UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 484

September Term, 2015

---

JERRY HARRIS

v.

STATE OF MARYLAND

---

Berger,
Nazarian,
Alves, Krystal Q.
(Specially Assigned),

JJ.

---

Opinion by Alves, J.
Dissenting Opinion by Nazarian, J.

---

Filed: January 17, 2017

Following a jury trial in the Circuit Court for Baltimore City, Jerry Harris ("Appellant" or "Harris") was convicted of robbery, two counts of second-degree assault, theft less than $1000 and conspiracy to commit the following crimes: robbery with a dangerous weapon, robbery, first degree assault, second degree assault and theft less than $1000.[1] The court sentenced Appellant to an aggregate term of 10 years.[2] On appeal, he presents four issues which we rephrase and consolidate below:[3]

---

[1] On March 10, 2014 a Baltimore City grand jury filed multiple indictments against Appellant in connection with the robbery of Gale Binko, Lester Allen, Alease Holmes and a woman known as "Reds." With respect to Ms. Binko, Appellant was charged with robbery with a deadly weapon, conspiracy to commit robbery with a deadly weapon, robbery, conspiracy to commit robbery, first degree assault, conspiracy to commit first degree assault, second degree assault, conspiracy to commit second degree assault, theft less than $1000, conspiracy to commit theft less than $1000 and use of a firearm in the commission of a crime of violence. With respect to Lester Allen, Alease Holmes and "Reds", Appellant was charged with first and second degree assault on each person respectively.

[2] For the crimes against Ms. Binko, Appellant was sentenced by the court as follows: 25 years with all but 10 years suspended and five years of probation for conspiracy to commit first degree assault; a concurrent sentence of 20 years with all but 10 years suspended and five years of supervised probation for conspiracy to commit armed robbery; a concurrent sentence of 15 years with all but 10 years suspended and five years of supervised probation for robbery; a concurrent sentence of 15 years with all but 10 years suspended and five years of supervised probation for conspiracy to commit robbery; concurrent sentences of 18 months for both theft and conspiracy to commit theft and a concurrent sentence for five years for second-degree assault. For the crimes against Mr. Allen, Appellant also received a concurrent sentence of five years.

[3] Appellant framed the issues as follows:

I. Whether the trial court erred by allowing testimony that Appellant had invoked his Fifth Amendment right to counsel.

II. Whether the trial court erred by giving a missing witness instruction.

III. Whether the trial court erred in sentencing Appellant.

We conclude, as the State concedes, that the trial court erred in its sentencing of Mr. Harris to multiple sentences for conspiracy instead of one sentence for the flagship count of conspiracy to commit robbery with a deadly weapon. Otherwise, for the reasons stated herein, we shall affirm.

1. Did the trial court err by admitting evidence of post-arrest silence when it allowed Detective Gaskins to testify that Mr. Harris had invoked his right to counsel?

2. Did the trial court err by issuing a missing witness instruction against Mr. Harris, even though the witness was physically available to the State and did not have the kind of close relationship with Mr. Harris that would have rendered her peculiarly available to the defense?

3. Did the trial court err by failing to merge lesser-included offenses under the required evidence test?

4. Did the trial court err when it imposed separate sentences for five conspiracy convictions arising from a single agreement?

## BACKGROUND

Appellant does not challenge the sufficiency of the evidence. Accordingly, we will limit our discussion of the facts to those necessary to provide context for the issues raised in this appeal. *See, e.g.*, *Joyner v. State*, 208 Md. App. 500, 503 n.1 (2012).

Appellant's criminal convictions arise out of a home invasion armed robbery that occurred on January 16, 2014 in Baltimore City, Maryland. Two masked men entered the home of Gale Binko and stole U.S. currency. One of the suspects also took a pill bottle containing "oxycodone"[4] from Ms. Binko's blouse and subsequently handled two other pill bottles in the home. The other assailant held a gun to the head of Ms. Binko's friend, Lester Allen.[5]

The State theorized that Appellant was one of the assailants who committed the offense because three left-handed latent fingerprints belonging to Appellant were found on the pill bottles that remained in the home. Appellant argued that he could not have committed the offense because he was at home with his mother during the time of the incident and because a serious injury that he suffered to his left hand in 2004, left his hand

[4] Oxycodone is a medication used to help relieve moderate to severe pain. Oxycodone belongs to a class of drugs known as narcotic (opiate) analgesics. WebMD-www.webmd.com/drugs/2/drug-1025-5278/oxycodone-oral/oxycodone-oral/detail

[5] Two other alleged victims, Alease Holmes and a woman known only as "Reds" were also present during a portion of the robbery but were able to flee. The jury failed to convict the Appellant of any charges with respect to Ms. Holmes and "Reds."

in a "claw-like" state which he argued physically prohibited him from leaving the latent prints.

## DISCUSSION

### I. The Trial Court Did Not Err by Allowing Testimony that Appellant Had Invoked His Fifth Amendment Right to Counsel.

On appeal, Appellant first alleges that the trial court erred in admitting evidence of Appellant's post-arrest silence when it allowed Detective Gaskins, the lead investigator in the case, to testify that he "believed" Appellant "requested an attorney." Appellant argues Gaskins's testimony violated his Fifth Amendment right to remain silent as the testimony is an indirect comment on his right to remain silent because such testimony implicates the fact that Appellant is requesting to remain silent until he has counsel present.

We hold that the trial court erred in admitting Detective Gaskins's testimony concerning his "belief" that Harris requested an attorney. Nevertheless, based on the record in this case, we hold that the error is harmless. We explain.

It is well settled that the admissibility of evidence is left to the sound discretion of the trial judge. We will not disturb a trial court's evidentiary ruling unless "the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Mines v. State*, 208 Md. App. 280, 291-92 (2012) (internal quotations) (citations omitted).

The United States Constitution and the Maryland Declaration of Rights guarantees an accused the right to remain silent.[6] As such, where an accused invokes their right to remain silent, the accused is entitled to have that silence remain free from the barnacle of an adverse presumption that his or her silence be equated with guilt. *See Newman v. State*, 384 Md. 285, 315 (2004). During custodial interrogation, the rights provided under the seminal case of *Miranda v. Arizona*, 384 U.S. 436 (1966), protect one's privilege against self-incrimination.

We note, preliminarily, that Appellant specifically objected to Detective Gaskins's testimony on the grounds that the testimony constituted a violation of his Fifth Amendment right to remain silent. The record reflects that the objection was not based upon Appellant's failure to knowingly and intelligently waive his *Miranda* rights, although it appears from the record that Appellant did not waive his *Miranda* rights.[7] As such, an argument

[6] *See* U.S. CONST. amend. V (providing that "[n]o person…shall be compelled in any criminal case to be a witness against himself"); Md. Const. Declaration of Rights, art. 22 ("That no many ought to be compelled to give evidence against himself in a criminal case"). The Fifth Amendment is applicable to Maryland via the Fourteenth Amendment of the United States Constitution. (Citation omitted).

[7] We are unclear why the Appellant did not object to the admission of his statements because the State did not establish that he knowingly and intelligently waive his *Miranda* rights.

Our review of the record as a whole indicates that the Appellant, pursuant to Md. Rule 4-263, properly requested a copy of each written, recorded or oral statement made by the Appellant to a State agent that the State intended to use at a hearing or trial. In response, the State indicated in its Initial Disclosures, Notices and Motions that the "Defendant did not make an oral or written statement to a State agent that is known to the State at this time." In fact, in the State's Index of Information Produced in Discovery, no oral, written

premised upon non-waiver is not preserved for our review. Md. Rule 8-131. Instead, Appellant argues that that the trial court erred when it allowed Detective Gaskins to testify that Appellant had invoked his right to counsel because such testimony runs afoul of Maryland's "well-settled" prohibition of the use of a defendant's post-arrest silence as substantive evidence of guilt. Appellant also alleges that the testimony of Detective Gaskins is unduly prejudicial.

The testimony relevant to this issue is brief. We set forth the relevant testimony below:

> [STATE]: Upon identifying the individual whose prints were lifted, did you make contact with Mr. Harris?
>
> [DETECTIVE GASKINS]: Not immediately, no. After I got the confirmation from Ms. Harris that she didn't know—I'm sorry Ms. Binko—that she didn't know Mr. Harris, I prepared an arrest warrant, went down to the court commissioner, and I issued an arrest warrant for Mr. Jerry Harris. And then members of our warrant apprehension task force picked him up, February 9 or 10—on or about February 9th or 10th—and that was my first contact with Mr. Harris.
>
> [STATE]: Okay. Did you attempt to interview Mr. Harris?

---

or recorded statement of the Appellant is listed. The record indicates that the State thereafter supplemented its initial discovery. The State provided supplemental discovery to the Appellant however no oral, written or recorded statement of the Appellant was included in these supplements. We see no further supplements that bear on this issue in the record as a whole.

Additionally our examination of the evidence admitted at trial shows no "Explanation and Waiver of Rights" form for the Appellant, either signed or unsigned. Finally, the record does not reflect that the State nor Appellant's counsel examined Detective Gaskins regarding whether he advised Appellant of his *Miranda* rights and whether Appellant knowingly and intelligently waived those rights. As such, there is nothing to corroborate or rebut trial counsel's statements to the court.

[DETECTIVE GASKINS]: Yes.

[STATE]: What, if anything occurred during that interview?

[APPELLANT'S COUNSEL]: Objection.

Thereafter, a bench conference ensued where the following colloquy occurred:

> [COURT]: There's nothing wrong with the question. I don't know what the answer is going to be. Meaning, if his answer is, he said, then we could get into this. It could be, I observed him crying. And then that's fine. Do you know what I mean? So I don't know where this is going.
>
> [APPELLANT'S COUNSEL]: Well, what actually occurred was that he started to sign a waiver of rights form, and then asked if he was being charged with armed robbery. And they said yes. And he says, well, I'm not talking, you know, I want to talk to my lawyer. And he refused to sign the rest of the statement. So I think he has a [F]ifth [A]mendment privilege not to incriminate himself and that, you know, his refusal to talk to police shouldn't be admissible as proof of his guilt.

Ultimately, the court overruled Appellant's objection and the following testimony ensued from Detective Gaskins:

> [DETECTIVE GASKINS]: Mr. Harris provided us with a false address, denied any involvement with the robbery, and then *I believe he requested an attorney*.

(Emphasis added.) The record reflects no further testimony or discussion about Detective Gaskins interview with the Appellant. Additionally, neither counsel mentioned the brief exchange during closing arguments.

It is well established in Maryland that the prosecution, generally, may not use an accused post-arrest silence as substantive evidence of guilt or as impeachment evidence

whether or not *Miranda* warnings are given. *Kosh v. State*, 382 Md. 218, 220 (2004). [8] Maryland courts have held, as such, because "in general, silence is evidence of dubious value that is usually inadmissible under either Md. Rule 5-402 or 5-403. *Id.* at 226 (quoting *Grier*, 351 Md. at 252 ("Evidence of a person's silence is generally inadmissible because in most circumstances silence is so ambiguous that it is of little probative force.") (citation omitted)).

As noted above, Maryland Courts have traditionally analyzed these issues in the context of Maryland's evidentiary rules as opposed to deciding the issues on a constitutional basis. *See Kosh, supra*, 382 Md. at 228; G*rier v. State*, 351 Md. at 258; *Dupree v. State*, 352 Md. 314, 323 (1988) (citing *State v. Raithel* where the court stated "[N]othing is better settled than the principle that courts should not decide constitutional issues unnecessarily.") (quoting *State v. Raithel*, 285 Md. 478, 484 (1979) (internal citation omitted)).

Accordingly, the State argues that because Appellant was not silent after his arrest (i.e. Harris gave a false address and denied involvement in the robbery), Detective Gaskins's statement about his belief that Appellant requested an attorney is relevant, under Md. Rule 5-402, to give context to Harris's denial of his involvement in the robbery and explains why the police ceased questioning. The State further argues that the disputed testimony is not prejudicial, under Md. Rule 5-403, because Appellant's denial of his

[8] An accused silence may be used and/or commented on under the fair response or opening the door doctrine. *Grier v. State*, 351 Md. 241 (1998).

involvement in the robbery preceded his request for an attorney. Therefore, the State contends, his request for counsel is consistent with and a logical extension of Appellant's prior claim of innocence and thus a jury would not view the testimony as a "badge of guilt." *See Grier*, *supra*, 351 Md. at 263.

We find no merit in the State's arguments. *Id. Grier v. State*, 351 Md. 241, 263 (1998) (citing *Walker v. United States*, 404 F.2d 900, 903 (5th Cir. 1968) ("we would be naïve if we failed to recognize that most laymen view an assertion of the Fifth Amendment privilege as a badge of guilt") (quoting *Walker v. United States*, 404 F.2d 900, 903 (5th Cir. 1968)). Rather, we find that the trial judge erred in admitting this lone statement of Detective Gaskins's testimony. In our view, however, the error was harmless.

We are mindful that our Courts have stated that "an error is not harmless unless, upon an independent review of the record, a reviewing court is able to declare beyond a reasonable doubt that the error in no way influenced the verdict." *Lupfer v. State*, 420 Md. 111, 139 (2011) (citations omitted). In the instant case, the brief remark by Detective Gaskins was made on the first day of trial;[9] there was no mention of Gaskins's statement throughout the remainder of the trial nor did either counsel make any reference to the statement during closing arguments. Additionally, although Ms. Binko was unable to

[9] The trial in this case began on January 7, 2015. Testimony and closing arguments concluded on January 8, 2015. The jury began deliberations on January 8, 2015 from 2:57 p.m. to 5:33 p.m. The jury resumed deliberations on January 9, 2015 approximately 9:30 a.m. and reached a verdict at 3:51 p.m.

identify Appellant as her assailant, there was compelling evidence, in the form of Appellant's fingerprints on the pill bottles, to link the Appellant to the robbery.

Ms. Binko testified that the assailant handled the pill bottles and that they were in her exclusive custody and control from the time she obtained them from the pharmacy until the assailant handled them. She further testified that the pill bottles remained in her exclusive custody and control after the robbery and prior to processing by the police. Additionally, the Appellant, on cross-examination by the State, was unable to explain how his fingerprints came to be on the pill bottles. Finally, the fingerprint identification evidence in this case was not contradicted. We are mindful that the Court of Appeals has previously taken judicial notice of the high degree of reliability accorded to fingerprint identification. *Eley v. State*, 288 Md. 548, 553-54 (1980) (citing *Murphy v. State*, 184 Md. 70, 85-86 (1944); *Reed v. State*, 283 Md. 374 (1978)). Accordingly, based upon our independent review of the record, we hold that the brief singular comment made by Detective Gaskins is harmless beyond a reasonable doubt.

**II. The Trial Court Did Not Err By Giving A Missing Witness Instruction.**

Appellant next asserts that the trial court abused its discretion by giving a missing witness instruction to the jury without first conducting an inquiry that Appellant's mother, Barbara Fallin, was peculiarly within the control of Appellant. Specifically, Appellant argues that the trial court failed to address that Ms. Fallin was equally available to the State, via subpoena, and that the court incorrectly applied a "per se" rule in determining whether to give the missing witness instruction because of the familial relationship between

Appellant and Ms. Fallin.[10] Additionally, Appellant argues that the error was not harmless beyond a reasonable doubt because Ms. Binko was unable to identify Appellant as the person who robbed her, and the only evidence linking Appellant to the crime were his fingerprints on the pill bottles left in the home which he argues he could not have left because of his "claw-like" hand. The State asserts that Ms. Fallin was peculiarity within the Appellant's control and the court did not abuse its discretion in giving a missing witness instruction to the jury under the facts presented in this case. We agree with the State.

In his opening statement, Appellant articulated for the jury his defense. Expected alibi evidence was a significant component of his opening statement.[11] Appellant stated in pertinent part:

> [APPELLANT'S COUNSEL]: I want you to listen to the facts, because there are going to be two important things that come out. Number 1, Mr. Harris has an alibi witness. He was at home the night of this, living at his mother's house. He was home that night. His mother will come in and testify that Mr. Harris was there the whole night that he was in the basement. She did not see him leave.

[10] At trial, Appellant's counsel additionally objected to the instruction on the basis that the instruction impermissibly shifted the burden of production to the Appellant. This issue was not raised on appeal. See, *Mines v. State*, 208 Md. App. 280, 293 (2012) (finding that prosecutor's questions to defendant about his failure to call witnesses to corroborate his alibi defense did not violate defendant's Fifth Amendment rights and did not improperly shift the burden of proof.).

[11] The other component of Appellant's defense was his alleged physical limitations of his left arm.

During direct examination, Appellant did not testify regarding his mother's whereabouts on the night in question. During the State's cross examination, however, Appellant raised his alibi defense during the following colloquy:

> [STATE]: What day of the week was January the 16th?
>
> [APPELLANT]: I have no idea.
>
> [STATE]: You have no idea what day of the week that was, but yet you know where you were that day?
>
> [APPELLANT]: Yes, I do.
>
> [STATE]: How do you know that?
>
> [APPELLANT]: Because at that time, I was staying with my mother.
>
> ***
>
> [STATE]: So the evening in question that you say you don't know what day of the week it was but you know that you were at your house that day, but not your house that you stayed at with you wife—but at your mother's house—who was there that day?
>
> [APPELLANT]: My mom.
>
> [STATE]: Is your mom here today?
>
> [APPELLANT]: No she's not.
>
> ***
>
> [STATE]: Was you mother there all day on January 16, 2014?
>
> [APPELLANT]: Yes.
>
> [STATE]: Where was she in the house?
>
> [APPELLANT]: Most likely in her room, or down in the living room.

> [STATE]: Okay. So at any point in time, did you see your mother leave your house that day?
>
> [APPELLANT]: No. My mother does not go out in cold weather.
>
> [STATE]: Okay. And it was cold in January.
>
> [APPELLANT]: Yes, it was.
>
> [STATE]: So your mother never left the residence that day.
>
> [APPELLANT]: Not that I recall.
>
> [STATE]: Okay. And would she have seen you go out if you left?
>
> [APPELLANT]: Yes, she would have.

At the close of all the evidence and prior to instructing the jury, the circuit court, out of the presence of the jury, discussed with the State and Appellant the proposed jury instruction as follows:

> [COURT]: Okay. Nineteen, missing witness. Tell me about [t]his one [State].
>
> [STATE]: Your Honor, this is [Appellant counsel's] request. I would—
>
> [COURT]: Okay.
>
> [APPELLANT'S COUNSEL]: Well, Reds did come to testify. She was prominent throughout the whole trial—
>
> [COURT]: Okay.
>
> [APPELLANT'S COUNSEL]: --in the testimony.
>
> [COURT]: Are we saying Reds, or are we still doing the, a woman known as Reds?

[APPELLANT'S COUNSEL]: A woman known as Reds.

[COURT]: A woman known as Reds. Okay. Are you asking [State] for Ms. Fallin to be included in this?

****

[APPELLANT'S COUNSEL]: You know what, not to cut you off but it was my request. I will withdraw the request for the instruction.

[COURT]: Okay. Eliminating 19.

[STATE]: And Your Honor, as far as Reds goes, I do realize that Ms. Fallin is not here. Her failure to appear, in light of the fact that she was elicited in the opening that she would be an alibi witness—I would be making the request that Ms. Fallin be included.

[APPELLANT'S COUNSEL]: Well, what's good for the goose is good for the gander. They're not going to—if you're not going to mention Reds in this jury instruction, then I don't believe Ms. Fallin can be mentioned in this jury instruction.

[COURT]: Why is that?

[APPELLANT'S COUNSEL]: Well, because, if they—

[COURT]: Well, they're different, meaning one was available to you and one was not. Meaning Ms. Fallin as[sic] available to you. Ms. Reds was not available to him.

[APPELLANT'S COUNSEL]: Well, I don't know that Ms. Reds was never available. I mean, that's not within my burden. So, I mean, there wasn't any testimony or anything about this—

[COURT]: Yeah there was. The police officer testified that he never was able to find out who that was.

[APPELLANT'S COUNSEL]: Well, then I would argue—

[COURT]: And he question—I don't even know—I don't even remember, and I could be wrong— I don't even remember Mr. Harris when he testified about his mom ever calling her anything but his mom. I don't know if her name, besides for during voir dire, I don't know if her name was even mentioned. I don't think you asked, what is your mother's name? I don't recall that happening.

[APPELLANT'S COUNSEL]: No.

[STATE]: Well, Your Honor, Ms. Fallin's name was mentioned because of the consent to search, which she signed.

[COURT]: Oh, okay. Okay.

[STATE]: So—

[COURT]: Got you. Okay.

[STATE]: --she was present.

[COURT]: Got you. Okay. Okay. Right. Okay. All right.

[STATE]: And Your Honor, I just would additionally add in the—

[APPELLANT'S COUNSEL]: Well, it says, Your Honor that if a witness was peculiarly within the power of the State or the defendant to produce but was not called as a witness. The State never requested a subpoena for Ms. Fallin.

[COURT]: No, it's by the State or the defendant.

[APPELLANT'S COUNSEL]: Right. I didn't call to request a subpoena for her. I just—you know, there's multiple reasons why she is not here, none of which are pertinent to the issue.

[COURT]: Okay. Okay. If a witness could have given important testimony in the issue with this case—and I imagine an alibi would be considered important testimony—and if the witness was peculiarly in the power of the defendant to produce—which she was, it's his mother—but was not called

> as a witness by the defendant, and the absence of that witness was not sufficiently accounted for or explained—which it was not—then you may decide that—I mean, how is this not applicable?
>
> [APPELLANT'S COUNSEL]: Because it's not peculiarly within his power. He's in jail. He doesn't have the power to do anything—
>
> [COURT]: Right. You are acting as his agent, [counsel].
>
> [APPELLANT'S COUNSEL]: True.
>
> [COURT]: Okay. So you had the ability to either bring her here or subpoena her here as an alibi witness. The objection is overruled. 3.29 missing witness instruction is being read.

While instructing the jury, the circuit court, over Appellant's objection,[12] gave the following instruction regarding Appellant's mother, Barbara Fallin:

> You have heard testimony about Barbara Fallin, who was not called as a witness in this case. If a witness could have given important testimony on an issue in this case, and the witness was peculiarly within the power of the defendant to produce but was not called as a witness by the defendant, and the action of that witness was not sufficiently accounted for or explained, then you may decide that the testimony of that witness would have been unfavorable to the defendant.[13]

[12] At the close of instructions to the jury Appellant did not lodge an objection to the instructions, nor did the circuit court ask counsel if they took exceptions to the instructions; however the court had previously noted Appellant's objection "for the record" when Appellant's counsel initially raised the issue. See Md. Rule 4-325 (e). Nevertheless, the State in its brief citing *Gore v. State*, 309 Md. 203, 209 (1987) acknowledges that this issue is properly before this court based upon the doctrine of substantial compliance. *See* Md. Rules 4-325 (e) and 8-131.

[13] The parties do not dispute that the jury instruction given by the court was a correct statement of the law.

During closing arguments both the State and Appellant commented on Barbara Fallin's failure to testify at trial as follows:

> [STATE]: One of the things counsel brought up in his opening was, he has an alibi witness. He was at home with his mother, and his mother did not see him leave the house. Well, I ask you, where is Ms. Fallin? Where is his mother? Where? This is his mother. The mother he gave $75,000 to back in 2009 . . . . Where is she?

Appellant, during his closing argument stated:

> [APPELLANT'S COUNSEL]: And I want to apologize in advance for anything that I did that would reflect negatively on Mr. Harris. . . .And in keeping with my apology, Sometimes things happen in trials that you don't anticipate, or you have things that were going to happen in the mind and they just don't materialize. And Barbara Fallin didn't testify. She wasn't here. Mr. Harris took the stand. He told you what the story was, what happened with him, what physically happened with his arm. But Ms. Fallin didn't testify, and I acknowledge that. And I know [the State] [is] going to beat me over the head about that. But the fact is that's not testimony. Folks, that's not testimony. That's non-testimony. Because nobody testified—she wasn't there. She wasn't at the scene. You heard from [the court] that what is evidence? It's testimony from the witness stand, and its . . . these exhibits. That's evidence. That's what's evidence.
>
> A person not testifying is non-evidence.

The State in part of its rebuttal closing argued:

> [STATE]: Where is his mother? The judge instructed you. You as jurors can draw a rational inference from the fact that she's not present. And from that, you can draw a reasonable inference to the fact that her testimony would have possibly been unfavorable to this defendant.

***

> Rest assured that if there was an alibi witness—you were told of an alibi witness? No. You were told that his mother didn't see him leave the residence that day. Where is she?

Additional facts will be added to our discussion as needed.

We review the trial court's decision under an abuse of discretion standard. *Hall v. State*, 437 Md. 534, 539 (2014) ("We review a trial court's decision whether to grant a jury instruction under and abuse of discretion standard.") (quoting *Derr v. State*, 434 Md. 88, 133 (2013). This Court has further explained "[t]here is an abuse of discretion 'where no reasonable person would take the view adopted by the [trial] court.'" *Pinkney v. State*, 200 Md. App. 563, 578 (2011), *cert. granted*, 424 Md. 55 (2011), *affd.*, 427 Md. 77 (2012) (quoting *Peterson v. State*, 196 Md. App. 563, 584 (2010).

The missing witness rule applies where (1) there is a witness, (2) who is peculiarly available to one side and not the other, (3) whose testimony is important and non-cumulative and will elucidate the transaction and (4) who is not called to testify. *Pinkney*, 200 Md. App. at 578 (citing *Woodland v. State*, 62 Md. App. 503, 510, *cert. denied*, 304 Md. 96 (1985)).

> A relationship between a party and a witness in the missing witness instruction context generally refers to a family relationship, an employer-employee relationship, and, sometimes a professional relationship. Underlying the principal is the realization that despite a party's theoretical ability to subpoena the witness's testimony, there is a practical concern that certain relationships may engender a very strong bias which would undermine the utility of that witness's testimony. As such, the rule looks toward addressing the bias engendered by feelings of love, friendship, or loyalty.

*Id.* at 578-79 (internal citations and quotations omitted).

Before the inference may be drawn, however, the opponent seeking the presumption must demonstrate that "the missing witness was peculiarly within the adversary's power to produce by showing either that the witness is physically available only to the opponent or that the witness has the type of relationship with one side that "pragmatically renders his testimony unavailable to the opposing party." *Dansbury v. State*, 193 Md. App. 718 (2010) (citing *Chi. Coll, of Osteopathic Med. v. George A. Fuller Co.*, 719 F.2d 1335, 1353 (7th Cir. 1983)).

To be sure, the Court of Appeals has indicated that a "preferred procedure" should be followed by the court when determining whether or not a missing witness instruction should be given. In *Christensen v. State,* 274 Md. 133, 135 n.1 (1975), the Court cited a New Jersey case, *State v. Clawans*, 38 N.J. 162, 183 A.2d 77, 81, 82 (1962), as an "excellent explanation of the rule . . . as to what we regard as the 'preferred procedure'." 38 N.J. 162, 183 A.2d 77, 81-82 (1962). We set forth the court's statement in *Clawans* at length in order to provide context:

> Such request normally comes at the conclusion of the entire case without warning to the opposition. The alleged defaulting party is not accorded an opportunity to justify or explain his failure to call the witness. *It is conceivable that the factual situation involved in the litigation and the relationship of the parties to the witnesses, are such that the trial judge may properly reach a conclusion as to whether an inference could arise without the necessity of proof in explanation that therefore without prior warning of the intention to request a charge*. The better practice… is for the party seeking to obtain a charge encompassing such an inference to advise the trial judge and counsel out of the presence of the jury, at the close of his opponent's case, of his intent to so request and demonstrating the names of classes of available persons not

> called and the reasons for the conclusion that they have superior knowledge of the facts. This would accord the party accused of nonproduction the opportunity of either calling the designated witness or demonstrating to the court by argument of proof the reason for the failure to call. Depending upon the particular circumstances thus disclosed, the trial court may determine that the failure to call the witness raises no inference, or an unfavorable one, and hence whether any reference in the summation or a charge is warranted.

*Christensen*, 274 Md. at 135 n. 1 (1975) (Emphasis Added). We recognize that the preferred procedure is not a mandatory requirement for the court to follow; however if followed, a trial court is better equipped to determine whether a missing witness instruction should be given; and may bar a judge from unintentionally "overemphasizing just one of the many proper inferences that a jury may draw." *Davis v. State*, 333 Md. 27, 52 (1993), *overruled on other grounds*, *Pearson v. State*, 437 Md. 350 (2013).

At the outset, we note that the State concedes that Ms. Fallin was physically available to it via subpoena. As such, the key issue in this case is whether Ms. Fallin had the type of relationship with the Appellant that pragmatically renders her testimony unavailable to the State.

Appellant argues that the trial court did not "conduct a fact-specific inquiry" and cites *Davis* as his support. However as we explain, *infra*, *Davis* gives support to the trial judge's actions in the instant case.

In *Davis*, the Court of Appeals ultimately held that the trial court did not err in allowing the State to make a missing witness argument in closing. Similar to the instant

case, the missing witness had a familial relationship[14] with Davis and based on that relationship the Court found she was peculiarly available to Davis and not the State. Additionally, based upon the testimony, the court found the witness had important and non-cumulative testimony which would elucidate the transaction but Davis failed to call her as a witness.[15] For these reasons and based upon prior case law, the Court found that the trial court did not err in allowing the State to make a missing witness argument in closing. The Court, however, went on to state:

> We should also point out that the missing witness rule was raised by the State in closing argument rather than the judge's instructions to the jury which may have been a factor in the trial judge's decision. The missing witness inference may arise in one of two contexts. A party may request that a trial judge instruct the jury on the operation and availability of the inference where all the elements of the rule are present. *See Christensen v. State*, 274 Md. 133, 333 A.2d 45 (1975). Additionally, a party may wish to call the jury's attention to this inference directly during closing arguments. See *Bruce*, 318 Md. at 729-31, 569 A.2d at 1266-67. As a matter of necessity, the requirements of the missing witness rule must be more rigidly applied where the inference is used in the former context. Where a party raises the missing witness rule during closing argument, its use is just that—an argument. Trial judges typically instruct the jury, as in this case, that the parties' arguments do not constitute evidence. Furthermore, the opposing side also has an opportunity to refute the argument and counter with reasons why the inference is inappropriate.
>
> In contrast to the argument context is the trial judge's instruction to the jury. In the latter case, the inference is communicated to the jury as part of the judge's binding jury instructions, creating the danger that the jury may give the

[14] The missing witness was Davis's girlfriend and the mother of his children.

[15] Notably, Davis's girlfriend was present in court throughout the trial.

> inference undue weight. At the very least, a trial judge's jury instruction on the missing witness inference may have the effect of overemphasizing just one of the many proper inferences that a jury may draw. *As a result where the jury instruction is the vehicle by which the missing witness inference is brought to the jury's attention, the trial court should be especially cautious and closely abide by the requirements set out in Christensen.*

*Id*. at 52 (Emphasis added).

It is true that in the instant case as opposed to *Davis*, the vehicle by which the missing witness inference was brought to the jury's attention was by an instruction via the court. To be sure, we are well aware that that under those circumstances, "the missing witness rules must be more rigidly applied." *Id.* Nevertheless, we find under the facts of this case, the trial court closely abided by the requirements articulated in *Christensen* and, as such, did not abuse its discretion.

As we previously noted, the State, who ultimately was the party seeking the missing witness instruction; requested the jury instruction at the close of Appellant's case during the period when the parties and the court conferenced to determined which instructions to give to the jury. [16] During the conference, the record reflects that the State after asking for the instruction, attempted to further argue for its inclusion when Appellant's counsel interrupted the State and engaged the trial court in a discussion regarding the appropriateness of the instruction. Thereafter, the record demonstrates that the State was

[16] The missing witness instruction was initially requested by the Appellant to be used with respect to "a woman known as Reds." The court, *sua sponte* asked the State whether it was asking for the instruction with respect to Ms. Fallin. Appellant withdrew his request for the instruction. Ultimately, the State requested the instruction.

not presented with the opportunity to elaborate on its argument in support of the missing witness instruction.

Throughout the discussion between Appellant's counsel and the court, Appellant's counsel raised the argument that there were "multiple reasons" why Ms. Fallin was not present. Notably, he failed to articulate those reasons to the court. Furthermore, Appellant had the opportunity on direct examination, cross examination and redirect examination to explain why Ms. Fallin was not present yet he failed to do so.

Faced with the factual void left by Appellant's failure to sufficiently explain Ms. Fallin's absence, the court was left to consider the following based upon the record and testimony: (1) Ms. Fallin was Appellant's mother hence they have a familial relationship; (2) Ms. Fallin allowed the Appellant to live with her during his estrangement from his wife; (3) Appellant lived with Ms. Fallin from November 2013 and was still living with her as of January 2015, a year after the incident; (4) Appellant did not pay any rent to his mother for staying with her; (5) Appellant gave his mother $75,000 from a Worker's Compensation settlement for his injured hand; (6) Ms. Fallin attended the court proceedings on at least the first day of trial; (7) Ms. Fallin, and not Appellant's wife, brought clothes for Appellant to wear for trial[17]; (8) The court was aware based upon trial testimony and the circumstances of this case that Ms. Fallin's testimony was the only

[17] Appellant's counsel informed the court that "[h]is mother and wife are going to purchase [clothing] tonight and give them to me."

testimony that corroborated Appellant's alibi defense which Appellant raised during cross examination.[18]

Given this evidence, the trial judge sufficiently considered the facts, circumstances and inferences that bore upon the particular relationship between the Appellant and Ms. Fallin. There was a sufficient factual basis for the trial court to find that Ms. Fallin was peculiarly available to Appellant and not to the State. Although it may have been better practice for a trial court to articulate all of its rationale for its discretionary rulings, it is

[18] On the first day of trial, prior to the trial commencing, the parties and the court were discussing plea negotiations in open court. At a point in the discussion, the court asked Appellant's counsel and the State to approach the bench. The following discussion ensued:

> [COURT]: Okay/ So do you know who these people are?
>
> [APPELLANT'S COUNSEL]: That's his mother. She's the alibi, so she should probably not be present.

The State knew that Ms. Fallin was Appellant's alibi witness. As such, it is reasonable to assume that the State would not subpoena her for trial nor call her as a witness because her testimony would not be favorable to the State's case. The record reflects that although Appellant made known to the court that Ms. Fallin was his alibi witness he failed to issue a subpoena for her. She did attend the proceedings at least one day. Nevertheless, the record reflects however she was under no obligation to remain available. Although this Court is not alleging any inappropriate conduct on the part of Appellant in the instant case, an unscrupulous Defendant under the facts presented here could unfairly argue against the missing instruction to seek an advantage. For example, a Defendant could argue in opening statement that he has an alibi, thus putting the issue before the jury; however because the Defendant fails to subpoena the alibi, the court lacks a mechanism by which it could bring the witness to court if requested by either side. The unscrupulous Defendant then argues that the State should not be entitled to utilize the instruction. It is more likely so than not that the instruction from the court carries more weight with a jury as opposed to the State raising the issue via closing argument alone. Thus, by prohibiting the State from being able to argue the inference the unscrupulous Defendant obtains an advantage as the State raising the issue in argument is just that -- merely an argument.

well established that a court need not spell out every thought and step of logic in rendering its decisions. See generally *State v. Chaney*, 375 Md. 168, 179-182 (reiterating the long standing principal that "[t]rial judges are presumed to know the law and to apply it properly") (citations and explanatory parentheticals omitted).

Finally, Appellant's counsel, in closing, addressed the State's missing witness argument and the missing witness instruction in general by arguing, "She wasn't at the scene. You heard from the court what is evidence? It's testimony from the witness stand, and it's … these exhibits. That's evidence. That's what's evidence. A person not testifying is non-evidence."

In sum, we find that there exists a sufficient factual basis upon which the court drew to support the inference that Appellant failed to call Ms. Fallin as a witness because her testimony may have been harmful to the Appellant. Appellant drew the jury's attention to Ms. Fallin's testimony, when in opening statement and on cross-examination, he claimed that he could not have been the perpetrator of the robbery, in part, because he was at home with Ms. Fallin and they never left the residence that evening.

To be sure, this was not a close case even in light of Ms. Binko's inability to identify her assailant.[19] Contrary to what Appellant states in his brief, Appellants' credibility was

[19] On cross examination, Ms. Binko testified that she could not identify her assailant. However on redirect Ms. Binko stated she did not identify the individuals who invaded her home because she was "upset and afraid."

not the only issue for the jury to decide.[20] As Appellant stated during his opening statement, the jury also had to determine beyond a reasonable doubt that the fingerprints belonged to the Appellant and that he was physically able to put his prints on the pill bottles.[21]

As we stated *supra,* Appellant's fingerprints were found on Ms. Binko's pill bottles that she testified the assailant picked up. The testimony was uncontradicted that bottles remained in the home after the robbery and were in Ms. Binko's exclusive care and custody from the time she received them from the pharmacy until the robbery. Further, Ms. Binko testified that she did not know the Appellant and he had previously never been in her home. Additionally, the expert testimony that the fingerprints were identified as those of the Appellant's was not contradicted. This Court notes that during the trial the Appellant was

[20] We note that Appellant's credibility, as viewed by the jurors, also may have been impacted by the fact that Appellant admitted to having a previous theft conviction.

[21] In opening statement, Appellant's counsel stated: " . . . [M]ore importantly I think, this is basically the crux of the case—is that in July of 2004, Mr. Harris suffered an industrial accident. He has his left arm amputated below the elbow mid-line. It was completely severed from his body . . . . His arm was reattached; . . . . He has some feeling in his hand. He has the ability to sense stuff with his fingers. But it is in a claw-like state. The fingerprints found on the pill bottles are a thumb print, and index finger, and a middle finger. Ms. Binko is going to testify—I believe she's going to testify—the person who assaulted her and took the money from her was rummaging through her things, was picking pill bottles up, putting them back down, picked up car keys, put them in their pocket and then left the scene. Not once was it mentioned before that there was deformity of any kind of problem with the person's left hand. So basically what you have is a thumb print, an index finger, and a middle finger print. You have to believe beyond a reasonable doubt that, number 1, those prints are Mr. Harris's But number 2, that he could physically put those prints on the pill bottles given his situation. That's a factual determination that you're going to make."

allowed to approach the jury to enable the jury to observe the Appellant's arm so that they were able to make their own independent assessment of his alleged physical limitations. It was up to the jury to ascertain whether the Appellant was able to grasp the pill bottles.

Accordingly, based upon the evidence the trial judge had before her we hold that there was a sufficient factual basis to support the inference that Ms. Fallin, has the type of relationship with Appellant that pragmatically rendered her testimony unavailable to the State. We have observed that "[w]hether, in given circumstances, an unfavorable inference may be drawn from missing evidence or witnesses is a matter of fact, not law . . ." *Dansbury v. State*, 193 Md. App. 718, 742 (2008) (quoting *Keyes v. Lerman*, 191 Md. App. 533, 546 (2010) (citation omitted). Additionally, "[t]he trial judge has discretion to grant or deny the instruction when facts would support the inference." *Id.* at 743 (quoting *Robinson v. State*, 315 Md. 309, 319 n. 7 (1989) (internal quotations and citations omitted). Appellant did not call Ms. Fallin to testify to corroborate his alibi nor did he explain her absence albeit he had several opportunities to do so. The Court of Appeals has stated "[w]hat is meant by 'equal availability' in this context is not merely that a witness is subject to compulsory process, and thus available in a descriptive sense, but that he is of equal avail to both parties in the sense that he is not presumptively interested in the outcome." *Dansbury v. State*, 193 Md. App. 718, 746 (2010) (citing *Bereano v. State Ethics Comm'n*, 403 Md. 716, 744 (2008). Under the circumstances of this case, we hold that Ms. Fallin was presumptively interested in the outcome. Accordingly, the trial court granting the State's request for the missing witness instruction was not an abuse of discretion.

## III. The Trial Court Erred in Sentencing the Appellant to Separate Sentences for Various Convictions of Conspiracy.

At the outset, we recognize that the State in its brief and during oral argument concedes that Appellant's four lesser included conspiracy offenses[22] should have merged with the "flagship" conspiracy count of robbery with a dangerous weapon, as such Appellant should be sentenced to only one count of conspiracy. We briefly explain.

The doctrine of merger of offenses for sentencing purposes prevents a convicted defendant from having multiple punishments imposed for the same offense. *Moore v. State*, 198 Md. App. 655, 684 (2011) (citing *Purnell v. State*, 375 Md. 678, 691 (2003)). "Under federal double jeopardy principles and Maryland merger law, the principal test for determining the identity of offenses is the required evidence test." *Moore*, 198 Md. at 685 (citing *Dixon v. State*, 364 Md. 209, 236 (2001).

In *State v. Lancaster*, 332 Md. 385 (1993), the Court of Appeals explained the required evidence test by stating:

> The required evidence test focuses on the elements of each offense; if all of the elements of one offense are included in the other offense, so that the latter offense contains a distinct element or distinct elements, the former merges into the latter. Stated another way, the required evidence is that which is minimally necessary to secure a conviction for each offense. If each offense requires proof of a fact which the other does not, or in other words, if each offense contains an element which the other does not, there is no merger under the required evidence test even though both offenses are based upon the same act or acts. But where only one offense requires proof of

[22] Appellant's lesser included conspiracy offenses are: Robbery, First degree assault, Second degree assault and Theft less than $1000.

> an additional fact, so that all elements of one offense are present in the other, and where both offenses are based on the same act or acts, merger follows . . . [.]
>
> When there is a merger under the required evidence test, separate sentences are normally precluded. Instead, a sentence may be imposed only for the offense having the additional element or elements.
>
> When applying the required evidence test to multipurpose offense, *i.e.*, offenses having alternative elements, a court must examine the alternative elements relevant to the cases at issue.
>
> *Id.* at 391-92, 631 A.2d 453, 457 (internal quotations, ellipses and citations omitted).; See also, Robert A. Scott, *The Uncertain Status of the Required Evidence Test in Resolving Multiple-punishment Questions in Maryland, 24 U. Balt. L. Rev. 251, 255 (1994).*

332 Md. 385, 391-392 (1993).

Simply stated, under the required evidence test if an offense requires proof of one element not required to prove a violation of another offense, the offenses are separate and a defendant may be convicted of each offense and a sentencing judge may impose a separate sentence for each of the convicted offenses. (e.g., robbery and conspiracy to commit robbery are two separate offenses; therefore a sentencing judge may impose a sentence for each offense). However, if all of the elements of one offense are included in the second offense so that the second offense requires proof of only one additional element, the crimes are deemed the same and the lesser offense is merged into the greater offense and a sentencing judge may only impose one sentence. (e.g. conspiracy to commit robbery and conspiracy to commit theft would merge into conspiracy to commit armed robbery as

all of the elements of robbery and theft are present in the offense of conspiracy to commit armed robbery).

In this case, as Appellant and the State correctly point out in their briefs, there was no evidence of multiple conspiracies as all of Appellant's conspiracy convictions spring from the same act and objective which was to rob Ms. Binko. *See Tracy v. State*, 319 Md. 452, 459 (1990). Critically, because there is no basis from which to conclude that the jury based its separate conspiracy convictions on separate agreements, only Harris's sentence for conspiracy to commit robbery with a deadly weapon should stand. Accordingly, all of Harris's sentences for conspiracy except for the flagship count of conspiracy to commit robbery with a deadly weapon are vacated. All other judgments of convictions are hereby affirmed.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED IN PART AND VACATED IN PART. THE CASE IS REMANDED TO THAT COURT WITH INSTRUCTIONS TO VACATE HARRIS'S SENTENCES FOR CONSPIRACY EXCEPT THE COUNT OF CONSPIRACY TO COMMIT ROBBERY WITH A DEADLY WEAPON. ALL OTHER JUDGMENTS ARE HEREBY AFFIRMED. COSTS TO BE PAID ¾ BY APPELLANT AND ¼ BY MAYOR AND CITY COUNCIL OF BALTIMORE.**

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 484

September Term, 2015

---

JERRY HARRIS

V.

STATE OF MARYLAND

---

Berger,
Nazarian,
Alves, Krystal Q.
(Specially Assigned),

JJ.

---

Dissenting Opinion by Nazarian, J.

---

Filed: January 17, 2017

This is, at its core, a robbery case that turned at trial on the identity of the robbers. Jerry Harris wasn't identified as a robber (or as being present at all) by any witness, even though one of the two robbers lost his mask for good mid-way through the crime; and the victim he was accused of robbing, who said she got a good look at her assailant, testified that Mr. Harris was not the man who robbed her. The only physical evidence tying Mr. Harris to the crime was a set of left-handed fingerprints lifted from bottles of pills handled during the robbery. But Mr. Harris has a distinctively clawed left arm and hand and disputed that he could have left those fingerprints, and none of the witnesses noticed anything about the unmasked robber's left arm and hand. Moreover, Mr. Harris also had an alibi—he testified that he was at his mother's house on the evening of the robbery. He didn't call his mother as a witness to corroborate that fact, but the State didn't call her either, as it could have.

I disagree with the majority that "this was not a close case even in light of [the victim]'s inability to identify her assailant." *Harris v. State*, Case No. 484, Sept. Term 2015 (Md. App ___ ), Slip op. at 25. In my view, the question of the robber's identity was, for the jury, very much a question of Mr. Harris's credibility, and a question not at all free of doubt. And that context informs my view that the combination of two errors—the one on which the majority and I agree, and the one on which we don't—requires us to reverse Mr. Harris's convictions and remand for a new trial.

First, our point of agreement. I join the majority's analysis and conclusion that the trial court erred when it allowed Detective Gaskins to testify, after a bench conference, that

Mr. Harris requested an attorney when the Detective tried to interview him. *Id.*, slip op. at 4–10. Whether as a matter of Maryland evidence law or a violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), the court should not have permitted the Detective to mention Mr. Harris's invocation of his right to counsel during the interview. But I also agree that, viewed by itself, the error would have been harmless—the inappropriate reference to Mr. Harris's request for counsel consisted of a single statement on which neither side dwelled and that neither reinforced.

I disagree, though, that the court properly exercised its discretion when it granted the State's request for a missing witness instruction as to Ms. Fallin, Mr. Harris's mother. The State, not Mr. Harris, bore the burden of proof in this case, and Mr. Harris was not obligated (even if it might have bolstered his defense) to corroborate independently his sworn testimony about his whereabouts. The State had the same opportunity to subpoena Ms. Fallin as Mr. Harris did, and didn't ask for the opportunity to subpoena and call her as a rebuttal witness when it learned that Mr. Harris wasn't going to call her. There is no dispute that the State was entitled in closing to note her absence or to question the veracity of Mr. Harris's testimony, and that the jury would be entitled to disbelieve him. But it is another thing altogether to have the *court instruct* the jury, as it did here, that Ms. Fallin's absence from the witness stand "permits the jury to infer that the testimony would have been unfavorable to the party who failed to call such witness," *Dansbury v. State*, 193 Md. App. 718, 741 (2010) (citations omitted), especially without first following the "preferred procedure" of advising the parties of its intention to give the charge at the close of the

defense's case, *id*. at 742–43. Under these circumstances, the judicial thumb on the scale was not warranted and, combined with the erroneous admission of his request for counsel, deprived Mr. Harris of a fair trial.

Everyone agrees, including me, that Ms. Fallin would have provided important, non-cumulative testimony and that she wasn't called as a witness. Under *Dansbury* and *Davis v. State*, 333 Md. 27 (1993), *overruled on other grounds by Pearson v. State*, 437 Md. 350 (2014), a missing witness instruction would be appropriate if Ms. Fallin were peculiarly available to Mr. Harris, and thus not similarly available to the State. The court's finding that she was peculiarly available to Mr. Harris hinged on the (undisputed) fact that she is his mother, but required the court to reject Mr. Harris's characterization of their relationship, which it did without taking any testimony or making findings. Mr. Harris is not a child, and he doesn't control his mother. The State, not Mr. Harris, had the duty to prove the special relationship that justified the instruction, but the trial court and the majority both, *see Harris*, slip op. at 23 (Mr. Harris's counsel "failed to articulate" the reasons for Ms. Fallin's absence to the court, and "[f]urthermore, . . . It had the opportunity on direct examination, cross examination and redirect examination to explain why Ms. Fallin was not present yet he failed to do so."), seemed to have required Mr. Harris to disprove it. It didn't fall to Mr. Harris, for example, to ask to reopen the record for this purpose during the jury instruction conference, or to explain Ms. Fallin's absence. It fell to the State to prove that the relationship between Mr. Harris and Ms. Fallin was strong

enough to justify an instruction from the bench about the inferences it could draw from her absence, rather than leaving the jury to draw them from the evidence and argument.

I can't explain why Mr. Harris's fingerprints were on the pill bottles, and the evidence absolutely was sufficient to convict him of these crimes. But the jury should have been permitted to draw inferences from the evidence and argument, without the additional, potentially powerful guidance of the missing witness instruction here. Nor can I conclude that the impact of these two decisions was harmless beyond a reasonable doubt, where Mr. Harris's credibility lay at the heart of the case. I dissent, respectfully.