Circuit Court for Wicomico County
Case No. 22-K-15-000572

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1786

September Term, 2023

DELONTE BRYANT

v.

STATE OF MARYLAND

Leahy,
Zic,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: August 19, 2025

* This is an unreported opinion. The opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

For the second time, Delonte Bryant appeals from his convictions in the Circuit Court for Wicomico County related to the shooting death of Dommeir Deshields on August 3, 2015. In his first appeal, *Bryant v. State*, No. 2187, Sept. Term 2016, 2018 WL 1956411 (Md. Ct. Spec. App. Apr. 25, 2018), we vacated Bryant's convictions and remanded the case for a new trial, finding that the State had failed to timely discover and disclose material evidence under *Brady v. Maryland*, 373 U.S. 83, 87 (1963) —a report from the Maryland State Police indicating that the firearms examiner who testified for the State "had performed her job requirements unsatisfactorily" in another case. *Bryant*, 2018 WL 1956411, *1.

Following Bryant's first trial, Maryland caselaw spawned significant development in our jurisprudence governing expert testimony. In *Rochkind v. Stevenson*, 471 Md. 1 (2020), the Supreme Court of Maryland abrogated the *Frye-Reed* standard for expert testimony and formally adopted a standard based on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In *Abruquah v. State*, 483 Md. 637, 698 (2023), the Court determined that a circuit court abused its discretion in permitting a firearms examiner to "opine without qualification" that a set of bullets was fired from a single firearm. During the second trial, the State offered a new firearms examiner, and the trial court ruled that under *Abruquah*, she could testify that "a single unknown firearm cannot be excluded as the source of all the shell casings . . . and projectiles[.]"

Also, one of the witnesses at the first trial, Michael Green, disappeared in October 2022, and could not be located by State investigators. The court ruled during the

underlying trial that, because of Green's unavailability, his testimony from the first trial could be read to the jury.

Bryant was retried over three days on May 26-28, 2023, and was again convicted on all counts. Bryant timely filed this appeal and raises four questions for our review, which we have re-ordered, re-phrased, and consolidated as follows:[1]

1. Did the trial court err by permitting the State's firearms examiner to testify that a single unknown firearm could not be excluded as the source of the ballistics evidence recovered on July 4 and August 3?

2. Did the trial court err by denying Bryant's motion to exclude evidence related to the July 4 shooting as propensity evidence?

3. Did the trial court err by granting the State's motion to admit the former trial testimony of Michael Green under Maryland Rule 5-804(b)(1)?

4. Did the trial court abuse its discretion by denying Bryant's motion to strike a juror after he disclosed that he saw a spectator make a "disturbing" gesture to a witness?

[1] Bryant's questions presented were, as originally ordered and phrased:

1. Did the trial court err by denying Appellant's motion to exclude evidence related to the July 4 incident?

2. Did the trial court err by permitting the State's firearms examiner to testify that a single unknown firearm could not be excluded as the source of the ballistics evidence recovered on July 4 and August 3?

3. Did the trial court err by granting the State's motion to admit the former trial testimony of Michael Green under Maryland Rule 5-804(b)(1)?

4. Did the trial court abused its discretion by denying Appellant's motion to strike juror no.12 after he disclosed being "disturbed" by something he saw in the courtroom?

We answer "no" to all four questions presented. *First*, we conclude that the trial court did not err in permitting the firearms examiner's testimony because it was reliable and there was no "analytical gap" between the examiner's testimony and her conclusions. *Second*, we hold that the trial court did not err in denying Bryant's motion to exclude evidence related to the July 4 shooting because it was substantially relevant to prove his identity as the shooter on August 3. *Third*, we hold that the trial court did not err by granting the State's motion to admit Green's former trial testimony because he was unavailable, and Bryant had a full and fair opportunity to cross-examine him at the first trial. *Fourth* and lastly, we also hold that the trial court did not abuse its discretion in denying Bryant's motion to strike a juror based on a spectator's actions during trial.

Discerning no error or abuse of discretion by the trial court, we shall affirm the convictions.

BACKGROUND

Two Shootings[2]

On August 3, 2015, at around 11:30 a.m., Dommeir Deshields was shot and killed at a street corner in Salisbury. Upon hearing gunshots, Maxy Hall, a nearby resident, looked out his apartment window and saw a "Black person . . . wearing shorts" shoot

[2] Because Bryant does not challenge the sufficiency of the evidence to sustain his convictions, we only provide a brief background of the evidence adduced during Bryant's second trial to provide context for our discussion of the issues presented. *Lovelace v. State*, 214 Md. App. 512, 518, n.1 (2013).

another person on the ground before running off. Jean Guirand also saw a "black man with a white t-shirt and braided hair" running away but did not see the man's face. When detectives showed Guirand an array of six photographs, he identified Bryant as the man he saw with "40 percent or 50 percent" confidence.

About a month prior, on July 4, 2015, Brittney Dozier was driving to pick up a friend from work when she heard gunshots. Dozier saw a "gray Durango" in the middle of East Road and then saw Bryant "running backwards to the Durango." Dozier recognized Bryant and had seen him up close "frequently." Bryant was wearing "a white shirt" and had his hair "pulled back . . . in a ponytail." After Bryant entered the passenger side of the Durango, the car drove away.

The police, including Sergeant (Sgt.) Ivan Barkley, responded to the shooting, and recovered six shell casings and three bullets from the scene—two bullets fired into cars parked along the street, and one bullet lying on the street—although one of the bullets later went missing. The day after the August 3 shooting, the police interviewed Dozier, who picked Bryant out of a photo array as the man she saw on July 4 with "100 percent" confidence.

On October 5, 2015, a grand jury indicted Bryant, charging him with the following offenses related to the murder of Deshields: (1) first-degree murder; (2) second-degree murder; (3) first-degree assault; (4) second-degree assault; (5) use of firearm in a crime of violence; (6) illegal possession of firearm possession; (7) reckless endangerment; and (8) wearing, carrying and transporting a handgun upon one's person.

First Trial

Bryant's first trial took place over three days, from August 16-18, 2016. *Bryant*, 2018 WL 1956411, at *2. Both parties called multiple witnesses, including Michael Green, who appeared in person and testified.[3] A police firearms examiner testified that "the projectiles recovered from the scene of both [June 4 and August 3] shootings were fired from the same gun and the cartridge cases were fired from the same gun." *Id.* at 4. At the end of the trial, the jury convicted Bryant on all counts for the murder of Deshields. *Id.* at *5.

Months after his conviction, Bryant moved for a new trial under Maryland Rule 4-331, based on newly-discovered evidence: a report from the Maryland State Police indicating that the firearms examiner who testified at the trial "had performed her job requirements unsatisfactorily" in another case. *Id.* at *1. After the circuit court denied his motion for a new trial, Bryant timely noted an appeal. On appeal, this Court found that the State's failure to discover and disclose the report violated the *Brady* rule, holding that the circuit court abused its discretion by denying Bryant's motion. *See id.* at *11-12. On May 29, 2018, Bryant's convictions were vacated, and the case was remanded to the circuit court for a new trial.

[3] At the time of the first trial, Green was incarcerated for an offense unrelated to Deshields's murder.

Events Leading Up to Bryant's Second Trial

Rochkind Decision and *Daubert* Hearing

Following the remand, Bryant's second trial was repeatedly postponed.[4] While the trial was pending, on August 28, 2020, the Supreme Court of Maryland released its opinion in *Rochkind v. Stevenson*, 471 Md. 1 (2020), replacing the *Frye-Reed* standard that courts in Maryland had applied to determine admissibility of expert testimony,[5] and holding that all expert testimony must be evaluated under the standard articulated by the Supreme Court of the United States in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 582 (1993).

Citing the new *Daubert-Rochkind* standard, Bryant filed a motion *in limine* to entirely exclude the "proposed testimony and report of" Susan Kim, the State's firearms examiner who re-examined casings and bullets from the July 4 and August 3 shootings for the second trial. In the alternative, Bryant asked to limit Kim's testimony "to what is scientifically reliable – testimony as to class characteristics (such as the caliber and general rifling characteristics) only." Among other things, Bryant challenged the Association of Firearm and Toolmark Examiners ("AFTE")'s "theory of identification"—the

[4] At least five postponements were at Bryant's request or with his consent.

[5] The *Frye-Reed* standard is derived from two cases, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), where the standard was first articulated, and *Reed v. State*, 283 Md. 374 (1978), where the Supreme Court of Maryland adopted the *Frye* standard. Under the *Frye-Reed* standard, "for expert testimony predicated on a novel scientific principle or discovery to be admissible, the scientific principles or discoveries must be generally accepted in the relevant scientific community." *Rochkind*, 471 Md. at 13.

methodology which Kim used for her re-examination—as "circular and fully subjective," noting that "courts across the country . . . have found claims that an examiner can match a specific bullet to a specific gun inadmissible."

The circuit court conducted a *Daubert* hearing over three days: April 23, 24, and 25, 2023. Kim, without objection, was accepted as an expert in the field of firearm and toolmark identification. She outlined the ATFE theory of identification, explaining that it involves comparing two projectiles based on class characteristics (e.g., caliber) as well as individual characteristics (e.g., the marks created by the barrel of the firearm during firing). Kim also explained the difference between "individual characteristics," which are unique to a given firearm, and "subclass characteristics," which are common to a limited run of firearms and originate from minor defects in the tools used in the manufacturing process.

Kim then testified about her examination process in the instant case. She initially compared the bullets and cartridges from each shooting against each other, and then she compared the bullets and cartridges from one shooting to those from the other shooting. She concluded that the projectiles and casings from both the July 4 and August 3 shootings came from the same firearm. Kim stated that another examiner independently reviewed the evidence and verified her conclusions. Kim acknowledged that she had previously reviewed and verified the work of the firearms examiner for Bryant's first trial, but asserted that it did not affect her examination result for the second trial. Kim agreed that having a recovered firearm to test-fire provides the best opportunity to identify subclass characteristics on spent ammunition, but she asserted that an appropriate conclusion can be

drawn without a recovered firearm.

The State then called Dr. Eric Warren, the co-founder of a forensic consulting company, who was also received, without objection, as an expert in the use and operability of firearms, forensic firearm and toolmark examination, identification of firearms, and crime scene processing. Dr. Warren testified that he had reviewed Kim's work in the case, and that it was consistent with the policies and procedures of other crime labs that he had reviewed. Dr. Warren also testified that Kim's prior work in reviewing another primary examiner's work for Bryant's first trial would not have affected her conclusion from the current examination because she was shielded from the initial results. Although Dr. Warren stated that Kim had a sufficient basis to reach her opinion, he agreed that having a gun to test-fire would be the "ideal case" because it would permit an examiner to create "a pristine exemplar of the types of marks . . . that the gun's barrel would leave on that bullet."

Dr. Warren then addressed the issue of reliability within the field of firearms examination. He explained that multiple "black box" studies found very low error rates and established firearms examination as generally reliable. Dr. Warren acknowledged, however, that the lack of a widely used database of samples prevents the examiners from drawing quantifiable conclusions about the rarity of certain levels of agreement between toolmarks. He also recognized the need for statistical methods to quantitatively measure the likelihood that two bullets were fired from the same gun.

The Defense called David Faigman, Dean of the University of California College of Law San Francisco (formerly U.C. Hastings). Dean Faigman was subsequently received

as an expert in scientific research methods, research design, and statistics. Dean Faigman expressed that further empirical research is needed to establish the scientific validity of firearm and toolmark examination. He highlighted that the firearms examiners do not typically receive external feedback about the accuracy of their examination results. Dean Faigman also opined, contrary to Dr. Warren, that studies to date were insufficient to establish the reliability of firearm and toolmark examination. In his view, although "the way forward" for firearm and toolmark examination was "pretty positive" based on evolving technology, the examiners should currently "be limited to what they are able to testify to, which is the class of guns that creates these kind of marks[.]"

Following the hearing, the court entered a forty-two-page opinion and order, denying Bryant's motion *in limine*. In the opinion, the court acknowledged some shortcomings in the methodology but concluded:

> [S]hortcomings in an expert's conclusion, so long as they are supported by sufficiently reliable methodological underpinnings, "go[] to the weight, not the admissibility of the testimony." *Parkway Neuroscience*, [255 Md. App. 596, 630 (2022)] (internal citation omitted). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Rochkind*, 471 [Md.] at 38 (citing *Daubert*, 509 U.S. at 596). This description—shaky but admissible evidence—accurately describes the nature of Kim's testimony.

The court also declined to limit Kim's proposed testimony, provided it complies with the Department of Justice Uniform Language for Testimony and Reports for the Forensic Firearms/Toolmarks Discipline—Pattern Matching Examination ("DOJ ULTR"). Under those guidelines, the court held:

> Kim "will not use terms such as match, will not state her expert opinion with any level of statistical certainty, and will not use phrases when giving her opinion of 'to the exclusion of all other firearms' or 'to reasonable degree of scientific [or ballistic] certainty.'" *United States v. Harris*, 502 F. Supp. 3d 28, 44-45 (D.D.C. 2020) (some internal quotations omitted). Kim may:
>
> > "conclude that casings were fired from the same firearm when all class characteristics are in agreement, and the quality and quantity of corresponding individual characteristics is such that the examiner would not expect to find that same combination of individual characteristics repeated in another source and has found insufficient disagreement of individual characteristics to conclude they originated from different source."
>
> *Ibid.*

(citation modified).

Abruquah Decision and Bryant's Motion for Reconsideration

On June 20, 2023, the Supreme Court of Maryland released its opinion in *Abruquah v. State*, 483 Md. 637 (2023), in which it applied the *Daubert-Rochkind* standard to determine the admissibility of firearms identification testimony by an expert witness.

In *Abruquah*, police compared bullets recovered from the scene of a murder with bullets fired from a gun found in the defendant's residence. *See* 483 Md. at 649, 651. At trial, over the defendant's objection, a firearms examiner "opined that four bullets and one bullet fragment recovered from the crime scene 'at some point had been fired from'" the defendant's gun. *Id.* at 651. Later, after an extensive evidentiary hearing, the circuit court concluded that the examiner's testimony remained admissible under *Daubert-Rochkind* standard. *See id.* at 651-52.

Reversing the circuit court, the Supreme Court of Maryland held that "the

methodology of firearms identification presented to the circuit court did not provide a reliable basis for [the examiner's] unqualified opinion that four bullets and one bullet fragment found at the crime scene in this case were fired from [the defendant's gun]." *Id.* at 681-98. The Supreme Court of Maryland reasoned:

> Based on the evidence presented at the hearings, we hold that the circuit court did not abuse its discretion in ruling that [the examiner] could testify about firearms identification generally, his examination of the bullets and bullet fragments found at the crime scene, his comparison of that evidence to bullets known to have been fired from [the defendant's gun], and whether the patterns and markings on the crime scene bullets are consistent or inconsistent with the patterns and markings on the known bullets. However, the circuit court should not have permitted the State's expert witness to opine without qualification that the crime scene bullets were fired from [the defendant's] firearm.

Id. at 698.

On June 25, the day before trial, Bryant filed a motion for reconsideration,[6] arguing that the circuit court's "decision to permit the examiner to testify using [DOJ ULTR] is now inconsistent with the Supreme Court's holding in *Abruquah*." According to the motion, although Bryant "continues to object to the admissibility of the firearms testimony in its entirety . . . , for the purposes of this motion to reconsider, [he] requests that this examiner's testimony be limited to . . . a description of the class characteristics of the fired cartridge cases."

[6] Prior to the filing of the motion for reconsideration, the parties jointly asked the circuit court for "some guidance in light of *Abruquah* [on] what the State's firearms expert can say." After some discussion, the court told the parties' counsel, "I'm going to give you the weekend to think about it, too, and I'm going to take the weekend and think about it."

The next day, before the trial began, the State proffered that Kim would testify that the markings on the projectiles and shell casings were consistent with each other, and that "because these markings are consistent, a single unknown firearm cannot be excluded as the source of all the shell casings, and a single unknown firearm cannot be excluded as the source of all the projectiles[.]" Based on the State's proffer, the court denied Bryant's motion for reconsideration.

Second Trial

Bryant's second trial lasted three days. Paul and Guirand testified that they saw the person who shot Deshields on August 3, but none could conclusively identify the shooter as Bryant. Dozier and Sgt. Barkley testified about the July 4 shooting as summarized above. Dozier further related that following the August 3 shooting, Bryant contacted her and urged her "not to go to court."

Green's testimony from the first trial was read into the record, over the Defense's objection,[7] due to his unavailability for the second trial.[8] On July 4, 2015, Green gave Bryant a ride in a "tannish gold" Dodge Durango that belonged to Green's girlfriend. Bryant told Green to stop on East Road and hopped out of the car, holding a black handgun. Bryant started firing the gun towards a parking lot area, got back in the car, and then he

[7] The admissibility of Green's former testimony is discussed in greater detail in Section III of the Discussion, *infra*.

[8] Green's testimony was read by Michael Daugherty, a special investigator at the Wicomico County State's Attorney's Office. Later during the trial, Daugherty testified that to the best of his knowledge, Green was still alive.

and Green drove away.

On August 3, 2015, Green gave Bryant another ride in the Durango and dropped him off near the railroad tracks. Bryant was wearing shorts, a white t-shirt, a "gardening hat," and sunglasses. After dropping Bryant off, Green drove down the street and turned left to talk to somebody he knew. Three or four minutes later, Green heard "five or six" gunshots coming from behind him. Later that day, Green asked Bryant about the shooting. Bryant responded, "ain't nothing happen, don't worry about it."

Kim testified as an expert in the field of firearms and toolmark comparison and analysis. She explained the components to a cartridge, including the bullet and the cartridge case, and how the rifling on a gun's barrel creates recesses on the bullet when the gun is fired. She discussed the difference between class characteristics, subclass characteristics, and the "finer detail." Kim stated that she looked at two bullets and six cartridge casings from the July 4 shooting, examining the breechface marks on the cartridge casings and the land and groove impressions on the bullets. She similarly examined six cartridge casings and five bullets from August 3, 2015. She noted that all the bullets and cartridge casings from both shootings came from a .40 caliber. She also confirmed that the markings on the projectiles from both dates were consistent with each other, and that "a single unknown firearm cannot be excluded as the source of all of the projectiles[.]"

On the last day of the trial, the trial court gave jury instructions. Among other instructions, the court issued a limiting instruction related to the July 4 shooting:

> You have heard evidence that the Defendant committed the prior act of shooting a handgun on July 4, 2015, which is not a charge in this case. You

> may consider this evidence only on the question of identity; however, you may not consider this evidence for any other purpose. Specifically, you may not consider it as evidence that the Defendant is of bad character or has a tendency to commit crime.

Both parties then stated that they were satisfied with the jury instructions.

After closing statements, the jury deliberated and reached a verdict.[9] The jury found Bryant guilty on all counts: murder in the first degree; murder in the second degree; assault in the first degree; assault in the second degree; firearm use in a crime of violence; firearm possession by a prohibited person; reckless endangerment; and handgun wear, carry and transport upon their person. On October 30, 2023, Bryant was sentenced to life in prison on count one, first degree murder; 20 years with a five-year mandatory minimum, concurrent to count one, on count five, firearm use in a crime of violence; and 15 years with a five-year mandatory minimum, concurrent to count five, on count six, firearm possession by a prohibited person. Bryant timely noted this appeal.

[9] During deliberations, the court received two questions from the jury. The first asked, "are we allowed to have Michael Green's testimony?" The second asked, "is it definite that the gun used during the shooting on 7-4 is the same gun that had to be used on 8-3?" After consulting with both parties, the court answered that the jury would have to rely on its own memory of the witnesses' testimonies.

DISCUSSION

I.

Admissibility of Firearms Examination Testimony

Standard of Review

"We review a circuit court's decision to admit expert testimony for an abuse of discretion." *Abruquah*, 483 Md. at 652. "Under this standard, an appellate court does 'not reverse simply because the . . . court would not have made the same ruling.'" *State v. Matthews*, 479 Md. 278, 305 (2022) (alteration in original) (quoting *Devincentz v. State*, 460 Md. 518, 500 (2018)). "In connection with the admission of expert testimony . . . a circuit court abuses its discretion by, for example, admitting expert evidence where there is an analytical gap between the type of evidence the methodology can reliably support and the evidence offered." *Abruquah*, 483 Md. at 652.

Legal Framework

In *Rochkind v. Stevenson*, 471 Md. 1 (2020), the Supreme Court of Maryland outlined ten factors it deemed "persuasive" in determining whether expert testimony is admissible under *Daubert* and Maryland Rule 5-702:

> (1) whether a theory or technique can be (and has been) tested;
>
> (2) whether a theory or technique has been subjected to peer review and publication;
>
> (3) whether a particular scientific technique has a known or potential rate of error;
>
> (4) the existence and maintenance of standards and controls; and

(5) whether a theory or technique is generally accepted.

* * *

(6) whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying;

(7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;

(8) whether the expert has adequately accounted for obvious alternative explanations;

(9) whether the expert is being as careful as he [or she] would be in his [or her] regular professional work outside his [or her] paid litigation consulting; and

(10) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

471 Md. at 35-36 (all but first alteration in original) (internal citations and quotations omitted).

In *Abruquah*, the Court applied these *Daubert-Rochkind* factors to the expert testimony of a firearms examiner "that four bullets and one bullet fragment recovered from the crime scene 'at some point had been fired from'" the defendant's gun. 483 Md. at 651, 681-98. Specifically, the Supreme Court determined that (1) the ATFE Theory of firearms examination is testable; (2) the methodology has not been subjected to peer-review, but studies on firearms examination have been critiqued and analyzed by outside reports; (3) studies show a low "false positive" rate for identification, but do not demonstrate a reliable identification rate in actual casework; (4) although the ATFE Theory provides standards

and controls applicable to firearms examination, it lacks guidance regarding certain aspects of analysis, such as the quality or quantity of shared characteristics necessary to find a "match"; (5) the ATFE Theory is overwhelmingly accepted by firearms examiners, but has been criticized by other scientists and academics; (6) the examiner reached his conclusion independently and not to reach a preferred result for litigation; (7) there was an "analytical gap" between the examiner's methodology and his "unqualified testimony that the crime scene bullets and bullet fragment were fired from" the defendant's gun; (8) "without the ability to examine other bullets fired from other firearms in the same production run as the firearm under examination," the examiner could not reliably eliminate all alternative sources for the bullets; (9) the examiner's testimony was given as part of his professional work; and (10) although "firearms identification is generally reliable," it "has not been shown to reach reliable results linking a particular unknown bullet to a particular known firearm." *Id* at 681-98.

The Court concluded that "the methodology of firearms identification presented to the circuit court did not provide a reliable basis for [the examiner's] unqualified opinion that four bullets and one bullet fragment found at the crime scene in this case were fired from" the defendant's gun, and the circuit court therefore abused its discretion in permitting the examiner to offer that opinion. *Id.* at 696-97. The Court specifically found that there was an "analytical gap" between the methodology and the examiner's unqualified testimony that the crime scene bullets were fired from a particular firearm. However, the Court did "not question that firearms identification is generally reliable, and can be helpful

to a jury, in identifying whether patterns and markings on 'unknown' bullets or cartridges are consistent or inconsistent with those on bullets or cartridges known to have been fired from a particular firearm." *Id.* at 695-96. The Court held that the circuit court did not abuse its discretion in admitting testimony about firearms identification generally, the examiner's comparison of bullets found at the crime scene to bullets known to have been fired from the defendant's gun, and the examiner's opinion on whether the patterns and markings on the crime scene bullets were consistent or inconsistent with the patterns and markings on the known bullets. *Id.* at 998.

Parties' Contentions

On appeal, Bryant argues that under *Abruquah*, "a firearms examiner may testify that the patterns and markings on different sets of bullets and/or casings are consistent with one another." Although a footnote in *Abruquah* addressed the argument that "the testimony of a firearms identification examiner should be limited to opining, 'at most, that a firearm cannot be excluded as the source of the questioned projectile[,]'" Bryant argues that "[t]he Court dropped this footnote in the course of clarifying that an examiner may testify that the patterns and markings on an unknown projectile or casing 'are consistent or inconsistent with those on bullets or cartridges known to have been fired from a particular firearm.'" (Quoting 483 Md. at 696 n.31.) Therefore, Bryant posits, "in another case, with a known firearm, it may be proper under *Abruquah* for an examiner to use the 'cannot be excluded' language." Bryant argues that this case presents a different scenario from *Abruquah*, where the examiner was "comparing bullets and casings fired by an unknown firearm to bullets

and casings known to have been fired by a particular firearm." Here, "[t]he examiner was comparing sets of bullets and casings that could have been fired by potentially thousands of different firearms." He argues that "[f]or the State's expert to opine that a single unknown firearm could not excluded as the source of both sets of evidence suggests to the jury greater certainty than is supported by the science[,]" and the trial court therefore "erred in denying the defense objection to Susan Kim's testimony."

In response, the State first contends that Bryant failed to preserve the argument "that the trial court erred by 'permitting the State's firearms examiner to testify that a single unknown firearm 'could not be excluded' as the source of the ballistics evidence recovered on July 4 and August 3.'" The State acknowledges that on the morning of the first day of trial, the Defense lodged a generalized objection, stating, "the only thing that we know for certain is the class characteristics of these items, which are set by their manufacturer, and that we would contend that that is as far as the testimony should go." However, the State argues that Bryant's written motion for reconsideration, which contained more specific objections, did not contest the "could not be excluded" language, and that in a pre-trial hearing, Defense counsel agreed that "cannot be excluded" would be "better language than 'consistent with fired from the same firearm.'" The State avers that "[b]y failing to specifically raise the issue to the trial court, and indeed specifically advocating for the language about which he now complains, Bryant deprived the trial court of contemporaneously considering the issue."

On the merits, the State argues that "[w]hen read as a whole, *Abruquah* expressly endorses, pursuant to the proper foundation, testimony that certain firearm evidence (shell casings or projectiles) are 'consistent' or 'inconsistent' with having been fired from the same firearm, and that a particular firearm 'cannot be excluded' as the source of particular projectiles." The State contends that "Kim's testimony that a single unknown firearm could not be excluded as the source of both sets of firearm evidence flowed naturally from her opinion that they were consistent with one another 'across both dates.'" The State argues that the Supreme Court in *Abruquah* viewed this type of testimony as permissible, and that the methodology of firearms examination supports such a conclusion. The State points out that "[e]ven when the firearm evidence is being compared with a known firearm, that evidence is not compared directly with the firearm"—instead, the same process is used, whereby individual projectiles and shell casings are compared with each other.

Analysis

We open our analysis with our ruling that Bryant's argument is preserved. Prior to trial, a party may file a motion *in limine* on the admission of evidence to "give the court sufficient time to consider the matter in making a ruling, thereby minimizing interruptions during the trial." *Id.* at 447. When evidence has been ruled admissible after a motion *in limine*, a general reference to the earlier motion is sufficient to preserve the party's objection during trial. *Handy v. State*, 201 Md. App. 521, 538 (2011). This accords with the purpose of the preservation rule, which is "to prevent the trial court from being sandbagged by unseen error." *Jordan v. State*, 246 Md. App. 561, 586 (2020).

Bryant filed a motion *in limine* asking the court to entirely exclude the "proposed testimony and report of" Susan Kim; or, in the alternative, to limit Kim's testimony to "class characteristics." His counsel continued to object to testimony by Kim beyond class characteristics during the discussion before trial, re-raised that objection prior to Kim's testimony, and was granted a continuing objection by the trial court. Although Bryant's counsel argued at a pre-trial hearing that 'cannot be excluded' would be "better language than 'consistent with fired from the same firearm[,]" this did not waive Bryant's objection to Kim's testimony as a whole. Bryant's motion *in limine* was sufficient to raise the issue to the trial court, and his objections at trial were sufficient to preserve the issue.

On the merits, we hold that the circuit court did not abuse its discretion in admitting Susan Kim's expert testimony. First, Kim could reliably testify that the markings on the bullets and cartridge casings from July 4 were consistent with the markings on the bullets and cartridge casings from August 3. In *Abruquah*, the Supreme Court specifically held that "firearms identification is generally reliable, and can be helpful to a jury, in identifying whether patterns and markings on 'unknown' bullets or cartridges are consistent or inconsistent with those on bullets or cartridges known to have been fired from a particular firearm." 483 Md. at 695-96. In that case, the examiner compared bullets fired from the defendant's firearm with bullets from the crime scene, *id.* at 651; here, Kim compared bullets and cartridge casings from the murder on August 3 with bullets and cartridge casings from the July 4 shooting. In both cases, however, the methodology is the same: the firearms examiner compares spent bullets and cartridge cases with each other, looking

for consistencies and inconsistencies in the impressions created by the barrel and the firing pin when the gun was fired. Thus, there is no "analytical gap" between Kim's methodologies and her conclusion that the markings on the bullets and cartridge casings from July 4 were consistent with the markings on the bullets and cartridge casings from August 3.

A comparison involving bullets fired from a recovered firearm is more reliable than a comparison without a recovered firearm—as Dr. Warren testified at the *Daubert* hearing, having a gun to test-fire permits the examiner to create a "pristine exemplar" of "the types of marks that a . . . gun's barrel would leave on that bullet." However, that does not mean that an examination without a recovered firearm is so unreliable that it is an abuse of discretion to admit. As noted in *Rochkind*, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 471 Md. at 38 (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993)). Here, the circuit court did not abuse its discretion in finding that Kim's testimony was reliable enough to admit at trial, subject to Bryant's cross-examination.

Kim reliably testified that a single unknown firearm "could not be excluded" as the source of the bullets and cartridge casings recovered on July 4 and August 3. In *Abruquah*, the Supreme Court ruled that the methodology of firearms examination could not support "an unqualified opinion that the crime scene bullets were fired from [the defendant's] gun." 483 Md. at 648. This was, in large part, because "the record [did] not support that firearms

identification can reliably eliminate all alternative sources so as to permit unqualified testimony of a match between a particular firearm and a particular crime scene bullet." *Id.* at 695.

The conclusion that a single unknown firearm could not be excluded as the source of multiple bullets does not require the examiner to eliminate all alternative sources of the bullets. The methodology of firearms examination can reliably support excluding bullets from being fired from the same firearm if they have different characteristics such as caliber, direction of twist, number of grooves, and width of lands and grooves. Kim's conclusion that "a single unknown firearm cannot be excluded as the source of all the cartridge casings . . . and projectiles" follows logically from her testimony that the characteristics of the bullets and cartridge casings from both dates were consistent with each other. Therefore, there is no "analytical gap," and the circuit court did not abuse its discretion in permitting her to testify that a single unknown firearm "could not be excluded" as the source of the bullets and cartridge casings recovered on July 4 and August 3.

II.

Admissibility of July 4 Shooting Evidence

Parties' Contentions

Bryant argues that "[t]he 'probative force' of the firearms identification evidence was significantly reduced by the limitations imposed by the *Abruquah* decision." He contends that Kim "did not have and could not give an accurate sense of how many guns could possibly be the 'unknown firearm' that could not be excluded as being the source of

both sets of projectiles and casings[,]" and "[w]ithout the context of how many guns could possibly create the markings she observed, her testimony regarding the July 4 evidence lost its meaning and became, essentially, propensity evidence, not identity evidence." Bryant avers that evidence of prior bad acts is not admissible to prove a person's propensity to commit crime, and that evidence of the July 4 shooting therefore should have been excluded.

The State argues that "[d]espite the lack of *unqualified* testimony that the same firearm was used in both incidents, the evidence of the July 4 shooting was relevant to Bryant's identity as DeShields's killer, and its probative value was not substantially outweighed by the danger of unfair prejudice." The State contends that Bryant's defense at trial was based on identity as he "sought to convince the jury that he was not guilty because he was not the person who killed DeShields." The evidence of the July 4 shooting, therefore, "had a tendency to make it less probable that someone other than Bryant shot and killed DeShields." Citing several cases, the State contends that Maryland courts routinely allow evidence of a defendant's earlier "possession of a similar firearm" as proof of identity. In this case, the State avers that "even with a less definitive conclusion that the projectiles and shell casings were all 'consistent,' the firearm evidence was still probative of Bryant's identity where the two incidents happened within a month of each other." The State argues that the unfair prejudice resulting from this evidence was limited because "[t]he evidence about the shooting that was presented to the jury was succinct, and it was not more incendiary than necessary." The State also points out that the court instructed the

jury that it could "'consider [the evidence of the July 4 shooting] only on the question of identity; however, you may not consider this evidence for any other purpose . . . [s]pecifically, you may not consider it as evidence that the Defendant is of bad character or has a tendency to commit crime.'" (Quoting transcript from May 28, 2023, page 230.)

In his reply brief, Bryant argues that "[b]ecause the purported link between the July 4 incident and the August 3 was so incredibly tenuous . . . the probative value of the July 4 evidence was not high enough to meet the threshold for relevance[.]" Bryant contends that the cases cited by the State, in which prior firearm use was used to prove the defendant's identity, involved much stronger links between the firearm used in the prior bad act and the firearm used in the charged crime. Bryant also argues that the July 4 evidence had "tremendous" prejudicial effect because "[t]he State's ability to prove identity as to the August 3 shooting rested entirely on its ability to present evidence of the July 4 incident."

Legal Framework

Maryland Rule 5-404(b), which covers the admissibility of prior bad acts evidence, provides:

> Evidence of other crimes, wrongs, or acts . . . is not admissible to prove the character of a person in order to show action in the conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident[.]

The Supreme Court of Maryland has established a three-step test to determine the admissibility of prior bad acts evidence pursuant to Rule 5-404(b). *See Browne v. State*, 486 Md. 169, 190 (2023).

First, the court must determine "whether the evidence fits within one or more of the [special relevancy] exceptions." *Streater v. State*, 352 Md. 800, 807 (1999) (alteration in original) (quoting *State v. Faulkner*, 314 Md. 630, 634 (1989)). "[T]he evidence must be 'substantially relevant to some contested issue in the case[.]'" *Gutierrez*, 423 Md. 476, 489 (2011) (quoting *Faulkner*, 314 Md. at 634). "Before admitting such evidence, a trial court must therefore determine that the issue to which the evidence is addressed is genuinely contested in that case and that the evidence has more than a minimal bearing on the issue." *Browne*, 486 Md. at 192. "[A] court may not admit other bad acts evidence if the primary inference to be drawn from it depends on propensity reasoning." *Id.* at 191. This "is a legal determination that we review without deference to the trial court." *Id.* at 193-94.

Second, the court must "decide whether the accused's involvement in the other crimes is established by clear and convincing evidence." *Streater*, 352 Md. at 807 (quoting *Faulkner*, 314 Md. at 634). "We will review this decision to determine whether the evidence was sufficient to support the trial judge's finding." *Faulkner*, 314 Md. at 635; *see Browne*, 486 Md. at 194.

Third, "the evidence 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]'" *Gutierrez*, 423 Md. at 489 (quoting Md.

Rule 5-403). We review this determination for an abuse of discretion. *Browne*, 486 Md. at 194.

Analysis

Bryant does not contest that his involvement in the July 4 shooting was established by clear and convincing evidence; his argument is focused on the first and third steps of the test. Regarding the first step, Bryant argues that evidence of the July 4 shooting is not substantially relevant to a contested issue. To the extent that the first step is satisfied, Bryant argues that the evidence should be excluded at the third step because its probative value is substantially outweighed by the danger of unfair prejudice. We disagree with both arguments.

To begin with, evidence of the July 4 shooting had "more than a minimal bearing on" a hotly contested issue in this case: Bryant's identity as the shooter on August 3. *Browne*, 486 Md. at 192. Although multiple witnesses saw the August 3 shooting or its aftermath, the strongest identification was Jean Guirand's selection of Bryant in a photo array with "40 percent or 50 percent" confidence as the man he saw running away from the shooting immediately after hearing gunshots. Green gave Bryant a ride to the location of the shooting on July 4, and testified that Bryant was wearing a "white t-shirt," and a "gardening hat"—just like the man Guirand saw running away from the shooting. But Green did not see the shooting; he only heard "five or six" gunshots about three or four minutes after dropping Bryant off. Brittany Dozier, who testified about the July 4 shooting,

told the jury that, following the August 3 shooting, Bryant contacted her and urged her "not to go to court."

The key link between the two shootings is Kim's testimony that the projectiles fired on both dates were consistent with each other. To be sure, the strength of that link was reduced when the testimony was diluted from "the projectiles recovered from the scene of both shootings were fired from the same gun[,]" *Bryant v. State*, No. 2187, Sept. Term 2016, 2018 WL 1956411, at *4 (Md. Ct. Spec. App. Apr. 25, 2018), to "a single unknown firearm cannot be excluded as the source of all of the projectiles[.]" "Cannot be excluded" is language is often used in DNA cases, where the analyst is able to produce an estimate that a random individual would be included in the sample. *See, e.g.*, *Phillips v. State*, 451 Md. 180, 186 (2017) (expert concluded defendant "could not be excluded as a contributor" to DNA sample, and chances an unrelated African-American individual from random population would be included were approximately "1 in 2.93 million"); *Derr v. State*, 434 Md. 88, 109 (2013) (expert concluded defendant "cannot be excluded" from DNA profile and "testified about the remote possibility of the profile appearing elsewhere in the general population"). Here, due to the current limitations of firearms examination, Kim was unable to provide an estimate of how many guns might fire bullets with matching characteristics.

Still, based on the whole of Kim's testimony, the link was strong enough to make evidence of the July 4 shooting substantially relevant to prove Bryant's identity. Kim stated that "when the cartridge is discharged and the bullet makes its way down the barrel," grooves in the barrel cut into the bullet, creating grooves and raised areas. She stated that

when she compares the markings on projectiles, she looks at "class characteristics," including the caliber of the projectiles, when comparing the markings on projectiles. She also said she looks at the "number of grooves on the bullet" and "the direction of the twist." She stated that all the bullets from the July 4 shooting and the August 3 were ".40 caliber class," had the "same number and the same direction of twist[,]" and "widths of the lands and grooves" were consistent. She found six different types of .40 caliber firearms and two 10-millimeter firearms that had consistent characteristics. Kim stated that she also looks at "subclass characteristics" that are "not determined prior to manufacture," but are "caused during the manufacturing process . . . in that state of wear of that tool." She stated that she examined the projectiles with a comparison microscope to compare the lines on each bullet and see if they matched up.

As such, Kim's testimony gave the jury more material evidence to draw an inference that Bryant was the shooter on both dates than the bare assertion that "a single unknown firearm cannot be excluded as the source of all the cartridge casings across those two dates[.]" Rather, the ultimate inference permitted by Kim's testimony is that the group of individual firearms that could have fired the bullets on both July 4 and August 3 is very narrow, albeit not exclusive. With this inference, evidence of the July 4 shooting was substantially relevant to show Bryant's identity as the shooter on August 3. In *Wilkerson v. State*, 139 Md. App. 557, 561 (2001), this Court examined the admissibility of evidence that the defendant in a murder case possessed the murder weapon in a separate robbery committed eight days after the murder. We held that evidence of the robbery established

the defendant's identity because "as the person in possession of the weapon during the robbery . . . he may have also been in possession of the murder weapon as part of a similar scenario eight days earlier." *Id.* at 572. And in *Henry v. State*, 184 Md. App. 146, 168 (2009), we held that evidence of the defendant's involvement in a prior robbery was relevant to prove his identity because he possessed "a gun similar to that used in a prior crime[.]" Here, as in *Wilkerson* and *Henry*, evidence tending to prove that Bryant possessed the same firearm on July 4 and August 3 is relevant to prove his identity as the shooter on August 3.

Bryant argues that the cases cited by the State in which prior bad acts were admissible to show identity based on firearm use, the evidence was stronger than in this case. For example, in *Simms v. State*, 39 Md. App. 658, 665 (1978), "the ballistics testimony established that the same gun which fired the bullets killing [the victim] also fired the bullet wounding" another individual in a prior act. But in *Henry*, "the State offered evidence only to show that [the defendant] possessed a gun similar to the one used in the murder." 184 Md. App. at 169. We do not agree that there must be an exact match between firearms for evidence of a prior bad act to be substantially relevant to prove identity. Indeed, taken to its logical extreme, Bryant's argument would prohibit the introduction of all prior bad acts to prove identity through ballistics evidence, since the Supreme Court of Maryland held in *Abruquah v. State*, 483 Md. 637, 698 (2023), that the methodology of firearms identification cannot support an unqualified conclusion that bullets were fired from a single gun. We do not believe that this was the intended result of *Abruquah*. In

Browne v. State, 486 Md. 169, 192 (2023), decided later that year, the Court described "ballistics tests" as one of "the ways in which bad acts evidence may permissibly be used to prove identity."[10]

Going to the third step, we also find that the probative value of evidence of the July 4 shooting was not outweighed by the danger of unfair prejudice. We recognize that admitting evidence showing that, on a separate date from the crime charged, Bryant fired multiple bullets into cars on a residential street is prejudicial. But the question before the court was whether the prejudice was outweighed by its probative effect. The Supreme Court has instructed that "[t]he *necessity for* and probative value of the 'other crimes' evidence is to be carefully weighed against any undue prejudice likely to result from its admission." *Snyder v. State*, 361 Md. 580, 604 (2000) (emphasis added) (citations omitted). Here, we observe that the evidence of the July 4 shooting was restricted to the facts necessary to prove Bryant's identity as the shooter on August 3. Although Dozier testified that Bryant had been "using a truck door as, like, a shield," Sgt. Barkley, who responded to the scene, testified that to his knowledge nobody was injured. Moreover, as the State points out, the trial court carefully instructed the jury not to consider the evidence in light of Bryant's character or propensity to commit the crime charged.

[10] In *Browne*, the Supreme Court reversed the defendant's conviction because the prior bad acts evidence "was not offered for a permissible purpose that was relevant to a disputed issue[.]" 486 Md. at 210. The Court determined, among other things, that the degree of similarity between the two crimes was not enough to support a *modus operandi* theory of admission, and the prior crime was not admissible to show lack of mistake because that issue was not genuinely contested. *Id.* at 198, 204.

The "balancing of probative value against prejudicial effect is committed to the sound discretion of the trial judge[,]" who "is in the best position to make this assessment." *Stevenson v. State*, 222 Md. App. 118, 142 (2015) (quoting *Ayala v. State*, 174 Md. App. 647 (2007)). Here, where "the murder weapon was not recovered. . . . the evidence of prior bad acts was significant because it tended to establish that [Bryant] possessed a gun similar to the one used in the shooting[,]" and that he had this gun in his possession shortly before the shooting. *Henry*, 184 Md. App. at 169. As discussed above, identity was a significant contested issue in this case, and any evidence tending to prove Bryant's identity as the shooter on August 3 therefore had substantial probative value. Given the strong inference permitted by Kim's testimony, the trial court did not abuse its discretion in determining that the probative value of evidence of the July 4 shooting was not outweighed by the danger of unfair prejudice. Because all three steps of the test required under our decisional law to admit prior the prior shooting under Maryland Rule 5-404(b) are satisfied, the trial court did not err in admitting evidence of the shooting on July 4.

III.

Admissibility of Green's Former Testimony

Relevant Facts

On June 16, 2023, the State filed a motion to admit the former testimony of Michael Green pursuant to Maryland Rule 5-804, which provides an exception to the hearsay rule for the former testimony of an unavailable witness. The State represented that despite its best efforts, it had "been unable to locate Mr. Green to serve him with a subpoena to appear

and testify at the current trial." The State thus contended that Green was "unavailable" pursuant to Rule 5-804(a)(5). The State argued that Green testified at the previous trial, and Bryant "had an opportunity and similar motive to develop the testimony of Mr. Green through cross-examination[.]" Therefore, the State requested that the court permit the introduction of Green's former testimony at trial.

On June 23, 2023, the court held a hearing on the State's motion. The State called Michael Daugherty, an investigator at the Wicomico County State's Attorney's Office. Daugherty stated that he was assigned to the case in March 2021. Daugherty spoke to Green "several times" over the phone and Green was "more than cooperative[.]" His last contact with Green was in September 2022. In October 2022, Daugherty tried to call Green's cell phone but found that it was no longer activated. Daugherty contacted the halfway house where Green had been living and found that he had been released and the staff had no further contact with him. Daugherty detailed the efforts he and other investigators undertook to locate Green, including checking all halfway houses in the Baltimore area, checking multiple databases for information on Green, and contacting Green's known relatives. In May 2023, Daugherty contacted a parole and probation agent and found that Green had been sentenced to probation for possession with intent to distribute. However, Green was placed on unsupervised probation and the office did not have his contact information. Despite his efforts, Daugherty was unable to locate Green.

After Daugherty stepped down, the court took judicial notice of Green's testimony in the first trial. The Defense made three principal arguments against the admission of

Green's former testimony. First, the Defense argued that Bryant had different counsel at the first trial, and there were additional questions that his new counsel would ask and additional impeachment through prior recorded statements. Second, the Defense argued that Green received a new conviction since the first trial, which would be an impeachable offense. The Defense contended that Green received a very lenient sentence for this conviction, which could lead to an inference that Green received that outcome "as a result of his participation in this particular case or his participation as a witness." Third, the Defense averred that issues related to an alleged threat to prosecute Green, raised in a December 2021 hearing, could no longer be used to cross-examine Green.

The Defense requested, "to the extent the Court disagrees with me, that there be an ability to present information by the defense through other witnesses" of Green's prior inconsistent statements. The State responded that "if testimony comes in this way, by reading a transcript of his former testimony, for impeachment purposes it's just as if he's here and the defense can certainly impeach." The State argued that "these were all statements that were available to everybody at the first trial[,]" but agreed that "[t]o the extent Mr. Green wasn't already impeached by them I think it's fair game to raise them in front of the jury."

The court ultimately found that Green was unavailable, and ruled that his former testimony could be read at trial:

> All right. Well, the Court, pursuant to Maryland Rule 5-804, would find that Mr. Green is unavailable as a witness. I think that pursuant to the rule it requires that in effect reasonable efforts by process or other reasonable means, I think that the State has taken reasonable efforts in an attempt to

> procure Mr. Green's attendance. That, you know, he was a willing witness, that whether he's avoiding him or whether he's homeless, whether there are other things going on, it would appear since he's in halfway houses either that's because he's on probation and being supervised or they are halfway houses dealing with substance abuse issues. He has a case manager and a sponsor which seem to indicate clearly that there are or have been substance abuse issues in the past.
>
> I think the State's made reasonable means and attempts to try to procure service upon Mr. Green, they have not been able to do so. I do find him to be an unavailable witness. And in light of that his former testimony I think is admissible under section B.
>
> The Court would note that [defense counsel] has raised some interesting issues as it relates to different counsel and other potential impeachment issues. I would note that the rule doesn't sort of contemplate the idea that if you have new counsel now that would potentially cross-examine in a different way that now the testimony doesn't come in. But I would say that since it's coming in in this way that if there are other statements there's some leeway there to ask officers about inconsistent statements maybe that Mr. Green gave to those officers in the course of investigation or trial prep. That normally would not be fair game since Mr. Green was here, but would be, you know, we can address it as we come across those issues in terms of scope, what can be asked. And I'm not saying the State's conceding on any of this, but has the ability to object. But I do think there's some leeway that would be allowed there within bounds, with the State having the opportunity to object to if it is inconsistent or not.
>
> So I will allow the testimony from the trial.

At trial, Michael Daugherty read Green's testimony from the first trial to the jury over the Defense's objection.[11] The Defense later re-called Daugherty and confirmed that Green was convicted of possession with intent to distribute narcotics on October 14, 2022, and that Green was sentenced to an unsupervised term of probation for that offense. In

[11] This testimony is described in the Background, *supra*.

addition, during cross-examination of Detective Sabrina Metzger, a State witness, the Defense questioned her about a prior police interview with Green. During that interview, police showed Green a photo of Bryant and Green said that he "knew that person but it wasn't the person he gave a ride to on August 3rd[.]" Police also asked Green if he had given that person a ride back in July, and Green said, "I don't think so." A detective told Green that somebody "picked him out" and he needed to tell the truth because he had "a lot to lose[.]" In addition, Green was shown a fake witness statement to convince him that police had information that he was present at the shooting on July 4.

Parties' Contentions

On appeal, Bryant does not contest Green's unavailability but contends that he did not have a fair opportunity to cross-examine Green. Bryant argues that "although [he] had the opportunity to cross examine Green, the cross examination at [the] first trial was not 'fairly equivalent' to what defense counsel's cross examination would be at the re-trial." (Quoting *Dulyx v. State*, 425 Md. 273, 287 (2013)). He points to "additional prior inconsistent statements defense counsel intended to cross examine Green with, and an additional impeachable conviction Green had received since the first trial (and a very sweet sentence that had been imposed for that conviction)."

The State responds that "Bryant was afforded ample opportunity to cross-examine Green at his first trial, and his motive to develop that cross-examination was similar in his second trial[.]" The State argues that "Bryant's motive to cross-examine Green at his first trial was virtually identical to his motive to do so at his second trial." The State further

contends that Bryant was given the opportunity to apprise the jury of Green's prior inconsistent statements through the cross-examination of a detective familiar with those statements, and that "he did just that during his cross-examination of Detective Metzger." The State avers that Bryant was able to introduce Green's 2022 conviction and sentence to the jury, but points out that "any benefit theoretically conferred to Green related to Green's most recent conviction would have occurred after he testified in Bryant's first trial." Thus, the State argues, his sentence for the conviction in 2022 could not have affected the substance of his testimony at the first trial, "which is what the jury in this case heard."

Standard of Review

We typically review rulings on the admissibility of evidence for abuse of discretion. *Dulyx*, 425 Md. at 287. However, "a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility." *Id.* (quoting *Parker v. State*, 408 Md. 428, 436 (2009)). "Whether evidence is hearsay is an issue of law reviewed *de novo*." *Id.* (quoting *Parker*, 408 Md. at 436).

Legal Framework

Maryland Rule 5-801 defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *See Williams v. State*, 416 Md. 670, 696 (2010). "Except as otherwise provided by [the Maryland Rules] or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802. One exception to the inadmissibility

of hearsay is contained in Rule 5-804(b)(1), which covers former testimony when the declarant is unavailable:[12]

> Testimony given as a witness in any action or proceeding or in a deposition taken in compliance with law in the course of any action or proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The admissibility of former testimony has a constitutional dimension in criminal cases, as the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee "that the accused shall enjoy the right to be confronted with the witnesses against the accused." *Cross v. State*, 144 Md. App. 77, 88 (2002) (quoting *State v. Breeden*, 333 Md. 212, 219 (1993)). However, the confrontation requirement is satisfied "where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant.'" *Id.* (quoting *Breeden*, 333 Md. at 222). This exception is "justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement." *Breeden*, 333 Md. at 220 (quoting *Barber v. Page*, 390 U.S. 719, 721 (1993)).

In determining whether the accused had sufficient opportunity to cross-examine the witness, the "crucial question is whether, given that the opponent cannot now cross-

[12] Relevant here, Rule 5-804(a)(5) defines a declarant as unavailable when the declarant "is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance . . . by process or other reasonable means."

examine the witness, the examination on the prior occasion was fairly equivalent to cross-examination in the present situation." *Dulyx*, 425 Md. at 287 (quoting *Huffington v. State*, 304 Md. 559, 569 (1985)). The Supreme Court of Maryland has "said that a prior occasion to cross-examine is 'fairly equivalent,' and the 'opportunity' requirement is thereby satisfied, when the objecting party has enjoyed a 'full and fair opportunity to probe and expose [the] infirmities [of the testimony] through cross-examination.'" *Id.* (alterations in original) (quoting *Williams*, 416 Md. at 696). "A motive to develop testimony is sufficiently similar . . . when the party now opposing the testimony would have had, at the time the testimony was given, 'an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue' now before the court." *Williams*, 416 Md. at 696 (quoting *United States v. Carneglia*, 256 F.R.D. 366 (E.D.N.Y. 2009)).

Analysis

Green's former testimony falls under definition of "hearsay" in Rule 5-801, as it was a statement made outside of the trial and introduced by the State to prove the truth of the matters asserted—*i.e.*, that Bryant fired bullets into multiple cars on July 4, 2015, and Bryant was in the area of the shooting on August 3, 2015. However, Green's former testimony is admissible under Rule 5-804(b)(1) because Bryant "had an opportunity and similar motive to develop" Green's testimony through cross-examination in the first trial. Bryant clearly had a similar motive to develop Green's testimony in both trials, as Bryant was charged with the same crimes and had the same interest in countering Green's testimony and attacking Green's credibility.

Bryant argues that "the cross examination at [his] first trial was not 'fairly equivalent' to what defense counsel's cross examination would be at the re-trial." But the keystone of whether cross-examination is "fairly equivalent" is *opportunity*—specifically, whether the defendant had a "full and fair opportunity to probe and expose [the] infirmities [of the testimony] through cross-examination." *Id.* (alterations in original) (quoting *Williams*, 416 Md. at 696). Bryant points to various prior inconsistent statements that his new counsel might have used to impeach Green, as well as questions that defense counsel might have asked related to police coercion, but defense counsel had the opportunity to explore these issues at the first trial.[13] Bryant's new counsel may have explored these issues differently or more thoroughly at the second trial, but his prior counsel had a full and fair opportunity to do so at the first trial.

The only issue raised by Bryant that he could not have raised at the first trial is Green's 2022 conviction for possession with intent to distribute. However, as the State points out, Green had already testified at the first trial, and so any lenient sentence given to Green in 2022 could not have affected the substance of his testimony in 2016. And in any case, Bryant was able to introduce the fact of Green's 2022 conviction, as well as his "lenient" sentence, through direct examination of Michael Daugherty. With these facts introduced outside Green's testimony, "the examination on the prior occasion was fairly

[13] The coercion issue referenced by defense counsel at the pre-trial conference on June 16, 2023, was generally related to police interviews that occurred (and were known to the Defense) prior to the first trial. Further, defense counsel was able to cross-examine Det. Metzger about these issues during the second trial.

equivalent to cross-examination in the present situation." *Dulyx*, 425 Md. at 287 (quoting *Huffington*, 304 Md. at 569). Therefore, the circuit court did not err admitting Green's former testimony under Rule 5-804(b)(1).

IV.

Motion to Strike Juror

Relevant Facts

On June 28, 2023, at the beginning of the third day of trial, the trial court received a note from juror number 12 that stated:

> [D]uring the course of the trial I've been observing the two men seated behind the Defendant. The taller gentleman who wears the chain basically sits motionless through most of the proceedings. However, when the witness, Ms. Dozier, testified she was admittedly scared. Upon leaving the courtroom I observed the man with the chain look at her and make a running motion with his arms. This was disturbing to me as she was already frightened. Maybe this can be seen on camera.

The court called juror 12 to the bench to discuss the note, with both parties present. The court asked the juror 12 if he had shared this observation with other jurors, and juror 12 responded that he had not. The court stated, "I would ask that if you remain on the jury that you would not share it with the other jurors." The court then asked juror 12 a series of questions about whether this observation would affect his deliberations, and the juror answered that he could still be impartial:

> THE COURT: My second question is do you think that this in any way impacts your ability to be fair and impartial as a juror in this case?
>
> THE JUROR: No.

> THE COURT: Okay. Obviously we're intending to have the case to the jury today for deliberations. Would you be able to make your own determination as to this Defendant's guilt or innocence just based on the facts and evidence that you've heard in the courtroom?
>
> THE JUROR: Yes.
>
> THE COURT: Would your observations potentially about this gentleman's, what you felt you observed, this gentleman and the motion you felt him make towards Ms. Dozier in any way impact your ability to be fair and impartial?
>
> THE JUROR: I don't think so.
>
> THE COURT: Okay. Any thoughts on that you would be able to set aside in terms of making a determination just based on what you've heard in court as it relates to the Defendant's guilt or innocence?
>
> THE JUROR: Yes.

The court asked both counsel if they had any follow-up, and both responded that they had no additional questions. The court asked juror 12 to return to his seat.

> After juror 12 left, the Defense made a motion to strike:
>
> I would just, for the record, sorry, for the record I understand how he answered the questions but I am going to make a motion to strike the juror. I think that it's information that will just by definition taint how he views the case given what he wrote in the note. He indicated the person was seated behind the Defendant, it's clear he's associating that person with the Defendant. It is not evidence before the Court, it's not something that should be considered, it's not part of the evidence in the case but it is something clearly that he noticed and is going to have in his mind as he goes through deliberations.

The court denied the motion to strike, stating:

> Okay. The Court would note that many times we have spectators in the course of a trial who are here on one side or the other behave inappropriately, behave in a way that the Court, the jury or the parties finds to not be in the best manner or potentially could lead to people having bad thoughts about one side or the other.

> The Court would find that I think he's appropriately answered the questions, that he can rely on just the facts and evidence that he's heard in the case in making his determination. I'm going to deny the motion to strike him.

After the close of the evidence, the court issued a curative instruction with language agreed to by both parties:

> The jury should not be influenced by the actions of anyone in the gallery during the course of the trial. You must rely on the evidence presented in making your decision. Further, you should not assume that a spectator is supporting the State or Defendant based on where they are sitting in the gallery.[14]

Parties' Contentions

Bryant contends that the trial court abused its discretion by not striking juror 12 and "replacing him with an untainted alternate." He argues that "[w]hat the juror thought he witnessed was, essentially, other crimes committed by or on behalf of Appellant[,]" and that it "was simply not realistic" for the juror to disregard what he had seen. Bryant compares this case to *Rainville v. State*, 328 Md. 398, 399 (1992), in which a witness at a sexual assault trial stated that the defendant was "in jail for what he had done to" the victim's nine-year-old brother. Bryant also references *Bruton v. United States*, 391 U.S. 123, 130-32 (1968), in which the Supreme Court noted that it is overwhelmingly difficult for a jury to disregard one co-defendant's confession when determining the guilt of innocence of the other co-defendant. Bryant argues that what juror 12 reported seeing had

[14] At the bench conference, Bryant told the court that the spectator who made the gesture was not associated with him and was "sitting with the victim's family."

a similar "substantial and irrevocable impact," and "there was no principled reason not to strike the juror and replace him with an alternate for the remainder of the trial."

The State responds that "[t]he trial court in this case properly considered the information provided by the juror, observed the juror's demeanor, and exercised its discretion in retaining the juror as a member of the jury." The State argues out that the juror "was forthcoming" and points out that "the juror repeatedly assured the trial court that his observation would have *no* impact on his ability to serve as a juror in the case." The State contends that "[t]here was no evidence whatsoever that what Juror 12 observed impacted his decision-making in Bryant's case at all, let alone in a 'substantial and irrevocable' way."

Legal Framework

Maryland Rule 4-312(g)(3) provides that "[a]t any time before the jury retires to consider its verdict, the trial judge may replace any jury member whom the trial judge finds to be unable or disqualified to perform jury service with an alternate[.]" Rule 4-312(g)(3) "does not define the circumstances under which a juror shall 'become unable or disqualified' to perform his duties." *Martin-Dorm v. State*, 259 Md. App. 676, 691 (2023) (quoting *James v. State*, 14 Md. App. 689, 699 (1972)). "Each case must be evaluated on a case-by-case basis." *Id.* "[T]he substitution of an alternate juror for a regular juror 'lies within the sound discretion of the trial judge [and s]uch an exercise of discretion will not be disturbed on appeal unless arbitrary and abusive in its application." *Williams v. State*,

231 Md. App. 156, 195 (2016) (second alteration in original) (quoting *James*, 14 Md. App. at 699).

Analysis

The trial court did not abuse its broad discretion in denying Bryant's motion to strike juror 12. The trial court found that juror 12 answered its questions appropriately and could judge the case impartially. "[W]e will not, based on the cold record provided us, substitute our judgment for that of the trial judge." *State v. Cook*, 338 Md. 598, 617 (1995) (upholding trial judge's decision to excuse juror). And as the trial court pointed out, "many times we have spectators in the course of a trial who are here on one side or the other behave inappropriately, behave in a way that . . . potentially could lead to people having bad thoughts about one side or the other." If the trial court's decision in this case were an abuse of discretion, then jurors would be dismissed far too frequently—potentially requiring a mistrial when an inappropriate gesture is seen by the entire jury.

The cases cited by Bryant are inapposite. It is extremely difficult for a juror to ignore testimony that the defendant himself committed a crime against another child, as in *Rainville*, or a co-defendant's confession to the charged crime that implicates the defendant, as in *Bruton*. Here, juror 12 witnessed a gesture made by a spectator who may or may not have been affiliated with Bryant. This was not, as Bryant argues, "essentially, other crimes committed by or on behalf of Appellant." To the extent that what juror 12 witnessed prejudiced Bryant, the curative instruction was sufficient to remind that jury that they "should not be influenced by the actions of anyone in the gallery during the course of

the trial" and that they "should not assume that a spectator is supporting the State or Defendant based on where they are sitting in the gallery." Thus, the trial court did not abuse its discretion in declining to replace juror 12 with an alternate.

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