Circuit Court for Baltimore City
Case No. 120031014

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 223

September Term, 2022

DEONTE WALKER

v.

STATE OF MARYLAND

Friedman,
Albright,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: April 16, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Deonte Walker, appellant, was convicted, following a jury trial in the Circuit Court for Baltimore City, of the following offenses: second-degree murder, use of a handgun in a crime of violence, possession of a firearm by a disqualified person, carrying a handgun on his person, and transporting a handgun in a vehicle. The court sentenced Walker to a term of forty years' imprisonment on the conviction of second-degree murder, a consecutive term of twenty years' imprisonment—with all but ten years suspended—on the conviction of use of a handgun in a crime of violence, and a concurrent term of ten years' imprisonment on the conviction of possession of a handgun by a disqualified person. The remaining convictions were merged for sentencing purposes.

In this appeal, Walker presents six questions, which we have reordered and rephrased as follows:[1]

1. Did the trial court err in refusing to strike the testimony of a witness who testified remotely via two-way video?

[1] The questions presented, as set forth in Walker's brief, are:

1. Is Appellant entitled to have his sentences for second degree murder and use of a handgun run concurrently and not consecutively?

2. Did the trial court impermissibly restrict Appellant's closing argument?

3. Did the trial court err in permitting Natalia Overton to testify via Zoom connection, and in failing to reverse that ruling and strike the testimony when it became clear that the required technology was unreliable?

4. Did the trial court err in admitting the extrajudicial statement of Natalia Overton (State's Exhibit 6)?

5. Did the trial court err in admitting video evidence of the 7-Mart in the absence of proper authentication?

6. Did the trial court err in propounding a flight instruction?

2. Did the trial court err in admitting a witness's prior extrajudicial statement after the court found that the witness had feigned memory loss?

3. Did the trial court err in admitting video evidence after Walker objected on the grounds that the video had not been properly authenticated?

4. Did the trial court err in propounding a flight instruction?

5. Did the trial court err in restricting Walker's closing argument?

6. Is Walker entitled to have his sentences for second-degree murder and use of a handgun in a crime of violence run concurrently rather than consecutively?

As to question 1, we conclude that the court did not abuse its discretion in refusing to strike the testimony of a witness who testified via video. As to question 2, we conclude that the court properly admitted the witness's prior statement. As to question 3, we conclude that the court did not abuse its discretion in admitting the video evidence. As to question 4, we conclude that the court did not err in instructing the jury on flight. As to question 5, we conclude that the trial court did not abuse its discretion in restricting Walker's closing argument. As to question 6, we conclude that Walker is not entitled to have his sentences run concurrently. Accordingly, we shall affirm the judgments entered by the circuit court.

BACKGROUND

In the early morning hours of January 14, 2020, Justin Johnson was shot and killed outside of the "7-Mart" convenience store located in the 1400 block of East Fayette Street in Baltimore. Walker was later arrested and charged as the shooter.

At trial, Walker's girlfriend, Natalia Overton, testified that, just prior to the shooting, she and Walker had driven to the 7-Mart, and they had entered the store. Ms. Overton further testified that, upon exiting the store, Walker got into an altercation with an individual who was later identified as Justin Johnson. Ms. Overton said that, during that altercation, she observed Walker fall to the ground, at which point she heard gunshots. But, when pressed for further details regarding the shooting, Ms. Overton testified that she could not remember.

At the State's request, the trial court found that Ms. Overton's memory loss was feigned. The court then admitted, over objection, a previously recorded statement Ms. Overton had provided the police when she was interviewed following the shooting. In that statement, which was played for the jury, Ms. Overton stated that, upon exiting the 7-Mart just prior to the shooting, she and Walker had returned to and entered their vehicle before the start of Walker's altercation with Mr. Johnson. According to Ms. Overton, she was sitting in the driver's seat when Mr. Johnson approached the vehicle and spoke to Walker—who was sitting in the vehicle's passenger seat—through the vehicle's open window. Mr. Johnson then walked away, and Ms. Overton attempted to drive away. But, before Ms. Overton could drive away, Walker reached over and put the vehicle in park, got out, and walked toward Mr. Johnson. Ms. Overton then looked in the vehicle's rearview mirror and saw Walker fall to the ground. Immediately thereafter, Ms. Overton observed Walker shoot Mr. Johnson. Walker then returned to the vehicle and told Ms. Overton to "go." The two then went home, retrieved some personal effects, and drove to Walker's father's residence. Upon arriving there, the two met with a friend, Davon Bannerman, who advised them to

remove their clothing and "shower in bleach[,]" which they did. Mr. Bannerman then assisted them in disposing of their clothes. The police later found some of that clothing, which smelled of bleach, in a garbage bag that had been left in a nearby dumpster.

Walker was ultimately convicted of second-degree murder, use of a handgun in a crime of violence, possession of a firearm by a disqualified person, carrying a handgun on his person, and transporting a handgun in a vehicle. This timely appeal followed. Additional facts will be supplied as needed below.

DISCUSSION

I.

Walker's first claim of error concerns the testimony of Natalia Overton, who testified via two-way video from her home in Texas. Prior to trial, the State requested that Ms. Overton be permitted to testify remotely because she lived out of state and had recently given birth. Walker opposed the request. Following a hearing on the issue, the court ruled that Ms. Overton would be allowed to testify remotely.

On the second day of trial, following jury selection but before opening statements, Walker again objected to Ms. Overton being allowed to testify via two-way video. He argued, through counsel, that the court's technology was "wholly inadequate to give the jury the proper ability to assess [Ms. Overton's] credibility." The trial court disagreed, noting that the screen on which Ms. Overton was being displayed was large and easy to see; that the image of the witness was "very clear"; and that the sound was "fine." After noting Walker's continuing objection, the court allowed the testimony.

Ms. Overton thereafter testified. At one point during the testimony, the internet connection to the courtroom experienced a drop, and Ms. Overton's testimony was interrupted. The trial court subsequently excused the jury from the courtroom to assess the problem. Approximately eighteen minutes later, the technological problems were said to be resolved, the jury was brought back into the courtroom, and Ms. Overton's testimony resumed. Aside from that one interruption, the record reflects no other technological issues during Ms. Overton's testimony, and the record does not disclose any indication that either the prosecutor or defense counsel had any problems examining Ms. Overton.

Parties' contentions

Walker claims that the trial court erred in permitting Ms. Overton to testify via two-way video. In so doing, Walker acknowledges that he "does not take serious issue with [the court's] preliminary ruling" permitting Ms. Overton to testify remotely. Walker contends, rather, that the court erred in not striking the testimony at trial because there were "repeated failures of the technical equipment to maintain a reliable connection between the witness and the courtroom" and because "continuing problems with the equipment plagued the communication between [the] witness and trial participants[.]" Walker claims that those technical problems did not "reliably permit the defense and the jury to size up [the] witness as effectively as if the witness were present."

The State contends that the trial court acted within its discretion in regulating Ms. Overton's testimony. The State asserts that Walker's claims regarding the "repeated" failures of the equipment are not supported by the record. The State further asserts that any communication problems between Ms. Overton and the participants were confined to the

brief interruption in the internet connection in the middle of Ms. Overton's testimony. The State notes that the jury was not present in the courtroom during that interruption while the technical issue was being addressed.

Standard of Review

A court's decision to permit a witness to testify remotely implicates a defendant's constitutional right to confront witnesses. *Spinks v. State*, 252 Md. App. 604, 614-15 (2021). When determining whether that right has been violated, we conduct an "independent constitutional appraisal, by reviewing the law and applying it to the peculiar facts of the particular case." *Id.* at 614 (quotation marks and citation omitted). "In doing so, we accept the trial court's factual findings unless they are clearly erroneous." *Id.* at 615.

Analysis

Generally, a defendant's right to confrontation includes the physical presence of a witness in the courtroom. *Id.* That right is not, however, absolute and may "'give way to considerations of public policy and the necessities of the case.'" *Id.* (quoting *Maryland v. Craig*, 497 U.S. 836, 849 (1990)). A witness may be permitted to testify remotely by way of a two-way video if the court finds that considerations of public policy necessitate its use. *Id.* at 616-20; *see also White v. State*, 223 Md. App. 353, 392-93 (2015). In making that determination, a court must find that the two-way medium is reliable and that permitting the witness to testify remotely is necessary and furthers an important public policy. *White*, 223 Md. App. at 393.

Here, Walker does not argue that the trial court erred in making its initial finding that Ms. Overton's remote testimony was necessary and furthered an important public policy. Walker's sole claim is that the method utilized by the court was not reliable.

We conclude that the court did not err in permitting the testimony. Although Walker claims Ms. Overton's two-way video testimony suffered "repeated failures of the technical equipment to maintain a reliable connection" and was "plagued" by "continuing problems[,]" we find no support in the record for those claims. As the State observes in its brief, "Walker does not identify what the jury might have been unable to observe or to comprehend." There was only one discernible technical problem that occurred during Ms. Overton's testimony, wherein the court lost internet connectivity and Ms. Overton's two-way video feed was temporarily disconnected. That interruption lasted just eighteen minutes, during which the jury was excused from the courtroom. When the problem was resolved, the jury returned to the courtroom, and Ms. Overton's testimony continued without any further interruptions.

The record does reflect that the trial court appeared to have some issues communicating with Ms. Overton *during* the eighteen-minute interruption, and, at one point during that interruption, Ms. Overton could be seen "vaping." But all of those issues occurred while the court was attempting to fix the problem, not while Ms. Overton was providing any testimony. And none of those issues occurred in the presence of the jury.

Aside from that one interruption, there is nothing in the record to indicate that there were any communication problems with Ms. Overton or that the court participants had any issues interacting with Ms. Overton. The court found that the screen on which Ms. Overton

was being displayed was large and easy to see, the image on the screen was clear, and the sound was adequate. We conclude that Ms. Overton's two-way video testimony was sufficiently reliable to protect Walker's right of confrontation.

II.

Parties' contentions

Walker claims that the trial court erred in admitting, as substantive evidence, Ms. Overton's out-of-court statement to the police, which she had provided following the shooting. Walker argues that the court's decision ran afoul of Maryland Rule 5-802.1, which requires that, before a prior inconsistent statement can be admitted as substantive evidence, the statement must be found to be accurate and reliable. Walker contends that no such foundation was laid here because there was "no proffer or description" that demonstrated the reliability of the statement. The State asserts that the statement was sufficiently reliable, and was therefore properly admitted pursuant to Rule 5-802.1 because the statement had been recorded by electronic means.

Standard of Review

"Determinations regarding the admissibility of evidence are generally left to the sound discretion of the trial court." *Baker v. State*, 223 Md. App. 750, 759-60 (2015) (quotation marks and citation omitted). Where, however, an evidentiary determination involves whether evidence is hearsay and whether it is admissible under a hearsay exception, we review that determination *de novo. Gordon v. State*, 431 Md. 527, 538 (2013). But, if the court renders any factual findings in the course of making a hearsay determination, those findings will not be disturbed absent clear error. *Id.*

Analysis

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Hearsay is generally inadmissible "[e]xcept as otherwise provided by [the Maryland] rules or permitted by applicable constitutional provisions or statutes[.]" Md. Rule 5-802. One such exception can be found in Maryland Rule 5-802.1, which allows for the admission of a hearsay statement if that statement is inconsistent with the declarant's testimony and was "recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement[.]"[2] Md. Rule 5-802.1(a).

We conclude that the trial court did not err in admitting Ms. Overton's statement. The statement was inconsistent with Ms. Overton's trial testimony because the statement included significant details about the shooting that were missing from Ms. Overton's trial testimony. Moreover, the statement that was played at trial, which consisted of an audio/video recording of Ms. Overton's interview with the police, had been recorded by the police in real time while Ms. Overton was making the statement. The statement was sufficiently accurate and reliable to be admitted, in that it was "recorded in substantially verbatim fashion by . . . electronic means contemporaneously with the making of the statement[.]" *Id.*

[2] The Rule contains two additional indica of reliability, but neither of those is applicable here. Md. Rule 5-802.1(a).

III.

Walker claims that the trial court erred in admitting a video recording that had been taken from surveillance cameras located at the 7-Mart store where the shooting occurred. That video purportedly showed Walker and Ms. Overton at the store around the time of the shooting. In the course of laying a foundation for the video to be offered into evidence by the State, the prosecutor asked Ms. Overton if she had seen the video and, if so, whether the video was a fair and accurate depiction of what occurred on the night of the shooting. Ms. Overton answered in the affirmative, stating specifically that "it was accurate."

When the State asked for the video to be admitted, Walker objected, arguing that "the proper foundation" had not "been laid for the 7 Mart video as far as authenticity, custodian of record, et cetera." The State responded that Ms. Overton provided that foundation because she was "actually depicted in that video[.]" After the State proffered that the 7-Mart video had not been edited in any way, the court ruled that Ms. Overton's testimony had authenticated the video sufficiently to be admitted unless there was some reason to believe the video had been edited or tampered with in some fashion. After the State represented that the entire 7-Mart video would be admitted, the court agreed to conditionally admit the video, telling defense counsel that, "if there's something else that's not shown that [the defense] want[s] to bring up, . . . you can bring it up as well." In response to that ruling, defense counsel said: "Okay. That's what I wanted to clarify." Walker did not lodge any further objections.

Parties' contentions

Walker now claims that the trial court erred in admitting the video. He argues that the State failed to lay the proper foundation before the court admitted the video into evidence.

The State contends that Walker's claim is unpreserved because he did not lodge any further objections after the court issued its conditional ruling regarding the video's admissibility. The State further argues that, even if preserved, Walker's claim is without merit because Ms. Overton, a witness with personal knowledge, provided testimony as to the video's accuracy and reliability.

Standard of Review

We review for abuse of discretion a trial court's decision to admit evidence based on a finding that the evidence was properly authenticated. *Prince v. State*, 255 Md. App. 640, 651-52 (2022), *cert. denied*, 482 Md. 746 (2023).

Analysis

As a preliminary matter, we agree, at least in part, with the State's preservation argument. At trial, Walker objected on the ground that the 7-Mart video had not been properly authenticated. After the trial court ruled that the proper foundation had been laid based on Ms. Overton's testimony, and after the State confirmed that the video had not been edited, the court admitted the video on the condition that, if anything came to the attention of Walker suggesting that it appeared that the video had been altered or tampered with, Walker could renew his objection. Following that conditional ruling, Walker did not lodge any further objection. To the extent that Walker is claiming that the State failed to

lay the proper foundation because there was a risk that the video had been edited, that claim is not preserved. Md. Rule 8-131(a).

Regarding Walker's more general claim that the video was not properly authenticated, we disagree with his contention, and conclude that the trial court did not abuse its discretion in admitting the video. The authentication of evidence is governed by Maryland Rule 5-901(a), which states that the requirement of authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." When the evidence is a photograph or video, proper authentication may be accomplished either through the "pictorial testimony theory" or the "silent witness theory." *Prince*, 255 Md. App. at 652. Under the pictorial testimony theory, a video may be admitted "to illustrate [the] testimony of a witness when that witness testifies from first-hand knowledge that the [video] fairly and accurately represents the scene or object it purports to depict as it existed at the relevant time." *Washington v. State*, 406 Md. 642, 652 (2008) (quotation marks and citation omitted). The silent witness theory, on the other hand, "allows for authentication by the presentation of evidence describing a process or system that produces an accurate result." *Id.*

Here, the 7-Mart video, which depicted the events at the 7-Mart around the time of the shooting, was offered to illustrate Ms. Overton's testimony regarding those very same events. The transcript reflects that the following took place prior to admission of the video:

> [STATE:] Okay. Taking you back to January 14th specifically, the early morning hours around 2:30 in the morning, the night that this incident actually occurred, what were you doing that night?
>
> [MS. OVERTON:] Going to the store.

* * *

[STATE:] Okay. On this specific night you stated that you were going to the store, what store are you referring to?

[MS. OVERTON:] Um, I don't know the name of the store, it was just a convenience store right there.

[STATE:] Is that the store on Fayette Street?

[MS. OVERTON:] Uh, yeah.

[STATE:] Okay. Does the name 7 Mart ring any bells?

[MS. OVERTON:] Sure.

[STATE:] **Okay. Did you have the chance to see the surveillance footage from the 7 Mart?**

[MS. OVERTON:] **Uh, yes.**

[STATE:] **And you had a chance to view that the last time you spoke with me; correct?**

[MS. OVERTON:] **Yes.**

[STATE:] **Do you recall watching the surveillance footage from a disk?**

[MS. OVERTON:] **Yes.**

[STATE:] **And the surveillance footage that you viewed on that disk, was it a fair and accurate depiction of what you observed in the convenience store on the night that this happened?**

[MS. OVERTON:] **I don't really remember it but it was accurate.**

* * *

[STATE:] **When you had a chance to view that surveillance video, were you able to see yourself in it?**

[MS. OVERTON:] **Yes.**

[STATE:] **Did you also see Deonte Walker?**

[MS. OVERTON:] **Yes.**

* * *

[STATE:] And Ms. Overton, you can see the disk I believe on the screen that I'm holding up to you? It's marked State's Exhibit 5. **Do you recall being able to watch this video from this disk, the 7 Mart video?**

[MS. OVERTON:] **Yes.**

[STATE:] Okay. **And is that the same video that essentially those pictures that you recognized are from?**

[MS. OVERTON:] **Yes.**

[STATE]: Your Honor, at this time I'd motion to have State's Exhibit 5 admitted into evidence as well.

[DEFENSE]: Objection.

THE COURT: You're objecting? All right. Could you approach?

(Whereupon, counsel approached the bench, and the following ensued:)

[DEFENSE]: Your Honor, I don't believe the proper foundation has been laid for the 7 Mart video as far as authenticity, custodian of record, et cetera.

THE COURT: Oh, I will – I'll tell you what I do because I understand why we need it for this witness but also that you might want to have a detective or whoever it is that procured the video talk about that, I will provisionally admit it under the Rule with the understanding that the State will loop back around and add that missing link into the chain of authenticity.

[STATE]: I mean, at this point, Your Honor, I don't really have any intention of doing that. **She is a witness with knowledge, she is actually depicted in that video and she – we just admitted the two images which**

are still images from that video into evidence and she said that they're all fair and accurate depictions of –

THE COURT: **Has the video been edited in any fashion?**

[STATE]: **It is not.**

* * *

THE COURT: All right. Now, she did say we went to the store, it was the 7 Mart and that's us in the video. I think that authenticates it as far as – that demonstrates its relevance, the only issue would be if it was edited or tampered with in some fashion and if you're saying it's a continuous video that hasn't been edited in any fashion, then I don't think that that is a risk either. If there is some evidence that comes up that it's been altered in some fashion, certainly renew your objection but I'll allow it.

[DEFENSE]: All right. And I could just clarify based on what the State just said, my understanding, I got the entire 7 Mart video.

THE COURT: Mm-hmm.

[DEFENSE]: And there's 10 separate camera angles or –

[STATE]: I don't know.

THE COURT: But multiple cameras.

[STATE]: There's many camera angles, yeah.

[DEFENSE]: Are you – is that disk the entire thing that I got or is it just partial?

[STATE]: I believe that is the entire thing, I only intend on using two of those angles but I believe that is the entire thing.

THE COURT: So it's all coming in, some of it is dubious relevance perhaps but if there's something else that's not shown that you want to bring up, the whole thing is in, and you can bring it up as well.

[DEFENSE]: Okay. That's what I wanted to clarify.

[STATE]: Yeah.

THE COURT: All right.

(Whereupon, counsel returned to the trial tables, and the following ensued:)

THE COURT: All right. So State's 5, the video, is admitted.

(Emphasis added.)

As noted, Walker raised no further objections. And we perceive no error in the trial court's rulings with respect to the objections that were raised prior to the admission of the video. Because Ms. Overton was one of the individuals depicted in the video, she had first-hand knowledge of the video's contents. She testified that she had reviewed the entire video, that she recognized herself and other persons in the video, and that it accurately represented the scene at the 7-Mart around the time of the shooting. Consequently, we conclude that the video was properly authenticated under the pictorial testimony theory.[3]

[3] *Cf. Washington v. State*, 406 Md. at 655 (holding that the video evidence in that case had not been properly admitted under the silent witness theory). We are aware that, on February 16, 2024, the Supreme Court of Maryland granted a writ of *certiorari* in *Mooney v. State*, Case No. 32, Sept. Term, 2023, to consider a question relative to the authentication of video evidence, namely: "Did [the Appellate Court of Maryland] lower the requirements for authentication of video evidence through the 'pictorial testimony theory' where a witness is permitted to authenticate video evidence even when the witness did not see the entirety of the events depicted in it?" *See Mooney v. State*, No. 1561, Sept. Term, 2022 (Md. App. October 13, 2023). In Walker's case, he did not object that the video should be excluded on the ground that Ms. Overton did not see the entirety of the events depicted in the 7-Mart video.

IV.

Parties' contentions

Walker claims that the trial court erred in instructing the jury on flight. The instruction given by the court stated as follows:

> A person's flight or concealment immediately after the commission of a crime or after being accused of committing a crime is not enough by itself to establish guilt but it is a fact that may be considered by you as evidence of guilt. Flight or concealment under these circumstances may be motivated by a variety of factors some of which are fully consistent with innocence.
>
> You must first decide whether there is evidence of flight or concealment. If you decide there is evidence of flight or concealment, then you must decide whether this flight or concealment shows a consciousness of guilt.

Walker contends that the trial court should not have given that instruction because the evidence did not support it. More specifically, Walker claims that the evidence did not establish that he left the scene of the crime in an effort to avoid detection or apprehension. The State disagrees.

Standard of Review

Generally, we review a trial court's decision to give a flight instruction for abuse of discretion. *Hayes v. State*, 247 Md. App. 252, 295 (2020). On the other hand, "[t]he threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law for the judge." *Bazzle v. State*, 426 Md. 541, 550 (2012) (quotation marks and citation omitted). In reviewing that determination, our task is to assess whether the requesting party "produced th[e] minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that

the evidence supports the application of the legal theory desired." *Id.* (quotation marks and citation omitted). "This threshold is low, in that the requesting party must only produce 'some evidence' to support the requested instruction." *Page v. State*, 222 Md. App. 648, 668 (2015). The Supreme Court explained in *Dykes v. State*, 319 Md. 206, 216-17 (1990): "*Some evidence* is not strictured by the test of a specific standard. It calls for no more than what it says—'some,' as that word is understood in common, everyday usage." *Accord Bazzle*, 426 Md. at 551. Moreover, "[u]pon our review of whether there was 'some evidence,' we view the facts in the light most favorable to the requesting party, here being the State." *Page*, 222 Md. App. at 668-69.

Analysis

"Evidence of a defendant's conduct following a crime may be admissible as circumstantial evidence of consciousness of guilt, but not when the conduct is too ambiguous or equivocal to indicate consciousness of guilt." *Rainey v. State*, 480 Md. 230, 256 (2022). "There is a distinction between 'flight' and 'departure.'" *Hayes*, 247 Md. App. at 294. "At its most basic, evidence of flight is defined by two factors: first, that the defendant has moved from one location to another; second, some additional proof to suggest that this movement is not simply normal human locomotion." *Hoerauf v. State*, 178 Md. App. 292, 323 (2008) (quotation marks and citation omitted). Conversely, mere "departure" from the scene of a crime, "without any attendant circumstances that reasonably justify an inference that the leaving was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt, does not

constitute 'flight,' and thus does not warrant the giving of a flight instruction." *Hayes*, 247 Md. App. at 294 (quotation marks and citation omitted).

We conclude that the trial court did not err in giving a flight instruction. When viewed in a light most favorable to the State, the evidence presented at trial established several "attendant circumstances" that reasonably justified an inference that Walker's departure from the scene of the crime (and what he and Ms. Overton did immediately after departing the scene) was not "simply normal human locomotion." Immediately after shooting the victim, Walker got back into his vehicle and told Ms. Overton to "go." Walker then travelled to his home, collected some personal belongings, and went to his father's house. Upon arriving there, Walker removed his clothes and doused himself in bleach. Walker then placed the clothes he was wearing in a trash bag, which was eventually disposed of in a nearby dumpster. From that, a reasonable inference can be drawn that Walker's departure from the scene of the shooting was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution. That was sufficient evidence to support the court's instruction.

V.

Walker claims that a comment made by defense counsel at trial during closing argument was impermissibly restricted. That comment concerned Davon Bannerman, the individual whom Ms. Overton claimed had assisted her and Walker in disposing of their clothing following the shooting:

> [DEFENSE:] Now, this is what we do. My client was taken into custody. He was staying at his Dad's house. He didn't live in Spring Court. And interestingly – I mean, the State went to the trouble to introduce these

two weapons into evidence. They wanted you to see these guns that were in the house. It's not my client's house. Not my client's guns.

Now, one of those guns belonged to D[a]von Bannerman. **I'd like to review his testimony with you, but I can't do that because he wasn't called as a witness.**

[STATE]: **Objection, Your Honor.**

THE COURT: **Sustained.**

[STATE]: **Move to strike**.

THE COURT: **Disregard that about not being called.**

(Emphasis added.)

Parties' contentions

Walker claims that the trial court erred in precluding him from commenting on the State's failure to call Davon Bannerman as a witness. Walker argues that he was entitled to invoke the "missing witness rule" during closing argument. He also argues that "the defense in closing is permitted to point out in argument that which the State did not offer." The State contends that the court acted within its discretion in regulating Walker's closing argument.

Standard of Review

"It is well settled that 'a trial court has broad discretion when determining the scope of closing argument.'" *Colkley v. State*, 251 Md. App. 243, 293 (quoting *Cagle v. State*, 462 Md. 67, 75 (2018)), *cert. denied*, 476 Md. 268 (2021). We generally defer to the judgment of the trial court, as it "is in the best position to evaluate the propriety of a closing argument as it relates to the evidence adduced in a case." *Ingram v. State*, 427 Md. 717,

726 (2012). "Therefore, we shall not disturb the ruling at trial 'unless there has been an abuse of discretion likely to have injured the complaining party.'" *Pietruszewski v. State*, 245 Md. App. 292, 319 (2020) (quoting *Grandison v. State*, 341 Md. 175, 243 (1995)). "A trial court abuses its discretion when its ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective." *Ingram*, 427 Md. at 726-27 (quotation marks and citation omitted).

Analysis

Walker first claims that defense counsel's comment was proper for him to include in his closing pursuant to the "missing witness rule." Under that rule, if a witness is "peculiarly available to one party," and if that party fails to call the witness to testify, a factfinder "is then permitted to infer that the party did not call the witness because whatever testimony that individual would have given would be unfavorable to that party." *Harris v. State*, 458 Md. 370, 388 (2018) (quotation marks and citation omitted). In certain circumstances, a court may permit a party to discuss, during argument, a witness's absence and the related "missing witness" inference. *Id.* at 396-405. In even more limited circumstances, a court may also give a missing witness instruction to the jury. *Id.* In either case, a party is not "entitled" to invoke the rule; rather, the decision lies within the court's discretion. *Id.* Moreover, for the missing witness rule to be applicable, several prerequisites must be met: 1) there must be a witness who was not called to testify; 2) the witness must be "peculiarly available to one side because of a relationship of interest or affection"; and 3) the witness's testimony must be important and non-cumulative. *Id.* at 404.

We conclude that the trial court in the instant case did not err in sustaining the State's objection to defense counsel's comment that he would have liked "to review [Davon Bannerman's] testimony" with the jury but could not "because [Bannerman] wasn't called as a witness." To the extent that counsel was making a missing witness argument, the court was not required to permit such an argument. Rather, as noted, the decision to allow the argument was within the court's discretion. And, based on the record before us, we cannot say that the court abused its discretion in refusing to allow counsel to make that argument. Walker has provided no evidence or argument to indicate how Mr. Bannerman's testimony was important, or even relevant, to any issue in the case. Walker has likewise provided no evidence or argument to indicate how Mr. Bannerman's testimony, if he had been called, would have been unfavorable to the State. *See id.* at 394 ("There may be many reasons why a potential witness does not make the cut, few of which have anything to do with whether what the witness would say would be favorable to the party.").

Relying on *Sample v. State*, 314 Md. 202 (1988), and *Eley v. State*, 288 Md. 548 (1980), Walker also argues that the trial court should have allowed defense counsel to make the disputed comment because "the defense in closing is permitted to point out in argument that which the State did not offer." Walker's reliance on *Sample* and *Eley* is misplaced. In each of those cases, the Supreme Court of Maryland held that the trial court had erred in refusing to permit defense counsel to argue during closing that the State had failed to produce fingerprint evidence linking the defendant to the crime. *E.g.*, *Sample*, 314 Md. at 206-09; *Eley*, 288 Md. at 553-56. The Court explained that, "when the State has failed to utilize a well-known, readily available, and superior method of proof to link the defendant

with the criminal activity, the defendant ought to be able to comment on the absence of such evidence." *Sample*, 314 Md. at 207 (applying *Eley*). The Court reasoned that the defendant should have been permitted to comment on the absence of fingerprint evidence because, in those cases, such a comment '"went to the strength of the prosecution's evidence or, more specifically, to the *lack of evidence*."' *Id.* at 208 (quoting *Eley*, 288 Md. at 553).

That reasoning does not apply in the instant case because the evidence purportedly at issue, Mr. Bannerman's testimony, was not fingerprint evidence or any other "well-known, readily available, and superior method of proof to link [Walker] with the criminal activity." *Id.* at 207. Moreover, unlike in *Sample* and *Eley*, where the relevance of the defendant's comment was clear from the record, we have no way of knowing the substance of Mr. Bannerman's testimony or how the absence of said testimony went to the strength of the State's case. Based on Ms. Overton's recorded statement, it appeared that Mr. Bannerman's involvement was coaching Walker to destroy evidence of the shooting. At trial, Walker made no proffer of how Mr. Bannerman could have testified to anything that would have been helpful to the defense.

Under all the circumstances, we conclude the trial court did not abuse its discretion in disallowing the disputed comment.

VI.

Walker's final claim of error concerns an issue that arose during his sentencing hearing. Due to Covid restrictions, Walker's sentencing hearing was conducted remotely via video, and Walker participated in the hearing via Zoom from the correctional facility

in which he was being held. At the conclusion of the hearing, the sentencing court pronounced Walker's sentence as follows:

> On Count 2, the second degree murder of Justin Johnson, the sentence of the Court is 40 years.
>
> On Count 3, use of a handgun in the commission of a crime of violence, the sentence of the Court is 20 years, suspend all but 10.
>
> On Count 4, possession of a regulated firearm after a disqualifying prior conviction, the sentence of the Court is ten years concurrent to the ten years for the use of a handgun in the commission of a crime of violence.
>
> Count 5 and Count 6, which are wear, carry and transport charges merge into Count 4.
>
> That's the Court's sentence.

Walker was then advised of his post-sentencing rights by defense counsel. At the conclusion of that colloquy, Walker indicated that he was confused about something. The sentencing judge suggested that the court could "make [defense counsel's] life a little easier" by putting Walker and defense counsel in a virtual "breakout room" to discuss the matter before the court "turn[s] off the call[.]" Defense counsel agreed, and the sentencing court then stated: "**All right. So the Court's proceeding is adjourned**, but I will put [defense counsel] and Mr. Walker in a breakout room so they can have a conversation without as . . . many obstacles." (Emphasis added.) But immediately after the court finished that sentence, the following exchange occurred on the record when one of the two prosecutors participating in the hearing interjected a question:

> MS. REYNOLDS: Your Honor, I'm sorry – Court's indulgence, [Assistant State's Attorney] Alison Reynolds. I just sent [the other prosecutor participating in the sentencing hearing] an email about this, but I was

listening to the sentence. I heard that the ten years straight was a concurrent sentence.

THE COURT: Right. It was 20 suspend all but –

MS. REYNOLDS: But was –

THE COURT: – 10 is –

MS. REYNOLDS: – the 20 suspend all –

THE COURT: – consecutive. The 20 suspend all –

MS. REYNOLDS: Thank you.

THE COURT: – but 10 is consecutive to the 40, but the 10 straight is concurrent. So it's a total of 50 served, 10 suspended, 3 years probation.

MS. REYNOLDS: I just wanted that –

[PROSECUTOR]: Thank you, Your Honor.

MS. REYNOLDS: – clarification for the record, because I wasn't sure myself.

[PROSECUTOR]: Thank you, Your Honor.

(Whereupon, the above-entitled proceeding was adjourned at 11:01 a.m.)

The proceedings concluded. Walker's sentence was thereafter recorded as: a term of forty years' imprisonment on the conviction of second-degree murder, a *consecutive* term of twenty years' imprisonment, with all but ten years suspended, on the conviction of use of a handgun in a crime of violence, and a concurrent term of ten years' imprisonment on the conviction of possession of a handgun by a disqualified person.

Parties' contentions

In this appeal, Walker argues that the sentencing court erred in revising his sentence for use of a handgun in a crime of violence to make the sentence consecutive to his sentence for second-degree murder. Citing *Nelson v. State*, 66 Md. App. 304, 311 (1986), Walker contends that, as a matter of law, the court's initial failure to specify whether the two sentences were consecutive or concurrent automatically resulted in the sentences being concurrent. Citing *State v. Sayre*, 314 Md. 559 (1989), Walker claims that the court's subsequent statements purporting to convert one of those sentences from concurrent to consecutive rendered the sentences illegal.

Even though Walker recognizes that a court has the power, pursuant to Maryland Rule 4-345(c), to correct an "evident mistake" in the announcement of its sentence before a defendant leaves the courtroom, Walker claims that that exception did not apply here because he was never "in" the courtroom given that the sentencing hearing was conducted remotely. Walker argues that, under those unique circumstances, the court's power to correct a sentence should have ended when the proceedings were adjourned. Further, Walker contends that, in his case, the proceedings were expressly adjourned by the court prior to the colloquy purporting to clarify that his sentences were to be served consecutively. Walker maintains, therefore, that the court's "correction" resulted in an illegal sentence.

The State replies that the court properly corrected an evident mistake in its sentence prior to Walker leaving the courtroom. The State argues that Walker's insistence that he was never "in" the courtroom and that the proceedings had effectively ended when the

court announced an adjournment is meritless and not supported by the citation of any authority.[4]

Standard of Review

We review *de novo* the question of whether a sentencing court made an evident mistake in the pronouncement of a sentence and whether the court timely corrected such a mistake. *State v. Brown*, 464 Md. 237, 251 (2019).

Analysis

Maryland Rule 4-345(c) states that a court "may correct an evident mistake in the announcement of a sentence if [1] the correction is made on the record [2] before the defendant leaves the courtroom following the sentencing proceeding." (Brackets and numbers added.) For a mistake to be "evident," it "must be clear or obvious." *Brown*, 464 Md. at 260. We may determine that a court corrected such a mistake "where the trial court acknowledges that it made a mistake in the announcement of a sentence, and indicates that it is correcting that mistake." *Id.* The Supreme Court of Maryland has explained the process as follows:

> Where a prosecutor or defense counsel believes that a trial court has made an evident mistake in the announcement of a sentence, the attorney may raise that belief before the defendant leaves the courtroom following the sentencing proceeding, giving the trial court the opportunity to acknowledge and correct the mistake, if one was made. . . . Once a mistake in the announcement of a sentence comes to a trial court's attention, the trial court need not recite any magic words to correct that mistake. Instead, . . . the trial court must simply acknowledge that it made a mistake in the announcement

[4] The State also argues that Walker's argument was waived because he did not lodge a contemporaneous objection. Although the State is correct that Walker did not lodge an objection during the recording of the sentencing proceedings, we nevertheless exercise our discretion to decide the argument on the merits. Md. Rule 8-131(a).

> of a sentence, and indicate that it is correcting the mistake. This interpretation of Maryland Rule 4-345(c) will prevent a defendant from essentially being resentenced based on potentially stray remarks by a trial court at a sentencing proceeding.

Id. at 266.

Turning to the instant case, we conclude that the sentencing court did not err in imposing consecutive sentences. The court made an evident mistake in the announcement of its sentence by failing to indicate one way or the other whether Walker's sentence for use of a handgun in a crime of violence was to run concurrently or consecutively to the previously-announced sentence for second-degree murder. *Cf. Gatewood v. State*, 158 Md. App. 458, 482 (2004) ("There is a presumption that if the court does not specify that a subsequently imposed sentence is to be consecutive to an earlier imposed sentence, the latter is concurrent."). An attorney who was participating in the proceedings brought the mistake to the court's attention before Walker "left" the courtroom. The court subsequently acknowledged that it had intended the second sentence to be consecutive to the first-announced sentence, and the court corrected that mistake by declaring that the two sentences were to run consecutively. That was all that was required for the court to comply with Rule 4-345(c). *Cf. Brown*, 464 Md. at 263 (holding that there was no "evident mistake" in the circuit court's sentence, where "no one suggested that the circuit court had made a mistake in the announcement of [the] sentence" and the court "never acknowledged having made such a mistake").

As noted, Walker argues that the plain language of Rule 4-345(c) does not apply because he was never "in" the courtroom given that his sentencing hearing was conducted

remotely. Walker therefore urges us to consider the court's "adjournment" as the point at which the court's authority to correct its mistake expired.

We are not persuaded by Walker's argument. Walker fails to cite, and we could not find, any authority that suggests that a defendant is not considered "in" the courtroom during remote proceedings. Such a conclusion would, in fact, be untenable and would delegitimize all remote proceedings that required the "presence" of a defendant. In our view, Walker was considered "in" the courtroom when he appeared for the proceedings via Zoom from his place of incarceration, and he remained "in" the courtroom until the remote proceedings concluded following the sentencing court's correction of its sentence. That the court may have stated that the proceedings were "adjourned" before Walker left the courtroom is of no moment for the purposes of applying Rule 4-345(c), as the Rule requires only that the correction be made "on the record before the defendant leaves the courtroom following the sentencing proceeding." *Id.*

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.