Circuit Court for Montgomery County
Case Nos. 127706C & 127707C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1065 & 1329

September Term, 2017

LARLANE PANNELL-BROWN AND
HUSSAIN ALI ZADEH

v.

STATE OF MARYLAND

Meredith,
Graeff,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: February 26, 2019

Larlane Pannell-Brown and Hussain Ali Zadeh were tried together, before a jury in the Circuit Court for Montgomery County, for the love-triangle murder of Cecil Brown, Ms. Pannell-Brown's husband, and both were convicted. On appeal, Ms. Pannell-Brown raises several issues relating to jury selection and challenges one evidentiary decision. Mr. Zadeh argues that his trial should have been severed from Ms. Pannell-Brown's, that the court should have suppressed a cell phone found in a search of his car, that the court should have admitted prior bad acts evidence about the victim's son, and that the court unfairly restricted his counsel's closing arguments. We affirm Ms. Pannell-Brown's conviction, but because we hold that Mr. Zadeh should have been tried separately and that the cell phone should have been suppressed, we reverse his conviction and remand for further proceedings. We also address his other contentions for guidance on remand.

BACKGROUND

On the afternoon of August 4, 2014, Ms. Pannell-Brown found her husband, Cecil Brown, dead and lying face-down on the ground in their backyard in Takoma Park with blood all around his head. The State contended that Ms. Pannell-Brown and Mr. Zadeh conspired to kill Mr. Brown, although no physical evidence linked either to the killing. The State indicted them and sought to try them together.

A. The Motion to Sever

Before trial, Mr. Zadeh moved to sever his trial[1] from Ms. Pannell-Brown's. He

[1] Ms. Pannell-Brown joined the motion at the hearing, but does not challenge on appeal the decision to deny it.

argued that "a joint trial poses an unacceptable risk of prejudice arising from evidence that is admissible against [Ms. Pannell-Brown], but not admissible against, or even relevant to, [Mr. Zadeh]." The court held a hearing, and Mr. Zadeh identified three categories of evidence that were not mutually admissible and that, if admitted, would prejudice him:

> [MR. ZADEH'S COUNSEL]: The first category is testimonial hearsay, the second category is nontestimonial hearsay, and the third category is other material that is irrelevant, both irrelevant and unfairly prejudicial [to Mr. Zadeh], and thus inadmissible under rules 402 and 403.
>
> With respect to the testimonial hearsay, as I mentioned, the police conducted three taped and one untaped statement with Ms. Pannell-Brown. . . . **If these statements are admitted at a joint trial and if Ms. Pannell-Brown stands on her right not to testify, my client [Mr. Zadeh] will be unable to cross-examine her about this extensive -- these extensive statements to the police that conflicts with the principals [sic] articulated in *Crawford* [*v. United States*, 212 U.S. 183 (1909)]**. Further, insofar as those statements are inculpatory or implicate [Mr. Zadeh], they would also be in violation of *Bruton* [*v. United States*, 391 U.S. 123 (1968)]. And we think that the presence of such extensive testimonial hearsay here alone is enough to warrant severance.
>
> But turning to the second category of inadmissible and prejudicial evidence, nontestimonial hearsay, and I'll briefly highlight two examples of statements by Ms. Pannell-Brown that the State intends to introduce for the purposes of the implied assertions that they contain.
>
> The first is an August 4th text message from Ms. Pannell-Brown to Mr. Zadeh, which reads: Hey, they checked my phone. I told them that I know you though [sic] Isaiah and that you need help to get your wife over here.
>
> Clearly, the State doesn't rely on the statement for its express content. It doesn't advance their case. The reason for the State to rely on the statement is for the implied assertion from Ms. -- the purported implied assertion from Ms. Pannell-Brown to Mr. Zadeh that they need to get their stories together, that he

> needs to be aware of what she's telling the police in order to hide their, you know, supposed guilt.
>
> The second piece of nontestimonial hearsay we highlight is an August 3rd text message from Ms. Pannell-Brown to her son and/or daughter-in-law that reads: I love you all no matter what.
>
> Again, it's hard to imagine the State relying on that for its express content, I think it's clear that the point from their perspective is the implied assertion that I love you no matter what, notwithstanding that, you know, the bad acts that I've committed or I'm in the process of committing. So because these statements' only relevance is by virtue by their implied assertions, they're hearsay under *Stoddard* and its progeny and thus inadmissible against Mr. Zadeh and provide another reason for severance.
>
> ***
>
> Turning to the third category of evidence, I mentioned briefly that the police seized materials from Mrs. Brown and her residence. These included handwritten notes, internet histories from -- internet search histories from computers and cell phones, and those include, among other things, to take some inflammatory examples, a recipe for how to make cyanide – it's undated and was found mixed up in a bunch of papers in the Brown house – and also internet searches about things like Tasers and how to cause sudden cardiac arrest.
>
> In its brief, the State concedes that these materials were not used to murder Mr. Brown. More importantly, **there's no indication that Mr. Zadeh knew about these materials, let alone approved of them, or that they were created during the life of any conspiracy. So we think they're irrelevant under 402**, and even if they were relevant in some marginal sense, we think that their prejudicial character vastly outweighs any relevance and thus are inadmissible under 403, and so that's another reason to sever.

(Emphasis added).

The State argued that all three categories *were* mutually admissible:

> There is [sic] no grounds to grant [Mr. Zadeh's] motion to sever in this case, and in fact, the biggest reason, I guess, presented to the [c]ourt for severance is that Mr. Zadeh would like a separate trial. And of course he would.
>
> ***
>
> And the State's main argument in his case is that the categories of evidence that [Mr. Zadeh] refers to are not categories of inadmissible evidence as to their client. The State does believe -- and I will describe to the [c]ourt in brief the reasons why we believe all this evidence is mutually admissible.
>
> ***
>
> If we have this trial twice, the exact same evidence is going to be introduced twice. It is not going to be a different case to each codefendant, because the evidence is mutually admissible as to both codefendants.

The trial court found the evidence mutually admissible and denied Mr. Zadeh's motion to sever "because there was no indication that there would be a *Bruton*, 391 U.S. 123,[2] issue, or issues regarding non-mutually admissible evidence":

> If there's not a *Bruton* problem, and of course we'll make sure there's not a *Bruton* problem, there's really no reason to sever the trials because as long as the evidence is mutually admissible and as long as there's no *Bruton* problem, then clearly it's in everyone's interest, other than maybe the defendants who don't want it -- but it's in everybody else's interests to have one trial, apparently a trial of this length, to have an efficient use of resources. And I quite frankly think it's better to have one trial so one jury can assess all of the evidence and fairly sort of look at the evidence vis-à-vis both defendant[s].

[2] *Bruton v. United States*, 391 U.S. 123 (1968), involved two defendants accused of participating in the same crime who were tried jointly. One of the defendants confessed and incriminated the other. The trial judge instructed the jury to consider the confession as evidence only against the defendant who had confessed, not against the co-defendant he named. *Bruton* held that notwithstanding the limiting instruction, inculpatory statements by a non-testifying co-defendant violate the Confrontation Clause.

> Because if you think about it, if you have two trials, not only do you have to bring everybody back twice, but you have two different juries assessing the cases, and you may end up with kind of perverse results just because you have two different juries hearing two different defendants. So I think it's actually in the interest of society to have one trial with one jury hearing the same evidence against both defendants. So the bottom line is, the motion to sever is denied.

Mr. Zadeh later moved for reconsideration based on the then-recent Court of Appeals decision in *State v. Hines*, 450 Md. 352 (2016). The court denied the motion, finding that (1) no non-mutually admissible evidence would be introduced at trial; (2) admitting Ms. Pannell-Brown's statements to the police would not result in unfair prejudice to Mr. Zadeh; and (3) a limiting instruction and redaction would cure any prejudice.

B. The Trial

Because the other issues on appeal flow primarily from the trial itself, we recount the evidence and testimony as the parties presented it.

David Kapp, a home improvement consultant, was in the kitchen of Janet Barry, Ms. Pannell-Brown's next-door neighbor, at around 12:15 p.m. when he heard screaming and banging at the back door. He called to Ms. Barry, who said, "oh my gosh, that's my neighbor." Mr. Kapp opened the sliding door as Ms. Pannell-Brown approached; she was screaming, yelling, and flailing, and she pulled him toward her home. Mr. Kapp, Ms. Barry, and other neighbors followed and saw Mr. Brown's body "on the ground, not moving, in horrible condition, and wallet contents on the ground." Mr. Kapp called 911 and waited.

Ms. Barry was at home with Mr. Kapp when he told her that somebody was banging on her back door. When Mr. Kapp opened the door, Ms. Barry went toward the door and

saw Ms. Pannell-Brown standing on her deck. Ms. Pannell-Brown "grabbed [her] arm and said, Cecil, it's Cecil," and dragged her toward the Browns' backyard. When they got there, they saw Mr. Brown lying on the ground. Ms. Barry told Mr. Kapp to call 911, and he did. She testified that Cecil Pannell, Ms. Pannell-Brown's son (also known as "Beanie"),[3] arrived shortly after the authorities and appeared to be visibly upset.

Miranda Morris, a neighbor and friend of the Browns, returned home from yoga class around 11:45 a.m. After she took a shower, she heard her daughter say "there's someone outside screaming help," and she ran downstairs. She looked outside and saw Ms. Barry, Mr. Kapp, and Ms. Pannell-Brown walking by. Ms. Pannell-Brown gestured for Ms. Morris to come, so she did, and they all walked to the Browns' backyard, where they found Mr. Brown. Ms. Pannell-Brown, despite "heaving and wailing," asked Ms. Morris if she could use her phone to call Beanie. Beanie arrived at the scene shortly after with his wife, Tahira Pannell, and their children.

Ms. Morris also testified that approximately a year-and-a-half before Mr. Brown's death, she had noticed a change in Ms. Pannell-Brown. Ms. Pannell-Brown also had confided in her that Mr. Brown was unemployed and that they were struggling financially. She suggested to Ms. Morris that she was "seeing someone, a boyfriend" and suggested that Ms. Morris "get a friend too."

Detective Richard Poole was assigned as the lead investigator on the case. At the

[3] Because he appears in the record overwhelmingly by this nickname, and to reduce confusion, we will deviate from our usual convention and refer to Mr. Pannell as "Beanie." We mean no disrespect.

scene, he spoke with Ms. Pannell-Brown and checked two of her phones. One cell phone showed a call to a person named "Ali" at 6:41 a.m. Detective Poole asked Ms. Pannell-Brown if he could search her other phone, and Ms. Pannell-Brown retrieved it from her bedroom. After searching the phones, Detective Poole asked Ms. Pannell-Brown if he could take them, and she agreed. He then interviewed Beanie, who told Detective Poole that his mother was having an affair with Mr. Zadeh.

That evening, Detective Poole visited Mr. Zadeh's workplace, Enterprise Rent-A-Car. He testified that he went there as part of "a preliminary investigation" to "follow through the initial information about a phone call to [Mr. Zadeh] in the morning." When he approached Mr. Zadeh, Mr. Zadeh asked the Detective if he was there to "talk about the lady's dead husband." Detective Poole asked Mr. Zadeh how he knew Ms. Pannell-Brown, whether he had spoken to her that morning, and whether he had a vehicle. Mr. Zadeh explained that he knew Ms. Pannell-Brown from the parking lot at Enterprise, where he detailed her car, that he spoke to her around 6:30 or 7 that morning, and that he did not own a vehicle but took the subway to work that morning. He also mentioned that Ms. Pannell-Brown was helping him with his family and that they spoke every other day. Detective Poole asked to see Mr. Zadeh's phone, but he refused.

The following day, around 9:00 p.m., Detective Poole and his team executed a search and seizure warrant on a Jaguar station wagon registered to Ms. Pannell-Brown. The assignment team surveilled the vehicle until Mr. Zadeh got in it. The warrant authorized officers to search and seize the car. Detective Poole testified that after stopping the vehicle,

he asked Mr. Zadeh to step out of the car and frisked him. During the frisk, Detective Poole felt Mr. Zadeh's cell phone in his pocket and seized it. The inventory report listed twelve items seized from the station wagon and indicated that the warrant was limited to a "conveyance," not a "person" or "premises." The report also stated that police seized the first eleven items from the vehicle, but seized the twelfth item, Mr. Zadeh's cell phone, from his pocket. Detective Poole did not obtain a warrant to search Mr. Zadeh's person until September 12, more than five weeks after the killing.

On August 15, 2014, police executed a search warrant on 805 Colby Avenue and seized several items, including Ms. Pannell-Brown's bedroom computer, a laptop, a green folder, and a white bag. Inside the green folder were several documents, among them IRS paperwork for Mr. Zadeh and retirement and life insurance forms for Ms. Pannell-Brown that designated Mr. Zadeh as her beneficiary. The police also found a taser flashlight, a box for a "tactical stun flashlight," and two pages of handwritten notes. One note listed toxic substances such as "Carbon Monoxide," "Botulin," "Belladonna," "Hemlock," and "Aconite." The other described how to use a "mortar, pestle, a bottle of acetone," and listed ingredients and supplies and various fruit seeds to produce cyanide.

On September 18, 2014, Detective Poole met again with Mr. Zadeh at Enterprise, this time with a search and seizure warrant authorizing him to obtain DNA and to seize any cell phones in Mr. Zadeh's possession. Mr. Zadeh complied.

In May 2015, Detective Poole checked the Motor Vehicle Administration ("MVA") database for additional addresses for Ms. Pannell-Brown and Mr. Zadeh. He found one

listing for them both, an apartment in Takoma Park. He obtained and executed a search warrant and found a one-bedroom apartment occupied by two people, with clothing for both a male and female in the bedroom, a laptop computer, and medications prescribed for Ms. Pannell-Brown and Mr. Zadeh.

The police arrested Mr. Zadeh and Ms. Pannell-Brown at BWI Airport a few days later. They were charged jointly, by indictment, with first-degree murder and conspiracy to commit murder.

At trial, the State presented cell phone tower data showing Mr. Zadeh's travel from his D.C. apartment to his workplace and placing Mr. Zadeh at or near Ms. Brown's house on August 4, 2014. Also, calls and texts made to and from Ms. Pannell-Brown's phone between approximately 6:59 a.m. to 11:51 a.m. placed him in the area where Mr. Brown was found dead.

George Floyd, a Verizon Wireless employee, produced records for phone numbers registered to Ms. Pannell-Brown. These records revealed text messages from Ms. Pannell-Brown's phone to Mr. Zadeh's phone on August 4, 2014 at 11:10 a.m. and 11:59 p.m. At 11:15 a.m., Ms. Pannell-Brown texted Mr. Zadeh "when I text you, come outside." Mr. Zadeh responded, "Okay from what door," and Ms. Pannell-Brown replied, "the bedroom your friend name is Brian." At 2:51 p.m., Ms. Pannell-Brown texted Mr. Zadeh, "Hey they checked my phone I told them I no [sic] you throw [sic] Isiah [sic] and that you. You need help to get your wife over here[]." (We'll call this the "checked-my-phone" text message.)

The State also called Special Agent Richard Fennern as an expert witness in cellular

technology and historical data records. Agent Fennern, using the cell phone records and the addresses for the crime scene, Mr. Zadeh's apartment, and Mr. Zadeh's workplace, analyzed the cell phone tower data for the phone numbers associated with Mr. Zadeh and Ms. Pannell-Brown. He identified various data communications from Mr. Zadeh's phone between 7:52 p.m. the day before the murder and 6:15 a.m. the day of the murder. He testified that the cell phone utilized two towers in a manner consistent with the phone being at Mr. Zadeh's apartment. On August 4, 2014, Mr. Zadeh's phone was near his workplace between 6:38 a.m. and 6:56 a.m.; when Ms. Pannell-Brown called Mr. Zadeh at 6:40 a.m., her phone was located at her home and his phone was located near his workplace. Agent Fennern concluded that between 6:59 a.m. and 11:51 a.m., the data was consistent with Mr. Zadeh being at or near Ms. Pannell-Brown's home, moving between 11:53 a.m. and 1:16 p.m., then returning to Mr. Zadeh's workplace.

The State also called Michael Yu, a Montgomery County Police sergeant in the Electronic Crimes Unit, as a digital forensics expert. Sergeant Yu extracted call logs, text messages, pictures, and contacts from three phones, two registered to Ms. Pannell-Brown and one to Mr. Zadeh. The web searches from Ms. Pannell-Brown's phones included "what happened if you got tasered in the head" and "shock Taser while sleeping," searches for sudden cardiac death causes, and drinks that cause heart failure. Sergeant Yu also analyzed a laptop retrieved from Ms. Pannell-Brown's home and extracted internet searches seeking information about, among other things, harmful energy drinks for people over seventy; tasteless, odorless, deadly poisons; death cap mushrooms; deadly foods; stun guns; bad

meds; bad pills; and crime victims' compensation programs.

No eyewitness testimony placed Mr. Zadeh at the Browns' house at the time of the murder. Throughout the trial, the defendants attempted to discredit the State's witnesses primarily by confirming that no one had seen or heard anything before hearing Ms. Pannell-Brown's screams. The defense also attempted to discredit the police department's investigation by emphasizing the absence of physical evidence tying either defendant to the crime.

At the conclusion of the State's case, the appellants moved for judgment of acquittal. The court denied their motions. Mr. Zadeh moved for mistrial on severance grounds, which the court denied. Both then called witnesses of their own.

Kopal Jha, a neighbor, testified that on August 4, 2014, she was working at home with the windows open and, for approximately ten minutes around noon, heard male voices arguing loudly. She asked her boyfriend to "go out and see what was happening," then heard Ms. Pannell-Brown yelling for help. Ms. Jha and her boyfriend watched as "police wearing, looked like tactical gear, and with a lot of guns, large guns" arrived at the Browns' house. They went outside and stood on their lawn, and a police officer approached and asked them their name and address. Ms. Jha testified that the officer "cut [her] off" when she told him that she had "heard something that they might want to talk to [her] about" so, on August 7, 2014, she "searched until [she] found someplace online . . . for the [police department] and [] wrote some things [she] remembered from that day that [she] thought

might be useful to the police." Detective Poole read her tip the next day, but didn't interview her until December 22, 2014.

At the close of trial, but before the jury retired, both defendants renewed their motions for acquittal. The court denied the motions, and the jury found both guilty of second-degree murder. Each filed a timely notice of appeal. We include additional details below, as appropriate.

DISCUSSION

Ms. Pannell-Brown raises four contentions[4] that we have re-ordered and condensed into three, and Mr. Zadeh raises four issues of his own.[5]

[4] In her brief, Ms. Pannell-Brown phrased her Questions Presented as follows:

> 1. Did the trial court abuse its discretion when it refused to propound defense counsel's requested jury instructions?
> 2. Did the trail [sic] court err in not striking the entire jury panel when it was learned that juror 97 knew a member of the victim's family?
> 3. Did the trial court abuse its discretion in refusing to ask voir dire questions requested by the Appellant?
> 4. Did the trial court abuse its discretion in preventing the admission of the chain of custody report and the search warrant returns?

[5] In his brief, Mr. Zadeh phrased his Questions Presented as follows:

> 1. Did the trial court err by denying Zadeh's motions for severance and mistrial?
> 2. Did the trial court err by denying Zadeh's motion to suppress a smartphone seized from his pants pocket?
> 3. Did the trial court err by prohibiting Zadeh from introducing prior-acts evidence of a non-defendant witness?

I.

Ms. Pannell-Brown

First, Ms. Pannell-Brown contends the trial court abused its discretion in denying her requests for (1) jury instructions identifying the evidence inadmissible against her and explaining the law governing the admissibility of a party's own statement and (2) certain voir dire questions. *Second*, she contends that the court erred in declining her request to strike the entire jury panel after learning that one of the jurors knew a member of the victim's family. And *third*, she asserts that the court abused its discretion in excluding the chain of custody report and search warrant returns.

The State responds *first* that neither instruction was warranted because the issues were covered fairly by pattern instructions; that the second instruction was an incorrect statement of law; and that the requested voir dire questions were covered fairly by other questions or were not likely to uncover cause for disqualification. *Second*, the State argues the trial court properly exercised its discretion when it struck the unqualified juror and replaced him with an alternate juror pursuant to Maryland Rule 4-312(g). *Third*, the State contends that the trial court did not abuse its discretion in excluding the chain-of-custody log and search warrant returns because "they were irrelevant to the competency of the police investigation."

4. Did the trial court err by not declaring a mistrial based on the prosecutor's remarks in closing argument?

A. The Trial Court Did Not Abuse Its Discretion In Denying Ms. Pannell-Brown's Requested Jury Instructions and Voir Dire Questions.

1. Jury Instructions

First, Ms. Pannell-Brown contends that the trial court wrongly denied her request for jury instructions about evidence inadmissible against her, and that the court erred in explaining the law about the admissibility of a party's own statement. We review jury instructions "in their entirety to determine if reversal is required. The jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate." *Fleming v. State*, 373 Md. 426, 433 (2003) (citation omitted). Maryland Rule 4-325(c) requires the trial court to give a requested instruction when the requested instruction is a correct statement of the law, when it is generated by the evidence at trial, and when the content of the instruction was not covered fairly by other instructions that the court gave. *See Atkins v. State*, 421 Md. 434, 444 (2011). We review a trial court's refusal to give a jury instruction for abuse of discretion. *Appraicio v. State*, 431 Md. 42, 51 (2013).

Ms. Pannell-Brown asked the court to instruct the jury that specific pieces of evidence were not admissible as to her:

> You must not consider the following evidence against Ms. Pannell Brown:
>
> 1) Any statements by Mr. Zadeh, including but not limited to those made to Detective Poole, Detective Demuth, and Amatullah Zadeh;

2) Any action taken by Mr. Zadeh after the conspiracy alleged by the state ended;

3) Any testimony provided by witnesses that was only about Mr. Zadeh, that includes but is not limited to testimony by Amatullah Zadeh, and the Enterprise people, activity testified [] about his driving when being followed by the police.

During the instruction conference, her counsel argued the instruction was necessary to avoid confusion about which evidence was admissible against which defendant:

> THE COURT: The No. 4, any testimony provided by witnesses that was only about Ms. Pannell, I think that's too --
>
> THE STATE: That's absolutely inappropriate, yes.
>
> THE COURT: -- that's too broad. I mean, that's, that's too broad.
>
> THE STATE: And I think as are -- as is No. 2, is too broad as well.
>
> * * *
>
> THE STATE: I just don't understand why we have to marshal the evidence in this way. I mean, the jury has been instructed repeatedly throughout the trial as to what they can consider and what they can't, and they're presumed to follow Your Honor's instructions. I mean, there's case law ad nauseam on how jurors are presumed to follow instructions. I, I don't think we need to repeat it all, and then that -- I think this really risks confusion as to what they can consider. I think it's very clear all along, that they seem to get it, and I think this is a marshalling of the evidence. And I . . . don't think this is proper, and I think it's going to cause confusion, and I think that there's no need for it.
>
> * * *
>
> MS. PANNELL-BROWN'S COUNSEL: I, I mean, we obviously submitted our own limiting instruction for you to consider and for those reasons exactly, for the two people who have basically been, you know, immersed in this trial for a very long time, and we had to go back through all of the very copious notes that we took as well as transcripts of the trial

> from Week 1 and the first half of Week 2 to be able to actually remember which person we got a limiting instruction on and who we didn't.
>
> I think it would be very appropriate for this [c]ourt to remind the jury that there was in fact certain evidence admitted at this trial that is not to be considered for the separate defendants. To just assume that they're going to remember that and then remember the specifics, I think, is -- I don't think it creates confusion for them. I think it creates clarity. I think that then, when they go in and they're deliberating -- **we already have told them they have to consider the defendants separately**, right -- so now when they go in, they have a list of things, like, okay, well, when we're talking about Ms. Pannell-Brown, we know now we can't consider what Mr. Zadeh said to Detective Poole, to Detective Demuth, and any testimony by Ms. Zadeh, because they have that list there; so that when they're talking about Ms. Pannell-Brown, there isn't a confusion of that.
>
> It in fact, we believe, dispels any confusion about what shouldn't be considered against the defendants because it's broken up, it is very specific, and **we already instructed them that they have to consider the defendants separately and each count separately**. So I'm not really sure why there is even an idea that it creates confusion.
>
> THE COURT: Well, I think it only creates confusion if we can't agree on what it is that we're saying they need to consider separately.

The court declined Ms. Pannell-Brown's request and gave the pattern instruction (Maryland Pattern Jury Instruction Criminal ("MPJI-CR") 3:09) relating to evidence admissible against only one defendant:

> THE COURT: Next is evidence applicable only to one defendant, jury to limit consideration.
>
> Again, there are two defendants in the 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, those limiting instructions during the**

> **trial**. Each defendant is entitled to have the case decided separately on the evidence that applies to that defendant.

(Emphasis added).

"[A] trial court need not give a requested instruction if the instructions given fairly cover the same subject matter." *Berry v. State*, 155 Md. App. 144, 157 (2004). We and the Court of Appeals have held repeatedly "that a trial court is strongly encouraged to use the pattern jury instructions." *Johnson v. State*, 223 Md. App. 128, 152 (2015); *Yates v. State*, 202 Md. App. 700, 723 (2011) (courts have repeatedly "recommended that trial judges use the pattern instructions"); *Minger v. State*, 157 Md. App. 157, 161 n.1 (2004) ("[a]ppellate courts in Maryland strongly favor the use of pattern jury instructions."); *Green v. State*, 127 Md. App. 758, 771 (1999) ("we say for the benefit of trial judges generally that the wise course of action is to give instructions in the form, where applicable, of our Maryland Pattern Jury Instructions"). And here, the pattern instructions fairly covered the concern addressed in Ms. Pannell-Brown's requested instruction, if perhaps not as specifically as she requested. But we have cautioned against giving instructions that emphasize particular facts because "it creates the danger that the jury may give [the facts] undue weight" and "may have the effect of overemphasizing" or limiting its deliberations to those facts, *Patterson v. State*, 356 Md. 677, 684 (1999) (cleaned up), and the trial court struck a reasonable balance in this regard.

Ms. Pannell-Brown also challenges the court's refusal to instruct the jury that "[t]he law did not permit a defendant to introduce his or her own statements during trial," and that the State "is the only party that can admit a defendant's statement to police at trial."

Measured against Rule 4-325, though, we see no abuse of discretion in the court's decision not to give this instruction. The instruction was not a correct statement of law, and other instructions fairly covered the issue.

Although it's true that generally a party's own statement is inadmissible hearsay, *Braxton v. State*, 57 Md. App. 539, 546 (1984), a party may introduce her own statements to prove other things, such as "to demonstrate that his actions were performed under direction of the law." *Id*. As such, an instruction that "[t]he law did not permit a defendant to introduce his or her own statements during trial" would be incorrect. Moreover, as the State points out, the instruction the trial court gave sufficiently instructed the jury on the applicable law. The jury was instructed to decide the case on the evidence presented and was prohibited from considering evidence that was *not* presented or from making inferences about Ms. Pannell-Brown's refusal to testify. Ms. Pannell-Brown argues that without her instruction, "the jury would be left to wonder why they knew what [Mr.] Zadeh told the police, but not what [Ms. Pannell-Brown] said to the police." But the jury was given ample guidance as to what evidence to consider, and the trial court did not abuse its discretion in refusing to give further, more specific instructions on that point.

2. Voir Dire Questions

Next, Ms. Pannell-Brown asserts that the trial court abused its discretion in declining to ask two sets of proposed voir dire questions. She submitted two voir dire documents—"Defendant's Proposed General Voir Dire," which contained twenty-six questions, and

"Defendant's Proposed Specific Voir Dire Questions (Areas of Bias, Prejudice, or Preconception)," which contained ten additional questions.

During voir dire, the court described the nature of the offense to the panel and asked whether anyone (1) had any knowledge of the alleged facts of the case; (2) knew any of the defendants, the victim, or a member of their respective families, lawyers or the judge in the case, and/or potential witnesses; (3) would be inclined to give greater weight to the testimony of a police officer than other witnesses; (4) would be biased for or against the defendants or any witness based on race, color, age, religion, national origin, sexual orientation, appearance, or gender; (5) had political, religious, or philosophical beliefs about the criminal justice system or strong feelings about conspiracy to murder and murder that would prevent them from being fair and impartial; and (6) had any formal training and/or had been employed in law enforcement or the legal profession. Finally, the court asked whether any panel member knew of "any other reason, personal, or otherwise, why you cannot sit as a fair and impartial juror in this case?"

We review a trial judge's decisions about voir dire questions for abuse of discretion. *See Pearson v. State*, 437 Md. 350 (2014). A trial judge has broad discretion in conducting voir dire, especially with regard to the scope and form of the questions, and the court need not make any particular inquiry of the prospective jurors unless that inquiry is directed toward revealing cause for disqualification. *Dingle v. State*, 361 Md. 1, 13–14 (2000). A trial judge isn't required to ask a voir dire question merely because a defendant requests it, and we will not reverse a failure to ask specific questions unless the court

abused its discretion. *Stewart v. State*, 399 Md. 146, 162 (2007).

In this case, none of the questions Ms. Pannell-Brown requested (and that the court declined to ask) were mandatory. Many of the proposed questions essentially asked the jurors if they would abide by the trial court's instructions, a "disfavored" practice. *Stewart*, 399 Md. at 162–63. Others were covered fairly by jury instructions. We will address the questions Ms. Pannell-Brown requested in logically aligned groups:

i) General Questions 3 & 18 – Jury Opinion & Ability to Follow Legal Principles.

> 3. Has any member of the panel formed any opinion, as to whether the Defendant, Larlane Pannell Brown, is guilty or not guilty of any crime?
>
> ***
>
> 18. There are certain legal principles governing a criminal case by which you must abide once you have taken your oath as a juror. If you have any difficulty in understanding these principles, or in accepting these principles, you must inform the Court at this time. It is imperative that you be absolutely honest and open about your feelings.
>
> a. **Presumption of Innocence**
>
> . . . If you are selected as a juror in this case, will you have difficult[y] in accepting and/or applying the rule of law that Larlane Pannell Brown must be presumed to be innocent?
>
> b. **Indictment**
>
> . . . Do you believe that it is more likely that Larlane Pannell Brown is guilty merely because [s]he has been charged by way of indictment with a crime?
>
> c. **Burden of Proof**
>
> . . . If the prosecution does not prove every element of an offense beyond a reasonable doubt, the jury must find the Defendant not guilty of that offense. Will you have any difficulty accepting and/or applying this legal principle?

> d. **Right to Remain Silent**
>
> In every criminal case, the Defendant has an absolute Constitutional right not to testify.
>
> i) Does any member of the jury panel believe that a Defendant who does not testify is more likely to be guilty?
>
> ii) If the Defendant presented no evidence at all in his defense, would this affect your ability to presume him innocent?
>
> e. **Beyond a Reasonable Doubt**
>
> One of the fundamental principles of our system is that the prosecution has the burden of proving that the Defendant is guilty beyond a reasonable doubt. Will you have any difficulty accepting and/or applying this legal principle?

The trial court was not required to ask jurors whether they had formed an opinion as to Ms. Pannell-Brown's guilt; were unwilling or unable to abide by the rules that Ms. Pannell-Brown was to be presumed innocent until proven guilty; would have difficulty applying the beyond-a-reasonable-doubt standard; or would draw an inference from her election not to testify. And she acknowledges in her brief that these questions are not required under *Twining v. State*, 234 Md. 97 (1964). In *Twining*, the Court of Appeals rejected the contention that the jury should have been asked a question "related to whether the talesmen would give the accused the benefit of the presumption of innocence and the burden of proof." *Id.* at 100. The Court held these questions unnecessary because they would be covered in jury instructions:

> The rules of law stated in the proposed questions were fully and fairly covered in subsequent instructions to the jury. It is generally recognized that it is inappropriate to instruct on the law at this stage of the case, or to question the jury as to

> whether or not they would be disposed to follow or apply stated rules of law.

Id.

So too here. Moreover, MPJI Cr 3:17 reminds the jury that the defendant has an absolute constitutional right not to testify and the jury must not consider or even discuss the fact that Ms. Pannell-Brown didn't testify. Ms. Pannell-Brown argues that *Twining* is "outmoded" and cites several cases from other jurisdictions to support her contention. This is not the first time that argument has been made, but even if we were persuaded, it falls to the Court of Appeals to revisit *Twining* if it is so inclined (and we are not suggesting it should be). *See Baker v. State*, 157 Md. App. 600, 618 (2004) ("In any event, it is up to the Court of Appeals, not this Court, to decide, as appellant suggests, that the reasoning of *Twining* is 'now outmoded.'").

ii) General Question 7 – Jury's Familiarity With Neighborhood

Ms. Pannell-Brown contends that court was required to ask whether "any member of the panel live[ed] near, or frequent[ed] the area of 805 Colby Avenue, Takoma Park, Maryland?" because that question "would have uncovered if jurors had outside knowledge of the facts of the case that would have impacted deliberations." But the trial court was not required to ask this question because it had already asked whether any member of the panel had read or heard or knew anything about the case and whether any member knew any of the defendants, the victim, or their family members.

iii) General Questions 8, 9, & 20 - Bias For/Against Defendant & Involvement with Law Enforcement

> 8. Has any member of the panel, any member of your

family, or anyone close to you, been employed in any capacity, or otherwise associated with, any law enforcement agency (for example: Maryland State Police, Montgomery County State's Attorney's Office, FBI, DEA, ATF, IRS, Parole and Probation Department, Sheriff's Department, correctional facility, fire department, or prosecutor's office), or any criminal defense, prisoners' rights, or sentencing reform, group (for example: Office of the Public Defender, etc.)?

9. Does any member of the panel have strong feelings regarding the roles of Defense Lawyers or Prosecutors in the criminal justice process?

20. Does any member of the jury panel entertain, or is anyone aware of any bias or prejudice for, or against, the Defendant in this case?

Other voir dire questions covered these areas sufficiently. The trial court asked the venire whether any member had formal training in or had been employed in the field of law enforcement. The court asked whether any member of the panel had "political, religious, or philosophical beliefs" about the criminal justice system that would interfere with their ability to be fair and impartial, which mirrored the proposed "strong feelings" question about the role of defense lawyers and prosecutors in the criminal justice system. And the judge's query about whether any member of the panel knew of any reason why they couldn't be fair or impartial covered requested question 20.

iv) General Questions 10, 12 & 13 – Involvement in the Criminal Justice System

10. Has any member of the jury panel ever served on a jury in a criminal case?

If yes (**individual voir dire** on the following questions):

(a) When did you serve on the jury?

(b) What was the nature of the crime?

(c) What was the result of the trial?

(d) How did your experience affect your feeling about the criminal justice system in general and the jury system in particular?

12. Have you, your spouse, your family member, or your close friend ever been accused of, arrested for, charged with, or convicted of any crime other than a minor traffic offense?

13. Is there any member of the panel who has been called as a witness by the prosecution in any criminal case?

If yes (**individual voir dire** on the following questions):

(a) When did you testify as a witness for the prosecution?

(b) What was the nature of the crime?

(c) Was it a court or a jury trial?

(d) What was the result of the trial?

The trial court was not required to ask whether any member of the panel or their family members had previously served as a juror or testified as a witness, or whether they had been accused of, arrested for, charged with, or convicted of any crime. *See Perry v. State*, 344 Md. 204, 218 (1996) ("A juror's having had prior experience as a juror, witness, victim or defendant in a criminal proceeding of any kind, or in one involving a crime of violence, is not *per se* disqualifying. It is even less tenable to argue that a juror is disqualified simply because of the experience of a member of the prospective juror's family or on the part of a close personal friend.").

v) General Question 11 – Crime Victim Question

11. Have you, your spouse, your family member, or your close friend ever been the victim of a crime of violence?

If yes (**individual voir dire** on the following questions):

(a) Identify the person.

(b) What is the nature of the crime?

(c) When did the crime occur?

(d) Was the perpetrator arrested?

(e) Was the perpetrator convicted?

(f) Do you believe a just result was obtained?

The trial court was not required to ask whether any member of the panel had ever been the victim of a crime of violence. This issue was resolved in *Pearson v. State*, in which the Court of Appeals held that a trial court need not ask whether any prospective juror has been the victim of crime, but *must* ask, on request, whether any prospective juror has any strong feelings about the crime with which the defendant is charged. 437 Md. 350, 357 (2014). The court asked the panel an appropriate "strong feelings" question, and Ms. Pannell-Brown doesn't claim otherwise.

vi) Specific Questions 1 & 2 – Strong Feelings about Murder

1. **MURDER**

. . . Does any member of the jury panel have strong feelings regarding the crime murder, that is, the violent death of a human being by another human being, such that you would be unable to be fair and impartial in your deliberations?

2. **LAW OF HOMICIDE**

   a. Would any member of the jury panel find it difficult or impossible to follow the Court's instructions regarding the different types of homicide and render a verdict consistent with the fact and the law as presented to you?

   b. Does any member of the jury panel hold the belief that all homicides should be regarded the same?

   c. Will you be able to set aside any such disagreement and follow the Court's instruction and render a

verdict based only upon the evidence in the case whether you agreed with it or not?

This too was resolved by *Pearson*: the trial court asked if the jury panel had "such strong feelings about" murder and conspiracy to commit murder, and was not required to ask the question Ms. Pannell-Brown requested. 437 Md. at 360–61.

vii) Specific Questions 3 & 10 – Age Bias & Passion/Prejudice

3. **AGE OF VICTIM**

The victim, Cecil Brown, was 73 years old at the time of his death.

a. Have you, or your family, or any close friend of yours, experienced the death of an elderly relative due to violence?

b. Do you believe that the killing of an elderly person is worse than the killing of any other citizen?

c. Do you believe that a person who kills an elderly person should be punished more severely than a person who kills any other citizen?

d. If you have elderly parents, stepparent or grandparents, do you think that fact would effect [sic] your feelings about sitting as a juror in a case involving the death of an elderly person?

e. Do you feel that, because of your own personal experiences, beliefs, or opinions, that it may be emotionally difficult for you to be a juror in a case involving the death of an elderly person?

f. Is there any member of the jury panel who has strong feelings about the murder of an elderly person?

***

10. **PASSION / PREJUDICE**

You may not reach a verdict on the basis of passion, prejudice, matters of public policy, or to "send a message" to the community. Could you avoid the consideration of these factors in determining whether

> the Defendant is guilty or not guilty of the crimes charged, and whether the Defendant is criminally responsible or not criminally responsible for his acts?

The trial court asked the panel:

> Is there any member of the panel who would be **prejudiced for or against the defendant or witness** based on their race, color, age, religion, national origin, sexual orientation, appearance or gender? **Could you be prejudiced for or against the defendants or anybody**?

(Emphasis added.) This question covered Ms. Pannell-Brown's requested questions 3 and 10.

B. The Trial Court Was Not Required To Strike The Entire Jury Panel.

Second, Ms. Pannell-Brown contends she was "denied a meaningful use of her peremptory challenges" when the trial court declined to strike the entire jury panel after discovering—at the close of jury selection but before the trial began—that juror 97 knew the victim's relative. To be sure, 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. And if a party feels that a prospective juror will not be fair and impartial, she can move to strike that juror for cause. Md. Rule 4-312(a)(3). But trial judges stand in the best position to determine whether a juror can be fair and impartial, and their decisions to replace a juror with an alternate are accorded considerable deference. *Gupta v. State*, 452 Md. 103, 125 (2017). Accordingly, we don't reverse a trial court's decision to substitute a juror unless there is "a clear abuse of discretion or prejudice" to the defendant. *State v. Cook*, 338 Md. 598, 620 (1995).

We see no abuse of discretion here. Under the Maryland Rules, "[a]t any time before the jury retires to consider its verdict, the trial judge may replace any jury member whom

the trial judge finds to be unable or disqualified to perform jury service with an alternate. . . .” Md. Rule 4-312(g)(3). All parties agreed that Juror 97 was unqualified to sit as a juror in the case, and the trial judge dismissed him and replaced him with an alternate. Ms. Pannell-Brown takes issue with the timing of the discovery—because the juror’s connection to a relative wasn’t discovered until selection was almost complete, she assumed until that point that he was neutral, and might have employed her peremptory strikes differently. But it’s hard to see how she was prejudiced, and she doesn’t offer anything beyond the broad statement that her counsel was “denied a meaningful use of her peremptory challenges.” She didn’t use a peremptory strike on juror 97 in the normal course, and had she (and the State and the court) known about the juror’s connection to the victim, the juror more likely would have been stricken for cause, so there was no lost peremptory strike. And most importantly, the juror was removed and replaced before the trial began. The process may not have been perfect, but there was no reversible error.

C. The Trial Court Did Not Abuse Its Discretion In Excluding A Chain Of Custody Log And Two Search Warrant Returns.

Third, Ms. Pannell-Brown challenges the trial court’s denial of her request to admit search warrant returns and a chain of custody log. She contends the exhibits were relevant and critical to establishing her defense and that they were admissible under the public records hearsay exception. The State responds that the exhibits were inadmissible hearsay, and that even if they were admissible under the public records hearsay exception, they were “irrelevant to the competency of the police investigation.”

Generally, we review a circuit court’s rulings to admit or exclude evidence for abuse

of discretion. *Norwood v. State*, 222 Md. App. 620, 642 (2015) (citation omitted); *Moreland v. State*, 207 Md. App. 563, 568 (2012) ("The admissibility of evidence ordinarily is left to the sound discretion of the trial court." Md. Rule 5-104(a)). But whether evidence is legally relevant is a legal determination that we review *de novo*, *Fuentes v. State*, 454 Md. 396, 325 (2017), and if relevant, we review a trial court's determination that its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury for abuse of discretion. *State v. Simms*, 420 Md. 705, 724 (2011). An abuse of discretion occurs where "no reasonable person would take the view adopted by the [trial] court," *Fontaine v. State*, 134 Md. App. 275, 288 (2000), so we don't reverse a reasonable decision just because we might have ruled differently.

During cross-examination, Detective Poole identified errors, omissions, and discrepancies in a chain of custody log and two search warrant returns. Ms. Pannell-Brown sought to admit the exhibits to support her theory that "the police did a sloppy investigation in this case and rushed to judgment without a thorough investigation." The court heard arguments and determined the exhibits were not relevant:

> I guess I still don't quite understand what, what relevance it has, and if it maybe marginally relevant, it seems to me that the confusion that it's going to cause the jury outweighs, you know, the relevance, because they heard about the markings, that Takoma Park uses their own system and Montgomery County uses a different system, and they're two different police forces and all that. They've heard about that. So you can argue all that, and you've got the evidence itself.
>
> ***
>
> So I just don't see why putting this actual evidence in helps things. If anything, it's just going to, you know, be more

> confusing and it's cumulative and you can argue it anyway. Right? You can still argue it.
>
> ***
>
> . . . I don't think it's admissible. . . . So they're not going to be received in evidence. You can argue from the evidence, but those pieces of evidence are not going to be received.

We disagree with the circuit court at the first step. Evidence is relevant if it has any tendency to make any fact more or less probable in determination of the action. Md. Rule 5-401. "[A]ny tendency" to make "any fact" more or less probable is a very low bar to meet. *Williams v. State*, 457 Md. 551, 564 (2018) (*quoting State v. Simms*, 420 Md. 705, 727 (2011)). Here, the exhibits themselves and Detective Poole's testimony about the discrepancies, omissions, and errors in each could support Ms. Pannell-Brown's theory that the police's investigation was "sloppy," could discredit Detective Poole, and could make the truth of certain facts more or less probable.

Even so, relevant evidence may be excluded if its probative value is substantially outweighed by the danger it could cause unfair prejudice, create confusion, or mislead the jury. Md. Rule 5-403. And the court could reasonably have concluded that the marginal probative value of this evidence would be outweighed substantially by the risk it would confuse the jury. *See Malik v. State*, 152 Md. App. 305, 325–26 (2003). Ms. Pannell-Brown asked the court to admit a 100-page change of custody log, even though Detective Poole testified only about five pages. Although the whole document didn't come in, Ms. Pannell-Brown was not precluded from referring to Detective Poole's testimony about the discrepancies, omissions, and errors in the exhibits. "[T]rial 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 (2009) (cleaned up). We agree that the trial court imposed reasonable limits on this evidence.

The review of the admissibility of evidence that is hearsay is different. Hearsay is inadmissible unless it falls under an exception to the hearsay rule. Md. Rule 5-802. Whether a statement is hearsay is a factual determination that we review for clear error, and the decision that a hearsay statement is subject to an exception is a legal determination that we review *de novo*. *Bernadyn v. State*, 390 Md. 1, 7–8 (2005); *Baker v. State*, 223 Md. App. 750, 760 (2015). In this case, though, there is nothing to review: the trial court made no finding on record that the exhibits were hearsay or that they would be admissible under the public record hearsay exception, and we decline to address Ms. Pannell-Brown's argument on this issue.

For these reasons, we affirm Ms. Pannell-Brown's convictions.

II.

Mr. Zadeh

Mr. Zadeh raises four errors on appeal. He contends *first* that the trial court abused its discretion in denying his motions for severance and mistrial. *Second*, he argues that the court erred in denying his motion to suppress. *Third*, he challenges the trial court's exclusion of third-party prior acts evidence. *And finally*, he argues that the prosecutor's "improper" closing remarks severely prejudiced him and that the trial court abused its discretion in regulating the closing argument.

The State responds *first* that the trial court acted within its discretion in denying the motions to sever and for mistrial, and that in any event the court's limiting instructions cured any potential prejudice. *Second*, the State contends the trial court denied the motion to suppress properly because the phone was seized lawfully under the plain-feel doctrine. *Third*, the State asserts the trial court was within its discretion to exclude the evidence of the third party's prior acts. And *finally*, the State argues the trial court acted within its discretion in regulating the State's closing remarks.

We agree with Mr. Zadeh on the first two points.

A. The Joint Trial Unfairly Prejudiced Mr. Zadeh.

Mr. Zadeh contends that he was prejudiced unfairly by the admission at trial of evidence admissible only against Ms. Pannell-Brown, and that the court abused its discretion in denying his motions for severance and for a mistrial. We review the denial of a motion to sever for abuse of discretion.[6] *Hines*, 450 Md. at 366.

When considering whether to sever a trial, the court must determine whether (1) non-mutually admissible evidence will be introduced; (2) the admission of that evidence will unfairly prejudice the defendant requesting the severance; and (3) any unfair

[6] Mr. Zadeh's counsel conceded at oral argument that the proper question on appeal is whether the trial court abused its discretion in denying Mr. Zadeh's mistrial motion. Because the standard is the same, we treat the motions interchangeably. *See Erman v. State*, 49 Md. App. 605, 614 (1981) ("it is not the label put on the motion, whether one for severance or mistrial" that's important, but it's the standard the trial judge must use, which is an abuse of discretion for both); *Cooley v. State*, 385 Md. 165, 173 (2005) ("[A] request for a mistrial in a criminal case is addressed to the sound discretion of the trial court[.]") (*quoting Wilhelm v. State*, 272 Md. 404, 429 (1974)).

prejudice that results from the admission of non-mutually admissible evidence can be cured either by severing the co-defendants or by other relief, such limiting instructions or redactions. *Id.* at 369–70. A denial of severance is an abuse of discretion where a limiting instruction or redaction doesn't cure the unfair prejudice. *Id.* at 370.

Similarly, we review a trial court's denial of a motion for mistrial for abuse of discretion. A mistrial is an extraordinary remedy warranted only when no other remedy will suffice to cure prejudice to the accused. *See Rutherford v. State*, 160 Md. App. 311, 323 (2004). An abuse of discretion occurs in that context "when the court acts without reference to any guiding rules or principles," or "when the ruling under consideration appears to have been made on untenable grounds," or "is clearly against the logic and effect of facts and inferences before the court." *Nash v. State*, 439 Md. 53, 67 (2014) (cleaned up). The test is whether the defendant has been deprived of a fair trial. *Kosh v. State*, 382 Md. 218, 226 (2004).

We typically afford trial judges "a wide berth" when reviewing a ruling on a mistrial motion because they are in the best position to assess the degree, if any, to which a defendant has been prejudiced. *State v. Hawkins*, 326 Md. 270, 278 (1992). When a mistrial request stems from exposing the jury to inappropriate information or inadmissible evidence, "[t]he trial judge must assess the prejudicial impact . . . and assess whether the prejudice can be cured." *Carter v. State*, 366 Md. 574, 589 (2001). In many instances, a timely corrective instruction to the jury is a sufficient remedy. *Kosh*, 382 Md. at 226. But when "no curative instruction, no matter how quickly and ably given, could salvage a fair

trial for the defendant[,]" we will reverse the trial court's denial of a motion for mistrial. *Rainville v. State*, 328 Md. 398, 411 (1992).

When the trial court in this case was asked initially to try these defendants separately, the State represented that the evidence introduced at the joint trial would be admissible as to both, and the court was persuaded that "the exact same evidence is going to be introduced twice" and that "the evidence is mutually admissible as to both codefendants." That turned out not to be the case. At least nine pieces of non-mutually admissible testimony were introduced and admitted against Mr. Zadeh, and the sheer volume of non-mutually available testimony overwhelmed the parties' and the court's ability to track and neutralize it.

1. The admission of non-mutually admissible testimony unfairly prejudiced Mr. Zadeh.

Indeed, the problem surfaced on the first day of trial, during the State's first witness, Bernard Brown. After Mr. Brown testified about statements by Ms. Pannell-Brown, the court instructed the jury not to consider them against Mr. Zadeh:

> MR. ZADEH'S COUNSEL: Your Honor, may we approach for a moment?
>
> (Bench conference follows)
>
> ***
>
> THE COURT: Okay. What I'm asking you, do you want me every time --
>
> MR. ZADEH'S COUNSEL: Yes.
>
> THE COURT: -- every time there's a statement, you want me to tell the jury that this statement you just heard –
>
> ***

MR. ZADEH'S COUNSEL: Something to that effect.

***

(Bench conference concluded.)

THE COURT: All right. Just a clarification for the jury's benefit. Sometimes during the trial, of course, we have two defendants on trial, right, so, depending on what the evidence is it may be evidence that is being brought out by the State that could be admissible against one defendant, or against the other defendant, or against both defendants, all right?

So, in a case, such as this, where the witness was saying that Ms. Larlane Pannell-Brown was saying so and so, that's really only evidence against her. In other words, it's not being offered by the State as against the other defendant; it's only being offered [against] her.

Now, at the end of the trial, there will be pretty elaborate instructions about, you know, evidence, and how it's used, and that sort of thing, but I just do want to advise you, as we hear it, and the attorneys will stop, and maybe I'll be doing it from time-to-time depending on what the evidence is, but in a case like this where it's just one party who's present, the other party's not there, it's just a statement that's being, you know, made she seemed, you know, whatever the evidence was, that sort of thing. So, just take that as evidence against the one defendant, and not the other defendant.

Had this been the only such instance, that instruction might have avoided unfair prejudice. But over the course of the trial, the court gave a great many more limiting instructions.

Day 2: Mr. Zadeh's counsel objected after Tahira Pannell testified about what Ms. Pannell-Brown told her had happened the morning of the crime:

MR. ZADEH'S COUNSEL: Your Honor, I would object as to Mr. Zadeh and ask for a limiting instruction.

THE COURT: Okay. Well, again, this is I think what we said yesterday. There's going to be certain evidence that comes in against one defendant or the other. So some evidence will come

> in -- in this case, if it's a statement made by one defendant and, you know the other defendant is not there -- in a case like this, it's only admissible against the one defendant and not the other. So each defendant is entitled to have the case decided upon the evidence, you know, that was applied only to that defendant. And we'll get into this again at the end of the trial. But just take that as we get it for each piece of evidence.
>
> MR. ZADEH'S COUNSEL: And in this case, this evidence is not admissible against Mr. Zadeh, correct?
>
> THE COURT: Right. So in this case, we're talking about a statement that was made by one co-defendant and it's not admissible against the other co-defendant.

That same day, Ms. Morris, Ms. Pannell-Brown's neighbor, testified about changes Ms. Pannell-Brown had undergone and financial issues Ms. Pannell-Brown and her husband had experienced, which led to another objection and another instruction:

> MR. ZADEH'S COUNSEL: Your Honor, [I] object and ask for a limiting instruction as to statements by Ms. Pannell-Brown.
>
> ***
>
> THE COURT: All right, but in any event, for now this is just part of what I was saying before a couple times, when you have a statement of one defendant, it's only admissible vis-a-vis that defendant. If you want to somehow bring up something later, that's fine, but for now it's just being used against Ms. Pannell Brown.

Day 3: Mr. Zadeh's counsel objected after a corporate witness from the Browns' mortgage company testified about Ms. Pannell-Brown's mortgage, and the court instructed the jury again:

> MR. ZADEH'S COUNSEL: We would object to, we would object and ask for a limiting instruction . . . [a]s to this witness's testimony.
>
> THE COURT: Okay. This evidence you're going to be hearing is about one of the defendants. It's not about the other

> defendant. I think we talked about that, that the evidence is only being admitted, you know vis-à-vis defendant Larlane Brown. You shouldn't take it as evidence against the, Mr. Zadeh.[7]

Day 4: Two additional instructions came after a State's witness testified about Ms. Pannell-Brown's statements:

> THE COURT: All right. This is that same issue of we're now hearing evidence about when this witness was living in the residence with Ms. Pannell-Brown, and the witness is giving testimony about things that Ms. Pannell-Brown said. So, you should only take this as evidence against the one defendant. Recall we have two different defendants. Some evidence is going to be admissible against both. This type of evidence is admissible only against Ms. Pannell-Brown.

[7] The issue wasn't unique to Mr. Zadeh—on the same day, Ms. Pannell-Brown's counsel asked the court for a limiting instruction as to the admissibility of statements by Mr. Zadeh against Ms. Pannell-Brown, in this instance in connection with Detective Poole's testimony about his interview with Mr. Zadeh:

> MS. PANNELL-BROWN'S COUNSEL: Your Honor, when we start this, I would just ask for the limiting instruction to the jury that this is applying to [Mr. Zadeh]. I know that you keep giving it, but I think that it's appropriate at this point that [Mr. Zadeh's] statement does not apply to [Ms. Pannell-Brown].
>
> ***
>
> THE COURT: One thing I did want to mention before, and we've talk[ed] about this before, we have two defendants, and sometimes you're going to hear evidence that's only applicable as to the one of the defendants. So, I think we're hearing about the statement that Mr. Zadeh made to the officer. Of course, that's admissible only as to him; it's [in]admissible as to the other defendant, Ms. Pannell-Brown. So, you can only consider that as it relates to him, and not her.
>
> And I think there may be another statement, I think, that you're going to hear about, so it's the same basic thing.

Ms. Pannell-Brown has not cited this as an error on appeal, however.

***

> MR. ZADEH'S COUNSEL: Your Honor, sorry, excuse me. We would ask the limiting instruction again as to any testimony about what Ms. Pannell-Brown said.
>
> THE COURT: Okay. Well, again, just to the ladies and gentlemen of the jury, all this stuff we're hearing about, vis-à-vis Ms. Pannell-Brown is being admitted against her, not against Mr. Zadeh.

Day 5: The court gave another limiting instruction after Beanie testified about the bedroom door:

> THE COURT: -- again, we're now talking about one defendant as opposed to the other defendant. So if he's, if there's some evidence about one statement by one of the defendants, you can only take that as evidence vis-à-vis that defendant as opposed to the other defendant.

And another instruction followed a State's witness's testimony about the signatories on Ms. Pannell-Brown's deed and the purchase agreement for 805 Colby Avenue:

> THE COURT: Okay. So again, ladies and gentlemen of the jury, this is just being offered as evidence against Defendant Pannell-Brown, so you should only consider vis-à-vis her.

At some point, after Mr. Zadeh's ninth request for a limiting instruction on non-mutually admissible evidence, the court acknowledged the sheer number of similar instructions:

> THE COURT: All right. Well, okay, but we know this. I'm not going to, **I'm not going to give them an instruction every time, you know, there's some piece of evidence**. They know that anything that she's saying at this point with regard to him is relevant to her.
>
> MR. ZADEH'S COUNSEL: And not to Mr. Zadeh?

THE COURT: And not to Mr. Zadeh.[8]

(Emphasis added.)

In addition to these limiting instructions, the court also admitted a text message Ms. Pannell-Brown sent to Mr. Zadeh at 11:15 a.m. on August 4, 2014. Her initial text read "when I text you, come outside;" Mr. Zadeh responded, "okay from what door;" and Ms. Pannell-Brown replied, "The bedroom your friend name is Brian." On direct examination,

[8] Another instruction not to consider testimony against Ms. Pannell-Brown followed during the testimony of Mr. Zadeh's wife (although again, Ms. Pannell-Brown has not appealed on this basis):

> MS. PANNELL-BROWN'S COUNSEL: Also, we would just like to know what that, this doesn't come in at all against Ms. Pannell-Brown, and we would, obviously, object to any insinuation that any statements that Mr. Zadeh made that he cleaned something up after the conspiracy was over and the crime was already committed, the insinuation being, you know, he was taking a shower, washing his clothes, all those types of things, so we would object to that. We would ask for a limiting instruction.
>
> THE COURT: Okay. Well, it's not being admitted against your client, right?
>
> MS. PANNELL-BROWN'S COUNSEL: Right, but the statements themselves that on the night of August the 4th, he reminded her that he was there to take a shower and wash his clothes could be – inferred.
>
> ***
>
> THE COURT: All right. So just one more time, I've mentioned a couple of times that some of the evidence is only applicable as to one defendant as opposed to both defendants. This, again, is a situation where we're hearing evidence about one of the defendants and not the other defendant, so just take all this evidence, vis-à-vis, Mr. Zadeh and not as to Ms. Pannell-Brown.

Beanie testified that the door leading to his parents' backyard was his "father's bedroom door:"

> THE STATE: How do you distinguish by name between the basement door and that door? What do you call each door?
>
> BEANIE: That's my father's bedroom door.
>
> THE STATE: And is that how you refer to it?
>
> BEANIE: Yes.
>
> THE STATE: Have you ever heard your mom refer to it?
>
> ***
>
> BEANIE: Yes.
>
> THE STATE: How does she refer to it?
>
> BEANIE: Your father's bedroom door.

Mr. Zadeh's counsel objected to Beanie's testimony as hearsay, and the court instructed the jury to consider the testimony only as to Ms. Pannell-Brown, not Mr. Zadeh. During a recess, Mr. Zadeh's counsel approached the bench and moved for mistrial, which the court denied:

> MR. ZADEH'S COUNSEL: I said, I believe on more than one occasion in the lead-up to this trial that trying these defendants together is like walking into a mine field and I think we just stepped on a land mine. The, one of, if not the very most important issue in this case is the bedroom. What is the bedroom? What does the bedroom mean?
>
> We've heard numerous witnesses about what the bedroom means.
>
> ***
>
> What the bedroom means is, as I say, one of, if not the most important issues in this case, they just elicited hearsay by Ms. Pannell-Brown that the bedroom that she said that the bedroom door is the door in question. We can't cross-examine Ms. Pannell-Brown on that. It's as prejudicial to Mr. Zadeh as anything I can imagine in this case, never should have been

elicited, it was not mutually admissible, it's extremely prejudicial and I was afraid this would happen.

We're getting ready to start our third week. We've had a tiny fraction of this case has had [sic] anything to do with Mr. Zadeh. We tried them together and for the sake of the State's convenience and now we've stepped on a land mine. It's a clear violation of the [Confrontation] [C]lause, *Crawford,* [*Bruton*] and more easily [*Hines*], and there's no way to fix it.

***

And to instruct the jury that they're not to accept that for the truth, that that is the bedroom door would just be nonsensical at this point. What possible purpose could it serve in this trial? It was in both, every party's opening. What is the door? What is the bedroom door? [Ms. Pannell-Brown's counsel] had, I think, five minutes on it. That's not a bedroom door. The jury -- it wasn't a loss on the jury and it can't possibly be undone and never should have been elicited, they never should have been tried together because there were so many statements by Ms. Pannell-Brown and so little about Mr. Zadeh this never should have happened.

THE COURT: Okay. **Maybe it never should have happened, but it did happen, right?** All right, So what, what relief do you want?

MR. ZADEH'S COUNSEL: A mistrial, Your Honor.

***

THE COURT: Okay. All right. Well, all right. So I'm going to deny the motion for a mistrial. I still feel that I'm not sure exactly how relevant the evidence is given what the text message is and how many, I mean there, there are doors. . . . [W]e know he wasn't killed, at least I think we know he wasn't killed inside the house. I mean correct me if I'm wrong, if somebody is going to argue that he was killed in his bedroom or somewhere near the bedroom door, I think the evidence is, is pretty clear-cut that he was killed in the backyard and he had to get out of the house somehow, assuming he was in the house, he had to get out -- and now I'm talking about the victim, right? So he was out of the house. He wasn't killed in the bedroom. What that means and how it refers to whatever it refers to, I guess you all can argue that however you want. I'm not sure

> exactly why it would be prejudicial to call something a bedroom door when we know that somebody was either coming into the house, out of the house, maybe they never were in the house. I mean I don't know quite how all that plays out.

(Emphasis added.) The court later instructed the jury to disregard "any testimony about what [his mother] called, you know, any particular door."

We agree with Mr. Zadeh that the premise of the court's decision to deny a severance turned out to be mistaken, and that once the court realized that there was more than just an incidental amount of non-mutually admissible evidence, it should have granted a mistrial. *Erman v. State*, 49 Md. App. 605 (1981), provides an instructive example. *Erman* involved a joint jury trial during which the court admitted several items of evidence admissible only against Mr. Erman's co-defendant. The judge instructed the jury several times not to consider the evidence against Mr. Erman. We reversed, reasoning that the cumulative effect of the admission of non-mutually admissible evidence denied Mr. Erman a fair trial. *Id*. at 616. We also noted that when "the instances of the need to so instruct the jury are many, the effectiveness of such instructions may very well diminish to the point of becoming meaningless." *Id.* at 615.

So too here. Mr. Zadeh, like the defendant in *Erman*, moved for a mistrial after moving before trial for severance, and again sought a mistrial during trial, after the State introduced several pieces of evidence admissible only against Ms. Pannell-Brown. The evidence included testimony concerning Ms. Pannell-Brown's statements to third parties, financial and property records, her and Mr. Brown's financial issues, and intimate details about her and Mr. Brown's sex life. Everyone agrees that this evidence would not have

been admissible in a separate trial of Mr. Zadeh alone. Over the course of the trial, the court instructed the jury at least nine times not to consider the evidence against Mr. Zadeh, and we don't see how the jury could have "separate[d] the wheat" of admissible evidence as to Mr. Zadeh "from the chaff" of inadmissible evidence. *See id.* at 615. Nor, eventually, could the State: in denying Mr. Zadeh's request for a jury instruction outlining which evidence was inadmissible as to him, the State argued that it would be an "insurmountable" task to "go back through and review the whole trial" to determine which evidence was admissible against which defendant:

> MR. ZADEH'S COUNSEL: How on earth are they going to remember what they're supposed to consider against one or the other, I mean, even if you take seriously the notion that they could follow the instruction, in the first instance? I can't remember which limiting instructions you gave. This is why, Your Honor, I think, suggested that we do this. I literally couldn't tell you --
>
> THE COURT: Yes.
>
> MR. ZADEH'S COUNSEL: -- as I stand here, and to expect the jury to be able to divide up the evidence in their minds based purely on their memory, as [the State] suggests, is, is not going to work.
>
> ***
>
> THE STATE: **To now go back through and we're going to review the whole trial and make sure from our notes and our memories that we recite every ruling that Your Honor made in the instructions, I think, is, is not a -- I think it's an insurmountable task and I think we might miss something and I -- and it's, it's not appropriate to recite it.**
>
> ***
>
> MR ZADEH'S COUNSEL: Your Honor, I'm reminded of our first argument about severance when the State stood up and told you that all of the evidence in this trial would be mutually admissible, that it would be the exact same evidence if they

> were in separate trials. Here we are at the end, and [the State] just said it would be an insurmountable task to figure out what evidence is admissible against each client.
>
> I'll tell you this: I've been keeping track, we've been keeping track of the non-mutually admissible evidence, we've been -- we've had motion practice about it for a year and a half, we've been keeping track of it every night, and if the State should prevail in this case, which I obviously hope they do not, you better believe that they're going to have to surmount that task as they defend the fact that they put on a trial where they can't figure out what's admissible against each defendant. It's unbelievable what I'm hearing, that they don't know which evidence is admissible against each.
>
> ***
>
> MR. ZADEH'S COUNSEL: All right. All right. How can we, how can we expect the jury to do what we're saying is impossible and too time-consuming for us to do? That just doesn't make any sense. How can we put that burden on them?
>
> THE STATE: Because --
>
> THE COURT: That's what they do in every case.
>
> ***
>
> THE COURT: Do you, do you, do you give them a list of every time an objection was made and something was struck?
>
> ***
>
> MR. ZADEH'S COUNSEL: No, but usually we don't have two co-defendants going to trial together in a three-week trial where there's 400 pieces of evidence and days and days of testimony and make a demand like this, like you can't listen to this for her but you have to listen to this, and then not, not explain that.

(Emphasis added).

The State, perhaps accidentally, articulated what Mr. Zadeh was trying to avoid when he moved for severance and for a mistrial. And although it's true that jurors are presumed to have followed the court's limiting instructions, *Berry*, 155 Md. App. at 172,

"[n]o juror, no matter how intelligent and how desirous of doing his duty, and obeying the instructions of the court, could rid his mind of the impression necessarily made upon him" by these many statements admissible against one defendant but not the other. *Day v. State*, 196 Md. 384, 390 (1950). If it would be an "insurmountable" task for well-experienced counsel and the court to undertake to figure out which evidence was admissible to which defendant, we cannot expect a jury of laypeople to do it. The cumulative effect of the non-mutually admissible evidence unfairly prejudiced Mr. Zadeh, and compels us to reverse his conviction and remand for further proceedings.

B. The Cell Phone Should Have Been Suppressed.

Our decision to reverse Mr. Zadeh's convictions doesn't end the inquiry—the circuit court necessarily will face certain other issues on remand. Chief among these is Mr. Zadeh's contention that the trial court erred in denying his motion to suppress his T-Mobile cell phone. We review a denial of a motion to suppress evidence seized in a warrantless search based on the record of the suppression hearing, not the trial record. *McCracken v. State*, 429 Md. 507, 515 (2012). On this posture, we consider the facts in the light most favorable to the State, *id.*, and accept the facts found by the court unless they were clearly erroneous. *Brown v. State*, 397 Md. 89, 98 (2007). We review *de novo* all legal conclusions and determine independently whether the search was lawful or a constitutional right was violated. *Id.*

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. *See Jones v. State*, 407 Md. 33, 51 (2008). "[T]he ultimate

touchstone of the Fourth Amendment is 'reasonableness.'" *Riley v. California*, 573 U.S. 373, 381 (2014) (cleaned up). The general rule is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[9] *Goodwin v. State*, 235 Md. App. 263, 278 (2017) (*quoting Arizona v. Gant*, 556 U.S. 332, 338 (2009)).

The issue for us is not whether the search of the Jaguar was unreasonable—the police had a valid warrant to search and seize the vehicle and its contents. But the cell phone was not in the car. It was on Mr. Zadeh's person, and was seized from him after he exited the vehicle. And a warrantless search of a person is "reasonable only if it falls within a recognized exception," *Missouri v. McNeely*, 569 U.S. 141, 148 (2013), such as consent, a search incident to an arrest based on probable cause, reasonable suspicion to conduct a protective frisk, and the plain-view/feel doctrine. *Grant*, 449 Md. at 16, n.3. The State argues that the search was justified under the latter two exceptions. We need not address the frisk,[10] though, because we hold the seizure was unlawful.

[9] The Court of Appeals has recognized several exceptions to the warrant requirement: (1) searches incident to an arrest (*Arizona v. Gant*, 556 U.S. 332 (2009)); (2) hot pursuit (*Warden v. Hayden*, 387 U.S. 294 (1967)); (3) the plain view doctrine (*Horton v. California*, 496 U.S. 128 (1990)); (4) the *Carroll* doctrine (*Carroll v. United States*, 267 U.S. 132 (1925)); (5) stops and frisks (*Terry v. Ohio*, 392 U.S. 1 (1968)); (6) consent (*Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)); and (7) exigent circumstances (*Kentucky v. King*, 563 U.S. 452 (2011)). *See Grant v. State*, 449 Md. 1, 16 n.3 (2016).

[10] As such, we are not deciding whether the frisk *was* reasonable. This was not a *Terry* frisk—there was no *Terry* stop in the first place—but rather a frisk for officer safety. Mr. Zadeh was a suspect at that point, but the Detective also testified that he patted people down as a matter of course when he ordered them out of the vehicle:

The State argues that the seizure of the cell phone was proper under the plain-feel doctrine. And it's true that "[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons." *Minnesota v. Dickerson*, 508 U.S. 366, 376 (1993); *accord McCracken v. State*, 429 Md. 507, 510–11 (2012). As the Court of Appeals has explained, the plain-feel doctrine allows an officer, during the course of a lawful *Terry* frisk, to seize an item "that by mere touch is immediately apparent to the officer to be contraband or of 'incriminating character.'" *Id.* (citation omitted). For the incriminating character of an item to be "immediately apparent," though, the officer, upon seeing or feeling the item, must have probable cause to believe that the "item in question is evidence of a crime or is contraband." *Hicks*, 480 U.S. at 326. And "[i]f during a lawful pat-down an officer feels an object which obviously is not a weapon, further patting of it is not permissible." *In re David S.*, 367 Md. 523, 544 (2002) (citing *Minnesota v. Dickerson*, 508 U.S. at 373).

> THE STATE: When you ask an individual to get out of the car, would you normally pat them down?
>
> DETECTIVE POOLE: Yes ma'am.
>
> THE STATE: Would you explain why, please?
>
> DETECTIVE POOLE: We, I have no idea what the person has on their person or inside their vehicle at the time. The vehicle, once he was stepped out, we were, he was not going to be allowed to get back into it. So that was secure. But anything that he had on him, I was unaware of. So I wanted to check and be sure that he didn't have any weapons.

Assuming, without deciding, that the frisk was reasonable, the seizure of the phone was improper. The State represents in its brief that at the time Detective Poole frisked Mr. Zadeh, the Detective knew, at *most*, that:

> [Ms.] Pannell-Brown and [Mr.] Zadeh were having an affair about which they had both lied; that they spoke on the phone regularly, including at 6:41 a.m. on the morning of the murder; that they had given contradictory accounts about what was discussed in the conversation; and that [Mr.] Zadeh had repeatedly refused to show the detective his cell phone to confirm his account of what he had done on the morning of the murder.[11]

There is no indication in the record that Detective Poole knew anything more particularized about the cell phone; the phone itself raised no officer safety concerns, and was obviously a phone, not a weapon. The Detective had no information that the phone had been used in the crime under investigation, and he did not testify at the suppression hearing about any particular piece of evidence likely to be found on the device. Nor was there any evidence of exigent circumstances justify the seizure of the cell phone to prevent destruction of evidence while Detective Poole sought a warrant. *See e.g.*, *Illinois v. McArthur*, 531 U.S. 326, 331–33 (2001).

The State analogizes this case to *McCracken*, but the comparison fails. *McCracken* involved a defendant convicted of transporting a handgun in a motor vehicle. 429 Md. at 511. The police received a report of an armed individual in East Baltimore, and when the officer arrived on the scene, he saw a woman arguing on a porch with a man later identified

[11] Mr. Zadeh does not dispute this representation of the most that Officer Poole could have known at the time.

as Mr. McCracken. *Id.* at 511–12. Other officers at the scene separated the two and remained with Mr. McCracken as another officer spoke with the woman. *Id.* at 512. The woman reported that Mr. McCracken had "hacked" her to her present location, the officer understood "hacking" to mean "the illegal transport of a person in exchange for money without a taxi license," she and Mr. McCracken argued during the ride, and he threatened to shoot her. The officer approached Mr. McCracken, and, suspecting he might be carrying the handgun to which the woman referred, frisked Mr. McCracken. *Id.* While patting him down, the officer felt a set of keys and a car remote. *Id.* Based on what the woman had told him about being hacked to her present location, the officer removed the keys and pressed the alarm to locate the vehicle. *Id.* at 512–13. The officer located the vehicle nearby, shone his flashlight into the passenger window, saw a black handgun in the open glove compartment, and seized the gun. *Id.* at 513. Mr. McCracken moved to suppress the keys and remote, arguing their seizure was unlawful. The trial court denied Mr. McCracken's motion and he appealed. We affirmed the trial court's judgment, and the Court of Appeals granted *certiorari* and affirmed:

> Even before initiating the frisk of Petitioner, Officer McGinnis had learned several significant facts: (1) the woman he interviewed at the scene, who perhaps out of fear declined to give her name, reported to him that Petitioner, a hacker, **drove her** to their present location and during the drive threatened to shoot her; (2) Petitioner did not live in the nearby area; and (3) Petitioner **claimed that he did not drive** to his present location and gave inconsistent explanations for how he got there. Thus, by the time Officer McGinnis felt the keys and remote in Petitioner's pants pocket, he had amassed sufficient evidence that those items, although in and of themselves innocuous, **were immediately apparent to be evidence of Petitioner's**

involvement in hacking a short time earlier.

Id. at 519 (emphasis added). Ultimately, the Court held that the officer had knowledge sufficient to support probable cause that the keys and remote found in the defendant's pocket were evidence of his involvement in hacking (a crime in itself) a short time earlier, and the keys and remote he touched while frisking Mr. McCracken were seized lawfully.

Unlike the officer in *McCracken*, Detective Poole didn't have sufficient information to support probable cause that Mr. Zadeh's cell phone was evidence of his alleged involvement in Mr. Brown's murder. As noted above, the facts Detective Poole knew relating to a cell phone were that Mr. Zadeh had spoken to Ms. Pannell-Brown early that morning and that Mr. Zadeh refused to give Detective Poole his phone number or let him search his phone. But Detective Poole did not know whether the cell phone on Mr. Zadeh's person was the cell phone in question, and had no knowledge of any particular facts linking that cell phone to the murder.

In addition, the seizure could not be justified on other grounds. The police did not have a warrant for Mr. Zadeh's arrest, nor did they have probable cause to arrest him and search him incident to arrest. *Compare Riley*, 573 U.S. at 400-03 (officers who seize phones during searches incident to arrest cannot search the contents of the phone without a warrant). The search warrant the police did have authorized them to search the Jaguar and the Jaguar only. The cell phone in this case was not inside the Jaguar during the execution of the vehicle search warrant—it was in Mr. Zadeh's pocket, "as intimately part of his person as would have been a money belt strapped around his waist, a wallet in his

pocket, or a woman's purse actually being held in the hand of its owner." *State v. Funkhouser*, 140 Md. App. 696, 716 (2001). Had it been in the car and *not* on Mr. Zadeh's person, "it would unquestionably have been vulnerable" to a seizure. *Funkhouser*, 140 Md. App. at 715. But it was not, and we decline to allow a lawful seizure of items from a vehicle under a valid search warrant to justify an unlawful frisk and seizure of a cell phone from the pocket of the vehicle's driver. *See Wyoming v. Houghton*, 526 U.S. 295, 308 (1999) ("[T]he search of a person, including even 'a limited search of the outer clothing,' is a very different matter in respect to which the law provides 'significantly heightened protection.'").

The court should have suppressed the T-Mobile phone, and it should be suppressed from any proceedings on remand.

C. The Trial Court Did Not Abuse Its Discretion In Making The Other Evidentiary Rulings Mr. Zadeh Challenges.

1. The circuit court did not err in excluding third party bad acts evidence.

The circuit court also will need to address anew the admissibility of evidence of prior acts by Beanie. Mr. Zadeh argues that the circuit court "denied [him] an opportunity to fully present his defense theory" that Beanie was the "true killer" by excluding, as irrelevant, evidence of Beanie's prior bad acts. The State responds that evidence of Beanie's past acts of violence and "heated" conversations with his father were irrelevant and the circuit court properly excluded the evidence. On this issue, we agree with the State.

Generally, a court may not admit evidence of other crimes, wrongs, or acts

offered "to prove the character of a person in order to show action in conformity therewith."[12] Md. Rule 5-404(b). But the exclusion applies only to crimes or prior bad acts of *the defendant* and not when the accused, *in his or her defense,* offers other crimes evidence of another individual. *Sessoms v. State*, 357 Md. 274, 282–83 (2000). The admissibility of crimes or bad acts committed by others is "reverse other crimes evidence," and must be relevant *and* pass the Md. Rule 5-403 balancing test—that is, its probative value must not be outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." *Allen v. State*, 440 Md. 643, 664–65 (2014). We review the trial court's decision to exclude this evidence for abuse of discretion. *Moore v. State*, 390 Md. 343, 384 (2004).

Defense counsel asserted during opening statements that Beanie—not Mr. Zadeh—murdered Mr. Brown. On direct, she sought to elicit evidence from Detective Poole of Beanie's history of domestic violence, and the State objected:

> THE STATE: And I'm going to object to any further inquiry that violates the rules of evidence on character, including this witness --
>
> THE COURT: Is Beanie going to testify?
>
> THE STATE: He's going to testify, including to him and including . . . to anyone who knows him. This is inappropriate questioning about character and it blatantly violates the rules of evidence.
>
> MR. ZADEH'S COUNSEL: Your Honor, I have case law that's contrary to what she's saying about the character. I understand your position on this, but I'm just saying that's the law.

[12] For the purposes of our discussion, the terms "prior bad acts" and "other crimes" have the same meaning and are used interchangeably.

***

> THE COURT: . . . [U]ntil somebody can proffer something about him as an actual legitimate suspect -- I haven't heard anything that ties him as a legitimate suspect to this case. Have I? Have we heard any evidence?
>
> ***
>
> I want you to proffer something and maybe you can do it when Beanie testifies. But I haven't heard anything about him being a legitimate suspect other than somebody that you're -- you know --
>
> MR. ZADEH'S COUNSEL: But he said to our client four days before the murder, if anything ever happens to my father, I'm going to blame you.
>
> THE STATE: Because he thought something might happen to his father.
>
> THE COURT: What does that have to do with him being a suspect? I don't see the connection.

The court revisited the issue during a brief recess and requested a proffer:

> THE COURT: All right. So, do you want to be heard, [Mr. Zadeh's counsel] about why the character evidence should be admissible? Because I guess I don't quite understand it, unless there's some basis for --
>
> ***
>
> I guess all I'm trying to figure out is what is . . . the proffer that Cecil Pannell had anything to do with the crime? Because I haven't heard anything that, in any way, shows that he had any [sic] to do with this crime.

After listening to the proffer and the State's response, the court excluded the evidence of Beanie's "character for violence" as irrelevant:

> THE COURT: . . . [S]o, you're saying the fact that he may have had arguments with his father in the past, and the fact that he happens to live five minutes away means that he's a possible murder suspect, and that the police didn't investigate that, so, because of that, you should be able to put him in the position

> of being the suspect, and to bring out his character, and to bring out -- I guess that's what I don't understand.
>
> MR. ZADEH'S COUNSEL: That's exactly what we're saying.
>
> ***
>
> THE COURT: Well, obviously, you need something more than what you have. So, the bottom line is I'm not going to let you bring out character evidence about this witness. You can impeach his credibility, you can bring in prior conviction, if they're admissible under Maryland law, you can bring in prior inconsistent statements to impeach his credibility, all the things that you do, **but I'm not going to let you bring in evidence of his character for violence. I mean, that's not a relevant factor at this point**.

(Emphasis added.)

We see no abuse of discretion in this decision. The fact that Beanie lived close to his parents' home and was, understandably, unhappy about his mother's affair was not relevant to Mr. Zadeh's defense. The proffered testimony "merely cas[t] a bare suspicion" that Beanie might have killed his father. *Taneja v. State*, 231 Md. App. 1, 12 (2016). And although Beanie's "troubling past of violence" could raise an inference that he, rather than Mr. Zadeh, killed his father, the absence of anything more concrete renders it "speculative and tenuous" and it was not, in our view, an abuse of discretion to exclude. *Worthington v. State*, 38 Md. App. 487, 498 (1978).

2. The "checked-my-phone" text message was admissible.

Mr. Zadeh also contends the court erred in admitting a text message Ms. Pannell-Brown sent to Mr. Zadeh on August 4, 2014, the day of the murder.[13] He disputes that it

[13] Mr. Zadeh moved in *limine* to exclude as hearsay two text messages Ms. Pannell-Brown sent. The first—not at issue here—went from Ms. Pannell-Brown to her son or daughter-

was admissible under the conspirator exception to the hearsay rule because the statement was not made during a conspiracy. This time, we agree with the State.

The text message at issue went from Ms. Pannell-Brown to Mr. Zadeh and read "Hey they checked my phone I told them I no [sic] you throw [sic] Isiah [sic] and that you. You need help to get your wife over here[]." The State sought to introduce the message as evidence of a conspiracy between the two to murder Mr. Brown. The trial court ruled that the message was admissible as to both defendants under the conspirator exception to the hearsay rule, Md. Rule 5-803(a)(5), "because it's a text message from one co-defendant to the other co-defendant within a couple hours of a murder occurring" and it was unclear "that all acts of concealment were completed at the time the text was sent."

When reviewing hearsay statements, we start from the premise that hearsay is inadmissible unless it falls within an exception to the hearsay rule or is "permitted by applicable constitutional provisions or statutes." Md. Rule 5-802. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Whether a statement is hearsay is a factual determination that we review for clear error, and the decision that a hearsay statement is subject to an exception is a legal determination, *Baker v. State*, 223

in-law on August 3, 2014, a day before Mr. Brown was found dead, and read: "Hi family, just saying hello and I love you all no matter what." At the motions hearing, the trial court ruled that this message was admissible only against Ms. Pannell-Brown, not against Mr. Zadeh, but later modified that ruling and found it inadmissible as to both because the text message was "ambiguous and susceptible of various meanings." The court concluded the "potential for prejudice outweighs its probative value" as to Ms. Pannell-Brown and was "not admissible under any hearsay exception" against Mr. Zadeh.

Md. App. 750, 760 (2015), that we review *de novo*. *Bernadyn v. State*, 390 Md. 1, 7–8 (2005).

We agree with the trial court that the message is hearsay—the issue is whether it came in via an exception. The relevant exception is the conspirator exception, which permits hearsay statements for which the State "present[s] evidence that the defendant and the declarant were part of a conspiracy, that the statement was made during the course of the conspiracy, and that the statement was made in furtherance of the conspiracy." *Shelton v. State*, 207 Md. App. 363, 376 (2012). "[A] conspirator is, in effect, the agent of each of the other co-conspirators during the life of the conspiracy. As such, any statement made or act done by him in furtherance of the general plan and during the life of the conspiracy is admissible against his associates and such declarations may be testified to by third parties as an exception to the hearsay rule." *Manuel v. State*, 85 Md. App. 1, 16 (1990) (cleaned up).

Mr. Zadeh does not dispute on appeal the trial court's finding that he and Ms. Pannell-Brown were parties to a conspiracy. Instead, relying on *State v. Rivenbark*, he argues that at the time Ms. Pannell-Brown sent the text message, the murder had been completed and, therefore, that the statement was not made during the course or in furtherance of the conspiracy. 311 Md. 147 (1987).

Conspiracies don't necessarily include an agreement to conceal the agreed substantive offense although, as with any rule, there are exceptions. *Id.* at 158. Under Rule 5-803(a)(5), a conspirator's hearsay statement must typically be made "before the

attainment of the conspiracy's central objective." *Id.* at 158. These statements are typically "interpreted broadly" and "a statement is in furtherance of a conspiracy if it is intended to promote the objectives of the conspiracy." *Shelton*, 207 Md. App. at 378 (internal quotations and citations omitted). And a conspiracy doesn't necessarily end after the conspirators have "successfully attained their main object, [as] they often must take additional steps, *e.g.*, fleeing, or disposing of the fruits and instrumentalities of crime. Such acts further the conspiracy by assisting the conspirators in realizing the benefits from the offense which they agreed to commit." *Rivenbark*, 311 Md. at 158. It all depends on the relative timing between the substantive offense and the concealment, and it is typically only when statements about concealment come "long after" the participants have "realized all benefits from the [criminal] offense which they had agreed to commit" that they must be excluded. *Id.*

When Ms. Pannell-Brown sent the text message to Mr. Zadeh, she furthered the alleged conspiracy to commit the murder, and her hearsay statements were admissible against Mr. Zadeh, whether or not he said anything in response. The text message was sent just three hours after the murder occurred, close in time to the commission of the crime and while the investigation was in full swing. We agree with the trial court that the text message could reasonably be construed as an attempt to keep Mr. Zadeh informed and on the same page in case he was questioned, and therefore that it qualified for admission under the conspirator exception.

D. The Trial Court Did Not Abuse Its Discretion In Regulating Closing Arguments.

Finally, and although it is less obvious that these issues will recur on remand, we address Mr. Zadeh's challenges to the prosecutor's remarks during closing argument. He asserts that the prosecutor improperly (1) overstated the precision of Agent Fennern's cell-site analysis; (2) asserted that eyewitness and earwitness testimony is unreliable; and (3) implored the jury to "convict in the name of the victim, his family, and the State." The State responds that the trial court acted properly with respect to the prosecutor's remarks about the cell-site evidence, and that Mr. Zadeh's additional contentions were not preserved for appellate review, and in any event, any prejudice was cured by limiting instructions.

Trial courts are "in the best position to evaluate the propriety of a closing argument," *Ingram v. State*, 427 Md. 717, 726 (2012), and thus have broad discretion to regulate arguments. *Grandison v. State*, 341 Md. 175, 224 (1995). And we will not disturb the trial court's ruling but for an abuse of that discretion likely to have prejudiced a party. *Id.* at 243.

Generally, the parties are permitted "liberal freedom of speech" and "may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Whaley v. State*, 186 Md. App. 429, 452 (2009) (cleaned up). But they are prohibited from vouching for the credibility of a witness, *Spain v. State*, 386 Md. 145, 153–54 (2005), or arguing facts not in evidence or materially misrepresenting the evidence introduced at trial. *Whack v. State*, 433 Md. 728, 748–49 (2013). Even if a prosecutor's

remark during closing is improper, reversal is mandatory only "where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Spain*, 386 Md. at 158. We "consider several factors, including the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Id.* at 159. And ultimately, errors in closing argument are subject to harmless error review. *Fuentes v. State*, 454 Md. 296, 321 (2017) (citing *Lee v. State*, 405 Md. 148, 174, 950 A.2d 125, 140 (2008)).

During trial, the State called Special Agent Fennern as an expert in the field of cellular technology and historical data records to testify about Mr. Zadeh's whereabouts on the day of the murder based on his analysis of Mr. Zadeh's cell phone records. Agent Fennern testified that the data was consistent with Mr. Zadeh being at or near 805 Colby Avenue between 6:59 and 11:51 a.m. on August 4:

> THE STATE: Okay. And in terms of the phone call that we're looking at on your particular slide, is that call at 6:40 a.m. reflected in this particular document as well?
>
> RICHARD FENNERN: Yes. It's the third call down. It shows 6:40 a.m., telephone 301-706-3225.
>
> THE STATE: Thank you. Now returning to your analysis, what if anything, or what if any conclusions can you draw based on the data that is depicted in slide number 16?
>
> RICHARD FENNERN: So again this is showing the left and right limits of just that sector, but additionally we have this arc in here of that .22 distance. So what that's showing me now is that phone would be consistent with being in the area of 6875 New Hampshire Avenue.
>
> THE STATE: And in terms of being consistent with location at 6875 New Hampshire Avenue, you were also provided the scene of the homicide and that address. Is that depicted in this slide?

RICHARD FENNERN: Yes, that's 805 Colby Avenue.

THE STATE: And as of 6:40 a.m., does the data that you reviewed tell you anything about the likelihood of this particular phone being at 805 Colby Avenue at 6:40?

RICHARD FENNERN: The phone would not be located at Colby Avenue during that call at 6:40.

THE STATE: Now after 6:40, were you able to obtain information through any other I guess data communications or phone calls for the phone number ending in 1365 that morning?

RICHARD FENNERN: Yes, ... But that's showing me these transactions are happening from 6:38 a.m. to 6:56 a.m. on August 4th. . . . And you can see those, both of those areas are just near the New Hampshire address, New Hampshire Avenue address, once again . . .

THE STATE: And what if any conclusions can you draw regarding the location of phone 202-510-1635 between 6:38 a.m. and 6:56 a.m., based on the data provided by the phone company?

THE STATE: It would be consistent with being in the area near 6875 New Hampshire Avenue, or can't decide from this, you can't tell from this information if it's actually moving at that time or it's just located in that general area. But it would not be consistent with being at the Colby Avenue address.

***

THE STATE: And looking at slide number 17 and then moving on to slide number 18, what is the timeframe depicted in slide 18?

RICHARD FENNERN: Let me get this cleared real quick. This is now the cell tower sector and distance information for a telephone call that happens at 7:56 a.m., so now we're approximately I believe about an hour later. And this now is an incoming call from 202-499-8176. This now is utilizing that same 11 tower, but now it's the north-facing tower, which is sector one, illustrated here with the left and right kind of arms for that 120-degree wedge or sector. . . .

THE STATE: And so what is the difference then I guess between the data depicted in the previous slide and the data

> depicted in this slide, reference the most likely location of that cell phone?
>
> RICHARD FENNERN: At this point this would show that the phone has moved from the previous slide. And now this would be, **the data is now more consistent with being at 805 Colby Avenue**, and inconsistent with a phone that would be at or near 6875 New Hampshire Avenue.
>
> ***
>
> THE STATE: Okay. And so what, looking at this slide, just one last question about this slide, do you have an opinion as to whether this data is consistent with the phone being at 6875 New Hampshire Avenue at 6:56 a.m.?
>
> RICHARD FENNERN: It would be inconsistent with that.
>
> ***
>
> THE STATE: And so based on this analysis, is it possible if you are making a call, or if your phone is at 805 Colby Avenue, would it be possible to be connecting with three different cell towers and sectors?
>
> RICHARD FENNERN: Yes.

(Emphasis added.)

During closing arguments, the prosecutor argued that Mr. Zadeh was at or near 805 Colby Avenue on August 4:

> And then you have the cell tower analysis, completely independent of that eyewitness information, puts him and the phone in the area of 6875 New Hampshire Avenue. So we know the data is, again, correct at this time of day.
>
> ***
>
> We know that Ali is lying in wait, waiting to commit this murder the morning of August the 4th, **because the data says that he's there**. And if you consider the text messages that are sent between the two, which we'll talk about in one minute, there is no other conclusion that you can arrive at other than that **Ali was at, nearby Colby Avenue**. We know in the morning at 6:40, he's near his work.

And the State would suggest to you that after he calls Larlane, and she goes to get him and brings him back to the house. And that's why, from 6:59 to 9:50, and then, ultimately, from 9:50 to 11:51, all the evidence and all the cell tower data is that **he's at this location**.

***

So what did Rich Fennern do? He actually went out and he did a drive test to actually measure the radiofrequency of the tower to see where that dividing line was between sectors, and where the phone could be in order to be serviced by those sectors.

And what he found was that the 805 Colby Avenue area is exactly where you would get service from both of those sectors that Mr. Zadeh was hitting off of for that several-hour period on the morning of the murder for all of those 63 data communications.

He's hitting off of this sector and in that sector. This sector and that sector. And **that's consistent with being in an area** that's serviced by both sectors, which is what we have as the result of Special Agent Fennern's drive testing data.

We also know that Mr. Zadeh is at 805 Colby Avenue when you look, again, at the other tower that Larlane Brown is using at a time when we know, for a fact, she was there. And if you look at the blue arc in this diagram, and you look at the red arc, the red arc is Adelphi 111, that tower, and the blue arc is Adelphi 255.

And so we know that someone who is at 805 Colby Avenue is hitting off of these towers and sectors because Larlane is hitting off of these towers and sectors when we know she's there.

And we know that this analysis continues; that the towers and sectors that this phone is hitting off of, that Ali's phone is hitting off of that entire morning **are consistent with him being at 805 Colby Avenue**.

And I think that the best demonstration of this is that Special Agent Fennern testified that in order for this data to happen -- and this data did happen, and it's kept by the phone company, and it's recorded accurate data -- that in order for a phone to connect with Adelphi 255, that sector, and then Adelphi 111, those two sectors, all at the same time, the phone has to be in a

> location that's served by all those sectors and towers. And the only place that is the area of 805 Colby Avenue.

(Emphasis added.)

We find no error in the prosecutor's remarks, but, even if we did, they were harmless. Mr. Zadeh likens the prosecutor's statements that the cell tower data showed Mr. Zadeh was "at 805 Colby" to that in *Whack v. State*, 433 Md. 728 (2013), in which the State introduced two DNA samples from a vehicle. The State's DNA expert testified that as to one DNA sample, the odds that it came from someone other than the victim was one in 212 trillion. *Id.* The other, however, was less reliable; because it contained four DNA profiles, and the defendant's DNA matched with only eleven out of the fifteen tested locations in that sample, only one in 172 African-Americans could similarly have matched it. *Id.* at 737. During the rebuttal portion of its closing argument, the State argued that the defendant's DNA was definitely present in the truck. *Id.* at 746. The Court of Appeals held that the prosecutor had overstated the statistical significance of the DNA evidence and that the record didn't support the statement that the defendant's DNA conclusively matched the sample from the truck. *Id.* at 749.

Here, the prosecutor simply recounted the evidence. Special Agent Fennern testified about what the cell tower analysis revealed about Mr. Zadeh's phones at various times during August 4th. The prosecutor summarized, and even used the Agent's language, when she argued that the "data" was "consistent with [Mr Zadeh] being at 805 Colby Avenue." We see no "overstatement of the precision of cell-site analysis" or argument involving facts not in evidence.

Mr. Zadeh contends next that the prosecutor overstepped—and "vouched against"—in the way she challenged a defense witness's credibility, and again when she urged the jury to convict in the name of the victim, his family and the State. The prosecutor argued on rebuttal that a neighbor's, Ms. Jha's, "ear-witness" testimony was unreliable:

> THE STATE: So, where does that leave us with Kopal Jha? Yeah, what she heard, it says something different about the timeline, but they are assuming that she heard an escalating argument which we know from the scientific evidence and everything we know about Mr. Brown, didn't happen. Ladies and gentlemen, you know from your common sense and your everyday experiences and what you learn in the world that eyewitnesses and ear witnesses are some of the most unreliable testimony you ever have --
>
> MR. ZADEH'S COUNSEL: Objection, Your Honor.
>
> MR. ZADEH'S CO-COUNSEL: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> ***
>
> THE STATE: And that [] is some of the stuff you actually should not rely in in judging a case. What you do want to rely on is forensic cell phone technology that doesn't lie and isn't mistaken. Eyewitnesses and ear witnesses, ladies and gentlemen are mistaken --
>
> MR. ZADEH'S COUNSEL: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> THE STATE: -- can be mistaken and lie in a way that technology doesn't. That's why this case is so clear because you don't have to worry about is someone lying, is someone mistaken? Why did Ms. Jha hear something further away that six other people that are closer didn't hear an escalating argument? Six other people, Miranda, Janet Berry, David Kapp, Thomas Walton, who said he was right outside Janet Berry's door around noon and then he walks home with his groceries. He's right there and he doesn't say he hears some big argument. Thomas Walton, Miranda's daughter, who

> alerted Miranda, remember the short shower taker, so she's only in the shower for a couple of minutes and Kopal Jha says she's hearing this on and on and on, going on, she said, you know, definitely more than 10 minutes.
>
> Well, Miranda the next door neighbor didn't hear it. Her daughter didn't alert her to anything. Her daughter alerted to help me, help me, but not to some big, huge argument, and Barbara Brown. So, this is why, ladies and gentlemen, eyewitness and ear witness testimony is something you really need to be careful with. It's the [sic] not the stuff you rely on --
>
> MR. ZADEH'S COUNSEL: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> THE STATE: -- in a criminal case. You want to rely on the things that can't be mistaken, the things that don't lie.

Then, at the end of the argument, the prosecutor asked the jury to find Ms. Pannell-Brown and Mr. Zadeh guilty "in the name of the State of Maryland and Cecil Brown and the people that love him truly" to which both defendants' counsel objected. The court instructed the prosecutor to "get away from that."

The defense requested a bench conference and asked the court to strike and instruct the jury to disregard the prosecutor's "inappropriate" comments about the reliability of eyewitness and ear witness testimony and her plea to the jury to convict in the name of the State, Cecil Brown, and his family. The court granted the request and gave a curative instruction:

> All right, just a couple of comments and things that [the prosecutor] argued that were not appropriate to argue that I am going to ask you to focus on and disregard.
>
> One is, at the very, very end of her argument, she said something like on behalf of the State, we want you to convict and she also said on behalf of the family and on behalf of, you

> know, that's not appropriate. This case is about what the evidence is. [The prosecutor] doesn't represent the family. She represents the State of Maryland. It's a criminal prosecution, so she should not be arguing that you should do or appeal to your emotions about what the family would like. So, you should disregard that.
>
> The other thing that [Mr. Zadeh's counsel] objected to a couple of times that also was inappropriate, at the time, I didn't want to, you know, stop things, so I was kind of overruling the objections, but recall a couple of times during [the prosecutor's] closing argument, she was arguing that you should, I don't know exactly how she put it, but it was put a couple of different ways about eyewitness testimony, ear witness testimony, the inconsistencies and we all know that eyewitness testimony is unreliable and ear witness testimony is unreliable.
>
> She's not, [the prosecutor] is not an expert. She's not testifying as an expert. You've been told that her arguments are not testimony and, you know, you may have heard things about eyewitness identification testimony and that sort of thing, so, the bottom line is, you are the arbiters of the evidence. What [the prosecutor] argued, as well as what everybody else argued is not evidence, but she is not, it's not appropriate for her to kind of inject her opinion about what eyewitness testimony is or isn't reliable. So, that's up to you to decide that.

Vouching typically occurs "when a prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity or suggests that information not presented to the jury supports the witness's testimony." *Spain v. State*, 386 Md. 145, 153 (2005) (cleaned up). We disagree that the prosecutor's remarks about Ms. Jha's testimony constituted vouching against her credibility, but even if it were, the instruction cured any overstepping.

On the other hand, the prosecutor's plea that the jury to convict "on behalf of the victim" and his family was improper, and the State (appropriately) agrees in its brief that

"[i]nvoking the victim's family was concededly improper to the extent that the comments 'appealed to the jurors' prejudices and asked them to abandon their neutral fact finding role.'" (quoting *Lawson*, 389 Md. 570, 594 (2005) (cleaned up)). Although we allow counsel considerable rhetorical license in opening and closing arguments, counsel should not argue for jurors to "consider their own interests in violation of the prohibition against the 'golden rule' argument."[14] *Lee v. State*, 405 Md. 148, 171 (2008). By arguing that the jury should render a guilty verdict on behalf of the victim and his family, the State appealed improperly to the passions of the jury. Because we are reversing on other grounds, we need not consider whether this inappropriate argument would itself have entitled Mr. Zadeh to appellate relief. On remand, though, the State would be well-advised to heed the circuit court's admonition to "stay away" from that sort of argument.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED IN NO. 1065, SEPTEMBER TERM 2017, AND REVERSED AND REMANDED IN NO. 1329, SEPTEMBER TERM 2017. COSTS TO BE PAID BY APPELLANT IN NO. 1065 AND BY MONTGOMERY COUNTY IN NO. 1329.

[14] A "golden rule" argument is one in which an arguing attorney asks the jury to place themselves in the shoes of the victim. *Lawson v. State*, 389 Md. 570, 594 (2005).