Circuit Court for Baltimore City
Case No. 118250007

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1812

September Term, 2019

KEON GRAY

v.

STATE OF MARYLAND

Graeff,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: March 8, 2022

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

On July 5, 2018, appellant Keon Gray fired a gun into a vehicle occupied by Darnell Holmes, her boyfriend Malik Edison, her daughter D.R.[1], and her goddaughter, seven-year-old Taylor Hayes. Tragically, one of the bullets fatally wounded Taylor. Consequently, the State charged appellant with numerous crimes including: first and second-degree murder of Taylor Hayes, and attempted first and second-degree murder and first and second-degree assault of Darnell Holmes, Malik Edison, and D.R. The State also charged appellant with use of a firearm in the commission of a crime of violence and unlawful possession of a firearm.

Following a trial that spanned over two weeks, a jury in the Circuit Court for Baltimore City convicted appellant of the second-degree murder of Taylor Hayes, but acquitted him of the attempted murders of Darnell Holmes, Malik Edison, and D.R. The jury did, however, convict appellant of the first-degree assault of Darnell Holmes and Malik Edison. Following an unsuccessful motion for a new trial, the court sentenced appellant to an executed sentence of 75 years.[2] Appellant timely appealed and presents the following five issues for our review:

1. Did the [c]ourt err in permitting the State's surrogate DNA expert to testify at trial?

[1] Because D.R. is a minor, we shall use her initials to protect her privacy.

[2] The allocation of sentence was as follows: 40 years for the murder of Taylor Hayes; 20 years, consecutive, for use of a firearm in the commission of a crime of violence; 25 years, concurrent, for the first-degree assault of Darnell Holmes; 20 years, concurrent, for use of a firearm in the commission of a crime of violence; 25 years, concurrent, for the first-degree assault of Malik Edison; 20 years, concurrent, for use of a firearm in the commission of a crime of violence; and 15 years, consecutive, for unlawful possession of a firearm.

2. Is the jury's failure to apply the law reversible error? And did the [c]ircuit [c]ourt abuse its discretion in denying [a]ppellant's Motion for A New Trial based on an inconsistent verdict?

3. Did the [c]ourt err in denying defense counsel the opportunity to call Assistant State's Attorney Blomquist as a witness to testify regarding the Attorney Grievance Complaint filed against him by the State's key witnesses Malik Edison and Darnell Holmes?

4. Did the [c]ourt err in failing to require Assistant State's Attorney Blomquist to disclose to defense counsel his written response to the Attorney Grievance Commission regarding Malik Edison's filed Complaint?

5. Did the [c]ourt err in failing to propound to potential jurors defense counsel's *voir dire* questions pertaining to [a]ppellant's fundamental rights?

As we shall explain, we answer all of these questions in the negative, and affirm.[3] Finally, we shall grant the State's request for a limited remand to allow the court to correct an illegal sentence.

FACTUAL AND PROCEDURAL BACKGROUND

On July 5, 2018, Darnell Holmes was driving her Honda Accord on Edmondson Avenue in Baltimore City, Maryland. Also in the vehicle were her boyfriend, Malik Edison, her daughter, D.R., and her goddaughter Taylor Hayes. Mr. Edison sat in the front

[3] After appellant submitted his first appellate brief, the State moved to stay proceedings pending the Court of Appeals's resolution of *Leidig v. State*, No. 19, Sept. Term 2020, and *State v. Miller*, No. 24, Sept. Term 2020. Despite appellant's opposition, this Court ultimately issued an order granting the State's motion to stay. Shortly after the Court of Appeals issued its decisions in *Leidig* and *Miller*, this Court issued an order for supplemental briefing. Rather than timely file his supplemental brief, however, appellant filed a motion seeking a reconsideration of the briefing schedule and an opportunity to expand the issues on appeal. Specifically, appellant wished to raise an issue concerning jury *voir dire* that did not appear in his original brief. This Court, in the interests of judicial economy, granted appellant's motion, and allowed him to file an amended brief which completely supplanted and replaced his original brief.

passenger seat, with D.R. directly behind him, and Taylor in the rear-middle seat. As Ms. Holmes neared the Edmondson Village Shopping Center, she noticed a white Mercedes and a black BMW recklessly weaving through traffic. At the intersection of Edmondson and Athol Avenues, the Mercedes maneuvered around Ms. Holmes's Honda, and in doing so, nearly caused a collision. Because of this near-collision, Ms. Holmes beeped her horn at the Mercedes.

Due to traffic congestion stemming from an accident ahead, Ms. Holmes eventually caught up with the Mercedes. As the Mercedes pulled up to the left of Ms. Holmes's Honda, the driver lowered his window, and Ms. Holmes immediately recognized the driver as appellant. Ms. Holmes responded by lowering her window and telling appellant that he had nearly struck her vehicle, and that there were children in her car. When appellant asked Ms. Holmes what she meant by her statement, Ms. Holmes expressed confusion, but told appellant that he was "about to cause a whole accident."

Appellant then pulled the Mercedes in front of Ms. Holmes's vehicle and exited, and the driver of the black BMW did the same. Ms. Holmes followed suit by exiting her vehicle, and went to speak with appellant and his friend. The three then exchanged words, but in Ms. Holmes's view, the discussion did not rise to the level of an argument or major disagreement. Other witnesses on the scene, however, perceived the interaction to be a "heated exchange." Ultimately, the encounter ended with appellant's friend telling him that the situation "wasn't that serious." The three participants then returned to their respective vehicles.

Upon entering their vehicles, appellant and his friend proceeded to turn onto Lyndhurst Street, but stopped and pulled over. Ms. Holmes, who happened to be going in that direction, then pulled onto Lyndhurst Street and as she did so, she noticed that appellant was "bent over in the backseat." As Ms. Holmes drove past appellant, she heard what sounded like a gunshot. Looking into her car's side mirror camera, Ms. Holmes saw appellant standing in the middle of the street shooting at her car. Ms. Holmes then realized that her daughter was screaming Taylor's name because Taylor had been shot.[4] Taylor suffered a single gunshot wound to her back which struck her spinal column, aorta, esophagus, diaphragm, and liver. Sadly, Taylor eventually passed away due to complications arising from this injury. We shall provide additional facts as necessary to resolve the issues on appeal.

DISCUSSION

I. APPELLANT'S CONFRONTATION RIGHTS WERE NOT VIOLATED

Appellant first argues that the circuit court erred by allowing a "surrogate" DNA expert to testify at his trial in violation of the Confrontation Clause of the United States Constitution. In order to fully understand appellant's argument, additional background information is necessary.

Shortly after the shooting, a white Mercedes later determined to be owned by a woman named Daneka McDonald was involved in an accident a few miles away.

[4] Although not relevant to the outcome of this appeal, we note that immediately after appellant fired at Ms. Holmes's vehicle, Mr. Edison exited the Honda and, with his own firearm, began shooting at appellant. Mr. Edison did not hit appellant.

Ultimately, police connected appellant to Ms. McDonald's vehicle based on cellular records, and from DNA analysis of a swab taken from one of the airbags that had deployed as a result of the accident. In doing so, police found that a match between appellant and the "inferred genotype" of that sample was "158 million times more probable than a coincidental match to an unrelated individual in the African-American population[.]"[5]

At appellant's trial, the State intended to call as a witness the analyst who authored the report matching appellant's inferred genotype to the samples from the white Mercedes, but that analyst purportedly went into labor a month early, and gave birth on the third day of trial. Although the State apparently made some efforts to bring the analyst to court to testify, the analyst's supervisor "adamantly said that's not a possibility." The State then sought to introduce the testimony of the analyst's technical reviewer, Virginia Sladko.

Appellant challenged the admissibility of Ms. Sladko's testimony by arguing that it would violate his rights pursuant to the Confrontation Clause of the Sixth Amendment of the United States Constitution. Appellant argued that, because Ms. Sladko did not perform any independent DNA analysis, allowing her to testify would violate his right to confront the actual author of the report. Although the State conceded that the report itself was not admissible, the court ultimately permitted Ms. Sladko to testify as to the contents of the report based on her "independent review of the raw data."

On appeal, appellant argues that the trial court erred in allowing Ms. Sladko to testify. He first argues that the State failed to make a good-faith effort to summon the

[5] Appellant is an African-American male.

actual analyst who authored the report. Next, appellant argues that under *State v. Norton*, 443 Md. 517 (2015), Ms. Sladko should not have been permitted to testify. Finally, appellant claims that *State v. Miller*, 475 Md. 263 (2021)[6] is distinguishable from the instant case.

As we shall explain, this case is on all fours with *Miller*, and pursuant to *Miller*, whether the State failed to make a good-faith effort to bring in the original analyst is of no consequence where the testifying witness is a technical reviewer who, after substantial contributions to the production of the report, conveys her own independent opinions at trial. This is so because *Miller* stands for the proposition that in such circumstances, the technical reviewer becomes the functional equivalent of a second author of the report.

In *Miller*, an unidentified assailant sexually assaulted a victim in 2008. *Id.* at 265. Although forensic scientists generated a DNA profile for the assailant, the case eventually went cold. *Id*. Nine years later, the Federal Bureau of Investigation's Combined DNA Index System ("CODIS") produced a match for the assailant—Miller. *Id*. At Miller's trial for the 2008 sexual assault, the State produced several witnesses involved with the forensic evidence, but did not call Thomas Hebert, the former analyst for the Baltimore Police Department who analyzed the DNA evidence and was the primary author of two reports. *Id*. at 266. The first report was a 2008 report indicating that the DNA of "unknown male #1" was identified from various pieces of evidence collected pursuant to the investigation

[6] As noted above in footnote 3, *supra*, we issued a stay of appellant's appeal pending the resolution of *Miller*.

of the 2008 sexual assault. *Id*. The second report was a 2017 report naming Miller as the source of that DNA. *Id*.

By the time of Miller's trial, Mr. Hebert had relocated to Georgia. *Id*. The State therefore sought to introduce the testimony of Kimberly Morrow, the technical reviewer of the 2017 report.[7] *Id*. Miller challenged the admissibility of Ms. Morrow's testimony by arguing that it would constitute hearsay and violate his constitutional rights under the Confrontation Clause. *Id*. The trial court disagreed and allowed Ms. Morrow to testify. *Id*.

On appeal, the Court of Appeals was tasked with determining "whether a trial court violates a criminal defendant's constitutional rights, where the court allows the technical reviewer of a report analyzing DNA evidence to testify about the results of that analysis, without requiring the primary author of the report to be available for cross-examination." *Id*. The Court of Appeals concluded that Ms. Morrow's testimony as a technical reviewer did not violate the Confrontation Clause. *Id*.

At the outset, the Court first explained the development of the CODIS Program, and the fact that the FBI requires laboratories that contribute samples to the index to comply with Quality Assurance Standards ("QAS") and undergo periodic audits. *Id*. at 266-67. Relevant to the appeal, QAS Standard 12.1 requires participating forensic laboratories to

[7] At Miller's trial, the State also called Kelly Miller (no relation to the defendant), the technical reviewer of Mr. Hebert's 2008 report. 475 Md. at 266. Although Miller argued that neither technical reviewer should have been allowed to testify at trial, the appeal to the Court of Appeals only concerned Ms. Morrow's testimony regarding the 2017 report. *Id*.

"conduct and document administrative and technical reviews of all case files and reports to ensure conclusions and supporting data are reasonable and within the constraints of scientific knowledge." *Id*. at 267-68. Whereas an administrative review under the QAS simply consists of tasks such as checking for clerical errors and reviewing the chain of custody and disposition of the evidence, a technical review "is a thorough, substantive review of the primary analyst's work. Thus, a technical reviewer must be a qualified analyst in the methodology being reviewed." *Id*. at 268 (citing QAS Standards 5.5, 12.1.1). "A technical review includes 'an evaluation of reports, notes, data, and other documents to ensure there is an appropriate and sufficient basis for the scientific conclusions.'" *Id*. (quoting QAS Standard 12.1).

The Court then turned to the facts of the case. In 2008, an unknown assailant sexually assaulted a woman in her home. *Id*. at 270. Following the attack, "[t]hirty-nine items were submitted to the Forensic Services Division of the Baltimore Police Department for analysis[.]" *Id*. Mr. Hebert prepared a report analyzing the DNA present on the items submitted, and concluded that "unknown male #1" was the source of DNA found on several of the items recovered and tested. *Id*. at 270-71. Unfortunately, the case went cold for nearly nine years. *Id*. at 271.

Then, in 2017, Oliver Miller's DNA was collected pursuant to an unrelated sexual assault case and "on April 3, 2017, the Baltimore Police Department received notification from CODIS of a 'hit' in the system, which produced Miller's DNA profile as a match with the DNA record associated with" a sample recovered and tested in the course of the 2008 sexual assault investigation. *Id*. Mr. Hebert thereafter prepared a report in which he

concluded that Miller was the source of the DNA samples collected and documented in the 2008 report. *Id*. at 272.

At Miller's trial for the 2008 sexual assault, when it became clear that Mr. Hebert, the author of the 2008 and 2017 reports, would not be testifying, the State argued that it could instead introduce the testimony of the technical reviewers of the two reports without violating the rules against hearsay or the Confrontation Clause. *Id*. at 273-74.

Outside the presence of the jury, the trial court examined Ms. Morrow, the technical reviewer of Mr. Hebert's 2017 report. *Id*. at 274. Ms. Morrow explained to the court that although Mr. Hebert ultimately authored the report, it was common for more than one analyst to perform the "hands-on work" that is required to prepare a DNA report. *Id*. Ms. Morrow noted that, in his role as analyst, Mr. Hebert would be responsible for "reviewing the data at the end and drawing the conclusions, the statistics, and issuing the report." *Id*. Nevertheless, Ms. Morrow stated that, with regard to the 2017 report, "she had been 'responsible for the quantification, amplification and the electrophoresis of the portion of the victim's blood card.'" *Id*.

Ms. Morrow then elaborated on the role of a technical reviewer. *Id*. at 275. She explained that, as the technical reviewer, she was responsible for going through all of the work performed by the analyst to make sure that the results are "scientifically valid." *Id*. She further explained that a technical reviewer will "review all of the statistics. We make sure that we are in agreement with the report that has been authored." *Id*. She agreed with the prosecutor's portrayal of her role as performing a "step-by-step" analysis to verify the analyst's results. *Id*. at 275-76. Based on this information, the trial court allowed Ms.

Morrow to testify as to the contents and conclusions contained in the 2017 report.[8] *Id*. at 276.

Following his conviction for the 2008 sexual assault, Miller appealed, arguing that Ms. Morrow's testimony should have been excluded because it violated his confrontation rights pursuant to Article 21 of the Maryland Declaration of Rights and the Sixth Amendment of the United States Constitution. *Id*. at 278-79. He argued that Ms. Morrow's reading and endorsement of the 2017 report was "testimonial" and that the State was required to present Mr. Hebert for cross-examination. *Id*. at 279.

The Court of Appeals began its discussion by noting that "The Confrontation Clause of the Sixth Amendment to the United States Constitution provides a criminal defendant with the right 'to be confronted with the witnesses against him.'" *Id*. at 281 (quoting U.S. Const. amend. VI.). To determine whether Ms. Morrow's testimony violated the Confrontation Clause, the Court traced the history of Supreme Court and Maryland caselaw concerning the admissibility of "surrogate" testimony in the context of scientific reports.

Relevant here, the Court of Appeals considered *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). The issue presented in *Bullcoming* was "whether a prosecutor may introduce a forensic laboratory report through the in-court 'surrogate' testimony of an expert who neither signed the report nor performed or observed the analysis." *Miller*, 475 Md. at 285-86 (citing *Bullcoming*, 564 U.S. at 652). At Bullcoming's criminal trial for

[8] The trial court declined to determine whether the 2017 written report was admissible because the State did not intend to offer it into evidence. *Miller*, 475 Md. at 277.

driving while intoxicated, the prosecution failed to call as a witness the forensic analyst who prepared the laboratory report indicating Bullcoming's blood-alcohol concentration. *Bullcoming*, 564 U.S. at 651-55. Instead, the State called as an expert witness someone who was familiar with the procedures and processes, but had "neither observed nor reviewed [the forensic analyst's] analysis." *Id*. at 655. The Supreme Court held that simply providing the testimony of a surrogate expert who neither signed the report nor performed any part of the analysis violated Bullcoming's right to confrontation. *Id*. at 652.

After establishing that subsequent Supreme Court precedent did not resolve the level of involvement required for a surrogate analyst to testify, the *Miller* Court turned to Maryland caselaw. Among the Maryland cases considered, the *Miller* Court reviewed *Norton*, 443 Md. 517. In *Norton*, the Court of Appeals considered whether a Forensic DNA Case Report which was not executed under penalty of perjury, but which contained the language "within a reasonable degree of scientific certainty" would violate the Confrontation Clause if admitted into evidence. *Id*. at 519. There, Bode Technological Group, Inc., a commercial DNA testing company, analyzed a DNA sample extracted from a mask Norton owned and which was apparently used in the commission of a robbery. *Id*. at 519-20. An analyst for Bode created a report in which she concluded, "within a reasonable degree of scientific certainty," that Norton provided the "major source" of DNA extracted from the mask. *Id*. at 520.

At Norton's second trial,[9] the State attempted to introduce the report into evidence through the testimony of a Bode Technology supervisor, "without calling the analyst who had authored and signed the [r]eport." *Id*. at 522. In construing *Norton*, the *Miller* Court explained:

> [The supervisor] testified that he had "reviewed all the materials, all of the notes, the lab notes, all of the data that was generated, the paperwork and the final report." *Norton*, 443 Md. at 522, 117 A.3d 1055. However, [the supervisor] did not testify that he had done that review as part of the creation and issuance of the report. Nor did he sign the report. Rather, in addition to [the analyst] . . . a "Forensic Casework Manager[]" signed the report. *See id*. [*The Forensic Casework Manager*], *who Norton represented in his brief to this Court was the "technical reviewer who actually signed the . . . report," did not testify at Norton's trial*. Thus, although we concluded that [the supervisor] was not an appropriate witness to convey the results of the report to the jury, *we did not decide whether the technical reviewer who signed* [*the analyst's*] *report could have done so without violating Norton's confrontation rights*.

Miller, 475 Md. at 290 (footnote omitted) (emphasis added).

Against this backdrop, the *Miller* Court concluded that, where the technical reviewer is thoroughly involved in the production of the report, and provides testimony consisting of her own independent opinions, such testimony does not violate the Confrontation Clause. *Id*. at 291, 301. In reaching this holding, the Court noted that Ms. Morrow "testified that, as the technical reviewer of the report, she reviewed 'all of the documentation that's been done, all of the conclusions, all of the statistics and then sign[ed] off' on the report, indicating that she 'believe[d] all of these are valid conclusions.'" *Id*. at 291. As opposed to simply "rubber stamp[ing]" the analyst's conclusions, Ms. Morrow

[9] Norton's first trial ended in a mistrial. *Norton*, 443 Md. at 522.

verified that she looked at all of the data and reviewed all of the statistics and then formed her own conclusions "prior to the issuance of the report." *Id*. Thus, "Ms. Morrow became the functional equivalent of a second author of the 2017 report by thoroughly reviewing all the underlying data, results, and conclusions, and then expressing her agreement with the report by signing off on it on the review sheet." *Id*.

The *Miller* Court distinguished *Bullcoming* and *Norton*, explaining,

> A technical reviewer's adoption of a report's results and conclusions – based on a complete review of the same data the primary author used, *and as part of the process of finalizing and releasing the report* – is the key distinction between the situation presented in this case and cases such as *Bullcoming* and *Norton*.

Id. In *Bullcoming*, the problem with the "surrogate" expert was that he had "neither observed nor reviewed [the original analyst's] analysis[.]" *Id*. at 292 (quoting *Bullcoming*, 564 U.S. at 655). Accordingly, that surrogate expert "did not have 'any independent opinion' concerning Bullcoming's [blood-alcohol concentration]." *Id*. (quoting *Bullcoming*, 564 U.S. at 662). Similarly, in *Norton*, although the supervisor had reviewed the analyst's final report, materials, lab notes, and data, the supervisor "did not sign the report, nor did he testify that he conducted his review in connection with the creation of the report." *Id*. (citing *Norton*, 443 Md. at 522).

Unlike the witnesses in *Bullcoming* and *Norton*, Ms. Morrow's degree of involvement in the 2017 report was much more substantial. Her role as the technical reviewer required her to "(1) thoroughly review all the data that Mr. Hebert [the analyst] used; (2) independently determine whether or not Mr. Hebert's results and conclusions were correct; and (3) if they were correct, sign off on the report's issuance." *Id*. at 293.

This level of involvement made Ms. Morrow the "functional equivalent of a second author of the report and thus rendered her testimony concerning the information contained in the report nonhearsay." *Id*.

We conclude that *Miller* is dispositive. As we shall explain, Ms. Sladko, the technical reviewer of the report in the instant case, was the functional equivalent of a second author and therefore, pursuant to *Miller*, appellant's confrontation rights were not violated by allowing her to testify as to the contents and results of the report.

At trial, Ms. Sladko testified to the extensive role she played in the production of the report at issue. She explained:

> So a technical reviewer is a peer, another analyst in the laboratory who's proficient in DNA analysis.
>
> The first thing they're going to do is, in the actual analysis process I was talking about . . . when the analyst who is assigned to the case gets the data, the technical reviewer is going to review that data at that point. *So before the analyst can even go forward with their interpretation of the data, it has to be signed off by a technical reviewer*.
>
> Then the next step is, if the TrueAllele software program is used, the technical reviewer steps in there as well and reviews the data that's going into the TrueAllele software program, *signs off on that before it even begins its analysis*.
>
> Then the last step as a technical reviewer is the final technical review, which is done after the analyst has made all their conclusions, written their report, and finished their case file; that *the technical reviewer is responsible for going through the entire case file, looking at that data again, making sure that the conclusions that the analyst is making in the report are supported by the data and that everything is done according to the protocols that we have in our laboratory*.

(Emphasis added). Additionally, Ms. Sladko testified that the report is not released to law enforcement until the analyst, technical reviewer, and administrative reviewer have performed their respective reviews and "signed off on the case file[.]"

Turning to the specific report in appellant's case, Ms. Sladko testified that she reviewed the data in the case and developed her own independent conclusions and opinions based on that review. When appellant's counsel asked whether Ms. Sladko formed her independent opinions based upon the results contained in the report, Ms. Sladko clarified that she "formed [her] independent opinion *based off of the data*." (Emphasis added). Only after reaching her own independent conclusions did Ms. Sladko "look at [the analyst's] report and make sure that the data [was] consistent and [was] backing up [the analyst's] conclusions."

We discern that Ms. Sladko's involvement in the creation of appellant's report was consistent with that of the technical reviewer in *Miller*. Utilizing the *Miller* template, we conclude that Ms. Sladko's testimony made clear that she "(1) thoroughly reviewed all the data that [the analyst] used[,]" testifying that an analyst cannot even proceed with any interpretation until the technical reviewer reviews the underlying data. *Id*. at 293. Ms. Sladko's testimony further indicated that she "(2) independently determine[d] whether or not [the analyst's] results and conclusions were correct[,]" by clarifying that she used the data itself to reach her own independent conclusions as opposed to relying upon the analyst's results. *Id*. Finally, Ms. Sladko verified that, "(3) if [the analyst's results and conclusions] were correct, [she would] sign off on the report's issuance." *Id*. Based on Ms. Sladko's testimony, we conclude that, like the technical reviewer in *Miller*, Ms.

Sladko's role in the production of appellant's report made her the "functional equivalent of a second author," and her testimony did not violate appellant's confrontation rights. *Id.* at 291.

In an effort to distinguish *Miller* from his own case, appellant argues that, unlike in *Miller*, he introduced his own DNA expert to challenge Ms. Sladko's opinions, and that his "cross[-]examination and attack on the DNA results were hampered by [his] inability to question the actual DNA analyst and to have the jury weigh her credibility." In making these arguments, appellant misreads *Miller* and erroneously latches on to language which appears in the "harmless error" section of that opinion. Appellant's efforts are misguided.

In its "harmless error" discussion, the *Miller* Court considered whether it was improper for Ms. Morrow, the technical reviewer, to reference the conclusions of the absent analyst during her testimony. *Id.* at 301-02. The Court acknowledged that the State "muddied the water somewhat by eliciting that the conclusions contained in the report were [the analyst's] and that Ms. Morrow agreed with those conclusions," but ultimately concluded that Ms. Morrow's testimony, "as a whole established that she was conveying her independent opinions based on her technical review of the case file." *Id.* at 302.

The Court recognized the possibility of improper vouching resulting from "the jury learning that a non-testifying analyst agreed with Ms. Morrow[.]" *Id.* Nevertheless, the Court determined that any such vouching was "harmless beyond a reasonable doubt" because "Miller did not contest the substance of Ms. Morrow's opinions." *Id.* Misreading the significance of this discussion in *Miller*, appellant asserts that, "In contrast [to *Miller*],

the [a]ppellant in the current case **did contest** the opinions of the State's actual and absent DNA analyst, Suzanne Gray."

We decline to distinguish the instant case from *Miller* on this ground. Simply put, *Miller* cannot be construed as holding that a qualified technical reviewer loses her status as the functional equivalent of a second author of the report simply because the defendant has challenged the substance of the technical reviewer's opinions. Such a conclusion would be illogical and contrary to the substantive analysis of that opinion. Rather, the *Miller* Court explained that it would not reverse Miller's convictions due to improper vouching because any vouching was harmless where Miller never challenged the substance of the expert opinion concerning DNA analysis. We are not concerned with any vouching issues here because, unlike in *Miller*, the trial court prevented Ms. Sladko from testifying whether her opinions were consistent with those of the absent analyst:

[THE STATE]:	In reviewing the data, independently of your colleague, were you able to determine or draw any conclusions and opinions of your own?
[MS. SLADKO]:	Yes.
[THE STATE]:	Were those opinions consistent with your colleague's?
[APPELLANT'S COUNSEL]:	Objection.
THE COURT:	Sustained.

Finally, we summarily reject appellant's contention that his "cross[-]examination and attack on the DNA results were hampered by [a]ppellant's inability to question the actual DNA analyst and to have the jury weigh her credibility." As explained above,

because Ms. Sladko was the technical reviewer of the report, and because she reached her own independent conclusions based on the underlying data, "she became the functional equivalent of a second author of the report." *Id*. at 303. Thus, appellant did have the ability to question an "actual DNA analyst" in this case.[10]

II. APPELLANT WAIVED ANY ARGUMENT REGARDING INCONSISTENT VERDICTS

Appellant's second appellate argument is that the jury rendered a legally inconsistent verdict by convicting him of the second-degree murder of Taylor Hayes, but acquitting him of the attempted murder of Ms. Holmes. According to appellant, these results cannot be reconciled based on the State's theory of the case—that appellant fired at Ms. Holmes with an intent to kill or seriously harm her, but ended up killing Taylor. Thus, appellant argues that his convictions must be reversed as legally inconsistent.

We conclude that appellant has failed to preserve this issue for our review. Maryland appellate courts have consistently held that, in order to preserve a challenge to a legally inconsistent jury verdict, the defendant must object before the verdicts are made final and the jury is discharged. This Court has characterized the preservation requirement

[10] We also reject appellant's contention that it was improper for Ms. Sladko to rely on the report itself rather than any personal notes she had prepared. In *Miller*, the Court of Appeals stated,

> We discern no error in Ms. Morrow's using the same language in her testimony that Mr. Hebert used in the 2017 report. As we have explained, as the report's technical reviewer, Ms. Morrow is properly viewed as the functional equivalent of a second author of the report. Thus, to the extent Ms. Morrow used language that came directly from the 2017 report, there was no error because she had previously adopted those words as her own.

Miller, 475 Md. at 302 n.22.

as "iron-clad." *Travis v. State*, 218 Md. App. 410, 452 (2014). In *Givens v. State*, the Court of Appeals explained the reasoning for this "iron-clad" requirement:

> Basic principles of equity require a defendant to object to inconsistent verdicts before the verdicts become final and the trial court discharges the jury. As the concurring opinion in [*Price v. State*, 405 Md. 10, 40 (2008) (Harrell, J., concurring)] noted, "a jury may render [] legally inconsistent verdict[s] to show lenity to [a] defendant. . . . [W]e should not permit the defendant to accept the jury's lenity in the trial court, only to seek a *windfall reversal on appeal* by arguing that the [] verdicts are inconsistent." And, as the Court of Special Appeals has put it, a defendant may not "*have his* [*or her*] cake and eat it too"; in other words,
>
> > [t]he defendant may not stand mute and later complaint about the verdicts [that] he [or she] *did nothing to cure* at the only time [that] a cure was still possible. . . . A defendant simply may not seek to *exploit an alleged inconsistency* without taking the necessary step to cure or resolve the inconsistency when it is still possible to do so.
>
> Simply stated, it would be incongruent with the administration of justice to permit a defendant to acquiesce while a trial court accepts inconsistent verdicts—despite the circumstance that the inconsistent verdicts may be easily recognized—then raise the issue of the inconsistent verdicts later, when it is too late for the trial court to send the jury back to resolve the inconsistency. Stated otherwise, allowing a defendant to wait and raise the issue of an inconsistent verdict after the finality of the verdicts and the discharge of the jury leaves the trial court in a criminal case with no alternative remedy but to strike the legally inconsistent guilty verdict, even though the objection could have been raised earlier at a time when the trial court could have addressed the issue.

449 Md. 433, 476-77 (2016) (internal citations omitted) (first quoting *Price*, 405 Md. at 40; then quoting *Tate v. State*, 182 Md. App. 114, 132, 135-36 (2008)).

The record here indisputably demonstrates that appellant raised no objection to the jury's verdict and sat silent as the court finalized the verdict and excused the jurors. Accordingly, appellant failed to preserve this issue for our review.[11]

III. THE COURT DID NOT ERR IN REFUSING TO ALLOW APPELLANT TO CALL THE PROSECUTOR AS A WITNESS, NOR DID IT ERR BY DECLINING TO REQUIRE THE PROSECUTOR TO DISCLOSE HIS RESPONSE TO AN ATTORNEY GRIEVANCE COMPLAINT

Appellant's third and fourth appellate arguments concern the fact that, prior to appellant's trial, both Ms. Holmes and Mr. Edison filed grievances with the Attorney Grievance Commission regarding the conduct of Charles Blomquist, one of the prosecutors of the case. At trial, appellant sought to call Mr. Blomquist as a character witness in order to demonstrate that the grievances Ms. Holmes and Mr. Edison filed contained false statements, thereby impeaching their credibility and undermining the State's case. The trial court, however, refused to allow appellant to call Mr. Blomquist as a witness.

On appeal, appellant argues that the trial court erred by refusing to allow him to call Mr. Blomquist as a witness. At the outset, we note that a trial court's decision to admit or exclude character evidence is reviewed for an abuse of discretion. *Devincentz v. State*, 460 Md. 518, 539 (2018) (citing *Durkin v. State*, 284 Md. 445, 453 (1979)). The Court of

[11] Although we shall not decide this issue, we express doubt that appellant's verdicts were legally inconsistent. *See Price*, 405 Md. at 36 (Harrell, J., concurring) (providing a factually inconsistent verdict hypothetical where the vehicular homicide of two victims in the same vehicle results in both a conviction and an acquittal); *see also Teixeira v. State*, 213 Md. App. 664, 683 (2013) (stating that an inconsistency analysis "requires that we review the elements of the offenses as charged to the jury without regard to the proof that was actually presented at trial" (quoting *People v. Muhammad*, 959 N.E.2d 463, 470 (N.Y. 2011))).

Appeals has described an abuse of discretion as a decision "where no reasonable person would take the view adopted by the [trial] court, *or* when the court acts without reference to [] guiding rules or principles." *State v. Robertson*, 463 Md. 342, 364 (2019) (quoting *Alexis v. State*, 437 Md. 457, 478 (2014)).

We perceive no abuse of discretion in the court's decision to exclude Mr. Blomquist as a witness. Although, as appellant notes, Maryland Rule 5-404(a)(2)(B), states that "an accused may offer evidence of an alleged crime victim's pertinent trait of character[,]" this rule does not end the inquiry. Maryland Rule 5-403 tempers the admission of all evidence and provides that "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In refusing to allow appellant to call Mr. Blomquist as a witness, the trial court explained:

> [Y]ou're getting into another mini trial of whether or not the statements [in the Attorney Grievance Commission] case are true in this . . . . That is a totally collateral matter that you're trying to then litigate before the jury. . . . I'm not permitting you to get into [Ms. Holmes's] complaint. And I'm not permitting you to call Mr. Blomquist. We're going to get into another mini trial about whether or not what she filed is true or not true. We're not getting into that.

We see no abuse of discretion. If appellant had been permitted to call Mr. Blomquist as a witness, the jury would have been presented with a "mini trial" in which it would have been faced with evaluating the merits of Ms. Holmes's and Mr. Edison's attorney grievance complaints. The court correctly characterized this issue as "collateral," and evidence

related to this issue would have likely been confusing. In light of appellant's ability to elicit on cross-examination that both Ms. Holmes and Mr. Edison had filed grievances against Mr. Blomquist, we perceive no abuse of discretion in the trial court's determination to avoid "another mini trial," which would have been confusing to the jury and a "waste of time" pursuant to Rule 5-403. *Robertson*, 463 Md. at 364.

Appellant next argues that the court erred in denying his motion to compel Mr. Blomquist's written response to Ms. Holmes's and Mr. Edison's complaints. In order to understand this argument, we note that the jury convicted appellant on August 14, 2019. Following appellant's convictions, but prior to sentencing, the State informed appellant that Mr. Blomquist had filed a response with the Attorney Grievance Commission regarding Ms. Holmes's and Mr. Edison's complaints against him. The State, however, declined to provide that response to appellant. Accordingly, on October 15, 2019, appellant filed a Motion to Compel Compliance with Maryland Rule 4-263 in which he asked the trial court to compel the State to release Mr. Blomquist's response. Three days later, at the October 18, 2019 sentencing hearing, appellant orally moved to shorten the time for the State to respond to his motion to compel. When the court made clear that it would not be ruling on the motion at that time, appellant moved to postpone sentencing.

In denying appellant's motion to postpone the sentencing, the court explained,

> you could have filed, along with your motion, a motion to shorten time. You did not do that. That would have given the State an opportunity to not bring in the victim's family. It would have prevented us from bringing in [appellant and appellant's] family . . . . You didn't file the motion. I'm denying your request for a postponement.

Thus, the court never ruled on appellant's motion to compel, but instead, simply denied appellant's motion for postponement.

It is well-settled that "the decision whether to grant a postponement is within the sound discretion of the trial judge." *Ware v. State*, 360 Md. 650, 706 (2000) (citing *Wilson v. State*, 345 Md. 437, 451 (1997)). Here, three days prior to sentencing, appellant filed his motion to compel, seeking Mr. Blomquist's response to the grievances filed against him concerning a matter that we have concluded would have likely caused more confusion than clarity at trial. Appellant's motion failed to inform the State that he was seeking to shorten the time to respond, and consequently, the court did not wish to delay sentencing where both the victim's family and appellant's family were present and awaiting sentencing. Under these circumstances, we see no abuse of discretion in the court's decision to deny appellant's motion for postponement.

IV. APPELLANT FAILED TO PRESERVE HIS JURY *VOIR DIRE* CLAIMS

The final argument appellant raises is that his convictions must be vacated and the case remanded for a new trial because the trial court failed to propound certain requested *voir dire* questions to the jury panel. In *Kazadi v. State*, 467 Md. 1, 35-36 (2020), the Court of Appeals held that, "on request, during *voir dire*, a trial court must ask whether any prospective jurors are unwilling or unable to comply with the jury instructions on the long-standing fundamental principles of the presumption of innocence, the State's burden of proof, and the defendant's right not to testify." The Court made clear, however, that its holding would only apply "where the relevant question has been preserved for appellate review." *Id*. at 47 (citing *Hackney v. State*, 459 Md. 108, 119 (2018)). As we shall explain,

appellant failed to preserve the relevant question for our review.

Prior to trial, both the State and appellant submitted their proposed *voir dire* questions to the trial court. When, during *voir dire*, the court did not ask all of the questions that appellant had submitted, appellant noted his exceptions for the record. In the process of noting appellant's exceptions, however, it became apparent that the list of proposed *voir dire* questions appellant's counsel was reading from was different from the list appellant's counsel had earlier provided to the trial court and which the trial court was using. For example, question #5 on appellant's counsel's version inquired whether any potential juror had served as a petit or grand juror, but the court's version showed that question #5 concerned whether any member of the jury panel or their immediate family members were employed by law enforcement. It appeared that the numbering was off by two, as the court's question #7 referred to the question regarding petit or grand jury service.

Consequently, appellant's counsel asked to use the court's version of the *voir dire* for the purpose of noting exceptions. When the State indicated that it possessed a blank copy that matched the version the court was using, appellant's counsel relied on that copy to note appellant's exceptions. Appellant's counsel specifically noted exceptions to the court's failure to ask *voir dire* questions 7, 10, 11, 12, 13, 14, 17, and 25. Appellant's counsel apparently circled these questions on the blank copy provided by the State and handed them to the court, and the court stated that it would provide this "marked up" copy to a clerk. Unfortunately, however, this marked up copy was never marked for identification as an exhibit, and is not part of the record.

As noted in footnote 3, *supra*, when this Court granted appellant's motion to expand the issues for appellate review, appellant provided the Court with what we shall refer to as "Exhibit 3." In his Consent Motion to Correct/Supplement Record to this Court, appellant referred to Exhibit 3 as "defense counsel's July 10, 2019 email to the trial court attaching his proposed *voir dire* (**Exh. 3**)." Thus, relying on appellant's representations in his motion and the trial transcript itself, we construe Exhibit 3 to be a copy of the proposed *voir dire* questions which appellant provided to the trial court.[12] We note that the sequence of questions in Exhibit 3 is consistent with the version the court used because question #5 concerns jurors or their immediate family members being employed by law enforcement and question #7 concerns service as petit or grand jurors. As we shall discuss, Exhibit 3 is important because it unequivocally shows that appellant failed to preserve his *Kazadi* claim for our review.

[12] In his reply brief, appellant suggests that "[i]t is impossible to know for certain . . . whether the remaining *voir dire* questions objected to by [a]ppellant's counsel included the question at issue." He goes on to argue that "It is *not* clear from the record dialogue . . . whether the version of [a]ppellant's *voir dire* that the State possessed was the same as the version that either [a]ppellant's counsel originally had, the version that the court had, or a different version altogether." Even assuming he were correct, this is problematic for appellant because he bears the burden of producing a factual record for us to determine whether the trial court erred. *Mora v. State*, 355 Md. 639, 650 (1999) ("It is incumbent upon the appellant claiming error to produce a sufficient factual record for the appellate court to determine whether error was committed[.]"). By conceding that the record is "not clear," appellant failed to meet his burden of preservation. Moreover, at oral argument, appellant's counsel conceded that he made no effort to confer with the prosecutor to clarify the discrepancy. Finally, despite appellant's allegations in his reply brief that there were potentially three (or more) versions of his proposed *voir dire*, appellant's consent motion to correct or supplement the record neither alleged as much, nor was it supported by affidavit as required by Rule 8-414(b)(1) ("A motion that is based on facts not contained in the record or papers on file in or under the custody and jurisdiction of the appellate court and not admitted by all the other parties shall be supported by affidavit.").

In his brief, appellant argues that, pursuant to *Kazadi*, the trial court erred by failing to propound the following *voir dire* question:

> The defendant need not testify, need not offer any evidence, and may, in fact, stand mute, since he stands presumed innocent. Does anyone here feel a defendant should testify or put forth evidence on his own behalf before you could find him not guilty?

We recognize that, pursuant to *Kazadi*, had appellant objected to the trial court's failure to read this question to the jury panel, it would have been reversible error for the court to refuse to propound the question to the venire. *Id*. at 48 ("a trial court must ask whether any prospective jurors are unwilling or unable to comply with the jury instructions on the presumption of innocence, the burden of proof, and the defendant's right not to testify"). This question concerning the defendant's right not to testify or present evidence and the presumption of innocence appears in Exhibit 3 as question #23. As noted above, however, appellant noted exceptions to the following questions: 7, 10, 11, 12, 13, 14, 17, and 25. Appellant did not note an exception to the court's failure to read #23.

On appeal, appellant argues that by objecting to question #25 at trial, he actually preserved his objection to question #23 in Exhibit 3. We are not persuaded. To be sure, we agree with appellant that at one point there was a discrepancy between the *voir dire* his counsel used and the version the court used. This was demonstrated by the fact that appellant's question #5 concerning petit or grand jury service appeared in the court's version as question #7.

Nevertheless, the record makes clear that appellant specifically noted his objections by circling questions on the blank copy the State provided, which was consistent with the

court's copy. It is also clear that the court was using a version with the same numbering as found in Exhibit 3. This is demonstrated by the fact that both Exhibit 3 and the court's version list question #5 as asking whether any panel members or their immediate family are employed by law enforcement, and both list question #7 as asking whether any panel members have previously served as a petit juror or a grand juror. Thus, Exhibit 3 and the court's version of the *voir dire* questions are not, as appellant claims, "two (2) numbers off"—they appear to be the same versions of appellant's *voir dire*.

Having established for purposes of the record that Exhibit 3 and the court's version of appellant's *voir* dire are apparently the same, we note that appellant excepted to the court's failure to propound question #25 on Exhibit 3: "Does any member of the panel have any physical or medical problem such as visual or hearing difficulty or any other physical or medical reason that would prevent you from being able to serve as a juror in this case?" This question does not implicate the fundamental rights discussed in *Kazadi*. *Id*. at 47-48. Accordingly, appellant failed to preserve any objection he may have had regarding the court's failure to propound question #23 on Exhibit 3 concerning his right not to testify and the presumption of innocence.

Finally, we reject appellant's argument—based on the assumption that he may be stuck with Exhibit 3 for purposes of this appeal—that the court erred in failing to propound question #17 of Exhibit 3 (a question appellant specifically circled on the copy presented to the court): "Do you believe that if a Defendant testifies, that Defendant's testimony is less credible than any other witness?" *Kazadi* does not require a court to ask whether the jury panel will find the defendant's testimony less credible; it only requires a court to ask

"whether any prospective jurors are unwilling to comply with the jury instructions on the presumption of innocence, burden of proof, and the defendants' right not to testify." *Id*. at 48. Additionally, we note that the trial court here did ask the jury: "[I]s there any member of the jury panel who would give either more weight or less weight to a witness called by the Defense, just because they're called by the Defense." This question is an even broader version of the question appellant requested and therefore adequately covered the issue. *See Bernadyn v. State*, 152 Md. App. 255, 283-84 (2003) (stating that a question related to all witnesses testifying on behalf of the defendant is a broader version of a question focused only on the defendant, and that the broader question "would reveal not only bias towards [the defendant's] testimony but also toward those witnesses testifying on [the defendant's] behalf"), *rev'd on other grounds*, 390 Md. 1 (2005).

V. WE SHALL VACATE AND REMAND DUE TO APPELLANT'S ILLEGAL SENTENCE

Finally, we shall vacate and remand for resentencing on all convicted counts due to an illegality in appellant's sentence. As noted above in footnote 2, *supra*, the trial court sentenced appellant as follows: 40 years for the murder of Taylor; 20 years, consecutive, for use of a firearm in the commission of a crime of violence, the first five of which must be served without the possibility of parole; 25 years, concurrent, for the first-degree assault of Darnell Holmes; 20 years, concurrent, for use of a firearm in the commission of a crime of violence; 25 years, concurrent, for the first-degree assault of Malik Edison; 20 years, concurrent, for use of a firearm in the commission of a crime of violence; and 15 years, consecutive, for unlawful possession of a firearm, the first five of which must be served without the possibility of parole.

In the first conviction for use of a firearm in the commission of a crime of violence, the court sentenced appellant to a twenty-year sentence consecutive to his conviction for second-degree murder, with no parole eligibility for the first five years. In the second and third convictions for use of a firearm in the commission of a crime of violence, however, the court simply sentenced appellant to two concurrent 20-year terms. This was error.

Md. Code (2002, 2021 Repl. Vol.), § 4-204(c) of the Criminal Law Article ("CR"), which governs the sentencing for the offense of use of a firearm in the commission of a crime of violence, provides that:

> (1) (i) A person who violates this section is guilty of a misdemeanor and, in addition to any other penalty imposed for the crime of violence or felony, shall be sentenced to imprisonment for not less than 5 years and not exceeding 20 years.
>
> (ii) The court may not impose less than the minimum sentence of 5 years and, except as otherwise provided in § 4-305 of the Correctional Services Article, the person is not eligible for parole in less than 5 years.
>
> (2) For each subsequent violation, the sentence shall be consecutive to and not concurrent with any other sentence imposed for the crime of violence or felony.

Here, the court erred by failing to sentence appellant to consecutive sentences for his *subsequent* convictions under CR § 4-204(c)(2)[13], and by failing to state that appellant would not be eligible for parole in less than 5 years for each offense under CR § 4-

[13] Although each subsequent violation requires a consecutive sentence, CR § 4-204 does not require the court to sentence appellant to a consecutive sentence regarding the first violation for use of a firearm in the commission of a crime of violence. *Wright v. State*, 24 Md. App. 309, 317-18 (1975).

204(c)(1)(ii). *See Garner v. State*, 442 Md. 226, 242 (2015) (holding that "a defendant may be convicted of, and sentenced for, use of a handgun in the commission of a crime of violence corresponding to each underlying felony or crime of violence of which the defendant is convicted"); *see also Brown v. State*, 311 Md. 426, 434-36 (1988) (holding that "multiple handgun use convictions and sentences are appropriate where there are multiple victims" and recognizing that the "unit of prosecution is the crime of violence" itself).

Having determined that the court issued an illegal sentence, we shall vacate all sentences imposed and remand for resentencing. We do so to allow the sentencing court the maximum flexibility in fashioning "a proper sentence that takes into account all of the relevant facts and circumstances." *Scott v. State*, 230 Md. App. 411, 449 (2016) (quoting *Twigg v. State*, 447 Md. 1, 30 n.14 (2016)).[14]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REMANDED FOR RE-SENTENCING ONLY. JUDGMENT OTHERWISE AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[14] In *Garner*, 442 Md. at 250-51, the Court of Appeals held that a court may correct an illegal sentence on appeal even where the issue was not raised before the trial court, and even if the State has failed to note a cross-appeal.