Circuit Court for Baltimore City
Case Nos. 119343014, 119343015, 119343016

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

Nos. 611, 639, 1598

September Term, 2023

CONSOLIDATED CASES

JAMES DUNBAR,
SHAMAR JERRY,
WILLIAM THORNTON

v.

STATE OF MARYLAND

Nazarian,
Reed,
Albright,

JJ.

Opinion by Nazarian, J.

Filed: July 21, 2025

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

Donnell Brockington was shot and killed on November 13, 2019. An unknown number of individuals from among a six-person group shot Mr. Brockington ten to twelve times, then fled the scene. Police apprehended four individuals—Anthony Clark, James Dunbar, Shamar Jerry, and William Thornton—nearby after a short car chase ended when their vehicle crashed into a tree. Police recovered four firearms from the car and one from Mr. Clark's person. Using DNA and firearms identification evidence, investigators connected Messrs. Clark, Dunbar, Jerry, and Thornton to the firearms and, ultimately, to the scene. They faced a joint jury trial in the Circuit Court for Baltimore City and the jury convicted each of various offenses. Messrs. Dunbar, Jerry, and Thornton now raise several issues on appeal pertaining to the court's rulings on courtroom disturbances, evidence, and Mr. Dunbar's waiver of his right to testify. Messrs. Dunbar and Thornton also challenge the sufficiency of the evidence supporting their convictions. We reverse Messrs. Dunbar's and Thornton's convictions based on the erroneous admission of expert firearms identification testimony and remand for further proceedings, and we affirm Mr. Jerry's convictions.

I. BACKGROUND

A. The Investigation

On November 13, 2019, Officer Justin Merson, a member of the Baltimore City Special Weapons and Tactics ("SWAT") unit, was on "crime suppression" duty (*i.e.*, patrolling high-crime areas and assisting patrol officers) in the Eastern District of the city when he received a notification of a shooting nearby. He and other Baltimore City officers

arrived on the scene at McElderry Street and found Mr. Brockington shot, unconscious, and bleeding on the sidewalk. Another officer attempted to provide treatment until medics arrived to render aid and transport Mr. Brockington to Johns Hopkins Hospital.

Sergeant Isreal Villodas, another member of the SWAT unit, was also on crime suppression duty that evening when he received a notification about the shooting. He started driving towards McElderry Street in his unmarked SWAT vehicle when another vehicle, a gold Infiniti SUV, crossed in front of him at an intersection. He noticed that at least six people were in the SUV and that the driver looked surprised when they passed by; one of the backseat passengers started to duck down as if to hide himself. Sergeant Villodas found this odd and decided to follow the SUV. He notified dispatch immediately and requested assistance from "Foxtrot," the police department's aviation unit. Sergeant Villodas and Foxtrot pursued the SUV until it crashed at the intersection of Ashland Avenue and North Caroline Street. Sergeant Villodas arrived at the crash site moments later. He apprehended an individual who was running from the crash but determined later that that individual was not associated with the car chase or Mr. Brockington's murder.

Officer Alan Chanoine, who was also on patrol in the Eastern District that evening, followed the SUV for a short time on Ashland Avenue before it crashed. He saw the driver and several passengers exit the damaged vehicle and flee on foot. He ran after the last person to exit the SUV—Mr. Jerry—and, with assistance from SWAT officers, apprehended him. Mr. Jerry had no weapons on his person.

Officer Richard Cetrone, another Eastern District patrol officer, heard the radio call from Foxtrot about the crash and the fleeing suspects. He responded to Eden Street—one street over from the crash site—where he came upon Officer Burrell[1] apprehending Mr. Dunbar. Officer Burrell brought Mr. Dunbar to the back of Officer Cetrone's patrol car where Officer Villachez, who was on patrol with Officer Cetrone, searched Mr. Dunbar and found no weapons on his person.

Detective Jerry Damestoit and Sergeant Melinda Walp, both members of the police department's District Action Team (a "proactive enforcement" unit) for the Eastern District, responded to the crash site as well. Sergeant Walp saw Mr. Thornton stumbling away from the car and, with Detective Damestoit's help, arrested him. According to Sergeant Walp, Mr. Thornton exited the car from the driver's side and had the car keys attached to his belt loop, although he denied being the driver of the car. Sergeant Walp then conducted a pat down and found no weapons on Mr. Thornton's person.

After assisting Sergeant Walp, Detective Damestoit removed the front passenger, Mr. Clark, from the SUV. Mr. Clark was injured, so Detective Damestoit helped him out of the car to render aid. He then asked Mr. Clark if he had any weapons on him, to which he responded yes and directed Detective Damestoit to the loaded firearm in his waistband. The officers then called for the medics to treat Mr. Clark and Mr. Thornton, who also sustained injuries in the crash.

[1] Officer Burrell's first name doesn't appear in the record, nor does that of his colleague, Officer Vallechez.

Officer Merson, who had heard about the car chase while he was at the scene of the shooting, relocated to the crash site to assist the other officers. He was responsible for recovering any weapons and handing them off to the crime lab technicians for evidence. He collected Mr. Clark's firearm—a Ruger Model EC9S 9mm Luger semi-automatic pistol (the "Ruger")—from Detective Damestoit. He then recovered three firearms in plain view from inside the SUV: a Taurus Model PT140 Millenium .40 S&W caliber semi-automatic pistol (the "Taurus") from the rear passenger-side seat; an IMI Desert Eagle 9mm Luger semi-automatic pistol (the "Desert Eagle") from the front passenger-side floor; and a Romarm/Cugir GP WASR-10/63 7.62x39mm semi-automatic rifle (the "rifle") from the rear passenger-side floor. Later, officers obtained a search warrant and found one additional firearm in the SUV, an RG Industries Model RG31 .38 special revolver (the "revolver"), on the back passenger-side floor underneath some coats.

The primary homicide detective, Frank Miller, remained at the scene of the shooting while officers secured the crash site. He directed crime lab personnel to collect blood samples and projectiles as evidence and canvassed the area for any additional evidence or witnesses. No one witnessed the incident, but during a second round of canvassing the next day, Detective Miller discovered and obtained footage from a residential security camera that faced the crime scene. There was no audio, and the video wasn't clear enough to identify the subjects, but the camera did capture the murder of Mr. Brockington.

The security footage showed Mr. Brockington walking down McElderry Street at approximately 8:35 p.m. with two people later identified as Terrell Smith and his cousin

"Chuck." Mr. Smith and Chuck turned down another street just before Mr. Brockington walked through a group of six individuals headed in the opposite direction on McElderry Street. According to Detective Miller, one of the six individuals appeared to be holding a long gun (the same type of firearm as the rifle). As the group parted around Mr. Brockington, two people stopped and turned towards him. The other four walked past Mr. Brockington, then turned to look back at him and the two others who had stopped. In a matter of seconds, the two individuals began shooting at Mr. Brockington, and he collapsed onto the sidewalk. Immediately, all six individuals fled back in the direction from which they came. One final white muzzle flash indicated that someone fired at Mr. Brockington's fallen body before running away.

Unable to identify the shooters from the video, Detective Miller relied on DNA and firearms identification evidence in his investigation of Mr. Brockington's murder. Dana Keiter, a Technical Leader in the Forensic Processing Unit of the Baltimore City Crime Lab, collected DNA evidence from the recovered firearms, the crash site, the murder scene, Messrs. Brockington, Clark, Dunbar, Jerry, and Thornton, and two other individuals whose connection to the crime (if any) was not discussed at trial. The DNA Analyst, Christy Silbaugh, analyzed the DNA samples and developed a final report that linked Messrs. Clark, Dunbar, Jerry, and Thornton to the recovered firearms: Messrs. Clark's, Dunbar's, and Thornton's DNA matched with the sample from the Desert Eagle; Mr. Jerry's DNA matched with the sample from the Taurus, though Messrs. Clark, Dunbar, and Thornton couldn't be included or excluded as contributors; Mr. Dunbar's DNA matched with the

sample from the rifle, although Messrs. Clark and Thornton couldn't be included or excluded as contributors; Mr. Dunbar's DNA matched with the sample from the revolver; and Messrs. Clark and Dunbar couldn't be included or excluded as contributors to the sample from the Ruger.

As for the firearms identification evidence, Jeremy Monkres, a firearms examiner with the Firearms Analysis Unit of the police department, conducted operability tests and found all five weapons to be operable. Mr. Monkres also examined and compared the markings left on projectiles (*i.e.*, bullets, bullet fragments, and cartridge cases) recovered from the murder scene with the markings left on new, test projectiles that he fired from the five firearms to determine whether the recovered projectiles came from any of those firearms. He then developed a report in which he concluded that two cartridge casings, one bullet, and two bullet fragments "were fired with" the Desert Eagle, and two cartridge cases "were fired with the same unknown firearm." He also confirmed that the five spent casings found inside the revolver "were fired with" that revolver.

B. The Trial

Detective Miller filed charges against Messrs. Dunbar, Jerry, and Thornton on November 15, 2019.[2] They faced a joint jury trial that spanned fifteen days in November and December 2022. The jury returned a verdict on December 6, 2022. They found Mr.

[2] Mr. Clark was charged, tried, and convicted alongside Messrs. Dunbar, Jerry, and Thornton, but is not before us in this appeal. Aside from the relevant facts of the investigation and trial, we will not discuss Mr. Clark's case and will focus on Messrs. Dunbar, Jerry, and Thornton for the remainder of the opinion.

Dunbar guilty of possessing an assault pistol (specifically, the rifle), possessing a handgun with a disqualifying conviction, and conspiracy to use a handgun in a crime of violence. The jury remained deadlocked on his charges for second-degree murder and use of a handgun in a crime of violence. The court declared a mistrial by manifest necessity as to those counts. The jury found Mr. Jerry guilty of transporting the Taurus in a vehicle, possessing a handgun while under the age of twenty-one, and conspiracy to use a handgun in the commission of a crime of violence. Finally, the jury found Mr. Thornton guilty of first-degree murder, use of a handgun in the commission of a crime of violence, transporting the Desert Eagle in a vehicle, possession of an assault pistol (specifically, the rifle), possession of a handgun with a disqualifying conviction, conspiracy to commit murder, and conspiracy to use a handgun in a crime of violence.

The court held separate sentencing hearings. Mr. Dunbar received a total sentence of twenty years' imprisonment; Mr. Jerry received a total sentence of fifteen years' imprisonment; and Mr. Thornton received a total sentence of life plus eighteen years' imprisonment.

The issues on appeal relate to the court's rulings on courtroom disturbances and closures, Mr. Monkres's expert testimony, and Mr. Dunbar's waiver colloquy. Messrs. Dunbar and Thornton also challenge the sufficiency of the evidence as to some of their convictions. We include additional facts throughout the Discussion.

II. DISCUSSION

Messrs. Dunbar, Jerry, and Thornton raise several issues on appeal. We've rephrased their Questions Presented[3] and will address them in the following order:

1. Did the court abuse its discretion when it refused to exclude emotional members of the gallery from the courtroom?

[3] Mr. Dunbar's questions on appeal are as follows:

1. Did the trial court commit plain error in permitting a firearms examination expert to opine that certain projectiles were fired from certain identified weapons?
2. Does the record fail to reflect that Mr. Dunbar knowingly, intelligently, and voluntarily waived his right to testify and elected to remain silent?
3. Was the evidence legally sufficient to sustain a conviction for possession of an assault pistol?
4. Did closures of the courtroom deprive Appellant of the right to a public trial?

Mr. Jerry's questions on appeal are as follows:

1. Did disruptions from individuals in the gallery violate Mr. Jerry's constitutional right to a fair trial?
2. Did removing the public from the courtroom violate Mr. jerry's constitutional right to a public trial?

Mr. Thornton's questions on appeal are as follows:

1. Whether there is insufficient evidence to support appellant's convictions for murder, conspiracy to commit murder, using a firearm during the commission of a crime of violence, and conspiracy to use a firearm during the commission of a crime of violence.
2. Whether the circuit court erred by closing the courtroom to the public during critical stages of appellant's jury trial.
3. Whether the circuit court committed reversible, plain error by permitting a prosecution witness to opine that 9-mm

Continued . . .

2. Did the court abuse its discretion when it closed the courtroom during jury deliberations and limited attendance during the reading of the verdicts?

3. Was it plain error under *Abruquah v. State*, 483 Md. 637 (2023), to allow Mr. Monkres to testify that certain recovered projectiles "were fired with" certain weapons?

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caliber shell casings and bullet fragments had been discharged by the Desert Eagle 9-mm pistol.

4. Whether there is insufficient evidence that appellant possessed an assault "pistol."

5. Whether disruptions from persons in the courtroom gallery during trial violated appellant's constitutional right to a fair trial.

And finally, the State's Questions Presented are as follows:

1. Should this Court decline to review for plain error the trial court's admission of the firearm examiner's opinion that ballistics evidence recovered from the murder scene and from the victim had been fired from a known firearm?

2. Did Dunbar knowingly and voluntarily waive his right to testify?

3. Should this court decline to review Dunbar's [and Mr. Thornton's] unpreserved claim that the evidence was insufficient to support his conviction for possession of an assault pistol?

4. Is the Sixth Amendment inapplicable to the consideration of jury questions during deliberations, and, if applicable, did the trial court soundly exercise its discretion when it closed the courtroom during jury deliberations and limited attendance when the verdict was announced?

5. To the extent preserved, did the trial court soundly exercise its discretion in handling disruptions from the gallery?

6. Is the evidence sufficient to support Thornton's convictions for murder, conspiracy to commit murder, use of a firearm in the commission of a crime of violence, and conspiracy to use a firearm in the commission of a crime of violence?

4. Does the record support the finding that Mr. Dunbar waived his right to testify knowingly, intelligently, and voluntarily?

5. Is the evidence sufficient to support Messrs. Dunbar's and Thornton's convictions for possession of an assault pistol?

6. Is the evidence sufficient to support Mr. Thornton's convictions for first-degree murder, conspiracy to commit murder, use of a firearm[4] in a crime of violence, and conspiracy to use a firearm in a crime of violence?

We hold that (1) the court did not abuse its discretion when it refused to remove emotional spectators from the courtroom; (2) the court did not abuse its discretion when it closed the courtroom during jury deliberations and limited attendance during the reading of the verdict; (3) it was plain error under *Abruquah* to allow Mr. Monkres to match the recovered projectiles conclusively to specific weapons; (4) the record supports the finding that Mr. Dunbar waived his right to testify knowingly, intelligently, and voluntarily; (5) Messrs. Dunbar and Thornton failed to preserve the issue of whether the evidence was sufficient to support their convictions of possession of an assault pistol; and (6) the evidence was sufficient to support Mr. Thornton's challenged convictions. We reverse Messrs. Dunbar's and Thornton's convictions because of the erroneous introduction of Mr. Monkres's unqualified ballistics opinion and we remand their cases for further proceedings consistent with this opinion. We affirm Mr. Jerry's convictions.

[4] Although Mr. Thornton's verdict sheet indicates he was convicted of use of a *handgun* in a crime of violence and conspiracy to do such, the relevant statute uses the term "firearm" and does not limit the weapon used to a "handgun." *See* Md. Code (2022, 2021 Repl. Vol.), § 4-204(b) of the Criminal Law Article.

A. The Court Did Not Abuse Its Discretion When It Declined To Remove Emotional Spectators From The Gallery Because The Court Was In The Best Position To Determine Whether The Disruptions Caused A Prejudicial Impact.

Messrs. Jerry and Thornton argue that disruptions from individuals in the gallery violated their Sixth Amendment right to a fair trial to the point that the court should have removed certain spectators from the courtroom. The State responds *first* that neither Mr. Jerry nor Mr. Thornton preserved this issue for appeal; *second*, that neither provided a sufficient record for appellate review; and *third*, that, even if the issue were preserved and the record sufficient, the court didn't abuse its discretion when it chose to admonish the disruptive members of the gallery rather than remove them from the courtroom. We conclude that Messrs. Jerry and Thornton preserved this issue and that the record is clear enough for review. On the merits, we hold that the court did not abuse its discretion in managing the courtroom as it did during each disruptive situation.

Multiple disturbances came to the court's attention during the trial, three through defense counsels' objections. The first objection arose just before opening statements. Mr. Clark's attorney informed the court that some members of the gallery were "engaged in some type of display," namely "openly weeping and, like, hugging each other during the Court's instructions [to the jury]." He asked the court to remove the emotional spectators. The court refused, stating that "[t]rials are open to the public," and that it will not remove them "absent any . . . openly disruptive conduct . . . ." Mr. Thornton's attorney spoke next. Although much of what he said is marked "unintelligible" in the transcript, he seemed to

suggest moving the emotional spectators away from the jury rather than removing them from the courtroom completely:

> [MR. THORNTON'S ATTORNEY]: (unintelligible)
>
> [COURT]: Okay. The motion to excuse the victims from the courtroom.
>
> [MR. THORNTON'S ATTORNEY]: (unintelligible) my premise wasn't so much for removing (unintelligible) away from the jury.
>
> [COURT]: Okay. Thank you.

The court then warned the public that it would not tolerate any disruptions:

> I'm speaking to everyone who's seated in the gallery. Before we begin, I just want to make sure that we understand some of the ground rules.
>
> The Court is aware that this case involves very, very serious charges, such as they—many people seated in the gallery may be impacted by them and some of the testimony and images that you may either hear or see. However, this is still a formal proceeding. Therefore, if for any reason it becomes difficult for someone, anyone, seated in the gallery to control themselves or their emotions, please excuse yourselves rather than disrupt the proceedings.
>
> Any disruption to these proceedings will not be tolerated and I will have to ask you to excuse yourselves. Therefore, if you feel like you are not going to be able to control yourself, please step out into the hallway and you will be permitted to return to the courtroom to view the proceedings afterwards.

After opening statements, the State played a recording of the 9-1-1 call about the shooting. Mr. Clark's attorney objected to the victim's mother "looking at the jury and . . . making a spectacle of herself" during the recording. The court asked if anyone else would like to be heard on the matter, and Mr. Thornton's attorney responded, although his response is "unintelligible" in the transcript. The court said it didn't notice any such

behavior, and the State said it hadn't "heard any verbal outbursts by her, nothing drawing attention to her." The court overruled the objection and declined to remove the victim's mother from the courtroom: "[S]ince I have already given a warning, until unless [sic] I notice the jurors making some kind of contact or react in some way, I am not going to excuse her. . . . When I see [disruptive behavior], I will address it again. But I've already addressed it."

The next day, the medical examiner, Pamela Ferreira, MD, testified about the autopsy she performed on Mr. Brockington. Her testimony included descriptions and discussions of several photos that she took during the autopsy. Before the State introduced the first photo, the court warned the public that they should step out if they felt uncomfortable listening to Dr. Ferreira's testimony:

> If for any reason there is somebody in the gallery who does not believe that they will be able to handle this testimony, I'm going to suggest and urge you to step out of the courtroom at this time. No disruptions will be permitted. If you cannot handle the testimony, that's perfectly fine, but you need to step out. Thank you.

Soon after this warning, Mr. Jerry's attorney raised another objection, and the court again refused to remove any spectators from the courtroom:

> [MR. JERRY'S ATTORNEY]: Objection.
>
> [COURT]: Come on up.
>
> Yes?
>
> [MR. JERRY'S ATTORNEY]: (Unintelligible).
>
> [COURT]: They're going to cry, so I'm not going to put them out because they cry. I've already made the announcement. But I'm not going to allow them to do it excessively. But to say they cannot move, I'm not going to do that.

Mr. Clark's attorney added that some people had been going in and out of the courtroom during the testimony and that such behavior was "unfair to the defendants." The court agreed that the public should not be exiting and reentering the courtroom frequently during testimony. The court directed the State to tell the victim's family not to do so and that they must remain outside the courtroom for the duration of Dr. Ferreira's testimony if they couldn't handle it. Mr. Thornton's attorney joined in the objection. The court then reiterated that it was sustaining the objection as to the family going in and out of the courtroom and overruling the objection as to counsel's request to remove the family from the courtroom.

1. Messrs. Jerry and Thornton preserved this issue for appeal.

As a threshold matter, the State claims that neither Mr. Jerry nor Mr. Thornton preserved this issue. We disagree.

Ordinarily, an issue must "plainly appear[] by the record to have been raised in or decided by the trial court" for it to be eligible for appellate review. Md. Rule 8-131(a). In trials with multiple defendants, each must lodge their own objections; they cannot, in most cases, rely on a co-defendant's objection to preserve an issue for appeal. *See Osburn v. State*, 301 Md. 250, 253 (1984) (declining to address merits of claim that State made erroneous statement during closing argument because co-defendant objected, but appellant did not); *Holt v. State*, 129 Md. App. 194, 210 (1999) ("When one co-defendant objects, but the other does not, the latter has not preserved the issue for appellate review.");

Williams v. State, 216 Md. App. 235, 254 (2014) (co-defendants must lodge their own objections or expressly join other co-defendants' objections to preserve issue for appeal).

In some cases, however, when the objecting attorney indicates that the objection applies to all defendants or the trial judge indicates that its ruling applies to all defendants, one defendant's objection may preserve the issue for another who didn't object. *See, e.g.*, *Hall v. State*, 233 Md. App. 118, 130–31 (2017) (co-defendant preserved issue for appellant because co-defendant indicated to trial judge that their position applied to defense as a whole, State "included the entire defense" when it raised its objection, and all three defendants "were bound by the same rulings" on the issue); *Bundy v. State*, 334 Md. 131, 146–47 (1994) (co-defendant's objection preserved issue for appellant because trial judge "acknowledge[d] that the codefendant's objection also benefited [the appellant]," and "the manner in which the trial judge summarily overruled the objection . . . adequately reflect[ed] that he assumed the objection was made on behalf of both defendants").

We are satisfied here that the objections raised by Messrs. Jerry and Thornton preserve this issue for appeal. Mr. Thornton objected or joined another attorney's objection to the disturbances on all three occasions. Although his objections were sometimes "unintelligible," the surrounding conversations provided enough context for us to understand that Mr. Thornton was objecting to the spectators' behavior. Despite the less-than-perfect record, Mr. Thornton preserved this issue.

Unlike Mr. Thornton, Mr. Jerry objected only after the third disturbance (of the three noted above—there were others that did not involve objections). Mr. Jerry's objection was

"unintelligible," but the court's response provides enough context to conclude that he objected to the spectators being overtly emotional. We also are satisfied that Mr. Jerry's single objection, raised only after the third disturbance, preserved the overarching issue: that the court refused defense counsels' requests to remove disruptive members of the gallery. We reach this conclusion due to the particular context of the disturbances and objections. In this context, the court's rulings, which implicated the co-defendants' rights to a fair (joint) trial, applied equally to all four defendants regardless of who objected or to whom the court directed its ruling. *See Hall*, 233 Md. App. at 130–31 (preserved in part because all co-defendants were "bound by the same rulings" on the issue, and they "were left with no other option but to comply with those rulings"). There was no significant difference between the three incidents (*i.e.*, of the three disruptions involving objections, no one disruption was more egregious or influential than the others). And no specifics about any one incident drives our holding on this issue. We view this issue less as three separate incidents requiring three separate analyses—although such parsing may be necessary in another case with different facts—and more as one overriding issue that happened to arise more than once in similar situations and with similar results.

Finally, we are satisfied that this conclusion conforms with the purpose of Rule 8-131(a): to "'ensure fairness for all parties in a case and to promote the orderly administration of law.'" *Conyers v. State*, 367 Md. 571, 594 (2002) (*quoting State v. Bell*, 334 Md. 178, 189 (1994)). The parties in this case had ample opportunity to litigate this issue and the court was able to address this issue during the trial more than once. Far from

sandbagging the State or the circuit court on appeal, the issue plainly was raised in and decided by the circuit court, as Rule 8-131(a) requires. Messrs. Jerry and Thornton preserved this issue for our review.

2. The court did not abuse its discretion when it refused to remove the emotional spectators from the courtroom.

Now to the merits. Messrs. Jerry and Thornton argue that the public's "displays, demonstrations, and emotional outbursts" in the courtroom violated their rights to a fair trial because the behavior was directed at, and evoked reactions from, the jury. They contend that the court abused its discretion when it allowed the emotional spectators to remain in the courtroom and, in turn, failed to correct the violation. The State argues in response that "the court's finding of a middle ground was a proper exercise of its discretion," and that we should "defer to the trial court's assessment of what was happening and the best way to address it." We see no abuse of discretion in the circuit court's rulings on this issue.

Generally, "[t]he conduct of criminal trials falls within the sound discretion of the trial judge." *Hunt v. State*, 312 Md. 494, 500 (1988), *aff'd*, 321 Md. 387 (1990); *see also* Jacob A. Stein, *Trial Handbook for Maryland Lawyers* § 2:7, Westlaw (3d ed. database updated Nov. 2024) ("A large measure of discretion must necessarily reside in the court" to manage the conduct of the proceedings.); *Calder v. Levi*, 168 Md. 260, 274 (1935) (trial court must have discretion to "maintain order and assure propriety in the conduct of legal proceedings"). Deference to the trial court's management of its proceedings is "especially appropriate in cases involving emotional displays or outbursts by members of a victim's

family." *Griffin v. State*, 192 Md. App. 518, 551 (2010), *rev'd on other grounds*, 419 Md. 343 (2011). After all, "emotional responses in a courtroom are not unusual, especially in criminal trials," and "the trial judge is in the best position to" determine whether an emotional outburst may have had a prejudicial effect on the jury. *Hunt*, 312 Md. at 501–02.

Messrs. Jerry and Thornton rely on *Parham v. State*, 79 Md. App. 152 (1989), and *Malik v. State*, 152 Md. App. 305 (2003)—both of which involved motions for mistrial following disruptions from gallery members—to argue that the court abused its discretion in the way it handled the outbursts in this case. In *Parham*, Mr. Parham was testifying in his own defense when the victim's mother shouted from the gallery, "Every time you beat my daughter's behind, that is how many times you went [to rehab]." 79 Md. App. at 157. Mr. Parham moved for a mistrial. *Id.* The trial judge denied the motion, instructed the jury to disregard that comment, and reminded the jury that they must reach a decision "based solely on the evidence . . . ." *Id.* at 157–58. Mr. Parham appealed, claiming that the trial court's instructions were not enough to cure the prejudice that resulted from the outburst. *Id.* at 158. We held that the court didn't abuse its discretion in denying the motion for a mistrial:

> [N]either the trial judge nor counsel was in the position to anticipate the outburst in this case. The witnesses had been sequestered and no one was aware that the victim's mother would react as she did during appellant's testimony. The trial judge acknowledged the outburst, assessed its impact upon the jury, and gave curative instructions. Appellant did not request any alternative relief to a mistrial, such as inquiry of the jury to learn if any of them did know what was said. The

> trial judge was in the best position to evaluate any prejudicial effect, and we defer to her assessment. Thus, we find no clear showing of prejudice and no abuse of discretion in the denial of the mistrial.

Id.

In *Malik*, one of the State's witnesses said to Mr. Malik, "you didn't have to put me through this. You put me through this," then left the courtroom crying and shaking. 152 Md. App. at 326–27. Mr. Malik moved for a mistrial. *Id.* at 327. The court denied the motion and gave a curative instruction: "Members of the jury, please disregard anything that the witness may have said or done after she left the witness stand." *Id.* at 327 n.11. The next day, another witness for the State became emotional while on the stand and spoke hostilely to Mr. Malik directly. *Id.* at 327. Mr. Malik moved for a mistrial again. *Id.* The court denied the motion, *id.*, and instructed the jury that they should ignore the outburst and that it was not evidence. *Id.* at 328 n.12. We affirmed the circuit court's rulings on appeal, holding that "the curative instructions were a reasonable and proper way to deal with the outbursts." *Id.* at 329.

Messrs. Jerry and Thornton argue that this case is distinguishable from *Parham* and *Malik* because here they sought removal of the disruptive spectators, not a mistrial; the disruptions started before trial and occurred more frequently than in *Parham* or *Malik*; the court's "sole curative instruction" was ineffective; and there is evidence that the outbursts distracted the jury. We are unpersuaded, however, that the differences in this case change the outcome from that in *Parham* or *Malik*.

First, our review of the court's ruling remains deferential even though the ruling here pertained to a request to remove disruptive gallery members rather than a motion for mistrial. Trial courts "must exercise considerable discretion in excluding family members or other members of the public from the courtroom," and that discretion "should be exercised sparingly." *Hunt*, 312 Md. at 502–03. Likewise, "motions for mistrial, based on the presence of a member of the victim's family, should only be granted under urgent or very extraordinary and striking circumstances," but the court's ruling on such a motion "will not be disturbed absent a clear showing of prejudice to the defendant." *Id.* at 503. The court has discretion both to handle a disruption and to grant or deny a motion for mistrial based on disturbances after considering the potential prejudicial impact. *Id.* at 501–03. Our review of the court's ruling here, then, is not so different from our review of a motion for a mistrial based on similar circumstances.

Second, the record is unclear about the impact of each disruption. There is no evidence aside from defense counsel's own comments, which in some instances contradicted the State's and the court's observations, demonstrating that the jury noticed any disruptions let alone felt swayed by the gallery members' behavior. Additionally, defense counsel did not ask the court to *voir dire* the jury to see if they noticed any emotional outbursts or felt influenced by such behavior. *See Parham*, 79 Md. App. at 158 (noting that appellant didn't ask trial court to *voir dire* jury to see if they heard what spectator said and that "trial judge was in the best position to evaluate any prejudicial effect").

It is the parties' responsibility to create a record "so that the appellate court may easily comprehend what is being complained of on appeal." Lynn McLain, *Maryland Evidence, State & Federal* § 103.21, Westlaw (database updated Aug. 2024); *see also Fields v. State*, 172 Md. App. 496, 513 (2007) ("An appellant has the burden of producing a record to rebut the general presumption that a trial court's actions are correct."). In some instances, an appellant's failure to create an adequate record will prevent us from reviewing their issue on appeal, *see, e.g.*, *Hunt*, 312 Md. at 507–08 (Court "unable to determine whether [appellant] suffered any prejudice" from guards accompanying appellant to bench conferences during trial because record was "silent as to what actually transpired" during bench conferences and unclear as to whether officers did in fact accompany appellant); *Holt*, 129 Md. App. at 211 (Court couldn't "undertake meaningful review of the [trial] court's ruling" because appellants didn't include trial court's written opinion on the subject motion in the record on appeal), but that's not the case here. Although imperfect, the record is sufficient for us to understand the parties' contentions. And in this context, we can defer to the trial court's assessment of the disruptions and its responses to each situation without disposing of this issue for lack of an adequate record. *See Parham*, 79 Md. App. at 158 (deferring to trial court's assessment because there was no inquiry into whether jury heard spectator's comments); *Hunt*, 312 Md. at 501–02 (deferring to trial court's decision not to grant mistrial because courtroom disruption not preserved in the record).

Finally, the relative frequency of the disruptions in this case doesn't sway our analysis, particularly when weighed against the seemingly minor nature of the disruptions

as compared to the outbursts in *Parham* and *Malik*. *See Parham*, 79 Md. App. at 157; *Malik*, 152 Md. App. at 326–27. Moreover, when closing the courtroom later in the trial, the court mentioned multiple other incidents or disturbances that influenced its decision but made no mention of the three disruptions underlying this argument. Again, we defer to the circuit court's assessments of each disruption. On this record, we cannot conclude that the number of emotional outbursts affected the conduct and fairness of the trial. At bottom, the circuit court did not abuse its discretion when it refused to remove emotional spectators from the courtroom.

B. The Court Did Not Abuse Its Discretion When It Closed The Courtroom During Jury Deliberations And Limited Attendance During The Verdict Reading Because Both Closures Were *De Minimis*.

Next, Messrs. Dunbar, Jerry, and Thornton all argue that the court abused its discretion by closing the courtroom to the public during jury deliberations and then allowing all six of the victim's family members, but only two family members per defendant, back into the courtroom for the reading of the verdict. Mr. Thornton contends that the court barred members of the public from entering the courtroom during two "critical stages" of the trial—jury deliberations (including the court's response to jury notes) and the reading of the jury's verdict. All three appellants claim this *sua sponte* action by the court violated their constitutional right to a public trial because it was not a *de minimis* response to the disruptions. Messrs. Jerry and Thornton argue further that the court's decision to close the courtroom constituted structural error that requires reversal whether or not they can establish prejudice.

The State responds that none of the appellants preserved their claim about the court's decision to limit attendance for the reading of the verdict. As for the closure during jury deliberations, the State asks us to adopt its position that the Sixth Amendment right to a public trial does not apply to the trial court's consideration of jury notes. Alternatively, the State argues that the court exercised its discretion soundly when it closed the courtroom due to concerns regarding space and the previous conduct of certain spectators. We hold that both closures qualified as *de minimis* restrictions on the right to a public trial.

The Sixth Amendment of the United States Constitution guarantees all criminal defendants the right to a public trial. U.S. Const. amend. VI. As the Supreme Court of the United States has emphasized repeatedly, this guarantee is a crucial component of our judicial system that is rooted in fairness and accountability. *See, e.g.*, *In re Oliver*, 333 U.S. 257, 270 (1948) ("[T]he guarantee [to a public trial] has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."); *Press-Enterprise Co. v. Superior Ct. of Cal.*, 464 U.S. 501, 508 (1984) ("Openness . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."); *Waller v. Georgia*, 467 U.S. 39, 46 (1984) ("In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages

perjury."). "Consequently, criminal trials are to be open to the public as a matter of course . . . ." *Robinson v. State*, 410 Md. 91, 102 (2009).

The right to a public trial, however, is not absolute. As we explained in *Walker v. State*, 125 Md. App. 48 (1999), other interests may take precedence over the defendant's right to a public trial to the extent that a partial or total closure of the courtroom may become necessary:

> The Sixth Amendment does not require a court to forfeit its legitimate and substantial interest in maintaining security and order in the courtroom. To the contrary, prophylactic measures, including closure, may be warranted under some circumstances, in order to maintain order, to preserve the dignity of the court, and to meet the State's interests in safeguarding witnesses and protecting confidentiality.

Id. at 69; *see also Waller*, 467 U.S. at 45 ("[T]he right to an open trial may give way . . . [to] the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information."). This is the exception rather than the norm, however, and "the balance of interests must be struck with special care." *Waller*, 467 U.S. at 45. As our Supreme Court warned in *Robinson*, "any closure of the courtroom for even part of the trial and only affecting some of the public must be done with great caution." 410 Md. at 102.

Due to the nature and significance of a defendant's right to a public trial, a violation of this right—such as an unjustified courtroom closure—is considered a "structural error," and the defendant need not prove prejudice to obtain relief. *Campbell v. State*, 240 Md. App. 428, 441 (2019) ("Because a public trial is a constitutional guarantee that is essential to the 'framework of any criminal trial[,]' the Supreme Court has deemed a violation of

this right to be a structural error that requires 'automatic reversal' when properly preserved and raised on direct appeal." (*quoting Weaver v. Massachusetts*, 582 U.S. 286, 295, 299 (2017))). Additionally, as a structural error, the deprivation of a defendant's constitutional right to a public trial cannot be harmless error. *Watters v. State*, 328 Md. 38, 48 (1992) (*citing Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). In some cases, however, a courtroom closure can be "*de minimis*," or "'too trivial' to constitute a violation of the Sixth Amendment right to a public trial." *Campbell*, 240 Md. App. at 442 (*quoting Gibbons v. Savage*, 555 F.3d 112, 121 (2d Cir. 2009)). *De minimis* closures are "undeserving of constitutional protection," and therefore do not "carry[] with [them] a presumption of prejudice to the defendant." *Watters*, 328 Md. at 46.

To determine whether a courtroom closure was *de minimis*, we consider three factors: (1) "the length of the closure"; (2) "the significance of the proceedings that took place while the courtroom was closed"; and (3) "the scope of the closure, *i.e.*, whether it was a total or partial closure." *Kelly v. State*, 195 Md. App. 403, 421–22 (2010). In *Watters*, for example, the Court held that a bailiff's unilateral decision to close a courtroom to the press, the public, and the appellant's family during the first morning of *voir dire* was not *de minimis* because the closure spanned an entire morning of trial, the public missed *voir dire* and the selection and swearing in of the jury, and the bailiff excluded the public even though some seating was available. 328 Md. at 42, 49; *see also Campbell*, 240 Md. App. at 458 (closure held not *de minimis* where court excluded appellant's family for three to three-and-a-half hours during part of *voir dire* and all of selection and swearing in of jury).

In *Kelly*, on the other hand, we distinguished *Watters* and held that a closure during part of *voir dire* qualified as *de minimis*. 195 Md. App. at 427. There, a sheriff excluded the appellant's family from the courtroom during part of *voir dire* because there was not enough seating for the prospective jurors. *Id.* at 415. Defense counsel learned of the closure and moved for a mistrial. *Id.* at 413–14. In denying the mistrial, the court explained that the sheriff excluded spectators due to space limitations: "a couple of jurors . . . were standing throughout [*voir dire*]," and the court "had no place for anybody else in the courtroom." *Id.* at 415. The court also noted that the closure lasted only a few hours in the morning and that the family was not excluded during the afternoon session (though it was unclear whether the family knew they could attend in the afternoon). *Id.* at 416. Furthermore, unlike in *Watters*, where the public missed the entire *voir dire*, selection, and swearing in process, the individuals excluded from the courtroom in *Kelly* missed only a portion of *voir dire*, much of which "involved questioning of individual jurors at the bench, a procedure that typically cannot be heard by spectators in the courtroom." *Id.* at 426. Finally, the closure was partial—limited to the appellant's family, according to the record—unlike the total closure of the courtroom in *Watters*. *Id.* at 428.

1. The total closure during jury deliberations was de minimis.

The *first* closure at issue in this case occurred during jury deliberations. On the twelfth day of trial, the court received a jury note at 2:04 p.m.—about an hour after the court dismissed the jury to have lunch and then begin deliberations—stating that one of the jurors had spoken with Mr. Clark's father during the lunch recess. The court said it no

longer was "comfortable with the public being in this trial or observing it anymore," and closed the courtroom for the duration of jury deliberations:

> This is basically the third incident that is disturbing to this Court that has occurred during the course of this trial. Earlier in the trial, the Court learned that someone had been taking photographs inside of the courtroom.
>
> The second incident the Court was made aware of was the incident that occurred I believe yesterday between family or family members, I don't know, of the victim or victims. And then the Court also learned the same day two individuals approached two other individuals who were in this courtroom watching the trial. And then I hear about this [brief exchange between a juror and Mr. Clark's father]. I am not, for those reasons, comfortable with the public being in this trial or observing it any more. I don't want the jurors to feel that they can not deliberate freely. Every juror has said that they can be fair and impartial, but the Court does not want to impose any (unintelligible). For those reasons, the Court is not going to allow the public back until it's time to hear the verdict.

The court recessed at 3:03 p.m., then reconvened later to hear objections from all four defendants. The court then *voir dired* each juror at the bench for the second time (the first time occurred before the court's closure order). The court asked each juror if they had any "unusual discussions" since they returned to the jury room. All the jurors said "no," and they returned to the jury room at 4:32 p.m. The court then discussed scheduling matters with the parties and adjourned at 5:05 p.m. Even if we don't account for a break between the time of recess (3:03 p.m.) and the time of reconvening (unknown), the court's second round of *voir dire*, which occurred at the bench, likely lasted no more than one-and-a-half hours. Combined with the subsequent thirty-minute scheduling conversation, the public

missed about two hours of proceedings, the bulk of which they would not have been able to hear even if they had been in the courtroom.

On the next day—the first full day of jury deliberations—the court received a jury note at 3:38 p.m. about scheduling. The court brought the jury in at 4:13 p.m. to inform them about a change in the courtroom for the remainder of the trial, then adjourned at 4:15 p.m. All told, this discussion likely lasted approximately thirty to forty-five minutes from the time the court received the note to the time of adjournment.

On the second full day of deliberations, the court received a note at 2:20 p.m. stating that the jury had reached unanimous verdicts on all the charges except the second-degree murder charges for three of the four defendants. The jury asked if the lack of unanimity on those three charges would affect the other verdicts. The court conferred with the parties then wrote the following response to the jury: "Your unanimous verdicts are not impacted by the undecided counts. You may continue to deliberate on the undecided counts." The court recessed at 3:16 p.m. At 3:59 p.m., the court received a second note, stating that the jury remained deadlocked on three charges and would like to end deliberations for the day. The court again conferred with the parties. The court then brought the jury in and repeated Maryland Criminal Pattern Jury Instruction 2:01, which it had given a few days earlier in its initial instructions:

> The verdict must be the considered judgment of each of you. In order to reach a verdict, all of you must agree. In other words, your verdict must be unanimous. You must consult with one another and deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself but do

> so only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to re-examine your own views. You should change your opinion if convinced you are wrong, but do not surrender your honest belief as to the weight or effect of the evidence only because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict.

The court excused the jury at 4:30 p.m. and adjourned at 4:35 p.m. In total, the court was on the record for approximately one-and-a-half hours.

The next day, the court received a final note at 12:05 p.m. explaining that the jury remained deadlocked on two charges specific to Mr. Dunbar but had reached a unanimous verdict on all other charges. The State asked the court to accept the verdicts as to Messrs. Clark, Jerry, and Thornton; accept a partial verdict as to Mr. Dunbar; and declare a mistrial as to the two deadlocked charges. Mr. Dunbar moved for a mistrial as to all charges brought against him. Ultimately, the court accepted the unanimous verdicts and declared a mistrial by manifest necessity as to the two charges on which the jury remained deadlocked. The court brought the jury in at 1:03 p.m. for the reading of the verdict. All told, this discussion lasted approximately one hour, bringing the grand total of on-the-record proceedings that occurred during jury deliberations to about five hours.

Based on this temporal breakdown, we conclude that the *first* factor of the *de minimis* analysis—the length of the closure—is neutral. *Kelly* is informative. In that case, we explained that although "the length of time, by itself, is not dispositive, courts have found that a courtroom closure of less than an hour was *de minimis*" and that a closure "for an entire day or longer" was not. *Kelly*, 195 Md. App. at 422–23. We determined that the

two-to-three-hour closure in *Kelly* was "not extensive, but . . . clearly not inconsequential" and that it fell "within the time frame in which courts have reached conflicting results." *Id.* at 427. As a result, this factor did not strongly support or oppose a *de minimis* conclusion, and we found it necessary to rely on the second and third factors to determine whether the closure qualified as *de minimis*. *Id.*

We reach the same conclusion here. The public in this case missed a total of about five hours of on-the-record proceedings across the three days of jury deliberations. As in *Kelly*, this amount of time "falls within the time frame in which courts have reached conflicting results" on this factor. *Id.* Although this Court has determined that a timeframe as short as three to three-and-a-half hours was not *de minimis*, we reached that conclusion based on factual distinctions and our analyses of the second and third factors. *See Campbell*, 240 Md. App. at 449 (three to three-and-one-half-hour closure held not *de minimis*, and fact that closure spanned part of *voir dire* and all of jury selection and swearing in was "most significant fact" distinguishing *Campbell* from *Kelly*). As we explain below, our analysis of the significance of the proceedings leads us to conclude that this case is more like *Kelly* than *Watters* or *Campbell*. Therefore, this factor weighs neither for nor against a *de minimis* determination.

The *second* factor—the significance of the proceedings—weighs in favor of a *de minimis* finding. About one-and-a-half hours of the five hours that the public missed occurred at the bench (the second *voir dire* of the jury) and outside the hearing of the public had they been in attendance, so the public missed "'nothing of significance'" during that

portion of the proceedings. *See, e.g.*, *Kelly*, 195 Md. App. at 426 (closure held *de minimis* partly because spectators excluded during *voir dire* wouldn't have heard much of what occurred, as the court questioned jurors at the bench); *Gibbons*, 555 F.3d at 121 (closure held *de minimis* partly because court interviewed jurors in adjacent room, so spectators excluded from *voir dire* missed "'nothing of significance'"). Another hour or so of the proceedings pertained solely to scheduling, a matter that the judge has discretion to handle even in the absence of the defendants. *See* Md. Rule 4-326(d)(2)(B) (judge determines whether note pertains to the case, and if it doesn't, "the judge may respond as the judge deems appropriate"); Md. Rule 4-311(c) ("The court, either before or after submission of the case to the jury, may permit the jurors to separate . . . ."); Md. Code, (1974, 2020 Repl. Vol.), § 8-422 of the Courts & Judicial Proceedings Article ("At any time before or after submission of a case to a jury, a trial judge may allow the jury to separate . . . ."). And another thirty to forty-five minutes was spent discussing and then delivering, without objection, an instruction that the court had given days earlier while the public was in attendance.

The only matter of significance that occurred during the closure was Mr. Dunbar's motion for a mistrial. But before Mr. Dunbar made this motion, at least one spectator was present and speaking with the State and the court about how many members of the victim's family would be attending the verdict reading. This seems to indicate that the court had lifted its closure order by then, but nothing else in the record suggests the same or clarifies exactly when the court allowed the spectators to return to the courtroom. Even if we

assume, though, that the courtroom was closed at that time, the spectators who attended the verdict reading heard the court's decision on Mr. Dunbar's verdict when, after the jury confirmed that they didn't reach a unanimous verdict on two of his counts, the court ruled that it would accept a partial verdict and declare a mistrial on the deadlocked counts. Aside from Mr. Dunbar's motion, the parties made no objections during the closed proceedings, and the court made no other decisions without the consent of all the parties. *See Gibbons*, 555 F.3d at 121 (public missed "nothing of significance" during closed *voir dire* where court didn't excuse any prospective jurors without both parties' consent, and parties didn't make peremptory challenges or raise objections).

Finally, although the *third* factor weighs against a *de minimis* finding because this was a total closure of the courtroom, we are persuaded that the overall lack of significance in the proceedings carries the analysis here. In concluding that this closure was *de minimis*, however, we do not adopt the State's proposed categorical rule that closures during jury deliberations never implicate a defendant's Sixth Amendment right to a public trial. Each closure must be analyzed in context and any potential infringement on a defendant's constitutional rights considered on its own merits.

2. The partial closure during the verdict reading was de minimis.

The *second* closure at issue occurred during the verdict reading. At the start of the first full day of jury deliberations, the court stated its intention to conduct the verdict reading in segments due to space limitations and earlier disruptions:

> [W]hen the jury reaches a verdict, I'm not bringing everybody up at the same [time]. I'm bringing one co-defendant up at a

> time. When that co-defendant is brought up, their respective family members and the victims will be in the courtroom. After I read the verdict, the verdict is read for that defendant, they will go downstairs, and we'll bring up the other co-defendants one by one until the verdicts are read. My courtroom cannot accommodate all the families, and given the prior incidents, it's too close for me to take that risk, and I'm not going to do it.

The parties did not object to this plan.

The court modified its ruling on the final day of deliberations. Rather than bringing the defendants and their families in one at a time, the court decided to bring all the defendants in at once but limit the number of the defendants' family members who could attend the verdict reading:

> While [Mr. Dunbar confers with his attorney on the final jury note], I've spoken with Lieutenant Spencer and the deputy. I will allow two people from each family so that I can read the verdicts all at one time, and that's for all — that includes the victim's family, but two people from each Defendant's family. Do you all know who's all here for your clients?

The court allowed counsel for Messrs. Clark, Jerry, and Thornton to contact their respective clients' families while Mr. Dunbar conferred with his attorney on the two deadlocked charges. The State then asked the court to clarify its ruling as to the victim's family and discussed the number of family members who would be attending:

> [STATE]: I'm sorry, Your Honor. You sort of dropped off a little bit. Did you say that you're not holding the victim's family to two people, or you are?
>
> [COURT]: I'm not holding the victim's family to two people.
>
> [STATE]: Okay.
>
> [COURT]: Two people for each Defendant's family because there's four Defendants.
>
> [STATE]: Yes, Your Honor. Thank you.

> [COURT]: The Court can only accommodate forty-five basically, and so I have eight corrections officers, eight counsel, so I'm just — [prosecutor], how many people are with the victim's family?
>
> [STATE]: I think there are six. I might be off by one or two.
>
> [COURT]: Okay. I'm sorry —
>
> [STATE]: Is there somebody that can stay outside with the five year old?
>
> [COURT]: I don't allow children in the courtroom.
>
> [UNIDENTIFIED SPEAKER]: That is going to be me . . . .
>
> [COURT]: Yep. Nope.
>
> [STATE]: So, it sounds like there should be five of them coming in.
>
> [COURT]: Okay.
>
> [UNIDENTIFIED SPEAKER]: Six, miss.
>
> [STATE]: Well, we need one to stay out there with the five year old.

All four defendants noted objections to the partial closure. Mr. Dunbar's attorney noted his "continuing argument for Mr. Dunbar and his family being allowed" to attend the verdict reading. Mr. Thornton's attorney then stated, "on behalf of Mr. Thornton, same objection, at the Court's order." And Mr. Jerry's attorney added "[s]ame for Mr. Jerry, Your Honor, same objection. Continuing objection to the limit to — well, the closing of the courtroom, generally, and then the limited number of family members allowed . . . ." The court then reiterated its reasoning for the attendance limitations:

> As to the, I guess, Counsel's reference to the fact that I'm allowing the victim's family, I guess, supporters to come in, and I understand there are six of them. There are four Defendants, and so the total number of people would be eight of them, so the Court is trying to be even-handed there. However, this Court's capacity is forty-five, not 120, and so

> I'm not going to for the sake of space, and given the previous conflicts that the Court has already put on the record, I'm not satisfied or comfortable that such a conflict will not reoccur, and to minimize that, as well as the Court's concern for the jury's safety, the Court is not going to allow more than that number of people in the courtroom.

As a threshold matter, we hold that Messrs. Dunbar, Jerry, and Thornton all preserved this issue for review. The appellants each lodged their own objections to the court's partial closure order and the court understood them that way. *See* Md. Rule 8-131(a); *see also* Md. Rule 4-323(c) (To make a proper objection, "it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court.").

On the merits, we hold that this closure qualified as a *de minimis* closure as well. With regard to the length of the closure, the jury entered the courtroom at 1:03 p.m. for the reading of the verdict; the courtroom clerk read and confirmed the jury's verdict; the court heard objections at the bench; and the court dismissed the jury from service at 1:32 p.m. The court then discussed the scheduling of the sentencing hearings with the parties before adjourning at 1:43 p.m. All told, the verdict reading lasted approximately thirty minutes. Even if the closure remained in effect during the scheduling discussion that followed the verdict reading, the time increases to just forty minutes. This amount of time weighs in favor of a *de minimis* conclusion. *See Kelly*, 195 Md. App. at 422 (generally, closure of less than one hour is *de minimis*). As to the significance of the proceedings, the verdict reading is an important part of trial that must occur in "open court." Md. Rule 4-327(a). Some courts have said explicitly that it is a "critical stage[] of a criminal trial," *see Siverson*

v. O'Leary, 764 F.2d 1208, 1214 (7th Cir. 1985) (referring to defendant's right to effective counsel), and we don't dispute that notion here. With regard to the scope of the closure, though, this was only a partial closure, because the court excluded some but not all the defendants' family members from the courtroom. So, despite the significance of the proceedings involved, the limited nature of this closure both in time and scope makes it *de minimis* overall. *See Kelly*, 195 Md. App. at 427–29 (partial closure during stage of trial (*voir dire*) was *de minimis* partly because it was limited in time (few hours) and scope (only appellant's family was excluded)).

We hold that both closures were *de minimis* and that neither implicated Messrs. Dunbar's, Jerry's, or Thornton's right to a public trial.

C. It Was Plain Error To Allow A Firearms Expert To Conclude That Certain Projectiles Were Fired From Certain Weapons Because This Testimony Violated *Abruquah*, And It Affected The Outcome And Fairness Of The Trial.

Next, Messrs. Dunbar and Thornton argue that the court committed plain error when it allowed Mr. Monkres to testify that some of the recovered projectiles were fired with specific weapons. They contend that Mr. Monkres's testimony is prohibited under the reasoning of the Maryland Supreme Court's ruling in *Abruquah v. State*, 483 Md. 637 (2023), an opinion the Court issued after their trial but before the resolution of their direct appeals. They argue here that this renders the court's decision to admit Mr. Monkres's testimony plain error.

In response, the State argues that this claim is not appropriate for plain error review. Alternatively, the State claims that plain error review is unwarranted in this case even if

Messrs. Dunbar and Thornton satisfied the usual elements guiding our discretion to exercise plain error review because Messrs. Dunbar's and Thornton's position is "unfair" in light of the anti-sandbagging purpose of Md. Rule 8-131(a) and the limited nature of *Abruquah*'s holding. We disagree and conclude that Messrs. Dunbar and Thornton have satisfied the plain error doctrine and that reversal is warranted.

Rule 8-131(a) restricts appellate review ordinarily to issues that the parties had a chance to litigate or that the trial court had a chance to address. Under the plain error doctrine, however, appellate courts have discretion, in limited circumstances, to consider unpreserved claims of error when doing so would not "work an unfair prejudice to the parties or to the court." *Bell*, 334 Md. at 189. Our discretion to consider an unpreserved error isn't subject to a rigid test, but when considering the possibility, appellate courts typically assess the plainness and significance of an unpreserved error in four ways:

> "(1) there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant; (2) the legal error must be clear or obvious, rather than subject to reasonable dispute; (3) the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings; and (4) the error must seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings."

Hallowell v. State, 235 Md. App. 484, 505 (2018) (*quoting Newton v. State*, 455 Md. 341, 364 (2017)); *see also United States v. Olano*, 507 U.S. 725, 731–37 (1993) (explaining plain error review framework).

1. This case involves an error that neither Mr. Dunbar nor Mr. Thornton waived.

The *first* plain error consideration seems obvious: an error must exist. *See Hallowell*, 235 Md. App. at 505 (*quoting Newton*, 455 Md. at 364).[5] Messrs. Dunbar and Thornton assert that permitting Mr. Monkres to testify that the recovered projectiles were fired from specific weapons was "improper as a matter of law." The State argues that it's not "'clear or obvious' that the trial court committed an error" because the law on the admissibility of firearm identification evidence was "very much in flux" at the time of the trial and, even after *Abruquah*, the reliability and admissibility of such evidence remains unsettled. Although relevant to the first consideration, this argument goes to the second: whether the error was "plain." As for the first prong, Mr. Monkres's testimony connecting the projectiles to the guns conclusively was exactly the kind of testimony that *Abruquah* prohibits, and admitting that portion of his testimony was error under the holding of that case.

Although the facts are different, the error here mirrors that in *Abruquah*. In that case, police charged Mr. Abruquah with the shooting death of one of his housemates. *Abruquah*, 483 Md. at 649–50. During Mr. Abruquah's first trial, Scott McVeigh, a firearms expert, testified that he had concluded "'to a reasonable degree of scientific certainty'" that the

[5] The error also must be one that the appellant did not waive at trial affirmatively. *Hallowell*, 235 Md. App. at 505 (citation omitted). The parties do not dispute the issue of waiver, so we need not undertake the waiver versus forfeiture portion of this analysis. *See Olano*, 507 U.S. at 732–34 (discussion on waiver and forfeiture); *Savoy v. State*, 420 Md. 232, 240–41 (2011) (same).

projectiles recovered from the victim's body had been fired from the firearm that Mr. Abruquah had admitted was his. *Abruquah v. State*, No. 246, Sept. Term 2014, 2016 WL 7496174, at *3 (Md. App. Dec. 20, 2016). The jury convicted Mr. Abruquah of first-degree murder and a related firearm offense. *Abruquah*, 483 Md. at 650. He appealed, and we reversed and remanded for a new trial on grounds unrelated to Mr. McVeigh's testimony. *See Abruquah*, 2016 WL 7496174, at *1.

Before his next trial, Mr. Abruquah filed a motion *in limine* to exclude Mr. McVeigh's testimony. *Abruquah*, 483 Md. at 650. The circuit court held a hearing to determine whether Mr. McVeigh's testimony was admissible under the *Frye-Reed* "general acceptance" test. *Id.* at 650 n.3; *see also Reed v. State*, 283 Md. 374, 389 (1978) (adopting *Frye* general acceptance test), *overruled by Rochkind v. Stevenson*, 471 Md. 1 (2020). The court decided that "'firearm and toolmark identification [was] still generally accepted and sufficiently reliable,'" but the matching analysis that firearms examiners engage in was too subjective to permit Mr. McVeigh to "'testify to any level of . . . scientific certainty that a suspect weapon matches certain [projectiles].'" *Id.* Despite this ruling, the circuit court, over the defense's objections, allowed Mr. McVeigh to testify at Mr. Abruquah's second trial that certain recovered projectiles "'at some point had been fired from [Mr. Abruquah's firearm].'" *Id.* at 651. The jury convicted Mr. Abruquah of the same offenses. *Id.* Mr. Abruquah appealed, and we remanded the case to the circuit court to determine whether Mr. McVeigh's testimony would still be admissible under the newly adopted *Daubert-Rochkind* standard. *Id.*; *see also Rochkind*, 471 Md. at 38–39 (overruling

Frye-Reed and adopting *Daubert* standard). The circuit court held another hearing and reached the same conclusion it had at the previous *Frye-Reed* hearing. *Abruquah*, 483 Md. at 651–52.

Mr. Abruquah filed another appeal and while it was pending in this Court, the Supreme Court granted his petition for writ of *certiorari*. *Id.* at 652. The Court began with an extensive background on the methodology of firearms identification in which the examiner compares recovered projectiles to test projectiles that are fired from a suspect weapon, then categorizes the recovered projectiles as identified, eliminated, or inconclusive based on their level of similarity with the test projectiles. *Id.* at 653, 656–73. The Court determined that the scientific community criticizes this methodology for, among other things, its lack of specific protocols; issues in accuracy, repeatability, and reproducibility of results; deficiencies in training; subjective nature; and lack of scientific validity. *Id.* at 663–64. The Court then conducted its own *Daubert-Rochkind* analysis using the testimony and studies introduced in the circuit court and concluded that the evidence "did not provide a reliable basis for Mr. McVeigh's unqualified opinion that" certain projectiles recovered from the crime scene were fired from Mr. Abruquah's firearm. *Id.* at 680–97. Ultimately, the Court held that the circuit court abused its discretion by allowing Mr. McVeigh to provide such an opinion, vacated Mr. Abruquah's convictions, and remanded for a new trial. *Id.* at 697–98.

The error in this case was the same as in *Abruquah*. Like the expert in that case, Mr. Monkres used microscopic comparisons to determine whether the projectiles found at the

murder scene matched the test projectiles that he fired from the recovered weapons. He testified that of the projectiles recovered from the murder scene and Mr. Brockington's body, two cartridge cases, one bullet, and two bullet fragments "were fired with" (*i.e.*, matched) the Desert Eagle, and three cartridge cases were fired with the same unknown firearm. The remaining projectiles collected from the murder scene did not match any of the recovered firearms conclusively. He testified further that the five spent cartridge cases found inside the revolver had been fired from that revolver (*i.e.*, the revolver had been fired five times at some point). The defendants didn't request a *Daubert-Rochkind* hearing, nor were they required to. The State didn't submit any evidence establishing the reliability of Mr. Monkres's conclusive testimony, let alone enough evidence to satisfy *Abruquah*. And without evidence sufficient to support the admissibility of this testimony, which we discuss in greater detail below, it was error for the court to allow him to provide this unqualified opinion.

2. The error was "plain."

The *second* question is whether the error was "plain." According to the State, the alleged error in this case was not "plain" because the law on the admissibility of firearms evidence was unsettled at the time of the trial. The State argues further that the alleged error in this case is "subject to reasonable dispute" because *Abruquah* limited its holding to the facts and data established and introduced *in that case* and did not render a final verdict on the admissibility of conclusive firearm identification evidence. We disagree on the first point—the relevant law was settled, at least in Maryland, at the time of the trial in

this case. On the second point, although the holding in *Abruquah* was specific to the facts and data in that case, the result is nonetheless the same in this case.

a. The law was settled at the time of trial.

In *James v. State*, 191 Md. App. 233 (2010), this Court opined that an error is not "plain" for purposes of plain error review unless the error was wrong at the time of the trial. *Id.* at 247. Eight years later, we recognized an exception to this rule: if "'the law at the time of trial was *settled* and clearly contrary to the law at the time of appeal,' [then] 'it is enough that an error [is] "plain" at the time of appellate consideration'" to satisfy this prong of the analysis. *Hallowell*, 235 Md. App. at 505–06 (emphasis added) (*quoting Johnson v. United States*, 520 U.S. 461, 468 (1997)). We adopted the Supreme Court of the United States's "reason[ing] that were the rule otherwise, defense counsel would be obligated to 'inevitably [make] a long and virtually useless laundry list of objections to rulings that were plainly supported by precedent.'" *Id.* at 506 (*quoting Johnson*, 520 U.S. at 468). Although the Supreme Court later held that this exception applies whether the legal question at issue was settled or unsettled at the time of trial, *see Henderson v. United States*, 568 U.S. 266, 279 (2013), Maryland courts have yet to do the same. And the State, contending that the admissibility of firearms identification evidence was unsettled law at the time of the trial in this case, urges us not to adopt *Henderson*'s expansion of the plain error doctrine. We need not reach the *Henderson* question in this case, however, because the law regarding the admissibility of firearms identification evidence was settled at the time of the trial.

Citing our Supreme Court's lengthy discussion of firearms identification evidence in *Abruquah*, the State points out that after two national research councils released reports in 2008 and 2016 criticizing the validity of firearms identification evidence, "'some jurisdictions began to limit the scope of a ballistics expert's testimony.'" 483 Md. at 678 (*quoting Gardner v. United States*, 140 A.3d 1172, 1183 (D.C. 2016)). The Court cited several out-of-state cases in which courts restricted firearms experts' testimonies and, in most cases, prohibited the expert from providing a conclusive, unqualified opinion that certain projectiles matched with certain firearms. *Id.* at 678–79 (citations omitted). Apart from one United States District Court for the District of Maryland case in which the court applied federal law, *see United States v. Willock*, 696 F. Supp. 2d 536, 546–47, 571–74 (D. Md. 2010), *aff'd sub nom.*, *United States v. Mouzone*, 687 F.3d 207 (4th Cir. 2012), none of the cited cases were decided in Maryland or relied on Maryland precedent on the admissibility of firearms identification evidence. And we are not persuaded that the presence of trends in other state and federal jurisdictions by itself unsettles a legal question in our state. Although our courts sometimes look to other jurisdictions for persuasive authority or to find a majority view on a particular issue, the question of whether Maryland law answered a legal question at a specific point in time is not a question we can or should answer using other jurisdictions' opinions on the matter. To conclude that a legal question was unsettled because courts in other jurisdictions were moving toward a new perspective on that issue would put an unnecessary burden on trial attorneys to always know the state of a legal issue in jurisdictions across the country to determine whether that issue is settled

or unsettled in Maryland. In the plain error context, particularly while Maryland has yet to adopt the expanded doctrine under *Henderson*, this would be a heavy burden indeed.

Despite the complicated nature of scrutinizing and admitting expert testimony in trial court, firearms identification evidence, including conclusive testimony matching specific projectiles with specific firearms, was admissible in Maryland at the time of the trial in this case. *See, e.g.*, *Reed*, 283 Md. at 380 (noting "ballistics" as an example of a "generally accepted" scientific discipline); *Fleming v. State*, 194 Md. App. 76, 80, 106–07 (2010) (concluding (in dicta) that circuit court didn't err when it admitted expert testimony matching conclusively the recovered weapon to the "fatal shots"; noting that, despite *Reed*'s age and widespread debate, "courts have consistently found the traditional method [of firearms identification] to be generally accepted within the scientific community"); *Patterson v. State*, 229 Md. App. 630, 639–43 (2016) (rejecting appellant's claim that firearms identification was "junk science" and that he wouldn't have been convicted if he'd been able to introduce studies criticizing it at trial because such science was still generally accepted). Although the general standard for evaluating expert testimony changed when our Supreme Court adopted *Daubert*, *see Rochkind*, 471 Md. at 38–39, the law on the admissibility of firearms identification testimony did not become unsettled solely as a result of this change. *See, e.g.*, *Williams v. State*, 251 Md. App. 523, 548, 552–55 (2021) (firearms expert gave unqualified opinion matching projectiles with weapons at trial; this Court remanded for a *Daubert-Rochkind* hearing; Court commented that it saw no "analytical gap" and no "error in the firearm examiner's testimony that would prevent the

circuit court from admitting the testimony after remand"), *aff'd*, 478 Md. 99 (2022). Having an opportunity to challenge a law or precedent does not make that legal issue unsettled.

b. *Abruquah*'s holding applies to this case.

As to the State's second point, it's true that the Court in *Abruquah* limited its holding to the evidence introduced during the *Frye-Reed* and *Daubert-Rochkind* hearings in that case. *Abruquah*, 483 Md. at 656. And the Court highlighted that it did not consider additional scientific articles that the State had not presented at the hearings, explaining that "[i]f any of those studies materially alters the analysis . . . , they [would] need to be presented in another case." *Id.* at 656 n.6. The State uses this language to assert that because Messrs. Dunbar and Thornton didn't request a *Daubert-Rochkind* hearing, the State had no opportunity to present those additional studies. The State suggests that had such a hearing occurred, it would have submitted evidence sufficient for the court to find Mr. Monkres's conclusory testimony admissible and that, therefore, the error here was "subject to reasonable dispute." We do not believe the lack of a hearing makes this error subject to reasonable dispute.

Again, the law on the admissibility of firearms identification evidence was settled in Maryland at the time of the trial in this case. (*See* Subsection II.C.2.a. of this opinion). That testimony was "generally accepted" and admissible at trial, *see Reed*, 283 Md. at 380; *Fleming*, 194 Md. App. at 106–07; *Patterson*, 229 Md. App. at 639–43; *Williams*, 251 Md. App. at 552–53, and defense counsel was not *required* to request a *Daubert-Rochkind* hearing. Unlike a trial that occurs *after* the Court issued its opinion in *Abruquah*, where

defense counsel is on notice of the inadmissibility of conclusory firearms identification testimony and must request a *Daubert-Rochkind* hearing to challenge its admissibility and preserve that issue for appeal, the trial in this case occurred *before* the Court issued its opinion in *Abruquah*, so defense counsel was not on notice of the potential inadmissibility of such testimony and was free to rely on the fact that it was accepted freely at the time. Defense counsel in this pre-*Abruquah* trial relied on valid precedent that Mr. Monkres's testimony was admissible. The lack of an optional hearing at which the State *may* have submitted evidence sufficient for the circuit court to find Mr. Monkres's testimony admissible even under *Abquruah* does not render the error here "subject to reasonable dispute."

At bottom, the admissibility of firearms identification testimony was settled at the time of this trial, and the admission of Mr. Monkres's unqualified testimony was plain error under *Johnson* and *Hallowell*.

3. The error affected Messrs. Dunbar and Thornton's substantial rights.

The *third* question asks whether the error affected the defendant's substantial rights, or, in other words, affected the outcome of the trial. *Hallowell*, 235 Md. App. at 505 (citation omitted). The State says that in this case, the outcome of the trial would've been the same had the court prohibited Mr. Monkres from providing a conclusive opinion matching the firearms with the cartridge cases. The State suggests that had Mr. Monkres testified that the markings on the projectiles were "'consistent with'" the identified guns

rather than "fired with" those guns, "practically speaking, the jury would [have] likely reach[ed] the same conclusion." We disagree.

Johnson provides a helpful contrast. In that case, Ms. Johnson stood trial for perjury after lying to a grand jury. *Johnson*, 520 U.S. at 463. She had testified that she paid for improvements to her house with cash from her mother when the money in fact came from her boyfriend's drug trafficking activities. *Id.* at 463–64. During her perjury trial, the court, in accordance with the law at the time, concluded that her statements were material and did not submit the question of materiality to a jury. *Id.* at 464. Ms. Johnson didn't object. *Id.* While her case was pending on direct appeal, the law changed to require that the question of materiality go to the jury. *Id.* Ms. Johnson appealed under the plain error doctrine, but the Eleventh Circuit held that "there was overwhelming evidence of materiality and that no reasonable juror could conclude that [Ms.] Johnson's false statements about the source of the money were not material to the grand jury's investigation." *Id.* at 465 (cleaned up). Essentially, it made no difference that the court didn't submit the question to the jury, because the jury likely would've reached the same answer on materiality as the court had. *Id.* The Supreme Court agreed and affirmed. *Id.* at 470.

Unlike *Johnson*, this case lacked "overwhelming" evidence connecting the projectiles recovered at the murder scene to the weapons found at the crash scene. Without Mr. Monkres's testimony, only speculation linked Messrs. Dunbar and Thornton to Mr. Brockington's murder. The security footage couldn't establish this connection because it's impossible to identify any of the six individuals in that video. And the remaining evidence,

if sufficient to connect the defendants to the weapons in the car, didn't connect the weapons (and thus the defendants) to Mr. Brockington's murder. We decline as well to speculate as to whether a jury would find Mr. Monkres's (hypothetical) testimony that the projectiles were *consistent with* certain firearms to be persuasive enough to conclude beyond a reasonable doubt that one or more of the defendants fired a weapon at Mr. Brockington.

Without Mr. Monkres's unqualified opinion linking the recovered projectiles to certain weapons, there is a reasonable possibility that the jury would not have found beyond a reasonable doubt that Messrs. Dunbar or Thornton participated in Mr. Brockington's murder. The error, then, affected Messrs. Dunbar's and Thornton's substantial rights.

4. The error seriously affected the fairness of the trial.

Fourth, and finally, we exercise our discretion to remedy a plain error only if the error "'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.'" *Hallowell*, 235 Md. App. at 505 (*quoting Newton*, 455 Md. at 364). The State argues that the error in this case doesn't meet this standard because Messrs. Dunbar and Thornton each received a vigorous defense, the State introduced sufficient evidence to warrant a guilty verdict, both had the opportunity but failed to lodge a *Daubert-Rochkind* challenge on the reliability of Mr. Monkres's testimony, and the reliability of Mr. Monkres's testimony was a question best left to the jury.

An error that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings," *id.* (*quoting Newton*, 455 Md. at 364), is one that "'vitally affects a defendant's right to a fair and impartial trial.'" *Rubin v. State*, 325 Md. 552, 588 (1992)

(*quoting State v. Daughton*, 321 Md. 206, 210–11 (1990), *habeas corpus granted by Rubin v. Gee*, 128 F.Supp.2d 848 (D. Md. 2001), *aff'd*, 292 F.3d 396 (4th Cir. 2002)). In *Hallowell*, for example, the trial court instructed the jury (correctly, at the time) that first-degree assault could serve as a predicate felony for Mr. Hallowell's second-degree felony murder charge. 235 Md. App. at 501. The jury convicted him of second-degree murder and a related firearm offense. *Id.* at 496. The law changed while Mr. Hallowell's direct appeal was pending such that first-degree assault can no longer serve as the predicate offense for second-degree felony murder. *Id.* at 493 (*citing State v. Jones*, 451 Md. 680, 708 (2017)). Although Mr. Hallowell didn't preserve this issue, we held that the erroneous instruction constituted plain error. *Id.* at 506. We determined that the error was plain under *Johnson* and that it affected Mr. Hallowell's substantial rights because "it created the distinct possibility that he was convicted of . . . a 'non-existent crime'" (*i.e.*, second-degree felony murder based on a first-degree assault). *Id.* And we concluded that "the error seriously affected the fairness, integrity or public reputation of judicial proceedings" because we had no way of knowing whether the jury found Mr. Hallowell guilty of second-degree specific-intent murder or second-degree felony murder (the "'non-existent'" crime). *Id.*

Hallowell aids our analysis here. We know the exact crimes of which Messrs. Dunbar and Thornton were convicted, but we don't know whether the jury relied on the connection provided by Mr. Monkres's inadmissible testimony in reaching its decisions. It's not unreasonable to say, as Mr. Thornton argues in his brief, that "[Mr.] Monkres's

testimony was an integral part of the prosecution's evidence against [him]" and the other defendants. Based on our review of the record, Mr. Monkres's testimony played a significant role in connecting the defendants to Mr. Brockington's murder. But that testimony, under these circumstances, is now considered unreliable. *See Abruquah*, 483 Md. at 696. As Mr. Dunbar contends, "it is hard to imagine a more effective means of undermining the fairness, integrity, or public reputation of judicial proceedings than by basing a conviction . . . upon evidence found to be scientifically unsound."

The admission of Mr. Monkres's conclusive testimony matching the recovered projectiles to certain weapons was plain error. It bears emphasizing that this error was neither the fault of the trial judge nor trial counsel, all of whom were following what, at the time, was settled law in Maryland on the admissibility of firearms identification testimony. Under these circumstances, it would disserve the interests of justice to allow this error to go uncorrected, and we reverse Messrs. Dunbar's and Thornton's convictions and remand for further proceedings consistent with this opinion.[6]

D. The Record Supports The Finding That Mr. Dunbar Waived His Right To Testify Knowingly, Intelligently, And Voluntarily.

The *next* issue pertains solely to Mr. Dunbar. He contends that the record fails to establish that he waived his right to testify knowingly, intelligently, and voluntarily. Mr.

[6] Although the jury may have reached a verdict on Messrs. Dunbar's and Thornton's possession-related convictions without relying on Mr. Monkres's expert opinion connecting the weapons to the murder, we decline to speculate about whether Mr. Monkres's testimony affected the jury's decisions on those offenses. And in any event, the State has not argued that any error in admitting Mr. Monkres's testimony was harmless as to any specific convictions, possession-related or not.

Dunbar points to two "ambiguous" answers he provided during the on-the-record waiver colloquy that, he claims, cast doubt on whether his decision to remain silent was constitutionally adequate. He argues the trial court erred by not resolving the ambiguities before finding the waiver to be sufficient.

The State responds that Mr. Dunbar's answers were not ambiguous when viewed in the context of the entire waiver colloquy. The State argues further that the trial court was under no obligation to intervene during the waiver colloquy and that the court found correctly that Mr. Dunbar waived his right to testify knowingly, intelligently, and voluntarily. We conclude that Mr. Dunbar's answers were not ambiguous and that the court did not err in finding his waiver to be constitutionally sufficient.

The Fifth and Sixth Amendments of the United States Constitution guarantee defendants two conflicting yet "inextricably intertwined" rights: (1) the right to testify on their own behalf; and (2) the right to remain silent. *Tilghman v. State*, 117 Md. App. 542, 553–54 (1997); *see also Hamilton v. State*, 79 Md. App. 140, 142–43 (1989) (explaining conflicting nature of right to testify and privilege against self-incrimination). A defendant may waive one of these rights and, inevitably, invoke the other only if they do so "knowingly and intelligently." *Tilghman*, 117 Md. App. at 553. To satisfy this requirement, the defendant, at the time of the waiver, must have had a "'sufficient awareness of the relevant circumstances and likely consequences' that forfeiting his right entails." *Id.* (*quoting Brady v. United States*, 397 U.S. 742, 748 (1970)); *see also Morales v. State*, 325

Md. 330, 335 (1992) ("The decision whether or not to testify . . . must be made with a basic appreciation of what the choice entails.").

Although a trial court must advise a *pro se* criminal defendant of their constitutional rights, the court is not required to do so itself when the defendant is represented by counsel. *Tilghman*, 117 Md. App. at 554. Instead, "Maryland law recognizes a presumption, premised on the permitted inference that attorneys, as officers of the court, 'do as the law and their duty require them,' that a represented defendant has been told of his constitutional rights, by his attorney." *Id.* at 554–55 (*quoting Stevens v. State*, 232 Md. 33, 39 (1963)). Indeed, "the trial court is entitled to assume that counsel has properly advised the defendant about [their right to testify] and the correlative right to remain silent." *Id.* at 555. Only if "it becomes clear to the trial court that a defendant 'does not understand the significance of his election not to testify or the inferences to be drawn therefrom and where the presumption is rebutted,' [must the court] advise a represented defendant of" these rights. *Morales*, 325 Md. at 336 (*quoting Gilliam v. State*, 320 Md. 637, 652–53 (1990)).

Here, with consent from the State and the other defense attorneys, Mr. Thornton's attorney advised all four defendants of their right to testify or remain silent and engaged in short questioning with each of them. While speaking with Mr. Dunbar, the defense attorney asked two questions back-to-back about Mr. Dunbar's state of mind:

> [MR. THORNTON'S ATTORNEY]: Is your mind free and clear? Are you under the influence of any alcohol or narcotics or other substances?
>
> [MR. DUNBAR]: *Yes and no.*

(Emphasis added). Mr. Dunbar's attorney did not object or intervene at the time. Now, Mr. Dunbar claims that his answer was ambiguous and that the court was obligated to ask follow-up questions to clarify the ambiguity.

We disagree. Although this answer might be troubling if Mr. Dunbar had been responding to a single question (*i.e.*, Q: "Is your mind free and clear?" A: "Yes and no."), the structure of his answer follows the structure of the defense attorney's questioning. It's reasonable to conclude that Mr. Dunbar intended to answer "yes" to the first question about the clarity of his mind and "no" to the second question about substance use. To be sure, the best practice is to ask and answer questions one at a time to avoid confusion, but we perceive no ambiguity in this portion of the conversation.

The second question at issue pertained to whether Mr. Dunbar was waiving his right to testify under duress:

> [MR. THORNTON'S ATTORNEY]: Okay. And no one is threatening you, forcing you, or coercing you in any way, shape, or form if you decide not to testify, *is that correct?*
>
> [MR. DUNBAR]: *No.*

(Emphasis added). Mr. Clark answered the same question in this manner, stating "no" despite the added "is that correct" question. Messrs. Jerry and Thornton answered the same question in the affirmative. Neither the defense attorneys nor the court raised concerns about these questions or answers. The court and the parties seemed to understand, as do we, that those who responded "no" answered the substantive question, and those who responded "yes" answered the "is that correct" question. Again, it is best to ask a single

question to avoid this type of confusion, but we are comfortable that everyone, especially the court, understood all the answers.

We note as well that on the following day, each defense attorney, including Mr. Dunbar's, had their clients confirm that they still wished to remain silent. Later that same day, when asked if he had evidence or testimony to present, Mr. Dunbar's attorney reiterated that "Mr. Dunbar wishe[d] to exercise his right not to testify and asked . . . [the court] to advise the jury not to hold that against him." The court had the discretion to presume that Mr. Dunbar's attorney advised him of his right to testify adequately before stating not once but three times that he wished to remain silent. *See Tilghman*, 117 Md. App. at 554–55 (*quoting Stevens*, 232 Md. at 39). We see no error in the court's decision not to interfere during the waiver colloquy, and we conclude that Mr. Dunbar's waiver was constitutionally sufficient.

E. Messrs. Dunbar And Thornton Failed To Preserve A Claim As To Their Convictions For Possession Of An Assault Pistol.

Next, Messrs. Dunbar and Thornton argue that the evidence in this case is insufficient to support their convictions for possession of an assault pistol because the only assault weapon that the evidence linked to Messrs. Dunbar and Thornton was the rifle, which is not an assault *pistol*. The State argues that neither Mr. Dunbar nor Mr. Thornton preserved this claim because they did not argue during trial that the recovered weapons were not assault pistols. We agree that this issue is not preserved.

To preserve a sufficiency claim, a defendant must make a motion for judgment of acquittal at trial and "'argue precisely the ways in which the evidence should be found

wanting and the particular elements of the crime as to which the evidence is deficient.'" *Arthur v. State*, 420 Md. 512, 522 (2011) (*quoting Starr v. State*, 405 Md. 293, 303 (2008)); *see also* Md. Rule 4-324(a) (defendant must "state with particularity all reasons why the motion [for judgment of acquittal] should be granted"). The defendant is limited to the reasons articulated in their motion at trial and may not raise new sufficiency arguments for the first time on appeal. *See Starr*, 405 Md. at 303 (defendants who moved for judgment of acquittal at trial are "not entitled to appellate review of reasons stated for the first time on appeal"); *Poole v. State*, 207 Md. App. 614, 633 (2012) (refusing to consider appellant's sufficiency argument because he didn't include it in his motion for judgment of acquittal at trial).

In this case, Mr. Thornton moved for judgment of acquittal at the close of the State's evidence. He argued, among other things, that the evidence was insufficient to convict him of possession of an assault pistol because "there [was] no evidence that [he] was the individual carrying what appears to be a long gun in" the video of Mr. Brockington's murder. He did not challenge the fact that the State listed the rifle (a type of long gun) as the weapon underlying his charge for possession of an assault pistol. Mr. Thornton renewed his motion at the close of all the evidence. He incorporated his prior arguments and the arguments of the co-defendants, and he added one additional ground unrelated to the assault pistol charge.

Mr. Dunbar also moved for judgment of acquittal at the close of the State's evidence. He incorporated Messrs. Thornton's and Jerry's arguments, both of whom had made their

motions before Mr. Dunbar. Mr. Thornton had argued that he wasn't the one holding the long gun in the video, and Mr. Jerry argued that his DNA was not on the rifle. Mr. Dunbar did not add further argument as to his charge for possession of an assault pistol other than a blanket statement that he "was not found with any weapons." He renewed his motion at the close of all the evidence, incorporating his earlier arguments and those of his co-defendants. None of the defendants raised the issue of whether the rifle qualified as an assault pistol, so neither Mr. Dunbar nor Mr. Thornton incorporated that argument in their motions for judgment of acquittal. This issue is not preserved, and we decline to reach it.

F. The Evidence Is Sufficient To Support Mr. Thornton's Convictions For First-Degree Murder, Conspiracy To Commit Murder, Using A Firearm In A Crime Of Violence, And Conspiracy To Use A Firearm In A Crime Of Violence.

Finally, Mr. Thornton argues that the evidence was insufficient to support his convictions for first-degree murder, conspiracy to commit murder, use of a firearm in a crime a violence, and conspiracy to use a firearm in a crime of violence. Specifically, he contends that the evidence was insufficient to find beyond a reasonable doubt that he acted with premeditation or that there was a conspiratorial agreement between him and another person. The State counters that when viewed in the light most favorable to the State, the evidence admitted at trial was sufficient to find all essential elements of each challenged conviction. We conclude that the evidence was sufficient to support Mr. Thornton's convictions.

The "'critical inquiry'" in a sufficiency analysis "'is whether, after viewing the evidence [and any reasonable inferences supported by 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.'" *Smith v. State*, 415 Md. 174, 184, 185–86 (2010) (*quoting Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)). In conducting this analysis, we acknowledge that the jury was in the best position to view the evidence and assess the credibility of the witnesses. *Id.* at 185. We therefore defer to the jury's reasonable inferences, *id.*, and their "ability to choose among differing inferences . . . ." *State v. Manion*, 442 Md. 419, 431 (2015) (*quoting State v. Smith*, 374 Md. 527, 534 (2003)). Our role simply is to "determine whether [those inferences] are supported by the evidence." *Smith*, 415 Md. at 185.

This standard remains the same even though Mr. Thornton's convictions rest solely on circumstantial evidence. *See id.* 185–86 (citations omitted). Although circumstantial evidence must produce more than a "'strong suspicion'" that the defendant committed the subject offense, *id.* at 185 (*quoting Bible v. State*, 411 Md. 138, 157 (2009)), "'generally, proof of guilt [beyond a reasonable doubt] based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eyewitness accounts.'" *Manion*, 442 Md. at 431–32 (*quoting Smith*, 374 Md. at 534). What matters is that the circumstantial evidence "'afford[s] the basis for an inference of guilt beyond a reasonable doubt.'" *Smith*, 415 Md. at 185 (*quoting Taylor v. State*, 346 Md. 452, 458 (1997)).

In addition, as Mr. Thornton concedes in his brief, all the evidence introduced at trial, including the firearms identification testimony that we have deemed inadmissible

under *Abruquah* (*see* Section D above), must be considered in this sufficiency analysis. *See Emory v. State*, 101 Md. App. 585, 629–30 (1994) (holding that the appellate court must consider the evidence heard by the jury in its sufficiency analysis, even if it was admitted improperly (*citing Lockhart v. Nelson*, 488 U.S. 33 (1988))).

The jury in this case convicted Mr. Thornton of first-degree murder, conspiracy to commit murder, use of a firearm in a crime a violence, conspiracy to use a firearm in a crime of violence, and a few other offenses not challenged in this appeal. As for Mr. Thornton's non-conspiracy-related convictions, to convict him of the use of a firearm in a crime of violence, the jury had to find beyond a reasonable doubt that he used a firearm "in the commission of a crime of violence," in this case, murder in the first degree. Md. Code (2002, 2021 Repl. Vol.), § 4-204(b) of the Criminal Law Article ("CL"); *see also* Md. Code (2003, 2022 Repl. Vol.), § 5-101(c)(11) of the Public Safety Article (listing first-degree murder as a "crime of violence"). To convict him of first-degree murder, the jury had to find beyond a reasonable doubt that he murdered Mr. Brockington deliberately, willfully, and with premeditation. *See* CL § 2-201(a)(1). Mr. Thornton argues only that the evidence failed to establish premeditation. To establish premeditation, the State must prove that the defendant contemplated killing the victim before doing so:

> [For a killing] to be "premeditated" the design to kill must have preceded the killing by an appreciable length of time, that is, time enough to be deliberate. It is unnecessary that the deliberation or premeditation shall have existed for any particular length of time. Their existence is discerned from the facts of the case. If the killing results from a choice made as the result of thought, however short the struggle between the

> intention and the act, it is sufficient to characterize the crime as deliberate and premeditated murder.

Tichnell v. State, 287 Md. 695, 717–18 (1980) (citations omitted).

As for Mr. Thornton's conspiracy-related convictions, conspiracy to commit murder and to use a firearm in the commission of that murder required the jury to find beyond a reasonable doubt that he and at least one other person agreed to use a firearm to kill Mr. Brockington. *See Mitchell v. State*, 363 Md. 130, 145 (2001) (defining common law conspiracy (citation omitted)). "'The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design.'" *Id.* (*quoting Townes v. State*, 314 Md. 71, 75 (1988)).

The State introduced evidence establishing that Mr. Thornton was in the SUV that crashed that evening and that he may have been the driver of that vehicle. Sergeant Walp, the officer who arrested Mr. Thornton, testified that she saw Mr. Thornton exit the car from the driver's side and that he had the car keys attached to his belt loop, even though he denied being the driver. A reasonable jury could credit Sergeant Walp's testimony, which was corroborated by footage from her body-worn camera. The jury then could conclude from this evidence that Mr. Thornton was the getaway driver and that he was fleeing the scene of the murder. Moreover, as the court instructed, the jury was permitted to consider flight as evidence of consciousness of guilt. *See Thompson v. State*, 393 Md. 291, 303 (2006) ("[F]light may be indicative of a consciousness of guilt by the defendant.").

The State also introduced evidence linking Mr. Thornton to some of the weapons found in the SUV. Officer Merson collected the Desert Eagle from the floor of the front

passenger side of the SUV, next to where Mr. Thornton would have sat as the alleged driver. Ms. Silbaugh, the DNA analyst, concluded that Mr. Thornton's DNA matched the sample from the Desert Eagle and that the match was "971 billion times more probable than a coincidental match to an unrelated individual in the African American population." Although Messrs. Clark's and Dunbar's DNA matched the sample on the Desert Eagle as well, the probabilities of their matches being non-coincidental were much smaller (94.9 thousand times and 37.5 million times more probable, respectively). Ms. Keiter testified that she swabbed two "red-brown stain[s]" on the Desert Eagle and its magazine as well, and that both came back positive for blood. Ms. Silbaugh's report confirmed that Mr. Clark was the "major contributor" to those two samples. The State, however, introduced photos of the SUV, photos of Mr. Clark after the crash, Ms. Silbaugh's report, and testimony from Detective Damestoit indicating that Mr. Clark sustained injuries during the crash and that his blood was on the front passenger airbag. Based on this evidence, a reasonable jury could dismiss these two strong matches as the likely result of Mr. Clark bleeding on the Desert Eagle, which was below his feet in the car. Finally, the State introduced Mr. Monkres's expert testimony that multiple projectiles recovered from the murder scene "were fired with" the Desert Eagle, the weapon that Mr. Thornton's DNA matched.

The State also introduced evidence sufficient for a reasonable jury to find that Mr. Thornton conspired with others to murder Mr. Brockington with the Desert Eagle, which in turn served as evidence of premeditation. *See Mitchell*, 363 Md. at 149 ("[T]he kind of awareness and reflection necessary to achieve the unity of purpose and design for a

conspiracy is essentially the same as that required for deliberation and premeditation."); *Alston v. State*, 414 Md. 92, 117 (2010) ("[T]he conspiracy [to murder] necessarily supplies the elements of deliberation and premeditation."). The security footage introduced at trial showed a group of six people approach Mr. Brockington. One of them was holding what appeared to be a long gun, the same type of gun as the rifle that police later found in the SUV. Two of the six people turned towards Mr. Brockington and began shooting at him. All six individuals then fled the scene, which again can be considered evidence of consciousness of guilt. *See Thompson*, 393 Md. at 303. A reasonable jury could consider the actions of at least the two individuals who stopped, if not all six individuals in the group, as evidence of a planned course of action.

Alongside this seemingly coordinated action, the number of wounds inflicted, "the intensity of the wounds[,] and the brutal manner in which the wounds were inflicted" serve as evidence of premeditation as well. *Purnell v. State*, 250 Md. App. 703, 715 (2021). In this case, after conducting Mr. Brockington's autopsy, Dr. Ferriera concluded that he'd been shot ten to twelve times. Additionally, the security footage showed that one person in the group fired a final shot at Mr. Brockington after he'd fallen on the sidewalk from the previous barrage of bullets. A reasonable jury could consider this as evidence of premeditation due to the number of gunshot wounds Mr. Brockington had and the brutal nature of the shooting.

The firearms identification evidence also supported a finding of conspiracy and premeditation. Mr. Monkres's report and testimony indicated that two cartridge casings

and one bullet recovered from the murder scene were fired with the Desert Eagle; two of the recovered cartridge casings "were fired with the same unknown firearm"; and one bullet and one bullet fragment extracted from Mr. Brockington's body were fired with the Desert Eagle. Based on his examination, he concluded that at least two, but potentially four, firearms were fired at the murder scene.

Mr. Monkres confirmed that the revolver had been fired five times, leaving behind five spent casings. He confirmed as well that the Taurus and Ruger were both fully loaded. Officer Merson's body-worn camera footage showed him removing ten rounds of ammunition from the rifle and its magazine, about one-third of its capacity according to Mr. Monkres's assessment. This evidence shows that the six individuals who approached Mr. Brockington that night were carrying at least five fully or partially loaded weapons and had fired at least two of those weapons at the scene. The fact that the long gun was visible in the security footage indicates further that all six people knew that at least one person in the group was armed. Viewing this evidence in the light most favorable to the State, a reasonable jury could conclude beyond a reasonable doubt that Mr. Thornton conspired with at least one other individual, which could include the two individuals who escaped apprehension at the crash site, to use the Desert Eagle to murder Mr. Brockington.

* * *

Based on these holdings, we reverse Messrs. Dunbar's and Thornton's convictions due to the *Abruquah* violation and remand for further proceedings consistent with this opinion. We affirm Mr. Jerry's convictions.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY IN CASES NOS. 1598/2023 AND 611/2023 REVERSED AND CASES REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. THE MAYOR AND CITY COUNCIL OF BALTIMORE TO PAY THE COSTS.

JUDGMENT IN CASE NO. 639/2023 AFFIRMED. APPELLANT TO PAY THE COSTS.