UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1767

September Term, 2015

DIONA THOMAS

v.

STATE OF MARYLAND

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

JJ.

Opinion by Eyler, James R., J.

Filed: January 24, 2017

On October 21, 2014, Diona Thomas, appellant, and Jade Cooper, both females, and Charles Newman and Devin Marbury, both males, were indicted on fourteen counts. The counts in each indictment were identical and charged the co-defendants, *inter alia*, with the September 12, 2014 armed carjacking of Charles Douglas, III, and the September 13, 2014 armed robbery of Mohan Burujukadi.[1] At a pre-trial motions hearing, the co-defendants moved to sever the armed carjacking counts involving Mr. Douglas from the armed robbery counts involving Mr. Burujukadi. The court denied the motions. The co-defendants also noted that their cases were never formally joined. In response, the State made an oral motion to join, and the court ordered the State to file a written motion to join. Thereafter, the State emailed a written motion to join the cases, and the court granted the State's motion in a written order.[2]

Following a jury trial, appellant was convicted of armed carjacking, armed robbery, and conspiracy to commit armed carjacking and related lesser counts of Mr. Douglas, and acquitted of the counts involving the armed robbery of Mr. Burujukadi.

[1] On March 17, 2016, this Court consolidated the cases for argument. *See Newman v. State*, No. 1472, September Term, 2015, and *Marbury v. State*, No. 2657, September Term, 2015. One of the four co-defendants, Jade Cooper, did not note an appeal. *See* Maryland Judiciary Case Search, *State of Maryland v. Cooper*, Case No. CT141414D (Prince George's County).

[2] The State's motion to join is not referenced in any of the docket entries and is not included in appellant's record on appeal. However, it is included as an attachment to the court's order granting the motion to join in both co-defendants' Newman's and Marbury's records in this consolidated appeal. *Newman v. State*, No. 1472, September Term 2015; *Marbury v. State*, No. 2657, September Term 2015. The court's order was stamped as filed with the clerk on April 8, 2015. The order notes that, on April 1, 2015, the court mailed copies to trial counsel of record.

Appellant was sentenced, in a separate disposition hearing from her co-defendants, to concurrent terms of 14 years, with all but 5 years suspended, for the armed carjacking, armed robbery and conspiracy convictions, to be followed by five years supervised probation. Appellant timely appealed and presents the following questions for our review:

> 1. Did the Circuit Court err when it belatedly joined for trial the prosecution of Ms. Thomas with the prosecution of the co-defendants?
>
> 2. Did the Circuit Court err when it failed to instruct the jury to disregard the portions of the State's closing argument where the prosecutor (1) cited to facts about a victim that were not in evidence to enhance his credibility, and (2) argued for guilty verdicts because the defendants resided in another county but entered Prince George's County to victimize its residents?

For the following reasons, we shall affirm.

BACKGROUND

On September 12, 2014, at around 3:00 p.m., Mr. Douglas was at a 7-Eleven convenience store in Forestville, Maryland, when he was approached by two females who asked him for a ride. When Mr. Douglas agreed, the females got inside his vehicle, a green 1997 Chevy Lumina, with Maryland tag 8BA1246. After Mr. Douglas drove away from the 7-Eleven, the females asked him to pull over so they could talk to two males. Mr. Douglas did so, and then overheard one of the females ask one of the males about a purchase of marijuana.

At that point, one of the males, a dark-skinned man with his hair in dreadlocks, opened Mr. Douglas's car door. Mr. Douglas tried to put the car in gear to escape. However, "the female in the right passenger, pulled my arm down. The guy pushed my

neck up, put the knife to my neck and the female in the back held my shoulder." Mr. Douglas's assailants then went through his pockets, took his blue Nokia cell phone, approximately $300 in cash, and his identification card. The males then pulled Mr. Douglas out of his vehicle, hopped in, and then "pulled off" in his car. Douglas went home and reported the crime to the police.

The next day, the police showed Mr. Douglas several photo arrays. Mr. Douglas identified a photograph of one of the females involved in the carjacking and wrote on the back of the array that the female depicted "[p]ulled my hand away from the steering wheel and proceeded to go into my pants pocket." Mr. Douglas identified another female in a different array, writing on the back of that one that "[s]he was in the car while one of the guys had the knife to my neck."

Mr. Douglas also viewed photo arrays containing pictures of males and identified the person who held a knife to his neck. Mr. Douglas wrote on the back of the array that this person "[h]eld a knife to my neck while pushing my head up" and "took the money out of my pocket, pulled me out of the vehicle with the help of the other guy. Then he drove off." Mr. Douglas also identified a person in another array as the person who pulled him out of his car.

At trial, Mr. Douglas identified all four co-defendants as the individuals who were involved in the crimes. The photo arrays were admitted into evidence, without objection.[3]

[3] Although these exhibits were admitted and available for the jury's consideration, (continued)

On September 13, 2014, the evening after the carjacking, Mr. Burujukadi was delivering pizza in Temple Hills, Maryland when another vehicle, being driven by two African-American men, flagged him down and told him to stop. Mr. Burujukadi did so, and the two men, one with long "dread" hair and the other with short hair, got out of their green-colored vehicle and approached Mr. Burujukadi's vehicle. One of the men reached into Mr. Burujukadi's vehicle, grabbed him by the collar, and forced him to exit. The men took Mr. Burujukadi's wallet, containing his credit cards, his iPhone 5S in a "butterfly case," and the remaining pizzas he was scheduled to deliver.

After the men let him go and drove away in the same vehicle in which they had arrived, Mr. Burujukadi went to a friend's house and reported the robbery to the police. Mr. Burujukadi testified that the license plate on the assailants' vehicle was Maryland 8BA1246. He identified a photograph of the vehicle for the jury.

A few days after the robbery, the police showed Mr. Burujukadi photographs to see if he could identify anyone involved. He identified a photo of the person he believed attacked him during the robbery. He signed the back of the array and wrote, "I'm not sure I'm suspecting this guy. His face looks like the man who robbed me." Mr. Burujukadi also looked at a separate array of photographs and selected a photograph of the second individual involved in the robbery. Mr. Burujukadi signed the back of the array and wrote, "I just think he may be the guy, because I was not sure, because it was

(continued)
they are not included in the record on appeal. The court ordered all exhibits returned at the end of the trial.

dark. And the idea which I have I based on this idea, I think he may be but I'm not sure." At trial, with respect to the attacker, Mr. Burujukadi further testified as follows:

> Q. What about this photograph is similar to the person that attacked you, can you tell the ladies and gentlemen of the jury?
>
> A. His face looks like the same, and as it was dark, I was not clear. But still when I close my eyes and I think of the person on that day, I thought when among those photographs I have seen nothing was close, only this photograph was somebody because his face cut was like this. So I had a rough idea based on the rough idea. I told the cops that this photo looks familiar, but I'm not sure.

On cross-examination, Mr. Burujukadi agreed that he first told the police on the day of the incident, and prior to being shown photographs, that he could not identify anyone involved in the robbery. He testified, however, that he provided the police with a description of the suspects. He further explained that, when he originally described one of the individuals as having "curly" hair, he had since learned that the hairstyle was referred to as "dread" hair. He also agreed that he still was "[d]efinitely not sure" who the persons were that robbed him.

About two hours after the robbery of Mr. Burujukadi on September 13, 2014, Officer Joshua Boutaugh, of the District of Columbia Metropolitan Police Department, was on patrol and using a license plate reader near the 2500 block of Benning Road when the reader "hit" on a vehicle that was suspected to have been taken in an armed carjacking. Officer Boutaugh testified that the vehicle was a 1997 green Chevy Lumina with Maryland tags 8BA1246 which was then occupied by four individuals. Officer Boutaugh activated his emergency equipment and pursued the vehicle through the District of Columbia, eventually stopping it.

Various officers with the Metropolitan Police Department confirmed that all four co-defendants were present inside the Lumina at the time of the stop. Ms. Cooper was the driver at the time. Inside the Lumina, the police found pizza boxes, with a "flip or switch-blade knife laying on top of them," as well as an open, silver folding knife resting on Mr. Newman's lap.

Mr. Burujukadi's Virginia driver's license was recovered from the vehicle; a credit card from the rear driver's side floor; four cellphones, including an iPhone 5S with a "butterfly cover"; a blue Nokia cellphone; and a black, hoody sweatshirt. Mr. Burujukadi testified at trial that his credit card and iPhone were returned to him by the police. He also testified that one of his assailants was wearing a hoody. Photographs of the co-defendants were taken on the night of the arrest and were used to prepare the photo arrays that were shown to both victims in this case, Messrs. Douglas and Burujukadi.

We shall include additional detail in the following discussion.

DISCUSSION

I.

Appellant first contends the circuit court erred in *sua sponte* joining her case with that of the co-defendants. The State responds that the circuit court properly exercised its discretion and that appellant's trial counsel waived any complaint with respect to the joinder. In their briefs, none of the parties acknowledge that the State emailed to trial counsel a motion to join before the circuit court ordered joinder.[4] As will be explained,

[4] Although the emailed motion does not appear in appellant's record, it is included (continued)

we conclude that the circuit court properly exercised its discretion in granting the State's motion to join.[5]

At the pretrial motions hearing, held on March 30, 2015, the clerk called all four cases involving the four co-defendants together, and, along with the State, each counsel entered an appearance on their respective clients' behalf. The court then heard argument on co-defendants' joint motion to sever as to whether evidence relevant to the charges of armed carjacking involving Mr. Douglas, and evidence relevant to the charges of armed

(continued)
in the record on appeal for appellant's co-defendants. *See Newman v. State*, No. 1472, Sept. Term 2015, R. 97, and *Marbury v. State*, No. 2657, Sept. Term 2015, R. 115. Pursuant to Maryland Rule 5-201, we take judicial notice of this fact in this consolidated appeal. *See Dashiell v. Meeks*, 396 Md. 149, 176 (2006) ("[J]udicial notice may be taken during appellate proceedings"); *Stovall v. State*, 144 Md. App. 711, 717 n. 2 (taking judicial notice of official entries in circuit court records), *cert. denied*, 371 Md. 71 (2002); *Smith v. Hearst Corp.*, 48 Md. App. 135, 136 & n.1 (1981) (courts may take judicial notice of "facts relating to the personnel, operation and records of the court[.]").

[5] In their joint reply brief, co-defendants Thomas and Marbury also assert that the court's order joining the cases for trial denied them their constitutional right to due process, suggesting that they did not have an opportunity to respond the motion for joinder or to the court's order granting joinder. The constitutional claim was not argued in appellant's initial brief in this Court, however. Thus, we need not consider that issue on appeal. *See Robinson v. State*, 404 Md. 208, 216 n. 3 (2008) ("An appellate court will not ordinarily consider an issue raised for the first time in a reply brief"). In any event, contrary to appellants' representations, the State filed a written motion to join and that motion was emailed to trial counsel before the court ruled. As will be explained, the original oral motion to join was raised in an open hearing, where all co-defendants were in attendance, and all counsel were given an opportunity to, and did, in fact, voice their objection to joinder. Thus, even if properly raised, we would conclude that appellants were afforded their rights to due process. *See generally, Wagner v. Wagner*, 109 Md. App. 1, 23 ("Just what process is due is determined by an analysis of the particular circumstances of the case, including the functions served and the interests affected"), *cert. denied*, 343 Md. 334 (1996).

robbery involving Mr. Burujukadi, was mutually admissible.[6] Appellant's counsel specifically argued that the evidence "between the two crimes and the counts relating to the separate incidents should be severed."

The State set forth its reasons for the joint trial, arguing judicial economy but primarily that the evidence was admissible to prove identity, as follows:

> [PROSECUTOR]: So, as to mutual admissibility, Your Honor, the State's case is a theory of basically a crime spree that began on September 12 and concluded on September 13, that these four individuals agreed to and carried out a carjacking. Again, the first victim, Charles Douglas, the theory is that Ms. Cooper and Ms. Thomas lured Mr. Douglas to an area where Mr. Marbury and Mr. Newman, then with physical force, took the vehicle of Mr. Charles Douglas. That vehicle was a gray [sic] 1997 Chevrolet Lumina. They took this vehicle. All four defendants drove away. They also took Mr. Douglas's cell phone and some cash.
>
> They take this vehicle, is our theory of the case. They drive it around, they hang out, they party in the car. Then, the next day, less than 30 hours later, they rob[,] Mr. Newman and Mr. Marbury again pretending like they need help lured Mr. Burujukadi. Mr. Burujukadi gets out of his vehicle – he's delivering pizza. He's again robbed. Ms. Cooper is the driver. She drives away the vehicle. The robbery – during the robbery, Mr. Marbury and Mr. Newman take pizza boxes out of Mr. Burujukadi's vehicle, his wallet, his identification, and a credit card, his cell phone and cash.

[6] Although not raised by the State, it appears that the codefendants' respective motions to sever were not filed timely under Maryland Rule 4-252 (b). Ms. Thomas was arraigned in the circuit court on November 7, 2014, and trial counsel entered her appearance, according to the clerk, on November 12, 2014. It appears that Ms. Thomas did not file a separate written motion to sever, instead joining in the motion at the pretrial hearing, held on March 30, 2015. Mr. Marbury's counsel entered an appearance on October 24, 2014 and then, also more than 30 days later, filed a written motion to sever on January 30, 2015.*Marbury v. State*, No. 2657, September Term, 2015. Mr. Newman's counsel entered an appearance on October 29, 2014 and did not file a motion to sever, as part of an omnibus motion, until February 24, 2015. N*ewman v. State*, No. 1472, September Term, 2015.

> So, this happens just about again 30 hours after that carjacking. Two hours after the armed robbery, the four suspects are pulled over in the green 1997 Chevy Lumina, which is the device that was used in the second attack. It was obviously the car that was taken from Mr. Douglas the day before, the first day on September 12.

In response, counsel for the co-defendants argued that the test for joinder was mutual admissibility and that test was not met.

Towards the end of argument by all the parties, counsel for Mr. Marbury and counsel for appellant, for the first time, observed that the cases involving the four co-defendants had never been formally joined. The State then made an oral motion to join:

> [PROSECUTOR]: I apologize for interrupting. Your Honor, I would like to make an oral motion. We believe that the cases were joined based on the way we indicted them, and the way we have been moving forward. If it wasn't clear to the Court, wasn't clear to the defense counsel as we have been selecting these dates all together, at this point, I would like to make an oral motion to join these four defendants.
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> [CO-DEFENDANT NEWMAN'S COUNSEL]: We strongly object to that. There is a procedure for joining cases.
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> [APPELLANT'S COUNSEL]: I object as well on behalf of Ms. Thomas.
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> [CO-DEFENDANT COOPER'S COUNSEL]: Ms. Cooper also objects.
>
> THE COURT: You need to put that in writing.
>
> [CO-DEFENDANT MARBURY'S COUNSEL]: As well as Mr. Marbury.

The court then denied the codefendants' motion to sever. It ruled that, based on "the analysis put forth, the arguments of counsel, the Court's examination of the facts in this case, or alleged facts in this case, the motions to sever are denied."

The next day, March 31, 2015, the State emailed to trial counsel a motion to join. That motion provided as follows:

> Comes now the State of Maryland, by and through Jennifer H. Berger and Rose E. Gibson Assistant State's Attorney for Prince George's County, Maryland, and pursuant to Rule 4-253 moves the Court to join the above cases for trial.
>
> > 1) This honorable court heard oral argument from all defendants and the State regarding the issue of severance of these matters and these defendants.
> >
> > 2) This honorable court denied the motion for severance holding the evidence in each incident and regarding each defendant was mutually admissible.
>
> WHEREFORE, for the foregoing reasons, the State requests that the above-captioned cases be joined for trial.

Marbury v. State, Case No. 2657, September Term, 2015.

No response to the State's written motion was filed, by any party. On April 1, 2015, the court granted the State's motion to join, sending copies to trial counsel of record. The order was stamped as filed by the clerk on April 8, 2015.

Maryland Rule 4-253 (a) provides that "[o]n motion of a party, the court may order a joint trial for two or more defendants charged in separate charging documents if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Time for filing such a motion in the circuit court is governed by Maryland Rule 4-252, which provides that a request for a joint trial of defendants or offenses "shall be raised by motion in conformity with this Rule and if not so raised are waived unless the court, for good cause shown, orders otherwise . . ." Md. Rule 4-252 (a) (5). And, pertinent to the issue raised, such a motion

"shall be filed within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213 (c) . . ." Md. Rule 4-252 (b).

Here, there is no dispute that the State did not file a motion to join within 30 days after the appearance of counsel or the first appearance of appellant. Instead, following the pretrial hearing, on March 31, 2015, the State emailed a written motion to join to the parties and the circuit court. Appellant did not file a response to that emailed motion, although Maryland Rule 4-252 (f) permits such a response. As previously noted, the court granted the State's motion.[7]

Based on the above, we conclude that the trial court did not, *sua sponte*, order joinder of the co-defendants. The order followed the State's oral motion at the pretrial hearing, as well as a written motion emailed to counsel after the hearing. Clearly, Rule 4-252 (a) permits the court to grant even a late motion for good cause. *See Sinclair v. State*,

[7] The emailed motion was accompanied by a Certificate of Service listing the email addresses for trial counsel of record, including appellant's trial counsel, and indicating that the motion to join was emailed on March 31, 2015. *See* Md. Rule 1-323 ("A certificate of service is prima facie proof of service"); *Lovero v. Da Silva*, 200 Md. App. 433, 446 (2011) (observing that the requirements of Rule 1-323 assures that "each party has been duly notified before action is taken by the court in response to or as a result of the subject pleading or paper"); *see also* Md. Rule 1-321 (listing general rules for service of pleading, papers and other items); Md. Rule 1-322 (a) (recognizing that a judge may accept a filing). There was no motion to strike or other response challenging the State's motion. *See generally, Murnan v. Joseph J. Hock, Inc.*, 274 Md. 528, 531-32 (1975) ("Under these circumstances, something more than a mere denial of receipt was necessary to rebut the presumption of service . . ."). We also note that, prior to jury selection on the first day of trial, co-defendant Newman filed a renewed motion to sever the charges. *Newman v. State*, No. 1472, September Term 2015. The renewed motion was heard and denied.

444 Md. 16, 30 (2015) (recognizing that Rule 4-252 "grants trial courts discretion to hear noncompliant motions 'for good cause shown'"); *Ball v. State*, 347 Md. 156, 206 (1997) ("Trial judges are presumed to know the law and to apply it properly"). Notably, absent a factual dispute on a pertinent evidentiary matter, a court may determine a motion under Rule 4-252 (g) without a hearing. *Cf. McMillian v. State*, 65 Md. App. 21, 30 (1985) ("While we agree with the State that generally no hearing is required under the rule, where, as here, a factual dispute is central to the resolution of the motion, an evidentiary hearing is required").

In any event, a hearing was held on co-defendants' motion to sever. In *Fisher v. State*, 128 Md. App. 79, 133 (1999), *aff'd in part, vacated in part on other grounds*, 367 Md. 218 (2001) *abrogated on other grounds by Hunter v. State*, 397 Md. 580 (2007), we observed that joinder and severance are the "flip sides of the same coin."

Thus, the court's denial of the severance at the pretrial hearing can be seen as the precursor to the court's subsequent order granting the joinder. The parties' focus was on mutual admissibility of the evidence with respect to charges, but that issue was intertwined with mutual admissibility of the evidence with respect to defendants. If evidence was mutually admissible as to charges, then evidence was mutually admissible as to defendants. After the court denied the motion to sever charges, and after the State filed a written motion for joinder, the defendants did not object to joinder of defendants or ask the court to re-visit that issue.

"The decision to join or sever charges ordinarily lies within the sound discretion of the trial court." *Galloway v. State*, 371 Md. 379, 395 (2002); *see also Harper v. State*,

162 Md. App. 55, 88-89 (2005) ("Decisions regarding the joinder or severance of charges for trial are committed to the sound discretion of the trial court"). Moreover:

> This discretion applies unless a defendant charged with similar but unrelated offenses establishes that the evidence as to each individual offense would not be mutually admissible at separate trials. In such a case, the defendant is entitled to severance. Nevertheless, where a defendant's multiple charges are closely related to each other and arise out of incidents that occur within proximately the same time, location, and circumstances, and where the defendant would not be improperly prejudiced by a joinder of the charges, there is no entitlement to severance. In those circumstances, the trial judge has discretion to join or sever the charges, and that decision will be disturbed only if an abuse of discretion is apparent.

Carter v. State, 374 Md. 693, 705 (2003) (citations omitted); *see also Day v. State*, 196 Md. 384, 395 (1950) ("Under ordinary circumstances, where two parties are accused of the same crime, it is in the interest of both justice and economy that they should be tried together"); *Ogonowski v. State*, 87 Md. App. 173, 187 ("Where the crimes arise out of a single, indivisible series of events, a common scheme or other such circumstances, however, no presumption is applied, and the defendant shoulders the burden of demonstrating prejudice"), *cert. denied*, 323 Md. 474 (1991).

Contrary to appellant's suggestion, the circuit court considered the issue of mutual admissibility at the pretrial hearing when counsel clearly argued the issue. We have explained the pertinent law in this area as follows:

> Md. Rule 4-253(c) provides that the court "may" order a separate trial for different counts "[i]f it appears that any party will be prejudiced by the joinder for trial of counts[.]" Joinder issues are determined by use of two questions. *Conyers v. State*, 345 Md. 525, 553, 693 A.2d 781 (1997). The first question is, whether evidence as to each of the accused's individual offenses would be "mutually admissible" at separate trials concerning the offenses? *Id.* Because this question requires a legal conclusion, we give no deference to a trial court's ruling on appeal. *Id.* To

> resolve this question, the trial court is to apply the "other crimes" analysis announced in *State v. Faulkner*, 314 Md. 630, 552 A.2d 896 (1989) and its progeny. *Id.* Originally a list of five substantially relevant "exceptions" to the general rule excluding other crimes evidence – motive, intent, absence of mistake or accident, identity, or common scheme or plan – the list is not exclusive. *Oesby v. State*, 142 Md. App. 144, 160, 788 A.2d 662 (2002) (citations omitted) and *Solomon v. State*, 101 Md. App. 331, 353–56, 646 A.2d 1064 (1994), *cert. denied*, 337 Md. 90, 651 A.2d 855 (1995). Over the years the list has grown with inevitable overlap. *Oesby*, 142 Md. App. at 162, 788 A.2d 662.
>
> The second question is, whether "the interest in judicial economy outweigh[s] any other arguments favoring severance?" *Conyers*, 345 Md. at 553, 693 A.2d 781. This question requires a balancing of interests by the trial court, and we will only reverse if the trial judge's decision "was a clear abuse of discretion." *Id.* at 556, 693 A.2d 781. To resolve this second question, the trial court weighs the likely prejudice against the accused in trying the charges together against considerations of judicial economy and efficiency, including the time and resources of both the court and the witnesses. *Frazier v. State*, 318 Md. 597, 608, 569 A.2d 684 (1990) (citing *McKnight v. State*, 280 Md. 604, 609-10, 375 A.2d 551 (1977)). We note that "once a determination of mutual admissibility has been made, any judicial economy that may be had will usually suffice to permit joinder unless other non-evidentiary factors weigh against joinder." *Conyers*, 345 Md. at 556, 693 A.2d 781. "If the answer to both questions is yes, then joinder of offenses . . . is appropriate." *Id.* at 553, 693 A.2d 781.

Cortez v. State, 220 Md. App. 688, 694-95 (2014), *cert. denied*, 442 Md. 516 (2015).

At the pretrial hearing, the State summarized the facts concerning the armed carjacking of Mr. Douglas and the subsequent armed robbery of Mr. Burujukadi. The State contended joinder was appropriate in this case because the evidence as to both crimes was specially relevant to show identity. Identity was at issue throughout the trial.

Evidence of other offenses may be received to establish identity if it shows any of the following:

> (a) the defendant's presence at the scene or in the locality of the crime on trial;

> (b) that the defendant was a member of an organization whose purpose was to commit crimes similar to the one on trial;
>
> (c) the defendant's identity from a handwriting examplar, "mug shot," or fingerprint record from a prior arrest, or his identity through a ballistics test;
>
> (d) the defendant's identity from a remark made by him;
>
> (e) the defendant's prior theft of a gun, car or other object used in the offense on trial;
>
> (f) that the defendant was found in possession of articles taken from the victim of the crime on trial;
>
> (g) that the defendant had on another occasion used the same alias or the same confederate was used by the perpetrator of the present crime;
>
> (h) that a peculiar modus operandi used by the defendant on another occasion was used by the perpetrator of the crime on trial;
>
> (i) that on another occasion the defendant was wearing the clothing worn by or was using certain objects used by the perpetrator of the crime at the time it was committed;
>
> (j) that the witness' view of the defendant at the other crime enabled him to identify the defendant as the person who committed the crime on trial.

Emory v. State, 101 Md. App. 585, 610-11 (1994) (quoting *Faulkner*, 314 Md. at 637-38), *cert. denied*, 337 Md. 90 (1995).

Several of these factors are present in this case, including, but not limited to, the prior theft of the car used in the subsequent crime, the possession of articles from both crimes when appellant was arrested, and the presence of the same confederates from the time of the crime to the moment of arrest. The proffers sufficiently informed the court that appellant was involved in the armed carjacking of Mr. Douglas's vehicle. As supplemented by facts from the State's written response to Mr. Marbury's motion to

sever, *see Marbury v. State*, No. 2657, September Term 2015, that vehicle was then used, 30 hours later, in the armed robbery of Mr. Burujukadi. When the co-defendants were arrested, in the vehicle stolen from Mr. Douglas, evidence from both crimes, including, but not limited to knives, cellphones, pizza boxes, and credit cards, was recovered. *Marbury v. State*, No. 2657, September Term 2015. This is not a situation in which there are confessions or other statements that might be admissible only as to some of the defendants. *See Williams v. State*, 226 Md. 614, 621 (1961) (citing, in contrast, *Day v. State*, 196 Md. 384 (1950)), *cert. denied*, 369 U.S. 855 (1962); *see also Tichnell v. State*, 287 Md. 695, 712-13 (1980) (upholding joinder of charges where the offenses were closely related to each other and occurred within a fifteen minute period within a tightly confined area); *Hamwright v. State*, 142 Md. App. 17, 34-36 (2001) (permitting one trial for several incidents, which included two separate armed robberies of two Royal Farms stores, and an earlier carjacking incident involving robbery, kidnaping, and sexual offense, where proof that appellant robbed the two stores was probative to establishing that he was one of the carjackers), *cert. denied*, 369 Md. 180 (2002); *Solomon*, 101 Md. App. at 370-71 (identity satisfied for mutual admissibility where "unities of time and place among the three assaults helped to establish the identity of the perpetrators" where all offenses occurred on same morning in same area). Further, as argued by the State in its written response to co-defendant Marbury's motion to sever, the two crimes were mutually admissible to show a common scheme or plan as that exception applies when there is "evidence that the crimes involved were conceived of by the defendant as part of

one grand plan; the commission of each is merely a step toward the realization of that goal." *Emory*, 101 Md. App. at 613.

Acknowledging that opening statements are not evidence, appellant spends a large portion of her appellate argument on the import of Ms. Cooper's opening statement. In opening statement, Ms. Cooper's counsel stated that appellant and Ms. Cooper were in Mr. Douglas's car to exchange sex for drugs. Appellant argues that the statement contained inadmissible bad acts and violated *Bruton v. United States*, 391 U.S. 123, 137 (1968) (holding that, in a joint trial of co-defendants, the prosecution may not move into evidence the confession of a non-testifying defendant that inculpates a co-defendant, even if the jury is given an appropriate limiting instruction).

There was no objection, by any party, to Ms. Cooper's opening statement. Therefore, these issues regarding inadmissible bad acts and violation of *Bruton* were never presented to the trial court and are not preserved for appellate review. *See* Md. Rule 8-131 (a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court. . . ."); *accord Robinson v. State*, 404 Md. 208, 216 (2008); *see also Malarkey v. State*, 188 Md. App. 126, 157 (2009) ("The trial court cannot correct errors of which it is not informed"). Furthermore, Ms. Cooper never testified. The prosecution did not admit any statements of the co-defendants at trial. Moreover, the jury was instructed that opening statements are not evidence. "As this Court has often recognized, 'our legal system necessarily proceeds upon the assumption that jurors will follow the trial judge's instructions.'" *Alston v. State*, 414 Md. 92, 108 (2010) (quoting *State v. Moulden*, 292 Md. 666, 678

(1982)). As the Supreme Court observed, in a case where it was claimed an opening statement violated *Bruton*, "it does not seem at all remarkable to assume that the jury will ordinarily be able to limit its consideration to the evidence introduced during the trial." *Frazier v. Cupp*, 394 U.S. 731, 736 (1969). Furthermore, even if the jury were to treat the opening statement as an actual hostile defense, this Court has explained that "[t]he mere fact that a joint trial may place a defendant in an uncomfortable or difficult tactical situation does not compel a severance. Only the threat of damaging inadmissible evidence does that[.]" *Eiland v. State*, 92 Md. App. 56, 76 (1992), rev*'d on other grounds sub nom. Tyler v. State*, 330 Md. 261 (1993).

This case is distinguishable from *Day v. State*, 196 Md. 384 (1950), a case heavily relied upon by appellant. In that murder prosecution, a total of five contradictory statements by the co-defendants were offered into evidence. *Day*, 196 Md. at 387. The Court of Appeals held it to be an abuse of discretion to deny a motion to sever under these circumstances. *Id*. at 395. In summarizing the facts leading to this holding, the Court observed:

> Each of the defendants admitted being present at the scene of the crime, that he knew the purpose of going to the trolley car was to rob the driver, but each accused the other of being the one who got in the car and, presumably, killed the operator. Each said that he, and not the other, remained outside and pulled the trolley pole from the wire so as to darken the interior of the vehicle. The court was advised at the time the motion for severance was made that these statements were to be offered, and it was obvious that if they were admitted, the only way the court could protect each traverser from the statements of the other against him was to instruct the jury (which was done) that each man's statement was evidence only against him and not against the other.

Day, 196 Md. at 387-88.

In contrast, here, there were no statements to counter, and no evidence of contrasting theories of the case to refute. Generally, this was a case where the parties primarily questioned the witnesses' identifications and recollections of the pertinent evidence. The evidence, tending to show that the co-defendants carjacked one victim and then used that stolen vehicle in an armed robbery roughly a day later, was specially relevant and mutually admissible. We are not persuaded that appellant was unfairly prejudiced by the joinder with the co-defendant's cases.

II.

Next, appellant asserts there was reversible error based on two instances that transpired during the prosecutor's closing argument. Addressing them in turn, first, appellant argues that the court erred by permitting the State to appeal to the jury's "passions or prejudices," by invoking their community "conscience" against "outsiders who came into [Prince George's County] two times to commit two separate crimes." The State responds that this issue is not preserved and does not warrant reversal in any event.

The State's argument at issue was as follows:

> Ladies and gentlemen, I submit to you had they not been caught, we don't know if the crime spree would have ended. But it stops here. During the jury selection process we were careful and thoughtful and we selected people that we could rely on based on a few questions we get to ask that would use their common sense and experience to evaluate the evidence and to come back with the appropriate verdict. And to hold these four people that came into our county, not once, but twice, and commit violent crimes against our citizens.

Maryland Rule 8-131 (a) provides, in pertinent part:

> Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial

> court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

"We have repeatedly held that pursuant to Rule 8-131(a), a defendant must object during closing argument to a prosecutor's improper statements to preserve the issue for appeal." *Shelton v. State*, 207 Md. App. 363, 385 (2012); *see also Hill v. State*, 355 Md. 206, 219 (1999) (under Md. Rule 4-323 (c), "if there is an opportunity to object to an order or ruling when made, the failure to do so (and to inform the court of the relief requested) may constitute a waiver"); *Correll v. State*, 215 Md. App. 483, 515 (2013) (stating that "argument about prosecutor's improper comments not preserved for appellate review when counsel neither objected when the argument was made nor at any later point [and] did not request a mistrial or a curative instruction'") (citation omitted), *cert. denied*, 437 Md. 638 (2014).

There was no objection to this remark, thus, we agree that this issue was not preserved for appellate review. Even if preserved, however, reversal was not required. Initially, we note that "[a] trial court is in the best position to evaluate the propriety of a closing argument." *Ingram v. State*, 427 Md. 717, 726 (2012) (citing *Mitchell v. State*, 408 Md. 368, 380-81 (2009)). Therefore, we shall not disturb the ruling at trial "unless there has been an abuse of discretion likely to have injured the complaining party." *Grandison v. State*, 341 Md. 175, 243 (1995) (citing *Henry v. State*, 342 Md. 204, 231 (1991), *cert. denied*, 503 U.S. 192 (1992)). Trial courts have broad discretion in determining the propriety of closing arguments. *See Shelton v. State*, 207 Md. App. at 386.

Generally, counsel is given "wide range" in closing argument. *Wilhelm v. State*, 272 Md. 404, 412 (1974). Both the defense and prosecution are free to "state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence." *Id*. Even when a prosecutor's remark is improper, it will typically merit reversal only "'where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to prejudice the accused.'" *Lawson v. State*, 389 Md. 570, 592 (2005) (quoting *Spain v. State*, 386 Md. 145, 158-59 (2005)). As the Court of Appeals has explained, "not every ill-considered remark made by counsel . . . is cause for challenge or mistrial." *Wilhelm*, 272 Md. at 415 (citations omitted); *accord Spain*, 386 Md. at 158-59 (citation omitted).

In evaluating a similar remark, the Court of Appeals has made clear that "'appeals to jurors to convict a defendant in order to preserve the safety or quality of their communities are improper and prejudicial.'" *Beads v. State*, 422 Md. 1, 11 (2011) (quoting *Hill*, 355 Md. at 225). To that end, appellant cites *Hill, supra*. *Hill* supports the proposition that a prosecutor must not use closing argument to appeal to jurors to convict a defendant in order to preserve the safety or quality of their community. *Hill*, 355 Md. at 225. In that case, Hill was prosecuted for, and ultimately convicted of, transporting a firearm after having been convicted of a felony, possession of a firearm after having been convicted of a felony, and possession of cocaine. *Hill*, 355 Md, at 210. Although the specific issue before the Court concerned preservation of an appellate issue, *Hill*, 355 Md. at 209, the Court provided detail about the prosecutor's closing argument as follows:

> The issue before us emanates, ultimately, from the insistence of the prosecutor, throughout the trial and over constant objection, on informing the jurors that they had a responsibility to keep their community safe from people like Hill. In a soup to nuts performance, the prosecutor, whether through inexperience or a more disturbing disdain for proper conduct, began his inappropriate remarks with the very first statement he made to the jury and did not end them until the very last statement he made, paying utterly no attention to the numerous objections that were sustained by the court. He commenced his opening statement by noting that his broken foot would mend but wondering if society would mend – "society full of people like Mr. Hill who carry guns and drugs." An objection to that remark was sustained. In the next breath, however, he continued that "one only needs to read the paper to know what that does to our community." An objection to that also was sustained. After very briefly recounting the events leading to the officer's stop of the car, he told the jury, "what happens next is why you are here *and why you've been chosen to send a message to protect our community*." (Emphasis added.) Objection sustained. Undeterred, he completed his opening statement by telling the jury that "in the end, we're going to ask you to do the just thing, the right thing, the thing that protects all of us and keeps this community safe." Objection sustained. On that performance alone, Hill moved for a mistrial, which the court denied in favor of informing the jury that opening statements were not supposed to be argument and that the jury should not consider anything that the court declared objectionable.

Hill, 355 Md. at 211.

Hill is distinguishable. The prosecutor's remarks here were isolated and not so egregious as to draw even a passing objection from any of the four co-defendants. Even if the remarks were arguably improper, unlike as was the case in *Hill*, this was not a sustained attack that was likely to mislead the jury or to enflame their passions such that it unfairly prejudiced appellant.

We turn to appellant's second instance of concern, *i.e.,* the State's rebuttal closing argument. By way of background, appellant's defense counsel challenged Mr. Douglas's credibility during closing argument when she asked the jury "[d]o you even believe he

was carjacked?" Counsel suggested that Mr. Douglas was not credible and may have had marijuana on his person when he met the two women, Ms. Thomas and Ms. Cooper, and that he was not "lured or fooled" by them. Instead, according to appellant, Mr. Douglas was at the 7-Eleven to "pick[] up" these two girls." Counsel further noted that Mr. Douglas testified he was not scared when a knife was held to his neck, indicating "[t]hat's just how I am." Based on this, counsel theorized that the case involving Mr. Douglas appeared to be "some sort of weed drug deal that didn't go quite the way it was supposed to go."

Thereafter, during rebuttal, the State attempted to address Mr. Douglas's demeanor, and the following ensued:

> [Thomas's Defense Counsel] says we don't know that a carjacking occurred. We do know that a carjacking occurred. And Mr. Douglas had a very flat effect. And the reason I asked him about it after was he scared, how come he didn't sound nervous, is that that's his personality. I have met him three or four times over the course of this case and every single time that is what he acts like.
>
> [THOMAS'S DEFENSE COUNSEL]: Objection, how he acts when he meets with her?
>
> THE COURT: Overruled. Go ahead.
>
> [PROSECUTOR]: One of the times we were talking and he had a job interview.
>
> [THOMAS'S DEFENSE COUNSEL]: Objection.
>
> [NEWMAN'S DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Why don't you approach the bench?
>
> (Counsel approach the bench.)
>
> THE COURT: Where are you going?

[PROSECUTOR]: Just as to how he reacts to things. The conversation was he had a job interview that was great. I asked how did it go? Good.

THE COURT: Yeah, but it's not in evidence.

[PROSECUTOR]: It's as to his personality.

THE COURT: You can comment on his personality as to how he was on the stand.

[THOMAS'S DEFENSE COUNSEL]: That's not appropriate that he was calm.

[PROSECUTOR]: You asked about it in –

THE COURT: – but you really can't.

(Counsel return[ed] to counsel table and the following is had in open court.)

[PROSECUTOR]: [Newman's Defense Counsel], I believe it was, asked him on the stand when good things happen, how do you react? Like this. When bad things happen, how do you react? Like this. And that is just who he is.

To put this discussion in context, we note that, earlier, during redirect examination, Mr. Douglas testified as follows:

Q. [Newman's Defense Counsel] asked you about your affect on the 911 call that you were not screaming and you were not startled. And today in the courtroom, I noticed your affect is very flat to say the least. Do you ever get startled?

[THOMAS'S DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

THE WITNESS: This is mainly how I am?

BY [THE PROSECUTOR]:

Q. How about if something really great happens to you?

A. This is how I am.

Q. And then something terrible happens and you are real sad?

A. This is how I am.

Recognizing that we consider the remarks under the abuse of discretion standard, "'[t]he first step in our analysis is to determine whether the prosecutor's statements, standing alone, were improper.'" *Carrero-Vasquez v. State*, 210 Md. App. 504, 510-11 (2013) (quoting *Sivells v. State*, 196 Md. App. 254, 277 (2010), *cert. dismissed*, 421 Md. 659 (2011)). The Court of Appeals has provided guidance on what types of arguments will be deemed improper:

> Great leeway notwithstanding, not all statements are permissible during closing arguments. As we explained in *Mitchell v. State*:
>
> > For instance, counsel may not 'comment upon facts not in evidence or . . . state what he or she would have proven.' It is also improper for counsel to appeal to the prejudices or passions of the jurors, or invite the jurors to abandon the objectivity that their oaths require.
>
> 408 Md. 368, 381, 969 A.2d 989, 997 (2009) (citations omitted). It is also improper for counsel to make "golden rule" arguments in which counsel asks the jury to put themselves in the shoes of the victim, *Lee*, 405 Md. at 171, 950 A.2d at 138, *Hill v. State*, 355 Md. 206, 215, 734 A.2d 199, 204 (1999), or for counsel to vouch for or against the witnesses' credibility, *Spain*, 386 Md. at 153, 872 A.2d at 30.

Donaldson v. State, 416 Md. 467, 489 (2010); *see also Whack v. State*, 433 Md. 728, 748 (2013) ("We have criticized prosecutors who stray outside of the record during closing arguments"); *Spain*, 386 Md. at 156 ("Courts consistently have deemed improper comments made during closing argument that invite the jury to draw inferences from information that was not admitted at trial").

We assume that the prosecutor's remarks referred to facts not in evidence and were improper. However, that does not mean we agree that reversal is required. As evident from our recitation from the transcript, the trial court clearly knew the law in this area, informing the prosecutor as much. Although the court did not, in fact, sustain or rule on the appellant's second objection, the court's admonishments had that effect as the State did not pursue this argument any further. Considering there was no additional objection, motion to strike or request for a mistrial, we are unable to conclude that the trial court abused its discretion.

We also conclude that the jury was not misled by the comments because the issue of Mr. Douglas's demeanor was already before them when he testified, including when he explained that "This is how I am." Furthermore, the jury was instructed, as with opening statements, that "closing arguments of lawyers are not evidence in this case." Ultimately, we are persuaded that the trial court properly exercised its discretion in the matter.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.