UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 2698 and 2788

September Term, 2015

No. 2698
TYRONE CARTER

v.

STATE OF MARYLAND

No. 2788
JAMES BERRY

v.

STATE OF MARYLAND

CONSOLIDATED CASES

Wright,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: January 3, 2017

This consolidated appeal arises out of a shooting incident that occurred on November 13, 2012, and which claimed the lives of Allen Horton ("Allen") and Darien Horton ("Darien"), and wounded Renee Horton ("Renee"). After a jury trial in the Circuit Court for Baltimore City, the jointly-tried[1] appellants, Tyrone Carter ("Carter") and James Berry ("Berry"), were convicted of several charges, including two counts of first-degree murder, conspiracy to commit murder in the first degree, six counts of use of a handgun in the commission of a crime of violence, two counts of attempted first-degree murder, two counts of first-degree assault, and two counts of conspiracy to commit assault. In addition, Carter was found guilty of illegally possessing a firearm after previously being convicted of a crime.

Sentencing took place on February 2, 2016. As to Carter, the circuit court imposed two consecutive life sentences plus 115 years, and he noted his appeal on February 5, 2016. Meanwhile, Berry received two consecutive life sentences plus 110 years, and he appealed on February 9, 2016.

Questions Presented

We have combined and reworded the questions presented by both appellants, as follows:

1. Did the circuit court err in denying appellants' motions to dismiss for speedy trial violations?

2. Did the circuit court err or abuse its discretion in admitting testimony regarding a separate shooting incident?

[1] A third individual, Travian Taylor ("Taylor"), was also tried at the same time. Taylor was acquitted of all charges and, therefore, is not a party to this appeal.

3. Did the circuit court abuse its discretion in allowing the State to make certain comments during its rebuttal closing argument?

4. Did the circuit court abuse its discretion in prohibiting Berry from introducing double hearsay testimony?

For the reasons that follow, we answer all questions in the negative and affirm the circuit court's judgments.

Facts

On November 13, 2012, several members of the Horton family resided at 2571 West Lafayette Avenue, Baltimore, Maryland, including: Renee; her sons, Allen and Darien; her daughter, Tenee Horton ("Tenee");[2] Renee's four-year-old grandson, Tiquan; and Shandrea Lowe ("Shandrea"), who was Allen's fiancé and Tiquan's mother. Renee testified that shortly after she arrived home from work that day, a group of men, all carrying guns, kicked in the front door of the house. One of the men, whom she recognized as Berry, told her to call her son, Brandon Morris ("Brandon"), who was known as "Gotti." According to Renee, Brandon did not reside in that home, but visited two or three times a week to socialize with the family.

Renee asked Berry what Brandon had done and was told that he was "doing things he ain't got no business." As Renee did not have her phone, Berry allowed Tenee to go and retrieve it. Berry took the phone but never called anyone. Next, Berry asked who was in the house and, thereafter, took Renee, Tenee, Allen, and Darien downstairs to the

[2] There are various spellings of this name throughout the record. We shall adopt the spelling, "Tenee," as seen in the indictment.

living room. Renee recalled Berry saying that they would not hurt her, while a second man, who Renee identified as Taylor, repeatedly told her to shut up. At some point, Tenee was allowed to go back upstairs to get Tiquan out of the bathtub and to take Tiquan to his bedroom.

When Tenee returned to the living room, she stood by the couch, while Renee, Allen, and Darien sat down. Renee thought that if she acted like she was having a heart attack, the men might leave, so she fell backwards onto the couch. Presumably, she was shot while falling and was rendered unconscious. When Renee woke up, she was face down on the floor, and she realized that her nose and hand had been shot. Renee saw Darien lying on the floor and ran to him, at which time she saw a couple of gunshot wounds on him and put pressure on them. Renee also saw that Allen had been shot. Renee then ran to the rowhome next door and asked her neighbor to call 911.

Tenee testified that when the guns started firing, she ran to the basement to look for a place to hide. While Tenee was running, she heard bullets go past her. After about a minute, she slowly came up the stairs and looked to see if anyone was in the house. Upon seeing that one of the men was running out, she returned to the living room, where she saw that her mother and brothers were laying by the now-bloodstained couch. As Tenee approached, she saw Renee begin to move. Seeing that Renee had a bloody face, Tenee "[f]rantically" called 911 to request an ambulance.

Allen was pronounced dead as soon as he arrived at the hospital, while Darien was pronounced dead at 5:40 a.m. Renee was taken to Shock Trauma, where she had surgery and remained for several days.

Sergeant Raymond P. Santucci, Jr., of the Baltimore City Police Department's evidence control unit, was one of the first officers to arrive at the scene, at approximately 9:20 p.m. He spoke to Renee, who seemed "hysterical, aggravated, agitated." When Sgt. Santucci asked her for "any descriptions," Renee "said that they were all wearing masks, but she could see their eyes" and identified "one as Berry."

At trial, Tenee testified that all of the men who came in the house wore black hoodies, jeans, and "open face ski mask[s]." She stated that the guns they carried – one all black and one silver and black – were both "nine millimeters." Tenee recognized two of the men as Taylor and Berry.

On November 16 and 17, 2012, Renee and Tenee, respectively, selected a photograph of Berry from a photo array. On the back of the photo, Tenee wrote, "He kept saying that he was not going to hurt us and he had a gun in his hand. He was also shooting when the [gun]fire occurred."

Renee was shown two additional photo arrays on November 30, 2012, from which she was unable to make an identification. Around that time, Shandrea received a picture on her phone – later identified to be Carter – and showed it to Renee, who in turn recognized the person based on "the eyes, nose, complexion" as the "third person in [her] home on November 13th 2012. That same day, Renee provided Detective Aaron Cruz

with the name "Jordo" as an individual who might have been involved in her shooting. Det. Cruz took steps to identify "Jordo" and was able to associate that name with Carter. On December 4, 2012, Shandrea sent the photo to Det. Cruz, who showed Renee a blown up version on December 12, 2012. At that time, Renee wrote on the back of the photograph, "That looks like one of the guys that was in the house."

Det. Cruz also met with Tenee on December 12, 2012, and showed her two photo arrays. From one array, Tenee was unable to make an identification, but from the other, Tenee selected two photographs – those of Carter and Taylor. Tenee wrote on the back of that array, "The people I've selected were likely to be in the group who attacked us on November 13th, 2012."

Dr. Julia Shields, an Assistant Medical Examiner with the Office of the Chief Medical Examiner for the State of Maryland, was admitted as an expert in the field of forensic pathology. Dr. Shields performed an autopsy on Darien and observed six gunshot wounds. Wound one was to the right side of the head at the temple, wound two was on the chin, wound three was to the back of the left shoulder, wounds four and five were to the right forearm, and wound six was a superficial wound to the anterior of the neck. Dr. Shields observed gunpowder stippling around the temple wound, which indicated a close-range gunshot. Based upon her examination of Darien and her expertise, she determined that Darien's manner of death was homicide, caused by multiple gunshot wounds.

Dr. Melissa Brassell, another Assistant Medical Examiner with the Office of the Chief Medical Examiner for the State of Maryland, was admitted as an expert in the field of forensic pathology. Dr. Brassell conducted an autopsy on Allen and observed four gunshot wounds. Wound one, which had evidence of gunpowder stippling and soot, was to the left side of the head, wound two was also to the left side of the head, and wounds three and four were to the right thigh. According to Dr. Brassell, the two wounds to the head would be rapidly fatal if left untreated. Based on her medical training and expertise, Dr. Brassell concluded that Allen's manner of death was homicide, caused by multiple gunshot wounds.

Karen Sullivan, a firearms examiner assigned to the lab division with the Baltimore Police Department, was admitted as an expert in firearms examination and identification. After reviewing the cartridge cases, bullets, bullet jackets, and bullet jacket fragments in this case, Sullivan determined that there were ten "9 millimeter" cartridge cases and six "40 Smith and Wesson" cartridge cases. For the bullets, Sullivan determined that four bullets and bullet jackets were all fired with the same unknown firearm that was a 9 millimeter. Similarly, there were four bullets that were all fired with the same 40 Smith and Wesson. Sullivan also found that for the cartridge cases, eight were 9 millimeter cartridge cases that were all fired with one gun and seven were 40 Smith and Wesson cartridge cases that were all fired with the same unknown firearm. Sullivan determined that based on the cartridge cases, there would have been a minimum of two weapons that were fired during the incident.

Over objection, the State was allowed to present evidence that earlier in the day on November 13, 2012, Eric Anderson ("Eric") went to visit Carter, his cousin, at Carter's home where he lived with his mother, Lynette Carter ("Lynette"). Lynette was about to go to the store, and Eric, who had borrowed a Chevrolet hatchback from Berry, volunteered to drive Lynette and her daughter, Mishan, while Carter stayed at the house. Sometime between 7:00-7:30 p.m., Eric, Lynette, and Mishan walked across the street to the car. Eric sat on the driver's seat, Mishan sat on the front passenger seat, and Lynette sat in the back. "By the time [Eric] put [the car] in drive, they [were] shot at." Lynette was unable to see the shooter, but Eric could tell that the shooter was tall, skinny, and wore a white shirt.

A call to 911 was placed at 7:22 p.m. Thereafter, Eric drove to the hospital, where they arrived at 7:45 p.m. He was treated for a gunshot wound to his left ankle and Lynette was treated for a gunshot wound to her right leg. While at the hospital, Eric called Berry and told him to get his vehicle. At trial, all parties agreed and it was stipulated that the car was regularly driven by Berry, that Berry's fingerprints were in it, and that it contained his personal items.

Kristie Stone, a crime lab technician with the Baltimore Police Department, examined Berry's vehicle, a Chevy Equinox, on November 28, 2012, and processed it for DNA and possible latent fingerprints. Sean Dorr, a latent print examiner for the Baltimore City Police Department, was admitted as an expert in the analysis of latent

fingerprints. He identified the left palm print of Berry and the left middle finger of Carter on the vehicle.

At the time that appellants were indicted in this case in August 2013, they were already incarcerated on separate charges. After multiple postponements, they were ultimately tried in September 2015. Following an eight-day trial, the jury found appellants guilty of conspiracy to murder Brandon; first-degree murder of Allen; first-degree murder of Darien; use of a handgun in the commission of a crime of violence against Darien - to wit - murder in the first-degree; use of a handgun in the commission of a crime of violence against Allen - to wit - murder in the first-degree; attempted first-degree murder of Renee; attempted first-degree murder of Tenee; first-degree assault of Renee; first-degree assault of Tenee; conspiracy to assault Renee in the first-degree; conspiracy to assault Tenee in the first-degree; use of a handgun in the commission of a crime of violence against Renee - to wit - attempted murder in the first-degree; use of a handgun in the commission of a crime of violence against Renee - to wit - assault in the first-degree; use of a handgun in the commission of a crime of violence against Renee - to wit - attempted murder in the first degree; use of a handgun in the commission of a crime of violence against Tenee - to wit - attempted murder in the first-degree; and use of a handgun in the commission of a crime of violence against Tenee - to wit - assault in the first-degree. In addition, Carter was convicted of illegally possessing a firearm after previously being convicted of a crime.

Additional facts will be included as they become relevant to our discussion, below.

Discussion

I. Speedy Trial

Appellants first argue that the circuit court erred in denying their motions to dismiss for speedy trial violations. In so doing, they note that they were arrested in late 2012, and indicted in August 2013, but that the case did not proceed to trial until September 2015. Appellants now ask us to reverse the circuit court's judgments.

A. Statutory

First, Carter argues that the circuit court abused its discretion in finding good cause to postpone the trial beyond February 2014. In Maryland, a defendant must be brought to trial within 180 days of the earlier of the appearance of counsel or the defendant's initial appearance in circuit court, unless trial is postponed by the administrative judge for good cause shown. *See* Md. Rule 4-271(a)(1); Md. Code (2001, 2008 Repl. Vol.), § 6-103 of the Criminal Procedure Article. "This 180-day rule 'is mandatory and dismissal of the criminal charges is the appropriate sanction for violation of that time period . . . .'" *Wheeler v. State*, 165 Md. App. 210, 222 (2005) (quoting *Ross v. State*, 117 Md. App. 357, 364 (1997)); *see also State v. Hicks*, 285 Md. 310, 318 (1979). As Carter had his initial appearance in the circuit court on August 7, 2013, he avers that the 180th day (commonly called the "*Hicks*" date), as it pertains to him, was "approximately February 4, 2014."

A good cause determination may be challenged on two grounds: (1) lack of good cause for not commencing the trial on the assigned trial date, and (2) lack of good cause

for the extent of the delay. *State v. Frazier*, 298 Md. 422, 448 (1984). When reviewing an allegation of a *Hicks* violation, the critical postponement to which we look is "the one that carries the case beyond" the 180-day deadline. *State v. Brown*, 355 Md. 89, 108-09 (1999). "[A]nd, when deciding whether to dismiss a case for inordinate delay, it is the length of the delay between the postponed trial date and the rescheduled date that is significant." *Id.* at 109.[3] "The resolution of what constitutes good cause is a discretionary decision within the power of the administrative judge and carries a presumption of validity." *State v. Green*, 54 Md. App. 260, 266 (1983) (citations omitted), *aff'd*, 299 Md. 72 (1984). Thus, "the burden is on the defendant to establish either a clear abuse of discretion or a lack of good cause for postponement as a matter of law." *Brown*, 355 Md. at 108 (citation omitted).

As we have previously reiterated, "[t]here is an abuse of discretion where no reasonable person would take the view adopted by the [trial] court." *Fontaine v. State*, 134 Md. App. 275, 288 (2000) (quoting *Metheny v. State*, 357 Md. 576, 604 (2000) (internal quotation marks omitted). "[A] ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling." *Kusi v. State*, 438 Md. 362, 385 (2014) (citation omitted). "Thus, where a trial court's ruling is reasonable, even if we believe it might have gone the other way, we will not disturb it on appeal." *Fontaine*, 134 Md. App. at 288.

[3] Carter does not allege that there was an inordinate delay in resetting his trial after the critical postponement.

In this case, Carter's first appearance in circuit court was on August 7, 2013, and trial was originally scheduled for January 7, 2014. Thus, the relevant issue is whether good cause existed, on January 7, 2014, to postpone the trial to a date later than February 3, 2014. At the time of the request for the critical postponement, the State informed the circuit court that the prosecutor was in trial for a different homicide case and that discovery was not completed because the court had yet to rule on the State's motion for a protective order regarding the identity and addresses of civilian witnesses.[4] The circuit court found that those reasons constituted good cause, and so do we. As the Court of Appeals previously stated, an appellate court "cannot hold that the trial court committed an error of law in finding that [the prosecutor's] unavailability constituted good cause to postpone the [] trial." *State v. Toney*, 315 Md. 122, 138 (1989). Therefore, even if the unavailability of the prosecutor had been the only reason provided by the State, we would find no abuse of discretion on the circuit court's part.[5]

B. Constitutional

The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights, guarantee a criminal defendant the right to a speedy trial. *Henry v. State*, 204

[4] In response, Carter argued that the State's request for a protective order was a tactic used to avoid complying with the rules of discovery.

[5] On appeal, it does not appear that Berry is advancing a speedy trial argument based on *Hicks*. But even if he were, that argument would also fail. Because Berry's first appearance was on August 9, 2013, his *Hicks* date would have been just two days after Carter's, making January 7, 2014 the critical postponement date for him as well.

Md. App. 509, 548-49 (2012). Here, both appellants argue that the overall delay in trying their cases violated this constitutional right. In response, the State contends that while the delay was sufficient to trigger Sixth Amendment scrutiny, a balancing of the relevant factors weighs against dismissal of the charges. We agree with the State.

In Maryland, appellate courts have "consistently applied the four factor balancing test announced by the U.S. Supreme Court in *Barker* [*v. Wingo*, 407 U.S. 514, 530 (1972)] to address allegations that a defendant's right to a speedy trial . . . has been violated." *State v. Kanneh*, 403 Md. 678, 687 (2008) (citation omitted). Those factors are: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 688 (quoting *Barker*, 407 U.S. at 530). "None of these factors are 'either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.'" *Id.* (quoting *State v. Bailey*, 319 Md. 392, 413-14 (1990)).

"In reviewing the judgment on a motion to dismiss for violation of the constitutional right to a speedy trial, we make our own independent constitutional analysis." *Glover v. State*, 368 Md. 211, 220 (2002) (citations omitted). "We perform a *de novo* constitutional appraisal in light of the particular facts of the case at hand; in so doing, we accept a lower court's findings of fact unless clearly erroneous." *Id.* at 221 (citations omitted). With this standard of review in mind, we shall address each of the four *Barker* factors, as to both Carter and Berry.

1. Length of Delay

First, we note that "the length of the delay, is a 'double enquiry,' because a delay of sufficient length is first required to trigger a speedy trial analysis, and the length of the delay is then considered as one of the factors within that analysis." *Kanneh*, 403 Md. at 688 (citation omitted). The length of delay in this context is measured from the date of arrest. *Id.* While there is no bright line rule regarding the length of time that triggers the speedy trial analysis, the Court of Appeals has "previously determined that a delay of one year and 14 days was 'sufficiently inordinate' . . . such that this Court should engage in a speedy trial balancing analysis." *Id.* (quoting *Epps v. State*, 276 Md. 96, 111 (1975)).

In this case, the murders occurred on November 13, 2012, and appellants were arrested in late 2012 on unrelated charges. They were indicted for this case in August 2013, and not brought to trial until September 2015. As the State concedes, this over-two-year delay, even if measured only from the time of indictment, is sufficient to trigger Sixth Amendment scrutiny.

However, the length of delay is not that significant considering the complexity of the case. It involved multiple co-defendants, many civilian and police witnesses, and complex discovery issues that surfaced as a result of the State's need for a protective order to shield the whereabouts of various witness. Contrary to Carter's assertion, this was not a "relatively simple" and "straightforward" case. Accordingly, we do not find that this factor necessarily weighs in appellants' favor.

2. Reasons for the Delay

We next consider the reasons for the delay and note that "different reasons should be assigned different weights[.]" *Kanneh*, 403 Md. at 690. In *Barker*, 407 U.S. at 531, the Supreme Court explained:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

(Footnote omitted).

1. Late 2012 – January 7, 2014: Appellants were arrested in late 2012, indicted in August 2013, and their trial was originally scheduled for January 7, 2014. This period of time between the arrest and the first scheduled trial date is generally considered pre-trial preparation, which is neutral and not weighted against either party. *See Malik v. State*, 152 Md. App. 305, 318 (2003) ("Generally, time spent in pre-trial preparation is neutral and not charged either to the State or the defendant."). This approximately 13-month period, therefore, is neutral in our analysis.

2. January 7, 2014 – March 19, 2014: As we previously recounted, this delay occurred because the court had not yet ruled on an outstanding motion and the prosecutor was unavailable. This approximately two-month delay is, therefore, partially attributable to the State.

3. March 19, 2014 – May 30, 2014: This approximately two-month delay occurred in Carter's case so that his trial could be "kept together with all of the other defendants." It is also attributable to the State.

4. May 30, 2014 – August 1, 2014: This approximately two-month delay occurred because the State requested to have the case specially set and because of continuing discovery obligations. It is attributable to the State.

5. August 1, 2014 – October 28, 2014: This approximately three-month delay occurred because the State asked to have the case specially set, and because of the "voluminous nature of the discovery involved." Although it does not seem that any defense counsel objected, it is still attributable to the State.

6. October 28, 2014 – December 17, 2014: This one-and-a-half-month delay occurred because one of the co-defendants was not present, necessitating a postponement request by the State for the purpose of consolidation. It is attributable to the State.

7. December 17, 2014 – April 7, 2015: On November 21, 2014, the parties agreed to specially set the trial date to March 16, 2015. However, defense counsel broke her ankle at the end of January and was unable to begin trial on March 16th. The trial, therefore, was postponed to April 7, 2015. Based on the unclear record, we conclude that any delay that is not neutral during this four-month period is attributable to the defense.

8. April 7, 2015 – June 1, 2015: This delay occurred because of the appellants' need for more time to prepare and for medical reasons. This two-month period is attributable to the defense.

9. June 1, 2015 – September 8, 2015: This final delay occurred because of the appellants' need for more time to prepare. This three-month period is attributable to the defense.

Out of the eight postponements requested in the 20 months between January 7, 2014 and September 8, 2015, five were chargeable to the State (accounting for approximately 11 months), and three were chargeable to the defense (accounting for about six months).[6] Thus, although the circuit court erred in attributing one year, seven months, and 18 days to the State, we agree with its conclusion that the second *Barker* factor, on the whole, weighs in appellants' favor. We note, however, that like the circuit court, we find that "none of the reasons for the delay was purposeful or for the net advantage of the State." *See Fields v. State*, 172 Md. App. 496, 550 (2007) (stating that a constitutional violation can be found where "the record had demonstrated a purposeful delay of the trial by the State" and appellants can "demonstrate impairment of their defenses as a result of the delay, given the unacceptable reasons").

3. Assertion of Right

The third *Barker* factor is whether and to what extent a defendant asserts his or her right to a speedy trial. 407 U.S. at 531. The "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.* at 532. In this

[6] As the reasons for postponement between December 17, 2014 and March 16, 2015, were unclear, we shall consider that three-month period neutral.

case, the State concedes that both Carter and Berry asserted their right to a speedy trial. Accordingly, this factor weighs in appellants' favor.

4. Prejudice

Finally, the "most important factor in the *Barker* analysis is whether the defendant has suffered actual prejudice." *Henry*, 204 Md. App. at 554. Prejudice is evaluated in the context of the interests that the right to a speedy trial was designed to preserve: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532. The *Barker* Court clarified that, "[o]f these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*

Appellants argue, foremost, that their lengthy pre-trial incarceration was presumptively prejudicial. Berry adds that, during the delay, his anxiety and concern were extreme, and that "the possibility that the defense was impaired is significant" because witnesses and suspects were incarcerated or killed throughout the pendency of trial.

After reviewing the record, we agree with the circuit court that appellants did not experience any actual legal prejudice as a result of the delays. Carter and Berry were incarcerated on other serious charges at the same time; thus, any delay in this case did not cause them to be unnecessarily jailed. Moreover, neither Carter nor Berry indicated at trial that evidence was destroyed or witnesses went missing as a result of the delay. As

such, this argument is waived. *See* Md. Rule 8-131(a). Lastly, it is worth noting that the last (approximately) six months of the delay were attributable to appellants, to allow their counsel more time to prepare, such that their defense would not be impaired for lack of preparation. Therefore, the fourth and most important *Barker* factor favors the State.

5. Balancing the Factors

Under the circumstances of this case, a proper assessment and balancing of the *Barker* factors lead us to conclude that neither Carter's, nor Berry's, constitutional speedy trial right under the Sixth Amendment was violated. Although the delay was of constitutional dimension, the reasons for the delay were more often chargeable to the State, and Carter and Berry asserted their right to a speedy trial, the delay was not purposefully caused by the State and, ultimately, did not prejudice the appellants' defense. As such, we conclude that the motions to dismiss were properly denied.

II. Separate Shooting Incident

Next, appellants argue that the circuit court erred when it permitted the State to introduce testimony about the shooting that occurred earlier on November 13, 2012, and which injured Eric Anderson and Lynette Carter, while they were in a vehicle that belonged to Berry. According to appellants, the testimony was irrelevant, prejudicial, and served to mislead the jury. In response, the State asserts that the court acted within its discretion because the evidence was relevant to show motive, intent, and conspiracy.

Maryland Rule 5-401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action

more probable or less probable than it would be without the evidence." Relevant evidence is generally admissible, Md. Rule 5-402, but "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. Thus, in deciding whether to admit evidence, a trial court must consider first, whether the evidence is legally relevant, and, if so, whether it is inadmissible because its probative value is substantially outweighed by the danger of unfair prejudice or other countervailing concerns. *State v. Simms*, 420 Md. 705, 725 (2011); *see also Thomas v. State*, 372 Md. 342, 350 (2002) ("The fundamental test in assessing admissibility is relevance.").

Because a court does not have the discretion to admit irrelevant evidence, "[d]uring the first consideration, we test for legal error[.]" *Simms*, 420 Md. 724-25. The *de novo* standard of review "is applicable to the trial judge's conclusion of law that the evidence at issue is or is not of consequence to the determination of the action." *Id.* at 725 (citation omitted). Nonetheless, because relevance is necessarily a fact-bound determination, "[t]rial judges generally have 'wide discretion' when weighing the relevancy of evidence." *Id.* at 724 (quoting *Young v. State*, 370 Md. 686, 720 (2002)).

As to the second consideration involving the balancing between probative value and unfair prejudice, "[t]he appellate standard of review . . . is the highly deferential abuse-of-discretion standard." *Oesby v. State*, 142 Md. App. 144, 167 (2002). To that end, "[a] properly disciplined appellate court will not reverse an exercise of discretion

because it thinks the trial judge's decision was wrong." *Id.* Rather, "[r]eversal should be reserved for those rare and bizarre exercises of discretion that are, in the judgment of the appellate court, not only wrong but flagrantly and outrageously so." *Id.* at 167-68.

In this case, the State's theory was that Carter and Berry were motivated to murder two people, and try to kill other individuals, based upon the belief that Brandon "Gotti" Morris had tried to kill Berry earlier. Specifically, Berry and others believed that Brandon had opened fire on a vehicle that belonged to Berry, but which was occupied at the time by Carter's family members.[7] We conclude that not only was this evidence relevant, but it also was properly admitted because its probative value was not substantially outweighed by the danger of unfair prejudice or misleading the jury.

As the State correctly avers, the prosecution is entitled to present evidence of motive in its case-in-chief, regardless of whether Md. Rule 5-404 is implicated.[8] *See Snyder v. State*, 361 Md. 580, 604 (2000) ("Motive is the catalyst that provides the reason for a person to engage in criminal activity."). The Court of Appeals has previously stated that "motive is a mental state, the proof of which necessarily requires inferences to be drawn from *conduct or extrinsic acts*." *Johnson v. State*, 332 Md. 456, 471 (1993) (emphasis added). Here, not only was the State obligated to present evidence of premeditation in its case, as the defendants were charged with first-degree murder, *see*

[7] The State notes that one of those occupants, Eric, bore a strong resemblance to Berry.

[8] In any event, Berry agrees that "the query is whether the proffered evidence is a) relevant, [and] the (b) probative value is substantially outweighed by the danger of prejudice."

Leyva v. State, 2 Md. App. 120, 123 (1967), it likewise was obligated to present proof of a conspiracy between the defendants.

It is certainly relevant that someone had opened fire on a car owned by Berry, containing Carter's family members, to show the motives and intent of appellants when, just a few hours later, they kicked down the door to the Horton home, looking for Brandon, whom they said was "doing things he ain't got no business." The circuit court did not err or abuse its discretion in finding that this information had a tendency to make the existence of any fact that is of consequence to the determination of the action more probable. Whether "Gotti" actually was the person who fired at Berry's car earlier is unimportant; a jury could infer that appellants believed this to be the case, which makes the evidence relevant and admissible.

Moreover, the circuit court did not abuse its discretion when it determined that the probative value of this evidence outweighed the risk of unfair prejudice. As the State correctly asserts, either the jury interpreted the evidence in the way the prosecution intended – in which case the prejudice was entirely legitimate, or it would not – in which case nothing about the evidence was likely to cause the jury to convict appellants on improper grounds.

III. Rebuttal Closing Argument

Appellants also argue that the circuit court erred in allowing the State to make prejudicial comments during rebuttal closing argument. Specifically, they take issue with the following statement regarding Tiquan:

> This little boy is sitting up here on this second step, and he can see his father, his uncle, his grandma, and his aunt having guns pointed at them by these masked men. And then he sees from this view here - - you can only imagine his father laying there with bullet holes in his head.

According to appellants, there was no evidence presented at trial to support this assertion, and they aver that this was a blatant attempt to appeal to the passions of the jury.

"The regulation of argument rests within the sound discretion of the trial court." *Grandison v. State*, 341 Md. 175, 224 (1995) (citation omitted). "Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom[.]" *Wilhelm v. State*, 272 Md. 404, 412 (1974). "He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions." *Whaley v. State*, 186 Md. App. 429, 452 (2009) (quoting *Spain v. State*, 386 Md. 145, 153 (2005)). During rebuttal, "prosecutors may address . . . issues raised by the defense in its closing argument." *Degren v. State*, 352 Md. 400, 433 (1999) (citing *Blackwell v. State*, 278 Md. 466, 481 (1976)).

"Closing argument, however, is not without limitation, in that the court should not permit counsel to state and comment upon facts not in evidence or to state what he or she would have proven." *Smith v. State*, 388 Md. 468, 488 (2005) (citing *Wilhelm*, 272 Md. at 414-15). "It is also improper for counsel to appeal to the prejudices or passions of the jurors, or invite the jurors to abandon the objectivity that their oaths require." *Mitchell v. State*, 408 Md. 368, 381 (2009) (citations omitted).

Even if we determine that counsel's comments were improper, we will not reverse a conviction "unless there has been an abuse of discretion by the trial judge of a character

likely to have injured the complaining party." *Donaldson v. State*, 416 Md. 467, 496 (2010) (citation and emphasis omitted). "We must determine, upon our own independent review of the record, whether we are able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *Id.* (citation omitted). Thus, an improper closing argument remark will only warrant reversal if it "actually misled the jury or w[as] likely to have misled or influenced the jury to the prejudice of the accused." *Frazier v. State*, 197 Md. App. 264, 283 (2011) (citation omitted).

In this case, we agree with the State that the circuit court did not abuse its discretion. During the direct examination of Tenee, she testified to seeing Tiquan "on the stairs like at the top like where the railing just starts peeking down," both before and after the shooting. Then, during closing arguments for both Carter and Berry, their respective attorneys referred to the fact that Tiquan was present when his father and uncle were murdered. As we previously noted, during rebuttal, the State is entitled to respond to issues raised by the defense during its closing argument. *See Degren*, 352 Md. at 433. Because closing arguments – and in particular, rebuttal arguments – are improvised, we will "not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974).

Moreover, even if the statement was impermissible, a new trial is not justified.[9] "When assessing whether reversible error occurs when improper statements are made during closing argument, a reviewing court may consider several factors, including the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Spain*, 386 Md. at 159 (citations omitted). As the State correctly points out, here, the isolated remark of the prosecutor, in rebuttal, on a point that had already been made by two defense attorneys in their arguments, does not justify overturning the convictions, especially where one of the three co-defendants was acquitted. From this record, we are able to ascertain that the jury's decision to convict Carter and Berry was not caused by any emotional appeal contained in the prosecutor's passing reference to Tiquan. As such, we can declare a belief, beyond a reasonable doubt, that the statement, even if permitted in error, in no way influenced the verdict.

[9] As an aside, we find Judge Moylan's words in *Perry v. State*, 150 Md. App. 403, 433 (2002), to be particularly relevant here:

> The appellant now claims that [the judge's] allowance of that testimony entitles him to a new trial. Although our reaction to such a claim might instinctively be, "So what?" we will, rather than risk inelegance, go on to the merits. In terms of the merits, it is as if Hermann Goering, at Nuremberg, had been discourteous to a sentry. To suggest that even the erroneous admission of such an evidentiary factoid [or a statement made during closing argument] might overturn the Judgment at Nuremberg is absurd. Even so is it here.

IV. Double Hearsay

Lastly, Berry argues that the circuit court erred when it declined to play the recording of an interview of an individual named Bryant Muhamin ("Muhamin") telling a private investigator that Chealyn Mitchell ("Mitchell"), deceased, had once confessed to the Horton murders. In response, the State contends that this matter is unpreserved because it was not raised below. Alternatively, the State avers that even if preserved, Berry's argument would fail because the evidence constituted double hearsay. Assuming without deciding that this issue was properly preserved, Berry's argument remains unmeritorious.

At trial, counsel for Berry maintained that Muhamin was unavailable to testify because he was incarcerated in the State of Virginia at the time. Thus, Berry sought to have Muhamin's recorded statement admitted under the residual hearsay clause of Md. Rule 5-803(b)(24).[10] The circuit court denied his request, finding that "the 5-803

[10] That section states:

> (24) *Other Exceptions*. Under exceptional circumstances, the following are not excluded by the hearsay rule: A statement not specifically covered by any of the hearsay exceptions listed in this Rule or in Rule 5-804, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

exception requires the equivalent circumstantial guarantees of trustworthiness [of Mitchell's statement] and there just are none, none whatsoever." We perceive no error on the court's part. *See Walker v. State*, 107 Md. App. 502, 517 (1995) (stating that when reviewing "a trial court's admission of hearsay under a residual exception," an appellate court "will decide whether the trial judge erred as a matter of law"), *aff'd*, 345 Md. 293 (1997).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Here, it is undisputed that Berry was attempting to introduce double hearsay: a statement made by Muhamin about a statement made by Mitchell to show that Mitchell committed the Horton murders. Although a defendant's constitutional due process rights could trump the rule against hearsay (or double hearsay, as it were), it can only do so in unique circumstances, such as where the evidence "b[ears] persuasive assurances of trustworthiness." *Foster v. State*, 297 Md. 191, 206-08 (1983). Berry correctly cites *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), for the proposition that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." However, he disregards the portion of the Supreme Court's opinion that says, "[t]he hearsay rule . . . is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact." *Id.* at 298. In this case, the circuit court properly found that even if Muhamin's statement could be

admitted, there was no guarantee that Mitchell's statement was likely to be trustworthy. Therefore, it did not err in excluding the double hearsay.

For all of the foregoing reasons, we affirm the circuit court's judgments.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANTS.