UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2756

September Term, 2013

CARL LESTER GLEN

v.

STATE OF MARYLAND

Wright,
Reed,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: October 19, 2016

Appellant, Carl Lester Glen, was tried and convicted by a jury in the Circuit Court for Prince George's County of second-degree murder and conspiracy to commit murder.[1] The trial court sentenced appellant to life in prison, suspending all but 30 years, on the conspiracy charge and to a concurrent 30 years on the murder charge**.** From the conviction and sentence, appellant filed a timely notice of appeal. Appellant presents the following issues for our consideration:

> I. Whether the trial court erred by prohibiting the defense from playing the taped interview of an alleged co-conspirator at trial.
>
> II. Whether the trial court erred by allowing the State to elicit inadmissible hearsay evidence.
>
> III. Whether the trial court erred by failing to *voir dire* the jurors about whether the un-admitted exhibit was included in the evidence taken into the jury room and whether the trial court erred by denying defense counsel's motion for a mistrial.
>
> IV. Whether the trial court erred by failing to give a missing witness instruction.
>
> V. Whether the trial court erred by improperly curtailing defense counsel's closing argument.
>
> VI. Whether the trial court erred in failing to instruct the jury as to territorial jurisdiction for conspiracy.
>
> VII. Whether the trial court failed to grant defense counsel's motion for mistrial after Peter Roos testified that the Appellant sold marijuana to him.

[1] The trial court granted appellant's motion for judgment of acquittal on charges of conspiracy to commit armed carjacking and conspiracy to commit kidnaping. The jury acquitted appellant of first-degree murder.

For the reasons that follow, we shall affirm the judgments of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

Jacqueline Hernandez, the link between appellant and the victim, Alexis Cuevas, provided the following version of the events that culminated in the shooting death of Cuevas on December 4, 2009.[2] Hernandez testified that she met appellant in 2009 through a friend and that they initially engaged in a drug business together, eventually becoming a romantic couple.[3] Hernandez introduced appellant to Cuevas, her cocaine supplier, and acted as the intermediary between the pair. Cuevas "fronted" the drugs to Hernandez without requiring payment until appellant sold all the supplied drugs. On one occasion, Cuevas allegedly supplied appellant and Hernandez with $800 worth of "bad" cocaine, for which appellant decided not to pay. Cuevas repeatedly contacted Hernandez asking for the money, and she lied to him for approximately two weeks, providing untrue excuses for the delay in payment.

As a result of the non-payment of the drug money, Hernandez said, Cuevas burglarized her mother's house on Inlet Street in New Carrollton, Prince George's County, where Hernandez was living at the time, and she believed he meant to kill her and/or harm

[2] At the time of appellant's trial, Hernandez was incarcerated awaiting sentencing for her part in the crimes against Cuevas. She had previously entered into a plea agreement with the State.

[3] Hernandez and appellant were no longer involved romantically at the time of trial.

her family. When she told appellant that Cuevas had burglarized her house, appellant said, "Fuck him, going to get him."

Hernandez, appellant, Brandon Strong, Antonio Jones, and Javon Reid conceived a plan to tie Cuevas up, beat him, and kill him. While high on marijuana at Strong's apartment, Hernandez and appellant decided on December 4, 2009, to carry out their plan.

In the early morning hours of that day, the group went to Washington, D.C. to purchase a gun, taking appellant's car. They bought an AK-47 assault rifle and returned to Strong's apartment.[4]

Appellant called his friend Peter Roos, whom Hernandez knew only as "White Boy," and asked to borrow his car. Roos brought the car over but remained in Strong's apartment while Hernandez, appellant, Strong, Jones, and Reid set off in Roos's sedan.

As they drove around, Hernandez "play[ed] back and forth with the phone" with Cuevas, making plans to meet him in various locations, allegedly to give him the money she and appellant owed him. Because their surveillance revealed that Cuevas had someone with him at each stop—and because appellant and Hernandez wanted him alone—at approximately 5:00 a.m. on December 4, 2009, Hernandez and appellant decided to go back to Hernandez's mother's house on Inlet Street and have Cuevas meet them there. They parked up the street from the house, and Hernandez, appellant, and Jones exited the car, appellant with the AK-47 and Jones with the AR-15. Hernandez waited on the steps of the

[4] Hernandez said Jones had another gun in the car during the purchase of the AK-47, an AR-15 he had obtained from appellant. The AR-15, she said, was "involved" in the murder of Cuevas but was not used. After the shooting, Jones told her he had tried to pull the trigger of his gun but it jammed.

house, and appellant and Jones hid around the side. When Cuevas arrived, Hernandez snapped her fingers as a signal, and appellant and Jones appeared. Appellant, with the AK-47 in hand, yelled, "Don't move, mother fucker," after which Cuevas, a heavy set man of almost 300 pounds, took off running. Appellant ran after him and fired his weapon five to eight times. Cuevas fell on the street corner. Appellant ran to Cuevas where he lay and apparently found him still alive, so he hit Cuevas on the head so hard with the rifle that pieces of the wooden stock broke off.[5]

Hernandez ran back toward her mother's house, but realizing that Roos's car was parked in the other direction, she turned around to reach the car. When she arrived at the car, appellant and Jones asked where Cuevas's cell phone was. Hernandez did not have it, so she went to the body and attempted to retrieve it; however, she was unable to do so.

When Hernandez arose from Cuevas's body, appellant and Roos's car was gone. She ran to the house of a "crackhead" she knew, and when she eventually reached appellant by phone, he told her that he had dropped everyone off at Strong's apartment and that he

[5] The responding police officers found spent cartridges consistent with those used by an AK-47, and all fired by the same unknown firearm, along with broken pieces of wood near Cuevas's body. They also observed two lacerations and wood fragments on the back of Cuevas's head and a cell phone next to his body. A latent palm print later determined to match appellant was recovered from the hood of Hernandez's mother's Honda Accord, which had been parked in the driveway of her Inlet Street house.

Cuevas was pronounced dead at the scene. Autopsy revealed that he was the victim of three gunshot wounds received from a distance of more than two feet, lacerations on the back of his head caused by blunt force, and scrapes on his head and shoulder. According to the medical examiner, all the gunshot wounds contributed to blood loss and death. The cause of death was determined to be multiple gunshot wounds, and the manner of death, a homicide.

and Roos were on their way to pick her up. Thereafter, the trio returned to Strong's apartment to discuss what had happened; on the way there, appellant told Hernandez he would kill her if she said anything about the murder.

Once at Strong's apartment, appellant bragged that he had "beat the shit out of Alexis." He cleaned the AK-47 with bleach, wiped it down, and took it apart before giving it to Strong and Reid to dispose of. The other gun, the AR-15, was thrown into the trash. Hernandez and appellant then went to appellant's mother's house in Virginia.

Other of the State's witnesses provided further information regarding the series of events leading to the shooting of Alexis Cuevas. Cuevas's friend, Lauri Pitlauga,[6] testified that at about 12:30 a.m. on December 4, 2009, Cuevas picked her up, after which the pair drove around looking for a party. During their time in the car, Cuevas received ten to twelve phone calls from a woman who identified herself as "Jacky." Jacky had them running a "dog race," going to numerous locations to find her to collect money she owed Cuevas for drugs he supplied her, but she was not present at any of the places. Cuevas dropped Pitlauga off at her car at a Langley Park McDonald's at approximately 5:15 a.m. As Cuevas left the McDonald's, he did not head in the direction of his home.

At approximately 4:15 a.m. on December 4, 2009, Cuevas phoned another friend, Kelvi Escano, and told him that if anything happened, he was going to Jacky's house to

[6] Although the witness spelled her name "Pitlauga," it was subsequently transcribed as "Pitaluga."

pick up money she owed him. After he learned of Cuevas's murder, Escano alerted the police of the phone call.

Through a Spanish interpreter, Gerardo Reyes testified that in 2009 he lived next door to Hernandez's mother on Inlet Street. At 5:50 a.m. on December 4, 2009, he was outside his home warming up his truck, preparing to go to work. He saw two men running, with the man following shooting at the man leading. The man being chased was heavy-set, holding up his jeans as he ran, and the man chasing him was a darker complected black man with dreadlocks and a gun in his hand.[7] Reyes heard five to seven shots, after which the shooter ran toward the man he had shot. Reyes also saw a woman running toward the man who had been shot. After the shooting, the shooter and the woman left the area in a dark car that Reyes had not seen before.

Peter Roos testified that appellant was his "weed supplier." On December 3, 2009, Roos called appellant to see if appellant wanted to "hang out." Roos went to Strong's apartment and encountered Jacky Hernandez and several other men whom he had met a few times but did not know.

While Roos was playing video games, appellant, Hernandez, and perhaps two of the other men left the apartment, asking to borrow Roos's car to go "to the store or something." They did not return for several hours, and appellant did not answer Roos's repeated phone calls demanding the return of his car.

[7] Several witnesses stated that appellant, who had short hair at trial, had worn dreadlocks in 2009.

Early the next morning, appellant returned to the apartment with the same people who had left with him, but for Jacky. They were "[f]reaking out." Shortly thereafter, Roos and appellant left in Roos's car to pick up Jacky. When they returned to the apartment, appellant told Roos that he shot a man, and all the people present discussed what happened.[8]

Roos said he did not see a weapon that night, but he acknowledged that he had seen appellant with an AK-47 with a wood barrel[9] in the past. He told the investigating detective that he saw broken pieces of wood on appellant's hands when he returned to Strong's apartment.[10] In explanation, appellant told him that "the dude was still breathing, so he held the gun over his head and cracked it on him." Roos denied knowing Alexis Cuevas or being present when he was murdered.[11]

[8] Roos had been advised by a public defender about the possibility of invoking his Fifth Amendment right against incriminating himself in the crime of accessory after the fact.

[9] When asked on direct examination where the gun had wood on it, Roos responded, "On the barrel of the gun." He went on to testify that no other part of the gun had wooden components.

[10] When asked if he remembered telling the detective that the AK-47 was broken on the night of the murder, Roos changed his testimony to say he was not sure whether he had seen the AK-47 that night.

[11] There was no evidence that Roos was present on the scene at the time of the murder.

Hernandez and appellant were arrested in Virginia on December 14, 2009.[12] Hernandez said she initially "made up some lies" to tell the detectives, in an effort to protect herself and appellant. For example, she did not admit her or appellant's involvement in, or knowledge of, the events leading up to Cuevas's death. The charges against her and appellant were eventually dropped, but, as a result of further police investigation, they were re-arrested on March 29, 2012.

Pregnant and scared, Hernandez retained a lawyer, and in January 2013, she spoke to the State's Attorney's office about cooperating and agreeing to testify against appellant. She pled guilty to second-degree murder and conspiracy to commit kidnaping, receiving a 25 year prison sentence in exchange for truthful testimony at appellant's trial.

During her incarceration, appellant told her he planned to take his case to trial and advised her that he was going to blame Jones for Cuevas's murder. He further told her that Roos disclosed to the police that he saw blood on appellant's shoes on the night of the shooting, but appellant assured Hernandez that she had nothing to worry about.

At the close of the State's case-in-chief, appellant moved for judgment of acquittal. The court granted the motion as it related to the counts charging conspiracy to commit armed carjacking and conspiracy to commit kidnaping but denied the motion as to the remainder of the charges.

[12] Jones, Strong, and Reid were also arrested. The charges against Jones and Strong were dropped. Reid was indicted, but the State *nolle prossed* the charges against him prior to his scheduled 2011 trial.

In his case-in-chief, appellant called Gerardo Reyes, Peter Roos, and Jacqueline Hernandez as witnesses. At the close of all the evidence, appellant renewed his motion for judgment of acquittal, which the trial court denied.

Additional relevant facts will be supplied as necessary.

DISCUSSION

I.

Appellant first avers that the trial court erred when it refused to permit defense counsel to play for the jury the recorded statements Jacqueline Hernandez made to police upon her first arrest in 2009, statements in which she denied her and appellant's involvement in Cuevas's death, before changing her story dramatically after she entered into a plea agreement with the State to implicate herself and appellant in the murder. Apparently conceding that the trial court's ruling—that Maryland Rule 5-613[13] precluded the introduction of extrinsic evidence of the prior inconsistent statements because Hernandez did not deny making inconsistent statements—was proper, a concession with which we concur, appellant nonetheless argues that Md. Rules 5-802.1 and 5-616[14]

[13] Md. Rule 5-613(b) states: "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."

[14] Rule 5-802.1(a) provides that a statement that is inconsistent with a declarant's testimony is not excluded by the hearsay rule. Rule 5-616(a)(2) permits the attack on the credibility of a witness by use of questions directed at proving that the facts are not as testified by the witness.

provided alternate authority by which the court could have admitted the recordings of the 2009 statements and that the court abused its discretion in failing to consider those rules in rendering its decision.

The State's short answer to appellant's contention that the court should have considered Rules 5-802.1 and 5-616 is that it has not been preserved for our review because it was raised for the first time on appeal. We agree.

During his cross-examination of Jacky Hernandez, defense counsel asked if what she said in court during her direct examination was the truth. Hernandez asserted that it was and acknowledged that virtually everything she told the investigating detective in 2009 was a lie. She also agreed that her 2009 statement was entirely inconsistent with her trial testimony.

Upon that admission, defense counsel sought leave from the court to play the inconsistent statements from the 2009 recording. During a bench conference in which defense counsel averred that he should be permitted to play for the jury approximately two hours of the two and one-half hour recording, the State objected, noting that Hernandez had "already acknowledged that she made inconsistent statements and she went into detail. . . . It's no need to play the tape. It has—he already impeached her with it."

The court did not rule immediately on the admissibility of the recording, and defense counsel continued his cross-examination, having Hernandez reiterate all the lies she told the detective in 2009 and admit that in cooperating with the State she was looking out for herself. After lengthy cross-examination, the court granted the jury a short break.

Following the break, but before the return of the jury to the courtroom, the court ruled on the admission of Hernandez's recorded statement:

> THE COURT: All right. We're back on the record following our break. And before, Mr. [Defense Counsel], you conclude your cross-examination of this witness, and before the jury comes in, I think that under Rule 5-613 the extrinsic evidence of the prior inconsistent statement of the witness should not come in, as Miss Hernandez has not denied making a prior inconsistent statement. You have had one response to a question indicating that she did not recollect one of her answers that you asked specifically and you asked whether or not anybody had anything that would refresh her recollection. If you have some of the transcripts of that and you wish to show her that regarding that matter, we can use that to refresh her recollection if you want to pursue that one question. All right.

Defense counsel's only response to the court's ruling was, "All right." He did not object further or offer Rule 5-802.1 or 5-616 as potential authority for the admissibility of the recorded statement.

Md. Rule 8-131(a) provides, in pertinent part: "Ordinarily, the 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[.]" Our appellate courts have consistently held, in accordance with Rule 8-131, that we will generally not consider any point or question not plainly raised in or decided by the trial court. *Fitzgerald v. State*, 384 Md. 484, 505 (2004). The purpose of Rule 8-131(a) is "'to ensure fairness for all parties in a case and to promote the orderly administration of law.'" *Cecil Laroy Robinson v. State* ("*C.L. Robinson*"), 410 Md. 91, 103 (2009) (quoting *State v. Bell*, 334 Md. 178, 189 (1994)). Those considerations of fairness and judicial efficiency "ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court

so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge." *Chaney v. State*, 397 Md. 460, 468, (2007). In failing to raise before the trial court the contention he makes on appeal, appellant has waived his right to appellate review of the issue.

II.

Appellant's next claim of error rests on the court's admission of a hearsay statement, through Hernandez's testimony, that upon returning to Strong's apartment after the shooting, Antonio Jones told the group he did not shoot at Cuevas because his AR-15 rifle jammed and would not fire. The State argued at trial, and the court agreed, that Jones was a co-conspirator to the murder and that Md. Rule 5-803(a)(5) provided a co-conspirator exception to the hearsay rule.[15] In appellant's view, however, Jones's statement was made after the murder—the object of the conspiracy—had been completed and was not a statement made during the course of the conspiracy and in furtherance thereof. As such, it

[15] Rule 5-803(a)(5) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (a) Statement by party-opponent. A statement that is offered against a party and is:
>
> * * *
>
> (5) A statement by a coconspirator of the party during the course and in furtherance of the conspiracy.

should have been excluded. The admission of the statement was prejudicial, he claims, because the State proceeded on a theory that appellant was the sole shooter, rather than an aider or abettor to a second shooter. If the hearsay had not been admitted, and the jury believed that Jones, known to be in possession of a rifle at the time of the shooting, had been the shooter, it would have had no basis upon which to convict appellant.

Jacqueline Hernandez testified that although both appellant and Jones carried guns on the night of the murder, only appellant fired at Cuevas. When the prosecutor asked how she knew that Jones did not fire the AR-15, defense counsel objected, and the following colloquy occurred at the bench:

> MS. [Prosecutor]: He's a co-conspirator. She certainly can testify. She's already testified that he was in on the conspiracy. So she can testify to his statements. So they are co-conspirators at this point.
>
> MR. [Defense counsel]: . . . The leaders, all the leaders of the brigade are the two, Jacky and Carl. None of the other three are charged as co-conspirators in this case, and I'll continue to say that this is not in furtherance of the conspiracy, either. The spirit of the objection is the conspiracy has been met, the death of Mr. Cuevas. They go back. This not [sic] an attempt to conceal anything. There is a statement about whether this gun was functioning or not, something like that. The conspiracy, the object of the conspiracies is over.
>
> MS. [Prosecutor]: The object of the conspiracy not over [sic]. They're all still together, all still talking about the crime. There's still conversation to be had. Certainly she can talk about what her co-conspirators said. And she is definitely able to talk about it. She is able to talk about it further. Just because the two ring leaders are the master minds of this, it's clear that he is down with the conspiracy because he's out there with the AR-15, ready to fire.

> THE COURT: All right. The Court finds that the defendant's brothers, Antonio and Brandon, [sic] were all conspirators in this and all went out with the purpose of getting the victim and ultimately killing him. The court finds that the conversation now with respect to, among these various co-conspirators, is close to the actual shooting, they're still discussing the crime that they have engaged in. This is not a conversation that's happened several days later, whatever else. And the Court finds that the goal of the crime is—not only is it still in, they're still in the heat of the crime. And so the Court will allow his testimony and meeting immediately after leaving the body of the defendant [sic] and talking about it.

Pursuant to the court's ruling, the prosecutor asked Hernandez, "[H]ow do you know that Antonio didn't shoot?" She responded that after returning to Strong's apartment the group discussed "the whole scene, what happened," and Jones told the others "that he tried to pull the trigger but it jammed, the gun jammed."

In *Bernadyn v. State*, 390 Md. 1, 7-8 (2005), the Court of Appeals reiterated the standard of review for appeals challenging a trial court's ruling on the admissibility of hearsay evidence:

> We review rulings on the admissibility of evidence ordinarily on an abuse of discretion standard. *See Hopkins v. State*, 352 Md. 146, 158, 721 A.2d 231, 237 (1998). Review of the admissibility of evidence which is hearsay is different. Hearsay, under our rules, *must* be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or is 'permitted by applicable constitutional provisions or statutes.' Md. Rule 5–802. Thus, a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility. Whether evidence is hearsay is an issue of law reviewed *de novo*.

(Emphasis in original). Because appellant challenges the trial court's ruling that Jones's statement falls within the co-conspirator exception to the hearsay rule, we review the trial court's ruling for legal error. *Shelton v. State*, 207 Md. App. 363, 375 (2012).

There is no question or dispute that Jones's statement, introduced through the testimony of Hernandez, comprised hearsay. *See* Md. Rule 5-801(c) (hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). Unless his statement fell under an exception to the hearsay rule, or was otherwise permitted by constitutional provision or statute, it should have been excluded. *Bernadyn*, 390 Md. at 8.

We agree with the trial court that Jones's statement was properly admitted, pursuant to Rule 5-803(a)(5), which permits the introduction of a statement by a co-conspirator of a party, even if the statement is hearsay, so long as the co-conspirator made the statement "during the course of and in furtherance of the conspiracy." As this Court explained in *Manuel v. State*, 85 Md. App. 1, 16 (1990) (quoting *Terrell v. State*, 34 Md. App. 418, 425 (1977)):

> [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.

For the co-conspirator exception to apply and permit admission of a hearsay statement, "the State must present evidence that the defendant and the declarant were part of a conspiracy, that the statement was made during the course of the conspiracy, and that

the statement was made in furtherance of the conspiracy." *Shelton*, 207 Md. App. at 376. Appellant does not dispute that he and Jones were parties to a conspiracy.[16] He argues only that at the time Jones made the statement deemed admissible hearsay by the court, the murder, which was the object of the conspiracy, had been completed and, therefore, the statement was not made during the course or in furtherance of the conspiracy.

In *State v. Rivenbark*, 311 Md. 147 (1987), Rivenbark and his accomplice, Johnson, were charged with the May 1981 felony-murder committed during their robbery of Johnson's aunt. *Id.* at 150. Shortly after the murder, Rivenbark told Shirley Wilson, Johnson's girlfriend, that everyone involved had an alibi and that "[a]s long as everyone stays cool everything will be fine." *Id.* at 150-51.

Six months later, Wilson broke off her relationship with Johnson and informed the police of Johnson's role in the crimes. *Id.* at 151. At the request of the police, she spoke with Johnson while wearing a wire, which recorded numerous statements inculpating him and Rivenbark in the murder. *Id.* The State introduced Johnson's statements into evidence during Rivenbark's trial. *Id.*

On appeal, the Court of Appeals was tasked with determining whether the co-conspirator exception to the hearsay rule applied to the facts of the matter. The principal

[16] "Criminal conspiracy" has been defined as "'the combination of two or more persons, who by some concerted action seek to accomplish some unlawful purpose, or some lawful purpose by unlawful means.'" *Savage v. State*, 212 Md. App. 1, 12 (2013) (quoting *Mason v. State*, 302 Md. 434, 444 (1985)). It is clear that, in together fashioning a plan to kidnap, beat, and kill Cuevas, appellant, Hernandez, Strong, Jones, and Reid all conspired to commit the crime.

question was whether, after the conspirators had obtained their central objective of robbery and murder, there was an implied subsidiary conspiracy of concealment of the crimes during which one co-conspirator could continue to harm his accomplice with a hearsay declaration. *Id.* at 158.

The Court held:

> We therefore agree with the Court of Special Appeals that the better reasoned cases reject the theory that every criminal conspiracy includes, by implication, a subsidiary conspiracy to conceal evidence of the substantive offense that the conspirators agreed to commit. Consequently, we adopt the *Krulewitch* [*v. United States*, 336 U.S. 440 (1949),] view that a co-conspirator's statement is inadmissible unless it was made before the attainment of the conspiracy's central objective.
>
> This is not to say that statements made in connection with acts of concealment are never admissible. As noted above, conspirators do not necessarily achieve their chief aim at the precise moment when every element of a substantive offense has occurred. Before the conspirators can be said to have successfully attained their main object, they often must take additional steps, *e.g.*, fleeing, or disposing of the fruits and instrumentalities of crime. Such acts further the conspiracy by assisting the conspirators in realizing the benefits from the offense which they agreed to commit. . . . Therefore, statements made in connection with such acts occur before the conspirators have attained their chief objective and are admissible. . . . On the other hand, it is necessary to distinguish statements made in connection with acts of concealment performed long after the conspirators have realized all benefits from the offense which they had agreed to commit. Such statements occur after the conspirators attained their principal aim and are, therefore, ordinarily inadmissible.

Id. (internal citations omitted).

The Court acknowledged that the disposal of the instrumentalities of the crime, that is, shoestrings used to bind the victim, a ski cap used as a mask, and bloody gloves, into

the trash to be picked up by sanitation workers the day after the murder was in furtherance of attaining the chief objective of the conspirators, but that the chief objective of the conspiracy to conceal the murder and burglary "clearly had been achieved" by the time of Johnson's inculpatory statements against Rivenbark six months later. *Id.* at 159. In a footnote, the Court noted that most decisions on the issue do not reveal the amount of time that passed between the commission of the substantive offense and the co-conspirator's statement, but it cited cases that indicated the amounts of time the courts "have found tolerable," ranging from one-half hour to three months. *Id.* at 156 n.3.

In this matter, the trial court found that appellant and Jones had engaged in a conspiracy, with the central objective of the conspiracy being the murder of Cuevas. The court also found, based on the undisputed evidence, that Jones's statement that he had not fired his gun because it jammed, occurred very shortly after the shooting. We find no clear error in those factual findings.

We conclude that, under the particular facts of this case, the central objective of the murder was not met until the conspirators took the additional steps of disposing of the "instrumentalities of the crime," *id.* at 158, which were the weapons used or intended to be used in the murder. Because Jones made his statement to the group shortly after the murder and before he and appellant had disposed of their weapons, it was made during the conspiracy. And, with respect to the furtherance requirement of Rule 5-803(a)(5), we conclude that Jones's statement was in furtherance of the conspiracy because it explained his failure to act in concert with appellant in the attack on Cuevas, as planned. As we stated in *Shelton*, 207 Md. App. at 378 (quoting *Walker v. State*, 144 Md. App. 505, 542-43

(2002)), "the requirement that the statement be made in furtherance of the conspiracy is interpreted broadly." Thus, "'[i]f some connection is established between the declaration and the conspiracy[,] then the declaration is taken as in furtherance of the conspiracy.'" *Id.* (quoting *Irvin v. State*, 23 Md. App. 457, 472 (1974)). Accordingly, the trial court properly admitted Jones's hearsay statement.

III.

Next, appellant argues that the trial court erred by declining to *voir dire* the jurors as to whether a demonstrative exhibit used by an expert witness at trial, but not admitted into evidence, had gone back to the jury room and been considered by the jury during its deliberations. He also contends that the trial court's acceptance of the jury's verdict over his objection and its refusal to grant a mistrial on the ground that the jury had considered an exhibit not entered into evidence was an abuse of its discretion.

Following counsel's closing argument on Friday, December 20, 2013, the trial judge advised the jury that "[a]ll of the exhibits that I have allowed in during the trial will go back." Once the jury was dismissed to the deliberation room for lunch, the trial judge asked, "Counsel, could you come forward and look at the exhibits that are going to go back with the jurors at this time and make sure that we are all on the right page with respect to entered exhibits." Presumably, counsel examined the exhibits, which were provided to the jury, and shortly thereafter, the jury began its deliberations.

By 8:50 that evening, the jury had not reached a verdict and was dismissed for the night. The trial judge announced that she was not available to continue deliberations the following Monday but that the administrative judge would permit another judge to continue

deliberations and take a verdict if one were reached that day, in lieu of continuing the trial until January 2, 2014, after the Christmas holiday.

When the parties re-convened on Monday, December 23, 2013, with a different judge presiding, the deputy clerk confirmed that all the exhibits were "right here," having been collected from the jury room on Friday night. The jury began deliberations and was told the exhibits would be sent in after counsel confirmed the exhibits with the clerk.

Following an off-the-record discussion about the exhibits, there appeared to be some confusion about State's exhibit 81, a poster board of a generic palm print (not appellant's palm print that was recovered from the hood of Hernandez's mother's car following the murder), used as a demonstrative aid by the expert latent print examiner to explain generally to the jury about the sections of the palm and the 500 identifying characteristics of a palm print that may be used to compare a print lifted from a crime scene to a known print. Exhibit 81 had been marked for identification, but no one was sure whether it had been admitted into evidence or had gone back to the jury room on Friday.

The prosecutor advised it was "the State's impression or our understanding that it was admitted," but she could not say that she had seen the poster board go back to the jury the previous Friday. Defense counsel did not know whether the exhibit had been admitted, but he suspected that it had gone back to the deliberation room. As a result, he moved for a mistrial on the ground that he believed the jury had considered an un-admitted exhibit.

The judge declined to rule on the motion at that time, instead speaking with courtroom personnel and attempting to consult with the judge who had presided over the trial the previous Friday; however, the previous judge was unreachable. The court reporter

asserted that she had found no words from the judge in the transcript admitting the exhibit. The deputy clerk "[did] not recall that board going back" but could not say for sure, and the bailiff did not remember how many poster boards he had taken to the deliberation room.

As defense counsel argued his motion for mistrial, the court received a note that the jury had reached a verdict. Defense counsel remained of the opinion that the exhibit had been marked but not admitted and had gone back to the jury room with the admitted poster board exhibits. Because the unadmitted exhibit may have been influential in the jury's decision making, he argued, appellant had not been afforded a fair trial.[17] Defense counsel asserted that the jury's possible access to the exhibit was an "issue that should be probed prior to the jury . . . announcing the verdict."

The prosecutor pointed out that in addition to the deputy clerk's recollection that the exhibit had not gone back to the jury deliberation room, both parties had been given an opportunity to review the exhibits to ensure that everything going back to the jury had been properly admitted, and defense counsel never advised the clerk that an unadmitted exhibit remained among them. In any event, she continued, exhibit 81 was used solely as a demonstrative aid by the latent print expert, presented to the jury, used by the defense upon cross-examination of that witness, and referenced by both sides during closing arguments. As such, the exhibit was not prejudicial to appellant.

[17] Counsel alternately argued that mistrial was appropriate because the jury, which had been deadlocked after eight hours of deliberations and had been given an *Allen* charge twice, likely compromised on a "hair-trigger verdict."

The trial judge again questioned the deputy clerk, who advised that she had examined the exhibits that morning to ensure only admitted exhibits went back to the jury. She said she had no intention of sending the "two hand prints" to the jury, as she did not show them as being admitted. When she retrieved the poster boards from the jury room on Friday, she remembered grabbing only the "bigger poster boards" but not the smaller ones, and exhibit 81 was a "smaller one." She later reiterated that "I really don't think I sent back Exhibit 81."

Ruling that "all indications from the file was that that exhibit was not admitted," the trial judge continued:

> THE COURT: . . . Madam clerk, when she came in this morning, indicated that she did not believe that that had gone back because that was not in the pile that she had for the exhibits to go back to the jury.
>
> I've heard you all's argument regarding the exhibit that was used as demonstrative evidence during the course of the trial. The Court is satisfied, from what I've heard thus far from madam clerk and the way that she had the exhibits, that this is not one of the exhibits that, one, that she had with those that were admitted, that went back to the jury.
>
> Now, during the course of argument previously, madam state believed that that was admitted, had gone back. Madam clerk clearly objected to that. Mr. [Defense counsel] believed that it had gone back, but he said he didn't really know; he just indicated what he believed.
>
> I must rely on what I have from the clerk of the Court because it is her responsibility to keep these exhibits straight. So the motion for mistrial is denied.

Defense counsel asked the court either to send a note to the jury, prior to receiving the verdict, inquiring whether they had exhibit 81 during deliberations on Friday or to show

the jury the exhibit in open court and ask if it had been part of their consideration. The trial judge, "not convinced that will resolve anything" because the jurors could have "a myriad of responses that wouldn't clear anything up," denied the request. Acknowledging that appellant had made his record, the judge received the jury's verdict.[18] Thereafter, the deputy clerk, after speaking with the bailiff, advised the court and counsel, "[t]he poster boards were ones that I took back, and Exhibit 81 was not with it. I just wanted to state that, they did not go back."

We review a court's ruling on a motion for mistrial under the abuse of discretion standard. *Nash v. State*, 439 Md. 53, 66-67, *cert. denied*, 135 S. Ct. 284 (2014). "Our determination of whether a trial court abused its discretion 'usually depends on the particular facts of the case [and] the context in which the discretion was exercised.'" *Wardlaw v. State,* 185 Md. App. 440, 451 (2009) (quoting *King v. State*, 407 Md. 682, 697 (2009)). "Regarding the range of a trial judge's discretion in ruling on a mistrial motion, reviewing appellate courts afford generally a wide berth." *Nash,* 439 Md. at 68. And, we remain mindful that because the grant of a mistrial is "an extraordinary measure, it should only be granted where manifest necessity, as opposed to light or transitory reasons, is shown." *Ezenwa v. State*, 82 Md. App. 489, 518 (1990).

[18] As the parties waited for the jury to arrive in the courtroom, defense counsel added that, following the verdict, he would renew his request to ask the jury about the exhibit "so that there's just no room for any question" because at that point "it's harmless." The judge, having "resolved the issue to my satisfaction," denied the request.

It is clear that implicit in the right to an impartial jury trial is the right to have the jury's verdict be "based solely on the evidence presented in the case." *Johnson v. State*, 423 Md. 137, 148 (2011) (quoting *Couser v. State*, 282 Md. 125, 138 (1978)). Therefore, consideration by the jury of extrinsic evidence implicates the defendant's constitutional right to a fair trial before an impartial jury. *Id.* at 148-49.

When, as here, the defendant alleges that the jury considered evidence not admitted at trial, "a proper exercise of discretion must be prefaced by an adequate investigation." *Id.* at 151. Indeed, when the court is informed that the jury "might have been influenced by information not presented to the jury in the form of evidence or legitimate argument of counsel, and the defense reacts with a motion for a mistrial, the court must conduct a sufficient inquiry to ascertain whether the jury's deliberations have been corrupted, before the court fairly can exercise its discretion in determining whether a mistrial is warranted." *Id.* at 152. The level of inquiry is dictated by the particulars of the misconduct. *Id.*

In this matter, when the parties discovered that the jury may have considered unadmitted evidence during its deliberations, the trial judge determined that *voir dire* of the jurors was unnecessary in light of the *voir dire* she conducted of virtually every officer of the court in the courtroom. The result of the judge's questioning of the attorneys and court personnel revealed that neither the prosecutor nor defense counsel could state definitively whether exhibit 81 had gone back to the jury as it began its deliberations, although defense counsel suspected it may have. The deputy clerk, who was ultimately responsible for the administration of the exhibits, stated that she had no intention of sending the "two hand prints" to the jury and that she remembered grabbing only poster boards

larger than exhibit 81 from the jury room after deliberations on Friday. Later, after a conversation with the bailiff, she strengthened her answer to say, "The poster boards were ones that I took back, and Exhibit 81 was not with it. I just wanted to state that, they did not go back."

Accepting the clerk's declaration that the jury had not considered exhibit 81over defense counsel's suspicion that perhaps it had, the court ruled that *voir dire* of the jury was unnecessary and likely to evoke confusion in light of the several other poster boards the jury had properly considered. We agree and conclude that the trial judge conducted a sufficient inquiry. The circumstances of this case required the judge to do no more than she did, particularly in light of the facts that exhibit 81, a poster of a general palm print used by the latent print expert solely to explain to the jury the sections of the palm and to provide an example as to the characteristics print experts may use to compare palm prints, was hardly of central importance to the issue the jury had to decide, which was whether appellant murdered Cuevas. Moreover, the jury had already viewed and considered the exhibit during the print expert's trial testimony. Appellant failed to show any infringement upon his constitutional right to a fair trial before an impartial jury, and the trial judge therefore properly denied his request to *voir dire* the jury and his motion for mistrial.

IV.

Appellant also claims that the trial court erred when it declined to give the jury a missing witness instruction regarding the absence of Javon Reid as a trial witness.[19]

[19] *See* Maryland Pattern Jury Instructions-Criminal ("MPJI-Cr.") 3:29, which states:

Because the charges against Reid relating to his part in the murder of Cuevas had been dropped in exchange for his agreement to testify before a grand jury in appellant's case, and return for his trial, appellant concludes, the witness was peculiarly available to the State and should have been produced to testify at trial.

A "missing witness" instruction informs the jury that the failure of a party to call a material witness permits the jury to infer that his testimony would have been unfavorable to the party who failed to call such a witness, in this case, the State. *Dansbury v. State*, 193 Md. App. 718, 741 (2010). In *Woodland v. State*, 62 Md. App. 503, 510 (1985), this Court explained that "the missing witness rule applies where (1) there is a witness, (2) who is peculiarly available to one side and not the other, (3) whose testimony is important and non-cumulative and will elucidate the transaction, and (4) who is not called to testify." Notably, however, an adverse inference cannot be drawn if the witness is equally available to both sides, *Dansbury*, 193 Md. App. at 742, and the court has "no discretion to grant the instruction where the facts do not support the inference." *Walter E. Robinson* ("*W.E. Robinson*"), 315 Md. 309, 319 n.7 (2008). Even assuming that Reid's testimony would

(…continued)

> You have heard testimony about _____, who was not called as a witness in this case. If a witness could have given important testimony on an issue in this case and if the witness was peculiarly within the power of the [State] [defendant] to produce, but was not called as a witness by the [State] [defendant] and the absence of that witness was not sufficiently accounted for or explained, then you may decide that the testimony of that witness would have been unfavorable to the [State] [defendant].

have been important, non-cumulative, and elucidating to the crime, appellant's claim of error in the court's decision not to give the missing witness instruction nonetheless fails because he did not show that Reid was peculiarly available as a witness to the State.

In discussing jury instructions, defense counsel requested that the court give MPJI-Cr. 3:39, arguing that the State *nolle prossed* Reid's case in 2011 in exchange for his testimony against appellant before the grand jury and at trial. He further asserted that pursuant to the deal, the State released Reid from its peculiar control, with the promise that he return for appellant's trial. Because the deal with the State required his testimony at appellant's trial, the State, which, by the time of appellant's trial, was unable to locate Reid, should still have been deemed to have peculiar control over him.

The State countered that Reid was not within its control. The prosecutor had not seen nor heard from Reid since he was released from custody in May 2011. She and the lead detective had made efforts to locate him, as had his own defense attorney, all to no avail. She pointed out, however, that appellant had Reid on his own witness list, and, as a friend of his, appellant had a better chance of finding Reid through family members or mutual friends. As either side could have produced the witness, the prosecutor concluded, the missing witness instruction was not warranted.

The court ruled as follows:

> THE COURT: The court is going to deny the request for the instruction on the missing witness. Mr. Reid has been out of the custody of the State since 2011. The State couldn't hold him in jail for two years waiting to testify in this matter.

> In fact, in this case I think the defendant wasn't even charged until 2012, and we would not have just had him sit in jail between 2011 and December of 2014.
>
> I do note that he's to be a cohort of Mr. Glen, and so there certainly is—he's as likely to be located through friends and family as through the police, and Mr. Reid seems to be avoiding at this point in time.
>
> But I don't think that Mr. Reid is currently particularly within the power of the State to produce. And having looked for him, having tried to locate him, the fact that they can't locate him or explain where he is does not put him in the State's possession. So I think the defendant has not convinced the Court that they could have otherwise got him there.

Based on the assertions by the State that it, along with the police, had made efforts to locate Reid and have him appear for trial, we agree with the trial court that the missing witness instruction was not generated, as Reid was not peculiarly in the control of the State. After the State *nolle prossed* the charges against Reid in 2011, there was no reasonable way for it to maintain custodial or other control over him until appellant's 2014 trial. Indeed, at the time Reid was released from custody, appellant had not yet been re-charged with Cuevas's murder, and there was no certainty appellant would even proceed to trial. Moreover, the defense had the same trouble locating Reid, even though he was apparently a friend of appellant's.

Even if the evidence properly generated the missing witness instruction, it remains within the trial court's discretion to grant or deny the instruction "when the facts would support the inference." *W.E. Robinson*, 315 Md. at 319 n.7. In general, "the court is under no obligation to give an instruction on the matter. It may do so, and in certain circumstances

perhaps it *should* do so, but . . . failure to do so is not error or an abuse of discretion." *Keyes v. Lerman*, 191 Md. App. 533, 546 (2010) (emphasis in original).

In addition, we have explained:

> The failure to grant an affirmative instruction does not remove the availability of the inference. As a consequence, whatever prejudice may usually come from not giving an advisory instruction is diminished, because the inferential thought process is still available. The prejudice is simply that such an inference is not given preferred instructional attention over any other inferences available from the testimony or absence of testimony. Possibly for that reason, judges hesitate to grant the missing witness instruction; they do not wish to emphasize one legitimate inference over all others which the jurors have been told are solely within their judgment.

Jarrett v. State, 220 Md. App. 571, 592-93 (2014) (quoting *Patterson v. State*, 356 Md. 677, 685 (1999)). As such, "despite the trial court's decision not to give a missing evidence instruction, the jury was still free to infer that the [missing] evidence would have been detrimental to the State's case." *Id.*

Indeed, during closing argument, defense counsel reminded the jury that it was free to infer that Reid's testimony may have been detrimental to the State. He reiterated that initially the charges against appellant, Hernandez, and Strong were dropped, leaving only Reid as a potential defendant and that Reid remained in jail for the crime for 15 months before his case was ultimately dropped as well. Counsel also drew the jury's attention to the fact that "you know you haven't heard from people like Javon Reid, people who were allegedly on the scene of that crime." However, he continued, "Javon almost went to trial. He almost went to trial on some serious stuff with some alleged serious evidence." If "you put Javon on that stand to say these things, and you hit him with . . . anything else that's

inconsistent from what they said, and this thing starts going straight to pot." Thus, defense counsel alerted the jury that it could infer that Reid's testimony would have been detrimental to the State.

For the foregoing reasons, the trial court was not required to give the missing witness instruction and did not abuse its discretion in failing to do so.

V.

Appellant further asserts that the trial court erred by improperly curtailing defense counsel's closing argument in an erroneous belief that a comment he made about Hernandez's testimony was not in evidence. The State concedes that the trial court abused its discretion in sustaining the State's objection, as the evidence was supported by Hernandez's trial testimony. The State nonetheless argues that "the trial court's *de minimus* limitation on Glen's closing argument did not prejudice him."

During his cross-examination of Hernandez, defense counsel elicited the facts that on the night of the murder, Hernandez had been using appellant's cell phone to lure Cuevas to various locations in an effort to get him alone and that Cuevas had spoken only to her on that phone, not appellant. Defense counsel asked:

> Q. And when you were arrested by the police the first time, you were in possession of C.J.'s SIM card, weren't you?[20]
>
> A. Yes.

[20] "A SIM card or Subscriber Identity Module is a portable memory chip used in some models of cellular telephones. The card simplifies switching to a new phone by simply sliding the SIM out of the old phone and into the new one, thereby transferring personal identity information, cell phone number, phone book, text messages and other data." *State v. Dyas*, 32 So. 3d 364, 366 n.1, *writ denied*, 49 So. 3d 397 (2010).

Q. It was in your purse, wasn't it?

A. Yes.

(Footnote added).

During his closing argument, defense counsel attempted to paint Hernandez as a heartless person and an unreliable witness, intent only on her own best interest. He highlighted some of the lies she initially told the police, such as "I don't know nothing" and "I wasn't with [appellant] that day." However, he continued, "[w]hen she was arrested, she had Carl's SIM card in her purse."

The State objected to that characterization, erroneously arguing that it "was not in evidence. She did not testify to that, under no circumstances did she, and we will have the court reporter read it back. She never testified to that."[21] Despite defense counsel's assertion that "[s]he absolutely did," the court did not recall the testimony, sustaining the State's objection and granting its motion to strike "the argument regarding the SIM card." Compounding the error, when defense counsel reminded the jury that it should rely on its own memory, the court added, "they have to agree with what I say, and I already ruled on this matter. You can't argue it because it's not a part of the evidence."

Appellant argues that Hernandez's possession of appellant's SIM card was "highly relevant" because her possession of the card cast doubt upon the cell phone records that purportedly placed appellant at the scene of the murder. Moreover, he continues, because

[21] The lapse in the prosecutor's memory is understandable, as closing argument occurred 12 calendar days after Hernandez's cross-examination.

Hernandez was an accomplice to the murder, her testimony required corroboration, and it was possible that the jury believed that "the *only* corroborating evidence was the cell phone records placing Appellant at the scene of the crime." (Emphasis in original).

The Court of Appeals outlined the contours of permissible closing argument in *Wilhelm v. State*, 272 Md. 404, 412–13 (1974) (citations omitted):

> As to summation, it is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is afforded a wide range. Counsel is free to use the testimony most favorable to his side of the argument to the jury, and the evidence may be examined, collated, sifted and treated in his own way. Moreover, if counsel does not make any statement of fact not fairly deducible from the evidence his argument is not improper, although the inferences discussed are illogical and erroneous. Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom; the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of witnesses which the [prosecution] produces.
>
> While arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel, generally speaking, liberal freedom of speech should be allowed. There are no hard-and-fast limitations within which the argument of earnest counsel must be confined—no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.

(Citations omitted).

Because defense counsel was entitled to discuss the evidence admitted at trial and all reasonable inferences deducible therefrom, it was indeed an abuse of the trial court's discretion to curtail his inference that the cell phone records that allegedly placed appellant at the scene of the murder were dubious because Hernandez, exclusively, used his phone to contact Cuevas on the night of the murder and because she had the SIM card from his phone when she was arrested. The State concedes as much.

It is also true, however, that a court's abuse of discretion in a ruling relating to the curtailment of closing argument is subject to a harmless error analysis and that this Court "will not overturn a judgment, even where error is found, unless it is likely that the proponent of the error was injured." *Ingram v. State*, 427 Md. 717, 733 (2012). And, such prejudice "must be shown as a 'demonstrable reality' and not as a 'matter of speculation.'" *Wilhelm,* 272 Md. at 416 n.6 (quoting *Baldwin v. State,* 5 Md. App. 22, 28 (1968) (quoting *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 462 (1956))). "The decisive factors [in testing for prejudice] are the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error." *Wilhelm*, 272 Md. at 416 (1974) (internal citations omitted).

In our view, the case against appellant was not close. The damaging testimony by his co-conspirator, Hernandez, established appellant's presence at the scene of the murder, as well as a timeline for the events leading up to Cuevas's murder. Her testimony was generally corroborated by not only cell phone records plotting the progress of appellant's cell phone on the night of the murder, but also the testimony of Pitlauga, Escano, Roos, and Reyes, the physical evidence of the spent cartridges consistent with the use of an AK-

47 seen with appellant, wood chips at the scene of the murder and on appellant's hands, and appellant's palm print found at the scene of the murder.

Hernandez's possession of appellant's SIM card at the time of their arrest was not, contrary to appellant's assertion, central to his case. As the State points out, the testimony of the cell phone mapping expert served only to place someone using appellant's cell phone or SIM card at the scene of the murder. Given Hernandez's concession that it was she who used the cell phone to lure Cuevas to various locations, the testimony regarding the plotting of the cell phone data was not particularly damaging to appellant. In addition, Hernandez's possession of appellant's SIM card upon their arrest, almost two weeks following the murder, was not relevant to who possessed it at the time of the murder in the absence of testimony about when and how Hernandez came into possession of the SIM card.

Although the trial court took no steps to mitigate the effects of the error, we cannot say that appellant was unfairly prejudiced by the court's abuse of discretion in curtailing his closing argument. As such, the totality of the circumstances "renders harmless any rhetorically assumed abuse of discretion." *Ingram*, 427 Md. at 735.

VI.

As his next claim of error, appellant argues that the trial court abused its discretion in refusing to instruct the jury on the issue of territorial jurisdiction for the conspiracy charge. Because Hernandez testified that the conspiracy was completed in Brandon Strong's apartment, which she thought was in "Southeast" Washington, D.C., appellant concludes there was a genuine dispute as to whether the conspiracy was hatched in

Maryland or Washington, D.C., and the jury should have been permitted to decide whether Maryland had territorial jurisdiction over the crime.[22]

During discussion regarding the parties' proposed jury instructions, defense counsel requested the inclusion of MPJI-Cr. 5:09, territorial jurisdiction.[23] He argued that Hernandez's statement that Strong's apartment was located in Washington, D.C. was enough to generate the instruction. The State disagreed, adding that Roos, the investigating detective, and the cell phone mapping expert had all testified that the apartment was in Oxon Hill, Maryland, albeit "right up against the D.C. line."

The court ruled:

> THE COURT: All right. Well, Ms. Hernandez did testify that the apartment where they came up with this plan to kidnap and kill the victim was in southeast Washington, D.C.
>
> Detective Eckrich gave the house number and the street name but not the city where the apartment was located, when we asked if he went there, because I had the opportunity to review the recorded testimony on that.
>
> So I thought, initially, that this issue might really be before the Court. But Detective Seger came in today and provided maps for us, which clearly show the location as being in Oxon Hill, Maryland.

[22] Appellant does not, nor can he, given the evidence, claim any doubt as to territorial jurisdiction for the murder of Cuevas. There appears to be no dispute that the murder occurred in New Carrollton, Maryland.

[23] MPJI-Cr. 5:09 states: "You have heard evidence that the crime of (offense) was not committed in the State of Maryland. While not all of the elements of the crime of (offense) must occur in Maryland, in order to convict the defendant, the State must prove, beyond a reasonable doubt, that at least one of the following elements of the crime occurred in Maryland: (essential element(s) for territorial jurisdiction)."

> Ms. Hernandez is under the mistaken belief that the apartment is in D.C. Initially, I was concerned that there would be no more evidence generated because people were just not asked as to the city.
>
> But Detective Seger's map gives the street name and the city and provides a map that shows the location of the house and where the killing took place and where the apartment was as all being clearly in Maryland, and that apartment is in Oxon Hill, Maryland.
>
> So the Court finds that although Ms. Hernandez was under the mistaken belief that the apartment was in Washington, D.C., there is definitive evidence that the location of the apartment is, in fact, in Maryland.
>
> To instruct the jury that they then needed to find that some elements took place in Maryland, if it was elsewhere, would be confusing and incorrect and that request is, therefore, denied.

As we explained in *Jones v. State*, 172 Md. App. 444, 453-54 (2007):

> Territorial jurisdiction describes the concept that only when an offense is committed within the boundaries of the court's jurisdictional geographic territory, which generally is within the boundaries of the respective states, may the case be tried in that state. In Maryland, territorial jurisdiction is not an element of the offense for which the defendant is on trial, so as to require that it be proven in every case. However, "when evidence exists that the crime may have been committed outside Maryland's territorial jurisdiction and a defendant disputes the territorial jurisdiction of the Maryland courts to try him or her, the issue of where the crime was committed is fact-dependent and thus for the trier of fact." Territorial jurisdiction may be proven by circumstantial evidence.
>
> For territorial jurisdiction to be an issue for the jury to decide, the evidence must raise a genuine dispute about where the crime was committed. A bald conclusory assertion that the offense was not committed within Maryland's territorial jurisdiction . . . is not, by itself, sufficient to create a dispute as to territorial jurisdiction—there must be some supportive evidence. It is not enough for the defendant to "make a bare

> allegation that the crime might have occurred outside of Maryland in order to sufficiently generate the issue of lack of jurisdiction." When the evidence generates a genuine issue of territorial jurisdiction, the prosecution must prove, beyond a reasonable doubt, that the crime was committed within the geographic limits of the State of Maryland.

(Internal quotation marks and citations omitted).

Here, there was no genuine dispute about where the conspiracy to murder Cuevas was completed. Hernandez's undisputed testimony established that the conspiracy to kidnap, beat, and murder Cuevas was formed in Brandon Strong's apartment on Southern Avenue.

Although Hernandez initially stated that the apartment was in "Southeast," defense counsel himself appears to have verified the location of the Southview Apartments on Southern Avenue in Maryland, having Hernandez clarify that Strong's apartment was "[b]y National Harbor, in that vicinity," in the city of Oxon Hill near the D.C./Maryland line. When Hernandez testified about the specifics of the plan to kill Cuevas the night before the murder, she agreed that she, appellant, Jones, Reid, and Strong were in Oxon Hill, "the South Side," before driving "up to someplace in D.C." to obtain a weapon. It appears unlikely that she would have commented that the group drove "to someplace in D.C." if they had already been in the District.

In addition, the lead detective, a 19-year veteran of the Prince George's County Police Department, testified that he had been to Brandon Strong's apartment near Southern Avenue, which was "[c]lose to the District of Columbia." And, the latent print expert created a map, State's exhibit 95, which plotted the locations of appellant's cell phone

usage on the night in question. That map clearly showed that the address provided for Strong's apartment was located in Oxon Hill, Maryland. The evidence sufficiently established that the locus of the conspiracy was Prince George's County, Maryland, despite Hernandez's apparently incorrect initial assertion that Strong's apartment was in southeast Washington, D.C., and the trial court did not err in so finding.

Even were there a genuine dispute about where the conspiracy was completed, the trial court nonetheless maintained territorial jurisdiction to prosecute appellant for the conspiracy. As we recently explained in *Randall v. State*, 223 Md. App. 519, 560 (2015), "[u]nder certain circumstances, a person's actual presence in Maryland at the time the crime was committed is not required for this State to obtain jurisdiction." For example, we continued, a "defendant's presence is not required in a court's territorial jurisdiction if, for instance, the intended result or an essential element of his or her crime lies in Maryland." *Id.* (quoting *State v. Butler*, 353 Md. 67, 74 (1999)). Because the intended result of the conspiracy, the murder of Cuevas, unquestionably occurred in New Carrollton, Maryland, the State maintained jurisdiction to try and punish him in its courts, and no instruction on territorial jurisdiction was required or warranted.

VII.

Finally, appellant contends that the trial court erred when it declined to grant his motion for mistrial after Peter Roos testified that he had purchased marijuana from appellant on numerous occasions. He claims that the introduction of other crimes evidence into his trial unfairly prejudiced the minds of the jurors against him.

As noted in Section III, above, the grant of a mistrial is an extraordinary measure to be granted only when "manifest necessity" is shown. *Ezenwa*, 82 Md. App. at 518. We review a court's ruling on a motion for mistrial under the abuse of discretion standard. *Nash*, 439 Md. at 66-67. We conclude that Roos's testimony did not provide such manifest necessity for a mistrial, and, consequently, the trial court did not abuse its discretion in denying appellant's motion.

Upon direct examination of Roos, the prosecutor established that he had known appellant for approximately four years. She asked Roos, "[I]n the time that you've known the defendant, have you ever purchased marijuana from him?" Defense counsel objected, and, during a bench conference, moved for a mistrial on the grounds of irrelevance, lack of probative value, and unfair prejudice to appellant.

The court ruled:

> THE COURT: This jury has already heard lots of testimony from Ms. Hernandez regarding a drug business that she was engaged in with Mr. Glen, along with the victim in this case. And so this is a small pebble in the lake compared to what they've already heard with respect to purchasing drugs and selling drugs and the defendant's involvement.
>
> So the defendant's request for a mistrial is denied.

Roos then testified that he had purchased marijuana from appellant on more than 20 occasions and that it was fair to say that appellant was his "weed supplier."

By the time the jury heard from Roos, however, it already had the benefit of Hernandez's lengthy testimony wherein she stated, without objection, that when she and appellant first met, she dealt marijuana to him, but after they became boyfriend and

girlfriend, "he was the dealer and I was the supplier." She further testified that at some point, she also began to supply appellant with cocaine, fronted to her by Cuevas, to sell.

This Court has made clear that "[w]e shall not find reversible error when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury without objection through the testimony of other witnesses." *Berry v. State*, 155 Md. App. 144, 170 (2004); *see also Jones v. State*, 310 Md. 569, 589 (1987) ("Where competent evidence of a matter is received, no prejudice is sustained where other objected to evidence of the same matter is also received."); *Williams v. State*, 131 Md. App. 1, 26 (2000) ("When evidence is received without objection, a defendant may not complain about the same evidence coming in on another occasion even over a then timely objection."). Because Hernandez had testified earlier, without objection, that appellant dealt marijuana and cocaine, appellant cannot now claim prejudice in Roos's testimony to the same effect. As such, the trial court was correct in denying appellant's motion for mistrial on that basis.

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