UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 2523 & 2711

SEPTEMBER TERM, 2013

ANTHONY ROACH
AND QUINCY CHISOLM,

v.

STATE OF MARYLAND

Eyler, Deborah, S.,
Berger,
Reed,

JJ.

Opinion by Eyler, Deborah, S., J.

Filed: April 26, 2016

A jury in the Circuit Court for Baltimore City convicted Anthony Roach and Quincy Chisolm, the appellants, and Robert Moore of conspiracy to murder Alex Venable, his family members, and their associates. Roach also was convicted of attempted first-degree murder of Venable's brother, Allen Venable ("Allen"), use of a handgun in the commission of a felony or crime of violence, and possession of a firearm after a felony conviction. The court sentenced Roach to life imprisonment for conspiracy to commit murder; life imprisonment for attempted murder in the first-degree, to run consecutively; 20 years' imprisonment, the first five without parole, for use of a handgun in the commission of a crime of violence, to run concurrently; and five years without the possibility of parole for the possession of a firearm after a felony conviction, to run concurrently. The court sentenced Chisolm to life imprisonment, all but 40 years suspended, with a mandatory five years' supervised probation upon release, for conspiracy to commit murder.[1]

Roach raises nine issues on appeal and Chisolm raises four. Some of the arguments on those questions include sub-issues. In its brief, the State has rephrased, reorganized, and consolidated the questions raised by Roach and Chisolm. We shall adopt and address the issues as presented by the State:

[1] Moore was tried with Roach and Chisolm, but, as we shall explain, was not present at trial. In addition to conspiracy to commit murder, he was convicted of first-degree murder, four counts of attempted first-degree murder, and five counts of use of a handgun in the commission of a crime of violence. Roach, Chisolm, and Moore noted separate appeals, which were consolidated by Order of this Court on August 18, 2014. Thereafter, counsel for Moore filed a motion to strike his appearance. This Court granted that motion by Order dated June 9, 2015. Subsequently, on October 16, 2015, Moore's appeal was severed.

Questions Presented By Both Roach And Chisolm:

I. Did the trial court properly decline to grant the motion to sever?

II. To the extent Appellants' contentions are addressed and preserved for review, did the trial court properly exercise its discretion to admit Moore's recorded calls?

III. If addressed as to Roach and if preserved, was Moore's voluntary absence from trial not unduly prejudicial as to Appellants?

IV. Was the lunch between [two witnesses for the State] during trial neither a sequestration nor *Brady* violation?[2]

V. To the extent preserved, was the evidence sufficient?

Questions Presented Only By Roach:

VI. Was there sufficient evidence from which the jury could find that the recorded calls were authentic?

VII. If addressed, did the trial court properly exercise its discretion in denying three of Roach's mistrial motions?

VIII. To the extent preserved, did [the trial court] have good cause to issue the protective order?

IX. Did the trial court properly exercise its discretion to strike three prospective jurors for cause?

X. Should this Court decline to address Roach's claim that his right to a public trial was violated?

Questions Presented Only By Chisolm:

XI. If preserved, was the jury's verdict finding Chisolm guilty of conspiracy to commit murder not infirm and was his sentence on that conviction illegal?

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

XII. Did the trial court properly exercise its discretion in responding to the jury's notes during deliberations?[3]

[3] Roach worded his questions presented as follows:

1. Whether the Circuit Court erred by granting joinder and denying severance.

2. Whether in a joined codefendant trial the Circuit Court erred by admitting forty-[four] unredacted, recorded statements by Mr. Roach's codefendant Mr. Robert Moore, who did not testify, and whom Mr. Roach had had no previous opportunity to cross-examine.

3. Whether the Circuit Court erred by admitting in evidence the state's forty-[four] selected recordings without authentication.

4. Whether the Circuit Court erred by denying Mr. Roach's motions for mistrial.

5. Whether the Circuit Court erred by denying Mr. Roach's motion for judgment of acquittal.

6. Whether the Circuit Court erred by giving the jury a supplemental instruction regarding concurrent intent.

7. Whether the Circuit Court erred by granting the Protective Order.

8. Whether the Circuit Court erred by striking three citizens from the venire for cause.

9. Whether the Circuit Court erred by excluding Mr. Roach's family and friends from the courtroom.

Chisolm worded his questions presented as follows:

1. Did the Trial Court err in failing to instruct the jury that a conviction on the count of "Conspiracy to murder," would be for Conspiracy to commit murder in the first degree?

2. Did the trial court's sentence of Mr. Chisolm–on one Count of Conspiracy to commit murder in the first degree–constitute an illegal sentence under Maryland Rule 4-345 because it differed from the jury's verdict of "Conspiracy to murder?"

(Continued…)

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

FACTS AND PROCEEDINGS

The evidence adduced at trial established that on April 27, 2011, at around 8:00 p.m., Darian Kess was stabbed to death in his apartment located in a complex off The Alameda, in Northeast Baltimore. Kess was Moore's cousin. Earlier that evening, Kess was in his apartment with Maria Randle and Rokia Lewis. Kess decided to order food and left the apartment to borrow carryout menus from a neighbor. Randle and Lewis saw that when he returned he was accompanied by three men whose faces were covered with a "t-shirt type material." One man had a grip on Kess's arm and was holding a gun to his head.

The men ordered Randle and Lewis to lie face-down on the floor in the living room, which they did. Randle could not see anything, but overheard one of the men demand money from Kess and say he knew that Kess "hit like 30 today." Two of the men walked Kess around the apartment while the third man stayed in the living room with Randle and Lewis.

(…continued)

3. Did the trial court err in failing to grant severance where the majority of the State's evidence and testimony consisted of bad acts by co-defendant Moore, and Moore was absent from the jury trial?

4. Did the trial court err in failing to grant Mr. Chisolm's motion for judgment of acquittal when the State's evidence against him was based on the uncorroborated accomplice testimony of co-defendant Moore's wife–Sarah Hooker?

After about 10 minutes, the two men brought Kess back into the living room. Randle heard a noise that "sounded like . . . some type of liquid or something was hitting the floor." The three men ran out of the apartment. Randle waited about five minutes, stood up, and saw Kess lying on the floor, holding his neck with one hand and "bleeding real bad, losing a lot of blood." He had been stabbed. Lewis assisted Kess while Randle went door-to-door in the apartment building seeking help. (The men had stolen her cell phone.) A neighbor called 9-1-1. About 30 minutes later, an ambulance arrived and transported Kess to The Johns Hopkins Hospital ("Hopkins"). Randle reported the incident to the Baltimore City Police Department ("BCPD"). Kess died three days later.

On the night of the stabbing, Moore and his wife, Sarah Hooker, went to the hospital to see Kess. The next morning, April 28, 2011, Hooker contacted Randle by phone to find out what had happened. Randle did not want to discuss the events over the phone and agreed to meet with Hooker. Hooker drove a black SUV with dark, tinted windows, and picked Randle up at around noon. Moore and Hooker's brother, Donnie Adams, were in the vehicle. Randle described the events of the previous night. Moore asked her if she would be able to identify any of the assailants' voices and she responded yes. Hooker then drove the group to the 1900 block of North Collington Avenue, between East 20th Street and North Avenue, stopping in front of a row house in the middle of the block. According to Randle, "four or five" people exited the row house and approached the SUV. Moore and Adams got out of the vehicle and asked the people if they knew anything about Kess's stabbing. Randle, who remained inside the SUV out of

sight, recognized a voice as being one of the assailants. Moore and Adams got back in the SUV and Hooker drove Randle to the hospital to see Kess. Randle had no further contact with Hooker, Moore, or Adams.

That same day, Gloria Johnson was standing in the 1900 block of North Collington Avenue with a group of people, including Venable and a man she knew as "Kevin." An SUV pulled up and two men got out. Adams, who she knew from the neighborhood, was one of them. Adams briefly spoke to Venable. Johnson overheard Adams say he would "come back and spray the block." Adams and the other man got back in the SUV and drove away. Johnson walked down the street to a carryout store to buy a pack of cigarettes and returned ten minutes later. She saw someone come "out of 20th onto Collington" and start shooting in the area where she had been standing. Later, in a photo array she identified Adams as the shooter. She wrote on the photo array: "This is Donnie [Adams]. He came on the 1900 block of Collington and stated, I will spray this block and he was talking to Venable."

Venable, Thomas McNeil, and Derrick Vaughn all sustained gunshot wounds and were transported by ambulance to Hopkins. Venable died of his wounds. McNeil was shot three times in the stomach, twice in the right arm, and once in the left arm. He underwent surgery to remove the bullets from his stomach and place a metal plate in his right elbow. He remained in the hospital for a month. Vaughn was shot in his left leg. He was treated and released that day.

At trial, Adams testified pursuant to a plea agreement with the State.[4] He stated that he had spoken to Kess on the afternoon of April 27, 2011, while Kess was selling drugs in the 1900 block of North Collington. They discussed how much money Kess had made that day. Venable, Vaughn, and McNeil were standing nearby when that conversation took place. Kess believed they overheard the conversation and were involved in Kess's stabbing later that night.

Adams's testimony conflicted in some minor respects with that of Randle and Johnson. According to Adams, the day after the stabbing, Hooker picked him up at around 10:00 a.m. Randle and Moore already were in the SUV. Randle was there to let them "know who did it." He and Moore "were going to handle it" and "take care of it." Hooker drove them to North Collington Avenue. Adams got out of the SUV to speak to Venable. He denied making any threats. He got back in the SUV. Randle identified Venable as one of the assailants at Kess's apartment the night before. They drove away, let Randle "out of the car" "[o]nce it got back to North Avenue[,]" and then parked the car at the corner of North Avenue and Castle Street. Moore contacted Roach and it was Roach who shot Venable.

[4] Adams plead guilty to conspiracy to commit murder and conspiracy to distribute controlled dangerous substances ("CDS") in exchange for a 10- to 20-year sentence. At the time he testified, his sentencing was pending.

Hooker likewise testified pursuant to a plea agreement with the State.[5] She explained that Moore and his associates were drug dealers in the area of North Collington and North Avenues. Venable and his associates were rival drug dealers. On April 28, 2011, she contacted Randle and picked her up in a black SUV she had rented. She drove Randle, Moore, and Adams to the 1900 block of North Collington Avenue. After they left there, she dropped Randle off at the hospital and dropped Adams off on Preston Street. Moore called Roach, and she and Moore went to Gary Williams's house to meet him. Tavon Price was there. Moore said he "wanted something done about" Kess's stabbing.

Hooker testified that Roach and Price were responsible for shooting Venable, McNeil, and Vaughn on April 28, 2011 (the "April 28 Shooting"); that she, Moore, Adams, Chisolm, Roach, Price, Emanuel Deminds, and Taylor Flemming agreed to retaliate against Venable for killing Kess; and that the April 28 Shooting was the first of several retaliatory acts that Moore and she orchestrated against Venable, his family members, and their associates.

Tavon Baker was one of Venable's associates. On June 7, 2011, he was shot while standing in the 2000 block of East Lafayette Street, in front of Hasan Rahman's house (the "June 7 Shooting"). Rahman testified that he saw Moore, who he had known

[5] Hooker anticipated that she would be sentenced to 15 years' imprisonment for conspiracy to commit murder and conspiracy to distribute cocaine, in lieu of a sentence of 16 years to life.

"practically all [his] life," walking east on East Lafayette Street in Baker's direction. Moore's hands were behind his back. When Moore raised his left arm, Rahman saw a gun in his hand. Rahman yelled, "He got a gun" and Baker ran up a side alley. Moore followed Baker and fired the gun several times. Baker ran into the back yard of a row house and through an open basement door. He hid inside. He realized he had been shot in his left foot. Police arrived moments later. They transported Baker by ambulance to Hopkins. His gunshot wound was treated and he was released three hours later.

Allen was shot on the morning of September 16, 2011 (the "September 16 Shooting"). He, Edwin Willis, and their friend Robert Foster were walking southbound in the 2100 block of North Collington Avenue, toward Allen's father's house. As they approached the intersection of North Collington and Cliftwood Avenues, two men rounded the corner with guns in their hands. The men opened fire. Allen turned and ran north on North Collington, not stopping until he reached a gas station three blocks away. Officer Robert Crane of the BCPD happened to be there, and Allen reported the shooting to him. Allen was treated for a gunshot wound to his left buttock. At trial, he identified Roach as one of the shooters.

Hooker testified that on September 16, 2011, she rented a silver Lexis and drove Roach and Chisolm to the corner of Cliftwood and Collington Avenues. The two men got out of the Lexis and shot Allen. Later, Moore gave Roach and Chisolm cocaine in exchange for their carrying out the September 16 Shooting.

Willis was not wounded in the September 16 Shooting, but was shot three days later (the "September 19 Shooting"). That day, he and Rahman were standing outside Rahman's house, in the 2000 block of East Lafayette Street, "talking to some girls," including Rahman's niece. Rahman noticed a black minivan driving west on East Lafayette Street. It stopped in the 2100 block of that street. Willis also noticed "a suspicious van." Two men got out and started shooting at Willis. He tried to run away but was shot. He did not see who shot him. Area residents came outside to assist and called an ambulance. Willis was shot in his neck, left shoulder, right buttock, and the left side of his face. The bullet fractured bones in his face. He was taken to Hopkins for treatment. In a photo array, Rahman identified Chisolm and Moore as the shooters.

At trial, Rahman testified that Hooker was the driver of the minivan.[6] Hooker corroborated Rahman's testimony, admitting that she rented the minivan and was driving it on September 19, 2011. She identified Chisolm and Roach as the shooters, and further testified that Moore gave them cocaine for committing the shooting.

In November of 2011, Moore was incarcerated after being convicted of an unrelated drug charge. Notwithstanding Moore's incarceration, he and Hooker continued to plan additional retaliatory acts, over the telephone. These telephone calls were recorded and 44 of them were played at trial.

[6] Rahman testified that he recently had been arrested on a drug charge and for violating his parole. He entered into a plea agreement with the State, agreeing to testify against Roach, Chisolm, and Moore in exchange for the State dropping the parole violation charge, which carried a possible sentence of 10 years' imprisonment.

In December of 2011, Adams was incarcerated on an unrelated handgun charge. He was attacked and severely stabbed in prison. Hooker and Moore believed the stabbing was in retaliation for their attacks on Venable, his family members, and their associates over the previous months. Moore called Hooker and told her "to go up" to "North and Collington" and "shoot anybody in the block."

On January 1, 2012, Chisolm was arrested in connection with the September 16 and 19 Shootings.

On January 7, 2012, Officer Nathaniel McCullough of the BCPD responded to a call about an incident at 1935 North Collington Avenue (the "January 7 Shooting"). He found Vaughn in the living room of the house, holding his abdomen. His clothes were bloodstained. Officer McCullough called a medic. Vaughn was transported to Hopkins, where he underwent surgery to remove a bullet from his abdomen. Vaughn testified that he could not remember any of the details of the shooting or the shooter's identity.

Deminds also testified pursuant to a plea agreement with the State.[7] He stated that Hooker and Moore paid him to shoot Vaughn on January 7, 2012, and that Chisolm was supposed to participate in the shooting. Hooker tried to reach Chisolm by phone, without success. (Apparently, Hooker did not realize that Chisolm was incarcerated.) Deminds testified that Roach told him that he (Roach) had shot Venable, McNeil, and Vaughn on April 28, 2011.

[7] Deminds plead guilty to conspiracy to commit murder and conspiracy to distribute CDS. At the time of his testimony, his sentencing was pending, and he anticipated that he would receive a 15-year sentence.

We shall include additional facts as pertinent to the issues.

DISCUSSION

Questions Presented By Both Roach And Chisolm

I.

(a)

All eight co-conspirators, including Roach, Chisolm, and Moore, were charged in one indictment. Roach, Chisolm, and Moore moved to sever their trials from one another and from the other co-conspirators, and to be tried separately on each underlying offense. The State opposed the severance motions. On September 30, 2013, the court held a hearing on those motions.

Roach argued that, because the State was alleging that he was involved in the April 28 Shooting, the September 16 Shooting, and the September 19 Shooting, it would be unduly prejudicial to him for the State to present evidence at his trial about the June 7 Shooting and the January 7 Shooting. He maintained that severance would make the trial "much more palatable, much more construed to bring about a fair and just trial," and he "would have a better chance at due process if [the court] split" the trials.

Chisolm argued that he was not involved in the conspiracy at least until the September 16 Shooting, and therefore any evidence of acts perpetrated before then would be irrelevant and highly prejudicial to him. He maintained that the incidents in which he had participated were separate from the overarching conspiracy by Moore and Hooker. Moreover, the evidence that he did not respond to Hooker's phone calls to participate in

the January 7 Shooting established that he had abandoned the conspiracy after the September 19 Shooting; and any evidence of planning or carrying out shootings after that date would be highly prejudicial.

The State countered that the nature of the charges against the eight co-conspirators and the context for the shootings militated against severance. The crimes stemmed from a feud between two rival drug gangs, one lead by Venable and the other lead by Moore. Roach was related to Moore, Chisolm was Moore's friend, and they were both part of his organization. They participated in the overarching conspiracy to kill Venable, his family members, and their associates in retaliation for Kess's murder. And under Maryland conspiracy law, evidence of any overt act in furtherance of a conspiracy is admissible at the trial of any co-conspirator, regardless of whether that co-conspirator was or was not involved in the specific act. Finally, judicial economy dictated that all the charges be tried together.

The court denied the motions to sever. It explained:

> [T]he State has set forth an overarching conspiracy and this Court does not see how dividing it up in multiple trials would serve one of the goals of judicial economy. As the cases that have been cited indicate, actors in a conspiracy don't have to take part in each act as one as there is a conspiracy and that is the nexus to the acts. The State has proffered that the shootings and killings were -- excuse me -- and even the stabbing -- were all related to one common goal and that was revenge. Therefore, this Court is going to deny the motion to sever. These cases will be tried together.

On appeal, Roach contends the trial court abused its discretion by denying his motion to sever. He maintains that, because he was only alleged to have participated in three shootings, evidence about the other two shootings would not be mutually

admissible at a separate trial because it was not relevant. Moreover, even if the evidence was relevant, it was inadmissible under Rule 5-403 because any probative value it might have was substantially outweighed by its prejudicial effect.

Chisolm contends the court should have granted his motion to sever because "[t]he overwhelming evidence the State presented against Moore through more than 20 days of trial, plus the State's countless exhibits, all combined with Moore's absence to produce an atmosphere that unduly prejudiced [his] case before the jury." He also purports to "incorporate" Roach's arguments about severance.[8]

The State counters that the evidence was "mutually admissible against Roach and Chisolm as overt acts in furtherance of the conspiracy with which each of the [a]ppellants were charged, regardless of which co-conspirator actively participated in the shooting" and that Roach and Chisolm's arguments are "largely based upon a misunderstanding of conspiracy law."

Under Rule 4-253(a), a trial court may order a joint trial of two or more defendants "if they are alleged to have participated in the same act or transaction or in the same

[8] Chisolm argues that the January 7 Shooting was carried out in retaliation for Adams's prison stabbing and therefore was part of a conspiracy completely separate from the overarching conspiracy to murder Venable, his family members, and their associates. He maintains that because the January 7 Shooting was not part of the overarching conspiracy with which he was charged evidence of that shooting was not mutually admissible under the common scheme exception in Rule 5-404(b). This argument is without merit because he points to "no proof of multiple conspiracies[.]" *Bolden v. State*, 44 Md. App. 643, 653 (1980). Indeed, the evidence, as we have recounted it, showed that Moore and Hooker believed that Adams was stabbed by someone with the Venable drug organization in retaliation for the continuing retaliatory acts Moore's drug organization was perpetrating, all of which were part of the overarching conspiracy.

series of acts[.]" The decision to try multiple defendants and offenses charged in one trial is within the sound discretion of the trial court. *Wilson v. State*, 148 Md. App. 601, 647 (2002), *cert. denied*, 374 Md. 82–84 (2003). "The exercise of that discretion requires balancing the prejudice caused by the joinder against the considerations of economy and efficiency in prejudicial administration." *Id.* (internal quotation marks and citations omitted). Concern for prejudice is diminished when the evidence would be mutually admissible against each defendant at separate trials. *Osburn v. State*, 301 Md. 250, 254 (1984) (citing *Graves v. State*, 298 Md. 542 (1984)). We review a trial court's decision to deny a motion to sever for abuse of discretion. *McKnight v. State*, 280 Md. 604, 614 (1977).

Evidence is "mutually admissible" when it falls within an exception to the prohibition against "other crimes" evidence under Rule 5-404(b). *Solomon v. State*, 101 Md. App. 331, 354–56 (1994). These exceptions include "proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." Md. Rule 5-404(b).

Conspiracy clearly comes within the "common scheme or plan" exception to Rule 5-404(b). *See Manuel v. State*, 85 Md. App. 1, 15 (1990) ("Conspiracy involves a common scheme or design that constitutes a single, continuing conspiracy evidenced by a series of acts in furtherance of the criminal scheme."). As noted, "'there is no requirement that every defendant must participate in every transaction in order to find a single conspiracy.'" *Bolden v. State*, 44 Md. App. 643, 652 (1980) (quoting *United*

States v. Perez, 489 F.2d 51, 62 (5th Cir. 1973), *cert. denied*, 417 U.S. 945 (1974)). For evidence to be mutually admissible against co-conspirators, the State need only establish that the appellants "were part of a conspiracy," that acts were carried out over "the course of the conspiracy," and that each act was done "in furtherance of the conspiracy." *Shelton v. State*, 207 Md. App. 363, 376 (2012); *see also* Md. Rule 5-803(a)(5).

As we shall discuss, the State's evidence was sufficient to establish that Roach, Chisolm, Moore, and others entered into a single conspiracy to murder Venable, his family members, and their associates from April 2011 through April 2012. The grand jury returned a single indictment that included the conspiracy charge based on "the same series of acts or transactions constituting an offense or offenses," *i.e.*, the conspiracy itself.[9] *See also Ogonowski v. State*, 87 Md. App. 173, 187 (1991) ("[C]harges includ[ing] continuing conspiracies [are] a significant factor favoring a joint trial."). Each of those acts occurred over the course of the conspiracy and each act was perpetrated against either Venable, his family members, or their associates. The trial court did not abuse its discretion in concluding that the evidence of each act was mutually admissible as to each defendant to establish one overarching conspiracy.

Because the otherwise inadmissible bad acts propensity evidence was mutually admissible under the "common scheme" exception, the burden shifted to Roach and

[9] Rule 4-203(b) was amended effective January 1, 2016 to provide that "[r]egardless of whether two or more defendants are alleged to have participated in the same act or transaction or in the same series of acts or transactions, a charging document may not contain charges against more than one defendant." The amendment does not apply to this case.

Chisolm to show that it was unduly prejudicial. *See Wilson*, 148 Md. App. at 647 ("Where the crimes arise out of a single, indivisible series of events, a common scheme or other such circumstances, . . . no presumption is applied, and the defendant shoulders the burden of demonstrating prejudice."); *Holt v. State*, 129 Md. App. 194, 209 (1999) ("The burden of showing prejudice where defendants act in concert, therefore, is on the party alleging the same."). Their only argument in this respect is that the evidence against Moore was so voluminous that the jury would not be able to parse it out from the evidence linking them to the conspiracy. This argument is contrary to standing conspiracy law.

> "[A] conspirator is, in effect, the agent of each of the other co-conspirators during the life of the conspiracy. As such, any statement made or act done by him in furtherance of the general plan and during the life of the conspiracy is admissible against his associates and such declarations may be testified to by third parties as an exception to the hearsay rule."

Manuel, 85 Md. App. at 16 (quoting *Terrell v. State*, 34 Md. App. 418, 425 (1977)).

In *Osburn*, *supra*, the defendant was a partner in a law firm. He and another partner conspired to violate Maryland tax laws by not reporting as income cash payments they received. Both partners were convicted in a joint trial. On appeal, the defendant argued that the trial court erred in denying his motion to sever because "the majority of the evidence to support the charges was actually directed at [his partner] in that nearly all of the unreported cash fees were generated by [him] and not [the defendant.]" 301 Md. at 254. The Court of Appeals rejected this argument, holding that it was irrelevant who collected the cash fees. "[W]hat is relevant [is] the evidence that demonstrated that the

cash income did not find its way to the total income being reported by either" the defendant or his partner–co-defendant. *Id.* at 255. The Court found that the evidence was mutually admissible and concluded the "denial of the motion for severance was not an abuse of discretion." *Id.*

In a similar vein, it is immaterial that there was so much more evidence of Moore's actions in furtherance of the conspiracy than of Roach's and Chisolm's actions. All three were involved in the same conspiracy, and took overt actions over the course of and in furtherance of the conspiracy, evidence of which was mutually admissible. When the court originally ruled on the severance motions, and later when the motions were renewed, there was nothing to suggest that a jury would not be able to distinguish between acts ascribed to Moore and acts ascribed to Roach and Chisolm. Indeed, it was likely that a jury would take the greater volume of evidence against Moore to mean that he was the mastermind of the conspiracy, which he was.

The court properly balanced the danger of unfair prejudice against the benefits of handling a single trial. *See Cortez v. State*, 220 Md. App. 688, 697 (2014) (discussing the benefits of conducting a single unitary trial). Accordingly, the trial court did not abuse its discretion in denying the motions to sever.

(b)

Before trial, the State moved to admit evidence of a plot by Moore to murder one of the prosecutors in the case. The State proffered that in December of 2012, while Moore was incarcerated awaiting trial, he told fellow inmate Terry Mackall that he was

planning to murder the prosecutor, in an effort to avoid trial. Mackall wrote a letter to the prosecutors informing them about Moore's threats against the prosecutor. Further investigation substantiated the threats.

The State sought to introduce evidence of Moore's plot to kill the prosecutor under Rule 5-404(b), to show his consciousness of guilt. Roach and Chisolm objected, arguing that the threats were made after the conspiracy they were charged with had ended, and that the evidence was highly prejudicial. The court granted the State's motion to introduce the evidence of threats, but with "a limiting instruction that those threats or the testimony regarding the threats against the prosecutor are only offered against Mr. Moore."

At trial, Mackall testified about Moore's plan to have the prosecutor killed. The court instructed the jury:

> You have heard evidence in this case that Mr. Robert Moore tried to -- tried or attempted to have [the prosecutor] . . . harmed. You may consider this evidence as consciousness of guilt, evidence against Mr. Robert Moore, but not for any -- not for any other purpose.
>
> *You must not consider this evidence in any way for the guilt or innocence of either Mr. Quincy Chisholm or Mr. Anthony Roach.*

(Emphasis added.) Neither counsel for Roach nor counsel for Chisolm objected to the limiting instruction.

On appeal, Roach and Chisolm contend the trial court abused its discretion by admitting the evidence of Moore's plot to kill the prosecutor. Roach argues that the evidence was inadmissible other bad acts evidence that was not in furtherance of the overarching conspiracy with which he was charged, was irrelevant to his guilt or

innocence, and was highly prejudicial. Chisolm argues that the trial court's limiting instruction did not "serve to remove this prejudice."

The State counters that the threats were properly admitted for the limited purpose of showing Moore's consciousness of guilt and that the jurors are presumed to have followed the court's limiting instruction. *Spain v. State*, 386 Md. 145, 160 (2005). It further argues that the appellants "have failed to show that they were unfairly prejudiced by admission of this evidence when balanced against considerations of efficiency in judicial administration."

As we have explained, the decision to admit other crimes or bad acts evidence is within the trial court's discretion; and we review the decision for abuse of discretion. *Cousar v. State*, 198 Md. App. 486, 518 (2011).

In *Copeland v. State*, 196 Md. App. 309 (2010), the defendant was charged with kidnapping, second-degree assault, false imprisonment, and carrying a dangerous weapon. Before trial, he went to the victim's house and threatened to kill her and her family if she testified. At trial, the victim testified about the crimes the defendant committed and his threats against her and her family. The defendant was convicted of second-degree assault. On appeal, he argued that evidence that he had threatened the victim and her family was inadmissible and "unduly prejudicial 'other crimes'" evidence. *Id.* at 316. We disagreed, noting that "consciousness of guilt is an 'other purpose' that will overcome the presumption of exclusion that is attached to 'other crimes' evidence," under Rule 5-404(b). *Id.* (citations omitted).

In the case at bar, the evidence at issue was admissible to show Moore's consciousness of guilt. The trial court recognized that it was not mutually admissible against Roach and Chisolm, under any of the Rule 5-404(b) exceptions, and gave a limiting instruction.

"It is basic that an accused is entitled to a fair trial although not to a perfect one." *Erman v. State*, 49 Md. App. 605, 615 (1981) (citing *Burkett v. State*, 21 Md. App. 438, 443 (1974)). We presume that a limiting or curative instruction, like the one given in this case, will "overcome any prejudice to a co-defendant." *Id.* *See also Spain*, 386 Md. at 160 ("Maryland courts long have subscribed to the presumption that juries are able to follow the instructions given to them by the trial judge, particularly where the record reveals no overt act on the jury's part to the contrary." (citations omitted.)); *Brooks v. State*, 68 Md. App. 604, 613 (1986) ("[W]hen curative instructions are given, it is presumed that the jury can and will follow them.").

Here, the court's limiting instruction was adequate to overcome any potential prejudice to Roach or Chisolm. The trial court admonished the jury that it was to consider the threats with respect to Moore and not with respect to the guilt or innocence of Roach or Chisolm. The need for judicial economy and the benefit of conducting a single trial combined with the clarity of the curative instruction outweighed any minimally prejudicial impact of Mackall's testimony on Roach and Chisolm.

II.

As noted, in November of 2011, Moore was incarcerated on an unrelated drug charge. Over Roach and Chisolm's objection, the State moved into evidence and played for the jury 44 recorded jailhouse telephone conversations between Moore and others, primarily Hooker. The calls between Moore and Hooker were admitted to show that the conspiracy continued after Moore's incarceration.

(a)

Roach and Chisolm contend the trial court's decision to admit the recorded jailhouse calls violated their confrontation rights under the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. They argue that the calls "explicitly and implicitly accuse[d]" them of participating in the conspiracy and that because Moore was a co-defendant who did not testify they could not cross-examine him about the calls. Citing *McClurkin v. State*, 222 Md. App. 461, 478, *cert. denied*, 443 Md. 735–36, *cert. denied*, ___ U.S. ___, 136 S.Ct. 564 (2015), the State responds that there is no confrontation issue triggered because the "recorded phone calls made by Moore while he was incarcerated . . . are not testimonial."

> The Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, *see Brye v. State*, 410 Md. 623, 634 (2009), provides, in pertinent part, that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. This confrontation right "seeks to protect a defendant from the complexities of the legal system and his or her lack of understanding of the law." *Brye*, 410 Md. at 634.

Langley v. State, 421 Md. 560, 567 (2011) (parallel citations omitted).[10]

"[T]he right of confrontation is implicated only when two conditions are met: the challenged out-of-court statement or evidence must be presented for its truth and the challenged out-of-court statement or evidence must be 'testimonial.'" *Cooper v. State*, 434 Md. 209, 233 (2013) (citing *Derr v. State*, 434 Md. 88, 106–07 (2013) (citing *Crawford v. Washington*, 541 U.S. 36, 59–60 n.9 (2004))); *see also State v. Payne*, 440 Md. 680, 715 (2014) ("The Confrontation Clause analysis is triggered when hearsay, sought to be introduced, is 'testimonial' in nature.").

A statement is testimonial when "'a reasonable person in the declarant's position would have expected his statements to be used at trial–that is, [when] the declarant would have expected or intended to "bear witness" against another in a later proceeding.'" *McClurkin*, 222 Md. App. at 476 (quoting *United States v. Jones*, 716 F.3d 851, 856 (4th Cir. 2013), *cert. denied*, __ U.S. __, 134 S.Ct. 496 (2013)) (alteration in *McClurkin*). By contrast, a statement that is part of a "'casual conversation between private acquaintances' and . . . '[is] not made for the primary purpose of creating a substitute for trial testimony'" is not testimonial. *Payne*, 440 Md. at 716 (quoting *Cox v. State*, 421 Md. 630, 650–51 (2011)). A statement that is not testimonial does not trigger application

[10] Article 21 of the Maryland Declaration of Rights likewise provides that "in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him . . . [and] to examine the witnesses for and against him on oath[.]"

of the Confrontation Clause and need only be admissible under the rules of evidence. *Cox*, 421 Md. at 643; *Crawford*, 541 U.S. at 68.

In *McClurkin*, the defendant, Dijon McClurkin, and his co-defendant, Tavon Jackson, were tried jointly for attempted first-degree murder. They both were incarcerated at the Baltimore City Detention Center ("BCDC") while awaiting trial. McClurkin placed a telephone call from the BCDC to an unidentified person "in an effort to induce the victim to sign a 'paper'" stating that he and Jackson were innocent. 222 Md. App. at 470. Jackson likewise placed a call from the BCDC to an unidentified woman, telling her "he needed someone to pressure the victim and stop him from telling people that he and McClurkin were involved[.]" *Id.* The conversations were recorded "[i]n accordance with correctional policy and procedures" and "before any recordation began, an auditory notice was given to anyone on the line that the call would be recorded." *Id.* The State introduced the recordings at trial, over objection.

On appeal, McClurkin argued that the recorded jailhouse telephone calls were testimonial, triggering the protections of the Confrontation Clause. Rejecting that argument, we explained:

> In their respective calls, Jackson and McClurkin instructed the recipients of the calls that the victim needed to be pressured into stating that neither one of them was involved in the shooting. As the primary purpose of those calls was clearly to induce the victim to change his account of who was involved in the shooting, it hardly needs stating that no reasonable person would have made such calls with a purpose, "primary" or otherwise, that they be used as evidence at his or her future trial given their inculpatory nature. . . . Indeed, . . . the calls at issue here were "casual conversations between private acquaintances," a conclusion which other appellate courts, facing the same issue under similar sets of circumstances,

> have drawn. *Jones*, 716 F.3d at 856 (characterizing recorded jailhouse telephone calls as "casual conversations"); *United Sates v. Castro-Davis*, 612 F.3d 53 (1st Cir. 2010) (and cases cited therein) (holding that a jailhouse telephone call was not testimonial hearsay), *cert. denied*, [562 U.S. 1162] (2011).

Id. at 477–78.

McClurkin controls the Confrontation Clause issue in this case. The primary purpose of Moore's jailhouse calls to Hooker was to continue to carry out the conspiracy to murder Venable, his family members, and their associates. In the calls, Moore and Hooker discussed hiring Deminds to shoot Vaughn (the January 7 Shooting). The calls revealed plans to commit additional overt acts in furtherance of the conspiracy and plans to cover up the conspiracy. To conclude that a participant in these jailhouse calls reasonably would expect to "bear witness against the person their statements may ultimately incriminate . . . defies logic and its more pedestrian partner, common sense[.]" *Id.* at 478 (citations omitted). The jailhouse calls in the instant case were not testimonial and did not trigger any confrontation rights.[11]

(b)

Chisolm argues in addition that the court erred in admitting four jailhouse calls that were made after April 2012, *i.e.*, after the conspiracy with which he was charged had ended, because they were unduly prejudicial. The State responds that "to the extent calls

[11] Pointing to *State v. Norton*, 443 Md. 517 (2015), Roach argues that *McClurkin* is "not the final word on whether these audio recording are testimonial." In *Norton*, the Confrontation Clause analysis concerned a report written by a DNA analyst. It did not concern recorded jailhouse telephone calls. *McClurkin* is the controlling authority here.

were admitted after the conspiracy ended, the interest in judicial economy outweighed any prejudice to Chisolm." We agree with the State.

Of the 44 recorded jailhouse calls admitted into evidence at trial, four were made after April of 2012. The first was a call between Moore and his mother that was introduced to establish Moore's identity on the calls; it did not contain any statements regarding Roach or Chisolm. The second call was used for the same purpose and also to show that Roach and Chisolm were in a car together at some point. No specifics were provided. The third and fourth calls were between Moore and his mother and father, respectively. In both of them, the speakers discussed in general terms Venable's associates and their involvement in the ongoing dispute. These calls were again used to show Moore's identity and to establish the ongoing nature of the dispute between the rival organizations. The calls were cumulative of evidence already introduced and were not prejudicial to Chisolm.[12]

III.

Over the course of the proceedings, Moore, represented by counsel but acting on his own accord, loudly protested that the court did not have jurisdiction over him,

[12] Chisolm also argues if the jailhouse calls were admissible they were accomplice testimony, and therefore the court erred in denying his request to instruct the jury that he could not "be convicted solely on the uncorroborated testimony" of Moore, in the form of the calls. The State counters that the jailhouse calls were substantive evidence, not mere accomplice testimony; and that the instruction Chisolm requested only is proper when a witness gives live testimony. We agree with the State that the instruction is limited to live testimony, and does not apply to extrajudicial statements. *See* MPJI-Cr 3:11 Testimony of Accomplice.

interrupted the court repeatedly, objecting to "all silent contracts," and physically resisted being brought into the courtroom. During jury selection, while the potential jurors were at lunch, Moore became combative. The court ordered him escorted from the courtroom. It then stated:

> The record should reflect that Mr. Moore unlike other times where he just, his body just went limp and [Correctional Officers] had to, they had to carry him to the chair, he physically resisted and refused to come up and I had to instruct the Sheriffs, I'm sorry, the Correctional Officers to put his, put handcuffs back on him and he kept pushing the chair away as if he was not going to remain seated and the Court then asked him would he conduct himself in a proper manner and he simply said, no and this is the first outburst of him being physical and so once he responded he was not going to conduct himself appropriately, the Court had the -- in fact, the Sheriffs had to jump in to assist the Correctional Officers in trying to restrain and move Mr. Moore. So, Mr. Moore is no longer with us. The Court will consider having him brought back up in after today's session to see if he's had a change of heart. If he doesn't, we will continue without him. At this point, the Court finds his conduct to be extremely disruptive and this is the first episode where he's become physical, but the Court is not going to put Correctional Officers, Sheriffs, the lawyers, the Co-Defendants in harm's way and he will be tried to the extent necessary without him. This Court will have order.

Two days later, Moore was brought back to the courtroom but continued to shout objections to "all silent contracts." The court again had him removed, stating:

> The court is going to adopt the matters that took place before the calling of the case this morning as part of the record of this particular case. In short, Mr. Moore was brought here. Not only did we have Correctional Officers, we had at least one officer from the Special Operations Unit because Mr. Robert Moore is escalating in his defiance of this court and these proceedings.
>
> And so we had an operational officer here, we had director and deputy director here from the Transportation Unit, . . . because Mr. Robert Moore is in such a volatile state. In this court's view he [is] escalating. He went from, as I said the other day, a peaceful type protest, although it was

> disruptive to a certain extent, it was manageable, now it is not manageable. So he had to be carried out of the courtroom.

Moore subsequently was excluded from the courtroom for safety reasons. Each time Moore was removed, Roach and Chisolm renewed their motions to sever. Later, counsel for Roach moved for a mistrial based on Moore's absence from the courtroom. The court denied each of these motions.

Roach–in a single sentence in his brief–now contends the trial court should have granted his motion for mistrial "because of the prejudice of Mr. Moore's absence." Chisolm contends the trial court erred by denying his renewed severance motion because the evidence at trial was "aimed mainly at securing conviction against Moore as the lead defendant" and that Moore's absence was highly prejudicial.

With respect to Roach, the State responds that the issue is not adequately briefed and we should decline to address it. *See Honeycutt v. Honeycutt*, 150 Md. App. 604, 618 (2003). On the merits, the State argues that neither Roach nor Chisolm made a showing that Moore's defense was inhibited by his absence and, if it was, that his absence had any negative effect on them.

The denial of a motion for a mistrial, like the denial of a motion to sever, is reviewed "'under the abuse of discretion standard.'" *Johnson v. State*, 423 Md. 137, 151 (2011) (quoting *Dillard v. State*, 415 Md. 445, 454 (2010)). "That is, we look to whether the trial judge's exercise of discretion was 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Simmons v. State*, 436 Md. 202, 212 (2013) (quoting *Stabb v. State*, 423 Md. 454, 465 (2011)). In addition, "'[t]he decision as

to the method and extent of courtroom security is left to the sound discretion of the trial judge.'" *Wagner v. State*, 213 Md. App. 419, 476 (2013) (quoting *Miles v. State*, 365 Md. 488, 570 (2001), *cert. denied*, 534 U.S. 1163 (2002)). "A reviewing court does not engage in speculating whether less oppressive security measures were available to the trial court, provided that the measures employed were reasonable." *Woodlock v. State*, 99 Md. App. 728, 734 (1994).

As a preliminary matter, we agree that Roach has not properly presented this issue on appeal. "[I]f a point germane to the appeal is not adequately raised in a party's brief, the court may, and ordinarily should, decline to address it." *Abbott v. State*, 190 Md. App. 595, 631–32 n.14 (2010) (internal quotation marks and citations omitted); *see also Y.Y. v. State*, 205 Md. App. 724, 736 n.9 (2012) (when an appellant's argument is unclear, this Court "will not consider the argument . . . further"); Md. Rule 8-504(a)(5)–(6). In section IV of his brief, entitled "The Circuit Court Should Have Granted Mr. Roach's Motions for Mistrial," Roach states, in subsection (C)(1): "Mr. Roach moved for a mistrial, because of the prejudice of Mr. Moore's absence. The Circuit Court denied the motion." (Record citations omitted.) In subsection (B)(2), he cites to cases that stand for the proposition that a trial court is required to declare a mistrial when a defendant is "deprived of a fair trial." (Citing *Kosh v. State*, 382 Md. 218 (1989)). Roach makes no argument as to why the trial court abused its discretion by denying his motion for mistrial based on Moore's absence. "'[W]here a party initially raise[s] an issue but then fail[s] to provide supporting argument, this Court has declined

to consider the merits of the question presented but not argued.'" *Honeycutt*, 150 Md. App. at 618 (quoting *Fed. Land Bank of Balt., Inc. v. Esham*, 43 Md. App. 446, 457–58 (1979)). Thus, Roach has not adequately presented this issue for review.

In any event, Roach's argument, like Chisolm's, is meritless. The court reasonably responded to Moore's threats of physical violence in the courtroom by having him removed and proceeding in his absence. It took substantial steps to ensure that Moore's absence would not affect Roach and Chisolm. During jury selection, the court asked all potential jurors whether they could decide the case fairly in Moore's absence. Those who answered in the negative were stricken. The record reflects that although Moore was absent from the courtroom during the trial his lawyer was present and actively participated at all stages of the trial. Finally, in instructing the jury, the court stated: "You are not to consider Mr. Robert Moore's lack of presence at this trial. You are to evaluate the evidence, give it the weight you believe it deserves, and reach a verdict in this case as though Mr. Robert Moore had been present throughout the entire trial." In these circumstances, we cannot conclude that the court's rulings were "manifestly unreasonable" and that it abused its discretion in denying the renewed motion to sever, proceeding with the trial of Moore, Roach, and Chisolm in Moore's absence, and denying the mistrial motions made based on Moore's absence.

IV.

At the outset of trial, the court imposed a rule on witnesses. Adams testified for the State on October 18, 2013. Hooker, who as noted is Adams's sister, testified on

October 29, 30, and 31, 2013. Each time Hooker left the stand before her testimony concluded, the court instructed her that she was not permitted to discuss her testimony with anyone else.

On October 31, 2013, before Hooker's testimony was finished, the court recessed for lunch. Unbeknownst to the defense or the court, the prosecutors had obtained a writ for Adams and had arranged for Hooker and Adams to go to lunch (accompanied by the prosecutors and correctional officers).

At the beginning of the lunch recess, counsel for Chisolm noticed Adams outside the courtroom and wondered why he was there. He learned about the lunch and, when the trial resumed, questioned Hooker about it on cross-examination. At a bench conference, the prosecutors disclosed that they had arranged for Hooker and Adams to have lunch because they both were facing long prison terms and would not see each other for a long time. They thought it was "a nice thing to do." The court allowed defense counsel to further explore the issue with Hooker on cross-examination. When Hooker completed her testimony, counsel for Chisolm moved for a mistrial, which counsel for Moore and Roach joined.

The court dismissed the jury for the day and addressed the mistrial motions. Chisolm's lawyer argued that a mistrial was proper because the lunch was a benefit provided to Hooker and Adams that the State did not disclose to the defense, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Roach's lawyer argued that she had been denied the opportunity to question Adams about the lunch because his testimony already

concluded two weeks prior and that the lunch violated the court's sequestration order. She asked for Hooker's testimony to be stricken in its entirety.

The prosecutors conceded that they had arranged for Hooker and Adams to have lunch and had submitted a writ for the court to sign in order to have Adams transferred to the courthouse. They argued that defense counsel had had an opportunity to cross-examine Hooker about the lunch and that a mistrial was not appropriate relief under the circumstances. The court took the matter under advisement.

The next day, outside the presence of the jury, the court questioned Adams and Hooker about the lunch. They both said that they had not known about the lunch in advance, that the lunch lasted for approximately 20 minutes, that they did not discuss the case at all, and that they were supervised by correctional officers throughout the lunch. The court found that the lunch did not violate the sequestration order because Hooker and Adams did not discuss the case and that the prosecutors' conduct amounted to a discovery violation, not a *Brady* violation. The court permitted Adams and Hooker to be recalled for the limited purpose of questioning them about the lunch.[13]

(a)

Roach renews his argument that the lunch was a violation of the rule on witnesses and constitutes reversible error. The State counters that both Hooker and Adams testified

[13] The court held the prosecutors in criminal contempt and imposed a $100 fine for their actions. They appealed, and, in an unreported opinion, this Court reversed the contempt convictions.

that they did not discuss the case during the lunch and there is no evidence the lunch violated the rule on witnesses.

Rule 5-615(a) states in pertinent part:

> [U]pon the request of a party made before testimony begins, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. . . . The court may order the exclusion of a witness on its own initiative or upon the request of a party at any time. The court may continue the exclusion of a witness following the testimony of that witness if a party represents that the witness is likely to be recalled to give further testimony.

"The general purpose of the sequestration of witnesses has been to prevent . . . [witnesses] from being taught or prompted by each other's testimony." *Tharp v. State*, 362 Md. 77, 95 (2000) (alteration in original) (internal quotation marks and citations omitted); *Jones v. State*, 11 Md. App. 468, 480–81 (1971) ("The purpose of the rule is to prevent prejudice, and its essential purpose is to prevent one prospective witness from being taught by hearing another other witness's testimony[.]"). Even when the rule is violated, "it is within the sound discretion of the trial judge to determine whether to admit the testimony of the witness[.]" *Id.* at 481.

There is nothing in the record that would support a finding that the lunch was a violation of the rule on witnesses by the prosecutors or their witnesses. Both Adams and Hooker testified that the lunch lasted 20 minutes and that they did not discuss the case. Indeed, correctional officers were present and could have testified had that been the case. And, even if a violation had occurred (and again, there is no evidence that it did), the court acted prudently by providing defense counsel the opportunity to further cross-examine Hooker and Adams to their satisfaction.

(b)

Chisolm argues that the State's failure to disclose the lunch was a *Brady* violation, and the court erred in ruling otherwise. The State counters that *Brady* does not apply because Chisolm learned about the lunch and was given the opportunity to cross-examine Hooker and Adams about it.

> The Supreme Court made clear in *Brady v. Maryland,* 373 U.S. 83, (1963), that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. In order to establish a *Brady* violation, Petitioner must establish "(1) that the prosecutor suppressed or withheld evidence that is (2) favorable to the defense–either because it is exculpatory, provides a basis for mitigation of sentence, or because it provides grounds for impeaching a witness–and (3) that the suppressed evidence is material." *Ware v. State*, 348 Md. 19, 38 (1997). Evidence that is obviously favorable must be disclosed even absent a specific request by the defendant.

Wilson v. State, 363 Md. 333, 345–46 (2001) (parallel citations omitted). "The failure to disclose evidence relating to any understanding or agreement with a key witness as to a future prosecution, in particular, violates due process, because such evidence is relevant to [a] witness's credibility." *Conyers v. State*, 367 Md. 571, 597 (2002).

Although the prosecutors did not spontaneously disclose that they had arranged for Hooker and Adams to have lunch together, when counsel for Chisolm learned about the lunch and notified the court, they readily conceded that they had arranged it. The lunch only was material to show that Hooker and Adams had received an additional benefit from the State in exchange for their cooperation. The court gave defense counsel an opportunity to question Hooker and Adams about the lunch and any perceived benefit

they received from the State, thus eliminating the effect of any potential prejudice. Under the circumstances, the court properly addressed the issue and found no *Brady* violation.

V.

(a)

Roach and Chisolm both contend the evidence was legally insufficient to support their conspiracy convictions. Specifically, they argue that the only evidence of a conspiracy came from Hooker, Adams, and Deminds, who were other alleged accomplices; and the testimony of those witnesses was not corroborated and therefore is not sufficient to convict Roach and Chisolm of conspiracy to commit murder.

"In reviewing the sufficiency of the evidence we are mindful that '[t]he standard of review for appellate review of evidentiary sufficiency is whether any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt.'" *State v. Gutierrez*, 446 Md. 221, 231–32 (2016) (quoting *Moye v. State*, 369 Md. 2, 12 (2002)). "We defer to any possible reasonable inferences the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *State v. Mayers*, 417 Md. 449, 466 (2010) (citing *State v. Smith*, 374 Md. 527, 557 (2003)).

Although the testimony of an accomplice must be corroborated, "only slight corroboration is required." *Turner v. State*, 294 Md. 640, 642 (1982). The Court of Appeals has explained:

> Not much in the way of evidence corroborative of the accomplice's testimony has been required by our cases. We have, however, consistently held the view that while the corroborative evidence need not be sufficient in itself to convict, it must relate to material facts tending either (1) to identify the accused with the perpetrators of the crime or (2) to show the participation of the accused in the crime itself. *See Wright v. State*, 219 Md. 643 (1959). If with some degree of cogency the corroborative evidence tends to establish either of these matters, the trier of fact may credit the accomplice's testimony even with respect to matters as to which no corroboration was adduced. *McDowell v. State,* 231 Md. 205 (1963). That corroboration need not extend to every detail and indeed may even be circumstantial is also settled by our cases. *Nolan v. State*, 213 Md. 298 (1957); *Brown v. State*, 210 Md. 301 (1956).

Brown v. State, 281 Md. 241, 244–45 (1977) (parallel citations omitted).

With respect to Roach's involvement in the conspiracy, Hooker testified that Roach is Moore's brother and that she had known Roach for more than 10 years. Roach was at Williams's house when Moore planned retaliatory acts against Venable, his family members, and their associates. Hooker and Adams testified that Roach was directly involved in the April 28 Shooting, the September 16 Shooting, and the September 19 Shooting. Deminds confirmed that Roach carried out the April 28 Shooting. Hooker testified that Moore gave Roach a .9mm semiautomatic firearm to use in the shootings; that she rented a silver Lexis to drive Chisolm and Roach to the corner of Cliftwood and North Collington Avenues to shoot Allen in the September 16 Shooting; that she returned the Lexis immediately after the shooting and rented a black minivan; and that she drove Roach and Chisolm in the minivan to East Lafayette Street where they shot Willis on September 19.

To corroborate the accomplice testimony, Michael Bailey, a BCPD crime lab technician, testified that he recovered .9mm casings from North Collington Avenue on April 28, 2011. Daniel Lamont, an expert in the area of firearm examination and operability determination and who works for the BCPD crime lab, testified that the .9mm casings were fired from a single gun. Those casings were consistent with the gun Hooker testified that Moore gave Roach to use.

With respect to the September 16 Shooting, Officer Crane confirmed that Allen reported the shooting to him at a gas station near Cliftwood and North Collington Avenues soon after it happened and that he also reported the shooting to Detective Chris Wade. Detective Wade responded to the scene and learned that a silver Lexus was connected to the shooting. Allen and Foster identified Roach as one of the shooters.

As to the September 19 Shooting, both Willis and Rahman testified that two shooters got out of a black minivan parked in the 2100 block of East Lafayette Street. Whitfield Glover, Yonsam Kim, and Shamere Holland all live or work in that neighborhood, and all three were in that area on September 19, 2011. They each testified that they saw the shooting and the shooters drive away in a black minivan. Detective Keith Kienle responded to the scene and obtained the license plate number for the minivan, which he traced to the minivan Hooker had rented. Detective Kienle obtained records from the rental car company showing that Hooker rented a silver Lexis on September 14, 2011, she returned the car two days later, on September 16, and she rented a black minivan on that day. The State introduced photographs taken from cameras

inside and outside the rental car company. The photographs showed Hooker on September 14 and September 16, 2011, accompanied by three men. At trial, Hooker identified Roach, Chisolm, and Moore in the photographs.

With respect to Chisolm's involvement in the conspiracy, Hooker testified that she had known Chisolm for about two years from his being "around the area." Chisolm was part of Moore's group and was at Williams's house when Moore planned the attacks on Venable, his family members, and their associates. The evidence that corroborated her testimony with respect to the September 16 Shooting and the September 19 Shooting likewise established that Chisolm was part of the conspiracy. Furthermore, Rahman, who knew Chisolm from having seen him on previous occasions, testified that Chisolm was one of the shooters in the September 19 Shooting. He identified Chisolm in a police photo array and again at trial.

The testimony by Hooker, Adams, and Deminds was corroborated by non-accomplice testimony and other evidence to establish that Chisolm and Roach were part of the criminal conspiracy to murder Venable, his family members, and their associates. "If it be proved that the defendants sought the same objective and that one performed one function and the other another in the attainment of that objective, the inference that they were engaged in a conspiracy will be justified." *Greenwald v. State*, 221 Md. 245, 250 (1960). The evidence adduced at trial, including the accomplice testimony that was amply corroborated, was legally sufficient to allow a rational trier of fact to find that Roach and Chisolm were guilty of conspiracy, beyond a reasonable doubt.

(b)

Roach contends the evidence was legally insufficient to support his conviction for attempted first-degree murder of Allen because "no reasonable juror could have inferred that [Roach] intended to cause the death of Mr. Allen Venable by shooting him in the rear end." Citing *Wilson v. State*, 319 Md. 530, 537 (1990), he maintains that a "conviction must not be sustained unless the 'circumstances, taken together are inconsistent with any reasonable hypothesis of innocence.'" He argues that an alternative hypothesis is that because Allen was only "shot one time in the rear," the evidence did not support his conviction because it is equally likely that he "intended to injure, but not kill [Allen] or . . . intended to frighten" him. We disagree.

Hooker testified that she was at Williams's house on the morning of September 16, 2011, with Roach, Moore, and others. Moore said he had not heard any "noise in a minute." She understood this to mean that Moore wanted her and Roach to "go up . . . [to] North and Collington" because Moore "didn't want [Venable, his family members, and their associates] to think [he] was joking." Using the silver Lexus she had rented, she drove Roach and Chisolm to the corner of Cliftwood and North Collington Avenues. Roach and Chisolm got out of the vehicle. Roach was carrying a TEC-9 semiautomatic pistol. Moments later, Hooker heard "five or six" gunshots. Roach and Chisolm got back into the vehicle and they all returned to Williams's house. Roach said that he had shot Allen, and Chisolm said if his gun had not jammed he "could've had him." In

response to Moore's being upset that nobody was killed, Roach said, "Well, at least they getting shot."

At trial, Foster and Allen both identified Roach as one of the shooters in the September 16 Shooting. Foster testified that he saw the shooters turn the corner of Cliftwood onto North Collington Avenue and start shooting at Allen "as soon as they seen him[.]" He watched the shooters chase Allen and continue firing for approximately three minutes. At least five shots were fired at Allen, in the vicinity of his vital organs. Four .9mm cartridge cases were found at the scene.

Roach relies on *Santoni v. Shaerf*, 48 Md. App. 498 (1981), and *Coates v. State*, 90 Md. App. 105 (1992), to support his argument that "[t]here is no evidence whether [sic] Mr. Allen Venable's injuries were more likely than not to cause death." Both cases are completely irrelevant to the question of whether there was legally sufficient evidence to support a finding of intent to kill. *Santoni* is a civil case concerning contributory negligence. In *Coates*, the defendant was convicted of homicide by motor vehicle while intoxicated. He argued on appeal that the deceased, who was a passenger on his motorcycle, was intoxicated and contributed to the accident that killed him. We held that the trial court erred in prohibiting the jury from considering whether the victim's intoxication was relevant to determine the defendant's guilt beyond a reasonable doubt.

In the case at bar, there was ample corroborated evidence that, at Moore's behest, and with Hooker's assistance, Roach went to North Collington Avenue and chased Allen, shooting at him at least four times with a TEC-9 semiautomatic pistol. Roach was trying

to satisfy Moore, who had directed that additional members of the Venable organization had to be killed. The fact that Roach only was able to strike Allen once, in his "rear end," does not negate the other evidence showing his intent to kill. The evidence at trial was legally sufficient to support Roach's attempted murder conviction in the first degree, beyond a reasonable doubt.

Questions Presented Only By Roach

VI.

Roach contends the State failed to properly authenticate the jailhouse telephone call recordings and therefore the court abused its discretion by allowing them into evidence. The State counters that there was sufficient "evidence from which a rational finder of fact could determine that the evidence [was] more likely than not to be what the [State] claim[ed] it to be."

Rule 5-901(a) provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." "[T]he burden of proof for authentication is slight, and the court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* might ultimately do so." *Dickens v. State*, 175 Md. App. 231, 239 (2007) (emphasis in original) (internal quotation marks and citations omitted). Whether evidence is properly authenticated and should be submitted to a jury is a preliminary determination made by

the trial court, subject to review for abuse of discretion. *Griffin v. State*, 419 Md. 343, 346 (2011); *Gerald v. State*, 137 Md. App. 295, 305 (2001).

At trial, Lieutenant Monique Mitchell testified that she was employed as an Intelligence Officer at the BCDC from 2001 through 2013. She was the acting Custodian of Records when Moore was incarcerated awaiting trial. Lieutenant Mitchell discussed the BCDC's recording policy with respect to inmate telephone calls. Each inmate receives a State Identification Number ("SID"). The inmate inputs this number before making an outgoing call. Each call is recorded and the participants are informed of this before the conversation begins. The BCDC staff does not monitor what SID numbers inmates use and it is possible for an inmate to use another inmate's SID number.

In the investigation of this case, it was determined that Moore was using another inmate's SID to place calls to Hooker. In June of 2012, Lieutenant Mitchell was served with a subpoena from the State for all recorded conversations under SID 1977737 for an inmate named "Cleo Blue." Lieutenant Mitchell responded to the subpoena by downloading the calls from a server, listening to the beginning of several of them, and putting the recorded calls on a disc and sending them to the State.

Detective Kienle reviewed the recordings provided by Lieutenant Mitchell. He testified that the disc allowed him to search the calls by phone number. He retrieved Hooker's cell phone number from car rental records the officers had collected in their investigation. The calls revealed that Moore was using "Cleo Blue's" SID number when making telephone calls to Hooker. Hooker and Deminds both identified their voices, as

well as Moore's voice, on the recorded jailhouse calls. The State also played jailhouse telephone call recordings made from Moore's own SID number, and the jury was afforded the opportunity to compare Moore's voice on those recordings to the voices on "Cleo Blue's" recordings to ascertain whether they were the same.

It is clear from the record evidence that the State met its burden to show that the jailhouse call recordings admitted at trial were what the State purported them to be.

VII.

In total, Roach moved for a mistrial five times. In his brief, he summarizes the motions as follows:

> [First, t]he Circuit Court did not permit Mr. Roach to ask Det. Miller whether Det. Miller had shown Mr. Douglas Cheetum a photo array and whether Mr. Cheetum was unable to identify Mr. Roach. Mr. Roach renewed his motion for severance and for mistrial. The Circuit Court denied the motion(s).
>
> [Second,] Mr. Roach moved for a mistrial, when one of the jurors inquired: "How safe are we supposed to feel with all of your sheriffs asleep?" The Circuit Court indicated that it would *voir dire* Juror No. 5, but the Court did not do so.
>
> [Third,] Mr. Roach moved for a mistrial, because of the prejudice of Mr. Moore's absence. The Circuit Court denied the motion.
>
> [Fourth, d]uring cross-examination Ms. Hooker, who was incarcerated and sequestered, disclosed that the state had arranged for her to meet with another incarcerated and sequestered witness Mr. Adams. Mr. Roach joined in a defense motion for mistrial, and the state confessed to having made the arrangement. Mr. Roach also proposed instructing the jury to disregard Ms. Hooker's testimony.
>
> [Fifth,] the jury inquired whether the elements of murder and attempted murder must be proven for each victim or incident. Mr. Roach asked the Circuit Court to read only [Maryland Criminal Pattern Jury Instruction] 4:17.13, and he objected to reading anything else in addition to that. Although Mr. Roach objected to instructions for both transferred intent and concurrent intent, the Circuit Court insisted that Mr. Roach pick one. Over Mr. Roach's objection the Circuit Court read instructions

> including a tailored one for concurrent intent. The Circuit Court also denied Mr. Roach's motion for a mistrial.

(Record citations omitted.)

We have addressed Roach's challenges with respect to the third and fourth mistrial motions. (*See* questions III and IV, *supra*.)

(a)

We decline to review Roach's challenges regarding the first and second mistrial motions because they have not been adequately briefed. Roach makes no argument that the trial court abused its discretion in denying these two mistrial motions, and, if so, how. Nor does he make any showing of prejudice from the rulings. As explained above, "if a point germane to the appeal is not adequately raised in a party's brief, the court may, and ordinarily should, decline to address it." *Abbott*, 190 Md. App. at 631–32 n.14 (internal quotation marks and citations omitted). Because Roach "'failed to provide supporting argument,'" we decline "'to consider the merits of'" his challenges to the trial court's denial of his first and second motions for a mistrial. *Honeycutt*, 150 Md. App. at 618 (quoting *Fed. Land Bank of Balt., Inc.*, 43 Md. App. at 457–58).

(b)

Roach's fifth motion for mistrial stemmed from the court's response to a jury note it received during deliberations. The note stated:

> Your Honor,
>
> How are multiple victims of a single crime treated with respect to the charge of 1st Degree Murder/Attempted murder? If intent, willfulness, deliberation, and pre-mediation have been established for the shooting of one victim of the crime, do those elements need to be re-established

> individually for the shooting of each victim? Is it per victim or per incident?

(Emphasis in original.)

The court and counsel conferred about how the court should respond. The discussion focused solely on the April 28 Shooting, which was the only shooting in which there were multiple victims (Venable, McNeil, and Vaughn). The prosecutors argued that the court should give the jurors an instruction on concurrent intent. Roach's lawyer argued that the court should instruct the jurors that in order to convict Roach of first-degree murder or attempted murder they must find that he "willfully, deliberately, and premeditatedly tried to kill those victims that did not die as a result of the shooting." Her main argument was that a concurrent intent instruction did not apply. She argued, in the alternative, that the court should give an instruction on transferred intent.

The court, agreeing with the prosecutors, responded to the note by instructing the jury on concurrent intent. Roach moved for a mistrial, which the court denied.

On appeal, Roach maintains that the jury's question concerned the September 16 shooting of Allen, not the April 28 Shooting, and contends that the court abused its discretion by denying his mistrial motion because the facts adduced at trial did not generate a concurrent intent instruction.

It is abundantly clear from the jurors' question that they were seeking guidance with respect to the first-degree murder and attempted murder charges pertaining to the April 28 Shooting. Their note speaks of "multiple *victims* of a single crime." (Emphasis added.) As noted, the only incident in which there were multiple victims was the April

28 Shooting. Roach did not argue below that the concurrent intent instruction was not generated by the evidence of the September 16 Shooting. He did not object to the instruction on that basis and his mistrial motion was not made on that basis. It is obvious that he is advancing a new appellate argument on the September 16 Shooting because that shooting was the sole basis for the jury's attempted first-degree murder conviction. He was acquitted of attempted first-degree murder with respect to the April 28 Shooting.

Not having objected to the concurrent intent instruction on the ground that the jury's question concerned the September 16 Shooting, instead of the April 28 Shooting, and not having based his mistrial motion on that argument, Roach waived the argument he now advances. *See* Md. Rule 4-325(e). Moreover, as explained, it was clear that the jury's question concerned the April 28 Shooting and *not* the September 16 Shooting. A concurrent intent instruction was generated by the facts surrounding the April 28 Shooting, and the instruction given by the court was a correct statement of the law.

VIII.

On August 12, 2012, the State filed a motion for protective order, under Rule 4-263(m)(1), seeking to withhold the "names, addresses, and statements of several witnesses" who were expected to testify at trial. It alleged that the protective order was "needed to ensure the safety of several civilian witnesses, and to facilitate truthful witness testimony at trial." The State argued that the defendants had ties to a "violent prison-based gang" known as the Black Guerrilla Family ("BGF"); that they had a history of "violence targeting individuals whom they believed to be witnesses"; that the witnesses

in this case had expressed "fears of retaliation" to the police; and that the defendants were planning "future attacks against witnesses, as recorded by jail calls." Roach opposed the motion for protective order.[14]

On November 14, 2012, the court held a hearing on the State's motion. The State called three witnesses: Special Agent ("S.A.") Bernard Malone, Detective Kienle, and Officer Phillip Smith.

At the time of the hearing, S.A. Malone had been a member of the Drug Enforcement Administration ("DEA") for fifteen years. He testified that in the course of working on this case he investigated Moore's drug organization by reviewing intercepted wiretapped telephone conversations. The pattern of violence after Kess's death was "four non-fatal shootings and one homicide" and, given "the violence associated with the group[,]" there was "extreme reluctance in the community to generate cooperating witnesses and cooperating informants[.]" S.A. Malone pointed out ties that existed between Moore's group and the BGF. He had personally interviewed people in the community who would not cooperate for fear of retaliation. In total, ten potential witnesses were fearful that they would be murdered if they cooperated with the prosecution. In addition, a "cooperating source" had told him that if Moore and his

[14] At the relevant time, eight co-conspirators were awaiting trial. Five of them, including Moore, consented to an agreed-upon discovery schedule with the State. Only Roach, Chisolm, and a third co-conspirator objected to the protective order the State was seeking. Chisolm does not pursue this issue on appeal.

associates found out who was providing information to the police, "they would take care of it" and "they would eliminate the witness."

Detective Kienle is a member of the Violent Crime Impact Section of the BCPD. He testified that he investigated the conspiracy by people within Moore's organization against Venable, his family members, and their associates. He detailed each shooting that was carried out in furtherance of the conspiracy.

Officer Smith was qualified as an expert in "the areas of gang and gangs, the operation of gangs, specifically the operation of BGF." He testified about the BGF hierarchy, and stated that BGF members are known to target witnesses who cooperate in criminal prosecutions. Specifically, "[BGF members] would try to identify who that witness was, who he or she was, locate them and deal with them by one of two means, either violence or get them to recant whatever it is they [are] going to testify to[.]" They achieve this by threats to the person or "to their family, to their loved ones."

In a memorandum opinion and order entered on November 30, 2012, the court granted the State's motion for protective order. It explained:

> On the whole, this wealth of evidence regarding witnesses' serious existing fears the Moore group's violent reputation, its ability to compel violence from inside of prison, and its connection to the dangerous BGF gang, combined with the close links and familial bonds between many members of the Moore group, convinces the Court that the risks of divulging the identities of the witnesses any sooner than permitted by the attached Order poses too grave a threat to the civilian witnesses. Quite simply, this Court finds that the State's evidence in favor of the protective order of non-disclosure, concealing the identity of the civilian witness until a date closer to trial, clearly outweighs concerns regard[ing] the Defendants' Sixth Amendment rights.

(Footnote omitted.) The court ordered the State to provide all discovery within 14 days, *i.e.*, by December 14, 2012, except for the names, addresses, and statements of the civilian witnesses at issue. Those names and addresses, and transcripts of the statements, were to be produced to defense counsel 45 days before the actual trial date. The court directed that defense counsel could share with their clients the general information in the statements but could not share the names of the witnesses until two days before trial; and that defense counsel could not provide copies of the statements to their clients.

Trial was specially scheduled to begin on October 17, 2013, and the case was specially assigned to a judge who was not the judge who granted the protective order. At a pre-trial hearing on September 30, 2013, Roach's lawyer moved to dismiss or, in the alternative, for a postponement, alleging that the State had not complied with the protective order. She asserted that on August 13, 2013, the State produced a package containing "four CDs with hundreds of pages of documents"; that the State continued to produce supplements to the discovery; and that she could not adequately review all of the discovery before trial. She conceded that she knew when the court granted the motion for protective order that her time to review documents to prepare for trial would be limited, but she did not file a motion for reconsideration or seek other relief.

The State countered that the August 13, 2013 document production included all the discovery subject to the protective order and that the supplements to discovery provided thereafter only were minor changes to transcripts and statements that already had been produced.

The court found that the State had complied with the terms of the protective order in its document production and that counsel should have raised any issue she had about inadequate time to prepare with the judge who issued the protective order. The judge explained that, because the case was specially scheduled for trial, he did not have the authority to grant a postponement. The court ruled that dismissal was not an appropriate remedy in the circumstances.

On appeal, Roach contends the court erred in granting the State's motion for protective order because the State failed to make a good cause showing that a protective order was necessary. He argues that the court abused its discretion in denying his motion to dismiss, or in the alternative, to postpone the trial.

The State responds that the witnesses' testimony supported the court's finding that "there was a 'wealth of evidence'" establishing good cause for the entry of a protective order and that the "court's determination that the State's evidence clearly outweighed the defendants' Sixth Amendment Rights was not clearly erroneous." Moreover, it argues that the court did not abuse its discretion by denying Roach's motion to dismiss or, in the alternative, to postpone, because the State had complied with the protective order and Roach did not file a motion to reconsider the order with the judge who granted it.

Rule 4-263(m)(1) provides:

> On motion of a party, a person from whom discovery is sought, or a person named or depicted in an item sought to be discovered, the court, for good cause shown, may order that specified disclosures be denied or restricted in any manner that justice requires.

We review a trial court's decision to grant a motion for protective order under this rule for abuse of discretion and its factual finding that "the life of any State witness was in danger once the witness was identified" for clear error. *Lancaster v. State*, 410 Md. 352, 380–81 (2009); *Coleman v. State*, 321 Md. 586, 603–04 (1991).

In *Coleman*, the defendant was charged with first-degree murder and conspiracy to commit murder. The State filed a motion for protective order, asking the court to allow it to withhold the names of witnesses until two weeks before trial. At a hearing on the motion, the State called two BCPD officers. They testified that drug dealers force witnesses not to cooperate with police investigations "by fear and intimidation" and, because of this, "the ability of law enforcement authorities to assist them is, to say the least, seriously hampered." *Id.* at 593. The officers had received valuable information about the murder from eyewitnesses, but the eyewitnesses had reservations about testifying because they were concerned about "their personal safety." *Id.* at 596. At the conclusion of the hearing, the court granted the State's motion, ruling that the State could withhold the names of key witnesses until two weeks before trial.

On appeal, the defendant argued that the circuit court had erred in granting the State's motion for protective order. The case came before the Court of Appeals, which held that the court did not abuse its discretion in granting the State's motion for a protective order. "Without the testimony of the witnesses, the charges against [the defendant] simply could not be proved." *Id.* at 603. The circuit court "was convinced that the life of any State witness was in danger once the witness was identified." *Id.* "In

the light of the evidence before [the circuit court], which [the court] found to be credible and worthy of heavy weight, we cannot say that [the court's] judgment thereon was clearly erroneous." *Id.*

In *Lancaster*, the Court observed that, "unlike in *Coleman*, the State failed to present any evidence at the protective order hearing about the victim witnesses' testimony or the facts surrounding the alleged crime[.]" 410 Md. at 379. The State also failed to produce evidence that the defendant had a "reputation for violence" or that he had made any threats to prospective witnesses, nor did it identify any "persons who might have carried out the alleged threats against the witnesses[.]" *Id.* at 380. The Court held the trial court's finding that there was "a significant issue with respect to the safety and welfare of" the State's witnesses was clearly erroneous. *Id.*

In the case at bar, the State met its burden to show good cause why a protective order was needed. It adduced evidence that Moore's drug organization had ties to the BGF, a violent gang, and that Moore was planning to "take care of" and "eliminate" witnesses who were cooperating with the prosecution. The court's finding that witnesses having information supportive to the State were facing the prospect of violence against them was supported by the evidence and not clearly erroneous. The court did not abuse its discretion by granting the protective order.

Roach's argument that the trial court abused its discretion by denying his motion to dismiss or, in the alternative, to postpone the trial likewise lacks merit. As the court found, the State did not violate the terms of the protective order. There was no basis on

which to grant Roach's motion to dismiss. With respect to the terms of the protective order and whether they unduly restricted the period of time in which defense counsel had to prepare for trial, counsel for Roach at no time asked the court to reconsider or revise the document production timeframe as set forth in the protective order, despite having ample time to do so. In this circumstance, the court did not abuse its discretion by denying Roach's postponement request or taking steps to have the Administrative Judge consider a postponement.[15]

IX.

Roach contends the trial court abused its discretion by striking prospective Jurors 8282, 8128, and 8318, for cause. He argues that all three jurors were qualified to serve and that nothing they "said indicated that [they] could not be fair." The State counters that the court adequately questioned the three jurors to determine if they could fairly and impartially decide the case, that it correctly determined they harbored potential bias, and that the court had a reasonable basis to dismiss each of the three jurors.

A prospective juror may be struck for cause when he or she "displays a predisposition for or against a party 'because of some bias extrinsic to the evidence to be presented.'" *Wyatt v. Johnson*, 103 Md. App. 250, 264 (1995) (quoting *Miles v. State*, 88

[15] Roach argues that the terms of the protective order were more restrictive than the terms in the agreed-upon discovery schedule. He maintains that this was "a deliberate effort [by the State] to tie defense counsel's hands . . . [and] foreclose . . . the pursuit of . . . information [to] cross-examine the State's witnesses." This argument has no merit because the terms of the protective order and the agreed-upon discovery schedule are identical.

Md. App. 360, 375, *cert. denied* 325 Md. 94 (1991)). Whether a prospective juror harbors any bias is a question of fact, *Dingle v. State*, 361 Md. 1, 15 (2000), and the "court is well equipped to make such factual determinations and, in fact, is required to do so." *Id.* at 19 (citing *Wainwright v. Witt*, 469 U.S. 412, 428 (1985)). "Because the task of the trial [court] is to impanel a fair and impartial jury . . . [the court decides] whether, and when, a prospective juror is dismissed for cause." *Id.* at 14. We review a trial court's decision to strike a juror for cause for abuse of discretion. *State v. Cook*, 338 Md. 598, 607 (1995).

> There are two situations in which a trial court's exercise of discretion may constitute reversible error. First, a party may allege that the trial judge failed to make an adequate inquiry into the likelihood of bias before electing to strike the juror. *King v. State,* 287 Md. [530,] 537 [1980]; *Stokes v. State,* 72 Md. App. 673, 677 (1987). Second, a party may allege that there was no reasonable basis from which the court could conclude that the juror was incapable of giving fair consideration to the evidence. *See Stokes,* 72 Md. App. at 677–78 (holding that the mere exchange of smiles between the juror and appellant, without more, did not amount to a showing of bias).

Wyatt, 103 Md. App. at 264 (parallel citations omitted).

Juror 8282 informed the court that she previously had been arrested and charged with drug possession. At one point in the exchange, she stated that she had been convicted of the charge; later she said the charge was dismissed. The court asked whether she was treated fairly by the police and prosecutors, and she answered no. It then asked whether she had been adequately represented by her public defender. She responded: "Not that I think of because he didn't ask the right questions as far as I was concerned." She stated that she could remain fair and impartial in deciding the case.

The court properly questioned this juror about potential bias and her answers provided a reasonable basis for the court to conclude that she could not be fair and impartial. Although she said that she could be fair and impartial, "[t]hat . . . does not mean that the court is bound by the answers or is relieved of its responsibility to make the ultimate decision as to the effect of an answer or of a prospective juror's fitness to serve." *Dingle*, 361 Md. at 19. The court did not abuse its discretion in dismissing Juror 8282.

Juror 8128 participated in the first day of *voir dire*, which was a Friday. She disclosed that her daughter formerly worked for a criminal defense attorney. After breaking for the weekend, the court resumed *voir dire* that following Monday. At that time, Juror 8128 approached the court and said she had a work assignment due that week. She also said that her daughter is a lobbyist and is involved in "shielding of records of persons that have criminal backgrounds." The court indicated that it could not dismiss her for those reasons. She responded that she would be "influenced by" the work her daughter does. When the court asked why she had not disclosed this information earlier, she responded that she was not given an opportunity, and she was now raising the issues because the court was at the "second stage of selection." The court struck her for cause, initially stating, "I don't trust her" and then clarifying that "I'm striking her because I don't believe she'll be a good juror in this case." The court based its finding on the juror's demeanor and the conflicting answers she gave to its questions. Having the "opportunity to question the juror and observe . . . her demeanor[,]" the court did not abuse its discretion in striking her from the panel. *Cook*, 338 Md. at 615.

Finally, Juror 8318 disclosed that she had a medical appointment scheduled for the first day of trial. The court directed her to stand off to the side and asked counsel how they wanted to proceed. The State moved to strike her. Counsel for Roach objected, arguing that it was unclear when the appointment had been made. She argued that the appointment could be rescheduled. The court brought Juror 8318 back to the bench. In response to the court's questions, she stated that the appointment had been made two weeks prior. She had had an MRI a month before and the appointment had been made for the purpose of reviewing the results. The results would determine whether she would need shoulder surgery. The court provided counsel with an opportunity to ask additional questions and counsel for Roach declined to do so. The court was concerned, with a reasonable basis, that the juror might not appear for trial. It had a reasonable ground to strike her for cause.

X.

Roach contends the trial court violated his right to a public trial. He complains that the trial court "routinely removed" some of his family "from the courtroom." The record shows that the court prohibited children from entering the courtroom. Sheriffs removed two people who brought a five-year-old child into the courtroom. There were no other instances when members of the public were removed. Moreover, there was no objection by Roach.

There is no merit to this issue. To the extent that Roach asks this court to review for plain error, we decline to do so. *Pickett v. State*, 222 Md. App. 322, 342 (2015).

Questions Presented Only By Chisolm

XI.

In a discussion between counsel and the court regarding proposed jury instructions, Chisolm's lawyer argued that the conspiracy instruction should specify "murder in the first degree and not to commit murder." The court stated that it was "going to leave the instruction as it is."

The next day, the court and counsel discussed the verdict sheet. With respect to the conspiracy count, counsel for Chisolm stated:

> Your Honor, in regards to the first charge; how do you find the Defendant, Quincy Chisolm, on the charge of conspiracy to murder Alex Venable; it says, Alex Venable and then a comma. I believe it should be "and" because the indictment says to murder Alex Venable and his family and their associates. So I believe it should be and his family and his associates.
>
> Your Honor, in regard -- and then in addition I renew . . . my request that -- or my contention that the verdict sheet has a significant variance from the indictment, I'm sorry -- . . . and that we should again, for the Defendant each should -- they should read, conspired with Sarah Hooker, Robert Moore, Anthony Roach, Donnie Adams, . . . Emanuel Deminds and Taylor Fleming[.]

Chisolm's counsel did not argue that the verdict sheet should specify conspiracy to commit "first-degree murder," as opposed to "murder."

The court instructed the jury on conspiracy as follows:

> Mr. Quincy Chisolm, Mr. Robert Moore, and Mr. Anthony Roach are charged with conspiracy to commit the crime of murder of Alex Venable and his family and their associates. Conspiracy is an agreement between two or more persons to commit a crime. In order to convict the Defendant of conspiracy, the State must prove: (1) that the Defendants agreed with each other or at least one other person to commit the crime of murder of Alex Venable and his family and their associates; and (2) that the

> Defendants entered into the agreement with the intent and that the crime of murder of Alex Venable and his family and their associates be committed.

On appeal, Chisolm contends he was illegally convicted of, and sentenced for, conspiracy. He argues that the court improperly denied his request to include "first-degree murder," as opposed to "murder," in the jury instruction and verdict sheet. He maintains that his conviction is ambiguous because the jury could have convicted him of conspiracy to commit second-degree murder, not first-degree murder, and argues that the court "should have given appropriate instructions so the basis of [the jury's] first degree murder verdict could be determined."

The State responds that Chisolm "did not object to the jury instruction or verdict sheet" and that "any error in the instructions is not before this Court for Review." On the merits, the State argues that *Mitchell v. State*, 363 Md. 130 (2001), makes clear that "conspiracy to murder necessarily is conspiracy to commit first-degree murder"; and that his sentence was legal because it falls within the statutory limits for that crime.

Rule 4-325(e) states:

> No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

Rule 4-325(e) makes clear that a party must object "promptly after the court instructs the jury" and state "distinctly the matter to which the party objects and the

grounds of the objection." "Countless opinions of this Court have held that, when no timely objection to the jury instructions is made in the trial court, this court ordinarily will not review a claim of error based on these instructions." *Alston v. State*, 414 Md. 92, 111 (2010). Chisolm did not object when the court gave the conspiracy instruction or after all of the instructions were read. Accordingly, this issue is not preserved for review.

This issue lacks merit in any event. In *Mitchell*, the Court of Appeals explained:

> [W]here the charge is made and the evidence shows that the defendant conspired to kill another person unlawfully and with malice aforethought, the conspiracy is necessarily one to commit murder in the first degree (even if a murder pursuant to the conspiracy never occurs or, for whatever reason, amounts to a second degree murder), as the agreement itself, for purposes of the conspiracy, would supply the necessary deliberation and premeditation. We are unable to [conclude] that spontaneity or acting on impulse can, at the same time, suffice to establish an agreement to murder but not suffice to constitute the deliberation and premeditation that distinguishes first from this form of second degree murder, as we have defined those concepts. That kind of inconsistency would either broaden the crime of conspiracy, by eroding the specific intent necessary for that crime, or create greater uncertainty in the meaning of deliberation and premeditation.

363 Md. at 149. The Court further explained in *Alston*:

> It is clear from *Thornton* [*v. State*, 397 Md. 704, 721–25 (2007)] that the intent-to-inflict-grievous-bodily-injury variety of second degree murder does not involve an intent to kill. An intent to murder, however, means an intent to kill with malice. *State v. Earp*, 319 Md. 156, 163–164 (1990); *State v. Jenkins*, 307 Md. 501, 514–515 (1986). And a conspiracy to murder means a malicious intent to kill with deliberation and premeditation, *i.e.*, first degree murder, as the conspiracy necessarily supplies the elements of deliberation and premeditation. *Mitchell v. State, supra,* 363 Md. 130. Consequently, a charge of conspiracy to murder logically excludes second degree murder based upon an intent to inflict grievous bodily harm. The intent elements of each offense are entirely separate and distinct.

414 Md. at 116–17 (parallel citations omitted).

Accordingly, it is clear that the jury convicted Chisolm of conspiracy to commit first-degree murder, and not the non-crime of conspiracy to commit second-degree murder. And, his sentence of life with all but 40 years suspended is within the statutory limits. *See* Md. Code (2002, 2012 Repl. Vol., 2015 Cum. Supp.) § 2-201(b) of the Criminal Law Article ("C.L.") (prescribing a sentence of life without the possibility of parole or life imprisonment for first-degree murder); C.L. § 1-202 ("The punishment of a person who is convicted of conspiracy may not exceed the maximum punishment for the crime that the person conspired to commit.").

XII.

On November 13, 2013, the second full day of deliberations, a juror sent the court a note stating:

> I need help! We as a group are having a tough time coming to a conclusion on some of these charges. What should I do? Is it possible to have a hung jury? I really don't know how to handle this.

The court conferred with counsel, brought the jurors into the courtroom, read them the "Duty to Deliberate" instruction in Maryland Criminal Pattern Jury Instruction ("MCPJI") 2:01, and stated, "This court is encouraging you to continue to deliberate with a view of reaching a verdict. You will write additional notes as you deem necessary."[16]

[16] Maryland Criminal Pattern Jury Instruction 2:01 reads:

> The verdict must be the considered judgment of each of you. In order to reach a verdict, all of you must agree. In other words, your verdict
> (Continued…)

On November 14, 2013, a juror sent a note stating, "Please send me home because I am having a problem." After conferring with counsel, the court brought the jurors into the courtroom and stated, "To the person who made a request to go home, that request is denied. Whoever that person is, you may not go home. You must continue with this jury."

A third jury note was received by the court later that same day. It stated:

> Juror No. 5 is being highly unruly and not cooperating with the other jurors and I don't feel comfortable with her yelling and swearing at me in front of the other jurors. I am trying to conduct civilized discussions but she's making it very hard.

The court conferred with counsel and responded:

> Let me say that no juror can be excused until you have completed your assignment, all right. And this Court will not accept any juror being disrespected. This Court will not accept unruly conduct. This Court will not accept profanity used towards any juror or swearing at any juror. That is totally unacceptable. And this Court expects that you will treat each other with the same courtesy that I see here in the courtroom. If there are any further concerns about that please write a note and I will have to address it. But I trust that that will not be the case from this point forward. And that's all I'm going to say at this time, ok? All right.

(…continued)

> must be unanimous. You must consult with one another and deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. During deliberations, do not hesitate to reexamine your own views. You should change your opinion if convinced you are wrong, but do not surrender your honest belief as to the weight or effect of the evidence only because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict.

(a)

Chisolm contends the court's responses to the November 13 and 14, 2013 notes were "confusing and coercive," and thereby denied him a fair trial. The State counters that the court's responses were appropriate under the circumstances.

MCPJI 2:01 is a standard *Allen* charge. A trial judge's decision to give that instruction is reviewed for abuse of discretion. *Nash v. State*, 439 Md. 53, 90 (2014); *see also Kelly v. State*, 270 Md. 139, 144 (1973). "We have long held 'that the decisions as to whether . . . [an] *Allen*-type charge should be used and "when to employ it . . . are best left to the sound discretion of the trial judge."'" *Nash*, 439 Md. at 92 (quoting *Mayfield v. State*, 302 Md. 624, 630 (1985) (quoting *Kelly*, 270 Md. at 143)).

An "instruction given in response to a jury question" is reviewed for abuse of discretion. *Appraicio v. State*, 431 Md. 42, 51 (2013). "Trial courts must avoid giving answers [to jury questions] that are 'ambiguous, misleading, or confusing.'" *Id.* (quoting *Battle v. State*, 287 Md. 675, 685 (1980) (quoting *Midgett v. State*, 216 Md. 26, 41 (1958))).

In *Browne v. State*, 215 Md. App. 51 (2013), we held that when a jury is deadlocked and when a particular juror holds out for a not guilty verdict a trial court abuses its discretion when it requires the jury to continue deliberating. In that case, a specific juror was *voir dired* and indicated that she could not render a guilty verdict. The court instructed the jury to continue deliberating. The defendant moved for a mistrial, which the court denied. We reversed, holding that "[w]hen a jury reveals that it is

deadlocked and volunteers the numerical breakdown of its split, there is an increased risk that the trial judge's remarks in response will be coercive." *Id.* at 62.

Here, the court's response to the November 13, 2013 question, asking whether it was "possible to have a hung jury," was not an abuse of discretion. There was no indication that the jury was deadlocked, none of the jurors indicated that they could not reach a guilty or not guilty verdict, and giving the *Allen* charge instruction in response was appropriate under the circumstances. *See Nash*, 439 Md. at 93 (stating that a deadlock need not exist for the court to give an *Allen* charge).

Likewise, the court's responses to the November 14, 2013 notes were appropriate. The notes do not reveal that any juror could not continue service; the jurors did not send further notes alerting the court to any problems with their deliberations; and the court's responses were not in any way confusing or misleading.

(b)

In his reply brief, Chisolm argues for the first time that the trial court did not respond to three additional questions from the jury concerning the court's instruction on conspiracy. He contends the record "fails to reveal either reference, or response to these notes" and that the court violated Rule 4-326(d) by not responding.

Because this argument was not made in Chisolm's initial brief, and first was raised in a reply brief so the State could not respond to it, the issue is not properly before us, and we shall not address it. *Martin v. State*, 218 Md. App. 1, 23 (2014) (citing *Williams v.*

State, 188 Md. App. 691, 703 (2009), *aff'd*, 417 Md. 479, *cert. denied*, ___ U.S. ___, 132 S.Ct. 93 (2011)).

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID ONE-HALF BY ROACH AND ONE-HALF BY CHISOLM.