UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

CONSOLIDATED CASES

No. 2302
September Term, 2013

DARREN KEON GRAY
v.
STATE OF MARYLAND

No. 2797
September Term, 2013

JAMES HENDERSON
v.
STATE OF MARYLAND

**Zarnoch,
Kehoe,
Leahy,

JJ.

Opinion by Zarnoch, J.

Filed: September 24, 2015

**Zarnoch, Robert A., J., participated in the conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following a late-night party in Towson, four young adults were the victims of an armed robbery, committed by two individuals whom they had seen earlier in the night at the party. Police arrested the suspects, and, after a jury trial, two convictions resulted, which are now the subject of this consolidated appeal. Appellants James Henderson and Darren Gray allege error at virtually every stage of the proceedings.

QUESTIONS PRESENTED

Henderson presents the following question:

I. Did the Circuit Court err in denying Appellant's pre-trial motion to suppress evidence of an out-of-court photo array identification?

Gray presents the following questions:

II. Did the trial court err when it failed to inquire into Gray's statement that he wished to proceed pro se and discharge his public defender and when it failed to comply with Rule 4-215?

III. Did the trial court abuse its discretion when it asked an "anti-CSI" voir dire question over defense counsel's objection?

IV. Did the trial court abuse its discretion when it denied defense counsel's motion for a mistrial?

V. Was Gray's waiver of his right to testify knowing and voluntary?

VI. Was the evidence insufficient to support Gray's convictions for use of a handgun in the commission of a crime of violence in light of the jury instructions?

VII. Did the trial court err and/or abuse its discretion when it permitted testimony that police recovered a "shoulder holster" from the residence associated with Gray?

Finding no reversible error, we affirm.

BACKGROUND

We state the facts as recounted at appellants' trial, held in the fall of 2013. On the night of January 26 and early morning of January 27, 2013, the victims attended a party at 1341 Taylor Avenue in Towson. At one point, about 100 people had joined the festivities. Dominic Castro, a State's witness, testified that when he arrived, he noticed three men at the party who it was "apparent" did not know anyone there.

Castro left the party around 2:00 a.m. with Jacob Hux, Shelby Schultz, and Jeremy Riley. Hux was in the driver's seat. As Hux was placing the key in the ignition, his car was blocked in by a four-door Ford. According to Castro, a man exited from the rear driver's seat wearing a face mask and carrying a revolver. The man told Hux, "Give me your stuff," and took Hux's keys. The man then pointed the gun at Schultz and made a similar request. After she said she had nothing, the assailant hit her in the face. Castro then gave the man his wallet, and the man left in the Ford.

After the police responded to the incident, Castro told the officers that the car was silver and that his friend had told him it was silver-blue. Hux testified that a black man with a darker complexion and a "fairly big build" got out of the backseat of the car that blocked them in.

Darren Gray and James Henderson were indicted in the Circuit Court for Baltimore County with thirty nine counts related to two separate instances of armed robberies and related crimes, both of which occurred on January 27, 2013. After a jury trial—held from October 29, 2013 through November 1, 2013—Appellants were found guilty of twenty-counts in the indictment. They each were sentenced on December 18,

2013, to more than one-hundred twenty years of imprisonment with the first five years to be served without the possibility of parole for robbery and attempted robbery with a dangerous weapon and for the use of a handgun in the commission of a crime of violence. This appeal followed.

DISCUSSION

I. Photo-Array Identification

Henderson alleges error in the circuit court's denial of his motion to suppress a photo-array identification. Because, in reviewing a motion court's denial of a motion to suppress, we are limited to the record of the suppression hearing, we will recount the testimony heard by the court in the suppression hearing held on October 29, 2013. *Upshur v. State*, 208 Md. App. 383, 391 (2012) (citing *Williams v. State*, 372 Md. 386, 401 (2002)). According to testimony, following a tip from one of the victims, police arrested Roland Eisenhart on February 5, 2013 and brought him to the Towson precinct police station where they questioned him. Eisenhart testified that he told the police that he did not know the identities of the Appellants in this case, but did know them by their nicknames, Tay and Gooch. After being placed in a holding cell, Eisenhart identified Gray from an image in a photo-array. Eisenhart was released 24-hours later.

On February 8, 2013, Detective Meckley contacted Eisenhart to notify him that the police were going to come to his residence. Eisenhart met Det. Meckley outside and stepped into the detective's vehicle. While inside the vehicle, Det. Meckley produced a photo array from a manila envelope and asked Eisenhart to look at it. According to Eisenhart, Det. Meckley did not state that one of the suspects would be in the array;

instead, Det. Meckley stated "I want you to look at some pictures." Eisenhart stated that Det. Meckley did not tell him that he was required to identify someone from the array, that Det. Meckley did not tell him whom to identify, and that Det. Meckley did not suggest that he pick a particular photograph. The photo-array contained six individuals, only one of whom had tattoos on his face–Henderson. Eisenhart identified Henderson in the array.

At the motions hearing, Henderson moved to suppress Eisenhart's identification, arguing that the absence of tattoos on the faces of the other subjects in the photo-array made the array unduly suggestive. The court denied Henderson's motion to suppress, finding nothing impermissibly suggestive in the photo array and observing that "[t]he fact that [Henderson] may or may not have tattoos is another distinguishing factor that is subject to change[,] similar to hairstyles, facial hairs[,] and other things."

In his only contention on appeal, Henderson argues that the photo array identification made by Eisenhart was impermissibly suggestive because, of the six photographs presented in the array, Henderson's was the only one with visible tattoos.

We view the evidence and inferences that may be reasonably drawn therefrom in a light most favorable to the party who prevailed on the motion to suppress, in this case, the State. *Williams v. State*, 372 Md. 386, 401 (2002) (citing *Wilkes v. State*, 364 Md. 554, 569 (2001); *(Samuel) Jones v. State*, 343 Md. 448, 458 (1996)). The appellate court will "defer to the fact finding of the suppression court and accept the facts as found by that court unless clearly erroneous." *Upshur*, 208 Md. App. at 391-92 (citing *Wilkes*, 364 Md. at 569). "In determining whether a constitutional right has been violated, we make an

independent, de novo, constitutional appraisal by applying the law to the facts presented in a particular case." *Id.*

Police often use photographic displays in criminal investigations to aid in identification of suspects. As the Court of Appeals stated in *(Kevin) Jones v. State*, "[t]he use of photographic displays by the police to identify suspects is used widely in the United States, and when conducted properly, has been held to be admissible in evidence." 395 Md. 97, 107 (2006) (citing *Simmons v. United States*, 390 U.S. 377 (1968)). "Criminal defendants receive due process protection 'against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures.'" *Id.* at 108 (quoting *Moore v. Illinois*, 434 U.S. 220, 227 (1977)). Maryland courts apply a two-step inquiry when a defendant challenges an out-of-court photographic identification as being impermissibly suggestive. *Upshur*, 208 Md. App. at 400.

> The first [step] is whether the identification procedure was impermissibly suggestive. If the answer is "no," the inquiry ends and both the extra-judicial identification and the in-court identification are admissible at trial. If, on the other hand, the procedure was impermissibly suggestive, the second step is triggered, and the court must determine whether, under the totality of the circumstances, the identification was reliable.

(Kevin) Jones, 395 Md. at 109 (citing *(Gregory) Jones v. State*, 310 Md. 569, 577 (1987), *vacated on other grounds*, 486 U.S. 1050 (1988)) (Internal citations omitted). "The defendant bears the burden of proof in the first stage of the inquiry, and, if the defendant meets this burden, then the prosecution has the burden in the second stage of the analysis." *Upshur v. State*, 208 Md. App. 383, 400 (citing *In re Matthew S.*, 199 Md.

App. 436, 447-48 (2011)). We reiterate that "unless and until the defendant establishes that the identification procedure was in some way suggestive, the reliability of a witness' identification is not relevant for due process purposes." *(Kevin) Jones*, 395 Md. 97, 110 (2006) (citing *(Gregory) Jones*, 310 Md. at 577); *see also Smiley v. State*, 442 Md. 168, 180 (2015).

"Suggestiveness can arise during the presentation of a photo array when the manner itself of presenting the array to the witness or the makeup of the array indicates which photograph the witness should identify. *Smiley*, 442 Md. at 180 (citing *(Gregory) Jones*, 310 Md. at 577. In a case in which the Court of Appeals concluded that a photo array was not impermissibly suggestive, the Court explained that a photo array "'to be fair need not be composed of clones.'" *Bailey v. State*, 303 Md. 650, 663 (1985) (quoting *Webster v. State*, 299 Md. 581, 620 (1984)).

In another photo array case, *Sallie v. State*, the victim was presented with 12 photographs depicting differences in age, height, and weight of the subjects. 24 Md. App. 468, 472 (1975). Sallie argued, similar to Henderson's arguments in the instant case, that the presence of a diamond shaped mark, which could be seen on his face in his photograph, distinguished him from the other subjects and rendered the array impermissibly suggestive. *Id.* at 471-72. Disagreeing with Sallie's contention, this Court held that the presence of the mark in the photograph of the appellant did not render the photo array impermissibly suggestive.

As stated by the trial court, a tattoo is another distinguishing factor that is subject to change similar to hairstyles, facial hairs, and other things. Taking the evidence and the

inferences reasonably drawn therefrom in the light most favorable to the State, we hold that the photographic array was not impermissibly suggestive due to the depiction of Henderson's tattoos and the absence of tattoos on the other subjects.

II. Request to Discharge Counsel

On July 31, 2013, Gray, Henderson, and their respective attorneys, Ms. Shepherd and Mr. Henslee, appeared in court. The State requested a postponement, which the court granted over Gray's opposition. The parties next appeared at a hearing on August 27, 2013. At the hearing, the prosecutor requested a postponement due to the fact that the State's witness, a detective, was working until 5 a.m. that morning. The prosecutor also noted the absence of Gray's regular attorney (Shepherd) due to a family emergency that caused her to be out of court for the week. An associate of Shepherd, James Sorenson, substituted for her that morning, and explained that he was "asking on [Shepherd's] behalf to postpone the matter on behalf of Gray." He then stated that Gray

> is opposed to a postponement. He would like to proceed today himself with a new motion that he has authored himself to dismiss the indictment. I have not had an opportunity to review that. I don't believe Miss Shepherd has had an opportunity to review that.
>
> * * *
>
> I know that Gray is eager to present his motion--he calls it a petition to dismiss the indictment today. I'll – I'll let Your Honor rule on whether that's appropriate or not.

The court then allowed Gray to speak:

> I want to let you know is that I'm confused about the whole situation because I haven't been allowed to speak in a courtroom and I've been told I wasn't allowed to speak. But when I did my research, I learned that I – it is my right to speak on my own behalf and that – . . .

> This is what I'm saying, that me being an accused, my Sixth Amendment Right allows me existence of counsel, correct. . . . And being as though that I – this accused in this courtroom, Your Honor, I feel as though that I should be able to speak up on my own behalf and be – now I don't have a lot of resources at Towson and I didn't have adequate amount of time to make proper copies for someone – to the State or to file on with the Courts because my – my motion came up so fast.

The court explained to Gray that he could file a petition to dismiss and explained that it was uncertain how long it would take the court to rule on that petition.

> GRAY: Okay. So what if I was to oppose the postponement and waive my counsel and want to proceed with trial tomorrow? Would that be possible? Because –
>
> COURT: Well, that's two different questions, okay?
>
> GRAY: Okay.
>
> COURT: And now you're getting complicated because if you're asking me at this point to discharge your attorney, then I've got to go through a whole bunch of rights with you. . . . And I'm not going to go through that right now, but I'll be happy to do it later in the day, but I'm going to deal with the request for postponement right now.
>
> Do you understand?
>
> GRAY: Okay.
>
> COURT: So what do you want me to do?
>
> GRAY: I want to proceed. I don't want no postponement, Your Honor.

Gray then expressed his frustration at being held without bail and the delays in the proceedings and stated he was the father of three children.

The court found good cause for the postponement and rescheduled motions and the trial for October 28. The court then spoke to Gray:

COURT: Is it your--is it your request for this Court to consider discharging your attorney knowing that the trial date at this point is scheduled for October 28th? That's a simple yes or no.

GRAY: Your Honor, it will be no point to dis--to discharge my counsel at this point because I can't proceed tomorrow.

COURT: I agree with you. So is it--

GRAY: That was the only purpose for me to discharge my counsel.

COURT: So you don't want me to entertain a request--

GRAY: *No, sir.*

COURT: – discharge counsel?

(Emphasis added).

Gray argues that the court violated his Sixth Amendment rights by failing to adhere to the requirements set out by the Court of Appeals in *Snead v. State*, 286 Md. 122 (1979), and Maryland Rule 4-215, both of which identify certain procedures that a court must follow when a defendant indicates that he or she wants to discharge his or her counsel and proceed pro se. Specifically, Gray argues that, at the August 27 hearing, he requested discharge of his counsel and the right to proceed pro se, and that once he uttered his request to discharge counsel, the court was obligated to immediately pursue further inquiry on the reasons and merits of his request. Therefore, by ruling on the postponement first, the court violated Rule 4-215. The State argues in response that the court did not err because Gray did not unequivocally invoke the right of self-representation.

"The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a right to counsel, including appointed counsel for an indigent, in a criminal case involving incarceration." *Pinkney v. State*, 427 Md. 77, 90 (2012) (quoting *Parren v. State*, 309 Md. 260, 262-63 (1987)) (Internal quotation marks omitted). These "constitutional guarantees encompass not only the right of a defendant to the effective assistance of a duly licensed attorney at law but also the right of a defendant to appear *in propria persona*[,]" otherwise known as the right of self-representation. *Id.* Maryland Rule 4-215 was drafted and implemented to protect both the right to the assistance of counsel and the right to self-representation.[1] *State v. Brown*, 342 Md. 404, 412 (1996).

However, a defendant's clear invocation of his or her right to self-representation is a prerequisite to initiating the Rule 4-215 procedures. In other words, when the defendant indicates a desire to defend pro se, the court must, by appropriate inquiry, determine whether he "truly wants to do so" by ascertaining whether the defendant "clearly and unequivocally" wants to defend himself. *Snead v. State*, 286 Md. 122, 127-

[1] The Court of Appeals, in *Broadwater v. State*, explained that Rule 4-215

> explicates the method by which the right to counsel may be waived by those defendants wishing to represent themselves, the modalities by which a trial judge may find that a criminal defendant waived implicitly his or her right to counsel, either by failure or refusal to obtain counsel, and the necessary litany of advisements that must be given to all criminal defendants before any finding of express or implied waiver of the right to be represented by counsel may be valid.

401 Md. 175, 180 (2007).

28 (1979) (quoting *Faretta v. California*, 422 U.S. 806, 817 (1975)). "[A]ny statement by the defendant from which the court could reasonably conclude that the defendant desired self-representation would be sufficient" to alert the trial judge that further inquiry may be necessary. *Id.* at 127. If however, upon conducting further inquiry, the defendant indicates that he or she does not wish to discharge his or her counsel and proceed pro se, Rule 4-215 is not implicated. This is the situation present in the instant case.

At the hearing, the court considered two issues: the motion for postponement and Gray's intention to proceed pro se. After hearing the grounds for good cause to postpone the trial from the State and from Ms. Shepherd's colleague, the court allowed Gray to speak his concerns. Gray posed the question: "what if I w[ere] to oppose the postponement and waive my counsel and want to proceed with trial tomorrow? Would that be possible?" The court responded, "that's two different questions . . . if you're asking me at this point to discharge your attorney, then I've got to go through a whole bunch of rights with you. . . ." The court then determined that it would consider the request for postponement first, and then consider Gray's inquiry into discharging his attorney.

After granting the request for the postponement[2], the court asked Gray, "[I]s it your request for this Court to consider discharging your attorney knowing that the trial date at this point is scheduled for October 28th?" Gray responded unequivocally that he

[2] Gray does not assert that the court clearly erred in finding good cause for the postponement.

did not want to discharge his counsel. He stated, "Your Honor, [there would] be no point . . . to discharg[ing] my counsel at this point because I can't proceed tomorrow."

Gray now argues that the court should not have ruled on the postponement issue before it inquired into Gray's desire to discharge his counsel. Gray cites no law to support his assertion, and we have found none. Having two matters before it, the court did not err in choosing to resolve the postponement issue before attending to Gray's equivocal request to discharge counsel. Further, it was clear to the court that Gray did not want to relinquish the advice of counsel altogether—any desire to discharge counsel was premised on proceeding to trial as quickly as possible, and Gray did not express any further dissatisfaction with counsel.

After granting the postponement, the court asked Gray if he still wanted to discharge counsel. Gray then unequivocally stated that he did not want to discharge his counsel, and the court correctly concluded that it was not required to proceed further to a Rule 4-215 inquiry. We hold that the court did not violate Gray's Six Amendment rights.

III. Anti-CSI Question

Prior to voir dire, the State proposed the following venire instruction:

> I will tell you that television shows such as CSI and NCIS for example are fiction. Many of the scientific methods used in these types of shows are exaggerated or may not exist. If you are selected as a juror in this case, you will be required to base a decision solely on the evidence presented in court.
>
> Would any member – potential juror be unable to ignore the crime dramas they have seen on television and/or in the movies and make their decision based solely on the evidence that they see and hear in this courtroom? Anybody so influenced by what they've seen, read, television, media about crime dramas and certain techniques that they feel that would influence them one way or the other in deciding this case?

Appellants' attorneys objected. The court, relying on *Morris v. State*, 204 Md. App. 487 (2012), overruled the objection and the instruction was read as proposed.

Gray contends that the court abused its discretion in propounding the anti-CSI question to the potential jurors during voir dire. As an initial matter, the State asserts that Gray waived this issue on appeal when he tacitly agreed to the jury at the end of the voir dire process. Alternatively, the State contends that the court did not abuse its discretion in propounding the question to the jury and that, even if there was an abuse of discretion, any error would be harmless because Gray addressed the issue in his closing argument. Regarding the State's assertion of waiver, Gray responds that he did not waive argument regarding the anti-CSI question on appeal because his counsel did not expressly acquiesce to the composition of the jury after voir dire.

A defendant's claim of error in the jury selection process "'is ordinarily abandoned when the defendant or his counsel indicates satisfaction with the jury at the conclusion of the jury selection process.'" *Gilchrist v. State*, 340 Md. 606, 617-18 (1995) (quoting *Mills v. State*, 310 Md. 33, 40 (1987), *vacated on other grounds*, 486 U.S. 367 (1988)) (citing *Foster v. State*, 304 Md. 439, 450-451 (1985), *reconsideration denied*, 305 Md. 306, *cert. denied*, 478 U.S. 1010 (1986)). In order for a defendant to waive the claim of error, defense counsel must expressly state that the jury panel is acceptable. *Id.*

Near the end of jury selection, Gray's attorney indicated to the court that he did not have any peremptory strikes left. Neither the clerk nor the court asked Gray's counsel if the panel was acceptable. Several minutes later, at the close of jury selection, the court asked the clerk to ask the State if the last alternate juror was acceptable. The

clerk asked, "Is this jury panel as presently constituted acceptable to the State?" The State indicated that it was acceptable, and the court excused the jury for the evening. Because the court did not ask Gray's counsel if the panel was acceptable, and Gray's attorney did not expressly state that the panel was acceptable, we hold that Gray did not waive this issue. We now move to the merits of Gray's argument.

The purpose of voir dire is to protect a criminal defendant's right to an impartial trial under the Sixth Amendment. *White v. State*, 374 Md. 232, 240 (2003); *see Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). "In Maryland, the primary purpose of voir dire is to ensure a fair and impartial jury by determining the existence of cause for disqualification." *State v. Logan*, 394 Md. 378, 396 (2006) (Quotation omitted). There is cause to disqualify a juror who 1) does not meet the statutory qualifications, or 2) after examining the juror's state of mind, the court determines that "the matter in hand or any collateral matter [is] reasonably liable to unduly influence him [or her]." *Id.* (Quotation omitted) (Internal quotation marks omitted). The court is charged with discerning a juror's ability to perform his or her duty fairly and impartially via its questioning of the juror on "issues particular to the defendant's case so that biases directly related to the crime, the witnesses, or the defendant may be uncovered." *Id.* (Quotation omitted) (Internal quotation marks omitted).

"In the absence of a statute or rule prescribing the questions to be asked of the venire persons during the examination, the subject is left largely to the sound discretion of the court in each particular case." *Moore v. State*, 412 Md. 635, 644 (2010) (quoting *Corens v. State*, 185 Md. 561, 564 (1946)) (Internal quotation marks omitted). The trial

court's discretion "extends to both the form and the substance of questions posed to the venire." *Wright v. State*, 411 Md. 503, 508 (2009).

A court abuses its discretion "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." *King v. State*, 407 Md. 682, 697 (2009) (Quotation omitted). Additionally, abuse of discretion occurs if the court's decision

> appears to have been made on untenable grounds, when the ruling is clearly against the logic and effect of facts and inferences before the court, when the ruling is clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result, when the ruling is violative of fact and logic, or when it constitutes an untenable judicial act that defies reason and works an injustice.

Id. (Internal quotations and quotation marks omitted). As the Court explained in *King v. State*, we will not substitute our judgment simply because we might have reached a different ruling, but instead the voir dire instruction must be "beyond the fringe of what that court deems minimally acceptable." 407 Md. 682, 697 (2009) (quoting *North v. North*, 102 Md. App. 1, 13-14 (1994)).

In *Morris v. State*, we confronted a challenge to an anti-CSI voir dire question similar to the one presented in the instant case:

> Ladies and gentlemen, [1] *televisions shows such as C.S.I., Crossing Jordan and some of the like are fiction*. They are not true. Many of the scientific methods used in those kinds of television shows are exaggerated or do not even exist. If you are selected as a juror in this case[,] you will be required to base your decisions solely on the evidence presented in court. [2] *Would any potential juror be unable to ignore the so*[-]*called crime dramas they have been seeing on television, the movies and Internet or such and putting that aside in making your decision based solely on the evidence that you hear in court and hot through some expectation of something that you've seen through the media or television*? Is there anyone who would be so

> persuaded by such a show that they would not be able to judge this case fairly and impartially?

204 Md. App. 487, 490 (2012) (Emphasis added).

We held that the circuit court did not abuse its discretion and reasoned that "[t]he court's statement was nothing more than a permissible *voir dire* question that 'use[d] neutral language, asking the venire if they would give either more weight or less weight,' or whether they 'have strong feelings,' or whether they have beliefs that might affect their ability to 'render a fair and impartial verdict.'" *Id.* at 496-97 (quoting *Stringfellow v. State*, 199 Md. App. 141, 153 (2011), *rev'd on other grounds*, 425 Md. 461 (2012)). Here, the question read:

> I will tell you that [1] *television shows such as CSI and NCIS for example are fiction*. Many of the scientific methods used in these types of shows are exaggerated or may not exist. If you are selected as a juror in this case, you will be required to base a decision solely on the evidence presented in court. [2] *Would any member – potential juror be unable to ignore the crime dramas they have seen on television and/or in the movies and make their decision based solely on the evidence that they see and hear in this courtroom*? Anybody so influenced by what they've seen, read, television, media about crime dramas and certain techniques that they feel that would influence them one way or the other in deciding this case?

(Emphasis added).

Despite slight dissimilarities, the respective questions in *Morris* and the instant case explain that (1) crime and legal procedural dramas like CSI are fictional, so (2) any juror who was unable to grasp this distinction between reality and fiction should identify herself or himself. An anti-CSI question thus relates to the purpose of voir dire—"to ensure a fair and impartial jury by determining the existence of cause for disqualification"—because a juror is incapable of fairly and impartially assessing the

evidence presented if they require it have been collected via the fictional methods present in CSI-type shows. *See Logan*, 394 Md. at 396. As in *Morris*, we see no abuse of discretion in the asking of an anti-CSI question of the type presented here.

Gray argues that the Court of Appeals's decision in *Robinson v. State*, 436 Md. 560 (2014), mandates the conclusion that the propounding of an anti-CSI voir dire question is an abuse of discretion. However, *Robinson* concerned jury instructions, not voir dire questions, and so is inapposite to the case *sub judice*.

In that case, the Court of Appeals held that anti-CSI jury instructions are impermissible and expressed its skepticism that television programs such as *C.S.I.* and its ilk influence a juror's thinking. *Robinson*, 436 Md. at 579 ("The academic and scientific community has yet to conclude that a 'CSI effect' exists and, thus, supports our skeptical view that the 'CSI effect' exists"). The Court determined that this jury instruction "effectively relieved the State of its burden to prove Robinson guilty beyond a reasonable doubt." *Id.* at 580. The Court limited the use of anti-CSI instructions for curative purposes. *See id.* at 581 ("A trial court does not abuse its discretion in giving an anti-CSI effect jury instruction after a defendant misstates the State's burden."); *see Stabb v. State*, 423 Md. 454, 473 (2011) (An anti-CSI effect jury instruction "ought to be confined to situations where it responds to correction of a pre-existing overreaching by the defense, i.e., a curative instruction").

However, voir dire questions and jury instructions, occurring at two different stages of the trial, serve distinct purposes. "The main purpose of a jury instruction is to aid the jury in clearly understanding the case, to provide guidance for the jury's

deliberations, and to help the jury arrive at a correct verdict." *Appraicio v. State*, 431 Md. 42, 51 (2013) (Quotation omitted). In contrast, it is well-settled that *voir dire* is a process during which the parties, "seek to uncover any bias that a venireperson might harbor. To achieve that result, to be able to do so, any proposed question related to the facts of the case, designed to uncover such bias, is directed to a specific cause for disqualification and, therefore, must be asked." *Moore v. State*, 412 Md. 635, 650 (2010) (Quotation omitted). Voir dire may concern a juror's statutory qualifications and an inquiry "to discover the juror's state of mind as to the matter in hand or any collateral matter reasonably liable to have undue influence over him." *Washington v. State*, 425 Md. 306, 312-13 (2012) (quoting *Davis v. State*, 333 Md. 27, 35-36 (1993)). The scope of these questions is broad, and on review we extent "considerable deference" as the parties seek to discover disqualifying conditions and biases. *Washington v. State*, 425 Md. 306, 313-14 (2012) (Citations omitted). Gray has not explained why, given the distinct purposes of jury instructions and voir dire questions, the Court of Appeals's holding in *Robinson*, compels a different conclusion from the one we reached in *Morris*, *supra*.

In light of the deference extended to courts in determining the "form and substance" of voir dire questions, *Wright*, 411 Md. at 508, and the contested question's substantial similarity to that before us in *Morris*, we hold that the court did not abuse its discretion in propounding the contested question.

IV. Mistrial

During the testimony of Det. Meckley, the detective assigned to investigate the robberies, the State asked for a description of the progression of his investigation into the identities of the suspects. Det. Meckley testified that he obtained the records for the telephone number of an unknown suspect provided by a witness and that the records showed the phone was listed to a "Shanae Peoples." The State continued:

> STATE: And when you found the name of Shanae Peoples, what did you do?
>
> MECKLEY: We conducted data base checks in reference to the name Shanae Peoples, and what we had found is that on March 28th of 2012, that Shanae Peoples and a person by the subject of the name Darren Gray were engaged in a domestic dispute –

Defense counsel objected and moved for a mistrial. The court denied the motion, declaring, "I do not find that there's manifest necessity [to declare a mistrial.] . . . [T]he State was not anticipating that response. And this is something that the Court will cure and instruct the jury to disregard." The court then instructed the jury, "Ladies and gentlemen, you are to disregard that answer. Any reference to any domestic disturbance is totally irrelevant to this case and that is non-responsive to the question. So disregard any reference to that."

Gray argues that the trial court abused its discretion in failing to grant a mistrial because he suffered "irreparable prejudice when the trial court denied his mistrial motion in favor of a curative instruction." The State counters that the trial court correctly exercised its discretion to deny the motion.

"A mistrial is no ordinary remedy and '[a] request for a mistrial in a criminal case is addressed to the sound discretion of the trial court and the exercise of its discretion, in a case involving a question of prejudice which might infringe upon the right of the defendant to a fair trial, is reviewable on appeal to determine whether or not there has been an abuse of that discretion by the trial court in denying the mistrial.'" *Cooley v. State*, 385 Md. 165, 173 (2005) (Citation omitted).

"[T]he declaration of a mistrial is an extraordinary act which should only be granted if necessary to serve the ends of justice." *Jones v. State*, 310 Md. 569, 587 (1987), *vacated on other grounds*, 486 U.S. 1050 (1988). "The determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 595 (1989)). The trial judge must evaluate the circumstances of the case and "[i]n assessing the prejudice to the defendant, the trial judge first determines whether the prejudice can be cured by instruction." *Id.* If such a curative instruction is given, it must be "timely, accurate, and effective." *Carter v. State*, 366 Md. 574, 589 (2001). However, "[u]nless the curative effect of the instruction ameliorates the prejudice to the defendant, the trial judge must grant the motion for a mistrial." *Kosh*, 382 Md. at 226.

Nevertheless, as stated above, "a trial judge is afforded considerable discretion in deciding a motion for mistrial, and 'in a case involving a question of prejudice which might infringe upon the right of the defendant to a fair trial, [that decision] is reviewable on appeal to determine whether or not there has been an abuse of that discretion by the

trial court in denying the mistrial.'" *Cooley v. State*, 385 Md. 165, 174 (2005) (Citation omitted). We will not reverse a trial court's denial of a motion for mistrial unless it is clear that there has been prejudice to the defendant.

> Whether evidence is so prejudicial as to require a mistrial ruling depends on:
>
> > whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists. . . .

Rainville v. State, 328 Md. 398, 408 (1992) (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)). The Court of Appeals has made clear that "these factors are not exclusive and do not themselves comprise the test[,]" *Kosmas v. State*, 316 Md. 587, 594 (1989), "but rather, they help to evaluate whether the defendant was prejudiced[,]" *Guesfeird*, 300 Md. at 659. We consider Gray's arguments in light of these factors.

Gray argues that the remark was solicited by the State because the State must have known in advance that Det. Meckley would reference the domestic disturbance by virtue of the fact that it called a detective "who had been on the force for seventeen and a half years, [and] put before the jury information that he surely knew from experience was both inadmissible and grossly prejudicial." Yet Det. Meckley's experience with investigations and, presumably, with testifying cuts both ways, i.e., the State could reasonably expect the detective to know that referring to a domestic disturbance would be prejudicial, and therefore expect Det. Meckley to refrain from mentioning it in the first place. The State's question, "when you found the name of Shanae Peoples, what did you

do?", was not leading and was not, on its face, intended to solicit a prejudicial statement. Under the circumstances, Det. Meckley's response appears to have been inadvertent and certainly not in direct response to an attempt to solicit prejudicial testimony.

Gray contends that the statement suggested he had a violent nature. As the State responds, the jury would have had to assume that the domestic "dispute" involved violence; however, there was no such indication. Moreover, the jury would have then had to assume that Gray, was more likely to be the aggressor in a violent domestic dispute, as Det. Meckley never established that Gray, not Peoples, was the aggressor.

Finally, the evidence against Gray was not insubstantial. During this two-day trial, eight other witnesses testified. Among these was Eisenhart, who testified that Gray was the driver of the car used in the robbery on the night of the party. Although Gray contends that Eisenhart himself was involved in the robbery, Gray had the opportunity to impeach Eisenhart's credibility and, in any event, establishing Eisenhart's involvement as a conspirator, principal, or accomplice would not diminish Gray's own involvement. In addition, Andre Harris described Gray, Henderson, and Eisenhart as the passengers in the Ford, the same vehicle that matched Hux and Castro's description of the assailants' vehicle. Moreover, the victims recognized Gray and Henderson as persons in the party, establishing their presence there. The allegedly prejudicial statement alone, therefore, was only one piece of evidence before the jury. In all, we are unconvinced that the

unsolicited mention of a "domestic dispute," in light of its single repetition as part of a prompt curative instruction, was so prejudicial as to justify the grant of a mistrial.[3]

V. Waiver of Right to Testify

At the time of trial, Gray had a prior first-degree assault conviction on his record. He was advised by his attorney and the court that he could be impeached with that conviction if he chose to testify. Gray contends that this advice was incorrect, that he depended on this advice, and that as a result, his waiver of his right to testify was neither knowing nor voluntary. The State concedes that the advice he received was incorrect under *Fulp v. State*, 130 Md. App. 157, 167 (2009), but instead argues that Gray never demonstrated on the record that he relied on this incorrect advice in deciding not to testify.

Due to the constitutional significance of the decision of whether to testify or not, a defendant who waives his right to testify must show "at a minimum, an awareness of these correlative rights and a basic understanding of what each entails." *Tilghman v. State*, 117 Md. App. 542, 544 (1997). Waiver must be knowing and voluntary, requiring a demonstration of the defendant's "sufficient awareness of the relevant circumstances and likely consequences that forfeiting his right entails." *Id.* at 553.

When trial counsel provides incorrect advice to a defendant about his right to testify, the defendant has the burden to "establish that the incorrect advice influenced his

[3] Gray also argues that the reference to the domestic disturbance was repeated, in the form of the judge's curative instruction. We do not agree with this contention—if this were the law, any reasonable judicial attempt to address prejudice would, in fact, further the prejudice.

election not to testify." *Savoy v. State*, 218 Md. App. 130, 155 (2014). "It is appellant's burden to show reliance upon his counsel's legal advice, not the State's burden to show he did not rely on the misstatement." *Id.* "Absent detrimental reliance, appellant is not entitled to reversal." *Id.* (citing *Gilliam v. State*, 320 Md. 637, 656 (1990); *Morales v. State*, 325 Md. 330, 339 (1992); *Oken v. State*, 327 Md. 628, 641 (1992); *Thanos v. State*, 330 Md. 77, 91-92 (1993); *Gregory v. State*, 189 Md. App. 20, 38 (2009)).

In *Savoy v. State*, counsel incorrectly advised the defendant that the State could impeach him with his conviction for first-degree assault if he testified. 218 Md. App. 130 (2014). After Savoy was advised by his counsel, the judge adjourned court. Savoy "met with his attorney over the evening recess and told the court the next day that he did not wish to testify." *Id.* at 156. We, however, did not reverse Savoy's convictions, because Savoy did not show that he relied on that specific advice in making his decision. *Id.* at 156 ("There is no indication in the case *sub judice* that appellant relied detrimentally on his trial counsel's advice. Appellant does not claim that he would have testified but for the erroneous advice given by his counsel. He baldly asserts, by argument only, that it is "highly likely" that his election was affected, which is mere speculation.").

We concluded in *Savoy* that the defendant failed to demonstrate reliance on counsel's advice because his attorney specifically stated on the record that he and Savoy had discussed the election before it was made. *Id.* at 156-57. We further explained that "the question of whether appellant detrimentally relied on his attorney's advice is best left for post-conviction proceedings," which "can elucidate the factors that influenced

appellant's election, as well any off-the-record conversations between appellant and his attorney about his decision." *Id.* at 157-58.

In the instant case, it is clear that the court incorrectly denied Gray's motion to restrict cross-examination on Gray's first-degree assault conviction. Although prejudice was the only ground Gray asserted for the motion, the court should have denied the motion pursuant to *Fulp v. State*, *supra*, 130 Md. App. at 167. *See Savoy*, 218 Md. App. at 147.

However, Gray has the burden to show that he relied on his attorney's advice and the court's ruling in making his decision not to take the stand. The record shows that Gray and his counsel had discussed the waiver numerous times before the colloquy in court. Gray's attorney stated "Gray, we've come to the point in [the] case where you're going to have to make an election whether or not you wish to testify or remain silent. *We've had numerous discussions about this issue*, but it is your right. You have my advice, you're free to consider and take the advice for whatever it's worth." (Emphasis added).

Gray attempts to distinguish *Savoy* by calling our attention to several factual differences, none of which compels a different conclusion from the one we reach here. He asserts (1) that he made his decision to remain silent immediately after his attorney provided the erroneous advice, not the following day like in *Savoy*; (2) that when his attorney asked him what his decision was she specifically directed him to consider "what will happen if you take the stand and testify;" and (3), the trial judge in the instant case

committed error himself and left no doubt about the consequences of Gray taking the stand.

Taking Gray's arguments in turn, first, the fact that he did not have the night to consider his election does not necessarily mean that the court's ruling influenced his decision because his counsel represented that the two had "numerous discussions about the issue" before the court made its ruling. *See Gilliam*, 320 Md. at 653 (holding that appellant did not show that he relied upon a misstatement of law where he and his counsel had several discussions about the significance of the election not to testify). Second, absent other indicia of influence, the fact that the court would have allowed cross-examination does not demonstrate that Gray relied upon this ruling, especially when he was represented by counsel. *See Oken v. State*, 327 Md. 628, 637, 641-42 (1992); *Gregory v. State*, 189 Md. App. 20, 38 (2009).

Finally, Gray suggests that his attorney's questioning directly prior to his election not to testify indicates detrimental reliance on the court's ruling. Defense counsel stated:

> All right. You also have the absolute right not to testify. If you choose not to testify, we can request that Judge Alexander instruct the jury that they not – that they are not allowed to consider your silence against you in any way at all. They can't talk about it, they can't factor it into their decision, can't be considered. You have pled not guilty. That's all you're required to do in a criminal case.
>
> So understanding what your rights are and understanding what will happen if you choose to take the stand and testify, do you wish to exert your right to take the stand and testify or do you want to exert your right to remain silent?

Gray then stated "I'm going to remain silent." Counsel's question was not a statement by Gray indicating reliance. In his response, Gray does not provide any indication that he relied upon the court's ruling in making his decision.

Gray also cites to *Morales v. State*, a case where the trial court suggested to the defendant that the State could impeach him with his prior convictions if he testified, when in fact, as here, the State could not. 325 Md. 330 (1992). The defendant declined to testify and was convicted. The Court of Appeals held the judge's mistake to be reversible error. *Id.* at 340. Two crucial distinctions, however, differentiate that case from this one. First, Morales was unrepresented, and he thus relied on the trial judge for instruction about his right to testify. *Id.* at 338. Second, the record in *Morales* suggested very strongly that the court's mistake materially affected his decision not to testify. *Id.* at 339. Indeed, Morales had indicated that he wanted to take the stand until the trial judge erroneously warned him of the impeachment hazards presented by his prior convictions. *Id.* The circumstances of *Morales* contrast with the instant case, where Gray was represented by counsel and where there was no indication that Gray's decision was influenced by the court's ruling to allow questioning about his prior conviction.

Therefore, on the basis of this record, Gray has not demonstrated his reliance on the court's erroneous ruling, and we are thus not convinced that Gray did not knowingly or voluntary waive his right to testify at trial. If Gray so desires, a post-conviction proceeding can elucidate the factors that influenced his election, as well any off-the-record conversations between him and his attorney about his decision. *See Savoy*, 218 Md. App. at 158.

VI. Sufficiency of Evidence to Support a Conviction for the Use of a Handgun in the Commission of a Crime of Violence

Gray next contends that there was insufficient evidence to establish a conviction for the use of a handgun in the commission of a crime of violence. Specifically, Gray argues that, under the law of the case doctrine, the jury could not have found him guilty of use of a handgun as an accomplice because the court did not instruct the jury in accomplice liability as to this count. Gray concedes, however, that he did not raise this issue below because the Maryland Rules require a defendant to make a motion for judgment of acquittal before the jury is instructed, but urges us to exercise discretionary review under Maryland Rule 8-131.

In fact, Gray failed to move for a judgment of acquittal at the close of the State's case or at the close of all evidence on the ground that the State failed to prove his use of a handgun in the commission of a crime of violence as outlined in the trial court's jury instruction. Moreover, Gray failed to raise any objection to the court's jury instructions, and he did not argue the "law of the case" doctrine at any point during trial. In addition, we are unpersuaded that Gray's sufficiency challenge occupies a "unique procedural posture." *See Claybourne v. State*, 209 Md. App. 706, 749 *cert. denied sub nom. Clayborne v. State*, 432 Md. 212 (2013).

Accordingly, we conclude that Gray's legal assertions are unpreserved for our review. *See* Md. Rule 4-324(a) (requiring a defendant to move for judgment of acquittal at the close of the State's case or at the close of all the evidence and "state with particularity all reasons why the motion should be granted"); Md. Rule 8-131(a)

("Ordinarily, the appellate court will not decide any other issue unless it plainly appears in the record to have been raised in or decided by the trial court...."); *accord Claybourne*, 209 Md. App. at 749-50.

In *Claybourne v. State*, a case where the appellant made the same argument as Gray, this Court stated:

> It is a well established principle that our review of claims regarding the sufficiency of evidence is limited to the reasons which are stated with particularity in an appellant's motion for judgment of acquittal. *Taylor v. State*, 175 Md. App. 153, 159, 926 A.2d 805 (2007) (citation omitted). Thus, "[a] defendant may not argue in the trial court that the evidence was insufficient for one reason, then urge a different reason for the insufficiency on appeal[.]" *Bates v. State*, 127 Md. App. 678, 691, 736 A.2d 407 (1999), *quoted in McIntyre v. State*, 168 Md. App. 504, 527–28, 897 A.2d 296 (2006). *See also Starr v. State*, 405 Md. 293, 302, 951 A.2d 87 (2008) ("A criminal defendant who moves for judgment of acquittal is . . . not entitled to appellate review of reasons stated for the first time on appeal.") (citation omitted). To be sure, "no Maryland case has utilized the plain error doctrine to reverse a trial judge's denial of a motion for judgment of acquittal when the ground raised on appeal was never advanced before the trial court at the time the motion for judgment of acquittal was being considered." *McIntyre*, 168 Md. App. at 528, 897 A.2d 296.

209 Md. App. 706, 750 (2013).

In *Claybourne*, we declined to entertain the appellant's sufficiency challenge. We similarly decline to address Gray's challenge here.

VII. Testimony Concerning the Shoulder Holster

Eisenhart testified that Gray provided the gun that Henderson used to commit the robberies. Later in the trial, Det. Meckley testified to the details of a search conducted at a residence that Gray frequented. After Det. Meckley testified that police had recovered a black mask from the home, the State asked what else was seized from the residence.

The detective responded that he found "[a] receipt for the 2003 [Ford] Taurus, residency papers, which are mail . . . addressed to Gray and Peoples, and a box containing a shoulder holster." Gray immediately objected, and the court overruled the objection. Gray now argues that the court erred in admitting testimony concerning the shoulder holster because it was irrelevant, and alternatively, even if relevant, the court abused its discretion in admitting the testimony because its probative value was substantially outweighed by its prejudicial effect. The State responds that the shoulder holster testimony was relevant, and that the court did not abuse its discretion in failing to exclude the testimony pursuant to Maryland Rule 5-403.

We review a trial court's decision to admit evidence under a two-step analysis. "'First, we consider whether the evidence is legally relevant, a conclusion of law which we review *de novo.*'" *Smith v. State*, 218 Md. App. 689, 704 (2014) (quoting *Brethren Mut. Ins. Co. v. Suchoza*, 212 Md. App. 43, 52 (2013)). If we determine that the evidence in question is relevant, we then look to whether the court "'abused its discretion by admitting relevant evidence which should have been excluded'" as unfairly prejudicial." *Brethren Mut. Ins. Co.*, 212 Md. App. at 52 (quoting *Wash. Metro. Area Transit Auth. v. Washington*, 210 Md. App. 439, 451 (2013)).

"To qualify as relevant, evidence must tend 'to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Smith*, 218 Md. App. at 704 (quoting Md. Rule 5-401). Evidence that is relevant is admissible, however, the trial court may not admit evidence that is not relevant. Md. Rule 5-402; *State v. Simms*, 420 Md. 705, 724 (2011).

To determine whether evidence is relevant, courts consider the materiality and probative value of the evidence. *Williams v. State*, 342 Md. 724, 737 (1996). "Evidence is material if it bears on a fact of consequence to an issue in the case." *Smith*, 218 Md. App. at 704 (citing *Williams*, 342 Md. at 736-37). The term "probative value" embodies the strength of the connection between the evidence and the issue, to the tendency of the evidence "'to establish the proposition that it is offered to prove.'" *Williams*, 342 Md. at 737 (quoting *State v. Joynes*, 314 Md. 113, 119 (1988)).

Under Maryland Rule 5-403, the trial court may exclude relevant evidence if the probative value of the evidence "is substantially outweighed by the danger of unfair prejudice." "'Evidence is prejudicial when it tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission.'" *Hannah v. State*, 420 Md. 339, 347 (2011) (quoting *King v. State*, *supra*, 407 Md. at 704). A court determines whether a particular piece of evidence is unfairly prejudicial by balancing the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case. Unfairly prejudicial evidence is excluded to avoid the possibility "that a jury will convict the defendant 'because of something other than what he did in that case.'" *Snyder v. State*, 210 Md. App. 370, 395 (quoting *Odum v. State*, 412 Md. 593, 611 (2010), *cert. denied*, 432 Md. 470 (2013)).

Because Eisenhart accused Gray of providing the gun used in the robberies in this case, the fact that a shoulder holster was found at Gray's residence is relevant to whether Gray possessed a gun. Stated differently, the shoulder holster bears on a fact of consequence in the case—whether or not Gray owned a gun that he could give to

Henderson. We acknowledge that probative value of the shoulder holster—i.e., the strength of its relationship to whether or not Gray gave the weapon to Henderson—is not large; however, it is not so small as to make the holster irrelevant and prevent its introduction. Further, the fact that a holster was found at the residence is not so inflammatory as to mandate its exclusion under Rule 5-403. Considering the court's substantial discretion to admit or exclude relevant evidence pursuant to Rule 5-403, we hold that the court did not abuse its discretion in overruling Gray's objection.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.