UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0397

September Term, 2014

JAMAL CHAPMAN

v.

STATE OF MARYLAND

Meredith,
Berger,
Kenney, James, A. III
(Retired, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: July 27, 2015

The appellant, Jamal Chapman, was convicted by a jury sitting in the Circuit Court for Baltimore City of first degree murder, use of a handgun during a crime of violence, possession of a firearm by a prohibited person, and wearing, carrying or transporting a handgun. He was sentenced to life imprisonment for first-degree murder, 20 years consecutive for use of a handgun during a crime of violence (the first five years of which was to be served without the possibility of parole), and five years for possession of a firearm by a prohibited person (to run concurrently with the sentence imposed for the use of a handgun during a crime of violence). The remaining conviction was merged for sentencing purposes. Chapman appealed and presents six questions for our review, which we recite *verbatim*:

1. Did the trial court err in dismissing the jury panel outside of the Appellant's presence?

2. Did the trial court err in failing to limit the prior statement of identification by Jerard Sparow?

3. Did the trial court err in admitting Ms. Butler's testimony and prior statement that Appellant appeared to have a gun and that Appellant turned and ran away when he saw the police?

4. Did the trial court err in allowing testimony that Appellant refused to give a DNA sample?

5. Did the trial court err in allowing prejudicial rebuttal closing argument by the State?

6. Did the trial court err in failing to merge Appellant's murder conviction into the sentence for use of a handgun in the commission of a crime of violence?

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

BACKGROUND

On June 19, 2010, Wesley Lashley was shot near the intersection of Park Heights and Woodley Avenue in Baltimore City. He died of his injuries two days later.

Joanne Butler, Lashley's neighbor, testified that on the evening of June 19, 2010, she was sitting on the balcony of her third-floor apartment, watching her grandson play outside. The sun had set, but it was still light outside. She observed a burgundy car that she did not recognize driving around the parking lot. She then saw Lashley come through the gate to the apartment complex. A man, whom she identified at trial as the appellant, got out of the burgundy car, walked up to Lashley and punched him. A lengthy fist fight ensued which, according to Ms. Butler, resulted in Lashley winning the fight. As Lashley walked to the door of the apartment building, the appellant said, "I know where you live and I know where your girl live." Lashley went into his home, reemerged in a change of clothes, and left.

Shortly after Lashley departed, the appellant returned to the apartment complex on foot, with his hand down his pants, which, Ms. Butler explained over objection, indicated to her that the appellant was carrying a weapon. Ms. Butler then observed two police cars entering the parking lot. She testified, again over objection, that "as [the appellant] spotted the police cars, he took off running back through the opposite end of the parking lot."

The following day, Ms. Butler spoke to Lashley's girlfriend, and learned that "something happened" to Lashley. Ms. Butler told Lashley's girlfriend about the fight the

day before, and agreed to tell the police about it. Two days later, Ms. Butler identified the appellant from a photo array presented to her at the police station as the person who fought with Lashley.

At 9:46 p.m. on June 19, 2010, a few hours after Ms. Butler observed the fight between the appellant and Lashley, Officer Surge Felt responded to a call for a shooting on the corner of Park Heights and Woodland Avenue, which was not far from where Ms. Butler lived. He observed a black male, who was identified as Lashley, suffering from gunshot wounds to the torso, head and legs. While he was on the scene, he received a radio transmission from City Watch, which he explained was a police monitored camera system. Officer Felt was informed by City Watch that prior to the shooting, a camera near the scene had shown a fight between Lashley and a bald-headed black male with a long beard. The cameras had not recorded the actual shooting.

Merrill Compton lives on Woodland Avenue in the area where the shooting occurred. He knew Lashley as a neighbor who lived several houses up the block, and testified that his nickname was "Whiz."[1] At about 9:30 on the evening of the shooting, Compton went to the bus stop to meet his wife, who was coming home from work. As they walked toward their home, they passed Lashley, who was standing on a porch, talking to friends. Lashley stepped off the porch and walked toward the appellant, who was walking down the street.

[1] Various witnesses at trial knew Lashley by his nickname, alternatively spelled in the record "Whiz," "Wizz," and "Wiz." For the sake of consistency, we will refer to Lashley by his surname.

Lashley said to the appellant, "What the fuck's up, yo?" The appellant then pulled a gun from the back of his shorts and shot Lashley. Three shots were fired, and Lashley turned around to run. The appellant kept shooting, emptying his gun. Lashley made it to the corner, then fell. The appellant ran up the block and out of sight.

Compton called 911 to report the shooting. He described the shooter to the police as bald, with facial hair, wearing tan khaki shorts and a black t-shirt. As Compton walked his wife up the street after calling 911, the appellant came "flying" past them, driving a tan, four-door car. Although he testified that he saw the appellant shoot Lashley, Compton later stated that "the next morning is when I found out that it was [Lashley] who actually got shot."

A couple of months later, Compton was contacted by the police, and went to police headquarters to give a statement and view a photo array. He identified the appellant from the photo array as the person who shot Lashley.

Gerrod Sparrow,[2] who was called as a witness for the State, testified that he lived on Park Heights Avenue his whole life. He had known Lashley since he was a kid, and stated that the appellant, whom he knew as "Mal," was a friend of the family. Sparrow testified at trial that he did not recall seeing a shooting in June of 2010. He knew that Lashley had died, but denied being present when he was shot, stating, "I'll be honest, I don't remember

[2] Mr. Sparrow's name is spelled several different ways in the record. We shall refer to him as his name appears on the signed photo array.

too much of anything." Sparrow testified that his memory wasn't that good because he was "getting high back then."

Sparrow admitted that his signature appeared on a photo array dated June 21, 2010, two days after the shooting, but stated that he did not remember writing it and that he was probably high at the time. The photo array bearing Sparrow's signature next to appellant's photo was admitted into evidence. On the back of the photo array, a handwritten comment indicates "[t]he person I picked out (Mall) is the person I watched shoot [Lashley] on Saturday. I know this person as Mall."

An audio tape of a recorded statement taken on the same date as that of the photo array was played for the jury. Sparrow testified that he believed that the voice on the recording was his, but said that he did not recall making the statement, and hearing the audio tape of the statement did not help him to recall the events of June 19, 2010. In the recorded statement**,** Sparrow said that he was not under the influence of alcohol or narcotics at the time, and indicated that he saw "Mal" shoot "Whiz." At trial, Sparrow identified the appellant as the person he knew as "Mal" and agreed that Lashley was the person he knew as "Whiz."

Sparrow testified that he was arrested for marijuana possession on June 21, 2010, and was in jail in November 2010. He denied seeing the appellant in jail at that time, and testified that he did not recall the appellant telling him not to come to court.

Detective Christopher Kasmarek of the Baltimore City Police Department testified that Sparrow gave a recorded statement two days after the shooting, and had identified appellant from a photo array as the shooter. Detective Kasmarek stated that he spoke with Sparrow again two months later, at which time Sparrow indicated that he was receiving threatening phone calls and was being followed as a result of his cooperation in the case. Just before the appellant's first trial in February 2011, Sparrow advised Detective Kasmarek that he had recently been in jail at the same time as the appellant, and that the appellant threatened him with bodily harm if he testified. Thereafter, Sparrow began to change his story and it became difficult for Detective Kasmarek to get in touch with him.

Detective Kasmarek also testified that after speaking with witnesses to the shooting, a search warrant was obtained for the appellant's mother's address. While executing the warrant, Detective Kasmarek observed a burgundy colored Buick parked out front of Chapman's mother's house, that was registered to the appellant's mother. Detective Kasmarek testified that a DNA sample taken from the appellant matched DNA taken from underneath Lashley's fingernails.

Derrick Holloway testified that he had "hung out" with both Lashley and the appellant on occasion. He explained that Lashley sold drugs, and that the appellant was trying to take over the area to sell narcotics there himself. On several occasions, Holloway had heard the appellant say he was going to "use physical harm" against Lashley, and had been witness to a verbal altercation between the appellant and Lashley several weeks prior

to the shooting. Holloway quoted the appellant as saying he was going to "fuck [Lashley] up."

On the day of the shooting, Holloway attended a cookout at the home of his aunt in the area of Park Heights and Woodland Avenues. He testified that both the appellant and Lashley were there. When Holloway first arrived, he noticed the appellant and Lashley engaged in a "hostile altercation," which he explained involved "hand movement and hostile body movement." According to Holloway, the appellant was the "lead aggressor." Holloway heard several gunshots, and turned to see that the appellant was the one firing the shots, and that Lashley was running to escape. Five days later, Holloway identified the appellant from a photo array.

The parties stipulated that the appellant had previously been convicted of a crime that would prohibit his possession of a firearm.

Additional facts will be introduced in the discussion as they become relevant.

DISCUSSION

1. Release of the Jury Panel

On the first day of trial, after voir dire of the prospective jury panel and strikes for cause had been completed, there remained an insufficient number of jurors for the parties to exercise all of their peremptory strikes and seat a jury. The court excused the jurors that had been stricken for cause, and instructed the remaining members of the panel to return the following day. Thereafter, the court brought in an additional 30 prospective jurors. After

conducting voir dire of this second panel, the court excused the jurors that had been stricken for cause and instructed the remaining panel members to return the following day.

Not all of the remaining jurors from the first and second panels returned the next day as instructed by the court, which meant that there were, again, an insufficient number of jurors remaining for the parties to exercise all of their peremptory strikes and seat a jury. The court then released all of the remaining panel members. The appellant was not present in the courtroom when the prospective jurors from the first and second panel were dismissed. A jury was selected from an entirely new panel the following day.

The appellant argues that, in dismissing the panel of prospective jurors when he was not present in the courtroom, the trial court deprived him of his right to be present at every stage of the trial, in violation of Maryland Rule 4-231(b) which provides:

> [a] defendant is entitled to be physically present in person at a preliminary hearing and every stage of the trial, except (1) at a conference or argument on a question of law; (2) when a nolle prosequi or stet is entered pursuant to Rules 4-247 and 4-248.

The State responds preliminarily that the issue was not properly preserved for appellate review because there was no objection to the dismissal of the jury panel when the appellant was not present. Moreover, the State argues that the release of the panel was not a stage of the proceedings at which the appellant was entitled to be present, and even if it was, the appellant's presence was waived through the acquiescence of counsel. We conclude that the issue was not properly preserved.

Maryland Rule 8-131 (a) provides, in pertinent part:

> Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.
>
> The purposes of Rule 8-131 are:
>
> (a) to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings, and (b) to prevent the trial of cases in a piecemeal fashion, thus accelerating the termination of litigation.

Fitzgerald v. State, 384 Md. 484, 505 (2004) (citations and internal quotation marks omitted.)

Defense counsel did not object to the release of the jury panel when the appellant was not present in the courtroom, and did not insist on the appellant's presence. Nor was there any objection raised later in the proceedings, when defense counsel explained to the appellant that the jury panel had been dismissed:

> DEFENSE COUNSEL: I had explained to Mr. Chapman, Your Honor, that we had released the other panel and that we were unable to make a choice of through that panel. You understand that, Mr. Chapman?
>
> THE APPELLANT: Yes.
>
> DEFENSE COUNSEL: And tomorrow we will start again, hopefully when we find out. And hope this time we're going to try to get a hundred and ten people if we can so we don't run into the problem we ran into yesterday. Do you understand that, Mr. Chapman?

THE APPELLANT: Yes.

Accordingly, the issue of whether the trial court erred in dismissing the jury panel when the appellant was not present in the courtroom was not preserved for our review. As the Court of Appeals has held, "[a] contention not raised below either in the pleadings or in the evidence and not directly passed upon by the trial court is not preserved for appellate review." *Zellinger v. CRC Dev. Corp*., 281 Md. 614, 620 (1977). *See also Davis v. State*, 189 Md. 269, 273 (1947) ("[S]ome objection [must] be made and . . . the court [must] rule upon the question. In the absence of such a ruling there is nothing for the [appellate court] to review.").

Even if the issue had been properly preserved, we would find no error. Rule 4-231 (c)(3) expressly provides that the right to be present is waived by a defendant, who, personally or through counsel, agrees to or acquiesces in being absent. For the same reasons that led us to conclude that the issue was not properly preserved for appellate review, the appellant would be deemed to have waived his right to be present, in accordance with Rule 4-231(c)(3).[3]

[3] Additionally, we note that although Maryland law holds that a defendant has the right to be present during jury selection, that right would not extend to the situation presented here. In *Porter v. State*, 289 Md. 349 (1981), the Court of Appeals observed that the right of a criminal defendant to be present during impaneling of the jury is based on the defendant's right to a jury which is not biased or prejudiced. *Id*. at 355 (citing *Hopt v. Utah*, 110 U.S. 574, 578 (1884). Noting that, "[t]he purpose of the right to be present, in the context of juror selection, relates solely to jury impartiality and the disqualification of (continued...)

2. Admissibility of Gerrod Sparrow's prior statement

Sparrow testified at trial that he did not recall seeing a shooting in June 2010, and was not present when Lashley died. This testimony conflicted with a statement he gave to the police two days after the shooting, after he had identified the appellant from a photo array as the individual who shot Lashley. In the statement, Sparrow indicates that he saw the appellant shoot Lashley.

After providing a transcript of the recorded statement to the defense, the State offered the recording into evidence pursuant to Md. Rule 5-802.1(c) which provides that a witness's previous statement of identification of a person, made after perceiving the person, is not excluded by the hearsay rule if the witness is subject to cross-examination concerning the statement. The statement was admitted into evidence.

[3](...continued)
prospective jurors[,]" the Court held that the right did not extend to communications involving the personal hardship of a juror to serve because "[t]he question of a prospective juror's ability to serve because of personal hardship has no direct relation to his impartiality or whether he should be disqualified in that case." *Id.* Similarly, in this case, had the issue been either properly preserved by objection to the appellant's absence when the jury was released, and therefore not also waived by acquiescence, there would still be no right to be present when the panel of jurors was dismissed for essentially logistical reasons because the dismissal of the jurors was not related to issues involving their impartiality or disqualification.

The appellant argues that the court erred in admitting the statement, claiming that, while a portion of the prior statement was admissible under Md. Rule 5-802.1(c), "the statement went far beyond the identification and contained inadmissible hearsay."[4]

The State responds preliminarily that the issue is unpreserved for appellate review as there was no objection to the statement when it was offered into evidence, and no request that the statement be redacted or limited in any way. Alternatively, the State responds that the statement was admissible as a prior inconsistent statement and a statement of identification. We conclude that the issue is not properly preserved.

When the State moved the taped statement into evidence, defense counsel objected, stating, "[j]ust for the purpose for the argument in [indiscernible]." A bench conference followed, in which the prosecutor confirmed that the basis for the admissibility of the statement was that it was an extra-judicial identification, and therefore, admissible as an exception to the hearsay rule under Rule 5-802.1. Defense counsel admitted that he was confused as to whether it was Sparrow's testimony from an earlier trial or the taped police interview that was being offered. The record demonstrates that the objection was to the admission of Sparrow's testimony from the appellant's previous trial that was admitted

[4] "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," and is not admissible unless an exception applies. Md. Rules 5-801(c); 5-802.

without a proper foundation.[5] Once it was clarified that it was the taped interview being offered into evidence, and not the prior testimony, defense counsel appeared to acquiesce in its admissibility:

> [DEFENSE COUNSEL]: I'm reading 5-801.2.1, [sic] maybe I'm missing it. I probably am, but it talks about the statement previously made by a witness who testifies at trial and who is subject to cross examination - - and that's the problem with unavailability is if he's not available then he's not subject to cross examination. But you're reading - - I think I - -
>
> * * *
>
> THE COURT: . . . First of all, what are you moving into evidence? Can you describe for the record what State's No. 11 is.
>
> [PROSECUTOR]: The taped statement of Mr. [Gerrod] Sparrow that was given to Detective Kazmarek at the Baltimore City Police Headquarters on June 21st, 2010.
>
> THE COURT: So the basis for that would be you - - would be 5-802.1, extra judicial identification statement.
>
> [PROSECUTOR]: That is correct.
>
> THE COURT: If I remember this correctly.
>
> [DEFENSE COUNSEL]: Oh, okay.
>
> * * *

[5] Prior to the trial that began in March 2013, the appellant had been tried twice before for the same crimes, both trials ending in a hung jury. Sparrow had testified in at least one of the prior trials.

> [DEFENSE COUNSEL]: But we're not talking about the testimony yet, which is 5-804.[6]
>
> THE COURT: Right. . . . We're talking about the . . . pretrial identification.
>
> [DEFENSE COUNSEL]: That's where I got confused again. . . . See that's where I thought we were going to is that statement because it's in that situation where he's got to be subject to cross examination. But the prior testimony, he doesn't. He can be unavailable and that's where I was getting confused with which one we were using. His prior statement is 5-802.1. His prior testimony is 5-804.
>
> THE COURT: Right. So right now, but for right now we're just talking about a photo array statement and that is in this rule as I read it, under 5-802.1.
>
> [DEFENSE COUNSEL]: Okay.
>
> THE COURT: Yes, it is admitted.

The appellant did not request that the statement be redacted or limited in any way prior to its admission. Thus, because the issue was not before the circuit court, the appellant's claim that the trial court erred in admitting the statement in its entirety was not preserved for appellate review. *See Malarkey v. State*, 188 Md. App. 126, 157 (2009) ("The trial court cannot correct errors of which it is not informed.")

Assuming, *arguendo*, that the issue had been properly preserved, we would find no error. "[T]he admission of evidence is committed to the considerable discretion of the trial

[6] Maryland Rule 5-804 provides for hearsay exceptions where the declarant is unavailable.

court." *Sifrit v. State*, 383 Md. 116, 128 (2004). Because appellant made no request to redact or limit any portion of the statement, Sparrow's entire statement to the police was properly admitted as a prior statement of identification under Maryland Rule 5-802.1(c). In addition, the statement was also admissible under Rule 5-802.1(a)(3), which provides that a statement:

> . . . previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement [is] not excluded by the hearsay rule [if it is a] . . . statement that is inconsistent with the declarant's testimony, if the statement was . . . recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement.[7]

"Inconsistency includes both positive contradictions and claimed lapses of memory. When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied." *Tyler v. State*, 342 Md. 766, 777 (1996) (quoting *Nance v. State*, 331 Md. 549, 564 n.5 (1993)).

The recorded statement was clearly inconsistent with Sparrow's trial testimony in many respects. In his statement, Sparrow indicates that he was not under the influence of

[7] Even though the State did not claim at trial that Sparrow's statement was admissible as an exception to the hearsay rule under 5-801(a)(3), its admission could be affirmed on this ground. *See Robeson v. State*, 285 Md. 498, 502 (1979) ("[W]here the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm."), *cert. denied*, 444 U.S. 1021 (1980).

alcohol or narcotics at the time (thus contradicting Sparrow's trial testimony that he was probably high at the time he gave the statement), that he witnessed the appellant shoot Lashley, and that he identified the appellant from a photo array. In addition, despite Sparrow's claim at trial that he could not remember anything about the night of the murder because he was using drugs at the time, the recorded statement indicates that Sparrow had, in fact, recalled many details including the lighting conditions, the description of the weapon used by the appellant, what the appellant was wearing, and what happened after Lashley was shot.

3. Testimony of Joanne Butler

The next issue presented for our review is whether the trial court erred in admitting Ms. Butler's testimony that the appellant was walking in a way that suggested to her that he had a weapon, and that he ran away when he saw the police. The appellant asserts that Ms. Butler had no direct personal knowledge that the appellant had a gun, or that he spotted the police, and contends that her testimony was therefore speculative and constituted improper lay opinion evidence. The appellant also argues that the trial court erred in admitting the portion of Ms. Butler's photo array identification because it went beyond the identification of the appellant. On the back of the photo array, Ms. Butler had written:

> The person I pick is the man I saw get out of a burgundy car on Saturday evening and start a fight with Wesley in the parking lot between 2416 [and] 2414 Loyola Northway. After the fight was over he told Wesley, I know were [sic] you live and your girl. [Illegible word] back he did return after Wesley left the

> property but saw two police cars in the lot and ran back through the opening in the fence. I saw him with his hand down in the front of his pants like he had a gun."

The State responds that the court properly exercised its discretion in allowing Ms. Butler's testimony that the appellant was walking in a way that suggested he was carrying a gun into evidence because it was based on first-hand knowledge of the way the appellant was walking, compared to the way she had observed other people walking in that neighborhood. The State further responds that the appellant's objection to the admission of Ms. Butler's testimony that the appellant ran away when he saw the police was waived, because similar evidence was introduced without objection. Finally, the State submits that any error in admitting Ms. Butler's testimony was harmless beyond a reasonable doubt because of the strength of other evidence establishing that the appellant was the shooter.

We conclude that Ms. Butler's testimony that the appellant was walking in a way that suggested to her that he had a gun constituted improper lay opinion. Nevertheless, admitting Ms. Butler's testimony into evidence was harmless beyond a reasonable doubt. We further conclude that the appellant's objection to Ms. Butler's testimony that the appellant ran away as soon as he spotted the police was waived.

Maryland Rule 5-701 provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear

> understanding of the witness's testimony or the determination of a fact in issue.

In addition, the Court of Appeals has held that to be admissible, lay opinion testimony must be based on first-hand knowledge. *Robinson v. State*, 348 Md. 104, 118 (1997), *overruled on other grounds, Ragland v. State*, 385 Md. 706 (2005).

We reject the State's contention that the record establishes that Ms. Butler's testimony (that appellant was walking like he had a gun) was based on her first-hand knowledge. Indeed, she testified only that she had seen people in her neighborhood walking with their hands down their pants on prior occasions, and that, to her, it meant they were carrying a weapon. But, she did not state that she had ever seen anyone who was walking that way actually produce a gun from their pants, which would have confirmed her assumption. Absent that critical nexus, we cannot conclude that Ms. Butler's testimony that appellant was walking "like he had a gun" was based on her first-hand knowledge. Therefore, it was improperly admitted.

Nonetheless, as there was strong evidence presented at trial from other eyewitnesses, namely Compton, Holloway and Sparrow, that the appellant shot Lashley a few hours after Ms. Butler observed him fighting with Lashley, we conclude that any error in admitting the objectionable statement was harmless beyond a reasonable doubt. *See Dorsey v. State*, 276 Md. 638, 659 (1976) (error will be harmless when reviewing court, upon independent review,

is able to declare a belief beyond a reasonable doubt that there is no reasonable possibility that the error contributed to the verdict).

Turning next to appellant's argument that the court erred in admitting Ms. Butler's testimony that appellant ran away when he spotted the police cars, we conclude that even if the court erred in admitting it, any error was harmless because the same evidence was later admitted without objection. Just after the court overruled the appellant's objection to Ms. Butler's testimony that ". . . as [the appellant] spotted the police cars, he took off running," Ms. Butler testified, without objection, that "[the appellant] got right to that dumpster almost before he spotted the police car coming there." Later in her testimony, Ms. Butler testified, again without objection, that "when he saw the police cars, he went back up through the fence and left . . ."

"[I]t is not reversible error when evidence, claimed to be inadmissible, is later admitted without objection." *Tichnell v. State*, 287 Md. 695, 716 (1980). *See also*, *Robeson v. State*, 285 Md. 498, 507 (1979), *cert. denied*, 444 U.S. 1021 (1980) ("The law in this state is settled that where a witness later gives testimony, *without objection*, which is to the same effect as earlier testimony to which an objection was overruled, any error in the earlier ruling is harmless." (emphasis in original)).

The State argues that appellant's claim that the court erred in admitting Ms. Butler's photo array identification (which contained handwritten comments that went beyond the identification of the appellant) is unpreserved. We disagree. A general objection was

lodged when Ms. Butler was asked to read what she wrote on the photo array, and again when the State offered it into evidence.[8] We conclude, however, that any error in admitting that portion of the photo array that went beyond identification of the appellant was harmless beyond a reasonable doubt because it was merely cumulative of Ms. Butler's testimony.

4. Refusal to Give DNA Sample

Detective Kasmarek testified, over objection, that in August 2010, he attempted to obtain an oral DNA swab from the appellant, pursuant to a court order, while the appellant was in jail. The appellant "began yelling and screaming and acting very upset," and Detective Kasmarek was unable to obtain the DNA at that time. Later, the medical staff at the facility where the appellant was detained took blood samples, but the chain of custody was not properly maintained, necessitating the taking of a second sample. Preliminary results of the blood testing were shared with the appellant. Detective Kasmarek testified that when he went to the jail to take the appellant to Mercy Hospital to obtain the second sample, by oral swab, the appellant "retreated into the facility and had to be physically removed by staff at the facility."

[8] *See Anderson v. Litzenberg*, 115 Md. App. 549, 569 (1997) ("Generally, Maryland litigants are not required to state the specific ground for an objection unless requested to do so by the trial court. . . . Consequently, if a court overrules an objection, all grounds for the objection may be raised on appeal.")

The appellant contends that the trial court erred in allowing the State to introduce evidence that he refused to give a DNA sample, arguing that the refusal was "too ambiguous and equivocal to support the inference of consciousness of guilt.

The State responds preliminarily that the appellant's argument is unpreserved because the appellant failed to object to every question about the DNA collection, nor was a continuing objection requested. Alternatively, the State responds that the argument fails on the merits because the appellant's reaction to the attempts to collect his DNA was circumstantial evidence of his consciousness of guilt. We conclude that the issue was unpreserved.

The appellant had moved *in limine* to preclude the State from introducing evidence regarding the appellant's reaction to attempts to collect his DNA pursuant to the court's order. The court ruled that if the proper foundation was laid, evidence of the appellant's resistance to the DNA sampling would be admissible. To preserve the issue for appellate review, however, it was still incumbent upon the appellant to raise a proper objection when the evidence was offered, for, as we have stated, "[a] motion *in limine* is not a ruling on the evidence, but [] merely a procedural step prior to the offer of evidence, which serves the purpose of pointing out before trial certain evidentiary rulings that the court may be called upon to make." *Brown v. State,* 90 Md. App. 220. 225, *cert. denied*, 326 Md. 661 (1992).

When Detective Kasmarek took the stand, and the State began to question him about the DNA testing, defense counsel objected only to the first question regarding what happened when he attempted to recover DNA from the appellant.

> [PROSECUTOR]: Detective, did there come a time when you attempted to recover DNA from [the appellant]?
>
> DETECTIVE KASMAREK: Yes.
>
> [PROSECUTOR]: And what happened? When was that?
>
> [DEFENSE COUNSEL]: For purposes of the record, I would object to this.
>
> THE COURT: I understand. . . . Overruled.

The prosecutor then proceeded to ask a line of questions regarding efforts to obtain DNA samples on two different dates, and the appellant's reaction to each. No objection was lodged to any of the succeeding questions. As we stated in *Brown*, an objection must be made to each and every question, or alternatively, a continuing objection must be requested and granted, in order to preserve an evidentiary issue for review. *Id*. at 225. Because the appellant did neither, this issue is not properly before us.

Even if the issue had been properly preserved, we would nevertheless affirm. The appellant argues that the State failed to show that there was an inference that he desired to conceal evidence because of his resistance to the DNA test.[9] We disagree. The appellant's

[9] The Court of Appeals has held that resistance to submit to blood testing in a (continued...)

vehement resistance on two occasions to attempts to collect oral DNA certainly gave rise to a reasonable inference that his behavior arose out of a desire to conceal evidence, especially given Detective Kasmarek's testimony that appellant was told that the test was ordered in connection with this case, and that preliminary results from the earlier blood DNA test were shared with the appellant. In our view, the fact that there might have been alternative inferences to be drawn, as appellant suggests, such as fear, embarrassment, or objection on religious grounds, they would affect the weight of the evidence, and not its admissibility. *See Decker v. State*, 408 Md. 631, 641 (2009) ("any evidence contradicting the inference of guilt derived from flight does not render evidence of flight inadmissable, but is merely to be considered by the jury in weighing the effect of such flight.")

5. The State's Rebuttal Closing Argument

The appellant argues that the trial court erred in allowing three instances of what he claims were improper rebuttal closing argument by the State. We will address each instance in turn and the State's response separately.

[9](...continued)
homicide case is admissible to establish "consciousness of guilt" if four inferences can be drawn: "(1) from his resistance to the blood test, a desire to conceal evidence; (2) from a desire to conceal evidence, a consciousness of guilt; (3) from a consciousness of guilt, a consciousness of guilt of the murder of [the victim]; and (4) from a consciousness of guilt of the murder of [the victim], actual guilt of the murder. *Thomas v. State*, 372 Md. 342, 356 (2002). The appellant argues only that the first inference was unsupported by the evidence.

"[C]ounsel is afforded considerable leeway in closing argument, and [ ] regulation of closing arguments falls within the sound discretion of the trial court." *Frazier v. State*, 197 Md. App. 264, 283, *cert. denied*, 419 Md. 647 (2011) (citation omitted). A trial court is in the best position to observe the jury's reaction to closing arguments. *See Washington v. State*, 191 Md. App. 48, 103 (2010), *cert. denied*, 415 Md. 43 (2011)("The [trial court] is able . . . to note the reaction of the jurors . . . to inadmissible matters.")

> [W]hat exceeds the limits of permissible argument by counsel depends on the facts of each case. Because the trial [court] is in the best position to gauge the propriety of arguments in light of such facts, . . . an appellate court should not disturb the trial court's judgment absent a clear abuse of discretion by the trial court of a character likely to have injured the complaining party.

Mitchell v. State, 408 Md. 368, 380-81 (2009) (citations, alternations, and internal quotation marks omitted).

a. Did the court err in allowing the State to improperly shift the burden of proof?

In closing argument, defense counsel suggested to the jury that certain witnesses who could have corroborated the crime had not been called, despite the fact that the State could have subpoenaed them:

> People don't want to come forward. They don't want to say what happened here. Well, they can make anybody come that they want. . . .
>
> Do the people want to come in? I[t] doesn't matter. If they have the witness they'll bring them in here. But where are the witnesses? Where is Mr. Compton's wife? Where is Mr.

> Bailey? Where are all [the] people that were at the cookout if a cookout even happened?
>
> In rebuttal argument, the State responded as follows:
>
> Ladies and gentlemen, this is not a perfect taste [sic] and example being the camera. But the State has produced a number of witnesses, who have been courageous enough to come forward and to tell you what they saw.
>
> And Defense mentioned the right of compulsory process at one point during this closing. Well, the State can bring anybody in. Well, that right applies to both the State and Defense.

An objection was lodged, and a bench conference followed, at which the prosecutor indicated she would make it clear that the defense did not have to prove anything. Defense counsel appeared to acquiesce in this solution, and did not request a curative instruction from the court, or move for a mistrial. The prosecutor then resumed rebuttal closing argument, stating:

> Ladies and gentlemen, I'm not saying that the defense has [to] prove a thing in this case. I'm just saying that they have the same rights to bring forward witnesses as the State. . . . Defense has had every opportunity to cross examine the witnesses to bring forward things that they believe may show that Mr. Chapman is guilty [sic].

The appellant complains that, in suggesting that the defense had the right to introduce evidence and bring in witnesses, the jury was "undoubtedly left with the impression that the defendant had a burden" to prove that the State had failed to prove his guilt beyond a reasonable doubt. The State responds that this argument was not properly preserved, and

we agree. The appellant agreed to allow the prosecutor to address this issue, and thereafter, did not object to the way in which it was done. Because nothing further was requested from the court on this particular issue, there is nothing for us to review. *See Malarkey, supra.*

b. Did the court err in allowing the prosecutor to argue facts not in evidence?

In closing argument, the prosecutor suggested to the jury that the appellant trimmed his full beard between the day of the murder and his arrest ten days later in an attempt to "distance" himself from the crime, and that the comments were unduly prejudicial. Defense counsel objected, stating that there was no evidence presented that the appellant had changed or altered his appearance. The court overruled the objection, stating "[t]here was no evidence, but there was certainly an opportunity in this - - your comments."[10] The appellant contends that the prosecutor argued facts that were not in evidence. We disagree.

[10] The State suggests that this argument was waived because the objection was not made contemporaneously with the prosecutor's comment. We disagree. As we have held:

> [O]bjections to improper argument are timely if interposed either (1) immediately after the allegedly improper comments are made, or (2) immediately after the argument is completed. We shall decline, however, requests to review "improper argument" objections that were not presented to the trial judge until after the jurors have been excused from the courtroom.

Height v. State, 185 Md. App. 317, 337-38, *vacated on other grounds*, 411 Md. 662 (2009). The appellant raised the objection during the State's rebuttal, before argument had been completed. Therefore, the issue was preserved.

Although the court seemed to suggest that there was no evidence that appellant had altered his appearance after the shooting, our review of the record indicates that evidence was presented that the appearance of the appellant's beard had changed in the ten days after the shooting. Ms. Butler described appellant as having a "full beard" when she observed him fighting with Lashley in the parking lot on the day of the shooting. Detective Kasmarek testified that Compton, who witnessed the shooting while walking past with his wife, described the appellant as having a "long beard," and the report Officer Felt received from City Watch was that Lashley fought with an individual with a long beard prior to the shooting.

Nevertheless, the photograph taken of appellant at police headquarters ten days after the shooting, and admitted as State's Exhibit 8, shows appellant with a closely shaven beard. The testimony of Holloway, who was attending his aunt's cookout and witnessed the shooting, corroborated that appellant's beard was three inches longer on the night of the shooting than it was in State's Exhibit 8. Therefore, the prosecutor did not argue facts that were not in evidence, and the trial court did not err in permitting this argument.

c. Appeal to the sympathy of the jury

The appellant contends that the State improperly appealed to the sympathy of the jury in discussing Derrick Holloway's testimony about what compelled him to come forward as a witness. Holloway had testified that people in his neighborhood do not report crimes because they do not want to be a "snitch," and that he did not go to the police immediately

because of his "pride." He explained that he did not report what he had seen to the police for approximately two weeks after the murder, but that he "had to put [his] pride aside" and eventually went to the police because "everybody keep getting injured or dying nowadays, and you never see no - - no justice really occur." On cross examination, Holloway admitted that at the time of the murder, he was on parole for a robbery conviction, and that, at the time of trial he was incarcerated.

In closing argument, defense counsel called into question the credibility of the State's witnesses, including Holloway, arguing that he was a convicted robber, and should not be trusted. In rebuttal closing, the State responded as follows:

> As far as Mr. Holloway is concerned, Mr. Holloway is friends with [the appellant]. Friendly enough that [the appellant] felt comfortable discussing his drug dealing activities around Mr. Holloway. He felt comfortable hanging out and telling him what he was going to do to Mr. Lashley. He was friendly with him. They would go out drinking. Mr Holloway has absolutely nothing against [the appellant]. And yet he was able to overcome his belief that you shouldn't snitch, the peer pressure that he was facing, all of that, because he wanted to see justice done in this particular case.
> He got up on the stand and testified that. He just - - he thought it was wrong that so many people aren't standing up and they're letting people gun other people down in the streets. He thought that was wrong and so he got over his need not to be a snitch, and came forward.

Defense counsel objected, and requested that the court instruct the jury that "they should not allow their sentiment of other people being gunned down in the street to be a reason why they should or shouldn't decide this case." The court overruled the objection and

declined to give the instruction, finding that it was not an appeal to the jury's sympathies, but an explanation as to why Holloway was reluctant at first to talk to the police.

Appellant asserts that defense counsel never argued that there had been an unreasonable delay in Holloway coming forward, and that the State was improperly allowed to explain his "inflammatory" motives during rebuttal. The State responds that the prosecutor's comments were a response to defense counsel's suggestion that the State's witnesses were not credible, and did not imply that the jury should feel similarly. We agree with the State.[11]

The Court of Appeals has observed that a prosecutor must not use closing argument to appeal to jurors to convict a defendant in order to preserve the safety or quality of their community, noting that such arguments are considered "unfairly prejudicial and risk diverting the focus of the jury away from its sole proper function of judging the defendant on the evidence presented." *Hill v. State*, 355 Md. 206, 225 (1999). An example of such an improper appeal is the prosecutor's opening statement in a murder trial in which the jury was told "it's time for someone to say, 'Enough. Enough.'" *Beads v. State*, 422 Md. 1, 6 (1999). There, the Court of Appeals held that "[t]he 'say Enough!' exhortation implored the jurors to consider their own personal safety," and was improper under *Hill*. *Id.* at 11. *See also,*

[11] We disagree with the State's argument that this issue was not preserved because the objection was not made contemporaneously with the prosecutor's comment. The objection was made at a bench conference during the State's rebuttal and before the jury had been excused.

Holmes v. State, 119 Md. App. 518, 526-27, *cert. denied*, 350 Md. 278 (1998) (concluding that prosecutor's argument that "[t]his is not about jail time. It's about the day of reckoning, the day of accountability, the day we say no, Mr. Holmes, no longer will we allow you to spread that poison on the streets" was improper); *Couser v. State*, 36 Md. App. 485, 501 (1977) (concluding that prosecutor's argument, "[l]et me just say this to you, by your vote you can say no to drug dealers, to people who rain destruction" was improper).

Here, however, the prosecutor's remarks fell far short of such an appeal. We agree with the State that the remarks were carefully and accurately limited to Holloway's testimony on the stand, and were offered as an explanation of why Holloway, a convicted criminal and friend of the appellant, who lived in a neighborhood where people do not normally "snitch," had made the honorable decision to come forward, and why he should be believed. It was not, as appellant suggests a "diversion of the jury's attention to issues relevant only to their bias and sympathy." Under the circumstances of this case, there was no abuse of discretion in allowing this argument.

6. Merger

The appellant's final argument is that the trial court erred in failing to merge the appellant's murder conviction and the conviction for use of a handgun in the commission of a crime of violence for sentencing purposes. The State responds that the sentences do not merge because the legislature intended that a sentence for use of a handgun in the

commission of a crime of violence be in addition to the sentence for the underlying crime. We agree with the State.

Merger of convictions for sentencing purposes is derived from the protection against double jeopardy afforded by the Fifth Amendment of the United States Constitution and Maryland common law, and protects criminal defendants from multiple punishments for the same offense. *Brooks v. State*, 439 Md. 698, 737 (2014). As we observed in *Britton v. State*, 201 Md. App. 589 (2011):

> [W]hen the trial court is required to merge convictions for sentencing purposes but, instead, imposes a separate sentence for each unmerged conviction, it commits reversible error. . . . [S]uch an error implicates the illegality of imposing multiple sentences . . . for the same offense. . . . [T]he result is the imposition of a sentence not permitted by law.

Id. at 598-99 (internal quotation marks omitted).

The test for determining whether separate charges constitute the "same offense" for double jeopardy purposes is the "required evidence" test, which the Court of Appeals has explained as follows:

> The required evidence test "is that which is minimally necessary to secure a conviction for each . . . offense. If each offense requires proof of a fact that the other does not, or in other words, if each offense contains an element which the other does not, the offenses are not the same for double jeopardy [and merger] purposes, even though arising from the same conduct or episode. But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, the offenses are deemed to be the same for double jeopardy [and merger] purposes."

Holbrook v. State, 364 Md. 354, 370 (2001) (quoting *Williams v. State*, 323 Md. 312, 317-18 (1991))(alterations in original).

Ordinarily, when separate offenses qualify as the same offense under the required evidence test, they must be merged for purposes of sentencing. *Williams*, 323 Md. at 318. But, if the legislature "specifically authorizes cumulative punishment under two statutes irrespective of whether they prohibit the same conduct, such punishment may be imposed under the statutes in a single trial." *Holbrook*, 364 Md. at 369. *See also, Missouri v. Hunter*, 459 U.S. 359, 368 (1983) (there is no double jeopardy violation where legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct); *Whack v. State*, 288 Md. 137, 143 (1980) ("even though two offenses may be deemed the same under the required evidence test, separate sentences may be permissible, at least where one offense involves a particularly aggravating factor, if the Legislature expresses such an intent.")

The appellant was convicted under Maryland Code (2012 Repl. Vol), Criminal Law Article ("CL"), § 4-204 which imposes criminal sanctions for the use of a firearm in the commission of a felony, or "crime of violence."[12] C.L. § 4-204(c) specifically provides that "[a] person who violates this section is guilty of a misdemeanor, and *in addition to any other*

[12] The appellant was convicted of first-degree murder, which is both a felony and a crime of violence. *See* C.L. § 2-201(b); Maryland Code (2012 Repl. Vol.), Public Safety Article, § 5-101(c)(11).

penalty imposed for the crime of violence or felony, shall be sentenced to imprisonment for not less than 5 years and not exceeding 20 years." (Emphasis added.)

In *Whack, supra*, the Court of Appeals examined the legislative history of former Article 27, § 36B, (now codified as C.L. §4-204), and concluded that

> [t]he language of the 1972 handgun statute confirms . . . that the penalties set forth in the handgun act were intended to be imposed, *in addition to* the penalties under other applicable statutes. The Declaration of Policy . . . discloses that the Legislature viewed handguns as a particularly aggravating problem, and one not effectively controlled by the laws applicable to weapons generally[.]

Whack, 282 Md. at 147 (emphasis in original).

The Court then quoted from its opinion in *Dillon v. State*, 277 Md. 571, 584 (1976), in which it had observed that:

> [t]he dominant purpose as disclosed from the language in all of Art. 27, § 36B is to stop the alarming rise in the use of handguns in the commission of crimes of violence. Subsection (d) makes it clear that the use of a handgun in the commission of any felony or any crime of violence, constitutes a separate misdemeanor, independent of the felony or crime of violence, in connection with which a handgun may have been used, and mandates a separate minimum sentence. The provisions in the statute preclude the application of the doctrine of merger of such misdemeanor in the felony or crime of violence.

Id. at 148 (citations and internal quotation marks omitted).

Accordingly, even if first-degree murder and use of a handgun in the commission of that murder were deemed to be the same offense under the required evidence test (but, as we

discuss below, they are not), merger would not be required because it is clear that the Legislature specifically authorized separate sentences for use of a handgun in the commission of a felony or crime of violence, and the underlying crime.

The appellant's reliance on *State v. Ferrell*, 313 Md. 291 (1988), in support of his argument that the convictions should have merged is misplaced. There, the issue was whether Ferrell, who had been convicted of armed robbery, could subsequently be prosecuted on a charge of use of a handgun in the commission of felony, when the charge was based on the same armed robbery for which he had already been convicted. The Court held that under the required evidence test, Ferrell's convictions for armed robbery and use of a handgun in the commission of a felony or crime of violence were the same for double jeopardy purposes, thus precluding the second prosecution. *Id*. at 301. The Court was not called on to address the issue of whether, had Ferrell been tried and convicted of both crimes in the same proceeding, the sentences should have merged. Accordingly, the holding in *Ferrell* is limited to successive prosecutions for the same offense, and has no bearing on whether the sentences for the two offenses should merge.

Moreover, the conviction at issue here is first-degree murder. This Court has expressly held that first-degree murder and use of a handgun in the commission of a felony or crime of violence are not the same offense under the required evidence test, because each offense requires proof of an element or elements that the other does not. *See Godwin v.*

State, 41 Md. App. 233, 235 (1979); *Robeson v. State,* 39 Md. App. 365, 382 (1978), *aff'd*, 285 Md. 498 (1979), *cert. denied,* 444 U.S. 1021 (1980).

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.