Circuit Court for Baltimore County
Case No. C-03-CR-19-3178

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 1325

September Term, 2021

MARKUS HAGGINS

v.

STATE OF MARYLAND

Nazarian,
Reed,
Zic,

JJ.

Opinion by Reed, J.

Filed: February 8, 2023

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

** On December 14, 2022, the name of the Court of Special Appeals was changed to the Appellate Court of Maryland.

At 11:17 a.m. on August 4, 2019, when Derrick Towe-Williams ("Williams") approached a vehicle on the street near his Randallstown residence, neighbors' security surveillance cameras recorded his murder. Markus Haggins, appellant, and Cory Dwayne Fennell were jointly tried in the Circuit Court for Baltimore County. The jury credited the State's "attempted robbery gone wrong" theory that the co-defendants "set up" Williams by arranging to purchase marijuana from him, but instead of Fennell robbing Williams while Haggins drove the getaway car as planned, Fennell shot Williams. Both were convicted of first-degree felony murder, attempted robbery with a dangerous weapon, use of a firearm in the commission of a crime of violence, and possession of a regulated firearm after a disqualifying conviction for a crime of violence.

Although their appeals have been consolidated because they present overlapping records and issues, each case has been separately argued and reviewed in this Court. In this appeal, Haggins challenges the denial of his motion to sever his trial from co-defendant Fennell, the propriety of certain voir dire questions, the admission of unobjected-to expert testimony from an FBI agent about cell phone location data, and the sufficiency of the evidence supporting his murder, attempted robbery, and firearm use convictions.[1]

[1] In our discussion, we will address the following questions presented in Haggins' brief, after re-sequencing them in the order the challenged rulings occurred:

1. Did the motions court err by denying Appellant's motion to sever his trial from that of Cory Fennell?

2. Did the trial court err by propounding compound *voir dire* questions?

Because we conclude there was no error or abuse of discretion, and that the evidence is sufficient to support Haggins' convictions, we will affirm those convictions.

FACTUAL & PROCEDURAL BACKGROUND

The Crimes

Surveillance footage recovered from two residences on Southall Road in Randallstown shows that at 11:17 a.m. on August 4, 2019, Derrick Towle-Williams walked up to a distinctive gold Chevrolet Suburban that had stopped on the street a few houses away from his. A person wearing a mask jumped out of the front passenger seat. When Williams took steps toward him, the masked individual shot Williams in the chest, then the back.

Based on evidence developed by police investigators that Fennell and Haggins arranged to buy marijuana from Williams, while planning to rob him instead, the State charged both with first degree felony murder, attempted robbery with a dangerous weapon, use of a firearm in the commission of a crime of violence, and possession of a firearm after a disqualifying conviction.

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3. Is the evidence sufficient to sustain Appellant's convictions for felony murder, attempted robbery with a dangerous weapon, and use of a firearm in the commission of a crime of violence?

4. Did the trial court commit plain error by permitting Special Agent Wilde to offer expert opinion testimony where he was not offered or accepted as an expert witness?

In his appeal, co-defendant Fennell challenges his convictions on comparable voir dire, expert testimony, and sufficiency grounds, and further contends that he was deprived of his constitutional right to be present and right to counsel during the severance hearing. *See Cory Dwayne Fennell v. State*, No. 1351, Sept. Term, 2021.

Suppression of Fennell's Post-Arrest Statements to Police

After police arrested Haggins and Fennell together, Fennell admitted shooting Williams, while simultaneously exculpating Haggins. Fennell declared, "I did it. He ain't do nothing." Despite insisting he had "nothing else to say[,]" Fennell stated, "I just want it on record that Markus Haggins . . . . the dude who was arrested today because he was with me . . . . ain't have nothing to do with it." Explaining that he "meant to shoot" Williams when "he reached for the gun[,]" Fennell stated, "I'm not sorry. I just don't want that man being locked up . . . . for something I did." He added, "I don't want no promises, I just want you to let [Haggins] know that I . . . took my charge, and I told y'all he ain't got nothing to do with it."

Fennell moved to suppress his statements on the ground that they were improperly elicited after he invoked his right to counsel, in violation of the protections afforded to his Fifth and Sixth Amendment rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Finding that there was "a clear and unequivocal invocation of the right to remain silent[,]" the suppression court granted Fennell's motion to exclude his ensuing statements, which included both his inculpatory admission and his exculpatory declarations regarding Haggins' involvement.

Denial of Haggins' Motion to Sever (A Change in Direction)

Haggins then moved to sever his trial from Fennell's. In support, trial counsel argued that Haggins would be prejudiced by the exclusion of Fennell's statements inculpating himself ("I did it") and exculpating Haggins ("He didn't do nothing" and "I

don't want any promises. I just want him to know I took my charge. He had nothing to do with it.").

At a hearing on April 30, 2021, the circuit court heard from Haggins and the State. Counsel for Haggins argued that Fennell's statements were admissible in Haggins' defense, under the hearsay exception for statements against the declarant's penal interest, because they "completely" inculpated him and exculpated Haggins. In Haggins' view, "because of the Defendant's right to put forth a trial, trustworthiness is needed, reliability is needed, but not to the constitutional level" required when the State seeks admission of inculpatory statements made by an unavailable declarant, implicating the defendant's right to cross-examination. Counsel for Haggins argued that the proffered statements were sufficiently corroborated by the fact that, until they were suppressed, "the State was the one arguing" they "should come in and should be used against him" and by the fact that "Mr. Fennell took complete responsibility . . . by admitting numerous times to a shooting" while "knowing full well that he was being interviewed regarding a murder," after having "been Mirandized."

After reviewing the statements at issue, the court asked counsel for Haggins, "what does that mean he didn't do nothing?" When defense counsel posited that Fennell meant, "He's not responsible for any of the acts[,]" the court pointed out that "[t]he State's theory is that you have two people involved" even though "there is only one that was the shooter[.]" The court queried: "Does it mean [Haggins] didn't shoot? Does it mean he didn't go to the scene? Does it mean that he wasn't involved in any type of alleged plan? Does it mean he didn't set up the victim?"

In response, counsel for Haggins claimed that Fennell's declarations asserted that Haggins "lacked the knowledge as to what was going to happen. Everything was – Mr. Fennell was responsible for it." As for "the State's theory . . . that Mr. Haggins[] drove. That's something that will be up for the jury to decide."

The prosecutor rebutted Haggins' characterization of Fennell's statements as reliable and corroborated by the circumstances, pointing out that "if the State thought the statement was entirely trustworthy, Mr. Haggins wouldn't be charged today. We would have believed Mr. Fennell. We do not." Although Fennell's statement that he "did it" was against his penal interest, the prosecutor emphasized that his statements about Haggins having "nothing to do with it" were not.

In further opposition, the State proffered a series of text messages between Haggins' and Fennell's cell phones on the morning of the murder. After reading through them, the prosecutor argued that such evidence "strikes at the trustworthiness of Fennell's statement" that "Haggins had nothing to do with" the Williams shooting, by showing that Haggins and Fennell had "spent the entire morning doing robberies." So "if a severance was granted," the prosecutor proffered, "the State would put forth a very strong argument of other crimes evidence to show the knowledge of Fennell and the complete untrustworthiness of Fennell's statement" that Haggins had nothing to do with Fennell's fatal encounter with Williams.

The court denied Haggins' severance motion, ruling that Fennell's statements would not be admissible in a separate trial of Haggins because they were hearsay that did not fall

within any exception, including for statements against interest. *See* Md. Rule 5-804(b)(3). The court explained that,

> [i]n terms of the factors the Court is required to consider, the Declarant's statement was against his penal interest and that part that says, "I did it," that certainly is against penal interest. The Declarant is an unavailable witness. I suspect he will be unavailable because he will invoke his Fifth Amendment right. I mean, he could decide to testify, but this statement has been suppressed by the Court. So any statements he made after he invoked his right to Counsel, those have been suppressed.
>
> The third factor is one of the corroborating circumstances that exists [sic] to establish the trustworthiness of the statement or statements. I understand there is an argument to be made that the Court should cross out these two statements . . . . and there is a discussion about that in the case law that was cited by Counsel.
>
> I think the more important question for the Court is the trustworthiness and whether there are corroborating circumstances to establish the trustworthiness of the statements. Now, [counsel for Haggins] argues that that's really for the trier of fact to determine. I think that the Court has a requirement to look at it before it's admissible.

The motion court then distinguished *Gray v. State*, 368 Md. 529 (2002), a decision and rationale cited by Haggins as grounds for admitting Fennell's exculpatory statements. Reversing the trial court, the Court in *Gray* held that the court erred in excluding testimony about incriminating statements allegedly made by a third party who allegedly murdered Gray's wife, for which Gray was on trial. *See id.* at 537. In that case, the motion court pointed out,

> the Declarant was not a co-defendant and the . . . Appellate Court, looked at things a little differently there and talked about the need for the trier of fact to evaluate this person who was alleged to have made several incriminating statements about killing the victim. I think in the case the victim's husband was on trial, but there was another woman who said she had witnessed arguments between the victim and the male friend, that the male friend had made some statements that clearly seemed to indicate that he was responsible

and had even threatened the witness that something similar would happen to her if she talked about an alleged rape that she was the victim of by this person. The jury could hear from her, but the person who is alleged to have made the statements in this case is the co-defendant.

The court in this case stated:

I still believe that the Court has as a result a requirement to look at the corroborating circumstances and see if they exist and evaluate the trustworthiness of the statement. Given the proffer of the State, given the fact that there really isn't a dispute about what the State alleges its evidence is about the text message exchange earlier that day between the two Defendants in this case, about the content of the messages, about the existence of their relationship of some sort between Mr. Haggins and the victim, about the other evidence, . . . meaning eyewitness and . . . . video of the area where the shooting occurred. The Defendant's car seen. The evidence that the State has proffered that it was Mr. Fennell had exited the front passenger seat of Mr. Haggins' car and had on a mask and got out and shot the victim. The fact, quite frankly, that Mr. Fennell didn't make these statements until the custodial interrogation until after he had invoked his right to Counsel a couple times, I think all of that along with the fact that the two men were arrested together in Baltimore City, I think all of that weighs against the trustworthiness of these statements. And as I said earlier this hearing, I don't really know what "he had nothing to do with it" means. Does that mean he didn't have anything to do with actually shooting the victim? Does it mean that he didn't have anything to do with setting it up? I don't know what that means. . . .

[F]or the reasons that I have articulated, I have looked at the rule, and because I don't believe these statements would be admissible, because I don't find that they have the trustworthiness, that they are not the corroborating circumstances which would support trustworthiness of the statements, I don't find that they would be admissible at trial.

So, therefore, it wouldn't come in under the hearsay exception and I don't find that there is prejudice in trying the Defendants together. So the Motion to Sever is denied.

Trial

The State's prosecution theory was that Haggins and Fennell "set up what Williams believed would be a drug deal" but, instead, was a plan to rob him that went "bad."

According to Williams' mother, her son sold small quantities of marijuana to family and friends. Daniel Todd, a close friend of Williams, testified that Williams knew Haggins, who previously lived a few houses away on the same street, from school.

To link Haggins and Fennell to the murder, the State presented evidence from cell phones, surveillance cameras, and the vehicle carrying the shooter and his accomplice.

Cell phone records show calls and texts between Haggins and Fennell beginning early that morning, attempting unsuccessfully to arrange a drug purchase with someone unrelated to this investigation. At 8:58 a.m., Haggins texted Fennell, "hit him for an OZ right quick."

At 11:12 a.m., Fennell called Williams, with the call lasting 24 seconds. Williams called Fennell at 11:17 a.m. That call lasted 43 seconds and corresponded to events captured by surveillance videos.

The arrival of Haggins' vehicle, Williams' approach, the murder, and the flight appear on footage recovered from residences on Southall Road. At 11:08 a.m., a gold 2004 Suburban featuring a Virginia license plate, distinctive "after market rims" and a back window sticker, came into view. That vehicle was later determined to be registered to Haggins. The Suburban paused at the intersection of Shenton Road, before continuing to park in front of a residence on Southall Road.

At the same time he made the 11:17 a.m. call to Fennell, Williams walked to the Suburban while holding his cell phone to his ear. When Williams approached the rear passenger door, a masked and armed person jumped out of the front passenger seat.[2] After Williams "took a few steps towards" him, the individual fired, causing Williams, with "blood on his chest[,]" to turn and flee. The assailant fired several more shots at Williams as he ran down the street. The assailant got back in the Suburban, which drove off with the front passenger door still open.

Williams died on the sidewalk, with two bags containing 16 grams of likely marijuana with a street sale value "between $180 and $350" and $48.47 on his person. His cause of death was one close-range gunshot wound to his chest, and another to his back.

Williams' cell phone was within his reach. His mother, who rushed to the scene, "took it in the house for his best friend, Daniel, to have."

Mr. Todd testified that shortly after Williams was shot, he "got the phone numbers that the victim had recently spoken to" from Williams' mother, who screen-shot them from her son's phone.[3] Todd "proceeded to dial those numbers and tried to . . . hear anything or find out what [he] could from the numbers [he] dialed." The first two numbers he reached were friends who were distressed to hear about Williams' death.

[2] The encounter occurred before the COVID-19 pandemic made masks common.

[3] By the time a forensic examiner obtained Williams' cell phone, it could not be examined because "it was too dangerous to even power on or charge[.]" Because blood had seeped in, wetting the inside, "as the board heats up it could catch on fire, it could short out the board in the phone."

At 11:56 p.m., Todd called Fennell's number. When "[s]omeone answered," Todd "told them to basically come back because Derrick is dead and the person responded by saying, Derrick sold drugs. Derrick is a drug dealer."

After that call, Fennell's phone never made or received another call. But later that evening, text messages sent from Haggins' phone show that Fennell was "using Mr. Haggins' phone to send messages."

On August 5, the day after the murder, police surveilled an address listed on the Suburban's registration. When Haggins emerged, investigators followed him to a residence in Baltimore, which was later determined to belong to his aunt and uncle.

Police seized Haggins' Suburban, which was parked inside a fence behind that house. The vehicle contained paperwork addressed to Haggins. Forensic examiners recovered latent fingerprints from the interior front passenger window, then matched two of them to Fennell.

Investigators obtained records showing that one of the last cell phone numbers Williams communicated with was a number assigned to Fennell's phone. In turn, Fennell's cell phone made frequent calls and texts to the number assigned to Haggins' cell phone.

On the morning of the shooting, Haggins and Fennell exchanged a series of messages consistent with attempting to setting up a drug purchase with another individual. When Haggins texted Fennell, "hit him for an OZ right quick[,]" an expert in drug transactions testified that referred to buying an ounce of marijuana. After several intervening messages reporting that "[h]e ain't answer[,]" at 9:59 a.m., Haggins texted Fennell that he was "OMW" (on my way), and Fennell replied, "At the gas station."

Special Agent Mathew Wilde, with the FBI's Cellular Analysis Survey Team, conducted a historical cell site analysis of Haggins' and Fennell's phone numbers, then mapped calls and movements in relation to the site and time of the murder. He testified, without objection, that after 10 a.m. on August 4, 2019, both phones were "consistently in the same general areas," including near the Southall Road site of the shooting between 11:05 and 11:16 a.m. This positioning includes the critical period when Fennell called Williams at 11:12 a.m., and when Williams called Fennell back at 11:17 a.m.

Two days after the murder, Haggins and Fennell were still together. On August 6, at 1:30 p.m., the Criminal Apprehension Support Team arrested both while they were walking together in a parking lot. Fennell had the cell phone associated with Haggins in his pocket and tried to give it away to bystanders. At police headquarters, the two were interviewed separately.

Haggins and Fennell each stipulated to being prohibited from possessing a firearm.

DISCUSSION

I. Severance

Haggins contends that the circuit court erred by denying his motion to sever his trial from Fennell. In Haggins' view, because the exculpatory statements made by co-defendant Fennell were admissible in his defense, under the hearsay exception for statements against interest, he should have been tried separately from Fennell. For reasons that follow, we disagree.

A. Standards Governing Joinder and Severance of Defendants

Maryland Rule 4-253(c) provides that,

> [i]f it appears that any party will be prejudiced by the joinder for trial of counts, charging documents, or defendants, the court may, on its own initiative or on motion of any party, order separate trials of counts, charging documents, or defendants, or grant any other relief as justice requires.

Joinder implements established "policy favoring judicial economy and its purpose is 'to save the time and expense of separate trials under the circumstances named in the Rule, if the trial court, in the exercise of its sound discretion deems a joint trial meet and proper.'" *State v. Hines*, 450 Md. 352, 368 (2016) (citation and footnote omitted). "[A] trial court's decision to sever or join the trials of multiple criminal defendants or multiple counts is ordinarily committed to the sound discretion of the trial judge and is reviewed for abuse of discretion." *Hemming v. State*, 469 Md. 219, 240 (2020). Nevertheless, "[t]he interest in efficiency and 'judicial economy' should not outweigh the interest in ensuring that a defendant is afforded a fair trial." *State v. Zadeh*, 468 Md. 124, 151 (2020).

Summarizing the competing concerns underlying decisions regarding joinder and severance, the Supreme Court of Maryland has recognized that joinder may be prejudicial based on the admission of certain evidence:

> Maryland Rule 4-253 contemplates the joinder of defendants and offenses. Regarding the joinder of defendants, a trial court may "order a joint trial for two or more defendants charged in separate charging documents[,] if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses[,]" and "most of the evidence admissible at trial is mutually admissible[.]" . . . Subsection (c) of Rule 4-253 provides . . . . "where joinder will result in prejudice to one or more defendants, a trial judge has discretion under Maryland Rule 4-253 to grant a severance or order other relief as justice requires." In the context of both co-defendant and offense joinder, the crux

> of the severance inquiry is whether the joinder is unduly prejudicial. "What differs between the two situations is the application of the test—how a trial court determines the existence of prejudice."

Id. at 147 (citations omitted).

In the more common severance of defendants scenario, the problem alleged by the moving defendant is that he or she will be prejudiced as a result of evidence that will be admitted against a co-defendant. In those cases,

> [a] defendant must demonstrate that "non-mutually admissible evidence will be introduced and that the admission of such evidence will result in unfair prejudice."
>
> Under *State v. Hines*, the test for determining whether a motion for severance of defendants should be granted is whether (1) non-mutually admissible evidence will be introduced; (2) the admission of that evidence will unfairly prejudice the defendant requesting severance; and (3) any unfair prejudice that results from admitting the non-mutually admissible evidence can be cured either by severance of the defendants or some other relief such as limiting instructions or redactions. In such cases, where a limiting instruction or other relief is inadequate to cure the prejudice, the denial of severance is an abuse of discretion.

Zadeh, 468 Md. at 147-48 (citations omitted).

In this case, however, the less common severance scenario involves the moving defendant's request for a separate trial so that he may present evidence that has been ruled inadmissible against his co-defendant. Applying the test for defendant joinder to this situation, the threshold issue is whether, if Fennell were tried separately, the "non-mutually admissible evidence" of his statements exculpating Haggins could have been introduced in Haggins' defense.

B. Analysis

The motion court ruled that Fennell's exculpatory statements about Haggins would not be admissible in a separate trial of Haggins, because those statements by an unavailable declarant were hearsay that does not fit within the proffered exception for statements against interest. We agree.

In this case, as in *Roebuck v. State*, 148 Md. App. 563, 590 (2002), it was a defendant, rather than the State, who sought admission of the proffered out-of-court statement against interest, "claiming it was inculpatory as to the declarant and exculpatory as to" one of two co-defendants. In these circumstances, "the confrontation clause is not implicated[.]" *Id*. Instead, we ask whether, as a result of the joinder of these two defendants for trial, Haggins was unfairly prejudiced in presenting his defense, because he was not permitted to present admissible evidence of Fennell's out-of-court statements inculpating himself and exculpating Haggins.

As the Supreme Court of Maryland recently reminded us in an instructive case disapproving the use of a proffered statement against interest during defense cross-examination,

> "[h]earsay is defined as 'a statement, other than one made by the declarant while testifying at the trial . . . , offered in evidence to prove the truth of the matter asserted.' Maryland Rule 5-801(c). . . .
>
> As a general rule, hearsay is not admissible in evidence at trial. Maryland Rule 5-802. As the Supreme Court has explained, the theory underlying this general rule is "that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements – the oath, the

> witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine – are generally absent for things said out of court." *Williamson v. United States*, 512 U.S. 594, 598, 114 S. Ct. 2431, 129 L.Ed.2d 476 (1994).

State v. Galicia, 479 Md. 341, 354-55 (2022), *cert. denied,* __ U.S. __, 2022 WL 17408204 (Dec. 5, 2022).

Although "[t]he general principle that hearsay is inadmissible . . . is subject to many exceptions that are compiled in . . . Maryland Rules 5-802.1 through 5-804[,]" *id*. at 355, "[w]hether a particular out-of-court statement qualifies for admission under a hearsay exception is ultimately a question of law that is reviewed without deference to the trial court." *Id*. at 360. Nevertheless, when, as in this case, "the outcome may hinge on certain fact findings by the trial court – *e.g.*, whether a statement is reliable – . . . the appellate court applies a more deferential standard of review." *Id.* at 360-61.

The hearsay exception at issue here is for an out-of-court statement against interest, defined as

> [a] statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest, so tended to subject the declarant to civil or criminal liability, or so tended to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Md. Rule 5-804(b)(3).

Emphasizing that "[t]he importance of a hearsay statement to a party's case does not bear on its admissibility under Maryland Rule 5-804(b)(3)[,]" the Supreme Court of

Maryland (at the time, named the Court of Appeals Maryland) in *Galicia* considered whether an out of court declaration by a co-defendant was admissible as a statement against penal interest. *Galicia*, 479 Md. at 354-59, 383. Reviewing the rule, the Court explained that

> [t]he rationale for the exception is that there are circumstantial guarantees of sincerity and accuracy when one makes a statement adverse to one's own interests. As a shorthand, this is often referred to as the exception for a "statement against penal interest."
>
> This exception is narrower than the exception for a statement by a party-opponent in several respects. First, a statement against penal interest is admissible only if the declarant is unavailable as a witness – a condition that does not apply to the exception for an out-of-court statement by a party-opponent. Second, the content of the statement must fit the description of the rule – *i.e.*, it must be so adverse to the declarant's interest that a reasonable person would not have made it unless it was true. That condition does not apply to the exception for a statement by a party-opponent. Finally, in a criminal case, there must be "corroborating circumstances" that indicate that the out-of-court statement is trustworthy; there is no corroboration requirement for a statement by a party-opponent.

Id. at 358 (citations omitted).

The Court in *Galicia* pointed out that "the trial court never definitively ruled on whether [the co-defendant's] statement that his brother 'shot them guys, too' was independently admissible as a statement against the declarant's penal interest[,]" perhaps "because, by itself, any out-of-court statement [the co-defendant] may have made inculpating his younger brother had no bearing on the case against Mr. Galicia" absent the witness testifying that the co-defendant expressly exculpated Galicia while giving "a comprehensive description of the participants and events surrounding the murders." *Id*. at 383.

Although "the trial judge offered to have [the witness] returned to the courtroom and questioned outside the presence of the jury on the topic of what [the co-defendant] may have told [her] about Mr. Galicia's involvement in the offense[,] Mr. Galicia's counsel objected to the form of a question the court proposed to ask her and never pursued the idea of clarifying, outside the presence of the jury, what her testimony would be." *Id*. at 383-84. Given the trial judge's doubts about whether a transcribed account of the witness' statement represented "an exhaustive account of her conversation with [the co-defendant] on the day after the murders[,]" the Supreme Court of Maryland could not "say that the trial judge abused his discretion in declining to allow Mr. Galicia's counsel to pursue a line of cross-examination that would elicit out-of-court statements (or non-statements) that were not clearly admissible under an exception to the hearsay rule and that would directly inculpate . . . one of his co-defendants at the time [the witness] was on the stand." *Id*. at 384.

In these circumstances, the Court held that "the trial court did not abuse its discretion when it declined to allow Mr. Galicia's counsel to cross-examine [the witness] about an alleged out-of-court statement by" his co-defendant. *Id*. The Court reasoned that "'[t]he fundamental rationale in leaving the matter of prejudice [or not] to the sound discretion of the trial judge is that the judge is in the best position to evaluate it'" because "'[t]he judge is physically on the scene, able to observe matters not usually reflected in a cold record'" and "'able to ascertain the demeanor of the witnesses and to note the reaction of the jurors and counsel to inadmissible matters.'" *Id*. at 385 (quoting *State v. Hawkins*, 326 Md. 270, 278 (1992)).

Haggins does not contend that the motion court erred in applying either the law governing severance and the hearsay exception for statements against interest. Instead, he challenges the court's underlying factual determination that Fennell's statements inculpating himself and exculpating Haggins were not admissible because they lacked sufficient corroboration to meet the trustworthiness threshold for this hearsay exception. "[W]hether a statement is reliable" in this context requires a factual finding that we review under a "more deferential standard[.]" *Id*. at 360-61.

We conclude that the trial court did not err or abuse its discretion in determining that Fennell's exculpatory statements about Haggins were not sufficiently reliable to be admitted under the hearsay exception for statements against interest. As the trial court pointed out, Fennell's declarations that Haggins had "nothing" to do with the shooting were not statements against his own penal interest. *Cf., e.g., Gray v. State*, 368 Md. 529, 547 (2002) (holding that declarant's inculpatory statement against interest was admissible because "[i]t was not just a statement that he had murdered somebody; it was a statement that he had murdered a specific person with whom he had a relationship," who "had, in fact, been murdered"); *State v. Matusky*, 343 Md. 467, 492 (1996) (holding trial court erred in admitting entire conversation rather than parsing out the portions that incriminated the declarant).

Moreover, Fennell's remarks were ambiguous in that they did not specify whether he was narrowly referring to Haggins having no involvement in the shooting, or more broadly asserting that Haggins played no role in setting up the encounter with Williams. As the trial court recognized, clarification is impossible given Fennell's unavailability, but

critical because even if Haggins had "nothing" to do with *shooting* Williams, he could be convicted of felony murder based on his participation as an accomplice in the robbery scheme that escalated into that shooting. *See generally Yates v. State*, 429 Md. 112, 128 (2012) ("a killing constituted felony murder when the homicide and the felony are part of a continuous transaction and are closely related in time, place, and causal relation").

Nor did the record preclude the motion court from concluding that Fennell's volunteered exculpation of Haggins was not sufficiently reliable to be admitted under the exception for statements against interest. As the suppression court determined earlier, both Fennell's statement that he shot Williams and his declarations that Haggins had "nothing" to do with the murder were elicited in violation of *Miranda*'s protections for the right to counsel. Moreover, the prosecutor proffered that if Fennell's exculpatory statement that Haggins had nothing to do with the murder were to be admitted in a separate trial of Haggins, the State would seek to undermine Fennell's out-of-court declaration with "other crimes" evidence that Haggins and Fennell worked together on other "drug buy" robberies. *Cf. Stewart v. State*, 151 Md. App. 425, 455-56 (2003) (affirming exclusion of declarant's exculpatory statement "that he acted alone" on ground that it was "entirely implausible, given that three people, almost half [the declarant's] age, were either seriously wounded or killed" in the fight). Citing that proffer and the continued association of Haggins and Fennell after the murder, the court determined those factors undermined the reliability of Fennell's exculpatory declarations. Based on this record, we cannot say that the trial court erred or abused its discretion in concluding that Fennell's statements were not sufficiently

corroborated and trustworthy to warrant the inference that they were truthful rather than designed to prevent Haggins from being charged.

Because Fennell was unavailable to testify, having indicated through counsel that he intended to invoke his Fifth Amendment privilege, this scenario presents the same type of hearsay "hazard" that precluded cross-examination predicated on the allegedly exculpatory statements in *Galicia*. Here, the co-defendant declarant cannot be questioned about his out-of-court statements elicited in violation of his constitutional rights, to determine whether he is "lying" in an effort to protect Haggins and/or whether his vague claim that Haggins had "nothing" to do with the shooting "misperceived" the legal significance of Haggins' actions as an accomplice. *See Galicia*, 479 Md. at 354. Nor is there another witness who could corroborate Fennell's sweeping exculpation of Haggins. *Cf. Roebuck*, 148 Md. App. at 592-93 (admitting hearsay statement that was "largely consistent" with the prosecution theory and corroborated by a third party).

Absent the protections that minimize these dangers "for in-court statements – the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine[,]" we agree with the motion court that Fennell's hearsay exculpation lacks both the adverse penal consequences and the reliability required for admission under the exception for statements against interest. *See Williamson*, 512 U.S. at 598; *Galicia*, 479 Md. at 354-55. Under these circumstances, the court did not err or abuse its discretion in concluding that Fennell's out-of-court statements were not admissible as statements against

interest and, on that basis, in denying Haggins' motion to sever his trial for the purpose of presenting evidence of those statements in his defense.

II. Voir Dire

Haggins next contends that the trial court erred in propounding compound voir dire questions that ran afoul of the procedural framework established by *Dingle v. State*, 361 Md. 1 (2000), *Pearson v. State*, 437 Md. 350, 361-64 (2014); and *Collins v. State*, 463 Md. 372 (2019). The State counters that "[b]y not objecting at the time of trial, Haggins has waived any objection to the court's questioning." Even "[i]f considered, the circuit court properly exercised its discretion in how it posed the two-part questions because they were not mandatory and . . . not the type of compound form disapproved by the" Supreme Court of Maryland.

We agree that Haggins waived any objections he had by failing to timely assert them before accepting the empaneled jury without qualification. In any event, we also conclude that the trial court did not err or abuse its discretion in conducting the challenged voir dire.

A. Standards Governing Voir Dire

"Voir dire, the process by which prospective jurors are examined to determine whether cause for disqualification exists, is the mechanism whereby the right to a fair and impartial jury, guaranteed by Art. 21 of the Maryland Declaration of Rights, is given substance." *Dingle*, 361 Md. at 9 (internal citations omitted). This Court "review[s] the trial judge's rulings on the record of the voir dire process as a whole for an abuse of discretion, that is, questioning that is not reasonably sufficient to test the jury for bias, partiality, or prejudice." *Washington v. State*, 425 Md. 306, 314 (2012).

The Supreme Court of Maryland has disapproved compound voir dire questions asking whether prospective jurors have "strong feelings" about a certain experience or association that would affect their ability to be fair and impartial. *See Dingle*, 361 Md. at 21. As the Court has explained, it is for the trial court, not the prospective juror, to "decide whether, and when, cause for disqualification exists for any particular venire person." *Id.* at 14. In *Pearson*, 437 Md. at 363-64, the Court held that trial courts should not pair required voir dire questions about whether members of the jury panel have "strong feelings" about certain crimes or trial participants with such an improper invitation for individual jurors to decide for themselves whether they can be fair and impartial. *Accord Collins*, 463 Md. at 379 (a "strong-feelings" question is improper when asked in a compound form that allows the individual panel members to determine whether their "strong feelings" about the charges in that case would make it "'difficult for you to fairly and impartially weigh the facts'").

"An appellate court reviews for abuse of discretion a trial court's decision as to whether to ask a *voir dire* question." *Pearson*, 437 Md. at 356. Because "Article 21 of the Maryland Declaration of Rights 'guarantees a defendant the right to examine prospective jurors to determine whether any cause exists for a juror's disqualification[,]'" any "'[f]ailure to allow questions that may show cause for disqualification is an abuse of discretion constituting reversible error.'" *Lopez-Villa v. State*, 478 Md. 1, 10 (2022) (citations omitted). "Yet, it remains a requirement that '[t]o preserve any claim involving a trial court's decision about whether to propound a [voir dire] question, a defendant must object to the court's ruling.'" *Id.* (citation omitted).

B. Relevant Voir Dire Record

As grounds for his voir dire challenge, Haggins points to the trial court's questions during voir dire conducted on the first of two days of jury selection. The court first asked members of the jury panel whether anyone knew any of trial participants, including the judge, prosecutor, defense counsel, and defendants. Only one person answered yes (Juror 62), but that individual was later questioned individually and determined to be able to render a fair and impartial verdict despite having worked with the voir dire and trial judges.

Next, the court asked panel members whether they knew any of the witnesses, prompting another affirmative answer (Juror 199). After noting the juror number, the court continued to the next question, without asking that individual whether he or she could be fair and impartial given that acquaintance.

The court then asked about prior service on a jury, as follows:

> Now, my next question is if you have an affirmative response to this question, I want you to stand and I'm going to go around the room and get your call-in number, but I'm going to ask you to remain standing and I'll have a follow-up question if you have a response to this question.
>
> The question is have any of you ever served on a trial jury before? That's a trial jury. Not Grand Jury. Trial jury. Whether civil or criminal, whether federal or state. If you have prior jury service officers [sic], please stand.
>
> Very good. All right. Probably the best thing to do is to start back there. Okay. Go ahead.

After noting the 25 members of the jury panel who responded by standing, the court continued with the following instructions:

> Now, as I told you earlier, if you had an affirmative response to some of these questions, we were going to identify your call-in number and have a follow-up question.
>
> For those of you who had prior jury service, whether state or federal, whether civil or criminal, would that prior experience prevent you or substantially impair you from rendering a fair and impartial verdict if selected as a juror in this case? If it would not, have a seat. If you think that it might, please remain standing.
>
> And everybody has had a seat.

The court continued by asking about racial bias, the presumption of innocence, credibility of witnesses including police officers and defense witnesses, "strong feelings concerning the allegations of a murder[,]" charges of "a similar offense" against themselves or an immediate family member, and any other reason for concern about participating in the case.

Next, the court questioned prospective jurors about fellow members of the panel:

> THE COURT: So you all had a chance to see each other this morning, haven't you? Interact, hang out. . . .

Well, my question relates to that actually.

Do any of you think you might know any other member of the jury panel?

When six jurors (Jurors 36, 83, 121, 144, 278, and 295) stood in response, the court followed up:

For whatever reason you responded to that last question, would the fact that you think you might know somebody else in the panel prevent you or substantially impair you from rendering a fair and impartial verdict if selected as a juror in this case? If it would not, have a seat. If you think that it might, please remain standing.

Everybody has had a seat.

Before beginning to voir dire individual jurors, the court reviewed the procedure for doing so, then invited counsel to raise any concerns about the group voir dire:

THE COURT: Anything additional from anybody before we ask the jurors to start coming in?

[COUNSEL FOR FENNELL]: Your Honor, I just have one question.

THE COURT: Sure, Ma'am.

[COUNSEL FOR FENNELL]: *On the questions about the prior jury service and then knowing if you know anybody, you asked that question would that render you fair and impartial.* Are you bringing them in for further voir dire?

THE COURT: No, I'm not.

[COUNSEL FOR FENNELL]: *I would object to those for the record because you are putting the decision on the juror whether they are fair and impartial.*

THE COURT: Well, you know, I understand that's what – I understand your argument and having done extensive research on voir dire, and when I say extensive, going back to 1905, it's my understanding that the Court requires a two-part question. Part one, to use Judge Murphy's example, have you ever been a member of the Red Cross. The answer is yes. Part two is would that prevent you or substantially impair you from rendering an impartial

> verdict. If the answer is no, then I don't need to follow up. The whole purpose of voir dire is not to give information to Counsel to exercise peremptory challenges, but rather to exercise challenges for cause.
>
> So I think this is not a *Dingle* situation. So your objection is noted.

(Emphasis added.)

Ultimately, four members of the venire panel who identified themselves as having prior jury service (Jurors 32, 55, 63, 65) were seated, and another (Juror 122) was seated as an alternate**.** None of the jurors who identified themselves as knowing another juror were seated.

After counsel for Fennell accepted the empaneled jury "subject to [the] prior exception that [she] stated on the record[,]" counsel for Haggins accepted the empaneled jury without exception.

C. Analysis

Haggins did not object to the voir dire questions he is now challenging. Under Maryland Rule 4-323(c), governing the method for objecting to rulings and orders other than evidentiary rulings, "it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court." Maryland Rule 4-323(d) further elaborates that, "[a] formal exception to a ruling or order of the court is not necessary."

Nevertheless, when reviewing an appellate claim of error during voir dire, "the plain language of Md. Rule 4-323(c) twice references that an objection or indication of disagreement must be made contemporaneous with the court's action." *Lopez-Villa*, 478 Md. at 11-12. "Without a contemporaneous objection or expression of disagreement, the

trial court is unable to correct, and the opposing party is unable to respond to, any alleged error in the action of the court." *Id*. at 13.

Consistent with this preservation requirement, appellate courts ordinarily will not review an issue unless it has been "raised in and decided by the trial court." *See* Md. Rule 8-131(a). Although we have discretion to review unpreserved issues, "appellate courts should rarely exercise" such discretion because

> considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

Chaney v. State, 397 Md. 460, 468 (2007). *Accord Ray v. State*, 435 Md. 1, 23 (2013).

Haggins acknowledges that he did not object to the court's voir dire questions, either at the time they were asked or before the jury was sworn. Nevertheless, he points to the objection by Fennell's counsel and requests relief under the doctrine of plain error.

Plain error review involves four steps:

> "(1) there must be an error or defect—some sort of 'deviation from a legal rule'—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant"; (2) "the legal error must be clear or obvious, rather than subject to reasonable dispute"; (3) "the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the [trial] court proceedings'"; and (4) the error must "seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings."

Newton v. State, 455 Md. 341, 364 (2017) (quoting *State v. Rich*, 415 Md. 567, 578 (2010)), *cert. denied*, 138 S. Ct. 665 (2018). Although granting plain error relief for improper voir dire is within this Court's discretion, *Kelly v. State*, 195 Md. App. 403, 433 (2010), it is –

and should remain – "a rare, rare phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003).

We decline to exercise our discretion to grant plain error relief in this case because doing so would undermine the important function of the preservation rules in protecting "fairness to the trial court, which should be permitted 'to resolve as many issues as possible so as to avoid unnecessary appeals'" and "fairness to opposing parties, who should be afforded the opportunity to respond to any alleged error in the court's ruling in their favor." *Lopez-Villa*, 478 Md. at 13 (citations omitted). Moreover, Haggins does not satisfy any of the plain error preconditions.

First, he affirmatively waived his right to complain about voir dire because, after failing to object to the questions when asked, then failing to join the exception asserted by counsel for Fennell, counsel for Haggins accepted – without qualification – all of the empaneled jurors. As in *Lopez-Villa*, 478 Md. at 16, Haggins never articulated his opposition to the questions he now challenges because counsel "did not merely object or disagree informally or without explanation; he did not object or disagree with the court's ruling at all."

Nor are we persuaded that the trial court erred in this voir dire. In contrast to the improper "strong feelings" questions addressed in *Dingle*, *Collins*, and *Pearson*, these fact-based questions merely asked members of the venire to stand (1) if they had previously served in a jury trial and (2) if they knew another juror. The court then asked jurors who stood to remain standing if they felt such experiences "might" affect their ability to be fair

and impartial in this case. All of the jurors sat, indicating that no one expressed a level of concern that triggered individual voir dire.

Unlike the questions disapproved in *Dingle* and progeny, this voir dire elicited objective factual information that was not "directly related to the crime, the witnesses, or the defendant." *Collins*, 463 Md. at 376-77. The court did not ask jurors to subjectively self-assess whether they had such "strong feelings" about those core matters that it would be "difficult for the prospective juror to be fair and impartial." *See Collins*, 463 Md. at 377.

Consequently, we do not view the challenged questions as improperly compound in that they shifted from the court to the juror, the decision regarding whether the jurors' subjective feelings about the crime, the witnesses, or the defendant impaired their ability to render an impartial verdict. *See generally id.* at 376-77 (explaining that collateral matters that may have undue influence over prospective jurors are "biases [that are] directly related to the crime, the witnesses, or the defendant") (quoting *Pearson*, 437 Md. at 356); *Thomas v. State*, 454 Md. 495, 508 (2017) ("'the questions should focus on issues particular to the defendant's case so that biases directly related to the crime, the witnesses, or the defendant may be uncovered'") (quoting *Dingle*, 361 Md. at 9). Likewise, we also are not persuaded that these questions "'affected the appellant's substantial rights'" in a manner that "'seriously affect[ed]'" both "'the outcome of'" his trial and "'the fairness, integrity or public reputation of judicial proceedings.'" *Newton*, 455 Md. at 364. Under these circumstances, we will not exercise our discretion to engage in plain error review.

For similar reasons, we are not persuaded that Haggins is entitled to relief on the ground that his counsel rendered ineffective assistance of counsel. Appellate courts generally do not consider ineffective assistance of counsel claims on direct appeal because "the trial record does not provide adequate detail upon which the reviewing court could base an assessment regarding whether counsel rendered ineffective assistance[.]" *Smith v. State*, 394 Md. 184, 199-200 (2006). This policy and practice reflects that "the character of counsel's representation is not the focus of the proceedings and there is no discussion of counsel's strategy supporting the conduct in issue." *Id*. at 200.

Although Haggins argues that trial counsel could not have had a "sound trial strategy" for failing to object, we discern strategically plausible reasons for such silence. Specifically, trial counsel might have preferred to keep individual jurors who answered "yes" to the challenged voir dire questions. Indeed, we note that counsel, despite knowing which individual jurors had previously served on a jury, chose not to exercise peremptory strikes against jurors who stood in response to the questions, despite ample opportunity to do so given that he used only four of his 20 strikes. Absent any opportunity to inquire into trial counsel's reasoning for accepting particular jurors, this Court cannot determine whether trial counsel's performance was ineffective or prejudicial.

III. Expert Opinion Testimony

Haggins next argues that the trial court erred in permitting FBI Special Agent Mathew Wilde to offer testimony about historical cell site analysis, including identifying which cell tower the two cellular phones recovered from Haggins and Fennell communicated with around the time of the shooting.[4] Although expert testimony is undisputedly required for such evidence, *see State v. Payne*, 440 Md. 680, 701-02 (2014); *Hall v. State*, 225 Md. App. 72, 93 (2015), Wilde was neither proffered, nor accepted as an expert witness.

As Haggins concedes, his trial counsel did not object on any ground to either Special Agent Wilde's testimony or his written report. Yet he once again contends that this Court should exercise its discretion to grant plain error relief. We again disagree.

[4] Because Fennell makes the identical argument in his consolidated appeal, our analysis and conclusion are the same in both cases.

A. Standards Governing Challenges to Expert Witness Testimony

A party who does not make timely objections to a witness' testimony "will be considered to have waived them and he cannot now raise such objections on appeal." *Breakfield v. State*, 195 Md. App. 377, 390 (2010) (quoting *Caviness v. State*, 244 Md. 575, 578 (1966)). As we have emphasized, only when there are "'compelling, extraordinary, exceptional or fundamental [circumstances] to assure the defendant a fair trial[,]'" do we consider unpreserved objections to evidence. *See State v. Brady*, 393 Md. 502, 509 (2006) (quoting *Conyers v. State*, 354 Md. 132, 171 (1999)). More specifically, the Supreme Court of Maryland has explained that an appellate court

> will intervene in those circumstances only when the error complained of was so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial. In that regard, we review the materiality of the error in the context in which it arose, giving due regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald inattention.

Robinson v. State, 410 Md. 91, 111 (2009) (citation and quotation marks omitted).

B. Analysis

Once again, none of the circumstances warranting plain error relief is present here. To the contrary, given the evidence of Special Agent Wilde's extensive and unchallenged qualifications to give such expert opinions, we agree with the State that the admission of his testimony and report, without a formal judicial declaration of his expertise, was purely technical error that was neither material, nor prejudicial.

During the fourth day of trial, the State presented three prior witnesses who were accepted as experts before testifying about latent prints, forensic pathology, and firearms

and toolmark identifications. When Special Agent Wilde was called to testify, the State elicited extensive background information about his experience, education, and training in analyzing historical call detail and phone records as a member of "a group of about 75 special agents and task force officers" on the FBI's Cellular Analysis Survey Team ("CAST"), then moved his resume into evidence. There was no objection to the introduction into evidence of his resume. Yet neither counsel, nor the court expressly addressed whether he could testify as an expert. Instead, he proceeded to review the contents and conclusions set forth in his written report, which was admitted into evidence without objection.

Even viewed in the light most favorable to the co-defendants, the apparently inadvertent omission of obtaining a formal ruling that Special Agent Wilde could testify as an expert was the result of inattention that ultimately did not prejudice either defendant. As the State points out, "[t]his was not a situation in which a person who was unqualified to offer expert testimony opined as to matters outside the scope of his expertise." Special Agent Wilde undisputedly worked for a specialized FBI unit dedicated to examining cell phone location data, has had 400+ hours of specialized training, recertifies his qualifications annually, and has been qualified to give expert testimony 98 times. Whether the prosecutor's failure to seek expert designation resulted from an inadvertent mistake, or defense counsel's failure to challenge his testimony and report resulted from a tacit waiver, the lack of expert qualification did not affect these defendants' "substantial rights," much less warrant the extraordinary relief of reversal. *See Rich*, 415 Md. at 578.

IV. Sufficiency Challenges

Haggins challenges the sufficiency of the evidence supporting his convictions for felony murder, attempted robbery with a dangerous weapon, and using a firearm in the commission of a crime of violence, on the ground that "the State failed to prove the conduct underlying those charges: attempted robbery." In Haggins' view,

> the surveillance footage from Southall Road reveals [that]there was no robbery, or even attempted robbery, in this case. When Derrick Towe-Williams approached the Suburban, Fennell exited the vehicle and *immediately* fired shots at him. Fennell made no attempt to take money or marijuana from Mr. Towe-Williams via force or threat of force. Indeed, the shooting took place so quickly that there was not enough time for a substantial step toward a robbery. And there was no attempted robbery after the shooting, either. Fennell did not go to Mr. Towe-Williams and try to take money or marijuana off his person after he fell down; he immediately left the scene. Thus, there was no evidence presented by the State that Fennell committed an attempted robbery. Accordingly, the three . . . convictions based on this predicate (felony murder, attempted robbery with a dangerous weapon, and use of a firearm in the commission of a crime of violence) must be reversed.

Although Haggins concedes that his trial counsel failed to preserve the sufficiency challenge to his firearm use conviction, he requests plain error relief from that conviction.

The State responds that Haggins "is wrong" about the insufficiency of the evidence because "[t]he surveillance video was consistent with the State's theory of the case" that Haggins was jointly responsible with Fennell as an accomplice, because they "planned to rob Williams, and . . . Fennell attempted to do so before fatally shooting" him. Nor is Haggins entitled to plain error relief with respect to his unpreserved challenge to his conviction for use of a firearm, the State argues, "because there was an attempted robbery[.]"

A. Standards Governing Sufficiency Challenges

This Court recently reviewed the standards governing a sufficiency challenge to a felony murder conviction predicated on a robbery or attempted robbery, explaining:

> A murder "committed in the perpetration of or an attempt to perpetrate . . . robbery" is murder in the first-degree. Crim. Law § 2-201(a)(4)(ix). We have defined robbery as "the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence or putting in fear." *Thomas v. State*, 128 Md. App. 274, 299 (1999). . . . "In order to sustain a conviction for felony-murder, the intent to commit the underlying felony must exist prior to or concurrent with the performance of the act causing the death of the victim." *State v. Allen*, 387 Md. 389, 402 (2005).

Purnell v. State, 250 Md. App. 703, 718-19, *cert. denied*, 476 Md. 252 (2021).

Both at trial and in this appeal, the State's prosecution theory has been that the predicate felony for first degree felony murder was attempted robbery. "A defendant is guilty of an attempted armed robbery if, 'with intent to commit [armed robbery], he engages in conduct which constitutes a substantial step toward the commission of that crime whether or not his intention is accomplished.'" *Bates v. State*, 127 Md. App. 678, 688 (1999) *overruled on other grounds by Tate v. State*, 176 Md. App. 365 (2007) (quoting *Young v. State*, 303 Md. 298, 311 (1985) (adopting substantial step test for attempts in general)). "Violence to a person with an intent to steal and the larceny not consummated is not robbery but attempted robbery." *Purnell*, 250 Md. App. at 721 (quoting *Cooper v. State*, 14 Md. App. 106, 117 (1972)). Consequently, "the fact that the intended robbery was not consummated does not preclude the attempted robbery from supporting a felony-murder conviction." *Id.* at 722 (citing Crim. Law § 2-201(a)(4)(ix) ("A murder is in the

first degree if it is committed in the perpetration of or an attempt to perpetrate . . . robbery")).

Our task in evaluating whether evidence was sufficient to convict on a first degree felony murder charge is "to assess whether any rational trier of fact could have found that [the] Appellant killed [the] Decedent during the commission or attempted commission of a felony specified under Crim. Law § 2-201(a)(4)(i-xii)." *Id.* at 718. As we pointed out in that attempted robbery/felony murder case,

> "[w]hen dealing with the issue of legal sufficiency in a jury trial, we are dealing only with the satisfaction of the burden of production." Importantly, "[i]n examining the satisfaction of that burden of production, the test of the legal sufficiency of the evidence to support the conviction is the same in a jury trial and in a bench trial." In either case, "'the question is whether, after viewing the evidence in the light most favorable to the [State], any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"
>
> Moreover, because this is a challenge to the legal sufficiency of the evidence, we review the sufficiency of the evidence *de novo*. When reviewing the legal sufficiency of evidence to sustain a verdict, we are "not concerned with what a factfinder . . . d[id] with the evidence." Instead, we are concerned with what a factfinder "could have done with the evidence." Accordingly, we will assess the evidence presented against Appellant at trial in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of first-degree [felony] murder based on that evidence.

Id. at 710-11 (citations omitted).

B. Analysis

We agree with the State that the jury could have found "that Williams' death was the result of a botched robbery" based on the following evidence presented at trial:

- Williams was known to sell marijuana to family and friends. Haggins knew Williams because he used to live on the same street about three houses away.

- On the morning of the murder, Haggins texted Fennell, asking him to take him somewhere when he woke up and stating that he wanted "a OZ real quick[,]" which the State's primary detective and narcotics investigator testified was slang for obtaining marijuana.

- When the person whom Fennell first contacted did not answer, Fennell called Derrick Towe-Williams.

- By 10 a.m., Haggins was en route to pick up Fennell, and their cell phones remained in the same area at the time of the murder and beyond.

- At 11:08 a.m., surveillance cameras recorded a Chevrolet Suburban, registered to Haggins, drive past Williams' house, then pull over along the curb a few houses away.

- According to Detective Mark C. Fisher, lead investigator, many drug transactions in Baltimore County are conducted via car, in a parking lot or a street.

- A 43 second call from Fennell's phone to Williams' phone occurred at 11:12 a.m. Five minutes later, at 11:17 a.m., a 24 second call from Williams' phone connected to Fennell's phone.

- A videorecording shows Williams approach the Suburban, while holding a phone in a manner consistent with being on his 11:17 a.m. call to Fennell's phone.

- When Williams moved to open the back passenger door, a man wearing a mask and carrying a handgun emerged from the front passenger seat.

- Two fingerprints on the interior window of that front passenger door were later matched to Fennell.

- When Williams stepped toward him, the masked individual fired, hitting Williams in the chest. As Williams attempted to flee, the masked individual fired again, hitting Williams in the back.

- The shooter returned to the Suburban, which drove away with the front passenger door still open. Police identified Haggins as the registered owner of the vehicle, which they recovered the next day, hidden behind his relative's house.

- Williams died on the sidewalk, with fatal gunshot wounds to his chest and back. His cell phone lay next to his hand. He was carrying $48.47 and two bags of marijuana weighing a total of 16 ounces with a street value of $160 to $350 depending on its grade and strength.

- The last call made on Williams phone was to Fennell's phone number. When Williams' friend called that number at 11:56 p.m. that day, he told the person who answered, "Derrick's dead." The person responded that Williams was dealing drugs. That was the last call or data ever logged by Fennell's phone.

Based on this evidence, the State argued in closing that Haggins and Fennell planned to steal marijuana and/or money from Williams. The prosecutor asked the jury to find that because Haggins knew Williams, Fennell set up a fake buy using Fennell's phone so it could not be connected to Haggins. Haggins drove his vehicle, while Fennell rode in the front passenger seat, armed with a disguise and a handgun.

We agree with the State that the jury could reasonably infer from this evidence that Haggins and Fennell jointly planned to rob Williams when he came out to the vehicle to exchange marijuana for money. As the State argued in closing, Haggins was the person who initially wanted to buy marijuana and knew Williams from living a few houses away. Yet it was Fennell who communicated with Williams. After Fennell arranged the meeting, Haggins drove Fennell to Williams' house, but otherwise concealed his involvement in the encounter from Williams.

The evidence is sufficient to show that Fennell was armed and masked as he sat next to Haggins in the Suburban. After Fennell called Williams, he came out of his house, carrying marijuana in an amount and packaging consistent with street sales. While talking

to Fennell on the phone, Williams approached Haggins' vehicle, moving toward the rear passenger door. This elevated the risk that Williams would see and recognize Haggins.

At that point, Fennell jumped out of the front passenger seat. In a matter of seconds, Williams took steps toward Fennell, who then shot him. When Williams turned to run, Fennell shot him again.

Williams fell to the sidewalk, fatally wounded, in full daylight view of any witnesses on that residential street. Fennell jumped back into the Suburban. Haggins drove away, with the passenger door still open.

Although Haggins contends that the shooting took place too quickly for any robbery attempt to have occurred, neither the video, nor the timeline of the encounter precludes the attempted robbery scenario articulated by the State. Specifically, the evidence shows that while Williams came out to the car talking on his phone to Fennell, Fennell jumped out wearing a mask and carrying a gun. Contrary to Haggins' characterization of the shooting as occurring "immediately" after the gunman exited the vehicle, the surveillance footage shows Williams taking steps toward the gunman before the first shot.

Based on this evidence, jurors could reasonably find that Fennell perceived Williams' movements, first toward the rear passenger door and then toward Fennell, as threatening the plan to commit an anonymous robbery, which in turn triggered Fennell to shoot. Alternatively, the jury could infer that while Williams approached the Suburban talking to Fennell on the phone, Fennell demanded his marijuana and/or cash. In either scenario, Haggins took a substantial step toward the robbery by participating in the set-up – supplying Fennell with Williams' name and phone number, driving to Haggins' old

neighborhood, standing by as his armed and masked passenger confronted Williams, driving the getaway car after the shooting, concealing that vehicle, and continuing to associate with Fennell until they were arrested together.

This evidence amply supports the jury's determination that Haggins took a "substantial step" toward robbing Williams before shots were fired. Haggins is the person who connected the victim with Fennell, drove to the encounter, stood by as Fennell masked himself and shot the victim, then drove Fennell away from the scene, gave Fennell use and possession of his phone, concealed the getaway vehicle, and was still in Fennell's company two days later when they were arrested. The fact that there was no attempt to take anything from Williams after he was shot is not dispositive. *See Purnell*, 250 Md. App. at 721. Instead, the jury was free to conclude that after the victim approached the would-be robbers' vehicle in a manner that threatened their anonymity and/or their plan, the encounter escalated from an attempted robbery into a completed murder. In turn, the evidence was also sufficient to support the guilty verdicts on the first degree murder and firearm use charges.

CONCLUSION

We are not persuaded by Haggins' challenges to his convictions for first degree murder, attempted robbery, use of a firearm in committing a crime of violence, and unlawful possession of a firearm after a disqualifying conviction. Specifically, the motion court did not err or abuse its discretion in denying Haggins' motion to sever his trial from that of his co-defendant Cory Fennell. Likewise, the trial court did not err or abuse its discretion in propounding voir dire questions or in admitting expert testimony regarding

historical cell phone data. Because the evidence is sufficient to convict Haggins of felony murder committed during an attempted robbery with a firearm, we shall affirm the judgments of conviction.

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