Circuit Court for Worcester County
Case No. 23-K-16-000289

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 854

September Term, 2019

KELVIN SEWELL

v.

STATE OF MARYLAND

Leahy,
Friedman,
Beachley,

JJ.

Opinion by Leahy, J.
Concurring Opinion by Friedman, J.

Filed: August 30, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Our Court is again confronted with appellant Kelvin Sewell's conviction by a jury, for a second time, of a single count of misconduct in office. Kelvin Sewell served as Chief of the Pocomoke City Police Department (the "Department") from 2011 until his termination in 2015. He was the first African American to lead the Department. In 2016, the United States Equal Employment Opportunity Commission ("EEOC") found reasonable cause to believe that Sewell[1] was unlawfully "discharged in retaliation" for refusing to fire Officer Franklin Savage and Lieutenant Lynell Green, who had alleged various forms of racial discrimination against the Department with the EEOC.

On July 16, 2016, Sewell was indicted in the Circuit Court for Worcester County on one count of misconduct in office and one count of conspiracy to commit misconduct in office. The charges stemmed from Sewell's involvement in the investigation of a traffic incident that occurred on November 14, 2014. That evening, Douglas Matthews hit and damaged two unoccupied parked cars while driving home from the Prince Hall Masonic Lodge in Pocomoke City and then left the scene of the accident. The force of the impact, however, caused one of the wheels to come off the car, leaving a mark in the road where the remnants of the axle dragged for several blocks along Cedar Street. The car then made a right turn onto Eighth Street, and then a left turn onto Laurel Street, until the car finally stopped on Matthews's front lawn.

---

[1] In this opinion we refer to parties and witnesses by their last names in all succeeding references without honorific, and mean no disrespect thereby. We do this to avoid confusion because, since 2014, the job titles of the parties and witnesses have changed—in some instances, multiple times.

Pocomoke City Police Officer Tanya Barnes, and several other witnesses, testified, during Sewell's first trial, to the unusual manner in which Sewell directed the investigation and his failure to issue any citation to Matthews. At the close of a one-day trial, on December 1, 2016, the jury found Sewell guilty of misconduct in office but acquitted him on the conspiracy charge. Sewell appealed his conviction, raising five issues pertaining to the fairness of the proceedings in the trial court. On November 29, 2018, this Court reversed his conviction and remanded the case for a new trial on the basis that the trial court erred in excluding Sewell's expert witnesses. *Sewell v. State*, 239 Md. App. 571, 580 (2018).

Between the first and second trials, Sewell's counsel informed the Office of the State Prosecutor ("OSP") that one of the State's witnesses, Tanya Barnes, recanted her testimony in the presence of Sewell and his colleague, Kedrick Scribner, an investigator for the Baltimore City State's Attorney's Office. Sewell's counsel provided the OSP with Scribner's affidavit to support Sewell's claim that Barnes told him she was pressured by OSP investigators to testify against Sewell or else the OSP would bring unrelated charges against her.

According to the State Prosecutor, Barnes "vehemently denied" these allegations. The OSP then subpoenaed Barnes to appear before a grand jury, where she testified that she never recanted her testimony. Next, the OSP subpoenaed Scribner to testify before the grand jury. The State Prosecutor stopped the proceeding, when it appeared that Scribner

was not being truthful, and gave his counsel an opportunity to review the transcript. Thereafter, Scribner invoked his Fifth Amendment privilege against self-incrimination.

Sewell filed a motion to dismiss and a motion for an evidentiary hearing on his allegations of prosecutorial misconduct and vindictiveness, including "the improper use of the grand jury to 'lock in' potentially exculpatory witnesses in an already-indicted case." Sewell attached his affidavit to the motion to dismiss in which he recited, among other things, his version of the facts surrounding Barnes's recantation of her testimony. The court denied the motions, without receiving any evidence regarding Sewell's allegations of prosecutorial misconduct and vindictiveness, at a hearing on April 11, 2019.

Sewell's second trial began on May 14, 2019 and ended the next day. Once again, a jury convicted Sewell of the single count of misconduct in office. Sewell was sentenced to three years, all suspended, and placed on supervised probation. Sewell timely appealed and presents three issues for our review, which we reorganize as follows:

1. "Whether the trial court abused its discretion in denying Sewell's motions and other filings relating to prosecutorial misconduct, and in denying an evidentiary hearing concerning them."

2. "Whether the trial court erred in permitting the State's expert witness to opine on Sewell's mental state and intent, and in permitting the State's expert to assume critical facts not in evidence."

3. "Whether the jury's verdict was based on legally insufficient evidence."

We conclude that the circuit court erred by denying Sewell an evidentiary hearing after he proffered verifiable facts amounting to some evidence of bad faith conduct by investigators within the OSP. Accordingly, we remand the case for an evidentiary hearing

on Sewell's verifiable allegations relating to prosecutorial misconduct. *See Portillo Funes v. State*, 469 Md. 438, 475-76 (2020) (stating that when the trial court "fail[s] to make findings of fact . . . prior to trial," on a matter "discrete from the issue at trial," and justice would be served by further proceedings, "[a] limited remand is proper"). For guidance on remand, we observe that under the circumstances presented, we do not discern anything improper about giving a witness, in the presence of counsel, an opportunity to consider whether the testimony provided to the grand jury was not truthful. Based on the record, Sewell did not present the trial court with verifiable facts to support his contention that the OSP coerced Scribner into silence or threatened to prosecute him for perjury.

In part II of this opinion, we address the remaining issues Sewell raises on appeal on the contingency that Sewell is unable to substantiate his claims of prosecutorial misconduct. *See, e.g.*, *Mills v. State*, 239 Md. App. 258, 264 (2018) (ordering limited remand for *Batson* hearing to determine reasons for peremptory challenges but finding no reversible error on remaining issues raised on appeal). Accordingly, based on the record in the second trial, we hold that the State's expert's opinions did not lack an evidentiary basis and that the jury was presented with sufficient evidence to support its finding that Sewell's conduct in responding to the hit and run amounted to misconduct in office rather than the appropriate exercise of his discretionary authority.

I.

Pretrial Motions Relating to Allegations of Prosecutorial Misconduct and Vindictiveness

A. Background

Sewell's Motion to Dismiss in First Trial

In October 2016, Sewell filed a motion to dismiss for prosecutorial misconduct, alleging the charges against him were brought in retaliation for his EEOC complaints and the federal discrimination lawsuit that were filed against the Department and the Worcester County State's Attorney's Office.[2] Sewell argued that the "timing of the indictment

[2] While Sewell was Chief of the Department, he filed a federal complaint of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), with the EEOC against the Pocomoke City Police Department, which he later amended on June 9, 2015, to also include a charge of racial discrimination against the Worcester County Sheriff's Office. The Pocomoke City Council and Mayor terminated Sewell on June 29, 2015, after which he amended his EEOC complaint the third time to allege retaliatory termination based on his refusal to fire Officer Franklin Savage and First Lieutenant Lynell Green, who had their own charges of discrimination pending before the EEOC against the Department. On January 20, 2016, Sewell, Savage, and Green filed a civil rights lawsuit under 42 U.S.C. § 1981 and § 1983 in federal court against multiple defendants, including the Department, Pocomoke City, and the State's Attorney for Worcester County, seeking damages and attorney's fees as well as declaratory and injunctive relief. *Savage v. Maryland*, 896 F.3d 260, 267 (4th Cir. 2018). On September 29, 2016, Sewell, Savage, and Green amended their federal complaint to include the Title VII claims after they were administratively exhausted before the EEOC. The United States Department of Justice Civil Rights Division intervened in support of the plaintiffs on March 20, 2017. Order Granting Motion to Intervene, *Savage v. Pocomoke,* No. 1:16-cv-00201-ELH (D. Md. Mar. 20, 2017), ECF No. 154. Ultimately, the case was resolved under a consent decree that required the City to develop and revise its policies "to ensure proper handling of complaints"; prohibited retaliation against individuals who assert claims under Title VII; and "provide[d] mandatory annual training regarding harassment and retaliation to all of [the City's] employees." The City was required to pay approximately $1.1 million in monetary awards to Savage, Sewell, and Green, and another $500,000 in attorney's fees.

(Continued)

compared to [his] EEOC complaints and the State's investigation [wa]s indicative of a taint" and suggested a "targeting of [Sewell] to find something, anything against him." The circuit court denied his motion to dismiss, without holding an evidentiary hearing, on November 3, 2016.

In Sewell's first appeal, we held that the court's denial of his motion to dismiss for prosecutorial misconduct without a hearing was proper because "Sewell failed to 'present facts sufficient to raise a reasonable doubt about the [OSP's] motive[.]'" *Sewell*, 239 Md. App. at 601 (quoting *McNeil v. State*, 112 Md. App. 434, 465 (1996)). We reasoned that the "curious" timing of Sewell's indictment alone was insufficient to merit a hearing because "[a] claim of vindictive prosecution based solely on the timing of the filing of the charges, without some evidence of actual bad faith, does not rise beyond the level of mere conjecture." *Id.* at 601 (quoting *Robinson v. State*, 209 Md. App. 174, 190 (2012), *overruled on other grounds, Dzikowski v. State*, 436 Md. 430, 456 (2013)). We also noted that Sewell conceded, on three prior occasions, that he was *not* accusing the party against whom he directed his motion, the OSP, of governmental misconduct. *Id.* at 600.

Alleged Recantation

After we remanded the case, on February 12, 2019, Sewell's counsel sent a letter to the State Prosecutors informing them that counsel had "learned additional information regarding Tanya Barnes that warrants dismissing the case against Chief Sewell." Counsel

---

See Order Entering Judgment, *Savage* (D. Md. Jan. 10, 2020), ECF No. 314 (incorporating by reference releases and a consent decree and entering judgment against Pocomoke City).

indicated that, in January 2019, Barnes approached Sewell's vehicle while it was parked on Gay Street in Baltimore City. The letter stated that Barnes apologized for lying, and quoted Barnes telling Sewell that "[t]he two investigators told me that they were going to indict me if I didn't lie for them." The letter further indicated that Barnes approached Sewell at least two other times and that the encounters were corroborated by video footage. Counsel submitted that the "new information strongly cautions in favor of dismissal of the indictment[.]" In addition, counsel informed the OSP that if it elected not to dismiss the indictment, counsel intended to file a "renewed motion to dismiss for government misconduct and to seek an evidentiary hearing, incorporating these new developments."

Sometime after receiving the letter from Sewell's counsel, the OSP, "aware of its important obligation as truth-seekers and wanting to avoid suborning perjury, asked [] Barnes if [Sewell's] allegations were truthful."[3] Because Barnes "vehemently denied" the allegations, the OSP placed her in front of a grand jury, "not to discuss her past testimony, but to discuss [Sewell's] new allegations against her and ensure that she was being truthful with the State and would be truthful in her trial testimony." Barnes denied the allegations before the grand jury under oath. Defense counsel was then made aware of Barnes's grand jury testimony.

On March 1, 2019, defense counsel provided the OSP with an affidavit from Kedrick Scribner dated February 22, 2019. In his affidavit, Scribner noted that he worked

[3] The quotations in this paragraph are from the "State's Response to Defendant's Motion for Evidentiary Hearing and Supplemental Memorandum Supporting Renewed Motion to Dismiss," filed by the State Prosecutor on April 1, 2019.

with Sewell and that Sewell was his supervisor. Scribner attested that, on February 1, 2019, he was with Sewell at the Juvenile Justice Center in Baltimore when Barnes approached them. Although Sewell told Barnes, "I can't talk to you," the two walked away from Scribner to talk. Eventually, Scribner walked over to where Sewell and Barnes were conversing and overheard that Barnes had received "some type of letter from someone, talking about her coming to court to testify against Chief Sewell." In Scribner's account,

> Ms. Barnes stated, "I don't want to. I don't want to do that." She then said, "I'm not going to lie again." And she also said, "I'm not going to let them make me lie again. You're a good Chief, and you treated me good." I recall her saying at least twice that she was not going to lie again. She also said, "I'm not going to testify. Those guys came after me last time." I understood that she was referring to whoever had sent her the letter to testify.

Scribner observed in the affidavit that, after the conversation, Barnes "seemed distressed." He recounted that Barnes spoke with Steve Janis, a reporter, and his assistant. Scribner averred that Janis asked Barnes to record a video statement, but Barnes declined because "she was still on the clock, and was in uniform."

Defense counsel provided the OSP with video footage of the February 1 interaction between Barnes, Scribner, Janis and his assistant, and Sewell. In turn, on March 5, 2019, the OSP provided defense counsel with the grand jury testimony of Barnes,[4] and subpoenaed Scribner to appear before the grand jury. According to the OSP, the State stopped questioning Scribner before the grand jury "[w]hen it became apparent to the State that [he] was not being truthful[.]" Outside of the grand jury room, the State Prosecutor

[4] Barnes's grand jury testimony was not a part of the record on appeal.

expressed his concerns to Scribner's counsel and offered Scribner the opportunity to review and perhaps amend his testimony after speaking to his counsel. Scribner's counsel requested a copy of the grand jury transcript and additional time to confer with Scribner. Approximately two weeks later, Scribner's counsel informed the OSP that Scribner would invoke his Fifth Amendment privilege if subpoenaed again to testify in front of the grand jury.

On March 12, 2019, a few days after Scribner's grand jury appearance, the State Prosecutor questioned a third individual before a grand jury—Lieutenant Spencer Giles, an employee of the Baltimore City Sheriff's Office.[5]

Motion to Dismiss in Second Trial

Sewell filed a "Renewed Motion to Dismiss" for prosecutorial misconduct on March 12, 2019. The motion "incorporate[d] the arguments and recitations made in his prior motion to dismiss for government misconduct" filed before his first trial. Sewell newly asserted that there was "significant evidence that [] Barnes not only lied but did so under pressure from investigators from the Office of the State Prosecutor." Because the prosecutors were aware of Barnes's admissions, Sewell contended, "their continued pursuit of th[e] case amount[ed] to misconduct warranting dismissal." Sewell requested an

[5] The transcript from Giles's grand jury appearance only appears in the record as an exhibit to Sewell's Memorandum in Aid of Sentencing. It is not clear, therefore, whether the OPS provided the transcript to defense counsel prior to the hearing on the motion to dismiss and request for hearing.

"evidentiary hearing to probe Officer Barnes'[s] admissions and the circumstances around them."[6]

Scribner's affidavit was attached as an exhibit to the motion, along with an affidavit from Sewell dated March 11, 2019. In his affidavit, Sewell recounted occasions in early 2019 when he interacted with Barnes "in or around the Juvenile Justice Center located in Baltimore, Maryland." First, Sewell averred that on January 11, 2019, he was waiting for his daughter in front of the Baltimore City Juvenile Court. He asserted that,

> Ms. Barnes exited the courthouse and then looked in my direction. She began walking in another direction but then diverted toward me. Once she got to the passenger side of my truck, she stated, "I am so sorry for lying on you, Chief." She then told me that she lied because "they were going to charge me with stealing five hundred dollars." When I asked who she meant, she said, "Those two investigators. They harassed me, they did surveillance on my house, and they came to my house unexpectedly, just showed up several times."

Sewell then attested that he and Barnes "had other passing interactions at the Juvenile Justice Center[,]" during which Barnes "was friendly" and would "sometimes say in front of her coworkers that [Sewell] was 'the best Chief.' Sewell recounted an interaction that took place on February 1, 2019, when he went to the Juvenile Justice Center with Scribner to meet with an investigator. In the affidavit, he described what happened after he got off an elevator on the third floor with Scribner and Giles:

> Lieutenant Giles pointed and said, there's Tanya. Tanya looked in my direction and started walking towards me. I started backing up, saying, "I can't talk to you, I can't talk to you."

---

[6] As defense counsel explained to the motions court, all references to Barnes's grand jury testimony in the motion were redacted.

> She said, "I've got something to show you. Let me put my stuff down in the office." Mr. Scriber was there while this was happening. Ms. Barnes then went to another room.
>
> When she came back out, she gave me a hug and kissed me on the cheek, and then we walked to another part of the room to talk, away from Mr. Scribner. She pulled her cell phone out, and she showed me the screen, which had a letter displayed on it. I could clearly see the name Thomas McElroy on the letter.
>
> In that conversation, she stated, "They are trying to get in touch with me because they want me to come back to court to testify against you." I did not respond, and she went on to say, "Chief, I'm not going to go back to court to testify against you, they made me come to court the last time and I didn't want to go."

According to Sewell, Barnes repeated "I'm not going to lie on you," and "I'm not going to testify" in front of Scribner. Sewell told Barnes that she "need[ed] to tell somebody," so he called a reporter to speak with her. Sewell attested that after the reporter, Janis, arrived with his assistant, Barnes declined to be videotaped and asked to speak with Sewell's counsel instead. Sewell averred:

> I called my attorneys and let [Barnes] take the phone. I heard her tell them, "I'll take your phone number and call you when I get off, because I'm still on the clock." I took the phone back and gave her the office number for my attorneys.
>
> While I was talking to my attorney, I overheard Ms. Barnes say to Mr. Janis that she was being "harassed by them."

On March 22, 2019, the OSP filed a "Memorandum in Opposition to Defendant Kelvin Sewell's Renewed Motion to Dismiss and Request for an Evidentiary Hearing." In its memorandum, the OSP summarized its investigation into Sewell's allegations. Specifically, the OSP recounted:

> After receiving the [February 12th] letter, the State served Barnes with a grand jury subpoena and she testified before the grand jury. During her testimony, Barnes denied all of the allegations contained in the letter from Sewell's attorneys and indicated that the letter was a lie and an attempt by Sewell to discredit her. Based on her grand jury testimony, the State began a larger investigation into these allegations raised by Sewell's attorneys against Barnes and any potential charges. This investigation is on-going; **however other witnesses have testified before the grand jury and documentary evidence has been obtained which discredit these allegations**.
>
> In response to the letter and after Barnes testified before the grand jury, the State contacted Sewell's attorneys and told them that Barnes had testified and denied these allegations. The State further stated its intent to move forward with the underlying re-trial and provided Sewell's attorneys with a copy of Barnes['] grand jury testimony. A few days later, Sewell's attorneys presented the State with an Affidavit from Kedrick Scribner, an individual who works for Sewell at the Baltimore City State's Attorney's Office. This Affidavit described the interaction between Sewell and Barnes that Barnes had previously described in grand jury. Based on this Affidavit the State placed Scribner in grand jury and questioned him about his statements in his Affidavit. Scribner was represented by counsel when he testified. Based on his testimony, the State believes that his Affidavit is not credible.
>
> Shortly thereafter, Sewell's attorneys filed this instant Motion to Dismiss which now includes an Affidavit by Sewell as an Exhibit. Sewell's Affidavit is inconsistent with Sewell's attorneys' earlier letter to the State, as well as inconsistent with the Affidavit of Scribner, his colleague.

(Emphasis added). After noting the "demanding" standard necessary to prove a claim of selective prosecution, the OSP asserted that "Sewell has failed to present verifiable facts amounting to some evidence tending to show the existence of bad faith" and instead concluded that "[t]here was an allegation by Sewell that the State investigated and has found meritless." According to the OSP, "[t]o grant a hearing on such evidence would

mean that any defense lawyer's disagreement about a witnesses['] credibility amounts to prosecutorial misconduct."

A few days later, on March 25, Sewell filed a "Motion for Evidentiary Hearing and Supplemental Memorandum Supporting Renewed Motion to Dismiss." Sewell alleged prosecutorial misconduct including "prosecutorial sanctioning of investigators' improper motivation in pursuing this prosecution; prosecutorial vindictiveness stemming from the reversal and remand of this case by the Maryland Court of Special Appeals; intimidation of exculpatory witnesses; and improper use of the grand jury to 'lock in' potentially exculpatory witnesses in an already-indicted case." Regarding the alleged intimidation of Scribner and Barnes, Sewell contended "[a]ccording to our understanding of what transpired, an evidentiary hearing would demonstrate that the prosecutors crossed the line drawn in *Webb* [*v. Texas*, 409 U.S. 95 (1972)] and [*State v.*] *Stanley*[, 351 Md. 733 (1998)] by intimidating Mr. Scribner and deterring him from testifying" and "elicit what transpired between Officer Barnes and the prosecutors." Sewell asserted that "there was no credible underlying crime to be investigated" but "[r]ather, the circumstances described here show that the grand jury was used to intimidate witnesses into not producing exculpatory testimony at trial." Sewell concluded:

> The circumstances presented here produce an inference that the prosecutors are retaliating against Mr. Sewell by seeking to deter one witness – the State's most critical witness – from recanting her inculpatory trial testimony, and another witness from providing exculpatory testimony. At a bare minimum, it is submitted that an evidentiary hearing is needed to further develop these facts.

On April 1, 2019, the OSP filed another response to Sewell's motions. The OSP asserted that Sewell's "contentions regarding the actions of investigators from the Office of the State Prosecutor have been litigated and are without merit"; that his "contention that the State's use of the grand jury was for the purpose of intimidating a witness and thus, improper, misrepresents important facts and mischaracterizes the State's use of the grand jury"; and that Sewell failed to meet his burden to show circumstances posing a realistic likelihood of vindictiveness. Specifically regarding Barnes, the OSP argued:

> The facts here . . . essential to understanding the State's basis for using the grand jury are rooted in the Defendant's allegation that a State's witness, Tanya Barnes, confessed to the Defendant that she had been intimidated by investigators employed by the Office of the State Prosecutor and testified untruthfully in the original trial of Defendant. Defendant's counsel provided the State with this information and requested the State not retry Defendant based on Defendant's allegation and threatened a Motion to Dismiss for prosecutorial misconduct if the State intended to proceed with the retrial of Defendant. The State, aware of its important obligation as truth-seekers and wanting to avoid suborning perjury, asked Ms. Barnes if Defendant's allegations were truthful. Ms. Barnes vehemently denied Defendant's allegations and asserted she had been truthful during the Defendant's original trial. The State then placed Ms. Barnes in grand jury, not to discuss her past testimony, but to discuss Defendant's new allegations against her and ensure that she was being truthful with the State and would be truthful in her trial testimony. Her testimony was disclosed to Defense Counsel making them fully aware that the State was using the grand jury to ensure that Defendant's new allegations were not true and that a State's witness had and would continue to testify truthfully.

The OSP concluded: "all of the actions related to the events [Sewell] raises in his current motion arise from [Sewell]'s allegation that a State witness was lying. The State, after careful examination and investigation, prompted by [Sewell]'s serious allegation against its witness, has elected to retry the Defendant."

Motions Hearing

The court considered Sewell's motions at a hearing held on April 11, 2019. Defense counsel explained the basis of the allegations to the court:

> The misconduct is that we voluntarily proffered to [the State Prosecutor and Deputy Prosecutor] , we told them – we didn't have to, but we told them about Mr. Scribner's existence and the fact that he was in a position, just happened to be apparently, in a position where he could corroborate the fact that Ms. Barnes was recanting her testimony. And we gave them a declaration.
>
> * * *
>
> . . . . But here's what happened. Basically – first of all, they dropped a grand jury subpoena on him. . . . They had no right to do that because the case is already indicted and they're misusing the grand jury in order to prepare this case as opposed to some other case.

Defense counsel recounted that the State prosecutors told Scribner they believed he was lying during his grand jury testimony and asserted:

> The government cannot, the State cannot – they absolutely cannot intimidate an exculpatory witness in that manner. As a result of their interaction with Mr. Scribner, Mr. Scribner now intends to take the Fifth.

Defense counsel informed the court that Scribner was present for the hearing.

The State Prosecutor presented the court with the February 12, 2019 letter from Sewell's counsel and argued:

> Your Honor, if you look at what's written in that letter, there are criminal allegations against our investigators. They say that Tanya Barnes, a State witness, has recanted her testimony. And not only recanted her testimony, but actually has said that – t[w]o investigators, long-term investigators who work for my office, have threatened her and said, if you don't lie for us, we're going to charge you. So even though that testimony – her testimony was corroborated, including by a statement that we had from his co-defendant, even though on the face it seems somewhat of an incredible

> allegation, the fact that they've written this letter that was such a serious allegation made us feel that we had to do certain due diligence.
>
> So we went right to sheriff-who is now Deputy Sheriff Barnes. We confronted her and said, what's the story here. She denied it. She said I've had contact with Chief Sewell. He's offered me a job. He's been friendly to me. I've been friendly back because [we] work in the same building. However, I never said that at all.

The State Prosecutor explained that after Barnes denied recanting her testimony, he put her in the grand jury to take it to the "next level because of the seriousness of the accusation." After receiving Scribner's affidavit, "alleging that [the OSP's] witness admitted to perjuring herself and that that testimony ended up convicting two individuals[,]" the OSP subpoenaed Scribner before the grand jury. Meanwhile, the State Prosecutor explained that "we did some of our own research. We looked at other videotapes." When Scribner testified before the Grand Jury, after a series of questions, the State Prosecutor stopped the proceedings when he believed Scribner "was not being honest" because the "goal [wa]s not to charge Mr. Scribner with perjury" but "to get to the bottom of the investigation of extremely serious criminal allegations that [the defense lawyers] have made against our office."

Defense counsel spoke next, maintaining that the OSP's actions were improper:

> What a prosecutor is allowed to do, Your Honor, they are allowed to warn a witness in a generic manner. . . . They're allowed to warn the witness generically about the consequences of committing perjury. If you lie under oath, you can be prosecuted for perjury. That's it.
>
> You cannot tell a witness – a prosecutor cannot tell a witness ever, an exculpatory witness that we think you're lying. You can't do it. It's not close. There is not one case, [] in the State of Maryland or any other jurisdiction that I know of that says that that's allowed.

In closing, defense counsel renewed his request for an evidentiary hearing.

The court denied Sewell's motion to defer decision on the motion to dismiss, and then denied the motion to dismiss, after asking counsel why the "Scribner issue" could not be handled at trial. "If I assume everything you're saying is true, couldn't – couldn't I or some other judge make a decision based on what you're saying?" Defense counsel replied, "In point of fact you could." Then, after inquiring about the trial dates, the judge also stated that he didn't "see any need at this time for an evidentiary hearing. Do you have any other grounds for your motion to dismiss?" Defense counsel began to answer but was interrupted by the court's observation: "[y]ou can raise anything later. If you want to, you can raise this later orally if you want, but at this time I see no basis to grant your motion to dismiss." Defense counsel responded, "[u]nderstood." The court continued, "the motion to dismiss is denied. The renewed motion to dismiss and for an evidentiary hearing is denied."

Additional Pre-Trial Filings

On May 7, 2019, Sewell filed a "Motion to Compel Immunity for Defense Witness Kedrick Scribner." In the motion, he argued that Scribner's testimony would be significant and exculpatory, but that, as a result of the State Prosecutor's conduct, Scribner "may invoke his constitutional right against self-incrimination if called to testify." The motion requested "two forms of relief: an order compelling the State to confer immunity upon Scribner so that he can testify, and an order precluding the State from eliciting testimony from Ms. Barnes."

The OSP filed a response on May 8, 2019. The OSP asserted that Sewell "manufactured an allegation against a State's witness, Tanya Barnes, and now asks this Court to force the State to immunize a witness who has produced statements, parts of which the State knows to be untrue." The OSP pointed to Barnes's assurances that she had been truthful, as well as emails obtained by the OSP that "show[ed] that Mr. Scribner's affidavit, that the State questioned Mr. Scribner about in grand jury, was edited and drafted in part by [defense counsel] and by [Sewell]." The OSP further alleged that Sewell "changed his own narrative in a separate sworn statement based on the evidence Mr. Scribner was presented with in grand jury that contradicted his original narrative." The court denied Sewell's motion in an order entered later that same day.

A few days before trial, on May 11, 2019, Sewell's counsel filed an Offer of Proof "relating to [the] prior motions to dismiss th[e] case, for an evidentiary hearing, and to preclude, *in limine*, the testimony of Officer Tanya Barnes, all of which ha[d] been denied." Specifically, Sewell's counsel proffered that the "State has utilized the process of the grand jury to question Mr. Kedrick Scribner, terminate that questioning, and then inform his counsel, in Mr. Scribner's presence, of its belief that Mr. Scribner was lying" and that, "[c]onsequently, Mr. Scriber . . . elected to invoke his Fifth Amendment privilege against self-incrimination concerning future testimony on this subject[.]" Counsel surmised:

> Had Mr. Scribner been available to us as a witness, we would have sought to cross-examine Ms. Barnes about this alleged recantation and circumstances relating to it, such as when and where it occurred and precisely what she sought to recant, and why. However, given the present circumstances, it is plain that were we to do so, Ms. Barnes would deny that she sought to recant. Given that we cannot elicit substantive testimony from Mr. Scribner on this

> point, our only available substantive evidence of Ms. Barnes' recantation would be the testimony of our client, a directly interested party. Further, the State has made known to us that, in its view, were we to elicit any such testimony concerning Ms. Barnes' testimony from Mr. Sewell or Mr. Scribner, we would be suborning perjury.

Defense counsel noted that, under the circumstances, they would "not cross-examine Ms. Barnes about her alleged recantation, nor elicit testimony from [Sewell] or Mr. Scribner concerning it." Counsel, however, "believe[d] such testimony would be appropriate, necessary, and significantly exculpatory of [their] client" and saw "no evidence that it would be perjurious[.]"

B. Parties' Contentions on Appeal

Although the motions that Sewell filed in the circuit court cast broad allegations of prosecutorial misconduct, Sewell's brief, like his argument before the motions court, focuses on two allegations of misconduct.[7] First, Sewell claims that OSP investigators pressured Barnes into providing false testimony against Sewell. Second, Sewell contends that, after defense counsel informed the OSP of Barnes's alleged recantation, the OSP

[7] Sewell's brief purports to renew his argument that the OSP engaged in prosecutorial misconduct when it "investigated and prosecuted [him] in retaliation for his allegations of racial discrimination." Sewell asserts that he alleged additional facts as to the motivations of the prosecutors in connection with the retrial, yet his brief does not point to any "verifiable facts" that he claims he presented below. Accordingly, we limit our review to the allegations that the OSP investigators pressured Barnes to provide false testimony, and that the OSP misused the grand jury and wrongfully caused Scribner to invoke his Fifth Amendment right not to testify.

intimidated Scribner into invoking his privilege against self-incrimination and misused the grand jury to "lock in" Barnes's testimony against Sewell after he was already indicted.

Sewell asserts that the trial court erred in "summarily rejecting" his motion to dismiss and his motion seeking an evidentiary hearing on the issue prior to trial. While his "main focus" is that the court erred in denying him a hearing, Sewell argues that "it also was error for the [c]ourt to fail to dismiss the case under the circumstances, to fail to immunize Scribner (or compel the [OSP] to do so) so that he could testify at trial, and to fail to preclude Barnes from testifying since Scribner was made unavailable because of the prosecutor's misconduct."

In turn, the OSP asserts that the comments made to Scribner were only intended to ensure that his testimony was truthful, and that the OSP's use of the grand jury was for the proper purpose of investigating Sewell's allegations that OSP investigators pressured Barnes to provide false testimony. The OSP points out that the grand jury testimony of Barnes was disclosed to Sewell to make him "fully aware that the State used the grand jury to ensure that the new allegations were not true and that the witness had and would continue to testify truthfully."

The OSP insists there is no evidence that Scribner was threatened or coerced into silence. Again, the OSP asserts, to ensure the State's witness was being truthful, the OSP investigated Scribner's assertions, including "collecting video surveillance, emails, and other witness testimony" before bringing Scribner, who was represented by counsel, before the grand jury. The OSP further contends that the court did not abuse its discretion in

denying Sewell an evidentiary hearing because Sewell did not present verifiable facts of bad faith by the OSP. [8]

C. *"Verifiable Facts"*

Prosecutors retain broad discretion in "determining which cases to prosecute, which offenses to charge, and how to prosecute the cases they bring." *Evans v. State*, 396 Md. 256, 298 (2006). Prosecutors are entitled to a presumption of regularity in how they exercise their discretion. *Id.* at 320 (quoting *United States v. Armstrong*, 517 U.S. 456, 465 (1996)). Consequently, we are averse to interfere with this discretion and inquire into the executive's charging decision. *McNeil v. State*, 112 Md. App. 434, 463 (1996). Vindictive and selective prosecution claims necessarily "ask[] a court to exercise judicial power over a 'special province' of the executive." *Armstrong*, 517 U.S. at 465 ("In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.'" (citation omitted)). Without "verifiable facts" tending to show bad faith, *McNeil*, 112 Md. App. at 465, our inquiry into the prosecutor's

[8] We note that the OSP does not address in its brief whether Sewell's counsel waived Sewell's request for an evidentiary hearing. Accordingly, we decline to address this issue. Md. Rule 8-504(a)(3), (6) (requiring party to present a "statement of the questions presented" and "[a]rgument in support of the party's position on each issue"). We will make the observation in this footnote, however, that it does not appear from record that Sewell waived his request for an evidentiary. At the motions hearing, the judge concluded that he did not "see any need at this time for an evidentiary hearing" and, instead, directed Sewell's counsel that he could "raise anything later." Although Sewell's counsel stated that he "[u]nderstood," he did not abandon this issue but continued to file related motions, including a motion to compel immunity for Scribner and preclude the State from eliciting testimony from Barnes. We do not conclude (nor, apparently, did the OSP) that Sewell's counsel's actions constituted an "intentional relinquishment or abandonment of a known right" to preclude our review. *State v. Rich*, 415 Md. 567, 580 (2010) (citation omitted).

decision ends. *See also United States v. Adams*, 870 F.2d 1140, 1141, 1145-46 (6th Cir. 1989). A defendant's burden to prove a claim for prosecutorial misconduct "is a demanding one," *Armstrong*, 517 U.S. at 462, and the court's intrusion into prosecutorial decisions only is warranted in limited circumstances. *Sewell*, 239 Md. App. at 598.

The prosecutor's broad discretion, however, is not unfettered. *Wayte v. United States*, 470 U.S. 598, 614 (1985). Rather, the United States Supreme Court has instructed:

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional."

Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (cleaned up). As stated above, a defendant is entitled to a hearing on a claim of prosecutorial misconduct if the defendant "proffers *verifiable facts* amounting to 'some evidence tending to show the existence of' the State's bad faith." *McNeil*, 112 Md. App. at 465 (emphasis in original) (adopting language from *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974)). To be verifiable, the defendant's allegations must be specific enough to be meaningfully evaluated in the requested evidentiary hearing. *See id.* at 466 (holding that a defendant meets their burden when they present "specific factual allegations that call into question the legitimacy of the State's conduct"). As we cautioned in *McNeil*, "[a] mere general allegation of prosecutorial misconduct is not sufficient to warrant the granting of an evidentiary hearing," and "such an evidentiary hearing is not a discovery device." *Id.* at 465. Consequently, "in limited circumstances, such an intrusion upon the prosecutor is warranted if the defendant 'presents facts sufficient to raise a reasonable doubt' about the

prosecutor's motive." *Id.* (quoting *United States v. Falk*, 479 F.2d 616, 620-21 (7th Cir. 1973)). As we explained in Sewell's first appeal, "[a] claim of vindictive prosecution based solely on the timing of the filing of the charges, without some evidence of actual bad faith, does not rise beyond the level of mere conjecture." *Sewell*, 239 Md. App. at 601 (quoting *Robinson*, 209 Md. App. at 190.

In *McNeil*, the defendant was charged with armed robbery and attempted murder. *McNeil*, 112 Md. App. at 442. On September 22, 1995, the trial court granted McNeil's motion to suppress a confession he made to investigators because it was made before he had been advised of his constitutional rights. *Id.* Trial was then scheduled for September 27, 1995. *Id.* On that date, the State appealed the suppression order pursuant to § 12-302(c)(3) of the Courts and Judicial Proceedings Article. *Id.* As required by the statute, the State certified that the appeal was not taken for the purposes of delay. *Id.* The court rescheduled the trial for November 6, 1995, with the understanding that if the appeal had not yet been resolved by that time, then the court would hold a hearing to determine whether there was good cause for a further postponement. *Id.* at 443-44. The court date was then delayed for one more day, until November 7, because the defense counsel had a scheduling conflict. *Id.* at 444.

On November 7, the State gave the court notice that it was withdrawing its appeal. *Id.* McNeil objected, arguing that the appeal had been taken in bad faith as an attempt to delay the trial and gather evidence against him. *Id.* To support his claim, McNeil pointed to the following facts. First, the State never paid the filing fee for its appeal. *Id.* at 445.

Second, three days after filing the appeal, the State subpoenaed a witness to appear at the November 7 court date, suggesting that it did not intend to follow through on its appeal in this Court. *Id.* Third, the State continued collecting evidence after the appeal was filed. *Id.* Fourth, the State did not inform McNeil of its intent to abandon the appeal until the scheduled court date on November 7. *Id.* Fifth, the State's prosecutor told the subpoenaed witness "that he could either talk or he would be 'read his rights.'" *Id.*

McNeil asked the court to hold an evidentiary hearing to investigate his claims of bad faith conduct by the State. *Id.* The court denied his motion, and the case immediately moved on to trial on November 8. *Id.* at 446. McNeil was convicted. *Id.*

On appeal, we considered McNeil's argument that the trial court acted improperly by failing to hold an evidentiary hearing on his claims of misconduct by the State. *Id.* at 461. After reviewing the treatment of related issues in other jurisdictions, we held "that a defendant is entitled to a hearing, if timely requested, to prove or dispel his claim of misconduct if he proffers *verifiable facts* amounting to 'some evidence tending to show the existence of' the State's bad faith." *Id.* at 465 (emphasis in original).

We concluded that McNeil had met his burden of proffering verifiable facts. His specific factual allegations raised sufficient doubt about the State's good faith in noting its appeal, because, together, the facts tended to suggest that the State had no intention of following through on the appeal, and that the appeal was being used for improper purposes. *Id.* at 466. The trial court should have held an evidentiary hearing because "[w]ithout a

hearing, McNeil was unable to challenge the State's unsupported claim that it acted in good faith." *Id.*

In *United States v. Adams*, the Sixth Circuit reached similar conclusions. 870 F.2d 1140 (6th Cir. 1989). Although *Adams* dealt with a defendant's motion for discovery rather than a motion for an evidentiary hearing, the case is instructive here because it analyzes the evidence that a defendant must submit before a defendant is granted an opportunity to substantiate allegations of prosecutorial misconduct.

The defendants, Adams and Coiner, were a married couple accused of making false federal income tax returns. *Id.* at 1141. They challenged their indictment on the theory that it was brought in retaliation for a sex discrimination suit that Adams had filed against the EEOC. *Id.* Their claims were supported by affidavits from a former employee of the Internal Revenue Service ("IRS") and from the former director of the EEOC office where Adams had worked. *Id.* The IRS employee stated that the prosecution of Adams and Coiner was unusual because they had no outstanding debts to the IRS and they had already amended their tax returns to correct their errors. *Id.* The former EEOC employee alleged that "the EEOC instigated and pushed the investigation and prosecution of Alayne Adams as revenge against her" for her discrimination lawsuit. *Id.* When Adams and Coiner asked for discovery on these claims, the trial court denied their motion. *Id.*

The relevant question on appeal was whether the trial court erred by denying the defendants discovery on their defense of vindictive prosecution. *Id.* at 1146. The Sixth Circuit determined the court erred because the defendants were only required to present

"some evidence" of the alleged misconduct. *Id.* The court saw this standard as appropriate because holding the defendants to a higher burden of proof would be asking them to already have the evidence that they would only be able to find through the discovery process that was denied to them. *See id.* ("It is hard to see, indeed, how the defendants could have gone much farther than they did without the benefit of discovery[.]"). Applying this standard, the Court concluded that the affidavits were enough to establish some evidence of vindictive prosecution. *Id.* The court remanded the case for discovery. *Id.*

We apply the foregoing precepts in our analysis of whether Sewell proffered verifiable facts amounting to some evidence to support his allegations that: (1) the OSP investigators pressured Barnes into providing false testimony against him; and (2) the OSP misused the grand jury and wrongfully caused Scribner to invoke his Fifth Amendment right against self-incrimination.

D. Analysis

1. Alleged Intimidation of Barnes

Sewell's allegations of prosecutorial misconduct relate to Barnes's alleged recantation of her testimony from the first trial. Specifically, Sewell alleges that:

(1) Barnes told both Sewell and Scribner that she had perjured herself at Sewell's first trial after two OSP investigators threatened to indict her on an unrelated criminal charge if she did not testify against Sewell;

(2) These interactions between Sewell, Scribner, and Barnes occurred on specific dates in or around the Juvenile Justice Center and were corroborated by video footage;

(3) Both Scribner and Sewell swore, under penalty of perjury and upon personal knowledge in an affidavit, to their interactions with Barnes and identified other

individuals, including Steven Janis and his assistant, and Lieutenant Spencer Giles, who could potentially corroborate their averments;

(4) At least one of the OSP investigators was an old acquaintance and former co-worker of members of the Maryland State Police whom Sewell implicated in his civil suit for racially discriminatory conduct; and

(5) The OSP's case against Sewell was based in part on information from members of the Worcester County State's Attorney's Office who were named defendants in the civil case and retaliated against Sewell by causing criminal charges to be filed against him.

In his first trial, Sewell failed to offer verifiable facts of actual misconduct or bad faith on the part of the OSP because he directed his allegations toward the local agencies and not the OSP. *Sewell*, 239 Md. App. at 599-600. Without allegations of misconduct by the OSP, we reasoned, Sewell relied only on the "curious" timing of his indictment and failed to present evidence of actual bad faith. *Id.* at 601.

In his motion to dismiss filed prior to his second trial, however, Sewell offered verifiable facts of misconduct. First, Sewell and Scribner's sworn affidavits describe with specificity the time, place, and content of the conversations with Barnes. Second, the affidavits detail specific misconduct by the OSP; namely, that OSP investigators pressured Barnes to lie in the first trial. Third, Sewell's affidavit provides the explicit threat that the OSP investigators utilized to compel Barnes to testify untruthfully—charging her with stealing money. Fourth, in addition to Sewell and Scribner, the affidavits identify other individuals—Giles, Janis, and Janis's assistant—who could corroborate the information detailed in the affidavits. Fifth, counsel for Sewell provided video footage of the interactions between Barnes, Scribner, Janis and his assistant—these videos may also

corroborate Sewell's account. Finally, this incident occurred within the broader context of alleged racial discrimination and retaliation involving Sewell and Pocomoke City. Sewell suggests a plausible motive through his assertion that one of the investigators was implicated in Sewell's civil case.

If the affidavits are truthful, then the averments describe specific misconduct by the OSP investigators. *See Sahin v. State*, 337 Md. 304, 321 (1995) (recognizing the "equal presumption of truthfulness the law in theory accords each witness"). Like the affidavits presented in *Adams,* these affidavits contain specific factual averments that may be verified in an evidentiary hearing through the videos allegedly collected by both parties and/or through the testimony of witnesses to the events identified in the affidavits.

Unlike Sewell's prior allegations of prosecutorial misconduct, Sewell's new allegations are specific enough to "rise beyond the level of mere conjecture." *Sewell*, 239 Md. App. at 601 (quoting *Robinson*, 209 Md. App. at 190). Because Sewell met his burden of "proffer[ing] *verifiable facts* amounting to 'some evidence'" of misconduct by the OSP investigators, an evidentiary hearing should have been held on this issue. *McNeil*, 112 Md. App. at 465 (emphasis in original).

The State Prosecutor recognized "the seriousness of the allegations" and conducted its own investigation—going so far as to convene a grand jury to ferret out whether a State's witness had committed perjury and whether the OSP was inadvertently suborning perjury. It further investigated these claims by "collecting video surveillance, emails, and other

witness testimony." Based on this evidence, the OSP concluded to its own satisfaction that neither Scribner or Sewell were credible and that Sewell's claims were meritless.

According to the record, however, in addressing Sewell's motions, the trial court did not view any of the video recordings in the possession of both parties or review the full grand jury testimony of Barnes, Scribner, Giles, and other unnamed witnesses brought before the grand jury. None of the witnesses identified in the affidavits testified at the hearing. In short, it appears that the court based its decision to deny the motion for an evidentiary hearing largely upon the OSP's assurances that its investigators acted in good faith, that Barnes never recanted her prior testimony, and that Scribner's affidavit was false. The OSP's assurances, however, were insufficient to deny Sewell an evidentiary hearing once he met the burden required to request one. *McNeil*, 112 Md. App. at 466 (requiring a hearing despite the prosecution's claims of good faith); *cf. Batson v. Kentucky*, 476 U.S. 79, 98 (1986) (holding that once a defendant has made a prima facie showing that the prosecution's use of peremptory challenges to jurors was racially discriminatory, the prosecutor may not "rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.'" (citation omitted)). The merits of Sewell's allegations should be determined by an impartial court, rather than by the OSP's investigation of its own conduct. *McNeil*, 112 Md. App. at 466 ("Without a hearing, McNeil was unable to challenge the State's unsupported claim that it acted in good faith.").

The seriousness of Sewell's allegations of prosecutorial misconduct, and the OSP's allegations that Sewell gave false testimony cannot be overstated. If Sewell is telling the truth, then investigator(s) within the OSP committed serious misconduct by pressuring Barnes into providing false testimony. If Sewell is not telling the truth, then he has presented false testimony in an attempt to tarnish the reputation of the OSP, and, he has done so at the expense of Barnes, an innocent third party.

Sewell is entitled to an evidentiary hearing. And, given the distressing background of alleged racial discrimination and retaliation, the OSP should welcome the opportunity to dispel the cloud that these unresolved allegations put over the proceedings.[9]

[9] Four groups of amici curiae submitted briefs in support of Sewell: (1) United Black Police Officers' Association, Hispanic National Law Enforcement Association, and American Civil Liberties Union of Maryland; (2) Howard University School of Law Civil Rights Clinic; (3) Citizens for a Better Pocomoke, Pocomoke City Councilwoman Dian Downing, Worcester County Branch of the NAACP, Caucus of African American Leaders, and Public Justice Center; and (4) Washington Lawyers' Committee for Civil Rights and Urban Affairs. Sewell and the amici raise weighty questions of public policy that cloud the circumstances surrounding this case. Debra Gardner, counsel for the Public Justice Center, in the *amici curiae* brief submitted on behalf of several advocacy groups, writes:

> *Amici* view this prosecution as an outgrowth of longstanding practices on the Eastern Shore of denying blatant race discrimination, holding Black residents to a higher standard than their white counterparts, and punishing those who resist white officials' abuse of authority. The criminal investigation against Chief Sewell began only *after* Sewell's discriminatory firing and the Black community's organized protests, in a region known for its resistance to racial progress.

The brief outlines the amici's view of the Eastern Shore's deep and stubborn commitment to segregation. It recounts the racially-hostile work environment found not so long ago in the Worcester County Sheriff's Office—which figures prominently in the background of this case—in *Demby v. Preston Trucking Company,* 961 F. Supp. 873 (D.
(Continued)

Accordingly, we hold that, because Sewell presented "some evidence tending to show the existence of" a lack of good faith by the OSP, the court abused its discretion in failing to grant Sewell's request for an evidentiary hearing. *McNeil*, 112 Md. App. at 465.

2. Alleged Misuse of the Grand Jury Process

The OSP argued before the motions court that the grand jury was convened to investigate allegations that Barnes had perjured herself. Grand juries have "broad powers to investigate whether a crime has been committed." *In re Special Investigation No. 281*, 299 Md. 181, 191 (1984). Courts traditionally have accorded the grand jury this "wide latitude"

> because "[a] grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an ex parte investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person."

In re Misc. 4281, 231 Md. App. 214, 228-29 (2016) (quoting *United States v. Calandra*, 414 U.S. 338, 343-44 (1974)).

Turning to the allegation that the State Prosecutor intimidated Scribner into invoking his Fifth Amendment right, the State Prosecutor contended before the circuit court that it stopped questioning Scribner because the State Prosecutor believed he was not being truthful. Rather, the State proffered, it advised Scribner's counsel that he may have been perjuring himself, and subsequently gave Scribner and his counsel the opportunity to

---

Md. 1997). *Amici* state, "[t]he *Demby* case is emblematic of a pattern in which white Worcester officials minimize or deny blatant racial discrimination, creating a pervasive culture of second-class citizenship endorsed by government officials."

confer. "[P]rosecutors can and sometimes should warn witnesses of the consequences of perjury[,]" so long as the warnings are "general in nature and [do] not directly intimidate or coerce a witness into silence." *State v. Stanley*, 351 Md. 733, 748 (1998).

On the record before us, we cannot find evidence that the OSP coerced Scribner into silence or threatened to prosecute him for perjury. As the OSP points out in its brief, the cases cited by Sewell do not state or suggest that there is anything improper about giving a witness, in the presence of counsel, an opportunity to consider whether the testimony provided was not truthful. In *Stanley*, the Court of Appeals instructed that, "[u]nless the prosecutor specifically threatens, intimidates or coerces the witness, no constitutional violation will be found." 351 Md. at 746. In *Webb v. Texas*, on which Sewell relies as a "principal case," it was the judge who threatened the defense witness by telling that witness, among other things:

> It is the Court's duty to admonish you that you don't have to testify, that anything you say can and will be used against you. If you take the witness stand and lie under oath, the Court will personally see that your case goes to the grand jury and you will be indicted for perjury and the likelihood (sic) is that you would get convicted of perjury and that it would be stacked onto what you have already got[.]

409 U.S. 95, 95-96 (1972). Here, in contrast to the cases cited by Sewell, the OSP merely advised Scribner and his counsel, privately, that Scribner may have been perjuring himself and then gave Scribner and his counsel the opportunity to confer. We conclude, based on the record, that Sewell failed to offer the court verifiable facts that the OSP intimidated Scribner into invoking his privilege against self-incrimination and misused the grand jury to "lock in" Barnes's testimony against Sewell after he was already indicted.

II.

Issues Relating to Sewell's Retrial

A. Background

Retrial

The OSP's Case

The retrial began on May 14, 2019. The OSP's first witness, Gayle Conrad, testified that, on November 14, 2014, her neighbor called at around 11:30 p.m. to let Conrad and her husband, Eric Johnson, know that a vehicle had hit their truck and left. They went outside of their Cedar Street residence and immediately observed, sitting between their truck and their grandson's vehicle, a wheel and "part of a front end" of another vehicle. Conrad testified, "[w]e called the police and told them that there had been a hit and run and we needed assistance." Conrad and Johnson called again after discovering that their grandson's vehicle had also been hit, and "was actually drove [sic] up into a telephone pole."

The OSP then called Douglas Matthews, who testified that, on November 21, 2014, he was involved in an accident while driving home from the Lodge. At the time of the accident, Matthews was employed as a correctional officer, served as treasurer of the Lodge, and also prepared meals for the Lodge. He agreed that the accident occurred in the 700 block of Cedar Street, a straight four or five block drive away from the Lodge. According to Matthews, he "fell asleep" somewhere along the route and "hit two vehicles." He then testified,

> After the accident occurred, I think I woke up somehow, heard a loud noise. I then tried to – only what I know. I believe I tried to hit the brakes and it didn't work. At that point in time – and the vehicle's still moving now. So I try to maneuver the vehicle to my front lawn. And once I got there the vehicle stopped. And that was the last time it moved until it was towed away.

Matthews admitted that "to get to [his] residence requires two and a third turn from where the accident took place."

Once he got to his house, Matthews "called Pocomoke police officer Lieutenant Green," "using a card that [he] had found somewhere," to tell Green that he "was in some sort of accident[.]" Matthews did not recall where he found the card, or whether Green had given him the card. Matthews said that he was not drinking that night, but "might have had a beer early that day" around 5:00 or 6:00 p.m. He had no explanation for why he did not remember most of the events from the evening.

On cross-examination, Matthews testified to his relationship with Sewell: "I like to think I was getting to know him. I didn't know him that well. The only time I seen him was when he came down to a lodge meeting." He explained that his tiredness was from "just putting in hours" between two jobs, and that he was not and would never use any drugs or mind-alternating substances. Matthews stated that he "was not looking for anything" when he called Green. During redirect examination, Matthews agreed that he was not cited for the accident, nor was he asked to participate in any tests or further investigation.

The OSP next elicited testimony about the functioning of the Department from Sergeant Damien McGlotten. McGlotten explained that the Department was currently

slotted for 17 officers. In 2014, the Department had 12 officers in patrol, "split up into three shifts; a day, evening and night shift[,] eight hours each." The Department divided Pocomoke City into north and south sectors, and McGlotten described, a sector assignment is "a responsibility," "[s]o when dispatch comes over the radio, they will actually know what officer to send to what call." McGlotten testified that, while sector assignments are "generally followed," "[i]t's not a hundred percent" and "[t]here's times an officer will handle a call outside of their sector." He also explained the significance of call backups, explaining that "what would happen would be the officer that's essentially free would be the one that would respond to the second call so that way the citizen gets an expedited response."

The OSP then asked McGlotten about November 21, 2014, and he replied that he was working the evening shift, from 4:00 p.m. to midnight, on that day, along with Tanya Barnes. McGlotten was assigned to the south sector, while Barnes was assigned to the north sector. Both officers were at an apartment complex responding to a noise complaint when a call came out for a hit and run. The call was assigned to McGlotten, who cleared from the complex and responded to the 700 block of Cedar Street, followed by Barnes. When he arrived on Cedar Street, McGlotten observed two vehicles with "clear damage" and "a wheel with [] a control arm that was laying in the roadway." He began investigating the incident while Barnes "was standing there with [him] as [his] backup." McGlotten testified that Green arrived on scene, in plain clothes, after about "five to ten minutes," which McGlotten found unusual because

> [I]t was late. It's near midnight. And Lieutenant Green had worked day shift that day 8:00 to 4:00. And he had not called out that he was in town working at all.
>
> * * *
>
> I thought it was obviously strange for him to show up without notifying – obviously he's number two, but without him acknowledging that he's in town working, had not seen him that late[.]

McGlotten said that he had not heard Green on the radio that evening, but that "[n]ormally we would hear another officer that is working with us on the radio [] at some point."

At some point, Sergeant Brad Morgan came over the radio and "indicated that he found the at fault vehicle" at a Laurel Street residence. McGlotten testified that he "attempted to leave to respond to where the vehicle was located" but was "advised by Lieutenant Green to stay put." He "thought it was strange" because he "was done with as much of the investigation [he] could do at the crash scene" so the next step would be to respond to the location of the at fault vehicle. McGlotten testified that Green did not tell him about the call from Matthews. After being told to stay put a second time, McGlotten was able to respond to Laurel Street, which was "almost essentially a block up" from the crash scene, a "right and a left" turn away.

McGlotten explained that he was the third officer to arrive, following Morgan and Green and before Barnes and Sewell. Again, McGlotten "found it strange" that Sewell and Green were at the secondary scene:

> The reason I found it strange, we – well, it would be essentially now four officers there, and then now a fifth officer responding that was actually the chief or in charge of everything, for an accident that is essentially routine for us. I mean, I've handled them before then. And for them to respond – both

> one and two to respond out to essentially a simple accident is – at that time of night is unheard of for me.

Sewell was in plain clothes, which was not "unusual" to McGlotten because he "had seen [Sewell] out at night in plain clothes before." McGlotten was not sure if Sewell had been working that evening, but said that "[h]ad he been working it's more likely that I would hear him on the radio as well."

McGlotten further testified that, after he gave Sewell a recap of what happened, Sewell twice asked him whose call it was, and both times McGlotten indicated that it was his call. Sewell then paused, which gave McGlotten "an indication that [Sewell] didn't want [him] to handle the call." Following the pause, "Barnes chimed up and said that she could take the call." Sewell "essentially immediately said yeah to that" and asked McGlotten if he was okay with it. Although McGlotten said "I guess," he testified that he was not really okay with the reassignment because he had already done almost all of the work, and the only remaining step was to speak with the suspect. McGlotten explained that he needed the driver's information "because he failed to report the accident" and "left the scene of an accident without leaving [] his information," making it a hit and run.

McGlotten later "learned that no charges had been filed for the suspect," which surprised him. He "never got a chance to speak to the suspect at all," so he didn't know if "he was DUI or not," but, McGlotten noted, "the hit and run of it is actually an arrestable offense as well when you leave the scene of an accident." McGlotten further testified that he spoke with Green about "why no charges were filed" because he "thought it was strange that nothing happened." According to McGlotten, Green "stated sometimes you look out

for people," which McGlotten understood to mean "[t]hat essentially a favor was done for the suspect to not get charged."

On cross-examination, McGlotten agreed that the traffic incident occurred in the north sector, where Barnes was assigned, and that he was assigned to the south sector. He clarified on redirect that the call from Cedar Street was not assigned to Barnes because "[s]he was still on the noise complaint call in her sector," and that it was "common" to be assigned calls from another sector.

The OSP's next witness, Tanya Barnes, testified that she was employed by the Department for a "very brief stint" starting in "April or June of 2014." In November 2014, while she was a police officer trainee, she responded as the backup officer to a hit and run call. Upon arriving at the scene, she "noticed some vehicles damaged and a wheel – like a random wheel on the scene, not attached to the vehicles that were damaged." As the officers tried to get information, McGlotten was asking the questions. After hearing a call over the radio, Barnes responded to the second scene, and "at that location was Chief Sewell, Corporal Morgan, Lieutenant Green, inside of the location was Mr. Matthews." Barnes remembered that Sewell and Green were both in plain clothes. When asked whether it was unusual for Green to be there, Barnes testified, "[N]o, he was the shift commander. So typically if it's serious in nature, he responded whether he was on duty or off-duty." When asked about Sewell, Barnes replied, "Yes. It was unusual. It was an accident, but he usually doesn't respond to – no. He usually doesn't respond to calls like that."

The State Prosecutor directed Barnes's testimony to her conversation with Sewell and McGlotten about who was handling the call:

> [BARNES]: So McGlotten and I were standing at the location. I got out of my vehicle. He had gotten out of his vehicle. And Chief Sewell basically approached us and said – and asked who was handling the call.
>
> [THE STATE PROSECUTOR]: Did anyone respond to him?
>
> [BARNES]: McGlotten did.
>
> [THE STATE PROSECUTOR]: And what did he say?
>
> [BARNES]: He responded that he was the primary. He was handling the call.
>
> [THE STATE PROSECUTOR]: And did [Sewell] give any response to that?
>
> [BARNES]: Yes. He asked at least two more times if – who was handling the call. He asked McGlotten and myself, who's handling the call two additional times.
>
> [THE STATE PROSECUTOR]: And what happened after that?
>
> [BARNES]: After the third time, he basically looked at me, gave me eye contact, and said, who's handling the call? And then I said, I guess I'm handling the call.
>
> [THE STATE PROSECUTOR]: Why did you say that if Officer McGlotten had been handling the call?
>
> [BARNES]: Because he was looking at me, and he was basically telling us indirectly that he wanted me to handle the call.

Believing Sewell "indirectly gave [her] an order to handle the call," Barnes went into Matthews's residence to "try to find out what happened." She testified that "inside of the residence was Mr. Matthews, his wife, and Chief Sewell." Barnes wanted to question Matthews "[b]ecause the wheel was off the vehicle which was uncommon" and her concern

"was that the person was possibly impaired." Based on that concern, she would have done a field sobriety test, "with Corporal Morgan's assistance." After asking Matthews if he had been drinking, however, "Chief Sewell answered. He said that he wasn't drunk. It's just an accident report." Barnes "tried to ask questions about the accident, but Chief Sewell answered the questions." Barnes recalled, "[Sewell] basically said to me that, Tanya, this is a[n] accident; this is not a hit and run. And I want you to write it as an accident." Barnes admitted on cross-examination, "I just assumed that [Matthews] was intoxicated. I don't know that he was."

Barnes said that she was "skeptical" and "nervous" about writing it up as an accident, as "[i]t didn't feel authentic":

> Based off of my training and knowledge as a law enforcement officer, typically if someone leaves the location, either they don't have insurance, they're impaired, and it's something that they're trying to hide.

Barnes testified that she was not allowed to use her police discretion that evening.

On cross-examination, Barnes agreed that Matthews did have insurance. She also admitted that she did not "see anything" indicating Matthews's impairment, even though she was sitting "maybe 15 [feet] away" from him. On redirect, the State Prosecutor asked Barnes about why she filled out her report the way she did:

> [BARNES]: So a few days after the incident, I saw Chief Sewell at the station, and I asked him a second time if Mr. Matthews – if he was impaired, and he said no. He wasn't drunk. Just write it as an accident report. Don't write it as a hit and run.
>
> [THE STATE PROSECUTOR]: If you had been allowed to conduct your investigation and had determined that there was impairment or something, would you even have been filling out this form?

*   *   *

> [BARNES]: I would fill it out, but it would be different. . . . I would have done the field sobriety, and it would read very differently.
>
> [THE STATE PROSECUTOR]: So all the boxes that defense counsel spoke to you about, you filled them out the way you did for what reason?
>
> [BARNES]: Because I was afraid that if I didn't I would be fired. I didn't want to lose my job.
>
> [THE STATE PROSECUTOR]: Why were you afraid?
>
> [BARNES]: Because Chief Sewell told me to fill it out as an accident report, and I didn't want to go and do something different that would get me fired.

Following Barnes's testimony, the OSP called Anthony Tull, a member of the Masonic Lodge in Pocomoke. Tull testified that he knew Sewell, Green, and Matthews were members of the Lodge. He agreed that Sewell and Green were both newer members in 2014. On cross-examination, Tull noted that, in 2014, he had not seen Sewell at Lodge meetings "that many times" but that Sewell had attended "summer events."

The OSP also called Lynell Green, who explained that, while he was employed at the Department, he was a lieutenant and Sewell was his chief. Green indicated that he knew Matthews because he was a Mason in Pocomoke City. When asked about the evening of November 21, 2014, Green testified that he received a call from Matthews, who said that "he was involved in an accident or something." Green could not remember Matthews's exact words, as he "didn't let him finish" and "told him he had to call 911." The OSP asked Green whether he called Sewell immediately after Matthews called, and Green explained that he typically called Sewell to inform him of incidents "because the next

morning the Mayor or City Council will call him and ask him what happened and why they wasn't notified. . . . So I always call him. It's not like that's out of the norm when something occurs in Pocomoke City."

Green noted that he was in plain clothes that evening, after going home and changing after his day shift. When he arrived at the scene of the accident on Cedar Street, he talked to McGlotten for "probably a minute or less" and told him to stay at the scene "to make sure that nothing disappeared[.]" Although Green did not normally handle accidents, he stated, "I respond to all calls coming to Pocomoke. I assist officers." Green responded to the scene at Matthews's home on Laurel Street thereafter, and recalled that Sewell, Morgan, McGlotten and Barnes were there.[10]

Over a continuing objection from the defense, the State Prosecutor asked Green if he recalled certain statements made to investigators about the incident:

> [THE STATE PROSECUTOR]: [] Isn't it true that you told investigators that when he called – when you called Chief Sewell, you told Sewell that Matthews called because he was involved in an accident and left the scene?
>
> [GREEN]: I don't recall making that statement, sir. No, sir.
>
> [THE STATE PROSECUTOR]: Isn't it true you told state investigators when you arrived at the scene you noticed a faint odor of alcohol on Mr. Matthews' breath?
>
> [GREEN]: I don't recall making that statement, sir.
>
> [THE STATE PROSECUTOR]: Isn't it true that you told state investigators that you told Chief Sewell that Mr. Matthews had been drinking?

[10] Green described having trouble remembering some of the events. His testimony that McGlotten was at Matthews's home when he arrived does not match his preceding testimony that he told McGlotten to remain at the scene of the accident.

> [GREEN]: I don't recall making that statement, sir.
>
> [THE STATE PROSECUTOR]: Isn't it true that you told state investigators that you and Chief Sewell discussed not charging Mr. Matthews because he was a Mason?
>
> [GREEN]: No, sir. I don't recall making no statement like that, sir.

In response to a question from defense counsel, Green emphasized that, "whenever things occur in Pocomoke City, no matter how small or minute we would call [Sewell] and advise him to let him know what occurred on – during the shift that day." Green also agreed that, when he told McGlotten to stay at the Cedar Street scene, he did not do so believing it would be easier to manipulate Barnes into writing the incident up as an accident rather than issuing a hit and run citation. Lastly, Green stated that he did not intend to cut Matthews a break due to their status as Masons; that Sewell, to his knowledge, did not have that intention; that it was not unusual for him or Sewell to be in plain clothes; and that he and Sewell were not trying to intimidate Barnes into doing anything.

The OSP's final witness was Sheriff Joseph Gamble, who was accepted by the court as an expert in police policies and procedures. Defense counsel objected at various times during Gamble's testimony. The court overruled an objection on the basis that Gamble was "invading the province of the jury" to determine Sewell's motivation, but gave the defense a continuing objection. Defense counsel also raised objections for lack of an evidentiary basis that were likewise overruled.

At the start of his testimony, Gamble indicated that he had reviewed prior testimony, reports of interviews, Pocomoke City Police Department written directives, and the

accident report from November 21, 2014. The OSP also presented Gamble with photographs from the accident that had been admitted into evidence. Gamble testified that there was nothing inappropriate about Green taking the call from Matthews on November 21, 2014. He added that it was not inappropriate for Green to call Sewell, because "it's not inappropriate for a subordinate to call their supervisor to tell their supervisor about an incident that's going on." In response to hypotheticals posed by the OSP, Gamble opined that, whether Green was on or off duty, it would not be inappropriate for Green to respond to Cedar Street and meet with Matthews. He further opined that the second scene, Matthews's home, was not "inappropriate for the patrol commander to respond to." When asked whether it was appropriate for Sewell to respond to Matthews's home, Gamble opined: "it's inappropriate for a police chief or the chief executive officer of the police department to insert him or herself into an investigation that one of his subordinates is working."

Although Gamble testified that it is "not unusual for calls to be reassigned," he stated that, in this case, his opinion was that Sewell "reassigned the call because he didn't want the initial investigating officer to investigate it." The OSP next asked for Gamble's opinion on Sewell's actions with Barnes inside of Matthews's house. Gamble stated that he was "shocked" to read that Sewell was responding to Barnes's questions on behalf of Matthews, and explained:

> . . . . Mr. Matthews should have been giving those answers, specifically about alcohol that Chief Sewell said that he had not been drinking. That should have been a question that the defendant – or Mr. Matthews should have been answering. To write it up as an accident when obviously this is a hit and run.

* * *

> I mean, the law requires when you strike a vehicle to stay at the scene, right, and notify the police. That's what the law says.
>
> This man drives home, calls the second in command of the police department, or at least the patrol commander who then calls the chief who then shows up to be his defense counsel in front of his own people.

* * *

> If I don't feel that my department or that I can adequately handle this, I would ask the Worcester County Sheriff's Office to come into Pocomoke. Hey, can you handle this? I've got a good buddy of mine who's did a hit and run, and for transparency to the public, I want an outside agency to come in. Or the state police. Pick up the phone and call the state police. Have somebody else come in if you got so wrapped up in that situation.
>
> But what I found shocking in this case was that he's acting as a defense attorney for a guy who just did a hit and run in his community.

With regard to Barnes's testimony that she was ordered to code the incident as an accident, rather than a hit and run, Gamble gave his opinion that "[i]t's totally inappropriate to [] order a subordinate not to do their job." Again in response to hypotheticals posed by OSP, Gamble opined on the appropriateness of Sewell and Green responding to Matthews's house. The OSP posited,

> Let's say hypothetically now the chief knows that information, his number two in command has called him and said, Mr. Matthews was in a hit and run. He was drinking. And Lieutenant Green and the defendant then talk about not charging him because he's a Mason, then do you have an opinion about whether or not the defendant should have even responded to that second location?

Gamble replied, "He shouldn't have responded." He explained that the head of a police department has to be "very careful to be transparent and fair to our community," and the

actions described would be "covering up a crime." The State Prosecutor also asked Gamble about police discretion, and he opined that the "investigating officer is the one who has the discretion." He indicated that Sewell would not have discretion to order a subordinate officer to draft a report in a certain way.

Gamble clarified his opinion on officer discretion during cross-examination:

> [I]f I said it I didn't mean that Chief Sewell didn't have any law enforcement discretion. But I believe as a chief or a sheriff that the investigator, that it's their job to investigate the crime and follow the evidence where it goes.
>
> And then once . . . they've collected all their facts and had the opportunity to collect and interview and do everything they think possible in that case to figure it out, then they can base their decision and exercise some discretion. I don't believe that I meant – however I answered it, what I meant was that basically I believe Chief Sewell usurped their discretion.

Gamble also noted that his "testimony would definitely change" if Sewell had not been answering for Matthews and the investigating officer "was allowed to question Mr. Matthews and conduct a full and thorough investigation." When asked if his opinion would change if the evidence showed that no mention of alcohol were made, Gamble stated "it would not have an effect on my answer in that the police officer was not allowed to conduct a thorough investigation."

Following Gamble's testimony, the OSP rested. Sewell made a motion for judgment of acquittal, which the court denied.

The Defense's Case

Sewell testified on his own behalf. He first discussed his schedule during his tenure as Chief in Pocomoke City, noting that he worked "12 to 16 hours a day without any overtime" Monday through Saturday, and often changed clothes at the end of the 8:00 to

4:00 shift. On the night of November 21, 2014, Sewell was in the Wal-Mart parking lot "for the crime that occurs during the holiday season" and because he "received information that it was an employee who worked at Wal-Mart . . . on the midnight shift that was selling narcotics in the Wal-Mart parking lot." After hearing about a traffic accident on the radio, Sewell "stayed in [his] position for a while and [] was monitoring the radio" until he received a call from Green, who told Sewell "there was an accident and that he received a call from Doug Matthews and Doug Matthews was the one involved in the accident."

Sewell went to both scenes, responding first to Cedar Street, where he ensured that no one had been hurt, and then to Matthews's residence. In Sewell's account, he asked Matthews, while in the vestibule of his house, whether he was okay, and Matthews said yes. Sewell explained: "I did that for a reason. . . . I wanted to see if I smelled any odor of alcohol on his breath. I did not detect any odor of alcohol. His clothes w[ere] not in disarray, and he didn't have slurred speech." Next, Sewell walked over to Barnes and McGlotten and asked who was handling the case. Barnes volunteered, Sewell said, and McGlotten "just gave her his notes and gave her whatever he had, and she started investigating the case." Sewell testified that he did not go back into Matthews's house with Barnes. When asked whether he directed Barnes to investigate in a particular way, Sewell said:

> What I told Officer Barnes on the scene, I said, look. This is an accident. You have to write an accident report. I gave her instructions to write an accident report. It's up to you. You don't have to give a citation if you don't want to. It's your discretion. You do not – it's up to you. I turned around, walked to my car, got in and started it and left the scene.

Sewell maintained that he did not have an opinion as to whether or not a citation should be issued because it was Barnes's investigation.

The defense then called Bradley Morgan, who was a corporal with the Department in 2014. On the night of the traffic incident, Morgan "heard over the radio that there had been a collision" so he responded to the area and "observed an obvious trail of some type of fluid that obviously emanated from a vehicle and lines in the road from where the tire had come off and it actually caused damage to the road." He followed the damage to Matthews's residence and observed the vehicle before making contact with Matthews's wife and then Matthews. Morgan agreed that his initial impression was that the accident was not alcohol or drug related and that Matthews just got scared, "based on a general odor not being there."

Finally, the defense called his expert witness, James Trainum, to testify about criminal investigations and the conduct of law enforcement officers. Trainum offered opinions related to officer discretion, particularly in the context of commanding and subordinate officers. At the start of his testimony, Trainum indicated that he reviewed an overview of the facts of the case, accident reports, investigative reports, and radio transmittals, and spoke with Sewell for "about 45 minutes to an hour." Trainum also listened to the testimony throughout the second trial. Trainum testified that "[l]aw enforcement discretion, the ability to exercise it, applies in every case except when [a] statute prohibits it. And it did apply in this case."

Trainum then responded to a series of hypotheticals posed by the defense. In response to a hypothetical regarding whether "there [was] anything improper" with a ranking officer instructing a subordinate to remain at a scene, Trainum opined "[n]o" and that this decision "frequently happens on scenes in a lot of police departments" and is "typically made by the ranking officer." The State evoked testimony from Trainum with hypothetical questions as follows:

> [DEFENSE COUNSEL]: . . . . Assuming only what Officer Barnes said is correct for the sake of my question, okay, considering the following factors, A, that it had been established that Mr. Matthews had insurance, B, that Mr. Matthews called the police, that is Mr. Green, C, that there was no personal injury, D, that Chief Sewell had heard the radio traffic that we just heard from Officer Morgan, there was no evidence of intoxication, would there have been anything wrong, just as a hypothetical, with Chief Sewell acting as a supervisor, instructing Officer Barnes that she should write this up as an accident, and hypothetically not issue a citation for [a] hit and run?
>
> [TRAINUM]: Using his discretion and taking into account mitigating factors, that was his right. It would have been appropriate.

After two hours of deliberations, the jury returned a guilty verdict on the charge of misconduct in office. At a sentencing hearing on July 9, 2019, the court sentenced Sewell to three years, but suspended the sentence and placed Sewell on three years of supervised probation.

B. The OSP's Expert's Testimony

Sewell argues that the trial court's decision to allow certain testimony of the OSP's expert witness, Sheriff Joseph Gamble, "violated both established case authority and Maryland Rule 5-704(b), resulting in severe prejudice to Sewell warranting reversal of the conviction." In particular, Sewell asserts that (1) Gamble "opined impermissibly on

Sewell's state of mind in contravention of Rule 5-704(b)"; (2) "the State used hypotheticals to circumvent the Rules of Evidence" assuming facts not in evidence; and (3) "Gamble's testimony about law enforcement discretion is legally incorrect."

The OSP responds that "Gamble did not opine about Sewell's state of mind but rather discussed his opinions related to Sewell's actions and discretion." Next, the OSP asserts that the "facts used in the hypothetical questions posed to the expert were based on evidence in the record," making the OSP's use of hypotheticals appropriate. The OSP adds, "[a]ssuming, *arguendo*, this Court finds that the hypothetical questions were improper, it would amount to harmless error" because any error was "cured by clarifications in cross-examination." Finally, the OSP argues that Sewell's argument that Gamble's opinion about law enforcement discretion was legally incorrect "has been waived and is entirely without merit."

We will address each of the above challenges in turn.

Standard of Review

Trial courts are "vested with wide discretion in determining the admissibility and propriety of expert testimony." *Henson v. State*, 212 Md. App. 314, 325 (2013). Although the court's decision to admit or exclude expert testimony "will seldom constitute a ground for reversal[,]" the ruling "may be reversed on appeal 'if it is founded on an error of law or some serious mistake, or if the trial court clearly abused its discretion.'" *Sippio v. State*, 350 Md. 633, 648 (1998) (citation omitted). We will find an abuse of discretion "where no reasonable person would take the view adopted by the [trial] court or when the court

acts without reference to any guiding rules or principles." *Henson*, 212 Md. App. at 325 (citation omitted).

1. Sewell's State of Mind

Pursuant to subsection (a) of Rule 5-704 of the Maryland Rules of Evidence, "testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact." Subsection (b) of Rule 5-704 provides as follows:

> **An expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may not state an opinion or inference as to whether the defendant had a mental state or condition constituting an element of the crime charged.** That issue is for the trier of fact alone. This exception does not apply to an ultimate issue of criminal responsibility.

(Emphasis added). The Committee note to the rule explains that, although section (b) does not preclude "an opinion on the ultimate issue of criminal responsibility, i.e., sanity," it does preclude "an opinion as to whether the defendant had a required intent or mental state where that intent or mental state is an element of the offense."

In *Gauvin v. State*, the Court of Appeals observed that Rule 5-704(b) is not

> inconsistent with cases interpreting [Federal Rule of Evidence] 704(b) in which the courts have drawn the critical distinction between (1) an explicitly stated opinion that the criminal defendant had a particular mental state, and (2) an explanation of why an item of evidence is consistent with a particular mental state.

411 Md. 698, 707-08 (2009). Accordingly, "[e]xpert testimony at one remove from such ultimate issues as intent may be admitted even though it indirectly supports a conclusion or suggests an inference on some ultimate issue." *Id.* at 708 (citation omitted).

According to Sewell, Gamble "testified as to what he guessed motivated Sewell[,]" which is "significant because the core of a charge of misconduct in office is whether the defendant acted 'corruptly' and 'beyond a mere error in judgment.'" As we explained in Sewell's first appeal, the requisite mental state for a charge of official misconduct is "that the public officer acted 'willfully, fraudulently, or corruptly.'" *Sewell*, 239 Md. App. at 602. Looking at Gamble's testimony, we discern no abuse of discretion in the trial court's rulings because Gamble did not impermissibly opine that Sewell intended to act corruptly. Rather, Gamble focused on the actions Sewell was alleged to have taken and gave the opinion that those actions were "inappropriate" under the circumstances.

Sewell argues that motivation is synonymous with intent in this case, and that Gamble's testimony "that Sewell 'did it for his buddy'" and that "Sewell was covering up a crime" thus impermissibly opined as to his corrupt intent. Examining the entirety of Gamble's opinions, however, reveals that he did not testify that Sewell was doing a favor for a buddy or covering up a crime. A close review of the transcript establishes that Gamble used the term "buddy" when explaining how he would handle a call under circumstances similar to those in the underlying case:

> I mean, the law requires when you strike a vehicle to stay at the scene, right, and notify the police. That's what the law says.
>
> This man drives home, calls the second in command of the police department, or at least the patrol commander who then calls the chief who then shows up to be his defense counsel in front of his own people.
>
> **If – say I get that call in the middle of the night and some citizen says, I need you, . . . and I decide I'm going to go. And I get there and I learn about this. I'm, like, wait a minute. If I don't feel that my**

> **department or that I can adequately handle this, I would ask the Worcester County Sheriff's Office to come into Pocomoke. Hey, can you handle this? I've got a good buddy of mine who's did a hit and run, and for transparency to the public, I want an outside agency to come in.** Or the state police. Pick up the phone and call the state police. Have somebody else come in if you got so wrapped up in that situation.

(Emphasis added). Rather than suggesting that Matthews was a "good buddy" of Sewell's, as Sewell characterizes Gamble's testimony, Gamble was expressing, based on his law enforcement experience, what he would have done had he received a call from a citizen as Green did. Further, Gamble explained the basis for his opinion that there was a friendly relationship between Green and Matthews:

> I mean, I – I could assume that if Mr. Matthews is calling Lieutenant Green and that he has his phone number somewhere that – and that he actually took the call, I can't speak for Mr. Green, **but when I get a call that's not programmed into my cell phone, I usually let it go to voice mail at 11:00, 12:00, 1:00 in the morning. So I can only assume that they knew each other and they had a relationship that he answered his phone at midnight – or close to midnight.**

(Emphasis added).

Gamble's reference to covering up a crime was in response to a hypothetical posed by the State:

> [THE STATE PROSECUTOR]: **Let's say hypothetically now the chief knows that information, his number two in command has called him and said, Mr. Matthews was in a hit and run. He was drinking. And Lieutenant Green and the defendant then talk about not charging him because he's a Mason, then do you have an opinion about whether or not the defendant should have even responded to that second location?**
>
> * * *
>
> [GAMBLE]: Absolutely. He shouldn't have responded.

> [THE STATE PROSECUTOR]: Tell the ladies and gentlemen of the jury why.
>
> * * *
>
> [GAMBLE]: As – especially being a police chief or a sheriff, the head of a department, we have to be very, very careful to be transparent and fair to our community. We put it on the sides of our police cars, integrity, fairness, service.
>
> And when – it's one thing for an officer, a line officer, a patrol officer to cross that line, but when the CEO, the chief, the sheriff crosses that line, it's just totally inappropriate. I mean, it's not fair. It's not transparent to the community. **He's covering up a crime.**

(Emphasis added). Thus, rather than explicitly state that Sewell himself was covering up a crime, Gamble expressed that if, hypothetically, Green and Sewell had discussed not charging Matthews because he was a Mason,[11] then Sewell's actions would be consistent with a cover-up. And, Gamble had already stated, based on his knowledge, that "the law requires when you strike a vehicle to stay at the scene, right, and notify the police." Because Matthews drove home before calling Green, Gamble found it "shocking" that Sewell would answer questions on behalf of an individual who was involved in a hit and run.

We cannot find any instance in which Gamble gave an "explicitly stated opinion" that Sewell had corrupt intent, or even an "explanation of why an item of evidence is

[11] In Sewell's first appeal, we determined that "the State failed to show that [his] membership in the Prince Hall Masonic Lodge motivated his actions or had any relevance to the crimes charged[.]" *Sewell*, 239 Md. App. at 580. We instructed that common membership in the Masons alone was not competent to prove that Sewell acted with corrupt intent. *Id.* at 612. While this should have exhorted to the State Prosecutor that the Mason connection should not be a focus of its case during the retrial, it does not change our conclusions regarding Gamble's testimony.

consistent with [the] particular mental state." *See Gauvin*, 411 Md. at 707-08. Although his opinions that much of Sewell's alleged conduct was inappropriate may support a conclusion or inference that Sewell had corrupt intent, Gamble's testimony, at the very least, "stay[ed] deftly one step back from the ultimate answer" of Sewell's mental state. *See Barkley v. State*, 219 Md. App. 137, 151, 155 (2014) ("Even though the circumstances may implicate the defendant, an opinion based on the circumstances themselves rather than on some special knowledge about the defendant's mind does not offend Rule 5-704(b).").

2. Hypotheticals

Trial courts may admit expert testimony upon a determination that "the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." Md. Rule 5-702. To make that determination, the court must decide "(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony." *Id.* As the reviewing court, "[w]hen analyzing whether expert testimony is based on a 'sufficient factual basis,' we consider whether the prospective testimony is comprised of (a) an adequate supply of data, and (b) a reliable methodology." *Santiago v. State*, 458 Md. 140, 154 (2018) (citations omitted).

Maryland courts have found that data from an expert's first-hand knowledge, facts from testimony, and facts related to an expert through hypothetical questions constitute a sufficient factual basis. *Id.* at 155. Consequently, experts "need not be testifying about

something that the expert has personally observed or experienced. The expert opinion may be in response to hypothetical questions posed by counsel." *Mack v. State*, 244 Md. App. 549, 561 (2020). A hypothetical question does not have to include all of the facts in evidence, but merely "any fair summary which can support the formulation of a rational opinion[.]" *O'Doherty v. Catonsville Plumbing & Heating Co.*, 269 Md. 371, 376 (1973). When the expert bases an opinion on an assumed set of facts from a hypothetical question, he or she "must make clear the observed or assumed facts upon which the opinion is based." *Uhlik v. Kopec*, 20 Md. App. 216, 223-24 (1974).

Sewell asserts that the State used hypotheticals as a vehicle "to plant its wished-for facts in the mind of the jury," particularly "(1) that the defendant was intoxicated; and (2) that Green and Sewell discussed not charging Matthews 'because he's a Mason.'" The facts alluded to were, however, fairly contained in the record.[12] Therefore, Gamble's opinions did not lack an evidentiary basis. Notably, the State adduced evidence that Green called Sewell immediately after speaking to Matthews; that Barnes suspected alcohol was involved but was barred from asking Matthews; and that Green, Sewell, and Matthews were all Masons. As noted, "facts related to an expert through the use of hypothetical

[12] To the extent that the State Prosecutor's questions toe the line of appropriateness, we are reminded, in *Barkley*, to focus our analysis on the actual opinions rendered by Gamble, rather than the questions asked by the State Prosecutor. *Barkley*, 219 Md. App. at 150 ("[I]t is the actual opinion rendered by the expert and not the antecedent question that is controlling in a Rule 5-704(b) analysis."). *See also Gauvin*, 411 Md. at 713 ("[A]lthough the prosecutor's question 'strayed from the track' established by [Rule] 5-704(b), Sgt. McDonough's 'answer did not.' Under these circumstances, Appellant is not entitled to a new trial on the ground that Sgt. McDonough expressed an opinion that should have been excluded under Md. Rule 5-704(b).")

questions" can suffice as the factual basis for an expert opinion. *Santiago*, 458 Md. at 155. The State identified its questions as hypotheticals when the questions involved facts that were in dispute, and Gamble made clear in his responses and during cross-examination the basis for his opinions.

Further, Sewell's attorney on cross-examination of Gamble effectively employed hypotheticals based on the assumption that there was no suspicion of alcohol:

[DEFENSE COUNSEL]: I'll ask you in the form of a hypothetical.

> What, if at the very beginning of this incident, before Chief Sewell shows up on the scene, before Lieutenant Green shows up on the scene, before either of them is there, one of the very first things than happens after this collision, what if hypothetically Corporal Morgan gets on the radio and he's the first one there, or one of the very first ones, and he says words to the following effect. It doesn't appear that there's any drugs or any alcohol involved here, he was just scared. Would that have an effect on your opinion?

In response, Gamble testified that he had reviewed information "that Green smelled an odor of an alcoholic beverage or an odor of alcohol, . . . on Matthews." Gamble added that he did not "think it matters because . . . the investigating officer is the one who signs his or her name or puts his or her name in that block saying that they've completed a thorough investigation." Defense counsel then pressed with another hypothetical on this same theme:

> [DEFENSE COUNSEL]: Now you mentioned reading something about Lieutenant Green and sort of the detecting an order of alcohol. What if the evidence in this courtroom is that Lieutenant Green said that never happened, would that have any effect on your opinion?

* * *

> [GAMBLE]: No, because the investigating officer was never allowed to conduct an investigation. . . . I mean, it would not have any effect on my answer in that the police officer was not allowed to conduct a thorough investigation.

To Sewell's allegation that the State Prosecutor employed hypotheticals that contained facts not in evidence, we point out that defense counsel asked Trainum a hypothetical in which he should assume "there was no evidence of intoxication," without adding the critical fact that Officer Barnes was prevented from conducting a sobriety test:

> [DEFENSE COUNSEL]: . . . . Assuming only what Officer Barnes said is correct for the sake of my question, okay, considering the following factors, A, that it had been established that Mr. Matthews had insurance, B, that Mr. Matthews called the police, that is Mr. Green, C, that there was no personal injury, D, that Chief Sewell had heard the radio traffic that we just heard from Officer Morgan, there was no evidence of intoxication, would there have been anything wrong, just as a hypothetical, with Chief Sewell acting as a supervisor, instructing Officer Barnes that she should write this up as an accident, and hypothetically not issue a citation for [a] hit and run?
>
> [TRAINUM]: Using his discretion and taking into account mitigating factors, that was his right. It would have been appropriate.

We conclude that the record does not show the trial court abused its discretion in permitting the expert testimony in this case, which, unlike Sewell's first trial, included the testimony of Sewell's expert.

3. Law Enforcement Discretion

In his final challenge to Gamble's testimony, Sewell contends that Gamble's opinion was "at odds with the law concerning law enforcement discretion." In Sewell's view, "Gamble's articulation of the bounds of law enforcement discretion means superior officers cannot overrule subordinates ever, even if an investigation has already been

conducted and concluded." Sewell asserts that Gamble's testimony was "legally incorrect" because "[i]t cannot be the case that a subordinate's judgment can never be superseded."

The State argues that Sewell waived this challenge by failing to raise an objection at trial. Sewell contends that his claim was preserved because "defense counsel repeatedly objected to Gamble's testimony that: Sewell was putting Barnes as the author of the report to get a certain result, that Matthews was drinking, and that Matthews was Sewell's 'good buddy.'" He notes that "[t]he trial court even granted the defense a continuing objection on Gamble's testimony."

Maryland Rule 4-323(a) provides that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." Pursuant to Rule 4-323(b), however, trial judges have discretion to grant a continuing objection, which "obviates the need to object persistently to similar lines of questions that fall within the scope of the granted objection[.]" *Kang v. State*, 393 Md. 97, 119 (2006). A continuing objection is "effective only as to questions 'clearly within its scope.'" *Fallin v. State*, 460 Md. 130, 152 (2018) (quoting Md. Rule 4-323(b)).

This Court recently clarified the contours of the "procedural phenomenon of the continuing objection":

> The same objection does not have to be repeated. Different objections, however, to very different evidentiary issues, such as these allegedly prejudicial remarks now before us, are by no means rendered unnecessary. They were not within the scope of the original objection. **A privilege not to have to repeat an objection already made is by no means a license never to have to make an objection in the first instance.** The relief from not

> having to repeat is a relief from reiteration, not from the initial iteration. **"You don't have to repeat that argument" does not mean, "You don't have to make it in the first place."**

Jordan v. State, 246 Md. App. 561, 586 (2020) (emphasis added).

The transcript reflects that the trial court granted Sewell a continuing objection to Gamble's testimony on the basis that Gamble was improperly opining on Sewell's mental state:

> [THE STATE PROSECUTOR]: Can you tell the ladies and gentlemen of the jury what your opinion is?
>
> [GAMBLE]: My opinion is that Chief Sewell reassigned the call because he wanted – he didn't want the initial investigating officer to investigate it.
>
> [DEFENSE COUNSEL]: **Objection.**
>
> [THE COURT]: **Overruled.**
>
> [GAMBLE]: I believe that the other officer – that he was basically taking his authority and putting who he wanted in that place so they would come to –
>
> [DEFENSE COUNSEL]: **Objection, Your Honor.**
>
> [THE COURT]: **What is the basis of your objection?**
>
> [DEFENSE COUNSEL]: Should I say it from here?
>
> [THE COURT]: Say it.
>
> [DEFENSE COUNSEL]: **Okay. What he's doing right now, Your Honor, is invading the province of the jury. It's the jury's decision in terms of what Chief Sewell's motivation was. He can opine on a hypothetical. He can't say what he thinks the facts were.**
>
> [THE COURT]: **Overruled.**
>
> [DEFENSE COUNSEL]: That's it, Your Honor.

[THE STATE PROSECUTOR]: You may answer, Sheriff Gamble.

[GAMBLE]: I believe he was putting the person there he wanted so he could get the result that he wanted.

[DEFENSE COUNSEL]: Objection.

[THE STATE PROSECUTOR]: Do you have an opinion, Sheriff Gamble, based on your review of the documents about the defendant's actions with Officer Barnes inside of Mr. Matthews' home?

[DEFENSE COUNSEL]: **Objection.**

[THE COURT]: **Is it the same basis?**

[DEFENSE COUNSEL]: **Yes, Your Honor. Can I have a continuing objection?**

[THE COURT]: **You have a continuing objection. It's overruled, but you have a continuing objection.**

(Emphasis added).

As Sewell points out, defense counsel also lodged objections to questions and answers that referenced Matthews drinking. When asked, defense counsel clarified that the objections were not part of the continuing objection, but rather for the lack of an evidentiary basis:

[THE STATE PROSECUTOR]: **What if hypothetically Lieutenant Green called the defendant and told him, Doug Matthews, our fellow Mason, just called me and told me that he had been drinking and hit two cars?** Does your opinion about whether or not the defendant should have responded to Mr. Matthews' house changed based on my new information in my hypothetical?

[DEFENSE COUNSEL]: **Objection. No evidentiary basis.**

[THE COURT]: Overruled.

*   *   *

> [THE STATE PROSECUTOR]: **Let's say hypothetically now the chief knows that information, his number two in command has called him and said, Mr. Matthews was in a hit and run. He was drinking.** And Lieutenant Green and the defendant then talk about not charging him because he's a Mason, then do you have an opinion about whether or not the defendant should have even responded to that second location?
>
> [DEFENSE COUNSEL]: **Objection. No evidence of that.**
>
> [THE COURT]: Overruled.

*   *   *

> [THE STATE PROSECUTOR]: Sheriff Gamble, **I want to take that same hypothetical, hypothetically Mr. Matthews has called Lieutenant Green, told him, I've been drinking.** I hit two cars. I left the scene. I'm at my house. Hypothetically Lieutenant Green transmitted that information to Chief Sewell. Hypothetically Chief Sewell arrives on the scene. And then hypothetically Chief Sewell reassigns the case and orders his subordinate officer to write the report as an accident. Do you have an opinion about that?
>
> [DEFENSE COUNSEL]: **Same objection, Your Honor.**
>
> [THE COURT]: **Is this part of your continuing objection, or is this –**
>
> [DEFENSE COUNSEL]: **No. It's a different basis.**
>
> [THE COURT]: It's a different basis. Overruled.

(Emphasis added).

We are not persuaded that Sewell's continuing objection, or any of the subsequent objections, encompass his appellate challenge to the legal correctness of Gamble's opinions on law enforcement discretion. Accordingly, we agree with the State that the argument was not preserved for appeal.

Moreover, in his first appeal, Sewell challenged the court's decision to exclude his expert testimony about law enforcement discretion. In holding that the court erred, we noted that Sewell was "severely disadvantaged" by "the inability to present *independent* expert testimony on the processes by which a police chief generally exercises his or her discretion[.]" *Sewell*, 239 Md. App. at 630-31 (emphasis in original). We discern no error in the trial court's admission of testimony about law enforcement discretion from the OSP's expert during Sewell's retrial, when Sewell argued prior that such testimony was necessary, and where Sewell's own expert testified on the same subject.

C. Sufficiency of the Evidence

Sewell maintains his conviction "should be vacated for lack of sufficient evidence, because the OSP failed to present evidence demonstrating that [he] acted 'corruptly beyond a mere error in judgment.'" Sewell suggests that the testimony of his expert demonstrates that his actions were within his discretion, thus precluding the OSP from meeting its burden to show misconduct in office.

This Court articulated the standard for reviewing sufficiency of the evidence claims in *Painter v. State*:

> In reviewing the sufficiency of the evidence presented, as appellant has requested we do, we consider "the evidence in the light most favorable to the prosecution." We then determine whether, based on that evidence, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." The test is "not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder."
>
> When we apply that test, we consider circumstantial as well as direct evidence. In fact, circumstantial evidence alone is "sufficient to support a

> conviction, provided the circumstances support rational inferences from which the trier of fact could be convinced beyond a reasonable doubt of the guilt of the accused."

157 Md. App. 1, 10-11 (2004) (emphasis in original) (cleaned up); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979) ("[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (emphasis in original)).

Misconduct in office is a common law misdemeanor in Maryland that "has been defined as 'corrupt behavior by a public officer in the exercise of the duties of his office or while acting under color of his office.'" *Leopold v. State*, 216 Md. App. 586, 604 (2014) (citing *Duncan v. State*, 282 Md. 385, 387 (1978)). As we previously explained in Sewell's first appeal, although misconduct in office "is a singular offense, the crime of official misconduct covers three modes of behavior: (1) misfeasance, (2) malfeasance, and (3) nonfeasance." *Sewell*, 239 Md. App. at 601 (citation omitted). We explained:

> Nonfeasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of an act which a person ought not to do at all. By way of example, a public officer tasked with awarding government contracts can commit *malfeasance* by rewarding a political donor with a public contract that the officer had no authority to grant and may commit *misfeasance* by rewarding the donor with a contract that is within the officer's authority to grant. Accordingly, a public officer commits malfeasance by corruptly exceeding the scope of his or her authority and commits misfeasance by acting within the scope of his or her authority but doing so corruptly. The corrupt behavior may be: (1) the doing of an act which is wrongful in itself, or "malfeasance;" (2) the doing of an act otherwise lawful in a wrongful manner, or "misfeasance;" or (3) the omitting to do an act which is required by the duties of the office, or "nonfeasance."

Id. at 602 (citations omitted) (cleaned up). "[R]egardless what type of act (or omission) forms the basis of a charge of official misconduct, the State must prove that the public officer acted 'willfully, fraudulently, or corruptly.'" *Id.* (quoting *Friend v. Hamill*, 34 Md. 298, 304 (1871)). It is not disputed that Sewell was acting under the color of office. Accordingly, our analysis is limited to reviewing whether facts were sufficient to permit the jury to conclude that Sewell acted with corrupt intent.

According to Sewell, "the State seeks to criminalize disagreement from Sewell's subordinates, asserting the existence of a 'cover-up' when there is no evidence of any such cover-up." Sewell's expert testified that Sewell's actions were "wholly within his discretion." Alternatively, the OSP asserts that the "only dispute at trial was whether Sewell did a corrupt act in interfering with a traffic ticket on behalf of an acquaintance." The OSP points to the "overwhelming" witness testimony supporting its theory:

- "Matthews admitted to hitting two parked vehicles because he fell asleep after approximately half a mile of driving. While he denied that he had consumed more than one beer that day, he acknowledged that he did not recall the accident or notice that he drove the remaining distance home on only three wheels[.] . . . He also did not call 911 but called Lieutenant Lynell Green, who he knew from the masonic lodge."

- "McGlotten testified that when he arrived at Matthews' residence, Chief Sewell arrived, which was strange because now the number one and number two individuals in the police department are at a response to a hit and run. . . . When McGlotten asked Green why no charges were filed, McGlotten testified that Green said, 'sometimes you look out for people.' McGlotten further testified that his discretion as an officer was taken away when Sewell took the call away from him."

- "Barnes then testified that she too thought it was unusual that Sewell was at the scene and in plain clothes. . . . After what Barnes classified as an

> 'indirect order' from Sewell to handle the call she went into the residence to interview the driver.
>
> However, when Barnes attempted to ask the driver questions, Sewell interjected and answered for Matthews stating that '[Matthews] wasn't drunk. It's just an accident report.'. . . She testified that she filled out the accident report because she was afraid that if she didn't, then she would lose her job."

The State also relies on the testimony of its expert, Gamble, including his opinion that it "was completely inappropriate for Sewell, as a Chief, to serve as a de facto 'defense attorney,' and answer questions for Matthews."

As we determined in Sewell's first appeal, "[a]lthough the State failed to prove that Sewell had a motive to help Matthews, the State presented circumstantial evidence showing that his conduct was so unusual that it could permit an inference of corrupt intent[.]" *Sewell*, 239 Md. App. at 614. In assessing the evidence in the light most favorable to the State, we credit the testimony of Barnes and McGlotten when it conflicts with Sewell's testimony. Considered together with the circumstances surrounding Matthews's accident, the testimony about the investigation and reasonable inferences that could be drawn about Sewell's intent were sufficient to permit the jury to conclude that Sewell did not commit a mere error in judgment, but rather, had the necessary corrupt intent that is an element of the crime of misconduct in office.

As in the prior trial, both McGlotten and Barnes testified that Sewell's behavior was strange and unusual. McGlotten explained that it was "strange" and "unheard of" for Sewell and Green to respond to a "simple accident . . . at that time of night." Barnes related that it was "unusual" for Sewell to respond to calls for an accident. Both officers testified

that the manner in which Sewell reassigned the case was unusual. McGlotten and Barnes related that Sewell asked McGlotten and Barnes multiple times who was working the case, and each time McGlotten indicated that it was his call. McGlotten and Barnes testified that Sewell then paused, which indicated that Sewell preferred that Barnes, rather than McGlotten, handle the call. The case then was reassigned to Barnes, despite McGlotten's testimony that he had completed most of the work and only needed to speak with the suspect.

Inside Matthews's residence, Barnes was concerned that Matthews was "possibly impaired" and wanted to question him because "the wheel was off the vehicle which was uncommon" and to perform a field sobriety test, "with Corporal Morgan's assistance." While Barnes "tried to ask questions about the accident," Sewell supplied answers on Matthews's behalf. She claimed that she wrote the incident as an accident at Sewell's direction but was "skeptical" and "nervous" to do so because "[i]t didn't feel authentic." Barnes explained that she wrote the incident as Sewell requested because she feared if she did not that she would be fired.

McGlotten told the jury that he spoke with Green about "why no charges were filed" because he "thought it was strange that nothing happened." Green responded, "sometimes you look out for people," which McGlotten understood to mean "[t]hat essentially a favor was done for the suspect to not get charged."

As we determined in the first appeal, "a reasonable jury could have concluded that this conduct was improper, and, together with other evidence concerning the accident—

would permit an inference that Sewell intended to corruptly influence the investigation." *Sewell*, 239 Md. App. at 615. We cannot say that the jury was not presented with sufficient evidence to support its finding that Sewell's conduct in responding to the hit and run amounted to misconduct in office rather than the appropriate exercise of his discretionary authority.

CONCLUSION

We conclude that the circuit court erred by denying Sewell an evidentiary hearing after he proffered verifiable facts amounting to some evidence of bad faith conduct by investigators within the OSP. Accordingly, we hold that a limited remand of the case is required for an evidentiary hearing on Sewell's verifiable allegations of prosecutorial misconduct. *See generally Southern v. State*, 371 Md. 93, 104-05 (2002) (discussing the purposes of limited remand). Should the court decide, at the conclusion of the evidentiary hearing, that the OSP did not act in good faith, the court will then need to determine the appropriate remedy. *McNeil*, 112 Md. App. at 467; *cf. Bailey v. State*, 303 Md. 650, 659 (1985) (ordering a limited remand and directing the circuit court to "determine the appropriate remedy" for a discovery violation by the State). In this regard, we note that Sewell sought as a remedy either the dismissal of the case or the exclusion of Barnes's testimony which would then require a new trial on the merits. Should the court decide, on the other hand, that the OSP did act in good faith, then the allegations of prosecutorial misconduct would not be cause to disturb Sewell's conviction. *Cf. Bailey*, 303 Md. at 659 (instructing the circuit court that if on limited remand it finds that the State's discovery

violation did not warrant a new trial, then "the judgment of conviction stands"); *Mills v. State*, 239 Md. App. 258, 273-74 (2018) (ordering a limited remand for a *Batson* hearing with the instructions that if the defendant meets his burden of proving discrimination, then the circuit court "'shall order a new trial,' but if it finds otherwise, then the judgments shall be affirmed").[13]

CASE REMANDED, WITHOUT AFFIRMANCE OR REVERSAL, TO THE CIRCUIT COURT FOR WORCESTER COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO ABIDE THE RESULT.

[13] In *Batson v. Kentucky*, the Supreme Court remanded the case to the trial court so that it could determine whether the prosecution purposefully used its peremptory challenges to construct an all-white jury, excluding all black members of the venire. 476 U.S. 79, 83, 99-100 (1986). Our Court of Appeals has recognized *Batson* as an example of limited remand, although the Supreme Court did not use that language to describe it. *Edmonds v. State*, 372 Md. 314, 340 (2002); *see Batson*, 476 U.S. at 100 (directing further proceedings on remand).

Circuit Court for Worcester County
Case No. 23-K-16-000289

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 854

September Term, 2019

KELVIN SEWELL

v.

STATE OF MARYLAND

Leahy,
Friedman,
Beachley,

JJ.

Concurring Opinion by Friedman, J.

Filed: August 30, 2021

I concur in the majority opinion.

As to Part I of the majority opinion, I am hopeful that on remand, the allegations of prosecutorial misconduct will be given a full airing and decided, one way or the other. These are serious claims and deserve no less.

As to Part II of the majority opinion, I agree with the outcome it reaches as to each of the specific legal issues presented. I write separately only to offer three additional comments.

I.

Sewell claims that the trial court erred by allowing improper questions to and answers from Gamble, OSP's expert witness. I agree with the majority that under the relevant precedents, principally including *Barkley v. State*, 219 Md. 137 (2014), the questions were acceptable. I write separately to note for the future that I don't agree that the fault for an objectionable testimonial exchange can be lain exclusively on the questioner, not the answerer, or solved by liberally sprinkling a question with the magic word, "hypothetically."

II.

Sewell has not raised as error, and thus the majority, quite correctly, does not reach the issue of OSP's continued reliance on evidence of Sewell's membership in the Prince Hall Masons. Despite this, I believe it is our responsibility to make mention when a party so flagrantly disregards our opinions. We made it clear in *Sewell I* that it was inappropriate for OSP to try to prove Sewell's intent by reference to his membership in the Masons for

several reasons. *Sewell I*, 239 Md. App. at 587 n.5, 608-612. Yet OSP did it again. *First*, it is wrong to find people guilty by association. *Second*, critics of Masonry have specifically pointed to the oaths that Masons take to provide assistance to one another as proof that a Mason would disregard his civic and professional obligations to help a brother Mason—precisely as Sewell is accused of doing for Matthews here. Elizabeth Bussiere, *Trial By Jury as "Mockery of Justice": Party Contention, Courtroom Corruption, and the Ironic Judicial Legacy of Antimasonry*, 34 LAW & HIST. REV. 168-69, 172, 185-86 (2016); *see generally Dowdye v. Virgin Islands*, 55 V.I. 736, 746 (2011) (discussing distrust of Masonic oaths). If the jury believed it, it wouldn't be evidence, it would be anti-Masonic prejudice. And *third*, the Prince Hall Masons are the African American branch of Masons. I think that emphasizing their mutual membership was intended to and did, in fact, signal to the white members of the jury: "Black people are different from us. They stick together. That's why Sewell did this for Matthews." For all of these reasons, I think it was wrong for OSP to put this evidence on at the first trial and doubly wrong that, despite our warnings, it did it again.

III.

As I noted in my dissent from *Sewell I*, I don't think the evidence that Sewell exercised his discretion in "unusual" ways is sufficient to show intent. By adopting *Sewell I* as a reported opinion of this Court, however, it is now a mandatory precedent, to which I am duty-bound to adhere.