Circuit Court for Prince George's County
Case No. CT161500X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 415

September Term, 2018

TAVONE ANTONE MARTIN

v.

STATE OF MARYLAND

Graeff,
Beachley,
Alpert, Paul E.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: July 17, 2019

After a jury trial in the Circuit Court for Carroll County, Tavone Antone Martin, appellant, was found guilty of second-degree murder and use of a firearm in the commission of a crime of violence. He was sentenced to 30 years, with all but 20 years suspended, for second-degree murder and a consecutive term of 15 years for the handgun conviction. This timely appeal followed.

QUESTIONS PRESENTED

Appellant presents three questions for our consideration, which we have re-ordered as follows:

I. Was the evidence sufficient to sustain appellant's convictions?

II. Did the trial court err in denying appellant's motions for mistrial?

III. Did the trial court err in permitting lay opinion testimony?

For the reasons set forth below, we shall hold the evidence was sufficient to sustain appellant's convictions and the trial court did not err in denying appellant's motions for mistrial and permitting lay opinion testimony.

FACTUAL BACKGROUND

On January 27, 2016, Derrick McCray was shot and killed near the intersection of St. Barnabas Road and Rosecroft Village Drive in Oxon Hill, Prince George's County. Crime scene investigators did not find any bullets, bullet fragments, or shell casings at or near the scene of the shooting. An assistant medical examiner from the Office of the Chief Medical Examiner for the State of Maryland, who testified as an expert in the field of forensic pathology, opined that the cause of Mr. McCray's death was multiple gunshot wounds and the manner of death was homicide. All of the gunshot wounds were on Mr.

McCray's right side and there was no evidence of gunpowder stippling, soot, or close range discharge of a firearm on the skin surrounding the entrance wounds. The State charged appellant with McCray's murder and the use of a handgun in the commission of that crime.

Several witnesses were near the scene of the shooting, but none of them witnessed the actual shooting. At about 6 p.m. on January 27, 2018, Davian Morgan was leaving a townhouse community near St. Barnabas Road. As he drove on Rosecroft Village Drive, he saw a white utility vehicle parked behind him and two black men wearing very dark clothing, including "big winter jackets and hoods" and hats, walking in the street ahead of him. The men appeared to be having a conversation and did not appear to be arguing or fighting. It had recently snowed and snow had been plowed to the side of the street, so Mr. Morgan drove "kind of in the middle of the road." As he drove past the two men, Mr. Morgan heard a sound that he thought were snowballs hitting his car. He opened his car window and then "heard it was actually gunshots[.]" As he looked back through the open car window, Mr. Morgan observed one of the two men fall to the ground. The other man, who had a gun, stood over the man on the ground. Mr. Morgan then heard one more shot and "that was when the person with the gun ran." He testified that it was dark and he could not describe the weapon. He observed the man on the ground crawl up a hill toward the intersection of Rosecroft Village Drive and St. Barnabas Road and the other man run back down the hill toward the townhouse community. Mr. Morgan described the person who stood over the victim as being more than six feet tall, having dark skin, and weighing 170 pounds.

On the night of the shooting, Amina Camara was working at a Jiffy Lube on St. Barnabas Road when she heard a series of three to four gunshots. She looked outside and saw someone, later identified as Mr. McCray, lying in the street. Ms. Camara crossed the street to attend to Mr. McCray, who said he had been shot. Mr. McCray's breathing became labored as time went on. Ms. Camara asked Mr. McCray if he knew who had shot him and he said yes, but did not identify the shooter. He told Ms. Camara that the shooter was in a Mercedes Benz truck. Ms. Camara called 911 and Mr. McCray's sister. Her call to 911 was played for the jury.

Angelines McCaffrey-Lazo was driving on St. Barnabas Road at about 6:20 p.m. when she heard three "pop" sounds. She slowed down, looked to her left, and observed a man fall into the road. She noticed smoke above the man and saw a "slimmer" man running away. The man who was running away was about five feet, nine inches to five feet, ten inches tall. Ms. McCaffrey-Lazo observed a white Chrysler stop to avoid running over the man who had fallen into the road.

Carlos Massey was turning from Wheeler Road onto St. Barnabas Road when he saw a woman in the street screaming that someone had been shot. He pulled over and assisted the victim. At some point, Mr. McCray "was like, there they go right there. I think it was like a silver wagon or something." Mr. Massey testified that he saw a silver Mercedes Benz wagon drive up St. Barnabas Road.

Prince George's County Police Officer Jose Garcia and his partner, Officer Brand Odhner, were the first to arrive at the scene of the shooting. Officer Garcia saw a man lying on the ground with a crowd of people around him. As he approached the man on the

ground, he heard a woman yell out, "that silver Mercedes SUV is the one involved in the shooting." Officer Garcia and his partner got in their police vehicle and drove to a 7-Eleven store that was part of an Exxon gas station about 300 feet away from where the man was lying on the ground. As they pulled into the parking lot, a silver Mercedes SUV was pulling out and the police stopped it. There were three individuals in the Mercedes, one of whom was appellant, who was seated in the center of the back seat. The vehicle was searched and a canine search of the area was conducted, but no weapon was found. Officer Odhner reviewed footage from a surveillance camera that captured the 7-Eleven parking lot. The video showed the front passenger of the Mercedes SUV standing outside the 7-Eleven store, the Mercedes SUV pulling up, and the individual getting into the front passenger seat.

Other witnesses described hearing gunshots and seeing a man dressed in dark clothing running in a townhouse community not far from where the shooting occurred. Alfred Cole was in the bedroom of his townhouse when he heard two to three gunshots. He got up and looked out his window into a parking lot. Mr. Cole's two sons and their mother were outside. Mr. Cole saw a man dressed in black "tucking and running past" his house. The man appeared to be holding something "around his waistband area." Mr. Cole looked out a window in the back of his home to see if the man had jumped a fence but he did not see anyone. When he returned to the window that faced the parking lot, he saw the man standing in front of his home looking towards St. Barnabas Road. Mr. Cole noticed a lime or lemon-lime square on the back of the man's coat or jacket but did not "have a plain

view of" the man's face. The man stood there for a couple of minutes and then walked across the street and up towards St. Barnabas Road.

Mr. Cole's son, Dana Cole, was outside talking to his mother and brother when he heard two to three gunshots. He "hopped" into the back seat of his mother's car. A couple of seconds later, he saw a man wearing a hood and dark colored clothing running towards them. The man was holding the waist area of his pants. He appeared to be about 145 to 150 pounds and about five feet, nine inches to five feet, ten inches tall. The man ran towards the home of Mr. Cole's neighbor, Stephanie Thomas.

Prince George's County Detective Ruben Paz obtained appellant's permission to search his cell phone. Detective Paz obtained from the phone a video of appellant with Mr. McCray shortly after 5 p.m. on the night of the shooting. According to Detective Paz, in the video, appellant was wearing "a black coat with something like, I think it was a hoody, like lime green on the back." Detective Paz showed a picture of the black coat to Alfred Cole. At trial, Detective Paz was asked if Mr. Cole identified "that" and he responded, "[y]es, he did." During the course of his investigation, Detective Paz went to Stephanie Thomas's home and noted that D.J. Ware and Jon Fitzgerald, the other individuals in the silver Mercedes SUV, were there.

Stephanie Thomas testified that she knew Mr. McCray, whose nickname was Dok, for about two years before he died. They were both physical trainers and worked at the same gym. Ms. Thomas described Mr. McCray as being "like a brother" to her. Ms. Thomas had known appellant for about 16 years prior to the shooting. She considered him a friend and also described him as being like a brother to her. When they were younger,

appellant lived with Ms. Thomas's grandmother and, at times, he stayed at Ms. Thomas's house, although he "never formally lived there." Ms. Thomas was not aware of any dispute between appellant and Mr. McCray.

The parties provided this Court with transcripts of two of the calls that were placed to 911 following the shooting. Recordings of those calls were marked as State's Exhibit 2 and played for the jury at trial. The first caller was not identified by name in the transcript, but was identified at trial as Ms. Camara. She advised the 911 operator that she worked at a nearby Jiffy Lube, heard "four gunshots across the street," and then saw a man, later identified as McCray, lying in the street. McCray had been "shot in his back." Ms. Camara said that McCray was conscious but was "probably going into a little bit of shock." The 911 operator asked Ms. Camara to ask McCray if he knew who shot him. Ms. Camara told the 911 operator, "[h]e said he does, but he's in too much pain to focus." Ms. Camara then stated, "[i]t was a Benz truck (phonetic), it was a Benz truck."

In the second 911 call, Davian Morgan told the 911 operator that he "just saw somebody get shot." Mr. Morgan made the following report:

> OPERATOR: And you actually saw it happen?
>
> [MORGAN]: Yeah. I was pulling my – I actually live in the complex and saw two guys walking up the street. They looked like they were walking up the street together. And as soon as I was pulling out, making a turn onto the street, like I could hear something go, pop, pop, pop, and it sound like – I thought it sounded like someone was like throwing snowball, like at cars. And, then, I looked and it was – the other guy that was with him shot him and then ran off.
>
> OPERATOR: So, the two males that were walking together, one ended up shooting the other?

[MORGAN]: Yes.

OPERATOR: Okay. All right. Hold on. (Pause.) Can you give me their -- the one that actually shot him, can you give me the description of him?

[MORGAN]: I couldn't see him that well. I know they're both black males and they both had on – and I guess it was (indiscernible) they both had on like their coats with their hood on. So, I really couldn't see their face. But one was a black male I want to say somewhat around six feet kind of tall but not too tall.

OPERATOR: Okay. Is this the one that actually had the gun on him that shot the other?

[MORGAN]: Yes.

OPERATOR: Okay.

[MORGAN]: Yes.

OPERATOR: What was he wearing?

[MORGAN]: The one that got shot looked a little shorter.

OPERATOR: Okay. The one that shot him, what did – how – what was he wearing?

[MORGAN]: I honestly can't remember. I know he had on a jacket and he had his hood on.

OPERATOR: Do you remember what color? Was it a dark color, a light color?

[MORGAN]: I want – I want to say it was a dark color but I'm honestly not a hundred percent sure.

OPERATOR: Okay. And you said – how old do you think he looked?

[MORGAN]: Definitely like twenties. Younger, mid-twenties.

OPERATOR: Okay. Hold on. (Pause) Okay. And what about the one that was shot?

[MORGAN]: He's still on the ground now. There's some people with him. Not sure if he's moving anymore.

OPERATOR: Okay. Is he conscious?

[MORGAN]: I – I'm not sure. I actually like pulled across the street. There's about five people around him and I'm not sure if he's moving anymore. I don't think he is conscious.

OPERATOR: Okay. All right. Hold on, okay? Did you see where the suspect went?

[MORGAN]: He went backwards. So, he ran back in towards the community. Like back into the townhouse complex. (Pause.)

OPERATOR: Okay.

[MORGAN]: But they were walking out of the complex and that's right at the corner of the street as if they were about to cross the street.

OPERATOR: Okay.

[MORGAN]: And that's when he shot him and I was back and saw the guy hit the ground. That's when I realized that he was actually getting shot. And, then, the other guy booked it back towards the houses.

The parties also provided a transcript of portions of appellant's recorded interview with Prince George's County Police Detective Joshua Kingston and a subsequent interview with Prince George's County Police Detective Denise Shapiro, that were played at trial.[1] In the interview with Detective Kingston, appellant acknowledged that he and Mr. McCray had robbed "a lot of" people "around there," including a robbery in the apartments in Oxon Hill Village. Appellant said that he and Mr. McCray, whom he referred to as "Doc" or "Dok," planned to rob someone on the night of the shooting. The plan was to meet up with

[1] The transcripts themselves do not identify Detective Kingston by name and refer to Detective Shapiro as Detective Denise.

someone who would give them a ride to a "station," and then commit the robbery. On the night of the shooting, appellant and Mr. McCray were walking together on the way to meet the person who would give them the ride. Appellant acknowledged that he was wearing a black jacket with a hood that had green reflectors that stood out. As they were walking, appellant heard gunshots "go off, pow, pow, pow." Appellant froze for a moment and then took off running. He did not see Mr. McCray lying on the ground. Just prior to the shooting, appellant saw someone with a hood walking behind him and Mr. McCray. After the shooting, appellant saw that person get into a "sky blue looking Honda" that drove off. Later, appellant said that he saw the sky blue Honda as he and Mr. McCray were walking up the street and that he could see figures in the driver's seat and the front passenger seat.

Appellant ran to "the house," meaning Ms. Thomas's house, and called "DJ," who was at the store, presumably the 7-Eleven. Appellant told him to stay where he was, that he and "John" were going to meet him there. As they drove to the 7-Eleven store, appellant saw the traffic backed up and Mr. McCray on the ground. At that point, Ms. Thomas called and asked them to pick her up from work. Appellant and John pulled into the parking lot of the 7-Eleven and picked up DJ. They were then pulled over by the police.

In the interview with Detective Shapiro, appellant again said that he and Mr. McCray were planning to meet someone for the purpose of committing a robbery, that he saw a car and could see figures in it through the tinted windows, that someone got out of that car and was walking behind them, and then he heard gunshots. Appellant mentioned that the person who was walking behind them was a black man who was a little taller than appellant and had a medium build. The person wore dark pants and a black Gill or Helly

Hansen jacket with a reflector on it. After the shooting, appellant ran to the back of Ms. Thomas's house, but the back door was locked. He started knocking and John, who was in the house, let him in. They left together in Ms. Thomas's car, with John driving and appellant in the back seat, and went to the 7-Eleven store to pick up DJ. Appellant acknowledged that Mr. McCray was selling "weed" and that he always had his bag with him when he went to Ms. Thomas's house. According to appellant, he and Mr. McCray had "robbed somebody right there across the street. We robbed somebody the day before." He and Mr. McCray had worn masks but had also robbed people without wearing masks. Appellant denied seeing Mr. McCray with a weapon at the time of the shooting. Appellant speculated that the person who shot and killed Mr. McCray was somebody he and Mr. McCray had robbed.

DISCUSSION

I.

Appellant contends that the evidence was not sufficient to sustain his convictions. Specifically, he argues that the evidence produced by the State amounted only to strong suspicion or mere probability that he shot and killed Mr. McCray. In support of his argument, appellant points to the lack of forensic evidence and eyewitness testimony linking him to the shooting. He also points out that there was no evidence to show he had a motive to shoot Mr. McCray, but there was evidence that others had a motive to shoot him. In addition, appellant notes that although Mr. McCray was capable of speaking, he failed to identify appellant as the shooter.

The State counters that motive is not an element of any offense and is irrelevant for evidentiary-sufficiency purposes. It maintains that appellant's arguments about the lack of forensic evidence, eyewitness testimony, and discrepancies in descriptions of the person standing over McCray and the person running away are "more suited for closing argument" and are neither relevant nor dispositive for determining evidentiary sufficiency. Finally, the State asserts that it is common for victims to be capable of identifying the people who assault them, but decline to do so, and that this "is a matter of weight, not sufficiency" of the evidence. Our review of the record convinces us that the evidence was sufficient to support appellant's convictions.

A. Standard of Review

The standard for determining the legal sufficiency of evidence is whether "'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Donati v. State*, 215 Md. App. 686, 718 (2014)(quoting *State v. Coleman*, 423 Md. 666, 672 (2011)). That standard of review "applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Smith v. State*, 415 Md. 174, 185 (2010)(citation omitted). Circumstantial evidence can support a conviction on its own if there is enough to support a finding of guilt:

> Circumstantial evidence is sufficient to sustain a conviction, but not if that evidence amounts only to strong suspicion or mere probability. Although circumstantial evidence alone is sufficient to sustain a conviction, the inferences made from circumstantial evidence must rest upon more than mere speculation or conjecture.

Corbin v. State, 428 Md. 488, 514 (2012)(quoting *Smith v. State*, 415 Md. 174, 185 (2010)).

"We defer to the fact finder's 'opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]'" *Neal v. State*, 191 Md. App.297, 314 (2010). "Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence." *State v. Suddith*, 379 Md. 425, 447 (2004)(quotation marks and citation omitted). "Our role is not to retry the case: [b]ecause the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Nicholson v. State*, 239 Md. App. 228, 252 (2018), *cert. denied*, 462 Md. 576 (2019)(quotations omitted). Thus, the limited question before us "is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Allen v. State*, 158 Md. App. 194, 249 (2004)(quotation marks and citation omitted).

B. Sufficiency of the Evidence

At the heart of this case is whether the evidence sufficed to prove, beyond a reasonable doubt, second-degree murder and use of a handgun in the commission of that crime. Second-degree murder is defined as "[a] murder that is not in the first degree under

§ 2-201" of the Criminal Law Article.[2] Md. Code (2012 Repl. Vol.; 2017 Supp.), § 2-204 of the Criminal Law Article ("CL"). Although the statute does not further define the offense of second-degree murder, Maryland case law identifies "four different types" of the crime:

> They are: first, the killing of another person, other than by poison or lying in wait, with the intent to kill but without the deliberation and premeditation required for first-degree murder; second, the killing of another person with the intent to inflict such serious bodily harm that death would be the likely result; third, "depraved heart murder," which is to say, "a killing resulting from 'the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not'"; and fourth, "murder committed in the perpetration of a felony other than those enumerated in the first-degree murder statutes."

Jones v. State, 222 Md. App. 600, 610 (2015), *vacated on other grounds*, 451 Md. 680 (2017)(quoting *Thornton v. State*, 397 Md. 704, 721-22, 721 n. 6 (2007)).

In the case at hand, the jury instructions for the second-degree murder charge discussed the elements of the crime with greater specificity:

> Second degree murder is the killing of another person with either the intent to kill or the intent to inflict such serious bodily harm that death would be the likely result.
>
> Second degree murder does not require premeditation or deliberation. In order to convict the defendant of second degree murder, the State must prove, one, that the defendant caused the death of Derrick McCray, and, two, that the defendant engaged in the deadly conduct, either with the intent to kill or with the intent to inflict such serious bodily harm that death would be the likely result.

[2] A murder is "in the first degree if it is (1) a deliberate, premeditated, and willful killing; (2) committed by lying in wait; (3) committed by poison; or (4) committed in the perpetration of or an attempt to perpetrate" specific enumerated felonies set forth in CL § 2-201(a)(4).

Use of a firearm in the commission of a felony or crime of violence is a statutory offense, defined by CL § 4-204, which provides, in part:

> (b) *Prohibited*. – A person may not use a firearm in the commission of a crime of violence, as defined in § 5-101 of the Public Safety Article, or any felony, whether the firearm is operable or inoperable at the time of the crime.

In order to establish this crime, the State must prove, beyond a reasonable doubt, that (1) a firearm was used by the defendant, and (2) that he or she used it in the commission of a felony or crime of violence. *Hoffert v. State*, 319 Md. 377, 379-80 (1990). In the instant case, the trial judge specifically instructed the jury that the crimes of violence at issue were first and/or second degree murder.

In his statements to the police, appellant acknowledged that he was present at the scene of the shooting. Appellant also admitted to police that after the shooting he ran to Stephanie Thomas's house, got into a silver Mercedes SUV, and went to the 7-Eleven store just across the street from where the shooting occurred. "It is a universally accepted rule of law that mere presence of a person at the scene of the crime is not of itself sufficient to prove the guilt of that person, even though it is an important element in determination of the guilt of the accused." *Fleming v. State*, 373 Md. 426 (2003)(and cases cited therein). Indeed, the trial judge instructed the jury:

> A person's presence at the time and place of a crime, without more, is not enough to prove that the person committed the crime. The fact that a person witnessed a crime, made no objection, or did not notify the police, does not make that person guilty of a crime. However, a person's presence at the time and place of the crime is a fact in determining whether the defendant is guilty or not guilty.

Our review of the record, in a light most favorable to the State, reveals that a rational trier of fact could conclude that appellant was the person who shot Mr. McCray. Evidence of the actual shooting was provided by Mr. Morgan, Ms. McCaffrey-Lazo, Ms. Carrara, and Mr. Massey. Mr. Morgan saw two men walking down the street and heard gunshots. He saw one of the men fall to the ground. The other man stood over the man on the ground with a gun. Mr. Morgan did not actually see the shooting, but at one point stated, "the guy that was with him shot him and then ran off." Mr. Morgan observed the man with the gun run away into the townhouse community. Ms. McCaffrey-Lazo heard three "pop" sounds, saw a man fall into the road, saw smoke above the man, and a slimmer man running away. Although she did not identify appellant as being at the scene, Ms. Carrara testified that the victim told her that the shooter was in a Mercedes Benz truck. The victim did not identify the person who shot him. Mr. Massey pulled over to assist Mr. McCray and heard him say "like, there they go right there." Mr. Massey thought Mr. McCray was referring to a silver Mercedes Benz wagon that Mr. Massey saw drive up St. Barnabas Road. When police officers arrived on the scene, Officer Garcia heard a woman yell out, "that silver Mercedes SUV is the one involved in the shooting."

Other witnesses observed a man running toward Stephanie Thomas's house wearing a jacket similar to one worn by appellant in a video recording taken about an hour or so before the shooting. Appellant acknowledged to police that after he heard gunshots, he ran to Ms. Thomas's house. Appellant suggested that someone he and Mr. McCray had robbed might have wanted to shoot them. There was no evidence that appellant had a motive to shoot Mr. McCray. Nevertheless, motive is not an element of any of the subject offenses.

As a result, evidence of criminal agency in the instant case, albeit circumstantial, is sufficient to establish guilt beyond a reasonable doubt.

II.

Appellant contends that the trial court erred in denying two motions for mistrial both of which pertained to statements made during the course of appellant's October 21, 2016 recorded interview with Detective Shapiro. The first motion for mistrial was based on statements by Detective Shapiro that the victim had identified appellant as the shooter. The second motion was based on appellant's statement that he did not have a gun on him at the time Mr. McCray was shot, but he did have an unloaded gun at his house. In addition to arguing each motion for mistrial separately, defense counsel argued that the two motions should be considered together, stating, "[m]y argument is that these two incidents coupled together to unfairly prejudice my client at this time and could affect the verdict in this matter." The court denied both motions for mistrial and rejected appellant's argument about the cumulative effect of both incidents.

A. Standard of Review

"A mistrial is no ordinary remedy[.]" *Cooley v. State*, 385 Md. 165, 173 (2005). It is an "extreme sanction" that is sometimes necessary when there is "such overwhelming prejudice" and "no other remedy will suffice to cure the prejudice." *Burks v. State*, 96 Md. App. 173, 187, *cert. denied*, 332 Md. 381 (1993). *Accord Webster v. State*, 151 Md. App. 527, 556 (2003)("A mistrial is 'an extreme sanction' that courts generally resort to only when 'no other remedy will suffice to cure the prejudice.'")(quoting *Burks*, 96 Md. App. at 187). Stated otherwise, "[t]he determining factor as to whether a mistrial is necessary is

whether 'the prejudice to the defendant was so substantial that he [or she] was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004)(quoting *Kosmas v. State*, 316 Md. 587, 594-95 (1989)). Such prejudice "must be shown as a 'demonstrable reality' and not as a 'matter of speculation.'" *Baldwin v. State*, 5 Md. App. 22, 28 (1968).

A request for a mistrial is addressed to the sound discretion of the trial court and will not be reversed absent a clear abuse of that discretion. *Simmons v. State*, 436 Md. 202, 212 (2013); *Cooley*, 385 Md. at 173 (holding same). To amount to an abuse of discretion, "[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *North v. North*, 102 Md. App. 1, 14 (1994).

"The possible prejudice that a defendant may suffer as a result of alleged misconduct forms the threshold for the decision whether to grant a mistrial." *Cooley*, 385 Md. at 173. "The fundamental rationale in leaving the matter of prejudice *vel non* to the sound discretion of the trial judge is that the judge is in the best position to evaluate it." *State v. Hawkins*, 326 Md. 270, 278 (1992). "[T]he trial court is peculiarly in a superior position to judge the effect of any of the alleged improper remarks," *Simmons v. State*, 436 Md. 202, 212 (2013)(quotation marks and citations omitted), because the trial judge is physically "on the scene," able to observe matters not reflected in the cold record, able to ascertain the demeanor of the witnesses and to note the reaction of the jurors and counsel to inadmissible matters. *Hawkins*, 326 Md. at 278.

When a witness makes an inadmissible statement before the jury that prejudices the defendant, we consider "whether the prejudice to the defendant was so substantial that he

[or she] was deprived of a fair trial[.]" *Kosmas*, 316 Md. at 594-95. The Court of Appeals has identified five factors relevant to a mistrial determination: whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists[.]" *Rainville v. State*, 328 Md. 398, 408 (1992)(quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)). Those factors are not exclusive and do not comprise the test, they are "simply helpful in the resolution of that question." *Kosmas*, 316 Md. at 594-95.

B. Identification as Shooter

During appellant's October 21, 2016 recorded interview, Detective Shapiro made several statements to appellant that the victim had identified him as the shooter. She stated, "when you passed Doc, he told those people that that's who shot me;" "[s]o when you guys passed by, he said that's who shot me;" "[h]e pointed at the truck, at you, and said that's who;" and "[h]e says that's who shot me." After the jury viewed portions of the recorded interview, the State questioned Detective Shapiro about her questioning of appellant. The prosecutor asked, "[w]hen you said to the defendant that Doc pointed him specifically out, did you have any evidence that somebody had specifically pointed him out?" Detective Shapiro responded, "[y]es." Appellant moved for a mistrial and the court reserved ruling on that motion.

The State continued to question Detective Shapiro as follows:

[PROSECUTOR]: Detective Shapiro, were you the lead on this case?

[DET. SHAPIRO]: No, I'm not the lead.

Q. And when you said – you first stated to him that someone had – that people had pointed out the car?

A. Yes.

Q. As the shooter, correct?

A. Yes.

Q. Then he asked you, did they specifically point him out. Did Doc specifically point him out in the car as the person who shot him?

THE COURT: Him, meaning Mr. Martin, the defendant?

[DET. SHAPIRO]: No. As the car was driving by, Doc was pointing at the car as the car drove past.

[PROSECUTOR]: So when you said this to him, were you being truthful to him or not truthful?

A. It was an investigative tactic and it made sense because he told me he was in the back seat of the car on that side with the driver on the other side.

Q. Was that a tactic to try to get him to admit that he did it?

A. It was a tactic to use to get to the truth.

Subsequently, the trial court denied appellant's motion for mistrial.

We find no abuse of discretion in the trial court's decision to deny appellant's motion for mistrial. Detective Shapiro's testimony revealed that her statements to appellant were an investigative tactic and when asked if the victim specifically pointed out appellant as the person who shot him, she said, "[n]o." The prosecutor did not argue in closing that the victim specifically pointed out appellant as the shooter and, in fact, made clear that the victim

only pointed to the Mercedes SUV. Moreover, it was evident that appellant knew the detective was bluffing because during the interview, after Detective Shapiro said that the victim "pointed at the truck, at you, and said that's who," appellant stated, "[t]here's no way he could have done that . . . Because first and foremost, if I was sitting in the back, you can't see back there" because of the tinted windows.

It is also significant to note that at the end of the prosecutor's closing argument, and before defense counsel's closing argument, the trial judge clarified this issue by instructing the jury that there was "no evidence that [the victim] pointed to Mr. Martin when the Mercedes car drove by." When considering a motion for mistrial, the trial judge must evaluate the circumstances of the case and '[i]n assessing the prejudice to the defendant, the trial judge first determines whether the prejudice can be cured by instruction.'" *Kosh*, 382 Md. at 226. "If a curative instruction is given, the instruction must be timely, accurate, and effective." *Carter v. State*, 366 Md. 574, 589 (2001). Here, the trial court gave the prosecutor opportunities to clarify that the victim did not specifically identify appellant as the shooter and then made that point clear through its instruction to the jury. Appellant did not object in any way to the court's curative instruction. In light of this record, we conclude that the trial court did not abuse its discretion in denying appellant's motion for mistrial.

C. Ownership of a Gun

Prior to trial, appellant filed a motion in limine to preclude the prosecutor from mentioning in her opening statement two types of evidence from police officers:

> [Defendant] hereby moves the [trial court] to preclude the State from commenting during the State's Opening Statement in the trial of this case that (1) the US Marshalls Service observed a black handgun lying with [sic] reach of the Defendant at the time of his arrest on October 21, 2016, at 1908

> Rochelle Avenue, Apartment 1511, in District Heights, or (2) that a handgun, assorted ammunition, and a magazine were recovered by police incident to a search of this apartment on October 21, 2016[.]

Appellant argued that the seizure of the black handgun, ammunition, and a magazine was not relevant and that "the probative value of admitting such evidence would be substantially outweighed by the danger of unfair prejudice, confusion of issues, and/or misleading the jury." Notably, the motion did not include any reference to statements made during the recorded interview of appellant on October 21, 2016.

On the first day of trial, the State advised the trial judge that it would not be using evidence of the black handgun, ammunition, or magazine in her opening statement, saying, "I don't anticipate using it. It might be coming out as something in rebuttal, but I'm not using it in my case in chief." Defense counsel responded, "[t]hat resolves it. I wanted to avoid it coming out in opening." The following colloquy occurred:

> [PROSECUTOR]: And if for some reason it's something that would be coming out, I would ask to approach if I see the door was open to it, for some reason.
>
> [DEFENSE COUNSEL]: My motion at this point was as to the opening.
>
> THE COURT: Then it's moot or it's withdrawn.
>
> [DEFENSE COUNSEL]: The State will just notify the Court if they're going to ask about it, they will approach the bench first, then I can make my motion about why it should not come in at that time if that's appropriate.
>
> THE COURT: Yes. But your motion was concerning the opening and you're not going to use it?
>
> [PROSECUTOR]: No.
>
> THE COURT: So the motion in limine to exclude the handgun is moot because there's an agreement that the State will not use it in opening.

[PROSECUTOR]: That's correct.

Later, during the direct examination of Detective Shapiro, the State played a portion of appellant's October 21, 2016 recorded interview in which appellant stated that he did not have a gun on him at the time Mr. McCray was shot, but he did have an unloaded gun at his house. The defense did not object before, during, or immediately after the challenged statement was played for the jury. Instead, the defense waited until after cross-examination of Detective Shapiro and after the prosecutor stated that she had no redirect, to complain about the playing of that portion of appellant's interview. Defense counsel acknowledged that he did not object during the playing of the recording because "it would have brought attention to it," but argued that the evidence was not relevant. Defense counsel asserted that the State was aware of appellant's motion in limine to exclude evidence of any gun recovered from the area where police found appellant, had indicated that it did not intend to use that evidence, and "basically circumvented" the motion in limine by playing the portion of the recorded interview containing references to a gun owned by appellant. Acknowledging that the motion in limine did not refer to the gun referenced by appellant during his police interview, defense counsel argued:

> It's a similar argument. If someone is allegedly in possession of a gun or in this case admitting to having been in possession of a gun, it's not admissible in this case. It's not relevant because, first of all, it wasn't even used in this case, so it is not relevant. The prejudicial value far outweighs any probative value if it were relevant.
>
> The State purposely played this recording. This is a multi-hour recording. They chose certain parts to play. They certainly knew what my argument was before with regard to this issue of having a gun and not wanting for it to be involved in the case.

> The remedy would be to ask the Court to entertain a mistrial at this time based on that. I do that respectfully. But that's all I would say.

The prosecutor argued that she thought appellant had admitted to having a gun on him at the time of the shooting, but that the gun did not have shells in it. The trial judge corrected the prosecutor, stating that appellant "said he has a gun. He owns one. It just wasn't on him. It was home with no shells in it. That's what he said." The prosecutor continued to maintain that appellant's testimony could be interpreted to mean that he had a gun but no bullets at the scene of the shooting and that he also had a gun at his house that did not have any shells. The prosecutor argued that, with respect to the gun at appellant's house, "it's not illegal to have a gun in your home, so it's not a basis for a mistrial." The following exchange followed:

> THE COURT: So why don't you discuss how you can cure it rather than having a mistrial? He said he didn't have a gun on him. I will think about it; but if you can think of a way to cure it, I think that would be more acceptable than to grant a mistrial.
>
> [PROSECUTOR]: Either way, Your Honor, it's not illegal to have a gun. The fact that he had a gun in his house doesn't mean anything. He even said there's no bullet in there. There's nothing. It's not like he's admitting to a crime. That's a constitutional right.
>
> [DEFENSE COUNSEL]: Your Honor, I want to be clear. My motion in limine was involving a gun recovered from the residence many months later. The State played this particular portion which I don't see how we can cure it with an instruction, because the jury won't be able to put it out of their mind. In this case, if my client is someone who has a gun, it might be perceived by some of the jurors as he could have been involved in the shooting. It is prejudicial and I don't see how we can cure it.

The court eventually denied appellant's motion for mistrial, stating:

> Okay. I am going to deny your request for a mistrial. I played the DVD. It speaks for itself. Ultimately, the jury will decide what they hear from that. I know I said what I believe I heard and I don't feel any differently, having heard the video again. So, it's the jury's decision. I do deny the request for a mistrial.

Appellant challenges the denial of his motion for mistrial on the ground that the evidence was irrelevant because there was no evidence to connect the gun used to shoot Mr. McCray to any gun owned by appellant. In addition, appellant contends that the evidence constituted inadmissible "bad acts" evidence under Maryland Rule 5-404(b), which provides:

> Evidence of other crimes, wrongs, or 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 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, or absence of mistake or accident.

Appellant maintains that the evidence that he had an unloaded gun in his home was unfairly prejudicial because it invited the jury to draw an inference that he had a propensity to gun violence. In support of that argument, appellant points out that the State's evidence "was by no means overwhelming," he and Mr. McCray were friends, there was no evidence of a motive for him to shoot Mr. McCray, there was no forensic evidence linking him to the shooting, and there was no identification of him as the shooter.

The trial court did not abuse its discretion in denying appellant's motion for mistrial based on the admission of evidence that appellant had an unloaded gun in his home. Appellant's objection to the statement in his recorded interview concerning the gun in his house was not lodged in a timely matter. Appellant had been aware of that statement for a

considerable amount of time but did not include it in his motion in limine. Nor did he lodge an objection prior to or during the playing of that statement for the jury. As the State notes, that might have been a strategic decision on the part of defense counsel. The court was free to consider that appellant had an opportunity to raise the issue prior to the time the recorded interview was played for the jury, but did not, and the fact that defense counsel might have made a strategic decision not to challenge the evidence.

With respect to the "bad acts" argument under Rule 5-404(b), appellant did not raise that argument below and thus, it is not properly preserved for our consideration. Md. Rule 8-131(a). Even if that argument had been raised below, there was no evidence that appellant was legally disqualified from possessing or owning a gun. Moreover, appellant's admission that he had an unloaded gun in his home had to be considered in light of his claim that he and Mr. McCray had committed robberies in the past and were planning to commit a robbery on the night of the shooting. For all those reasons, we cannot say that the trial court abused its discretion in denying appellant's motion for mistrial.

D. Cumulative Effect

Appellant argues, as he did below, that the cumulative effect of the statements pertaining to the victim's identification of him and his ownership of a gun unfairly prejudiced him and could have affected the verdict. We disagree. For the reasons set forth above, the court did not abuse its discretion in denying either of the motions in limine and the cumulative effect of those statements does not give rise to any prejudice that could have affected the verdict. The trial court did not abuse its discretion by denying appellant the extreme sanction of a mistrial in this case.

III.

Appellant argues that the trial court erred in allowing the State to play a recording of Ms. Camara's statement to a 911 operator that the victim knew who shot him, but was "in too much pain to focus." According to appellant, that statement was irrelevant, was not helpful to the trier of fact, and was inadmissible as lay opinion testimony under Maryland Rule 5-701. He further maintains that because Ms. Camara's opinion was premised on her ability to assess the impact of pain on the victim's cognitive functioning, a subject that requires specialized knowledge, skill, experience, training or education, and because she was not qualified as an expert, her statement constituted inadmissible expert testimony. We disagree.

Preliminarily, we note that this issue was not preserved for our consideration. Prior to Ms. Camara's testimony, defense counsel requested that she be instructed not to state that the victim "didn't give the name [of the shooter] because he was in too much pain[.]" The court granted that request and Ms. Camara did not give that particular testimony. The statement complained of was made by Ms. Camara on the day of the shooting during her call to a 911 operator. Before the recording of the 911 call was played at trial, defense counsel specifically advised the court that he did not object to the playing of the call. After the call was played, defense counsel asked to approach the bench and the following colloquy occurred:

> [DEFENSE COUNSEL]: I don't know how to undo that. The 911 call, he didn't say I'm not able to explain it or who it was. She said he is conscious and breathing. He just didn't say it.
>
> [PROSECUTOR]: She's talking to him.

[DEFENSE COUNSEL]: He said on the recording he's not able to answer the question. Then she said he's conscious and breathing. I just ask[ed] that the State be instructed not to have her say that. Well, they indirectly did that.

THE COURT: Didn't you have the tape recording?

DEFENSE COUNSEL: I wasn't aware of that. I made a motion in limine beforehand. The State chose to play it. Did they play the tape ahead of time? Did they know it was on there?

* * *

THE COURT: And you said no objection.

DEFENSE COUNSEL No, I didn't say no objection.

THE COURT: No objection to playing it. I don't understand – you had a copy of the tape, right, before today?

DEFENSE COUNSEL: Your Honor, I was not aware that that passage was on this particular tape.

The trial judge then questioned defense counsel as to how Ms. Camara's statement to the 911 operator prejudiced the defense:

THE COURT: But how does it prejudice you?

DEFENSE COUNSEL: I made a motion in limine ahead of time to avoid the situation. I guess the State isn't aware it was on the tape and played it. Did they purposely play it knowing it was going to be on there?

THE COURT: What do you want to do? She will have to come back tomorrow if we're going to spend time with this.

* * *

THE COURT: I don't see where the harm is. I can see the live witness comes up and gives an opinion. That is not admissible but this is.

[DEFENSE COUNSEL]: The tape sounded like an opinion.

> THE COURT: But the tape isn't admissible because it's hearsay, it's admissible because the statements are made for the purpose of getting help. And that's what she's doing, and the man has a gunshot, so I don't think anybody would think that he's not in any pain and he didn't say anything.
>
> [DEFENSE COUNSEL]: Thank you, Your Honor.
>
> (Counsel returned to trial tables)

Clearly, the defense did not object to the playing of the 911 tape and, after the recording was played, failed to request any specific relief. Maryland Rule 8-131(a) provides that "[o]rdinarily, 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[.]" In order to preserve an objection to the admission of evidence, a party is required to object "at the time the evidence is offered . . . . [o]therwise, the objection is waived." Md. Rule 4-323. Further, a party who voluntarily states his grounds for objection, "'must state all grounds and waives any not so stated.'" *Hall v. State*, 225 Md. App. 72, 84 (2015)(quoting *von Lusch v. State*, 279 Md. 255, 263 (1977)). *See also Colvin-el v. State*, 332 Md. 144, 169 (1993), *cert. denied*, 512 U.S. 1227 (1994)("Appellate review of an evidentiary ruling, when a specific objection was made, is limited to the ground assigned"). Here, appellant specifically sought to limit Ms. Camara's testimony at trial via an instruction not to state that the victim "didn't give the name [of the shooter] because he was in too much pain[.]" As we have noted, the court granted that request and Ms. Camara did not give that particular testimony. But appellant did not make any objection with respect to the recording of Ms. Camara's 911 call. As a result, that issue was not preserved for our review.

Even if the issue had been preserved, appellant would fare no better because Ms. Camara's statement to the 911 operator constituted proper lay opinion evidence. 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.

The decision to admit lay opinion testimony lies within the sound discretion of the trial court and we will not overturn such a decision absent an abuse of discretion. *Thomas v. State*, 183 Md. App. 152, 174 (2008), *aff'd,* 413 Md. 247 (2010); *Warren v. State*, 164 Md. App. 153, 166 (2005).

Here, the statement of Ms. Camara to the 911 operator related to the victim's emotional and physical state, specifically his pain, based on her perception of him. Her description was helpful in that it provided context to the fact that he did not identify the person who shot him even though he said he knew the shooter. Ms. Camara, who was very near to the victim, observing and speaking to him, was qualified to offer lay opinion evidence and to make reasonable inferences that were rationally based on her perception. *See Smith v. State*, 116 Md. App. 43 (1997)(permitting lay opinion testimony appellant perceived that the victim was dead).

Furthermore, appellant was not prejudiced by Ms. Camara's statement to the 911 operator. Although Ms. Camara's statement offered one explanation for why the victim did not identify appellant, it also explained why the victim did not identify anyone else, including the person appellant claimed was the shooter. We also note that there was

other evidence that undermined Ms. Camara's statement, specifically the fact that the victim was able to provide his sister's name and phone number. Accordingly, even if this issue had been preserved for our consideration, we would conclude that the trial court did not abuse its discretion in admitting Ms. Camara's statement to the 911 operator.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.