In the Circuit Court for Harford County
Case No. 12-K-14-1079

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1138

September Term, 2015

TANASHA EARLENE SIENA

v.

STATE OF MARYLAND

Arthur,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: September 15, 2017

It is undisputed that appellant, Tanasha Earlene Siena, shot and killed George S. Moore ("the victim") on July 2, 2014; what is disputed is why. A jury sitting in the Circuit Court for Harford County rejected her claim of self-defense and convicted appellant of second degree murder and the unlawful use of a firearm in the commission of a felony and crime of violence. She presents four questions for our review,[1] which we have consolidated and rephrased into the following three:

1. Did the circuit court err in excluding evidence regarding portions of the history of the relationship and home life between the victim and the appellant, the victim's character, and the victim's state of mind?

2. Did the circuit court err in refusing to dismiss a sitting juror who became visibly upset when appellant pointed the murder weapon in the direction of the jury during her direct examination?

3. Does the cumulative effect of the circuit court's alleged errors warrant reversal?

For the reasons that follow, we shall affirm the judgment of the circuit court.

[1] Appellant presented the following four questions:

1. Did the trial court err in excluding certain evidence about the history of the relationship between the victim and the defendant?
2. Did the trial court err in excluding evidence of the victim's character and state of mind?
3. Did the trial court err in failing to dismiss a biased juror?
4. Does the cumulative effect of the trial court's errors requires a reversal?

FACTUAL AND PROCEDURAL BACKGROUND[2]

Appellant and the victim met in 1997 when appellant was a first year college student and he was a fourth year university student at a different school. They became romantically involved almost immediately. After the victim graduated in December 2000, he accepted a job at NASA in Greenbelt, and, in January 2001, he and appellant lived together in an apartment in Laurel. Shortly thereafter, appellant withdrew from college. They separated soon after the birth of their first child. They never married, but they remained in an on-again, off-again relationship until the victim's death.

In early 2011, appellant and the victim purchased a house in Edgewood and "moved back in together." In February 2011, their second child was born. As their relationship deteriorated over the next few years, they argued frequently, mostly about finances and custody of their two children. By mid-2014, appellant had decided to file for child support and to move to North Carolina with the two children.

On July 23, 2014, the State charged appellant with violating Md. Code (2002, 2012 Repl. Vol., 2014 Cum. Supp.), § 2-201 (murder in the first degree), § 2-204 (murder in the second degree), § 4-204(b) (use of handgun or antique firearm in commission of crime), and § 3-202 (assault in the first degree) of the Criminal Law Article. She entered a plea of not guilty "by way of self-defense" to all charges.

On April 8, 2015, the court held a hearing on the State's motions in limine seeking to preclude the use of character evidence focusing on the victim as a "philanderer" with a

[2] The background information and what happened at the time of the shooting comes mostly from appellant's testimony.

"gambling addiction" and, there being no expert designated, the use of a battered woman syndrome defense, or the use of the term "battered spouse" or other references to the defendant as a battered spouse. The defense raised no objection, and the court granted the motions.[3]

Trial began on April 13, 2015. Among the witnesses called by the State, two detectives commented on their observations related to appellant's self-defense claim. Detective Jan Ryan of the Harford County Sheriff's Office Crime Scene Unit testified that it did not appear to him that a struggle had occurred in the bedroom where the shooting occurred because he "didn't see where [any objects on the floor] matched any, like dust rings on top of [the furniture] where [an object] was, like, knocked off." He commented, however, that the house was somewhat unkempt and there were objects on the floor throughout the house, including in the bedroom. Detective Michael Pachkoski testified that he had responded to the hospital where appellant was taken immediately after the incident and photographed appellant's face, hands, and legs. According to Detective Pachkoski, he observed "noticeable swelling above [appellant's] right eye."

The State also called Sophia Thompson, the victim's girlfriend, to advance a motive of jealousy for the shooting. Thompson testified that she met the victim on a cruise in April 2014, where they "formed a friendship" and "got to know each other." After the

[3] The grant of those motions is not before us on appeal, but we note that in not opposing the motion related to philandering and gambling, the defense indicated that it was not seeking to introduce character evidence "along those lines," but "whether it's offered for something other than character evidence would have to see how the evidence develops." The trial court and the State agreed, and the motion was granted "depending on how the testimony goes."

cruise, their friendship developed into a "full-fledged [romantic] relationship." The victim spent Tuesday and Thursday evenings at Thompson's home and weekends with her in Atlantic City. Thompson also testified that they "were going to get married."

Indicating that their relationship enraged appellant, Thompson testified that, on the evening of May 15, 2014, appellant drove to Thompson's apartment and held the door buzzer down for about ten seconds while screaming. She woke Thompson and the victim, who then turned his cell phone on, read his messages, and went downstairs to meet appellant. Thompson "hit the listen button [on the buzzer] . . . and heard [appellant] shouting at [Thompson] to 'come downstairs, you whore.'" As the argument between appellant and the victim continued, Thompson heard the victim tell appellant to "get away from these peoples' door," appellant saying she "want[ed] to save [their] family," and the victim responding "we're not together." Then, the victim got into his vehicle and left.

Appellant testified in the defense's case, stating that, on June 2, 2014, during the early evening hours, she took her children out for dinner and returned home shortly after 7:00 p.m. When the victim returned home less than one hour later, they began to argue. She disparaged the victim's parenting capabilities, and he objected to her plan to move to North Carolina with their children. The argument escalated rapidly into a physical confrontation.

According to appellant, the victim became enraged, called her a "bitch," and told her that she was "not going any fucking where." She testified:

> He pushed m[e] down and he kicked me once in the stomach. I was bent over and he grabbed me in the back of my hair right in the middle and dragged me to the dresser. I don't know how many times, but he banged my

> head into the dresser. He always liked to say I'm the mother fucking man, you have to do what I say. After he finished banging my head into the dresser, I don't know how you want to say that, I just kind of froze. I was like in shock for a moment. I could hear him say, bitch, don't you know who the fuck I am? I'm going to kill you.

Appellant was able to get to a dresser in the bedroom and, with her back to the victim, grabbed the gun from the drawer.[4] She turned toward the victim and pointed the gun at him. She told him he wasn't going to hit her anymore and tried to leave the room. But when the victim lunged at her, she knew that "he was going to kill [her]" and she shot him.

The jury found appellant guilty of second degree murder and use of a handgun during the commission of a crime. On July 2, 2015, the court sentenced appellant to thirty years' incarceration for second degree murder and twenty years' incarceration, to be served consecutively, for the use of a handgun in the commission of a crime. On July 10, 2015, appellant noted a timely appeal to this Court.

Additional facts may be provided as they relate to the discussion of each of the issues raised on appeal.

DISCUSSION

Exclusion of Evidence

Standard of Review

[4] According to appellant, the gun, which belonged to the victim, was kept in a top drawer of a dresser in appellant and the victim's shared bedroom. Appellant testified that, a few months prior to the shooting, she found the gun in a lower drawer when she "was putting the socks and underwear away" and moved it "so [her youngest son] wouldn't get to it."

Ordinarily, "[w]e review a circuit court's decision[] to admit or exclude evidence applying an abuse of discretion standard." *Norwood v. State*, 222 Md. App. 620, 642 (2015) (citing *Kelly v. State*, 392 Md. 511, 530 (2006)). But, where the evidentiary ruling "'involves an interpretation and application of . . . case law, [we] must determine whether the lower court's conclusions are "legally correct" under a [non-deferential] standard of review.'" *Lupfer v. State*, 420 Md. 111, 122 (2011) (quoting *Schisler v. State*, 394 Md. 519, 535 (2006)) (omission and alteration in *Lupfer*).

A. Relationship History and Home Life

The State objected when defense counsel asked appellant to describe the progression of her relationship with the victim during 2008 and 2009. The record reflects the following:

> [PROSECUTOR]: I'm generally lenient with hearsay and this really is not at all that important, but my objection is really getting into the details of how they got back together. I'm not sure how that is relevant.
>
> [DEFENSE COUNSEL]: I think the relationship is relevant and, therefore, how they got back together and broke up and got back together and broke up is relevant. I'm moving the timeline forward, Your Honor. She is moving at the pace she is moving.
>
> [COURT]: I'm trying to give you a little leeway to give some background information, but I'm also going to caution you that if you get so farfetched from the issues we're going to be doing these side bars again. The issues here have to be contained to what possible defenses you have to this and there are specific defenses that you have, not just anything. I am cautioning you not to get too far out of scope here. A little background on the relationship I do think is relevant, but you have to move it along, too.

A later attempt to elicit testimony from appellant concerning her youngest son prompted the following exchange:

> [DEFENSE COUNSEL]: At that point would you describe [your youngest son] as being a normal child?

[PROSECUTOR]: Objection.

[COURT]: Sustained.

[DEFENSE COUNSEL]: Ask to approach.

[COURT]: Come on up.

(Whereupon, Counsel and the defendant approached the bench and the following ensued.)

[DEFENSE COUNSEL]: I have to make a record. We submit that because [the youngest child] suffered from serious learning difficulties and serious behavioral problems which required his being treat [sic] at Kennedy-Krieger Institute and had a therapist and special schooling at the local school that it required extra attention of a mature adult to actually take care of him properly. We submit that it is essential that the jury hear that [he] had these difficulties so it is clear to the jury that as a comparative [sic] to have a mature adult at the house when she was not present to take care of him.

[COURT]: And that is relevant to the defense here how? I want to know how that is relevant.

[DEFENSE COUNSEL]: I have expressed it. I would incorporate what I have already argued.

[COURT]: Okay.

[PROSECUTOR]: I have to start with my objection was to the question is [the youngest son] a normal child. That is a very vague and broad question. How do you define normal and how do you define fine [sic] abnormal? The other part of my objection is again relevance of any issues or any problems with [him]. The basis of her knowledge and any of the diagnosis coming from doctors—there is just so much of it. The main part is really the relevance of any of [his] learning disability issues in any part of this case.

[COURT]: There has been no evidence presented before this Court to establish the relevancy of the children in terms of their care or in terms of any health issues or anything of that nature in terms of what transpired the date of the incident or to the possible defenses that the Defendant may have availed herself to in this particular case. Therefore, the objection is sustained. Do not ask the questions related to [the youngest son].

[DEFENSE COUNSEL]: Yes, ma'am.

The defense later called a longtime friend of appellant, Cynthia Charles, and sought to inquire about appellant's "demeanor and state of mind" since the birth of the younger child. According to appellant, this would show that any change in the appellant's demeanor was "not the result of jealousy," but the result of "other pressures within the relationship," including both financial and child related problems. That testimony was precluded.

Contentions

Appellant contends that the circuit court "improperly excluded evidence about [the victim] and [appellant's] relationship and home life." In support and citing several cases, including *Conyers v. State*, 345 Md. 525, 545–46 (1997), and *Jackson v. State*, 87 Md. App. 475, 478 (1991), she argues that the trial court abused its discretion when it sustained the State's objection on relevancy grounds, "[a]fter defense counsel asked [her on direct examination] to describe the progression of her relationship with [the victim] during 2008 and 2009." She argues that the "State opened the door" to that evidence by relying "heavily on the theme that [appellant's] motive for killing [the victim] was jealousy" over his romantic relationship with another woman. Therefore, "more than a 'bare denial'" of being jealous of Thompson, she was entitled to rebut the State's motive theory with evidence demonstrating her "true feelings about her relationship with [the victim] and the context and history of that relationship."

The State responds that "none of [appellant's] claims of error regarding the trial court's exclusion of irrelevant evidence are preserved for this Court's review." More specifically, in regard to the relationship history and home life, the State argues that

appellant's argument is not preserved because the circuit court did not sustain the State's objection to defense counsel's questions regarding the history and progression of their relationship, did not "strike [appellant's] response," or "give a curative instruction to the jury to disregard [appellant's] response." Also, according to the State, appellant "raises a different ground on appeal than was raised below." At trial, appellant argued that "the disputed testimony was relevant to rebut the State's theory that she murdered [the victim] because she was jealous of the relationship he was having with another woman," not because the State had "opened the door" to that evidence.

As to the evidence related to their second child's learning disabilities, the State contends that appellant's "claim of error on appeal is different than that raised in the trial court" and that defense counsel's response to the State's objection to that evidence "was not detailed enough to allow the court to make an informed decision." But, even if the issue were preserved, the State argues that its evidence of motive, *i.e.*, that appellant killed the victim out of jealousy, did not "open the door" to testimonial evidence regarding the home life and the character of the victim. The State, quoting *Savoy v. State*, 64 Md. App. 241, 253 (1985), asserts that the "open door" doctrine allows for the admission of evidence "'to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence.'" *Id.* at 253 (quoting *California Ins. Co. v. Allen*, 235 F.2d 178, 180 (5th Cir. 1956). Instead, according to the State, appellant was seeking to introduce evidence that she was "an unhappy and long-suffering victim of an increasingly volatile relationship in which she bore primary childrearing responsibilities with little

support" from the victim. Such evidence, in the State's view, did not relate to the issue of appellant's jealousy and therefore was not admissible under the opening the door doctrine.

Analysis

"Generally, a party cannot appeal from a judgment or order which is favorable to him, since he is not thereby aggrieved." *Adm'r, Motor Veh. Admin. v. Vogt*, 267 Md. 660, 664 (1973) (citing *Wright v. Baker*, 197 Md. 315 (1951); *Mugford v. Baltimore*, 185 Md. 266 (1945)). Appellant contends that the trial court abused its discretion when it sustained the State's objection regarding the relationship history and progression during 2008 and 2009, but our review of the record reveals that the trial court did not sustain the State's relevancy objection, did not strike appellant's response, or instruct the jury to disregard appellant's response, and the Court acknowledged that some "background on the relationship is relevant" but cautioned that the "issues" in the case related to the "defenses" and "not just anything."

"Appellate review of an evidentiary ruling, when a specific objection was made, is limited to the ground assigned." *Colvin-el v. State*, 332 Md. 144, 169 (1993) (citing *Calhoun v. State*, 297 Md. 563, 601 (1983), *cert. denied*, 466 U.S. 993 (1984)). Regarding questions related to the youngest child's alleged learning disabilities and the victim and appellant's relationship at the time the victim was killed, the State's objection to the evidence at issue was relevance. In response, appellant argued that the disputed testimony was relevant to rebut the State's theory that she killed the victim out of jealousy. On appeal, appellant argues that the State "opened the door" to its admission.

The admissibility of evidence based on relevance and its admission under the opened door doctrine involve different concepts. The opened door doctrine is "one of expanded relevancy, [where what was] initially irrelevant evidence is made relevant by questions that 'open the door.'" *Gray v. State*, 137 Md. App. 460, 484 (2001) (citing *Daniel v. State*, 132 Md. App. 576, 591 (2000)), *rev'd on other grounds*, 368 Md. 529 (2002). Appellant did not explicitly offer an "opening the door" argument at trial. But, by the time appellant testified, the State's motive theory of jealousy was clear. The evidence at issue was offered to establish that the stressful relationship between appellant and the victim was unrelated to jealousy. We are persuaded that the issue is sufficiently preserved for our review. That said, it fails on the merits.

As we have explained in *Savoy v. State*, 64 Md. App. 241, 253–54 (1985):

> The [opening the door] doctrine is to prevent prejudice and is not to be subverted into a rule for injection of prejudice. Introduction of otherwise inadmissible evidence under shield of this doctrine is permitted "only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence." *California Ins. Co. v. Allen*, 235 F.2d 178, 180 (5th Cir. 1956).
>
> As the trial judge in [*United States v.*] *Winston*, [447 F.2d 1236, 1240 (D.C. Cir. 1971)] expressively observed:
>
> > …Opening the door is one thing. But what comes through the door is another. Everything cannot come through the door…. In essence, evidence admitted under the "open door" theory does not give an unbridled license to introduce otherwise inadmissible evidence beyond the extent necessary to remove any unfair prejudice which might have ensued from the original evidence.

In other words, the opening the door doctrine permits the limited introduction of otherwise irrelevant evidence.

The State's evidence of the victim's romantic relationship with Thompson was relevant to why appellant shot the victim. To that extent, it was both relevant and prejudicial (relevant evidence ordinarily is). It did not, however, open the door to otherwise inadmissible evidence.

But, had the State opened the door, appellant's proposed testimony related to the victim and appellant's home life and the progression of their relationship would not, in our view, satisfy the requirements for admissible evidence under the opened door doctrine. In both *Clark v. State*, 332 Md. 77, 85 (1993), and *Grier v. State*, 351 Md. 241 (1998), the Court of Appeals explained that in order to be admitted under the opened door doctrine, the evidence must be "*on the same issue*" as the evidence that purportedly opened the door. (Emphasis added.) Appellant's proposed testimony related to the victim and appellant's home life and relationship and, more particularly, the younger child's learning disabilities was not clearly evidence "on the same issue" as appellant's alleged jealousy. Therefore, its relevance to why appellant shot the victim on July 2, 2014, rested within the sound discretion of the trial court. We perceive neither error nor abuse of discretion in not admitting that evidence.

B. The Victim's Character and State of Mind

During the cross-examination of State's witness Sophia Thompson, defense counsel questioned Thompson about the victim's financial concerns and spending habits, and the following colloquy occurred:

[DEFENSE COUNSEL]: Why is that?

> [THOMPSON]: Because George gave everybody all his time and all his money. He shopped at thrift stores for himself. He short-changed himself. I said, Oh, no. He was a country man here in Maryland. I said, Do you know what? I'm going to hook my baby up. So, I took the time and I would buy him shirts or I would buy him shoes. He was funny with the pants because his legs were long. He was funny. But I bought him shoes and shirts. I said we would take the time to go buy his pants together, because I'm funny with my pants, too. That is just how far it got. So, he didn't have to worry. When he came over, you don't have to bring anything, just bring yourself.

Defense counsel continued:

> [DEFENSE COUNSEL]: He was fussing or concerned that the child support would be too much. That's what he told you. Right?
>
> [THOMPSON]: He wasn't worried about child support, no. Money was never a problem for George, never.
>
> [DEFENSE COUNSEL]: You just said that the man didn't take care of himself, he didn't have clothes, you had to buy him his clothes. Which is it?
>
> [THOMPSON]: I said before he gave his money away. He wanted to make sure that everybody was taken care of. George was the last on his own list. He took care of everybody. He gave his all to everybody.
>
> [DEFENSE COUNSEL]: His money you mean?
>
> [THOMPSON]: He bought things for everyone else. He wanted to make sure that everybody else was having a good time and everybody's [sic] was happy. That is the type of person that he was.

Contentions

During the defense case, appellant sought to introduce testimony "pertaining to events and circumstances that would have 'negatively affect[ed] [the] state of mind" of the victim. Appellant contends that the circuit court "erred when it excluded evidence about [the victim's] character and state of mind" because Thompson, a State's witness, had "opened the door for the defense to introduce evidence of [his] bad character" by testifying

to the victim's good character. More specifically, appellant references the following statements made during the defense's cross-examination of Thompson: "George gave everybody all his time and all his money." "He wanted to make sure everybody was taken care of. George was last on his own list. He took care of everybody. He gave his all to everybody;" "He bought things for everyone else. He wanted to make sure that everyone else was having a good time and everybody's [*sic*] was happy. That is the type of person that he was;" and "[H]e wanted to make sure that his children were comfortable and that [appellant] was okay."[5]

According to appellant, when a defendant pleads self-defense, "it is axiomatic that a defendant may introduce evidence of the victim's bad character," under Maryland Rule 5-404. In addition, she contends that the State's witness Sophia Thompson "injected the victim's good character into the record" and thereby "opened the door" to bad character evidence. Appellant asserts that the circuit court "failed to evaluate whether evidence sought to be admitted by defense counsel was relevant to rebut the character evidence introduced by [the State's witness]," and the court's evaluation of the relevance of that evidence "to the issues in the case" was in error. In her view, evidence of things that would "negatively affect" the victim's state of mind and help explain why he erupted into violence during the argument with appellant did not need to be relevant to the issues in the case under the opened door doctrine.

[5] She also references "He was funny" but, in context, that statement related more to being "funny" about his pants than his personality.

The State responds that any argument that evidence was admissible under Maryland Rule 5-404(a)(2)(B) as "evidence of [the victim's] bad character" is unpreserved because appellant "failed to make that argument" in the circuit court. Moreover, it argues, it did not open the door to the bad character evidence because the testimony that appellant takes issue with was elicited by the defense in its cross-examination of the State's witness.

And, if preserved, the State, citing *Thomas v. State*, 301 Md. 294, 307 (1984), contends that the evidence at issue was not admissible under Maryland Rule 5-404(a)(2)(B) because that evidence did not serve to "prove that the defendant 'had reason to perceive a deadly motive and purpose in the overt acts of the victim'" or to "corroborate evidence that the victim was the initial aggressor."[6] In other words, appellant "did not attempt to introduce evidence of [the victim's] character for either of the permitted reasons" under Maryland law, but to establish why a person such as the person described by Thompson "erupted into violence that night despite previously never being violent."

Analysis

As previously stated, "[a]ppellate review of an evidentiary ruling, when a specific objection was made, is limited to the ground assigned." *Colvin-el*, 332 Md. at 169 (citing *Calhoun*, 297 Md. at 601). At trial, appellant argued that the State had opened the door to

[6] Maryland Rule 5-404(a)(2)(B) refers to character evidence in criminal and delinquency cases and states that, "[s]ubject to the limitations in Rule 5-412, an accused may offer evidence of an alleged crime victim's pertinent trait of character. If the evidence is admitted, the prosecutor may offer evidence to rebut it."

evidence related to the victim's character and state of mind.[7] On appeal, appellant also argues that the circuit court erred by not admitting the disputed character and state of mind testimony into evidence under Maryland Rule "5-404(a)(1)(B),"[8] which permits a defendant pleading self-defense to introduce evidence of the victim's bad character. Because appellant did not support its admission with this argument in the circuit court, it is not preserved for our review.

But, had the issue been preserved, appellant would fare no better. In *Thomas v. State*, 301 Md. at 306–07 (internal citations omitted) (emphasis added), the Court of Appeals noted that

> [w]hen the issue of self-defense has been properly raised in a homicide case, the character of the victim is admissible for two purposes. First, it may be introduced to prove the defendant's state of mind when the victim was killed. Specifically, the character evidence may be used to prove that [the] defendant had reasonable grounds to believe that [s]he was in danger. The accused may introduce evidence of the deceased's *previous violent acts* to prove that [s]he had reason to perceive a deadly motive and purpose in the overt acts of the victim….Second, the violent character of the victim may be introduced to corroborate evidence that the victim was the initial aggressor….To use character evidence for this second purpose, however, the proponent must first establish an evidentiary foundation tending to prove that the defendant acted in self-defense.

Here, appellant did not seek to introduce evidence of the victim's character for either of the reasons indicated in *Thomas*. Instead, she "sought to elicit testimony pertaining to

[7] The trial court noted the testimony which allegedly opened the door was elicited during cross-examination of the State's witness Sophia Thompson and that it was not the State opening the door.

[8] As the result of the renumbering of the rules in 2011, there is no Maryland Rule 5-404(a)(1)(B). Based on the language cited in appellant's brief, we assume appellant refers to Maryland Rule 5-404(a)(2)(B).

events and circumstances that would have negatively affected [the] state of mind of [the victim], as well as testimony about the state of mind that led [the victim] to this eruption of violence." The proposed testimony, therefore, was not evidence of the victim's *prior acts of violence* to show she "had reason to perceive a deadly motive and purpose in the overt acts of the victim." *Thomas*, 301 Md. at 307. In fact, by appellant's own statements, the victim did not have a propensity for violence and had "never been violent before [the evening he died]." Nor, at that point in the trial, could it be introduced to demonstrate that he was the initial aggressor. Similar to the situation in *Thomas*, the evidence was generated in the cross-examination of a State's witness. Appellant had not then testified and established an "evidentiary foundation tending to prove that [she] acted in self-defense." *Id.*

In sum, the evidence regarding the victim and his state of mind was not admissible under the opened door doctrine because appellant, not the State, opened the door.[9] Nor was it admissible under Maryland Rule 5-404(a)(2)(B) to corroborate evidence that the victim was the initial aggressor. Again, we perceive neither error nor abuse of discretion in omitting it.

Non-Dismissal of a Sitting Juror

When appellant testified, she demonstrated how she handled the firearm that she removed from the dresser drawer. In doing so, and against directions from the court and defense counsel not to do so, the weapon was pointed in the direction of the jury. After

[9] We do not express an opinion as to whether the cross-examination exceeded the scope of the direct examination.

she did that, Juror 59 became "visibly upset and [was] crying." Because of this, the court decided to take a recess. With the agreement of the parties, the court questioned Juror 59 on the record to ensure that she could "continue to serve":

> [COURT]: Juror 59, we wanted to bring you out because prior to the break you did become visibly upset.
>
> [JUROR]: I'm sorry.
>
> [COURT]: There's no need to apologize. Emotions are not uncommon in criminal trials. However, because you are a juror, the question is can you continue to serve fairly and impartially in this particular matter?
>
> [JUROR]: Yes, if we can move on.
>
> [COURT]: Well, we have still the trial to go on.
>
> [JUROR]: That's what I mean.
>
> [COURT]: The evidence that you have been presented so far cannot be considered yet by the jurors until the end when I instruct them on the law and you are deliberating. Are you able to still continue doing that?
>
> [JUROR]: Yes.
>
> [COURT]: Would either party like to question?
>
> [PROSECUTOR]: None from the State.
>
> [DEFENSE COUNSEL]: No.

After the juror was excused, defense counsel noted that the juror's "nose was red and she was clearly still in a state of being extremely upset. She has obviously been crying. She was crying as she was leaving." Defense counsel then "ask[ed] the court to consider inserting an alternate." The State "ha[d] no opposition" to inserting an alternate, but deferred to the court. According to the court:

> I have to say that I'm a bit reluctant to do that in light of the fact that that was brought upon by the defense's decision to have the Defendant stand in front of the jury with the gun. Upon my inquiry to her, she did indicate that she could still be fair and impartial and not consider the evidence until the end and accept it was an upsetting thing to see. So, for the time being, I'm not going to strike her. I'm going to keep her on the jury and take it from there.

After the jury left at the end of the day, the following colloquy took place:

> [COURT]: I wanted to just address again the issue with juror number 59 who I did allow to continue to be seated. I have, through the course of the afternoon, kept looking over at all of the jurors during the course of the testimony to see if anybody exhibited any behaviors that were concerning that would show either emotion or inattentiveness as a result of what transpired here, and I did not see that. I looked over, not continuously, but on several occasions. I looked over at juror number 59 and she was taking notes and appeared to be attentive to the testimony. I did not notice anything within her demeanor that caused me any concern at this point, but I did bring it up to the parties just to make a record of it and in order to have you echo in on anything that you would like to state.
>
> [DEFENSE COUNSEL]: We were watching also and we didn't observe anything untoward, if you will, or anything unusual.
>
> [COURT]: Is there anything from the State on that?
>
> [PROSECUTOR]: No, Your Honor.
>
> [COURT]: Again, I will revisit it again if you like or if we see anything, but I have not seen anything today after we came back from the break. We still have our three alternates.

Finally, at the close of all the evidence, after the jury had been excused, the following occurred:

> [COURT]: All right. I would like the record to reflect that throughout the proceedings today I did not notice or have any concerns concerning jurors in light of yesterday, what transpired. Throughout the day, throughout the testimony I looked over at all the jurors. They appeared attentive, taking notes, no emotional episodes were seen from any of them to show they were distraught as a result of what happened yesterday. I don't know if the parties

> were also looking over at the jurors but those are the observations that I did make of them.
>
> [PROSECUTOR]: Your Honor, just for the record, I did not notice anything out of the ordinary with any of the jurors, including the one in particular. Those were also my observations.
>
> [COURT]: Mr. [Defense counsel]?
>
> [DEFENSE COUNSEL]: Nor did I.

Standard of Review

"The decision to excuse a seated juror and replace him or her with an alternate for reasons particular to that specific juror will not be reversed unless there is 'a clear abuse of discretion or prejudice' to the defendant." *Diaz v. State*, 129 Md. App. 51, 59 (1999) (quoting *State v. Cook*, 338 Md. 598, 620 (1995)). An "'[a]buse of discretion' . . . has been said to occur 'where no reasonable person would take the view adopted by the [trial] court,' or when the court acts 'without reference to any guiding rules or principles.'" *Nash v. State*, 439 Md. 53, 67 (quoting *North v. North*, 102 Md. App. 1, 13–14 (1994)), *cert. denied*, 135 S. Ct. 284 (2014).

The reasoning for the deferential standard on review is two-fold: "First, 'the trial judge is physically on the scene, able to observe matters not usually reflected in a cold record. . . . [T]he judge has his finger on the pulse of the trial.' Second, a defendant is not entitled to a jury comprised of any particular group of individuals, but only to a jury that is fair and impartial." *Diaz*, 129 Md. App. at 59–60 (internal citations omitted).

Contentions

Appellant contends that the circuit court "erred when it failed to dismiss a biased juror." More specifically, she challenges the circuit court's decision not "to dismiss a crying juror after an unfortunate and highly prejudicial incident involving [appellant's] handling of a firearm on the stand." She argues that the court's decision to retain this juror was "highly prejudicial to [her] defense" because "one would be hard-pressed to believe that the juror's emotional state thereafter did not affect the outcome of this case."

The State responds that the circuit court "properly exercised its discretion when it refused to dismiss a sitting juror" because, when asked by the court about her ability to continue as a juror, "the juror indicated that she could still be fair and impartial and not consider the evidence until the end of the trial" and "on two separate occasions, the court and counsel indicated that they did not observe any of the jurors, and Juror 59 in particular, acting out of the ordinary . . . . all the jurors were attentive, taking notes, and did not seem emotional." Therefore, "reversal on this ground is unwarranted."

Analysis

In addressing judicial discretion, the Court of Appeals has stated that it "'is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.'" *Gunning v. State*, 347 Md. 332, 351 (1996) (quoting *In re Don Mc*, 344 Md. 194, 201 (1996)). In other words, the proper exercise of discretion involves consideration of the particular circumstances of each case. *Diaz*, 129 Md. App. at 61.

Here, the trial judge expressed concern about Juror 59's emotional state following the firearm incident and, with the agreement of counsel, directly asked the juror whether she could continue to serve fairly and impartially and to refrain from considering the evidence until the deliberations. The juror indicated she could. On two later occasions, both the trial judge and counsel indicated they did not observe Juror 59 acting out of the ordinary or emotionally. Rather, she was attentive and taking notes. The trial judge's decision not to dismiss Juror 59 was clearly not arbitrary or capricious, but rather an exercise of sound judgment after observing the jurors over a period of time and consulting with counsel as to their observations following the incident. We perceive neither error nor an abuse of discretion.

Cumulative Effect of the Alleged Errors

Contentions

Appellant contends that "the cumulative effect of the trial court's errors requires reversal." Citing *Muhammad v. State*, 177 Md. App. 188, 325 (2007), she asserts that "the cumulative prejudicial impact of the errors" lead to "the presentation of a highly biased and one-sided portrayal of the case to the jury." The State, presumably because it takes the position that the circuit court did not err or abuse its discretion, did not explicitly address appellant's cumulative effects doctrine argument.

Analysis

"'Cumulative error' is a phenomenon that exists only in the context of harmless error analysis. More precisely, it exists only in the context of multiple findings of harmless error. In the case of two or more findings of error, the cumulative prejudicial impact of the

errors may be harmful even if each error, assessed in a vacuum, would have been deemed harmless." *Muhammad*, 177 Md. App. at 325. In other words, "[t]here must first be error before there is any prejudicial effect of that error to be measured." *Id.*

With respect to each of appellant's contentions regarding the exclusion of the evidence, we conclude that the issues were not preserved for our review or, if they were, that there was no error or abuse of discretion. Therefore, there was no cumulative prejudice. *See Colvin-el v. State*, 332 Md. at 180 (finding that where claims individually have no merit, there is no merit to the argument that the "whole exceeds the sum of its parts").

JUDGMENT OF THE CIRCUIT COURT OF HARFORD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.