UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 929

September Term, 2016

RICKY DAVIS, AKA RICKEY DAVIS

v.

STATE OF MARYLAND

Meredith,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: March 30, 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.

A jury in the Circuit Court for Baltimore City convicted Ricky Davis, also known as Rickey Davis, appellant, of voluntary manslaughter and use of a firearm in the commission of a crime of violence following the death of Keenan Dixon on September 18, 2014. Appellant noted this appeal and presented two questions for review:

> 1. Did the circuit court err in denying a *Batson* challenge raised by the defense?
>
> 2. Did the circuit court err in denying a motion for mistrial?

For the reasons stated below, we find no error and affirm the judgments of the circuit court.

BACKGROUND

On the evening of September 18, 2014, Tyray Green, Julian Curtis, Jada Norris, and appellant, who is also known as "Hots," were hanging out at a playground near the 5800 block of Waycross Road in Baltimore.[1] They had gathered to smoke marijuana. Around 8:00 P.M., Mr. Dixon, also known as "Wolf," entered the park. Mr. Green and Mr. Curtis testified that Mr. Dixon wanted to fight appellant, either over a woman or because Mr. Dixon believed that appellant and/or appellant's brother had been involved in a fight with Mr. Dixon's cousin. Mr. Dixon began arguing with appellant. The argument quickly escalated into a fistfight, which according to witnesses, Mr. Dixon was clearly winning.

Appellant produced a gun from the waistband of his pants and started shooting. When appellant produced the gun, Mr. Green, Mr. Curtis, and Ms. Norris fled the park. Mr. Green testified that he heard five or six shots as he ran. He turned and saw Mr. Dixon

[1] We note that Mr. Green's name is sometimes spelled alternatively as "Tyrae" in the record.

on the ground. Mr. Curtis testified that he heard five shots and witnessed Mr. Dixon falling. Mr. Curtis attempted to call 911, but the call did not go through.

The gunshots attracted the attention of Charles Johnson and Leslie Laws, who lived close to the park. Mr. Johnson testified that from his back door, he saw a man standing over another man, and the first man shot the prone individual. He heard five or six gunshots. Mr. Johnson described the shooter as a black male, who was approximately six feet tall and "slender." Ms. Laws testified that she heard gunshots and called 911.[2] After the shooter fled the scene, Mr. Johnson ran to check on the victim, who he recognized as Mr. Dixon. Ms. Laws attempted to aid Mr. Dixon by placing towels under his head. Mr. Dixon died soon after being taken from the scene.

Dr. Donna Vincenti performed an autopsy and determined that Mr. Dixon suffered five gunshot wounds – two to the head, two to the body, and one to the left arm.[3] Dr. Vincenti opined that at least one of the shots was fired at point-blank range – less than a centimeter from Mr. Dixon's body. She testified that the cause of death was the multiple gunshot wounds. She also recovered two bullets from Mr. Dixon's body.

Baltimore City Police Detective Aaron Cruz was assigned as the lead investigator. From the scene police recovered several items of evidence – including four shell casings, two bullets, a bloody shirt, and a bloody towel. Christopher Faber, who was accepted as an expert in firearms identification and comparison, testified that all of the recovered

[2] The 911 call was played at trial.

[3] The court accepted Dr. Vincenti as an expert in forensic pathology.

casings and bullets came from the same .38 caliber gun. Detective Cruz interviewed Mr. Green, Mr. Curtis, and Ms. Norris. They all identified appellant in photographic arrays as the shooter. Later, after police located appellant in North Carolina, he was transported to Baltimore for trial.

The State charged appellant with first-degree murder and use of a handgun in the commission of a crime of violence. A first trial resulted in a hung jury and a mistrial. At the second trial, the jury convicted appellant as indicated above. The court sentenced appellant to a ten-year term, with five years suspended, for voluntary manslaughter, and a consecutive twenty-years, with fifteen years suspended, for the handgun conviction, to be followed by a five-year period of probation. This appeal followed.

DISCUSSION

I. *Batson* Challenge[4]

During *voir dire* on the first day of the second trial, appellant's counsel asked for a bench conference, at which the following occurred:

> THE COURT: Yes, [appellant's counsel]?
>
> [APPELLANT'S COUNSEL]: Your Honor, there appears to be a pattern with the State's strikes, with the exception of [one juror]?
>
> THE COURT: What is the pattern?
>
> [APPELLANT'S COUNSEL]: [Juror No.] 6368, African-American woman.
>
> THE COURT: Just a second.

[4] A *Batson* challenge takes its name from the United States Supreme Court case *Batson v. Kentucky*, 476 U.S. 79 (1986).

[APPELLANT'S COUNSEL]: [Juror No.] 6370, African-American male.

THE COURT: 6368, 6370, yes.

[APPELLANT'S COUNSEL]: [Juror No.] 6320, African-American male. [Juror No.] 6404 –

THE COURT: Just one second I said, please. Thank you. 6320?

[APPELLANT'S COUNSEL]: Yes, that's right.

THE COURT: If my memory is correct, 6320 indicated a hardship because of school.

[THE STATE]: Mm-hmm.

THE COURT: Correct?

[THE STATE]: Yes, that's the one that –

[APPELLANT'S COUNSEL]: He had exams in May.

THE COURT: Right.

[THE STATE]: He's preparing.

THE COURT: He said he had an absolutely compelling reason why he couldn't be here because he's preparing for exams in May.

[APPELLANT'S COUNSEL]: In May. May 2nd. Today is the 14th of April.

THE COURT: Right. Okay. I understand. And 6404.

[APPELLANT'S COUNSEL]: 6404, the last one.

THE COURT: Had a yes answer to Question Number 11, immediate family member victim of a crime such as those charged in this case or convicted of a crime or pending criminal charge, correct?

[THE STATE]: He was also sleeping in court and that's why I struck him.

THE COURT: Well, and for the record, Juror Number 6404 upon the Court's, if you will, bird's-eye perch, noted that the call had to be made not once, not twice, not thrice, but four times for Juror Number 6404 who was then nudged by the person sitting next to him because he was asleep. And, [appellant's counsel] has suggested what on its face is certainly a pattern of striking by the State four jurors who all happen to be African-American, correct? Raising a *Batson* issue, correct?

[APPELLANT'S COUNSEL]: Mm-hmm.

[THE STATE]: For the record, it's not what – I dispute that. I'll concede that there have been four in a row that have been African-American, so if Your Honor finds that to be a pattern then I can gladly articulate the non-racially based reasons why I struck them. We've already gone over two of the four.

* * *

THE COURT: So you're saying that they [the strikes] are race-neutral basis for the State's having struck those jurors?

[THE STATE]: Without a doubt.

THE COURT: Go ahead.

[APPELLANT'S COUNSEL]: I don't know the basis, Your Honor. I've heard the basis as to 6320.

THE COURT: Well, the basis for 6320 was because of a hardship because of school, trying to earn a degree in Morgan University, has exams in two weeks.

[THE STATE]: Engineering.

THE COURT: In Engineering, not a certainly inarduous course of study. 6404, the basis was not, at least according to the State, not race-based but rather ability to stay awake and pay attention based. Correct?

[THE STATE]: Yes.

THE COURT: And let's talk about 6370. 6370?

[THE STATE]: **6370, his mother was a court reporter.**

THE COURT: **Yes.**

[THE STATE]: **And I don't –**

THE COURT: **And he indicated that based upon his mother's being a court reporter that that would not prevent him from being fair and impartial, correct?**

[THE STATE]: **That's true.**

THE COURT: **Okay**.

[THE STATE]: **I still choose not to – I have a big X next to his name, so there was something during our colloquy up here that –**

THE COURT: **Well is the big X next to his name based on an instinct or quality that has nothing to do with the color of that juror's skin?**

[THE STATE]: **Without a doubt.**

THE COURT: And the final, who has not been discussed I believe, is 6368, is that correct?

[THE STATE]: 6368.

[APPELLANT'S COUNSEL]: Yes.

[THE STATE]: Yeah, 6368 –

THE COURT: Answered as to Question 9 –

[THE STATE]: -- her nephew is locked up currently.

THE COURT: -- her nephew is pending a charge on a gun charge, correct?

[THE STATE]: Yeah, I prefer not to have her sitting on a jury where she might have to judge the facts and look at this Defendant and

> maybe make that connection that well her nephew is facing a similar charge, I don't want to convict this guy even if I believe he's guilty.
>
> THE COURT: [Appellant's counsel], would you like to confer?
>
> [APPELLANT'S COUNSEL]: No, Your Honor.
>
> THE COURT: The Court notes the *Batson* based challenges raised by Mr. Davis via and through counsel[.] The Court, upon consideration of the submissions here at the bench by the State and by [appellant's counsel], does find that the State has provided to the Court sufficient race-neutral reasons as to the State's decision to exercise certain peremptory challenges as to Jurors Numbers 6368, 6370, 6320 and 6404.
>
> For the reasons stated on the Court – frankly, as part of the Court's questions to the State. And accordingly the challenge is denied.

(Emphasis added).

On appeal, appellant contends that the court erred in denying the *Batson* challenge, specifically regarding Juror Number 6370. Appellant maintains that a *Batson* challenge may be based on the striking of just one juror. Furthermore, appellant argues that the State's proffered race-neutral reason for exercising the strike as to Juror Number 6370 was not "meaningful." Appellant contends that the court and appellant's trial counsel were left to speculate what the State's "big X" meant, and this cannot be a *bona fide* race-neutral reason to exercise a peremptory strike. Appellant concedes that this issue may not be preserved because his trial counsel "accepted" the jury at the conclusion of *voir dire*, but he urges us to exercise our discretion and reach this otherwise unpreserved error because the prospect of post-conviction relief is "strong."

The State first contends that we should decline to reach this issue because appellant failed to preserve it. At the conclusion of *voir dire*, appellant's counsel accepted the seated jury without any reservations, which, the State maintains, renders this issue unpreserved. The State responds to appellant's post-conviction relief argument by noting that reaching the merits of appellant's unpreserved issue vitiates the purpose of Rule 8-131(a).[5] Should we address the merits of the claim, the State contends that the court was not clearly erroneous in denying appellant's *Batson* challenge because there were several race-neutral reasons for striking Juror Number 6370, including the juror's tardiness in arriving, the juror's seeming confusion during the colloquy with the court, and the State's assertion that the strike was not based on the juror's race.

The Court of Appeals recently commented on the three-step process in *Batson* challenges as follows:

> At step one, the party raising the *Batson* challenge must make a *prima facie* showing – produce some evidence – that the opposing party's peremptory challenge to a prospective juror was exercised on one or more of the constitutionally prohibited bases. "[T]he *prima facie* showing threshold is not an extremely high one – not an onerous burden to establish." A *prima facie* case is established if the opponent of the peremptory strike(s) can show "that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Merely "a 'pattern' of strikes against black jurors in the particular *venire* . . . might give rise to or support or refute the requisite showing."
>
> If the objecting party satisfies that preliminary burden, the court proceeds to step two, at which "the burden of production shifts to the proponent of the strike to come forward with" an explanation for the strike that is neutral as to race, gender, and ethnicity. A step-

[5] Rule 8-131(a) provides, in pertinent part: "Ordinarily, the appellate court will not decide any other issue [except for jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court[.]"

> two explanation must be neutral, "but it does not have to be persuasive or plausible. Any reason offered will be deemed race-neutral unless a discriminatory intent is inherent in the explanation." "At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation." The proponent of the strike cannot succeed at step two "by merely denying that he had a discriminatory motive or by merely affirming his good faith." Rather, "[a]lthough there may be any number of bases on which a prosecutor reasonably might believe that it is desirable to strike a juror who is not excusable for cause," the striking party "must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenge."
>
> If a neutral explanation is tendered by the proponent of the strike, the trial court proceeds to step three, at which the court must decide "whether the opponent of the strike has proved purposeful racial discrimination." "It is not until the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." At this step, "the trial court must evaluate not only whether the [striking party's] demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the [striking party]." Because a *Batson* challenge is largely a factual question, a trial court's decision in this regard is afforded great deference and will only be reversed if it is clearly erroneous.

Ray-Simmons v. State, 446 Md. 429, 436-37 (2016) (internal citations omitted).

We do not reach the merits of appellant's argument because his *Batson* challenge was waived. When a party raises a *Batson* challenge, but then later accepts the jury without noting any reservations, the challenge is waived for appellate review. *See State v. Stringfellow*, 425 Md. 461, 470 (2012) ("[A]ccepting the empaneled jury, without qualification or reservation, 'is directly inconsistent with [the] earlier complaint [about the jury],' which 'the party is clearly waiving or abandoning.'" (Quoting *Gilchrist v. State*,

340 Md. 606, 618 (1995))); *State v. Tejada*, 419 Md. 149, 168-70 (2011) (discussing holding of *Gilchrist* and waiver of challenges to composition of jury).

In this case, at the conclusion of *voir dire*, appellant's counsel accepted the jury panel without any reservations or exceptions noted. As such, appellant has waived his challenge to the circuit court's denial of his *Batson* challenge. We decline appellant's invitation to exercise our discretion to reach this issue on appeal. This is not simply a matter of an unpreserved issue; rather, appellant has waived the issue. *See Gutloff v. State*, 207 Md. App. 176, 197 (2012) (noting that waiver "is an intentional and voluntary relinquishment of a known right); *Williams v. State*, 131 Md. App. 1, 24-28 (2000) (discussing differences between preservation and waiver).

II. Motion for Mistrial

At trial, appellant's counsel sought to generate reasonable doubt by questioning the thoroughness of the police investigation into the shooting, specifically the lack of forensic testing. During Detective Cruz's direct examination, the following occurred:

> [THE STATE]: Detective Cruz, during this particular investigation into the murder of Keenan Dixon, did you have the occasion to make certain decisions regarding your investigation?
>
> [DETECTIVE CRUZ]: Yes.
>
> Q: All right. I'm now going to ask you some questions about some of those specific decisions. Okay.
>
> A: Yes.
>
> Q: You testified that there was a towel and a shirt recovered from the scene.
>
> A: Yes.

> Q: And was this towel and shirt, were they captured in the photographs taken by the Crime Lab?
>
> A: Yes, they were.
>
> Q: During the course of your investigation, did you request any further forensic testing on **the towel**?
>
> A: During the time of the investigation, no, but later on we did a request for DNA to be done on – **the shirt** that was recovered which was an orange shirt.

(Emphasis added). At that point, appellant's counsel asked to approach, and a bench conference ensued:

> [APPELLANT'S COUNSEL]: First of all, if this is true, which I don't think it is, there has been no prior discovery.
>
> [THE STATE]: This was requested – because it's not done yet. This was requested based on questions the defense – he shouldn't have answered like that.
>
> THE COURT: Uh-huh.
>
> [APPELLANT'S COUNSEL]: Why did you ask him the question then?
>
> [THE STATE]: Well I didn't – because I didn't expect that answer.
>
> THE COURT: Because he did not assume [the] answer.
>
> [THE STATE]: When we prepped not to answer like that.
>
> THE COURT: Would you like some limiting instruction? How would you like –
>
> [APPELLANT'S COUNSEL]: Well, what is a limiting instruction going to do at this point? Your Honor knows from –
>
> [THE STATE]: There's no results.

[APPELLANT'S COUNSEL]: -- (indiscernible) my other questions.

[THE STATE]: Right. There are no results.

[APPELLANT'S COUNSEL]: It doesn't matter; a request for testing.

[THE STATE]: Based on the first trial.

[APPELLANT'S TRIAL]: Even since the first trial, it's discovery that has not been provided.

THE COURT: Meaning the mere making of the request wasn't –

[APPELLANT'S COUNSEL]: During the (indiscernible) cross-examination and –

* * *

THE COURT: -- meaning that the mere making of the request wasn't disclosed to you?

[APPELLANT'S COUNSEL]: No.

THE COURT: This is the first you've heard of it?

[APPELLANT'S COUNSEL]: Yes. Absolutely the first I've heard of it.

Appellant's counsel then noted that she would have requested a continuance had the State's request for DNA testing been disclosed to her. The circuit court advised counsel that it would instruct the jury to disregard the last portion of Detective Cruz's testimony. Appellant's counsel questioned the efficacy of a curative instruction, and the discussion continued:

[APPELLANT'S COUNSEL]: And it's an important point in my cross and now this, these shenanigans are affecting my ability to effectively cross-examine.

THE COURT: Let me back up. Thanks. I hear you.

[APPELLANT'S COUNSEL]: I can't wait to see what else is going to happen.

THE COURT: Okay. There was testimony that the items that were recovered when they arrived at the scene at approximately 8:38 were a towel, a bloody shirt, multiple shell casings, four .380 [bullets], two bullet fragments, a lighter, a hat, a bag o[f] marijuana, a dirt bike and broken headphones, correct?

[APPELLANT'S COUNSEL]: Uh-huh.

THE COURT: So they've heard that there was a bloody shirt. They've now heard that there was an orange shirt.

[APPELLANT'S COUNSEL]: Well no because through the crime lab investigator.

THE COURT: Uh-huh.

[APPELLANT'S COUNSEL]: Not only is it (indiscernible) that I've introduced into evidence but I asked her questions and whether she had received a request for DNA testing.

THE COURT: Sure. And the answer was no.

[APPELLANT'S COUNSEL]: No.

[THE STATE]: Right.

[APPELLANT'S COUNSEL]: Because the problem now is that in the State's efforts to win this conviction at all costs apparently, they've now tried to take measures since the first trial to fix their mistakes. Now they're entitled to do that but I'm entitled to know.

THE COURT: Uh-huh.

[APPELLANT'S COUNSEL]: Right.

[THE STATE]: The effort to have – the reason the question was asked was because in the first trial counsel crossed the detective, well, why didn't you do this? Why didn't you put it in for DNA testing and he

> was prepared to answer that and that's what my question was designed to elicit right now.
>
> Since the first trial which was again seven weeks ago, preparation for this trial, I said well put the request in to get it done. Hopefully, we can get it done. We can turn over evidence. It's going to come out as the blood of the victim obviously because it's a bloody shirt at the scene just to close in that gap.
>
> THE COURT: Uh-huh.
>
> [THE STATE]: The evidence was not complete. It's not even close to being completed. It would never be completed in seven weeks so my question today was designed to have this detective explain to the jury why during the first 18 months of this case, why he had not put it in. Not at all to elicit anything about him subsequently putting in a request because that was never coming in to this trial because it's not even done.
>
> THE COURT: I understand.
>
> [THE STATE]: And that's – and again he was prepped on that issue and sanitized on that issue for this precise reason that it's not – there is [sic] no results. There are no results for this evidence.

When asked why a limiting instruction would not be an effective remedy, the following occurred:

> [APPELLANT'S COUNSEL]: Well, (indiscernible) but the problem is it's already damaged my cross-examination and that can't be taken – and even if the Court instructs the jury to strike the question and the response, it's already damaged my cross-examination and had I'd known –
>
> THE COURT: Well, the issue is whether the damage is so severe that it deprives Mr. Davis of a fair trial and in this Court it absolutely does not with a limiting instruction. The Court gives a limiting instructions and instructions all the time.
>
> [APPELLANT'S COUNSEL]: But in this case it's a critical part of my cross-examination and the State knows that. And I should have known –

[THE STATE]: Which is precisely why I did not want anything to come in about any request for DNA. The answer would have been, no. I did not do that work. Why not? And then he would have answered as to the first 18 months pre-first trial.

THE COURT: How do you propose on the behalf of the State to gently rehabilitate this sub issue which is a critical issue from the defendant's cross-examination perspective so as to keep this foundation for the record even to then open it because of the scope for the cross-examination to be pursued by Mr. Davis through his counsel?

[THE STATE]: I would ask permission to precisely lead on this question to make sure he doesn't answer anything other than, Detective, after learning of the property, the evidence that was recovered at the scene, did you ever in the days or weeks after this murder did you ever request – in the precise days or weeks after the murder, did you ever request DNA lab –

THE COURT: And?

[THE STATE]: -- to do any work, further work, testing on that evidence?

THE COURT: And?

[THE STATE]: The answer would be no.

THE COURT: Yes.

[THE STATE]: And then he's going to say, no. Why not?

THE COURT: Yes.

[THE STATE]: That's it.

[APPELLANT'S COUNSEL]: And why not?

[THE STATE]: Why not because he's going to proffer – my proffer is because I believe as a homicide detective that the towel and the shirt were the towel and the shirt that had the blood of the victim there and

there would have been no relevance and no reason to do so and that's going to be the nature of several of my questions.

[APPELLANT'S COUNSEL]: Yeah. The problem is they've just heard him say well since then however.

THE COURT: Well but then once he says his answer as to why not, which is presumably because we believe it would have only shown up as blood of the victim and not of any suspect or not any trace DNA evidence of any the other person being a suspect. Then on cross you're going to say and beyond the why not, what? Bring out what –

[APPELLANT'S COUNSEL]: Well, the bell has been rung and so no matter what Your Honor says to this jury they have heard that this detective has requested this DNA testing.

[THE STATE]: If anything it hurts the State because this jury will never hear evidence that this – she's right. They will never hear evidence that her client was forensically linked to the crime scene.

THE COURT: Thank you for your arguments. Thank you for your arguments. With regard to the State's objection – strike that, the defendant's objection with regard to the asking of the question as it was phrased, the objection is sustained.

The jury will be instructed to disregard the question and the answer and the State will be invited again as it has been on many occasions as has the defense on many occasions be[en] instructed to rephrase the question as an unremarkable event as it has been in prior instances in this trial.

[APPELLANT'S COUNSEL]: It's not unremarkable. If Your Honor would just permit me briefly. The problem is that if it's not, at this point, the way that it's left because they're not going to forget what he said no matter what you say, Your Honor, with all due respect. It leaves open, well was the result of the testing?

[THE STATE]: And it only hurts the State –

[APPELLANT'S COUNSEL]: Not necessarily.

[THE STATE]: -- when the State never presents the evidence.

> [APPELLANT'S COUNSEL]: It's known now. It's an open question of well what had been Rickey Davis'[s] DNA or somebody else's DNA?
>
> THE COURT: Is there a follow-up to Mr. Davis'[s] opinion in that regard as to what should then happen next?
>
> [APPELLANT'S COUNSEL]: Well, I don't think it can be fixed at this point no matter what you do.
>
> THE COURT: Toward what end?
>
> [APPELLANT'S COUNSEL]: I'm sorry?
>
> THE COURT: Toward what end, it can't be fixed?
>
> [APPELLANT'S COUNSEL]: In other words, if you give a limiting instruction they can still use it (indiscernible) open the jury's mind on what was the result of that request because it hurt.
>
> THE COURT: Okay. Is Mr. Davis somehow suggesting that the ultimate sanction should occur absent any attempt at reparation which would be a mistrial[?] Is that where he's going with this?
>
> Because if that's the request, given the course of the discussion with the Court's attempt to instruct the jury and to permit the State to rephrase, I believe that that request respectfully would just be premature at this time.

Once the bench conference concluded, the court instructed the jury as follows:

> Just one moment please. Members of the jury, as you just observed there was a brief perhaps two to three minute discussion between the court and counsel here at the bench out of your hearing although on the record and because that discussion, although somewhat brief, all things being relative lasted about two to three minutes perhaps, it may very well be that you don't even remember the last question that was asked before that objection and the time at which the lawyers approached and/or the answer to the question.
>
> That notwithstanding, in an abundance of caution, I am respectfully directing the jury to disregard totality [sic], in its totality, the last question asked by [the State] of the witness, Detective Cruz,

> as well as Detective Cruz's answer. Completely disregard both. And now the State shall rephrase as to this line of questioning. Thank you.

The State then elicited that in the days immediately after the shooting of Mr. Dixon, neither the shirt nor the towel were tested for DNA.

On appeal, appellant contends that the court abused its discretion in failing to grant a mistrial. Appellant maintains that the State failed to disclose that it had requested DNA testing on the shirt, which prejudiced appellant by first allowing the jury to speculate as to the results of the test and, second, by blunting the force of appellant's counsel's cross-examination concerning the perceived shortcomings of the police investigation. Appellant contends that Detective Cruz's response in this case was on par with the response of the mother of a sexual assault victim in *Rainville v. State*, 328 Md. 398 (1992). Appellant argues that the "potential for unfair prejudice" was more pronounced because the State's case was not "overwhelming."

The State maintains that the court did not abuse its discretion in refusing to grant a mistrial. The State notes that Detective Cruz's response was not solicited and was a non-responsive answer to the question posed. Moreover, the court ordered the objected-to question and response struck and provided a curative instruction. The State contends that *Rainville* is inapposite, and this case is not "close" because three eyewitnesses identified appellant as the shooter. Ultimately, the State argues, the court did not abuse its discretion in refusing to grant an extraordinary remedy, and appellant's counsel was able to present a theory of a slipshod police investigation to the jury.

We review a circuit court's ruling on a motion for mistrial for abuse of discretion. *See Nash v. State*, 439 Md. 53, 66-67 (2014). A court abuses its discretion where the ruling "'is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Weathers v. State*, 231 Md. App. 112, 132 (2016) (quoting *Norwood v. State*, 222 Md. App. 620, 643 (2015), *cert. denied*, 444 Md. 640 (2015)). Stated another way, an abuse of discretion occurs "'where no reasonable person would take the view adopted by the [trial] court [] or when the court acts without reference to any guiding rules or principles.'" *Jackson v. State*, 230 Md. App. 450, 461 (2016) (quoting *Nash*, 439 Md. at 67).

The Court of Appeals has noted that a "mistrial is no ordinary remedy . . . . 'the declaration of a mistrial is an extraordinary act which should only be granted if necessary to serve the ends of justice.'" *Cooley v. State*, 385 Md. 165, 173 (2005) (quoting *Jones v. State*, 310 Md. 569, 587 (1987), *vacated on other grounds*, 486 U.S. 1050 (1988)). In cases where the jury may have heard improper information or evidence, "the trial judge 'must assess [its] prejudicial impact . . . and assess whether the prejudice can be cured.'" *Walls v. State*, 228 Md. App. 646, 668 (2016) (quoting *Carter v. State*, 366 Md. 574, 589 (2001)). If the prejudice cannot be cured, then a mistrial is appropriate, but, if "the prejudice can be remedied by a curative instruction," and the court denies the mistrial motion and gives a curative instruction, "appellate review focuses on whether 'the damage in the form of prejudice to the defendant transcended the curative effect of the instruction.'" *Id.* at 668-69 (quoting *Kosmas v. State*, 316 Md. 587, 594 (1989)).

"'The determining factor as to whether a mistrial is necessary is whether the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Cooley*, 385 Md. at 173 (quoting *Kosh v. State*, 382 Md. 218, 226 (2004)). The Court of Appeals has recognized that extraneous information can be generally "'cured by withdrawal of it and an instruction to the jury to disregard it,'" and the cases where a mistrial is necessary are "'exceptional.'" *Id.* at 174 (quoting *Nelson v. Seiler*, 154 Md. 63, 72 (1927)).

The Court of Appeals has provided a list of factors to be considered in determining whether a mistrial is appropriate:

> "whether the reference [to the improper information] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists[.]"

Jackson, 230 Md. App. at 467-68 (quoting *Carter*, 366 Md. at 590).

In this case, Detective Cruz's reference to the shirt being tested for DNA was an isolated statement and was not responsive to the question posed. Furthermore, Detective Cruz was not the State's principal witness, nor was his credibility at issue. We note, too, that there was ample other evidence, namely the identification of appellant as the shooter by three eyewitnesses.

We are not persuaded that Detective Cruz's testimony that, later, there was a request to have the shirt tested so prejudiced appellant that a mistrial was necessary. There was no evidence that a test was performed. Detective Cruz's response in this case is not similar to the mother's response in *Rainville* which the Court of Appeals determined necessitated a

mistrial. In that case, in response to a question from the State about a child sexual assault victim's "demeanor," the mother of the victim responded: "She was very upset. I had noticed for several days a difference in her actions. She came to me and said where Bob [Rainville] was in jail for what he had done to Michael that she was not afraid to tell me what had happened." 328 Md. at 401. The trial court denied Rainville's motion for a mistrial and provided a curative instruction. *Id.* at 401-02.

On appeal, the Court of Appeals noted that the mother's remark appeared to inform the jury that Rainville had a prior conviction of a similar nature. *Id.* at 407. But, he had not been convicted of that conduct and was awaiting trial. *Id.* In analyzing the factors noted above, the Court determined that the mother's response "almost certainly had a substantial and irreversible impact upon the jurors, and may well have meant the difference between acquittal and conviction." *Id.* at 410. The Court furthermore determined that the court's curative instruction was ineffective: "It is highly probable that the inadmissible evidence in this case had such a devastating and pervasive effect that no curative instruction, no matter how quickly and ably given, could salvage a fair trial for the defendant." *Id.* at 411.

Rainville is not similar to this case. Unlike the mother's response in that case, Detective Cruz's answer did not implicate appellant in criminal conduct and did not prejudice him in the eyes of the jury. Although appellant's counsel argued that Detective Cruz's response blunted the force of her cross-examination, appellant's counsel had ample opportunity to present to the jury the perceived shortcomings of the police investigation. For example, appellant's counsel questioned the crime scene technician about the

difficulties of measuring the scene, whether any of the recovered evidence was tested for DNA, and whether photographs were taken of other parts of the area. Detective Cruz was asked about efforts to locate a car that may have been driven from the scene, his failure to check phone records to corroborate a witness, and his failure to determine the owner of the orange shirt. In closing, appellant's counsel argued that the jury should question the stories of the witnesses and the thoroughness of the police investigation. Appellant's counsel, therefore, presented her theory of the case to the jury. Whatever effect the reference to the previously-undisclosed request for DNA testing on the shirt had on the jury was remedied by the prompt curative instruction. We, accordingly, affirm.

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