UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED CASES

SEPTEMBER TERM, 2015

No. 1601

TERRENCE MILLHOUSE

v.

STATE OF MARYLAND

No. 1633

DANIEL EUGENE NESBITT

v.

STATE OF MARYLAND

Meredith,
Graeff,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: September 20, 2016

In this consolidated appeal, stemming from convictions after a joint jury trial related to a carjacking, Terrence Millhouse and Daniel Eugene Nesbitt each raise three separate issues for our review. Millhouse argues that the trial court erred when it: (1) failed to sever his trial from the trial of his co-defendant Nesbitt; (2) ruled that statements made by co-assailants were admissible against Millhouse as co-conspirator statements; and (3) convicted Millhouse of conspiracy to commit armed carjacking even though his co-conspirator, Nesbitt, was acquitted of the same conspiracy to commit armed carjacking at their joint trial. Nesbitt argues that the trial court erred when it: (1) permitted the admission of Nesbitt's statement to police when the statement was involuntarily induced; (2) declined to give a missing witness instruction; and (3) permitted the State to introduce testimony about a handgun that was recovered from a vehicle that Nesbitt never occupied.

For the reasons stated below, we affirm the convictions of both Millhouse and Nesbitt.

FACTS

On November 25, 2014, Derick Kelly and his wife, Diamond Abney-Kelly, were returning from the store when Mr. Kelly pulled his Yukon SUV into the parking lot of their apartment complex in Capitol Heights, Maryland. Mr. Kelly noticed a Chrysler 300 with paper tags stop near the parking lot. While Mr. Kelly was unloading packages from the trunk of the car, a man wearing a ski mask exited the driver's side back seat of the Chrysler and ran towards Mr. Kelly. The man put a gun in Mr. Kelly's back and told him to drop the box that he was carrying. Another man exited the front passenger seat of the Chrysler

with a gun and threatened Mrs. Abney-Kelly, who was still in the front passenger seat of the Yukon. A third individual, the driver of the Chrysler, got out of the car and watched the altercation.

The assailants made to steal the Yukon but had trouble starting it, so one of the men ran up to Mr. Kelly, pointed a gun at him, and demanded that he show them the correct key. The assailants finally started the Yukon, and drove the Yukon out of the parking lot following the Chrysler.

A police helicopter observed the Chrysler and Yukon driving in tandem. During the course of the police chase through the city, the Chrysler lost control and jumped a curb. The driver of the Chrysler, later identified as Nesbitt, bailed and ran south through residential yards, while the passenger in the Chrysler, later identified as Millhouse, ran north through the yards. After a foot chase, police apprehended Millhouse when an officer noticed a shed in the backyard with its door ajar and a pair of feet sticking out of the shed. Police apprehended Nesbitt after a three-hour standoff outside a nearby house. The record does not disclose what became of the driver of the Yukon.

The officers recovered a loaded, semiautomatic handgun from the front passenger floor of the Yukon. The officers did not recover any weapons from the Chrysler.

Later that evening, Nesbitt was interviewed by Washington, D.C. police detectives. During the two hour interview, Nesbitt first claimed that he had no connection to the carjacking or robbery. Nesbitt later told the detectives that he had only entered the Chrysler

after the other men offered him a ride home, that he had no knowledge that a carjacking or robbery would be taking place, and that he only saw a gun after he had already climbed into the Chrysler.

After a joint jury trial, Millhouse was convicted of one count of carjacking, one count of robbery, one count of unlawful taking of a motor vehicle, and one count of conspiracy to commit armed carjacking. The jury acquitted Millhouse of the armed carjacking charge. The same jury convicted Nesbitt of one count of carjacking, one count of robbery, and one count of unlawful taking of a motor vehicle. The jury acquitted Nesbitt on the charge of armed carjacking, and on the charge of conspiracy to commit armed carjacking.

ANALYSIS

Millhouse and Nesbitt each raise three separate issues on appeal. We will address each issue in turn.

I. Severance

Millhouse argues that his trial should have been severed from the trial of his co-defendant, Nesbitt.

Under Md. Rule 4-253(a), the court may order a joint trial for two or more defendants, "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." Additionally:

> If it appears that any party will be prejudiced by the joinder for trial of counts, charging documents, or defendants, the court

> may, on its own initiative or on motion of any party, order separate trials of counts, charging documents, or defendants, or grant any other relief as justice requires.

Md. Rule 4-253(c).

A court evaluates a severance request by first examining whether the evidence concerning the offenses or defendants is mutually admissible. *Conyers v. State*, 345 Md. 525, 553 (1997). This is because concern for prejudice is diminished when the evidence would be mutually admissible against each defendant at separate trials. *Osburn v. State*, 301 Md. 250, 255 (1984). Mutual admissibility is a question of law that does not allow for any exercise of discretion. *Conyers*, 345 Md. at 553.

If the evidence is not mutually admissible, then the court must grant severance as a matter of law, as long as the defendant can point to some prejudice suffered by the court's refusal to sever the trials. *Morris v. State*, 418 Md. 194, 210 n.9 (2011) ("If the evidence is not mutually admissible and prejudices the defendant (against whom it is inadmissible), then severance is proper normally.").[1]

If the evidence is mutually admissible, then the court moves on to the second step—determining whether the interest in judicial economy outweighs any arguments favoring severance. *Conyers*, 345 Md. at 553. At this stage, "any judicial economy that may be had

[1] The issue of whether a court must grant severance as a matter of law where the evidence is found not mutually admissible, is currently under review by the Court of Appeals. *State v. Hines*, 446 Md. 291 (2016) (granting cert.). In this case, however, we need not reach this step of the analysis because we hold that the video statement of Nesbitt is mutually admissible against both Millhouse and Nesbitt, as we explain below.

will usually suffice to permit joinder unless other non-evidentiary factors weigh against joinder." *Id.* at 556. The decision to try multiple defendants in one trial under this second step is within the sound discretion of the trial court. *Wilson v. State*, 148 Md. App. 601, 647 (2002). No Maryland appellate court has ever found an abuse of discretion in this stage of the balancing test. *Taylor v. State*, 226 Md. App. 317, 376 (2016) (citation omitted).

Millhouse argues that his trial should have been severed because the State introduced a video statement at the joint trial, made during Nesbitt's police interrogation, which Millhouse thinks inferentially implicated him as the other person in the Chrysler with Nesbitt. Specifically, Millhouse argues that Nesbitt's repeated use of the word "they" inferentially implicated both Nesbitt and Millhouse.

Nesbitt's statement is long. Rather than reproducing it, we will rely on his trial counsel's description. As Millhouse's counsel argued prior to trial:

> Nesbitt[] did not make a statement implicating my client, but because of the time line and the information that [he] did provide, [it] is somewhat the functional equivalent of a statement, because there were only two individuals in the vehicle that my client and Nesbitt were allegedly in. So by stating this from the time the incident allegedly occurred and the time that the vehicle was stopped. So if you place another individual in a vehicle that as driven by Nesbitt, it's tantamount to stating that my client was in the vehicle with him.

In a renewed motion to sever, shortly before opening statements, Millhouse's counsel argued:

> I think after looking or listening to the video, it's clear that [Nesbitt] supplies information that implicates my client. He

> also confirms information that would implicate my client relative to who was involved, who was in the vehicle, even though no specific names were mentioned, because in a very short period of time after the incident at the residence occurred, my client was [the] person that was found or seen bailing out of the vehicle.

Nesbitt did not testify at the joint trial, invoking his Fifth Amendment privilege against compelled self-incrimination. Therefore, according to Millhouse, the introduction, at a joint trial with co-defendants, of Nesbitt's out-of-court testimonial hearsay statement that implicated Millhouse, presents a Sixth Amendment confrontation clause issue. Also, while Nesbitt's statement is an admission against his own penal interest, and thus admissible against Nesbitt, according to Millhouse there is no exception to the hearsay rule that allows its admission in Millhouse's case. Consequently, Millhouse argues that the statement by Nesbitt is not "mutually admissible" against both Millhouse and Nesbitt.

The State counters that any inferential implication of Millhouse by Nesbitt's statement was insufficient to present a confrontation issue because the statement was so indefinite. As the trial court noted, "there is no evidence to say from the video statement that your client [Millhouse] is the one who was part of "they," meaning the "they" that we're talking about, the robbery or the carjacking." The statement "they" did not refer to Millhouse in any way—neither by name, reference, or physical description. The State also argues that the hearsay concern was not raised at trial, and is therefore not preserved for appeal.

We will first address the confrontation clause argument, and then we will address the hearsay argument. Finally, we will apply the facts of this case to the severance test set forth in *Conyers*.

A. Confrontation Clause

In *Bruton v. United States*, the Supreme Court held that a defendant's Sixth Amendment right of confrontation is violated by the introduction, at a joint trial with co-defendants, of an out-of-court testimonial hearsay statement, implicating the defendant, made by a non-testifying co-defendant. 391 U.S. 123, 137 (1968). A necessary requirement for finding a *Bruton* violation is that the out-of-court statement must actually implicate the co-defendant. *Gray v. Maryland*, 523 U.S. 185, 196 (1998) (holding that "inferences involv[ing] statements that did not refer directly to the defendant himself and which became incriminating 'only when linked with evidence introduced later at trial'" were not *Bruton* violations).

In this case, the out-of-court statement made by Nesbitt does not mention or refer to Millhouse in any manner. It merely refers to "they," with no further mention of to whom "they" may be referring. According to the testimony of the witnesses in the case, there were multiple individuals involved in the carjacking. The best that Millhouse could argue is that by connecting Nesbitt's statement to all of the other evidence presented in the case, a jury could infer that the word "they" spoken by Nesbitt may refer to Millhouse. That is not enough after *Gray*. The vague word "they" contained in Nesbitt's statement does not

implicate Millhouse's confrontation right. Because Millhouse's confrontation right was not implicated by Nesbitt's statement, the statement is considered mutually admissible against both Nesbitt and Millhouse.

B. Hearsay

Millhouse also contends that Nesbitt's statement is inadmissible hearsay evidence as applied to Millhouse. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Md. Rule 5-801(c). A hearsay statement is not admissible unless the statement is permitted by one of the recognized exceptions to the hearsay rule. Md. Rule 5-802. Under Md. Rule 8-131(a), however, an appellate court "will not decide any … issue unless it plainly appears by the record to have been raised in or decided by the trial court."

Although Millhouse raised his *Bruton* claim, a highly specific argument that necessarily includes a hearsay statement as a component of the argument, Millhouse never objected to the introduction of Nesbitt's statement as hearsay. Even more tellingly, Millhouse did not make a hearsay objection, or any objection at all, when Nesbitt's statement was played at trial. Because Millhouse never presented this hearsay argument to the trial court, and the trial court had no opportunity to rule or to fashion any sort of remedy or limiting instruction regarding hearsay, this argument is unpreserved, and we decline to review it.

C. Conyers *severance test*

We now turn to the application of the facts of the case to the two-part *Conyers* severance test, where we examine: (1) mutual admissibility; and (2) judicial economy. Because Nesbitt's statement contains no *Bruton* issue, and because the hearsay issue was not properly preserved for appeal, we hold that Nesbitt's statement is "mutually admissible" against both Millhouse and Nesbitt under the first step of test—the statement would have been admissible at a separate trial of Millhouse.

Under the second step, the trial court found that it had a strong interest in judicial economy—preventing separate trials on issues that arose out of the same set of fact, particularly where a number of the testifying witnesses were members of the Washington, D.C. Metropolitan Police Department. Because it would have been difficult to have the Washington, D.C. police come to Maryland to testify in two separate trials, this interest in judicial economy outweighs any prejudice described by Millhouse, including playing Nesbitt's statement for the jury during the joint trial. As we said before, no Maryland appellate court has ever found an abuse of discretion by the trial court in this second step of the *Conyers* severance test, and we decline to be the first.

II. Statements by co-assailants

Millhouse next argues that the trial court erred when it ruled that certain statements made by co-assailants were admissible against Millhouse as co-conspirator statements. At the end of the direct examination of Mr. Kelly, the prosecutor asked Mr. Kelly, "during the

time when the gun was being pointed at you and the gun was being pointed at your wife, were either of the two people who were doing it with the guns, were they saying anything to each other?" Millhouse's trial counsel objected on hearsay grounds. During the ensuing bench conference, the trial court overruled the hearsay objection, stating: "The alleged statement is going back and forth between two participants." Mr. Kelly then testified: "When they was—the big, before they got back out, was like, the door, dummy, close the door, dummy, close the door, dummy, hurry up, hurry up. That was the only thing they were saying."

The admissibility of evidence is ordinarily reviewed under an abuse of discretion standard. *Bernadyn v. State*, 390 Md. 1, 7 (2005). Whether a particular piece of evidence is hearsay, however, is a question of law and is reviewed *de novo*. *Id.* at 8.

Although hearsay is ordinarily not admissible, Maryland Rule 5-803(a)(5) provides an exception for statements made by co-conspirators: "A statement that is offered against a party and is … [a] statement by a co-conspirator of the party during the course and in furtherance of the conspiracy." To be considered as having occurred during the course of the conspiracy, the statement must be "made before the attainment of the conspiracy's central objective." *State v. Rivenbark*, 311 Md. 147, 158 (1987). Additionally, "the requirement that the statement be made in furtherance of the conspiracy is interpreted broadly. … A statement is in furtherance of a conspiracy if it is intended to promote the objectives of the conspiracy." *Shelton v. State*, 207 Md. App. 363, 378 (2012) (citations

omitted). The hearsay statement of one co-conspirator, made during the course of, and in furtherance of, the conspiracy is admissible against another co-conspirator because:

> [A] conspirator is, in effect, the agent of each of the other co-conspirators during the life of the conspiracy. As such, any statement made or act done by him in furtherance of the general plan and during the life of the conspiracy is admissible against his associates and such declarations may be testified to by third parties as an exception to the hearsay rule.

Manuel v. State, 85 Md. App. 1, 16 (1990) (citation and quotation omitted).

In this case, it is clear that the assailant's statement was made during the course of, and in furtherance of, the conspiracy to commit carjacking, and before the attainment of the conspiracy's central objective. According to Kelly's testimony, the statement "the door, dummy, close the door, dummy, close the door, dummy, hurry up, hurry up" was made "before they got back out"—meaning, while the assailants were attempting to start the Yukon and drive away. The declarant was exhorting his co-conspirator to hurry up so that the assailants could then make their getaway in the Yukon.

Because the statement was made during the course of, and in furtherance of, the conspiracy, and before the attainment of the conspiracy's central objective, we hold that the trial court did not err when it admitted the statement over Millhouse's hearsay objection.

III. Inconsistent verdicts

The jury found Millhouse guilty of carjacking and conspiracy to commit armed carjacking, and not guilty of armed carjacking. The same jury, as part of the joint trial,

found Millhouse's co-defendant, Nesbitt, guilty of carjacking, and not guilty of armed carjacking and conspiracy to commit armed carjacking.

There were two possible objections to the verdict that Millhouse could have raised. *First*, there is an apparent inconsistency between Millhouse's conviction on the charge of conspiracy to commit armed carjacking and the acquittal of both Millhouse and Nesbitt on the charge of armed carjacking. This is at best a factual inconsistency. *Second*, there is an inconsistency between Millhouse's conviction on the charge of conspiracy to commit armed carjacking and Nesbitt's acquittal on the same charge at the joint trial. This is a legal inconsistency. Millhouse only raised the first objection and waived the second.

After the verdict was announced, but before the verdict became final and the jury was discharged, the following conversation between Millhouse's stand-in defense counsel[2] and the trial court took place in a bench conference:

> **[STAND-IN DEFENSE COUNSEL]:** Your Honor. I believe before the jury hearken, there is a possibility I would like to recess for five minutes to call [retained defense counsel] to find out if he wishes to make the argument about inconsistent verdict.
>
> **[THE COURT]:** Inconsistent? What?
>
> **[STAND-IN DEFENSE COUNSEL]:** The conspiracy charge, Your Honor, the final charge.
>
> **[THE COURT]:** *Because he was guilty and the co-defendant was not guilty?*

[2] "Stand-in defense counsel" did not take part in the trial and was only present to take the verdict in the case.

> **[STAND-IN DEFENSE COUNSEL]:** *No, because he was found not guilty of armed carjacking and because the co-defendant was found not guilty*.
>
> **[THE COURT]:** That's not—well, the completed offense, the conspiracy, one can be found not guilty of the conspiracy, and well I mean the jury could find … one could be found guilty—you can be found guilty of the actual act and be found not guilty of the conspiracy.

(emphasis added). After stand-in defense counsel successfully contacted trial counsel regarding the nature of the objection, the exchange continued:

> **[STAND-IN DEFENSE COUNSEL]:** [Trial counsel] said he would like to object to it as an inconsistent verdict for the record.
>
> **[THE COURT]:** All right. With respect to the last count, the conspiracy?
>
> **[STAND-IN DEFENSE COUNSEL]:** Correct, Your Honor.
>
> **[THE COURT]:** Okay. I'm going to deny—over the objection, I believe it's a factual—fact issue, but not a legally inconsistent verdict. The jury was told to consider each defendant separately and each count separately. So as I noted early on the record *you could be guilty of conspiracy but not actually complete the offense, and that's what the jury did*. So I'm going to overrule the objection.

(emphasis added).

Millhouse contends that his conviction for conspiracy to commit armed carjacking is legally inconsistent with the acquittal of his co-defendant, Nesbitt, for conspiracy to commit armed carjacking. Therefore, Millhouse argues, the conviction is not legally valid. The State responds that the only objection made by stand-in defense counsel was to the

factual inconsistency—Millhouse was convicted of conspiracy to commit armed carjacking, while both Millhouse and his co-defendant, Nesbitt, were acquitted of the armed carjacking charge. According to the State, not only did Millhouse not raise the legal inconsistency issue in the trial court, but he expressly waived the issue.

"Factually and legally inconsistent verdicts have vexed litigants and been the subject of Maryland appellate opinions in both civil cases and criminal cases for decades." *Givens v. State*, ___ Md. ___, 2016 WL 4430935, *1 (2016). In *Price v. State*, the Court of Appeals held that "inconsistent verdicts shall no longer be allowed." 405 Md. 10, 29 (2008). This holding applies "only to legally inconsistent jury verdicts, but not to factually inconsistent jury verdicts." *McNeal v. State*, 426 Md. 455, 458 (2012). In distinguishing the two, the *McNeal* Court explained:

> A legally inconsistent verdict is one where the jury acts contrary to the instructions of the trial judge with regard to the proper application of the law. Verdicts where a defendant is convicted of one charge, but acquitted of another charge that is an essential element of the first charge, are inconsistent as a matter of law. Factually inconsistent verdicts are those where the charges have common facts but distinct legal elements and a jury acquits a defendant of one charge, but convicts him or her on another charge. The latter verdicts are illogical, but not illegal.

Id. at 458 (citations and footnotes omitted).

The conviction of one defendant for conspiracy in a joint jury trial, while the other defendant is acquitted of the same conspiracy, is a legally inconsistent verdict. "At the core of the crime of conspiracy is the agreement; thus, conspiracy requires two or more

participants." *State v. Johnson*, 367 Md. 418, 424 (2002) (citations omitted). The "rule of consistency"—relevant to legally inconsistent verdicts—"embodies the postulate that where the participation of only one person is established, the crime of conspiracy cannot exist and a conviction thereunder is void." *Id*. The rule of consistency does not apply to inconsistent verdicts issued at separate trials, but applies only to legally inconsistent verdicts rendered in a joint trial. *Id.* at 425. Therefore, one defendant in a joint trial cannot be convicted of the conspiracy while the only other co-defendant in the trial is acquitted of the conspiracy. In this case, under the rule of consistency, Millhouse could not be convicted of conspiracy to commit armed carjacking if Nesbitt was acquitted of the same in their joint trial.

The problem here is that Millhouse waived the proper legal inconsistency objection. "Waiver is the intentional relinquishment or abandonment of a known right." *State v. Rich*, 415 Md. 567, 580 (2010) (citation and quotation omitted). Waived rights are not reviewable for plain error. *Id.* at 580; *see also Brice v. State*, 225 Md. App. 666, 679 (2015) (holding that appellant expressly waived his right to the requested *voir dire* questions when defense counsel responded "No" to the court's request for any further comment or objection to the questions that had already been asked).

Here, Millhouse's stand-in defense counsel objected to inconsistencies in the jury verdict relating the conviction on the charge of conspiracy to commit armed carjacking. The trial court attempted to clarify the nature of the objection, stating: "Because he was

guilty and the co-defendant was not guilty?" Defense counsel responded: "*No*, because he was found not guilty of armed carjacking and because the co-defendant was found not guilty." (emphasis added). Even after the trial court allowed Millhouse's stand-in defense counsel to contact trial counsel regarding the nature of the objection, the final objection related to the seeming inconsistency between Millhouse's conviction on the charge of conspiracy to commit armed carjacking and the acquittal of both Millhouse and Nesbitt on the charge of armed carjacking.[3] The final objection did not address the legal inconsistency between Millhouse's conviction on the charge of conspiracy to commit armed carjacking and Nesbitt's acquittal on the same charge at the joint trial.

Because Millhouse's stand-in defense counsel responded "no" to the trial court's prompt to address the legal inconsistency, and persisted with a different, and ultimately meritless, factual inconsistency objection, the legal inconsistency objection was expressly waived. We, therefore, decline to address Millhouse's contention on appeal.[4]

We now turn to Nesbitt's three arguments on appeal.

[3] Although that argument has been abandoned on appeal, it would not have prevailed—the inconsistency is factual only.

[4] At oral argument, for the first time, Millhouse suggested that the potential legal inconsistency between the acquittal of Nesbitt for the conspiracy to commit armed carjacking, and the conviction of Millhouse for the same in the joint trial, is an illegal sentence that can be corrected by the court at any time under Md. Rule 4-345(a). *See id.* ("The court may correct an illegal sentence at any time."). Because this argument was not raised below or in the briefs, however, we decline to reach it here. Md. Rule 8-131(a). Our holding in this opinion that Millhouse waived his objection to the legal inconsistency is not a determination on how that issue should be resolved if raised in a new motion pursuant to Md. Rule 4-345(a).

IV. Voluntariness

Nesbitt argues on appeal that certain statements he made to the Washington, D.C. police were improperly induced, and, therefore, should be considered involuntary under the common law of Maryland. Specifically, Nesbitt argues that the interviewing detective: (1) expressly, and impermissibly, connected Nesbitt's ability to extricate himself from his predicament with his willingness to inculpate himself in the carjacking; (2) made it clear that inculpation was Nesbitt's only way to avoid charges in a Maryland court; and (3) offered Nesbitt the inducement of a "lighter journey" through the criminal justice system.

The State counters that under the totality of the circumstances, the interviewing detective did not improperly induce the confession. Nesbitt was twenty-four years old at the time of the interview, and had been interviewed by police before. The interview was only two-and-a-half hours long and was conducted with only one or two officers in the room. Additionally, while the detectives engaged in a "little bit of puffery" to encourage Nesbitt to confess, they did not make any specific promises to Nesbitt about using their influence to have the prosecutor exercise discretion on his behalf, nor did Nesbitt rely on any promises made by the police officers.

The standard for finding a confession to be involuntary under Maryland common law differs from the involuntariness standard under federal and state constitutional law. "Under Maryland common law, a confession is involuntary if it is the product of certain

improper threats, promises, or inducements by the police." *Lee v. State*, 418 Md. 136, 161 (2011) (citations omitted). Specifically, the Maryland common law test for involuntariness, set forth in *Hillard v. State*, 286 Md. 145, 153 (1979), provides a two-pronged approach:

> [A]n inculpatory statement is involuntary … if (1) any officer or agent of the police promises or implies to the suspect that he will be given special consideration from a prosecuting authority or some other form of assistance in exchange for the suspect's confession, and (2) the suspect makes a confession in apparent reliance on the police officer's explicit or implicit inducement.

Lee, 418 Md. at 161. In sum, a confession is involuntary under Maryland common law if there is a promise by the police officer, and reliance by the suspect on that promise.

"Both prongs [of the *Hillard* test] must be satisfied before a confession is deemed to be involuntary." *Winder v. State*, 362 Md. 275, 310 (2001). Under the first prong of the test, the court makes an objection determination of "whether a reasonable person in the position of the accused would be moved to make an inculpatory statement upon hearing the officer's declaration." *Hill v. State*, 418 Md. 62, 76 (2011). If the court finds that the officer objectively made a threat, promise, or inducement, then the second prong requires the court to make a subjective determination of "whether the accused relied on that inducement in making the statement he or she seeks to suppress … whether there exists a causal nexus between the inducement and the statement." *Id.* at 77 (citation and quotation omitted).

The type of promise or inducement to which the first prong of the *Hillard* test applies, "has been limited to leniency before, during, or after trial." *Lee*, 418 Md. at 161. An improper promise is a statement "by the interrogating officers either to exercise their discretion or to convince the prosecutor to exercise discretion to provide some special advantage to the suspect." *Knight v. State*, 381 Md. 517, 536 (2004); *see also* Andrew V. Jezic, *et al.*, MARYLAND LAW OF CONFESSIONS 88-106 (2012) (explaining the involuntariness standard under the common law of Maryland).

"The trial court's determination regarding whether a confession was made voluntarily is a mixed question of law and fact." *Knight*, 381 Md. at 535 (citation omitted). Therefore, "[t]he suppression court's ruling that a confession is voluntary is subject to *de novo* review on appeal, with credit given to the suppression court's first-level factual findings." *Hill*, 418 Md. at 77 (citation omitted).

Nesbitt challenges three specific statements as being improper inducements. *First*, after the initial hour interview in which Nesbitt denied all involvement in the carjacking and robbery, the police interrogator stated:

> [T]he fact of the matter is, unless you sit there and tell us the truth right now, when all the evidence points back, that judge is going to sit and look at you like this dude has no remorse; he had no effort to go and tell the truth. Why should I show him any kind of mercy when it comes to sentencing, because all of this stuff is going to be piled on getting you. From the beginning of the investigation, this is a lot of evidence against somebody for right out of the gate.

Second, the interrogator said: "I'm trying to give you a heads-up because this is the one opportunity that you have before you catch the charges from [Prince George's County] to help yourself out. That's it."

Third, he said:

> I don't know if you know—if you completely understand how this works, but whenever we have somebody who's placed under arrest for a felony—and I'm sure PG does it the exact same way—but the best deal you're going to get is at the beginning. The longer shit goes, the worse the deal gets, so I just want you to understand that. But if you come in here and you sit there and you say, look, I fucked up, this is what happened, this is the situation I was in, then the attorneys tend to take a little bit more leniency and a little bit more consideration when it comes to that.

The trial court ruled that Nesbitt's confession was made voluntarily, and we agree. We do not need to reach the second prong of *Hillard*—whether Nesbitt relied on the officer's statements—because the officer's statements did not rise to the level of objectively improper inducements under the first prong of *Hillard*. The officer never promised his assistance or any other person's assistance in obtaining mercy or leniency. In the first statement, the officer expressly conditioned the outcome at trial with "all the evidence pointing back" at Nesbitt, and "all this stuff [evidence] is going to be piled on." In the second challenged statement, the officer simply explained that this is the only time Nesbitt will have to explain his side of the story to the Washington, D.C. police before he "catch[es] the charges" from Prince George's County. In the third challenged statement, the officer merely suggested that cooperation can lead to a more favorable result, a different

way of characterizing the situation in which Nesbitt found himself. None of the officer's statements included a promise by the officer to exercise discretion or to convince the prosecutor to exercise discretion. Therefore, we affirm the trial court's finding that Nesbitt's confession was made voluntarily.

V. Missing witness jury instruction

Nesbitt next contends that the trial court abused its discretion when it refused to give a missing witness instruction to the jury regarding Mrs. Abney-Kelly. A trial court's decision not to provide a missing witness instruction, however, is never an abuse of discretion. *Dansbury v. State*, 193 Md. App. 718, 743 (2010). Therefore, although Ms. Abney-Kelly was available as a witness and was not called by the State to testify, we hold that the trial court did not abuse its discretion in refusing to give the missing witness instruction.

VI. Testimony regarding handgun

Nesbitt's last contention is that the trial court abused its discretion by allowing the State to introduce irrelevant testimony regarding a semi-automatic handgun recovered from the front passenger floor of the carjacked Yukon that Nesbitt says he never occupied.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Md. Rule 5-401. Relevant evidence is admissible. Md. Rule 5-402. Relevant evidence may be excluded, however, "if its probative value is substantially

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Md. Rule 5-403. We review the question of whether evidence is legally relevant *de novo*, and the question of whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice under an abuse of discretion standard. *State v. Simms*, 420 Md. 705, 724-25 (2011).

We conclude that evidence of the handgun recovered from the Yukon was relevant evidence against Nesbitt. Even if Nesbitt was never in the Yukon, nor one of the two men who threatened the Kellys with the guns, the handgun was relevant evidence as long as the State proved Nesbitt was one of the members of the group that carjacked the Kellys. A handgun used or possessed by one member of the conspiracy would be relevant and admissible to prove Nesbitt's culpability for armed carjacking and conspiracy to commit armed carjacking. *See Manuel*, 85 Md. App. at 16 ("[A] conspirator is, in effect, the agent of each of the other co-conspirators during the life of the conspiracy.") (citation and quotation omitted). Because the handgun was relevant evidence, we hold that the trial court did not abuse its discretion when it found that the prejudicial effect of the introduction of the handgun did not substantially outweigh the probative value of the evidence.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT TERRENCE MILLHOUSE IN CASE NO. 1601. COSTS TO BE PAID BY APPELLANT DANIEL EUGENE NESBITT IN CASE NO. 1633.