Circuit Court for Baltimore City
Case No. 24-C-17-003335

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 258

September Term, 2018

LINDZELL NELSON

v.

STATE OF MARYLAND

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

JJ.

Opinion by Kenney, J.

Filed: September 13, 2019

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

At issue in this case is the admission at trial of statements made by Lindzell Nelson, appellant, to police officers during their investigation of a shooting in Baltimore City, as well as testimony of the State's inability to locate for trial a presumed victim of the shooting. Mr. Nelson appeals his conviction for two counts of reckless endangerment and one count of unlawfully carrying a handgun. He asks four questions, which we have slightly rephrased:

I. Was his pre-arrest refusal to answer police questions relevant to a consciousness of guilt, and, if so, was its probative value substantially outweighed by its unfair prejudice?

II. Was his refusal to submit a DNA specimen relevant to a consciousness of guilt and, if so, was its probative value substantially outweighed by its unfair prejudice?

III. Was it error to admit evidence that a victim was a missing witness when there was no evidence of why he was missing at trial?

IV. Did the cumulative effect of evidentiary errors deprive Mr. Nelson of a fair trial?

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

FACTUAL AND PROCEDURAL BACKGROUND

Shortly after midnight, on February 8, 2017, City Watch Cameras recorded four men exchanging gunfire near the corner of Pennsylvania Avenue and Laurens Street in Baltimore.[1] Officers Adrian Featherstone and Gregory Smith, who were on patrol in that area, heard shots and arrived at that location one minute later. They found Mr. Nelson

[1] City Watch uses over 400 closed-circuit television (CCTV) monitors to observe and record events in the city and to aid in crime prevention and criminal investigation.

and Malik Whitehead on the ground suffering from gunshot wounds. Mr. Whitehead, who was under the front end of a vehicle with a gunshot wound in his back, was losing consciousness when the EMTs arrived. Both Mr. Whitehead and Mr. Nelson were transported to a hospital. Officer Thomas Carter and Detective Steven Fraser arrived at the scene a short time later.

A blood trail, starting in the 600 block of Laurens Street and continuing to Argyle Avenue, was discovered. It started as "little splats of blood" and became "heavier" farther towards Argyle Avenue, which indicated that the injured person was moving more slowly. The blood trail continued to the 600 block of Smithson Street, where Karon Davis was found suffering from a gunshot wound to the face. Mr. Davis was taken to a hospital.

During the investigation, Officer Featherstone, following the blood trail, found a semi-automatic Ruger handgun in a backyard on Argyle Avenue. He could not recall at trial if it was loaded. Officer Carter, aided by the video footage, found a .357 Magnum and a .38 special in a trash can near the 1800 block of Pennsylvania Avenue. The crime scene technician photo-documented the area and recovered the guns, clothing found on Pennsylvania Avenue, a cell phone, and blood samples. None of the bullets that struck the three men were recovered.

Detective Fraser recovered video footage from surveillance cameras at various nearby stores, which appeared to depict Mr. Davis and Andre Robinson (who was a co-defendant with Mr. Nelson) within a few feet away from each other earlier that evening.

Later footage showed Mr. Nelson discharging a handgun at Mr. Davis and Mr. Whitehead. As a result, Mr. Nelson was identified as a suspect in the shooting. The video footage, along with an anonymous source, caused Detective Fraser to consider Mr. Robinson a second suspect.

When Detective Fraser first went to the hospital he was unable to speak with any of the three men who were shot because of their medical conditions. He returned about twelve hours after the shooting and attempted to speak with Mr. Nelson. Detective Fraser testified that, before he could ask any questions, Mr. Nelson blurted: "I don't know what you're talking about. I don't have anything to say to you. You are wasting your time talking to me." Detective Fraser then left and attempted to speak with Mr. Whitehead.

About a day after the shooting, Detective Fraser recorded a statement made by Mr. Davis.[2] In that statement, Mr. Davis, using nicknames, said that he was walking to the store with Mr. Robinson and Keonne Black when two guys, whom he did not recognize, came up, drew guns, and told them "to get up against the wall." Mr. Davis ran, and the men started shooting. Shot in the face, he ran towards Fremont Street to seek help at the home of an acquaintance. At first, Mr. Davis denied having a weapon, but he later admitted arming himself for protection because Keonne Black had predicted that men with whom he had argued earlier that night would come back.

[2] At trial, Mr. Davis testified that he did not remember giving the statement to the police. The trial court found that he was feigning a lack of memory and admitted his statement as substantial evidence.

After Mr. Nelson was taken into custody, Detective Fraser obtained a warrant to collect a DNA sample from him to verify whether he had handled one of the weapons found in the trash can. Detective Fraser testified that the warrant permitted him to get the sample by either an "oral swab" or "blood draw." He first attempted to obtain the DNA sample by oral swab, but, when Mr. Nelson refused, he obtained a writ to transport Mr. Nelson to a hospital for a blood draw. There, after Mr. Nelson again refused to give an oral swab, a nurse obtained the DNA sample by a blood draw.

Mr. Nelson was eventually charged with identical counts related to Mr. Whitehead, Mr. Davis, and Mr. Black of attempted murder in the first degree; conspiracy to commit first degree murder; attempted murder in the second degree; conspiracy to commit second degree murder; assault in the first degree; conspiracy to commit first degree assault; assault in the second degree; use of a firearm in the commission of a crime of violence; recklessly engaging in conduct that created a substantial risk of death or serious physical injury to another; and one count of wearing, carrying, transporting a handgun.

Detective Fraser testified that he had attempted to locate and contact Mr. Whitehead after he was released from the hospital, but, at first, he was unable to locate him. Detective Fraser eventually found and served him with a subpoena on February 8, 2018. But, afterwards, he again lost track of Mr. Whitehead. He continued to try to locate Mr. Whitehead up until the day of the trial. Mr. Whitehead did not appear at trial.

At the end of the State's case, the trial court granted a motion for acquittal on all charges related to Mr. Black. The jury convicted Mr. Nelson on two reckless endangerment charges and the charge of carrying a handgun concealed or openly on his person. He was acquitted on the other charges. The jury did not reach a verdict on the charges against Mr. Robinson, and the court declared a mistrial.[3]

The circuit court sentenced Mr. Nelson to five years for each count of reckless endangerment and ten years on the handgun count, to be served consecutively, for a total of 20 years' imprisonment. Mr. Nelson filed this timely appeal.

STANDARD OF REVIEW

When reviewing whether evidence was relevant, the standard of review "depends on whether the 'ruling under review was based on a discretionary weighing of relevance in relation to other factors or on a pure conclusion of law.'" *Parker v. State*, 408 Md. 428, 437 (2009) (quoting *J.L. Matthews, Inc. v. Md.-Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 92 (2002)). In other words, "while the clearly erroneous standard of review is applicable to the trial judge's factual finding that an item of evidence does or does not have probative value, the *de novo* standard of review is applicable to the trial judge's conclusion of law that the evidence at issue is or is not of consequence to the determination of the action." *Ruffin Hotel Corp. of Maryland, Inc. v. Gasper*, 418 Md. 594, 620 (2011) (cleaned up); *see also* Md. Rule 5-401. Although a trial judge "generally

[3] When Mr. Robinson was tried a second time, he was found not guilty on all remaining charges.

[has] 'wide discretion'" when "weighing the relevancy of evidence[,]" the judge has no "discretion to admit irrelevant evidence." *Santiago v. State*, 458 Md. 140, 160–61 (2018) (quoting *State v. Simms*, 420 Md. 705, 724 (2011)).

A trial court's decision to exclude relevant evidence because its "probative value is substantially outweighed by the danger of unfair prejudice," under Maryland Rule 5-403, is reviewed for an "abuse of discretion." *Ruffin Hotel Corp. of Maryland, Inc.*, 418 Md. at 620. That discretion is "broad but it is not boundless." *Cooley v. State*, 385 Md. 165, 175 (2005) (quoting *Nelson v. State*, 315 Md. 62, 70 (1989)). "Abuse occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law." *Id.* (quoting *Jenkins v. State*, 375 Md. 284, 295–96 (2003))

DISCUSSION

I.

Pre-arrest Silence

Contentions

Detective Fraser testified that Mr. Nelson made three statements at the hospital in regard to speaking with the detective. Mr. Nelson contends that these statements expressed his desire to remain silent, and that "pre-arrest" silence is too ambiguous to

show consciousness of guilt or have any probative value. In his view, the testimony should not have been permitted because it may have prejudiced the jury.[4]

The State contends that Mr. Nelson did not file a pre-trial motion to suppress these statements for being illegally obtained under Maryland Rule 4-252(a)(4),[5] and that a general objection was insufficient in this case to preserve the issue for appeal. It also argues that Mr. Nelson's statements were not "silence" and were not used as substantive evidence of guilt.

Analysis

A. Preservation

To preserve a challenge to the admissibility of evidence for appellate review, it is necessary to object "at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent[;] [o]therwise, the objection is waived." Md. Rule 4-323. It is not necessary to state the grounds for the objection "unless the court, at the request of a party or on its own initiative, so directs." *Id.* Ordinarily, a "general objection is sufficient to preserve *all grounds* which may exist." *von Lusch v. State*, 279 Md. 255, 263 (1977) (emphasis added). Exceptions include "where a rule requires the ground to be stated, where the trial court requests that the ground be stated, and 'where

[4] Mr. Nelson also spends some time in his brief describing hearsay in this context. But he appears to concede that the rule against hearsay does not apply. Statements made by an accused are admissible under the exception for a statement of a party opponent. Md. Rule 5-803(a)(1).

[5] Mr. Nelson does not contend that these statements were illegally obtained.

the objector, although not requested by the court, voluntarily offers specific reasons for objecting to certain evidence.'" *Boyd v. State*, 399 Md. 457, 476 (2007) (quoting *von Lusch*, 279 Md. at 263).

Here, the prosecutor questioned Detective Fraser about what Mr. Nelson said to him while at the hospital. Mr. Nelson's counsel promptly objected without stating the reasons for the objection, and the court overruled the objection without further inquiry. The State contends that, in context, the objection was "to Detective Fraser reporting what Nelson 'said,' not Nelson's supposed silence," and that the court had no way of knowing the basis for counsel's objection. But it does not matter that the State or the court understood the basis for the objection so long as it was not offered, asked for by the court, or required by a rule. *See von Lusch*, 279 Md. at 263; *Boyd*, 399 Md. at 476. In short, the issue of pre-arrest silence was preserved for review.

<u>*B. Probative Value*</u>

Because it "is so ambiguous that it is of little probative force," pre-arrest silence is typically inadmissible. *Grier v. State*, 351 Md. 241, 252 (1998). There may be a myriad of motivations to remain silent when confronted with an accusation. *Weitzel*, 384 Md. 451, 459 (2004). Therefore, it is "'inappropriately simple'" to presume that an innocent person "'*always* objects when confronted with a baseless accusation.'" *Id.* at 459 (emphasis in *Ex parte Marek*) (quoting *Ex parte Marek*, 556 So.2d. 375, 382 (Ala. 1989)).

In exceptional circumstances, pre-arrest silence may be admissible as evidence of guilt "if it amounts to a tacit admission; that is, if it is in response to an assertion which the party would, under all circumstances, naturally be expected to deny." *Grier,* 351 Md. at 252. On the other hand, "'pre-arrest silence' . . . in the presence of a police officer," is "too ambiguous to be probative," because an interaction with a police officer is unique. *Weitzel*, 384 Md. at 456, 461; *see Santiago*, 458 Md. at 161–62 (noting the distinction between being accused in the presence of police officers rather than other individuals). Citizens generally are "aware that any words spoken in police presence are uttered at one's peril," and for that reason, they may be disinclined to speak at all in the presence of a police officer. *Weitzel*, 384 Md. at 461.

Prior Maryland cases have dealt with instances in which a defendant chose to remain silent. *See generally Weitzel*, 384 Md. 451; *Key–El v. State,* 349 Md. 811 (1998); *Grier*, 351 Md. 241; *Santiago*, 458 Md. 140. Detective Fraser did not testify to Mr. Nelson's silence when he approached him in the hospital. Rather, he testified to what Mr. Nelson said: "I don't know what you are talking about." "I don't have anything to say to you." "You are wasting your time talking to me." Although Mr. Nelson's statements do not fit perfectly into a *Weitzel* analysis, we conclude that the reasoning of *Weitzel* applies in this case.

Taken together, Mr. Nelson's three statements clearly indicated that he intended to remain silent. That the first statement was, strictly speaking, a declaration of lack of knowledge does not, in our view, alter that conclusion. It was made in concert with two

additional statements that clearly manifested his desire not to speak to a police officer, which Detective Fraser clearly understood because he said: "And I knew at that time to not speak to Mr. Nelson and I moved on to the third person which was Malik Whitehead." Mr. Nelson's statements should not have been admitted.

C. Harmless Error

That said, we are persuaded beyond a reasonable doubt that their admission did not influence the convictions in this case and, therefore, was harmless. A reversal is mandated when an error by the trial court has been established in a criminal case, "'unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.'" *Blair v. State*, 130 Md. App. 571, 613 (2000) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). In situations when inadmissible testimony is heard but not referenced in opening statements, mentioned in closing arguments, or used in any way as substantive evidence of guilt, the error may be harmless beyond a reasonable doubt. *See In re Kevin T.*, 222 Md. App. 671, 674–76 (2015) (holding testimony of the defendant's "pre-arrest silence" to be harmless because the prosecutor "made no attempt to draw an inference of guilt from [the defendant's] silence in closing argument" and the court found no indication that the testimony was relied upon in the judgment).

At issue in this case are reckless endangerment and wearing, carrying, transporting a handgun. This Court has explained that "'"the elements of a *prima facie* case of reckless endangerment are: 1) that the defendant engaged in conduct that created a

substantial risk of death or serious physical injury to another; 2) that a reasonable person would not have engaged in that conduct; and 3) that the defendant acted recklessly.''" *Thompson v. State*, 229 Md. App. 385, 414 (2016) (quoting *Holbrook v. State*, 364 Md. 354, 366–67 (2001), in turn quoting *Jones v. State*, 357 Md. 408, 427 (2000)). The *actus reus* for reckless endangerment is conduct of the defendant that "creat[es] a substantial risk" to another. *In re David P.*, 234 Md. App. 127, 142 (2017). Risk is "'measured objectively, not subjectively.'" *Id.* (quoting *Perry v. State,* 229 Md. App. 687, 700 (2016)). For example, "there is sufficient evidence of a substantial risk when a person puts a loaded and operable firearm in a position to discharge lethal force at an individual." *Id* at 142–43.

On the other hand, reckless endangerment is "'not a strict liability crime[;]'" there is the "'requirement of a *mens rea*[,]'" *Albrecht v. State*, 105 Md. App. 45, 84 (1995) (quoting *Williams v. State*, 100 Md. App. 468, 503 (1994)), which has "nothing to do with the establishment of the *actus reus,*" *Marlin v. State*, 192 Md. App. 134, 157 (2010). "The critical word" in the *mens rea* analysis is "the adverb 'recklessly.'" *Albrecht*, 105 Md. App. at 83. "A person acts recklessly with respect to a material element of an offense when he [or she] *consciously disregards a substantial and unjustifiable risk* that the material element exists or will result from his [or her] conduct." *Id.* (emphasis in original) (internal citations and quotation marks omitted). But, it is not required that the person knew that his or her conduct created a substantial risk to a particular individual. *Albrecht*, 105 Md. App. at 83. That the defendant knew that his or her conduct might

create "*some risk* to the life or limb of *someone*[,]" is "indisputably subjective." *Id.* at 85 (emphasis in original). But whether the risk created was a "justified or an unjustified risk is an objective fact to be objectively determined." *Id.* at 86.

Here, Mr. Nelson was acquitted of all charges except the reckless endangerment and the handgun charge, and there is video evidence that he engaged in a gun fight with Mr. Davis and Mr. Whitehead on the streets of Baltimore, and that he was shooting at Mr. Davis when Mr. Davis was attempting to flee the scene.

In reaching its decision on the reckless endangerment and handgun charges, there is no reason to believe that the jury drew a negative inference from testimony of Mr. Nelson's pre-arrest silence. When Detective Fraser indicated on direct examination that he "knew" not to speak to Mr. Nelson, the prosecutor soon moved on to a different topic. There were no further comments about Mr. Nelson's initial interaction with Detective Fraser by the prosecutor, trial court, or defense counsel. And there was no indication that the jury relied on it in any way. Put simply, "no inference was argued" and, in our view, "none was drawn." *See In re Kevin T.*, 222 Md. App. at 676.

II.

Refusal to Submit a DNA Specimen

Contentions

Detective Fraser testified that he attempted twice to retrieve an oral swab DNA sample from Mr. Nelson and that Mr. Nelson refused both times. Mr. Nelson contends that he was in custody at the time, and because there was no evidence that he was ever

Mirandized, the refusals may have been illegally obtained. Therefore, he argues, evidence of his refusals should not have been admitted into evidence. Although admitting that he did not seek a pre-trial suppression hearing to suppress these statements, Mr. Nelson argues that the Fifth Amendment implications of his refusals are reviewable under the Plain Error Doctrine. He further contends that these refusals were not conduct or behavior from which a jury could infer consciousness of guilt, and were, therefore, not relevant.

The State responds that plain error review is not available to Mr. Nelson because the failure to seek a pre-trial motion was a waiver of any Fourth and Fifth Amendment issue, and that there was no good cause shown for his failure to do so. In the State's view, his refusals were relevant to show consciousness of guilt.

Analysis

A. Waiver

Absent a showing of "good cause," a failure to challenge "[a]n unlawfully obtained admission, statement, or confession" through a pre-trial suppression hearing is a *waiver* of a defendant's right to appellate review of that issue. *See* Md. Rule 4-252(a)(4) (emphasis added); *Carroll v. State*, 202 Md. App. 487, 512–13 (2011).

In the context of appellate review, waiver and forfeiture are distinct. *Carroll*, 202 Md. App. at 511–12 (citing *State v. Rich*, 415 Md. 567, 580 (2010)) ("Forfeiture is the failure to make a timely assertion of a right, whereas waiver is the 'intentional relinquishment or abandonment of a known right.'"). Forfeited rights are reviewable for

plain error, waived rights ordinarily are not. *Rich*, 415 Md. at 580; and *see Carroll*, 202 Md. App. at 511, 514 ("Under the circumstances here, appellant's claim is waived. It is not subject to plain error review."). When a defendant does not challenge an "unlawfully obtained" statement in a pre-trial suppression hearing, plain error review is only available if a defendant demonstrates "good cause" for failing to raise the issue previously. *Id.* at 513. This good cause exception, which exists to "protect against a miscarriage of justice," is rarely applied. *Id.* at 512. Good cause will not be found "[w]here there was sufficient information available to allow counsel to raise the issue." *Id.* at 513.

Mr. Nelson concedes that he did not seek a suppression hearing challenging the obtainment of these statements. And, during the trial, counsel objected to these statements based on relevance, not Fourth or Fifth Amendment grounds. [6,7]

Mr. Nelson did not and does not advance a "good cause" reason for failing to raise the issue by pre-trial motion. And, nothing in the record suggests that he did not have

[6] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

[7] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

sufficient information to do so.[8] In short, the only issue preserved for our review relates to relevancy and consciousness of guilt, but even assuming that the *Miranda* issue had been preserved,[9] Mr. Nelson would fare no better.

B. Custodial Statements Made Without Miranda Warnings

Miranda rests on the "presumption of compulsion" when a defendant is subject to "custodial interrogation."[10] *Miranda*, 384 U.S. 436, 478–79 (1966); *Oregon v. Elstad*,

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[8] [Prosecutor]: So what, if anything did you do to potentially aid the forensic unit in completing that study?

> [Detective Fraser]: Because we seen the revolvers placed in the trash can by the individual, we asked for touch DNA to be taken from the revolvers which—and then we also asked for DNA to be taken from both Mr. Robinson and Mr. Nelson. And first went to—we responded to meet with Mr. Nelson to give DNA. He denied—
>
> [Defense Counsel]: Objection.
>
> [The Court]: Come up.
>
> (Counsel approached the bench and the following ensued:)
>
> [The Court]: What's the objection?
>
> [Defense Counsel]: The process by which they got the DNA. Apparently my—
>
> [The Court]: Process what?
>
> [Defense Counsel]: By which they got the DNA sample. Evidently my client was not all that cooperative. T3. 54.

[9] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[10] In this case, Mr. Nelson, who was in jail, was in "custody."

470 U.S. 298, 307 (1985); *Smith v. State*, 186 Md. App. 498, 516 (2009); *State v. Luckett*, 413 Md. 360, 377 (2010) (quoting *Florida v. Powell*, 559 U.S. 50, 60 (2010)). A custodial interrogation occurs "whenever a person in custody is subjected to either express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980). We are not persuaded that obtaining Mr. Nelson's DNA sample involved an "interrogation."[11]

The "functional equivalent" to express questioning extends "only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Id.* at 301–02 (emphasis in original). To determine whether an officer's behavior compelled testimony, we view the words and actions in context. *Prioleau v. State*, 411 Md. 629, 639, 643 (2009); *see Smith*, 186 Md. App. at 543–44 ("The existence of the functional equivalent of interrogation . . . frequently laps over into a consideration of the custody issue and, sometimes, into the more open-ended consideration of underlying compulsion itself."). Stated differently, a question "benign" in one context may be an "interrogation" in another. *Hughes v. State*, 346 Md. 80, 95 (1997).

The intent of the officer is relevant, but it is neither dispositive nor the primary consideration. *Blake v. State*, 381 Md. 218, 233 (2004). And it is not necessary that the

(…continued)

[11] Mr. Nelson contends only that there is no evidence that he was apprised of his *Miranda* rights. The issue was never raised in the circuit court.

officer ask a question for the interaction to be an interrogation. *Drury v. State*, 368 Md. 331, 337–38 (2002) (noting that placing evidence on the table before the defendant and telling him that it was going to be fingerprinted, when he had been expressly brought for questioning, was reasonably likely to evoke an incriminating response). Conversely, not every statement made by an officer "punctuated with a question mark will necessarily constitute an interrogation." *Prioleau*, 411 Md. at 639, 651 (determining that the question, "What's up, Maurice?" to a suspect arrested and brought in for questioning was not "reasonably likely to elicit an incriminating response"); and *see Fenner v. State*, 381 Md. 1, 15–19 (2004) (holding that the judge's question to the defendant during a bail hearing—"Is there anything you'd like to tell me about yourself, sir?"—was not "designed to elicit an incriminating statement" but was only "an innocuous question"); *Rodriguez v. State*, 191 Md. App. 196, 220–22 (2010) (holding that the officer's questions—"Are you okay?" and "[H]ave you ever been arrested before[?]"—was not an interrogation because they were either directed at the defendant's physical well-being or an irrelevant probe into prior crimes with no purpose to obtain incriminating responses). In addition, routine booking questions are exempted so long as the "questions [are] aimed at accumulating 'basic identifying data required for booking and arraignment[.]'" *Hughes*, 346 Md. at 94 (quoting *United States ex rel. Hines v. LaVallee*, 521 F.2d 1109, 1113 (1975)); *White v. State*, 374 Md. 232, 248–54 (2003) (stating that the police reading a charging document to the defendant would not reasonably prompt him "to give [an] inculpatory statement").

In this case, there is no reason to believe that Detective Fraser intended for his DNA request to produce an incriminating statement from Mr. Nelson, or that it was likely to do so. Moreover, beyond asking Mr. Nelson to open his mouth for a buccal swab, and, when he refused, transporting him to the hospital to obtain the sample by a blood draw, we know of nothing else the detective said or did to get the sample. On these facts, there is no reason to conclude that Detective Fraser should have known that his request would result in an incriminating response by Mr. Nelson.

C. Consciousness of Guilt

"[R]elevance is generally a low bar," and "evidence having *any tendency* to make the existence of *any fact* that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" is relevant. Md. Rule 5-401 (emphasis added); *Simms*, 420 Md. at 727. A defendant's "behavior after the commission of a crime," may be admissible, "not as conclusive evidence of guilt," but as circumstantial evidence from which guilt may be inferred. *Thomas v. State*, 397 Md. 557, 575 (2007) (*Thomas III*);[12] *Decker v. State*, 408 Md. 631, 640 (2009).

"Consciousness of guilt evidence is 'considered relevant . . . because the particular behavior provides clues to the [defendant's] state of mind,' and state of mind evidence is relevant because 'the commission of a crime can be expected to leave some mental traces

[12] In this opinion there will be citations to three *Thomas* cases, all of which involve Garrison Thomas. The first is *Thomas v. State*, 372 Md. 342 (2002), which we reference as *Thomas I*; the second is *Thomas v. State*, 168 Md. App. 682 (2006), which we reference as *Thomas II*; and *Thomas v. State*, 397 Md. 557 (2007), which we reference as *Thomas III*.

on the criminal.'" *Decker v. State*, 408 Md. at 641 (quoting *Thomas v. State*, 372 Md. 342, 351–52 (2002) (*Thomas I)* (internal citations omitted)). That said, "the probative value of 'guilty behavior' depends upon the degree of confidence with which certain inferences may be drawn." *Id.* (internal quotation marks omitted). In *Thomas III*, the Court of Appeals affirmed the "evidentiary foundation" set out in *Thomas I* that the State must "satisfy in order to admit evidence of [the defendant's] consciousness of guilt," stating:

> "The relevance of the evidence as circumstantial evidence of [a defendant's] guilt depends on whether the following four inferences can be drawn: (1) from his [behavior], a desire to conceal evidence; (2) from a desire to conceal evidence, a consciousness of guilt; (3) from a consciousness of guilt, a consciousness of guilt of the [crime at issue]; and (4) from a consciousness of guilt of the [crime at issue], actual guilt of [that crime]."

Thomas III, 397 Md. at 576 (quoting *Thomas I*, 372 Md. at 356).

"Conduct" often found to show consciousness of guilt includes "flight after a crime, escape from confinement, use of a false name, and destruction or concealment of evidence." *Id.* at 575. It is not limited, however, to those situations. *See Ford v. State*, 462 Md. 3, 50–51 (2018) (holding that the defendant's reaction from being told by his ex-girlfriend that he had to leave her home—"curs[ing] her out" and "slam[ing] back the front door" as he left—was relevant to show that he "did not want to leave because he wanted to continue hiding out and elude capture"); *Stevenson v. State*, 222 Md. App. 118, 143–44, 146 (2015) (determining that testimony of the defendant's initial refusal to give a DNA sample appropriate for showing consciousness of guilt); *see also United States v.*

Terry, 702 F.2d 299, 313-14 (2nd Cir. 1983) (holding that evidence of defendant's refusing to allow investigators to obtain palm prints was admissible to show consciousness of guilt).

"Behavior" admissible as circumstantial evidence of consciousness of guilt does not need to be "weighty enough to carry that party's burden of persuasion." *Snyder v. State*, 361 Md. 580, 591 (2000); *Thomas III*, 397 Md. at 577. As the Court of Appeals has repeatedly emphasized, "[t]he proper inquiry is whether the evidence *could* support an inference that the defendant's conduct demonstrates a consciousness of guilt." *Thomas III*, 397 Md. at 577 (quoting *Thomas II*, 168 Md. App. at 712) (emphasis in original); *see also Ford*, 462 Md. 50; *Simms*, 420 Md. at 727. And, "[s]imply because there is a possibility that there exists some innocent, or alternate, explanation for the conduct[,]" the inference, without more, is not invalidated. *Thomas III*, 397 Md at 578. If a party seeks to exclude evidence of conduct based upon an innocent alternative explanation for the conduct other than consciousness of guilt, "it is incumbent upon him [or her] to generate that issue." *Thomas III*, 397 Md at 578.

In *Stevenson*, the defendant was charged and "convicted of first-degree murder, first-degree sexual offense, and two deadly-weapon counts." *Stevenson*, 222 Md. App. at 129. During the trial, the prosecutor questioned a detective about the defendant's initial refusal to give a DNA sample to the police. *Stevenson*, 222 Md. App. at 143. The detective testified that he had obtained a warrant to retrieve the DNA sample. *Id.* When the detective sought to retrieve the DNA sample, the defendant refused. *Id.* at 144. Only

after the detective had a supervisor "reiterate that this was a Court order for him to give the DNA" did the defendant finally comply. *Id.* at 144, 146. The trial court overruled defense counsel's objection to this testimony. *Id.*

Focusing on his eventual compliance after he was "fully informed about the legal authority of the police to obtain the DNA sample," the defendant argued on appeal that "his initial hesitancy" could be explained by his desire to protect his constitutional rights. *Id.* The *Stevenson* court concluded:

> Similarly, to the extent Mr. Stevenson is suggesting that his initial refusal to provide a DNA sample to police during Ms. Sipayboun's murder investigation was due to his concern for his constitutional rights, "it was incumbent upon him to generate that issue" at trial. *Id.* [*Thomas*, 397 Md. at 578]. Like the defendant in *Thomas* [*III*], Mr. Stevenson "had the opportunity at trial to offer alternative theories explaining his resistance to [submitting a DNA sample], and the record is completely devoid of any such evidence." *Id.*

Stevenson, 222 Md. App. at 147 (second alteration in *Stevenson*).

Mr. Nelson's argument focuses primarily on distinctions between prior cases and this case. These differences, he contends, reveal an insufficient foundation for a consciousness of guilt inference.

First, Mr. Nelson contends that the record in this case, unlike *Stevenson*, does not reveal that Detective Fraser informed him that there was a warrant for the DNA sample. Although not clearly stated, the importance of this distinction presumably rests on his claim that there was an innocent explanation for his conduct; namely, his desire to protect his Fourth Amendment right to be free from an unreasonable search and seizure. *See Stevenson*, 222 Md. App. at 146. But the mere possibility of an innocent explanation

does not render the inference illegitimate. *Thomas III*, 397 Md at 577–78. Without Mr. Nelson offering evidence for an alternative innocent explanation for his behavior, the inference remains in play. *See Thomas III*, 397 Md at 577–78; *see also Stevenson*, 222 Md. App. at 147.

Second, Mr. Nelson asserts that the record reveals no point at which he was told that "his DNA was wanted as part of the investigation of the shooting on February 8, 2017." For that reason, the "jury could not have drawn an inference that [his] resistance was connected to a consciousness of guilt of the crime charged." *Thomas III*, 397 Md at 576.

The facts in *Thomas I* and this case are quite different. In *Thomas I*, more than three years had passed between the alleged crime and the date at which the police sought to get the DNA sample from the defendant; and there was "no evidence in [the] record, either direct or circumstantial, that [the defendant] was aware that the police wished to test his blood in connection with the [the crime at issue]." *Thomas I*, 372 Md. at 357; *see also Ford*, 462 Md. at 48 (suggesting that the length of time in *Thomas I,* in conjunction with the lack of any other evidence revealing knowledge on the part of the defendant of the purpose of the DNA sample, defeated the consciousness of guilt inference); *but see Thomas I*, 372 Md. at 357 n.4. ("The length of time between the conduct and the crime is not determinative of the admissibility of the evidence."). In this case, Detective Fraser's efforts to procure appellant's DNA occurred shortly after the shooting on February 8, 2017. Mr. Nelson was clearly aware that the detective had previously been investigating

the shooting when he came to the hospital and Mr. Nelson had refused to speak with him about it. And, he was in custody because of the shooting when his DNA was obtained.

Third, Mr. Nelson suggests that refusing to cooperate by a "verbal expression, such as one of displeasure or a preference to give blood rather than have a swab shoved into an orifice[,]" is not "the kind of 'behavior' or 'conduct' that has historically arisen to an inference of guilty consciousness." But there appears to be no reason why verbal expressions could not reveal a defendant's state of mind in the same way as physical acts. Indeed, this Court *has found* verbal refusals like that of Mr. Nelson's to be sufficient to support the inference. *See Stevenson*, 222 Md. App. at 143–47 (holding that the defendant merely refusing to submit a DNA sample could support an inference of consciousness of guilt). In addition, the record suggests more than simple verbal expressions of displeasure with providing his DNA; the DNA sample had to be recovered through a blood draw.

Fourth, Mr. Nelson notes that, in *Stevenson*, a supervisor had to be brought in to inform the defendant that his compliance was required by a court order. He argues that his "alleged refusal" "did not arise to the level in *Stevenson*[.]" Whatever relevance this distinction might have, it does not weaken the legitimacy of the inference. In *Stevenson*, the defendant eventually complied. *Stevenson*, 222 Md. App. at 146. There is no evidence that Mr. Nelson ever complied *voluntarily*.

Mr. Nelson also argues that the State did not prove that his "refusal to give a buccal swab at the jail or hospital" was contrary to the warrant at issue. In other words, if

the warrant did not authorize the DNA to be obtained through a buccal swab, Mr. Nelson did not refuse to comply with the court order. Whatever merit this argument might have if the factual premise of this contention were true, Detective Fraser testified that the warrant allowed for the DNA to be procured by either an oral swab or a blood draw. There is no evidence to the contrary. The trial court did not err or abuse its discretion in permitting testimony of Mr. Nelson's refusal to submit a DNA sample.

III.

Testimony Regarding the Missing Victim

Contentions

Detective Fraser testified that, on multiple occasions, he had attempted to locate Mr. Whitehead to testify at trial. Mr. Nelson contends that this testimony served no probative purpose and permitted the jury to draw an inference that Mr. Nelson was responsible for his absence. This, he maintains, unfairly prejudiced the jury against him.

Analysis

A. Waiver

Whether testimony by Detective Fraser of his attempts to subpoena Mr. Whitehead for the trial contained probative value was waived by the defense. As noted previously, objections to the admission of evidence in a criminal case are to be made at "the time the evidence is offered or as soon thereafter as the grounds for objection become apparent"; if not, the "objection is waived." Md. Rule 4-323. In addition, an objection to the admission of evidence is also waived "'by the subsequent admission, without objection,

of the same evidence at a later point in the proceedings.'" *Jackson v. State*, 230 Md. App. 450, 463–64 (2016) (quoting *Standifur v. State*, 64 Md. App. 570, 579 (1985)); *see also Anderson v. State*, 61 Md. App. 436, 459–60 (1985) (quoting *Sutton v. State*, 25 Md. App. 309, 316 (1975)) ("'Cases are legion in the Court of Appeals to the effect that an objection must be made to each and every question, and that an objection prior to the time the questions are asked is insufficient to preserve the matter for appellate review.'").

Here, appellant's counsel objected to the testimony by Detective Fraser on the grounds of relevance.[13] However, the issue of Mr. Whitehead's absence reoccurred without any objection. Defense counsel reintroduced the topic during her cross-examination of the detective. And, the prosecutor again questioned the detective, on redirect, about his attempts to locate Mr. Whitehead.

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[13] [Prosecutor:] I'd like to just talk to you briefly about Malik Whitehead. What, if any efforts did you take to locate him for these proceedings?

[Defense Counsel:] Objection.

[The Court:] Come up.

(Counsel approached the bench and the following ensued:)

[The Court:] What's your objection? Who made the objection? I thought you did.

[Defense Counsel:] I did, yes. It's completely irrelevant and it hasn't been disclosed to us what effort—

[The Court:] Well, this is what is going to happen. This is why what is going to happen. This is why he's doing that because you all are going to get up in closing and argue, where's Malik Whitehead?

Mr. Nelson argues that the prosecutor's questions concerning Mr. Whitehead on direct were distinct from those of defense counsel on the matter. The first questioning by the prosecutor concerned Detective Fraser's failed attempts to acquire Mr. Whitehead for the trial:

> [Prosecutor:] What if any efforts did you make—
>
> [The Court:] I said you may lead with that question.
>
> [Prosecutor:] I may lead with that question.
>
> [The Court:] Did you make any efforts to locate Mr. Whitehead?
>
> [Prosecutor:] I'm sorry.
>
> [Detective Fraser:] Yes.
>
> [The Court:] Were you unable to do so?
>
> [Detective Fraser:] I located him to serve him with a subpoena on February 8th, one year after the incident.
>
> [The Court:] At any time after that have you been able to locate him?
>
> [Detective Fraser:] No.

Defense counsel's questions on cross-examination, however, concerned the detective's attempts to interview Mr. Whitehead in regard to trial:

> [Defense Counsel:] All right. Now as far as Malik Whitehead—
>
> [Detective Fraser:] Yes, ma'am.
>
> [Defense Counsel:] –you testified that he was served with a subpoena; is that correct?
>
> [Detective Fraser:] February 8th, 2018, yes, ma'am.

> [Defense Counsel:] Now you—are you aware of whether or not—or did you see him this week?
>
> [Detective Fraser:] Yes.
>
> [Defense Counsel:] And is that because you went to his house?
>
> [Detective Fraser:] Yes.
>
> [Defense Counsel:] And did you physically see him?
>
> [Detective Fraser:] Yes.
>
> [Defense Counsel:] And he refused to cooperate; is that correct?
>
> [Detective Fraser:] Yes.

On redirect examination, the prosecutor again questioned the detective about his attempts to secure Mr. Whitehead as a witness and there was no objection:

> [Prosecutor:] Just as far as Mr. Whitehead is concerned, you've been looking for him up until—when was the last time you tried to find him?
>
> [Detective Fraser:] Since December I've been looking for him all the way up until this morning before court all the way until 9:00 o'clock I've had officers in the western, the central and the southwest looking for Mr. Whitehead. And even the northeast. Different addresses have been tried up.

In short, we are not persuaded that this issue has been preserved for review, but had it been, we perceive neither error nor an abuse of discretion.

B. Probative Value

As previously discussed, relevance is "generally a low bar." *Simms*, 420 Md. at 727. Evidence is relevant if it has "*any tendency* to make the existence of *any fact* that is

of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401 (emphasis added).

The prosecutor elicited testimony from Detective Fraser concerning his failed attempts to locate Mr. Whitehead for the trial, and defense counsel objected on grounds of relevancy. In overruling the objection, the court explained:

> [The Court:] Well, this is what is going to happen. This is why he's doing that because you all are going to get up in closing and argue, where's Malik Whitehead? Why didn't we hear from Malik Whitehead?
>
> [Defense Counsel for Mr. Robinson:] I'm not.
>
> [The Court:] Well, I don't know. [Mr. Nelson's Counsel] is. So one of you are. Listen, you've got different theories of the case, [Mr. Robinson's Counsel]. You might not be, but [Mr. Nelson's Counsel] is. That's why she's objecting. So I think it's only fair game that he made efforts to locate him, was unable to do so.

And, as predicted, Mr. Nelson's counsel, during closing arguments, pointed out the State's failure to call Mr. Whitehead:

> [Defense Counsel:] Now the State said there's no evidence that Mr. Whitehead had a gun. No evidence was presented to you. But at least two people approached Mr. Whitehead prior to the police getting there. We don't know that those people didn't take a gun from him . . . We don't know about Mr. Whitehead. We didn't hear from Mr. Whitehead, but you can use you own common sense. You can watch that body worn camera. You can see specifically on the videos that people are going up to Mr. Whitehead and then leaving before the police get there. So when the State says there's no evidence that Mr. Whitehead didn't have a gun, you don't know that. Nothing was provided to you. Mr. Whitehead wasn't provided to you.

Pointing to statements made by the prosecutor during closing arguments, Mr. Nelson argues on appeal that the "obvious purpose" of the testimony "was to convey to

the jury that Mr. Whitehead was justifiably frightened of him or his alleged accomplice and co-conspirator, Mr. Robinson." He argues that, in the absence of any evidence that the Mr. Nelson played a role in Mr. Whitehead's failure to appear, "[t]he probative value of Mr. Whitehead's absence was nil[.]"

This argument ignores the trial court's explanation, and we see nothing in the record supporting the alleged "obvious purpose" for testimony concerning Mr. Whitehead. First, none of the prosecutor's questions, and none of Detective Fraser's responses, imply that Mr. Whitehead feared Mr. Nelson or Mr. Robinson. Second, the prosecutor's closing argument in no way suggests that Mr. Nelson was responsible for Mr. Whitehead not showing up. In addition, it appears to relate primarily to Karon Davis and not to Mr. Whitehead.[14] Finally, when Mr. Robinson's counsel brought up his concern to the judge that the jury might infer from the testimony that Mr. Whitehead's "disappearance [had] something to do [the defendants]," the judge insisted that his concern was unfounded.[15] In sum, the testimony had some probative value and that probative value that was not substantially outweighed by a danger of unfair prejudice.

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[14] [Prosecutor:] And there's an individual right up here in the corner and I think we did a little more seeing of him yesterday. We would like to have heard a little bit more from him—but all we did—we did just get an opportunity to see him. See, ladies and gentlemen, that's Karon Davis. So that is Karon Davis in this store. And obviously we can tell this is just prior to the shooting most notably because nobody at this point has been shot.

[15] [Mr. Robinson's Counsel:] Just as a cautionary move. The State told me that someone approached his house and saw him in the house, but he wouldn't open the door. So just as a precautionary move so they don't

IV.

Cumulative Error

Mr. Nelson argues that the cumulative effect of the alleged evidentiary errors discussed above deprived him of a fair trial. He submits that, as to the charge of reckless endangerment, without the various inferences of consciousness of guilt, there was no evidence that he had *unjustifiably*—and therefore recklessly—created a substantial risk of death or serious physical injury to Mr. Whitehead or Mr. Davis. As such, there was

(…continued)

> think his disappearance has anything to do with our clients, I would ask the State to bring that out.
>
> * * *
>
> [Mr. Robinson's Counsel:] He saw [Mr.] Whitehead at the door the other day and he just wouldn't answer. Just so the jury knows nothing happened to Mr. Whitehead. I would ask—because you asked—
>
> [The Court:] Well, we still don't know that.
>
> [Mr. Robinson's Counsel:] But you said have you seen him.
>
> [The Court:] Right.
>
> [Mr. Robinson's Counsel:] Right?
>
> [The Court:] Listen, listen, listen.
>
> [Mr. Robinson:] But he saw him the other day.
>
> [The Court:] [T]hat doesn't necessary mean that your clients did anything to him. I don't—or didn't do anything to him. Nobody is implying that ….

insufficient evidence to find him guilty of reckless endangerment. And, for that reason, it cannot be said that the cumulative effect of the three errors is "harmless."

Because we hold that the trial court erred only in permitting testimony of Mr. Nelson's "pre-arrest silence," and that error was harmless, there is no cumulative error effect depriving Mr. Nelson of a fair trial.

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