UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0208

September Term, 2014

MICHAEL ANTHONY JORDAN

v.

STATE OF MARYLAND

Woodward,
Reed,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: August 18, 2016

Appellant Anthony Jordan was convicted in the Circuit Court for Prince George's County of first-degree felony murder, second-degree murder, robbery with a dangerous weapon, first-degree assault, use of a handgun in the commission of a crime of violence, theft of a motor vehicle valued between $1,000 and $10,000, unauthorized use of a vehicle, and carrying a handgun.

Appellant presents the following questions for our review:

> "1. Did the circuit court err in denying multiple motions for mistrial?
>
> 2. Did the trial court err in limiting defense counsel's cross-examination?
>
> 3. Did the trial court err in [not] giving Maryland Criminal Pattern Jury Instruction 3:13, concerning witness promised benefit?
>
> 4. Was the evidence insufficient to sustain the conviction for theft?"

We shall hold that the trial court did not err, and thus, we shall affirm.

I.

Appellant was indicted by the Grand Jury for Prince George's County for murder, robbery with a dangerous weapon, use of a handgun in commission of a crime of violence, conspiracy to commit robbery with a deadly weapon, first degree assault, conspiracy to commit first degree assault, theft of property with a value over $1,000 but less than $10,000, unauthorized use of a motor vehicle, wearing a handgun, transporting a handgun on or about

his person, and knowingly participating in illegal possession of a regulated firearm.[1] He was sentenced to life imprisonment, with all but 80 years suspended, for the murder; a term of imprisonment of twenty years, with all but ten suspended, consecutive, for the handgun use; a term of imprisonment of ten years, with all but five suspended, consecutive, for theft; plus five years probation.

The charges arose from an event which occurred on October 24, 2011, when Alonzo Guyton was shot and killed during a street robbery. The Grand Jury indicted appellant along with two accomplices, Lorenzo Carlton and William Knight. Although all three were scheduled to be tried jointly, during *voir dire*, Carlton entered a guilty plea to second degree murder. The State proceeded to try appellant jointly with co-defendant Knight.

Although trial began in April 2013, the first venire was dismissed because there were not enough prospective jurors. On December 3, 2013, the trial commenced again and *voir dire* began and continued over seven days. Because of the large number of jurors requested

[1]"Transporting a handgun on or about his person" in the original indictment was later amended by consent to "knowingly transport[ing] a handgun in a vehicle traveling on a roadway, parking lot generally used by the public, highway, waterway, and airway of the State."

At the close of the State's case, the State *nolle prossed* the charge of knowingly transporting a handgun in a vehicle traveling on a roadway, parking lot generally used by the public, highway, waterway, and airway of the State.

At the close of the State's case the court granted appellant's motion for judgment of acquittal on the charge of conspiracy to commit robbery with a deadly weapon.

At the close of the State's case the court granted appellant's motion for judgment of acquittal on the charge of conspiracy to commit first degree assault.

by the trial judge, 300 prospective jurors, the court divided the venire into two different groups designated the "orange" and "white" panels. The court conducted *voir dire* of each panel for three days (the orange panel on December 3, 4, and 9; the white panel on December 5, 6, and 11, 2013), then combined those remaining for final *voir dire* and selection on the seventh day.

After *voir dire* of the orange panel concluded on December 9, Carlton entered a guilty plea to second-degree murder, pursuant to a plea agreement. When the final day of *voir dire* of the white panel began on December 11, Carlton and his counsel were no longer in the courtroom. Counsel for Knight moved to dismiss both venire panels. He argued that the prospective jurors had "come to know the co-defendants as co-defendants," and "would look at this situation and now come to the conclusion that one of the co-defendants has now accepted a plea." According to Knight's counsel, "the jury will now have an inference, an unallowable inference that the remaining co-defendants of these conspiracies are also guilty." When the trial court asked for appellant's response, his counsel renewed prior requests to sever appellant's trial from Knight's, citing instances raised previously of inappropriate courtroom behavior by Knight and Carlton and the prejudicial impact of the co-defendants' visible tattoos. In the ensuing colloquy, counsel asked that appellant be tried separately by a jury selected from one of the two panels, but did not request a mistrial:

> "[APPELLANT'S COUNSEL]: [B]efore I join in [Knight's motion to dismiss the jury panels], which I may do, I would like

to if nothing else make a couple of statements that lead me to at least a different request for relief preliminarily.

Throughout the entire process, I have asked on numerous occasions to have the defendants separated. And quite frankly, ironically the reason that I asked to have [appellant] severed from Mr. Knight and Mr. Carlton was in large part because of [the] presence of Mr. Carlton.

The particularly, I think, at this point we are well chronicled in the record, the looks, the tattoos, the banter between defendants and the like and—

THE COURT: But who has had or has the tattoos?

[APPELLANT'S COUNSEL]: [Appellant] has two that Mr. Knight has one on his right hand.

THE COURT: Okay.

[APPELLANT'S COUNSEL]: But the tattoo of a marijuana leaf and the tattoo of the money bag with the word M.O.B., mob, the letter O with a cross hair through it belongs to my client.

Nonetheless, what I was focusing on at least as it relates to my argument was the presence of Mr. Carlton has always been an issue, a very serious issue, because I think at the end of the day, based on the feedback of the jurors, the potential jurors over several days over several months of attempted jury selection, that [appellant] is prejudiced.

The State most recently made a plea offer, and I would say a testimony inducing plea offer, because up until this third [sic] attempt at jury selection, the offer was always something as related to murder, life suspend all. And that would be first degree murder.

As the Court is well aware now, the State changed their position and made an offer of second degree murder where Mr. Carlton

who accepted that offer will not need the Governor's signature to be released.

I think the timing of the offer unfortunately to [appellant]'s detriment has caused this situation where Carlton bet on a plea. He took it. He who had been sitting with us for three days of a jury selection on one panel, three days on another panel.

He is now absent, and as soon as a jury panel walks in here and sees that Mr. Carlton is absent, as [counsel for Knight] pointed out, they will reach one of a few conclusions. Some of them are not even worthy of consideration, that he escaped from jail. Nobody is really going to reach that conclusion.

That he died, I don't think anybody is going to reach that conclusion either. I think that one conclusion that will likely be reached and is most foreseeable, as [counsel for Knight] pointed out, is that Mr. Carlton, who is charged as a co-conspirator under a theory of felony murder where we anticipate the jury instructions of life, aiding and abetting, accomplice liability, and the like.

[The Prosecutor's] proposed argument that the three of them were acting as a team, that they were acting as concerted principals associated with felony murder and the like and suddenly Mr. Carlton isn't there.

And if one does reach that logical conclusion, the very foreseeable and likely conclusion that Carlton pled, then those jurors are going to logically conclude that Carlton pled because he was there.

The three of them in together throughout the *voir dire* process, the three of them are charged together. [The Prosecutor] is making a big production about the three of them being a team doing this, that, and the other.

The damage is already done. And I appreciate the fact that the State has made such an inducing plea offer, but what has

happened as a result of their generosity is that [appellant] has been actually further prejudiced. And I don't think we get a jury pool that is going to be fair and impartial.

And we hearken back to any number of the panels in our history, and you see that jurors will hold the three collectively [sic] defendants responsible for the actions of one or two.

Stick figures, drawings, banter, demeanor, whether or not somebody looks like they're serious, whether somebody smiles, all to the difference of the three collectively.

Now we have a situation whereby his absence, not his presence anymore, his absence, Mr. Carlton has further complicated things in his absence.

I have real concerns and now at this point it's more a totality of the circumstances argument. I, in writing, I have laid out my reasons for requesting severance. Orally I have done the same. And a lot of it's been fluid and then based on input from the jurors.

But now I have a situation where we know what is in a lot of the jurors' minds. We know that our clients are under the selective microscope of our proposed panel. And now, we do have this pink elephant, as [counsel for Knight] puts it, which is going to be . . . the third defendant that will be the one sitting at counsel table.

I would almost rather have a pink elephant at counsel table that would detract from Mr. Carlton's absence, but we don't. And the reality is there is no cure at this point.

I say that with this caveat, because I tried to think about judicial economy. . . .

But it's the Court's or the—ultimately the economy associated with not bringing out too many witnesses or taking them out of their daily lives. And there is nothing convenient about this

> trial. We have learned that quickly, well, actually over a painstakingly long period of time.
>
> And we're all suffering as a result, but when we look at . . . two young men presumed innocent of a crime, no more heinous a crime, I don't think that judicial economy is necessarily the issue anymore.
>
> If it is the issue, if it is what drives everyone i[n] decision making, I would suggest that you have two panels and you have two defendants. At this point we can move forward and we can still have two weeks of trial, week one and week two.
>
> My request right now is for severance. I think at this point we can continue. There is a panel already to select from, and there is one that presumably will be ready to select from in the near future.
>
> We still have two weeks set aside. We have two defendants. I think it's very doable . . . .
>
> * * *
>
> Then the jury that's deciding Mr. Knight's fate wi[ll] not be influenced in any way, shape, or form by Carlton's absence or [appellant]'s absence. And likewise with [appellant]. Mr. Knight and Mr. Carlton's absence will not be a factor."

The trial court denied appellant's motion to sever the trials and Knight's motions to dismiss the two jury panels. As to the concerns raised by both counsel, the court ruled that it would instruct the prospective jurors not to speculate about why Carlton's case was handled separately and then conduct remedial *voir dire* of any panel member who might hold Carlton's absence against the two remaining co-defendants.

Following the court's ruling, appellant's counsel stated that in addition to preserving his request for severance, appellant joined Knight's request to dismiss the entire venire. He also objected to the court's plan for remedial *voir dire*.

When *voir dire* of the white panel continued, the trial court addressed prospective jurors regarding Carlton's absence, as follows:

> "Only two defendants are now present at the defense table. Mr. Lorenzo Anthony Carlton's case will be handled separately from the cases of the other defendants, [appellant] and Mr. William Anthony [Knight].
>
> With that said, you should not and you cannot speculate as to why Mr. Carlton's case will be handled separately.
>
> Would the fact that Mr. Carlton's case will be handled separately or the fact that he is no longer seated at the defense table affect your ability to render a fair and impartial verdict based solely on the evidence presented in court as it relates to [the] other two defendants who remain at the defense table?"

Seven prospective jurors answered yes. Six of those prospective jurors were dismissed for cause. The seventh juror was not selected for the jury that heard the case—thus none of the prospective jurors who indicated that Carlton's absence might affect his or her ability to decide the case were seated on the empaneled jury. The next day, December 12, the remaining members of both panels returned for jury selection. Before proceeding, the trial court asked substantially the same *voir dire* question to members of the orange panel. There were no affirmative responses to any of the questions. A jury was selected from the

remaining members of the venire, then instructed to return on January 6, 2014, for the joint trial of appellant and Knight.

At trial, the State introduced evidence to support its theory that appellant, Knight and Carlton stole a minivan, then picked up Knight's friend, Jerome Thomas, the State's key witness. Thomas testified that during the day on October 24, 2011, Thomas spoke with Knight about meeting later in the day to smoke marijuana. That evening, after Carlton called to say they were on the way, Knight picked Thomas up in a dark minivan. Although there was no discussion of the vehicle theft, and he was not involved in it, Thomas testified that he knew the minivan was stolen. Carlton was in the front passenger seat, and appellant was in a rear seat next to the sliding door. Because one of the rear seats had been removed from the vehicle, Thomas sat on the floor. An assault rifle lay on the floor between him and appellant.

Thomas testified that as the group drove around in the stolen minivan smoking marijuana, Carlton saw a stranger walking alone toward the entrance of an apartment building. Carlton announced that he was going to rob the man. Knight stopped the car and Carlton got out of the vehicle, carrying a nine millimeter handgun. Knight made a U-turn and then "pulled up and waited." Appellant, Knight, and Thomas sat in the minivan while Carlton attempted to rob Alonzo Guyton. Mr. Guyton, the victim, fought back and Knight remarked that Carlton was "getting the shit beat out of him." Appellant grabbed the assault rifle, exited the minivan, and went to help Carlton. About thirty seconds later, Thomas heard

a single gun shot. Appellant and Carlton, still carrying their weapons, returned to the minivan, and Thomas testified that appellant "said he think he hit him." Knight drove the minivan away from the scene but crashed nearby. All four occupants fled on foot.

The State presented circumstantial evidence corroborating Thomas's account. As Thomas testified, the minivan was stolen, missing one rear seat, and contained a handgun left behind after the crash. The nine millimeter semi-automatic pistol was consistent with the handgun Thomas described as the weapon Carlton carried when he exited the minivan, and it matched the magazine found at the scene of the incident. Further corroborating Thomas's report of Carlton's fight with the victim, Mr. Guyton's blood was found on the handgun, in the minivan, and on the outside of a jacket recovered from near the minivan, which had Carlton's DNA on the inside collar and cuffs.

Also corroborating Thomas's testimony that he heard a single shot about thirty seconds after appellant got out of the minivan with the assault rifle, was the fact that Mr. Guyton died from a single gunshot wound, along with a single source of discharged ammunition found at the scene. In addition, Christopher Filmore, another resident of the apartment complex, was watching "Monday Night Football" when he "heard some people talking outside." After one to two minutes, he heard a single gunshot, followed immediately by the sound of a vehicle speeding away. When Mr. Filmore looked out his first-floor window, he saw a male wearing a Howard University sweatshirt down on the ground and he called 911.

Qianne Knox, Mr. Guyton's girlfriend with whom he had been sharing an apartment, testified that on the evening of October 24, 2011, Mr. Guyton had planned stay with a mutual friend, Sherrell Dawkins, while Ms. Knox's mother was in town for a visit. Ms. Dawkins testified that she lived in an apartment at 4205 Kaywood Drive in Mount Rainer, near the District of Columbia. Around 8:00 or 9:00 p.m., she exchanged text messages with Mr. Guyton, arranging for him to stay at her apartment. Later, when she sent a text message to Mr. Guyton to verify that he still intended to come that night, he did not respond. After going to bed around 11:30 or midnight, Ms. Dawkins "heard a loud pop," followed by the sound of a car speeding off.

Emergency responders found Mr. Guyton with a fatal gunshot wound to his neck, a blunt trauma laceration on his skull, and abrasions on his face, hands, and knees. The bullet exited through Mr. Guyton's back. On the ground near his body were indicators of two incompatible weapons, only one of which had been fired: a magazine for a semiautomatic nine millimeter pistol, filled with 15 rounds of live ammunition, as well as a fired jacket fragment of a bullet, and a spent rifle cartridge casing.

Based on the presence of the fired bullet fragment and spent rifle casing at the murder scene, the State maintained that the fatal shot was fired from the assault rifle that Thomas saw appellant carrying when he exited the minivan and again when he returned. Police found a gas tube for an SKS assault rifle in the minivan, recovered the SKS assault rifle at Knight's

home,[2] and matched that weapon to the fired jacket fragment and casing found next to Mr. Guyton's body. DNA testing of the gas tube was inconclusive as to appellant, but definitively excluded Knight, Carlton, and Thomas.

Meanwhile, at 12:15 a.m., the Metropolitan Police Department of the District of Columbia (MPD) responded to a traffic accident less than a mile away from the Kaywood apartment complex, at the intersection of Michigan Avenue and Webster Street, N.E., near Michigan Park in Washington, D.C. MPD Officer Christian Tobe testified that the accident was very close to Eastern Avenue, which divides Washington, D.C., from Prince George's County. A blue Dodge Caravan minivan had crashed into an unoccupied parked vehicle, apparently because it was traveling too fast through a turn. The doors of the Caravan were open and the air bags deployed, but there were no occupants at the scene.

The Dodge Caravan had been stolen from James Hicks between 5:00 and 7:00 p.m. that evening. Inside the crashed vehicle, police found the semiautomatic Bernardelli nine millimeter pistol without a magazine, the gas tube from a Russian SKS assault rifle, and a cell phone for which Carlton was the authorized user. A K-9 officer's dog tracked human scents from the vehicle until he alerted on the blood-stained jacket lying on the ground on 17th Street.

[2]The Prince George's Police recovered the SKS assault rifle from a truck in the back yard of Knight's residence, during the execution of an arrest warrant for Knight, who was found hiding under insulation in the attic.

On direct examination at trial, Thomas testified that he had been convicted of the unrelated robbery in Prince George's County.[3] Appellant's counsel pursued a line of impeachment questions as follows:

> "[APPELLANT'S COUNSEL]: You are the same Jerome Gary Thomas that was convicted of robbery in case number CT 11-1896X, correct?
>
> THOMAS: Yes.
>
> [APPELLANT'S COUNSEL]: A case that occurred November 13, 2011; is that right?
>
> THOMAS: What I was incarcerated for?
>
> [APPELLANT'S COUNSEL]: The one that the State brought to light, the one that you served jail time for, right?
>
> THOMAS: Yes.
>
> [APPELLANT'S COUNSEL]: That one occurred on November 13, 2011, right?
>
> THOMAS: Yes.
>
> [APPELLANT'S COUNSEL]: In fact ten days after you spoke to the police, right?
>
> THOMAS: Yeah.
>
> [APPELLANT'S COUNSEL]: Okay. All right. And now you are on probation, you are out and about, right?

[3]After the events of October 24, 2011, Thomas was convicted of a robbery committed in Prince George's County, for which he was sentenced to five years, with all but two suspended, plus probation.

THOMAS: Yeah.

* * *

[APPELLANT'S COUNSEL]: All right. You agree that you were found guilty in that case, right?

THOMAS: Yes.

[APPELLANT'S COUNSEL]: But you pled not guilty, right?

[PROSECUTOR]: Your Honor, objection. Can we approach?

THE COURT: Sustained.

[PROSECUTOR]: Thank you.

[APPELLANT'S COUNSEL]: Now, you were—

[PROSECUTOR]: Move to strike.

THE COURT: Yes. The jury will disregard that question and answer as to how he pled and what he was found.

[APPELLANT'S COUNSEL]: Let me ask you this: The events that you witnessed on October 25th when you saw [Carlton] get out of the car with the nine millimeter gun and you saw [appellant] exit the vehicle with an assault rifle, and presumably hit somebody, was a shocking experience to you, wasn't it?

THOMAS: Yes.

[APPELLANT'S COUNSEL]: It was a life altering event, wasn't it? I mean you found out shortly thereafter that the gentleman that was hit died, right?

THOMAS: Yes.

[APPELLANT'S COUNSEL]: So you realized, you had a moment where you reflected on things and said, wow, I was within feet hanging out with guys that were really up to no good, right? You reassessed your situation, didn't you?

THOMAS: What you mean within feet? I was in the car.

* * *

[APPELLANT'S COUNSEL]: You were within a distance where you could see someone's life who was about to be tragically taken from him, right? Yes or no.

THOMAS: I guess.

* * *

[APPELLANT'S COUNSEL]: Change your life?

[PROSECUTOR]: Objection, Your Honor.

THE COURT: Overruled.

[APPELLANT'S COUNSEL]: You can answer.

THOMAS: Did it change my life?

[APPELLANT'S COUNSEL]: Yeah.

THOMAS: Yeah.

[APPELLANT'S COUNSEL]: Did it? 10 days later you are robbing someone else?

[PROSECUTOR]: Objection, Your Honor.

THE COURT: Overruled.

[PROSECUTOR]: Can we approach?

> THE COURT: All right, I will sustain it because it is a rhetorical question. Have a seat.
>
> [APPELLANT'S COUNSEL]: Did you rob someone else 10 days later?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: That is asked and answered, [appellant's counsel]. You can argue that. Sustained."

After the court sustained the State's objections, appellant's counsel continued cross-examination without proffering the content and materiality of the excluded queries regarding how Thomas's purported changed outlook on life squared with his commission of a robbery only weeks later and the nature of the plea Thomas entered in that case.

Counsel for appellant also pursued a line of questioning about tattoos on Thomas's face, asking Thomas, "[w]hat are the tattoos you have on your face?" The prosecutor objected to the question, stating that counsel "has constantly said that these prejudicial tattoos accounted for severance." At a bench conference, appellant's counsel proffered that the dollar signs on Thomas's face indicate that "[h]e is the robbery man. He is the money man." The prosecutor objected that "[i]t is inflammatory and prejudicial," pointing out that "[i]t has been the basis of his one motion to sever because of the prejudicial tattoos of [appellant]'s co-defendants." The prosecutor further questioned "[h]ow a dollar sign goes to credibility" and insisted that the State also should be permitted to "have [appellant] stand up and parade his dollar signs and weed sign and then the tattoo with a target or a little aiming sign." The

trial court sustained the State's objection, finding that the tattoos had "[i]nsufficient probative value."

At the outset of the case, the State advised the trial court that it would not present evidence of statements appellant made to police, "due to *Miranda*, voluntariness, those types of issues." On January 7, 2014, the second day of trial, Detective Allyson Hamlin testified upon direct examination by the State that she interviewed appellant's girlfriend, Nashawn Weems. She was not asked to provide details about that interview. On cross-examination, over the State's objection that the inquiry was "beyond the scope" of direct, counsel for appellant questioned Detective Hamlin about the interview, as follows:

> "[APPELLANT'S COUNSEL]: You are the only detective who questioned [Weems], correct?
>
> DETECTIVE HAMLIN: Correct.
>
> [APPELLANT'S COUNSEL]: You were attempting to get information that incriminated [appellant] out of her; is that true?
>
> DETECTIVE HAMLIN: It didn't start that way, but it did finish that way.
>
> [APPELLANT'S COUNSEL]: *What was your purpose for initially speaking with her?*
>
> DETECTIVE HAMLIN: *We were verifying [appellant]'s alibi.*
>
> [APPELLANT'S COUNSEL]: Ms. Weems gave you information. The information that she gave you initially was not information that you were satisfied with, correct?

> DETECTIVE HAMLIN: No. Actually she was honest from the very—from early on.
>
> [APPELLANT'S COUNSEL]: Do you remember telling her on numerous occasions throughout the interrogation process that you believed that she was holding back information and that she knew more?
>
> DETECTIVE HAMLIN: Yes.
>
> [APPELLANT'S COUNSEL]: So you say that you believed she was forthcoming from the very beginning?
>
> DETECTIVE HAMLIN: She was providing information from the very beginning that led me to believe that she knew more than what she was telling me. Initially, like I said, we were just trying to verify an alibi. I was not prepared for the information that she was going to provide until she did.
>
> [APPELLANT'S COUNSEL]: In her forthcoming way, once she told you that you believed it was more to it, and that would explain the reasons why the interview went on and on?
>
> DETECTIVE HAMLIN: Yes, given how much she knew I thought that there was more."

After counsel for appellant completed cross-examining Detective Hamlin, counsel for Knight conducted his cross-examination. During re-direct by the State, counsel for appellant moved for a mistrial, stating as follows:

> "I'm going to move for a mistrial on behalf of [appellant] at this point. When I was questioning the Detective Hamlin I asked her about her conversations with Nashawn Weems. She talked about whether or not she felt like she was being honest, or something to that effect. I asked her a question about her purpose for asking her some questions. What she said was she was doing—she was questioning her to verify [appellant]'s alibi.

* * *

> The State made an agreement in the case not to use any statement from [appellant] in its case-in-chief. I presume, therefore, they made their witnesses aware of the fact that [appellant]'s statement wasn't to come into evidence. It appears to me that Detective Hamlin is chomping at the bit to make an illusion [sic] to [appellant]'s statement in some way, shape or form.
>
> It wasn't me opening the door. This is not a rookie detective, this is a seasoned detective who at the first opportunity talking about a completely different witness, not opening any doors, she makes illusion [sic] to [appellant], which is consistent with the information in the statement which the State has agreed not to use. I move for a mistrial."

The prosecutor pointed out to the court that he "was jumping up and down saying beyond the scope" and noted that, as "a seasoned police officer," Detective Hamlin "tells the truth when she gets on the stand." The trial court denied the mistrial motion. Responding to whether appellant's defense had been harmed, the court concluded that counsel for appellant was "reading a lot more into it than the jury could read into it at this point." The court noted that it would revisit the matter if appellant raised it again later.

Knight was charged with possession of a firearm while having a prior disqualifying conviction. Counsel for Knight stipulated to his client's prior disqualifying conviction. The prosecutor nonetheless asked Detective Deere about Knight's disqualifying criminal conviction, and the following colloquy ensued:

> "[PROSECUTOR]: I will ask it again. Did you subsequently learn whether or not the Defendant Knight had a disqualifying conviction?
>
> DETECTIVE DEERE: Yes, he had a prior felony conviction.
>
> [PROSECUTOR]: Did he have a prior disqualifying conviction?
>
> DETECTIVE DEERE: Yes.
>
> THE COURT: Just yes or no.
>
> DETECTIVE DEERE: I'm sorry, yes."

After the prosecutor concluded direct examination of the detective, counsel for Knight approached the bench to point out that his client's prior disqualifying conviction was for the misdemeanor crime of conspiracy to commit robbery, not a felony. Citing overwhelming unfair prejudice, counsel for Knight moved for a mistrial, and counsel for appellant joined in that request, as follows:

> "Your Honor, I'm joining in the objection and in the request for the mistrial. I'm a collateral consequence of this whole mess.
>
> The two lead detectives in the case have now, the most senior law enforcement testifying witnesses, have now brought out evidence, one, that is not true, that Mr. Knight has a felony conviction.
>
> Two, in violation of the stipulation. We agreed with the State, they agreed that my client's statement would not be used against him in the case-in-chief. There has already been a recitation that my client asserted an alibi. So far we are "O" for two on the State witnesses following through with the stipulation."

The trial court denied the joint motion for a mistrial, ruling that it would give a "correction" that "will be sufficient to offset any prejudice." The court then instructed the jury as follows:

> "There has been a misstatement of fact by the witness that needs to be corrected . . . . Detective Deere was asked if Mr. Knight had a disqualifying conviction. Detective Deere said, yes, he had a disqualifying felony conviction. That was beyond the scope of this stipulation and it was, in fact, an error. It was wrong as a matter of law.
>
> Mr. Knight does not have a disqualifying felony conviction. He has a disqualifying conviction, but it is not a felony.
>
> You are instructed to disregard Detective Deere's testimony because it was wrong and it was contrary to the stipulation that had been meticulously worked out between the prosecution and the defense. It is sort of rare that the judge has to intercede to correct a misstatement by a witness, but this is a rather critical point and it is important that you disregard the detective's testimony about Mr. Knight's disqualifying conviction. The stipulation will speak for itself."

At the end of all of the evidence, in the course of discussing proposed jury instructions, counsel for appellant requested an instruction advising the jury to consider evidence only as it related to the individual defendant against whom it was admitted. The trial judge noted that he did not recall explaining to the jury that any particular piece of evidence was only relevant to any particular defendant or defendants and that counsel for the defendants had not objected to that approach. Counsel for appellant responded, and the following colloquy ensued:

> "[APPELLANT'S COUNSEL]: I raised an objection inherently from the very beginning of this process because I wanted to be

severed. I made that abundantly clear on every record for about eight straight days.

THE COURT: That is true as to sever.

[APPELLANT'S COUNSEL]: I will make a motion right now for a mistrial based on the fact that given the foreseeable consequence of non-severance we have a situation where a jury may not know which evidence is applicable only to one or the other defendant.

THE COURT: Well, you know what, as I told you during the trial period, because I don't think I told them during the trial.

[APPELLANT'S COUNSEL]: For the record, I think that's part of the problem.

THE COURT: No. It's not part of the problem . . . that is what the jury can discern.

[APPELLANT'S COUNSEL]: When they are being bombarded over eight consecutive days with a volume of facts, evidence, and everything else, and a presentation that is so dazzling as this one. They can lose track of who specific items of evidence are necessarily aimed towards.

THE COURT: I will delete, as I told you during the trial, and your objection is preserved. That is all I will delete.

Each defendant is entitled to have the case decided separately on the evidence that applies to that defendant.

That's all. Because the evidence was not . . . admitted *per se* as against defendant A or defendant C. The evidence may apply to both. We did not categorize this comes against [appellant], but not against Knight, or Knight against [appellant]. Knight's alleged fingerprints on the van, does that come in against [appellant] or does it come in against Knight? It, obviously,

> comes in against Knight, but . . . the extent to which it makes [appellant] culpable is a matter for the jury to determine.
>
> [APPELLANT'S COUNSEL]: To the extent that it makes him culpable at all that is an issue—
>
> THE COURT: As an occupant of that stolen van."

During the jury instruction conference, appellant's counsel requested the court instruct the jury as to "Witness Promised Benefit."[4] Appellant's counsel maintained that there was sufficient evidence to generate this instruction with respect to the credibility of key prosecution witness Thomas, arguing as follows:

> "[Thomas had p]laced himself in the van, directly implicated all three co-defendants, was afraid of being charged, and recalled being told by his interrogators that he could be liable for both murder and robbery if he did not come clean. Two weeks after the incident, furthermore, Mr. Thomas committed a robbery for which he received 5 years of incarceration, with all but 2 years suspended."

Appellant's counsel argued further to the court in favor of the "Witness Promised Benefit" instruction:

[4]Maryland Criminal Pattern Jury Instruction 3:13, "Witness Promised Benefit," reads as follows:

> "You may consider the testimony of a witness who [testifies] [has provided evidence] for the State as a result of [a plea agreement] [a promise that he will not be prosecuted] [a financial benefit] [a benefit] [an expectation of a benefit]. However, you should consider such testimony with caution, because the testimony may have been influenced by a desire to gain [leniency] [freedom] [a financial benefit] [a benefit] by testifying against the defendant."

"[Thomas] walked in the court room. He got on the witness stand. He has not been charged with the crime. He is a State's witness. He is promised a benefit. He gets up there and promises to tell the truth [so that] nothing happens to him.

* * *

I asked him if he has been charged with this offense. The answer was, no. It is a tacit promise is what it is. It doesn't have to be a direct promise. It doesn't have to be in writing. He is promised a benefit.

* * *

It is more innuendo in this particular quote where they are talking about who shot the dude. Thomas said, I don't know. The detective says, okay, I don't want to get mixed feelings about this. I want to be straight forward. I know who shot the dude. Then it goes down. So if you want to do the right thing, if you want me to believe that you had no involvement in this, okay, then you need to come forward with me. Do you see what I'm saying? I already know the motherfucker is already locked up, but the initial exchange between the two.

The initial exchange, we already talked with people about this case, this is Detective Ordono. We have already arrested three individuals in this case. I also hear that you weren't the triggerman. I could be wrong, I could be right. So if you want to help yourself, you have got to come forward and let me know exactly what took place that night, what happened, okay? So start talking.

* * *

That is after a denial of him knowing who the shooter is. If he wants to help himself, according to the State's agent who is responsible, under the purview of the State's Attorney's office. He knows to stay out of harm's way and not be the triggerman he has to point to [appellant].

> He has never been charged with the crime, never been indicted. He is receiving a benefit.
>
> This case, some other case, he believes he has to tell the truth, the truth according to him is what the State wants him to say in this case. I think that that is a tacit incentive for him and a benefit to be realized upon his testimony. I think the instruction is appropriate. I think it has been generated."

The State responded that appellant's counsel was "reading from a transcript which is not in evidence," but in any event, "no one said you will not be prosecuted. . . . All the detective said was if you want to help yourself, you had better start talking. That is not a benefit."

The trial court agreed with the State that there was not a sufficient factual basis to give MPJI-Cr. 3:13 because there was no evidence "that the State has promised a benefit and that is what this has to be." The court ruled that the detective telling Thomas, "if you want to help yourself, you had better start talking," did not constitute a benefit, explaining as follows:

> "I think if you had the detective saying in this, listen, you corroborate [sic] with us I will make a recommendation to the DA that we ignore your involvement in the case, or you tell us what we want to hear and we'll go easy on you, or we have a plea agreement, that is an exchange for truthful testimony, or we have something. I don't think we have a benefit that was promised. The evidence does not support that."

The trial court stated that it would give appellant broad leeway "to argue for everything that it is worth . . . to the jury about any promises that Mr. Thomas, . . . made by implication or by assumed inducement, including the fact that he is on probation, which you got out" because "it could be a clear indication of some bias or some motivation."

As noted above, the jury convicted appellant of first-degree felony murder, second-degree murder, robbery with a dangerous weapon, first-degree assault, use of a handgun in the commission of a crime of violence, theft of a motor vehicle valued between $1,000 and $10,000, unauthorized use of a vehicle, and carrying a handgun. He was sentenced to life imprisonment, with all but 80 years suspended, for the murder; a term of imprisonment of twenty years, with all but ten suspended, consecutive, for the handgun use; a term of imprisonment of ten years, with all but five suspended, consecutive, for theft; plus five years probation.

This timely appeal followed.

II.

Appellant contends that the trial court abused its discretion in denying his several motions for mistrial because, whether viewed individually or collectively, the unfair prejudice stemming from the denial of the motions deprived him of a fair trial. He argues that the trial court erred in denying his request for a mistrial after refusing to sever the trials or dismiss the venire panel following Carlton's guilty plea, which left only appellant and Knight to stand trial. He asserts that it would have been feasible to sever the trials as soon as Carlton plead guilty during *voir dire*, and that the unfair prejudice in failing to do so only increased over the course of the trial as a result of inadmissible information being imparted to the jury.

Appellant argues that at the outset of this case, the State advised the trial court that it would not present evidence of statements made by appellant to police, "due to *Miranda*, voluntariness, those types of issues." Appellant contends the trial court abused its discretion in denying his motion for a mistrial after Detective Allyson Hamlin violated that agreement by mentioning appellant's purported alibi during cross-examination.

Appellant next contends that the trial court abused its discretion in denying a motion for mistrial after Detective Sean Deere testified erroneously that Knight had a prior felony conviction, when Knight was convicted of a crime that was not a felony. Appellant acknowledges that the trial court provided the jury a curative instruction but argues that the harm in telling the jury that his co-defendant had a felony conviction could not be remedied. Appellant contends that the detective's testimony could very well have meant the difference between acquittal and conviction. Appellant argues that, in the aggregate, by denying all of the motions for mistrial, the circuit court committed reversible error.

Appellant next asserts that the trial court committed reversible error in preventing defense counsel from cross-examining Thomas about matters having a critical bearing on credibility. Specifically, appellant contends that the trial court abused its discretion when it precluded defense counsel from asking material follow-up questions about Thomas's unrelated robbery conviction, and questioning Thomas about tattoos on his face.

Appellant argues further that the trial court committed reversible error in concluding that the evidence did not generate Maryland Criminal Pattern Jury Instruction 3:13, "Witness

Promised Benefit." Appellant maintains that there was sufficient evidence to generate this instruction with respect to the credibility of the chief prosecution witness Thomas, because he was with the co-defendants when the events in question took place, directly implicated the co-defendants in his testimony, was fearful that he would be charged in the case, was told by police interrogators that he could be liable for both murder and robbery if he did not come clean, and that he received less than the maximum sentence for a robbery he committed two weeks after the incident. In sum, appellant argues that the evidence created an implication that Thomas received a benefit from the State by testifying because he was not charged in the Guyton murder case and received a lenient sentence for the unrelated robbery.

In his final claim, appellant argues that the evidence was insufficient to sustain his conviction for theft of property valued between $1,000 and $10,000, because at most the State established only that he was a passenger in a stolen minivan. Appellant does not dispute that there was sufficient evidence for the jury to find beyond a reasonable doubt that the minivan was stolen just hours before the events in question. Nor does appellant controvert the evidence that showed the ignition of the minivan was "punched" and that he occupied the rear passenger seat as Knight drove the group around. Instead, appellant argues that the State failed to establish that he participated knowingly in the theft because no witness testified as to how the minivan was stolen, that Thomas never testified that anyone in the minivan discussed stealing the minivan, and there was no evidence that appellant participated in stealing the minivan.

The State argues that appellant did not move for a mistrial during *voir dire*, but, instead moved only to either sever his case from his co-defendant's or to dismiss the jury panel and start the *voir dire* anew with a different venire. According to the State, the issue of whether the trial court erred in not granting a mistrial during *voir dire* is not preserved for appellate review because appellant did not raise the issue below. Even if preserved, the State argues the claim has no merit because the trial court did not abuse its discretion in denying appellant's motions to sever or strike the jury panel.

The State argues that appellant's motion for a mistrial during the cross-examination of Detective Hamlin was untimely, and hence is not preserved for review. The State contends that appellant's counsel did not object during cross examination when Detective Hamlin purportedly violated the terms of the State's agreement not to use appellant's statement to the police. Appellant did not object or request a mistrial during Knight's cross examination. Appellant did not object nor move for a mistrial until the prosecutor's re-direct of Detective Hamlin. Accordingly, the State argues that this issue is not preserved for review. If preserved, the State argues that appellant opened the door for the testimony and that appellant invited the error inasmuch as it was his line of questioning that produced the complained-of testimony. Thus, the trial court's refusal to declare a mistrial was proper.

The State argues that appellant's contention that the trial court erred by not granting his request for a mistrial when Detective Sean Deere mischaracterized Knight's prior disqualifying conviction as a felony conviction lacks merit and should be rejected. The

extraordinary remedy of a mistrial was not appropriate and the trial court gave an immediate curative instruction, according to the State.

The State argues next that, to the extent that appellant's argument is preserved, the trial court exercised its discretion properly when it limited appellant's cross-examination of Thomas. The State maintains that appellant's contention that the court erred in limiting his questions about Thomas's robbery conviction is not preserved because he failed during trial to proffer why the excluded testimony was material. Even if preserved, the State argues that the claim lacks merit because Thomas answered both questions about the robbery conviction as appellant asked them, and the testimony included all of the information that appellant could have permissibly elicited about the robbery conviction. As to Thomas's tattoos, the State argues that the testimony appellant sought was both irrelevant and unduly prejudicial, and as such, the trial court properly excluded that line of cross-examination.

The State argues that the trial court exercised its discretion properly when it declined to give the "Witness Promised Benefit" jury instruction, contending that Thomas received no benefit from the State for his testimony. Thomas, although in the minivan during the robbery and murder, was not involved in the crimes and was not charged. The State argues that appellant produced no evidence that supports the "Witness Promised Benefit" instruction, falling well below the threshold required by the "some evidence" test for warranting the instruction. Further, appellant had ample opportunity to cross-examine Thomas, then was given wide latitude by the court to argue in closing about any potential

benefit Thomas may have received for his cooperation. Finally, the trial court gave the "Credibility of the Witness" and the "Testimony of Accomplice" instructions.

The State concludes that the evidence was sufficient to support appellant's conviction for theft of property with a value between $1,000 and $10,000. The State points out that appellant was in the minivan—that he was in joint possession of recently stolen goods without a reasonable explanation of how he came into possession of the property—as a sufficient basis for the jury to have convicted appellant of theft. Also, the State argues that appellant's participation in a crime in the vehicle, the "popped" vehicle ignition, the presence of several screw drivers, and appellant's flight from the scene of the crash implicate him in the theft.

III.

We begin with Appellant's claim that the trial court abused its discretion in denying his several motions for mistrial because when considered individually or collectively, and that the unfair prejudice stemming from the denial of each and all of the motions deprived him of a fair trial. We conclude that the trial court did not err or abuse its discretion in denying appellant's requests for a mistrial.

A.

We address first appellant's contention that the trial court abused its discretion in refusing to declare a mistrial based on his severance concerns and argument that it would have been feasible to sever the trials when Carlton pleaded guilty during *voir dire*.

The record is clear. Appellant did not request a mistrial during *voir dire*. Appellant's counsel maintained that appellant was prejudiced by the change from three co-defendants to two because the jury would speculate improperly that Carlton pleaded guilty and hold that against appellant. Whereas counsel for Knight moved to dismiss both jury panels, which arguably was the functional equivalent of a mistrial in that he sought *voir dire* of substitute jury panels, counsel for appellant argued for severance and that any prejudice from Carlton's absence *could* be cured by using the two *voir dired* jury panels for two separate trials. As appellant did not request a mistrial or request to discharge the panel and start anew during *voir dire*, he cannot now complain that the trial court did not declare one. *See Klauenberg v. State*, 355 Md. 528, 545-46 (1999) (finding no error where appellant failed to request in the trial court the remedy sought on appeal). His argument is not preserved for our review.

It was not until after the trial court denied both appellant's motion to sever and Knight's motion to dismiss the jury panels that counsel for appellant belatedly joined Knight's motion to dismiss. Even if appellant had timely requested dismissal or a mistrial, he would not be entitled to appellate relief. The trial court directed prospective jurors not to speculate about why Carlton's case was handled separately. We assume that jurors followed

this instruction, which was an appropriate use of remedial action to prevent prejudice. *See Dillard v. State*, 415 Md. 445, 465 (2010) ("Jurors generally are presumed to follow the court's instructions, including curative instructions."). The court then questioned individual prospective jurors to determine the existence and extent of any prejudice. The effectiveness of that approach in curing any prejudice is indicated by the fact that none of the prospective jurors who expressed reservation about following the instruction were seated on the jury.

The only severance-related mistrial issue preserved properly for our review is whether the trial court abused its discretion in denying appellant's motion for a mistrial after the close of the evidence. Appellant does not argue, however, before this Court the ground that was asserted by his trial counsel when making that motion—that the joinder of his trial with Knight's allowed the jury to consider evidence that was admissible only against his co-defendant. Instead, appellant argues to this Court that the trial court abused its discretion in refusing to declare a mistrial after the close of evidence because, by that point, the trial court had erred in denying the motion for mistrial following Detective Deere's testimony about Mr. Knight's prior conviction, and had the trials been severed, such prejudice would not have occurred. As appellant did not present to the trial court the issue he now argues, it is not preserved for our review. *See Williams v. State*, 99 Md. App. 711, 715-16 (1994), *aff'd*, 344 Md. 358 (1996).

The question of whether to grant a motion for a mistrial is left to the sound discretion of the trial court. *See*, *e.g.*, *Klauenberg*, 355 Md. at 555. The grant of a mistrial is

considered an extraordinary remedy and should be granted only if necessary to serve the ends of justice. *Carter v. State*, 366 Md. 574, 589 (2001) (quoting *Klauenberg*, 355 Md. at 555). Our review on appeal is limited to whether the trial court abused its discretion in denying the motion for mistrial. *White v. State*, 300 Md. 719, 737 (1984), *cert. denied*, 470 U.S. 1062 (1985). A reviewing court should not reverse a trial court unless there is clear prejudice resulting from the trial court's abuse of discretion. *Hunt v. State*, 321 Md. 387, 422 (1990).

We do not find appellant's underlying arguments in favor of severance so compelling as to have required a mistrial at the close of all the evidence. Under Md. Rule 4-253(a), "the court may order a joint trial for two or more defendants charged in separate charging documents if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Separate trials may be ordered, however, "[i]f it appears that any party will be prejudiced by the joinder for trial." Md. Rule 4-253(c). "'[P]rejudice within the meaning of Rule 4-253 is a term of art and refers only to prejudice resulting to the defendant from the reception of evidence that would have been inadmissible against that defendant had there been no joinder.'" *State v. Payne*, 440 Md. 680, 718 (2014) (quoting *Galloway v. State*, 371 Md. 379, 394 n.11 (2002)).

Under Rule 4-253(a), the trial court did not err or abuse its discretion in ordering appellant and Knight be tried together as they were "alleged to have participated in the same act or transaction . . . constituting an offense or offenses." The charges against both defendants stemmed from sequential criminal episodes that began with the theft of the

minivan, continued with its unauthorized use, escalated into armed robbery, and ultimately resulted in murder. The State alleged that during this series of criminal acts, appellant and Knight were together. Both men were charged with theft, unauthorized use, weapons offenses, robbery, and first degree murder (both felony and premeditated). The trial spanned 9 days, plus 7 days of *voir dire*, and involved 25 prosecution witnesses. The court's interest in avoiding duplication of these closely intertwined cases was a strong factor weighing against severance because "joinder of defendants for trial is favored for reason of judicial economy, and is appropriate 'where most, if not all, of the evidence admitted at trial would have been admissible in each trial if the several defendants had been tried separately.'" *Cook v. State*, 84 Md. App. 122, 130 (1990) (quoting *Stevenson v. State*, 43 Md. App. 120, 130 *aff'd*, 287 Md. 504 (1979)). By the time appellant moved for a mistrial based on the failure to sever, seven full days of trial had confirmed the inter-related nature of the charges and proof.

As the trial court pointed out, neither defense counsel had asked the court to instruct the jury that certain evidence was admissible only against one or the other of them. Nor did appellant's counsel support his mistrial motion by making a proffer of specific evidence that should have been so limited. Appellant failed to establish a danger of "prejudice through the transference of evidence of guilt from one defendant to another . . . ." *Id.* at 129. Accordingly, we hold that the trial court did not err or abuse its discretion in denying appellant's mistrial motion based on severance concerns.

B.

We turn next to appellant's contention that the trial court erred by not granting a mistrial after Detective Allyson Hamlin purportedly violated an agreement made by the State to not introduce evidence of appellant's statements to police. This argument is not preserved for appellate review.

Even though there was a pretrial stipulation precluding the State from using appellant's statements to police, appellant was obligated to object when and if that agreement was breached. Rule 4-323 ("An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived."). Here, counsel for appellant did not timely challenge either of Detective Hamlin's references to appellant's alibi during his cross examination. Instead, counsel waited until after his cross-examination was complete and the prosecutor was conducting re-direct examination to raise the issue with the trial court.

Even if appellant's objection to Detective Hamlin's testimony was preserved, the testimony did not warrant a mistrial. Significantly, the State did not violate its agreement because it was appellant's counsel, not the prosecutor, who elicited the alibi references. Appellant's counsel was aware of the contents of Weems's statement, including that police were focused on whether appellant pressured her to provide him with an alibi. Despite that knowledge, counsel invited the detective to mention the alibi (or opened the door to her doing so), by asking her an open question, "[w]hat was your purpose for initially speaking

with [Weems]?" *See, e.g.*, *Klauenberg*, 355 Md. at 544 (noting that appellant invited error and waived objection to it, when defense counsel asked question that elicited challenged testimony, then did not object).

In any event, Detective Hamlin's mention of appellant's alibi did not in fact violate the agreement, because she did not indicate that appellant, rather than Weems, was the source of that alibi, or otherwise reveal that appellant spoke to police. The testimony did not delve into appellant's purported alibi. In these circumstances, the trial court did not err or abuse its discretion in denying appellant's motion for the extraordinary remedy of a mistrial based on Detective Hamlin's testimony.

C.

We next address appellant's contention that the trial court abused its discretion in denying his motion for mistrial after Detective Sean Deere testified erroneously that Knight had a prior felony conviction. Appellant acknowledges that the trial court provided the jury with a curative instruction, but argues that the harm in telling the jury that his co-defendant had a felony conviction could not be remedied.

The trial court did not abuse its discretion in giving a curative instruction *in lieu* of a mistrial. The witness's reference to a felony was not invited by the prosecutor and was a single, isolated, mistake regarding a factual matter that was easily and immediately corrected by the court through the instruction provided to the jury. *Dillard v. State*, 415 Md. 445, 465

(2010) ("Jurors generally are presumed to follow the court's instructions, including curative instructions."). Moreover, we see no prejudice to appellant because the mistake related only to Knight. Any residual prejudice following the correction was to the credibility of Detective Deere, the prosecution witness who made the mistake. Appellant's claim that this mistaken felony reference somehow enhanced the credibility of Thomas is incorrect because Thomas never addressed Knight's prior convictions.

D.

Appellant contends that by denying all of his motions for mistrial discussed above, the circuit court committed reversible error. Because we conclude that none of these individual grounds warranted a mistrial, we are not persuaded that they required a mistrial when considered in the aggregate.

IV.

We consider here appellant's assertion that the trial court committed reversible error in preventing appellant's counsel from cross-examining Jerome Thomas about matters that appellant asserts related to Thomas's credibility. In particular, appellant contends that the trial court abused its discretion when it precluded defense counsel from asking follow-up questions about Thomas's unrelated robbery conviction, and about the tattoos on his face. The challenged rulings did not deprive appellant of a fair trial.

The Confrontation Clause of the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant the right to confront the witnesses against him. *Martinez v. State*, 416 Md. 418, 428 (2010). A witness generally may be impeached through questioning about "'such matters and facts as are likely to affect his credibility, test his memory or knowledge, show his relation to the parties or cause, his bias, or the like.'" *Lyba v. State*, 321 Md. 564, 569 (1991) (quoting *Kantor v. Ash*, 215 Md. 285, 290 (1958)).

The right to cross-examination may reasonably be limited in a manner that does not deprive the accused of a fair trial. *Church v. State*, 408 Md. 650, 664 (2009). Thus, "'trial judges retain wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, . . . or interrogation that is repetitive or only marginally relevant.'" *Lyba*, 321 Md. at 570 (quoting *Smallwood v. State*, 320 Md. 300, 307 (1990)). The constitutional right of confrontation is satisfied when defense counsel is "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences related to the reliability of the witness." *Martinez*, 416 Md. at 428 (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)).

Within this constitutional constraint, the scope of an inquiry on cross-examination is subject to the trial judge's sound discretion. *Martinez v. State*, 416 Md. 418, 428 (2010). The trial court abuses that discretion only when the trial judge limits cross-examination that

inhibits the ability of the defendant to receive a fair trial. *Pantazes v. State*, 376 Md. 661, 681-82 (2003).

"A trial judge's refusal to allow a line of questioning on cross-examination amounts to exclusion of evidence . . . ." *Grandison v. State*, 341 Md. 175, 207 (1995). A claim that a court erred in excluding evidence must be preserved for appellate review by a formal proffer of the contents and materiality of the excluded testimony. *Muhammad v. State*, 177 Md. App. 188, 281 (2007). Under Md. Rule 5-103(a)(2), a party may not appeal from a ruling that excludes evidence unless the party is prejudiced by the ruling and "the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered."

After the court sustained the State's objections, appellant's counsel continued cross-examination without proffering the content and materiality of the excluded queries regarding how Thomas's "purported changed outlook on life squared with his commission of a robbery only weeks later," and what plea Thomas entered in that case. In the absence of any proffer that appellant sought to cross-examine Thomas about his plea in that case to explore the possibility of a "witness promised benefit," the trial court did not abuse its discretion in foreclosing that line of questioning.

Appellant argues alternatively that the trial court abused its discretion when it "prohibited defense counsel from cross-examining Jerome Thomas about tattoos on his face." In appellant's view, "where Thomas put himself in a van with three co-defendants facing

robbery charges and where Thomas admitted to committing a robbery only weeks later, defense counsel had a reasonable basis for questioning him about his tattoos." The court did not deny appellant a fair trial by ending this inquiry.

The trial court did not abuse its discretion in precluding cross-examination regarding Thomas's facial tattoos based on their marginal relevancy. *See Smallwood*, 320 Md. at 307-08. It is within the wide latitude of the trial court to determine whether evidence is relevant or cumulative (*i.e.* with evidence of Thomas's robbery conviction), or is straying into collateral matters that obscure the issue and contribute to the fact finder's confusion. *State v. Cox*, 298 Md. 173, 178 (1983). Furthermore, because appellant's counsel complained previously that the jury could be swayed unfairly by tattoos visible on appellant and his co-defendants, the trial court had a reasonable basis to preclude cross-examination about any tattoos, in order to avoid prejudice and confusion of the issues.

V.

We turn now to appellant's claims that the trial court committed reversible error in concluding that the evidence did not generate Maryland Criminal Pattern Jury Instruction 3:13, regarding a "Witness Promised Benefit." Appellant maintains that there was sufficient evidence to generate this instruction with respect to the credibility of the chief prosecution witness Jerome Thomas.

Rule 4-325(c) provides that a trial "court may, and at the request of any party shall, instruct the jury as to the applicable law," but "[t]he court need not grant a requested instruction if the matter is fairly covered by instructions actually given." Under this rule, trial courts are required to give jury instructions requested by a party when a three-part test is met. The instruction must state the law correctly, the instruction must apply to the facts of the case or be generated by "some evidence," and the content of the jury instruction must not be covered fairly in a given instruction. *Preston v. State*, 444 Md. 67, 81-82 (2015).

In evaluating whether there is sufficient evidence to generate a requested instruction, we view the evidence in the light most favorable to the accused, *General v. State*, 367 Md. 475, 487 (2002), 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." *Bazzle v. State*, 426 Md. 541, 550 (2012) (quoting *Dishman v. State*, 352 Md. 279, 292 (1998)). This has been characterized as the "some evidence" standard because the threshold is low, requiring only "some evidence"—any evidence, regardless of source, that, if believed, would support the defendant's claim. *Id.* at 551.

In the absence of clear factual error or an error of law, we review a trial court's decision not to give an instruction for abuse of discretion. *Preston*, 444 Md. at 82. The burden is on the complaining party to show both error and prejudice. *Tharp v. State*, 129 Md. App. 319, 329 (1999), *aff'd*, 362 Md. 77 (2000).

In *Preston*, the Court of Appeals reviewed the scope of "benefits" encompassed by the pattern instruction on "witness promised benefit." The Court recognized that this instruction is premised on the proposition that undercover agents, jailhouse informants, accomplices, and other witnesses who testify for pay, immunity, or other forms of personal advantage may be motivated to lie or exaggerate in order to obtain a particular "benefit." Accordingly, their testimony might be viewed by the fact finder with a degree of skepticism. The Court noted that while the broader meaning of the term "benefit" is unclear, it is relatively easy to identify a plea agreement, a promise not to prosecute, or a financial benefit such as a reward.

As the *Preston* Court observed, it is clear that MPJI-Cr. 3:13 should be given when a prosecution witness testifies after having received a favorable plea deal or promises of a reduced sentence. *See id.* at 86. Similarly, in *Dickey v. State*, 404 Md. 187, 192, 194 n.3 (2008), the Court of Appeals recognized that a "witness promised leniency" instruction is appropriate when there is evidence that a testifying witness was promised he would not be charged if he implicated the defendant.

Appellant was permitted to play portions of Thomas's recorded police interview supporting his contention that police primed Thomas to implicate appellant in order to exculpate himself. Counsel for appellant argued that Thomas gained a benefit from agreeing to testify—he was not charged in the Guyton murder and received only a term of

incarceration of five years, with all but two suspended, plus probation, for the robbery he committed just ten days after giving his statement implicating appellant, Knight, and Carlton.

Appellant concedes that there was no explicitly bargained promise of leniency but renews his trial contention that Thomas's testimony constitutes "some evidence" from which such a promise may be inferred. In the trial court, counsel for appellant maintained that this evidence was sufficient to establish the existence of a tacit promise that may be inferred from the fact that Thomas implicated the other occupants of the minivan but that he was not charged in the case.

The trial court agreed with the State that there was not a sufficient factual basis to give MPJI-Cr. 3:13 because there was no evidence "that the State has promised a benefit and that is what this has to be." We agree with the trial court that the witness promised benefit instruction was not generated because there was insufficient evidence of either an express or an implied promise not to prosecute Thomas in exchange for his testimony. There was no evidence of the promise itself. During the police interrogation, Thomas implicated the other three occupants of the minivan, giving police details that were corroborated by circumstantial evidence, including some forensic evidence that was not developed until long after Thomas's statement. No bargaining or agreement preceded Thomas's statement implicating the three defendants, and Thomas gave his statement before he committed the subsequent robbery.

We reject appellant's contention that an inferred promise not to prosecute was made by interrogating police officers urging Thomas to tell them what happened "if he wanted to

help himself." Under the circumstances presented herein, that is not the type of *quid pro quo* promise not to prosecute contemplated by this instruction. *See Preston*, 444 Md. at 85 ("We interpret the word 'benefit,' in the context of Jury Instruction 3:13, to mean something akin to a plea agreement, a promise that a witness will not be prosecuted, or a monetary reward or other form of direct, *quid pro quo* compensation or inducement.").

Like the approved instructions in *Preston*, the instructions here included MPJI-Cr. 3:10, the pattern instruction on credibility of witnesses, which instructs the jury to consider, among other factors, "[w]hether the witness has a motive not to tell the truth," "[w]hether the witness has an interest in the outcome of the case," and "whether the witness has a bias or prejudice." *See Preston*, 444 Md. at 77-78. The court also gave the following pattern instruction on "Testimony of Accomplice":

> "You have heard testimony from one Jerome Thomas, who may have been an accomplice. An accomplice is one who knowingly and voluntarily cooperated with, aided, advised, or encouraged another person in the commission of a crime. The defendants cannot be convicted solely on the uncorroborated testimony of accomplice.
>
> If you find either defendant has proven that it is more likely than not that Jerome Thomas was an accomplice, you must then decide whether his testimony was corroborated before you may consider it. Only slight corroboration is required. This means there must be some evidence in addition to the testimony of Jerome Thomas that shows either, one, that the defendant committed the crime charged or, two, that the defendant was with others who committed the crime, at or about the time and place the crime was committed.

> If you find that Jerome Thomas was an accomplice and the testimony of Mr. Thomas has been corroborated, you may consider it, but you should do so with caution and give it the weight you believe it deserves.
>
> If you find that Jerome Thomas was an accomplice, but you do not find that his testimony has been corroborated, you must disregard it and you may not consider it as evidence against either defendant.
>
> If you do not find that Jerome Thomas was an accomplice, you should treat his testimony as you would treat the testimony of any other witness."

The trial court afforded appellant ample opportunity to argue in closing Thomas's credibility in identifying appellant as the person who shot Mr. Guyton only after police primed him by telling him they knew he was not the triggerman and pressured him to name appellant as the shooter. Quoting from the transcript of Thomas's police interview, counsel argued that the prosecutor was "feeding the story to the witness, giving him his pass." Appellant's credibility concerns were addressed adequately by other instructions and appellant's opportunity to argue his theory as to why Thomas implicated him. We hold that the trial court did not abuse its discretion in denying appellant's request for MPJI-Cr. 3:13.

VI.

In his final claim, appellant argues that the evidence was insufficient to sustain his conviction for theft of property valued between $1,000 and $10,000 because the State

established only that he was a rear passenger in a stolen minivan. Appellant's position is not supported by the law or the record.

We review a criminal conviction to determine whether, on the evidence presented, considered in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Spencer v. State*, 422 Md. 422, 433 (2011); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Whether the evidence was legally sufficient to support a conviction is a question of law that this Court reviews by making an independent judgment based on the evidence admitted at trial. *See Polk v. State*, 183 Md. App. 299, 306 (2008). If the evidence "either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt," then we will not disturb that conviction. *Bible v. State*, 411 Md. 138, 156 (2009) (quoting *State v. Stanley*, 351 Md. 733, 750 (1998)).

The consolidated theft statute, codified at Maryland Code § 7-104 of the Criminal Law Article ("C.L."), establishes various modalities of theft. The jury was instructed on the prosecution theory of theft by unauthorized control over property, under C.L. § 7-104(a),[5]

[5] Criminal Law Article § 7-104(a) provides as follows:

"(a) *Unauthorized control over property*. — A person may not willfully or knowingly obtain or exert unauthorized control over property, if the person:

(1) intends to deprive the owner of the property;

(2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or

(continued...)

and on the inference arising from the unexplained exclusive possession of recently stolen goods. Appellant acknowledges that the "[u]nexplained possession of recently stolen goods gives rise to an inference that the possessor is the thief . . . ," *Samuels v. State*, 54 Md. App. 486, 493 (1983), and if another is the thief, then he is the receiver of stolen property. *Myers v. State*, 165 Md. App. 502, 529 (2005), *aff'd*, 395 Md. 261 (2006). Thus, absent a satisfactory explanation, "exclusive possession of recently stolen goods permits the drawing of an inference of fact strong enough to sustain a conviction that the possessor was the thief." *Painter v. State*, 157 Md. App. 1, 12 (2004) (quoting *Anglin v. State*, 244 Md. 652, 656 (1966)); *see also Grant v. State*, 318 Md. 672, 680 (1990) ("Ordinarily, the unexplained, exclusive possession of recently stolen goods permits an inference that the possessor is the thief."). "The permitted inference is more than a strand [of evidence]; it is proof of guilt that may stand alone." *Molter v. State*, 201 Md. App. 155, 163 (2011).

Appellant does not dispute that there was sufficient evidence for the jury to find beyond a reasonable doubt that the minivan was stolen just hours before the robbery, murder and crash. Nor does he contest that the evidence showed that the ignition of the minivan was "punched" and that he occupied the rear passenger seat as Knight drove the group around.

[5](...continued)

> (3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property."

Instead, he maintains that the State failed to establish that he knowingly participated in the theft.

Appellant's argument against the theft conviction is to challenge the evidence as equivocal. The jury was not required to view it with the same skepticism as appellant. Instead, the jury concluded that the evidence showed no reasonable explanation for his joint possession and use of the recently stolen vehicle. *See Dinkins v. State*, 29 Md. App. 577, 582 (1976) (trier of fact weighs explanation to determine whether it is reasonable, or plausible or satisfactory, and is not bound to accept or believe any particular explanation any more than it is bound to accept correctness of the inference); *Graham v. State*, 6 Md. App. 458, 463 (1969) (noting that the inference created by possession of recently stolen goods "casts upon [the defendant] the burden to give a reasonable explanation of how he came into such possession").

To be sure, the "mere presence" of the accused as a passenger in a stolen vehicle, "without more, is insufficient to show possession to sustain a conviction for theft of an automobile." *In re Melvin M.*, 195 Md. App. 477, 490 (2010). But here there is more than "mere presence." This record contains ample other evidence from which the jury reasonably could have inferred that appellant participated in the theft. The permissible inference of theft that may be drawn from appellant's joint possession and use of the minivan is strengthened by the evidence that the ignition was obviously punched. Especially compelling is the evidence of appellant's participating in the joint use of the minivan to pick up Thomas, to

smoke marijuana, to robbing Mr. Guyton, and to fleeing following his murder and the crash. After the crash precipitated the likely arrival of police, appellant fled from the vehicle, along with the other three occupants, indicating consciousness of guilt of the theft. Collectively, evidence of appellant's joint possession and use of the recently stolen minivan was sufficient for the jury to draw the permissible inference that he participated in the theft. *Cf.*, *e.g.*, *In re Landon G.*, 214 Md. App. 483, 496 (2013) (finding factors sufficient to establish juvenile passenger's joint possession of stolen vehicle included "flight by the driver and the defendant passenger when approached by the police, the use of the vehicle in a crime or other joint activity, and a relationship between the driver and the defendant passenger").

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.