Circuit Court for Prince George's County
Case No. CT-02-0039A

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 596

September Term, 2021

BRIAN JEROME FLETCHER

v.

STATE OF MARYLAND

Nazarian,
Reed,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: May 15, 2023

In 2003, a jury sitting in the Circuit Court for Prince George's County found Bryan Jerome Fletcher, appellant, guilty of premeditated murder in the first degree, use of a handgun in the commission of a felony or crime of violence, conspiracy to commit murder, and car theft. The court sentenced Fletcher to life imprisonment plus additional terms. His trial counsel thereafter failed to file a timely notice of appeal.

In 2013, Fletcher filed pro se a post-conviction petition, raising claims of ineffective assistance of trial counsel for, among other things, failing to perfect an appeal. In 2021, the circuit court, with the State's consent, granted Fletcher the right to file a belated appeal and held his remaining post-conviction claims in abeyance pending the outcome of that appeal. Fletcher raises the following issues:

> I. Whether the circuit court erred when it permitted a medical examiner who had no involvement with the original autopsy to offer opinions and bases for those opinions regarding the cause and manner of death and to admit the autopsy report into evidence?
>
> II. Whether the trial court erred in admitting "other crimes" evidence and denying Appellant's motion for mistrial on such basis?

We hold that any error the circuit court may have committed in admitting the testimony of the medical examiner and the autopsy report was harmless; and we hold that the court neither erred in admitting other crimes evidence nor in denying the defense motion for mistrial. Accordingly, we affirm.

BACKGROUND

In the afternoon of December 12, 2001, Leo Fenwick, a tow truck driver, was shot to death in Suitland, Maryland. Shortly before the murder, Fletcher, then seventeen years old, had called a local towing company to retrieve a car that had rolled into a ditch. Fenwick responded to that call and towed the vehicle out of the ditch. A dispute arose over the amount charged; Fenwick declared that the fee was $150, but Fletcher and his compatriot, sixteen-year-old Tyrone Powers, only had $75. According to Powers, Fletcher decided that they would have to kill Fenwick because he did not have the money, and Fenwick was "going to tell [Fletcher's] grandfather[.]"

According to Fletcher, Powers[1] shot Fenwick "[b]ecause the dude was about to attack him [with a tire iron] because he didn't get a hundred and fifty dollars." Fletcher then also shot Fenwick, and afterwards, he and Powers fled in a Chevrolet Caprice that previously had been stolen from the United States Postal Service. Later that day, police officers arrested Fletcher following a car chase and ensuing crash.[2]

Fletcher was taken to the Homicide Unit for questioning. He waived his *Miranda* rights and was interviewed by police detectives. Ultimately, he admitted that he shot Fenwick "[l]ike six times," and he gave a written statement to police, as well as an apology letter to the victim's family, in which he acknowledged having "killed a man." Fletcher

[1] Fletcher referred to Tyrone Powers by his nickname, "Rone."

[2] Powers initially was released but subsequently was arrested after police discovered his involvement in the crimes.

claimed that he threw away the murder weapon "on Saint [Barnabas] Road." After police detectives had finished interrogating Fletcher, they took him for a "ride-along" to search for the weapon but never found it.

In January 2002, a six-count indictment was returned, jointly charging Fletcher and Powers with premeditated murder in the first degree, robbery with a deadly weapon, use of a handgun in the commission of a felony or crime of violence, conspiracy to commit murder, car theft, and unauthorized use of a motor vehicle.

In November 2002, less than two weeks before the scheduled trial date, Powers reached a plea agreement with the State and agreed to testify against Fletcher.[3] The defense filed a motion for a continuance, which was granted. The case was continued several more times and ultimately was tried before a jury in September 2003.

Following a week-long trial, the jury found Fletcher guilty of premeditated murder in the first degree, use of a handgun in the commission of a felony or crime of violence, conspiracy to commit murder, and car theft. The court sentenced Fletcher to life imprisonment on Count 1 of the indictment (first-degree murder); a term of 20 years'

[3] Under the terms of Powers's plea agreement, he agreed to plead guilty to murder in the first degree and use of a handgun in the commission of a felony or crime of violence. He further agreed to testify truthfully at Fletcher's trial, and, in exchange, the State would recommend a sentence of life imprisonment, with all but 50 years suspended for first-degree murder and a concurrent sentence on the handgun offense, and it furthermore would not oppose a motion for reconsideration. It appears that, in 2015, a motion for modification of sentence was granted, with the result that Powers's sentence was modified to time served (the publicly available records indicate no sentence for the first-degree murder and a 20-year term for unlawful use of a handgun, but those terms may be the result of the grant of the motion for modification), and he was placed on five years' probation, which by now has concluded.

imprisonment on Count 3 (use of a handgun in the commission of a felony or crime of violence), consecutive to Count 1; a term of five years' imprisonment on Count 5 (car theft), consecutive to Count 1; and a term of life imprisonment on Count 4 (conspiracy to commit murder), concurrent with Count 1.

Although the court duly informed Fletcher of his post-trial rights, and Fletcher was represented by counsel, trial counsel failed to file a notice of appeal.[4] In 2013, Fletcher filed a post-conviction petition, raising claims of ineffective assistance of trial counsel for, among other things, failing to perfect an appeal. Ultimately, in 2021, the circuit court, with the State's consent, granted Fletcher the right to file a belated appeal and stayed the post-conviction proceedings pending the outcome of that appeal.

Additional facts are included where pertinent to discussion of the issues.

DISCUSSION

I.

Parties' Contentions

Fletcher contends that the circuit court erred in permitting Susan Hogan, M.D., a medical examiner who had no connection to the autopsy that had been performed on the murder victim, to "offer opinions and bases for those opinions regarding the cause and manner of death and to admit the autopsy report into evidence[.]" According to Fletcher, admission of that evidence, without affording him an opportunity to cross-examine Dr.

[4] Defense counsel filed a timely motion for modification of sentence but apparently neglected to file a notice of appeal.

Hogan, violated his right under the Confrontation Clause to confront witnesses against him.[5]

The State asks that we assume without deciding that there was a Confrontation Clause violation but insists that any error was harmless beyond a reasonable doubt. It rests that conclusion on the fact that the principal issue at trial was not whether the victim had been shot to death but rather, Fletcher's criminal agency; and, furthermore, the State asserts, there was overwhelming independent evidence that the victim had been shot to death.

Additional Facts Related to this Claim

The State called Dr. Hogan to testify about the autopsy that had been performed on the victim. When the State sought to qualify Dr. Hogan as an expert in the field of "medical pathology," she acknowledged that she began working at the Office of the Chief Medical Examiner in April 2002, four months after the autopsy of the victim had been performed.[6] She further acknowledged to defense counsel during voir dire that she had not examined the victim's body and that her opinions would be based upon "review of the written

[5] Although Fletcher mentions in passing Article 21 of the Maryland Declaration of Rights, he does not contend that the recent decision of the Maryland Supreme Court in *Leidig v. State*, 475 Md. 181 (2021), which for the first time decoupled Article 21 from the Confrontation Clause in determining the admissibility of scientific and forensic reports, should apply in this case.

[6] The autopsy was performed by Craig M.E. Litwin, M.D., assisted by Stephen S. Radentz, M.D., shortly after the death of the victim in December 2001. Neither doctor was employed by the Office of the Chief Medical Examiner at the time of Fletcher's trial, and no finding was made as to whether either was available to testify.

[autopsy] report and the photographs[.]" The court accepted Dr. Hogan as an expert in the field of forensic pathology, and she thereafter testified about the autopsy. Defense counsel did not, at any time, seek or obtain a continuing objection to Dr. Hogan's testimony.

When Dr. Hogan was asked to "describe the injuries that were found at autopsy on the body of Leo Fenwick[,]" defense counsel lodged a general objection, which the trial court overruled. Dr. Hogan then described "gunshot wound A," the entry wound on the victim's left temple, and noted that "a bullet was recovered from the [victim's] brain." Defense counsel did not object. Dr. Hogan proceeded to describe "gunshot wound B," the entry wound to the victim's left buttock. Defense counsel lodged another general objection, which the trial court again overruled. Dr. Hogan then described five additional gunshot wounds sustained by the victim, without objection.

The State thereafter moved into evidence State's Exhibit 59, a diagram of the victim's body prepared by Dr. Hogan from her review of the autopsy report and accompanying photographs, depicting the gunshot injuries he had sustained. Defense counsel lodged a general objection, which the court overruled, admitting that exhibit into evidence. Defense counsel lodged additional general objections when Dr. Hogan opined that the cause of death was multiple gunshot wounds and that the manner of death was homicide.

Then, when the State sought to introduce the autopsy report into evidence, defense counsel objected:

> Yeah, cannot come in either, Your Honor, because this was authored by an individual that is not here. He cannot testify as to the truth of the matters asserted, and he also cannot testify as to the form that it is in at this

> point, and **I have a right to cross-examine the actual person that actually did the autopsy or was there to actually see the autopsy done.**
>
> Me asking her questions about the manner in which the autopsy was done is futile. She was not there. She cannot tell me anything about what he did to extract bullets. She cannot tell me anything that he did in the process of looking at holes, measuring holes.
>
> **So, for that reason, Your Honor, I do not believe the State has done what it had to do in order to complete the chain of custody or to provide evidence as to this autopsy report that is sufficient enough for it to be entered into evidence.**

(Emphasis added.) The prosecutor countered that "it's clear that certified copies of public records, 5:902(4),[7] are self-authenticated" and that the prosecution "didn't even need to call a Medical Examiner to testify."

Defense counsel countered:

> As to the autopsy report, this is a hearsay document that if they wanted to get it in, . . . they would have to bring in the individual that wrote it or that was there at the time of the autopsy. She has already testified that she was not there. **If the jury wants to rely on her opinion, fine, but as far as this document coming in, she cannot authenticate this document.** It is not; should not be entered because she has no direct or personal knowledge of this document whatsoever.

[7] This was a reference to what then was Maryland Rule 5-902(a)(4), which stated:

> (4) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with this Rule or complying with any applicable statute or these rules.

Current Rule 5-902(4) is substantively identical.

(Emphasis added.) The trial court overruled defense counsel's objection and admitted the autopsy report (including the accompanying photographs) as a certified copy of a public record, under the then-extant Rule 5-904(a)(4).

Analysis

Preservation

The State appears to concede that the claim before us is fully preserved for appeal. We beg to differ. Although the general objections lodged by defense counsel generally would be sufficient to preserve for appeal "all grounds which may exist for the inadmissibility of the evidence," *Boyd v. State*, 399 Md. 457, 475-76 (2007) (declaring that, under Maryland Rules 4-323, 2-517, and 5-103, "a contemporaneous general objection to the admission of evidence ordinarily preserves for appellate review all grounds which may exist for the inadmissibility of the evidence"), it is no less true that a claim of error in admitting evidence is waived when the same evidence comes in without objection elsewhere at trial.[8] *Yates v. State*, 429 Md. 112, 120-21 (2012); *DeLeon v. State*, 407 Md. 16, 31 (2008); *Klauenberg v. State*, 355 Md. 528, 545 (1999).

Here, defense counsel lodged general objections to only two of the seven instances where Dr. Hogan described the victim's bullet wounds. Furthermore, defense counsel did

[8] Some decisions appear to frame the issue in terms of harmless error instead of waiver, but all the decisions reach the same result. *See, e.g.*, *Sinclair v. State*, 444 Md. 16, 43 & n.33 (2015) (noting that the erroneous admission of a photograph "would be harmless under any standard" where an "identical" copy had been properly admitted into evidence); *Jones v. State*, 310 Md. 569, 589 (1987) (declaring that "[w]here competent evidence of a matter is received, no prejudice is sustained where other objected to evidence of the same matter is also received"), *vacated on other grounds*, 486 U.S. 1050 (1988).

not request, and consequently the trial court did not grant, a continuing objection to Dr. Hogan's testimony.

Moreover, it also is true generally that when a party asserts specific grounds why evidence is inadmissible, it "normally is limited to those grounds on appeal." *Klauenberg*, 355 Md. at 541. Although defense counsel, in arguing against the admission into evidence of the autopsy report, initially asserted "a right to cross-examine the actual person that actually did the autopsy or was there to actually see the autopsy done," he subsequently told the court, "[i]f the jury wants to rely on her opinion, fine, but as far as this document coming in, she cannot authenticate this document," a position that was flatly inconsistent with the confrontation argument he had previously raised. The net effect was that defense counsel opposed admission into evidence of the autopsy report on the ground of inadequate authentication, an entirely different ground than the constitutional violation now raised on appeal. We therefore hold that the claim of a confrontation violation is not preserved for our review.

But even assuming that the claim of a confrontation violation is properly before us, we nonetheless conclude, as an alternative holding, that any error that the trial court may have committed in admitting Dr. Hogan's opinion testimony and in admitting the autopsy report into evidence was harmless beyond a reasonable doubt. We turn now to explain why.

What Body of Law Applies?

We first consider what law applies in the procedural posture of this appeal. That is because Fletcher's trial took place in 2003, prior to the U.S. Supreme Court's decision in

Crawford v. Washington, 541 U.S. 36 (2004), which effected a significant change in the law concerning the Confrontation Clause. "In *Crawford*, the [U.S.] Supreme Court sought to reconnect the application of the Confrontation Clause to its original meaning and held that, regardless of hearsay rules, the Confrontation Clause generally bars the introduction into evidence, at a criminal trial, of 'testimonial hearsay,' unless the defendant had a prior opportunity to cross-examine the declarant, and the declarant was presently unavailable to testify." *Rainey v. State*, 246 Md. App. 160, 172 (citing *Crawford*, 541 U.S. at 54), *cert. denied*, 468 Md. 556 (2020).

Although the U.S. Supreme Court has held, in *Whorton v. Bockting*, 549 U.S. 406, 416-21 (2007), that *Crawford* does not apply on collateral review of cases that were final prior to the date *Crawford* was decided,[9] the instant case is not on collateral review but rather, is a belated direct appeal. Thus far, the law is unsettled as to whether we must apply the law as it existed at the time of trial or as it exists now, at the time of appeal, more than 19 years later.

[9] The U.S. Supreme Court has further held, in *Danforth v. Minnesota*, 552 U.S. 264, 282 (2008), that states are not constrained to apply the *Teague v. Lane*, 489 U.S. 288 (1989), framework in determining whether a new rule of criminal procedure should apply to collateral review of a conviction that has become final. The Supreme Court of Maryland has not resolved this question. *See Miller v. State*, 435 Md. 174, 194 (2013) (observing that Maryland has "never expressly adopted *Teague*"). We further note that the U.S. Supreme Court recently adopted a slight modification of the *Teague* framework, expressly acknowledging what previously was merely implied—"New procedural rules do not apply retroactively on federal collateral review[,]" and the *Teague* "watershed exception" to that rule "is moribund." *Edwards v. Vannoy*, 593 U.S. __, 141 S. Ct. 1547, 1560 (2021).

In *Taylor v. State*, 236 Md. App. 397, 425-26 (2018) ("*Taylor I*"), *rev'd*, 473 Md. 205 (2021) ("*Taylor II*"), we concluded that a belated appeal is the same as any other direct appeal and therefore falls under the rule of *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987): "[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past," so long as the issue has been preserved. That is, *Taylor I* held that the law applicable to a belated appeal is the law in effect at the time of the appeal, and so long as a claim was preserved at trial, the defendant receives the benefit of any ensuing change in the law between the time of trial and the time of appeal.

Our Supreme Court ultimately reversed the judgment in *Taylor I*,[10] and our opinion in that case therefore is only persuasive, not binding, authority. *See West v. State*, 369 Md. 150, 157 (2002) (observing that a "[Maryland Appellate Court] opinion underlying a judgment, which is reversed or vacated in its entirety by [the Supreme] Court on another ground, may . . . constitute some persuasive authority" but "is not a precedent for purposes of *stare decisis*"). In *Taylor II*, our Supreme Court expressly declined to reach the issue of

[10] In *Taylor I*, we found instructional error (the trial court had given an "anti-CSI" jury instruction) but concluded that the error was harmless. *Taylor I*, 236 Md. App. at 440-44. The Supreme Court agreed that the trial court's jury instruction had been erroneous, but it disagreed with our harmless error analysis. *Taylor II*, 473 Md. at 235-38.

whether *Griffith* is applicable to belated direct appeals,[11] and it remains an open question under Maryland law. *Taylor II*, 473 Md. at 234-35 & n.21; *id.* at 238-39 (Biran, J., concurring).

Because, as we shall explain, whether we apply the law as it existed at the time of Fletcher's trial or as it exists today, the result would be the same, we too shall decline to reach this issue. We next briefly describe the divergent legal standards that could apply, followed by the crux of our analysis, on harmless error. Our exposition of the law of confrontation will be truncated because it ultimately has no bearing on our holding. For those interested in a fuller exposition of the subject, we direct the reader to the decision of our Supreme Court in *Leidig v. State*, 475 Md. 181 (2021), which examines both federal and Maryland law on the subject in considerable detail.

The Law at the Time of Trial

At the time of Fletcher's trial, Confrontation Clause jurisprudence was governed by *Ohio v. Roberts*, 448 U.S. 56 (1980), which examined "the relationship between the Confrontation Clause and the hearsay rule with its many exceptions," *id.* at 62, and concluded that a criminal defendant's confrontation right was not violated by the admission of an unavailable witness's hearsay statement against him if that statement bore "adequate 'indicia of reliability.'" *Id.* at 66. *Roberts* further articulated a two-pronged test for reliability; to be admissible, the hearsay at issue either had to fall "within a firmly rooted

[11] The Supreme Court determined that it was unnecessary to decide the question because, in that case, regardless of which body of law applied, the outcome of the case was the same. *Taylor II*, 473 Md. at 234-35.

hearsay exception," or it otherwise had to bear "particularized guarantees of trustworthiness." *Id.*

There are pre-*Crawford* authorities holding that autopsy reports are admissible without the testimony of the pathologist who performed the autopsy, under either the hearsay exception for business records or its close cousin, the hearsay exception for public records. *See, e.g., Grover v. State*, 41 Md. App. 705, 709-11 & n.2 (1979) (holding that a neuropathologist's statement in an autopsy report as to findings of the physical condition of a decedent's brain was properly admitted, both under the autopsy report statute and as a business record, and there was no violation of the accused's confrontation right). With regard to business records, our Supreme Court observed (during the heyday of *Roberts*), in *Chapman v. State*, 331 Md. 448 (1993), that the business records hearsay exception falls "within the 'firmly rooted' category."[12] *Id.* at 457 n.3.

> At the time of Fletcher's trial, Maryland Rule 5-803(b)(9) (2003) provided:
>
> > The following are not excluded by the hearsay rule, even though the declarant is available as a witness: * * * [(9) Records of Vital Statistics.] Except as otherwise provided by statute, records or data compilations of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

[12] During the time period between *Roberts* and *Crawford* but prior to the adoption of Title 5 of the Maryland Rules, our highest Court adopted a hearsay exception for public records similar to Fed. R. Evid. 803(8). *Ellsworth v. Sherne Lingerie, Inc.*, 303 Md. 581, 612 (1985). Several years later, a substantially similar hearsay exception was codified as Maryland Rule 5-803(b)(8). *See generally* 6A Lynn McLain, *Maryland Evidence*, § 803(8):1 (3d ed. 2020).

The rule contained (and still contains) a cross reference to Md. Code (1982, 2000 Repl. Vol.), Health-General Article ("HG"), § 5-311. At that time, subsection (d) provided:

> (1) In this subsection, "record":
>
> > (i) Means the result of a view or examination of or an autopsy on a body; and
> >
> > (ii) Does not include a statement of a witness or other individual.
>
> (2) A record of the Office of the Chief Medical Examiner or any deputy medical examiner, if made by the medical examiner or by anyone under the medical examiner's direct supervision or control, or a certified transcript of that record, is competent evidence in any court in this State of the matters and facts contained in it.

Under Rule 5-803(b)(9) and HG § 5-311, it appears likely that the autopsy report and Dr. Hogan's opinion testimony derived from it would have been deemed admissible. In that case, then, there would have been no error.

The Law at the Time of Appeal

During the intervening period from *Crawford* until the belated appeal in this case was filed, the law concerning the admissibility of forensic reports in the face of confrontation challenges has undergone significant development. The most recent exposition of that area of the law is *Leidig*, *supra*, 475 Md. 181, which decoupled Article 21 of the Maryland Declaration of Rights from the Confrontation Clause in determining the admissibility of scientific and forensic reports. *Leidig* held that, "under Article 21, a statement contained in a scientific report is testimonial if a declarant reasonably would have understood that the primary purpose for the creation of the report was to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 243. And if a

scientific report is testimonial under that standard, "the report (and/or testimony relaying the information set forth in the report to the trier of fact) is inadmissible under Article 21 unless the declarant is unavailable to testify and the defendant previously had the opportunity to cross-examine the declarant concerning the report." *Id.*

In a decision rendered the same day as *Leidig*, our Supreme Court further clarified *who* may testify about a forensic report without violating a defendant's right to confrontation. As summarized in *Leidig*:

> [I]f a testifying witness **thoroughly reviewed a scientific report for substance at the time of its creation** — providing a "technical" review of the primary author's results and conclusions within the meaning of the FBI's Quality Assurance Standards — and signed off on its issuance, the witness may convey the information contained in the report to the factfinder without violating Article 21. In such an instance, the report is effectively not just the work product of the primary author, but also that of the technical reviewer who acknowledged their agreement with the substance of the report at the time of its issuance.

Leidig, 475 Md. at 245 (summarizing the holding of *State v. Miller*, 475 Md. 263 (2021)) (Emphasis added). The "technical reviewer" described in *Miller*, however, stands in stark contrast with the mere "conduit" of the testimonial statements of others described in *Rainey*, who was held not a sufficient substitute for the person or persons who were actively involved in the creation of the technical report at issue. *See Rainey*, 246 Md. App. at 180 (holding that Maryland Rule 5-703, despite its language seemingly permitting an expert witness "to testify about otherwise inadmissible evidence," does not "permit an expert to act as a conduit for such evidence, regardless of the text of the rule").

For reasons that we cannot fathom, Fletcher does not cite *Leidig* in his brief (or his reply brief), nor does he contend that it should apply to this case. Ordinarily, that would

mean that we would not consider the issue on appeal. Md. Rule 8-504(b)(6). The result would be that we apply the law as it existed just prior to the date *Leidig* was rendered. In *Rainey*, *supra*, 246 Md. App. 160, relying primarily upon *State v. Norton*, 443 Md. 517 (2015),[13] we summarized that law as follows:

> [A] forensic report should be deemed testimonial if it satisfies "the basic 'evidentiary purpose' test espoused by Justice Kagan" and, additionally, either Justice Alito's "targeted accusation test" or Justice Thomas's "formality criterion."

Id. at 177 (quoting *Young v. United States*, 63 A.3d 1033, 1043-44 (D.C. 2013).[14]

Were we to apply the *Leidig* test, it is obvious that the autopsy report and Dr. Hogan's opinion testimony, derived from that report, would be deemed testimonial hearsay. And under *Miller* (and, for that matter, *Rainey*), Dr. Hogan, who had no role whatsoever in performing the autopsy, would not be an adequate substitute for confrontation purposes for the pathologist who performed the autopsy.

[13] *Rainey*, 246 Md. App. at 176-77.

[14] Justice Kagan's "evidentiary purpose" test, gleaned from her dissenting opinion in *Williams v. Illinois*, 567 U.S. 50 (2012), is substantially the same standard as that articulated in *Leidig*. *Leidig*, 475 Md. at 243-44. Justice Alito's "targeted accusation test," derived from the plurality opinion in *Williams*, reflects a narrowing of the basic "primary purpose" test of *Leidig* and *Davis v. Washington*, 547 U.S. 813 (2006), so as to apply only to a person who is the target of a police investigation (and thus not to apply to a suspect whose identity is unknown at the time the report was created), whereas Justice Thomas's "formality" test, under which a statement is testimonial only if it bears indicia of "formality and solemnity," *Williams*, 567 U.S. at 114 (Thomas, J., concurring in the judgment), is an "idiosyncratic" test, *Rainey*, 246 Md. App. at 175, characterized by our Supreme Court as "a holding of one." *Leidig*, 475 Md. at 237.

Were we to apply the *Rainey/Norton* test, it is somewhat less clear, but still likely, that the evidence in dispute would be deemed testimonial hearsay. That is because this evidence, in addition to satisfying the *Leidig*/Kagan test, also would likely satisfy the Thomas formality criterion, given the statutory requirements governing autopsies. Thus, because Dr. Hogan was not a proper witness for introducing into evidence the testimonial hearsay contained in the autopsy report, under either the *Leidig*/Kagan test or the *Rainey/Norton* test, we would presumably conclude that there was a confrontation error. But we need not resolve these thorny issues,[15] because, as we next explain, even under the assumption that a confrontation violation occurred in Fletcher's trial, any error was harmless beyond a reasonable doubt.

Harmless Error

In *Dorsey v. State*, 276 Md. 638 (1976), our Supreme Court articulated the standard of review that applies, under Maryland law, to every preserved claim of error in a criminal trial:

> [W]hen an appellant, in a criminal case, establishes error, 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, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

[15] By proceeding in this manner, we also avoid addressing a potentially difficult question, which is whether Dr. Hogan independently arrived at her opinions, or whether she acted as a mere "conduit" for the testimonial hearsay of Drs. Litwin and Radentz. For example, one might conclude that the opinions as to the cause and manner of death were not independent of the autopsy report (which expressly stated the same opinions), but that Dr. Hogan's opinion regarding the effect of the head wound on the decedent was her own.

Id. at 659 (footnote omitted). "Harmless error review is the standard 'most favorable to the defendant short of an automatic reversal.'" *Rainey*, 246 Md. App. at 185 (quoting *Bellamy v. State*, 403 Md. 308, 333 (2008)). It is a standard that "must be applied 'in a manner that does not encroach upon the jury's judgment.'" *Id.* (quoting *Dionas v. State*, 436 Md. 97, 109 (2013)). Among the factors we consider are "the nature, and the effect, of the purported error upon the jury, the jury's behavior during deliberations, including the length of those deliberations, and the strength of the State's case, from the perspective of the jury." *Id.* (citations and quotation marks omitted) (cleaned up).

Applying the *Dorsey* test here, we begin with the observation that Fletcher's defense was based upon his criminal agency, not upon whether someone was killed or whether the victim had been shot. Indeed, during opening statement, defense counsel told the jury that "someone was killed" and that the central issue in the case was "who actually committed the murder." It was largely uncontested that the victim had been shot and that he died as a result. We must also keep in mind that the assumedly erroneously admitted testimony confirmed only those same things: that the victim had been shot multiple times, that the cause of death was multiple gunshot wounds, and that the manner of death was homicide.

One witness, Heidi Meyers, who, accompanied by her husband, was driving by the scene of the killing on her way to a thrift store, testified that she heard several gunshots and then "saw a man shooting another man"; that the victim fell to the ground; and that the shooter then "shot [the victim] three more times after he was on the ground." Another witness, Myron Harris, who was attempting to rent a car at a nearby car rental agency,

testified that he heard gunshots, near the scene of the killing. When Harris went outside to see what was happening, he saw "two males," one of whom held "the handgun in his hands," and that the armed man jumped over a railing. According to Harris, more shots were fired, and the armed man then reappeared, entered a "blue Caprice," and drove away with his companion. Anthony Price, the rental car agent who was assisting Harris, corroborated Harris's testimony that there had been sounds of gunfire, although Price remained inside the rental car office during the shooting and did not observe anyone discharging a weapon.

Corporal George Harley, a police officer who responded to the crime scene, observed that the victim "had been shot several times." Corporal David Gehrman, a police evidence technician who responded to the crime scene, took photographs depicting the victim, which were admitted into evidence at Fletcher's trial. Corporal Charles Nelson, a police officer who attended the autopsy, testified that pathologists gave him four bullets, recovered from the victim, and Corporal Nelson was told that one of those had been recovered from the victim's head.

Fletcher was apprehended later on the day of the killing and gave a statement, not challenged on appeal,[16] to police detectives, in which he stated that Powers had shot the victim with a ".44 caliber revolver." In addition, Fletcher admitted that he had shot the victim "[l]ike six times" with a ".25 caliber [semi-]automatic," claiming that he had done

[16] Fletcher's pretrial motion to suppress his statement was denied.

so in defense of his friend, Powers. Fletcher also wrote an apology letter to the victim's family, in which he declared, "I can't live knowing I killed a man."

Powers, too, admitted that he had shot the victim. Powers testified in detail about the killing, but for our purposes it suffices to say that, according to Powers, he, at Fletcher's urging, shot "towards" Fenwick six times[17] with a .44 caliber revolver, and Fletcher shot Fenwick "[f]ive or six" more times with a .25 caliber handgun.

Police officers observed blood stains on a pair of jeans that Fletcher was wearing when he was arrested on the day of the murder. Those jeans were recovered from Fletcher at that time, and they subsequently were subjected to DNA testing. That testing confirmed the presence of the victim's DNA in the blood stains.

We must acknowledge that, during closing argument, the prosecutor referred briefly to findings from the autopsy. In an oblique reference, she noted that a "bullet was pulled from" the victim's brain and that other bullets "were pulled from his body," leading her to conclude, "There is no dispute that that's how Mr. Fenwick died was by handgun[.]"[18] The prosecutor later made express reference to Dr. Hogan's testimony, declaring that "until [the victim] received that head shot, he could have been moving, but once he got that head shot, he couldn't remain on his feet." The prosecutor further explained that "that last

[17] Before Powers began firing at Fenwick, he accidentally shot himself in the leg. Consequently, Fenwick was fleeing while Powers was firing at him, and it is unclear how many shots from Powers struck Fenwick.

[18] We note, however, that the prosecutor's remarks in this respect were supported by Corporal Nelson's testimony, which was admitted without objection and which is not the subject of a claimed confrontation violation.

wound . . . finished him off way back there in those woods," pointing out that "[i]n the autopsy photo," one could "see the wound on the side of" the victim's head.

Fletcher's defense was based on an alleged lack of proof of his criminal agency. Emphasizing discrepancies in various witnesses' statements, defense counsel maintained that there was a third suspect, whom police never identified, who shot and killed the victim. Defense counsel pointed out what he deemed were discrepancies between the autopsy report and Powers's testimony.

In rebuttal, the prosecutor reminded the jury that, according to the autopsy report, four .25 caliber bullets (the caliber weapon that Fletcher had admitting to using) were recovered from the victim's body and/or clothing. (We would further point out that the prosecutor's comment, during rebuttal, was a fair response to defense counsel's argument, and that furthermore, there was independent testimony from Corporal Nelson establishing the provenance of the .25 caliber bullets recovered from Fenwick's body.)

Finally, jury deliberations lasted approximately two-and-a-half to three hours,[19] a relatively brief time to review all the evidence that had been presented during a week-long trial, and the jury did not ask the court any questions or submit any notes during its deliberations.

[19] The jury may have deliberated for an additional brief period after closing arguments, but whatever deliberations that may have taken place then must have been short-lived, because instructions and closing arguments all took place in the afternoon. It reconvened the following morning and reached its verdict at 11:45 a.m.

Under all these circumstances, we conclude that there was no reasonable possibility that any assumed confrontation error in this case influenced the jury's verdict. Not only was there an enormous amount of independent evidence, all leading to the conclusion that Fenwick had been shot to death, but most crucially, Fletcher acknowledged as much in his own admissible statement to police detectives. Therefore, any such error was harmless beyond a reasonable doubt.

II.

Parties' Contentions

Fletcher contends that the circuit court erred in admitting "other crimes" evidence and denying his motion for mistrial on that ground. The State counters that, under the circumstances, the circuit court properly exercised its discretion in denying the motion for mistrial in favor of striking the offending testimony and giving a curative instruction instead of granting a mistrial.

Additional Facts Related to this Claim

During defense cross-examination of Detective Joseph Hoffman, the police officer who arrested Fletcher, the following colloquy occurred:

> [DEFENSE COUNSEL]: You stated earlier that Detective Richardson[20] told you that a witness said that they saw Brian coming out of the woods, is that correct?
>
> [DETECTIVE HOFFMAN]: No, what I said, that during a neighborhood [canvass], Detective Richardson talked to -- I refer to him as a witness. I was not referring they were an actual witness to this incident, but they were **a witness** in some form that they had **said that they had seen two**

[20] Detective Charles Richardson led the interrogation of Fletcher.

> **individuals, or one individual, I believe, come out of the woods with a flashlight earlier, and that that individual parks stolen cars down there in that area of the woods, and they said the person's name was Brian**, and that they lived at [redacted/the address where Fletcher lived].
>
> [DEFENSE COUNSEL]: Okay. So it's totally unrelated to this incident, is that correct?
>
> [DETECTIVE HOFFMAN]: I'm saying that this witness did not see the individual after this shooting do this, this, but said prior to the shooting, **that this person, Brian, who lived at that address, has parked cars down there; has parked stolen cars down there.**
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Sustained. Stricken.

(Emphasis added.)

Cross-examination of Detective Hoffman continued, and when he finished testifying, the trial recessed for the day. The following morning, when proceedings resumed, defense counsel moved for a mistrial:

> Yesterday, I objected to a comment that I thought -- well, I didn't know what he was going to say, Your Honor. I thought he was going to address the last witness. . . . The Officer -- basically, I thought he was going to say something about the instant case; about someone saying something about my client being seen coming out of the woods. That's what he was doing a lot of.
>
> However, instead of him doing that, he made reference voluntarily, without prompting, that he had some background information from a prior witness on a prior occasion that saw Brian with -- he said he saw Brian hide stolen cars, and he kept saying "stolen." He couldn't stop saying it. He kept saying "stolen cars," and that's how he had an idea who Brian Fletcher was, and of that address; so, basically, Your Honor, in this case, we have auto theft count.
>
> I think it's very inappropriate for him to do so, and the Jury heard it, and I think that prejudices my client's case expressly when they start putting on evidence about a stolen car. This Jury is going to think this case is all

> about the murder, but they are going to introduce evidence about the stolen car, and now the Police Officer has told everybody that he has this confidential witness pointing to my client coming out of the woods with stolen cars. I really think that it has been prejudiced by his own admissions that I knew nothing about, Your Honor.
>
> Now, as a result of that, I would like a mistrial as to that count of theft of a car.

The trial court declared that it would have preferred that defense counsel move for a mistrial at the time Detective Hoffman made the objectionable statements, instead of waiting until the next day, because, had defense counsel made a contemporaneous motion, the court could have given an appropriate curative instruction. The court then clarified that defense counsel was seeking a mistrial only as to Count 5, the car theft charge. The prosecutor objected, insisting that were a mistrial declared, it would have to encompass all charges. The court deferred its ruling.

Later that day, after Detective Richardson had finished testifying in the State's case-in-chief, the trial court denied Fletcher's motion for a mistrial, deciding instead to give a curative instruction:

> Jurors, you may recall yesterday during the examination or during the testimony of Detective Hoffman, that Detective Hoffman made reference to certain information received by the Police from a neighbor of Mr. Fletcher's regarding certain cars being parked in a certain location. The Court has determined to sustain the Defendant's objection to Detective Hoffman making those comments, and you are to strike that from -- strike it from your memory, but the Court has determined to strike that testimony. It may not be considered as part of the evidence in this case; that is, [t]he testimony of Detective Hoffman that relates to certain information received from a neighbor, a purported neighbor of Mr. Fletcher as to certain activity; Mr. Fletcher's alleged activity in reference to the area where he said.

Defense counsel did not object at that time.

Analysis

Preliminary Matters

Initially, we observe that, contrary to Fletcher's assertion, the trial court did not admit other crimes evidence, at least to the extent it was asked to rule on the matter. As we have set forth above, the other crimes evidence was elicited by *defense counsel* during cross-examination of Detective Hoffman, who then repeated the objectionable statements when *defense counsel* asked him for further clarification. At that point, after a defense objection, the trial court sustained the objection and ordered the testimony stricken.

We turn next to Fletcher's principal contention, that the trial court abused its discretion in denying his motion for a mistrial. We begin with preservation.

Maryland Rule 4-323(c) governs objections to a trial court's non-evidentiary rulings and provides:

> **(c) Objections to Other Rulings or Orders.** For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

Although defense counsel did not object when the trial court denied the motion for mistrial, he did, "at the time the ruling" was "made or sought, make[] known to the court the action that the party desire[d,]" which, under the rule, was "sufficient" to preserve the issue for appeal. *See, e.g., Rainville v. State*, 328 Md. 398, 403-04 (1992).

Merits of the Claim

A mistrial "is 'an extreme sanction' that should only be granted 'when no other remedy will suffice to cure the prejudice.'" *State v. Zadeh*, 468 Md. 124, 145 (2020) (quoting *Burks v. State*, 96 Md. App. 173, 187 (1993)). When a trial court "finds that inadmissible evidence has been presented to the jury, it is within the discretion of the trial court to decide whether a cautionary or limiting instruction should be given." *Carter v. State*, 366 Md. 574, 588 (2001).

A "trial judge must use his discretion to weigh the prejudice caused by an improper remark against the effectiveness of a curative instruction." *Simmons v. State*, 436 Md. 202, 219 (2013). "Whether a curative instruction is a reasonable alternative to a mistrial depends on whether the prejudice was so substantial as to deprive a party of the right to a fair trial and therefore warrant a mistrial." *Id.* If a trial court elects to give a curative instruction, it should avoid "highlight[ing] the inadmissible evidence rather than curing it." *Carter*, 366 Md. at 592.

We review a trial court's decision whether to deny a motion for mistrial in favor of giving a curative instruction for abuse of discretion. *Nash v. State*, 439 Md. 53, 66-67 (2014); *Simmons*, 436 Md. at 212; *Carter*, 366 Md. at 589. In reviewing a trial court's exercise of discretion in deciding whether to deny a motion for mistrial, we consider a number of non-exclusive factors: "'whether the reference to [inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether

credibility is a crucial issue; [and] whether a great deal of other evidence exists[.]'" *Rainville*, 328 Md. at 408 (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)). The ultimate measure, however, is one of prejudice—whether the defendant's right to a fair trial was denied. *State v. Hawkins*, 326 Md. 270, 276 (1992); *Kosmas v. State*, 316 Md. 587, 594 (1989).

The inadmissible evidence at issue here, although "isolated," was not limited to a "single" statement, because defense counsel inadvertently elicited the statement twice in rapid succession. The inadmissible evidence was not adduced by the prosecutor but, rather, by defense counsel. The witness who made the statements was not the lead detective in the case and was not the principal witness on whom the entire prosecution depended. Nor was this a case that turned primarily on credibility, given that Fletcher did not testify, and his inculpatory statement to police detectives, in which he acknowledged that he had shot the victim, was admitted into evidence. Furthermore, as we discussed in the harmless error analysis of the previous section, the evidence against Fletcher was overwhelming. And finally, neither party relied upon Detective Hoffman's offending remarks nor even mentioned them during closing argument, which is hardly surprising given that the entire focus of the trial was on the flagship charge, first-degree murder.[21]

There is one other peculiar fact in this case that weighed even further against granting a mistrial, namely, that defense counsel requested a mistrial only with respect to

[21] During closing argument, defense counsel's only reference to the car theft charge was, "Car Theft, do what you want."

a single count (and most assuredly not the flagship count) of a multiple count indictment, the charge of car theft. The defense request was, to put it mildly, unorthodox in the extreme. Under all the circumstances of this case, we hold that the trial court's decision to give a curative instruction that avoided the pitfall of "highlight[ing] the inadmissible evidence rather than curing it," *Carter*, 366 Md. at 592, was not an abuse of discretion.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.