Circuit Court for Baltimore County
Case No. 03-K-15-5492

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 986

September Term, 2017

MICHAEL ANTHONY JOBES

v.

STATE OF MARYLAND

Meredith,
Kehoe,
Berger,

JJ.

Opinion by Berger, J.

Filed: December 14, 2018

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

A jury in the Circuit Court for Baltimore County convicted appellant Michael Anthony Jobes of first-degree felony murder, use of a firearm in the commission of a crime of violence, conspiracy to commit armed carjacking, and armed robbery.[1] The trial court sentenced Jobes to life plus 40 years in prison, after which he filed a timely notice of appeal. He asks us to consider the following questions:

1. Did the trial court err in denying appellant's motion to sever his case from that of his co-defendant, Keith Harrison?

2. Did the trial court err in failing to strike two potential jurors for cause?

3. Did the trial court err in allowing Detective James Lambert, a lay witness, to give expert opinion concerning the likelihood of obtaining fingerprints from shell casings?

4. Did the trial court err in refusing to instruct the jury on voluntary intoxication?

5. Did the trial court err in allowing the State to make improper closing argument?

For the reasons that follow, we affirm the judgments of the trial court.

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[1] Appellant was tried with co-defendant Keith Harrison. After several days of deliberation, the jury was unable to reach a verdict on the charges against Harrison, and the court declared a mistrial in his case. On November 28, 2017, Harrison pled guilty to first-degree murder and was sentenced to life in prison, with all but 35 years suspended.

Of the remaining alleged perpetrators in the charged crime -- Hassan Jones, Kareem Riley, Ramart Wilson, and Christian Tyson -- Jones was tried and convicted prior to appellant and Harrison, and Riley, Wilson, and Tyson entered into plea agreements with the State, which included the requirement that they testify truthfully against appellant and Harrison.

FACTS AND LEGAL PROCEEDINGS

At approximately 4:45 a.m. on August 9, 2015, Baltimore County Police officers responded to Dark Head Road in the Hawthorne neighborhood of Baltimore County, in response to a 911 call of shots fired and an unconscious person covered in blood on the side of the road. The victim, identified as Sanddeep Bhulai, a resident of the neighborhood, was found lying face down on the grass next to his Nissan Maxima, which was still running. Bhulai was pronounced dead at the scene, having suffered six gunshot wounds to his head, neck, chest, and left arm; a "deformed small caliber gray metal bullet" was recovered from Bhulai's head upon autopsy, and six shell casings were recovered from the area surrounding his body.[2]

Apparently missing from Bhulai's person was his cell phone, as evidenced by the empty cell phone case still on his body and the charger that remained plugged into his car.

[2] Investigation revealed that Bhulai had left a car show at approximately 2:30 a.m. on August 9, 2015, in response to numerous text messages from his girlfriend, Alicia Harrell, telling him to come home. Harrell last received a text message from Bhulai at 2:47 a.m. At approximately 2:50 a.m., she heard five or six shots fired and then what sounded like a car revving its engine and taking off.

Jeffrey Markowski was dozing on the porch of his mother's house on Dark Head Road when he heard three or four pops that sounded like firecrackers. A few minutes later, he heard a "little bit of commotion, like people moving" in the alley behind his mother's house. He then saw approximately five young men hop a fence around the yard of his aunt's house around the corner, cross his aunt's front lawn, and run up the road.

A damaged motor scooter, later determined to be relevant to the investigation, was discovered in a wooded area a short distance away from Bhulai's body.[3]

There was no dispute that six men -- appellant, Harrison, Riley, Wilson, Tyson, and Jones -- were together on the night of August 8, 2015. Riley, Wilson, and Tyson testified against appellant and Harrison; they agreed on the basic timeline of events but differed on some details of their activities that night.

Riley recalled that on August 8, 2015, Wilson invited him to go with appellant, Harrison, Jones, and Tyson to a "mansion party."[4] By the time they arrived, the police had shut the party down, so the group proceeded to a different party, with the same result within minutes of their arrival at approximately midnight.

After the second party was shut down, the group went to a 7-Eleven in Middle River. Upon leaving the 7-Eleven, appellant directed Riley, who was driving, to a street around the corner, where appellant's cousin lived.

Riley parked the car, and Harrison and Wilson walked up the street; when they returned, they were pushing a scooter, which Riley helped them try to start. Unable to start the scooter, they ditched it nearby.

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[3] The scooter was reported stolen by an area resident approximately 30 minutes after its discovery by the police.

[4] Riley entered a guilty plea to a charge of accessory after the fact to first-degree murder for his part in the homicide of Bhulai, with the understanding that he would receive a ten-year sentence, all but five years suspended, for his cooperation with the State in the prosecution of appellant and Harrison.

Riley and Wilson then returned to Riley's car, where Riley passed out.[5] A few minutes later, Riley heard what sounded like gunshots, after which appellant, Harrison, Jones, and Tyson returned to the car, and appellant said something to the effect of, "[H]urry up, get us away . . . from here, I just shot somebody."[6] Riley drove away, dropped everyone off near the Reisterstown Road Plaza, and went home.

Wilson concurred with Riley that the six men went to a party on August 8, 2015, after which appellant directed them to the Baltimore County neighborhood in which appellant's cousin lived.[7] Wilson said that, once there, appellant, Harrison, Jones, and Tyson walked away from the car, while he and Riley walked up the street and tried to steal a scooter. When they could not get it started, they left it in the woods and returned to Riley's car. Shortly thereafter, they heard shots. When the others returned to the car, Wilson noticed that appellant, Jones, and Tyson had guns. Riley then drove everyone to appellant's house in East Baltimore, where they went to sleep. Later, appellant told Wilson that he had shot someone.

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[5] Riley said he had drunk approximately a half-pint of vodka, taken Xanax and Percocet, and smoked marijuana on the night in question. He admitted to being significantly impaired.

[6] According to Riley, appellant, Jones, and Harrison were carrying guns that night -- appellant with a silver revolver, and Jones and Harrison with black Glocks.

[7] Wilson also testified pursuant to a plea agreement with the State, in which he pled guilty to conspiracy to commit armed robbery, with a 20-year prison sentence, with all but ten years suspended, in exchange for his testimony against appellant and Harrison.

Tyson added that, while at the party, Jones, in response to a confrontation with another man, "whipped his gun out."[8] Tyson described Jones's gun as a Highpoint .9 millimeter handgun, which Jones had in his "dip." He said that appellant and Harrison also carried guns that night, appellant with a .22 revolver and Harrison with a .380. Despite some witness reports that he, too, had a gun on him, Tyson, although admitting that he owned a gun, denied carrying a weapon that night.

Tyson agreed that after they left the party, the group went to a 7-Eleven before heading to another neighborhood.[9] Once they parked, they all got out of the car and walked around before Wilson and Harrison found a scooter and tried to start it. Tyson helped to try to get the scooter started, but they were unsuccessful, so they ditched it in a wooded area.

Riley and Wilson then returned to Riley's car, while the others looked for more things to steal. When they came across an occupied Nissan, appellant and Harrison pulled the driver out of the car at gunpoint. Tyson stole the man's phone and got into the driver's seat to steal the car, but he then moved to the back seat. Appellant took the man's wallet and shot the man in the head, after which Harrison and Jones also shot the man.

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[8] Tyson was also charged for his part in the homicide of Bhulai and testified pursuant to an agreement with the State; he pled guilty to first-degree murder, with an understanding that the State would recommend a sentence of no more than life with all but 40 years suspended.

[9] He acknowledged that by that point he was high and that Riley was intoxicated on alcohol.

After the shooting, Tyson said, "everything was just messed up," and the four men ran back toward Riley's car instead of taking the victim's car. Riley pulled away without knowing what had happened. He eventually dropped the others off and drove away, after which they put Bhulai's wallet under a rock at a demolished house and went to appellant's house, where they all got high and went to sleep. When Tyson woke up the next morning, the phone he had stolen from the victim was gone from his pocket.

Among the 16 latent fingerprints lifted from the stolen scooter during the investigation, the State's expert fingerprint analyst identified prints belonging to Harrison, Wilson, and Riley. Lifted from the victim's car were five latent fingerprints, identified as belonging to Bhulai, the man who called 911 on his behalf, and Tyson.

Initially, Harrison and Tyson were developed as suspects in the murder of Bhulai. Further investigation and data recovered from their cell phones pursuant to a search warrant led to the ultimate development of all six men as suspects.

On September 4, 2015, Harrison was arrested in front of a vacant house in Baltimore City on an unrelated drug charge. Recovered from the porch of the house was a loaded black and silver .380 caliber Bersa handgun.[10] During the ensuing conversation between the police and Harrison, Harrison admitted his attempt to steal the scooter found near the scene of the murder, but he lied to the police about other the details of the night.

[10] The gun had been reported stolen from a Pennsylvania resident in 2016.

Appellant was interviewed by police on September 8, 2015; during the interview, he implicated himself in Bhulai's murder.[11] During the September 9, 2015 execution of a search warrant at appellant's home, the police recovered the victim's missing cell phone hidden under a recliner.

The State's firearm and toolmark expert testified that of the six cartridge cases found around Bhulai's body, two were fired from the .380 caliber Bersa Fender firearm recovered near Harrison on September 4, 2015. The remaining four cartridge cases were fired from the same .9 millimeter Luger firearm which had also been used in two separate crimes in Baltimore City. The bullet recovered from Bhulai's head by the medical examiner was identified as a "mutilated and distorted" .22 caliber long rifle projectile.

Expert analysis of the cell phone data of appellant, Harrison, Wilson, Jones, Riley, and Tyson revealed that Tyson's and Jones's phones did not make or receive any calls from approximately 10 p.m. on August 8, 2015 until 1 p.m. on August 9, 2015. Appellant's, Riley's, Wilson's, and Harrison's phones were determined to be in the same general area on that night, and all their phones overlapped the location of Mr. Bhulai's phone at approximately 3:00 a.m. on August 9, 2015, before moving back into Baltimore City.

Neither appellant nor Harrison elected to put on any evidence in his defense.

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[11] Thirteen clips from the videotaped interview were played for the jury. Therein, appellant admitted to being with "those guys" when "we all" walked up to a man's car and pulled him out with the intent to steal the car. He admitted to taking the man's wallet but denied shooting him and said he did not know who "popped a gun" because there were three guns at the scene. Any statements and photos that arguably implicated Harrison in the crimes were redacted from the clips shown to the jury.

DISCUSSION

I.

Appellant first contends that the trial court erred or abused its discretion in denying his motion to sever the trial of his case from that of his co-defendant, Keith Harrison. In his view, the introduction of evidence of Harrison's admission of his theft of the scooter on the night of Bhulai's murder and Harrison's arrest on drug charges, with the subsequent recovery of one of the murder weapons, would not have been admissible against appellant had he been tried separately but, in a joint trial, caused the jury to associate appellant with Harrison's illegal activities. He further avers that evidence of Harrison's statement to the police that Harrison had been with Riley on the night of the homicide "necessarily implicated" him because the State's theory was that appellant and Harrison acted jointly with Riley, Wilson, and Tyson in the crimes against Bhulai.

On July 15, 2016, appellant filed a written motion to sever the joint trial of the defendants, stating that evidence, including statements, existed that would not be mutually admissible should the defendants be tried together. And, even if the evidence were determined to be mutually admissible, appellant argued that he would be substantially prejudiced by being tried with Harrison.

The State responded that all the evidence to be presented at trial was mutually admissible and that the interest in judicial economy weighed heavily in favor of keeping the defendants joined for the lengthy trial. Moreover, the State continued, although he

argued that a joint trial with Harrison would prejudice him significantly, appellant cited no examples of prejudice in his motion.

The court heard argument on the motion on August 25, 2016. Defense counsel argued that the evidence that would not be mutually admissible against both defendants included "some statements given in this case by our client," as well as "some physical evidence that can be tied directly to [Harrison] but cannot be directly tied to [appellant]." Those "two very significant pieces of evidence" included Harrison's fingerprints found on the stolen scooter and the gun, found upon Harrison's arrest on unrelated charges, that was used in the homicide of Bhulai. According to appellant, neither piece of evidence implicating Harrison could be tied to appellant and would therefore be so prejudicial to him that he would be unable to receive a fair trial. He also argued that, given the fact that three of the six defendants had pled guilty and one had already been tried, judicial economy would not be severely impacted by separate trials for him and Harrison.

The State responded that all the evidence was mutually admissible and that it had made an offer to redact Harrison's statement to the extent that it arguably facially incriminated appellant. Moreover, the State anticipated calling 23 witnesses over the course of a trial expected to last almost two weeks; therefore, two trials to present the same evidence and witnesses of defendants who had acted in concert would inconvenience the witnesses, the court, and the victim's family.

The court ruled:

> THE COURT: All right. Having heard from counsel and reviewed the motion and the answer and the cases, I do find that the evidence that is going to be offered in this case against

> both Defendants is mutually admissible. In the interests of judicial economy, this is at least a ten-day case. I mean, with jury selection, this case will run trial days nine days long, and, you know, the physical evidence in the case related to the casings of a gun that is traced to Mr. Harrison and recovered from Mr. Harrison, that in and of itself I don't find to be so prejudicial that it would warrant a separate trial nor would the fingerprints of Mr. Harrison found on a stolen scooter which was located nearby, those items together would not be so prejudicial as to warrant a separate trial in the case.
>
> So the Defendant's motion to sever the case is denied. All right. All right. Counsel, we are recessed.

During trial, the trial court admitted evidence of Harrison's statement to the police admitting his part in the theft of the scooter, the fingerprint evidence obtained from the stolen scooter, and the recovery of one of the murder weapons during his arrest, all subject to a limiting instruction to the jury that it should consider evidence only as it related to the defendant against whom it was admitted.[12] Several times during trial, appellant reiterated his assertion that the defendants' trials should have been severed.

The issue of joinder or severance is governed by Maryland Rule 4-253, which provides that a trial court may order a joint trial for two or more defendants "if they are alleged to have participated in the same act or transaction or in the same series of acts or

[12] Specifically, the court instructed the jury:

> There are two Defendants in this case. Some evidence was admitted only against one Defendant and not against the other Defendant. You must consider such evidence only as it relates to the Defendant against whom it was admitted. As I told you during the trial, each Defendant is entitled to have the case decided separately on the evidence that applies to that Defendant.

transactions constituting an offense or offenses." Md. Rule 4-253(a). Joinder promotes judicial economy by saving the time and expense of separate trials if the court, in its discretion, deems a joint trial proper. *State v. Hines*, 450 Md. 352, 368 (2016). If, however, it appears "that any party will be prejudiced by the joinder for trial of counts, charging documents, or defendants, the court may, on its own initiative, or on motion of any party, order separate trials of counts, charging documents, or defendants, or grant any other relief as justice requires." Md. Rule 4-253(c).

"In its consideration of joinder (and thus of severance), a trial court weighs the conflicting considerations of the public's interest in preserving judicial economy and efficiency against unduly prejudicing the defendant." *Galloway v. State,* 371 Md. 379, 395 (2002). The term """[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.* at 394 n.11 (quoting *Ogonowski v. State*, 87 Md. App. 173, 186-87 (1991)).

When determining whether to grant a motion to sever trials among more than one defendant, the court must consider the following:

> First, the judge must determine whether evidence that is non-mutually admissible as to multiple offenses or defendants will be introduced. Second, the trial judge must determine whether the admission of such evidence will cause unfair prejudice to the defendant who is requesting a severance. Finally, the judge must use his or her discretion to determine how to respond to any unfair prejudice caused by the admission of non-mutually admissible evidence. 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. The judge must exercise his or her discretion to avoid unfair prejudice.

Hines, 450 Md. at 369-70.

The determination whether to grant severance of defendants or other relief to safeguard against prejudice from a joint trial is a matter within the discretion of the trial court. *Id.* at 370. The court's decision is reviewed on appeal only for abuse of discretion. *Id.*

The evidence against Harrison about which appellant complains -- Harrison's fingerprints on the stolen scooter and his possession of one of the murder weapons -- was mutually admissible against both defendants. As appellant notes in his brief, the State's theory was that appellant and Harrison acted in concert with Wilson, Tyson, Riley, and Jones in the crimes against Bhulai, so evidence linking Harrison to the scene of the crime and to the homicide would have been equally admissible against appellant, as further evidence (in addition to Riley's, Wilson's, and Tyson's testimony) of appellant's presence during, and culpability in, the murder and related crimes.

Even if not mutually admissible, the evidence of Harrison's participation in the theft of the scooter and possession of one of the murder weapons as proof of appellant's presence during, and participation in, the murder cannot be said to have unfairly prejudiced appellant. A redacted version of appellant's statement to the police was played for the jury; therein, appellant admitted to: (1) his presence with five other men that night, with specific mention of Jones, by his nickname "Teesy;" (2) the group's attempt to steal the car from the victim; (3) taking the victim's wallet; (4) the presence of three guns on the scene, at

least one of which was fired after the victim was pulled from his car; and (5) his fear after "those guys" killed "that guy." The evidence of appellant's presence and participation garnered through the evidence admitted against Harrison was merely cumulative of his own admissions.

Harrison's statement to police admitting his part in the theft of the scooter, while admissible against him as the statement by a party opponent, would have comprised inadmissible hearsay in appellant's trial, had he been tried separately. *See* Md. Rule 5-803. To the extent that the police witness testified regarding the substance of Harrison's statement, however, we find no unfair prejudice to appellant.

The detective detailed Harrison's initial denial of any knowledge of a scooter, which was revealed as a lie when Harrison was confronted with the fact that his fingerprints had been found on the scooter. Then, Harrison changed his story to say that he had been riding around with Riley on their way to Riley's girlfriend's house when they saw a scooter, tried to start it, and left it in some bushes when they could not get it started.

When the prosecutor asked the detective if Harrison had admitted to being with any other individuals thought to be involved in the murder, the detective stated that Harrison had said he was with no one other than Riley that night, and specifically stated he was not with Wilson or Tyson; appellant's name was not mentioned. Therefore, despite appellant's claim that "[i]n the context of the State's prosecution, Harrison's statements implicated" him, we fail to see how appellant was incriminated by a statement by Harrison that Harrison was alone with Riley on the night of the murder, even though other evidence later proved that to be a lie. *See Hines*, 450 Md. at 374 ("'prejudice' under Rule 4–253(c) by definition

means damage *from* evidence that would not have been admissible against a defendant in a trial separate from his codefendant.”).

Although the trial court found that the evidence of which appellant complained was mutually admissible against him and Harrison, and that appellant would suffer no unfair prejudice by its admission, the court, in the exercise of its discretion, gave a limiting instruction to the jury regarding the proper consideration of evidence as to only the defendant against whom it was admitted. The court also ensured that Harrison’s out-of-court statement, admitted through the testimony of the investigating detective, did not contain any reference to appellant. The court’s actions were sufficient to guard against any potential prejudice, and we find no abuse in its discretion in denying appellant’s motion to sever.

II.

Appellant next argues that the trial court erred in failing to strike two prospective jurors for cause. The jurors, he claims, expressed a pre-existing bias and did not unequivocally indicate an ability to be fair and impartial and to decide the case based solely on the evidence.

During *voir dire*, prospective juror 85 informed the court that his daughter had recently been the victim of a violent crime in Baltimore City. The perpetrator had been convicted of several charges and was due to be sentenced within the next week. The court asked:

> THE COURT: . . . Would the fact that she was a victim of that crime that went to Court in January affect your ability to render

> a fair and impartial verdict in this case based solely on the testimony?
>
> THE JUROR: I'm honestly not sure.
>
> THE COURT: Okay. So you think it may?
>
> THE JUROR: I think it may.
>
> * * *
>
> THE COURT: All right. Would you be able to follow the Court's instructions at the end of the case to base your decision in the case solely on the testimony and evidence you hear in the courtroom?
>
> THE JUROR: I could probably do that yes, but this is all so pretty raw, so—
>
> THE COURT: All right.
>
> THE JUROR: --I can't answer that (inaudible).

Defense counsel immediately moved to strike the prospective juror for cause. The court, finding that the prospective juror said he could follow the court's instructions, denied the motion but indicated its willingness to reconsider, "[d]epending on how many jurors we have at the end."

Prospective juror 119 answered a question about whether he would give greater or lesser weight to the testimony of a police officer merely because he or she was a police officer, explaining that his father was a police officer for 32 years and that he had considered becoming a police officer, which would cause him to be "pro law enforcement." When the court asked if he would be able to follow an instruction not to give greater or

lesser weight to the testimony of a police officer merely because he or she is a police officer, the prospective juror answer, "I guess I could, yes."[13]

Defense counsel again immediately moved to strike the juror for cause, given the man's stated bias toward the police. The court ruled:

> THE COURT: He says he can follow the Court's lawful instructions on whether or not he should base his decision solely on the testimony and other evidence offered in the courtroom. I think that—if the juror takes that position he stays on. That's a strike you can use.

At the close of the questioning of the prospective jurors, defense counsel renewed his motions to strike.[14] The court again denied the motions, based on reasons previously articulated.

During jury selection the following day, defense counsel used peremptory challenges to dismiss prospective jurors 85 and 119. Once the jury was empaneled, defense counsel preserved "for the record" his exceptions to the court's denial of his motions to strike jurors for cause and stated that the defense did not find the jury acceptable.

The following morning, the court commented:

> THE COURT: . . . Finally, with respect to [defense counsel's] challenge to the jury array yesterday afternoon, the jury selection process was two days. We went through 147 prospective jurors, needing I believe 93 to seat a jury.

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[13] The juror also stated that his father had been the victim of an armed robbery approximately 17 years before and that he and his brother had been the victims of car theft. When the court asked if those experiences would affect his ability to render a fair and impartial verdict based solely on the testimony, the prospective juror answered, "I certainly would be biased ou [sic] because of my experience," but added that he was "sure" he could base his decision in this matter solely on the evidence.

[14] The court did strike 13 prospective jurors for cause.

> On day one the defense challenged a couple of jurors that I found qualified. I know at least as to one of those jurors, and maybe more than one, I invited them to renew their motion to have me reconsider the juror at the time the final panel was assembled.
>
> When we recessed for the lunch yesterday, we had qualified I believe 110 jurors, needing 93. I asked if there was anything else at that point in time and there was nothing said, and then asked before we started striking the jury in the afternoon if there was anything else and the defense didn't renew their motion at that point.
>
> It was only after we had struck the entire jury and put them in the box that the defense then challenged the jury as seated.
>
> So at least my position is if I was given the opportunity, I may have reconsidered the ruling but it wasn't made at the time the final jury pool was assembled.[15]

A criminal defendant is entitled to a trial by a fair and impartial jury. U.S. Const. amend. VI; Md. Decl. of Rts. art. 21. *Voir dire* is the process utilized "'to ensure a fair and impartial jury by determining the existence of a [specific] cause for disqualification.'" *Pearson v. State,* 437 Md. 350, 356 (2014) (quoting *Washington v. State*, 425 Md. 306, 312 (2012)). If a party believes that a prospective juror will not be fair and impartial, he can move to strike that juror for cause. Md. Rule 4–312(e)(2). The trial court enjoys wide discretion in excusing jurors for cause because "the trial court is in the best position to

[15] While it is true that defense counsel did not reassert his motion to strike the two jurors for cause prior to the lunch recess or upon return to court after the lunch recess, he did renew his objection and state that the jury was not acceptable before the prospective jurors were released and before the jury was sworn.

assess a juror's state of mind, by taking into consideration the juror's demeanor and credibility." *Ware v. State*, 360 Md. 650, 666 (2000).

As the focal point of the process, the trial court's "'predominant function in determining juror bias involves credibility findings whose basis cannot be discerned from an appellate record.'" *Dingle v. State*, 361 Md. 1, 15 (2000) (quoting *Wainwright v. Witt,* 469 U.S. 412, 429 (1985)). *Voir dire*, to be meaningful, must uncover more than "'the jurors' bottom line conclusions [to broad questions], which do not in themselves reveal automatically disqualifying biases as to their ability fairly and accurately to decide the case, and, indeed, which do not elucidate the bases for those conclusions. . . .'" *Id.* (quoting *Bowie v. State,* 324 Md. 1, 23 (1991)).

Here, the court's colloquy with prospective juror 85 initially revealed that the prospective juror was unsure whether the fact that his daughter had been a victim of a violent crime would affect his ability to render a fair and impartial verdict based on the evidence. When questioned further by the court, however, juror 85 conceded that he "could probably" follow the court's instructions and base his decision on the evidence.

Juror 119 initially indicated that he would be "pro law enforcement," given that his father had been a police officer and that he had considered law enforcement as a career. But, when asked if he could follow the court's instructions, the juror answered, "I guess I could, yes." The same juror further advised the court that he would be biased because of his family experiences as crime victims, but he stated he was "sure" he could base his decision solely on the evidence.

To be sure, the prospective jurors initially expressed doubts as to their ability to be impartial, and their ultimate assurances may not have been considered by some to be entirely definitive. As we explained in *Morris*, 153 Md. App. 480, 502-3 (2003), however, even answers that appear equivocal on a cold record, such as the ones given by jurors 85 and 119, involve discretionary calls on challenges for cause because the words used

> are but a small part of the raw material that goes into making such a decision. There is body language. There is tone and force of voice. There is eye contact or lack thereof. There is firmness of intonation and quickness of speech versus equivocation and hesitation. . . The court reporter can only take down the words that are uttered. The trial judge, however, makes an on-the-spot assessment of the personality of the person who utters the words. . . . Our point is that the context is indispensable to an understanding of what [the juror] actually was saying.

In our view, the trial court effectively questioned each prospective juror about his possible biases and concluded he could be impartial. Considering the trial court's unique ability to make a determination of jurors' demeanor and credibility, we conclude the trial court acted within its broad discretion in declining to strike jurors 85 and 119 for cause.

III.

Next, appellant avers that the trial court erred in permitting Detective James Lambert, who was not offered or accepted as an expert, to provide expert testimony about the unlikelihood of obtaining usable fingerprints from shell casings. In appellant's view, the detective's testimony was based on his specialized knowledge, skill, experience,

training, or education and should not have been admitted in the absence of expert qualification.

Lambert testified that he did not request that any of the shell casings recovered from the grass near Bhulai's body be processed for fingerprints because, having submitted "[a]t least a hundred" casings for fingerprint testing during his 14-year career, none had yielded usable fingerprint evidence.[16] Appellant claims that because the detective's testimony was based on his specialized training and experience, it could not be offered as evidence unless and until he was qualified and accepted by the court as an expert.

In general, a trial court has wide discretion to rule on the admission of evidence. *State v. Simms,* 420 Md. 705, 724 (2011) (citing *Ruffin Hotel Corp. of Md., Inc. v. Gasper,* 418 Md. 594, 619 (2011)). The decision to admit lay opinion testimony lies within that sound discretion, and we will not overturn a trial court's decision to admit such evidence unless the trial court abused its discretion. *Thomas v. State,* 183 Md. App. 152, 174 (2008), *aff'd*, 413 Md. 247 (2010).

In *Ragland v. State*, 385 Md. 706 (2005), the Court of Appeals explained the difference between lay and expert opinion testimony: expert opinion testimony is that which is "based on specialized knowledge, skill, experience, training, or education" and "need not be confined to matters actually perceived by the witness," while lay opinion testimony is that which is "rationally based on the perception of the witness." *Id*. at 717.

[16] Defense counsel offered two general objections during this line of questioning but did not challenge the admission of the testimony on the ground that it comprised expert opinion.

A person who has developed opinions about an observed event based on his specialized knowledge, skill, experience, training, or education still may testify as a lay witness, pursuant to Md. Rule 5-701,[17] unless that testimony encroaches "'on the jury's function to judge the credibility of the witnesses and weigh their testimony and on the jury's function to resolve contested facts.'" *Hunter v. State*, 397 Md. 580, 593-4 (2007) (quoting *Bohnert v. State*, 312 Md. 266, 279 (1988)).

In *Fullbright v. State*, 168 Md. App. 168 (2006), a police officer observed a blood-covered knife used in an attack on Fullbright's girlfriend. In her opening statement, defense counsel predicted that the victim would say that Fullbright was the perpetrator, but she pointed out that the knife the attacker left behind was never fingerprinted, and Fullbright's hands were never tested to determine whether there was any blood on them.

On direct examination, the police officer testified that no fingerprint analysis had been conducted on the knife. When asked why, he responded, "At the time of the incident, there was blood that was still on there. It was in a wet condition. You know, stating that, from my past—from my experience--." *Id*. at 176. Defense counsel then objected, and the court overruled the objection, permitting the officer to explain that, in his "experience and

[17] Rule 5-701 provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

training in the Police Academy in regards to recovering latent prints. . .[o]ff the knife or off wet objects, it's pretty much—it's hard to get good prints off of blood." *Id*.

On appeal, Fullbright contended that the trial court had erred in permitting the officer to testify that, based on his training and experience, "it is 'hard' to recover 'good' latent fingerprints from wet objects." *Id*. at 177. Fullbright argued that the court improperly had permitted the officer to give an unqualified expert opinion that "'plugged a hole in the State's case.'" *Id*.

The *Fullbright* Court held that the officer's testimony was not opinion evidence -- expert or lay -- because the State was not offering it for its truth, *i.e*., that it is, in fact, difficult to get good fingerprints off wet objects. Rather, the prosecutor elicited the testimony for the sole purpose of explaining to the jury why the officer did not submit the knife for fingerprint analysis. Therefore, "the jury was not called upon to determine the truth or falsity of [the officer's] opinion." *Id*. at 181-2. Also, the officer's testimony about the quality of fingerprints on wet objects was not introduced to prove an essential element of the charged crimes; it was solely directed to the issue of the adequacy of the police investigation. The unimpeached eyewitness testimony of the victim was sufficient to support a conviction.

Here, the prosecutor similarly asked Lambert why he did not submit the recovered shell casings for fingerprint analysis. The detective answered that, in his 14-year experience, he had never successfully obtained a useful fingerprint from a shell casing. The statement was not offered for its truth, *i.e.* that fingerprints are never recoverable from

shell casings. The detective was simply asked to offer an explanation for why he did not submit physical evidence for fingerprint analysis.

In addition, the detective's testimony was not introduced as an essential element of the charged crimes. Riley, Wilson, and Tyson provided testimony, which the jury was entitled to accept or reject, that appellant was a participant in the crimes against Bhulai, and appellant implicated himself during his police interview. If believed, the testimony, the recorded statement, the cell phone data, and the physical evidence from the crime scene were sufficient to support the convictions. Therefore, the detective's testimony about declining to submit the recovered shell casings for fingerprint testing, a judgment call made during the course of the investigation, was not necessary to prove an essential element of any of the charges against appellant, and we cannot say the detective's testimony, which related his personal observations, impermissibly encroached upon the function of the jury.[18]

IV.

Appellant also claims that the trial court erred in declining to instruct the jury on voluntary intoxication as mitigation to the specific intent crimes with which he was charged. Because he submitted "some evidence" in support of his voluntary intoxication

[18] We further point out that, even had usable fingerprints been recovered from the shell casings, that evidence arguably would not have impacted the case against appellant. The testimony, if believed, indicated that appellant was in possession of a .22 caliber firearm, which he used to shoot Bhulai in the head. A deformed .22 caliber projectile was recovered from Bhulai's head upon autopsy, but no .22 caliber shell casing was recovered from the scene of the shooting.

on the night of the homicide, he concludes, the court was obligated to give the requested instruction.

Initially, the State asserts that this claim should be rejected because the record is inadequate for a review of the issue. According to the State, the only evidence that could arguably support appellant's argument is contained in his recorded statement to police, which was played for the jury but not transcribed on the record during the trial, nor in anticipation of appeal. Appellant's failure to order a transcript of the recording relevant to his appeal therefore warrants our summary rejection of the claim of error. Even if considered, the State concludes, appellant did not generate sufficient evidence to require an instruction on voluntary intoxication.

During discussion among the court, counsel, and defendants regarding jury instructions, appellant's attorney requested the voluntary intoxication instruction, based on appellant's statement to the police, the recording of which had been admitted into evidence.[19] According to counsel, appellant made "several references to being high" on

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[19] The record does not include the text of appellant's proposed instruction. Nevertheless, we note that Maryland Criminal Pattern Jury Instruction 5:08 provides:

> You have heard evidence that the defendant acted while intoxicated by [drugs][alcohol]. Generally, voluntary intoxication is not a defense and does not excuse or justify criminal conduct. However, when charged with an offense requiring a specific intent, the defendant cannot be guilty if [he] [she] was so intoxicated, at the time of the act, that [he][she] was unable to form the necessary intent.
>
> A specific intent is a state of mind in which the defendant intends that [his][her] act will cause a specific result.

the night of the murder and mentioned that he "may have been under the influence of Zannies that night, which we believe to be Xanax."

The court responded, as follows:

> THE COURT: All right. Over the evening recess, after yesterday afternoon, I did have an opportunity to review that exhibit because that is my belief the only evidence in the case regarding any issue of intoxication, is contained on State's Exhibit 150, that is the video tape interview of Mr. Jobes taken by Detective Lambert at Baltimore County Police Headquarters.
>
> That exhibit has 13 separate clips of video and audio. At clips 4, 7, 8 and 11 the Defendant makes references to "getting high," we partied, "we partied, we partied real hard," "I was highly under the influence" at clip 8, "that's what I was saying about being under the influence" and that is the extent of his references.
>
> At no time does he say that he is intoxicated. He says he's—he was impaired. There's no evidence in this case on that tape or otherwise as to what alcohol or drugs he claims to have taken prior to this crime.
>
> There is some reference to Zannies but there's no explanation as to what that is. There's no evidence of what quantity of any of this alcohol or drugs may have been

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> In this case, the defendant is charged with the offense of (offense requiring a specific intent), which requires the State to prove that the defendant acted with the specific intent to (specific intent). [Voluntary intoxication is not a defense to (list offenses not requiring a specific intent).]
>
> In order to convict the defendant, the State must prove, beyond a reasonable doubt, that the degree of the intoxication did not prevent the defendant from acting with that specific intent. A person can be [drinking][taking drugs] and can even be intoxicated, but still have the necessary mental faculties to act with a specific intent.

consumed. There's no evidence as to when it was taken by him in relation to when this offense occurs.

These parties, the evidence indicates, were together for a long period of time leading up to this event's occurrence.

His responses during the questioning were clear and cogent. He explained in detail their travelling to the scene, who was present, the group accosting the victim, ordering the victim to the ground. He recalls, you know, retrieving the wallet and running when he hears gunshots.

I'm putting all that into evidence because those are all the things that I have in my notes as to what he says. There's no evidence of memory loss, no evidence of passing out, no evidence of illogical behavior, no evidence of stumbling, staggering, slurred speech, impaired motor skills of this Defendant throughout the entire evening.

The burden is small. There has to be some evidence and clearly the State's evidence can be some evidence to support giving the instruction.

I have reviewed Dykes versus State, 319 Maryland 206 at pages 216 to 17. It is not a structured test or a specific standard. It calls for no more than what it says, some evidence. But in this case, the singular fact that the Defendant makes some statements several weeks after the fact that he was partying, getting high and was impaired and quantities not designated, by substances not designated, ingested by means, i.e., smoking, swallowing, injecting, et cetera, not designated, I find fails to meet that minimal standard of some evidence of voluntary intoxication, adding that not the least of which he never indicates he's intoxicated. He says he's impaired.

I don't believe there is evidence in the case to generate the instruction. I'm relying in part on Lewis versus State, 79 Md. App 1, as cited in Bazzle versus State, 426 Maryland 541, 45 A.3rd 166, 2012.

> Those are the reasons—when I say I'm overruling the exceptions, those will be the reasons that I'm incorporating when the exception to that instruction is made at the bench.[20]

As noted by the trial court in its ruling, the only evidence that arguably would have supported the voluntary intoxication instruction was contained in the recorded statement appellant gave to the police. Although that recording was played for the jury, it was not transcribed on the record at trial, nor was a transcript submitted for consideration upon appeal.

Md. Rule 8-411(a)(3) requires an appellant to order in writing from the court reporter a transcript containing, "if relevant to the appeal and in the absence of a written stipulation by all parties to the content of the recording, a transcription of any audio or audiovisual recording or portion thereof offered or used at a hearing or trial." In *Jacobs v. State*, 45 Md. App. 634, 641-2 (1980), although tape recordings of phone calls were played for the jury and offered into evidence, they were not transcribed or included in the record. We determined that the defendant's failure to provide the required transcript was "totally dispositive of the contention" on appeal. We are permitted to hold similarly here, but, because we did conduct our own review of the video recording of appellant's statement to the detective, contained in State's exhibit 150, we will invoke our discretion to consider the issue.

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[20] Indeed, following the court's jury instructions, defense counsel noted an exception to the court's failure to give the voluntary intoxication instruction. The court responded that it would not give the instruction "for reasons I have previously stated prior to the jury being brought into the courtroom."

We review a trial court's decision whether to give a jury instruction for abuse of discretion. *Albertson v. State*, 212 Md. App. 531, 551-2, *cert. denied*, 435 Md. 267 (2013). "In determining whether a trial court has abused its discretion, we consider '(1) whether the requested instruction was a correct statement of law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given.'" *Id*. at 552 (quoting *Bazzle v. State*, 426 Md. 541, 549 (2012)). Here, the only question is whether the voluntary intoxication instruction was applicable under the facts of the case.

The Court of Appeals has held that "[v]oluntary intoxication as a defense to some criminal charges is clearly recognized in Maryland." *Shell v. State,* 307 Md. 46, 58 (1986). More specifically, "[v]oluntary intoxication can have [an] exculpatory effect on any crime requiring specific intent. Thus, voluntary intoxication could negate guilt for criminal homicide of the specific-intent-to-kill variety at all levels of blameworthiness—first-degree murder, second[ ]degree murder, and voluntary manslaughter." *Bey v. State,* 140 Md. App. 607, 631 (2001) (last alteration in original). To be entitled to an instruction on voluntary intoxication, a defendant must produce "some evidence" that would permit the jury to conclude that his intoxication made him incapable of forming the intent necessary to constitute the crime. *Bazzle*, 426 Md. at 555.

"'[T]he degree of intoxication which must be demonstrated to exonerate a defendant is great. Evidence of drunkenness which falls short of a proven incapacity in the accused to form the intent necessary to constitute the crime merely establishes that the mind was affected by drink so that he more readily gave way to some violent passion and does not

rebut the presumption that a man intends the natural consequence of his act.'" *Wood v. State*, 209 Md. App. 246, 306–07 (2012) (quoting *State v. Gover,* 267 Md. 602, 607–08 (1973)), *aff'd*, 436 Md. 276 (2013). The mere fact of consumption of what may be considered an inordinate amount of alcohol or drugs, standing alone, is not sufficient to generate the voluntary intoxication instruction; in addition, evidence of the effect of the alcohol or drugs on the defendant is also required, so as to permit a jury reasonably to conclude that he had lost control of his mental faculties to such an extent that he was unable to form the requisite intent. *Bazzle*, 426 Md. at 553 (citing *Lewis v. State*, 79 Md. App. 1, 12-13 (1989)).

In *Bazzle*, the defendant presented evidence concerning the amount of alcohol he had drunk, his blood alcohol content, and his own testimony that he was unable to recall some of his behavior on the night of the crime. *Id*. at 546, 555. Nonetheless, the Court found no abuse of discretion in the trial court's failure to give the voluntary intoxication instruction because Bazzle's behavior on the night of the crime -- being able to recognize the gender of his attackers, escape by running away from them, and navigate to a friend's house in the middle of the night while severely injured -- was inconsistent with intoxication. *Id.* at 556.

In *Smith v. State,* 69 Md. App. 115, 119–21 (1986), a case in which we held that the evidence was sufficient to generate an instruction on voluntary intoxication, there was evidence presented as to the quantity and type of alcohol and drugs the defendant consumed, the timeframe in which the defendant consumed the substances, and witness

testimony that the defendant was slurring, unbalanced when walking, falling, and "totally out of it."

Here, appellant failed to produce sufficient evidence to permit the jury to conclude that he was intoxicated to such a degree that he was unable to form the specific intent necessary to commit the specific intent crimes with which he was charged. He identifies only his own recorded statement to police, made almost a month after the murder, as support for his request for an instruction on voluntary intoxication. In his statement, appellant stated that on the night in question: (1) he and the other men were "getting high and shit;" (2) the members of the group "got high; partied for real" and "partied real hard;" (3) he remembered "being high" when going up to the victim's car; and (4) he was "highly under the influence."

Although there was some mention of "Zannies," which defense counsel opined referred to Xanax, at no time did appellant detail what drugs or alcohol he had consumed that night or the quantity thereof. And, although he says he was "high" and "highly under the influence," there is no evidence concerning what appellant consumed, how much he consumed, when he consumed it, or what effect -- if any -- such consumption had upon him, sufficient to demonstrate that he was intoxicated to the point that he was unable to form a specific intent to kill Bhulai and commit the other charged crimes. Indeed, during his statement to police, he exhibited no difficulty remembering the details of the night of the murder (other than who fired the shots that killed Bhulai). Moreover, although some other members of the group talked about their own and Riley's intoxication on the night of the murder, no witness mentioned that appellant was impaired to any degree. We are

therefore not persuaded that the trial court abused its discretion in refusing to give the voluntary intoxication instruction.

V.

As his final assignment of error, appellant contends that the prosecutor engaged in improper and prejudicial closing argument, by disparaging the defense attorneys and their trial strategy. The prosecutor's comments accusing defense counsel of trying to obfuscate the issues and confuse the jury were, in his opinion, improper.

During her closing argument, the prosecutor advised the jurors that they required three things to come to a fair and just verdict: (1) the facts and evidence; (2) the law; and (3) their common sense. Regarding the third item, the prosecutor stated, "You are not expected to leave your common sense, your life experiences behind you when you step into your jury room to deliberate, and, in fact, counsel's counting on you not using your common sense. . . They have spent nine days trying to draw your attention to things that are of no consequence in this case."

Defense counsel objected that the comments were "absolutely improper" because the prosecutor was "commenting on what the defense is trying to do." In overruling the objections, the court disagreed, suggesting that the prosecutor was instead commenting on defense counsel's cross-examination of the witnesses and whether or not, in the State's opinion, the cross-examination accented things other than what the jury should pay attention to.

Immediately thereafter, the prosecutor continued: "So just as I was saying, there is [sic] a number of things they have tried to draw your attention to throughout the course of this trial, things that are of no consequence in an effort to confuse you so that you lose sight of the truth in this case. Those things I will refer to as red herrings. . . Red herrings are simply smoke and mirrors, an effort to try to draw your attention away from the things that are important and the things of consequence." Defense counsel again objected, and the court again overruled the objection.

Appellant now argues that the prosecutor's argument exceeded the bounds of permissible closing argument by disparaging his attorneys and their trial strategy and impugning their character.

The Court of Appeals has consistently stated that attorneys are afforded "considerable leeway in closing argument, and that regulation of closing arguments falls within the sound discretion of the trial court." *Frazier v. State*, 197 Md. App. 264, 283 (2011). In general, "counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom." *Mitchell v. State,* 408 Md. 368, 380 (2009) (quoting *Wilhelm v. State,* 272 Md. 404, 412 (1974)). There are, of course, lines that counsel may not cross in delivering a closing argument. For example, the Court of Appeals has explained that counsel may not: comment on facts not in evidence; claim what he or she would have proven; appeal to the prejudices or passions of the jurors; or invite the jurors to abandon the objectivity that their oaths require. *Id*. at 381.

What exceeds the limits of permissible commentary during closing argument depends on the facts of each case. *Degren v. State,* 352 Md. 400, 430-1 (1999) (quoting

Wilhelm, 272 Md. at 415). And, "[b]ecause the trial judge is in the best position to gauge the propriety of argument in light of such facts, we have also held that '[a]n appellate court should not disturb the trial court's judgment absent a clear abuse of discretion by the trial court of a character likely to have injured the complaining party.'" *Mitchell*, 408 Md. at 380-81 (quoting *Grandison v. State,* 341 Md. 175, 225 (1995)).

Even if counsel makes improper remarks during closing argument, reversal would only be merited if the comments "'actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.'" *Spain v. State,* 386 Md. 145, 158 (2005) (quoting *Degren,* 352 Md. at 431). In assessing prejudice, we must consider "the severity of the remarks, cumulatively, the weight of the evidence against the accused, and the measures taken to cure any potential prejudice." *Lee v. State*, 405 Md. 148, 174 (2008).

During his opening argument, defense counsel characterized the State's case as "a disjointed, jumbled mess of pieces that they tried to jam together," based on the testimony of "outrageously uncredible and incredible" co-participants who would be "spewing lies to you" in exchange for consideration by the State in sentencing for their own convictions relating to the crimes. He also emphasized the State's "striking lack of physical evidence that ties Mr. Jobes to these crimes."

Both defense attorneys followed up on those lines of attack in their cross-examination of the State's witnesses. As a result, during her closing argument, the prosecutor responded to what she perceived as defense counsel's attempt to divert the jury from the evidence of appellant's guilt of the charged crimes, which included eyewitness

testimony, cell phone data that placed him at the scene of the crime, and his own admissions as contained in his recorded statement to the police.

To be sure, a prosecutor may not "impugn the ethics or professionalism of defense counsel in closing argument," *Smith v. State,* 225 Md. App. 516, 529 (2015), *cert. denied*, 447 Md. 300 (2016), but, in our view, the prosecutor's "red herring" and "smoke and mirrors" comments, "were clearly directed to defense counsel's argument and did not impute impropriety or unprofessional conduct to defense counsel." *Id. See also Miller v. State,* 151 Md. App. 235, 250–51 (2003) (quoting *Wilhelm,* 272 Md. at 413) ("'There are no hard-and-fast limitations within which the argument of earnest counsel must be confined—no well-defined bounds beyond which the eloquence of an advocate shall not soar. . . . He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.'").

The comments about which appellant complains were permissible and did not serve to deprive appellant of a fair trial, especially in light of the court's instruction that the jury base its verdict solely on the evidence, applying the reasonable doubt standard of proof. The court, which had the benefit of hearing counsel's arguments and observing the jury, was not persuaded that the statements went beyond the acceptable boundaries of closing argument. Accordingly, the court did not abuse its discretion in overruling appellant's objections.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.