Circuit Court for Allegany County
Case No. C-01-CR-19-273

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2307

September Term, 2019

MARCUS LOGAN VAUGHN

v.

STATE OF MARYLAND

Fader, C.J.,
Ripken,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: June 2, 2021

This case is before us on appeal from the Circuit Court for Allegany County, where the appellant, Marcus Vaughn ("Vaughn"), was convicted of multiple counts stemming from an armed home invasion. Vaughn raises three contentions on appeal. First, he contends that there was insufficient evidence to sustain his conviction for use of a firearm in the commission of a crime of violence. Second, he contends that the trial court abused its discretion in admitting a piece of physical evidence because it was both irrelevant and unfairly prejudicial. Finally, he contends that the trial court abused its discretion in its *voir dire* of a juror who failed to disclose a connection to the Assistant State's Attorney.

As to the first issue, we hold that there was sufficient evidence to sustain the conviction for use of a firearm in commission of a crime of violence. As to the second issue, the piece of evidence, a bandana, was relevant, and we hold that the circuit court did not abuse its discretion in finding the probative value of the bandana outweighed the risk of unfair prejudice. Finally, as to plain error review of the *voir dire* of Juror Fifty-Four, trial counsel affirmatively waived the issue, and even if the issue had not been waived, the circuit court's *voir dire* of Juror Fifty-Four was sufficient. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 30, 2018, Brandon Carbaugh ("Carbaugh") was at his residence at 84 South Grant Street in Frostburg, Maryland, with his roommates Joshua Morales ("Morales") and Vincent Nair ("Nair"), his girlfriend Emily Johnson ("Johnson"), and their friends Nicholas Harper ("Harper"), Anthonee Llewellyn ("Llewellyn"), and Michael Roy

("Roy").[1] The group was socializing downstairs, with the exception of Nair, who was in his upstairs bedroom, and Morales and Llewellyn, who were in another upstairs bedroom. At approximately 8:45 p.m., Nair glanced out of his bedroom window and noticed a white vehicle approaching the house. Downstairs, Harper heard a knock on the door, then observed "three people come busting through the door." All three intruders—two men and one woman—had face coverings, and two carried guns. Harper attempted to run, but one of the intruders stopped him by grabbing his jacket and pointing a gun in his face. The intruders demanded the victims lie face-down and empty their pockets. When Harper refused to empty his back pockets, one intruder struck him in the back of the head, causing his head to bleed. When Johnson asked if Harper was okay, "someone stomped on [her] head." Johnson remembered one of the intruders saying "if [she] didn't keep [her] head down [she] would get shot."

Upon hearing the commotion, Morales and Llewellyn descended from the upstairs bedroom and were confronted with "guns and people" wearing face coverings and dressed in all black. Llewellyn later recalled, "there was a man in a mask with a gun pointing up at us." Carbaugh and Johnson indicated that during the encounter one of the male intruders removed his mask. The intruders took the victims' wallets, keys, cash, and cellphones and fled the scene in a white sedan. Harper ran upstairs and told Nair to call 911. Nair called 911 and reported a "gunpoint" robbery.

[1] Minor M.H. was also present at the residence on the night of the home invasion. At trial, Vaughn was acquitted of charges involving M.H.

Sergeant James Sites ("Sergeant Sites") was first to arrive at 84 South Grant Street and was approached by Harper, Johnson, and Carbaugh. Harper "was bleeding heavily from the face and head and had contusions." Carbaugh gave Sergeant Sites a black "magazine or a clip that appeared to have come out of a CO2 power, airsoft gun" recovered from the scene.[2]

Detective Nicholas Mazzone ("Detective Mazzone") responded to the scene shortly thereafter and spoke with several of the victims. As a result of those initial interviews, a police search began for a white passenger car, suspects dressed in dark clothing, and two handguns. On December 31, 2018, as part of the continuing investigation of the home invasion, Detective Mazzone provided a photo lineup of potential suspects to Johnson, Carbaugh, Llewelyn, and Morales. All four victims positively identified Vaughn as a person involved in the December 30 home invasion. Based on further investigation, the police also identified Shannon Broadway ("Broadway"), Shamere Washington ("Washington"), David Daughton ("Daughton"), and Mollie Robinson ("Robinson") as additional suspects. A search ensued for the suspects.

On the night of January 1, 2019, police responded to a report of suspicious activity near a parked Jeep in Hagerstown, Maryland. Police detained Vaughn near the Jeep, which was owned by his wife. A warrant check was run on Vaughn, and he was subsequently placed under arrest due to an outstanding warrant for a December 2018 robbery of a Circle

[2] Parties refer to the black airsoft gun remnants found at the scene as a "clip" or "piece of airsoft gun" in their briefs. For consistency, we will use the term "piece of airsoft gun" when referring to the recovered remnants.

K convenience store in Allegany County. Detective Matthew Shimer of the Cumberland City Police Department applied for and obtained a search warrant for the Jeep related to the Circle K robbery. Police executed the search warrant on January 2, 2019. As a result, the police found, among other items, a printed black bandana. The bandana was submitted for DNA testing, and Vaughn could not be excluded as the source of the significant contributor profile in the recovered sample.

Vaughn was charged with multiple counts relating to the December 30 home invasion. Prior to trial, the circuit court conducted a suppression hearing and excluded certain evidence obtained as a result of the January 1 arrest of Vaughn and the January 2 search of the Jeep and excluded any testimony at trial regarding the Circle K robbery.

A jury trial commenced on September 11, 2019. During *voir dire,* the Assistant State's Attorney informed the circuit court that she recognized Juror Fifty-Four as one of her neighbors. Juror Fifty-Four had not come forward when asked if he recognized either counsel. The circuit court questioned Juror Fifty-Four and received affirmation that Juror Fifty-Four could discharge his duties without bias. Juror Fifty-Four was empaneled without objection.

At trial, the State called multiple witnesses including two co-defendants to testify in its case in chief, Robinson and Broadway. Robinson testified that she stayed in the car during the home invasion, but Vaughn, Broadway, and Washington entered the home wearing masks and carrying bookbags. According to Robinson, Vaughn was no longer wearing a mask by the time the three returned to the car. Additionally, the State moved into evidence a photo, found on Robinson's phone, of co-defendant Washington holding a gun

with a shiny metal part. Broadway testified that she stole items from the house while the victims were held at gunpoint; Vaughn and Washington directed the victims be quiet and get on the ground.

The State also called Detective Mazzone as a witness at trial. While testifying on direct, Detective Mazzone referenced the Circle K robbery, which had been excluded during the afore referenced suppression hearing. The circuit court sustained Vaughn's objection and instructed the jury to disregard Detective Mazzone's statements regarding the excluded subject. Vaughn moved for a mistrial, and the circuit court denied his motion. The State moved to admit into evidence photos of the interior of the Jeep taken in connection with Vaughn's January 1 arrest. One photo depicted the back seat of the Jeep, including a printed black bandana on the floor. The Defense objected to one photograph from the search of the Jeep that depicted a paint ball gun, but the remainder were admitted into evidence without objection. Subsequently the State moved to admit into evidence the printed black bandana, and Vaughn objected pursuant to the earlier suppression hearing. Following a bench conference, which was in part inaudible to the court reporter, the circuit court noted that "the bandana was not suppressed" and overruled Vaughn's objection.

The jury convicted Vaughn of 27 counts relating to the December 30 home invasion and the court sentenced him to a total of fifty years of incarceration. Vaughn filed a timely notice of appeal to this Court.

Additional facts will be included as they become relevant to the issues.

ISSUES PRESENTED FOR REVIEW

On appeal, Vaughn asks us to review three issues:

1. Whether sufficient evidence supported the jury's finding that the Defendant used a "firearm" for the purpose of Maryland Criminal Code section 4-204(b)?

2. Whether the trial court erred in admitting evidence obtained in the execution of a search warrant targeting evidence of another crime?

3. Whether the trial court abused its discretion in failing to conduct *voir dire* to determine whether a juror's nondisclosure of his present relationship to the State's Attorney was inadvertent or intentional?

We review each issue below.

DISCUSSION

I. The Evidence Was Sufficient to Support the Jury's Finding on the Use of a Firearm in the Commission of a Crime of Violence Charge

Vaughn first contends the evidence was insufficient to sustain a conviction for use of a firearm in the commission of a crime of violence. Vaughn argues that the only physical evidence found at the crime scene was a piece of an airsoft gun and that the victims' testimony was insufficient to establish either a clear distinction between the two guns mentioned, or that the guns were firearms as defined by Maryland Code Ann., Crim. Law § 4-204(a) (2012). As we explain below, the evidence presented at trial was sufficient to sustain the conviction for use of a firearm in commission of a crime of violence.

A. Standard of Review

"Maryland appellate courts . . . adopt a deferential standard when reviewing the sufficiency of evidence" to support a conviction. *State v. McGagh*, __Md. __, No. 12/20, 2021 WL 302805 at *10 (Md. Jan. 29, 2021). Our sole question is "whether, after viewing

the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Manion*, 442 Md. 419, 430 (2015) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The test is not whether the evidence should have or probably would have persuaded the majority of factfinders, but only whether it could have persuaded *any* rational fact finder. *Anderson v. State*, 227 Md. App. 329, 346 (2016). It is not our task to evaluate the credibility of witness testimony or to resolve evidentiary conflicts. These matters are left for the finder of fact, in this case the jury. The record need only show that the verdicts "were supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 479 (1994).

> As Judge Moylan has observed, when a jury draws a permissible inference:
>
> > The jury must, indeed, speculate. In performing its broader duty of deciding whether or not to draw a permitted inference or in deciding which inference to draw out of a range of permitted inferences, the jury is by definition engaged in a speculative exercise . . . . Blind or purely random speculation, to be sure, can be treacherously deceptive. Informed and educated speculation, on the other hand, is a salutary and, indeed, indispensable part of the decision-making process.
>
> *Cerrato-Molina v. State*, 223 Md. App. 329, 333, 333 n.1 (2015). While conflicting inferences may arise at trial, so long as the jury's chosen inference is "reasonable and possible," we will not disturb the jury's resolution of evidentiary issues.

B. Use of a Firearm in Commission of a Crime of Violence

Under Maryland Code Ann., Crim. Law § 4-204(b): "A person may not use a firearm in the commission of a crime of violence, as defined in § 5-101 of the Public Safety Article, or any felony, whether the firearm is operable or inoperable at the time of the crime." A firearm is "a weapon that expels, is designed to expel, or may readily be converted to expel a projectile by the action of an explosive; or the frame or receiver of such a weapon." Md. Crim. Law § 4-204(a).[3]

In order to sustain a conviction for use of a firearm in commission of a crime of violence, the State must satisfy two elements: (1) use of a firearm (2) during a crime of violence.[4] While a weapon's identity can be established by tangible evidence in the form of the weapon itself, a weapon's identity "can [also] be established by testimony or by inference." *Brown v. State*, 182 Md. App. 138, 166 (2008). Circumstantial evidence will suffice in cases where the weapon cannot be recovered by law enforcement. *See Miller v. State*, 231 Md. 158, 160–61 (1963) (holding a victim's testimonial evidence regarding an armed robbery was sufficient to conclude a dangerous weapon was used in commission of the crime without further testimony regarding the type of gun).

In *Brooks v. State*, the Court of Appeals held that there was insufficient evidence to convict a man of armed robbery where the State submitted the toy gun into evidence. 314

[3] *See* Md. Crim. Law § 4-204(a)(2) ("'Firearm' includes an antique firearm, handgun, rifle, shotgun, short-barreled rifle, short-barreled shotgun, starter gun, or any other firearm, whether loaded or unloaded.").

[4] The "crime of violence" element is uncontested in this case.

Md. 585, 595–601 (1989). The Court reasoned that the lightweight, plastic toy gun used in commission of the armed robbery was not objectively a "dangerous or deadly" weapon. *Id.* at 589. The Court carefully distinguished the *Brooks* facts where a gun, albeit a toy gun, was recovered, from common circumstances where the State is unable to locate a firearm used in a crime. *Id.* at 589 n.3. In speaking to the latter, the Court noted: "the *corpus delicti* of the crime may be proven on the testimony of the victim or an eyewitness that the robber used . . . a weapon." *Id.* (quoting *Holle v. State*, 26 Md. App. 267, 274, *cert. denied*, 275 Md. 750, 750 (1975)). "In such a case, whether the instrument is dangerous or deadly must depend on how witnesses describe it. If it is described as a gun without further qualification, there is a permissible inference that it is a real and operable gun." *Id*.

Vaughn invites us to use the recovered piece of airsoft gun to infer that the second gun identified by the victims was not a firearm at all, but was likewise an airsoft gun. Vaughn presented the jury with the same invitation. At trial, the State offered testimony from multiple victims indicating that two guns were used in the home invasion, testimony from co-defendant Broadway that there was a gun, as well as corroborating testimony from Detective Mazzone that, based on witness interviews, he sought two guns as part of his investigation. While black pieces of an airsoft gun were found, no second gun or part thereof was ever recovered. However, the State presented a photograph, taken from Robinson's cell phone, depicting co-defendant Washington holding a gun with a shiny metal part. A video was presented from Robinson's cell phone depicting Washington holding a gun. Robinson testified that she first met Washington, Vaughn, and Broadway in person only a few days before the home invasion. The State subsequently asked the jury to

make the permissible inference under *Brooks* that the second gun described by victims and unrecovered by police was a firearm.

Vaughn further asserts that the State's burden of production on the firearm was elevated as there were two guns used, one of which evidence tends to show was an airsoft gun. In support of this contention, Vaughn relies on *Brown v. State*'s discussion of contradictory evidence. In *Brown*, this Court held there was insufficient evidence to support the assertion that a gun used in a crime was a .41 caliber handgun when the physical evidence tended to show—contrary to the State's assertion—that the weapon was likely a .45 caliber gun. *Brown*, 182 Md. App. at 173–75. However, we also noted in *Brown*, "in the absence of contradictory evidence, the prosecution is not required to introduce specific evidence that the weapon was a firearm; was operable; or was not a toy." *Id.* at 167.

Contrary to Vaughn's assertion, the State's burden of production is not elevated solely because the evidence tends to show that one of the two guns used in the crime was an airsoft gun. Unlike in *Brown*, where physical evidence directly contradicted the State's assertion, the recovered black piece of an airsoft gun does not contradict the inference that one of the guns was operable and not a toy. The victims described multiple guns and testified that they were told to "keep their heads down" and complied out of fear of being shot. The 911 call, which was played at trial, recorded upset victims screaming about a gunpoint robbery and imploring the police to respond in a hurry. Co-defendant Broadway, who admitted she was present during the home invasion, testified that there was a gun used during the crime. There was a photograph depicting co-defendant Washington holding a gun with a shiny metal part, and a black piece of airsoft gun was recovered at the crime

scene. In our view, the jury could reach the permissible inference that one gun was an airsoft gun and one gun was a firearm.

The jury, as factfinders, weighed the credibility of all the evidence presented and found that the State's position was persuasive. As enunciated in *Brooks*, witness testimony that the intruders used guns in the home invasion—despite the lack of recovery of one of the guns—creates a permissible inference for any rational trier of fact to find beyond a reasonable doubt that the unrecovered gun used by the intruders was a firearm. The jury's "informed and educated" conclusion that the second gun was a firearm was permissible based on the evidence.

On this basis, we hold there was sufficient evidence to support Vaughn's conviction for use of a firearm in the commission of a crime of violence.

II. The Court Did Not Abuse its Discretion in Admitting the Bandana into Evidence

Vaughn next contends that the trial court abused its discretion in admitting the printed black bandana into evidence. He argues the bandana was not only irrelevant, but its probative value was substantially outweighed by the danger of unfair prejudice to himself. Moreover, Vaughn argues the risk of unfair prejudice was accentuated when a detective impermissibly testified that the bandana was collected as the result of an investigation relating to a separate crime. We first provide additional facts relating to this issue, then discuss whether the issue has been properly preserved for appeal, and finally evaluate Vaughn's legal arguments.

A. Background

Detective Matt Shimer was investigating a December 25, 2018 robbery of a Circle K convenience store, during the course of which Vaughn was identified as a suspect. On January 1, 2019, two days after the home invasion, police responded to a report of suspicious activity around a Jeep in Hagerstown, Maryland. Vaughn was detained near the Jeep, which his wife owned. On January 2, 2019, Police executed a search warrant on the Jeep seeking evidence related to the December 25, 2018 robbery. During the search, police recovered, among other items, a printed black bandana. Police submitted the bandana for DNA testing. The testing results revealed Vaughn could not be excluded as a source of DNA located on the bandana.

Prior to trial, the Defense moved to suppress evidence found as a result of the January 1 arrest of Vaughn and evidence discovered during the execution of the search warrant of the Jeep on January 2. The circuit court found the January 1 arrest to be unlawful and granted the motion to suppress evidence resulting from the arrest of Vaughn. The circuit court granted in part and denied in part Vaughn's motion to suppress evidence resulting from the January 2 search of the Jeep. Specifically, the circuit court suppressed a PlayStation, blow torch, and shoes found in the Jeep as being outside of the scope of the warrant, but did not suppress any other items found in the Jeep, including the printed black bandana. Vaughn's counsel further argued in limine that "any reference to the fact that there were charges or investigation about Circle K, or charges out of Hagerstown, is certainly prejudicial, and is other crimes evidence . . . which would not be admissible . . . ."

The circuit court agreed that such evidence would be prejudicial and granted the motion in limine.

While on direct examination, the State asked Detective Mazzone "what was searched pursuant to that warrant?" In response, Detective Mazzone stated: "The search was for evidence for a separate crime." During the bench conference that followed, the trial judge acknowledged the Detective's comment raised the precise issue the court was trying to avoid in granting Vaughn's motion in limine. Vaughn moved for a mistrial. The circuit court denied the request, and instead instructed the jurors to disregard the statement addressing another crime, striking Detective Mazzone's statement.

During the direct examination of Detective Mazzone, the State moved to admit photographs of the Jeep taken during the January 2 search, which included a photograph of the printed black bandana in the back of the car. The Defense did not object to the admission of this photograph, and it was admitted into evidence. The State subsequently moved to admit into evidence the same bandana, already admitted via the photograph, and Vaughn objected. Following a bench conference, which was in part inaudible to the court reporter, the circuit court noted that "the bandana was not suppressed" and overruled Vaughn's objection and admitted the printed black bandana into evidence.

B. Preservation

Before reviewing Vaughn's contention regarding the admissibility of the printed black bandana, we first address whether the objection was properly preserved for appeal. Pursuant to Maryland Rule 8-131(a) (2021), an "appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial

court." *Conyers v. State*, 354 Md. 132, 148 (1999). The purposes of the rules governing preservation of issues for appellate review are:

> (a) to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceeding, and (b) to prevent the trial of cases in piecemeal fashion, thus accelerating the termination of litigation.

Handy v. State, 201 Md. App. 521, 545 (2011) (quoting *Fitzgerald v. State*, 384 Md. 484, 505 (2004)). When specific objections are made at the time of trial, those which are not specified are deemed waived. *Klauenberg v. State*, 355 Md. 528, 541 (1999).

The State argues that, because Vaughn's trial counsel made a specific objection that the bandana was inadmissible due to an underlying illegal search, renewing arguments made in the pre-trial suppression hearing, Vaughn failed to preserve any objection as to the admissibility of the bandana on any other basis. The State additionally notes that Vaughn's trial counsel failed to object to the photo of the interior of the Jeep depicting the black bandana. Once again, we note the trial court did not suppress the bandana during the suppression hearing.

Vaughn argues that he made a timely general objection to the admission of the bandana pursuant to Maryland Rule 4-323(a), which states: "An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent." Vaughn contends that his trial counsel raised a general objection to the bandana at the bench conference, but that general objection is not a part of the record. Portions of trial counsel's statements during this bench conference were not transcribed and are listed in the transcript as "inaudible." Vaughn insists that for

this Court to hold no general objection was raised would be unfairly prejudicial given the transcription issue. Additionally, Vaughn asserts it is the "general practice" for an appellate court to read transcription issues as a preservation of a general objection. The State contends this is not the case.

We initially note that making a complete and accurate record is the responsibility of the parties, and we review for error on the record as it comes before us. Md. Rule 8-414(b)(1); *see* Md. Rule 8-413(a). Based on the record before us, we do not find that the general admissibility of the bandana was properly preserved, and note the specific objection made at the suppression hearing. As to Vaughn's contention that it is the "general practice" for an appellate court to read transcription issues as a preservation of a general objection, no rule or case law was cited in support of this contention, nor was any located by this Court.[5] Regardless of whether or not such an objection to the admissibility of the bandana was preserved, we hold that the trial court did not err in admitting the bandana into evidence for the following reasons.

C. Standards of Review

Our review of preserved claims of error regarding the admissibility of evidence includes relevancy and unfair prejudice. We note they are interconnected yet have different standards of review. The standard of review for relevancy under Maryland Rule 5-401 is de novo, as relevancy is a legal conclusion. *Ford v. State*, 462 Md. 3, 46 (2018). If we find

[5] We note there may be contexts in which a transcription issue could rightly be treated as preserving a general objection, but the error and context here do not present such a circumstance.

that the evidence is relevant, we then analyze whether the trial court abused its discretion in determining that the admitted evidence was not unfairly prejudicial. *Portillo Funes v. State*, 469 Md. 438, 478 (2020).

D. Relevancy

Vaughn argues that the trial court erred in admitting the bandana because it was irrelevant. Evidence is relevant if it has *any* tendency to make the existence of any fact more or less probable than it would be without the evidence. Maryland Rule 5-401. Relevancy is a threshold matter with "a very low bar to meet." *Williams v. State*, 457 Md. 551, 564 (2018). At the same time, it is a "fundamental proposition that an accused may be convicted only by evidence which shows that he is guilty of the offense charged, and not by evidence which indicates his guilt of entirely unrelated crimes . . . ." *Ross v. State*, 276 Md. 664, 669 (1976).

Vaughn points to inconsistent testimony to support his assertion that the printed black bandana was irrelevant. A few of the victims indicated the robbers wore "ski masks," the face coverings were "just dark" or they were wearing "black masks," while one victim recalls a female robber wearing a black bandana. Vaughn argues that these inconsistencies demonstrate that ski masks or solid black masks were used by the robbers rather than a black bandana with white print on it. Moreover, Vaughn insists that the printed black bandana does not tie him to the crime in any way. In support of this argument, Vaughn relies heavily on *Sweeney v. State*, 242 Md. App. 160, 167 (2019).

In *Sweeney*, the defendant was on trial for robbery, and the trial court admitted into evidence photographs of "burglary tools" found in the defendant's car. *Id.* at 167. It was

undisputed that the tools were not used during the burglary, as the victim frequently left his door unlocked, and there were no signs of forced entry. *Id.* at 181. The purpose of admitting the tools into evidence was not to prove that the tools were used in the crime charged, but rather, that the defendant was "a well-prepared burglar with his tools at the ready." *Id.* at 184. This Court held that the trial court abused its discretion in admitting the photographs of the burglary tools because there was no evidence to suggest that the tools were used in the crime. *Id.* at 185. Instead, the photographs were used to show propensity to commit crime, which made them irrelevant and inadmissible. *Id.* at 184–85.

Unlike the burglary tools in *Sweeney*, which all parties agreed were not used in the commission of the offense in question, there is a dispute in this case whether the printed black bandana recovered from the Jeep was used in the December 30 home invasion. Several witnesses identified one of the robbers as wearing a bandana, and others remembered more generally "black masks" or "face coverings." During the suppression hearing, the circuit court did not suppress the printed black bandana. The jury heard testimony from the victims, Detective Mazzone, and even two co-defendants regarding the black face coverings, including Broadway's testimony that Vaughn provided the face coverings. DNA testing of the bandana indicated that Vaughn could not be excluded as the significant contributor of DNA on the garment. A juror could rationally conclude that the bandana recovered from the Jeep on January 1 was used in the December 30 home invasion, and the bandana tended to make it more likely than not that Vaughn was involved in the home invasion. While the evidence is not conclusive, it certainly satisfies the low bar of relevancy. Moreover, the jury, as factfinders in the case, have the right and responsibility

to weigh presented evidence as they see fit. We conclude that the black bandana recovered from the January 1 search was relevant.

E. Probative Value and Risk of Unfair Prejudice

Vaughn next contends that, even if it is relevant, the black bandana's probative value is substantially outweighed by the risk of unfair prejudice. Absent an abuse of discretion, we do not disturb a "trial court's decision to admit relevant evidence over objection that the evidence is unfairly prejudicial." *Donaldson v. State*, 200 Md. App. 581, 595 (2011). "An abuse of discretion occurs where no reasonable person would take the view adopted by the circuit court." *Williams v. State*, 457 Md. 551, 563 (2018).

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Maryland Rule 5-403. Correlation to the crime charged does not inherently make a piece of evidence unfairly prejudicial. *Newman v. State*, 236 Md. App. 533, 548–50 (2018). Evidence is unfairly prejudicial when it "might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged." *Odum v. State*, 412 Md. 593, 615 (2010).

Vaughn cites *Anderson v. State* in support of his position. 220 Md. App. 509 (2014). In *Anderson*, a defendant was on trial for rape. *Id.* at 514. During the investigation, the victim told police that the rapist had a gun. *Id*. at 511. Two weeks after the rape, police officers executed a search warrant on the defendant's home as a result of a separate crime and found a black handgun. *Id.* at 514. On the third day of trial, the State informed defense counsel of the police report relating to the search warrant detailing the police discovery of

the handgun. *Id.* Of note, the State was seeking to use the report for impeachment purposes, not to argue that the recovered handgun was the same handgun used during the rape. *Id*. at 514–15. The trial court permitted the State to use the report for impeachment purposes only. However, the report was later admitted into evidence. *Id.* at 515–16.

This Court determined that the risk of unfair prejudice in admitting the report was high given the jurors may incorrectly assume that the search was executed as a result of the rape rather than a separate crime. *Id.* at 527. Additionally, if the jurors assumed the search was the result of a separate crime, this assumption could also unfairly prejudice the defendant in that the jury could believe he had the propensity to commit crimes and was probably guilty of this one as well. *Id.* On the other side of the 5-403 balancing test, this Court held that the use of the report to impeach the defendant's credibility on cross examination was an abuse of discretion because the report "had virtually no probative value." *Id.* at 511.

Vaughn contends that his case is similar to *Anderson* given the risk of unfair prejudice resulting from not only the bandana, but Detective Mazzone's stricken testimony indicating that the search warrant for the Jeep was executed based on another crime. Vaughn emphasizes that the bandana was the only piece of physical evidence submitted to the jury linking him to the crime and argues that Detective Mazzone's impermissible statements overemphasized the importance of the bandana to the jury, despite the court's instruction to strike the statement.

In this case, a reasonable person could take the view adopted by the trial court—that the bandana's probative value was not outweighed by the risk of unfair prejudice. On

one side of the balancing test, there is probative value in the bandana. It was found two days after the home invasion in Vaughn's wife's car, with one co-defendant inside and Vaughn nearby. Several victims testified that they saw an individual wearing a bandana or black face covering during the home invasion. Furthermore, DNA found on the bandana could not rule out Vaughn as a significant contributor. An expert testified at trial that the probability of a random unrelated person being the significant source of the DNA was "approximately one in 5.4 quintillion U.S. [citizens], one in 390 quadmillion African Americans, and one in 500 quadmillion U.S. Hispanics." On the unfairly prejudicial side, we fail to see how the bandana itself is unfairly prejudicial. A photograph of the very bandana at issue here, located in the vehicle, was admitted without objection. Vaughn urges us to consider Detective Mazzone's testimony regarding the search of the Jeep resulting from a separate crime as unfairly prejudicial. However, the trial court properly struck the comment and instructed the jury to disregard the statement. Such curative instruction, intended to re-establish fairness, did not elevate the admission of the bandana to the level of "unfair prejudice" required under Rule 5-403.

While the jury was permitted to draw a conclusion connecting the testimony about bandanas and face coverings with the bandana in the car, such connection does not equate to *unfair* prejudice. We hold the trial court did not abuse its discretion in its Rule 5-403 analysis.

III. The Court Properly Conducted *Voir Dire* of Juror Fifty-Four

Vaughn's final contention is that the trial court abused its discretion in its *voir dire* of Juror Fifty-Four. Specifically, Vaughn alleges the court failed to properly inquire into

Juror Fifty-Four's potential bias after the Assistant State's Attorney disclosed that the juror was a neighbor. Vaughn concedes that the issue was not properly preserved for appeal, but he requests this Court engage in plain error review. Before analyzing the appropriate standard of review for this issue, we will provide a brief background of the *voir dire* of Juror Fifty-Four. As we explain below, Vaughn's contention fails on the first prong of the plain error review test. In addition, even if the issue was not affirmatively waived, we hold that the court did not commit error in its *voir dire* of Juror Fifty-Four.

A. Background

During *voir dire*, the trial judge asked the prospective jurors: "To my left is Sam Lane and this is Karen Detrick. And they are Assistant State's Attorneys here in Allegany County. Are you or a close friend or a relative familiar with Mr. Lane or Ms. Detrick through any family, social[,] business or other contact?" Juror Fifty-Four did not respond. Assistant State's Attorney Detrick then told the court: "There are two people here that I recognize that I know. Obviously they didn't come up and say they know me, so if you want to deal with that, if the Court believes it is appropriate." One of these two people was Juror Fifty-Four.[6] The trial judge called Juror Fifty-Four up to the bench and the following colloquy occurred:

> BY THE COURT: All right . . . . Okay, the reason I called you up is that Ms. Detrick says she recognizes you. Do you know Ms. Detrick?
>
> BY JUROR NUMBER FIFTY-FOUR: Do you live across the street from me?
>
> BY THE STATE: I do. Okay.

[6] The other person, Juror Fifty-Six, is not at issue in this case.

BY THE COURT: I gather you are not close friends.

BY JUROR NUMBER FIFTY-FOUR: No (laughing).

BY THE COURT: Is there anything about the fact that you live across the street from Ms. Detrick that you think would interfere with your ability to be a fair and impartial juror in this case?

BY JUROR NUMBER FIFTY-FOUR: No, sir.

BY THE COURT: Any other questions?

BY THE STATE: No, sir.

BY THE COURT: Thank you.

After completing *voir dire*, the court began to empanel the jury. When the trial judge got to Juror Fifty-Four, the clerk of the court asked the same standard questions posed to each prospective juror:

BY THE CLERK: Is this juror acceptable to the Defense?

BY SCHRAM (DEFENSE): Yes.

BY THE CLERK: To the State?

BY THE STATE: Acceptable to the State. Thank you.

BY THE CLERK: You may have a seat in the jury box.

Once the prospective jurors were all seated in the jury box, the circuit court asked: "Is the jury array satisfactory to the Defense?" Each side exercised two strikes from the box as jury selection continued. On three occasions the judge asked whether the jury was satisfactory to the State and Defense. The third time, the judge asked:

BY THE COURT: Is the jury array satisfactory to counsel?

BY SCHRAM: Court's indulgence. Acceptable, Your Honor.

BY THE COURT: All right.

BY THE STATE: Acceptable to the State.

The trial court specifically asked whether there were any exceptions to the *voir dire*, or whether there were any strikes for cause. The Defense chose not to take any exception nor to strike Juror Fifty-Four.

B. Preservation

Maryland Rule 8-131(a) specifically provides than an "appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court." *Conyers*, 354 Md. at 148. Vaughn's trial counsel failed to properly preserve this issue for appeal. Although the issue is not preserved, Vaughn requests we partake in plain error review of the trial court's *voir dire* of Juror Fifty-Four.

C. Standard of Review

Plain error review is an exception to the requirement for preservation under Maryland Rule 8-131(a), and is "reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Newton v. State*, 455 Md. 341, 364 (2017) (quoting *Robinson v. State*, 410 Md. 91, 111 (2009)). Our exercise of plain error review will always be a rare phenomenon. *Morris v. State*, 153 Md. App. 480, 507 (2003). In order for us to partake in plain error review:

> (1) there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant; (2) the legal error must be clear or obvious, rather than subject to reasonable dispute; (3) the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.

Newton, 455 Md. at 364 (internal quotation marks omitted) (quoting *State v. Rich*, 415 Md. 567, 578 (2010)).

Vaughn contends this Court should exercise plain error review of the trial court's *voir dire* of Juror Fifty-Four given the juror did not disclose he was a neighbor of the Assistant State's Attorney. Vaughn argues that the circuit court committed plain error in failing to create a record inquiring into Juror Fifty-Four's non-disclosure of this connection. However, the record unambiguously indicates that such an error, if any, was affirmatively waived.

Vaughn's trial counsel was aware of the connection between the Assistant State's Attorney and Juror Fifty-Four during *voir dire*. After the trial judge asked Juror Fifty-Four whether he recognized the Assistant State's Attorney, the juror asked "[d]o you live across the street from me?" indicating that the juror was unsure of any connection. The trial court went on to confirm the remote connection when the judge stated, "I gather you two are not close friends." Juror Fifty-Four stated they were not. To complete the factual finding of *voir dire*, the trial court asked, "[i]s there anything about the fact that you live across the street from Ms. Detrick that you think would interfere with your ability to be a fair and impartial juror in this case?" Juror Fifty-Four answered no. The trial court asked whether either side had additional questions for the juror, and neither did.

In addition to the individual *voir dire* of Juror Fifty-Four, the trial court provided six subsequent opportunities for Vaughn's trial counsel to raise a strike for cause, objection to his empanelment, or an exception to *voir dire*. Each time, trial counsel not only did not object, but expressly affirmed that Juror Fifty-Four was satisfactory, thereby waiving any

objection to his empanelment. As such, this issue does not survive the first requirement for plain error review. The issue of Juror Fifty-Four's *voir dire* is not properly preserved for review by this court as it was affirmatively waived by Vaughn's trial counsel. Therefore, Vaughn's argument fails on element (1) of the plain error analysis.

D. *Voir dire* of Juror Fifty-Four

Despite affirmatively waiving this issue, we hold the trial court did not commit an error in its *voir dire* of Juror Fifty-Four. Vaughn relies on *Williams v. State* to support his assertion that the trial court clearly erred in its *voir dire* of Juror Fifty-Four given the juror's non-disclosure of his connection to the State's Attorney.

The purpose of *voir dire* is to uncover bias, prejudice, or preconception which might hinder prospective jurors' "ability to objectively resolve the matter before them." *Williams v. State*, 394 Md. 98, 112 (2006) (quoting *Dingle v. State*, 361 Md. 1, 10 n.8 (2000)). In *Williams*, a juror failed to disclose during *voir dire* that a member of his family worked for the State's Attorney's Office, which was prosecuting the defendant. *Id.* at 104. The Defense did not discover the undisclosed relationship until after trial. *Id.* at 104 n.2. In a post-trial hearing on a motion for a new trial, the trial court heard arguments from the State and the Defense—the juror in question was not called to testify about her non-disclosure during *voir dire*. *Id.* at 105. After argument, the trial court determined that the relationship was "pretty remote" and denied the request for a new trial. *Id.* at 112. On appeal, the Court of Appeals held that the trial court abused its discretion because its failure to further *voir dire* the juror regarding her non-disclosure deprived the defendant of his right to "delve into the juror's state of mind for bias." *Id.* at 114–15.

Unlike the court in *Williams*—which failed to identify the undisclosed relationship until after trial—the circuit court in this case discovered the non-disclosure of Juror Fifty-Four during the *voir dire* process. Once the Assistant State's Attorney recognized the juror as her neighbor, she promptly alerted the trial court. In compliance with *Williams*, the trial court conducted an inquiry into Juror Fifty-Four's connection to the Assistant State's Attorney. The record indicates Juror Fifty-Four was unsure of whether the Assistant State's Attorney was his neighbor, even after the judge informed him that the Assistant State's Attorney recognized him. The trial court explicitly asked whether there was anything about being neighbors that would cause the juror to be biased in any way, and the juror said no. The trial court afforded both the State and Defense an additional opportunity to ask questions that would elicit additional information on bias, but both declined.

All four elements of plain error review require *error* – that there (1) be an error, and said error is (2) "clear or obvious, . . .(3) affects the appellant's substantial rights . . .and (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Newton*, 455 Md. at 364. The circuit court created a sufficient record examining any bias and the reason for the non-disclosure as required under *Williams*. We hold the trial court committed no error in its *voir dire* of Juror Fifty-Four, rendering any additional analysis of the four elements of plain error review unnecessary.

JUDGMENTS OF THE CIRCUIT COURT FOR ALLEGANY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.