Circuit Court for Anne Arundel County
Case Nos. C-02-CR-18-000517, C-02-CR-18-000513

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 0870 & 0906

September Term, 2020

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VINCENT ETHAN BUNNER & CALVIN LOCKNER

v.

STATE OF MARYLAND

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Kehoe,
Nazarian,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Nazarian, J.

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Filed: March 7, 2022

Vincent Bunner and Calvin Lockner were charged in the Circuit Court for Anne Arundel County with first-degree murder, second-degree murder, participation in a criminal gang activity that resulted in death, participation in a criminal gang, and conspiracy to commit murder. They were tried together, over Mr. Bunner's objection, and at the end of trial, a jury returned guilty verdicts on second-degree murder and acquitted them on the other charges. On appeal, Mr. Bunner reprises his claim that he should have been tried separately, contends that the circuit court erred by admitting evidence of Mr. Bunner's "assaultive behavior," and argues that the court erred in admitting irrelevant and prejudicial evidence. Mr. Lockner contends that the court erred in admitting letters written by Mr. Bunner without a contemporaneous limiting instruction. We affirm both convictions.

## I. BACKGROUND

On the morning of August 14, 2016, correctional officers at Jessup Correctional Institute ("JCI") responded to a code for an assault in a cell block. When officers arrived, they found John O'Sullivan lying on the ground with multiple stab wounds and surrounded by three inmates, Mr. Lockner, Mr. Bunner, and Brian Hare.[1] The State indicted them separately but sought to try them together.

### A. The Motion To Consolidate.

Before trial, on May 7, 2018, the State filed a Motion to Consolidate all four co-

[1] Mr. Hare pleaded guilty to first-degree murder and testified against Messrs. Bunner and Lockner at the first consolidated trial, which ended in a mistrial. He didn't testify at the second trial, but portions of his testimony were admitted into evidence.

defendant's cases—at the time this included Mr. Bunner, Mr. Lockner, Mr. Hare, and the head of the Aryan Brotherhood, Joseph Leissler.[2] The State argued that in order to prove the gang-related and conspiracy charges, it needed to establish an association among the defendants and a common scheme, which in turn required it to introduce the same evidence at all four defendants' trials.[3] At a hearing on the State's motion to consolidate, the State argued that each piece of evidence was mutually admissible because it would be introduced at each defendant's trial to prove the gang-related and conspiracy charges:

> The State's argument today is that, initially, the State isn't seeking to introduce evidence that is not mutually admissible in this case. And I think that's—what [is] important for the Court to consider, sort of broadly, in terms of the evidence to be introduced, is that this case is charged not just as a murder, but that there's multiple counts in this case.
>
> The first Count is charging the Defendant with murder, but the second and third counts relate to participations in a criminal gang. And so, because the Defendant in this case is charged in Count II, "with participating in underlying crime and association with the Aryan Brotherhood that resulted in the death of the victim, while a participant in a criminal gang," and even the language of that is that "knowing that the members of said gang participated in a pattern of criminal gang activity."
>
> The second—or the third count is participation in a criminal gang, "that the Defendant participated in a criminal gang, the Aryan Brotherhood, knowing that the members of said gang engaged in criminal gang activity, and knowingly and willfully participated in underlying crime committed in association with the criminal gang."
>
> And then the fourth count in the indictment is a conspiracy

[2] Mr. Leissler was severed from the case on the morning of the consolidation motion hearing.

[3] Before the second trial, the State *nol prossed* the gang-related charges, but went forward on the conspiracy charges.

> count for the murder of John O'Sullivan, alleging that he conspired with Brian Hare, Calvin Lockner, and Joseph Leissler in the commission of the murder of John O'Sullivan.
>
> And so I think that is important, because a lot of the evidence that the State will seek to introduce at trial does relate to the Defendant's gang affiliation. It also relates to the gang affiliation of the co-Defendant, but that is information that the State must prove in order to prove the elements under the gang statute.
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> ***
>
> And so the State needs to prove all of these things in order to prove that the Defendant was part of a criminal gang, that they —it was as part of that criminal gang that these underlying crimes, in this case, the murder, were carried out. For the conspiracy, that it was done with these other individuals, who are named in the indictment, as the co-defendants in this case.
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> There are—the State has already agreed to the severance of Joseph Leissler, we do think that the evidence presented for that defendant would potentially involve some evidence that would not be mutually admissible. Mr. Leissler gives a more extensive statement that we think really does implicate his co-defendants in a way that we wouldn't be able to use that statement if all of the co-defendants were tried together.
>
> We do not believe that that is the case with the evidence related to Mr. Bunner, Mr. Hare, and Mr. Lockner. The evidence that is presented is really this – the State believes the same, and we would be seeking to introduce the same evidence. Even if these cases were separate, the State would be seeking to introduce the same pieces of evidence.

(Cleaned up.)

The State then addressed the specific pieces of evidence seized from the co-defendants' cells, including "letters, magazines, notes, and books" that it called "gang paraphernalia." The State argued that "[t]his evidence was gang related because it included portions of "books related to the purposes of the Aryan Brotherhood," including "the names

of other gang members, information about other gang members, [and] photographs of individuals in the gang that were taken together."

Next, the State addressed a birthday card written by Mr. Lockner to Mr. Bunner (the "Lockner note"), and contended that it was mutually admissible and not unfairly prejudicial to Mr. Bunner because the note didn't name him specifically:

> Your honor, there's a note here that is authored by Mr. Lockner. The State believes that this note is mutually admissible. This is a—it's a hearsay statement, but it is a statement against interest. The State believes that it's admissible for that reason. I do believe that under the current case law, this statement could be introduced. I do not believe that it is—I believe it is mutually admissible, I also don't believe that even if the Court found it was not mutually admissible, that is unfairly prejudicial to Mr. Bunner.
>
> The language used in this note—this isn't even one where it would have to be really redacted or changed. Mr. Lockner uses the word, "I." At no point does he implicate Mr. Bunner through this note.
>
> ***
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> I think that this note could [be] introduced, that if the Court felt it was appropriate, if the Court did find that it was not something that would be mutually admissible, there really is no unfair prejudice to Mr. Bunner through the introduction of this note.
>
> What this note does do for the State—I think the only thing that could be viewed as prejudicial—is that it shows this conspiracy with Mr. Leissler that—we believe that that's not the Joe referenced in this note. That it shows that this was done—that Mr. Lockner's actions, at the least, were done at his—at his direction, but again, this is a conspiracy charge. We do have to show multiple individuals. But this note does not actually reference Mr. Bunner, and so we don't believe that this would unfairly prejudice Mr. Bunner to have this note introduced.

(Cleaned up.)

Mr. Bunner countered that the State's attempt to consolidate the cases and introduce evidence related to gang paraphernalia found in individual cells would require the State to offer evidence that wasn't mutually admissible, and that the State would not have been able to offer evidence found in another cell against Mr. Bunner in a separate trial:

> Your Honor, it's actually for those exact reasons that [State] just gave that it is highly prejudicial, and Mr. Bunner should be separated.
>
> Your Honor, the gang statute—first of all, she's even said, they have to prove that there's a gang and there's gang involvement. Just because someone has one similar piece of evidence in one cell to another cell, doesn't mean that there's a gang.
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> ***
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> Additionally, Your Honor, if you look at each piece of evidence that's taken from different cells, they have letters regarding the Aryan Brotherhood, regarding how things operate. Those things would not be mutually admissible against Mr. Bunner in his own trial, because they're not his statements, he will not be sitting there with his co-Defendants, or anything like that. So that wouldn't be automatically admissible in his trial, and that's the standard that we have to look at, Your Honor.

Mr. Bunner then expressed concern that they would "not have the opportunity to cross-examine [Mr.] Lockner on his particular behavior regarding the involvement of the criminal gang." Additionally, counsel argued that any evidence coming from the other co-defendants' cells would be highly prejudicial to Mr. Bunner.

The trial court rejected the defense's arguments and granted the State's motion to consolidate:[4]

[4] Defense counsel renewed the objection to the consolidation after the first trial ended in a mistrial.

> If they're going to try to get in other evidence, they've got to link them to somebody else. So there is going to be other evidence involving other individuals to be linked together to show three or more people involved in a gang, involved in this activity. So that issue is not going to go away simply by severance.
>
> ***
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> If I say the cases are going together, they may stand to lose some evidence, because it can't come in. And that could very well happen. But at this point, to say that they shouldn't be joined, that's what you're asking me to do based on the fact that there's going to be some evidence that you're going to argue should not or cannot come in against the others. And the State takes that risk if the cases are joined, and I say the evidence isn't coming in, it's not coming in.
>
> ***
>
> So at this point, what the Court's going to do is I am going to grant the State's motion to consolidate the three individuals—Mr. Bunner's case to those that we've already set, and we'll be—do a directive including that.

The motions court seemed to agree with the State that evidence of gang paraphernalia found in each cell could link everyone to the same gang, concluding that "it's not just the evidence itself, it's from inferences drawn from the circumstances, and how they link them together." Ultimately, the trial court determined that the ability to link each defendant to the gang and to each other outweighed the risk of unfair prejudice.

**B. The Trial.**

The trial began on January 6, 2020 and finished on January 16, 2020. Because the other issues on appeal flow primarily from the trial itself, we recount the evidence and testimony as the parties presented it.

Correctional Officer Ramon Balogun was working at JCI on August 14, 2016,

between 10:00 am and 10:30 am, when he saw Mr. O'Sullivan leave the yard and enter his cell without shutting the door behind him. Officer Balogun answered a telephone call, and when he looked up three men stepped out of the shower area and entered Mr. O'Sullivan's cell. He watched the three individuals stab Mr. O'Sullivan multiple times with shanks (homemade knives) and called out a code for inmate fighting. Once enough officers were present, they opened the large metal door (called a grill) that separated them from the assault. Upon entering the cell, the three men surrendered two of the weapons to officers (the third shank was later found in a cell toilet) and moved backwards. The incident also was captured on the Division of Corrections's ("DOC") video monitoring system. The three men identified by Officer Balogun and shown on the video were Messrs. Bunner, Lockner, and Hare.

Officer Stephen Perry responded to the code broadcast over the radio at 10:20 am, and when he arrived he found four inmates covered in blood. He witnessed one inmate, Mr. O'Sullivan, on the ground, while the other three stood over him. He identified the three assailants as Mr. Lockner, Mr. Bunner, and Mr. Hare. Officer Perry saw one of the weapons on the ground and recovered it. The three inmates were handcuffed and removed from the area. Officer Perry heard Mr. Bunner say "[t]hat's what you get, bitch" as he was escorted out of the cell.

Detective Dominic Bonvegna responded to JCI on the date of the incident and reviewed the video footage. Next, Detective Christopher Taylor from the Maryland State Police arrived to investigate. A weapon was recovered from cell 411 and two additional

weapons were recovered from the scene. Officers also recovered clothing from Messrs. Bunner, Lockner, and Hare, all with blood splattered on them.

The theory for the defense was duress—that Messrs. Bunner and Lockner were ordered to kill Mr. O'Sullivan by Mr. Leissler and felt they had no alternative, that they had to "[k]ill or be killed."[5] Mr. O'Sullivan belonged to a prison gang called Dead Man Incorporated ("DMI"), and Mr. Lockner, Mr. Bunner, and Mr. Hare are members of the Aryan Brotherhood. The defense contended that Mr. Leissler ordered the hit on Mr. O'Sullivan after a series of back-and-forth assaults between the two gangs.

Mr. Hare's testimony from the first trial was read for the jury in the second. Mr. Hare joined the Aryan Brotherhood in 2014. He explained that the Aryan Brotherhood had problems with Mr. O'Sullivan stemming from an attack on one of their brothers, Shawn Jones, by DMI. On the date of the incident, Messrs. Hare, Lockner, and Bunner were instructed to follow Mr. O'Sullivan from services and "hit him" in his cell. Mr. Hare further testified that he, Mr. Bunner, and Mr. Lockner followed Mr. O'Sullivan into his cell and stabbed him multiple times.

The State sought to introduce two letters that Mr. Bunner wrote after the murder.[6] *First,* he wrote to Sandy Marshall (the "Marshall Letter") that he and "one other brother

[5] Mr. Leissler was tried separately and found guilty of first-degree murder and various gang-related crimes. *See* C-02-CR-18-000515. An appeal has been noted in that case. *See Leissler v. State,* Case No. 1359, Sept. Term 2021, CSA-REG-1359-2021.

[6] Lieutenant Barnhart placed a "mail cover" on Messrs. Bunner and Lockner's outgoing mail after the August 14, 2016 incident. Lieutenant Barnhart testified that a mail cover was a document given to the warden that allowed them to search outgoing mail.

just killed one of DMI's head people. . . ." (Cleaned up.) *Second*, Mr. Bunner wrote a letter to Mike May (the "May Letter"), in which he detailed Mr. O'Sullivan's murder, including how many times Mr. O'Sullivan was stabbed and how he "ran but I'm faster. . . ." (Cleaned up.) The court admitted both letters over Mr. Lockner's objection, with the caveat that the court allowed counsel to craft an appropriate limiting instruction.

The State also sought to introduce two pieces of evidence against Mr. Lockner: the Lockner note and the contents of Mr. Lockner's shower bag. The Lockner note was found in Mr. Bunner's cell. The note referred to Mr. O'Sullivan's murder (he went by the nickname "Pic"). Mr. Lockner wrote that "48 Times was surely a fun time, we ended that whore Pic while not worrying who spied. For vengence [sic] was ours as Norns decree, [sic] it was funny watching that pussy flee." The State sought to introduce the note against Mr. Lockner as evidence of intent and premeditation. The court admitted the note and discussed with the parties that it would give a limiting instruction directing the jury not to consider the statements against Mr. Bunner.

During cross-examination, counsel for Mr. Bunner questioned Lieutenant Barnhart about Mr. Bunner's base file, and specifically about two incidents in which he was assaulted by members of the Black Guerrilla Family ("BGF") and the Bloods. Lieutenant Barnhart testified that he reviewed Mr. Bunner's base file and learned that Mr. Bunner had been assaulted by a member of the BGF in 2012. On July 15, 2015, Mr. Bunner was assaulted by two members of the Bloods.

On re-direct, the State sought to question Lieutenant Barnhart further about Mr.

Bunner's base file, specifically: (1) an incident in which Mr. Bunner stabbed fellow inmate Robert Vinzinni with a homemade knife, (2) a disciplinary action in which Mr. Bunner was cited for using threatening language towards a DOC staff member, and (3) Mr. Bunner's reputation within in the DOC for being disorderly and disrespectful.

Counsel for Mr. Bunner objected to this line of questioning and, outside the presence of the jury, the State argued that it was seeking to introduce instances in which Mr. Bunner was the aggressor or stated that he did not fear for his safety in order to return to the general population unit:

> She asked him about being attacked. I have instances where he says I'm not afraid of the person, I'm not afraid of BGF. I want to be back in general population. I have instances where he attacked people, I'm going to ask about, because [defense counsel] portrayed him as a victim. That he's a poor victim, that he's this young kid who was in the jail, and its—he was giving it out just as good as he was getting it. I have a paper where he says I'm not afraid of anybody, I'm going to attack a BGF when I get out.

Defense counsel countered that Mr. Bunner did not open the door to this line of questioning because they had stated simply that the assault occurred, and didn't characterize Mr. Bunner as a victim. The court agreed with defense counsel, but concluded that the defense had opened the door to evidence of the assaultive behavior contained in his base file:

> Right. But I do think you opened the door as far as his base file with regard to assaultive behavior on—by Mr. Bunner, gang-related.
>
> I think there can be a connection there where she can ask about questions where he was not the victim but the aggressor with the way that the question was laid out, I do. . . .

The State then asked Lieutenant Barnhart about Mr. Bunner stabbing Mr. Vinzinni:

> [THE STATE]: Lieutenant Barnhart, are you familiar with any—are you familiar with an assault taking place where Mr. Bunner was charged in the prison?
>
> [LIEUTENANT BARNHART]: Yes.
>
> ***
>
> [THE STATE]: Okay. Can you describe the incident Mr. Bunner was charged with in the prison?
>
> [LIEUTENANT BARNHART]: That was at Jessup Correctional Institution when he assaulted inmate Robert Gunzini (phonetic) with a homemade knife.

Next, the State questioned Lieutenant Barnhart about Mr. Bunner's reputation for being disrespectful:

> [THE STATE]: [In] 2012 when Mr. Bunner came into the institution, was there any concern from staff at the prison system regarding Mr. Bunner?
>
> [LIEUTENANT BARNHART]: Yeah, he was on—he was—it was known—we were told that it was known at his previous—the institution where we received him from that he was known to be very disrespectful, verbally threatening towards staff, disorderly, busting things in his cell or whatnot, coercion, and disobeying orders.
>
> [THE STATE]: And did he have an incident in 2012 regarding staff, November 26, 2012?
>
> [LIEUTENANT BARNHART]: Yes.
>
> [THE STATE]: And what was that?
>
> [LIEUTENANT BARNHART]: He was returned from the education building at North Branch Correctional Institution after the office told him to come back, and when he returned to the tier the tier office asked why he—
>
> [THE STATE]: No, I don't need details, but was he cited for behavior?
>
> [LIEUTENANT BARNHART]: Yeah, he was cited for threatening language.

After a nine-day trial, the jury returned guilty verdicts of second-degree murder for

both Messrs. Bunner and Lockner. The court sentenced each defendant to thirty years, with credit for time served, to run consecutively to their current sentences. Messrs. Bunner and Lockner noted separate appeals that were consolidated.

## II. DISCUSSION

Mr. Bunner raises three contentions[7] on appeal and Mr. Lockner raises a single issue.[8] We address Mr. Bunner's arguments first, then Mr. Lockner's sole argument.

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[7] In his brief, Mr. Bunner phrased his Questions Presented as follows:

1. Did the trial court err in granting the State's motion to join Appellant's trial with that of Mr. Lockner?
2. Did the trial court err in allowing the prosecution to introduce evidence of Appellant's assaultive behavior while incarcerated?
3. Did the trial court err in admitting irrelevant and prejudicial evidence?

[8] In his brief, Mr. Lockner phrased his Question Presented as follows:

> Did the circuit court err in admitting letters, which were written by Bunner but which incriminated both Bunner and Lockner, without a contemporaneous limiting instruction?

The State phrased its Questions Presented as follows:

> Raised by Lockner:
>
> 1. If preserved, did the trial court correctly exercise its discretion in admitting the Bunner Letters in a joint trial, where they did not implicate or otherwise prejudice Lockner, and was any error harmless?
>
> Raised by Bunner:
>
> 2. Did the trial court correctly grant the State's motion to join Bunner's and Lockner's trials, and was any error harmless?
> 3. Did the trial court correctly exercise its discretion in admitting evidence about Bunner's past assaultive behavior in prison to rebut a duress defense, and was

## I.

## Mr. Bunner

*First*, Mr. Bunner contends that the court erred in granting the State's motion to consolidate his trial with Mr. Lockner's. *Second*, he argues that the trial court abused its discretion in allowing evidence of Mr. Bunner's assaultive behavior to be introduced. And *third*, he asserts that the trial court erred in admitting irrelevant and prejudicial evidence.

The State responds *first* that the trials were joined properly. *Second*, the State argues that the court exercised its discretion correctly in admitting evidence about Mr. Bunner's assaultive behavior and evidence relating to Mr. Bunner's gang relations. *Third*, the State contends that the court's evidentiary decisions and its decision to grant the motion to consolidate could not have affected the outcome of the trial because of the insurmountable evidence supporting a verdict of second-degree murder for both defendants.

### A. The Circuit Court Did Not Abuse Its Discretion By Consolidating The Co-Defendants' Trials.

*First*, Mr. Bunner argues that the trial court consolidated his case with Mr. Lockner's wrongly and that it was an abuse of discretion to try them jointly. "[A] trial court's decision to sever or join the trials of multiple criminal defendants or multiple counts is ordinarily committed to the sound discretion of the trial judge and is reviewed for abuse

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any error harmless?

4. To the extent preserved, did the trial court correctly exercise its discretion in admitting particular evidence as more probative than unfairly prejudicial, and was any error harmless?

of discretion." *Hemming v. State*, 469 Md. 219, 240 (2020) (citations omitted). A circuit court abuses its discretion by ordering joinder or not granting a motion to sever when "(1) non-mutually admissible evidence will be introduced; (2) the admission of the evidence causes unfair prejudice; and (3) such prejudice cannot be cured by other relief." *State v. Zadeh*, 468 Md. 124, 145 (2020) (*citing State v. Hines*, 450 Md. 352, 369–70 (2016)).

Maryland Rule 4-253 governs joinder and severance in criminal cases. Rule 4-253(a) provides that two or more defendants can be tried together "if they are alleged to have participated in the same act or transaction or . . . offense or offenses." Rule 4-253(c) directs the court to balance "the likely prejudice caused by the joinder . . . [and] the considerations of economy and efficiency in judicial administration." *Hines*, 450 Md. at 369 (citation omitted). "'[P]rejudice' within the meaning of Rule 4-253 is a 'term of art,' and refers only to prejudice *resulting* to the defendant *from* the reception of evidence that would have been inadmissible against that defendant had there been no joinder." *Id.* (emphasis in original) (citations omitted). But if the evidence is mutually admissible, severance is not warranted because there is no prejudice. *Osburn v. State*, 301 Md. 250, 254 (1984); *Ogonowski v. State*, 87 Md. App. 173, 187 (1991).

Mr. Bunner contends that the circuit court abused its discretion by granting the State's pretrial motion to join his trial with Mr. Lockner's because certain pieces of evidence introduced at trial "were clearly prejudicial" to Mr. Bunner, "as they indicated a motive for the assault on Mr. O'Sullivan and showed a lack of remorse that would be held against [Mr. Bunner], who was not responsible for the creation of the statements." Mr.

Bunner takes issue with two pieces of evidence in particular, the Lockner note[9] and the contents of Mr. Lockner's shower bag. Mr. Bunner argues that these pieces of evidence were not admissible against him because the Lockner note was inadmissible hearsay and the shower bag contents belonged to Mr. Lockner, and that both were highly prejudicial.

In Mr. Bunner's view, he suffered prejudice not because he was mentioned in the Lockner note, but because the note's phraseology suggested a motive for assaulting Mr. O'Sullivan and a lack of remorse from Mr. Lockner, both of which, he contends, could be held against him. These phrases included "funny watching that pussy flee," "48 Times was surely a fun time," and that "vengence" [sic] was theirs, along with a swastika symbol and "666." Mr. Bunner also argues that the contents of Mr. Lockner's shower bag, including shower shoes with a swastika and "666" drawn on them, would not have been admissible in Mr. Bunner's trial, were he to be tried separately, because they were highly inflammatory. The State responds that "[a] court can join the trials of two defendants even if some evidence is only admissible against one of them, so long as the court ensures that the other defendant is not prejudiced by such evidence," and that Mr. Bunner cannot show that he suffered prejudice from the joint trial.

There is no dispute that Mr. Bunner and Mr. Lockner "participated in the same . . . series of acts or transactions constituting" the offenses arising

[9] The State argues that Mr. Bunner's objection to the Lockner note is not preserved for our review. But the transcript reflects that during the trial, defense counsel noted a general objection to the Lockner note the day before, when the trial court heard arguments from both counsel on various pieces of evidence that included the note. We are satisfied on this record that the general objection preserved this contention.

from the death of Mr. O'Sullivan. *See* Rule 4-253(a). The disputed issues concerned non-mutually admissible evidence and prejudice. At the pretrial hearing on the State's motion for joinder, which Mr. Bunner opposed, the parties advised the court of evidence for which mutual admissibility was disputed. Indeed, at the close of the hearing the court advised the parties that the State may stand to lose some evidence. But these items did come in, and the question is whether they prejudiced Mr. Bunner to an extent that he should have been entitled to a separate trial.

The Court of Appeals's decisions in *Hines* and *Zadeh* shed light on what may constitute unfair prejudice when non-mutually admissible evidence is introduced at a consolidated trial. In *Hines*, Mr. Hines and Mr. Allen were tried jointly for the murder of one victim and attempted murder of a second victim. The surviving victim described one assailant as wearing distinctive clothing. 450 Md. at 356. An officer saw Mr. Allen earlier in the day in such clothing, with Mr. Hines. *Id.* The police located Mr. Allen and he claimed he had been home when the shootings happened, with his friend "Mike," about whom he knew little except where he lived. *Id.* at 357. When the detectives played surveillance footage from a convenience store showing him and Mr. Hines together at the time he was claiming to have been at home, Mr. Allen acknowledged that he was in the video but claimed not to know the other man. *Id.*

After the State moved to try Mr. Allen and Mr. Hines together, Mr. Hines moved to sever, arguing that the State intended to move Mr. Allen's recorded statement into evidence, that the statement was not admissible against him, and that he would be unfairly

prejudiced by its admission. *Id.* at 359. The court ruled that part of Mr. Allen's statement was admissible, denied the motion to sever, and agreed to give a limiting instruction advising jurors that Mr. Allen's statement should only be considered against Mr. Allen. *Id.* at 362. During a portion of this statement, Mr. Allen gave police "Mike's" address which, as it turned out, was Mr. Hines's address. *Id.* Mr. Hines appealed his convictions, and the Court of Appeals addressed whether the trial court "err[ed] in denying a severance in accordance with Rule 4-253(c)" and whether "any error in admitting Allen's statement [was] harmless." *Id.* at 366. The Court held that when addressing severance in the context of defendant joinder, a court must "first determine whether there is non-mutually admissible evidence, and then must ask whether the admission of non-mutually admissible evidence results in any unfair prejudice to the defendant." *Id.* at 374. Prejudice is not presumed in a defendant joinder case because it is "foreseeable that in some instances, evidence that is non-mutually admissible may not unfairly prejudice the defendant against whom it is inadmissible because the evidence does not implicate or even pertain to that defendant." *Id.* at 375–76.

The Court concluded ultimately that Mr. Hines was prejudiced unfairly by the statements made by Mr. Allen, even though they were admissible against Mr. Allen. *Id.* at 383. In the Court's view, the prejudice to Mr. Hines was evident because the statement had implicated him in a damaging way—the detective's interest in "Mike" and the questions about the man in the surveillance video (who was Mr. Hines) indicated to the jury unequivocally that the detectives knew that "Mike" either was fictional or was Mr. Hines.

*Id.* at 384. The statement implicated Mr. Hines further because the jury heard testimony that Mr. Hines lived on the 300 block of Lyndhurst Avenue and Mr. Allen had stated previously that "Mike" lived on the same block. *Id.*

In *Zadeh*, Hussain Ali Zadeh and Larlane Pannell-Brown were tried jointly for the murder of Ms. Pannell-Brown's husband. 468 Md. at 124. Police responded to Ms. Pannell-Brown's house after a neighbor heard her screaming. She told officers she had found her husband unconscious in the backyard, bleeding from his head. *Id.* at 133.

When the police interviewed Ms. Pannell-Brown, she claimed that she had called her husband at work that morning and asked him to look at her truck when he got home because it was making a strange noise. *Id.* at 134. He got home around 10:00 am, she left to make a deposit at the bank, and when she returned, she found his body in the backyard. *Id.* The detective asked to examine her cell phone, which showed no record of a call to her husband but did show a call to a contact labeled "Ali." *Id.*

One of the Browns' sons contacted police and told them that Ms. Pannell-Brown was having an affair with a man named "Ali," that he drove a silver Jaguar station wagon, and that he worked at a rental car facility. *Id.* When confronted with this information, Ms. Pannell-Brown maintained that she and "Ali" were "merely friends." *Id.* at 135. Detectives went to the rental car facility and learned that "Ali" was Mr. Zadeh. Mr. Zadeh asked whether they were there to "talk about 'the lady's husband that died.'" *Id.* The detectives asked Mr. Zadeh if he had a car and he replied that he didn't, that he took the subway to work. *Id.*

The police located a Jaguar station wagon parked near the rental car facility and determined that it was registered to Ms. Pannell-Brown. *Id.* They obtained a search warrant for the vehicle, and by the time they executed it, the vehicle was being driven by Mr. Zadeh. *Id.* The search revealed a swab of suspected blood and other evidence. *Id.* at 136. The internet search history on a home computer and on Ms. Pannell-Brown's cell phone revealed searches into whether certain energy drinks were harmful to persons over age 70 (at the time of his death Mr. Brown was in his 70s) and into what could cause sudden cardiac arrest or heart failure. *Id.* at 137.

Mr. Zadeh moved to sever his trial from Ms. Pannell-Brown's trial, arguing that at a joint trial the State would be introducing non-mutually admissible evidence that would prejudice him. *Id.* at 138. The court denied the motion, ruling that the evidence largely would be mutually admissible and, to the extent non-mutually admissible evidence was introduced, any prejudice could be cured by a limiting instruction. *Id.*

At trial, the State introduced evidence that on the morning of the murder, Ms. Pannell-Brown and Mr. Zadeh exchanged text messages in which she told him, "When I text you, come out side[,]" and to which he replied, "OK, from what door??" *Id.* at 140. She responded, "The bed room[.]" *Id.* Ms. Pannell-Brown's son testified that his mother referred to the door leading to the backyard as the "bedroom door." *Id.* at 142. Mr. Zadeh objected, arguing that it was inadmissible hearsay that was highly prejudicial considering the text message evidence. *Id.* Ultimately, the court agreed and struck that testimony. *Id.*

Another of Brown's sons testified, over Mr. Zadeh's objection, that Ms. Pannell-Brown told him that when she saw her husband lying in the yard, she ran over and grabbed him, but the son noticed that Ms. Pannell-Brown did not have any blood on her. *Id.* at 141. The court gave a limiting instruction that that testimony could be considered only against Ms. Pannell-Brown. *Id.* A neighbor testified that Ms. Pannell-Brown and Mr. Brown were having financial problems before the murder and that Ms. Pannell-Brown disclosed to her that she was having an affair. *Id.* Mr. Zadeh's counsel objected to this testimony and the court agreed to give another limiting instruction. *Id.* at 142.

Mr. Zadeh also challenged testimony from Ms. Pannell-Brown's daughter-in-law about statements Ms. Pannell-Brown made "regarding her finances, as well as statements encouraging [the daughter-in-law] to 'get a friend on the side' too." *Id.* Before the close of evidence, Mr. Zadeh moved for a mistrial on the ground of improper joinder and the court denied his motion. *Id.* Mr. Zadeh and Ms. Pannell-Brown both were convicted by the jury of second-degree murder. *Id.*

The Court of Appeals reversed Mr. Zadeh's conviction. Relying on the test set forth in *Hines*, the Court held that "(1) non-mutually admissible evidence was introduced; (2) the admission of that evidence prejudiced Mr. Zadeh; and (3) the limiting instructions were insufficient to cure the prejudice." *Id.* at 147. The Court highlighted that "where a limiting instruction or other relief is inadequate to cure [] prejudice [caused by the introduction of non-mutually admissible evidence], the denial of severance is an abuse of discretion." *Id.* at 148 (*citing Hines*, 450 Md. at 370). The Court reasoned that Mr. Zadeh had been

"similarly prejudiced" by the non-mutually admissible evidence introduced at his joint trial, and especially by the cumulative effect of the non-mutually admissible evidence, which included the testimony about the "bedroom door" that ultimately was stricken from the record but couldn't be expunged from the minds of the jurors. *Id.* at 149. The Court noted that "[a]fter all the limiting instructions and categorizing of statements by Ms. Pannell-Brown that the trial judge determined were only admissible against Ms. Pannell-Brown, even the most attentive and intelligent juror would have had a difficult time determining what evidence was admissible against which defendant." *Id*. at 150. Once it became apparent to the trial court that "there was significantly more non-mutually admissible evidence than he originally thought, the only available and appropriate remedy was a mistrial." *Id*. at 151.

This case is much less complicated, even if we assume that the Lockner note and the contents of Mr. Lockner's shower bag would not be admissible against Mr. Bunner if introduced at a separate trial, that the Lockner note is hearsay if admitted against Mr. Bunner, and that the shower bag contained the belongings of Mr. Lockner's and was not connected to Mr. Bunner in any way. That limited degree of non-mutually admissible evidence didn't prejudice Mr. Bunner unfairly. Mr. Lockner's note merely added to the eyewitness testimony by Mr. Hare (who participated in the killing), multiple correctional officers (who witnessed the crime), and the physical and video evidence of the crime. Contrast that with *Hines*, in which Mr. Allen's false statements to the police and the police

commentary directly implicated Mr. Hines in the murder and attempted murder. 450 Md. at 384.

Moreover, none of the non-mutually admissible evidence was inconsistent with Mr. Bunner's defense. He didn't dispute that he had participated in killing Mr. O'Sullivan—he claimed instead that he had been forced into participating because of his gang affiliation. At the time the court granted the State's motion to consolidate, both defendants were charged with gang-related crimes. In order to demonstrate that these individuals were part of a gang, the State sought to establish a connection among the members of the gang. The motions court weighed the evidence and the potential prejudice against the need for the State to show a connection to the gang. When addressing Mr. Lockner's shower bag, the court concluded that "the relevance does outweigh any prejudicial points," but also that relevance was minimal because the contents of the bag were being introduced merely to connect the symbols in the Lockner note to Mr. Lockner's bag.

The Lockner note and Mr. Lockner's shower bag comprised two data points that linked directly to one defendant. By contrast, the jury in *Zadeh* faced significant amounts of non-mutually admissible evidence, too much for the jury to distinguish defendant-by-defendant. 468 Md. at 149. The admission of this small amount of non-mutually admissible evidence was not prejudicial to Mr. Bunner, and the trial court did not abuse its discretion by granting the State's motion to consolidate.

### B. The Trial Court Did Not Abuse Its Discretion In Admitting Testimony About Mr. Bunner's Past "Assaultive Behavior."

*Second*, Mr. Bunner challenges, as irrelevant and unfairly prejudicial, the circuit

court's decision to admit testimony about past "assaultive" behavior incidents involving Mr. Bunner. The State counters that evidence of Mr. Bunner's past behavior was used to rebut the defense of duress, and any error caused by its admission was harmless.

We review trial court decisions to admit evidence for abuse of discretion. *State v. Robertson*, 463 Md. 342, 351 (2019). "'Abuse of discretion exists where no reasonable person would take the view adopted by the trial court, or when the court acts without reference to guiding rules or principles.'" *Id.* at 364 (*quoting Alexis v. State*, 437 Md. 457, 478 (2014)) (cleaned up). However, errors of law, purely legal questions, and questions of relevance are reviewed *de novo*. *Id.* at 351.

Prior bad acts generally are not admissible to show that a defendant committed the charged crime.[10] *State v. Faulkner*, 314 Md. 630, 634 (1989) (citation omitted) ("Evidence of other crimes may be admitted, however, if it is substantially relevant to some contested issue in the case and if it is not offered to prove the defendant's guilt based on propensity to commit crime or his character as a criminal."). But if a defendant "opens the door," otherwise inadmissible evidence may become relevant. *Robertson*, 463 Md. at 352. We review *de novo* whether a defendant opened the door to rebuttal evidence. *Id*. at 353. And "trial judges are entitled to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues or interrogation that is only marginally relevant." *Parker v. State*, 185 Md. App. 399, 426

[10] For present purposes, the terms "prior bad acts" and "other crimes" have the same meaning and we use them interchangeably.

(2009) (cleaned up).

*1. Mr. Bunner opened the door to testimony about a previous attack on a fellow inmate.*

We agree with the trial court that Mr. Bunner opened the door when the defense asked Lieutenant Barnhart about past instances in which Mr. Bunner was attacked by members of rival prison gangs. After the defense probed those incidents, it was appropriate for the State to ask about Mr. Bunner's attack on Mr. Vinzinni. Mr. Bunner's past assaultive behavior was offered not to show that he acted in conformity with his prior bad behavior with another inmate, but to complete the picture, *i.e.*, to demonstrate that he also had initiated an assault. The trial court weighed the probative value of Lieutenant Barnhart's testimony against the likelihood of unfair prejudice appropriately, and we find no abuse of discretion in the court's decision to allow Lieutenant Barnhart to testify about the prior attack in Mr. Bunner's base file.

*2. Any error in admitting evidence of Mr. Bunner's use of threatening language towards a DOC guard and his reputation were harmless.*

We agree with Mr. Bunner's second point—testimony from his base file establishing that he "was known to be disrespectful and verbally threatening towards the staff, that [Mr. Bunner] was disorderly, broke things in his cell, and disobeyed orders," and that he was cited for using threatening language toward a DOC staff member should not have been admitted under the "open door doctrine." Unlike testimony about the attack on Mr. Vinzinni, this testimony didn't respond directly to defense counsel's cross-examination of Lieutenant Barnhart.

Nevertheless, any error in admitting this testimony was harmless because the

testimony was cumulative of other evidence presented at trial. For an error to be harmless, "we must be able to declare, beyond a reasonable doubt, that the error in no way influenced the verdict[.]" *Collins v. State*, 373 Md. 130, 148 (2003). In analyzing whether an error was harmless, we must consider whether the evidence was cumulative. *Id.* "Evidence is cumulative when, beyond a reasonable doubt, we are convinced that 'there was sufficient evidence, independent of the [evidence] complained of, to support'" a conviction. *Dove v. State*, 415 Md. 727, 743–44 (2010) (*quoting Richardson v. State*, 7 Md. App. 334, 343 (1969)). "[C]umulative evidence tends to prove the same point as other evidence presented during the trial[.]" *Id.* at 744. "The essence of this test" is determining "whether the cumulative effect of the properly admitted evidence so outweighs the prejudicial nature of the evidence erroneously admitted that there is no reasonable possibility that the decision of the finder of fact would have been different had the tainted evidence been excluded." *Ross v. State*, 276 Md. 664, 674 (1976).

Any error here was harmless beyond a reasonable doubt. This jury saw video evidence of the stabbing, heard testimony from the first trial from Mr. Hare (who participated in the killing), and heard testimony from multiple correctional officers (who witnessed the crime). The State also offered forensic evidence implicating Mr. Bunner's participation in the event.

The cumulative result of additional testimony outweighed the prejudicial nature of testimony about Mr. Bunner's reputation. To the extent that the circuit court erred in admitting the base file information, the error was purely cumulative of other testimony and

evidence and ultimately harmless.

### C. The Circuit Court Did Not Err In Admitting Evidence Relating to Gang Affiliation.

*Third*, Mr. Bunner argues that the circuit court erred in admitting three pieces of evidence including: (1) the fact that North Branch Correctional Institution ("NBCI") was a maximum-security facility, (2) comments written by Mr. Lockner in the Lockner note, and (3) possessions in a shower bag that belonged to Mr. Lockner and included prejudicial insignia.

#### *1. NBCI*

During cross-examination, the State questioned Lieutenant David Roman regarding Messrs. Bunner and Lockner being relocated to NBCI, and specifically asked him whether it is considered a maximum-security facility.[11]

[11] The State contends that this line of questioning is not preserved. We disagree. Defense counsel for Mr. Bunner objected to the description of the facility as maximum-security outside the presence of the jury, but did not renew that objection after the question was asked and answered:

> [COUNSEL FOR BUNNER]: Just to put on the record, I'm objecting to the description of what North Branch is because I think the prejudicial effect of that, it's a maximum security, would outweigh the probative value for this line of questioning. So for the record, I would make that objection.
>
> [THE COURT]: Okay, I'll note your objection, but—
>
> [COUNSEL FOR MR. LOCKNER]: I'll make the same objection.
>
> [THE COURT]: —make sure you're going to object as we go on because—
>
> [COUNSEL FOR MR. BUNNER]: Right.
>
> [THE COURT]: —I'm listening to—

Maryland Rule 5-401 defines the scope of admissible evidence in terms of relevance, *i.e.*, evidence that tends to make the existence of a fact more or less probable. All relevant evidence is admissible, with certain exceptions, and evidence that isn't relevant isn't admissible. Md. Rule 5-402. "A trial court does not have discretion to admit irrelevant evidence." *State v. Heath*, 464 Md. 455, 457–58 (2019) (*citing State v. Simms*, 420 Md. 705, 724–25 (2011)). But relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Md. Rule 5-403.

We see no error in the circuit court's decision to admit this line of questioning. The State asked Lieutenant Roman to describe the facilities to which Messrs. Bunner and Lockner were transferred after the stabbing. The trial court ruled that the State could ask a few questions about the facility, but cautioned the parties to pay attention, likely because the probative value of this evidence was low.

And although the probative value of this testimony was low, it was not unfairly prejudicial to Mr. Bunner. It was undisputed that Mr. Bunner was serving time in prison when the killing took place—if nothing else, the jury knew that from the video of the

[COUNSEL FOR MR. BUNNER]: I understand.

[THE COURT]:—every question individually.

The State then asked the question that Mr. Bunner now appeals—what type of facility NBCI is—and Lieutenant Roman responded, "a maximum correctional facility." Defense counsel objected to this specific question just before it was asked. Although the circuit court did ask that each objection be noted individually, it was not necessary to object again to that specific question because the court had already noted the objection on the record by stating, "I'll note your objection . . . ."

killing. It also was undisputed that he was transferred to a different facility after the event so any description of the facility to which he was transferred indicated nothing about his guilt, only that it was a more secure location. And even if we were to find that the above evidence was admitted in error, any error was harmless. Mr. Bunner's transfer to a maximum-security facility after the incident could not have influenced the jury when he was identified as one of the assailants through video evidence, eyewitness testimony, and forensic evidence.

*2. The Lockner note*

Mr. Bunner contends that the birthday card written to him by Mr. Lockner should not have been admitted because it is hearsay.[12] But when two defendants are tried together

[12] The State argues again that the issue has not been preserved for appeal but doesn't explain why. We could opt not to consider it further. *See Mayor & City Council of Baltimore v. Thornton Mellon, LLC*, 249 Md. App. 231, 237 (2021) (questions not argued in an appellant's brief are waived or abandoned, and therefore, not preserved). But we find that this issue has been preserved. Mr. Bunner's counsel made a general objection on the record on day five of trial, after arguing on the record on day four:

> [COUNSEL FOR MR. BUNNER]: Your Honor, we're just going to make a general objection to this coming in. I don't have any further argument to make than—
>
> [COURT]: Okay.
>
> [COUNSEL FOR MR. BUNNER]:—what was made yesterday. The request would be the entire birthday card come in.

Defense counsel then asked for a limiting instruction explaining that the Lockner note should only be used against Mr. Lockner:

> [COUNSEL FOR MR. BUNNER]: It's certainly a limiting instruction that [] should—as the Court said, should not be used against Mr. Bunner—

and evidence is inadmissible against one of them, the court approaches the matter differently because evidence admitted against one defendant may not be admissible against another co-defendant. *Winston v. State*, 235 Md. App. 540, 558 (2018). In those instances, "the trial judge is not required to order a severance merely because some evidence would not be mutually admissible against every co-defendant; instead, the judge must 'determine whether the admission of such evidence will cause unfair prejudice to the defendant who is requesting a severance.'" *Id*. at 558–59 (*quoting Hines*, 450 Md. at 369). "If those two conditions are met, the judge must then 'use his or her discretion to determine how to respond to any unfair prejudice caused by the admission of non-mutually admissible evidence.'" *Id.* at 559 (*quoting Hines*, 450 at 369–70). "The Rule permits the judge to do so by severing the offenses or the co-defendants, or by granting other relief, such as, for example, giving a limiting instruction or redacting evidence to remove any reference to the defendant against whom it is inadmissible." *Hines*, 450 Md. at 370.

Even though the birthday card was hearsay as against Mr. Bunner, it wasn't admitted as to him, only as to Mr. Lockner, and the jury was instructed to consider it that way. And as we have explained above, the Lockner note was not unfairly prejudicial to Mr. Bunner.

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> [COURT]: Right.
>
> [COUNSEL FOR MR. BUNNER]:—that's for Mr. Lockner—
>
> [COURT]: Correct.
>
> [COUNSEL FOR MR. BUNNER]:—and the same thing with the issues with that.

*3. Shower bag belongings*

Mr. Bunner contends that the contents of Mr. Lockner's shower bag, which contained shower shoes with a prejudicial insignia, should not have been admitted. As discussed above, though, this evidence was admissible as to Mr. Lockner and did not prejudice Mr. Bunner unfairly.

For these reasons, we affirm Mr. Bunner's conviction.

## II.

## Mr. Lockner

Mr. Lockner raises a single error on appeal: whether the trial court erred in admitting two letters (the Marshall letter and the May letter, together the "Bunner letters") written by Mr. Bunner because they were "clearly hearsay" and caused Mr. Lockner undue prejudice. As the State points out, though, hearsay is handled differently when co-defendants are joined properly. Evidence can be admitted against one defendant (in this case Mr. Bunner) and not be admitted as to another (Mr. Lockner) if the evidence is not unfairly prejudicial to Mr. Lockner.

We agree with Mr. Lockner that the Bunner letters would have been inadmissible against him at a separate trial. However, the Bunner letters did not cause Mr. Lockner unfair prejudice. *First*, Mr. Lockner contends that the Marshall letter implies that Mr. Lockner was involved in the stabbing of Mr. O'Sullivan via the term "and one other brother." But Mr. Bunner doesn't name Mr. Lockner in the Marshall letter. Mr. Lockner asserts that the jury would imply that he was the "brother" Mr. Bunner mentioned in the

note because they were the only two defendants tried together (although there were three assailants). Mr. Lockner's defense theory was duress, though, and he never disputed that he was involved in the killing—he claimed instead that he was forced into participating. The Marshall letter may have implicated him as being involved in the killing, but he never disputed that.

*Second*, Mr. Lockner does not argue on appeal that the May letter is prejudicial. While referring to both the Marshall letter and the May letter as "the Bunner letters" throughout its brief, the defense never identifies what language in the May letter is prejudicial. Even so, the May letter was written to another DOC prisoner, who was not involved in the killing, and stated as follows:

> Hey how are you doing? I hope you're doing all right. As for myself I'm in the hole as well. 300 days, better than the three years she was trying to give me LOL. Now John Sullivan a/k/a Pic is in a hole as well. 48 is how many times he got stabbed. That pussy ran but I'm faster. His security ran as well. 60 people made statements. Crazy shit. I might be going out of state if not I might be back with you and eight others with me. Shit, we'll see. This State don't know what they want to do. They said no one has ever been killed like that here before and no one who was the head of a group before.

(Cleaned up.)

This letter didn't prejudice Mr. Lockner unfairly. It neither implicates nor mentions him and doesn't undercut the defense's theory. To the extent that the Bunner letters were prejudicial to Mr. Lockner, however, the trial court responded appropriately, through an instruction directing the jury to consider them only against Mr. Bunner:

> You have heard some evidence of previous statements made

> by both Vincent Bunner and Calvin Lockner. These statements were admitted only against the Defendant who made those statements. You must consider such evidence only as it relates to the Defendant against whom it was admitted. Each Defendant is entitled to have the case decided separately on the evidence that applies to that Defendant.

Mr. Lockner didn't object to this instruction, didn't seek a more particularized jury instruction, and didn't ask that any part of the Bunner letters be redacted. And although he argues on appeal that a prompt instruction should have been given when the letters were introduced initially, the question of whether the court *could* have given a prompt instruction is different than whether the court *should* have given one. Mr. Lockner didn't request a limiting instruction at that time, nor did he object when one was not given. As such, Mr. Lockner waived his objection of the trial court's decision to forgo a limiting instruction at the time the Bunner letters were introduced, and to give a more particularized jury instruction on the letters' admissibility during jury instructions.[13]

**JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. APPELLANTS TO PAY COSTS.**

[13] In the alternative, Mr. Lockner asks us to exercise plain error review. To the extent we have that authority under the circumstances, we decline to do so. *See* Md. Rule 8-131(a).