Circuit Court for Baltimore City
Case No.: 120070001

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 85

September Term, 2023

CALVIN M. STEVENS

v.

STATE OF MARYLAND

Arthur,
Beachley,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: December 11, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

On February 6, 2020, Calvin M. Stevens, appellant, was arrested and charged with the murder of Khari Matthew Johnson in downtown Baltimore. After a jury trial in the Circuit Court for Baltimore City on November 15-23, 2022, appellant was convicted of first-degree premeditated murder and the use of a firearm in the commission of a crime of violence. The court sentenced appellant to life in prison for first-degree murder and a consecutive twenty years for use of a firearm in the commission of a crime of violence.

Appellant presents two questions for our review, which, as stated in his brief, are as follows:

1. Did the trial court err or abuse its discretion in permitting Paul Brown to make an in-court identification of [appellant] as a person who fled from the crime scene and disposed of items of evidence?

2. Did the trial court commit plain error in permitting evidence and argument that three shell casings recovered at the crime scene had, unquestionably, been fired from a known handgun?

For the following reasons, we affirm the judgments of the circuit court.

BACKGROUND

On January 15, 2020, at approximately 12:30 p.m., Khari Johnson was shot and killed in the 200 block of West Baltimore Street in front of Royal Farms Arena.[1] After hearing a gunshot, a nearby witness turned and saw a man wearing all black clothing and a cover over the bottom half of his face shoot another man who was lying on the ground

[1] In 2022, Royal Farms Arena was renamed CFG Bank Arena. *See Former Royal Farms Arena renamed CFG Bank Arena*, WBAL-TV (Oct. 25, 2022, 6:15AM) https://www.wbaltv.com/article/baltimore-arena-new-name-cfg-bank-arena/41755690#

two or three times. The man then fled east down West Baltimore Street toward Park Avenue.

Around the same time, Paul Brown was outside of his office at Catholic Relief Services on West Lexington Street in Baltimore, approximately four blocks north of the location of Mr. Johnson's shooting. Mr. Brown saw a man who appeared to be in shock running north around the corner from Park Avenue onto West Lexington Street from the direction of the Royal Farms Arena. Mr. Brown saw the man take off his black coat and throw it in a trash can. Mr. Brown then saw the man jump over a fence and run west onto West Clay Street.

Officer Troy Anthony of the Baltimore City Police Department ("BPD") was one of the officers who responded to the location of Mr. Johnson's death shortly after the shooting. After arriving on the scene, Officer Anthony went to search for the suspected shooter. During the search, an individual flagged down Officer Anthony and told him that he saw someone throw a ski mask on the ground and throw something into a storm drain near the intersection of Marion Street and Park Avenue, three blocks north of the Royal Farms Arena. When Officer Anthony looked in the storm drain, he saw a handgun, which he recovered when technicians from the Crime Lab Unit of the BPD arrived at his location.

Following the shooting, the BPD obtained footage from surveillance cameras on several nearby streets that captured the apparent shooter. Officer Christopher Amsel of the BPD was one of the officers who reviewed the footage from the surveillance cameras.

After reviewing the footage, Officer Amsel identified appellant as the individual captured on the surveillance cameras. Officer Amsel had interacted with appellant four or five times prior to January 15, 2020, including one time approximately a week before the shooting.

On February 3, 2020, appellant was arrested on a Violation of Probation Warrant, and Detective Aaron Cruz, the primary investigating officer into Mr. Johnson's death, took a DNA oral swab from appellant. The swab was sent to the BPD's DNA lab and tested against samples recovered from the handgun found in the sewer drain by Officer Anthony, the face mask found near the sewer drain, and the jacket recovered from the garbage can on West Lexington Street. Officer Cruz received the results of the DNA test on February 6, 2020, and appellant was arrested the same day. The results of the DNA test revealed that (1) it was overwhelmingly unlikely that the DNA extracted from the handgun came from a person other than appellant; and (2) appellant contributed DNA to the recovered facemask. Appellant was indicted on (1) murder in the first degree, and (2) use of a firearm in the commission of a crime of violence.

A trial was held in the Circuit Court for Baltimore City on November 15-23, 2022. Appellant was convicted on both counts. On March 14, 2023, the trial court sentenced appellant to life in prison for first-degree murder and twenty years, to be served consecutively, for the use of a firearm in the commission of a crime of violence. On that same day, appellant filed his notice of appeal. We shall provide additional facts as necessary to the resolution of the questions presented in this appeal.

DISCUSSION

I. Did the trial court err or abuse its discretion in permitting Paul Brown to make an in-court identification of appellant as a person who fled from the crime scene and disposed of items of evidence?

A. Facts

On January 29, 2020, Mr. Brown was interviewed by Detective Cruz about what he saw on the day of Mr. Johnson's death, and the interview was recorded on video. Mr. Brown told Detective Cruz that that the man he saw on January 15, 2020, had dreadlocks and that he was confident he could identify the man if he was shown a photo of him. Detective Hassan Rasheed, an officer not involved in the investigation of Mr. Johnson's murder, then showed Mr. Brown a photo array of six individuals, including appellant. Brown did not identify appellant.

Detective Cruz and another detective then discussed the photo array again with Mr. Brown, and asked him "when you looked at the photographs, . . . did any of them mean more to you than the other?" After reviewing the photo array a second time, Mr. Brown identified two photos that "struck [his] attention[,]" one of which was a photograph of appellant. Detective Cruz told Mr. Brown that none of the photos were taken on the day of the shooting, and Mr. Brown stated: "I guarantee you, if they stick that video up there, I see that, if they had a picture from that video, I'd be able to hit it." Later in the interview, Mr. Brown stated that, "I know if I had, you know, some type of video, I would know for sure." Mr. Brown then settled on appellant's photo and stated that he was "attracted by, you know, the length of the dreads" but that he "thought this

dude was kind of like older, not up in my age." After making the identification of appellant from the photo array, Mr. Brown stated that, "I think if you asked me, I think it might be him." Mr. Brown wrote his name down next to appellant's photo, but also wrote, "It might be him, but not sure."

On November 8, 2022, defense counsel emailed the prosecutor and asked, "what witnesses you intend to call that you expect to make an in court ID of [appellant], or who made an out of court ID of [appellant]." The prosecutor responded, stating:

> The only out-of-court ID was done by one of the police officers that knew [appellant] and recognized him in the surveillance video.
>
> I would of course craft his testimony to not talk about how/why he knows him, just that he does know him and recognized him from the surveillance footage.
>
> Other than that, no civilian witnesses did a positive ID on [appellant].

In a hearing on November 15, 2022, appellant moved to suppress Mr. Brown's out-of-court identification of appellant to the police, summarized above, on the grounds that the identification was unduly suggestive and that Mr. Brown did not clearly identify appellant. After reviewing the video recording of Mr. Brown's interview with the police, the trial court granted appellant's motion and suppressed the out-of-court identification.

At trial, on November 17, 2022, Mr. Brown was called as a witness by the State and asked about the man he saw on January 15, 2020, and whether he would be able to recognize him if he saw him. After responding affirmatively, the prosecutor asked whether Brown "might recognize" anyone in the courtroom. Defense counsel objected on grounds of surprise, arguing that under *Williams v. State*, 364 Md. 160 (2001), the

prosecutor committed a discovery violation because "the State never made any suggestion that [Mr. Brown] was going to make an in-court identification[.]"The State responded, among other things, that there was no discovery violation because in Mr. Brown's statement, Mr. Brown clearly said multiple times that he saw appellant's face, and "if I saw his face again, I'd probably recognize it."

After reviewing the case law and hearing further arguments from the parties, the trial court overruled the objection:

> THE COURT: There – there are several cases for which or under which or in which a witness was unable to identify a defendant in a lineup. Um. Which does – and the case law clearly says that in and of itself, even if the lineup is suggestive and the lineup has been the subject after Motion to Suppress, and has been suppressed, as long as the witness has an independent reason for identifying the defendant, um, meaning they're not identifying the defendant from the photo, then the witness can identify.
>
> **The issue of notice, there's no direct rule that requires notice.** In *Williams* it is – it is sort of a collateral sense what – what they're saying is, is that, um, **it's a violation to,** in discovery essentially say…**in *Williams* to say that he didn't see him, and then for him to come in and say that he, um, he could just identify** – he identified him right there in open court, that's essentially what *Williams* is, uh, you know.
>
> And then, when you, you know, weave it all back in, then the Court says it's unfair surprise and it defies the notice rule. It's not a separate rule, uh, is it only if the notice that is given, um, is somehow unfair or incorrect.
>
> **In this particular case that notice that was given under the rule was not unfair, incorrect, or anything else.**
>
> **The defense was provided with everything that the witness had to say about his ability to identify the defendant, um, or the person he saw, I should say.**
>
> Um, the fact that he could not, and I assume the defendant was in one of the pictures, I don't know. **The fact that he could not pick one of the pictures does not mean that he can't identify the defendant, um, it's very different from what happened in *Williams*.**
>
> Um, and so I do find that this is – this is distinguishable. And I also find, uh, that the defense is not, I mean, the defendant might be surprised

> because he didn't think that the witness was going to do that, but I don't – I don't think that that is necessary – there was no violation.
>
> **The bottom line is that there was no violation of the rule by this witness coming in here today looking at the defendant's face and trying to identify him. Um, and I think the defense – the defense was perfectly on notice of that.**
>
> I mean, the – the video – well, I mean the – the video talks – talks so much about the defendant's hair, in the last 48 hours he's changed his hair twice.
>
> So I do believe that – that there was no reason to believe that this – this – the, um – well let me just be clear.
>
> **The rule was not violated because the information provided to the defense was accurate, and the witness's testimony is not opposite [sic] to the information that was provided to the defense.**
>
> So for that reason, the motion is – or yes, the motion is denied.

(Emphasis added).

Back in the presence of the jury, the prosecutor again asked Mr. Brown if he could identify the man whom he saw on the day of the shooting. Mr. Brown pointed to appellant.

After his conviction, appellant moved for a new trial, arguing, among other things, that his trial was unfair because of Mr. Brown's in-court identification. Appellant contended that he relied on the prosecutor's November 8, 2022 email, which he understood to mean that there was no indication of any in-court identification of appellant. The trial court decided that, although it was a "close call" with the November 8, 2022 email, evidence of any identification "was not withheld during discovery[.]" In addition, the court determined that the prosecutor's non-answer to defense counsel's question about in-court identifications in the November 8, 2022 email was not an affirmative assurance that no in-court identification would take place. Finally, the court

held that the defense was on notice that, if "[Mr. Brown] saw the defendant or the person in-person, [] that he could, he believed that he could make such an identification, . . . which he did in-court." The court thus denied appellant's motion for a new trial.

B. Arguments of the Parties

Appellant argues that the trial court erred when it admitted Mr. Brown's in-court identification of appellant. Relying on *Williams*, appellant contends that the identification should have been excluded because "the information at hand would clearly have convinced a reasonable defense attorney that Paul Brown would not be making an in-court identification." According to appellant, although Mr. Brown stated that he could make an identification if he saw the individual in person, that statement was rendered insufficient for admission when, one week before trial, the prosecutor "was asked point blank if there would be an in-court identification, and provided a non-responsive answer regarding an out-of-court identification." Appellant concludes that defense counsel was legitimately surprised by the in-court identification and thus the identification should have been excluded.

In response, the State contends that "[t]here is no provision of Rule 4-263 that requires the prosecutor to provide to the defense pretrial notice of an anticipated in-court identification." According to the State, the instant case is distinguishable from *Williams* and is much closer to *Murdock v. State*, 175 Md. App. 267 (2007), where this Court found no discovery violation when a civilian witness identified the appellant in court after previously stating that she would not be able to do so. In addition, the State argues

that "there was no evidence or finding that the prosecutor provided inaccurate information to the defense[]" and the discovery rules "did not require the prosecutor to answer [appellant's] question about in-court identifications." Finally, the State asserts that, even if this Court decides that the prosecutor's response to defense counsel's November 8, 2022 email was misleading, there was no unfair surprise because appellant knew that Mr. Brown was a "critical witness" who told the police that he would be able to identify the man he saw on the day of the shooting if he saw him in person.

C. Standard of Review

"The application of the Maryland Rules, however, to a particular situation is a question of law, and [this Court] 'exercise[s] independent de novo review to determine whether a discovery violation occurred.'" *Cole v. State*, 378 Md. 42, 56 (2003) (quoting *Williams*, 346 Md. at 169). "[T]his Court 'reviews for abuse of discretion a circuit court's decision to impose, or not impose, a sanction for a discovery violation.'" *Alarcon-Ozoria v. State*, 477 Md. 75, 91 (2021) (quoting *Dackman v. Robinson,* 464 Md. 189, 231 (2019)). If there was a discovery violation and the trial court erred, this Court "'consider[s] the prejudice to the defendant in evaluating whether such error was harmless.'" *Id.* (quoting *Williams*, 346 Md. at 169).

D. Analysis

Under Maryland Rule 4-263(d)(6)(G), the State must disclose to the defense "[a]ll material or information in any form, whether or not admissible, that tends to impeach a State's witness, including . . . the failure of a witness to identify the defendant or a co-

defendant." Further, under Rule 4-263(d)(7), the State is required to disclose to the defense "[a]ll relevant material or information regarding . . . pretrial identification of the defendant by a State's witness[.]"

In the instant case, appellant does not contend that the State did not fulfill its obligation under Rule 4-263(d)(6)(G) to disclose Mr. Brown's failure to identify appellant from a photo array during his police interview. Nor does appellant claim that the State failed to disclose Mr. Brown's tentative identification of appellant after Mr. Brown reviewed the photo array a second time.[2] Instead, appellant asserts that the State violated the discovery rules by leading defense counsel to believe that Mr. Brown would not be making an in-court identification.

At the outset, we note that there is no provision in Rule 4-263 that requires the prosecutor to provide the defense with pretrial notice of an anticipated in-court identification of the defendant by a civilian witness. Rule 4-263 is limited to the disclosure of pretrial identification or pretrial failures to identify. *See* Md. Rule 4-263(d)(6)(G) and (d)(7)(B).

Nevertheless, appellant points to defense counsel's email to the prosecutor, dated November 8, 2022, in which defense counsel specifically asked "what witnesses you intend to call that you expect to make an in court ID of [appellant], or who made an out of court ID of [appellant]," to which the prosecutor responded that "no civilian witness

[2] As previously stated, Mr. Brown's tentative identification of appellant was the subject of a motion to suppress, which the trial court granted.

did a positive ID on [appellant]." Appellant claims a discovery violation under *Williams*, because the prosecutor's non-answer constituted the disclosure of inaccurate information that led to unfair surprise when Mr. Brown made an in-court identification of appellant. The State responds that the prosecutor did not provide inaccurate information to defense counsel, that *Williams* is distinguishable, and that the case is controlled by *Murdock*. We agree with the State.

In *Williams*, Williams was arrested for distribution of cocaine after police officers observed him carrying a package into an apartment and thirty minutes later found cocaine in that apartment when they raided it. 364 Md. at 165. Trooper Wilson, one of the officers surveilling the apartment at the time Williams went inside, planned to testify at Williams's trial. *Id.* at 165-66. On multiple occasions, defense counsel asked the State's Attorney for confirmation that "Trooper Wilson was not able to say, beyond a reasonable doubt, that the man who entered the apartment was Williams." *Id.* at 166. The State responded multiple times that Trooper Wilson "was only able to describe the size, height, and race of the man who entered the surveilled apartment and was not able to specifically identify Williams[.]" *Id.* at 167-68. When Trooper Wilson took the stand, however, he stated that "it was Mr. Williams who is seated at the defense table[]" who entered the apartment. *Id.* at 168. After Williams was convicted, defense counsel moved for a new trial, which the trial court denied. *Id.*

On appeal, Williams argued that the State violated its discovery obligations under Rule 4-263 and that he had been prejudiced as a result, but this Court affirmed. *Id.* at 168-

69. Our Supreme Court reversed and remanded the case for a new trial, holding that Trooper Wilson's observation of Williams was "'relevant material regarding a pretrial identification' under Rule 4-263(a)(2)(C)."[3] *Id.* at 178. The Court held that the State's disclosure that Trooper Wilson observed someone with characteristics similar to Williams was insufficient because any "surprise" to the State regarding Trooper Wilson's identification "does not excuse or mitigate the prejudice to the defendant." *Id.* at 175-76. Specifically, the Court stated that Rule 4-263(g)[4] "clearly articulates that the State's Attorney was accountable for information held by Trooper Wilson, as he both 'participated in the investigation' and 'reported to the office of the State's Attorney.'" *Id.* at 177. Thus the Court concluded that the State's "failure to provide Williams with complete and accurate information regarding the extent to which Trooper Wilson, a witness closely identified with the State, could identify Williams [was] a violation of Rule 4–263(a)(2)(C)."[5] *Id.*

In contrast, *Murdock* involved an identification by a civilian witness, rather than a police officer. In *Murdock*, a woman, Paige Bailey, and her boyfriend, Gary Cooper, were carjacked by two men in the parking lot of Ms. Bailey's aunt's apartment building. 175 Md. App. at 270. The next day, the police received an anonymous tip to investigate Murdock for the carjacking. *Id.* at 272. Detective Valenzia of the BPD interviewed both victims and individually showed them a photo array of six individuals, including

[3] Rule 4-263(a)(2)(C) appears in the current Maryland Rules in Rule 4-263(d)(7)(B).
[4] Rule 4-263(g) appears in the current Maryland Rules in Rule 4-263(c)(2).
[5] Rule 4-263(a)(2)(C) appears in the current Maryland Rules in Rule 4-263(d)(7)(B).

Murdock. *Id.* Cooper immediately selected Murdock's picture, and although Bailey narrowed it down to two photographs, including Murdock's, she did not make a selection. *Id.*

During discovery, the State disclosed to defense counsel both Cooper's and Bailey's responses to the photo array. *Id.* at 274. At trial, Bailey initially testified that she had narrowed her identification to two photographs, but then "claimed to have indeed made a positive identification during the photographic array presentation." *Id.* at 289. On cross-examination, Bailey "responded unequivocally to defense counsel's questioning that she had identified the appellant as the man who robbed her." *Id.* Defense counsel moved for a mistrial or for the jury to disregard Bailey's testimony, but the trial court denied both motions. *Id.* at 282.

On appeal, this Court held that *Murdock* was distinguishable from *Williams* and that there was no discovery violation. *Id*. at 292-293. Specifically, we stated:

> **In *Williams*, the identification information given to the defendant before trial was inaccurate because it was contrary to the information known before trial to Trooper Wilson, whose knowledge about the case was imputed to the State's Attorney's office.** Because Trooper Wilson knew, before trial, that he could identify the defendant as the person who entered the targeted house 30 minutes before the raid, the State's Attorney's Office was deemed to have known that too. Yet, apparently due to inadvertence, the prosecutor assigned to the case thought that, before trial, Trooper Wilson could not identify the defendant as that person.
>
> The thrust of the Court's opinion in *Williams* is that, given that the scope of the State's discovery obligation encompasses those facts known to anyone in the State's Attorney's Office or law enforcement agencies who participated in or reported about the case, the prosecutor assigned to a case must do the legwork necessary to determine the accuracy of the State's discovery information and to disclose information that is accurate.

Otherwise, there is an untenable risk that, due to inadvertence or intentional conduct, prejudicial evidence that the defendant is entitled to know, fully and accurately, before trial will not be disclosed. **When, before trial,** the **mandatory discovery information given by the prosecutor does not include identification evidence that the State's Attorney's Office is deemed to know, and is obligated to accurately report, the conflict of information is internal to the prosecution, and cannot excuse a non-disclosure to the defendant.**

The case at bar does not involve an internal conflict of information between the prosecutors and law enforcement officers or investigators working with them, or reporting to them, about the case. Bailey is not a Rule 4–263(g) actor. She did not "participate[ ] in the investigation or evaluation of the action" and did not "either regularly report, or with reference to the particular action ha[d] reported, to the office of the State's Attorney." Rule 4–263(g). **Rather, she was one of the crime victims.**

To be sure, the **State had an obligation to disclose to the defense the information obtained by Detective Valenzia when he presented the photographic array to Bailey,** and **to do so accurately, without even inadvertent mistake.** If, during the photographic array presentation, Bailey had selected the appellant's photograph, said he was "the man," or indicated a willingness or desire to sign the array as a positive identification of the appellant, those facts would be imputed to the State's Attorney's Office under Rule 4–263(g), and any inconsistency between them and the information disclosed by the State in mandatory discovery would constitute a discovery violation, regardless of how the inaccurate discovery came to be disclosed. **In the case at bar, however, there was no inconsistency between the information Detective Valenzia represented he obtained from Bailey during the photographic array presentation and the information disclosed by the prosecutor to the defense in mandatory discovery.** Thus, there was no internal inconsistency of information within the State's Attorney's Office.

The inconsistency that arose at trial was between the information Bailey was claiming to have given Detective Valenzia during the array presentation and the information Detective Valenzia was claiming to have received from Bailey during that presentation. This was a credibility issue, not a discovery violation issue, and the trial court's instruction to the jury properly addressed it. The court correctly ruled that, under the circumstances, the State did not violate its discovery obligation by not informing the defense that Bailey made an actual identification of the appellant from the photographic array.

Id. at 290–93. (Emphasis added).

In the instant case, Mr. Brown was a lay witness who did not "'participat[e] in the investigation'" of Mr. Johnson's murder nor "'report[] to the office of the State's Attorney[]'" as part of his job, unlike Trooper Wilson in *Williams*. 364 Md. at 177. As explained in *Murdock*, this case "does not involve an internal conflict of information between the prosecutors and law enforcement officers or investigators working with them, or reporting to them, about the case." *Murdock*, 175 Md. App. at 292. Instead, as in *Murdock*, Mr. Brown was a civilian witness brought into court solely to testify as to what he saw on January 15, 2020. Further, the State disclosed to appellant the entirety of Mr. Brown's conversation with Detective Cruz and Detective Rasheed, meaning that there was no "internal inconsistency of information" between the information the detectives obtained from Mr. Brown and the information disclosed to the defense.

Moreover, the prosecutor's non-answer to defense counsel's inquiry, in the November 8, 2022 email, about any State witnesses who were expected to make an in-court identification of appellant does not constitute the disclosure of inaccurate information under *Williams*. First, as stated above, Rule 4-263 does not require the State to disclose information about an anticipated in-court identification by a civilian witness. Second, unlike in *Williams*, the prosecutor here did not make repeated, unequivocal statements to defense counsel that Mr. Brown would not or could not identify appellant at trial. Third, for the prosecutor's non-answer to defense counsel's specific inquiry to constitute inaccurate information, defense counsel would have to infer from the non-

answer alone, and without any follow-up questions, that there would be no in-court identifications of appellant. The trial court did not accept that inference as a reasonable one, nor do we.

Finally, we conclude that, even if the prosecutor's non-answer may have misled defense counsel, there was no unfair surprise, and thus no prejudice. It is clear from Mr. Brown's interview that he had difficulty making an identification from a picture not taken on the day of the murder and that he repeatedly said that if he saw a video or picture from video taken by a surveillance camera on the day of the murder, he would be able to make an identification. Mr. Brown also said in his interview that he did not remember the clothing, because "I was more like into his face." Even appellant acknowledges in his brief that Mr. "Brown told the detectives that if saw the man in the flesh, he believed that he would be able to identify him." In light of all of the aforementioned information disclosed to the defense prior to trial, it logically follows that defense counsel was not unfairly surprised when Mr. Brown identified appellant at trial after seeing him "in the flesh."

For the foregoing reasons, we hold that there was no discovery violation under Rule 4-263 and that appellant was not unfairly surprised when Mr. Brown identified appellant in court as the man he saw fleeing from the crime scene shortly after Mr. Johnson's murder. Accordingly, the trial court did not err or abuse its discretion in allowing Mr. Brown's in-court identification of appellant.

II. Did the trial court commit plain error in permitting evidence and argument that three shell casings recovered at the crime scene had, unquestionably, been fired from a known handgun?

A. Facts

At trial, Daniel Lamont, a forensic scientist for the BPD Crime Lab, was accepted by the court as an expert in the field of firearms examination. Mr. Lamont testified that, through his firearm analysis, he was able to determine that the firearm that Officer Anthony recovered from the sewer drain was the gun that fired the three shell casings recovered from the scene of Mr. Johnson's shooting. Defense counsel did not object to the admission of Mr. Lamont's testimony.

B. Arguments of the Parties

Appellant admits that defense counsel did not object to the admission of Mr. Lamont's testimony, but claims that this case is one that this Court should exercise its discretion to recognize plain error. Appellant argues that the trial court committed plain error when it admitted Mr. Lamont's testimony because it is "absolutely clear that this evidence and the resulting argument were improper as a matter of law." Appellant contends that *Abruquah v. State*, 483 Md. 637 (2023), decided by the Maryland Supreme Court after appellant's trial, "made it clear that the science underlying firearms identification is not sufficiently reliable to permit unequivocal testimony that an unknown projectile was fired from a specific weapon." According to appellant, the instant case satisfies all four steps of plain error review derived from *United States v. Olano*, 507 U.S.

725 (1993), and thus this Court should find that the trial court erred in admitting Mr. Lamont's testimony.

In response, the State argues that plain error review is not warranted in this case. First, the State contends that the trial court's alleged failure to limit the State's firearm identification evidence was not a plain error because the law was unsettled at the time of appellant's trial. Next, the State asserts that, although *Abruquah* involved a challenge to the admissibility of firearm identification evidence that is similar to the instant case, our Supreme Court's holding was limited to the evidence presented to the lower court and thus did not "forever prohibit firearm examiners from opining that a bullet or cartridge case was fired from a suspect weapon." According to the State, additional studies, data, or expert testimony presented in another case may materially alter the analysis regarding the reliability of the methodology.

Third, the State argues that, under *Abruquah*, Mr. Lamont "was permitted to say everything he testified to at trial with the sole exception of offering his ultimate conclusion that" the cartridges entered into evidence were fired with the firearm that he examined. Even without the ultimate conclusion, the State contends, the jury likely would have reached the same verdict, because Mr. Lamont could have explained to the jury that the cartridges entered into evidence were consistent with test samples fired from the subject firearm. Finally, the State argues that the weight of the evidence against appellant, including video footage of appellant fleeing from the crime scene and discarding the firearm, and a positive identification of appellant by a detective who knew him, led to

appellant's conviction. The State concludes that any alleged error in admitting the firearm identification evidence did not undermine the fairness, integrity, or public reputation of the trial.

C. Analysis

Maryland Rule 5-702, which governs the admissibility of expert testimony, states:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine
> (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education,
> (2) the appropriateness of the expert testimony on the particular subject, and
> (3) whether a sufficient factual basis exists to support the expert testimony.

Md. Rule 5-702.

Before our Supreme Court's decision in *Rochkind v. Stevenson*, the admissibility of expert testimony was governed by the *Frye-Reed* standard, which stated that "'before a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the expert's'' relevant scientific community." 471 Md. 1, 4 (2020) (quoting *Reed v. State*, 283 Md. 374, 382 (1978)). In *Rochkind*, however, the Court abandoned this standard in favor of the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which focused on the reliability of expert testimony rather than on its general acceptance. *Id*. at 30-31. Under the new *Daubert-Rochkind* standard, a trial judge "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509

U.S. at 589. In assessing the reliability of expert testimony, the trial court must determine "not whether proposed expert testimony is right or wrong, but whether it meets a minimum threshold of reliability so that it may be presented to a jury, where it may then be questioned, tested, and attacked through means such as cross-examination or the submission of opposing expert testimony." *Abruquah*, 483 Md. at 655.

If a party fails to object to the admission of expert testimony, that party can prevail only if the admission of the testimony was plain error. *Newton v. State*, 455 Md. 341, 364 (2017). "Plain error review is 'reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial.'" *Id.* (quoting *Robinson v. State*, 410 Md. 91, 111 (2009)). In order for an appellate court to exercise plain error review,

> four conditions must be met: (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 district court proceedings'; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.

Id. (cleaned up). "[T]he court's analysis need not proceed sequentially through the four conditions; instead, the court may begin with any one of the four and may end its analysis if it concludes that that condition has not been met." *Winston v. State*, 235 Md. App. 540, 568 (2018).

The second requirement in the plain error review analysis is that the legal error is clear or obvious, rather than subject to reasonable dispute. *Newton*, 455 Md. at 364.

Appellant claims that in *Abruquah* our "Supreme Court made it clear that the science underlying firearms identification is not sufficiently reliable to permit unequivocal testimony that an unknown projectile was fired from a specific weapon." We disagree.

In *Abruquah*, the Supreme Court of Maryland stated:

> Because we evaluate a trial court's decision to admit or exclude expert testimony under an abuse of discretion standard, **our review is necessarily limited to the information that was before the trial court at the time it made the decision.** A trial court can hardly abuse its discretion in failing to consider evidence that was not before it.[6]

483 Md. at 656. (Emphasis added).

Footnote six in *Abruquah* reads:

> On appeal, the State cited articles presenting the results of studies that were not presented to the circuit court and, in some cases, that were not even in existence at the time the circuit court ruled. *See, e.g*., Maddisen Neuman et al., *Blind Testing in Firearms: Preliminary Results from a Blind Quality Control Program*, 67 J. Forensic Scis. 964 (2022); Eric F. Law & Keith B. Morris, *Evaluating Firearm Examiner Conclusion Variability Using Cartridge Case Reproductions*, 66:5 J. Forensic Scis. 1704 (2021). **We have not considered those studies in reaching our decision. If any of those studies materially alters the analysis applicable to the reliability of the Association of Firearm and Tool Mark Examiners theory of firearms identification, they will need to be presented in another case.**

Id. at 656, n.6 (Emphasis added).

Finally, in the Conclusion section of *Abruquah*, the Court held, among other things, that "*[b]ased on the evidence presented at the hearings*…the circuit court should not have permitted the State's expert witness to opine without qualification that the crime scene bullets were fired from [the appellant's] firearm." *Id.* at 698. (Emphasis added).

From the above language and holding of *Abruquah*, it is clear that our Supreme Court did not render a final verdict on the reliability of firearm identification evidence. The Court left the door open for the State to bring additional evidence in another case that might persuade the Court of the reliability of the firearm evidence. Thus, as the State aptly argues, "whether it would be an abuse of discretion for a trial court to admit a firearm examiner's unqualified opinion that cartridge cases were fired from a suspect weapon very much depends on whether the State can produce additional evidence that demonstrates the reliability of the disputed methodology."[6] Therefore, we conclude that appellant has failed to show that the alleged error in admitting Mr. Lamont's testimony is clear or obvious and not subject to reasonable dispute.

Even if the trial court's error is clear or obvious, appellant failed to satisfy the third requirement for plain error review — the error must have affected the outcome of the case. *Newton*, 455 Md. at 364. In the instant case, the evidence weighed heavily against appellant. Surveillance footage from multiple cameras showed appellant fleeing from the crime scene and discarding a firearm. Officer Amsel, who knew appellant, identified appellant as the individual shown in the surveillance videos. Mr. Brown identified appellant at trial as the man he saw running away from the crime scene and discarding a black coat that he had been wearing. A DNA test of the suspect firearm

[6] Because of appellant's failure to object to the admission of Mr. Lamont's testimony, the State was deprived of the opportunity to prove the reliability of Mr. Lamont's methodology at a *Daubert-Rochkind* hearing. It would be contrary to the principles undergirding plain error review for appellant to gain an advantage because of his own failure to preserve the issue for appellate review.

revealed that it was overwhelmingly unlikely that the DNA extracted from the suspect firearm came from a person other than appellant. Even though Mr. Lamont would not have been able to testify that the cartridge cases found at the crime scene were fired from the suspect firearm, he would have been able to testify that the cartridge cases had class and individual characteristics "consistent with" the patterns and markings on the test samples fired by the suspect firearm. Further, such evidence matched Mr. Lamont's testimony that a bullet recovered from the victim's body had class characteristics consistent with the suspect firearm, including that the bullet was a 9mm caliber and had "polygonal rifling" marks characteristic of Glock firearms.

In addition, the evidence against appellant is markedly different from the evidence in *Abruquah*. In *Abruquah*, the firearm and toolmark identification evidence "was the only direct evidence before the jury linking [the appellant's] gun to the crime." 483 Md. at 697. Therefore, we conclude that appellant has failed to demonstrate that the outcome of the case would have been different if Mr. Lamont had not testified that the evidence cartridge cases had been fired from the suspect firearm.

For the above reasons, this Court holds that appellant has failed to satisfy at least one of the conditions necessary for plain error review. Therefore, this Court will not exercise its discretion to recognize plain error.

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