UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

ANTOINE DORSEY
v.
STATE OF MARYLAND
No. 0173, September Term, 2014

ZEBARY PEARSON
v.
STATE OF MARYLAND
No. 0398, September Term, 2014

EDWARD ELLIS
v.
STATE OF MARYLAND
No. 0400, September Term, 2014

Graeff,
Berger,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: October 7, 2015

On December 5, 2013, following a trial in the Circuit Court for Baltimore City, a jury convicted co-defendants Antoine Dorsey, Zebray Pearson, and Edward Ellis, appellants, of second degree murder and related handgun offenses.[1] In this consolidated appeal, appellants present six questions for our review,[2] which we have combined and rephrased, as follows:

1. Did the circuit court err in declining to sever for trial the cases against Ellis and Pearson from the case against Dorsey?

2. Did the circuit court err in admitting against Ellis and Pearson the hearsay statement by Andrew Neely concerning what Dorsey told him regarding the crime?

3. Did the circuit court improperly restrict the cross-examination of Tyrone King?

4. Did the circuit court err in declining to give jury instructions regarding defense of others and hot-blooded provocation?

5. Should Ellis' sentence, as set forth in the docket entries, be vacated because it is inconsistent with the sentence pronounced by the judge in open court?

6. Did the court err in failing to merge Dorsey's sentence for wearing, carrying, or transporting a handgun into his sentence for use of a handgun in the commission of a crime of violence?

[1] Appellants were acquitted on charges of first degree premeditated murder and conspiracy to commit first degree premeditated murder. All three appellants were convicted of use of a handgun in the commission of a crime of violence, and of wearing, carrying, or transporting a handgun. Pearson was convicted of the additional count of possession of a regulated firearm by a prohibited person.

[2] The briefs of Ellis and Pearson present identical claims of error in their respective first four questions presented. Ellis also presents a fifth claim of error relating to his sentencing hearing. Dorsey's first two questions present identical claims of error to Ellis' and Pearson's third and fourth questions presented. Dorsey also presents a third claim of error relating to the merger of his sentences.

For the reasons set forth below, we answer the first question in the affirmative and shall reverse the judgments against Pearson and Ellis. We shall affirm the judgment of the circuit court regarding Dorsey, with the exception that we shall vacate Dorsey's sentence for wearing, carrying, or transporting a firearm.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 2:29 a.m. on July 28, 2012, Baltimore City police responded to 1418 Poplar Grove Street, following a call for a shooting. They found the victim, Jermaine Blue (a.k.a. "Duke"), deceased. Appellants were charged with his murder.

Shirley Omisore, who lived with her mother, Martha Fair, and her nephew, Tyrone King, at 1418 Poplar Grove, testified that she and Ms. Fair were watching television on July 28. Mr. King was out in front of the house on the porch with his friends, including Dorsey (a.k.a. "Antoine"), Ellis (a.k.a. "Eddie"), Pearson (a.k.a. "Stink"), Mr. Blue, Keyana Thomas, Stacia Livingston, Brandon Manuel, and a few others. At some point, the group became loud, so Ms. Omisore went to the front door and told them to keep it down or they would have to leave. From what Ms. Omisore heard, Mr. Blue, Dorsey, Ellis, and Pearson were arguing about Mr. Blue's dog, "Gotti." After she told them to quiet down, Mr. Blue said "okay" and told the others to be respectful of her home. Ms. Omisore described Mr. Blue as respectful toward her, her home, and her family, but she stated that he was "very outspoken," "could be aggressive if he wanted to be," was "rude and obnoxious" and "confrontational," and those behaviors became more pronounced when he was drinking. Ms. Omisore thought that the group was drinking that night.

Ms. Omisore went back inside the house, and approximately ten minutes later, she heard three gunshots. Two girls, Stacia Livingston and Keyana Thomas, and a young male came running through the front door. Ms. Omisore went to the door and saw Mr. Blue lying at the bottom of the stairs. Approximately five minutes later, Mr. King came into the house and called the police.

Yvette Dixon, Mr. Blue's mother, testified that Mr. Blue could be aggressive when he was drinking "if somebody is picking with him or get[s] him started." She stated that Mr. Blue had been drinking and doing drugs on the night that he was killed.

Mr. King testified that, on the evening of July 28, Mr. Blue was at 1418 Poplar Grove with his dog. At approximately 2:30 a.m., Mr. King was at the residence of his friend Michael Smith (a.k.a. "China"), directly across the street from his residence, and he heard what sounded like gunshots. Through a partially open door at China's residence, Mr. King saw Pearson, Ellis, and Dorsey at the bottom of the stairs at 1418 Poplar Grove. Dorsey was standing over Mr. Blue holding a gun. Pearson and Ellis were "assaulting" Mr. Blue, and Dorsey "was just shooting him." Mr. King saw "flashes of light" and heard loud noises as Dorsey stood over Mr. Blue. Mr. King thought that he heard six gunshots before he went to the door, and an additional four gunshots after he got to the door. There were no individuals on the sidewalk outside of 1418 Poplar Grove other than Mr. Blue, Pearson, Ellis, and Dorsey.

After the shooting stopped and Dorsey, Ellis, and Pearson ran away, Mr. King went to Mr. Blue, who was gasping for air. Mr. King told Mr. Blue to "try holding on," and he called for an ambulance. Mr. King made two 911 calls after the shooting, both of which

were played for the jury. In the first call, Mr. King stated that someone had just been shot, and when asked by the operator if he had seen the shooter, Mr. King responded: "No, man, he's just losing blood, man . . . . I ain't going over there." In the second call, Mr. King stated that he heard gunshots. When asked if he wanted to leave his name and number, Mr. King responded: "No." Both phone calls were made from inside his house at 1418 Poplar Grove. Mr. King remained with Mr. Blue until responders arrived. When Mr. King saw the police arrive, he went inside his house, but then he left. He stated that he did not stay on the scene to talk to the police because he was scared.

Mr. King did not talk to the police until September 12, 2012, when he voluntarily went to the police department and gave a tape-recorded statement.[3] He selected appellants' photographs from several photo-arrays, and he identified Dorsey as the shooter and Pearson and Ellis as the individuals he saw hitting Mr. Blue.

On cross-examination, Mr. King testified that, on July 28, he went to 1418 Poplar Grove after work. At some point, Mr. King left to go to China's house to purchase marijuana.

Mr. King's testimony regarding Mr. Blue's whereabouts when he left the house varied. At one point, he testified that Mr. Blue already had gone, and Mr. King did not see him return. At other times, he testified that Mr. Blue was still at the house when he left.

[3] Dorsey indicates in his brief that the taped statement was played for the jury at trial. The record reflects, however, that the taped statement was played out of the presence of the jury, so Mr. King could review his tape-recorded statement and make any corrections to the transcript. Defense counsel then used the transcript during cross-examination.

Ms. Fair testified that, during the morning hours of July 28, 2012, she and Ms. Omisore were watching television at 1418 Poplar Grove. Mr. King, her grandson, was across the street. At some point, Mr. King and Mr. Blue were out on the front porch "making a whole lot of noise" talking with "some other boys," and Ms. Fair asked Ms. Omisore to ask them to be quiet. After Ms. Omisore did so, the people on the porch quieted down. Approximately ten minutes later, Ms. Fair heard what she thought were five gunshots. Two girls then ran into the house from the porch. Approximately 15 minutes later, Mr. King came back into the house and called police.

Ms. Fair testified that Mr. Blue was drinking beer on July 28, but to her knowledge, he was not drunk. She stated that, when Mr. Blue drank, he had "a different attitude," and if someone started a fight with him, he would fight back. In a prior tape-recorded statement to police, Ms. Fair stated that Mr. Blue would get "violent like" when he drank and "wanted to fight."

Mr. Manuel testified that, on July 28, he was sitting on the porch at 1418 Poplar Grove drinking and looking at his phone. At some point, he heard Mr. Blue arguing or "loud talk[ing]" and "heard a lot of commotion from him." He did not know with whom Mr. Blue was arguing. Mr. Manuel thought Mr. Blue was intoxicated, although he could not recall seeing him drink alcohol. Mr. Blue left, stating: "I'll be back," in what Mr. Manuel characterized as a violent tone. When Mr. Blue returned ten or fifteen minutes later, he had his "face covered and it seemed like he was reaching down" into a pocket. Mr. Manuel went inside the house because he thought there was "a possibility that he had

a weapon," and when he saw Mr. Blue's "face covered and [saw him] reach down it just sent a signal that [he] wanted to go inside." A minute later, he heard shots.

Dr. Mary Ripple, Deputy Chief Medical Examiner for the State of Maryland, performed an autopsy on Mr. Blue on July 28, 2012. Mr. Blue suffered 22 gunshot wounds, and Dr. Ripple recovered 12 bullets from his body. He also had scrapes and tears to his skin. None of the individual wounds to Mr. Blue were "rapidly fatal" or "immediately incapacitating," but they all contributed to blood loss and ultimately led to Mr. Blue's death, which Dr. Ripple ruled a homicide. Two of the gunshot wounds had a downward trajectory, but most had an upward trajectory. Five of the gunshot wounds entered Mr. Blue from right to left, and others were left to right. Ten or eleven gunshot wounds entered Mr. Blue from front to back. Dr. Ripple could not tell what position Mr. Blue was in when he was shot, or the position of the people doing the shooting. A few bullets, however, entered from Mr. Blue's back. Dr. Ripple did not observe any evidence that Mr. Blue had been stomped or beaten.

A toxicology screen run on Mr. Blue indicated that he had a blood alcohol level of .11, with a .16 level in his urine. Mr. Blue's urine also tested positive for methylenedioxypyrovalerone, or "bath salt," an illegal stimulant drug similar to amphetamines or speed.

Karen Sullivan, a firearms examiner, examined the bullets recovered from Mr. Blue. She determined that the bullets came from three separate weapons: two bullets from a 9 millimeter handgun; six bullets from a .32 caliber Smith & Wesson; and four bullets from another .32 caliber Smith & Wesson.

Detective Martin Young, the primary homicide detective investigating Mr. Blue's death, testified that he responded to 1418 Poplar Grove after receiving a 911 dispatch at approximately 2:30 a.m. When he arrived, Mr. Blue was already deceased. Detective Young observed several shell casings near Mr. Blue's body. A set of keys and a black mask were recovered from the scene. No weapons were found. Detective Young did not request that Mr. Blue's hands be tested for gunshot residue because Mr. Blue, who was right-handed, was shot twice in his right hand and the blood would have made a test impossible. That he was shot in his right hand also indicated to Detective Young that Mr. Blue was not armed.

Detective Young identified three potential witnesses, Ms. Livingston, Ms. Thomas, and Mr. Manuel, and they were transported to the police station to be interviewed. Mr. Manuel refused to give a tape-recorded statement. Mr. King was not interviewed until September 12, at which time he identified appellants.

As discussed in more detail, *infra*, Dorsey's cousin, Andrew Neely, testified that, after the shooting, Dorsey made statements to him that he understood to mean that Dorsey "had to" shoot Mr. Blue. Additional facts will be provided, as warranted in the argument that follows.

DISCUSSION

I.

Severance of Trials

Pearson and Ellis first argue that the circuit court erred in denying their motions to sever their trial from that of Dorsey. The motions to sever were based on the State's

intention to call Andrew Neely to testify that, several days after the shooting, Dorsey explained the shooting to him by saying: "Niggas out there, things went bad, *I* did what *I* had to do." Pearson and Ellis argued that the statement was inadmissible against them, and if the testimony was to be admitted against Dorsey, separate trials were warranted.

The State contends that the "court acted within its discretion in declining to sever the appellants' trials." It concedes that Dorsey's inculpatory statement was not, "strictly speaking," admissible against Pearson and Ellis. It argues, however, that the question before the trial court "was whether the potential for harm" in joining the defendants "outweighed the advantage for judicial economy." Asserting that joinder of defendants is favored for reasons of judicial economy, and Dorsey's statement was "simply not relevant to" Ellis and Pearson, the State asserts that the court properly exercised its discretion "to try this lengthy, complex case" in a single proceeding.

A.

Proceedings Below

On November 14, 2013, the court heard arguments on the motion to sever. Counsel for Ellis argued that Mr. Neely had told police about a statement Dorsey made, in which he confessed and implicated his co-defendants.[4] Counsel stated that there was an argument between Dorsey and the victim over a dog, and Dorsey told Mr. Neely: "Niggas out there, that niggas were acting off and things went bad and he did what he had to do." Counsel argued that this was hearsay, and the court responded: "Well, statements made by a party

[4] The first part of Ellis' argument for severance was resolved when the State agreed not to use a statement by Dorsey inculpating Ellis by name.

or co-conspirator is not hearsay and any statements made . . . by a defendant to a person would be a statement against interest. Why would that be problematic in this particular trial of Mr. Pearson, Mr. Dorsey and Mr. Ellis?" Counsel responded that the statement was not made in furtherance of a conspiracy, and he also argued that there was a "*Bruton*" issue, *see Bruton v. United States*, 391 U.S. 123 (1968), because Dorsey had a right not to testify, and Ellis would lose his right to confrontation.

The State, apparently reading from the transcript of the recording, proffered that the statement Dorsey made was: "Niggas out there, things went bad, I did what I had to do." The State asserted that it intended to use the statement as an admission of a party opponent, and it agreed that it would not use another part of the statement that referenced Dorsey giving Ellis a gun. The State noted that the statement did not name Ellis or Pearson, and that the defense would have the right to confront Mr. Neely.[5] The court denied the motion for severance, finding that there was no "*Bruton* issue."

B.

Analysis

Pursuant to Maryland Rule 4-253(a), a trial court may conduct a joint trial of two defendants "if they are alleged to have participated in the same act or transaction or in the same series of acts." The Court of Appeals has stated that, "[u]nder ordinary circumstances, where two parties are accused of the same crime, it is in the interest of both

[5] The State did not address the right to confront Dorsey, the person who made the statement.

justice and economy that they should be tried together." *Day v. State*, 196 Md. 384 395 (1950).

A caveat to this rule is found at Rule 4-253(c), which provides that, "[i]f it appears that any party will be prejudiced by the joinder for trial of counts, charging documents, or defendants, the court may . . . order separate trials of counts, charging documents, or defendants, or grant any other relief as justice requires." "Ultimately, a trial judge has a duty to ensure that the defendant receives a fair trial and to guard against injustice." *Galloway v. State*, 371 Md. 379, 395 (2002).

The decision whether to sever defendants or charges is left to the court's discretion. As this Court has explained:

> "The exercise of that discretion requires balancing the 'prejudice' caused by the joinder against 'the considerations of economy and efficiency in judicial administration.' 'Prejudice' within the meaning of Rule 4-253 is a 'term of art,' and refers only to prejudice resulting to the defendant from the reception of evidence that would have been inadmissible against that defendant had there been no joinder."

Wilson v. State, 148 Md. App. 601 647 (2002) (quoting *Ogonowski v. State*, 87 Md. App. 173, 186-87 (1991)), *cert. denied*, 374 Md. 84 (2003). *See Cook v. State*, 84 Md. App. 122, 129 (1990), *cert. denied*, 321 Md. 502.

Here, the circuit court's decision not to sever the trials appears to have been based on a finding that a joint trial would not violate the dictates of *Bruton*. We agree with the court's *Bruton* analysis. In *Bruton*, 391 U.S. at 135-36, the Supreme Court held that a joint trial was improper, despite limiting instructions, because incriminating testimonial statements of a codefendant were introduced at trial. As the Court of Appeals made clear

in *State v. Payne & Bond*, 440 Md. 680, 717-18 (2014), however, evidence that is non-testimonial can be admitted in a joint trial without violating a co-defendant's rights under *Bruton*. Here, Dorsey's statement to Mr. Neely, a friend, was not testimonial. *See Ohio v. Clark*, 135 S.Ct. 2173, 2182 (2015) ("Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers."); *Payne*, 440 Md. at 714 (phone call between co-defendant and another person was not intended to be a substitution for trial testimony, and therefore, was not testimonial). Thus, the circuit court properly determined that the admission of Dorsey's statement did not implicate *Bruton* concerns.

A determination that a joint trial will not violate *Bruton*, however, is not the end of the analysis. In *Payne*, 440 Md. at 718, the Court of Appeals made clear that, although statements of Payne's co-defendant did not implicate *Bruton* because they were non-testimonial, the circuit court, on remand, should consider whether joinder of the defendants would cause prejudice pursuant to Rule 4-253(c).

The Court of Appeals recently summarized the requisite analysis regarding joinder. "For joinder to be proper, a trial court first asks whether 'the evidence offered [is] mutually admissible as to each defendant.'" *Morris v. State*, 418 Md. 194, 210 n.9 (2011) (quoting *Osburn v. State*, 301 Md. 250, 254 (1984)). "If the evidence is not mutually admissible and prejudices the defendant (against whom it is inadmissible)," then severance typically is proper. *Id.* *Accord Osburn*, 301 Md. at 254 (Generally, for joinder of multiple defendants or multiple charges against one defendant to be proper, "the evidence offered must be mutually admissible as to each defendant or as to each charge."). If the evidence

is mutually admissible, the court must then determine whether "the interest in judicial economy outweigh[s] any other arguments favoring severance." *Reidnauer v. State*, 133 Md. App. 311, 319 (quoting *Conyers v. State*, 345 Md. 525, 553 (1997)), *cert. denied*, 361 Md. 233 (2000).

Here, the State concedes, appropriately, that Dorsey's statement, "Niggas out there, things went bad, I did what I had to do," did not satisfy the "mutual admissibility" test. Although that statement was admissible against Dorsey as a statement against a party opponent, *see* Md. Rule 5-803(a)(1), it was not admissible against Pearson or Ellis on this ground.[6] As the Court of Appeals explained in *Payne*, 440 Md. at 710, where multiple defendants are tried together, "the State is the opponent of both; neither [defendant is] the party-opponent of the other." *Accord McClurkin v. State*, 222 Md. App. 461, 483-84, *cert. denied*, 443 Md. 736 (2015).

Nor was Dorsey's statement admissible under the co-conspirator exception to the hearsay rule. To be admissible as the statement of a co-conspirator, the State must have presented evidence that the appellants were part of a conspiracy, the statement was made during the course of the conspiracy, and the statement was made in furtherance of the conspiracy. *Shelton v. State*, 207 Md. App. 363, 376 (2012). *See also State v. Rivenbark*,

[6] Md. Rule 5-803(a)(1) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (a) Statement by Party-Opponent. A statement that is offered against a party and is:
>
> (1) The party's own statement, in either an individual or representative capacity.

311 Md. 147, 158 (1987) ("[A] co-conspirator's statement is inadmissible unless it was made before the attainment of the conspiracy's central objective."). Here, to the extent there was a conspiracy, the statement was made after it was over.

Because the statement by Dorsey was admissible against Dorsey, but not admissible against Pearson and Ellis, the court, in exercising its discretion to determine whether to sever the trials, was required to balance the prejudice to Pearson and Ellis caused by the admission of the inadmissible evidence against "the considerations of economy and efficiency in judicial administration." *Ogonowski*, 87 Md. App at 186. "The balancing test is a discretionary function, and this Court will only reverse a trial judge's decision to permit joinder if the decision was a clear abuse of discretion." *Conyers*, 345 Md. at 556. The failure to exercise discretion, however, is an abuse of discretion. *Johnson v. State*, 325 Md. 511, 520, (1992). *Accord Gray v. State*, 368 Md. 529, 565 (2002) ("the actual failure to exercise discretion is an abuse of discretion.").

Here, the court resolved the issue solely based on its opinion that a joint trial would not violate the dictates of *Bruton*. The court did not engage in the analysis set forth in Rule 4-253, addressing whether prejudice would result to Pearson or Ellis by evidence admissible against Dorsey but not admissible against them. Because the court did not address the prejudice prong, it did not balance the prejudice to Pearson and Ellis against

considerations of judicial efficiency.[7] The court's failure to exercise discretion in this regard was an abuse of discretion.

Because the court abused its discretion in failing to engage in the proper analysis in determining whether to sever the trials, and given the prejudice to Pearson and Ellis by the statement admissible against Dorsey, but not admissible against Pearson and Ellis, their convictions must be reversed and remanded for a new trial.

II.

Cross-Examination of Tyrone King

Dorsey, as well as Pearson and Ellis, argue that the trial court denied them their Sixth Amendment right to confront witnesses against them by precluding cross-examination of Mr. King, "the prosecution's critical eyewitness," regarding whether he "received or expected some benefit for his statements to police and subsequent trial testimony" implicating them in the killing. Specifically, he argues that he should have been permitted to cross-examine Mr. King with respect to a search warrant executed by the police at 1418 Poplar Grove in August 2012, shortly after the murder. In this regard, Dorsey asserts:

> The State never disclosed the outcome of the search and seizure warrant and [Mr.] King was never charged with any drug crime. All of this information, which was proffered to the trial court, pointed to the possibility that [Mr.] King may have received or expected some benefit in exchange for his September 12, 2012, statement to police and subsequent trial testimony. The issue was not a "collateral matter" and appellant was entitled to probe [Mr.] King on the subject during cross-examination in front of the jury.

[7] As counsel for Pearson and Ellis note, the only person who placed the defendants at the scene was Mr. King. Dorsey's statement, "I did what I had to do," "bolstered" Mr. King's testimony, which defense counsel characterized as "shaky."

The State contends that the court properly acted within its discretion "in excluding a line of questioning that was collateral and confusing and, therefore, irrelevant." It notes that the court "satisfied itself that there was no agreement between the State and [Mr.] King," and there "were no circumstantial indications that King sought or desired any kind of favorable treatment for *anything* involving the search warrant, and there was no indication that it even concerned him." Indeed, "when a different witness was permitted to testify on the subject, the only evidence about the purpose of the search warrant was that police were looking for a different person, who they found, and then they left with that person and with nothing else." Accordingly, the State contends, the court did not abuse its discretion in applying Md. Rule 5-403 and declining to permit questions about the execution of the warrant.[8]

A.

Standard of Review

"The Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment . . . provides, in pertinent part, that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'"[9] *Langley v.* State, 421 Md. 560, 567 (2011) (quoting U.S. CONST.

[8] Md. Rule 5-403 provides:

> Although relevant, evidence 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.

[9] The Sixth Amendment to the United States Constitution provides: (continued …)

amend. VI.). The right of confrontation includes a criminal defendant's opportunity to "'cross-examine a witness about matters which affect the witness's bias, interest or motive to testify falsely.'" *Martin v. State*, 364 Md. 692, 698 (2001) (quoting *Marshall v. State*, 346 Md. 186, 192 (1997)). A criminal defendant's constitutional right to cross-examination, however, is not boundless. *Pantazes v. State*, 376 Md. 661, 680 (2003). Trial judges have "'wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues . . . or interrogation that is . . . only marginally relevant.'" *Smallwood v. State*, 320 Md. 300, 307 (1990) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). The

(… continued)

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

Article 21 of the Maryland Declaration of Rights provides:

> That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

MD. CONST. DECL. RIGHTS art. 21.

court, nevertheless, "must allow a defendant wide latitude to cross-examine a witness as to bias or prejudices" so long as the questioning does not "obscure the trial issues and lead to the factfinder's confusion." *Id.* at 307-08.

The scope of cross-examination is within the "broad discretion" of the trial court. *Myer v. State*, 403 Md. 463, 476 (2008); *Pantazes*, 376 Md. at 681; *Washington v. State*, 180 Md. App. 458, 489 (2008). We will not disturb the exercise of that discretion in the absence of clear abuse:

> [O]ur sole function on appellate review is to determine whether the trial judge-imposed limitations upon cross examination that inhibited the ability of the defendant to receive a fair trial. . . . Consistent with that discretion, we note, however, that the trial judge, and not this Court, is in the best position to determine whether the introduction of certain impeachment evidence would enmesh the trial in confusing or collateral issues.

Merzbacher v. State, 346 Md. 391, 413-14 (1997). "An abuse of discretion occurs 'where no reasonable person would take the view adopted by the [trial] court,' or when the court acts 'without reference to any guiding rules or principles.'" *Thomas v. State*, 213 Md. App. 388, 405 (2013) (quoting *Hajireen v. State*, 203 Md. App. 537, 552 (2012)), *cert. denied*, 437 Md. 640 (2014).

B.

Proceedings Below

On November 22, 2013, Dorsey's counsel moved *in limine* to introduce prior bad acts of Mr. King, i.e., a 2009 Probation Before Judgment ("PBJ") for drug distribution from 1418 Poplar Grove. The court denied the motion, stating that the PBJ was "a collateral matter," which did not "fall within the impeachable rules. It's not a conviction. And we're

not trying whether or not Mr. King was a drug dealer at that same address in 2009. We're trying this case. So you may not use it."

On November 25, 2013, Ellis' counsel, joined by counsel for Dorsey and Pearson, complained of a possible discovery violation relating to impeachment information regarding Mr. King. Counsel referenced a note by Detective Young, dated August 9, 2012, after Mr. Blue's murder but prior to Mr. King coming forward to talk to police, which referred to a controlled drug buy made at 1418 Poplar Grove and stated that a search warrant was going to be executed at that address. Counsel proffered that "Tyrone King may be the target of this warrant," and Mr. King "may have received a benefit" from the State. Counsel did not know if Mr. King "was ever charged with anything."

The trial court ruled that the State was

> not required to disclose the sum and substance of the contents of a search and seizure warrant done on someone's house. They are required to disclose whether or not there was any agreement to dismiss charges or any preferential treatment given to . . . Mr. King, or anyone else at that residence, in exchange for their testimony. If they have not disclosed that material, then this [c]ourt will take it that there was no such agreement. But if it comes out in the middle of the trial that there was such agreement, I'm not going to hesitate to take action against the State.

The court continued:

> Learning about the fact there was a search and seizure warrant that was done on a residence, that's not discoverable. There's nothing about what you just said requires the State to do anything. What is discoverable is the possibility that as a result of a search and seizure warrant something was recovered and as a result of something being recovered, the witness or someone at that residence was arrested and as a result of their arrest, there was an agreement to make a statement. There's so many possibilities that would have to condition precedence that would have to come into being in order for a discovery violation to be ripe.

The court then asked the State whether any promise of benefit had been made to Mr. King, and the prosecutor responded there was no agreement with Mr. King. The court ruled that there was no discovery violation and advised defense counsel that they could "take care of that on cross examination, when the witness is on the stand."

Subsequently, the court asked Mr. King whether he had reached out to the State following an arrest for an unrelated matter. Mr. King responded that he had not. The following colloquy then ensued.

> THE COURT: Very well. Any questions, [counsel for Dorsey], following up on the issues that you raised?
>
> ***
>
> [COUNSEL FOR DORSEY]: May I ask him a question [in] reference did he call the homicide detective or the State's Attorney's Office while he was locked up?
>
> THE COURT: Did you?
>
> MR. KING: No.
>
> THE COURT: Anything else? [Counsel for Ellis]?
>
> [COUNSEL FOR ELLIS]: Your Honor, I would ask if he informed the arresting officer he was in the middle –
>
> ***
>
> If he informed the arresting officer that he was a witness in a homicide?
>
> THE COURT: Did you?
>
> MR. KING: No.

Counsel did not ask any further questions and did not inquire into the search warrant issue.

When Mr. King's cross-examination subsequently resumed, counsel for Ellis asked Mr. King about a search warrant conducted at 1418 Poplar Grove. The State objected, and a bench conference ensued, during which the following transpired:

> [MR. COX]:[10] Your Honor, this was the very thing we talked about and I asked, and you said that was the purpose of cross examination, about whether or not there was a search and seizure warrant on the house. That if, because that was the very redacted thing, that was why my complaint was, because I wouldn't be able to be specific in my questions because I had never been given discovery about what was heard.
>
> THE COURT: Pretrial. Motion in limine. I told you then and I will repeat it to you now, it's a collateral matter. Any search and seizure warrant at that residence, I ruled on that. I have it in my notes. You specifically asked me, and I told you it was a collateral matter and you would not be permitted to go into whether there was anyone arrested or searched at that residence for any drugs regarding any matter on that day, or after that day. And, oh, by the way, I ruled on it. So now I'm going to reiterate my ruling and I don't even want to discuss it with you. You can take exception when I finish and I'm really [not very] happy because I'm assuming that you forgot and not that you would intentionally violate my order.
>
> I heard your motion in limine. I heard the State's response, I heard what you said. You even told me when you got the information and I said it's a collateral matter and you will not be permitted to inquire. Would you like to take exception?

All three defense counsel indicated their exceptions, and the court noted the exceptions and ruled that it was "a collateral matter involving this witness."

Defense counsel then stated that he was under the impression "[t]hat was about a 2009 matter that happened prior to this occurrence, that's what we talked about, that's what

[10] The transcript indicates that the prosecutor made this statement. It is clear from the context, however, that the statement was made by counsel for Ellis.

we were aware about," and the court had ruled that counsel could cross-examine about the search warrant. The court responded:

> Absolutely not. The only thing that would be subject to cross is if there was some deal that was elicited between this witness and the State. And he answered the question no. Now I don't know what else you want, but he said no.
>
> ***
>
> You, it's very clear to the [c]ourt that you have an ulterior motive and it's not coming in, it's a collateral matter.

The following day, however, during the testimony of Ms. Fair, the State attempted to elicit testimony about the presence of children at her home, and whether children continued to visit following Mr. Blue's murder. The trial court terminated that line of questioning as irrelevant, and based on what it viewed as the State's willful violation of an order not to elicit testimony about witness intimidation, the court reversed its prior ruling regarding the search and seizure warrant, stating that the defense could ask Ms. Fair, on cross-examination, "whether there was a search and seizure warrant at her house . . . . [a]nd anything related to that search and seizure warrant." The defense did so, asking Ms. Fair whether, in August 2012, a search and seizure warrant was served at her house. She responded that a warrant was served, that "[t]hey was . . . looking for a boy named Waters," and the only thing the police took from the home was "the boy they was looking for named Waters." Dorsey did not seek to recall Mr. King to follow up regarding the warrant.

B.

Analysis

As Dorsey notes, Maryland Rule 5-616(a) addresses impeachment of a witness and provides as follows:

> **Impeachment by inquiry of the witness.** The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at:
>
> ***
>
> (4) Proving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely.

A defendant seeking to explore a witness's bias by cross-examining him or her regarding an expectation of leniency is not required to present evidence of an agreement between the witness and the State or the court. *Brown v. State*, 74 Md. App. 414, 421 (1988). Instead, the relevant inquiry "is the witness's state of mind. What is essential to the preservation of the right to cross-examine is that the interrogator be permitted to probe into whether the witness is acting under a hope or belief of leniency or reward." *Id.* at 421 (quoting *Fletcher v. State*, 50 Md. App. 349, 359 (1981)).

In *Calloway v. State*, 414 Md. 616 (2010), the Court of Appeals addressed the circumstances in which a court abuses its discretion in preventing cross-examination of a witness regarding his expectation of benefit in return for his testimony. In that case, Calloway's cell-mate, Nicholas Watson, called the Office of the State's Attorney and volunteered to testify about several inculpatory statements that Calloway allegedly made to him. *Id.* at 619. Although Mr. Watson denied any expectation of leniency in exchange

for his testimony, a transcript of his interview with the police showed that he recognized that there was some hope that his testimony could result in something being "worked out" in the cases against him. *Id.* at 624-28. Moreover, the record showed the following:

> [A]fter he made his phone call to the State's Attorney's Office, (1) Mr. Watson was released from the Montgomery County Correctional Facility, and (2) the charges pending against him were nolle prossed. Moreover, as of the date on which Mr. Watson testified in the case at bar, even though it is clear that he had entered a guilty plea that constituted a . . . violation of probation, no violation of probation charge had been filed against him. Under these circumstances, we hold that the issues of whether [Mr.] Watson placed the January 8, 2007 phone call in the hope of being released from detention, and whether he was testifying at trial in the hope of avoiding a violation of probation charge, should have been decided by the jury rather than by the Circuit Court.

Id. at 637.

Under these circumstances, the Court stated: "Because the issue is whether [Mr.] Watson had a hope that he would benefit from volunteering to testify against Petitioner, it is of no consequence that the State had not offered to make 'any deal or bargain with [Mr.] Watson regarding his charges and his testimony in [Petitioner's] case.'" *Id.* It held that the circuit court abused its discretion in preventing defense counsel from cross-examining Mr. Watson about whether he volunteered to testify for the State in the hope that he would receive some benefit in several cases that were pending against him. *Id.* at 637-39.

In *Martinez v. State*, 416 Md. 418, 420 (2010), the circuit court prohibited the defense from cross-examining Santos Lorenzo Mejicanos regarding his potential bias in connection with: (1) "the State's dismissal of unrelated charges filed against him"; and (2) "his incarceration status pursuant to a writ of body attachment to secure his presence at

trial." Mr. Mejicanos was facing a variety of criminal charges, which were nolle prossed by the State six days before he testified at a pre-trial motions hearing in Martinez' case. *Id.* at 423. Mejicanos also was brought to court on a body attachment and held in State custody for two days before testifying, and defense counsel wanted to inquire whether Mr. Mejicanos believed that his release from custody was conditioned on his testimony. *Id.* at 426.

The Court of Appeals held that the circuit court abused its discretion in limiting cross-examination. *Id.* at 432. The Court noted:

> "The issue of bias is often generated by circumstantial evidence, and does not disappear merely because the witness denies any reason to be biased. If such circumstantial evidence exists, *the trier of fact is entitled to observe the witness's demeanor as he or she responds to questions permitted by Rule 5-616(a)(4)*.
>
> When the trier of fact is a jury, questions permitted by Rule 5-616(a) should be prohibited only if (1) there is no factual foundation for such an inquiry in the presence of the jury, or (2) the probative value of such an inquiry is **substantially** outweighed by the danger of undue prejudice or confusion."

Id. at 430 (quoting *Calloway*, 414 Md. at 638).

Addressing the circumstantial evidence in that case, the Court stated:

> The facts that a mere six days before Mejicanos testified at the motions hearing in this case, the State *nolle prossed* charges that had been pending against him, and that he was incarcerated pursuant to a writ of body attachment pending his testimony, presented circumstantial evidence of bias, motivated by self-interest. It matters not whether the *nolle prossed* charges were the result of a deal with the State, or that the court, not the State, held the keys to Mejicano's release from the body attachment at the conclusion of his testimony; it matters only what Mejicanos might have thought about those two facts. When a defendant seeks to cross-examine a State's witness to show bias or motive, "the crux of the inquiry insofar as its relevant is concerned, is the witness's state of mind."

416 Md. at 431 (quoting *Smallwood*, 320 Md. at 309). After concluding that "there was a solid factual foundation for the defense's inquiry into Mejicanos' potential bias," and "such inquiry was not outweighed at all, much less substantially so, by the danger of confusion to the jury or unfair prejudice to the State," the Court held that the "trial court's ruling prevented the jury from considering the possibility that Mejicanos had a motive to testify as he did, resulting in a violation of Petitioner's right of confrontation." *Id.* at 431-32.

In *Calloway* and *Martinez*, there was circumstantial evidence, relating to criminal offenses charged against the witnesses themselves, that could cause a juror to believe that the witness believed that he might receive a benefit in return for his cooperation with the State. Here, by contrast, the sole proffer was that there had been a search warrant for the residence where Mr. King lived. Mr. King was not specifically implicated in any crime, nor was there any indication that the search and seizure warrant even concerned him. Indeed, when Ms. Fair was permitted to testify about the search warrant, the only evidence elicited regarding the warrant's purpose was that police were looking for a different person, Waters, and they left the residence with him, and nothing else. There was no circumstantial evidence here indicating that Mr. King sought, desired, or hoped for any kind of favorable treatment for anything involving the search warrant. Accordingly, when Dorsey sought to impeach Mr. King, by introducing "evidence" of his potential bias, the court properly exercised its discretion in determining that this line of questioning would not be permitted.

III.

Jury Instructions

Dorsey, as well as Pearson and Ellis, argue that the court abused its discretion in "refusing to give mitigation defense instructions on imperfect defense of others and hot blooded response to legally adequate provocation." The State responds that neither of those defenses was supported by the evidence, and therefore, the court did not abuse its discretion in refusing to give the requested instructions.

A.

Standard of Review

Maryland Rule 4-325(c) provides that the trial court must, upon the request of any party, instruct the jury regarding the applicable law. *Wagner v. State*, 213 Md. App. 419, 473-74 (2013). The court is required to give a requested instruction if: "(1) the instruction correctly states law; (2) the instruction applies to the facts of the case, or in other words, is generated by the evidence; [and] (3) its content is not fairly covered in another instruction." *Preston v. State*, 218 Md. App. 60, 68 (2014), *aff'd on other grounds*, 444 Md. 67 (2015).

In determining whether the evidence supports the giving of a requested instruction, there is "a relatively low threshold that must be met." *McMillan v. State*, 428 Md. 333, 355 (2012). The defendant need only show "'some evidence' that supports the requested instruction." *Albertson v. State*, 212 Md. App. 531, 552 (2012) (quoting *Bazzle v. State*, 426 Md. 541, 551 (2012)), *cert. denied*, 435 Md. 267 (2013). "The source of the evidence is immaterial; it may emanate solely from the defendant." *Dykes v. State*, 319 Md. 206, 217 (1990). "*Some evidence* is not strictured by the test of a specific standard. It calls for

no more than what it says – 'some,' as that word is understood in common, everyday usage. It need not rise to the level of 'beyond a reasonable doubt' or 'clear and convincing' or 'preponderance.'" *Id.* at 216-17. "We review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard.'" *Albertson*, 212 Md. App. at 552 (quoting *Arthur v. State*, 420 Md. 512, 525 (2011)).

B.

Hot-Blooded Response

The Court of Appeals has delineated a four-part test for determining when the defense of provocation applies:

> (1) There must have been adequate provocation; (2) The killing must have been in the heat of passion; (3) It must have been a sudden heat of passion – that is, the killing must have followed the provocation before there had been a reasonable opportunity for the passion to cool; [and] (4) There must have been a causal connection between the provocation, the passion, and the fatal act.

Wood v. State, 436 Md. 276, 294 (2013) (citations omitted).

In *Wood*, the defense asserted that the following evidence supported a provocation instruction:

> Following a prior assault that did not involve Petitioner, the victim told medical personnel that he had a "history of aggressive behavior" and had threatened others "physically or verbally" when "high or drunk." A local grocer testified that the victim was not allowed in the store if he was intoxicated. A toxicology report showed that the victim tested positive for ethanol and other drugs. A friend testified that Petitioner told him that Petitioner and the victim had been drinking when they got into an argument over pills, during which Petitioner "snapped" and stabbed the victim. Petitioner allegedly told his mother that during his encounter with the victim, the victim made a derogatory comment about Petitioner's mother.

436 Md. at 295. In rejecting the argument that this amounted to "some evidence" to support a defense of provocation, the Court stated: "Quite simply, there is no evidence that Petitioner was adequately provoked by a sudden heat of passion that caused the death of the victim." *Id.*

Dorsey presents a similar argument in this case, asserting that "Neely testified that [Dorsey] told him there had been an argument, that Blue left and came back, and that he had no choice but to shoot Blue," ostensibly because "Blue was an aggressive person who wanted to fight – especially when he was drinking alcohol." Mr. Manuel testified that, when Blue returned to the house, he was wearing a ski mask and reached into his waistband area, giving Mr. Manuel the impression that Blue was armed. "All of this evidence," Dorsey argues, "pointed to a rational inference that Blue came back to the area armed, that he was the aggressor, and that he intended to shoot appellant and/or the people he was with" when he returned to 1418 Poplar Grove. He contends that "Blue's introduction of a gun into the dispute was legally adequate provocation."

As in *Wood*, however, it is not enough that there may have been an argument that Mr. Blue was violent when he was drinking, or that he may have had a concealed gun. To generate a hot-blooded response instruction, there must be evidence that appellants were "adequately provoked by a sudden heat of passion." *Wood*, 436 Md. at 296. *Accord Sims v. State*, 319 Md. 540, 553 (1990) ("Even if we were to find the evidence sufficient to objectively show adequate provocation, there is not a shred of evidence showing the state of mind of the defendant at the moment of the shooting."); *Tripp v. State*, 36 Md. App. 459 (whether a killing was in the heat of passion "is the subjective question of whether a

particular defendant was actually in the heat of passion when he killed"), *cert. denied*, 281 Md. 745 (1977); *Bartram v. State*, 33 Md. App. 115, 175 (1976) ("The blood . . . must indeed by hot and, generally speaking, only the hot-blooded killer can attest to that."), *aff'd*, 280 Md. 616 (1977).

Here, there was no evidence that Dorsey shot Mr. Blue in a sudden heat of passion. The circuit court did not abuse its discretion in declining to give an instruction.

C.

Defense of Others

Appellants contend that the evidence, referenced *supra*, also supported an instruction regarding defense of others. With respect to a claim of defense of others, this Court has stated as follows:

> Defense of another is a recognized response to a second degree assault charge if: (1) the defendant actually believed that the person defended was in immediate and imminent danger of death or serious bodily harm; (2) the defendant's belief was reasonable; (3) the defendant used no more force than was reasonably necessary to defend the person defended in light of the threatened or actual force; and (4) the defendant's purpose in using force was to aid the person defended.

Robinson v. State, 209 Md. App. 174, 206 (2012) (quoting *Choi v. State*, 134 Md. App. 311, 326 (2000)), *cert. denied*, 431 Md. 221 (2013).

In *Lee v. State*, 193 Md. App. 45, *cert. denied*, 415 Md. 339 (2010), we stated that, "[w]hen claiming defense of others, the [defendant] has 'the burden of initially producing 'some evidence'" in support of the requested instruction. *Id.* at 55 (citation omitted). We noted that "[d]efense of others, like self-defense, is a justification or mitigation defense." *Id.* at 58. We explained that:

> If the appellant proved that he was acting in perfect defense of others, i.e., that he held a subjectively genuine and objectively reasonable belief that he had to use force to defend another against immediate and imminent risk of death or serious harm *and* the level of force he used was objectively reasonable to accomplish that purpose, he would be entitled to an acquittal on the murder charge.

Id.

We then reviewed a number of Maryland authorities on the subject, and concluded:

> A common thread running through the cases in which the defense of defense of others has been recognized or an instruction on the defense was found to be generated by the evidence is that the person being defended was coming under direct attack when the defendant came to his or her defense.

Id. at 64.

In *Lee*, we concluded that there was not "'some evidence' that the appellant actually believe when he shot [the victim] that any other person – patron or coworker – was in immediate and imminent danger from [the victim], much less that he held an objectively reasonable belief of the same," noting that Lee "did not testify that he thought a patron would be killed or otherwise seriously injured if he retreated." *Id.* at 65. Accordingly, we held that defense of others was not generated as a defense at trial, and therefore, no jury instruction was required. *Id.*

Here, as in *Lee,* there was no evidence that Mr. Blue attacked another person, and Dorsey responded to protect another. There was no testimony regarding Mr. Blue's actions, or any evidence of an actual attack underway. Nor did any appellant testify regarding what prompted them to kill Mr. Blue. Under these circumstances, the circuit court did not abuse its discretion in declining to give the requested instruction.

IV.

Merger of Dorsey's Handgun Sentences

Dorsey contends that the trial court erred in failing to merge his sentence for wearing, carrying, or transporting a handgun into his sentence for use of a firearm in a crime of violence.[11] The State agrees, and so do we.

In sentencing Dorsey, the court appeared to recognize that the two sentences should merge:

> For wear, carrying [or] transporting a handgun, technically I believe that might merge to the extent that it does the three years would be not seen, it would be concurrent. But I believe it merges as a matter of law.

The court, however, did not merge the sentences and imposed separate sentences for each offense: 20 years for use of a firearm in the commission of a crime of violence, and three years, concurrent, for wearing, carrying, or transporting a weapon.

The Court of Appeals has made clear that these offenses merge: "the Legislature did not intend that a separate punishment should be imposed for carrying, wearing, or transporting a handgun in addition to that imposed for using a handgun during commission of a felony or crime of violence." *Wilkins v. State*, 343 Md. 444, 446-47 (1996). *Accord Hunt v. State*, 312 Md. 494, 509-10 (1988). The court's failure to do so here was error,

[11] In sentencing Pearson, the court stated that the wearing, carrying, or transporting conviction merged into the conviction of use of a handgun in the commission of a crimes of violence count for sentencing purposes, and the court did merge the sentences.

and the conviction of carrying a handgun should merge into the conviction of using a handgun during the commission of a violent crime for sentencing purposes.

CONVICTIONS OF APPELLANTS PEARSON AND ELLIS REVERSED. APPELLANT DORSEY'S SENTENCE FOR WEARING, CARRYING, OR TRANSPORTING A HANDGUN VACATED. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID 67% BY THE MAYOR AND CITY COUNCIL OF BALTIMORE AND 33% BY APPELLANT ANTOINE DORSEY.