UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2192

September Term, 2014

TRAVON DONNELL BENNETT

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: December, 19, 2016

Travon Bennett appeals from two sets of convictions, both in the Circuit Court for Prince George's County, that have been consolidated in this Court. In the first case, Mr. Bennett was charged with two counts of robbery with a dangerous weapon and related offenses in connection with the robbery of Jose Molina-Perdomo and Christian Guitierrez on September 9, 2012. A jury trial was held in September 2013, and the jury found Mr. Bennett guilty of one count of theft relating to Mr. Molina-Perdomo and one count of conspiracy to commit robbery with a dangerous weapon relating to Mr. Gutierrez, and acquitted him of all other charges. In the second case, Mr. Bennett was charged with murder, attempted robbery with a dangerous weapon, and related offenses in the connection with the death of Markel Ross. A jury trial was held in August 2014, and the jury convicted him of first-degree felony murder, second-degree murder, attempted robbery with a dangerous weapon, use of a firearm in the commission of a crime of violence, and illegal possession of a regulated firearm, and acquitted him of premeditated first-degree murder.

Mr. Bennett contends that the trial court erred by providing inaccurate advice when he inquired about discharging his attorney, by using a misleading and incomplete verdict sheet, introducing other crimes evidence, and permitting testimony regarding threats against a witness. He also contends that his sentence for use of a firearm in the commission of a crime of violence must be vacated because he was not charged with that crime. We affirm.

I. BACKGROUND

A. The Robbery Trial

In the first case, which we'll call the Robbery Trial, Mr. Bennett was tried for robbery and related offenses. The victims, Jose Molina-Perdomo and Christian Guitierrez, testified at the trial along with other witnesses, including the other two co-defendants, Kendall Bland and Jeremey Brown, both of whom had entered plea agreements prior to trial.

According to the trial testimony, Mr. Guitierrez encountered Messrs. Bland, Brown, and Bennett at around 12:00 PM on September 9, 2012, at a pawn shop in Capitol Heights. Mr. Bland told Mr. Guitierrez that he had a laptop computer for sale for approximately $500—$600. Mr. Bland gave Mr. Guitierrez his cell phone number so that they could arrange to meet later that day to complete the sale. Messrs. Bland, Brown, and Bennett left the pawnshop and went to Mr. Brown's grandmother's house, where they waited for Mr. Guitierrez to call. About forty minutes later, Mr. Guitierrez called, and they arranged to meet at the Capitol Heights Metro station. Mr. Bland grabbed a revolver from Mr. Brown's room and the three of them walked to the station.

Mr. Molina-Perdomo drove Mr. Guitierrez to the station, where they parked and waited to be contacted. The three men approached the car: Mr. Bennett stood as a lookout at the front corner of the car, while Mr. Bland and Mr. Brown got into the back. Once they settled in the car, Mr. Bland pulled out a gun and demanded all of their cash and anything they had in their pockets. Mr. Molina-Perdomo handed over $500 and Mr. Guitierrez gave

them his shoes. Mr. Bland and Mr. Brown then got out of the car, and all three walked back to Mr. Brown's grandmother's house, where they "divvied" up the cash.

Mr. Guitierrez called the police to report the robbery. Officer Robert Wilson of the Prince George's County Police responded to the call. Mr. Guitierrez told the Officer that three African-American males in their late teens or early twenties had robbed them. He described one (later identified as Mr. Brown) as heavyset, with longer dreads down to the middle of his back, and wearing a white shirt and blue jeans; one (later identified as Mr. Bennett) as wearing a white tank top with dark blue jeans, shorter hair, and tattoos on his neck; and the third (later identified as Mr. Bland) as wearing a white T-shirt and blue jeans, with short hair, tattoos on both arms, and carrying a black revolver-style handgun. Police ultimately identified all three men as suspects, and on October 31, 2012, recovered a firearm from Mr. Brown's bedroom in his grandmother's house, which was about three blocks away from the scene of the robbery. All three men were arrested and charged with crimes related to the robbery. Mr. Bland and Mr. Brown accepted plea agreements; Mr. Bennett went to trial, and a jury found him guilty of one count of theft from Mr. Molina-Perdomo and one count of conspiracy to commit robbery with a dangerous weapon from Mr. Guitierrez.

B. The Murder Trial

In August 2014, in a trial we'll call the Murder Trial, Mr. Bennett was tried for first-degree felony murder and related offenses. The trial testimony adduced the following:

On September 11, 2012, at approximately 6:50 AM, officers responded to a call of a young man lying on the sidewalk in the area of 6168 Old Central Avenue in Capitol

Heights. Upon arrival, they found Markel Ross, a senior in high school, dead on the ground, books scattered around him, a fatal gunshot wound to the stomach area. No shell casings or bullets were found at the scene, but a bullet fragment was recovered during the autopsy.

Around the time of the shooting, Mr. Bennett had been staying with Mr. Brown at his grandmother's house for "[a] couple of months" and "spent the night most of the time." When he stayed there, Mr. Bennett slept in the back room, where Mr. Brown and his uncle also slept, along with Mr. Bland when he spent the night. On September 10, the night before the murder, Mr. Brown, Mr. Bland, and Mr. Bennett were at the house, but Mr. Bland left that evening and only Mr. Brown and Mr. Bennett spent the night there. The next morning, Mr. Brown left the house for work sometime before 6:15 AM. No one saw Mr. Bennett the morning of the murder, but Mr. Brown's aunt, Kiki White, saw him at the house later that day. Mr. Bennett asked her questions about the murder because she knew the victim and had walked past the crime scene that morning on her way to school. Mr. Bennett left the house and did not come back for about six weeks.

On October 31, 2012, police searched the grandmother's house, and Mr. Brown, Mr. Bland, and Mr. Bennett were at the residence during the search. In the basement bedroom where Mr. Brown, Mr. Bennett and the others slept, police recovered a glove containing ammunition from an open safe and the handle of a .38 sub-nose revolver from a laundry bin behind the door. They also found several documents, including a Maryland Identification card, a Social Security card, and an employment application, all in Mr. Bennett's name. A firearms examiner determined that the gun recovered from the basement was the same gun that had been used in the murder.

Mr. Bennett was ultimately arrested and charged with the murder. Mr. Brown and Mr. Bland were not charged, but pled guilty in unrelated cases and testified against Mr. Bennett during the murder trial. Mr. Bland testified that the weekend after the murder, Mr. Bennett told him that "he killed the kid" that "he tried to rob him, and the kid flinched at him, so he pulled the trigger." Dante Hall, an inmate with whom Mr. Bennett shared a cell, testified about a conversation he had with Mr. Bennett. According to Mr. Hall, Mr. Bennett recounted that early one morning, around 6:00AM or 7:00 AM, while everyone was getting ready to go to work and school, he grabbed a .38 revolver with tape around it out of a safe, then went to the area around where the Citron gas station was located and tried to rob a boy. When the boy didn't give him anything, he shot the boy and ran back to the house, where he put a bullet back in the gun and returned it to the safe.

Because there were no witnesses to the murder, the State sought to prove the identity of the shooter through other crimes evidence, *see* Md. Rule 5-404(b), that the court ruled admissible after a pretrial hearing. Through Detective Chad Miller, who had investigated the crime, and the victim, Jeronimo Carcamo, the State introduced evidence of an attempted robbery and shooting in Capitol Heights on May 31, 2012, less than a half of a mile from the location of the murder. According to Detective Miller, the victim had described the perpetrator as a 5'11" black male with a medium complexion, short "nappy" hair, several tattoos on his neck, and armed with a brown revolver. The assailant, who matched the description of Mr. Bennett, approached Mr. Carcamo, engaged him in a conversation, and then pulled out a brown revolver and said, "Step in the house or I'm going to bust your ass." Mr. Carcamo froze, the two of them stared at each other for a

second or two, and the perpetrator fired the gun. Mr. Carcamo lunged at the assailant, and they scuffled over the gun. The assailant ran away, and Mr. Carmaco fled in his car. He was treated at the hospital for a bullet graze on his chest and a burn on his arm from the barrel of a gun. During the investigation, Mr. Carcamo identified Mr. Bennett from a photo array and identified the gun that had been recovered from Mr. Brown's grandmother's house as the gun the perpetrator had used. At the conclusion of the trial, the jury convicted Mr. Bennett of first-degree felony murder and other related offenses.

II. DISCUSSION

Mr. Bennett raises five challenges to his convictions.[1] *First*, he contends that the trial court gave him inaccurate and misleading advice in response to his inquiry about

[1] His brief phrased the Questions Presented as follows:

> 1. Did the trial court err when it provided inaccurate advice and thus thwarted Mr. Bennett's attempt to discharge his attorney?
>
> 2. In the robbery case, did the trial court abuse its discretion when it phrased the question on the verdict sheet as "Did the Defendant, Travon Donnell Bennett, or another participating together and in concert with him, commit theft of less than $1,000 against Jose Molina-Perdomo on or about September 9, 2012?
>
> 3. In the murder case, did the trial court abuse its discretion when it permitted the State to introduce other crimes evidence?
>
> 4. In the murder case, did the trial court err and/or abuse its discretion when it permitted Mr. Hall to testify that he put his safety in jeopardy by testifying against Mr. Bennett?
>
> 5. In the murder case, must Mr. Bennett's conviction and sentence for use of a firearm in the commission of a crime of

discharging his attorney. *Second*, he argues that the trial court abused its discretion by improperly highlighting the State's theory on the verdict sheet in the Robbery Trial. *Third*, he contends that the trial court abused its discretion when it permitted the State to introduce other crimes evidence in the Murder Trial. *Fourth*, also in the Murder Trial, he claims that the court erred by allowing a witness to testify about threats to the witness's personal safety. And *fifth*, still in the Murder Trial, he argues that his conviction and sentence for use of a firearm in the commission of a crime of violence must be vacated because he was not charged with that crime.

A. The Trial Court Did Not Violate Maryland Rule 4-215(e).

First, Mr. Bennett contends that the trial court "provided inaccurate advice and thus thwarted [his] attempt" to discharge his attorney, in violation of Maryland Rule 4-215(e) (the exchange about which he complains occurred in a pre-trial hearing before the Robbery Trial). The State counters that Mr. Bennett's complaint was not preserved for appeal, and that even if it were, Rule 4-215(e) was not triggered because Mr. Bennett "made only a conditional request to discharge his attorney, which was effectively withdrawn following his off-the-record discussion with counsel." We review adherence to Rule 4-215 *de novo*, and strict compliance is required. *Webb v. State*, 144 Md. App. 729, 741 (2002). But rather than parsing preservation—the State is right that there was no contemporaneous objection, *see State v. Westray*, 444 Md. 672, 687 (2015)—we agree with the State that Rule 4-215(e)

violence be vacated in light of the fact that he was not charged with that crime?

never came into play because Mr. Bennett only inquired about what might happen if he were unsatisfied with his attorney, and never actually asked to discharge him.

"The purpose of Rule 4-215 is to protect that most important fundamental right to the effective assistance of counsel, which is basic to our adversary system of criminal justice." *Williams v. State*, 435 Md. 474, 485 (2013) (internal citations and quotations omitted). The Rule starts by requiring a defendant to seek permission to discharge his counsel, then sets forth the procedure that follows from that triggering event:

> **(e) Discharge of Counsel – Waiver.** If a defendant *requests permission to discharge an attorney* whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a) (1)-(4) of this Rule if the docket or file does not reflect prior compliance.

Md. Rule 4-215(e) (emphasis added).

At the beginning of a pretrial motions hearing, Mr. Bennett asked the court a hypothetical question "If I was unsatisfied--unsatisfied with [my attorney], the way he is representing me, can I extract him from my cases, and would the State appoint another lawyer to me?" The court responded by referencing Maryland Rule 4-215, and answered Mr. Bennett's question:

> Mr. Bennett, what happens is if you want to discharge your attorney you will have to tell me what the problem is. Okay?
>
> And I will let you explain to me the reasons for your request.
>
> If I find that there is a meritorious reason, something that I think is meritorious, if it has some credence to it, then I will permit --I can permit the discharge of counsel. Okay?
>
> If I find that there is no meritorious reason to, then what happens is you always have a right to represent yourself. Okay? So, the deal is this. If you have a meritorious reason and I permit the discharge I can ask the Public Defender to look at it again. Okay?
>
> But I don't have the power to actually order the Public Defender to substitute. But if I find it's not a meritorious reason, then you're [sic] only option is to represent yourself, which really is probably not a good move.
>
> * * *
>
> *So, if you want to tell me what the issues are you can. If you want to talk to [your lawyer], you can*. And I am -- like I said, . . . I'm the neutral guy, the referee. I'm just trying to give you a little bit of advice. I don't have any interest here one way or the other, but you have that right.
>
> So, do you want to talk to [your lawyer] for a minute?
>
> [MR. BENNETT]: Yes, sir.

(Emphasis added.)

Mr. Bennett and his attorney conferred off the record, after which Mr. Bennett had a further exchange with the court that included an invitation to raise his concerns again later if he had them:

> THE COURT: . . . So, you're going to have some stress and pressure, but you've also got a lawyer sitting next to you and

> you can pick his brain if something comes up. You can bring I [sic] back to me at a different time.
>
> [MR. BENNETT]: Thank you, Your Honor.

From here, the hearing continued. And at no point during the hearing or in future proceedings did Mr. Bennett ask to discharge or replace his attorney or indicate that he was dissatisfied with his attorney.

Mr. Bennett contends here that his convictions from both trials must be reversed because the trial court "misled" him both when it advised him that it "could," rather than "would," discharge his attorney if it deemed Mr. Bennett's request meritorious, and when it indicated that it might not appoint him another lawyer even if his lawyer was discharged for a meritorious reason. In this way, Mr. Bennett argues, the court violated Rule 4-215 "just as surely as it would have had it outright refused to hear [his] reasons for discharge."

We disagree. A defendant invokes Rule 4-215(e) when he asks the court to discharge his attorney. *See State v. Davis*, 415 Md. 22, 31 (2010) ("Under the Rule, upon a defendant's request to discharge counsel, the court must provide the defendant an opportunity to explain his or her reasons for seeking the change."). It's true that the rule does not define a "request" to discharge counsel, and we recognize that the request does "not need to be a talismanic phrase or artfully worded [request.]" *State v. Campbell* 385 Md. 616, 632 (2005). "It is well established, however, that a defendant must provide a statement from which the court could reasonably conclude that the defendant desires to discharge his or her attorney, and proceed with new counsel or self-representation." *State v. Taylor*, 431 Md. 615, 632 (2013) (internal citations and quotations omitted). And here,

Mr. Bennett raised the issue only in the abstract—he sought, and received, an explanation about what would happen *if* he sought to discharge his counsel, at which point he and the court moved on (and the topic never came up again).

The cases on which Mr. Bennett relies all involved situations where the defendant actually expressed a present intent to discharge his attorney. *See Gambrill v. State*, 437 Md. 292, 301 (2014) (stating that the trial court was required to permit the defendant to explain his reasons for requesting discharge of counsel when the public defender requested a postponement and indicated that the defendant would like to hire private counsel); *Williams*, 435 Md. at 485,494 (holding that the defendant's "unambiguous and to-the-point letter" expressing dissatisfaction with his counsel and asking that the lawyer be removed from the case constituted a request to discharge counsel under Rule 4-215(e), even though not expressed in open court). This is not such a case. Mr. Bennett asked the court what would happen if he were unsatisfied with his counsel, and the court answered that question. After answering his question, the trial court provided Mr. Bennett with an opportunity to explain why he was dissatisfied with his lawyer or to consult with him. Mr. Bennett chose to consult, and after doing so, said nothing further that indicated a desire to discharge his attorney or dissatisfaction with his counsel's services. And although the court might have mirrored the Rule more exactly in answering the question, we see nothing in the record to support the claim that the court's fundamentally correct answer misled Mr. Bennett into sticking with a lawyer he otherwise would have sought to discharge.

B. The Court Did Not Abuse Its Discretion In Phrasing The Theft Charge On The Robbery Trial Verdict Sheet.

At the conclusion of the Robbery Trial, the court submitted a verdict sheet to the jury that read "Did the Defendant, Travon Donnell Bennett, or another participating together and in concert with him, commit theft of less than $1,000 against Jose Molina-Perdomo on or about September 9, 2012?" Defense counsel objected to the verdict sheet, and the court overruled the objection:

> [DEFENSE COUNSEL]: So for the record, I will object because I think it, in my mind, it kind of directs the verdict. I understand the reason for it is accomplice liability theory, and I think that including that sort of directs the verdict in favor of the State toward those particular charges because of the way it's worded.
>
> THE COURT: I note your objection. I think based on my experience, accomplice liability is confusing and I think I gave the exact one out of the book. I just think it makes it easier for the jury to understand the instruction. I'm not trying to direct it one way or the other. I note your objection.

Mr. Bennett contends on appeal, as he did in the circuit court, that the verdict sheet improperly highlighted the State's theory of the case and effectively directed a guilty verdict. We disagree.

We don't consider the verdict sheet in isolation, but in the context of the instructions given to the jury. *Davis v. State*, 196 Md. App. 81, 113 (2010). The State's theory for the theft charge was that Mr. Bennett aided and abetted the robbery by serving as the lookout, and the State presented testimony supporting that theory. The jury instructions included an instruction on accomplice liability that Mr. Bennett concedes was a correct statement of law. We "assume that the jury, having been made aware of the respective rights and duties

of the judge and the jury in determining matters of law and of fact, would have followed the instructions of the trial judge." *Id.* (internal citations and quotations omitted). And as a matter of mechanics, the verdict sheet used a shorthand rather than reproducing the entire aiding and abetting instruction, but still left the jury to make the finding—it didn't highlight the State's theory of the case or direct any particular outcome.

Mr. Bennett also claims that the verdict sheet contained language that was "misleading and incomplete." But the verdict sheet is "merely a tool for the jury to use in order to aid in its deliberation," *Ogundipe v. State*, 424 Md. 58, 76 (2011), and need not contain a complete statement of the law, include the elements of the crime, or reproduce the multitude of other matters typically contained in the jury instructions. *Davis*, 196 Md. App. At 113. Rather, "[a] verdict sheet guides a jury in navigating the charges that are before it, reminds the jury of the findings that must be made, and provides a mechanism for recording the jury's determination on each charge." *Id.* Here, the jury was properly instructed by the trial judge on accomplice liability, and we see no error or abuse of discretion in referencing accomplice liability on the verdict sheet.

C. The Court Did Not Err In Admitting Other Crimes Evidence.

Mr. Bennett's *third* contention is that the trial court erred or abused its discretion by permitting the State to introduce other crimes evidence that, he contends, was not relevant to prove identity or intent,[2] was not proven by clear and convincing evidence, and was more prejudicial than probative.

[2] Mr. Bennett argues on appeal that the other crimes evidence was not relevant to prove intent. But since he never raised this argument in the circuit court, he didn't preserve it

The State sought to introduce evidence of two different crimes or bad acts in the Murder Trial, and on August 29, 2013, the trial court held a motions hearing to determine whether to permit either to come in via Rule 5-404(b). *First*, the State wanted to introduce evidence that on May 31, 2012, approximately three months *before* the murder and near the scene of the crime, Mr. Bennett had attempted to rob Jeronimo Carcamo and had shot him using the murder weapon. *Second*, the State sought to admit evidence that on October 31, 2012, less than two months *after* the murder, Messrs. Bland and Brown used the murder weapon to rob an individual in the vicinity of the murder crime scene. The trial court ultimately permitted the State to introduce evidence of the May 31 robbery and denied the State's request to introduce evidence of the October 31 one. We see no error or abuse of discretion in these decisions.

Although "evidence of a defendant's prior criminal acts may not be introduced to prove that he is guilty of the offense for which he is on trial," other crimes evidence may be introduced if it is independently relevant. *Straughn v. State,* 297 Md. 329, 333 (1983). Rule 5-404(b) lists the purposes for which other crimes evidence can come in, a list that includes the identification of the defendant and a common scheme or plan:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

for appeal, and we will not address it. *See Claybourne v. State*, 209 Md. App. 706, 748 n.28 (2013).

When considering whether to admit other crimes evidence, courts follow the three-step analysis set forth in *State v. Faulkner,* 314 Md. 630 (1989). *First*, the court must determine whether the evidence falls into one of the recognized exceptions, such as motive, opportunity, intent, preparation, or identity. *Id.* at 634. This determination does not involve discretion, and we review it *de novo. Id. Second*, if the evidence falls under one of the exceptions, the court must decide by clear and convincing evidence whether the defendant was involved in the prior crime or bad act. We review this prong for sufficiency of the evidence. *Id. And third*, the court must balance the probative value of admitting the evidence against the danger of unfair prejudice, a decision we review for abuse of discretion. *Id.*

At the *first* step, we agree that evidence of the May 31 robbery fell within a permitted exception because it was relevant to prove Mr. Bennett's identity in the Murder Trial. Identity is a recognized exception, *id.;* Rule 5-404(b), and proving Mr. Bennett's identity was the State's purpose in introducing it. The State called several witnesses, including Mr. Carcamo, the victim, who identified Mr. Bennett from a photo array and specifically identified the gun, which had been recovered from the house where Mr. Bennett was staying, as the gun Mr. Bennett used to shoot him. The State also called a ballistics examiner who testified, to a reasonable degree of scientific certainty, that the gun identified by Mr. Carcamo was the gun that was used in the murder. Based on the testimony presented at the motions hearing, the trial court correctly found that the other crimes evidence of the May 31, 2012, attempted robbery and shooting fell within the identity exception to the exclusionary rule.

For the *second* prong in *Faulkner*, Mr. Bennett argues that "the evidence that the gun used on May 31 was the gun that was used in Markel's murder was simply too weak to be admissible to show identity." Clear and convincing evidence is "more than a preponderance of the evidence and less than evidence beyond a reasonable doubt." *Govostis v. State*, 74 Md. App. 457, 466 (1988) (internal citations and quotations omitted). Mr. Bennet asserts that "the only link between the two was Mr. Carcamo's identification of the gun more than a year after the May 31 incident," and "[g]iven the length of time that passed before Mr. Carcamo's identification, given the generic nature of guns, and given the lack of any other evidence showing the guns were the same, the evidence was too tenuous to be admissible to show identity." We disagree. The trial court noted that Mr. Carcamo had described the perpetrator as a "young black male with tattoos, described a dark-colored revolver", had identified Mr. Bennett in a photo array (and in a previous hearing, the court had ruled that the array was conducted properly), and had identified the gun as the one used to shoot him. The trial court also relied on the report of the ballistics examiner, who expressed to a reasonable degree of scientific certainty that the gun Mr. Carcamo identified as the gun used to shoot him was the same gun used in the murder case. The crime appeared, like the Murder Trial, to be an attempted robbery, occurred in close proximity to the murder scene, and Mr. Bennett had access to the gun at the time it occurred. We find sufficient evidence to support the trial court's ruling that the gun used in the attempted robbery was the same gun that was used in the murder.

Lastly, we agree with the State that the probative value of the other crimes evidence did not outweigh the likely prejudice. When assessing this prong, we balance the need for

the evidence against the likelihood of unfair prejudice. *Faulkner*, 314 Md. at 634. Here, there were no eyewitnesses to the murder, so identity was a critical element of the State's case. The evidence was highly probative because the attempted robbery on May 31 demonstrates that Mr. Bennett possessed the gun a few months before the murder and used it in the same general area—as the trial court noted, the evidence "put the gun in his hand in a robbery attempt." The court also instructed the jury to consider the evidence only for identity, motive, or intent, and not to show that Mr. Bennett had a propensity to commit crimes or had a bad character. Under the circumstances, we see no error in the court's decision to introduce evidence of the May 31 robbery.

D. The Court Properly Exercised Its Discretion In Admitting Testimony By A State Witness That He Had Put His Safety In Jeopardy By Testifying.

Mr. Bennett's *fourth* contention is that the trial court erred or abused its discretion by permitting a State's witness to testify that he had put his safety in jeopardy by testifying, testimony he contends was both "irrelevant and grossly prejudicial." The State counters that the testimony was properly admitted, relevant, and its probative value was not substantially outweighed by risk of unfair prejudice.[3]

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401; *See also Johnson v. State*, 332

[3] The State asserts that Mr. Bennett's argument that the evidence was "grossly prejudicial" is not preserved because during the trial he only objected on relevancy grounds and lack of foundation. We are satisfied that the stated objections are close enough, and will address the merits.

Md. 456, 472 n.7 (1993) ("Evidence is relevant (and/or material) when it has a tendency to prove a proposition at issue in the case."). Relevance is left to the sound discretion of the trial court, and the court's evidentiary ruling will not be disturbed absent error or clear abuse of discretion. *Conyers v. State*, 354 Md. 132, 176 (1999).

During the Murder Trial, the State called Mr. Hall to testify about a conversation he had with Mr. Bennet while they were in jail. According to Mr. Hall, Mr. Bennett confessed to attempting to rob a boy, and when the boy didn't give him anything, to shooting him in the back. The State also played for the jury a recording of a conversation that had taken place between Mr. Hall and Mr. Bennett.

During cross examination, defense counsel's questioning suggested that Mr. Hall's testimony was influenced by Mr. Brown, another inmate and Mr. Bennett's co-defendant in the Robbery Trial, and that his motive for testifying was to receive a better sentence in his own case:

> [DEFENSE COUNSEL]: Now, when you were in H-12, Jeremy Brown was in there?
>
> [MR. HALL]: Yes.
>
> [DEFENSE COUNSEL]: Was Kendall Bland[4] also in there, the person you learned later was Kendall Bland?
>
> [MR. HALL]: Yeah.
>
> [DEFENSE COUNSEL]: Okay. So all three of you were in there together?
>
> [MR. HALL]: Yeah.

[4] Mr. Bennett and Mr. Brown's co-defendant in the Robbery Trial.

* * *

[DEFENSE COUNSEL]: You talked to Jeremy first before you talked to the police?

[MR. HALL]: Yes.

[DEFENSE COUNSEL]: Did Jeremy fill you in on any more details with regard to the homicide?

[MR. HALL] No.

[DEFENSE COUNSEL]: Did he tell you to go to the police?

[MR. HALL]: No.

[DEFENSE COUNSEL]: I'm talking about Jeremy, did he tell you to go talk to the police?

[MR. HALL]: No. . . . Then he asked me did I want to help him with the case, and I said yeah.

[DEFENSE COUNSEL]: Okay. When he said do you want him [sic] to help him with the case, who was he referring to?

[MR. HALL]: Travon.

[DEFENSE COUNSEL]: Okay. How were you going to help him with his case?

[MR. HALL]: Well, first, he was going to tell the police that I knew about the case and go from there.

[DEFENSE COUNSEL]: So are you saying you were trying to help Jeremy with his case?

[MR. HALL]: No.

[DEFENSE COUNSEL]: You weren't?

[MR. HALL]: No.

[DEFENSE COUNSEL]: So your understanding was, in telling the police allegedly what Travon said to you was going to help him with his case?

[MR. HALL]: No.

[DEFENSE COUNSEL]: Who was it going to help?

[MR. HALL]: I'm just trying to help.

[DEFENSE COUNSEL]: Was it going to help you with your case?

[MR. HALL]: No.

[DEFENSE COUNSEL]: It wasn't? Have you been sentenced on your case?

[MR. HALL]: No.

[DEFENSE COUNSEL]: In fact, your sentencing has been continued, hasn't it?

[MR. HALL]: Yeah.

[DEFENSE COUNSEL]: Right now, it's scheduled to take place after this case; is that right?

[MR. HALL]: Yes.

* * *

[DEFENSE COUNSEL]: Now, before you went to the Grand Jury, you met with the detectives, correct?

[MR HALL]: Yeah.

[DEFENSE COUNSEL]: And they went over your statement or whatever you were going to say to the Grand Jury?

[MR. HALL]: Yeah.

> [DEFENSE COUNSEL]: And actually, when you were in the Grand Jury, you were asked a series of questions in the form of what you said based upon your statement you gave to them; is that correct?
>
> [MR. HALL]: Yeah.

On re-direct, the State tried to restore Mr. Hall's credibility by demonstrating that Mr. Hall was testifying in spite of his best interest. Defense counsel objected, but the court allowed the State to continue:

> [THE STATE]: And, Mr. Hall, would it be fair to say that you put your safety in jeopardy by testifying as a witness?
>
> [MR. HALL]: Yes.
>
> [THE STATE]: And yet, you still told a set of facts on the 25th of January to--you told the same set of facts to the Grand Jury, and you're still willing to come in despite your fear and tell the same set of facts to the ladies and gentlemen of the jury today?
>
> [MR. HALL]: Yes.
>
> [THE STATE]: Your Honor, I have no other questions of Mr. Hall.

On re-cross, defense counsel again attacked Mr. Hall's credibility:

> [DEFENSE COUNESL]: And you're certainly going to let your sentencing judge know that you came to testify; is that correct?
>
> [MR. HALL]: (No audible response.)
>
> [DEFENSE COUNSEL]: You're going to let your sentencing judge know that you came to testify?
>
> [MR. HALL]: She already knows.
>
> [DEFENSE COUNSEL]: Nothing further.

Mr. Bennett claims that testimony regarding threats to witnesses is admissible only in two limited circumstances: (1) to rehabilitate a witness by explaining inconsistencies between his or her pretrial statements and his or her trial testimony, and (2) to demonstrate consciousness of guilt when the threats are linked directly to the defendant. Mr. Bennett asserts that Mr. Hall's testimony regarding his safety was irrelevant, and should not have been admitted over defense counsel's objection, because it fit into neither category. Although it is true that evidence of threats to a witness is not admissible as *substantive evidence of guilt* unless it is linked to the defendant, *Washington v. State*, 293 Md. 465, 468 n.1 (1982); *Saunders v. State*, 28 Md. App. 455, 459 (1971), the evidence in this case was not admitted as substantive evidence of guilt.

Instead, the trial court admitted the evidence for the purpose of allowing the State to rehabilitate Mr. Hall after his credibility had been attacked, a permissible purpose for testimony regarding a threat to a witness. Md. Rule 5-616(c); *Armstead v. State*, 195 Md. App. 599, 644, 645 (2010). The cases Mr. Bennett cites dealt with admitting evidence to rehabilitate a witness to explain prior inconsistent statements, *see Washington*, 293 Md. at 468 n.1 (evidence of threats to a witness is not admissible as substantive evidence of guilt unless the threat is linked to the defendant); *Armstead*, 195 Md. App. at 644–645 (trial court did not abuse its discretion in admitting evidence of threats against a witness to show her state of mind and explain inconsistent statements when introduced solely for the purpose of assessing credibility), and don't limit rehabilitation evidence to situations in which prior inconsistent statements are introduced. We find that Mr. Hall's testimony was

correctly admitted for the purpose of rehabilitating him. *See Smith v. State*, 273 Md. 152, 157 (1974).

Next, Mr. Bennett argues that Mr. Hall's testimony was "grossly prejudicial." In general, "all relevant evidence is admissible," Md. Rule 5-402, unless its probative value is substantially outweighed by its potential for unfair prejudice, Md. Rule 5-403. Mr. Bennett argues that Mr. Hall's testimony was "obviously" prejudicial because, "[a]lthough it was not linked to Mr. Bennett in any way, the jury was likely to speculate that Mr. Bennett was the reason why Mr. Hall feared for his safety." But this argument fails for the same reason as the last one: Mr. Hall's testimony was admitted for the sole purpose of rehabilitating his character after his credibility had been attacked, and the trial court did not allow the State to introduce any evidence linking the threat to Mr. Bennett.[5] In contrast to Mr. Bennett's assertion that the evidence had "scant" probative value, the testimony related directly to defense counsel's insinuation that Mr. Hall was testifying only to get a better sentence. And its probative value was not substantially outweighed by risk of unfair prejudice because there was nothing linking a specific threat to Mr. Bennett.

E. Mr. Bennett's Conviction For Use Of A Handgun In The Commission Of A Crime Of Violence Charged Him With A Cognizable Crime.

Finally, Mr. Bennett contends his conviction of use of a firearm in the commission of a crime of violence must be vacated because he was not charged with that crime, and

[5] During the Murder Trial, the State proffered that while in jail Mr. Hall had received a photograph of himself with an "X" through it, which had been placed there by Mr. Bennett and circulated throughout the prison to intimidate Mr. Hall. The trial court did not allow this evidence linking the threat to Mr. Bennett.

was instead charged with use of a *handgun* in the commission of a crime of violence. We disagree.

Count four of Mr. Bennett's indictment in the Murder Trial stated:

> THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT **TRAVON DONNELL BENNETT** ON OR ABOUT THE 11TH DAY OF SEPTMEBER 2012, IN PRINCE GEORGE'S COUNTY, MARYLAND, DID USE A HANDGUN IN THE COMMISSION OF A CRIME OF VIOLENCE IN VIOLATION OF CR-04-204 OF THE CRIMINAL LAW ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **HANDGUN USE/FELONY/VIOLENT CRIME**)[.]"

(Emphasis in original). As indicated in the indictment, Mr. Ross was shot and killed on September 11, 2012. The timing matters because the law has changed. Before October 1, 2011, liability under Md. Code (2002) § 4-204(a) of the Criminal Law Article was limited to crimes committed with a narrow range of weapons:

> A person may not use an antique firearm capable of being concealed on the person or any handgun in the commission of a crime of violence, as defined in [Section 5-1-1 of the Public Safety Article], or any felony, whether the antique firearm or handgun is operable or inoperable at the time of the crime.

After October 1, 2011, though, the statute was amended to encompass not only handguns and antique firearms, but *any* firearm:

> (a) "*Firearm*" defined.—(1) In this section, "firearm" means:
>
> (i) a weapon that expels, is designed to expel, or may readily be converted to expel a projectile by the action of an explosive; or

> (ii) the frame or receiver of such a weapon.
>
> (2) "Firearm" includes an antique firearm, handgun, rifle, shotgun, short-barreled rifle, short-barreled shotgun, starter gun, or any other firearm, whether loaded or unloaded.
>
> (b) *Prohibited*—A person may not use a firearm in the commission of a crime of violence, as defined in Section 5-101 of the Public Safety Article, or any felony, whether the firearm is operable or inoperable at the time of the crime.

Md. Code (2002, 2012 Repl. Vol.) § 4-204 of the Criminal Law Article ("CR").

Mr. Bennett contends that at the time Mr. Ross was murdered, use of a handgun in the commission of a crime of violence was no longer a crime in Maryland. As such, he argues, he was not charged with an offense prescribed by statute, so the trial court lacked jurisdiction to enter a judgment of conviction or impose a sentence for that charge.[6] Mr. Bennett's argument falls apart from the language of the statute itself: § 4-204 specifically defines "firearm" to include handguns, and the indictment charged him with a cognizable crime.

"A primary purpose of a charging document is to fulfill the constitutional requirement contained in Article 21 of the Maryland Declaration of Rights that each person charged with a crime must be informed of the accusation against him." *Williams v. State*, 302 Md. 787, 790–91 (1985). Every criminal charge must characterize the crime, and

[6] Mr. Bennett contends that the jury was not instructed on the elements of use of a handgun in the commission of a crime of violence but instead was instructed on the elements of use of a firearm in the commission of a crime. This argument, however, was not preserved for appeal because Mr. Bennett did not object to the instruction in the circuit court. *See* Md. Rule 4-325(e).

provide the defendant with such a description of the particular act alleged to have been committed so as to inform him of the specific conduct with which he is charged, thereby enabling him to defend against the accusation and avoid a second prosecution for the same criminal offense. *Id.* A court is without power to render a verdict or impose a sentence under an indictment that does not charge a cognizable offense within its jurisdiction prescribed by common law or by statue, and a claim that an indictment fails to charge or characterize a crime is jurisdictional and may be raised at any time. *Id.* But in determining, for jurisdictional purposes, whether an indictment sufficiently charges and characterizes a crime, use of "words that sufficiently characterize the crime will satisfy the jurisdictional requirement." *Id*. at 793.

The fact that the charging document lists "handgun" rather than "firearm" does not mean that no cognizable crime was charged. The charging document in this case alleged that on or about September 11, 2012, in Prince George's County, Mr. Bennett used a handgun in the commission of a crime of violence. These averments amply characterized a cognizable crime (use of a firearm in the commission of a crime of violence), and the charging document was not defective.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.