UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED CASES

SEPTEMBER TERM, 2013

No. 2675
ANTONIO MOORE
v.
STATE OF MARYLAND

No. 2713
MELVIN BAKER
v.
STATE OF MARYLAND

Meredith,
Friedman,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: August 25, 2016

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

We are asked to determine whether the Circuit Court for Baltimore City committed errors in the joint trial of Antonio Moore and Melvin Baker. Concluding that the circuit court did not err, we affirm both Moore's conviction and Baker's conviction.

BACKGROUND

Moore and Baker were convicted by a jury of first-degree murder, conspiracy to commit murder, and use of a handgun in the commission of a felony or crime of violence. The jury found that Moore and Baker had both shot and killed Gregory McFadden on November 15, 2011. Moore and Baker were tried in a joint trial.

At trial, two eyewitnesses described the shooting. First, McFadden's friend, Barry Speights, testified that, on November 15, 2011, he was outside drinking with McFadden when Baker and Moore approached them. Speights testified that Baker and McFadden got into an argument and that Baker pulled out a gun and shot McFadden. Speights testified that Baker and Moore then ran into a nearby house. Moore returned, shot McFadden, and ran back into the nearby house. Second, Kashiela Holt testified that, on November 15, 2011, she heard a noise outside and ran to her window where she saw McFadden lying in the gutter across the street. She testified that McFadden started to limp towards her house when a man walked up to McFadden and repeatedly shot him. From a photographic array, Holt identified Moore as the shooter.

A recorded statement by Baker's friend Rahim Biggers was also admitted into evidence at trial. Two weeks after McFadden was shot, a detective interviewed Biggers. In the recorded statement, Biggers told the detective that Baker had approached him in the

early morning hours of November 16, 2011, and asked for a change of clothes. Biggers stated that Baker said that he had done something crazy. Biggers also stated that Baker said that he had shot a man for disrespecting him, and that Moore had also shot the man.

Another witness, Kendra Hill-Wilson, testified at trial that Moore had told her that he and Baker had shot "the boy." Hill-Wilson had previously dated Baker's brother, Neal Hunt.[1] Sometime in the fall of 2011, she encountered McFadden on the street and he tried to flirt with her. Hill-Wilson told Hunt and Moore about the encounter. The three of them drove down the street, where Hill-Wilson pointed out McFadden to Hunt and Moore. At trial, Hill-Wilson testified that Moore had told her that Baker had the gun first and shot "the boy" and that Moore then took the same gun and shot him again.

Following the jury's decision, the circuit court sentenced Baker and Moore each to a life sentence for the first-degree murder conviction, a concurrent life sentence for the conspiracy conviction, and a fifteen-year consecutive sentence for the use of a handgun in the commission of a crime of violence conviction.

DISCUSSION

Moore and Baker contend that the circuit court committed numerous errors. Moore and Baker both argue that: (1) the circuit court erred in denying their *Batson* challenge; (2) the circuit court erred in denying their motion to dismiss on grounds of speedy trial violation; (3) the circuit court erred in denying their motion to suppress Rahim Biggers's

[1] The parties stipulated that on September 24, 2013, Neal Hunt was killed. Hunt had a .40 caliber handgun in his possession when he died.

statement; and (4) there was insufficient evidence to support their first-degree murder and conspiracy convictions. Additionally, Moore argues that the circuit court erred in denying: (5) his motion to sever the trials; and (6) his motion to suppress a photographic array. Finally, Baker argues that the circuit court erred in: (7) excluding evidence that Neal Hunt died during the commission of a felony; and (8) denying his request for a specific jury instruction. We address each allegation in turn.

I. *Batson* Challenge

First, both Moore and Baker argue that the circuit court erred by denying their *Batson* challenge. During voir dire, defense counsel raised a *Batson* challenge, arguing that the State's use of ten of its peremptory strikes against prospective jurors who were African-American established a *prima facie* case of intentional discrimination. In response, the State contends that the circuit court properly determined that Moore and Baker had not demonstrated a *prima facie* case of purposeful discrimination because the majority of the pool of prospective jurors was African-American. We agree with the State and conclude that the circuit court did not err in denying Moore and Baker's *Batson* challenge.

The Equal Protection Clause of the Fourteenth Amendment forbids purposeful racial discrimination in jury selection. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). To determine whether there has been purposeful racial discrimination, *Batson* provides a three-step process:

> 1. The party claiming discrimination must establish a *prima facie* case of purposeful discriminatory selection in the venire;

2. If the claiming party establishes *prima facie* discrimination, the burden shifts to the striking party to provide a neutral explanation for its strikes;

3. The trial court then determines if the claiming party has established purposeful discrimination.

Batson, 476 U.S. at 96-98. Because the current case involves solely the question of whether there was *prima facie* evidence of purposeful discrimination, we analyze only the first step in the *Batson* formulation.

To establish a *prima facie* case of purposeful discrimination in jury selection, the defendant must show that he or she is a "member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Id.* at 96. The trial court may look at "proof of disproportionate impact," such as "seriously disproportionate exclusion of [African-Americans] from jury venires." *Id.* at 93 (internal quotations omitted). To determine whether there is potential disproportionate impact, the court looks at both the number of African-Americans that were stricken, and the number of African-Americans in the venire from which the jury was chosen. As this Court has stated before, "[w]e cannot assess whether there has been a disproportionate use of peremptories so as to give rise to an inference of discrimination unless we have two numbers or two percentages to work with." *Bailey v. State*, 84 Md. App. 323, 332 (1990). In reviewing the trial court's ruling, we give deference to the trial court's decision and will only overturn it if it is clearly erroneous. *Berry v. State*, 155 Md. App. 144, 160 (2004).

This case involves ten stricken prospective jurors who were African-American and came from a prospective jury pool of which 82% were non-white.[2] After the State used nine of its peremptory strikes against prospective jurors who were African-American, Moore and Baker brought a *Batson* challenge, which the circuit court denied due to lack of *prima facie* evidence of purposeful discrimination:

THE COURT:	[T]he group that came in [was] roughly 18 percent white and 16 percent male. As long as that balance is reflected in the group that's still here, I don't believe you made a *prima facie* case and I will deny your motion.
[MOORE'S COUNSEL]:	Your Honor, let me join –
THE COURT:	Your … motion is denied also.
[MOORE'S COUNSEL]:	I join in the *Batson* process. I believe that the statistical analysis is only one part of the equation in *Batson* –
THE COURT:	It's the opening door.
[MOORE'S COUNSEL]:	It's –
THE COURT:	The door does not open –
[MOORE'S COUNSEL]:	That's true, Your Honor.
THE COURT:	-- beyond that. Because if it were opened I would be calling upon both sides to give me their answers as to why they are not allowing race and/or gender to pick this

[2] The record is unclear regarding the racial composition of the non-white group.

	juror. But I find no *prima facie* case for anything at this moment.

The State then used its tenth strike against another prospective juror who was African-American. Baker and Moore again raised a *Batson* challenge:

[MOORE'S COUNSEL]:	Your Honor, I'd raise the *Batson versus Kentucky* –
THE COURT:	Very well.
[MOORE'S COUNSEL]:	-- issue here?
THE COURT:	You joining in that, Mr. Woods?
[BAKER'S COUNSEL]:	I am, Your Honor.
	* * *
THE COURT:	The statistical analysis of the jury has not changed and I find no *prima facie* case made so I will deny your motion.

Ultimately, the jury that was sworn was comprised of three jurors who were white and nine jurors who were African-American.

The ten African-American prospective jurors that the State peremptorily struck came from a venire that was only 18% white. Therefore, it must be expected that most, if not all, of the potential jurors peremptorily struck would be non-white. As the circuit court explained, the racial makeup of the final jury reflected the racial makeup of the entire pool. The jury that was sworn was comprised of three jurors who were white and nine jurors who were African-American. The circuit court stated, "[the fact t]hat the State struck [ten

prospective jurors who were African-American] didn't change the racial makeup of the group beyond the racial makeup of the group that entered the room."

Therefore, the circuit court did not err in concluding that Baker and Moore failed to establish a *prima facie* case of purposeful discrimination because the venire was overwhelmingly African-American and the final jury included nine jurors who were African-American. We conclude that the circuit court did not err in denying Baker and Moore's *Batson* challenge.

II. Speedy Trial

Both Moore and Baker allege that the circuit court erred in denying their motion to dismiss the case because of a violation of both (A) their statutory right to a speedy trial and (B) their constitutional right to a speedy trial. The State responds that the trial delays were justifiable and that the circuit court properly exercised its discretion in postponing the trial. We agree with the State that the delay was justifiable.

Over 700 days passed between Moore and Baker's arrests and the date that their trial began. Baker was arrested on January 24, 2012. Moore was arrested on January 30, 2012. Their joint trial began almost two years later on January 6, 2014. Because Moore and Baker were arrested one week apart and tried together, we address their allegations together. We address their statutory and constitutional arguments in turn.

A. Statutory Speedy Trial Rights

Moore and Baker contend that the circuit court erred in denying their motion to dismiss the case for violating their statutory rights to a speedy trial, pursuant to Maryland

Rule 4-271 and § 6-103 of the Criminal Procedure Article ("CP"). In support of their statutory argument, Moore and Baker complain only that the September 17, 2012 postponement was without good cause. On September 17, 2012, the circuit court (Howard, J.) postponed the trial because the parties were awaiting a ruling on the State's motion for a protective order. Later that same day, after the case had been postponed, the circuit court (Carrion, J.) ruled on the State's motion, denying it. Moore and Baker now contend that, instead of postponing the trial, Judge Howard should have contacted Judge Carrion to ask when she would rule on the State's motion. In response, the State points out that Judge Howard *did* contact Judge Carrion to ask when she would file her decision:

> But the Court did make inquiry to find out if the order was coming out so that [if the parties made a] postponement request …, as a result of the lack of issuance, [the reason for the postponement request] hopefully would disappear. The order came out later that day but … this Court had been informed … that it was not coming out.

In light of Judge Howard's effort to ascertain when the ruling on the motion for a protective order would issue, and the answer he received, we conclude that Moore and Baker have failed to demonstrate "a clear abuse of discretion or lack of good cause as a matter of law." *See Frazier*, 298 Md. at 454. As such, we conclude that the circuit court did not err in denying their motion to dismiss on this ground.

B. Constitutional Speedy Trial Rights

Moore and Baker also contend that the circuit court erred in denying their motion to dismiss because their constitutional right to speedy trial was violated. The State responds that, using the balancing test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), the circuit

court correctly found that Moore and Baker's constitutional right to a speedy trial was not denied. We agree with the State.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to a speedy trial.[3] The test for determining whether a defendant has been deprived of his or her right to a speedy trial "is a balancing test, in which the conduct of both the prosecution and the defendant are weighed." *Barker*, 407 U.S. at 530. There are four factors that courts "should assess in determining whether a particular defendant has been deprived of his [or her] right[:] … [1] Length of delay, [2] the reason for the delay, [3] the defendant's assertion of his [or her] right, and [4] prejudice to the defendant." *Id.* "None of the four factors is … a necessary or sufficient condition to finding a denial of speedy trial rights. Rather they are related factors and must be considered together with such other circumstances as may be relevant." *Divver v. State*, 356 Md. 379, 394 (1999) (citation omitted). "In reviewing the judgment on a motion to dismiss for violation of the constitutional right to a speedy trial, we make our own independent constitutional analysis." *Glover v. State*, 368 Md. 211, 220 (2002). "We perform a *de novo* constitutional appraisal in light of the particular facts of the case at hand; in so doing, we accept a lower court's findings of fact unless clearly erroneous." *Id.* at 221.

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[3] Article 21 of the Maryland Declaration of Rights provides a similar guarantee, stating in part, that "in all criminal prosecutions, every man hath a right … to a speedy trial." Moore and Baker have not offered argument regarding Article 21, so we shall address this solely as a Sixth Amendment problem.

i. Length of the delay

The first factor, and least determinative of the four factors, is the length of the delay. *Howard v. State*, 440 Md. 427, 447-48 (2014). "The arrest of a defendant, or formal charges, whichever first occurs, activates the speedy trial right." *Wheeler v. State*, 88 Md. App. 512, 518 (1991). While no specific duration of delay constitutes a *per se* constitutional violation, "[a] post-indictment, pre-trial delay of sufficient length becomes presumptively prejudicial and thereby triggers scrutiny under the *Barker* factors." *Glover*, 368 Md. at 222 (concluding that a fourteen-month delay triggered constitutional analysis). "Thus, the length of delay is a 'double enquiry' as it both triggers constitutional analysis and is a factor in determining whether a defendant's constitutional right to a speedy trial has been violated." *Id.* at 222-23.

"As emphasized by the Supreme Court [in *Barker*], the delay that can be tolerated is dependent, at least to some degree, on the crime for which the defendant has been indicted." *Id.* at 224. "[T]he more complex and serious the crime, the longer a delay might be tolerated because 'society also has an interest in ensuring that' longer sentences 'are rendered upon the most exact verdicts possible.'" *Lloyd v. State*, 207 Md. App. 322, 328–29 (2012) (quoting *Glover*, 368 Md. at 224).

Here, almost two years passed between the dates of their arrests and the date that their trial began. The length of the delay triggers *Barker* analysis. *See Glover*, 368 Md. at 222. The length of the delay, however, wasn't sufficient in and of itself to compel dismissal. Moore and Baker were both charged with the very serious crime of first-degree murder,

and their trial was complex and lasted seven days. The serious nature of the charges means that a longer delay may be tolerated. *Glover*, 368 Md. at 224 (*"*In a murder case, for example, society has an interest in an expeditious trial, … but society also has an interest in ensuring that sentences of life imprisonment or death are rendered upon the most exact verdicts possible."). Therefore, we cannot say that the length of the delay weighs heavily in Moore and Baker's favor.

ii. Reasons for the delay

The second factor is the reasons for the delay. Different reasons are given different weight:

> [D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial … to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. 514, 531 (1972). We review each of the reasons for the trial's delay and conclude that many of the delays were for "more neutral reason[s]" and should be "weighted less heavily" against the State. *Id.*

- *January 26, 2012 (Baker)/January 30, 2012 (Moore) to July 24, 2012: time before first trial date*

The time preceding the first scheduled trial date is generally considered neutral and thus not chargeable to either side. *Malik v. State*, 152 Md. App. 305, 318-19 (2003).

- *July 24, 2012 to September 17, 2012: medical leave*

This continuance was necessitated by a prosecutor's medical leave. This delay is attributable to the State, but does not weigh heavily against the State. *Ferrell v. State*, 67 Md. App. 459, 464 (1986). Additionally, at the July 24, 2012 hearing, Baker's counsel characterized the delay as "absolutely unavoidable."

- *September 17, 2012 to November 15, 2012: awaiting decision on the motion for protective order*

As discussed above, the trial was postponed from September 17, 2012 to November 15, 2012 because the parties were awaiting Judge Carrion's ruling on the State's motion for a protective order. Moore and Baker argue that this delay should be weighed against the State because the State should have made the motion earlier. The State contends that both the prosecution and the defense were engaged in a discovery dispute, which caused the delay. We conclude that this delay was neutral because neither the defense nor prosecution was prepared to begin the trial that day.

- *November 15, 2012 to January 30, 2013: court congestion*

Delay due to court congestion is charged to the State, but does not weigh as heavily against the State as a purposeful delay to hamper the defense. *Divver*, 356 Md. at 391-92.

- *January 30, 2013 to February 22, 2013: Baker's counsel vacation*

The State accepts that this postponement for counsel's vacation should be weighed against the State and Baker. We agree.

- *February 22, 2013 to June 27, 2013: prosecutor unavailability*

This period of time when the State's Attorney was in trial or had a scheduled vacation weighs against the State, but not heavily. "Although the ultimate responsibility for unintentional delays caused by over-crowded court dockets or understaffed prosecutors must rest with the prosecution rather than with the defendant, such circumstances are among the factors to be weighed less heavily than intentional delay, calculated to hamper the defense." *Wilson v. State*, 281 Md. 640, 654 (1978) (citation omitted).

- *June 27, 2013 to August 30, 2013: Moore request for one week continuance, witness unavailability, and court congestion*

Moore requested a one week continuance to interview a witness. Although the circuit court offered July 11, 2013 as a potential trial date, that date was not feasible because the medical examiner was not available and defense counsel had a trial scheduled in federal court. The State agrees that all but one week of the delay should be charged against the State. We agree.

- *August 30, 2013 to December 6, 2013: State's Attorney Medical Leave*

As discussed above, this delay is attributable to the State, but does not weigh heavily against the State. *Ferrell*, 67 Md. App. at 464.

- *December 6, 2013 to December 11, 2013: Baker's counsel unavailable*

The State accepts that this postponement should be weighed against the State and Baker. We agree.

- *December 11, 2013 to January 6, 2014: no court available*

As discussed above, delay due to court congestion is charged to the State, but does not weigh as heavily against the State as would purposeful delay. *Divver*, 356 Md. at 391-92.

We conclude that the delays in Moore and Baker's case, as a whole, stem from neutral reasons or reasons that do not weigh heavily against the State. In addition, there is not the slightest implication that the State failed to act in good faith.

iii. Defendant's assertion of the right

The third factor is the defendant's assertion of the right. The State accepts that the "assertion of the right" factor weighs in favor of Moore and Baker.

iv. Prejudice to the defendant

The fourth factor is prejudice to the defendant. Prejudice is assessed in light of three interests of the defendant: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532. "[S]o long as the State acts with reasonable diligence, and absent any specific prejudice to the defense's case, a speedy trial claim fails 'however great the delay.'" *Randall v. State*, 223 Md. App. 519, 556 (2015) (quoting *Doggett v. United States*, 505 U.S. 647, 656 (1992)).

Moore and Baker assert that they were prejudiced by the delay because Neal Hunt, an alternate suspect, died before trial, and therefore they were unable to call him as a witness or cross-examine him. The State responds by pointing out that both Moore and

Baker were able to present their defense that Neal Hunt was an alternative suspect. Both Moore and Baker argued to the jury that Hunt had a motive to kill McFadden. It is unclear how Hunt's death impaired Moore and Baker's defense. Therefore, we conclude that Moore and Baker's showing of actual prejudice is weak.

v. Balancing

"Balancing the four factors is undoubtedly a sensitive task, completely dependent on the specific facts presented by each unique case. In carrying out this difficult task, we are mindful that our task is to ensure that the petitioner's right to a speedy trial has not been violated; we are also mindful, however, that delay is often the result of efforts to ensure the highest quality of fairness during a trial." *Glover*, 368 Md. at 231-32.

Application of the four *Barker* factors to this case shows that the circuit court properly concluded that Moore and Baker were not denied their constitutional right to a speedy trial. The State accepts that Moore and Baker asserted their right to speedy trial (factor three), but that factor balanced with the other *Barker* factors does not establish a speedy trial violation. Although a two year delay is certainly long (factor one), this was a complex case lasting seven days with two defendants on trial for the very serious crime of first-degree murder. Additionally, there is no evidence of bad faith on the part of the State, rather the bulk of the delay was due to unavailable prosecutors because of illness or other trials or to court congestion (factor two). Any prejudice to Moore and Baker was minimal (factor four). Therefore, based on our independent analysis, we conclude that Moore and Baker's constitutional right to a speedy trial was not violated.

III. Biggers's Statement

Moore and Baker next argue that the circuit court erred in admitting a recorded statement of witness Rahim Biggers because the State failed to establish, pursuant to *Nance v. State*, 331 Md. 549 (1993), that the statement was based on Biggers's own knowledge, and that Biggers had reviewed his statement or that he had in any way adopted his statement. The State responds that Moore and Baker's claim is not preserved because they failed to make this argument at trial. We agree with the State.

"Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." Md. Rule 8-131(a).

At trial, Moore and Baker argued that Biggers's recorded statement was inadmissible as extrinsic evidence of an inconsistent statement, pursuant to Maryland Rule 5-613(b).[4] Moore and Baker argued that the State had failed to meet the conditions of Rule

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[4] Rule 5-613(b) states that prior inconsistent statements by a witness are not admissible unless certain conditions have been met:

> (b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.

Md. Rule 5-613(b).

5-613. On appeal, Moore and Baker make a different argument. Moore and Baker now argue that the State failed to comply with the Rule for using an inconsistent statement as substantive evidence from *Nance*, 331 Md. at 569. Moore and Baker contend that the State failed to establish that Biggers's statement was based on his own knowledge of the facts and that Biggers had ever reviewed his statement or in any way adopted his statement. *Nance v. State*, 331 Md. at 569. Because Moore and Baker never presented this argument to the circuit court, we conclude that this argument is unpreserved and decline to review it.

IV. Insufficient Evidence

Moore and Baker contend that there was insufficient evidence to sustain their convictions for conspiracy and first degree murder. The State argues that the evidence was sufficient to sustain the convictions. We agree with the State and affirm the convictions.

The "standard of review for sufficiency of trial evidence is whether '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt' when the evidence is presented in the light most favorable to the State." *Bible v. State*, 411 Md. 138, 156 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original). Appellate courts affirm a conviction "[i]f the evidence either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Bible*, 411 at 156 (internal quotation marks omitted).

We address the conspiracy and first-degree murder convictions separately.

A. Conspiracy

Moore and Baker argue that there was insufficient evidence to support their conspiracy convictions. Moore and Baker contend that there was no evidence of an express agreement between Moore and Baker to shoot McFadden. They also argue that because the evidence showed that Moore shot McFadden only after Baker had left the scene, there was no concert of action to establish a conspiracy. The State responds that it presented sufficient evidence from which a jury could infer an unlawful agreement between Moore and Baker. We agree with the State.

Conspiracy is "the agreement between two or more people to achieve some unlawful purpose or to employ unlawful means in achieving a lawful purpose." *State v. Johnson*, 367 Md. 418, 424 (2002). The Court of Appeals has explained:

> The essence of a criminal conspiracy is an unlawful agreement. The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design. In Maryland, the crime is complete when the unlawful agreement is reached, and no overt act in furtherance of the agreement need be shown.

Townes v. State, 314 Md. 71, 75 (1988). "The existence of a conspiracy can be established from circumstantial evidence from which an inference of common design may be drawn." *McMillian v. State*, 325 Md. 272, 292 (1992). "The State is not required to show a formal agreement … to prove conspiracy. … '[T]he State [is] only required to present facts that would allow the jury to infer that the parties entered into an unlawful agreement.'" *Armstead v. State*, 195 Md. App. 599, 646 (2010) (quoting *Acquah v. State*, 113 Md. App. 29, 50 (1996)).

In this case, the circumstantial evidence provided "an inference of common design." *McMillian*, 325 Md. at 292. There was evidence that Moore and Baker approached the victim together and that they used the same weapon. There was evidence that Moore and Baker fled to the same location. Therefore, the State presented evidence "that would allow the jury to infer that the parties entered into an unlawful agreement.'" *Armstead v. State*, 195 Md. at 646 (internal quotation marks omitted). That evidence "supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of [conspiracy] beyond a reasonable doubt." *Bible*, 411 at 156. Thus, we conclude that there was sufficient evidence of a conspiracy between Moore and Baker.

B. First Degree Murder

Moore and Baker's only argument that there was insufficient evidence for their first-degree murder convictions is that the witnesses contradicted themselves and others in their testimony and those contradictions show that the jury could not credit the testimony. The State responds that the jury, not the court, determines what testimony to credit. We agree with the State.

A jury is "free to believe some, all, or none of the evidence presented" in a case. *Sifrit v. State*, 383 Md. 116, 135 (2004). It is "the jury's role to resolve the conflicts in the testimony, to determine the inferences to be drawn from the evidence, and to decide what relative weight to … attribute[ ] to the evidence presented." *McClurkin v. State*, 222 Md. App. 461, 488 (2015).

Therefore, the jury in Moore and Baker's case had the role of resolving any contradictions in one witness's testimony and any contradictions between the witnesses' testimony. As such, Moore and Baker have not shown that the evidence did not support "a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Bible*, 411 at 156.

V. Motion to Sever

Moore argues that the circuit court abused its discretion when it denied his motion to sever his trial from Baker's trial. Moore asserts that Baker's statements to witness Rahim Biggers that implicated Moore in the crime would have been inadmissible in a separate trial because of the hearsay rule, and, therefore, that the circuit court should not have conducted a joint trial. The State argues that Baker's statement would have been admissible in a separate trial because it falls within the hearsay exception for statements against penal interest. We agree with the State.

A court may try two defendants together in a joint trial 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." Md. Rule 4-253. If, however, evidence is admissible against one defendant but is inadmissible against the other defendant, separate trials are required. *Bussie v. State*, 115 Md. App. 324, 332 (1997). An abuse of discretion review applies to decisions regarding motions to sever. *Wilkerson v. State*, 139 Md. App. 557, 577 (2001). Accordingly, a denial of a motion to sever will only be overturned if "the ruling is

clearly against the logic and effect of facts and inferences before the court." *North v. North*, 102 Md. App. 1, 13 (1994) (internal quotations omitted).

At issue is the recorded statement made by witness Rahim Biggers to a detective during a police interview. In the recording, Biggers stated that he and Baker were together the day after the murder. Biggers stated that Baker told him that Baker had been disrespected by a man, and that, on November 15, 2011, Baker and Moore approached the man and shot him. Biggers stated that Baker said that he shot the man first, and then Moore shot the man some more.

Ordinarily, hearsay evidence is not admissible at trial. Md. Rule 5-802 ("Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible."). But Maryland Rule 5-804(b)(3) provides an exception to the hearsay rule for statements against penal interest:

> A statement which … at the time of its making … so tended to subject the declarant to … criminal liability, … that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Md. Rule 5-804(b)(3). Put simply, a trial court can admit a hearsay statement if, "1) the declarant's statement was against his or her penal interest; 2) the declarant is an unavailable witness; and 3) corroborating circumstances exist to establish the trustworthiness of the statement." *Roebuck v. State*, 148 Md. App. 563, 578 (2002) (citations omitted). To determine whether a statement was against a declarant's penal interest, the trial court must

consider "whether a reasonable person in the situation of the declarant would have perceived that it was against his [or her] penal interest at the time it was made." *Id.* at 581. To determine whether the declarant is an unavailable witness, the court must determine whether the declarant is "exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement." Md. Rule 5-804(a)(1). Once those two prongs are met, there are various factors that courts consider to determine whether a statement is sufficiently trustworthy. *Roebuck*, 148 Md. App. 563 at 583. For example, courts consider the timing of the statement. *Id.* "When a statement against interest is made soon after the event in issue, that factor generally weighs in favor of trustworthiness." *Id.* at 583-84. Courts also consider whether the statement was made spontaneously, as opposed to a statement made in response to coercive police questioning. *Id.* at 584. A spontaneous statement is deemed more reliable and trustworthy. *Id.*

The circuit court here determined that Baker's statement (as told by Biggers) would be admissible hearsay as a statement against penal interest, and found that the statement did not mandate severance under any standard of prejudice. We cannot say that the circuit court's ruling was clearly illogical. Baker's statement that he shot the victim was certainly against his penal interest. The statement rendered Baker criminally liable for murder, and a reasonable person would not have made the statement unless he believed it to be true. The corroborating circumstances indicated the trustworthiness of the statement. Baker volunteered the statement to his friend, Biggers. It was not coerced. Moreover, Baker made the statement only one day after the shooting. Therefore, Baker's statement falls under the

hearsay exception for a statement against penal interest because: (1) the statement was against Baker's penal interest; (2) Baker was an unavailable witness because he was Moore's co-defendant; and (3) the statement was trustworthy. *See Roebuck*, 148 Md. App. at 578.

Because Baker's statement falls under an exception to the hearsay exclusion rule as a statement against penal interest, it would have been admissible in a separate trial of Moore. For this reason, we conclude that the circuit court did not abuse its discretion in denying Moore's motion to sever.

VI. Motion to Suppress a Photographic Array

Moore argues that the circuit court erred in denying his motion to suppress a photographic array, and that the photographic array should have been suppressed because Moore's photograph was the lightest in the array[5] and because Moore was the only person with a visible tattoo. In response, the State contends that the circuit court properly exercised its discretion in denying the motion to suppress because Moore's photograph was not impermissibly suggestive. We agree with the State.

Due process protects a defendant "against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *Jones v. State*, 395 Md. 97, 108 (2006) (internal quotations omitted). *Jones*

[5] It is unclear whether Moore is arguing that his skin tone was the lightest, or that the photographic quality was the lightest. We conclude that, either way, the argument does not prevail.

describes a two-step inquiry for due process challenges of pretrial identifications. *Id.* at 109. The first step asks whether the identification procedure was impermissibly suggestive. *Id.* If the answer is no, the inquiry ends and the evidence is allowed in trial. *Id.* If the answer is yes, the second step asks the court to determine whether the identification was reliable under the totality of the circumstances. *Id.*

The present case centers on step one of the two-step inquiry—whether Moore's photograph was impermissibly suggestive. The defendant has the burden of proving impermissible suggestiveness. *Wallace v. State*, 219 Md. App. 234, 244 (2014). This burden can be met only if "'the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" *Smiley v. State*, 216 Md. App. 1, 33 (2014) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)). This Court has previously stated that meeting this threshold is a "hard furrow to plow," as there must not only be a likelihood of misidentification, but a "very substantial" likelihood, and the misidentification must be "irreparable." *Smiley*, 216 Md. App. at 33. A photographic array may be considered impermissibly suggestive if it "feed[s] the witness clues as to which identification to make," so that viewing the array would be like "playing with a marked deck." *Conyers v. State*, 115 Md. App. 114, 121 (1997). Additionally, the "critical identification factor" is the facial features of the people depicted in the array. *McGrier v. State*, 125 Md. App. 759, 766 (1999).

In reviewing the circuit court's denial of a motion to suppress, we accept the court's findings of fact unless they are clearly erroneous. *Wallace*, 219 Md. App. at 243. Furthermore, we examine the findings of fact in the light most favorable to the prevailing party, in this case the State. *Id.*

In the case at hand, the circuit court found that the six men in the array had similar features, and that their different degrees of skin tone were not "so significant." The court also found that Moore's tattoo on his neck was insignificant, as it was mostly hidden by his shirt collar. Kashiela Holt, the eyewitness who identified Moore using the photographic array, testified that she did not even notice the tattoo when she looked at the array. Finally, our review of the array leads us to conclude that the photographic quality of all six pictures is uniform—Moore's photograph is not lighter than the others.

Because there was no evidence that the photographic array was in any way "feeding the witness clues" as to which photograph was of the shooter, we conclude that the circuit court did not err in finding that the array was not suggestive. *See Conyers*, 115 Md. App. at 121. There was no likelihood for misidentification, let alone a "very substantial" likelihood for irreparable misidentification. *See Smiley*, 216 Md. App. at 33. Therefore, we conclude that the circuit court did not err in denying Moore's motion to suppress the photographic array.

VII. Irrelevant Evidence

Baker argues that the circuit court incorrectly excluded, as irrelevant, evidence that Neal Hunt, an alternative suspect, was killed while committing a felony. Baker contends

that evidence that Hunt was killed while committing a felony would have shown that Hunt had a propensity for violence. Baker contends that the evidence would have bolstered his alternate-suspect defense, and that it would have impeached Kendra Hill-Wilson's testimony that Hunt never had a gun. The State responds that evidence that Neal Hunt was killed while committing a felony was irrelevant and would have caused undue confusion and, therefore, that the circuit court properly excluded the evidence. We agree with the State and conclude that the circuit court did not err in excluding the evidence as irrelevant.

The record included a stipulation that: "On September 14, 2013 [almost two years after McFadden was shot] Neal Hunt was killed. At or shortly before his death Neal Hunt had possession of a .40 caliber handgun." The record also included abundant evidence that Neal Hunt had the motive and ability to kill McFadden. The circuit court ruled that the facts as reflected in the stipulation were relevant to impeach Hill-Wilson's testimony that Hunt never had a gun, but the evidence that Hunt died while committing a felony was irrelevant to this case.

The admissibility of evidence that someone other than the defendant committed other crimes or bad acts— so-called "reverse other crimes evidence"—is governed by Maryland Rule 5-403, under which inclusion is presumed. *Gray v. State*, 137 Md. App. 460, 487 (2001), *rev'd on other grounds*, 368 Md. 529 (2002). Maryland Rule 5-403 allows for the exclusion of relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative

evidence." Md. Rule 5-403. "Thus, reverse other crimes evidence must be relevant and must pass the Md. Rule 5-403 balancing test—that is, its probative value must not be outweighed by the danger of unfair prejudice [or other Rule 5-403 considerations]." *Allen v. State*, 440 Md. 643, 665 (2014). Appellate courts review the trial court's decision to exclude this evidence under an abuse of discretion standard. *Moore v. State*, 390 Md. 343, 384 (2004).

The circuit court did not abuse its discretion in excluding evidence that Hunt died during the commission of a felony as irrelevant. It was not an abuse of discretion to conclude that the fact that Hunt may have died while committing a felony two years after McFadden was shot was not relevant to Baker's defense. The circuit court allowed in the salient evidence that supported Baker's third-party defense theory—evidence: that Hunt's girlfriend, Hill-Wilson, was insulted by McFadden; that Hill-Wilson identified McFadden to Hunt; that Hunt lived in a house near where McFadden was shot; and that ammunition was found at Hunt's house. Even if the fact that Hunt died while committing a felony was relevant, the circuit court did not err in concluding that its probative value was substantially outweighed by the danger of confusion of the issues or by considerations of undue delay or waste of time. Md. Rule 5-403.

VIII. Jury Instruction

Baker also argues that the circuit court erred by not instructing the jury that State's Witness Rahim Biggers was promised a benefit in exchange for his statement implicating Baker. The State contends that the "witness promised benefit" instruction was not

generated because there was no evidence that Biggers received, or was even promised, a benefit in exchange for his statement against Baker. We conclude that the circuit court did not err in deciding not to give the "witness promised benefit" instruction.

Maryland Rule 4-325 requires that that trial court give a requested instruction under the following circumstances: "(1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction is not fairly covered elsewhere in the jury instruction actually given." *Ware v. State*, 348 Md. 19, 58 (1997). The decision of whether to give the "witness promised benefit" instruction lies within the discretion of the trial court and will not be reversed absent a clear error of law. *Preston v. State*, 444 Md. 67, 82 (2015).

The pattern instruction on witness promised benefit reads:

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

Maryland Criminal Pattern Jury Instructions 3:13. Maryland courts have interpreted "'benefit' in the context of Jury Instruction 3:13, to mean something akin to a plea agreement, a promise that a witness will not be prosecuted, or a monetary reward or other form of direct, quid pro quo compensation or inducement." *Preston*, 444 Md. at 85.

At trial, Baker requested the witness promised benefit instruction because of Biggers's testimony that the police threatened to take his daughter away. Biggers testified

that police picked him up in a police car and brought him to police headquarters, where a detective interviewed him about McFadden's murder. When the police picked him up, Biggers had his daughter with him. Biggers then testified that the police threatened to take his daughter away:

STATE:	Did the officers threaten you in any way to talk to them?
BIGGERS:	Yeah.
STATE:	What did they do?
BIGGERS:	The officers that arrested me said they was going to take my daughter away from …
STATE:	But you weren't under arrest?
BIGGERS:	No, they picked me up about a shooting that occurred—

* * *

STATE:	And … did they promise you anything?
BIGGERS:	No.

* * *

STATE:	And what happened after you [met] with them?
BIGGERS:	They made me call my daughter['s] mother to come pick up my daughter.

* * *

DEFENSE:	Now when you were down there they told you they were going to take your daughter away from you, who told you that?

BIGGERS:	The police.
DEFENSE:	You had just come from being with your daughter?
BIGGERS:	I had my daughter with me. When they pulled up on me.
DEFENSE:	Oh, so you had your daughter with you, what did they do with your daughter?
BIGGERS:	They took her and put her in the car. Made her wait for her mother.

Later, Baker asked the circuit court to instruct the jury that Biggers's testimony should be viewed with caution because Biggers received a benefit of "his liberty as a result of playing ball with the police." The circuit court denied Baker's request, ruling that Biggers's statement was not evidence of a benefit, but of a threat and therefore did not generate a witness promised benefit instruction.

The circuit court did not clearly err in refusing to give the witness promised benefit instruction because it was not an error of law to conclude that the instruction was not generated by the facts. Biggers's testimony that the police threatened to take his daughter away was not "something akin to a plea agreement, a promise that [Biggers] will not be prosecuted, or a monetary reward or other form of direct *quid pro quo* compensation or endorsement." *Preston*, 444 Md. at 85.

Because we conclude that the circuit court did not err, we affirm both Moore's conviction and Baker's conviction.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.