**UNREPORTED**

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 00796

September Term, 2016

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LARRY ENNIS

v.

STATE OF MARYLAND

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Meredith,
Beachley,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Meredith, J.

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Filed: August 8, 2017

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.

On April 1, 2015, Larry Ennis, appellant, was attending a party in Salisbury, Maryland, with several friends when a verbal altercation between Ennis's group and another group occurred. Ennis's group eventually left the party and later met an acquaintance of theirs, Jarrett Stokes, in the parking lot of an IHOP. After meeting with Stokes, the group drove back to the party, at which point Stokes fired a handgun into a large group of people that had gathered outside of the party, killing Rakim Russell.

Ennis, Stokes, and other members of the group were arrested in the months following the shooting. Ennis was charged with fourteen counts stemming from his involvement in the shooting. Following a jury trial in the Circuit Court for Wicomico County, Ennis was convicted of first-degree murder and various related offenses. This appeal followed.

## QUESTIONS PRESENTED

Ennis presents five questions for our review:

1. Did the trial court err in admitting hearsay evidence?

2. Did the trial court err in restricting defense counsel's cross-examination of Marquel Pinder?

3. Did the trial court err in imposing four separate sentences for conspiracy?

4. Did the trial court err in failing to merge firearm and handgun counts?

5. Did the trial court err in sentencing Appellant for carrying a concealed handgun?

We answer "Yes" to Question 5, and we vacate the judgment of conviction for carrying a concealed weapon. We answer "Yes" to Question 1, and will reverse all other judgments of the Circuit Court for Wicomico County and remand the case for further proceedings. We need not answer Questions 2-4.[1]

## FACTUAL & PROCEDURAL BACKGROUND

On April 1, 2015, Ennis and several friends attended a party at the America's Best Value Inn in Salisbury, Maryland. Once at the party, a member of the group Ennis had arrived with --- namely, Ky'Shir Connally --- got into an argument with another group at the party which included Rakim Russell. Ennis's group left the party after being told to do so by security. But Ennis and three associates later returned to the parking lot of the inn, and Jarrett Stokes fired a gun into a crowd, fatally wounding Rakim Russell.

At trial, there were conflicting versions of the events that led to the shooting incident. But, as Ennis candidly acknowledges in his brief, "the shooting resulted in the death of Rakim Russell. It was undisputed that the shooter was Jarrett Stokes, and that [Ennis] was a passenger in the car that Stokes was sitting in when he fired." Ennis asserts: "The question for the jury was whether [Ennis] aided and abetted the shooting."

[1] Because we are reversing the convictions and remanding the case for a new trial, we do not have to address the sentencing questions raised by Ennis, but we note that, in the State's brief responding to Questions 3 and 4, the State conceded that the sentencing court erred in imposing more than one sentence for the four conspiracy convictions, and in imposing more than one sentence for the multiple handgun/firearm convictions. The issue raised in Question 2 may not arise again upon retrial.

After being ordered to leave the party, Ennis, Connally, Marquel Pinder, and another friend --- Terrell Ervin --- drove away in Pinder's Chevrolet Impala. Ervin testified that, as the group was traveling, they discussed the altercation that had occurred at the inn, and that Connally and Ennis appeared to be "mad." But Ervin testified that Ennis was silent throughout the car ride. Ervin did not accompany the others on the return to the inn.

Ervin's account of the car ride differed from that of Marquel Pinder, who was the driver of the car from which Stokes fired the gun. Pinder testified after having entered into a plea agreement with the State. Pinder testified that, after the group left the party, Connally called his friend Jarrett Stokes. According to Pinder, Ennis had suggested calling Stokes, although Ennis himself did not make the call to Stokes. Pinder further testified that Connally had called Stokes "to get more people . . . [t]o come for a fight."

Pinder testified that Ennis looked "pissed off" following the argument at the inn. Pinder additionally told police following the shooting that, during the car ride, Ennis and Connally discussed feeling "bitched out" by the group they had argued with at the party, which Pinder explained as meaning "they were forced out, like they felt like they were forced out, like, against, isn't what they wanted to do, doing something they didn't want to do, basically." Pinder testified that Ennis and Connally were "agitated" and "annoyed" about what had occurred at the party.

The group eventually arrived at Connally's house. Pinder testified that, once they were at Connally's house, Connally made another phone call, and, after the call, Ennis

suggested the group go to an IHOP nearby. Pinder further testified that Ennis and Connally eventually informed him that they were going to go to IHOP to meet Stokes, although they did not say why they were going to meet him. Pinder initially testified that he believed they were going back to the party for a "fistfight," but Pinder also testified that he had told police following the shooting that he knew they would be bringing a gun with them to the party to get "revenge."

Ervin also testified that the group had discussed going to IHOP while they were in Pinder's car. But, once they arrived at Connally's house, Ervin left the group to attend another party. In Ervin's statement to police following the shooting, Ervin stated that he overheard Ennis and Connally say "we're probably going to head back," although Ervin claimed that they were not referencing the party at the inn. Detective Jason Caputo, who interviewed Ervin following the shooting, testified that Ervin had told him that the group had discussed getting a "Baby 9" in order to "go back to the party and confront the subjects that they had gotten into a previous altercation with." But Ervin testified at Ennis's trial that he did not remember saying that when he gave a statement to police.

Pinder testified that, once the group arrived at IHOP, Ennis and Connally exited Pinder's vehicle to talk to Stokes in the parking lot while Pinder stayed in his vehicle to smoke marijuana. Despite remaining in his car, Pinder recalled leaving his windows open while he smoked, and he overheard Ennis, Connally, and Stokes discuss removing the license plates from Pinder's car. Pinder testified that the trio eventually returned to his vehicle, and Stokes asked Pinder if he was "good to drive," to which Pinder

eventually responded yes. Stokes, Ennis, and Connally then got into Pinder's car, with Stokes in the front passenger seat, and Ennis and Connally seated in the back seat. Ennis was seated behind Stokes, and Connally was seated behind Pinder. Pinder was driving. The group then drove back to the inn. Pinder testified that, during the drive back to the inn, Stokes had an object wrapped in cloth on his lap, although Pinder claimed he did not know what the object was at that point.

Pinder testified that, as they drove to the inn, Stokes asked Ennis if the weapon was "ready to go," to which Ennis responded "it should be." But, in Pinder's prior statement to police, Pinder had stated that Ennis responded "I don't know" when asked by Stokes if the gun was ready. Detective Jeff Miller, who interviewed Ennis following the shooting, testified that Ennis had told him that when Stokes asked "is it ready," Ennis "said I don't know."

Between the time that Ennis's group left the party and the time they returned, everyone attending the party had been ejected by security after multiple fights broke out. As a result, hundreds of people were milling about the parking lot of the inn, and additional fights broke out.

Pinder testified that, when they approached the inn, he could not drive up to the inn because of the large crowd outside, and, as a result, he parked at a nearby mattress store. According to Pinder, Ennis and the group remained in Pinder's car once the car was parked, and Ennis and Connally both began looking for a specific individual in a red shirt in the crowd outside the inn. But, after Connally was arrested, he told police that

Ennis and Stokes had been the ones looking for the individual in the red shirt. Ennis did not say anything in his statement to police about looking for the person in the red shirt.

Pinder testified that Ennis eventually spotted the man in the red shirt and attempted to point him out to Stokes. Pinder additionally testified that there were ten to twenty people standing near the man in the red shirt, and that he did not believe Rakim Russell was the individual wearing the red shirt. According to Pinder's testimony, once Ennis pointed out the man in the red shirt to Stokes, Stokes pointed the gun out the car window, and fired four shots into the crowd. But, in Pinder's statement to police following the shooting, Pinder initially claimed that the group was unable to locate the man in the red shirt, which prompted Stokes to exclaim "fuck it," and fire "indiscriminately" into the crowd of people. Both Pinder and Ennis stated, either at trial or to police, that Stokes fired exactly four shots into the crowd. Pinder testified that he began driving away almost immediately after Stokes fired the gunshots because he wanted to get "the hell out of there."

Dominique Barnes, who was working security at the party the night of the shooting, testified that she was in the process of breaking up the crowd in the parking lot when she heard gunshots nearby. Barnes testified that roughly five seconds after hearing the gunshots she heard squealing tires and observed a white Chevrolet Impala driving away. Barnes testified that she then looked over and observed Russell on the ground with a gunshot wound to his head. Russell was later pronounced dead as a result of the gunshot wound to his head.

On August 4, 2015, Ennis was arrested after giving a statement to the Salisbury Police Department. Ennis was subsequently charged in the Circuit Court for Wicomico County with fourteen counts stemming from the April 1, 2015, shooting. Pinder, Connally, and Stokes were also charged with crimes related to the shooting.

At the conclusion of Ennis's trial, the jury convicted him of first-degree murder; two counts of conspiracy to commit murder; second-degree murder; first-degree assault; two counts of conspiracy to commit first-degree assault; second-degree assault; two counts of reckless endangerment; carrying a concealed dangerous weapon; wearing, carrying, and transporting a handgun on a public road; wearing, carrying, and transporting a handgun upon the person; and use of a firearm in the commission of a crime of violence. After sentencing, Ennis filed this direct appeal.

## DISCUSSION

### I. Concealed Handgun Conviction

Ennis contends that he was improperly convicted and sentenced for violating Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL"), § 4-101(c)(1), which prohibits carrying a concealed dangerous weapon. Ennis asserts that carrying a concealed handgun is not an offense pursuant to this statute because CL § 4-101(a)(5)(ii)(1) excludes "a handgun" from the definition of a "weapon" under CL § 4-101(c). The State concedes that Ennis "was convicted of a nonexistent offense," and "the conviction must be vacated," citing *Williams v. State*, 302 Md. 787, 791-92 (1985). We, too, agree, and shall vacate the conviction for carrying a concealed dangerous weapon.

## II. Hearsay Evidence

Ennis contends that the circuit court erred in admitting statements at trial which, according to Ennis, were inadmissible hearsay. Hearsay is defined in the Maryland Rules as "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." Rule 5-801(c). Hearsay is generally not admissible as evidence pursuant to Rule 5-802, which states: "Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." As the Court of Appeals stated in *Bernadyn v. State*, 390 Md. 1, 8 (2005):

> 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.

Rules 5-802.1, 5-803, and 5-804 provide exceptions to the rule against hearsay, and permit the admission of hearsay into evidence under certain circumstances.

In *Gordon v. State*, 431 Md. 527, 538 (2013), the Court of Appeals outlined the "two-dimensional approach" we apply when reviewing the admission of hearsay into evidence by the circuit court:

> Under this two-dimensional approach, the trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review. Accordingly, the trial court's legal conclusions are reviewed *de novo*, *see Bernadyn* [v. *State*, 390 Md. 1, 7–8 (2005)], but the trial court's factual findings will not be disturbed absent

clear error, *see State v. Suddith*, 379 Md. 425, 430-31, 842 A.2d 716, 719 (2004) (and citations contained therein).

**A. Connally's August 4, 2015, Statement to Police**

The State did not call Connally as a witness at trial, but offered evidence of statements he had made to police officers investigating the shooting. At trial, the State called Detective Ryan Brittingham as a witness to testify about interviews of Connally following the shooting. Detective Brittingham first interviewed Connally the day after the shooting, when Connally, Stokes and Ennis showed up at the police station voluntarily to provide information about the shooting. In the course of the interviews Detective Brittingham conducted during that first meeting, Connally and Ennis both denied being at the inn at the time of the shooting. Connally's statements at that point did not implicate himself or Ennis.

On August 4, 2015, after Connally had been arrested and Mirandized, Detective Brittingham conducted a second interview of Connally (the "second interview"). Detective Brittingham testified, over objection from Ennis, as follows regarding Connally's interview on August 4, 2015:

> [PROSECUTOR]: Did there come a point in time when you did a second interview with Mr. Connally?
>
> [DETECTIVE BRITTINGHAM]: Yes.
>
> * * *
>
> Q: Did Mr. Connally's story change during that second interview?
>
> A: It did.

Q: And how did it change?

[COUNSEL FOR ENNIS]: Objection, Your Honor.

THE COURT: Overruled.

A: **[Connally] advised that after the incident that initially occurred at America's Best Value Inn** where he felt like he was going to be jumped by Little Kevin and his friends, that he and [Ennis] and Marquel left, went to his house in Delmar, and **then [Ennis] had contacted a subject know as Jarrett Stokes**, he goes by Jarrett Montana, and they subsequently met in the parking lot of IHOP in Salisbury.

Q: And what happened when they met in the parking lot at IHOP?

A: They --

Q: What did Mr. Connally advise happened?

[COUNSEL FOR ENNIS]: Your Honor, can we approach?

THE COURT: Sure.

[COUNSEL FOR ENNIS]: Your Honor, the State could not make a deal with Mr. Connally to testify, but they're putting his testimony in through the officer at this point. So it's gone way beyond talking about a conspiracy at this point, now they're just getting into substantive evidence as Mr. Connally presented it. So it's absolutely hearsay. It's absolutely prejudicial to my client. And I don't see how that follows into the conspiracy at this point.

THE COURT: State?

[PROSECUTOR]: The statements are certainly against Mr. Connally's penal interest, so as they relate to Mr. Connally they would be admissible in this trial. Mr. Connally also indicated where the gun went, which is in furtherance of the conspiracy. Even though it's in a post-Miranda interview.

THE COURT: I'll overrule the objection. You've made the record.

[COUNSEL FOR ENNIS]: I'm going to keep a continuing -- I'm sorry Your Honor.

THE COURT: You wish a continuing?

[COUNSEL FOR ENNIS]: Yes, please, if I may.

* * *

THE COURT: And I'll grant that.

Q [BY PROSECUTOR]: What did Mr. Connally advise happened at IHOP?

A: They met with Jarrett Stokes, at which time Connally, he advised, or described that Jarrett Stokes had removed what he believed was a handgun wrapped in a cloth. He couldn't describe if it was a shirt or a bag but some sort of cloth. And Jarrett got into Marquel's vehicle and advised, he quoted "the beef ends tonight."

Q: Who said that?

A: Jarrett Stokes.

Q: And where did Mr. Stokes advise they went?

A: They responded back to the America's Best Value Inn.

Q: **Was Mr. Connally able to advise you who, if anybody, in the car was looking into the crowd.**

A: **He advised that when they got back to the America's Best Value Inn, that both [Stokes] and [Ennis] were looking into the crowd.**

Q: Did he advise what Marquel was doing?

A: Marquel was in the driver's seat of the vehicle, just sitting there.

* * *

Q: Did you ask Mr. Connally about the weapon?

A: Yes I did.

Q: What, if anything, did Mr. Connally advise?

A: **Mr. Connally advised that he had taken possession of the firearm, and** he responded to a small wooded area across from the house in Delmar where **he put the firearm in a spot that him and his associates all know as a spot where they store and hide things.**

Q: When you said took possession after, do you mean some time after the shooting?

A: Some time after the shooting, that's correct.

Q: On or after August 4th based on what Mr. Connally said, did officers go to the area in which he described?

A. Yes. On two different occasions officers responded out to what could be described as, it's a wooded area, high foliage, overgrown, it's across the road from Mr. Connally's house. And an extensive search was conducted to look for the firearm.

Q: How deep are those, how deep is that wooded area?

A: It could be approximately 100 yards deep, it backs up to a field.

Q: Where you able to locate any firearm?

A: No, we were not.

(Emphasis added.)

**B. Hearsay Exception: Statements Against Interest**

Maryland Rule 5-804(b)(3) provides that, if the declarant of a hearsay statement is unavailable, statements against the declarant's pecuniary or proprietary interest may be admitted into evidence if "circumstances clearly indicate the trustworthiness of the statement." The rule states:

**(b) Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

> (3) *Statement Against Interest*. A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest, so tended to subject the declarant to civil or criminal liability, or so tended to render invalid a claim by the declarant against another, 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.

In *Jackson v. State*, 207 Md. App. 336, 348–49 (2012), we summarized the burden facing a party --- here the State --- seeking to introduce a hearsay statement against interest under the exception provided in Rule 5-804(b)(3):

> For a statement to be admissible under Rule 5-804(b)(3), the proponent of the statement must convince the trial court that "'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.'" *Stewart v. State*, 151 Md. App. 425, 447, 827 A.2d 850 (2003) (quoting *Roebuck v. State*, 148 Md. App. 563, 578, 813 A.2d 342 (2002)). "The proponent of the declaration has the burden 'to establish that it is cloaked with 'indicia of reliability[,]' . . . mean[ing] that there must be a showing of particularized guarantees of trustworthiness.'" *Id*. (quoting *West*, 124 Md. App. at 167, 720 A.2d 1253) (other citations omitted).
>
> "The trial court's evaluation of the trustworthiness of a statement is 'a fact-intensive determination' that, on appellate review, is subject to the clearly erroneous standard." *Id*. (quoting *State v. Matusky*, 343 Md. 467, 486, 682 A.2d 694 (1996)) (citing *Powell v. State*, 324 Md. 441, 453, 597 A.2d 479 (1991); *Wilkerson v. State*, 139 Md. App. 557, 576–77, 776 A.2d 685 (2001)).

(Alterations in original.)

The Court of Appeals has further held that a statement against penal interest is presumptively unreliable, and must "be marked by particularized guarantees of

trustworthiness sufficient to overcome the presumption that [the statement] was unreliable." *Simmons v. State*, 333 Md. 547, 561 (1994); *see also Matusky v. State*, 105 Md. App. 389, 398 (1995) (quoting *Wilson v. State*, 334 Md. 313, 335 (1994), for the proposition that "a declaration against penal interest is 'presumptively unreliable'"), *aff'd*, 343 Md. 467 (1996). The Court of Appeals has cautioned that, when assessing the particularized guarantees of trustworthiness concerning a statement against interest, "[o]ne of the factors which a court may not consider, however, is other corroborative evidence." *Simmons*, *supra*, 333 Md. at 561. Rather, "[t]he [United States Supreme Court] made clear that, although '"particularized guarantees of trustworthiness"' must be shown from the totality of the circumstances," the only relevant circumstances are 'those that surround the making of the statement and that render the declarant particularly worthy of belief.'" *Id*. (quoting *Idaho v. Wright*, 497 U.S. 805, 819 (1990)); *see also West v. State*, 124 Md. App. 147, 167 (1998).

Ennis contends that Detective Brittingham's testimony summarizing Connally's second interview was erroneously admitted by the trial court for two reasons. First, according to Ennis, the State did not prove that Connally was "unavailable," and, therefore, his statement was not admissible under Rule 5-804(b)(3). Second, Ennis contends that, even if Connally were deemed to be "unavailable," Connally's statements during his second interview with Detective Brittingham were not against Connally's penal interest, but instead were partially self-exculpatory and an attempt by Connally to

minimize his involvement in the shooting, rendering Connally's second statement outside the scope of Rule 5-804(b)(3).

The State contends that Connally was "unavailable" under Rule 5-804(a)(1) because it can be inferred from the circumstances at trial that he was protected from testifying by his privilege against self-incrimination afforded by the Fifth Amendment to the United States Constitution, and that he would presumably invoke the privilege if called to testify in court. U.S. CONST. amend. V.[2] The State also contends that Ennis essentially conceded at trial that Connally was unavailable to testify, and, as a result, has waived any arguments pertaining to his unavailability. The State additionally asserts that the challenged statements were against Connally's penal interest within the meaning of Rule 5-804(b)(3), and were properly admitted by the circuit court.

**i. Connally's Availability under Rule 5-804(b)(3)**[3]

As a threshold matter, our review of the record persuades us that Ennis preserved the issue of whether Connally was unavailable. At trial, following Ennis's initial general

[2] The Fifth Amendment to the United States Constitution, in relevant part, provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

[3] Ennis's trial counsel did not argue at trial that Connally's statements to Detective Brittingham were testimonial hearsay that could not be admitted without violating Ennis's right to confront the witnesses against him. In his brief, he merely alludes to that missed opportunity to raise an additional basis for excluding the testimony about Connally's statements, saying: "Of course, if Connally was unavailable, his out-of-court statement to police, after he had been arrested and Mirandized, would be inadmissible under *Crawford v. Washington*, 541 U.S. 36 (2004). *See State v. Norton*, 443 Md. 517, 524-25 (2015)." But no argument based upon *Crawford* was raised at trial.

objection to Detective Brittingham's testimony, Ennis's counsel elaborated upon his basis for objecting as follows:

> Your Honor, the State could not make a deal with Mr. Connally to testify, but they're putting his testimony in through the officer at this point. So it's gone way beyond talking about a conspiracy at this point, now they're just getting into substantive evidence as Mr. Connally presented it. So it's absolutely hearsay. It's absolutely prejudicial to my client. And I don't see how that follows into the conspiracy at this point.

Ennis clearly alerted the trial judge that the detective's testimony about statements Connally allegedly made was inadmissible hearsay. Once Ennis lodged an objection to Detective Brittingham's hearsay testimony, in order for Connally's statements to be admissible as statements against penal interest under Rule 5-804(b)(3), "the proponent of the declaration must demonstrate that the declarant is unavailable." *State v. Matusky*, 343 Md. 467, 479 (1996). Accordingly, because Ennis timely objected to Detective Brittingham's testimony concerning Connally's hearsay statements, the State bore the burden of demonstrating to the circuit court that Connally was unavailable within the meaning of Rule 5-804(a).[4]

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[4] Rule 5-804(a) provides:

> (a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant:
>
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
>
> (2) refuses to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

continued…

One example of a situation in which a party is considered "unavailable" is in "situations in which 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[.]" Rule 5-804(a)(1). But here, the State did not make any proffer regarding Connally's unavailability to the circuit court, as reflected in the trial transcript of comments made immediately following Ennis's objection to Detective Brittingham's testimony:

> [COUNSEL FOR ENNIS]: Your Honor, can we approach?
>
> THE COURT: Sure.
>
> [COUNSEL FOR ENNIS]: Your Honor, the State could not make a deal with Mr. Connally to testify, but they're putting his testimony in through the officer at this point. So it's gone way beyond talking about a conspiracy at this point, now they're just getting into substantive evidence as Mr. Connally presented it. So it's absolutely hearsay. It's absolutely prejudicial

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continued…

> (3) testifies to a lack of memory of the subject matter of the declarant's statement;
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b) (2), (3), or (4) of this Rule, the declarant's attendance or testimony) by process or other reasonable means.
>
> A statement will not qualify under section (b) of this Rule if the unavailability is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying.

> to my client. And I don't see how that follows into the conspiracy at this point.
>
> THE COURT: State?
>
> [PROSECUTOR]: The statements are certainly against Mr. Connally's penal interest, so as they relate to Mr. Connally they would be admissible in this trial. Mr. Connally also indicated where the gun went, which is in furtherance of the conspiracy. Even though it's in a post-Miranda interview.
>
> THE COURT: I'll overrule the objection. You've made the record.

Before the hearsay statements could be admitted under Rule 5-804(b)(3), the State was required the "have persuaded the trial court that [Connally] was truly unavailable." *Bond v. State*, 92 Md. App. 444, 449 (1992). In *Bond*, we addressed a situation where the appellant, Bond, sought to introduce a hearsay statement made by a co-defendant to police under Rule 5-804(b)(3). *Id*. at 446–47. Bond's counsel proffered to the circuit court that Bond's co-defendant would invoke his Fifth Amendment privilege against self-incrimination if called to testify, and therefore, the co-defendant should be deemed unavailable under Rule 5-804(a)(1). The circuit court concluded that Bond had not made a sufficient proffer regarding the co-defendant's unavailability, and the co-defendant's testimony was not admitted. *Id*. at 449. On appeal, we affirmed the circuit court's ruling, and held that Bond's counsel "had no authority whatever to speak for [the co-defendant]. Thus, his proffer does not suffice." *Id*. at 451.

Here, the State did not make any proffer to the circuit court regarding the unavailability of Connally. The sole mention of Connally's availability came from Ennis's counsel, who noted only that "the State could not make a deal with Mr. Connally

to testify." Neither the State nor Ennis could invoke Connally's Fifth Amendment rights for him in order to render him unavailable. *Bond*, *supra*, 92 Md. App. at 451. Accordingly, because the State did not make any proffer regarding Connally's unavailability, the circuit court erred by implicitly concluding that Connally was unavailable, and, therefore, that his hearsay statements could be admitted under Rule 5-804(b)(3). *See Jackson*, *supra*, 207 Md. App. at 348.

**ii. Statements Against Interest under Rule 5-804(b)(3)**

But, even if we were to assume that Connally was unavailable, several statements made during his second interview were not against his penal interest, and, therefore, were not admissible under Rule 5-804(b)(3). In *State v. Standifur*, 310 Md. 3, 13–14 (1987), the Court of Appeals outlined the guiding principles for determining whether a declarant's statements are against his penal interest:

> The statement must in fact be against the penal interest of the declarant. It need not be a full confession but must involve substantial exposure to criminal liability. *McCormick on Evidence* § 279, at 825 (E. Cleary 3d ed. 1984). That exposure, however, is only a beginning point of inquiry. **The more important criterion is that a reasonable person in the situation of the declarant would have perceived the statement as disserving at the time he made it.** The fact that legal scholars may agree as to the disserving nature of a particular statement does not mean that a reasonable person in the speaker's place would have so understood it. The declarant's probable perception of the statement's disserving nature forms the basis for the exception, and without it the exception cannot be utilized.
>
> In determining the probable state of mind of a reasonable person in the position of the declarant, it is perhaps as important to consider the totality of circumstances under which the statement was made as to consider the contents of the statement. If experience tells us that we may presume trustworthiness when one is recounting symptoms to a physician who is to treat him, it also tells us that **we must treat as "inevitably**

> **suspect" a statement made to persons in authority and implicating a codefendant, even though the statement also contains an admission of the declarant's culpability.** *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987); *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). **A defendant implicating his confederate may do so to curry favor with the authorities, to achieve a plea bargain, to shift the blame by showing that another was more culpable, or simply to have another with whom to share the blame**. In *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 2064, 90 L.Ed.2d 514 (1986), Justice Brennan said for the Court:
>
> > As we have consistently recognized, a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another.

(Emphasis added.)

We agree with Ennis's argument that the portions of Connally's second interview that implicated Ennis were not so clearly contrary to Connally's penal interest that the hearsay statements were admissible under Rule 5-804(b)(3). According to Detective Brittingham's testimony, before Connally gave his second interview on August 4, 2015, Connally had already been arrested and charged with being involved in the shooting. Connally's second interview included details that implicated Ennis, and appears to have been an effort "to shift the blame by showing that another was more culpable," namely, Ennis. *Id*. at 13. Connally told Detective Brittingham that Ennis called Stokes (the shooter), which differed from Pinder's testimony that Connally was, in fact, the one who called Stokes two times before their meeting at IHOP. Connally also told Detective Brittingham that Ennis actively assisted Stokes by scanning the crowd in an effort to spot

the targeted individual in a red shirt. But Pinder testified that Connally (as well as Ennis) had both scanned the crowd for the man who was the target, whereas Ennis had not mentioned searching the crowd in his statement to police. Although Connally did acknowledge in his second interview that he was present in the car at the time of the shooting, his assertions that Ennis called Stokes and that Ennis (but not Connally) scanned the crowd tended to minimize his own participation in recruiting Stokes and spotting the victim, and thereby shift responsibility to Ennis. Accordingly, we cannot conclude that "a reasonable person in the situation of [Connally] would have perceived [his] statement as disserving at the time he made it." *Id*. at 13. Because the circuit court was obligated to "'exclude whatever non-self-inculpatory statements are contained in an otherwise admissible declaration against penal interest,'" the circuit court erred in admitting the portions of Connally's statements which tended to minimize his role in the shooting at the expense of his co-defendants, as those statements were not against Connally's penal interest. *Jackson*, *supra*, 207 Md. App. at 351 (quoting *Matusky*, *supra*, 105 Md. App. at 398).

**C. Hearsay Exception: Statement by a Coconspirator**

Maryland Rule 5-803(a)(5) provides an additional exception to the general rule that hearsay is inadmissible as evidence, and states: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (5) A statement by a coconspirator of the party **during the course and in furtherance of the conspiracy**." (Emphasis added.) Ennis contends that statements made during Connally's

second interview were also not admissible under Rule 5-803(a)(5) because the statement about concealing the gun occurred after the alleged conspiracy involving Connally and Ennis had been completed. The State does not present any argument in its brief pertaining to the admission of Connally's second interview under Rule 5-803(a)(5), although, at trial, the State contended that, during the second interview, Connally "indicated where the gun went, which is in furtherance of the conspiracy."

> In *State v. Rivenbark*, 311 Md. 147, 158 (1987), the Court of Appeals rejected
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> > 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**.

(Emphasis added.)

Here, the object of the alleged conspiracy involving Ennis and Connally was to return to the America's Best Value Inn on April 1, 2015, and, according to Pinder's testimony, get "revenge" on the individuals whom Ennis and Connally felt had previously been disrespectful to them at the party. The conspiracy's "central objective" was completed when the group returned to the party and Stokes opened fire on the crowd. *Id*. Any efforts by Connally at some later point to conceal the gun used in the shooting occurred after the conspiracy was complete. Therefore, Connally's statements, made on August 4, 2015, after he had been arrested and Mirandized, regarding the group's efforts to conceal the handgun following the shooting were not admissible under Rule 5-803(a)(5). *See Rivenbark, supra*, 311 Md. at 158.

### D. Harmless Error

The State contends that, even if the circuit court erred in admitting Detective Brittingham's testimony outlining Connally's second interview, the error was harmless. In *Butler v. State*, 231 Md. App. 533, 555–56 (2017), we summarized the harmless error standard as follows:

> ["]In *Dorsey v. State*, . . . we adopted the test for harmless error announced by the Supreme Court in *Chapman v. State*[, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)] . . . . As adopted in *Dorsey*, the harmless error rule is:
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> > ['']When an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.['']
>
> ["]In performing a harmless error analysis, we are not to find facts or weigh evidence. Instead, what evidence to believe, what weight to be given it, and what facts flow from that evidence are for the jury . . . to determine. Once it has been determined that error was committed, reversal is required unless the error did not influence the verdict; the error is harmless only if it did not play any role in the jury's verdict. The reviewing court must exclude that possibility beyond a reasonable doubt. To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record. The harmless error rule . . . has been and should be carefully circumscribed. Harmless error review is the standard of review most favorable to the defendant short of an automatic reversal.["]

(Quoting *Taylor v. State*, 407 Md. 137, 164–65 (2009), in turn quoting *Bellamy v. State*, 403 Md. 308, 332–33 (2008)) (alterations in *Butler*).

Upon reviewing the record in this case, we cannot declare a belief beyond a reasonable doubt that the admission of statements made by Connally during his second interview, via Detective Brittingham's testimony, in no way influenced the verdict. In addition to Connally's hearsay statements, the State's case against Ennis relied primarily on the testimony of Pinder, who testified pursuant to a plea deal he had reached with the State under which he would be sentenced to 45 years, with all but 15 suspended, for his role in the shooting. But Pinder's testimony at trial conflicted with portions of statements he had made to police following the shooting, and a reasonable juror could have found him not credible.

The State additionally introduced evidence pertaining to a statement Ennis made to police on August 4, 2015, at which time Ennis admitted to being present during the shooting. But, Connally's second interview with Detective Brittingham squarely identified Ennis as being the individual who contacted Stokes after the group left the party, and as one of the individuals who scanned the crowd to help Stokes find their target after the group returned to the scene of the party. Connally's testimony ascribed a greater role to Ennis in the shooting than did Ennis's statement to police or Pinder's initial statements to police, and, therefore, could have influenced the jury's determination as to Ennis's culpability in the shooting. Accordingly, we hold that the circuit court's admission of Detective Brittingham's testimony regarding Connally's out of court statements to him on August 4, 2015, was not harmless error.

**JUDGMENT OF CONVICTION FOR VIOLATION OF CRIMINAL LAW ARTICLE § 4-101(C)(1) VACATED, WITHOUT REMAND. ALL OTHER JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY REVERSED, AND THE CASE IS REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY WICOMICO COUNTY.**