."

Perhaps Mr. Hamm did not know that Mr. Commock would shoot anyone, but he knew he had a gun and he clearly participated in the robbery. To the extent that Mr.

Commock acknowledges that what happened "was all his fault" and that "he did it"—whatever that may mean—did not change the fact that Mr. Hamm was a participant in the robbery. In short, we are persuaded beyond a reasonable doubt the omission of Mr. Commock's alleged admissions of fault were "unimportant in relation to everything else the jury considered" in relation to Mr. Hamm's felony-murder conviction and thus, were harmless on this record. *See Bellamy*, 403 Md. at 332.

III.

Prior Bad Acts

During her cross-examination, Ms. Long testified that Mr. Hamm had told her that Mr. Commock had previously "committed robberies":

> [Defense counsel]: Okay. So you did not know that [Mr. Commock] was going to get out of the [car] and shoot somebody did you?
>
> [Ms. Long]: That's correct.
>
> [Defense counsel]: And that was not predictable, was it?
>
> [Ms. Long]: He had done – he had not that I know of shot anyone before but he had committed robberies like that before. Mr. Hamm had told me about an experience he had when he first met Mr. Commock with Danielle and they had done something similar to that before.
>
> [Defense counsel]: That was Danielle and Mr. Commock, is that correct?
>
> [Ms. Long]: Yes.

During redirect, the following exchange ensued:

> [The State]: [Defense counsel] asked you when the first time you met Mr. Commock was. When was the first time Mr. Hamm met Mr. Commock?
>
> [Ms. Long]: He had met him one more time before I did.

[The State]: And when was that?

[Ms. Long]: I could tell you the day but he had told me—

[Defense Counsel]: Objection.

[The court]: Overruled.

[The State]: What did he tell you? I apologize. What did he tell you?

[Ms. Long]: That he had been with Mr. Commock on one other occasion doing the same sorts of things.

[The State]: Same sorts of things. What do you mean?

[Defense counsel]: Objection.

[The court]: Overruled.

[Ms. Long]: Stealing and robbing.

The next day, defense counsel moved to strike Ms. Long's testimony "that there were other prior robberies that [Mr. Hamm] was involved in." The State responded that: the "testimony was elicited on cross examination not by the State"; "if there was an objection," it should have been made during its cross-examination; the testimony was "actually very probative"; there was "no undue prejudice"; and it went "to intent."

Defense counsel disagreed with the State's argument that she elicited the prior bad acts evidence on cross-examination. She pointed out that Ms. Long testified that "Ms. Ray, Danielle and Mr. Commock were the ones doing the robbery," and "it wasn't until redirect when she indicated that [Mr. Hamm] said that he was involved" in a prior

robbery. In her view, Ms. Long's testimony about the prior incident "would mislead the jury and confuse" the jury.

The trial court denied the motion:

> I don't think it is either misleading or confusing and I think – it was elicited on cross examination. I don't know that it was offered for the truth of the matter asserted, it was that that was a statement that she had received and that was her understanding. Having said all of that, I think the jury instruction that I intend to give about prior bad acts generally is curative and cautionary to the jury . . . .

On February 8, the court instructed the jury:

> You have heard evidence that [Mr. Hamm] may have committed the crime of attempted robbery of the two women in front of Wegmans and [Mr. Hamm] may have committed other robberies with [Mr.] Commock, all of which are not charges in this case.
>
> You may consider this evidence only on the question of identity, common scheme or plan, preparation, motive, intent, opportunity and/or knowledge. However, you must not consider this evidence for any other purpose. Specifically, you may not consider it as evidence that [Mr. Commock] is of bad character or has a tendency to commit crimes.

Contentions

Mr. Hamm advances five reasons that the court "erred by permitting Celeste Long to testify that [he] told her that he had previously committed robberies and thefts with [Mr.] Commock." First, "the circuit court clearly erred in agreeing with the State that defense counsel had 'elicited' the same testimony by [Ms.] Long on cross-examination." Second, "in permitting the other crimes evidence, the court failed to apply the three-part test" articulated in *State v. Faulkner*, 314 Md. 630, 634–35 (1989). Third, "testimony about the prior robbery and theft failed to establish in any relevant way—let alone in a

'substantially' relevant way . . . proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake, accident, or other purposes recognizes as probative of guilt in Maryland." Fourth, to the extent the testimony "shed a minimal amount of light on motive, its relevance was more than outweighed by the danger of unfair prejudice." And finally, the court's "curative instruction did not absolve the circuit court of its error because, simply put, Long's testimony should not have been permitted at all." He argues that these "errors were not harmless" and therefore grounds for reversal.

The State responds that "to the extent preserved, the trial court soundly exercised in discretion by admitting other crimes evidence for a non-propensity purpose." It argues that "defense counsel made a belated motion to strike Long's testimony 'that there were other prior robberies that [Mr. Hamm] was involved in' with Commock." But, even if the motion was timely, the State argues that Ms. Long's "testimony was specifically relevant for a non-propensity purpose (*i.e.*, knowledge and intent)" and thus, "the trial court correctly denied [Mr.] Hamm's motion to strike."

Preservation

We will address first the State's argument that the issue was not adequately preserved. Under Md. Rule 8-131(a), we do not ordinarily "decide any [] issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" To preserve a challenge to the admissibility of evidence for review, it is necessary to object

"at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent." Md. Rule 4-323(a). If not, the objection is waived and the issue is not preserved for review. *Id.* "[T]o preserve an objection, a party must either 'object each time a question concerning the [matter is] posed or . . . request a continuing objection to the entire line of questioning.'" *Wimbish v. State,* 201 Md. App. 239, 261 (2011) (quoting *Brown v. State*, 90 Md. App. 220, 225 (1992)).

Here, when the State asked Ms. Long when Mr. Hamm and Mr. Commock first met, defense counsel objected, which the court overruled. Defense counsel again objected when the State asked Ms. Long about what "[s]ame sorts of things" had Mr. Commock and Mr. Hamm done together during a prior occasion. In addition, defense counsel's basis for the motion to strike was clearly put forth on the record. In short, we are not persuaded that Mr. Hamm's right to appellate review of this issue was waived.

Clear Error

We turn to the issue of whether the trial court "clearly erred" in finding that the defense elicited Ms. Long's testimony regarding Mr. Hamm's involvement in prior robberies with Mr. Commock. We have explained that "[i]f there is any competent and material evidence to support the factual findings of the trial court, those findings cannot be held to be clearly erroneous." *L.W. Wolfe Enterprises, Inc. v. Md. National Golf, L.P.*, 165 Md. App. 339, 344 (2005).

The Maryland Rules allow a court to limit the scope of cross-examination to matters brought up during direct examination and issues of credibility, but no mention is

made with respect to the scope of redirect examination. *See* Md. Rule 5-611(b).[8] This Court has held that generally the rules governing the scope of cross-examination apply to the scope of redirect examination. *See e.g.*, *Thurman v. State*, 211 Md. App. 455, 470 (2013) (discussing the scope of redirect examination); *Tirado v. State*, 95 Md. App. 536, 552-53 (1993) (evidence on redirect examination properly admitted because defendant "opened the door" during cross-examination).

In response to defense counsel's question about the predictability of Mr. Commock's conduct, Ms. Long testified that she knew that Mr. Commock "had committed robberies like that before" and that Mr. Hamm told her that "when he first met Mr. Commock with Danielle" that "*they had done something similar to that before*" (emphasis added). On redirect, the prosecutor explored that testimony and Ms. Long confirmed that Mr. Hamm had only met Commock once before and that it was Mr. Commock and Mr. Hamm who were "doing the same sorts of things," i.e., "[s]tealing and robbing."

[8] Md. Rule 5-611(b) provides:

> **(b) Scope of Cross-Examination.**
>
> (1) Except as provided in subsection (b)(2), cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. Except for the cross-examination of an accused who testifies on a preliminary matter, the court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.
> (2) An accused who testifies on a non-preliminary matter may be cross-examined on any matter relevant to any issue in the action.

In sum, the information regarding what had occurred on the prior occasion that Mr. Commock and Mr. Hamm met was introduced during defense counsel's cross-examination of Ms. Long, and the State's questioning on redirect regarding that testimony was within the scope of defense counsel's cross-examination. The trial court did not clearly err or abuse its discretion in finding that the defense had opened the door to Ms. Long's testimony regarding Mr. Hamm's disclosure of his involvement with Mr. Commock in "[s]tealing and robbing."

Prior Bad Acts

Standard of Review

When asked to admit bad acts evidence, the trial court must engage in a three-step analysis. First, the court must determine that the evidence is for one of the permissible purposes specified in Rule 5-404(b).[9] *Hurst v. State*, 400 Md. 397, 408 (2007) (citing *State v. Faulkner*, 314 Md. 630, 634–35 (1989)). Second, the court must then determine "whether the accused's involvement in the other crimes [or acts] is established by clear and convincing evidence." *Id.* Third, the court must balance the probative value of the evidence against any undue prejudice that would result from its admission. *Id.*

[9] Rule 5-404(b) provides:

> **(b) Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or other acts including delinquent acts as defined by Code, Courts Article § 3-8A-01 is not admissible to prove the character of a person in order to show action in the conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident, or in conformity with Rule 5-413.

We review the first step of the trial court's analysis *de novo* because it "is a legal determination and does not involve any exercise of discretion." *Faulkner*, 314 Md. at 634. We review the second step "to determine whether the evidence was sufficient to support the trial judge's finding." *Id.* at 635. And, if "the trial court proceeds to the final step . . . . the analysis implicates the exercise of the trial court's discretion," which we review for abuse of discretion. *Id.* (citations omitted).

Analysis

Md. Rule 5-404(b) is "a rule of exclusion" based on the principle that "substantive and procedural protections are necessary to guard against the potential misuse of other crimes or bad acts evidence and [to] avoid the risk that the evidence will be used improperly by the jury against a defendant." *Burris v. State*, 435 Md. 370, 385 (2013) (quoting *Streater v. State*, 352 Md. 800, 807 (1999)); *see also Faulkner*, 314 Md. at 633 ("Evidence of other crimes may tend to confuse the jurors, predispose them to a belief in the defendant's guilt, or prejudice their minds against the defendant."). Further, "there are few principles of American criminal jurisprudence more universally accepted than the rule that evidence which tends to show that the accused committed another crime independent of that for which he is on trial, even one of the same type, is inadmissible." *State v. Taylor*, 347 Md. 363, 369 (1997) (quoting *Cross v. State*, 282 Md. 468, 473 (1978)).

"Evidence of other crimes may be admitted, however, if it is substantially relevant to some contested issue in the case and if it is not offered to prove the defendant's guilt

based on propensity to commit crime or his character as a criminal." *Harris v. State*, 324 Md. 490, 497 (1991) (quoting *Faulkner*, 314 Md. at 634). "Bad act" evidence has a "special relevance if it shows notice, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." *Wynn v. State*, 351 Md. 307, 316 (1998); Md. Rule 5–404(b).

The State contends that Ms. Long's testimony had special relevance because "evidence that Hamm and Commock had committed crimes together on a prior occasion[] was substantially relevant to the central contested issue of [Mr.] Hamm's knowledge and intent" on the day of the January 28 incident." We agree.

The defense's theory was that Mr. Hamm only intended to break into cars, not to engage individuals. And that he could not have known Mr. Commock was going to rob, much less shoot, someone. In other words, Mr. Commock's actions were "unpredictable." In closing, defense counsel argued:

> You heard from Ms. Long that their intent was to go out and they were [to] go . . . into cars, and that was their intent, to go into cars to get credit cards and to get money from the cars. That is not a felony. That was their agreement in the vehicle, when they were in that Ford 2002 Escape. That is what they planned to do.
>
> Both said that, you heard Mr. Hamm and you heard Ms. Long, both of them said that the agreement was changed. Who changed that agreement. That was Commock. There was no testimony that that was communication. But he changed the agreement.
>
> You heard Mr. Hamm said say that he did not know what his role was supposed to be. Maybe this, maybe that. I did not know what my role was supposed to be in this. Commock was the mastermind in this. He was the one that put together the plan and then he was the one that changed it. Unbeknowst to Ms. Long and also to Mr. Hamm.

> Their intent, Mr. Hamm's intent, Ms. Long's intent was not to take anything by force. That was not their plan.
>
> * * *
>
> Ms. Long says she was the one that chose to drive over to the Beacon Apartments. And then at the Beacon Apartments they were supposed to look through the cars. So, that five, ten minutes that you heard, what were they doing. They were looking through cars to see what they could take. That is not a felony. They were looking for credit cards and they were looking for money.
>
> And then what do we see that happened. The next – as they are looking Mr. Kolta arrives. [Mr. Hamm], under the belief they are going to do the same thing as they did in the Wegmans. The State would like you to believe that their motive was to go out and to rob the people. What they did was walk over. He even did the same thing, asked Mr. Kolta, excuse me, do you have any money. *There was no way that Mr. Hamm would know that Commock was going to decide to pull out his gun and then just shoot Mr. Kolta. Why would he know, because that was not his plan.*
>
> * * *
>
> [Mr. Hamm and Ms. Long] *had no idea.* They were scared. I asked her on the stand, [Mr. Commock] was unpredictable. And it took a while to get to it. But she said, yes, he was unpredictable. They did not know. *His unpredictability was how Mr. Hamm sits here now today because [Mr. Commock] was unpredictable*.

(Emphasis added.)

Defense counsel also argued that it was "debatable" whether Mr. Hamm "knowingly participate[d]" because he and Ms. Long "did not know" Mr. Commock and "they did not know what he might do." And that Mr. Hamm was not "ready, willing[,] and able" to provide assistance in the robbery because, he "says I did not know what this guy was going to do. He had a gun. I did not know."

In light of his asserted defense, Mr. Hamm's disclosure to Ms. Long that he had committed similar crimes with Mr. Commock previously was especially relevant to his knowledge and intent when he joined with Mr. Commock that evening.

Moreover, we are persuaded that the State established Mr. Hamm's acknowledgment of a prior involvement with Mr. Commock by clear and convincing evidence through Ms. Long's testimony. She testified that she "did not want to testify against Mr. Hamm" but had to "tell the truth" as a condition of her plea agreement.

Relevant evidence of other crimes "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *Gutierrez v. State*, 423 Md. 476, 490 (2011) (quoting 5-403). "We generally defer to the trial court's rulings on the admissibility of evidence, including determinations of relevance, and we do not disturb such rulings in the absence of an abuse of discretion." *Newman v. State*, 236 Md. App. 533, 556 (2018).

The trial's court determination that the danger of unfair prejudice did not substantially outweigh the evidence's probative value and admitting it for a limited purpose was within the court's discretion. Any potential danger that the jury would use the evidence for an impermissible purpose was mitigated by the limiting instruction the court gave to the jury. In short, we perceive no abuse of discretion.

IV.

Imposition of Sentences on the Handgun Counts

Standard of Review

An illegal sentence may be challenged at "any time," Md. Rule 4-345(a), regardless of whether defense counsel objected at sentencing. *Dixon v. State*, 364 Md. 209 (2001). Under both the Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution and the Maryland common law prohibition against double jeopardy, the standard for determining whether two offenses merge is the required evidence test. *See Nicolas v. State*, 426 Md. 385, 400-02 (2012). The "same evidence test" essentially "focus[es] on the particular elements of each offense; when all of the elements of one offense are included in the other offense, so that only the latter offense includes a distinct element, the former offense is deemed to merge into the latter offense." *Claggett v. State*, 108 Md. App. 32, 46 (1996).

Contentions

The trial court imposed separate sentences for felony murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Regarding the sentence for robbery with a dangerous weapon, Mr. Hamm, citing *Newton v. State*, 280 Md. 260, 269 (1977), contends that the sentence for robbery with a dangerous weapon must be vacated because under Md. Code Ann., Crim. Law ("C.L.") § 2-201(a)(4)(ix),[10] a robbery, a felony, is an "essential ingredient of the murder conviction" and "the only additional fact necessary to secure the first-degree-murder

[10] C.L. § 2-201(a)(4)(ix) provides: "A murder is in the first degree if it is . . . committed in the perpetration of or an attempt to perpetrate . . . robbery under § 3-402 or § 3-403 of this article[.]"

conviction which is not necessary to secure a conviction for the underlying felony is proof of the death." The State agrees.

In regard to the weapons convictions, Mr. Hamm, citing *Clark v. State*, 218 Md. App 230, 253-56 (2014), contends that "both counts of wearing and carrying a handgun must be vacated" because both offenses were part of a single transaction, the "alleged felony murder/robbery." More particularly, he argues that, under the rule of lenity, the wearing, carrying or knowingly transporting a handgun in a vehicle conviction under C.L. § 4-203(a)(1)(ii)[11] merges into the general wearing, carrying a handgun "on or about the person" conviction under C.L. § 4-203(a)(1)(i).[12] And, citing *Tilghman v. State*, 117 Md. App. 542, 571-72 (1997), he contends that the C.L. § 4-203(a)(1)(i) conviction "merge[s] into the sentence for robbery with dangerous weapons," analogizing this case "to cases where Maryland courts have held that, under the rule of lenity, wear & carry merges into use of a firearm."

[11] C.L. § 4-203(a)(1)(i) & (ii) provide:

> (a)(1) Except as provided in subsection (b) of this section, a person may not:
> (i) wear, carry, or transport a handgun, whether concealed or open, on or about the person;
> (ii) wear, carry, or knowingly transport a handgun, whether concealed or open, in a vehicle traveling on a road or parking lot generally used by the public, highway, waterway, or airway of the State[.]

[12] The jury was instructed that, to convict Mr. Hamm of wearing, carrying, or transporting a handgun on his person, the State had to prove that the handgun "was within his reach and available for immediate use" and that to convict him for wearing, carrying, or transporting the handgun in a vehicle, the State had to prove that he did so "while traveling on the public roads, waterways, airways, or parking lots."

The State contends that the sentence for "transporting a handgun in a vehicle" does not merge into the sentence for wearing and carrying "a handgun on a person" because, in this case, Mr. Hamm's convictions for those possessory offenses were not "based on a single act or transaction." The State points to the prosecutor's closing arguments in regards to the handgun charge and the emphasis on evidence that Mr. Hamm spent four days in Ms. Long's vehicle "after the robbery" with the handgun in the vehicle and that Mr. Hamm had admitted to the detectives that, before the robbery "he had shot the handgun when they were driving around."

But were we to find the verdict on these charges ambiguous, the State concedes that the transporting conviction would merge for sentencing with the "on the person" conviction, it contends that the "on the person" conviction would not merge with the sentence "for robbery with a dangerous weapon" for two reasons. The first reason is that there is no sentence with which it can merge because the sentence imposed "must be vacated under *Newton.*" The second reason is that the "on the person" conviction "was *necessarily* based on distinct conduct from the conduct underlying his conviction for robbery with a dangerous weapon" because there was "no evidence" that he was in possession of the handgun during the robbery. The only evidence to his physical possession of the handgun was when he shot the gun while driving around prior to the robbery.

Analysis

First, we agree with Mr. Hamm and the State that the sentence for robbery with a dangerous weapon must be vacated under "both federal double jeopardy principles and Maryland merger law." *Newton*, 280 Md. at 268. For that reason, we move directly to the two handgun violations.

The State's argument on the two handgun counts involved only eight lines of transcript:

> Wear, carrying and transporting a handgun and transporting a handgun in a vehicle. For the four days that handgun was in what Mr. Hamm referred to as our safe. His and Celeste's safe. He told the detectives that he shot that gun. He had it on his person. Shot that gun into the woods. *Both of these run together*. And the verdict on both of those together is guilty. Just as with conspiracy and conspiracy to commit robbery.

(Emphasis added).

The jury convicted Mr. Hamm of robbery with a dangerous weapon, felony murder, conspiracy to commit robbery with a dangerous weapon, and the two wearing, carrying, and transporting a handgun charges. The verdict sheet in this case clearly indicates that the jury acquitted Mr. Hamm of "use of a firearm in the commission of a felony, use of a firearm in a crime of violence, and conspiracy to commit robbery with a dangerous weapon. Therefore, it appears equally clear that the two charges related to a handgun for which the jury found him guilty were unrelated to the handgun used in the robbery and murder of Mr. Kolta.

Even though the evidence could support a finding that two handgun convictions arose out of two separate transactions, the prosecutor's argument to the jury that the two handgun charges "run together" creates an ambiguity that weighs in favor of Mr. Hamm.

We hold that the transportation in a vehicle conviction merges into the on his person conviction, but that the surviving handgun conviction does not merge into the robbery with a dangerous weapon conviction.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED IN PART AND REMANDED TO THAT COURT TO VACATE THE SENTENCE FOR ROBBERY WITH A DANGEROUS WEAPON AND WEARING, CARRYING, OR KNOWINGLY TRANSPORTING A HANDGUN, WHETHER CONCEALED OR OPEN, IN A VEHICLE. COSTS TO BE DIVIDED EQUALLY.