UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0220

September Term, 2015

ALVIN KELLEY

v.

STATE OF MARYLAND

Wright,
Graeff,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, J.

Filed: March 3, 2016

Appellant, Alvin Kelley, was indicted in the Circuit Court for Baltimore City, Maryland, and charged with murder and related counts. He was tried by a jury and convicted of second degree murder, use of a firearm in the commission of a felony or crime of violence, and wearing, carrying, or transporting a handgun. After he was sentenced to thirty years imprisonment for second degree murder and a consecutive twenty years imprisonment for use of a firearm, appellant timely appealed and now presents the following questions for review:

> 1. Did the circuit court err in denying Appellant's motion to suppress the statement?
>
> 2. Did the trial court err in denying the motion for mistrial?

For the following reasons, we shall affirm.

BACKGROUND

Motion to Suppress

On August 23, 2012, at approximately 3:48 a.m., appellant was stopped during a routine traffic stop and was found to be in possession of a handgun. After being advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), appellant admitted that the gun belonged to him. Subsequent analysis revealed that this handgun was the same one used in the August 4, 2012 murder of the victim in this case, Jeffrey Thomas.

As a result of this information, appellant was detained and then interviewed on April 3, 2013, by Detective David Moynihan of the Baltimore City Police Homicide Division. Prior to their first conversation, at approximately 4:45 p.m., appellant was taken

to an interview room at police headquarters and again advised of his *Miranda* rights. A copy of this statement was recorded and admitted into evidence during the motions hearing. The recording included the following:

> Det. Moynihan: 4:45 p.m. All right. It says, can you read to me number one?
>
> Mr. Kelley: You have the right to remain silent.
>
> Det. Moynihan: Okay. You understand that?
>
> Mr. Kelley: Yes, sir.
>
> Det. Moynihan: Can you put your initials there? Read me number two.
>
> Mr. Kelley: Any time [sic] you say or write may be used against you in the court of law.
>
> Det. Moynihan: You understand that?
>
> Mr. Kelley: Yes, sir.
>
> Det. Moynihan: Place your initials there. And number three, sir?
>
> Mr. Kelley: You have the right to talk with an attorney before any questioning or during any questioning.
>
> Det. Moynihan: You understand that?
>
> Mr. Kelley: Yes, sir.
>
> Det. Moynihan: And place your initials. Okay.
>
> Mr. Kelley: If you agree to answer questions you may stop at any time and request an attorney and or [sic] further questions will be asked of you.

Det. Moynihan: And do you understand that?

Mr. Kelley: Yes, sir.

Det. Moynihan: You can place your initials at the bottom. And number five.

Mr. Kelley: If you want an attorney and cannot afford to hire one, an attorney will be appointed to –

Det. Moynihan: Represent you.

Mr. Kelley: – represent you. Yes, sir.

Det. Moynihan: Public defender basically, if you can't afford one. Okay?

Mr. Kelley: Yes, sir.

Det. Moynihan: Place your initials. And then just read to me that line there.

Mr. Kelley: You have been advised of and understand you may, your rights freely and voluntarily waive my rights and agreed to talk with the police without having an attorney present.

Det. Moynihan: And just sign that you're waiving your rights. . . .

Appellant and the detective then discussed some background information, including, but not limited to, appellant's name, nickname, address, phone number, date of birth, height, weight, complexion, social security number, occupation, education, and family history. Appellant admitted that he had prior experience with law enforcement.

During this first interview, appellant was informed that he was there to discuss a murder that happened on August 4, 2012, near Chalgrove Avenue and Garrison Avenue. Appellant admitted that he had family in the area and that his "best friend," Jeremiah, also lived nearby with his mother.[1]

Detective Moynihan then showed appellant a photograph of the murder victim, Jeffrey Thomas. After the detective told appellant that police had information that appellant was at the scene of the shooting, appellant stated "I don't, I don't know this guy." Detective Moynihan maintained that appellant and his friend, Jeremiah, had both been identified as being at the scene.

Detective Moynihan then turned to an incident that happened approximately 19-20 days after the murder, on August 24, 2012. On or around that date, appellant was arrested for reckless driving. Jeremiah was with him at the time. Appellant admitted that a nine millimeter Beretta that he called "Keisha," was found during the course of the traffic stop.

Detective Moynihan then told appellant that the handgun recovered in that prior traffic stop was examined and compared to bullet casings found at Mr. Thomas's murder scene. The casings found at the scene of the crime on August 4th matched the handgun found in appellant's possession on August 24th. Appellant admitted that he co-owned that

[1] Appellant informs us that, although the prosecutor indicated that Jeremiah's last name was "Wright" during the suppression hearing, it actually was "McBride." We shall refer to him simply as "Jeremiah," for purposes of consistency herein.

gun with others, including Jeremiah. But, appellant also claimed that he told police that the gun belonged to him in order to protect one of his cousins who may have been prohibited from owning a gun.

Returning to the murder victim, Mr. Thomas, Detective Moynihan told appellant that Jeremiah had been "runnin' his mouth . . . about how you killed him, because he ordered you to." Appellant replied that "I never pulled a trigger a day in my life or none of that. I don't know this guy." The detective responded that he had information that appellant was identified in connection with the murder to which appellant agreed "I understand everything you sayin'. I don't know why – I don't understand that."[2]

Detective Moynihan then testified in court that the first statement ended almost two hours after it began, or at 6:37 p.m. Detective Moynihan then conducted some further investigation, leaving appellant in the same interview room. He returned for a second interview at 7:44 p.m. A recording of that second statement was admitted into evidence. This second interview ended at 8:12 p.m. Appellant was then escorted to a holding cellblock at the police station.

In the second statement taken from appellant, Detective Moynihan learned of a person of interest by the name of Darrell Jones. Detective Moynihan left police headquarters, found

[2] At this point during the motions hearing, the court asked the parties if they would consider not playing the recording because "I can read this [transcript] a lot faster than hearing the tape." The parties agreed to proceed by admitting the pertinent details and having the court read the transcribed statements later, prior to ruling on the motion to suppress.

Mr. Jones, and apparently brought him in for questioning. Prior to this, appellant told the detective that Mr. Jones would provide him with an alibi, in that Mr. Jones was present at the scene of the shooting and would say that appellant was not the shooter. However, when interviewed, Mr. Jones did not provide an alibi for appellant and, in fact, told the detective that appellant was outside of the vehicle when two shots were fired at the scene of the murder. According to Mr. Jones, after the shooting, appellant got back inside the vehicle with Mr. Jones, and placed a semiautomatic handgun with a brown handle underneath the driver's seat.

At 12:35 a.m. on the morning of April 4, 2013, appellant was returned to the interview room, and Detective Moynihan spoke to appellant for a third time. A portion of that statement was played for the motions court, as follows:

> Det. Moynihan: This is Detective Moynihan again. It's, it's now the 4th of April, 2013. It's currently 12:35 a.m. This is another statement with Mr. Alvin Kelley. Detective Jackson is seated to my left. And, Mr. Kelley, I'm here and I – let me remind you, you are still, you are advised that you have the right to remain silent.
>
> Mr. Kelley: Yes, sir.
>
> Det. Moynihan: You placed your initials there, right?
>
> Mr. Kelley: Right, sir.
>
> Det. Moynihan: Anything you say or write may be used against you in a court of law.
>
> Mr. Kelley: Right.

Det. Moynihan: You understand that?

Mr. Kelley: Yes, sir.

Det. Moynihan: You have the right to talk with an attorney before any questioning and during any questioning. You understand that?

Mr. Kelley: Yes, sir.

Det. Moynihan: If you agree to answer questions, you may stop at any time and request an attorney and no further questions will be asked of you. Do you understand that?

Mr. Kelley: Yes, sir.

Det. Moynihan: If you want an attorney and cannot afford to hire one, an attorney will be appointed to represent you. You understand that?

Mr. Kelley: Yes, sir.

Det. Moynihan: It says, I have been advised of and understand my rights. I freely and voluntarily waive my rights and agree to talk with the police without having an attorney present. And that's your signature there from before, correct?

Mr. Kelley: Yes, sir.

Det. Moynihan: Okay. It's been a little bit since we talked to you last, partially because – well, first let me ask you this. Have you been comfortable?

Mr. Kelley: Oh, yeah.

Det. Moynihan: You've got food in front of you?

Mr. Kelley: Yes, sir.

Det. Moynihan: Have you eaten?

Mr. Kelley: Yes, sir.

Det. Moynihan: Okay.

Mr. Kelley: One of 'em.

Det. Moynihan: You ate one of 'em, chilli dogs?

Mr. Kelley: I gotta get my vitamins and my medicine, so I can eat, for real.

Detective Moynihan told appellant that Mr. Jones had indicated he, appellant, was outside the car when the shots were fired on the night of the murder, and that he, appellant, returned to the car with a gun. Appellant initially maintained his innocence. Detective Moynihan then told appellant he was "not mad at you," that they had "been at this for a while throughout the night," and that there was a difference between being "a cold-blooded killer" and "someone who was ordered to do somethin'." Detective Moynihan told appellant that "you gotta talk to me. You gotta tell me the truth, because at this point it's, it's beyond, beyond understanding why you're still there, lying. Okay?"

Appellant then admitted that he was "forced into" the crime, and that he was "scared, man." Appellant confirmed that he shot Mr. Thomas, and that "[i]t wasn't not (inaudible) execution or none of that (inaudible)." Appellant stated that "I was runnin' past him when I did it" and that "it was either my life or his." Appellant then described the shooting to the detective:

> First, Jeremiah came out the house, then Jeffrey, then Heavy and Jeremiah went back to close the door, make sure the door was locked and Justin was (inaudible). They all came out, but then they both slowed up 'cause they seen me standin' on the corner. When he went to walk past me, but I ran by him real quick like, pop, pop, that was it. He just threw his hand up, had his back like this.

At the conclusion of the third interview, near 12:49 a.m., after appellant stated that he shot the victim because he wanted to protect himself and his family from a gang, either the Black Guerrilla Family or the Bloods, the following ensued:

> Mr. Kelley: I'm sorry for everything, 'cause (inaudible) I'm terrified. I'm already thinkin' that they gonna get my family when I'm in here.
>
> Det. Moynihan: Well, the gang that you end up dealing with, been here a while (inaudible) five o'clock. Now, we haven't been talking from five o'clock to –
>
> Mr. Kelley: Right.
>
> Det. Moynihan: – now, obviously. I think the first interview was an hour and a half. The second one was 28 minutes and in between we've been looking up stuff trying to find your witness, Darrell –
>
> Mr. Kelley: Yes, sir.
>
> Det. Moynihan: – who we did. All right? Took some time to speak with him. Okay? The whole time you've been here, right –
>
> Mr. Kelley: Yes, sir.
>
> Det. Moynihan: – have you been treated fairly?
>
> Mr. Kelley: Yes, sir.

Det. Moynihan: Okay. Anyone beat you, force you into giving us a statement?

Mr. Kelley: No, sir.

Det. Moynihan: Okay. Each time we've sat down we've gone over your Miranda rights and you're fully aware of those Miranda rights, correct?

Mr. Kelley: Yes, sir.

Det. Moynihan: And again, you've been supplied food. Obviously, you've been taken to the bathroom.

Mr. Kelley: And I'll go again.

Det. Moynihan: Do you need to go? Okay. I will take you to the bathroom. It's late. It's almost one o'clock in the morning. There's gonna be a State's Attorney here in the morning. Okay? Understand that, you know, you will be here a while. I'm gonna be here just as long as you are. Okay? You got a cot and we'll get you a blanket, 'cause it is chilly in this place at night, I can tell you that. All right? Do you have any questions of me?

Mr. Kelley: As far as can I call my father, I mean – I just need to get, you know, my keys to my truck so he can get my truck from down there. That's all.

Det. Moynihan: Yeah, I'm gonna take care of that. I'll allow you to call your father most likely after we talk to the State's Attorney in the morning. Okay?

Mr. Kelley: Yes, sir. I got a surgery in the mornin'. That's dead now.

Det. Moynihan: Can you think of anything that myself or my partner here, Detective Jackson, forgot to ask you?

Mr. Kelley: No, sir.

On cross-examination, Detective Moynihan testified that when appellant was at the police station he was not free to go, and was told he was under arrest after the third statement. Detective Moynihan denied that appellant ever asked for an attorney. Detective Moynihan agreed that he "made up" some facts during the interviews with appellant. The detective never asked appellant if he was intoxicated, testifying that appellant did not appear to be intoxicated because "he came from his parole hearing" earlier that same day. And, Detective Moynihan denied telling appellant that, if he gave a statement, he could go home, or promising him that he would not be charged. Detective Moynihan also did not believe that appellant had any difficulty reading the *Miranda* forms.

Appellant testified at the motions hearing and claimed that he was intoxicated on Ecstasy and whiskey when he spoke with Detective Moynihan on April 3, 2013. Appellant did "[n]ot really" understand his rights and testified that he first asked for an attorney between the first and second statements and a second time after the second statement. Appellant testified that Detective Moynihan replied, "no fuckin' deal." Appellant maintained that he asked for his lawyer "when the tape went off . . ."

Appellant also claimed that, when the tape was not recording, the detective also promised him "if I tell him what he wanted to hear, he was gonna let me go home." Appellant believed he was going to go home at that time and testified that Detective Moynihan promised him this "[m]ultiple times." Appellant did not realize why he was being

interviewed until after making the second statement, and did not know he was under arrest until the next morning.

On cross-examination, appellant testified that he ingested a gram and a half of Ecstasy around 12:00 p.m. on April 3, 2013, and then drank a half a pint of whiskey at around 3:30 p.m. on the way to meet his probation agent. He admitted that he could answer the detective's questions, as recorded on the tape, but that "I wasn't thinkin' straight. I wasn't myself."

After hearing argument whether appellant knowingly and voluntarily waived his *Miranda* rights, the court denied the motion to suppress, finding as follows:

> All right. I did not find Mr. Kelley credible at all. I do not believe that the, that he asked for a lawyer before the statement number one and statement number two. I do not ask, I do not believe that he was drinking and using Ecstasy on the way to his meeting with the probation officer.
>
> I agree with [Defense Counsel] that he's very glib and very casual and laughing and carrying on initially, but I, I believe that it's because he doesn't know how serious, he's in such a serious situation. There's nothing in any transcript which – and I reviewed them all. There are no threats, there are no promises. He answers hours of questions with appropriate answers. There is – as far as this Court's concerned, there was no improper police conduct, and therefore, I will deny your motion to suppress his statement.

Trial

On August 4, 2012, appellant was outside the home of Tinera Hayes, located at 5004 Chalgrove Avenue, near the intersection with Garrison Avenue, when Jeffrey Thomas was

shot and killed. The cause of Mr. Thomas's death was multiple gunshot wounds and the manner of death was classified as a homicide.

A little over two weeks later, on August 23, 2012, appellant was stopped while driving a truck on Greenmount Avenue. An operable semiautomatic nine millimeter Beretta handgun was located underneath appellant's seat and identified as belonging to appellant. Firearms experts opined that two nine millimeter cartridge cases, recovered from the murder scene, were fired from this same handgun.

Detective David Moynihan interviewed appellant on April 3-4, 2013 at Baltimore City Police Headquarters. Appellant made several statements during the course of that interview. He admitted the handgun found inside the truck on August 23, 2012 was co-owned by him and other individuals.

Appellant also admitted he was at the scene of the murder in this case, along with, among others, Darrell Jones. After confronting appellant with information the police received independently from Mr. Jones, appellant confessed to the shooting. Appellant stated that he shot Mr. Thomas, approximately two times, while Mr. Thomas was outside the aforementioned residence on Chalgrove Avenue. Appellant claimed he was ordered to shoot Mr. Thomas by members of either the Black Guerilla Family ("BGF") or the Bloods.

Appellant testified at trial and denied being present at the crime scene on the night in question, denied ever firing a gun before in his life, and denied murdering Thomas.

Appellant also claimed that he was under the influence of drugs when he was interviewed by the police detectives, and that he felt "scared," "pressured," and "intimidated," by them to make a statement. Appellant also testified that he was promised that he could go home if he told the police detectives "the story that they was telling me."

We shall include additional detail in the following discussion.

DISCUSSION

I.

Appellant contends that his waiver of *Miranda* rights was ineffective because he was never specifically asked if he understood those rights and whether he wanted to waive his rights. The State disagrees and responds that the court properly admitted appellant's statements.

On review of the denial of a motion to suppress, we look solely to the evidence adduced at the suppression hearing, and view it in the light most favorable to the prevailing party on the motion. *Gonzalez v. State*, 429 Md. 632, 647 (2012). "The credibility of the witnesses, the weight to be given to the evidence, and the reasonable inferences that may be drawn from the evidence come within the province of the suppression court." *Id*. at 647-48 (citing *Longshore v. State*, 399 Md. 486, 499 (2007) ("Making factual determinations, *i.e.* resolving conflicts in the evidence, and weighing the credibility of witnesses, is properly reserved for the fact finder. In performing this role, the fact finder has the discretion to

decide which evidence to credit and which to reject.")). We shall uphold the court's first level factual findings unless they are clearly erroneous, *id*. at 647, and will disturb the court's ruling on admissibility only if "'there was a clear abuse of discretion.'" *Jackson v. State*, 141 Md. App. 175, 187 (2001) (quoting *Murphy v. State*, 8 Md. App. 430, 435 (1970)). "We make our independent appraisal of the legal significance of the motion court's factual findings, however." *Id*. "Finally, we review decisions on questions of law *de novo*." *Id*.

In Maryland, a confession may be admitted against an accused only when it has been "determined that the confession was '(1) voluntary under Maryland non-constitutional law, (2) voluntary under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article 22 of the Maryland Declaration of Rights, and (3) elicited in conformance with the mandates of *Miranda*.'" *Ball v. State*, 347 Md. 156, 173-74 (1997), *cert. denied*, 522 U.S. 1082 (1998) (quoting *Hof v. State*, 337 Md. 581, 597-98 (1995)); *accord Smith v. State*, 220 Md. App. 256, 273 (2014), *cert. denied*, 442 Md. 196 (2015).

Of these three options, appellant's challenge is under *Miranda*. As has been explained, "[t]he Fifth Amendment to the United States Constitution, which applies to the States through the Fourteenth Amendment, provides in relevant part that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.'" *State v. Luckett*, 413 Md. 360, 376-377 (2010) (internal citations omitted). "To give force to the

Constitution's protection against compelled self-incrimination, the [United States Supreme] Court established in *Miranda* [*v. Arizona*, 384 U.S. 436, 478-79 (1966)], 'certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation.'" *Luckett*, 413 Md. at 377 (citations omitted).

"The warnings mandated by that [*Miranda*] decision are well known and require that when an individual is taken into custody, in order to protect the privilege against self-incrimination, procedural safeguards must be employed." *State v. Tolbert*, 381 Md. 539, 549 (citing *Miranda*, 384 U.S. at 478-79), *cert. denied*, 543 U.S. 852 (2004). "The police must warn any person subjected to custodial interrogation that he has a right to remain silent, that any statement he does make may be used in evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." *Tolbert*, 381 Md. at 549 (citing *Miranda*, 384 U.S. at 479). "In the absence of these warnings, or their substantial equivalent, the prosecution is barred from using in its case-in-chief any statements obtained during that interrogation." *Tolbert*, 381 Md. at 549.

Nonetheless, an individual may waive his or her *Miranda* rights, "provided the waiver is made voluntarily, knowingly and intelligently." *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (citation omitted). In *North Carolina v. Butler*, 441 U.S. 369, 372-73 (1979), the Supreme Court noted that "'a heavy burden rests on the government to demonstrate that the

defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.'" (quoting *Miranda*, 384 U.S. at 475).

> In Maryland, when the State intends to use a confession or admission given by the defendant to the police during custodial interrogation, the prosecution must, upon proper challenge, establish by a preponderance of the evidence that the statement satisfies the mandates of *Miranda v. Arizona*, and that the statement is voluntary. The test for voluntariness is whether, under the totality of all of the attendant circumstances, the statement was given freely and voluntarily.

Tolbert, 381 Md. at 557 (internal citations omitted); *see also Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010) (noting that the "heavy burden" imposed by *Miranda* was "not more than the burden to establish waiver by a preponderance of the evidence"); *In re Darryl P.*, 211 Md. App. 112, 170 (2013) ("Once informed of and understanding his *Miranda* rights, a suspect who then voluntarily speaks to the police may be found to have implicitly waived those rights"); *Warren v. State*, 205 Md. App. 93, 118 (concluding, based on the totality of the circumstances, that appellant knowingly, voluntarily, and intelligently waived his *Miranda* rights), *cert. denied*, 427 Md. 611 (2012).[3]

Here, the record reveals that, each time he spoke to the police on April 3-4, 2013, appellant read and agreed that he understood his *Miranda* rights prior to speaking to the

[3] The "preponderance of the evidence" standard is "'when a court is weighing one set of circumstances against another. Ordinarily in such a balancing process, a court simply determines which side outweighs the other, without being concerned with how much or how clearly one side may outweigh the other.'" *Bryant v. State*, 374 Md. 585, 602-603 (2003) (citation omitted).

detectives. Appellant's waiver was both express, as evident on the waiver form by his initials and his signature, and implicit, by both his conduct and conversation with the detectives. There was also evidence supporting a conclusion that, in fact, appellant was not coerced, threatened or promised anything in exchange for his statements. As such, under the totality of the circumstances, we are persuaded that appellant understood the *Miranda* warnings and validly waived his constitutional rights. The motion to suppress was properly denied.

II.

Appellant next asserts the court erred in not granting his motion for mistrial because Juror Number Five saw him in the hallway, being escorted by a correctional officer, in handcuffs and shackles. The State responds that the court properly exercised its discretion in denying the motion. We agree.

"Generally, appellate courts review the denial of a motion for a mistrial under the abuse of discretion standard, because the 'trial judge is in the best position to evaluate whether or not a defendant's right to an impartial jury has been compromised.'" *Dillard v. State*, 415 Md. 445, 454 (2010) (quoting *Allen v. State*, 89 Md. App. 25, 42-43 (1991)) (further citation omitted). In determining the propriety of a court's ruling on a motion for mistrial, we recognize that "'[a] mistrial is an extreme sanction'" which is appropriate only "'when such overwhelming prejudice has occurred that no other remedy will suffice to cure

the prejudice.'" *Diggs & Allen v. State*, 213 Md. App. 28, 70-71 (2013) (quoting *McIntyre v. State*, 168 Md. App. 504, 524 (2006)), *aff'd*, 440 Md. 643 (2014).

During deliberations, and after the luncheon recess, the prosecutor informed the court that she encountered both appellant and Juror Number Five in the hallway, outside the courtroom. Appellant was being escorted, in handcuffs and leg irons, by a correctional officer at the time. The prosecutor told the court that she advised defense counsel of this incident, and defense counsel confirmed that appellant also conveyed similar information about this encounter. At that point, defense counsel moved for a mistrial.

After a short recess to research the issue, the trial court ruled that it would hold the matter until later, during deliberations. Shortly thereafter, the court brought Juror Number Five into the courtroom and conducted the following inquiry:

> THE COURT: [Juror Number Five], can you come here? [Juror Number Five], I understand over the luncheon recess that you came back, sort of ahead of schedule and saw the defendant; is that right?
>
> A JUROR: Yes, ma'am, I did, in the hall.
>
> THE COURT: Okay. And was there anything about the defendant that caused you concern?
>
> A JUROR: Not to me.
>
> THE COURT: Okay. Maybe I should ask the question a different way. Did you notice that he was in the company of a guard?
>
> A JUROR: Well, I came around the corner and we almost bumped into each other.

THE COURT: Okay. So you did notice that he was –

A JUROR: Yes, ma'am.

THE COURT: – in handcuffs and –

A JUROR: Yes.

THE COURT: – in the company of a guard. Would that – the fact that he was in custody, in any way affect your ability to be fair in this case?

A JUROR: No, ma'am, I don't think so.

THE COURT: Okay. Have you discussed this with other jurors?

A JUROR: No, ma'am, I haven't.

THE COURT: Good. And I'd appreciate it if you didn't.

A JUROR: Okay.

THE COURT: Thank you. You may go back upstairs.

A JUROR: Okay.

After the juror returned to the jury room, the following ensued:

THE COURT: All right. Anything you would like to put on the record, [Prosecutor], before the Court rules?

[PROSECUTOR]: No, Your Honor.

THE COURT: Anything, [Defense Counsel], you'd like to put on the record before the Court rules?

[DEFENSE COUNSEL]: Nothing that hasn't already been put on the record.

> THE COURT: All right. I'm going to deny the motion for a mistrial. It appears to this Court that while the juror did see the defendant in shackles, the case law is clear that it's determined on a case by case basis, that [Juror Number Five], the juror, did – it's not affecting his decision one way or the other with regard to seeing him in shackles and leg irons. I would also like to point out that in the courtroom, the defendant, there was testimony that the defendant was arrested after he made a statement and there was no testimony at any – anything to indicate that he was ever released and that the jail guard has in fact escorted – been sitting behind the defendant throughout the entire trial.
>
> So for those reasons, I find that there is no manifesto necessity [sic] and will deny the motion for a mistrial. . . .

A fair trial is a fundamental liberty right guaranteed by the Fourteenth Amendment; the presumption of innocence is inherent in that right. *Estelle v. Williams*, 425 U.S. 501, 503, 512-13 (1976) (although the issue was waived, recognizing that the State cannot compel a defendant to stand trial in identifiable prison clothes). And, "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978). Such practices impair the presumption of innocence and violate the accused's due process right to a fair trial, because the defendant's appearance at trial under such circumstances "serves as a 'constant reminder' that the accused is in custody, and presents an unacceptable risk that the jury will consider that fact in rendering its verdict." *Knott v.*

State, 349 Md. 277, 286-87 (1998) (quoting *Estelle*, 425 U.S. at 504-05)); *see also Hunt v. State*, 321 Md. 387, 409 (1990); *Wagner v. State*, 213 Md. App. 419, 476 (2013).

The Court of Appeals has also determined, however, that an isolated, inadvertent sighting of a criminal defendant in prison clothing, restrained, or accompanied by officers, does not amount to reversible error. *See Miles v. State*, 365 Md. 488, 573 (2001) (concluding that an inadvertent sighting of the defendant in shackles was not prejudicial even without polling the jury to determine impact); *Bruce v. State*, 318 Md. 706, 720-21 (1990) (determining that: the presence of a uniformed sheriff's deputy near the defendant in the courtroom was reasonable; and, that an inadvertent sighting of deputies removing handcuffs from defendant did not rise to level of prejudice implicating his right to a fair trial); *Thompson v. State*, 119 Md. App. 606, 622 (1998) (holding that, since no showing of prejudice, there was no abuse of discretion when trial judge refused to grant a mistrial after jurors inadvertently saw defendant handcuffed and shackled on the way back to jail); *see also State v. Latham*, 182 Md. App. 597, 617 (2008) ("[N]ot all juror sighting of a restrained defendant are so inherently prejudicial as to require corrective measures by the trial court"), *cert. denied*, 407 Md. 277 (2009).

The Court of Appeals has recognized that there is a distinction between, "one inadvertent viewing of [a]ppellant in handcuffs," and "shackling [a defendant] during trial." *Bruce*, 318 Md. at 721. While the latter is ordinarily inherently prejudicial, the former is not.

Id. And, in considering whether a defendant was unfairly prejudiced by some obvious indicia of his incarcerated status being observed by one or more jurors, a reviewing court must decide whether what was seen "'was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over.'" *Id*. (quoting *Holbrook v. Flynn*, 475 U.S. 560, 572 (1986)).

We are persuaded that the trial court properly acted within its discretion. The sighting of appellant by one juror was entirely inadvertent. Moreover, the juror was questioned and confirmed that this incident would not affect his ability to be fair.

Additionally, we note that the jury was instructed that appellant was presumed innocent until proven guilty beyond a reasonable doubt. They were also informed that they "must consider and decide this case fairly and impartially" and that they were "to perform this duty without bias or prejudice as to any party." In reaching a verdict, the jury was further instructed that they "should not be swayed by sympathy, prejudice or public opinion." And, the jury was told to decide the case based upon the evidence, which included "the testimony from the witness stand, any physical evidence or exhibits admitted into evidence, and any stipulations."

Both this Court and the Court of Appeals "'have subscribed to the presumption that juries are able to follow the instructions given to them by the trial judge, particularly where

the record reveals no overt act on the jury's part to the contrary.'" *Jones v. State*, 217 Md. App. 676, 697-98 (quoting *Spain v. State*, 386 Md. 145, 160 (2005)), *cert. denied*, 440 Md. 227 (2014). We conclude the trial court properly denied the motion for a mistrial.

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