Circuit Court for Baltimore County
Case No. C-03-CR-19-000076

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1601

September Term, 2019

De'Shon Rodgers

v.

State of Maryland

Leahy,
Shaw,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: November 14, 2022

This case returns to us on remand from the Court of Appeals for reconsideration of our holding in *Rodgers v. State*, No. 1601, slip op. (filed Aug. 2, 2021) (*Rodgers I*) in light of the Court's decision in *Lopez-Villa v. State*, 478 Md. 1 (2022), filed shortly after our decision in *Rodgers I.* Specifically, the Court of Appeals has directed that we "consider whether or not the holding in [*Lopez-Villa*] should be applied" to our holding in *Rodgers I* concerning whether the trial court erred by not asking requested *voir dire* questions now required under *Kazadi v. State*, 467 Md. 1 (2020). Additionally, we have been ordered to address the remaining two issues raised on brief in *Rodgers I* that we did not address because we reversed on the *voir dire* issue. Specifically, we must consider whether the Circuit Court for Baltimore County erred or abused its discretion in: (1) permitting a helicopter pilot present at the scene of appellant's arrest to offer opinion testimony as to his observations of aerial video, and (2) limiting the scope of the defense's cross-examination of one of the arresting officers, Alexander Pearson.

For the reasons that follow, we hold that *Lopez-Villa* applies and is dispositive of appellant, De'Shon Rodgers', first claim of error. Indeed, *Lopez-Villa* compels the conclusion that Mr. Rodgers did not preserve for our review the question of whether the trial court erred in failing to ask requested *voir dire* questions pursuant to *Kazadi*. Moreover, because we perceive no error or abuse of discretion on the part of the circuit court with respect to Mr. Rodgers' second and third claims of error, we affirm the judgments of the circuit court.

BACKGROUND

Mr. Rodgers was charged with several criminal offenses in a nine-count indictment. The State elected to enter a *nolle prosequi* on six of the nine counts: (1) second-degree assault, (2) wearing, carrying, and transporting a handgun in a vehicle, (3) possession of a loaded handgun in a vehicle, (4) wearing, carrying, and transporting a handgun on the person, (5) possession of a loaded handgun on the person, and (6) illegal possession of ammunition. For the remaining counts—first-degree assault, use of a firearm in the commission of a crime of violence, and illegal possession of a weapon with a prior felony conviction—Mr. Rodgers was tried over four days between August 12 and 16, 2019, before a jury in the Circuit Court for Baltimore County. *Rodgers I*, No. 1601, slip op. at 1 (filed Aug. 2, 2021). Following jury selection proceedings, which we discuss later in this opinion, the State called seven witnesses to testify. Mr. Rodgers did not call any witnesses. The following account is derived from the evidence adduced at trial, viewed in the light most favorable to the State. *Molina v. State*, 244 Md. App. 67, 87 (2019).

On the night of February 3, 2019, Azaria Griffin called 911 from her father's apartment to report that her ex-boyfriend, Mr. Rodgers, "pulled out a gun on me" during an argument that had taken place earlier that evening while she and Mr. Rodgers were sitting in Ms. Griffin's vehicle.[1] She described the gun as "silver" and "black" in color..

[1] This testimony was adduced at trial through a recording of the 911 call which was authenticated through the testimony of Ms. Griffin's father and played to the jury. Ms. Griffin was called to testify but refused to answer questions, for which she was held in contempt by the circuit court.

Ms. Griffin was in the driver's seat when the couple had the argument somewhere near the Owings Mills Metro Station. She drove the car to her parents' home, and then left the car to go inside and call 911. Around five to ten minutes later, Baltimore County Police arrived at the apartment complex in Windsor Mill, Maryland. Mr. Rodgers had left the vehicle by the time the police arrived. Officer Jordan Babischkin, first on the scene, recorded Ms. Griffin's description of her assailant and put out a "BOLO" (short for "be on the lookout" for) on the suspect. He also requested aviation support, and then Officer Brian Carver, who piloted a helicopter from Martin State Airport, arrived at the scene roughly fifteen minutes later.

Officer Carver testified at trial that, once on the scene, he was able to observe "a person running from the apartment out to a vehicle" later identified as a Black Jeep. That information was relayed to Officer Alexander Pearson on the ground, who initiated a traffic stop of the Jeep on Lord Baltimore Drive. At that point, the "suspect jumped out of the passenger side and started running through the woods." Officer Carver, observing this from the helicopter, "followed him through the woods towards Derbyshire Circle" and saw the suspect run "between these cars, and we thought he fell down at the time, then he continued to run through this area back around the other side of Derbyshire."

Officer Carver followed the suspect as he "continued across the street through this split right here, climbed the fence, and he came around to 7220 Oak Haven and went inside the apartments there." From there, Officer Pearson arrived at the apartment building along with Officer Thorne Allen. Officer Pearson "entered after Officer Allen as he was giving

the suspect commands to get on the ground." Officer Allen then placed the suspect, later identified at trial by Officer Pearson as Mr. Rodgers, under arrest. No handgun was recovered from the person of Mr. Rodgers upon his arrest.

After Officer Carver returned to Martin State Airport, he reviewed the aerial footage of the pursuit. According to Officer Carver, he "viewed the footage, and where we thought he fell down, we looked at it closer, officer and I both looked at it at the same time . . . I looked at the scene at that time and slowed it down, and it actually looked like he climbed under the car and threw something under the car." That information was relayed to Officer Matthew Lundquist, who returned to the scene to search for the gun. Once there, Officer Lundquist "noticed this silver object laying in a parking spot." He then exited his vehicle, found the firearm on the ground, and bagged it as evidence.

Conviction and Appeal

The jury found Mr. Rodgers guilty of first-degree assault, use of a firearm in the commission of a crime of violence, and illegal possession of a firearm with a prior disqualifying conviction. On October 22, 2019, Mr. Rodgers was sentenced to seventeen years in prison: twelve years for first-degree assault; and two five-year sentences, to be served concurrently, for the remaining firearms convictions. That same day, Mr. Rodgers filed a timely notice of appeal. *Rodgers I*, slip op. at 2. On November 13, 2020, we ordered a stay of the appeal, on our own initiative, because the Court of Appeals granted *certiorari* in *State v. Ablonczy*, 474 Md. 149 (2021), and the outcome of that appeal could control our decision. *Rodgers I*, slip op. at 5. On June 23, 2021, the Court of Appeals issued its

decision in *Ablonczy* and we thereafter removed the stay on June 30, 2021. *Id.* In light of the Court's holding in *Ablonczy*, we reversed Mr. Rodgers' convictions in an unreported opinion filed August 2, 2021.

In our opinion, we explained that in *Kazadi*, the Court of Appeals adopted a new standard requiring trial courts, when requested by the defendant, "to ask *voir dire* questions concerning fundamental rights," specifically, the presumption of innocence, the State's burden of proof, and Appellant's right not to testify. *Id.* at 8, 9. Although the opinion in *Kazadi* was rendered during the pendency of Mr. Rodgers' appeal, we noted that the *Kazadi* Court intended its decision to have retroactive application to "any other cases that are pending on direct appeal when this opinion is filed, *where the relevant question has been preserved for appellate review.*" *Id.* at 8 (quoting *Kazadi v. State*, 467 Md. 1,47 (2020)) (emphasis in original). We concluded that Mr. Rodgers' appeal fit within those parameters.

First, we noted that Mr. Rodgers' counsel had requested that the circuit court ask two *Kazadi*-type questions during *voir dire* concerning his fundamental rights as a defendant:

[T]he first question requested was:

> Question 18. In a criminal case like this one, each side will present arguments about the evidence, but the State has the only burden of proof. The Defendant need not testify in his own behalf or present any evidence at all. Would you tend to believe or disbelieve the testimony of a witness called by the defense more than the testimony of a prosecution witness? Would you hold it against the Defendant if he chose not to testify and present any evidence[?]

The second question [] presented to the judge was:

> I would request that you ask the jury, you must presume the Defendant innocent of the charges now and throughout this trial unless and until after you've seen and heard all of the evidence and the State convinces you of the Defendant's guilt beyond a reasonable doubt. If you do not consider the Defendant innocent now or if you're not sure that you're require the State to convince you of the Defendant's guilt beyond a reasonable doubt, please stand.

Id. at 8-9. Although the trial judge "affirmatively consented to asking a 'modification' of 'Question 18,'" neither question was ultimately asked. *Id.* at 9.

Because the circuit court was, under *Kazadi*, required to ask these requested questions, we observed that the determinative issue was whether the court's failure to ask the questions was preserved for appeal. *Id.* at 9-10. Although Mr. Rodgers' counsel had failed "to make an objection, or, more appropriately, remind the judge at the conclusion of jury selection that the judge failed the ask the question that he had agreed to ask," we concluded that he had nonetheless preserved the trial court's failure to ask Question 18 for our review. *Id.* at 10. We relied on the Court's decision in *Ablonczy*, reasoning that:

> The Court of Appeals has recently considered the question; "Should accepting a jury as ultimately empaneled waive any prior objection to the trial court's refusal to propound [*voir dire*] questions?" *State v. Ablonczy*, ___Md. ___, No. 28, Sept. Term 2020, slip op. at 1 (filed June 23, 2021). In *Ablonczy*, the *voir dire* questions that were requested by the defendant's counsel fell within the parameters of *voir dire* questions required under *Kazadi*. *Id.* at 2. As in the instant case, in *Ablonczy*, the defense counsel accepted the jury as empaneled without objection. *Id.* at 3. Because the defense counsel had initially objected when the trial judge refused to answer the proposed *voir dire* questions in *Ablonczy*, the Court of Appeals held:
>
> > As this Court set forth in *State v. Stringfellow*, 425 Md. 461 (2012), objections that relate to the determination of a trial court to not ask a proffered *voir dire* question are not waived

> by later acceptance, without qualification, of the jury as empaneled. ... For the reasons expressed previously, Respondent did not waive that objection by accepting the jury as empaneled without repeating his prior objection.

Rodgers I, No. 1601, Sept. Term 2019, slip op. at 10-11 (filed Aug. 2, 2021) (quoting *Albonczy*, slip op. at 15-16)) (cleaned up).

Accordingly, under *Ablonczy*, we perceived that the trial court's failure "to ask prospective jurors Question 18 as requested, or some modification of that question, was an abuse of discretion constituting reversible error." *Id.* at 11. We noted first that because "the judge neglected to ask a modified version of Question 18 for reasons unknown, [] a formal objection was not required because Appellant made known to the court the question that he desired the court to ask pursuant to Maryland Rule 4-323(c)[.]" *Id.* at 10. Therefore, because we concluded that an initial objection was not required, it was also "not necessary to object to the jury as empaneled at the conclusion of *voir dire*" for the question to be preserved for our review. *Id.* at 11-12.

Further concluding that the trial court's error was not harmless, we reversed Mr. Rodgers' convictions and remanded to the circuit court for a new trial. *Id.* at 12-13. Because the *Kazadi* issue was dispositive of Mr. Rodgers' appeal, we declined to address his second and third claims of error.

Remand

The Court of Appeals granted certiorari on April 28, 2022, and issued a per curiam order that same day. *State v. Rodgers*, 478 Md. 394, 394 (2022). In its order, the Court of Appeals vacated our judgment of reversal and remanded the case for us "to consider

whether or not the holding in *Lopez-Villa v. State*, No. 22 (September Term, 2021) should be applied in this case and, if so, to reconsider its prior opinion concerning whether the trial court erred in not asking requested voir dire questions[.]" *Id.* Further, the Court ordered that the case be remanded "for consideration and resolution of the remaining two issues raised on brief by Respondent, De'Shon C. Rodgers." *Id.* at 394-95. In accordance with those instructions, we will address all three issues in this Opinion. For convenience, we restate the pertinent factual circumstances relevant to the issues within the discussion of each issue.

DISCUSSION

I.

Jury Selection

We review "for abuse of discretion a trial court's decision as to whether to ask a *voir dire* question." *Pearson v. State*, 437 Md. 350, 356 (2014). Even still, a "court's discretion is always tempered by the requirement that the court correctly apply the law applicable to the case." *Arrington v. State*, 411 Md. 524, 552 (2009). It is well-established that "Article 21 of the Maryland Declaration of Rights 'guarantees a defendant the right to examine prospective jurors to determine whether any cause exists for their disqualification.'" *Lopez-Villa v. State*, 478 Md. 1, 10 (2022) (quoting *Bedford v. State*, 317 Md. 659, 670 (1989)). Accordingly, the failure to "allow questions that may show cause for disqualification is an abuse of discretion constituting reversible error." *Marquadt v. State*, 164 Md. App. 95, 144 (2005) (internal citations omitted).

Background

In *Rodgers I*, we detailed the relevant exchanges during jury selection bearing on the preservation of Mr. Rodgers' *Kazadi* challenge. We noted:

> In preparation for trial, the circuit court began jury selection proceedings on August 12, 2019. After all potential jurors were sworn in under oath**,** the judge explained to them what jury selection or "*voir dire*" means. The judge also explained that the oath the jurors had just taken was similar to the oath taken by a witness testifying during a trial. After the judge asked the potential jurors general *voir dire* questions, he asked them specific questions relating to the case.
>
> Appellant's counsel and the State's attorney were called to the bench. The judge asked counsel to discuss any questions that the prospective jurors had not been asked. Appellant's counsel stated, "your Honor, there's [sic] a few questions you didn't ask and maybe you're not intending to. But I wanted to ask you to ask those and put on the record what those are." The judge responded, "well, I want to get through the questions that I will ask first. But since you're here, if it's something I would change my mind about." Appellant's counsel then requested the judge to ask several questions, and the following exchange occurred:
>
> > DEFENSE COUNSEL: Question 18. In a criminal case like this one, each side will present arguments about the evidence, but the State has the only burden of proof. The Defendant need not testify in his own behalf or present any evidence at all. Would you tend to believe or disbelieve the testimony of a witness called by the defense more than the testimony of a prosecution witness? Would you hold it against the Defendant if he chose not to testify and present any evidence?
> >
> > THE COURT: All right.
> >
> > THE STATE: Your Honor, I'm not opposed.
> >
> > THE COURT: All right. I'll ask a modification of that.
>
> The judge then denied several questions proposed by Appellant's counsel. Finally, Appellant's counsel presented the last proposed question:

> It's the last one. The last one, you did instruct them, but I would request that you ask the jury, you must presume the Defendant innocent of the charges now and throughout this trial unless and until after you've seen and heard all of the evidence and the State convinces you of the Defendant's guilt beyond a reasonable doubt. If you do not consider the Defendant innocent now or if you're not sure that you[] require the State to convince you of the Defendant's guilt beyond a reasonable doubt, please stand.

The judge responded, "denied. I know those are pattern questions in *voir dire* that have been proposed, but that's what they are, they're pattern." Following the discussion at the bench, the judge continued to ask questions to the potential jurors. However, the judge failed to ask "Question 18" or any modification of that question.

When the judge concluded posing the questions to the venire, the following exchange occurred:

THE COURT:	**Other than what's already been stated, anything else about *voir dire*?**
DEFENSE COUNSEL:	**Nothing from me.**
THE COURT:	Nothing from you. All right.
THE STATE:	No, Your Honor.
THE COURT:	Nothing. All right. Then we'll start bringing everyone up.

Rodgers I, No. 1601, slip op. at 3-5 (filed Aug. 2, 2021) (emphasis added) (cleaned up).

Lopez-Villa

After our decision in *Rodgers I*, the Court of Appeals issued its decision in *Lopez-Villa* holding that the *Kazadi* challenge in that case was not preserved for appellate review. *Lopez-Villa v. State*, 478 Md. 1, 18 (2022). In *Lopez-Villa*, Petitioner Brigido Lopez-Villa

submitted two *voir dire* questions concerning the presumption of innocence and the state's burden of proof, neither of which were fully accepted by the trial judge. *Lopez-Villa*, 478 Md. at 5-6. With respect to the first question, the court indicated that it "would not be inclined to ask[] because the Court believes it is duplicative with the State's questions[.]" *Id.* at 6. No contemporaneous objection was offered, and Lopez-Villa's counsel instead turned to inquire about the exclusion of a different proposed question. *Id.* Regarding the second question, the court agreed to give a modified version, but ultimately did so in a way that stripped the question of all content relating to the presumption of innocence and the State's burden of proof. *Id.* at 5-7. Again, no contemporaneous objection was offered.

At the conclusion of *voir dire*, a bench conference was held during which the following exchange occurred:

THE COURT: Did I miss any questions?

THE STATE: I don't believe so.

THE COURT: All right. Any additional questions from the State?

THE STATE: No, thank you.

THE COURT: **Defense counsel, anything? – what you previously objected to, which I will preserve for the record.**

DEFENSE COUNSEL: **No.**

Id. at 7 (emphasis added) (cleaned up).

Under these circumstances, the Court of Appeals held that Lopez-Villa had not preserved for appellate review the trial judge's failure to ask the requested *voir dire*

questions. The Court first reasoned that "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." *Id.* at 12. Thus, the mere submission of "proposed *voir dire* questions to the trial court prior to its decision," is insufficient to apprise the court of "the action that the party desires the court to take" within the meaning of Rule 4-323(c). *Id.* at 12-13 (internal citations omitted). Indeed, the Court emphasized that without contemporaneous objection, the court "may very well believe that defense counsel agrees with its rejection or modification of its previously submitted proposed *voir dire* questions." *Id.* at 13.

As applied to Lopez-Villa's case, those principles established that the preservation requirement of Rule 4-323(c) was not met. The Court observed that "defense counsel in the case before us neither made an objection nor expressed any indication of disagreement when the court stated prior to *voir dire* that it was 'not inclined' to give Petitioner's proposed question 2 or proposed question 22 as written." *Lopez-Villa*, 478 Md. at 15-16. Accordingly, Lopez-Villa's counsel "did not merely object or disagree informally or without explanation; he did not object or disagree with the court's ruling *at all*." *Id.* at 16 (emphasis in original). Moreover, "defense counsel's response of 'no' when asked by the trial court following *voir dire* if the court had missed any questions was another instance of Petitioner **waiving** his right to object to the trial court's omission and modification of his proposed questions[.]" *Id.* at 17 (emphasis added). That being the case, the Court determined that it could not hold "that Petitioner's claims are preserved for appellate

review simply because he submitted a written list of proposed questions that was not accepted in full by the court" because doing so "would largely erase Md. Rule 4-323(c)'s preservation requirement in the context of *voir dire* questions." *Id.* at 18.

Parties' Contentions

Mr. Rodgers asserts that *Lopez-Villa* is distinguishable from the present case for several reasons. First, Mr. Rodgers explains that, unlike Lopez-Villa's counsel, his counsel "indicated disagreement with the court's line of *voir dire* questioning when he suggested that the court ask the *Kazadi*-type questions because the court had failed to do so earlier." Second, Mr. Rodgers stresses that "at the end of *voir dire*, the *Lopez-Villa* judge asked a question (whether the court 'miss[ed] any questions') that *opened* discussion to any issue that the parties wanted to discuss — including the *Kazadi*-type questions." By contrast, Mr. Rodgers contends, the trial judge in the instant case "asked a qualified question ("Other than what's already been stated, anything else about *voir dire*?") that *limited* discussion to issues not previously addressed — thus, excluding the *Kazadi*-type questions." Finally, Mr. Rodgers asserts that even if *Lopez-Villa* applies, it "neither suggested that *Rodgers'*[] application of *Ablonczy* is inaccurate nor required defense counsel to remind a judge to ask a modified question that was already requested and that the judge agreed to ask earlier."

The State responds that *Lopez-Villa* is plainly applicable to this case and "makes clear that simply requesting a course of action is not enough." Rather, there must be a contemporaneous objection and defense counsel's "initial request for the question cannot be viewed as an 'objection' because the court ruled in his favor." Instead, the action "to

which Rodgers now objects was the failure to pose the modified question," a decision that was properly challenged "at the end of voir dire when the court indicated it was done asking questions and had *not* posed the modified question." Because defense counsel failed to do so, "there was never an actual, contemporaneous objection" and Rodgers, thereby, failed to preserve his claim of error. Nor, the State contends, does *Ablonczy* change that result. The State points out that *Ablonczy* is distinguishable because there the Court of Appeals considered whether a later objection was required *after* the initial objection was made (when the court informed defense counsel that it was not going to pose the questions, counsel responded "That's fine, over my objection. I understand."). *Ablonczy*, 474 Md. at 154.

Preservation

As in *Rodgers I*, we reiterate that defense counsel requested that the circuit court ask two questions during *voir dire* concerning Mr. Rodgers' fundamental rights as a defendant. *Rodgers I*, No. 1601, Sept. Term 2019, slip op. at 8-9 (filed Aug. 2, 2021). The parties do not dispute that Mr. Rodgers was entitled to the benefit of the *Kazadi* holding. Accordingly, we again conclude that the determinative question is whether Mr. Rodgers' challenge to the court's failure to ask the two questions during *voir dire* was preserved for appeal. *Id.* at 9. In light of the decision in *Lopez-Villa*, we can no longer conclude that Mr. Rodgers adequately preserved his challenge.

Under Maryland Rule 4-323(c), a ruling or order not dealing with the admission of evidence at trial is preserved for appellate review when "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." Md. Rule 4-323(c). In *Rodgers I*, we ascertained meaning in Rule 4-323(c)'s disjunctive phrasing and concluded that, under the Rule, a party's obligation to preserve a ruling for review was satisfied *by either* making known the action the party wishes the court to take or objecting to the court's action. *Rodgers I*, slip op. at 9. Thus, even though there was no contemporaneous objection, we considered Mr. Rodgers' counsel to have fulfilled his obligation under Rule 4-323(c) by the act of requesting the proposed questions. *Id.* We reasoned that this plainly apprised the trial court of the action Mr. Rodgers wished it to take and that, under *Ablonczy*, no further objection was needed at the conclusion of *voir dire* because the issue was already preserved within the meaning of Rule 4-323(c). *Id.* at 9, 11-12.

Lopez-Villa clarifies that presenting proposed *voir dire* questions to the trial court is not enough to preserve a challenge to the court's failure to ask them. The Court of Appeals emphasized that "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 12. Accordingly, the mere submission of "proposed *voir dire* questions to the trial court prior to its decision," is insufficient to apprise the court of "the action that the party desires the court to take" within the meaning of Rule 4-323(c) and does not preserve the related ruling for appellate review. *Id.* at 12-13; Md. Rule 4-323(c). Rather, a contemporaneous objection to the action of the trial court, even if informal, is a prerequisite to preservation. *Id.* at 18.

Mr. Rodgers urges that his challenge is preserved because defense counsel requested that the court ask the questions during "the time the judge set aside as an opportunity for the parties to challenge the court's *voir dire* questioning." Applying the precepts of *Lopez-Villa*, we conclude that this was insufficient to preserve his challenge on appeal. As we noted in our earlier opinion, Mr. Rodgers failed "to make an objection, or, more appropriately, remind the judge at the conclusion of jury selection that the judge failed the ask the question that he had agreed to ask[.]" *Rodgers I*, No. 1601, Sept. Term 2019, slip op. at 10 (filed Aug. 2, 2021).

We acknowledge that the facts in this case are distinguishable from *Lopez-Villa* insofar as the trial court affirmatively consented to asking a "modified" version of Question 18 but then failed to ask the question entirely. In *Lopez-Villa*, by contrast, the court did ask a modified version of the requested *voir dire* question, but in a manner that stripped it of the contents requested by the defendant. In both cases, there was no opportunity for "objection or indication of disagreement" that the defendants could have "made contemporaneous with the court[s'] action[s,]" *Lopez-Villa*, 478 Md. at 12, because the court *agreed* to ask the questions proposed. As in *Lopez-Villa*, however, our analysis does not end here.

Mr. Rodgers was given an opportunity at the conclusion of *voir dire* to object to the court's failure to ask Question 18. However, when asked by the trial court "[o]ther than what's already been stated, anything else about *voir dire*?", defense counsel replied "[n]othing from me." That colloquy is squarely analogous to *Lopez-Villa*, where no prior

objection was made and the trial court asked "Defense Counsel, anything? – what you previously objected to, which I will preserve for the record," to which counsel simply replied, "No." *Lopez-Villa*, 478 Md. at 16 (cleaned up). As in *Lopez-Villa*, Mr. Rodgers was required to offer a contemporaneous objection at that time and failed to do so. The Court's reasoning in *Lopez-Villa* applies soundly here: "the court could have reasonably perceived that, by failing to object or indicate his disagreement, [defense counsel] had abandoned [Question 18] or ultimately agreed with the court's determination that [it] w[as] unnecessary[.]" *Id.* at 16.

We are also not persuaded by Rodgers' argument on appeal that the trial court foreclosed the possibility of an objection by asking "Other than what's already been stated, anything else about *voir dire*?"[2] Rather, we agree with the State's contention that "this was an invitation to remind the court about the question and learn whether the omission was (1) intentional or (2) inadvertent, at which point the court either could have rectified its error or explained its decision not to pose the question[.]" We hold, therefore, that when Mr. Rodger's counsel answered, "nothing from me," counsel "waiv[ed] his right to object to the trial court's omission." *Id.* at 17.

[2] If anything, as pointed out by Judge Biran in dissent, the *Lopez-Villa* exchange presented a closer call than the present case because counsel in *Lopez-Villa* could have been lulled to inaction by the court's reference to a previous objection. *Id.* at 31 (Biran, J., dissenting) (explaining that a "reasonable defense attorney could have concluded that the trial court was expressing its understanding that counsel had not abandoned his position that the court should give questions 2 and 22 as counsel had proposed them.").

Although we relied on *Ablonczy* in *Rodgers I*, we did so based on a predicate interpretation of Rule 4-323(c) which considered the submission of *voir dire* questions to be sufficient to apprise the trial court of the action the party wished it to take. *Lopez-Villa* forecloses that view and renders *Ablonczy* distinguishable because a prior objection *was* made in that case but was simply not repeated when the jury was impaneled. *State v. Ablonczy*, 474 Md. 149,154, 166 (2021). That is not the situation we confront here because, as in *Lopez-Villa*, Mr. Rodgers' counsel failed to offer *any* contemporaneous objection to the trial court's failure to ask his proposed voir dire questions. *Rodgers I*, No. 1601, Sept. Term 2019, slip op. at 9 (filed Aug. 2, 2021). As a result, this issue is not preserved for our review and not amenable to retroactive application of the *Kazadi* standard.

II.

Opinion Testimony

This Court reviews a trial court's decision to permit a witness to offer lay opinion testimony for abuse of discretion. *Prince v. State*, 216 Md. App. 178, 198 (2014). Ordinarily, "the decision as to whether to require a witness to testify as an expert 'is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal.'" *Id.* (quoting *Oken v. State*, 327 Md. 628, 659 (1992)) (internal quotation marks omitted). As always, however, a "court's discretion is always tempered by the requirement that the court correctly apply the law applicable to the case." *Schlotzhauer v. Morton*, 224 Md. App. 72, 84 (2015) (quoting *Arrington v. State*, 411 Md. 524, 552 (2009)).

Background

On the second day of Mr. Rodgers' jury trial, the State called Officer Brian Carver, a helicopter pilot with the Police Aviation Unit, to testify during its case-in-chief. Officer Carver provided testimony explaining his role in identifying and tracking from his helicopter a "person [later identified as Mr. Rodgers] running from the apartment out to a vehicle." Officer Carver explained that after spotting Mr. Rodgers and directing officers on the ground to initiate a traffic stop, he "followed him through the woods towards Derbyshire Circle" and observed him run "between these cars, and we thought he fell down at the time, then he continued to run through this area back around the other side of Derbyshire." After Mr. Rodgers was arrested, Officer Carver finished his flight and reviewed the footage from the scene.

At trial, when the State attempted to elicit Officer Carver's testimony as to his observations of the aerial video, defense counsel objected in the following discussion:

[THE STATE]:	Have you had the opportunity to actually review the footage?
[OFC. CARVER]:	Yes, ma'am. That night we reviewed the footage, and that's when we discovered --
[DEFENSE]:	Objection. Can we approach?
THE COURT:	Come on up.
[DEFENSE]:	Your Honor, so I would object to him interpreting the footage. The footage that they're about to play speaks for itself.
THE COURT:	I don't know what he was going to say.
[DEFENSE]:	I believe what he was gonna say is that we discovered that he appeared to have dropped something, what he previously said was -- (Inaudible - 10:47:44) -- we thought he fell down at the time. So I object to him interpreting the footage in any way, this footage speaks for itself. The State has still images of that photo that

the jury – they're bright -- can choose to interpret how they wish, but I would object to this officer interpreting what he's simply watching, the same thing we're all gonna watch.

[THE STATE]: Your Honor, I think he should be able to tell them, the jury, why they sent officers out to that area, what they observed if he observed something.

THE COURT: I'm going to allow it if you lay a better foundation as to his experience; his experience in the air, his experience with seeing various things that are both in the daytime, and in this case in the nighttime, and his ability based on that experience to -- I won't use the word interpret, but to essentially state, at least, what he believes he saw based on that experience.

[THE STATE]: Okay.

THE COURT: So, I'm gonna overrule your objection if that foundation is laid.

With the trial court's admonition in mind, the State then began to establish a foundation with respect to Officer Carver's experience in reviewing aerial footage:

[THE STATE]: So let me kinda go back and touch on your experience. So, you indicated that you've been working as a pilot for Baltimore County since 2005?

[OFC. CARVER]: Yes, ma'am.

[THE STATE]: Prior to that you had 15 years of experience in the Army?

[OFC. CARVER]: 10 years, yes, ma'am.

[THE STATE]: 10 years. I'm sorry, 10 years' experience in the Army. When [you were] in the Army, were you used to observing footage and assessing threats in situations?

[OFC. CARVER]: Yes, ma'am. I flew 08's with the Delta, it was the Armour [Reconnaissance] Aircraft, and we had the same camera thermal imager to look for the enemy -- .

* **

[THE STATE]: When you were in the Army and you would be reviewing footage, what would that information be used for?

[OFC. CARVER]: Intelligence, to give to the intelligence officers about anything that's happening on the battle field.

At this point, defense counsel objected again to this line of questioning, arguing that "the State is laying the ground work for opinion testimony, opinion testimony that's apparently beyond the witness based on his prior experience." The court overruled the objection, pointing out that "a lay person can testify to a lot of things if it's within that lay person's experience and knowledge." Accordingly, the State continued with its direct examination of Officer Carver:

[THE STATE]: So, officer, you have quite a bit of experience using this type of night vision camera?
[OFC. CARVER]: Yes, ma'am, and I'm also qualified to sit left seat. I also do that when we have a two pilot crew, I will sit left seat on some flights.
[THE STATE]: When you say "sit left seat," what does that mean?
[OFC. CARVER]: That's the at the tactical flight officer's position, and I was trained actually to do that job before I actually began flying for the County.
[THE STATE]: Okay. So you were trained to actually be the one on the radio, observing things --
[OFC. CARVER]: Yes, ma'am.
[THE STATE]: -- and relaying information?
[OFC. CARVER]: Yes, ma'am.
[THE STATE]: Okay. So you indicated that previously that the Defendant went or the suspect went to a car, and initially you believe that it looked like as though he fell down?
[OFC. CARVER]: Yes, ma'am.
[THE STATE]: Were you able to go back and review the footage after you had left the scene?
[OFC. CARVER]: Yes, ma'am, we viewed the footage, and where we thought he fell down, we looked at it closer, officer and I both looked at it at the same time --
THE COURT: Just tell us what you did.

[OFC. CARVER]: Yes, I looked at the scene at that time and slowed it down, and it actually looked like he climbed under the car and threw something under the car --
[DEFENSE]: Objection.
THE COURT: Overruled.

The State then proceeded to play the aerial footage for the jury and authenticated several still photographs of the footage through Officer Carver's testimony. Officer Carver testified without objection that the still photographs showed, *inter alia*, Mr. Rodgers progressively "starting to bend down" and then "laying on the ground . . . looks like he's putting something under the car." The still photographs were entered into evidence as State's Exhibits 6A-6G without objection from Mr. Rodgers' counsel. Officer Carver then explained that his observations from the aerial video were relayed to Baltimore County Police.

Based on this information, Officer Lundquist later testified that he returned to the scene and located a handgun in the vicinity of the area identified by Officer Carver. Officer Lundquist, earlier in his testimony, noted that prior efforts to locate the gun had been unsuccessful and he had returned to the precinct to perform administrative tasks. After Baltimore County Police "had been contacted by the Aviation Unit[,]" Officer Lundquist "responded out to the area to check the area where the suspect potentially dropped an item in the parking lot." Officer Lundquist testified that upon arriving at the parking lot on Derbyshire Circle, "I put my spotlight on the ground, and I noticed this silver object laying in a parking spot." Officer Lundquist then exited his vehicle to get a closer look "and upon further investigation it was a firearm that was on the ground." Officer Lundquist called in

another unit and his supervisor to assist with packaging the gun as evidence. The coloring of the gun appeared to match Ms. Griffin's description of it as "silver" and "black" on her 911 call played for the jury at trial.

Parties' Contentions

Mr. Rodgers contends that "the State spent much of its direct examination of Officer Carver laying foundation for the officer to offer expert-opinion testimony in the guise of lay-opinion testimony." He points out that "Officer Carver described his experience in the U.S. Army for 10 years (before joining BCPD) observing aerial footage, assessing threats from the air, and interpreting footage using 'the same thermal imager' that he used as a BCPD pilot." Mr. Rodgers stresses that "had to look closer and slow down the film to interpret the image" and that "the average person viewing the footage cannot clearly see" what he was doing in the video. Accordingly, Mr. Rodgers asserts that the State "needed Officer Carver's help – based on his 24 years of experience and training as a military and police pilot – to guide a jury of ordinary citizens to the conclusion that Rodgers threw something, a gun, under a car[.]" Therefore, Mr. Rodgers concludes that the State "unfairly offered the officer's expert opinion under the guise of lay-opinion testimony" and that the error was not harmless because the State referenced Officer Carver's testimony several times in closing arguments.

The State responds that Mr. Rodgers failed to preserve this issue for review because he failed to object to Officer Carver offering his opinion of what was shown on the still photographs entered into evidence as State's Exhibits 6A-6G. On the merits, the State—

citing to this Court's decision in *Paige v. State*, 226 Md. App. 93 (2015)—asserts that a witness may "offer a detailed narrative of what the witness perceived could be seen on a surveillance video." Moreover, citing to *Prince v. State*, 216 Md. App. 178, 200 (2014), the State surmises that "police officers may testify about their actions investigating a crime, even if some of that testimony is based on activities that a member of the public would not ordinarily undertake." What matters, in the State's view, is that "Officer Carver's testimony required no expertise beyond his direct observations and focused on what he observed, in the same manner as any lay witness." Accordingly, the State contends that Officer Carver's experience did not convert his observations into expert opinion testimony when "[a]ny lay person can look at a video or photograph and draw conclusions about what it shows." Finally, the State argues that admission of Officer Carver's testimony, if erroneous, constituted harmless error because "[t]he State did not rest on Officer Carver's interpretation of the video; it instead relied on the video and photographs themselves."

Propriety of Officer Carver's Testimony

i. Preservation

As an initial matter, we decline the State's invitation to dismiss our consideration of this issue on preservation grounds. It is true, of course, that to comply with the preservation requirements of Maryland Rule 3-423(a), a party must generally object each time the evidence is offered or request a continuing objection to an entire line of questioning. *Ware v. State*, 170 Md. App. 1, 19 (2006). At the same time, the Court of Appeals has recognized that persistent objections are not necessary when a prior objection "went not only to what

was said but also to what was obviously to come" and the "judge demonstrated that he was permitting the [State] to continue along the same line." *State v. Robertson*, 463 Md. 342, 366 (2019) (quoting *Johnson v. State*, 325 Md. 511, 514-15 (1992)). Under those circumstances, where it is "apparent that [a] ruling on further objection would be unfavorable to the defense" and "[p]ersistent objections would only spotlight for the jury the remarks of the [State]," a failure to raise further objection does not constitute a waiver. *Id.* at 366-67.

Here, defense counsel thrice objected to the State's line of questioning: when the State first sought to elicit Officer Carver's observations of the aerial video, after the State (at the urging of the court) delved into Officer Carver's experience in reviewing aerial video, and when Officer Carver offered his observation that Mr. Rodgers threw something under a car on Derbyshire Circle. Each objection was overruled and we consider it apparent that (1) defense counsel was objecting to the entire line of questioning and (2) any further objection to Officer Carver interpreting the still photographs of the footage would have only served to "spotlight for the jury" the importance of his testimony. *Robertson*, 463 Md. at 367 (internal citations omitted). The purpose of the preservation rule is "preventing unfairness and requiring that all issues be raised in and decided by the trial court[,]" *Conyers v. State*, 354 Md. 132, 151 (1999), not erecting a formalistic hurdle to appellate review requiring repetition of futile objections. Accordingly, we will address Mr. Rodgers' contentions as to the propriety of Officer Carver's testimony.

ii. Lay vs. Expert Opinion Testimony

As the Court of Appeals observed in *Ragland v. State*, the language of Maryland Rules 5-701 and 5-702 "divides the universe of opinion testimony into two categories, each bearing restrictions that the other does not." 385 Md. 706, 717 (2005). Under Maryland Rule 5-701, lay opinion testimony is that which:

> in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Md. Rule 5-701. Conversely, Maryland Rule 5-702 provides that:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

Md. Rule 5-702.

Ultimately, "[t]his bisection is imperfect, however, because at least one class of opinions potentially falls within both categories." *Ragland*, 385 Md. at 718. After all, a "witness who has personally observed a given event may nonetheless have developed opinions about it that are based on that witness's specialized knowledge, skill, experience, training, or education." *Id.* In such a case, "[t]he question then becomes whether the fact of personal observation will permit admission of the opinion by a lay witness . . . or whether the 'expert' basis of the opinion will require compliance with Rule 5-702 and admission as expert testimony." *Id.* Although that line can be a difficult one to draw, it is

a firm one as the Court of Appeals has made clear that "Md. Rules 5-701 and 5-702 prohibit the admission as 'lay opinion' of testimony based upon specialized knowledge, skill, experience, training or education." *Id.* at 725; *see also State v. Blackwell*, 408 Md. 677, 692-97 (2009) (prohibiting admission as lay opinion testimony an officer's testimony regarding the result of a horizontal gaze nystagmus (HGN) test due to its scientific foundation); *State v. Payne*, 440 Md. 680, 700-02 (2014) (prohibiting the admission of testimony regarding cell phone communication paths as lay opinion testimony).

In *State v. Galicia*, the Court of Appeals recently explored this dichotomy in the context of location tracking data. 479 Md. 341 (2022). There, an employee from Google offered testimony explaining that "a user of a device could turn off Google's location tracking" and that there was a gap in Mr. Galicia's location data during the time of the alleged offense. *Galicia*, 479 Md. at 385-86. In evaluating the propriety of this testimony, the Court explained that expert testimony is only required "when the subject of the inference ... is so particularly related to some science or profession that is beyond the ken of the average layman[.]" *Id.* at 389 (internal citations omitted). Otherwise, a witness's inferences may be offered as lay opinion testimony so long as they are based on the witness's perception or helpful to a clear understanding of the witness's testimony or a fact in issue. *Id.* Given those principles, the Court concluded that the employee's testimony was properly admitted as lay opinion testimony because the "fact that a mobile electronic device allows its users to customize the data they share with the manufacturer, the cell

phone service provider, and various apps is common knowledge in modern society." *Id.* at 394.

In *Johnson v. State*, the Court of Appeals arrived at a similar conclusion in holding that a lay witness could testify as to GPS tracking data. 457 Md. 513 (2018). The Court emphasized that GPS technology is ubiquitous in modern society and familiar to the general public. *Johnson*, 457 Md. at531. While "a user may not understand precisely how a GPS device works," the reality was that the "general public has a common sense understanding of what information the device conveys[.]" *Id.* Accordingly, the Court held that "the times and locations reflected in GPS data in a business record do not necessarily require expert testimony to be admissible" because the average juror could understand the significance of GPS tracking data contained within a record of the user's movements. *Id.* at 532. In that case, the remedy for the party opposing admission of the testimony is simply "to cross-examine the sponsoring witness concerning any defects in the data, as happened in this case, or to present its own expert to contest the accuracy of a particular device." *Id.* at 533.

Generally speaking, a law enforcement officer may not offer expert opinions in the guise of lay opinion testimony when the "connection between the officers' training and experience on the one hand, and their opinions on the other, was made explicit[.]" *Ragland*, 385 Md. at 726. In *Ragland*, the testifying officers, Bledsoe and Halter, observed "a hand-to-hand transaction . . . between [a known offender] and the passenger of a yellow Cadillac[,]" but "[t]he evening was dark, and no officer was able to see either the face of

the Cadillac passenger or the nature of any items that individual had exchanged[.]" *Id.* at 709-10. At trial, Officer Bledsoe testified that "[i]n my opinion what occurred was [a] drug transaction" based on his "two and a half years with [the narcotics] unit" and "involve[ment] in well over 200 drug arrests." *Id.* at 712, 726. Detective Halter "similarly testified to an extensive history of training and experience in the investigation of drug cases, and gave his opinion that the events on Northwest Drive constituted a drug transaction." *Id.* at 726. Under these circumstances, the Court of Appeals held that the officers' testimony "cannot be described as lay opinion" because their opinions were clearly connected to their specialized experience. *Id.*

Although the facts of each case ultimately govern, we have previously observed that the "fact that a witness is a law enforcement officer does not automatically transform his testimony into expert testimony." *Prince v. State*, 216 Md. App. 178,201 (2014). In *Prince*, we concluded that a police officer's testimony regarding his placement of "trajectory rods" through suspected bullet holes in a car to track the path of the bullets was permissibly admitted as lay opinion testimony. *Prince*, 216 Md. App. atat 202. We reasoned that a law enforcement officer who "does nothing more than *observe* the path of the bullet and place trajectory rods (in the same manner as any layman could) need not qualify as an expert to describe that process." *Id.* (emphasis in original). Indeed, the officer simply "relied on his own observations" and "conducted no experiments, made no attempts at reconstruction, and 'was not conveying information that required a specialized or scientific knowledge to understand.'" *Id.* (quoting *People v. Caldwell*, 43 P.3d 663, 668

(Colo. App. 2001). As a result, his testimony "fell well within the universe of lay testimony, and the trial court properly admitted it." *Id.*

In *Paige v. State*, we reached a similar conclusion in holding that the testimony of a "loss prevention officer" at Macy's Department Store describing the store's surveillance video was properly admitted as lay opinion testimony. 226 Md. App. 93, 102, 130 (2015). There, the witness, Salley, had operated the surveillance cameras on the day of the alleged theft and "personally watched appellant, from the moment appellant first appeared in the women's department until she exited the door." *Id.* at 126. We found this to be crucial and emphasized that Salley's testimony, including any opinions derived from the surveillance video, were based on her first-hand knowledge of the events captured on video as Salley "witnessed appellant's actions, real time, as appellant moved through the women's department at Macy's." *Id.* at 130. Accordingly, Salley's testimony simply "explained facts on the video" and included opinions which were rationally derived from her real-time perception of the events. *Id.* at 129-30.

With these precepts in mind, we return to the present case. Mr. Rodgers asserts that Officer Carver's testimony crossed the line from lay to expert opinion testimony by virtue of the State laying a lengthy foundation as to his experience in viewing aerial surveillance footage to assess threats on the ground. We agree that much of the discussion regarding Officer Carver's credentials was unnecessary, but we must disagree with Mr. Rodgers that this discussion converted Officer Carver's testimony about his observations of the aerial footage into an expert opinion. To start, we observe that the purpose of Officer Carver's

testimony was simply to explain why Officer Lundquist later returned to the scene to search for a gun. It is well-established that law enforcement officers may explain their personal observations in the course of an investigation to establish why ensuing actions were undertaken. *See, e.g.*, *In re Ondrel M.*, 173 Md. App. 223, 243-44 (2007) (holding that an officer's testimony regarding odor of marijuana was permissible lay opinion testimony and helpful to explaining why a search of the vehicle was initiated); *Warren v. State*, 164 Md. App. 153, 157-58, 168-69 (2005) (concluding that an officer's testimony that defendant appeared to be inebriated was permissible lay opinion testimony and helpful to the jury in explaining why the officer initiated a traffic stop of the defendant).

Moreover, although we recognize that Officer Carver's explication of his experience in the Army may have obscured the point, we readily perceive that the nature of his testimony did not require any specialized knowledge. As in *Johnson*, while an average person might not understand exactly how the thermal imaging camera functioned, the "general public has a common sense understanding of what information the device conveys[.]" *Johnson*, 457 Md. at 531. Indeed, it is rather unobjectionable that a layperson can view video footage and draw conclusions as to what they saw. Even if the aerial footage in this case did not clearly show what Mr. Rodgers was doing, we simply cannot conclude that the act of replaying the footage and closely observing Mr. Rodgers' movements was "so particularly related to some science or profession that is beyond the ken of the average layman[.]" *Galicia*, 479 Md. at 389. Certainly, Officer Carver may have been more perceptive than the average viewer, but his experience did not

automatically transform his testimony into an expert opinion considering the basic first-hand observations which formed the foundation of his opinion.

In our view, both *Prince* and *Paige* are directly on point, while *Ragland* is distinguishable. As in *Prince*, Officer Carver relied on his own first-hand observations of the video on the night in question and "conducted no experiments, made no attempts at reconstruction, and 'was not conveying information that required a specialized or scientific knowledge to understand.'" *Prince*, 216 Md. App. at 201. And as in *Paige*, Officer Carver's opinions as to the nature of Mr. Rodgers' movements captured on video were rationally derived from his first-hand perception of those movements. *Paige*, 226 Md. App. 93. Although Mr. Rodgers' reliance on *Ragland* is certainly understandable, we consider the present case to differ from *Ragland* insofar as Officer Carver, unlike the *Ragland* officers, by no means needed to lean on his specialized experience to form his opinion. Rather, like any football fan that has pored over instant replay footage of a crucial play, Officer Carver utilized his basic sense of sight to arrive at a conclusion of what the video footage showed. Accordingly, we cannot consider his testimony to have improperly crossed the line from lay to expert opinion and therefore hold that the trial court did not abuse its discretion in this case.

III.

Scope of Cross-Examination

Standard of Review

As a general matter, the "trial courts have broad discretion in determining the scope of cross-examination." *Cagle v. State*, 235 Md. App. 593, 617 (2018) (citing *Martin v. State*, 364 Md. 692, 698 (2018)). That discretion must be exercised by balancing "the probative value of an inquiry against the unfair prejudice that might inure to the witness" so as to prevent "a discussion of collateral matters which will obscure the issue and lead to the fact finder's confusion." *State v. Cox*, 298 Md. 173, 178 (1983). Of course, because an "undue restriction of the fundamental right of cross-examination may violate a defendant's right to confrontation[,]" we must determine whether the trial court abused its discretion by imposing "limitations upon cross-examination that inhibited the ability of the defendant to receive a fair trial." *Pantazes v. State*, 376 Md. 661, 681-82 (2003).

Background

As part of its case-in-chief, the State called Officer Alexander Pearson, one of the two officers who executed the arrest of Mr. Rodgers. Officer Pearson offered testimony detailing the stop, pursuit, and arrest of Mr. Rodgers, who Officer Pearson identified at trial. The State authenticated Officer Pearson's body camera footage from the evening in question through the officer's testimony and played it for the jury. During the course of the footage, Mr. Rodgers is heard exclaiming "[h]e hit me in my head" and that "I can't

hear you . . . [m]y ear ringing." Mr. Rodgers also asked whether his lip was "busted" and was told by Officer Pearson "[i]t's bleeding a little bit."

On cross-examination, Mr. Rodgers' counsel focused on this footage and further inquired whether Officer Pearson saw "Officer Allen's right hand rising up and then coming down smacking Mr. Rodgers in the back of the head." Officer Pearson denied that he saw this occur. This line of questioning culminated in the following exchange after defense counsel replayed Officer Pearson's body camera footage from the evening in question:

[DEFENSE]:	That was Officer Allen saying, "You're lucky I didn't shoot your dumb ass. How about that?" Correct?
[OFC. PEARSON]:	Yes.
[DEFENSE]:	You heard that?
[OFC. PEARSON]:	Yes.
[DEFENSE]:	So you saw Officer Allen raise his hand up and bring it down?
[OFC. PEARSON]:	Yes.
[DEFENSE]:	You heard the Defendant say, "He hit me."
[OFC. PEARSON]:	Yes.
[DEFENSE]:	You heard Officer Allen's response which is, "I don't give a fuck."
[OFC. PEARSON]:	Yes.
[DEFENSE]:	You observed his lip bleeding a little bit?
[OFC. PEARSON]:	Yes.
[DEFENSE]:	You heard him saying, "My ears are ringing."

At this point, the State objected and the circuit court sustained the objection. Defense counsel then asked Officer Pearson "are you aware of the definition in the administrative manual of excessive force?" The State promptly objected again and a bench conference was held in which the following discussion ensued:

[THE STATE]: Your Honor, I would argue that this is in no way relevant to the case and . . . the slight amount of relevance would [sic] be outweighed by the -- the sole purpose is to inflame the jury at this point.

[DEFENSE]: Your Honor, I would say --

[THE STATE]: It's to a civil trial.

[DEFENSE]: -- (Inaudible), starting with Davis v. Alaska allows wide latitude to impeach the State's witnesses including [their] motive to ultimately come up and plant evidence against Defendants, which is my argument. We have a case where I would like to layout, and I would proffer that excessive force was used, that despite department orders, a use of force report was never written. I've already established that essentially why it was told to Officer Babushkin who wrote the statement of probable cause regarding the type of force that was used, and I think it goes to the officer's as a whole credibility, not simply as to what they're saying on the stand, but their actions that night. I think I have wide latitude on cross-examination --

THE COURT: Okay. All right. Ms. Scurto?

[THE STATE]: Your Honor, I don't believe he has established that there has been any lie. The witness testified that he never saw him hit the Defendant --

THE COURT: I'm sustaining the objection. I'm sustaining the objection because, first of all, you're trying to get to Officer Allen on his behavior through this witness. Officer Allen is not on trial in this case. Because you have a theory, Mr. Levy, of what you're trying to establish when you say something was planted --

[DEFENSE]: Well, that's the theory in the case.

THE COURT: -- or whether there was excessive force used, that is collateral to what is being tried before this jury. I'm not going to allow it. The objection is sustained. So let's move on, please?

[DEFENSE]: May I inquire? My next line of questioning would be that the administrative manual talks about filing complaints against other officers.

THE COURT: I'm going to sustain the objection on that as well.

[DEFENSE]: I would proffer that this --

THE COURT: Sir?

[DEFENSE]:	I simply proffer for the record, your Honor, that this officer would testify that against regulations, he did not file a complaint for excessive force against Officer Allen.
THE COURT:	For reasons I've already stated, the objection is sustained.

Parties' Contentions

Mr. Rodgers argues that the trial court prevented him "from a meaningful opportunity to present a defense" by prohibiting defense counsel "from cross-examining Officer Pearson about his failure to follow department policy." He asserts that "Officer Allen's excessive force . . . and his colleagues' failure to report this force demonstrated a willingness to be untruthful, which questioned their credibility." Mr. Rodgers emphasizes that "[i]mpeaching the officers' credibility was critical" to his defense because "if the cops were unwilling to follow their own department's policy requirement to report excessive use of force . . . it was quite possible that they were not being truthful about their other actions that night[.]" That, in turn, would support his theory that one of the officers planted "the gun that Officer Lundquist found later that night[.]" Thus, Mr. Rodgers concludes that the trial court abused its discretion in preventing him from probing the credibility of Officer Pearson.

The State counters that the circuit court "properly rejected Rodgers' speculative theory as being too collateral to the issues at hand." The State emphasizes that Officer Pearson "testified he did not see Officer Allen strike Rodgers during the arrest" and only acknowledged that Officer Allen appeared to do so after viewing the body camera footage. Accordingly, the State asserts that, because there must be a reasonable factual basis for a

prior bad act to serve as valid impeachment material under Maryland Rule 5-608(b), "[t]he alleged untruthful action (failing to file a complaint) did not have a reasonable factual basis, though, because Officer Pearson denied seeing Officer Allen strike Rodgers." Moreover, even if in error, the State asserts that the trial court's limitation of cross-examination was harmless because Rodgers had ample opportunity to question the credibility of the testifying officers and did so at length.

Propriety of Limitations on Cross-Examination of Officer Pearson

It is well-established that "[t]he Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant the right to confront the witnesses against him or her" through the crucible of cross-examination." *Pantazes*, 376 Md. at 680. That fundamental right to cross-examine witnesses "includes the right to impeach credibility, to establish bias, interest or expose a motive to testify falsely." *Id.* Nonetheless, the right to cross-examination is not boundless and "trial judges retain wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). Thus, under this balancing test, "[a] judge must allow a defendant wide latitude to cross-examine a witness as to bias or prejudices . . . but the questioning must not be allowed to stray into collateral matters which would obscure the trial issues and lead to the factfinder's confusion." *Smallwood v. State*, 320 Md. 300, 307-08 (1990) (internal citation

omitted). As with all evidence, "the court has the discretion to limit the examination, under Rule 5-403, if the court finds that the probative value of the evidence is outweighed by unfair prejudice." *Pantazes*, 376 Md. at 687.

As relevant here, one method of impeaching the witness's credibility—functioning as a limited exception to the general prohibition on character evidence—is questioning the witness regarding prior bad acts probative of the witness's character for untruthfulness which did not result in a conviction. This method of impeachment is governed by Maryland Rule 5-608(b), which provides:

> The court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness. Upon objection, however, the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred. The conduct may not be proved by extrinsic evidence.

Md. Rule 5-608(b).

Because Rule 5-608(b) involves questioning about alleged misconduct not proved definitively by a conviction, the "trial judge must exercise greater care in determining the proper scope of cross-examination." *Robinson v. State*, 298 Md. 193, 200 (1983). Accordingly, "the relevant inquiry is not whether the witness has been accused of misconduct by some other person, but whether the witness actually committed the prior bad act." *State v. Cox*, 298 Md. 173, 181 (1983).

Of course, because definitive proof of prior misconduct may not be available, Rule 5-608(b) requires only a "reasonable factual basis" for the inquiry. Although that concept has not been defined with precision, the Court of Appeals has suggested that, at the very

least, it requires that the questions are "propounded in *good faith* and are not aimed to put before the jury unfairly prejudicial and unfounded information supported only by unreliable rumors or innuendo." *Pantazes*, 376 Md. at 687 (emphasis in original). In *Cox*, although recognizing that a "hearsay accusation of guilt has little logical relevance to the witness'[s] credibility[,]" the Court of Appeals found reversible error in the trial court's limitation of cross-examination. *Cox*, 298 Md. at 181, 184. There, defense counsel sought to question the victim, the State's primary witness, about whether she had made a prior false accusation of assault by recanting her accusation at the trial of the individual she accused. *Id.* at 176-77. The Court of Appeals reasoned that this inquiry should have been permitted because it "had substantial probative force and there was no indication that defense counsel was harassing the witness by asking an unfounded question[.]" *Id.* at 184.

Conversely, in *Pantazes*, the Court of Appeals found that a speculative inquiry into alleged prior misconduct was properly limited by the trial court. In that case, the defense sought to cross-examine a State's witness, Kim Young, about an allegation that he "was involved in [a] robbery-turned-murder and that Young lied in identifying" the perpetrator. *Pantazes*, 376 Md. at 688. To establish a basis for that allegation, the defense submitted two affidavits which established that the charges were eventually dropped against the individual identified by Young and that a separate anonymous call claimed that this individual was not the perpetrator. *Id.* at 688-90. The Court found this to be insufficient, noting that the mere fact that the "charges were dismissed by the Government does not alone establish that Young lied[,]" especially considering that the prosecutor in

charge of the case claimed that "she believed Young" but did not have enough evidence to bring a case. *Id.* at 690. Accordingly, because no reasonable factual basis was established for the inquiry, there was no abuse of discretion in limiting the scope of cross-examination on this point. *Id.* at 691.

In this case, we conclude that defense counsel established a reasonable factual basis for his line of questioning on cross-examination. To be sure, as the State points out, Officer Pearson denied that he saw Officer Allen strike Mr. Rodgers in the head and may have believed that no excessive force was used in the course of the arrest. Even still, Officer Pearson's own body camera footage demonstrated several facts undercutting that purported belief. To start, Mr. Rodgers is heard exclaiming on the footage "[h]e hit me in my head" and "I can't hear you . . . [m]y ear ringing" while Officer Pearson was present. Further, Mr. Rodgers also asked whether his lip was "busted" and was told *by Officer Pearson* "[i]t's bleeding a little bit." Even if Officer Pearson did not see the actual strike, it is difficult to say that he was not at least on notice that something had occurred based on Mr. Rodgers' protestations and visible injury. Accordingly, we must conclude that there was a reasonable factual basis for defense counsel to have inquired into whether Officer Pearson knew that he should have filed a use of force report and willfully failed to do so.

With that said, even if there was a reasonable factual basis for the question, "the court has the discretion to limit the examination, under Rule 5-403, if the court finds that the probative value of the evidence is outweighed by unfair prejudice." *Pantazes*, 376 Md. at 687. Although we may have reached a different conclusion, we cannot say that the trial

court necessarily abused its discretion in this case. By this point in Officer Pearson's cross-examination, defense counsel had played and replayed Officer Pearson's body camera footage several times to establish that the officers central to the State's case had covered up an unnecessary use of force on Mr. Rodgers. Additionally, counsel had already cross-examined Officer Babischkin about why Mr. Rodgers's injuries were not included in the statement of probable cause written after his arrest. He had asked Officer Pearson several times about the inflammatory statements made by Officer Allen on the footage. While the additional inquiry into whether Officer Pearson intentionally failed to file a use of force report may have had additional force in undermining his credibility, the overall point was somewhat cumulative and could have served to simply inflame the passion of the jury against the police officers and obscure the key issue of whether Mr. Rodgers threatened Ms. Griffin with a handgun. Accordingly, we hold that the trial court did not abuse its discretion in limiting the cross-examination of Officer Pearson on this narrow point.

Even if we were to find that court erred in preventing Mr. Rodgers' counsel from pursuing this line of questioning further, we also conclude that any error would have been harmless beyond a reasonable doubt. *Dorsey v. State*, 276 Md. 638, 659 (1976). To be clear, we use the term "harmless" only in the sense that, upon our independent review of the record, we are convinced that the circuit court's decision to sustain the State's objection to Mr. Rodgers' proposed line of questioning did not influence the jury's verdict. If it were established that Officer Pearson did in fact turn a blind eye to a violent abuse of authority by a fellow officer, then we would have no trouble in concluding that act of misconduct to

be unacceptable and worthy of further investigation. We simply observe that, in the exact context of this case, continuing the inquiry into Officer Pearson's character for truthfulness as proposed would not have changed the outcome of the verdict due to the evidence against Mr. Rodgers and the other opportunities which defense counsel utilized to question the integrity of the police officers in this case.

First, while defense counsel's line of questioning may have had some additional value in establishing Officer Pearson's alleged propensity for dishonesty, we observe that the jury had already been presented with evidence to that effect. At this point in Officer Pearson's cross-examination, defense counsel had replayed Officer Pearson's body camera footage several times to establish that it showed "Officer Allen raise his hand up and bring it down" on Mr. Rodgers. Indeed, after Officer Person continued to deny that he ever saw Officer Allen strike Mr. Rodgers, defense counsel was able to get Officer Pearson to admit that his bodycam footage clearly showed (1) Officer Allen's hand rising up and being brought down on Mr. Rodgers, (2) Mr. Rodgers exclaiming that someone had hit him, and (3) Officer Pearson himself telling Mr. Rodgers his lip was bleeding.

Second, we must consider the effect of Officer Pearson's testimony within the overall context of the case. Mr. Rodgers stood charged with first-degree assault and several weapons offenses, with the key question being whether he actually threatened Ms. Griffin with a firearm. There was strong evidence to indicate that he had, including the 911 call from Ms. Griffin, which was played for the jury, in which she stated that Mr. Rodgers, "pulled out a gun on me" during an argument that had taken place earlier that evening.

Additionally, Officer Pearson's testimony was principally offered to establish the circumstances around Mr. Rodgers' actual arrest. Even if the jury considered Officer Pearson to be untruthful, there was no basis for concluding that he was involved in any conspiracy to plant a handgun because he was not involved in the recovery of the weapon.

Finally, even if the trial court erred in disallowing further inquiry on cross-examination of Officer Pearson, we consider that Mr. Rodgers was given a fair opportunity to cross-examine each of the testifying officers. And as the State points out, Mr. Rodgers' counsel was given wide leeway in closing arguments to present his theory to the jury that the police had conspired to plant a gun on Derbyshire Circle. The jury simply rejected that theory and we are convinced that asking Officer Pearson whether he knowingly failed to file a use of force report would not have changed that result.

To summarize, we hold that the trial court did not abuse its discretion in limiting the inquiry into Officer Pearson's alleged failure to file a use of force report. Although there was a reasonable basis for asking the question, the trial court retained discretion under Maryland Rule 5-403 to balance the probative value of the inquiry with the risk of unfair prejudice. We cannot say that the court's conclusion in this case amounted to an abuse of discretion. And even if it did, because the line of questioning proposed by Mr. Rodgers' was cumulative, the evidence independent of Officer Pearson's testimony was strong, and Mr. Rodgers was given a fair opportunity to call into question the integrity of the police officers in this case, any error would have been harmless beyond a reasonable doubt. Therefore, we affirm Mr. Rodgers' convictions.

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