Circuit Court for Baltimore City
Case Nos. 117331014 & 117331015

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1802 & 1803

September Term, 2019

XAVIER FARMER

v.

STATE OF MARYLAND

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

JJ.

Opinion by Graeff, J.

Filed: January 4, 2022

On April 2, 2019, Xavier Farmer, appellant, was convicted by a jury in the Circuit Court for Baltimore City of first-degree murder, conspiracy to commit murder, use of a firearm in the commission of a crime of violence, and two counts of possession of a regulated firearm by a prohibited person. On appeal, appellant presents the following questions for this Court's review, which we have rephrased slightly, as follows:

> 1. Did the trial court err by propounding an accomplice instruction to the jury?
>
> 2. Did remarks by the trial court and prosecutor erroneously undermine the State's obligation to prove guilt beyond a reasonable doubt?
>
> 3. Did the trial court err by admitting an eyewitness' photo identification of appellant in the absence of the police detective who actually displayed the photos?
>
> 4. Was the evidence legally sufficient to sustain two convictions for illegal possession of a regulated firearm?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On the night of October 15, 2017, Terrill Kennedy was shot 23 times in a parking lot in the 5200 block of Cuthbert Avenue in Baltimore City. Mr. Kennedy subsequently died of his injuries.

The police recovered from the crime scene numerous shell casings and bullet fragments consistent with different types of firearms.[1] Among those were four .40 caliber Smith & Wesson cartridge cases.

Ten days after the murder, Keon Holmes was arrested on unrelated drug charges and interviewed by the lead investigator on this case, Detective Eric Perez. During the interview, Mr. Holmes told Detective Perez that he knew Mr. Kennedy and had witnessed the shooting on October 15. He identified one of the shooters as a young man he knew as "Xay." He told police that Xay, who was dressed in black and wearing a North Face hooded sweatshirt, fired a 9-millimeter or .40 caliber weapon with an extended magazine. Xay had shown Mr. Holmes that same weapon a week or two earlier. Mr. Holmes described seeing Xay and multiple others "hop[] out" of a car and start "running with the guns" shooting at Mr. Kennedy.

Detective Perez then assembled a photo array, including a photograph of appellant. He asked another detective to conduct a photo identification with Mr. Holmes. Mr. Holmes orally identified the photograph of appellant as the man he knew as Xay, but he did not sign the photograph.

On October 29, 2017, appellant was arrested in Northwest Baltimore on an open warrant for a traffic citation. The arresting officer's body-worn camera footage, which was introduced into evidence at trial, showed that the officer recovered a semi-automatic

[1] The shell casings recovered were identified as those from a ".22 long rifle, .32 automatic, .380 automatic, 9 millimeter Luger, .40 Smith and Wesson, and .45 automatic."

handgun from appellant's waistband. Appellant told the officer that he had just bought the handgun that day. That weapon, a .40 caliber Glock handgun, was identified by a firearms expert at trial as the weapon that fired the four .40 caliber shell casings recovered from the murder scene.

On November 29, 2017, appellant was indicted in the Circuit Court for Baltimore City in Case No. 117331014, charging the following counts for the events of October 15, 2017: (1) first-degree murder of Mr. Kennedy; (2) conspiracy to commit murder; (3) use of a firearm in the commission of a crime of violence or felony; (4) conspiracy to use a firearm in the commission of a crime of violence or felony; (5) wearing, carrying, and transporting a handgun; (6) conspiracy to wear, carry, and transport a handgun; and (7) possession of a regulated firearm by prohibited person. That same day, the State filed a second indictment against appellant in Case No. 117331015, charging one count of possession of a regulated firearm by a prohibited person and one count of wearing, carrying, transporting a handgun, related to his arrest on October 29, 2017.

The two cases were tried together. The State called Mr. Holmes as a witness. Initially, Mr. Holmes denied that he was present on Cuthbert Avenue on the night of the shooting or that he knew Mr. Kennedy. He claimed not to recall speaking to Detective Perez or having identified appellant as one of the shooters. He denied that he made a recorded statement to the police.

Over objection, the court admitted into evidence a video of Mr. Holmes' interview with police as a prior inconsistent statement pursuant to Md. Rule 5-802.1(a)(3).[2] After the recording was played for the jury, Mr. Holmes acknowledged that he was the person in the video, but he recanted his statement, saying that he had lied to the police because he was scared that he would be charged in connection with the shooting. He testified that he was at his daughter's birthday party at the time of the shooting.

Detective Perez testified about his interview with Mr. Holmes. He explained that he created the photo array based on Mr. Holmes' statement that appellant was involved with the shooting, and he asked Detective Suiter, who is "no longer in this world," to show the array to Mr. Holmes. Mr. Holmes picked photo number two, which was a photo of appellant. Detective Suiter then walked out of the room and returned the photo array that Detective Perez had compiled. Detective Perez went back in the room to review the photo array with Mr. Holmes. He confirmed that Mr. Holmes picked the photo of appellant.

In addition to playing the video of the interrogation, a transcript of the video was also provided to the jury. The transcript provided to the jury notes that Mr. Holmes picked photo number two as someone who "looks familiar." When asked what role that person played in the investigation, Mr. Holmes stated that he first needed to know if his

[2] Md. Rule 5-802.1(a)(3) provides an exception to the rule against hearsay for a prior inconsistent statement made by a witness who testifies at the trial and is subject to cross-examination. The rule provides that such a statement is admissible if the prior statement was "recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement[.]" *Id.*

answer was confidential because he was "not coming to court," and he did not want to "be the next person getting killed." Detective Suiter said that he would get Detective Perez, the primary detective. Detective Perez came in and advised that any identification was confidential until trial and discovery. Detective Perez then asked about the photo that Mr. Holmes picked, number two, with the SID number 3812310, and Mr. Holmes stated that he saw that person with a gun when the victim was shot. He said that appellant and others shot the victim. Mr. Holmes refused to sign anything, expressing concern for his family.

The State also introduced evidence showing that, when appellant was arrested, he had a scabbed-over bullet wound in his right ankle and was taken to Sinai Hospital for evaluation. The medical records, which were introduced into evidence, reflected that he told treatment providers that he had been shot two weeks earlier, but he had not sought medical attention for the injury at that time.

The firearms expert testified that the four .40 caliber cartridge casings recovered from the crime scene were fired from the Glock handgun found on appellant.[3] The State was unable to establish, however, whether the .40 caliber bullets recovered from Mr. Kennedy's body also were fired from that same weapon. Specifically, the firearms expert's report, introduced as State's Exhibit 6, stated that the four .40 caliber bullets recovered from Mr. Kennedy's body bore "similar class characteristics," but they "could

[3] The firearms expert explained that the cartridge case is the piece that holds the projectile (i.e., the bullet) and, in the case of a semi-automatic weapon, it is ejected from the weapon when it is fired.

not be identified or eliminated as having been fired from the same . . . firearm" as the .40 caliber cartridge casings linked to the Glock handgun possessed by appellant.

At the conclusion of trial, the jury found appellant guilty in Case No. 117331014 of first-degree murder, possession of a regulated firearm by a prohibited person, use of a handgun in the commission of a crime of violence, and conspiracy to commit first-degree murder.[4] In Case No. 117331015, appellant was convicted of one count of possession of a regulated firearm by a prohibited person.

On October 23, 2019, the court sentenced appellant in Case No. 117331014 to life imprisonment, all but 50 years suspended, for the conviction of first-degree murder; life imprisonment, all but 50 years suspended, concurrent, for the conviction of conspiracy to commit murder; 15 years' imprisonment, concurrent, for the conviction of use of a handgun in a crime of violence; and 10 years' imprisonment, consecutive, for the conviction of possession of a regulated firearm by a prohibited person. In Case No. 117331015, the court sentenced appellant to 10 years' imprisonment, to run concurrently with his other sentences, for possession of a regulated firearm by a prohibited person.

This appeal followed.[5]

[4] The court granted a motion for judgment of acquittal on the conspiracy to use a firearm count (count 4). The State declined to send the wearing, carrying, transporting a handgun and related conspiracy count to the jury (counts 5 and 6). In Case No. 117331015, only one count was sent to the jury.

[5] On March 20, 2020, this Court issued an order consolidating the two cases for appeal.

DISCUSSION

I.

Accomplice Liability Instruction

At trial, the State requested a jury instruction on accomplice liability. Defense counsel objected, arguing that there was no evidence that appellant was "aiding, counseling, commanding, or encouraging [others in the] commission of the crime." Counsel argued that the State's theory was that appellant was a principal in the first degree, not an accomplice. The prosecutor responded that the evidence showed that appellant was present at the scene and discharged his weapon, but it was unclear whether he actually shot Mr. Kennedy.

The court overruled the objection and agreed to give an accomplice liability instruction. It subsequently instructed the jurors as follows:

> The defendant may be guilty of murder as an accomplice even though the defendant did not personally commit the acts that constitute the crime. In order to convict the defendant of murder as an accomplice, the State must have proven beyond a reasonable doubt that the murder occurred and that the defendant, with the intent to make the crime happen, knowingly aided, counseled, commanded or encouraged the commission of the crime or communicated to a participant in the crime that he was ready, willing and able to lend support if needed.
>
> A person need not be physically present at the time and place of the commission of a crime in order to act as an accomplice. On the other hand, the mere presence of the defendant at the time and place of the commission of a crime is not enough to prove that the defendant is an accomplice.[6]

[6] This instruction substantially tracked Maryland Criminal Pattern Jury Instruction 6:00 ("MPJI-Cr 6:00").

Defense counsel again noted her exception to this instruction.

On appeal, appellant contends that the court erred in giving the jury the instruction on accomplice liability. He argues that the instruction was not generated by the evidence because there was no evidence that he "aided, abetted, assisted, or encouraged anyone to do anything." He asserts that this error was prejudicial because it "improperly provided the jury with a basis for convicting that should not have been available."

The State contends that the court "lawfully instructed the jury about accomplice liability." It argues that the evidence supported the conclusion that appellant "was among the attackers," and "he had one of the murder weapons on his person in the following days." It asserts that, "[e]ven if the jury was not convinced that [appellant] had pulled the trigger at the scene, there was evidence from which it could have determined beyond a reasonable doubt that he was an accomplice."

Md. Rule 4-325(c) "requires a trial court to give a requested instruction when (1) it 'is a correct statement of the law'; (2) it 'is applicable under the facts of the case'; and (3) its 'content . . . was not fairly covered elsewhere in the jury instruction[s] actually given.'" *Hayes v. State*, 247 Md. App. 252, 288 (2020) (quoting *Thompson v. State*, 393 Md. 291, 302 (2006)). "Unless the trial court has made an error of law, we review its decision to give a jury instruction for abuse of discretion." *Id*.

Appellant challenges only the second element, i.e., whether the instruction was applicable under the facts of the case. "A requested jury instruction is applicable if the evidence is sufficient to permit a jury to find its factual predicate." *Bazzle v. State*, 426

Md. 541, 550 (2012). The minimum threshold of evidence required to generate a jury instruction is low, with the requesting party only needing to produce "some evidence" to support the requested instruction. *Id.* at 551. To determine whether there was "some evidence," "we view the facts in the light most favorable to the requesting party, here being the State." *Page v. State*, 222 Md. App. 648, 669, *cert. denied*, 445 Md. 6 (2015). "*Some evidence* is not strictured by the test of a specific standard. It calls for no more than what it says—'some,' as that word is understood in common, everyday usage. It need not rise to the level of 'beyond reasonable doubt' or 'clear and convincing' or 'preponderance.'" *Dykes v. State*, 319 Md. 206, 216–17 (1990) (emphasis in original).

In arguing that the instruction was inapplicable, appellant relies almost exclusively upon this Court's decision in *Sweeney v. State*, 242 Md. App. 160, 167 (2019). In *Sweeney*, the defendant was convicted of second-degree theft and burglary based on evidence that he broke into a shed at a church and stole a riding lawnmower and 25 pairs of sneakers that had been donated to the church. *Id.* at 167. The defendant presented an alibi defense and adduced evidence that he lent his truck, which was linked to the crime scene, to someone else. *Id*. at 169–70. The State advanced a "first-degree principal theory of liability," and the jury was not initially instructed on accomplice liability. *Id*. at 167. During jury deliberations, the trial court received a jury note asking if "two people engage in the crime of burglary but only [one] enters the shed are both guilty of the crime[?]" *Id*. at 170. The court proposed giving the accomplice liability instruction as a supplemental instruction. *Id*. The State agreed, but defense counsel objected, asserting

that the State never argued that the defendant aided or abetted anyone else in the commission of the crime, and the instruction was not generated by the evidence. *Id*. at 170–71. Over objection, the court gave the supplemental instruction, and the jury convicted the defendant. *Id*. at 171.

This Court reversed, holding that the accomplice liability instruction was not generated by the evidence. *Id*. at 172–73. We emphasized that "the State presented strong circumstantial evidence against [the defendant], but only against [the defendant]." *Id*. at 175. The State presented "no evidence that another person, *any* other person, was involved in the crime." *Id*. at 176 (emphasis in original). The only evidence the State could point to in support of the supplemental instruction was that the riding mower was too heavy for one person to lift into the bed of a truck. *Id*. We disagreed that this was "some evidence" generating an accomplice liability instruction. *Id*. We further held that the defendant was prejudiced by the supplemental instruction provided after closing arguments because it deprived him of any opportunity to respond to this new theory of the crime. *Id*. at 180–81.

Here, in contrast, the accomplice liability instruction was given during the normal course of instructing the jury at the close of evidence, and therefore, appellant had an opportunity to respond during closing arguments. Moreover, unlike in *Sweeney*, the evidence in this case was sufficient to generate an instruction on accomplice liability. The State's opening statement explained the State's theory that appellant was "one of the people involved" in Mr. Kennedy's murder, but he may not have fired any of the bullets

that struck or killed Mr. Kennedy. The evidence showed that Mr. Kennedy was shot 23 times using six different caliber firearms, and it permitted the jury to find that appellant was present on the night of the shooting and participated with other people to kill Mr. Kennedy.

This evidence met the "minimum threshold" to support a finding that appellant was a first-degree principal to murder or an accomplice. *See Dishman v. State*, 352 Md. 279, 292, 300 (1998) ("The task of this Court on review is to determine whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired."). Because the instruction was generated by "some evidence," the trial court did not abuse its discretion by giving it. *See Bazzle*, 426 Md. at 550–51.

II.

Comments Regarding Reasonable Doubt

Appellant next contends that "[r]emarks by the trial court and prosecutor erroneously undermined the State's obligation to prove guilt beyond a reasonable doubt." We will address each of the comments, in turn.

A.

Reasonable Doubt Jury Instruction

At the close of all the evidence, the circuit court gave a jury instruction regarding reasonable doubt that essentially tracked the Model Pattern Jury Instructions, with one variation. The court instructed:

> A reasonable doubt – we advise juries that reasonable doubt is a doubt founded upon reason. *Now, assuming that's not particularly helpful, let me give you an example of reasonable doubt in your day-to-day life.* Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs.

(Emphasis added.) The second sentence, italicized above, does not appear in MPJI-Cr 2:02 and was inserted by the trial judge.[7] Defense counsel did not object to the trial court's modification of the instruction.

Appellant contends that the trial court erred by modifying MPJI-Cr 2:02 for three reasons. First, he argues that the comment "undermined" the pattern instruction by suggesting that it was not helpful. Second, he asserts that the comment "trivialized" the pattern instruction by implying that individuals face decisions requiring application of the reasonable doubt standard on a daily basis. Finally, he contends that the court "demoted

[7] The pertinent portion of MPJI-Cr 2:02 provides as follows:

> A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs.

the core definition of the standard to an 'example,' and not a firm binding rule." Appellant acknowledges that defense counsel did not lodge an objection, but he requests this Court to review the issue for plain error. *See* Md. Rule 4-325(f) ("No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection.").

The State contends that this Court should decline to consider the issue. It asserts that the court's added language, "assuming that's not particularly helpful, let me give you an example of reasonable doubt in your day-to-day life," was not erroneous because people do make important decision in their day-to-day lives, and the court "did not err in offering to give an example and then not giving one," much less plainly err.

To be sure, a trial judge in a criminal jury trial is required to give an instruction on the "reasonable doubt standard of proof which closely adheres to MPJI-CR 2:02." *Ruffin v. State*, 394 Md. 355, 373 (2006). "Deviations in substance will not be tolerated." *Id.* "[A] court is not required to provide a verbatim recitation of the Maryland Criminal Pattern Jury Instruction defining reasonable doubt, but must 'closely adhere' to the language employed." *Turner v. State*, 181 Md. App. 477, 485 (2008).

As indicated, appellant acknowledges that he did not object below to the instruction, and therefore, his contention is not preserved for review. He urges this Court to address the issue under the doctrine of plain error review. Plain error review, however, is "reserved for those errors that are 'compelling, extraordinary, exceptional or

fundamental to assure the defendant of [a] fair trial.'" *Robinson v. State*, 410 Md. 91, 111 (2009) (quoting *Rubin v. State*, 325 Md. 552, 588 (1992)). It is available, at the discretion of an appellate court, if four elements are satisfied: (1) "there must be an error or defect – some sort of '[d]eviation from a legal rule' – that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant"; (2) "the legal error must be clear or obvious, rather than subject to reasonable dispute"; (3) "the error must have 'affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings'"; and (4) the error must "'seriously affect[] the fairness, integrity or public reputation of judicial proceedings.'" *State v. Rich*, 415 Md. 567, 578 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)). *Accord Givens v. State*, 449 Md. 433, 469 (2016).

Here, the court's added comment was not one that convinces us to exercise plain error review. *See Turner*, 181 Md. App. at 483, 485 (Plain error review not warranted when the trial court added one "obsolete sentence" in the reasonable doubt instruction because the court "substantially adhered to the current version of the pattern jury instruction."). We therefore decline to address this issue.

B.

Closing Argument

During the prosecutor's rebuttal closing argument, he revisited the meaning of reasonable doubt:

> A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of

> the fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs, getting married, college, stuff like that, business affairs, buy a house.
>
> If you're not satisfied of the defendant's guilt to that extent for each and every element of the crimes charged, then reasonable doubt exists and the defendant must be found guilty [sic] of that crime.

Appellant did not object to these comments.

Appellant contends on appeal that the prosecutor's use of "real-world examples" "was a deviation in substance" of the definition of proof beyond a reasonable doubt, "which could only have served to trivialize the standard." He asserts that they deprived him of a fair trial.

The State notes that there was no objection to the challenged language below. It also asserts that we should decline to address this claim because appellant "does not explain how these events in a person's life – terribly important as they are – trivialize the 'beyond a reasonable doubt' standard when presented this way, nor does he offer authority for the proposition that a prosecutor may not use this metaphor in closing argument."

We decline to review this issue regarding the prosecutor's comments. As this Court explained in *Campbell v. State*, 235 Md. App. 335, 337–38 (2017):

> The appellate process reviews legal proceedings for reversible trial error when such error is identified by counsel. Ultimate trial error, moreover, cannot be committed by the attorneys or by the parties or by the witnesses or by the jurors. Fate itself cannot commit trial error. Ultimate error can only be committed by the judge who makes an erroneous ruling or who erroneously fails to rule when properly and timely called upon to do so.

Here, appellant failed to object below to the comments. Therefore, appellant's argument relating to these comments is not preserved for this Court's review. *See* Md. Rule 8-131(a) (Court ordinarily will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

Moreover, in addition to failing to object below, appellant cites no caselaw supporting an argument that the prosecutor's examples of the types of personal and business decisions a juror might make was improper in describing reasonable doubt. Accordingly, we decline to consider this claim. *See Van Meter v. State*, 30 Md. App. 406, 408 (appellate court is not required to "seek out law to sustain [appellant's] position"), *cert. denied*, 278 Md. 737 (1976). *Accord Donati v. State*, 215 Md. App. 686, 743 (declining to consider an argument because appellant did not present "sufficient legal or factual argument" for us to address it), *cert. denied*, 438 Md. 143 (2014).

III.

Photo Array

Appellant's next contention involves the admission of evidence that Mr. Holmes selected appellant's photograph. He asserts that the court erred in admitting this evidence "in the absence of Detective Suiter, the officer who actually displayed the photos."

A.

Factual Background

Prior to jury selection on the first day of trial, appellant moved to exclude the admission of evidence regarding the photo identification made by Mr. Holmes on

October 25, 2017. Counsel argued that, because Detective Sean Suiter, the detective who presented the photo array to Mr. Holmes, had died and could not testify about the identification, there was a "confrontation issue."

At the motions hearing, Detective Perez testified, and the court reviewed, the relevant portions of the video recording of Mr. Holmes' interview. Detective Perez explained that, after Mr. Holmes identified "Xay" as one of the shooters during the interview, he created a photo array containing six photographs, including one of appellant. Department policy required that another detective, one who was uninvolved in the investigation and unaware of the identity of the suspect, "administer[] the photographic array." Detective Suiter was designated as the "blind" administrator.

Detective Perez left Mr. Holmes alone in the interview room, and Detective Suiter then came in with the photo array in hand. Detective Perez simultaneously observed the video feed from his computer monitor. The transcript of the video recording reflects that Detective Suiter read preliminary instructions to Mr. Holmes and then gave him six photographs, labeled 1 through 6. Mr. Holmes looked at the first photograph and put it to the side. He looked at the second photograph and stated: "He looks familiar." Detective Suiter responded: "Now so you recognize this photo? What's that number on there?" Mr. Holmes answered: "Two." Detective Suiter asked Mr. Holmes to explain the role the person in photograph two played in the investigation. At that point, Mr. Holmes asked Detective Suiter if everything he said would remain confidential. Detective Suiter told him that Detective Perez could answer those questions.

Detective Suiter took the photo array and left the interview room. He returned the photo array to Detective Perez within seconds of leaving the interview room.

Within ten minutes, Detective Perez returned to the interview room with the photo array. He answered Mr. Holmes' questions about confidentiality, and explained that he had been watching when Mr. Holmes indicated that he recognized someone. Detective Perez verified that Mr. Holmes had chosen photograph number two and asked Mr. Holmes to read the SID number that appeared over the photograph.[8] Mr. Holmes did so. Detective Perez asked: "Alright, now what did this person do?" Mr. Holmes replied: "He the one I seen with the gun when [Mr. Kennedy] got shot."

Defense counsel argued that, without Detective Suiter's testimony, the State could not "show that these are the exact same documents that Mr. Holmes was shown and the ones they bring in the courtroom are the same ones that Mr. Holmes was shown." The court asked counsel if her argument was "lack of a proper foundation for the admissibility." Defense counsel replied: "Yes, and the fact that any information that Detective Perez has from Detective Suiter, he should not be allowed to bring up either because . . . it's [a] confrontation issue. We can't cross-examine Detective Suiter as to

[8] "The [State Identification Number ("SID")] is a unique identifier issued by the Maryland Criminal Justice Information System (CJIS) Central Repository. A SID number is assigned to every individual who is arrested or otherwise acquires a criminal history record in Maryland[.]" *Bryant v. State*, 436 Md 653, 657, 657 n.1 (2014) (quoting *State v. Dett*, 391 Md. 81, 85 (2006)). At the motions hearing, Detective Perez testified that he could not see from the video feed which photograph Mr. Holmes chose, but he could hear the SID number identified.

what he said or didn't say." In particular, defense counsel asserted that Detective Perez stated that Detective Suiter told him that Mr. Holmes "picked out number two."

The court ruled that evidence of Mr. Holmes' identification of appellant in the photo array was admissible. It noted that the unfortunate death of Detective Suiter, "the blind administrator" of the array, put the parties in an "unusual situation," but the "question on authentication" was merely "whether there is sufficient evidence for the jury to determine that the thing is what it purports to be." It continued:

> [THE COURT]: In this case, we have the primary saying he's the one who put the array together, he handed that array to Detective Suiter who went into the room, left him with the array, went into the array with that -- went into the room to show the witness. We saw -- we can see on the video that Detective Suiter enters with one packet of material that consists of, I can go back and count how many pictures he shows him, and he -- and that's all he goes in with, he comes out with all of those pictures, that's all he comes out with. The testimony is that seconds later, Detective Suiter hands the packet, a package back to the primary who says identifies it as being the same array that he had put together, the same array that he had sent Detective Suiter in with, and as I said, the testimony is that it's second later.
>
> I think that is sufficient to establish under these circumstances, the authentication is sufficient for a jury to find that it is what it purports to be so I'm going to overrule the motion to suppress.

At trial, as indicated, Detective Perez testified that he assembled the photo array, with photos of previously arrested individuals who had features similar to appellant. Pursuant to protocol, he then asked Detective Suiter, a detective that had no involvement in the case, to show the array to appellant. The jury saw the video recording of the interrogation and had a transcript of the recording. The photo array was admitted into

evidence, and Detective Perez testified that Mr. Holmes identified photo number two, a photo of appellant.

B.

Parties' Contentions

Appellant contends that the court erred in admitting Mr. Holmes' photographic identification of him "in the absence of Detective Suiter, the officer who actually displayed the photos." He argues that this violated his Sixth Amendment right to confront a witness against him, asserting that "the Sixth Amendment right required that [Detective] Suiter, as the person who actually conducted the procedure, be available for cross-examination on such critical details as which photos were actually displayed and selected, and any suggestiveness such as prior displays which included a photo of [appellant]."[9]

The State contends that this case does not present a Confrontation Clause issue because Detective Suiter was not a declarant offering substantive evidence. Rather, he was merely "the person to whom the declarant was speaking when [Mr. Holmes] made the admissible prior inconsistent statement."

[9] Appellant does not raise, as he did below, any argument about the authentication of the photo array involved.

C.

Analysis

The Confrontation Clause of the Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that a defendant in a criminal trial has the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause prohibits the admission of out-of-court testimonial statements against the accused by a non-testifying declarant if there was no prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004).

We agree with the State that the trial evidence regarding the photo identification did not implicate the Confrontation Clause. "[T]he right of confrontation is implicated only when two conditions are met: the challenged out-of-court statement or evidence must be presented for its truth and the challenged out-of-court statement or evidence must be 'testimonial.'" *Cooper v. State*, 434 Md. 209, 233 (2013), *cert. denied*, 573 U.S. 903 (2014). *Accord Derr v. State*, 434 Md. 88, 106–07 (2013) ("[T]he Confrontation Clause only applies to hearsay, or out-of-court statements offered and received to establish the truth of the matter asserted."), *cert. denied*, 573 U.S. 903 (2014).

Here, although appellant asserts that Detective Suiter informed Detective Perez that Mr. Holmes "had selected [a]ppellant as one of the shooters," the State did not present to the jury any such statement by Detective Suiter. Indeed, Detective Perez did not testify regarding any statements made to him by Detective Suiter. Rather, he testified

that he observed the presentation of the photo array to Mr. Holmes, heard Mr. Holmes identify the number two photo of appellant, and confirmed with Mr. Holmes the selection of appellant's photo in connection with the shooting.

For confrontation purposes, the declarant that offered the substantive evidence against appellant was not Detective Suiter, but Mr. Holmes, who was available for cross-examination. There was no out-of-court testimonial statement admitted in violation of the Confrontation Clause.

IV.

Firearm Convictions

Appellant's final contention involves his two convictions of possession of a firearm by a disqualified person. As indicated, appellant was charged with two counts of possession of a regulated firearm as a prohibited person relating to his possession on October 15, 2017 (the day of the murder) and October 29, 2017 (the day he was arrested on an unrelated traffic warrant). The State introduced evidence that appellant had a disqualifying conviction for second-degree assault in 2016. At the close of the State's case, defense counsel made a motion for judgment of acquittal. As to the possession of a firearm counts, defense counsel stated that she would "submit on the facts as presented." The court denied the motion on those counts. Appellant subsequently was convicted of two counts of possession of a regulated firearm as a prohibited person and received a sentence of 10 years for each conviction (one concurrent, one consecutive).

On appeal, appellant contends that the evidence was "legally insufficient to sustain two convictions and sentences for possession of a regulated firearm by a disqualified person" because those convictions were predicated on his possession of the same handgun on two different days. He asserts that, even if he was in possession of the gun on two different days, the unit of prosecution is the number of guns, i.e., "one weapon sustains one conviction and one sentence."

The State contends that this Court should decline to address this issue because it was not raised below. In any event, it argues that the claim is without merit.

Pursuant to Md. Rule 4-324(a), a defendant must "state with particularity all reasons why [a] motion [for judgment of acquittal] should be granted." "Grounds that are not raised in support of a motion for judgment of acquittal at trial may not be raised on appeal." *Jones v. State*, 213 Md. App. 208, 215 (2013), *aff'd*, 440 Md. 450 (2014). *Accord Correll v. State*, 215 Md. App. 483, 497–99 (2013) (Sufficiency argument that was not made at trial was waived), *cert. denied*, 437 Md. 638 (2014). Because appellant failed to argue before the trial court that the evidence was insufficient to support two convictions for the same weapon, this argument is not preserved for our review. Accordingly, we will not address it.

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