Circuit Court for Prince George's County
Case Nos. CT161234X, CT161235X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 425

September Term, 2018

CHRISTIAN KWAME BANSON

v.

STATE OF MARYLAND

Fader, C.J.,
Reed,
Krauser, Peter B.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Krauser, J.

Filed: July 8, 2019

Convicted by a jury, in the Circuit Court for Prince George's County, of two separate armed robberies, and the use of a firearm during each of those robberies, Christian Kwame Banson, appellant, was sentenced, by that court, to a total sentence of fifty years of imprisonment, with all but forty years of that sentence suspended. Significantly, the total sentence included a twenty-five-year sentence for each of the handgun offenses, with all but ten years suspended, which were to run consecutively to each other. The propriety of those two sentences is one of the four issues, which Banson raises in this appeal.

As expressed in Banson's brief, those four issues are:

> I. Did the trial court err in admitting inadmissible hearsay?
>
> II. Did the trial court err and/or abuse its discretion in admitting a gun that was found pursuant to an unrelated traffic stop?
>
> III. Did the trial court err and/or abuse its discretion in refusing to allow Appellant to call any witnesses?
>
> IV. Did the trial court impose illegal sentences of twenty-five years for violations of Criminal Law Article ("CL"), § 4-204.[1]

For the reasons that follow, we find neither error nor abuse of discretion in the admission of either the testimony or the handgun at issue or in the denial of Banson's request to call certain witnesses, who had not been disclosed to the State, at any time

[1] Maryland Code (2002, 2018 Repl. Vol.), Criminal Law Article ("CL"), § 4-204, prohibits the use of a regulated firearm in the commission of a felony or crime of violence.

prior to trial. We do conclude, however, that the circuit court, as the State concedes, did err in imposing what amounts to illegal sentences for Banson's firearm offenses. Consequently, as requested by both sides, we shall vacate and remand for a resentencing on those two convictions but, in all other respects, affirm the judgments below.

BACKGROUND

Two men—Rider Gobarban Rivera-Martinez and Jaime Guillen—were each the victim of a robbery, committed at gunpoint, as they were sitting in their cars, in or near Hyattsville, Maryland, on the evening of June 29, 2016. Rivera-Martinez, the first to be robbed that night, was sitting in his parked car, on Buchanan Street in Hyattsville, when two men approached him. One of the two men pointed a "pistol" at Rivera-Martinez and demanded his wallet and cell phone. After obtaining Rivera-Martinez's wallet and cell phone, the two men fled.

Later that same evening, at approximately 11:30 p.m., the second robbery victim, Jaime Guillen, pulled into the driveway of his residence, on Finns Lane in Hyattsville, in a rented U-Haul truck. Then, as he waited, in the truck, for his niece's husband, who had agreed to help him return the rented truck, a white car pulled up, and two men exited that vehicle, while a third remained in the car. Moments later, the two men approached Guillen, one of whom was armed with a handgun. While one of the two men held the gun to Guillen's head, the other rifled through Guillen's pockets, taking "everything [he] had," including his keys, his wallet (which contained $400 in cash and a check for $800), his cell phone, and his credit, debit, and identification cards. After seizing those items, all three men took off in their vehicle.

At the conclusion of both robberies, the police were called. The two victims gave the officers similar descriptions of their assailants. Then, approximately three weeks later, during the early morning hours of July 22, 2016, Corporal Ian Webster, of the Prince George's County Police Department, while he "was monitoring a stop sign" at an intersection in Riverdale, Maryland, observed a silver Audi fail to stop at the stop sign. Corporal Webster immediately conducted a traffic stop of that car. At that time, the Audi contained three occupants, one of whom was Banson, who was sitting in the front passenger seat of that vehicle. While speaking with the driver, the corporal "smelled a strong odor of alcoholic beverages coming from the vehicle." When "backup" arrived shortly thereafter, Corporal Webster ordered the occupants to exit the vehicle. As they did, he observed "the butt of a revolver" underneath the front passenger seat.

All three occupants of the vehicle, including Banson, were then placed under arrest,[2] and the vehicle was searched. In addition to the revolver found beneath the front passenger seat, the police recovered a second handgun, on the driver's seat, as well as two backpacks, one of which was on the floor of the car, directly in front of where Banson had been sitting, and the other was found in the trunk of the Audi. Inside the backpack, which was found where Banson had been sitting, the police recovered personal property belonging to both of the robbery victims, specifically, Rivera-Martinez's cell phone, and Guillen's identification and credit cards, which were found in Banson's

[2] Banson ultimately was not charged with illegal possession of the firearms recovered that evening.

wallet. Thereafter, the police contacted both victims, and, employing a double-blind procedure, separately showed them a photographic array, from which each victim selected Banson as the man who had robbed him.

Then, after Banson was charged, in two eight-count indictments, with armed robbery, use of a firearm in the commission of a crime of violence, and related offenses,[3] the State filed motions to consolidate the two cases or, in the alternative, to permit the introduction, in each case, of evidence of the other, under Maryland Rule 5-404(b). The court granted the motions to consolidate, thereby rendering the Rule 5-404(b) request moot.

Although Rivera-Martinez had selected Banson's photograph from the photographic array, he was nonetheless unable to make a positive in-court identification of Banson, stating, "I am not completely sure," because the assailant had "shoulder length long hair," whereas Banson did not. Guillen, however, had no trouble identifying Banson, in court, as one of his assailants, explaining the hair-length differential, which

[3] In both cases, that is, Case No. CT161234X and Case No. CT161235X, Banson was charged with armed robbery and conspiracy to commit armed robbery; robbery and conspiracy to commit robbery; first- and second-degree assault; and use of a firearm in the commission of a crime of violence. The only difference between the two indictments, other than the victim named in each, was that count 8 of the indictment in Case No. CT161234X, which set forth the crimes alleged to have been committed against Guillen, charged Banson with wearing, carrying, and transporting a handgun on his person, whereas count 8 of the indictment in Case No. CT161235X, which set forth the crimes alleged to have been committed against Rivera-Martinez, charged Banson with theft of property having a value less than $1,000.

had troubled Rivera-Martinez, by stating that Banson was wearing hair "extensions" on the night of the robbery.[4]

The jury found Banson guilty of all charges. The following March, the circuit court sentenced Banson, in Case No. CT161234X, to concurrent terms of twenty years for armed robbery and conspiracy to commit armed robbery, as well as a concurrent term of twenty-five years, with all but ten years suspended, for use of a firearm in a crime of violence; and, in Case No. CT161235X, to concurrent terms of twenty years for armed robbery and conspiracy to commit armed robbery, as well as a concurrent term of twenty-five years, with all but ten years suspended, for use of a firearm in a crime of violence, all of which were to run consecutively to the sentences imposed in Case No. CT161234X.

DISCUSSION

I.

Banson first contends that the circuit court erred, in allowing Detective Jason Tidwell, during direct examination by the State, "to relate the details of the two robberies," as that testimony, in Banson's view, constituted "inadmissible hearsay." The testimony Banson challenges was elicited by the State during the following exchange:

> [THE STATE]: Did you notice any similarities with regard to the method of the robbery?

[4] During his investigation, Detective Jason Tidwell, the lead detective in the case, reviewed Banson's Facebook page and observed that, in none of the photographs that Banson had posted, did he have "long hair."

> [DETECTIVE TIDWELL]: I did.
>
> [THE STATE]: Please explain.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Basis.
>
> [DEFENSE COUNSEL]: Explain the methodology behind the robberies? Hearsay.
>
> THE COURT: Overruled if that is the basis.
>
> [DETECTIVE TIDWELL]: I noticed a similar description, both Hispanic male victims, both victims were on the street near the residence. Both at a similar time at night.

Relying on *Zemo v. State*, 101 Md. App. 303 (1994), Banson suggests that the foregoing testimony constituted hearsay as the "only reasonable inference that the jury could have drawn from" that testimony "was that the alleged victims, or some other person, had told Detective Tidwell that . . . the victims were near their residences when they were robbed; and . . . the robberies occurred at a similar time at night." He further claims the admission of that "hearsay" was "highly prejudicial" to him because one of the two victims, Rivera-Martinez, "provided *no* specific information about either the time or location of his robbery," and thereby bolstered an "otherwise quite weak" case, as demonstrated, he asserts, by the State's purported reliance upon that testimony both in closing argument and rebuttal.

"'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. "Except as otherwise provided by these rules or permitted by applicable

constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802. "Because a circuit court has no discretion to admit hearsay in the absence of an exception to Rule 5-802, appellate review of whether evidence is hearsay and, if so, whether it falls within an exception and is therefore admissible," is performed without deference to the circuit court's ruling. *Hallowell v. State*, 235 Md. App. 484, 522 (2018) (citing *Dulyx v. State*, 425 Md. 273, 285 (2012)).

First of all, it is not clear that Detective Tidwell's response to the prosecutor's question of whether he had noticed any similarities in the method used in the two robberies contained any hearsay. The detective simply stated that he had noticed certain similarities and then stated what he had observed, as one of the responding officers. Although it is true that his observations may have been based, in part, upon what the two victims had said to him, at no point did he relate any statement by either victim. In any event, to the extent his testimony relied upon any out-of-court statements by the victims, those statements were offered, not to prove the truth of what they asserted, but to convey the effect they may have had on the hearer. L. McLain, 6A *Maryland Evidence, State & Federal* § 801:10a, b, at 243-47 (3d ed. 2013). As the State aptly explains in its brief, "the single line of testimony elicited by the prosecutor's question was admissible to explain briefly why the lead investigator in both cases came to suspect that a single group of robbers was responsible for both robberies."

Moreover, Banson's reliance upon *Zemo v. State*, *supra*, is misplaced. Zemo was charged with breaking and entering and related offenses, 101 Md. App. at 305, and,

during his jury trial on those charges, the lead detective was permitted, over defense objection, to testify, in the words of this Court,

> that he [had] received evidence about the crime from a confidential informant, that the informant's information [had] put him on the trail of [Zemo] and other suspects, that other parts of the informant's information [had been] corroborated and turned out to be correct, and that, acting on the informant's information, he [had] arrested [Zemo].

Id. at 306. In reversing Zemo's convictions, we rejected the State's assertion that the detective's testimony had been offered for a non-hearsay purpose, that is, to explain why the detective "went where he went" as well as to "lay out the course of the investigation[.]" *Id.* at 309-10. We concluded that the "only possible import of such testimony was to convey," through the detective, hearsay statements that the confidential informant had told the detective, in violation of both the rule against hearsay and the Confrontation Clause. *Id.* at 306. In so concluding, we stressed that we were "objecting to . . . a **sustained and deliberate line of inquiry** that can have had no other purpose than to put before the jury an entire body of information that was none of the jury's business." *Id.* (emphasis added).

The only similarity between *Zemo* and the instant case is that both raise a similar claim of improper admission of hearsay, which purportedly was admitted for a non-hearsay purpose. Otherwise, the two cases are clearly distinguishable, for the simple reason that, in the instant case, unlike in *Zemo*, the detective made a single, isolated statement, which did not, moreover, contain any statement by either victim.

In fact, the issue before us more closely resembles the issue of hearsay raised in *Frobouck v. State*, 212 Md. App. 262, *cert. denied*, 434 Md. 313 (2013), where we rejected a defense claim of error, which was based upon *Zemo*. In that case, Frobuck was charged with manufacturing marijuana after his landlord had alerted police to his suspicions that Frobuck had been conducting a marijuana growing operation on the premises he had leased, which a deputy sheriff subsequently confirmed. During the jury trial that followed on that charge, the same deputy was asked why he had responded to the premises at issue, and he replied that he had been "dispatched there for a suspected marijuana grow." *Id.* at 281. The defense objected to that response, on the grounds that it constituted "inadmissible hearsay." But the trial court overruled that objection, reasoning that the deputy's testimony had been offered for a non-hearsay purpose, that is, as "a statement or assertion that the deputy [had] received to take some further action." *Id.* Following his conviction of the drug charge, Frobuck noted an appeal.

We affirmed, concluding that the deputy's statement had been offered for a non-hearsay purpose, namely, "to explain *briefly* what [had] brought the officers to the scene in the first place." *Id.* at 283. We declared that, unlike in *Zemo*, there had not been a "'sustained and deliberate' line of questioning" that "served 'no legitimate purpose,'" nor was the deputy's testimony "intended to put before the jury the testimony of someone who was not testifying in th[at] case." *Id.* We believe the same holds true here.

In any event, even if the circuit court did err in admitting the testimony at issue, any such error would have been harmless. Indeed, it was never disputed below, by either side, that both victims were Hispanic males and that both men had been robbed, at

gunpoint, in or near their motor vehicles, while in the area of Hyattsville, on the very same night. Moreover, both Guillen and Rivera-Martinez identified Banson, as one of their assailants, from a photo array, and Guillen did so again in court. Furthermore, Rivera-Martinez's inability to conclusively identify Banson, at trial, was due, as suggested by Guillen, to the artificial hair extensions that Banson wore during that robbery, to presumably disguise himself. Finally, when Banson was arrested, during a traffic stop that occurred twenty-three days after the robberies, he was in possession of personal property belonging to each of the robbery victims. Accordingly, we conclude, beyond a reasonable doubt, that any purported error in admitting Detective Tidwell's disputed testimony "in no way influenced the verdict." *Dorsey v. State*, 276 Md. 638, 659 (1976).

II.

Banson next contends that the circuit court erred or abused its discretion in admitting the handgun that was found when he was apprehended, three weeks after the robberies, during an unrelated traffic stop. We disagree.

Prior to trial, Banson moved, in limine, to exclude evidence that he had been a passenger in a vehicle from which two handguns had been recovered by police during a traffic stop. The court reserved its ruling on that motion. Then, during the direct examination of Corporal Ian Webster, the officer who had conducted the traffic stop, the following exchange occurred:

> [STATE]: What happened when you made contact with the vehicle?

[CORPORAL WEBSTER]: The driver refused —

[DEFENSE COUNSEL]: Objection. May we approach, Your Honor?

THE COURT: You may.

(At the bench.)

[DEFENSE COUNSEL]: Your Honor, we are not challenging the stop. What is important is the search incident to arrest. The gun has been adjudicated previously in another circuit court matter.

THE COURT: And?

[DEFENSE COUNSEL]: My client was not indicted.

THE COURT: That doesn't mean anything.

[DEFENSE COUNSEL]: **It is not relevant.**

THE COURT: State.

[STATE]: It is the victim's property, some of which has already been admitted that was actually found inside that bag.

THE COURT: Let him finish.

[STATE]: Our contention is the defendant was in possession of the victim's property, that stolen property.

In addition to that, there were also some guns found inside of the car. That was the reason for the arrest. I think the court alluded to this earlier, as if the defense is trying suppress all the evidence that came out from the car. It is important that the jury understand the context of which this stolen property was recovered and what else was there.

THE COURT: What is the context?

[STATE]: A traffic stop, an arrest. The evidence that came from this came from the search incident to arrest.

THE COURT: Okay.

[STATE]: The evidence is, one, relevant to the robbery because it's the victim's property. It is important to note that this is an armed robbery case. The defendant was found in a car with not one, but two guns.

THE COURT: What were the guns?

[STATE]: They are actually marked.

THE COURT: Where were they?

[STATE]: The way I believe the officer will testify. The driver was sitting on one gun. There is another gun under the front passenger seat, but towards the back. Not under the front passenger seat where he could reach down, but right behind it.

The State's contention is that one or two of these guns may have even been used in the robbery all together.

Again, the context of this is absolutely alarming given the fact that the defendant is being accused of armed robbery with a semiautomatic handgun, which is right there — I'm not sure which number at this time it is marked as. The State's position is this: The recovered property from the robbery was found during this traffic stop.

THE COURT: I got that part.

[STATE]: As to the defendant's arguments, judge. A proper and limiting jury instruction is fine. That is absolutely appropriate.

THE COURT: I'm having a problem with the gun the guy was sitting on. I'm having a problem with that gun.

[THE STATE]: It is two guns.

THE COURT: I'm having trouble with the gun the guy was sitting on. The second one could be constructive possession.

[DEFENSE COUNSEL]: Here is the problem. Here is the problem. The indictment says June 29th the day of the incident. July 22nd, if we want to charge him and challenge him and put him on the merits on for [sic] July 22nd, that is not —

THE COURT: Okay.

[DEFENSE COUNSEL]: It is July 22nd. **It is too prejudicial, too irrelevant.** The State just said this could be the gun that possibly happened. How can we possibly sit here and infer that because someone is in the car with the gun necessarily three weeks later that is similar or the same gun?

THE COURT: I'm talking about the gun underneath the seat.

[DEFENSE COUNSEL]: Here is specifically what it [s]ays in the statement of charges. The handle, brown, is hanging out behind where the third passenger is. Saying constructive possession in an instance where he is not under trial for it. What does constructive possession have to do if they are inferring if he had a gun at the time because he made good on the escape?

There is nothing in the indictment that he could be found guilty of for July 22nd for the guns. **It is only prejudicial.**

THE COURT: The robbery took place on what date?

[DEFENSE COUNSEL]: June 29th.

THE COURT: The stop took place when?

[DEFENSE COUNSEL]: July 22nd.

THE COURT: The gun was found when?

[DEFENSE COUNSEL]: July 22nd.

> THE COURT: That is what I thought. It was in the car that he was in?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: I got it from the defense. What are you arguing about that gun?
>
> [STATE]: Are you asking him?
>
> THE COURT: The defense.
>
> [DEFENSE COUNSEL]: **What I'm arguing about that gun is it is three weeks later.**
>
> THE COURT: I got that.
>
> [DEFENSE COUNSEL]: **The State is not allowed to be in the position where they can impute that this is necessarily and/or inferentially the gun from this situation. There is nothing on the charging document that speaks to a handgun on the person on July 22nd.** The only conversation about a gun, the handgun charged is from July — from June 29th. Having nothing do [sic] with July 22nd.
>
> THE COURT: Black and brown revolver sticking out from under the seat.
>
> [DEFENSE COUNSEL]: In the back.
>
> THE COURT: I will allow it as to the gun [found under the seat], but not the one he is seated on, that the driver was seated on. I will allow whatever testimony. You can object regarding the gun that is underneath the seat.

(Emphasis added.)

Banson claims that "the gun found in the vehicle on July 22, 2016 was inadmissible because it was not relevant." And, in the alternative, he asserts that, even if the gun was relevant, it was not admissible as evidence of a "bad act" under Maryland

Rule 5-404(b), a rule which generally excludes such evidence, subject to only a few exceptions, which he insists do not apply here. We conclude, however, that the evidence at issue was relevant, that the question of whether the admission of the gun violated Rule 5-404(b) was not preserved for appellate review, and that, in any event, that rule does not apply here.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. "Having 'any tendency' to make 'any fact' more or less probable is a very low bar to meet." *Williams v. State*, 457 Md. 551, 564 (2018) (citation omitted). "Except as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. Evidence that is not relevant is not admissible." Md. Rule 5-402. Relevant evidence may, however, "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Md. Rule 5-403.

A trial court's "conclusion that the evidence at issue is or is not of consequence to the determination of the action"—that is to say, its determination that that evidence is or is not "legally relevant," *State v. Simms*, 420 Md. 705, 725 (2011) (citations and quotations omitted)—must be reviewed, on appeal, without deference to the trial court's decision, as it is a question of law. And, if we find the evidence was "legally relevant," then we review the trial court's ruling, under Rule 5-403, for abuse of discretion. *Id.*

"Evidence of other crimes, wrongs, or acts" is "not admissible to prove the character of a person in order to show action in conformity therewith," but it "may be

admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." Md. Rule 5-404(b). "The Court of Appeals has established a three-part test for admission of other bad acts." *Smith v. State*, 232 Md. App. 583, 599 (2017) (citation omitted). "The first step is to determine whether the evidence fits into one or more of the special relevancy exceptions, which include motive, intent, absence of mistake, a common scheme or plan, identity, opportunity, preparation, or knowledge." *Id.* at 599-600 (citing *State v. Faulkner*, 314 Md. 630, 634 (1989)). "The second step is to determine whether the accused's involvement in the other crimes is established by clear and convincing evidence." *Id.* The third and final step requires the court to "carefully weigh the necessity for and the probative value of the 'other crimes' evidence against any undue prejudice likely to result from admission." *Id.* (citing *Faulkner*, 314 Md. at 635).

The handgun in dispute was found, under circumstances suggesting that it was in Banson's constructive possession, a little more than three weeks after the armed robberies. And, when the handgun was recovered, Banson was in possession of personal property belonging to the same robbery victims. Hence, the handgun was relevant evidence that Banson had committed the armed robberies in question and had done so using that handgun. To the extent that Banson denies possession of the handgun or maintains that it was not conclusively proven to be the weapon used in the armed robberies, such claims go to the weight of the evidence, not its admissibility. Nor are we persuaded that "its probative value [was] substantially outweighed by the danger of unfair

prejudice." Md. Rule 5-403. Thus, the circuit court did not err in failing to deny admission of the handgun under Rule 5-403.

Furthermore, Banson's contention that the handgun should have been excluded as "other bad acts" evidence under Rule 5-404(b) was not preserved for our review, as he objected to its admission solely on the grounds of relevance. Although, admittedly, there are appellate decisions, holding that the issue of the admission of "other bad acts" evidence may be raised on appeal, when only a general objection had been made, *see*, *e.g.*, *Gutierrez v. State*, 423 Md. 476, 487-89 (2011) (holding that Rule 5-404(b) issue had been preserved by means of a general objection); *Borchardt v. State*, 367 Md. 91, 132 (2001) (same), *cert. denied*, 535 U.S. 1104, *reh'g denied*, 536 U.S. 978 (2002), that is not so, when, in the absence of any judicial request, an objector sets forth the specific grounds for his objection. In that event, "the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified." *Brecker v. State*, 304 Md. 36, 39-40 (1985); *accord Gutierrez*, 423 Md. at 488. As Banson made no such general objection to the admission of the handgun at issue, but only a specific objection to the relevance of the gun, we hold that the trial court's purported error in admitting that evidence as "other bad acts" evidence, in violation of Rule 5-404(b), is not properly before us.

Even if we were to construe Banson's argument below, that the handgun was recovered too remotely in time to constitute evidence of the charged offenses and was, therefore, evidence of a separate bad act, and, consequently, reviewable on appeal as an objection under Rule 5-404(b), we would reject that argument as meritless. We do so, for

the simple reason, that the handgun, as previously noted, was relevant evidence of the offenses charged, and, hence, Rule 5-404(b) does not apply.

III.

Banson complains that the circuit court "erred and/or abused its discretion" in refusing to allow him to call any witnesses. He frames that issue to suggest that a grave and flagrant violation of due process was committed by the circuit court, but the facts indicate otherwise.

During voir dire, Banson's counsel, for the first time, notified the court and the State that he intended to call, as witnesses, Banson's mother, Nana Somuah, and his ex-girlfriend, Brynee Gray. Then, the following day, after the State had presented its case-in-chief and the court had denied Banson's motion for judgment of acquittal, the following exchange occurred between court and counsel:

> THE COURT: Ready for the jury? You can get the jury.
>
> [STATE]: Judge, can we approach?
>
> THE COURT: Yes.
>
> (At the bench.)
>
> [STATE]: I understand the defense is about to call two witnesses. I will object for the record, judge. My argument is under the Maryland Rule 4-263. These witnesses should have been given to us.
>
> [DEFENSE COUNSEL]: You got a witness list for my witnesses provided to the court. The girlfriend was initially provided to the court. I filed it. You should have a witness list. I had a witness list.
>
> [STATE]: I'm looking for it.

THE COURT: When would you have provided it?

[DEFENSE COUNSEL]: Months ago. I can step back.

THE COURT: You can look at the file. You can step back.

(Pause.)

[DEFENSE COUNSEL]: Your Honor, what I will if it is totally an issue I can make a phone call to my office. I don't know if I brought that. I have a list –

THE COURT: You can step back and look at it.

[DEFENSE COUNSEL]: It should be two files.

THE COURT: Would you have filed it in both of them? You can look.

(Handed.)

(Pause.)

(Open court.)

THE COURT: It wouldn't be in there.

[DEFENSE COUNSEL]: Your Honor, may we approach again?

(At the bench.)

[DEFENSE COUNSEL]: For the record, I provided Nana Somuah I believe and –

THE COURT: I didn't see anything in there. Did you find either one of them? Why would it have been provided to the court?

[DEFENSE COUNSEL]: I would have filed it with the court and given him a copy.

THE COURT: No, you would have [given] it to the State.

[DEFENSE COUNSEL]: **I don't see any witness list that I submitted.**

THE COURT: The witness list wouldn't be filed with the court. You said filed it, you exchanged it between each other.

[DEFENSE COUNSEL]: We filed it with the court.

THE COURT: You didn't file it in this one.

[DEFENSE COUNSEL]: There is not any witness list in the files.

THE COURT: It wouldn't be here.

[DEFENSE COUNSEL]: Your Honor, if this is an issue. I can step back if I can. If the court is not inclined to allow me to call the mother, which for certain was disclosed. I need to see if they can look in my office, send me a picture so I can show counsel and he can be satisfied.

THE COURT: The question is whether or not a copy was served. That is what he is objecting to.

[DEFENSE COUNSEL]: It would be with a certificate of service.

THE COURT: When would it have been done? I'm looking at all of the docket entries.

[DEFENSE COUNSEL]: It is difficult to guess right now. [I] will tell the court that I have seen the stamp file of the witness list that was provided. The Prince George's County court stamped it. With the certificate of service it was served thereafter to the State. If this is something that we need to clear up, instead of the court just denying it – especially with my representations. **There is nothing in the file.**

THE COURT: You had to serve it on him. That is what he is saying, you had to serve it on him. That is what you are saying?

[STATE]: I have not –

[DEFENSE COUNSEL]: I provided it. You know when I provided it, I did it on our motions date, I went in, it was near the time I gave you photographs.

[STATE]: I remember the photographs.

THE COURT: June the 30th, continue other pending motions. There is nothing else.

[STATE]: I will check my file.

THE COURT: It wouldn't be with us.

[DEFENSE COUNSEL]: I understand what you are saying, it wouldn't be with us. I filed it with the court, nonetheless. It was with service.

THE COURT: **You have put the court in a difficult position.** You said one thing, the other lawyer says something else. I know both of you. You are saying one thing, he is saying another thing. You put the court in the difficult position of – he said he did not receive it. You said you gave it to him.

[DEFENSE COUNSEL]: I did not say I gave it to him.

THE COURT: I thought you gave it to him at the motions hearing.

[DEFENSE COUNSEL]: That is when I filed it. I remember serving it upon the State.

THE COURT: That is what I thought you said.

[STATE]: He gave me a picture of his client.

THE COURT: He said at that time he gave you the witness list. I thought that is what you just said. Isn't that what you just said? You gave it to him at that time?

[DEFENSE COUNSEL]: I think counsel and I were talking about when I was recollecting of when I believe I did it. I'm asking the court to allow me to go back to see if I can obtain a piece of paper with my staff.

THE COURT: Check your file real quick.

[DEFENSE COUNSEL]: I specifically checked certain things and brought certain things today. When I looked over – I don't believe I will find it because I feel like I know what is in my file right now.

THE COURT: That is great. I'm stuck right now. Let's move on. Check. Check.

(Pause.)

(Open court.)

[DEFENSE COUNSEL]: Your Honor, I may need to step back.

THE COURT: I thought that is what you were doing. Check, whatever we need to move on.

(Pause.)

Counsel, would you approach?

(At the bench.)

THE COURT: Just so we are clear. The State objects to the calling of certain witnesses, they were not provided, correct?

[STATE]: Correct.

THE COURT: Defense, you say you gave the list?

[DEFENSE COUNSEL]: I'm saying I provided it to the court –

THE COURT: No, you gave it to the State? Not whether or not you gave it to the court. **Everybody has now checked**

the court's file. There is nothing in the court's file. Correct?

[STATE]: I have not seen it.

THE COURT: Counsel, you checked one of the court's files?

[DEFENSE COUNSEL]: No.

THE COURT: You did have one of the court's files. I thought you asked me a certain question that I answered, no, to. Mr. [State] had a Court file, I gave you one.

[DEFENSE COUNSEL]: Yes.

THE COURT: You checked the court file?

[DEFENSE COUNSEL]: Yes.

THE COURT: **You did not see anything in that court file regarding the list that you said you gave?**

[DEFENSE COUNSEL]: **That's correct.**

THE COURT: **You don't have anything in your file to reflect that you gave him anything?**

[DEFENSE COUNSEL]: **No.**

THE COURT: We have been waiting for 17, 18 minutes. We have to move on. Nobody provided anything. You object. I sustain the objection. Thank you.

(Open court.)

THE COURT: **Anything else, defense?**

[DEFENSE COUNSEL]: **No, Your Honor.**

THE COURT: Thank you. Defense rests?

[DEFENSE COUNSEL]: We do.

(Emphasis added.)

Maryland Rule 4-263 instructs defense:

> **(e) Disclosure by Defense.** Without the necessity of a request, the defense shall provide to the State's Attorney:
>
> (1) Defense Witness. The name and, except when the witness declines permission, the address of each defense witness other than the defendant, together with all written statements of each such witness that relate to the subject matter of the testimony of that witness. Disclosure of the identity and statements of a person who will be called for the sole purpose of impeaching a State's witness is not required until after the State's witness has testified at trial.
>
> * * *

If the foregoing provision of Rule 4-263 is not complied with, then, under section (n) of that rule, the court may impose the following sanctions:

> **(n) Sanctions.** If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court.

And Maryland Rule 5-103 further proclaims:

> **(a) Effect of Erroneous Ruling.** Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, and
>
> * * *

> (2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered. The court may direct the making of an offer in question and answer form.

The record confirms that the defense committed a significant and substantial discovery violation and that the circuit court, in accordance with Rule 4-263(n), disqualified Banson's witnesses from testifying, as was within its discretion to do. Whether the circuit court abused its discretion in doing so, is, however, another matter. Yet, even assuming, for the sake of argument, that the court's ruling was an abuse of discretion, we are nonetheless unable to grant the relief that Banson requests, as the purported error or abuse of discretion was not preserved for appellate review.

"A claim that the exclusion of evidence constitutes reversible error is generally not preserved for appellate review absent a formal proffer of the contents and materiality of the excluded testimony." *Muhammad v. State*, 177 Md. App. 188, 281 (2007), *cert. denied*, 403 Md. 614 (2008) (citing Md. Rule 5-103(a)(2)). *Accord Merzbacher v. State*, 346 Md. 391, 416 (1997) (noting that "[o]rdinarily, a formal proffer of the contents and relevancy of the excluded evidence must be made in order to preserve for review the propriety of the trial court's decision to exclude the subject evidence"); *Ratchford v. State*, 141 Md. App. 354, 368 (2001) (holding that the failure to proffer excluded testimony was "absolutely foreclosing" as to the claim of error), *cert. denied*, 368 Md. 241 (2002).

In the instant case, Banson's counsel failed to proffer what the testimony of the excluded witnesses would have been, even though the trial court gave him an opportunity to do so. Thus, under the circumstances, there is nothing for us to review, as it is not possible for us to ascertain whether Banson suffered any resultant prejudice from that exclusion.

IV.

Banson contends that the court imposed illegal sentences of twenty-five years of imprisonment, with all but ten years suspended, for each of his convictions for violations of CL § 4-204. That section provides in part:

> (c)(1)(i) A person who violates this section is guilty of a misdemeanor and, in addition to any other penalty imposed for the crime of violence or felony, shall be sentenced to imprisonment for not less than 5 years and not exceeding 20 years.
>
> (ii) The court may not impose less than the minimum sentence of 5 years and, except as otherwise provided in § 4-305 of the Correctional Services Article, the person is not eligible for parole in less than 5 years.
>
> (2) For each subsequent violation, the sentence shall be consecutive to and not concurrent with any other sentence imposed for the crime of violence or felony.

Plainly, Banson is correct (and the State concedes) that those sentences are illegal, as they each exceed the maximum sentence permitted under current law. Hence, we shall

therefore vacate those sentences and remand for resentencing in accordance with that statute and Courts and Judicial Proceedings Article ("CJ"), § 12-702.[5]

SENTENCES FOR USE OF A FIREARM IN THE COMMISSION OF A FELONY VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY OTHERWISE AFFIRMED. CASES REMANDED TO THAT COURT FOR RESENTENCING IN ACCORDANCE WITH THIS DECISION. COSTS TO BE PAID 50 PER CENT BY APPELLANT AND 50 PER CENT BY PRINCE GEORGE'S COUNTY.

[5] CJ § 12-702 governs resentencing after appeal.