UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 482

September Term, 2015

OSCAR SALVATIER ARIAS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: June 27, 2016

Following a three-day jury trial in the Circuit Court for Prince George's County, Oscar Salvatier Arias, the appellant, was convicted on charges of armed robbery and use of a handgun in the commission of a crime of violence. The court sentenced him to twenty years in prison for armed robbery and a consecutive sentence of five years without the possibility of parole for use of a handgun.[1]

Arias presents five questions for review, which we have rephrased:

I. Did the trial court err by refusing to strike two potential jurors for cause?

II. Did the trial court err by allowing the prosecutor to make improper comments during the State's rebuttal closing argument?

III. Did the trial court err by refusing, during jury deliberations, to question a juror the co-defendant claimed to recognize?

IV. Did the trial court err by permitting the State to present previously undisclosed victim impact information for consideration in sentencing?

V. Did the trial court err by imposing a consecutive five-year sentence for use of a handgun in the commission of a crime of violence?

For the following reasons, we shall affirm the judgment for armed robbery and the conviction for use of a handgun and the five-year sentence, without parole; but we shall vacate the consecutive imposition of that sentence and remand for the court to exercise discretion as to whether the sentence should be served consecutive to or concurrent with the armed robbery sentence.

[1] Prior to trial, the State entered *nolle prosequi* on the charges of attempted murder, aggravated assault, and conspiracy to commit armed robbery.

FACTS AND PROCEEDINGS

In December of 2003, Salvador Dejesus Cruzloza and the victim, Jose Luis Chavez, were working for Aida "Paty" Perreira, who ran several "prostitution houses" including an apartment located at 1903 Erie Street in Hyattsville. Their duties included acting as doormen, supplying food and condoms to the "girls" who worked in the houses, and collecting money from the men who visited the prostitutes.

About a week before the events underlying this case, Cruzloza told a friend, Jorge Sotello, that he wanted to start robbing the clients who came to the prostitution houses. Sotello said he was interested in "doing the same stuff," but he did not want to rob Paty's clients. A couple of days later, Cruzloza told Sotello that the victim had money and was no longer working for Paty. Sotello and Cruzloza agreed that Sotello would rob the victim and Cruzloza would kill him. At some point, Sotello and Cruzloza shared their plan with Arias, who agreed to assist Sotello with the robbery.

Around 4:30 p.m. on December 20, 2003, Cruzloza picked the victim up at his home and drove him to work at 1903 Erie Street. (The victim had resumed working for Paty.) Soon after Cruzloza and the victim entered the apartment, there was a knock on the door. When the victim opened the door, Sotello and Arias were outside. Sotello pulled out a gun, pointed it at the victim, and said, "This is a robbery." Sotello knocked the victim to the floor and Arias duct taped his hands, feet, mouth, and eyes. Arias and Sotello took money they found in a closet and money from the victim's wallet, then left the apartment.

After Sotello and Arias left, Cruzloza stabbed the victim thirty-three times, saying, "This was ordered by Paty." After Cruzloza left, the victim managed to get outside and call for help.

Arias, Sotello, and Cruzloza were arrested for their participation in the robbery and attempted murder of the victim. Sotello negotiated a plea agreement that required him to testify for the State. From July 27 to July 29, 2004, Arias and Cruzloza were tried together before a jury in the Circuit Court for Prince George's County. The jury found Cruzloza guilty of attempted first-degree murder, armed robbery, and use of a handgun in the commission of a crime of violence. As noted above, it found Arias guilty of robbery with a deadly weapon and use of a handgun in a crime of violence.

Cruzloza noted a timely appeal. Arias did not note a timely appeal. This Court affirmed Cruzloza's convictions.[2]

In October of 2014, Arias filed a post-conviction action alleging ineffective assistance of counsel. In April of 2015, the circuit court issued a consent order, granting Arias leave to file a belated appeal. Arias noted the instant appeal on May 5, 2015.

DISCUSSION

I.

During the *voir dire* of potential jurors, Jurors 1 and 44 approached the bench and informed the court of personal circumstances that arguably had the potential to affect their ability to decide the case relying only upon the evidence presented. First, Juror 1 informed

[2] *Salvador DeJesus Cruzloza v. State*, No. 2676, Sept. Term 2004 (filed July 9, 2008).

the judge that her son worked for the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). The following colloquy occurred:

> THE DEPUTY BAILIFF: Number 1.
>
> THE COURT: Made [sic] Juror, good morning. You can come forward. What do you want to tell me, please?
>
> JUROR: My son works for ATF.
>
> THE COURT: Okay, anything else?
>
> JUROR: That's it.
>
> THE COURT: How long has he been working for ATF?
>
> JUROR: About 20 something years.
>
> THE COURT: Okay. Could you be fair and impartial in this case?
>
> JUROR: Truthfully, the way I feel --
>
> THE COURT: We'll assume all your answers are truthful. And what that means, Madame Juror, is this: All jurors take an oath. I know nobody necessarily wants to be a juror, but they take an oath to listen to the evidence and base their verdict on the evidence. Could you follow that instruction?
>
> JUROR: I can follow the instruction, but I have -- I don't like guns in the wrong hands.
>
> THE COURT: I appreciate that. But, again, we're not talking about your beliefs here. ***We're talking about whether or not you will abide by the oath of the juror and that is to be fair and impartial?***
>
> JUROR: ***Yes***.
>
> THE COURT: All right, have a seat. Thank you very much.
>
> [CRUZLOZA'S COUNSEL]: You thought you couldn't be fair in this case because of guns?
>
> JUROR: Yes, one reason, yes.

[CRUZLOZA'S COUNSEL]: And then your son has been working for ATF for 20 years.

JUROR: Right.

[CRUZLOZA'S COUNSEL]: So he focuses on guns, right?

JUROR: Yes.

[CRUZLOZA'S COUNSEL]: ***And you think you could be fair in this case?***

JUROR: ***Yes***.

THE COURT: Thank you very much. Have a seat.

[CRUZLOZA'S COUNSEL]: I move to strike for cause.

THE COURT: No.

[CRUZLOZA'S COUNSEL]: Could I state on the record she prompted the Court that she couldn't be fair. She has a predilection against guns, which is in line with her personal beliefs and her son's occupation for 20 years at ATF. So she said unequivocally, "I can't be fair."

[ARIAS'S COUNSEL]: I have the same objection. She said initially with respect to the Court -- she said, "I can't be fair." Then you -- and then she called me "Your Honor." I mean, she scared me. She wants to give the right answer. When the question was asked her a second time, [c]an you be fair? [S]he said no.

THE COURT: The objection is overruled. Again, the Court can always follow up on somebody who says they can't be fair and ask why.

* * *

The basis for this juror saying that she felt she couldn't be fair was she didn't like guns. I followed up on that.

All right, your objections are noted.

(Emphasis added.) Counsel for Cruzloza later exercised a peremptory challenge to excuse Juror 1.

The following exchange occurred when Juror 44 approached the bench:

THE DEPUTY BAILIFF: 44.

THE COURT: Good morning, Madame Juror. What do you want to tell us, please?

JUROR: I was a victim twice of violent crime. Once reported to the police, once not. The second crime did involve a handgun. That was reported to the police.

THE COURT: What of [sic] crime was it?

JUROR: It was a robbery. PG Plaza.

THE COURT: Was anybody ever charged?

JUROR: Not that I was aware of.

THE COURT: Approximately how long ago did that happen?

JUROR: I'd say my early twenties.

THE COURT: Okay, just a few years ago, right?

JUROR: Yeah.

THE COURT: All right. Anything else? What was the other incident?

JUROR: The other incident was a sexual assault.

THE COURT: And was anybody ever charged in this case?

JUROR: No.

THE COURT: That's why we take these questions up here -- not to embarrass anybody. Did that happen also in Prince George's [C]ounty?

JUROR: No, in Florida.

THE COURT: ***Could you be fair and impartial in this case?***

JUROR: ***I would find it very difficult***.

THE COURT: ***Okay. If I told you, as I tell the other jurors, that the role of the juror is to listen to the evidence and base your verdict on the evidence and put aside personal experiences, would you follow the directive?***

JUROR: ***I would try my very best***.

THE COURT: ***If I told you you had to follow the directive, could you do that?***

JUROR: ***Yes***.

THE COURT: All right. [Cruzloza's Counsel], any questions?

[CRUZLOZA'S COUNSEL]: Yes. In this case, not the robbery, there's prostitution involved in this case. Do you think that might -- do you think given the nature of the crime that happened to you that that might cause you some concerns about people using women in certain levels?

JUROR: No, sir. I think that at any point when you have experience like that in my life, they will always affect you in some way. So you don't know the ways in which they affect your judgment on a daily basis. You try to keep them in the forefront of your mind, I'd say -- influence your thinking. But, you know, I cannot say that I'm unaffected by them. They were powerful experiences.

THE COURT: I appreciate that.

[CRUZLOZA'S COUNSEL]: Do you think you might be affected by them in the course of trial?

THE COURT: I think she's answered that, [Cruzloza's counsel]. [Prosecutor], any questions[?]

[PROSECUTOR]: No, I don't have any.

THE COURT: [Counsel for Arias]?

[ARIAS'S COUNSEL]: The Judge asked you specifically if you could be fair and impartial. And what I want to know is do you have any doubts that you'd be able to do that?

THE COURT: [Counsel for Arias], I don't think that's appropriate.

The bottom line, Madame Juror, is this. We appreciate that everybody's got different answers to my questions. ***We are focusing upon a panel of potential jurors that feel they could understand what happened to them, whether loved ones and -- but they can sit on this jury panel and be fair and objective. Isn't that what you told us that you believe you can be; is that correct?***

JUROR: ***Uh-huh***.

THE COURT: Thank you. Have a seat.

JUROR: I'm sorry. And I was a member of the NRA.

THE COURT: I appreciate that. All right, thank you.

* * *

[CRUZLOZA'S COUNSEL]: Here's the record I'd like to make. The problem is that the people say they're not going to be fair and when they have the experiences like this individual had, it's just natural that they're going to have difficulty being fair.

* * *

You can demand of them that they take an oath, but before you get to that point, the people have to qualify as to whether or not they can take the oath to be fair in the case. If they don't qualify, all the oaths in the world is not going to rectify the problem.

So this has been a continuing problem with the Court's questioning of these jurors. It's about the sixth juror who expressed a problem about being fair, but the Court basically shoves down their throats that they have to take an oath to be fair.

THE COURT: Well, that's your interpretation, [Cruzloza's counsel]. The record will speak for itself.

[CRUZLOZA'S COUNSEL]: Well, I'm going to move for a mistrial.

THE COURT: All right, a mistrial is denied.

[CRUZLOZA'S COUNSEL]: And I'm going to request that I have a continuing problem with at least six of the jurors that the Court has qualified over our objection.

> THE COURT: Your objections have been submitted. Thank you, [Cruzloza's counsel].
>
> [ARIAS'S COUNSEL]: Your Honor, I also wish to make a --
>
> THE COURT: You join in that.
>
> [ARIAS'S COUNSEL]: I move for a mistrial for the same reasons, a continuing objection.
>
> THE COURT: So noted. Denied.

(Emphasis added.)

Counsel for Cruzloza exercised a peremptory challenge against Juror 44. After counsel for both defendants had exhausted their peremptory challenges, Cruzloza's lawyer made the following objection in which counsel for Arias joined: "I am not satisfied with the jury because of the way the Court conducted the *voir dire*, forcing me to use peremptory challenges on people who said they couldn't be fair. . . ."

Arias contends the trial court erred by denying defense counsels' requests to strike Jurors 1 and 44 for cause. He asserts that the court improperly ignored the jurors' assertions that they did not believe they could fairly judge the instant case and improperly solicited their agreement to abide by their oaths and follow his instructions.

A criminal defendant has the right to be tried by an impartial jury. U.S. Const. amend. VI, XIV; *Owens v. State*, 399 Md. 388, 405 (2007). *Voir dire* is the means by which the court and the parties "identify and challenge unqualified jurors[.]" *Id.* at 402. "There are two categories of specific cause for disqualification: (1) a statute disqualifies a prospective juror; or (2) a 'collateral matter [is] reasonably liable to have undue influence

over' a prospective juror." *Pearson v. State*, 437 Md. 350, 357 (2014) (alteration in original) (quoting *Washington v. State*, 425 Md. 306, 313 (2012)).

It is the trial court's responsibility, through the *voir dire* process, "'to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence[.]'" *Washington*, 425 Md. at 312 (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981)). "'Bias is a question of fact, the existence of which is a matter left to the trial judge, the focal point in the process, whose predominant function in determining juror bias involves credibility findings whose basis cannot be discerned from an appellate record.'" *Tetso v. State*, 205 Md. App. 334, 369 (2012) (quoting *Williams v. State*, 394 Md. 98, 113 (2006)). We review a trial court's findings regarding the bias of potential jurors for abuse of discretion. *Moore v. State*, 412 Md. 635, 654 (2010).

In this case, both of the challenged jurors ultimately agreed that, notwithstanding their personal feelings and beliefs, they could abide by an oath to be fair and impartial in deciding the charges against the two defendants. As we emphasized in *Morris v. State*, 153 Md. App. 480 (2003), the trial judge, who is present in the courtroom and able to see and hear the potential juror as he or she responds to the questions of the court and counsel, is "infinitely more able" to discern whether the juror will be able to fairly and impartially discharge his or her duties than can we, who only have the "cold record" of the proceedings before us. *Id*. at 502–03. The court's admonitions to the prospective jurors about their duties under their oath to fairly and impartially decide the case based solely on the evidence presented does not make their acceptance of those duties unreliable. We conclude,

therefore, that the trial court "did not abuse the wide discretion entrusted to" it in denying defense counsels' requests to strike Jurors 1 and 44 for cause and for a mistrial. *Id*. at 501.

II.

Arias's defense was based on a theory of misidentification. In summation, his lawyer argued that the victim could not positively identify Arias because he had been "knocked out," and Sotello only revealed Arias's name after the police mentioned it. Counsel further argued: "You know, the bottom line is, when you look at this case, one thing you're going to come away with is that [the victim and Sotello] lied. And they lied. And that's the government's case. It's a case based upon two liars."

In rebuttal closing, the prosecutor responded as follows:

> [PROSECUTOR]: The Defense has not offered you an alternative theory.
>
> [CRUZLOZA'S COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: They have not offered you a motive as to why Mr. Chavez or Mr. Sotello would say that it was Oscar Arias and Salvador Cruzloza. They throw all of this at you -- that, oh, they're liars, they're liars.
> . . .

Arias contends the prosecutor's statements were "manifestly improper because a defendant is not required to rebut the State's evidence either through testimony or by putting on a case because the defendant does not bear the burden of proving his innocence"; the remarks shifted the burden of proof to the defense; and the trial court abused its discretion by permitting the prosecutor to so remark. He concedes that his own trial counsel (as opposed to Cruzloza's trial counsel) did not object to the prosecutor's statements and

acknowledges that he therefore "failed to preserve for appeal the issues concerning the prosecutor's remark[s]." Nevertheless, he maintains that we should review the issue because he and Cruzloza "were similarly situated" and "once the trial court overruled [Cruzloza's] objection, it would have been futile for [his trial counsel] to object again."

The State counters that the issue is not preserved, and even if preserved, it lacks merit because this Court has already considered and rejected the same argument advanced by Cruzloza in his direct appeal, and the same outcome is required here under the "law of the case doctrine." The State maintains that if the law of the case doctrine does not apply, the prosecutor's remarks were not improper in any event, and if they were improper, any error was harmless beyond a reasonable doubt.

Ordinarily, "in cases involving multiple defendants each defendant must lodge his own objection in order to preserve it for appellate review and may not rely, for preservation purposes, on the mere fact that a co-defendant objected." *Williams v. State*, 216 Md. App. 235, 254 (2014); *see also Osburn v. State*, 301 Md. 250, 253 (1984). An exception to this rule exists when the trial court makes clear that its ruling applies to all defendants. *See Ray-Simmons v. State*, 446 Md. 429, 440–42 (2016); *In re Emiliegh F.*, 353 Md. 30, 36–38 (1999); *Bundy v. State*, 334 Md. 131, 145–47 (1994). The trial court made no such ruling here, and the issue is not preserved as to Arias.

Even if the issue were preserved, Arias's argument lacks merit. The prosecutor's remarks in rebuttal closing did not shift the burden of proof to the defense. The remarks taken in context were a legitimate response to defense counsel's arguments that the victim and Sotello were lying about Arias and Cruzloza being two of the assailants. The

prosecutor's statements pointed out that there was no reason for the victim and Sotello to lie about that. Indeed, even though Sotello had testified pursuant to a plea agreement, there was nothing that would have motivated him (or the victim) to concoct a story that Arias (and Cruzloza) were involved in the crimes.

Moreover, even if the prosecutor's statements were improper–which they were not–any error by the trial court in permitting the prosecutor to make them was harmless beyond a reasonable doubt. "During closing argument, counsel must confine his or her advocacy to the issues in the case, but is afforded generally wide latitude to engage in rhetorical flourishes and to invite the jury to draw inferences." *Ingram v. State*, 427 Md. 717, 727 (2012) (citing *Degren v. State*, 352 Md. 400, 430 (1999)). Because the trial court is "in the best position to evaluate the propriety of a closing argument as it relates to the evidence adduced in a case," *id.* at 726 (citing *Mitchell v. State*, 408 Md. 368, 380 (2009)), "'[t]he regulation of argument rests within [its] sound discretion[.]'" *Paige v. State*, 222 Md. App. 190, 210 (2015) (quoting *Grandison v. State*, 341 Md. 175, 224 (1995)). Accordingly, "[a]n appellate court should not disturb the trial court's [decision to permit such argument] absent a clear abuse of discretion . . . of a character likely to have injured the complaining party." *Grandison*, 341 Md. at 225 (citations omitted). *See also Lee v. State*, 405 Md. 148, 164 (2008) (holding reversal required based on prosecutor's improper remarks in closing only when "'the remarks of the prosecutor actually mislead the jury or were likely to have misled or influenced the jury to the prejudice of the accused'" (quoting *Lawson v. State*, 389 Md. 570, 592 (2005))).

The prosecutor's remarks did not mislead the jury or cause undue prejudice to Arias. The court instructed the jury that counsels' closing arguments were not evidence; that the State had the burden of establishing Arias's guilt beyond a reasonable doubt; that that burden remained with the State throughout the whole trial; and that Arias was presumed innocent until proven guilty and was not required to prove his innocence. "Maryland courts long 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." *Spain v. State*, 386 Md. 145, 160 (2005) (citations omitted). The court did not abuse its discretion under the circumstances.[3]

III.

The jury retired to deliberate on the third day of trial. The court received a jury note. After lunch, the court and counsel discussed the note and the jurors were returned to the courtroom to hear the response. Immediately after they left the courtroom to return to the jury deliberation room, counsel for Cruzloza informed the court that his client "thinks that one of the jurors works in the jail in food services" and "thinks he remembers seeing her over at the jail, but not actually a jail employee but someone who works in food services." The judge stated he would not make an inquiry at that time. Cruzloza's attorney agreed with this approach, but said that if he "could figure out which juror that is and in fact she goes to work over at the jail, then at that point it would be appropriate to make inquiry." The court agreed. No further argument was made on this point.

[3] Because we have decided this issue on preservation grounds and alternatively on the merits, we shall not address the State's "law of the case doctrine" argument.

Later that day, the jury reached its verdicts. After the verdicts were returned and the jury was polled, Cruzloza's counsel asked to approach the bench. The court sent the jurors back to the jury deliberation room–but did not dismiss them–and heard from counsel. Cruzloza's lawyer asked the court to *voir dire* Juror 52, stating, "I believe she is the juror whom my client sees over at the jail serving food to the inmates." The court noted that "this is a three-day trial," and asked, "Is there a reason that this came to the Court's attention as this jury commenced deliberations?" Cruzloza's lawyer responded, "Your Honor, I'm bringing this to the court's attention as soon as I found out about it." Arias's lawyer joined in Cruzloza's request to *voir dire* Juror 52.

The court ultimately ruled as follows:

> The Court is not going to conduct any further *voir dire*.
>
> I would note by timeline that the bailiff was sworn in at 10:37 this morning. There was a note from the jury at 12:30. By agreement of all parties the jury was allowed to go to lunch from 12:30 to 1:30.
>
> We were back on the bench at 2:10 p.m. to address a note from the jury that was received just before they broke for lunch. And we addressed that.
>
> [Cruzloza's lawyer] advised the Court at approximately 2:13 that Mr. Cruzloza believed he recognized a juror. We did not know the name of the juror. And now that the jury has been polled, I take note, as [Cruzloza's lawyer] so noted, that based upon [Cruzloza's lawyer's] description of the juror, as pointed out by Mr. Cruzloza, that was [J]uror 52. Okay?
>
> In any event, I see no basis to *voir dire* the juror. The record is made known. The objections are noted. And I overrule the objections.

Arias contends the trial court erred by declining to *voir dire* Juror 52. He argues that if Cruzloza's statements were true, Juror 52 failed to disclose that she knew Cruzloza, having seen him at the jail prior to trial, and that the failure to disclose this information "gives rise to the reasonable belief that [Juror 52] would likely have been biased against"

Cruzloza. He asserts that because it declined to *voir dire* Juror 52 to determine whether she inadvertently or intentionally withheld this information, the trial court "had no basis to exercise its discretion in determining whether Arias was entitled to any relief." (Footnote omitted; citing *Williams*, 394 Md. at 102.)

The State responds that *Williams* is distinguishable because that case "involved a juror who, after verdict, was discovered to have been related to a State's Attorney's Office employee–a fact that the defendant could not have been expected to know at any time unless the juror disclosed it." Here, "if Cruzloza thought he recognized the juror on day three of trial as someone he might know, there appears no reason why he did not recognize her on day one," and "there was no reasonable likelihood that pursuing an inquiry about whether this juror worked at a jail would have revealed any bias or partiality." We agree with the State that *Williams* is distinguishable.

In *Scott v. State*, 175 Md. App. 130, 146 (2007), we held that "[w]hen a defendant is aware that a prospective juror has failed to disclose information that is sought by *voir dire*, and fails to alert the trial court of the fact until after the verdict, he has waived the right to later complain." (Footnote omitted.) In *Scott*, the defendant was convicted of possession with intent to distribute heroin, cocaine, and marijuana. Thereafter, he moved for a new trial, arguing that one of the jurors "had a 'negative history with [him] with respect to her sons'" and that she had failed to disclose this to the court. *Id.* at 135. The trial court denied his motion for a new trial.

On appeal we affirmed, concluding that

> we need not reach the issue of whether the assertion that the juror's children had "negative issues" with [the defendant] would be sufficient to prompt the factual inquiry that he sought from the trial court. . . . We reach that conclusion because it is clear that, on these facts, [the defendant] has waived any complaint about a jury that included the juror in question. Notwithstanding counsel's acknowledgment that he should have alerted the trial court to a potential conflict, [the defendant] and his counsel chose to remain silent, apparently hoping for a favorable verdict, rather than bring the matter to the court's attention at a time when the problem could have been resolved. The trial court emphasized that, until the jury retired to deliberate, there were alternate jurors available to replace [the juror in question].

Id. at 142.

The wavier holding in *Scott* controls here. The trial court conducted a thorough *voir dire*, during which Arias and Cruzloza stood and faced the prospective jurors, and the court asked the panel, "Do you know anything about the allegations in this case or *are you acquainted in any way, shape, or form with any of the parties that I've introduced to you?* If so, please stand up." (Emphasis added.) Juror 52 did not stand and later responded only to a question informing the court that she had had a prior traffic ticket. Throughout the trial, Cruzloza (and Arias) were able to see Juror 52 in plain view before them. Cruzloza was aware, or should have been aware, of the potential conflict when he saw the juror and, from the outset of the trial, should have informed his lawyer at that time; instead, he remained silent until the jury was in the midst of deliberating and even then communicated only a vague assertion, without identifying a particular juror. Only after the jurors returned their verdict against him did he suddenly recollect that it was Juror 52 who he supposedly had seen working in food services at the jail. Under the circumstances, Cruzloza, and likewise Arias, waived any right to challenge Juror 52's participation as a juror, and the trial court did not abuse its discretion in rejecting the request to *voir dire* that juror.

IV.

The victim did not appear at Arias's sentencing hearing or submit a victim impact statement. During the hearing, defense counsel raised the issue of the victim's current physical condition, arguing:

> I don't have the benefit of a victim impact statement, so I don't know, other than the scars on his body, what other issues he might have and [he] did seem to be otherwise in reasonably good health.
>
> In the course of the trial he seemed to move with a fair amount of ease and didn't have any problem using his arms or walking, or getting seated or anything like that.

In response, the prosecutor offered information about the lasting effects of the attempt on the victim's life. The following exchange occurred:

> [PROSECUTOR]: Now, the victim is not here today. I can speak on his behalf. He no longer lives in the area. He's afraid --
>
> [ARIAS'S COUNSEL]: I would object. I don't have the victim impact statement.
>
> THE COURT: Overruled. This is just argument.
>
> [PROSECUTOR]: He's afraid. As the Court is aware, prior to the motions, hearing [sic] he didn't show up. He had fled. And it took a number of sources and a lot of time and effort to locate him and get him back here in time. And the reason he fled was fear. He felt he'd almost been killed one time, he was just terrified and to have to testify, until we found him incarcerated. And for all intents and purposes, he realized he had to testify.
>
> * * *
>
> He's attempting to start a new type of business. He had tried to go into the carpentry business with Lesncal (phonetic), and he was able to work at that somewhat. But because of the scar tissue on his arms and his chest, it was not a profession that he could continue to do because he was unable to lift his arm all day or for long periods of time; and of course, as a carpenter driving nails and things like that, that's something you need to do. That was

> a skill he had and because of the actions, because of what occurred during this incident, he is not able to follow that profession.

Arias contends the sentencing court erred by allowing the State to present victim impact information that had not been disclosed to the defense. The State responds that this issue is not preserved for review and lacks merit in any event.

The issue was preserved by virtue of defense counsel's objection, made immediately after the prosecutor expressed her intention to "speak on [the victim's] behalf." It is clear that by objecting defense counsel was trying to keep out exactly the kind of information that the prosecutor then put before the court regarding the lasting effects of the victim's injuries.

Pursuant to Rule 4-342(d),[4] the State is required to provide to the defense any information the State expects to present in support of its sentencing recommendation at the sentencing hearing. The State asserts that the prosecutor was not required to disclose information that she did not expect to present at sentencing and that her remarks were made in response to defense counsel's assertions mischaracterizing the victim's health and physical condition.

The record makes clear that the prosecutor did not expect to present the information in question at sentencing. She only offered the information in response to the comments

[4] Rule 4-342(d) provides:

> Sufficiently in advance of sentencing to afford the defendant a reasonable opportunity to investigate, the State's Attorney shall disclose to the defendant or counsel any information that the State expects to present to the court for consideration in sentencing. If the court finds that the information was not timely provided, the court shall postpone sentencing.

by defense counsel suggesting that the victim had suffered few lingering effects as a result of the attack. The sentencing court acted within its discretion by permitting the State to communicate the information in order to correct a misimpression created by the defense.

We note, moreover, that the sentencing court does not appear to have considered the information at issue in crafting Arias's sentences. The court articulated two reasons for its sentences: "the extremely serious matter of this case," and the fact that "the victim was tortured[.]" The judge did not refer to the lasting effects of the crime on the victim's work and health. Thus, if the court erred in considering the information in question, the error was harmless beyond a reasonable doubt. *See Outmezguine v. State*, 97 Md. App. 151, 170 (1993) (finding no prejudicial error in State's presentation of victim impact information that had not been timely disclosed, where, *inter alia*, "[t]he court did not mention these statements in announcing its sentence" but did provide other justifications for its sentencing decision).

V.

A defendant who uses a handgun in the commission of a felony or crime of violence is guilty of a separate misdemeanor, independent of the underlying felony or crime of violence, and is subject to a separate minimum mandatory sentence. Md. Code (2002, 2012 Repl. Vol.), § 4-204 of the Criminal Law Article ("CL"). When Arias and Cruzloza robbed the victim, the version of CL section 4-204 in effect included the following:

> (b)(1) (i) A person who violates this section is guilty of a misdemeanor and, in addition to any other penalty imposed for the crime of violence or felony, shall be sentenced to imprisonment for not less than 5 years and not exceeding 20 years.

> (ii) The court may not impose less than the minimum sentence of 5 years and, except as otherwise provided in § 4–305 of the Correctional Services Article, the person is not eligible for parole in less than 5 years.
>
> (2) For each subsequent violation, the sentence shall be consecutive to and not concurrent with any other sentence imposed for the crime of violence or felony.

As this language makes clear, for a *first-time violation* of CL section 4-204, the term of imprisonment must not be less than five years, without the possibility of parole, but the court has discretion to impose the sentence concurrently or consecutively to the sentence imposed for the underlying felony. *Wright v. State*, 24 Md. App. 309, 318 (1975). For *subsequent violations*, the sentence must be consecutive to the sentence for the underlying felony. CL § 4-204(b)(2).

In pronouncing Arias's sentence, the court stated:

> As to Count 3, robbery with a deadly weapon of the victim, Jose Joseph Chavez, on December 20th, 2003, you're sentenced to the Division of Corrections for a period of 20 years. Sentence is to commence as of July -- or excuse me, January the 13th, 2004.
>
> * * *
>
> As to Count 4, use of a handgun, the sentence is that you be sentenced to the Division of Corrections for a period of 5 years. That sentence is consecutive to the sentence imposed as to Count 3. And that is mandatory in nature.

The docket entries and the commitment record show that the court imposed a consecutive sentence under CL section 4-204(b)(2).

Arias contends the court improperly sentenced him to a consecutive five-year sentence under CL section 4-204(b)(2). There was no evidence that he had any prior

convictions that would have triggered that mandatory consecutive sentence provision. The State responds that the sentencing court's comments reflect an intention to impose the "mandatory" minimum sentence of five years, without the possibility of parole, not to impose a mandatory consecutive sentence under CL section 4-204(b)(2).

We disagree with the State. The sentencing court's remark, "And that is mandatory in nature," follows immediately after its imposition of a consecutive sentence. It appears that the court misunderstood that it had discretion to impose the five-year sentence consecutively or concurrently to the sentence for the underlying felony. At best, the court's remark was ambiguous. Accordingly, we shall vacate the consecutive imposition of the five-year without parole sentence and shall remand the matter for the court to exercise its discretion to impose the sentence concurrently or consecutively.

JUDGMENT FOR ARMED ROBBERY AFFIRMED. CONVICTION FOR USE OF A HANDGUN IN THE COMMISSION OF A CRIME OF VIOLENCE AND SENTENCE OF FIVE YEARS WITHOUT THE POSSIBILITY OF PAROLE AFFIRMED. CONSECUTIVE IMPOSITION OF THAT SENTENCE TO THE SENTENCE FOR ARMED ROBBERY VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY TO DECIDE BY THE EXERCISE OF DISCRETION WHETHER THE USE OF A HANDGUN SENTENCE IS CONSECUTIVE TO OR CONCURRENT WITH THE ARMED ROBBERY SENTENCE.

COSTS TO BE DIVIDED EQUALLY BETWEEN THE APPELLANT AND PRINCE GEORGE'S COUNTY.