Circuit Court for Anne Arundel County
Case No. C-02-CR-15-000531

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 857

September Term, 2016

DARRYL ZACHARY MOORE

v.

STATE OF MARYLAND

Meredith,
Reed,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: March 28, 2018

Appellant, Darryl Zachary Moore, was charged in the Circuit Court for Anne Arundel County, Maryland, with assault in the first and second degree, reckless endangerment, theft of property less than $1,000, and carrying a handgun on his person. A jury acquitted him of the theft charge, but convicted him on all remaining counts. After appellant was sentenced to seventeen years for first degree assault, and a consecutive sentence of three years for carrying a handgun, appellant timely appealed, presenting the following questions for our review:

1. Was the evidence sufficient to sustain Mr. Moore's convictions?

2. Did the court err in denying Mr. Moore's motion for a new trial in light of a juror's failure to disclose her relationship to Mr. Moore's family?

For the following reasons, we shall affirm the verdict of the circuit court.

BACKGROUND

On September 8, 2015, four individuals, including: (1) Tykiva Mason, who was pregnant with appellant's child at the time; (2) Mason's three-year-old son; (3) Mason's friend, Jasmine Johnson; and, (4) Johnson's three-year-old daughter, drove to a parking lot in the Eastport area of Annapolis, Maryland, to go to a playground. Mason testified at trial that she was driving, while Johnson was in the front passenger seat, and the children were in the back seat. Once they arrived in the area, Mason and Johnson got out of the vehicle, and Mason went to her nearby uncle's house. Contrary to earlier statements she made outside the courtroom, Mason then testified that "[n]othing happened." Specifically, Mason denied seeing appellant in the area when she first arrived, and only saw him after she left her uncle's house.

Despite previously admitting that he was present, at least for a portion of the time, Mason maintained, in her testimony, that appellant was doing "[n]othing, just standing there." Mason also testified that appellant then left the area, and she left soon thereafter, without incident. She denied ever seeing appellant holding a rock or a handgun.

Mason then testified that her friend, Johnson, called the police while they were parked near the playground and confirmed that she, Mason, spoke to an officer at the scene. However, Mason testified that she did not recall telling the officer if appellant had done anything to precipitate the call, and also did not recall giving a written statement to the police. Mason did agree, however, that she did not want to testify at appellant's trial.

The prosecutor then presented Mason with State's Exhibit 1 and she confirmed that the exhibit was a statement she provided to the police on the day of the incident, agreeing that it was in her handwriting and that she signed the statement. The statement was admitted into evidence, without objection, and published to the jury.

In that handwritten statement, Mason stated that, after she parked near the playground, she saw appellant approach her car holding a "big rock." He then started "banging the rock against my car window saying he was going to bust my windows." In response, Mason started to make a call on her cellphone, and appellant opened the car door and "snatched" the phone away from her, ripping one of the braids from her hair as he did so. Mason got out of the car, went to her nearby uncle's house and called her brother. When her brother arrived, he retrieved Mason's phone from appellant. Thereafter, appellant walked to a nearby residence and returned "with a gun pointing it in the car on the driver's side" and told her to "go, leave get out of here" and "I will put the beam on

you." Mason attempted to leave, but appellant took her keys out of the ignition. Mason's statement concluded by indicating that, a few moments later, an unidentified girl returned Mason's keys.

After the jury had the opportunity to read State's Exhibit 1, Mason denied the contents of her own prior statement, testifying that she did not recall appellant approaching her car with either a rock or a handgun. She also did not recall him threatening her. She did agree that she wanted to maintain a relationship with appellant and wanted him to provide support for their newborn child.

But, Mason agreed that she provided another written statement to the police, and that State's Exhibit 3 was in her handwriting and signed by her. That statement, also admitted without objection and published to the jury, was set forth in an Annapolis Police Domestic Report. In it, Mason maintained that appellant: approached her car with a rock; "snatched" her phone and her hair; and then later, after she called her brother, pointed a "handgun" into the car and told her to leave. After the statement was published, Mason again testified that she did not recall any of the incidents stated therein. And, on cross-examination, Mason denied that any the events as described in her written statements actually occurred. She also testified that her prior statements to the police were false.

Mason's friend, and passenger in the vehicle on the day in question, Jasmine Johnson, testified on call by the State, but explained that she was "angry" to have to testify in this case. Johnson confirmed that she was with Mason on the day in question when the two of them, and their children, drove to a playground in Eastport. Johnson agreed appellant was there, but testified that he was doing "nothing" at the time.

However, Johnson confirmed that appellant approached Mason's car and started banging the driver's side window with a rock while the four of them were seated inside. According to Johnson's testimony, appellant angrily banged on the window one time, did not say anything, and then, the women and children drove away from the scene. Johnson testified that she did not recall seeing appellant with a gun.

Johnson then agreed that she gave a statement to the police that day, and identified her handwriting and signature on that statement, which was admitted at trial, this time over objection, as State's Exhibit 5. The statement, published to the jury, provided that appellant, known to Johnson as "Shorty," "was threatening us to leave because he was mad at the mother of his child[.]" Appellant then walked away and returned with a "grey and black gun," pointing it at the window. According to Johnson's statement, the gun had a "red beam on it." Johnson also told police that appellant stated "I'll smack you, I'll kill you call whoever you want" and "If you call the police I'll kill you."

After the events described in her statement occurred, Johnson testified that she called the police. Both a 911 call and a surveillance video tape of the incident were played for the jury, without objection. In the 911 call, Johnson identifies herself and tells the operator that "a man pulled out a gun on me and my daughter." She identifies that man as "Darryl Moore." After describing the clothing appellant was wearing at the time, Johnson also stated that appellant was the father of her friend's baby, and that her friend was presently sitting in the driver's seat of the car. Johnson also repeated, at least four more times, that appellant was carrying a gun. Asked by the 911 operator to describe the gun,

Johnson stated that "it wasn't that small. It wasn't like a pocket gun. It was a midsize gun and it was black and silver."

We shall include additional detail in the following discussion.

DISCUSSION

I. Sufficiency of the Evidence

A. STANDARD OF REVIEW

> "In reviewing a question regarding the sufficiency of the evidence presented at trial, the primary question we ask 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.'" *Haile v. State*, 431 Md. 448, 465 (2013) (quoting *State v. Smith*, 374 Md. 527, 533 (2003)). As an appellate Court, "'[w]e do not re-weigh the evidence,' but, instead, seek to determine 'whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.'" *Id*. at 466 (quoting *Smith*, 374 Md. at 534). "Because the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Tracy v. State*, 423 Md. 1, 12 (2011) (quoting *Smith v. State*, 415 Md. 174, 185 (2010)) (internal citations omitted).

B. Analysis

Appellant first contends that the evidence was insufficient to sustain his convictions because there was no proof that he possessed an operable firearm. The State disagrees,

responding that the 911 call and the out-of-court statements by Mason and Johnson were sufficient to sustain the convictions.[1]

Appellant was convicted of carrying a handgun on his person, in violation of Criminal Law Section 4-203. That statute provides, in pertinent part, that "[e]xcept as provided in subsection (b) of this section, a person may not: (i) wear, carry, or transport a handgun, whether concealed or open, on or about the person[.]" *See* Md. Code (2002, 2012 Repl. Vol. 2016 Supp.), § 4-203 (a) of the Criminal Law ("Crim. Law") Article. A "handgun" "means a pistol, revolver, or other firearm capable of being concealed on the person." Crim. Law § 4-201 (c) (1).

In this case, no gun was recovered. However, this Court has rejected the argument that a handgun violation cannot be proved absent production of the actual weapon at trial:

> It is one thing to say that, where the weapon alleged to be a handgun is produced and examined, and the evidence either shows that it was not a handgun or fails to demonstrate adequately that it was, there can be no conviction. It is quite another to extend the "sufficiency" theory to produce the same result when, despite credible testimony that the assailant used a weapon described as a handgun, a small pistol, the weapon was not subject to empirical examination because it was not recovered.

Brown v. State, 64 Md. App. 324, 335 (1985) (quoting *Couplin v. State*, 37 Md. App. 567, 578 (1977), *cert. denied*, 281 Md. 735 (1978)), *cert. denied*, 304 Md. 296 (1985); *see Brooks v. State*, 314 Md. 585, 589 n.3 (1989) (noting that the authenticity of the gun may be established by testimony of the victim that the defendant used a weapon); *see also Wilder v. State*, 191 Md. App. 319, 337-338 (2010) ("[T]angible evidence in the form of

[1] We note appellant does not challenge either the admission or the use of the witnesses' out-of-court statements on appeal.

the weapon is not necessary to sustain a conviction; the weapon's identity as a handgun can be established by testimony or by inference") (citations and quotations omitted).

Appellant also challenges the fact that there was no proof that any gun was operable. This Court has recognized:

> A weapon must be an operable firearm to sustain a conviction for carrying a handgun. *See Howell v. State*, 278 Md. 389, 364 A.2d 797 (1976) (holding that tear gas pistol was not a handgun because it was not a firearm, *i.e.*, it did not propel a missile by gunpowder or similar explosive (abrogating *Todd v. State*, 28 Md.App. 127, 343 A.2d 890 (1975))); *York v. State*, 56 Md.App. 222, 229, 467 A.2d 552 (1983) (holding that a firearm that is inoperable and not readily rendered operable at the time of use is not a handgun), *cert. denied*, 299 Md. 137, 472 A.2d 1000 (1983).

Brown v. State, 182 Md. App. 138, 167 n. 16 (2008).

However, in *Mangum v. State*, 342 Md. 392 (1996), the Court of Appeals made clear that circumstantial evidence suffices to prove operability, under the former statute for carrying a handgun:

> While circumstantial or indirect evidence may in some cases tend to prove an erroneous conclusion, this is equally true of direct or testimonial evidence. "Circumstantial evidence is as persuasive as direct evidence. With each, triers of fact must use their experience with people and events to weigh probabilities."
>
> Courts in other jurisdictions have also concluded that circumstantial evidence is as probative as direct evidence in determining the operability of a firearm. Moreover, the trier of fact may infer operability from a visual inspection of the weapon, without the aid of expert testimony. "Just as it would have been reasonable for the [potential victims] to believe that appellants' weapons were operable, so too would it be reasonable for the jury to conclude likewise."

Id. at 400 (citations omitted); *see also Brooks*, 314 Md. at 589 n. 3 ("If it is described as a gun without further qualification, there is a permissible inference that it is a real and

operable gun").

Here, the primary evidence against appellant came from Mason and Johnson's statements to police, as well as Johnson's call to 911. In her statement, Mason told police that appellant first approached her car with a big rock and banged on her windows. When she tried to call for help, he grabbed her phone and tore out one of her braids. He soon returned with a gun, pointed it at her, told her he was going to "put the beam" on her, and told her to leave. And, as recorded by the Annapolis Police in the Domestic Violence Report, she specifically identified the gun as a "handgun."

Johnson confirmed Mason's statement, actually testifying that appellant banged a rock on the window. She also informed the police, in her statement, that he pointed a "grey and black gun" with a "red beam on it" at them, and stated "I'll smack you, I'll kill you call whoever you want" and "If you call the police I'll kill you." And, in the 911 call recording, Johnson specifically identified appellant and described the gun as not "that small. It wasn't like a pocket gun. It was a midsize gun and it was black and silver." These facts, including the description of the gun and the identification of it as a "handgun" were sufficient, in our view, to overcome the fact that the gun was never recovered or admitted into evidence.

Appellant relies on *Beard v. State*, 47 Md. App. 410 (1980), and *Pharr v. State*, 36 Md. App. 615, *cert. denied*, 281 Md. 742 (1977). We note that both of these cases were decided before the line of cases, previously discussed, but conclusively held that circumstantial evidence and rational inferences from the evidence admitted are sufficient to prove the identity and operability of a gun. Accordingly, based on our review of the

record, we conclude that these cases are distinguishable on their facts. In *Beard*, the witness described the gun at issue as "sort of big and brown-rusty-it looked like an old gun to me. It looked rusty like. And it was big. It was rather big." *Beard*, 47 Md. App. at 412. In *Pharr*, there was evidence that the gun described was actually a blank gun. *Pharr*, 36 Md. App. at 632. In these cases, the gun is described as a blank and inoperable because it was old or clearly not a handgun. We conclude that, in contrast to these cases, the evidence in the case at bar was sufficient to support appellant's conviction for carrying a handgun.

As for his conviction of first degree assault, the jury was instructed that appellant could be guilty of the crime if he either used a firearm or intended to cause serious physical injury in the commission of the assault. *See* Crim. Law § 3-202. Notably, the evidence that appellant smashed a rock against Mason's window while threatening to kill her would arguably be sufficient to not only prove that he intended to cause her serious physical injury, sufficient for one modality of first degree assault, it was also, at minimum, sufficient to show he was guilty of a second degree assault. *See* Crim. Law § 3-203. Moreover, as to the issue of whether the State proved he used a "firearm," as contemplated by that modality of first degree assault, notably, this Court has also held that circumstantial evidence is sufficient to sustain such a charge. *See, e.g. Curtin v. State*, 165 Md. App. 60, 71 (2005) (concluding that testimony and photo evidence "was sufficient evidence regarding a handgun to support that element in appellant's convictions for armed robbery, use of a handgun in the commission of a crime of violence, *and* first degree assault") (emphasis added), *aff'd*, 393 Md. 593 (2006); *see also* Crim. Law § 3-202 (a) (2) (i) (observing that a "firearm" includes a "handgun" as defined under Crim. Law § 4-201).

As for appellant's remaining conviction of reckless endangerment, we conclude that the case appellant relies upon to argue insufficiency of that conviction, *Moulden v. State*, 212 Md. App. 331 (2013), is distinguishable. There, the only evidence about the gun was that the gun was a "fake." *See Moulden*, 212 Md. App. at 356 ("The State failed to counter Mr. Ramirez's testimony with any evidence from which a juror might rationally infer that the gun was real and capable of firing a projectile, or if used as a club, would present a substantial risk of death or serious personal injury"); *see also Marlin v. State*, 192 Md. App. 134, 166 ("[P]roof of use of a firearm is not required to establish reckless endangerment"), *cert. denied*, 415 Md. 339 (2010). In sum, we hold that the evidence was sufficient to sustain appellant's convictions.

II. Motion for New Trial

A. Standard of Review

In *Washington v. State*, 424 Md. 632 (2012), the Court of Appeals explained the extent of a trial court's discretion in denying a motion for new trial:

> Ordinarily a trial court's order denying a motion for a new trial will be reviewed on appeal if it is claimed that the trial court abused its discretion. Generally, we will not disturb a circuit court's discretion in denying a motion for a new trial. We have held that [t]he abuse of discretion standard requires a trial judge to use his or her discretion soundly and that discretion is abused when the judge exercises it in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law. A trial judge's discretion to grant or deny a motion for a new trial is not fixed and immutable; rather, it will expand or contract depending upon the nature of the factors being considered, and the extent to which the exercise of that discretion depends upon the opportunity the trial judge had to feel the pulse of the trial and to rely on his own impressions in determining questions of fairness and justice. Notably, [a] ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling.

Washington, 424 Md. at 667-68 (quotations and citations omitted).

And, "[a] trial court has wide latitude in considering a motion for new trial and may consider a number of factors, including credibility, in deciding it; thus, the court has the authority to weigh the evidence and to consider the credibility of witnesses in deciding a motion for a new trial." *Argyrou v. State*, 349 Md. 587, 599 (1998). Ultimately, "[i]t is a movant who holds the burden of persuading the court that a new trial should be granted." *Brewer v. State*, 220 Md. App. 89, 111 (2014).

B. Analysis

Appellant next asserts that the court erred in denying his motion for new trial under Maryland Rule 4-331 (a) because, after trial, he learned that one of the jurors knew members of his family. The State responds that the court properly exercised its discretion in denying the motion following a hearing.

During *voir dire* of the jury, the venire was asked the following: "Question two, does any member of the prospective jury panel know, is related to, or have a social or professional relationship with any of the following persons: First, the Defendant, Darryl Zachary Moore . . . or any other member of his family?" There was no affirmative response. Thereafter, during jury selection, the juror who would become Juror Number 1 was asked, "do you have a fixed and deliberate opinion of the guilt or innocence of the Defendant which prevents you from rendering a verdict fairly and impartially based on the law and the evidence presented at trial in this case?" This juror responded in the negative and defense counsel stated that she was acceptable.

On or around April 7, 2016, or within ten days after the verdict, appellant moved for a new trial by written motion. Appellant asserted that, after the verdict, defense counsel received information that Juror Number 1 knew the defendant and his family. Specifically, appellant alleged that this juror knew appellant's mother, Mrs. Thomas, all of Mrs. Thomas' children, including appellant, and Mrs. Thomas' mother, i.e., appellant's grandmother. Appellant's grandmother resides in the same apartment building that Juror Number 1 manages as a resident director for the Housing Authority for the City of Annapolis. Appellant further alleged there was "some animosity" between appellant's family and Juror Number 1 ever since his aunt was "threatened with being banned" from the aforementioned apartment building on some prior occasion. For these reasons, appellant requested a hearing and motioned the court to grant a new trial under Maryland Rule 4-331 (a).

The State responded to appellant's written motion by disputing appellant's account of any relationship between Juror Number 1 and appellant's family. The State alleged that appellant's mother, Mrs. Thomas, knew Juror Number 1 on the first day of trial and decided to withhold that information until after the jury returned a verdict in this case, despite the presence of two alternate jurors throughout the trial. The State proffered that Juror Number 1 merely recognized Mrs. Thomas, but did not know either her or her son, *i.e.*, appellant. Having recognized Mrs. Thomas, outside of the courtroom during a recess, Juror Number 1 advised a bailiff and believed that all parties were informed and that the trial could proceed without further inquiry. The State concluded that appellant did not exercise due

diligence in discovering the pertinent information in this case, and that, the court should deny the motion for new trial.

At the motion for new trial hearing, Juror Number 1 testified that she was a property manager for the Housing Authority for the City of Annapolis and that, during a break in the trial, she recognized Tarsha Thomas. Thomas's mother lived at the property she managed. The juror also knew Thomas's sister, who also visited the property, as well as Thomas's daughter. The juror explained that Thomas's daughter was a schoolmate of her own daughter, and that they went to their high school prom together in 2002. The juror testified that she had never had any disputes with Thomas, Thomas's sister, or Thomas's daughter. She also testified that she had never seen appellant before the trial in this case.

Juror Number 1 then explained the encounter with Thomas in the courthouse, testifying that she first saw her in the courtroom prior to jury selection and thought she might be someone she knew. After she was selected for the jury, the juror saw Thomas during a break for lunch in the hallway outside the courtroom. It was at that point that the juror recognized Thomas as someone she knew. The juror maintained that she did not speak with Thomas.

After seeing Thomas, Juror Number 1 spoke to a male bailiff and told him that she saw a woman in the hallway and that she knew that this woman's mother lived in the property the juror managed. This bailiff told her that he would discuss the matter with a female bailiff and that they would talk to the juror after lunch. After lunch, when Juror Number 1 returned to the jury room, she spoke to both bailiffs again about this matter. The juror then testified as follows:

> That the lady that was in the hallway visits her mom at my building and that I did know her. And they asked me - no. She said hold on, let me check. Something like that was said. I'm not remembering exactly. So then she left, and maybe about 10, maybe 15 minutes later or shorter, she came back. And I believe she said that she was asked whether or not she was a witness or something and that she wasn't, so everything was okay.

On cross-examination by the prosecutor, Juror Number 1 confirmed that she did not know appellant. She also did not know that, when she saw Thomas in the hallway, that Thomas was appellant's mother, or that appellant was the grandson of the woman who lived in the building she managed. She further testified that she had never had any "poor interactions" with appellant's family.

The juror further explained that she had been employed as the property manager for the building where Thomas's mother lived since October 2015, having served as the "congregate housing coordinator" since 2012. When asked if she was aware of any procedures involving banning members of appellant's family from the property, the juror replied that the "Housing Authority has not banned anyone since 2009." However, the juror did recall a meeting involving Thomas's sister when she was a housing coordinator, but that meeting was not about banning her from the property. The juror maintained that she held no animosity towards appellant or members of his family.

The juror further testified that had Thomas' name been mentioned during *voir dire*, which it was not, then she would have said she recognized the name. In fact, the juror did not realize that Thomas was appellant's mother until after the trial when she returned to work and was informed by a co-worker, who happened to work nights at the county

detention center, of the family relationship. The juror also did not realize, until after the trial, that her daughter knew appellant's sister.

Following the juror's testimony, Janae Sturgis, one of the bailiffs for appellant's trial, testified that she did not recall any of the jurors informing her that they knew appellant's family. She also did not receive any notes from any of the jurors to that effect. She also was not aware of any such conversation between her co-bailiff at the time and any juror. Sturgis testified that, were she so notified, she would have informed the trial judge.

Thereafter, Tarsha Thomas, appellant's mother, testified at the new trial hearing. Thomas testified that on the day that she walked into the courtroom, and also in the hallway outside of the courtroom, she recognized Juror Number 1 and had known her for over 30 years since they were teenagers together. Thomas testified that she had spoken with Juror Number 1 outside of the courthouse on prior occasions and that their daughters were "best friends." Thomas knew that Juror Number 1 managed the property where Thomas's mother resided. She also testified that Juror Number 1 knew appellant, testifying as follows:

> Q. Does [Juror Number 1] know your son?
>
> A. Yes, she does.
>
> Q. And how does she know your son Mr. Moore?
>
> A. Through family. You know, we like -- we talk. She talks to my mother. She talks to my -- yeah. She just know us.
>
> Q. Okay.
>
> A. It's not like she doesn't know us. She know us.

Thomas then testified that her sister had been in a relationship with Juror Number 1's brother-in-law for approximately 20 years. Thomas knew there was a dispute concerning

that relationship, but testified that she was aware of no ill-will between Juror Number 1 and her family.

On cross-examination by the prosecutor, Thomas testified that her daughter and the juror's daughter were friends in high school and still remained friends. Thomas then confirmed that appellant did not reside at the building that the juror managed, but had visited there on occasion. She also agreed that when she saw Juror Number 1 in the hallway, the two did not speak whatsoever.

During Thomas' testimony, a discrepancy arose about when Thomas passed on this information to defense counsel. Initially, Thomas testified that she "immediately" informed defense counsel that she recognized the juror. Defense counsel then proffered to the court that he was not so informed until after trial. Upon further questioning by the court, Thomas maintained that she left a message with defense counsel the same day she saw the juror, testifying that her message on his voice mail was that "it was very important, and I had some information I wanted to share." She agreed her message was not specific, testifying that defense counsel called her back after the trial was over.

After hearing this testimony, defense counsel argued that appellant was denied his right to a fair trial. In support thereof, counsel focused on alleged inconsistencies between the testimony of the juror and the bailiff, as well as between the juror and appellant's mother. Counsel challenged the juror's credibility, expressly stating that he did not think Juror Number 1 "is being completely truthful." Counsel stated that, had he known that the juror knew appellant and his family, that he would have moved to strike this juror for cause or, used a peremptory challenge to ensure that the juror not serve on appellant's jury.

The State responded that there was no evidence that Juror Number 1 was biased or prejudiced against appellant. Further, the juror testified that she did not know that Thomas was appellant's mother. Therefore, the State asked the court to deny the motion for new trial.

After hearing a short rebuttal argument from defense counsel, the court denied the motion for new trial. In pertinent part, the court made the following findings:

> And first let me discuss a bit about the witnesses. I found [Juror Number 1], the juror, to be a candid and credible witness. She with sufficient detail relates the circumstances of the day in question when she recognized someone, and it was in the context of a person whose mother lived in the building she managed. She was unequivocal in her testimony that she did not know that the person she recognized was the Defendant's mother. She describes other contacts between the family including the daughters that went to prom, apparently years before, together.
>
> She also relates the conversation she had with the bailiff, and nowhere in that testimony was it revealed to her that the woman that she recognized was in fact the Defendant's mother. The conversation, as [Juror Number 1] relates it, was all in the context of a woman she recognized whose own mother lived in the building that she managed. One can plausibly and really and reasonably see in that context how a bailiff could say well, that's not a witness in the case, didn't make inquiry about family member and innocently simply took no further action. That doesn't necessarily end the analysis, but that takes it at least to that point.

After noting that the bailiff did not recall any such conversations, the court then addressed the credibility of appellant's mother:

> Ms. Thomas' testimony is troubling in several regards, in the most significant regard when it came to the -- one of the central questions about whether, to her knowledge, the juror knew the Defendant specifically. And here the witness equivocates quite widely. She says well, yes, she knew the Defendant; the juror knew the Defendant "through family." "She just knows us." There was no testimony upon occasions where there was direct contact between the juror and the Defendant. I would note that the Defendant and his mother's last names are different and that it was vague, giving her the benefit

> of the doubt, the testimony as to the nature of any prior contact that would cause the juror to know the Defendant directly.
>
> Several other things that are troubling is that she describes the two daughters as still best friends, even though apparently it's been years since they went to prom together. That's possible but that does not seem to be consistent with the other testimony.
>
> She does not describe any other ill will between the families and somewhat downplays whatever dispute occurred with her own sister at the Housing Authority building on one occasion. She describes otherwise the family relationships, for what that's worth, as being positive generally.

Finding no credible evidence that the juror knew that Thomas was appellant's mother, the court observed that the juror simply told the bailiff that she knew someone in the courtroom. After opining that the bailiffs most likely determined that Thomas was not a witness and decided not to inform anyone, the court found that there was no "nondisclosure" by the juror. The court then continued its ruling with the following assessment of the issue presented:

> Then we have, a least parenthetically, another issue. If the mother of the Defendant is to be believed that the juror knew that she was in fact the Defendant's mother and further that the juror knew the Defendant then -- and this many years of contact, then logic dictates that the Defendant would have known the juror.
>
> Now we don't have any testimony to the contrary, and thus, the Defendant's failure to inform his attorney during -- or the Court during the course of the trial could in fact constitute a waiver of the very issues that are being raised by the Defense now. Where a defendant is aware that a prospective juror has failed to disclose and failed to alert, that could be -- and that defendant then fails to alert the Court or his counsel, that is waiving one's right to object to the nondisclosure at a later date. And that would be the circumstance if I believed factually that in fact the juror knew the Defendant. I'm not going quite that far because I find the juror's testimony to be credible, and I find that the juror in fact did not know the connection between the woman she recognized and the Defendant.

The court then concluded its ruling denying the motion for new trial as follows:

> Then we move to what is the ultimate issue as the State has styled it, whether there's been any demonstration of prejudice or bias. I think the situation is neutral at best, and perhaps beyond that, there is in fact perhaps a conceit going on behind the scenes here, at least on the party -- on the part of the Defendant's mother that she might have thought there was in fact a favorable juror seated, and it was only with the unfavorable outcome that this issue raised its ugly head.
>
> For all those reasons, I don't find that there was any actual prejudice or bias demonstrated by the Defendant, who has the burden to do so at this juncture. And I will deny the motion for new trial.

Initially, before we consider the merits of appellant's claim, we note that the court questioned whether appellant waived this issue based on the testimony from his mother. According to Thomas, she recognized Juror Number 1 on the first day of trial. And, although there was some dispute as to when Thomas attempted to convey this information to defense counsel, the court appeared to accept that no challenge to the juror came until after appellant was convicted.

The State asserts that the *voir dire* issue was waived and cites *Scott v. State*, 175 Md. App. 130 (2007). There, the alleged misconduct was the juror's failure to respond affirmatively when, on *voir dire*, the court asked the prospective jurors whether anyone knew the defendant. At the close of the evidence, the accused had explained to his counsel that he knew the juror. *Id.* at 138. Defense counsel did not bring this to the attention of the court at that time, although, when the motion for a new trial was heard, he acknowledged that he should have done so. *Id.* at 139. After the verdict was rendered adversely to Scott,

the juror misconduct issue was raised for the first time by motion for a new trial. Citing numerous cases in support of its ruling, this Court held:

> The failure of *voir dire* to disclose potentially disqualifying information does not, in all cases, entitle the defendant to a new trial. When a defendant is aware that a prospective juror has failed to disclose information that is sought by *voir dire,* and fails to alert the trial court of the fact until after the verdict, he has waived the right to later complain. We find no abuse of discretion in the trial court's denial of Scott's motion for a new trial.

Id. at 146-47.

In *Scott*, Scott and his counsel both knew that the juror was acquainted with Scott, prior to the verdict. In contrast, here, although appellant's mother knew about Juror Number 1, the court appeared to accept that defense counsel was not made aware of this until after the verdict. We conclude that appellant did not waive this issue and that the reasoning of *Scott* does not apply to this case.

Turning to the merits, appellant's motion was brought under Maryland Rule 4-331 (a), which provides: "[o]n motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial." In *Love v. State*, 95 Md. App. 420, *cert. denied,* 331 Md. 480 (1993), this Court commented that "[t]he list of possible grounds for the granting of a new trial by the trial judge within ten days of the verdict is virtually open-ended." *Love*, 95 Md. App. at 427. In the present case, the following description of a 4-331 (a) motion is pertinent:

> New trial motions that must be filed within ten days, pursuant to subsection (a), almost invariably (if not invariably) are based on events that happen in the course of the trial; such as, e.g., rulings on admissibility, potential trial error that may or may not be recognized at the time of occurrence, jury instructions, jury behavior, etc. These events are of a type that will ordinarily happen under the direct eye of the trial judge. For that reason, subsection (a)

> expressly provides that the trial judge may order a new trial 'in the interest of justice' for it is he who has his thumb on the pulse of the trial and is in a unique position to assess the significance of such events.

Jackson v. State, 164 Md. App. 679, 699-700 (2005), *cert. denied*, 390 Md. 501 (2006).

Generally, "[t]he law in Maryland is well settled that a juror cannot be heard to impeach his verdict, whether the jury conduct objected to be misbehavior or mistake." *Eades v. State*, 75 Md. App. 411, 416 (1988) (quoting *Williams v. State*, 204 Md. 55, 67 (1954)). However, the question presented does not directly concern the verdict, but whether the juror failed to disclose pertinent information during jury selection, thereby denying appellant his right to a fair trial by an impartial jury. *See Dillard v. State*, 415 Md. 445, 454 (2010) (observing that a criminal defendant's right to be tried by an impartial jury, "is one of the most fundamental rights under both the United States Constitution and the Maryland Declaration of Rights") (quotation marks and citation omitted); *Summers v. State*, 152 Md. App. 362, 375 ("The potency of the Sixth Amendment right to a fair trial relies on the promise that a defendant's fate will be determined by an impartial fact finder who depends solely on the evidence and argument introduced in open court"), *cert. denied*, 378 Md. 619 (2003).

We test potential jurors for bias or prejudice through the jury selection process, or *voir dire*. *Jenkins v. State*, 375 Md. 284, 331(2003) ("[O]ne of the ways to protect a defendant's constitutional right to an impartial jury is to expose the existence of factors which could cause a juror to be biased or prejudiced through the process of *voir dire* examination"). When, either as a result of a venire member's inattention or inadvertence, *voir dire* fails to reveal a potential basis for disqualifying an empaneled juror that is

discovered later in the trial, or even after a verdict has been rendered, the defendant may be entitled to a new trial. *See Williams v. State*, 394 Md. 98, 113-15 (2006). If the court is able to determine through *voir dire* that the juror's failure to disclose a potential bias was inadvertent, and that the potential bias did not in any way affect the juror's disposition of the case, the court may exercise its discretion to decide whether the defendant is entitled to a new trial, untainted by the prejudice of a potentially biased juror. *Id*. at 112-113; *see also Burkett v. State*, 21 Md. App. 438, 441-42, 445-46 (1974) (upholding circuit court's denial of defendant's motion for a new trial where the court was able to determine that a juror's inadvertent failure to disclose daughter's employment as a secretary in the State's Attorney's Office had no effect on the jury's verdict); *Leach v. State*, 47 Md. App. 611, 618-19 (concluding that circuit court's refusal to strike a juror or declare a mistrial was not erroneous, where questioning revealed that the childhood relationship between a juror and a homicide detective, which the juror had failed to properly disclose during *voir dire*, did not impair the juror's ability to fairly and impartially decide the case), *cert. denied*, 290 Md. 717 (1981).

Where, however, the juror is not available for questioning, and the circuit court is otherwise unable to determine whether the failure to disclose a potential bias was the result of intentional action or inadvertent omission during *voir dire*, there is no basis upon which the circuit court can determine that the juror's potential bias did not affect the jury's verdict. *Williams*, 394 Md. at 113-14. In such instances, the defendant is entitled to a new trial. *Id*. at 114. And, a court's failure to grant a new trial in such cases is an abuse of discretion. *Id*.

In this case, Juror Number 1 appeared at the hearing and informed the court that, when she recognized Thomas, she gave that information to the bailiff. Thus, although the bailiff may have faltered in conveying that information further, the juror did disclose what she thought was pertinent information. This weighs against a conclusion that the juror concealed her knowledge, either intentionally or inadvertently, such that the concealment would give rise to an implication of bias or partiality.

Moreover, not only was Thomas not identified when the jury was asked if they knew members of appellant's family, but there was evidence before the judge indicating that Juror Number 1 did not know Thomas, or that her mother, sister, or daughter for that matter, were related to appellant until after the trial. And, as even conceded by Thomas during the hearing, there was no evidence that the juror had any animosity to members of appellant's family. Ultimately, to the extent that there were any conflicts in the evidence, we are persuaded that resolution of such issues was properly left to the judge who presided over the hearing and the trial.

Finally, as for appellant's reliance on *Williams, supra,* in support of his claim of error, the facts of that case are distinguishable. In *Williams*, the prospective juror failed to give an accurate answer to a *voir dire* question actually posed to her, *i.e.*, whether she or any member of her immediate family was employed by a law enforcement agency, such as the police or the State's Attorney's Office or by a company that had a security or an investigative function. *Williams*, 394 Md. at 102-03.That prospective juror, as later discovered, was the sister of a secretary in the State's Attorney's Office, and did not respond to the question. *Id*. at 103. *Williams* stands apart from this case because, here, there

was no claim that Juror Number 1 gave inaccurate information in response to a specific question during *voir dire*. Thomas, and her relationship to appellant, was not the basis of a jury question. Unlike *Williams*, Juror Number 1 volunteered information that she simply knew someone in the court. Based on the totality of the circumstances, we conclude that the court properly exercised its discretion in denying the motion for new trial.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.