Circuit Court for Baltimore County
Case No. 03-K-16-3867

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1540

September Term, 2017

HERIBERTO RODRIGUEZ GUTIERREZ

v.

STATE OF MARYLAND

Graeff,
Arthur,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: February 14, 2019

Appellant, Heriberto Rodriguez Gutierrez (Gutierrez), and his co-defendant, David Carranza-Tobar (Carranza-Tobar), were convicted by the Circuit Court for Baltimore County, after a joint bench trial, of attempted first degree rape, second degree assault, and false imprisonment. Both received life sentences, with all but ten years suspended, for the attempted first degree rape conviction. The court merged the second degree assault conviction with the attempted first degree rape conviction, and imposed on each man a concurrent one-year sentence for the false imprisonment conviction.

QUESTIONS PRESENTED

Gutierrez presents the following questions for our potential consideration:

> 1. Did the trial court err by finding no discovery violation and refusing to strike the SAFE nurse's testimony, after the State failed to disclose the substance of the expert's opinion about the cause of [the victim's] injuries?[1]
> 2. Was Gutierrez's constitutional right to confrontation violated by the admission of DNA evidence, when he was not given the opportunity to cross-examine analysts involved in the processing of the evidence?
> 3. Did the trial court have jurisdiction to sentence Gutierrez for attempted rape in the first degree, where the State failed to properly charge the offense?
> 4. Did the trial court have jurisdiction to sentence Gutierrez for attempted rape in the first degree when the actual verdict the court announced was for rape in the first degree, an offense with which Gutierrez was not charged?[1]

Carranza-Tobar's appeal was decided shortly before Gutierrez's appeal. There is commonality between some of the questions presented in these appeals. Thus, we shall incorporate and adopt by reference parts of the unreported opinion in *Carranza-Tobar v.*

[1] Both Gutierrez and Carranza-Tobar raised essentially these common questions in their respective appeals.

State, No. 1539, Sept. Term, 2017 (filed 24 January 2019). Consistent with the panel's analysis in Carranza-Tobar's appeal regarding the common Question I, we shall reverse also the conviction of Gutierrez for attempted first degree rape and remand for further proceedings. Consistent with the disposition of Carranza-Tobar's Question III, which is common to Gutierrez's fourth question, we find Gutierrez's Question IV to be moot. As for Gutierrez's second Question, he and Carranza-Tobar present dissimilar contentions regarding the DNA evidence, which obliges us to engage in an independent analysis of Gutierrez's DNA challenge. We shall answer Gutierrez's Question II in the negative. As for Gutierrez's third question, which is presented on appeal facially as a jurisdictional challenge, his argument is, in substance, rather one of lack of notice on the face of the indictment. Lack of notice was not raised before the trial court. Therefore, Gutierrez waived his right to challenge on appeal the facial sufficiency of the indictment on notice grounds.

FACTUAL AND PROCEDURAL BACKGROUND

We adopt and incorporate by reference the factual narrative in *Carranza-Tobar v. State*, (slip op. at 2-7), and supplement that in the course of our analysis of Gutierrez's questions as they may differ from those raised by Carranza-Tobar. Nonetheless, for contextual reasons, we parrot here some of the facts recited in *Carranza-Tobar*.

Carranza-Tobar, Gutierrez, and the alleged victim, Ms. G., were ensconced in a bar in Baltimore County on 1 July 2016 and into the wee hours of 2 July 2016. It is unclear how many drinks Ms. G. consumed exactly, but testimony at trial revealed her to be "really drunk." Staff at the bar requested Ms. G. to leave. Gutierrez offered to drive her home.

Ms. G. accepted the offer and entered into a van with Gutierrez, Carranza-Tobar, and another man (who was never identified on this record). According to Ms. G., one man was seated behind her, while the other two were seated in the front passenger and driver seats. With the man behind her covering her mouth, the other men hit her on the head and removed her shoes and underwear as she struggled to escape from the van. Ms. G.'s underwear was around her knees when she lost consciousness. When Ms. G. awoke, her skirt was "all the way up" and one man was on top of her. She pushed the man off, and the men then pushed her out of the van.

Ms. G. sought help from a nearby residence. The homeowner called the police. The police arrived at approximately 3:00 a.m. and took Ms. G. to the hospital. At the hospital, Nurse Rosalyn Berkowitz, a SAFE nurse, conducted a SAFE examination.[2]

Police reviewed surveillance video taken from outside the bar, identified the van in question, and arrested two (Gutierrez and Carranza-Tobar) of the three men that were inside of the van when the incident occurred. It was determined that Gutierrez was the driver of the van.[3] During a search of the van, police found Ms. G.'s phone, wallet, underwear, and shoes. Gutierrez was arrested on 2 July 2016.

[2] The acronym SAFE stands for "Sexual Assault Forensic Examinations." The purpose of a SAFE exam, as testified to by Berkowitz at trial, is to:

> do a thorough head to toe nursing assessment for the purpose of diagnosis and treatment. A nursing assessment is the basis of everything we do in nursing. In addition[,] we obtain a thorough medical exam, as well as a thorough forensic exam and guide or exam to retain any residual evidence, as well as address any medical . . . concerns the patient might have.

[3] Carranza-Tobar was the man seated behind Ms. G. The unidentified man in the front-passenger seat was not charged.

Trial began on 20 June 2017. Berkowitz testified as an expert on behalf of the State. Her written report of the SAFE examination, which had diagrams and notes indicating, among other things, that she had identified bruising, swelling, and abrasions on Ms. G.'s inner thigh (near her groin), was received in evidence.[4] Berkowitz's report did not include any opinions or conclusions regarding the physical findings. Berkowitz testified, however, that she concluded, based on a reasonable degree of medical certainty, that the bruising on Ms. G.'s inner thigh was "consistent with finger tip bruising" from "trying to push the thigh[s] apart."

In the course of their investigation, the police recovered material from underneath Ms. G.'s fingernails, which was sent to Bode Cellmark Forensics (Cellmark) for DNA analysis and comparison to DNA profiles to be developed from buccal swabs from Carranza-Tobar and Gutierrez. Elana Bemelmans (Bemelmans), an employee at Cellmark, testified as an expert on behalf of the State regarding the DNA analysis. Bemelmans evaluated the developed data, some compiled substantively from her lab work regarding the recovered fingernail scrapings and some resulting from other Cellmark analysts who extracted the DNA profiles from the buccal swabs of Gutierrez and Carranza-Tobar, and reached a conclusion. She testified that, after comparing the unknown contributor(s') DNA profiles generated from the analysis of the fingernail materials (the evidence sample) and the known-contributor biological samples from Gutierrez and Carranza-Tobar (the reference samples), she "could not exclude the [co-defendants]" as matches to the material

[4] The report had been given in discovery to the defense prior to trial, when the State designated her as an expert witness to be called to testify consistent with her written report.

removed from underneath Ms. G.'s fingernails.

The court, in rendering its verdict, stated:

> After taking everything into account, the Court finds [as] follows: I find that the State has proven beyond a reasonable doubt that as to Count 1, both Defendants are guilty of first-degree rape. I find that the evidence is beyond a reasonable doubt that the Defendants are guilty of second-degree assault, Count 3. Count 4, the State has failed to meet its burden of proof as to Count 4, and I find the Defendants not guilty of theft. Finally, as to Count 5, I find that the State has met its burden beyond a reasonable doubt and find both Defendants guilty of false imprisonment. I did not consider attempted second-degree rape as I believe finding of first-degree rape renders this finding of second-degree rape a nullity.

Appellants filed a Motion for Appropriate Relief, requesting that the court dismiss Counts 1 and 2 on the ground that the announced verdicts were for the substantive crime of rape, rather than the charge of attempted rape. The court denied the motion.

DISCUSSION

I. Pretrial Discovery Error

Gutierrez urges that the trial court erred by refusing to strike Berkowitz's expert opinion testimony because the State did not disclose in pre-trial discovery the substance of the expert's opinion regarding the potential inculpatory cause of Ms. G.'s physical injuries, specifically regarding a potential cause of the bruising on Ms. G.'s legs. Berkowitz testified, on direct examination:

> [The bruises] are consistent with finger tip [sic] bruising trying to push the thigh apart, and the elliptical one is the finger that is pushing away instead of just holding straight down, because if you're pushing, you make more contact. It's a longer area of contact with the skin.

The State, in pretrial discovery, failed to disclose specifically that Berkowitz would

offer an expert opinion on the cause of Ms. G.'s injury. On cross-examination, Berkowitz acknowledged: "I don't indicate cause of injury in my report." At that point, defense counsel moved to strike Berkowitz's testimony on the grounds that her opinion about the cause of Ms. G.'s injuries exceeded in scope what was provided in pretrial discovery. The court denied the objection and allowed the testimony. The court stated that the defendants were "on notice that Ms. Berkowitz would be testifying as to the cause of the injuries, there were no objections to that testimony, and I will not strike it."

The State argues that any objection to Berkowitz's expert testimony was not preserved because the objection was not made "contemporaneously with the testimony at issue," but rather, the objection was made after defense counsel cross-examined her extensively over two days. If we were to reach the merits of the claim, the State argues further that the trial judge did not abuse his discretion in allowing Berkowitz's testimony.

Because Gutierrez's and the State's arguments regarding this question are the same as those raised by Carranza-Tobar and the State in the latter's appeal, we adopt and incorporate here by reference the relevant portions of our earlier unreported opinion in Carranza-Tobar's appeal. *See Carranza-Tobar v. State*, No. 1539, Sept. Term, 2017 (filed 24 January 2019) (slip op. at 7-14).

II. Confrontation Clause Violation?

Gutierrez argues that his constitutional right to confrontation was violated by the admission against him of inculpating DNA evidence.[5] The gist of this contention is that

[5] Carranza-Tobar's challenge to the admission of the DNA evidence was grounded as a Maryland Rules and state common law violation, but did not advance a Confrontation

the State failed to produce at trial testimony from Cellmark personnel, other than Bemelmans, who worked on developing the DNA evidence.

Cellmark, at the request of the police, performed a DNA comparison of organic material taken from under Ms. G.'s fingernails and buccal swabs from Gutierrez and Carranza-Tobar. At least five Cellmark employees performed various steps of the analytical processes. One technician "cut the reference of the known standards" samples [i.e., the buccal swabs from Gutierrez and Carranza-Tobar] and placed "a small sampling . . . into a tube." A different employee then "extracted the references [cut by the first employee], amped the references and loaded the references." A third employee "quantified the references," while a fourth "analyzed the results of that quantification." Elana Bemelmans, self-described as "one of the team members," analyzed personally the results of all testing and conducted herself the substantive steps in the development of DNA profiles from the fingernail scrapings, compared those results to those reached regarding the reference samples, and authored the final Forensic Case Report.

The State called Bemelmans at trial as its sole DNA expert. She testified, most pertinently here, that she concluded, based on the comparative DNA analysis performed, that Gutierrez "cannot be excluded as a possible contributor" of the DNA samples extracted from underneath Ms. G.'s fingernails.

Defense counsel moved to strike Bemelmans's testimony and preclude admission of the Report (State's Exhibit 18). Counsel argued that admission of the Report through

Clause argument. Hence, we shall undertake an independent analysis of Gutierrez's contention.

Bemelmans violated Gutierrez's rights under the Confrontation Clause of the United States Constitution to be confronted by the non-testifying Cellmark technicians who labored in the testing, particularly of the reference samples. The court denied the motion, stating that "the testimonial portion of the evidence in this case is the report . . . [and] the testimony which was rendered by the witness with regard to the conclusions and the description of the analysis."

A. Standard of review.

We give no deference to the trial court's ruling in our consideration of whether the admission of evidence violated a defendant's constitutional right. *Taylor v. State*, 226 Md. App. 317, 332 (2016).

B. Analytical framework.

Recent jurisprudence interpreting the right of confrontation, particularly with regard to forensic evidence, has traveled a long and winding road (apologies to The Beatles). We shall attempt to capture in a nutshell its principal teachings.

The Sixth Amendment to the United States Constitution provides, in relevant part: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. Const. art. VI. The Maryland Declaration of Rights provides to the accused an identical right. *See* Md. Decl. Rts., Art. 21.

The Supreme Court began this recent journey by holding that "[t]estimonial statements of witnesses absent from trial" are admissible under the Confrontation Clause of the Sixth Amendment "only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington*, 541

U.S. 36, 59 (2004). The Court provided a variety of possible "formulations":

> material such as affidavits, custodial interrogations, prior testimony that the defendant was able to cross-examine, or similar pre-trial statements that declarants would reasonably expect to be used prosecutorially, extrajudicial statements . . . contained in formalized, testimonial materials, such as . . . statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51-52 (internal quotations and citations omitted). *See also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307 (2007) (applying *Crawford*'s bar against out-of-court testimonial statements to affidavits reporting the results of forensic analysis which identified a substance as cocaine); *Bullcoming v. New Mexico*, 564 U.S. 647, 651 (2011) (holding that a report regarding the defendant's blood-alcohol concentration was testimonial and thus, the defendant had the right to confront the analyst who certified the report).

The Supreme Court refined further its thinking, in *Williams v. Illinois*, 567 U.S. 50 (2012), regarding the test(s) for when expert testimony regarding forensic laboratory reports might violate *Crawford*. In *Williams*, the prosecution called a specialist as an expert witness who testified that a DNA profile from a test performed at an outside laboratory matched the DNA profile produced by the State. *Id*. at 56.[6] The expert was asked on direct examination whether she "concluded that [petitioner] cannot be excluded as a possible source of [the DNA]," to which she responded "yes." *Id.* at 62. The expert was cross-examined and made no statement that was offered for the purpose of identifying the sample

[6] The DNA profile report from the outside laboratory was not admitted into evidence nor exposed to the trier of fact.

of biological material used in deriving the profile or for the purpose of establishing how the outside laboratory handled or tested the sample.

In a 4-1-4 plurality opinion authored by Justice Alito, the Court found no Confrontation Clause violation. The plurality opinion advanced two rationales for concluding that the testimony of the expert witness did not violate *Crawford*: 1) the statement was not offered for its truth, taking it from within the confines of the protections afforded by the Confrontation Clause; and, 2) the report from the outside laboratory was not testimonial because it was not produced for the primary purpose of accusing a "targeted" individual. *Id*. at 57-58.[7]

Justice Thomas, concurring in the judgment reached in the plurality's opinion, rested his concurrence on a different basis, i.e., the lack of "solemnity and formality" of the DNA report provided by the third-party laboratory. *Id.* at 104 (Thomas, J., concurring in judgment). He concluded that the report at issue was not testimonial under *Crawford* because it "lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact." *Id*. at 111 (Thomas, J., concurring in judgment).

Our Court of Appeals considered thereafter whether "a Forensic DNA Case Report . . . containing the language of 'within a reasonable degree of scientific certainty', was testimonial within the meaning of *Williams*." *State v. Norton*, 443 Md. 517, 519, 117 A.3d 1055, 1056 (2015) (internal citation omitted). The Court reached the conclusion that the Forensic DNA Case Report, which stated that DNA recovered from the victim's person

[7] The defendant was not identified as a possible suspect at the time of the DNA analysis by the third-party laboratory.

matched the defendant's DNA "within a reasonable degree of scientific certainty[,]" rendered the Report testimonial. *Id.* In reaching this conclusion, the Court of Appeals expressed its hope to "guide our [] courts, when reviewing the admissibility of forensic documents under the Confrontation Clause, to consider first, whether the report in issue is formal, as analyzed by Justice Thomas [in *Williams*], or, if not, whether it is accusatory, in that it targets an individual as having engaged in criminal conduct, under Justice Alito's rationale [in *Williams*]." *Id.* at 547, A.3d 1055 (internal citations omitted). Good soldiers that we are, we consider Gutierrez's contentions under the *Norton* framework.

i. *Was the Cellmark Report "formal"?*

We consider first whether the Report here reflected the "'solemnity of an affidavit or deposition,'" *State v. Norton*, 443 Md. 517, 547–48, 117 A.3d 1055, 1073 (2015) (quoting *Williams*, 567 U.S. at 111 (Thomas, J., concurring in judgment)).

In *Norton*, the DNA report contained the "talismanic" phrase "within a reasonable degree of scientific certainty." Without such a phrase, "the testimony cannot cross the threshold of acceptance by the judge as gatekeeper." *Norton*, 443 Md. 547–49, 117 A.3d 1073. Additionally, the report was deemed testimonial "because it was certified and was signed by the analyst who had performed the test, indicating that the analyst's results had been validated according to federal standards." *Id*. at 546, A.3d 1074.

Bemelmans performed (1) the substantive parts of the testing analysis of the evidence sample, i.e., the unknown contributor(s) of the fingernail scrapings taken from Ms. G., and the development of the resultant DNA profiles; and, (2) the comparison and statistical analysis of those results with the DNA profiles developed by her colleagues from

the known contributor buccal swabs, to reach the conclusion that Gutierrez could not be excluded as a contributor to the DNA samples taken from underneath Ms. G.'s fingernails.

Unlike in *Norton*, the "talismanic" phrase "within a reasonable degree of scientific certainty" was not used by Bemelmans to enshrine her conclusions. Rather, Bemelmans's Report included the following statement:

> Testing performed for this case is in compliance with accredited procedures under the laboratory's ISO/ID 17025 accreditation issued by ASCLD/LAB. Refer to certificate and scope of accreditation for Certificate Number ALI-231-T.

Additionally, a computer disk certifying that Cellmark was an "accredited lab that complies with the FBI's requirements" was provided with the Report.

There is nothing to indicate that Bemelmans's Report was a sworn declaration of fact or contained other indicia reflecting the solemnity of an affidavit or deposition. The Report was not prepared under oath and contains no language that could be construed reasonably as a formal certification. The pertinent statement in the Report and disk accompanying it describe merely the lab's accreditation for credentialing purposes, not for any formal or solemn purpose. As such, the Report lacked the requisites identified in Justice Thomas's test.

ii. *Even if the Report was "formal" sufficiently, was it testimonial, i.e., accusatory?*

Unlike in *Williams*, Gutierrez and his co-defendant, Carranza-Tobar, were identified as suspects prior to the analysis of DNA evidence by a Cellmark. This distinction is, however, not consequential here. We explain. As Justice Alito elaborated:

> When lab technicians are asked to work on the production of a DNA profile, they often have no idea what the consequences of their work will be. In some cases, a DNA profile may provide powerful incriminating evidence against a person who is identified either before or after the profile is completed. But in others, the primary effect of the profile is to exonerate a suspect who has been charged or is under investigation. The technicians who prepare a DNA profile generally have no way of knowing whether it will turn out to be incriminating or exonerating—or both.
>
> It is also significant that in many labs, numerous technicians work on each DNA profile. When the work of a lab is divided up in such a way, it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures.

Williams, 567 U.S. at 85.

That part of the Report in the present case contributed through the work of non-testifying lab technicians is not testimonial, i.e., accusatory, within the meaning of Confrontation Clause jurisprudence. The non-testifying technicians involved in the testing process of the buccal swabs from the known contributors did not know whether the results of their testing would be deemed inculpatory or exculpatory regarding any particular crime(s) alleged to have been committed by Gutierrez or Carranza-Tobar. Rather, they performed his or her assignment to develop DNA profiles for someone else to consider/compare with other test results, in accord with accepted procedures at Cellmark. The results of the testing of Gutierrez's known DNA sample (later used by Bemelmans to compare to the results of the testing of the material found under Ms. G.'s fingernails contributed by an unknown person or persons) are displayed merely as two columns of numbers. Although the columns are labeled with the respective co-defendant's name, such labeling does not put the technicians on notice that either contributor was accused of a crime or crimes. The labeling served only to distinguish which reference sample belongs

to which contributor in order to prevent confusion.

Bemelmans's substantive testing of the fingernail scrapings, her comparison of those results with the other technicians' results from testing the reference specimens, and her written Report could be considered testimonial/accusatory under Justice Alito's test. She testified Gutierrez "cannot be excluded" as a possible contributor of the DNA extracted from Ms. G.'s fingernails. Bemelmans, in her analysis of the evidence sample, performed the "extraction, quantification, amplification and the 31/30 set up of the [evidence] samples." On cross-examination by Gutierrez's defense counsel, she was asked: "[Q]: that means that you took the sample and mixed it with the things it needs to be mixed with and put it in a machine to have the machine multiply it? [A]: That is – yes."[8] Any Confrontation Clause concerns, however, evaporate because she was subject to cross-examination as to the testimonial/accusatory aspects of the developed DNA evidence.

We conclude, therefore, that the admission of Bemelmans's testimony and Report did not violate, to any cognizable degree, Gutierrez's Confrontation Clause rights under the U.S. Constitution or the Maryland Declaration of Rights.

[8] To be sure, two technicians, other than Bemelmans, played minor roles in the preparation of the unknown-contributor sample for testing. One technician "cut the sample," which, according to Bemelmans, consists of "tak[ing] a small sampling from the submitted [material], plac[ing] it into a tube . . . seal[ing] it and plac[ing] it in a secure room for me to come and pick up or whoever processed that next item." The second technician "microconned" the sample. Bemelmans testified that "microconning" is "a concentration step . . . we have to concentrate the sample from a volume of usually 48 microliters down to somewhere between 22 to 25 microliters." When asked on redirect whether she "did the processing in order to prepare the DNA for analysis" and whether she "made the conclusions and statistics" in regards to the evidence samples, Bemelmans responded in the affirmative. To the extent that Bemelmans's substantive lab work, the Report, and her opinion were accusatory, she performed that work herself.

III. Jurisdiction?

Gutierrez argues on appeal that the indictment was defective, characterized as a jurisdiction defect, because the State failed to charge properly the offense of attempted rape in the first degree. The first count of the issued indictment alleged:

> on about 7/2/2016, in Baltimore County, did unlawfully attempt to commit a rape upon [Ms. G]; against the peace, government and dignity of the State. (Attempted First Degree Rape, Criminal Law Article 3-309, 2A1120)

Md. Code, Crim. Law § 3-317, Rape and sexual offense—Charging document, guides the charging of attempted rape in the first degree:

> (a) An indictment, information, or warrant for a crime under § 3-303, § 3-304, §§ 3-307 through 3-310, or § 3-314 of this subtitle is sufficient if it substantially states:
>
> "(name of defendant) on (date) in (county) committed a rape or sexual offense on (name of victim) in violation of (section violated) against the peace, government, and dignity of the State."
>
> (b) In a case in which the general form of indictment, information, or warrant described in subsection (a) of this section is used, the defendant is entitled to a bill of particulars specifically setting forth the allegations against the defendant.

Gutierrez alleges that the body of the indictment failed to identify the specific section of the Code violated or the degree of rape he attempted allegedly. He claims further that the statutory citation contained in the parenthetical following the text of the charge did not cure the fatal error. *See In re Areal B.*, 177 Md. App. 708, 714, 938 A.2d 43, 47 (2007) ("It is well settled that the scope of the charge is limited by the allegation in the document, not in the statutory citation."); *Thompson v. State*, 371 Md. 473, 489, 810 A.2d 435, 445 (2002) (stating that the "character of the offense" is determined by the text contained in

body of the indictment rather than the statutory reference or caption); *Ayre v. State*, 291 Md. 155, 168, 433 A.2d 1150, 1158 (1981) (1981) (explaining that a statutory reference in a charging document "possesses no substance of its own."). Although Gutierrez did not raise this challenge in the trial court, he falls back for succor on *Williams v. State*, 302 Md. 787, 792, 490 A.2d 1277, 1280 (1985), which holds that jurisdictional arguments relating to charging documents may be raised at any time, even for the first time on appeal.

The State responds that, by alleging "the body of the charge failed to identify the specific section violated or the degree of rape he allegedly attempted[,]" the complaint raised by Gutierrez attacks the notice purpose served by an indictment, which has no jurisdictional implication. Unlike jurisdictional challenges, challenges to the sufficiency (or lack) of notice given by a charging document are waived by failing to move to dismiss the indictment at trial.

Gutierrez's argument claims essentially that the indictment failed to place him on sufficient notice as to the exact crime for which he was charged. "Where the claimed defect is not jurisdictional, it must be seasonably raised before the trial court or it is waived." *Williams*, 302 Md. at 792, 490 A.2d at 1280. Although he couches his appellate argument as jurisdictional (in an apparent effort to skirt the fact that he failed to advance below any notice defect), this stratagem shall fail. Gutierrez, in failing to raise lack of notice before the trial court, waived his right to advance this position on appeal. We shall not address it on the merits.

IV. Was the trial court's verdict on Count I valid?

Gutierrez's fourth question is essentially the same as mounted by his co-defendant,

Carranza-Tobar, in the third question presented in the latter's appeal. Accordingly, we adopt and incorporate by reference that part of Judge Graeff's opinion and conclusion for this panel in the unreported opinion in *Carranza-Tobar v. State*, No. 1539, Sept. Term, 2017 (filed 24 January 2019) (slip op. at 2, fn. 2), finding moot this question.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANT.