Circuit Court for Wicomico County
Case No. C-22-CR-19-000324

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 752

September Term, 2020

PATRICK ORRIE VETRA

v.

STATE OF MARYLAND

Leahy,
Reed,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: October 5, 2021

A young man approached the cashier at the Corner Market in Delmar, Maryland, on December 14, 2017. He pulled up his shirt, displayed the butt of a gun, and demanded that the cashier give him the money. Appellant, Mr. Patrick Orrie Vetra, was arrested following an investigation into the incident and charged with one count each of armed robbery, robbery, assault in the second degree, and theft.

At the conclusion of his trial before a jury in the Circuit Court for Wicomico County in January 2020, Mr. Vetra was convicted of armed robbery and robbery. He was later sentenced to incarceration for a period of twenty years, all but fifteen suspended. Mr. Vetra noted a timely appeal.

Mr. Vetra assigns numerous errors to the trial court, the individual and cumulative effect of which, he contends, require that we vacate his convictions and remand his case for a new trial. He presents the following questions, which we have rephrased:

I. Did the trial court commit plain error in failing to ask, during *voir dire,* the question that Mr. Vetra requested the court to ask concerning whether any potential jurors had "strong feelings" about the crimes with which he was charged?

II. Did the trial court err in admitting testimony that Mr. Vetra's behavior changed in response to questions about non-specific robberies, and then, did the court abuse its discretion by denying Mr. Vetra's motion for a mistrial?

III. Did the trial court abuse its discretion in denying Mr. Vetra's motion for a mistrial following testimony implying that he invoked either his right to remain silent or his right to an attorney?

IV. Did the trial court abuse its discretion in denying Mr. Vetra's motion for a mistrial following testimony that he was incarcerated for another crime at the time that he allegedly confessed to the crimes charged?

V. Does the cumulative effect of these evidentiary errors warrant vacating Mr. Vetra's convictions and remanding for a new trial?

We hold that Mr. Vetra waived the trial court's error in failing to present prospective jurors with the "strong feelings" question that he submitted with his written *voir dire* requests, and, therefore, we decline to exercise plain error review. From there, we hold that the trial court did not err in admitting testimony that Mr. Vetra's behavior changed in response to questions about the robbery; nor did the court abuse its discretion in denying Mr. Vetra's motions for mistrial. Finally, after observing that no prejudicial evidence was actually admitted into evidence by the court, and that the State presented strong witness testimony and physical evidence in support of Mr. Vetra's convictions, we conclude that any cumulative prejudice resulting from the alleged errors and abuses of discretion was harmless beyond a reasonable doubt.

BACKGROUND

Mr. Vetra does not challenge the sufficiency of the evidence. Still, to provide context for our examination of his contentions of error and abuse of discretion, and their prejudicial effect, we review the testimony and other evidence presented at Mr. Vetra's trial, held on January 15 and 16, 2020. We later supplement these facts in our discussion of the issues.

A. The Incident

Ms. Lula Foskey testified that she was working as the cashier at the Corner Market on Bi State Boulevard on December 14, 2017, when around 2:35 p.m., a "white male in

[his] 20's" entered the store and approached her.[1] He pulled up his shirt, displayed the butt of a gun, and demanded that she "give him the money." Ms. Foskey complied and was handing the perpetrator money out of the cash register until she was instructed to "hurry up," at which time the perpetrator reached over her shoulder and forcibly removed the remaining money. After the perpetrator exited the store, surveillance footage captured him fleeing the scene on a bicycle.

Several minutes after the crime occurred, Officer Nicolas Aungst, of the Rehoboth Beach Police Department, responded to the Corner Market. Once on the scene, Officer Aungst interviewed Ms. Foskey, who described the perpetrator as "a white male wearing a dark-hooded jacket." According to Officer Aungst, later that same afternoon, Ms. Foskey specified that the perpetrator had "displayed the butt of a handgun" and had thrown a pair of blue gloves into a nearby garbage can.

Sometime between 1:15 p.m. and 2:45 p.m. on the day of the robbery, Ms. Nakima Reaves noticed an abandoned bicycle in her yard. Officer Aungst attested that Ms. Reaves lives in close geographic proximity to the Corner Market,[2] and generally in the direction that security camera footage captured the perpetrator traveling. When officers arrived at Ms. Reaves's residence to recover the bicycle, they also discovered a BB gun "approximately 15 feet" from the bicycle. Officer August testified that the bicycle captured

[1] Ms. Foskey is known in the local community as "Cathy" or "Miss Cathy."

[2] Officer Aungst noted that it took him "under 30 seconds" to travel the distance between Ms. Reaves's residence and the Corner Market.

in surveillance footage from the Corner Market matched the bicycle recovered in Ms. Reaves's yard.

B. The DNA Swab and Meeting with Officers

On June 6, 2018, Detective Ronald Marzec of the Delmar Police Department and an officer from the City of Laurel met with Mr. Vetra to collect a DNA sample and question him about various robberies.[3] At the beginning of the interview, Mr. Vetra signed a *Miranda* form after he was read his *Miranda* rights.[4] During the interview, Detective Marzec questioned Mr. Vetra about the robbery of the Corner Market on December 14, 2017. When asked about his whereabouts on the day of the robbery, Mr. Vetra responded that he was in inpatient rehabilitative treatment. However, after Detective Marzec informed Mr. Vetra that he knew he was not in inpatient treatment on the date of the crime, Mr. Vetra ended the interview by requesting an attorney.[5]

On March 26, 2019, Detective Marzec filed a statement of charges against Mr. Vetra enumerating four counts related to the armed robbery of the Corner Market on December 14, 2017.

[3] On this date, Mr. Vetra was incarcerated at the Eastern Correctional Institution for an unrelated offense.

[4] *Miranda* rights are those custodial interrogation privileges accorded to a suspect as articulated in *Miranda v. Arizona*, 384 U.S. 436 (1966).

[5] While evidence that Mr. Vetra invoked his right to an attorney was not directly presented to the jury, during a bench conference, defense counsel noted that the interview ended after Mr. Vetra said he "wanted a lawyer."

Ms. Lindsey Sanney testified as an expert in the field of forensic DNA analysis. She related that her lab received a "swab of a blue surgical glove and a swab of a black Crossman Phantom BB gun." She explained that the lab's analysis of the blue surgical glove revealed "a partial DNA profile including at least one male contributor," however, "due to the limited data obtained no conclusions [could] be made on [the] partial profile." The analysis of the BB gun revealed that "the DNA . . . [was] consistent with a mixture of three or more individuals including a major male contributor." A major contributor, Ms. Sanney explained, is "someone that is contributing more DNA to [the] mixture than the other people present." After testing a sample of Mr. Vetra's DNA, the results showed that Mr. Vetra's sample was a match for the major contributor of DNA on the BB gun.

C. The Alleged Confession

Mr. Randy Brown, a family friend of Mr. Vetra, was called to testify by the State. Mr. Brown related that he twice spoke to Mr. Vetra about the Corner Market robbery. The first conversation took place at Mr. Vetra's father's house two or three days before the robbery occurred. Mr. Brown recalled that Mr. Vetra arrived at his father's house dressed in black, with a pistol in his possession, and said that he was "going to rob the store."

The second conversation that he and Mr. Vetra had occurred several months after the robbery while the two were "incarcerated at Naylor Mill Road."[6] During this conversation, Mr. Vetra revealed that he had robbed an "older lady" named "Miss Cathy."

[6] We note that the Wicomico County Corrections Center is located at 411 Naylor Mill Road, Salisbury, Maryland 21801.

He also said that he used a bicycle to get to and from the Corner Market but, as he was fleeing the scene of the robbery, the bicycle chain detached, rendering it inoperable, so he discarded the bike into the bushes. Mr. Brown attested that the bike spotted on surveillance footage and left in Ms. Reaves's yard was the "bike that [Mr. Vetra's] mom let him borrow or [gave] to him" and that the gun used in the robbery was the same gun Mr. Vetra displayed during their first conversation days before the robbery.

DISCUSSION

I.

Failure to Give "Strong Feelings" *Voir Dire* Question

A. The *Voir Dire*

Prior to trial, defense counsel submitted a written list of requested *voir dire* questions.[7] Of particular relevance here, defense counsel requested the following question:

> 14. The State alleges that the Defendant committed the crime of Armed Robbery, and related offenses. Do you have strong feelings about that crime?

Despite the pre-trial request, the court did not ask this question. However, the court did ask:

> Ladies and gentleman, do you feel that the nature of this case is such, and it's an alleged violent crime, do you feel the nature of this case is such that it would be difficult for you to render a fair and impartial verdict?

Despite the trial judge's failure to ask Mr. Vetra's requested "strong feelings" question, trial counsel did not, when given the opportunity, object or advise the court that the

[7] In total, the defense requested 15 *voir dire* questions.

question had been omitted. Prior to *voir dire* questioning, the court asked counsel:

> THE COURT: . . . Is there anything else, preliminarily, that we need to discuss that we haven't already discussed in chambers with regard to voir dire, challenges, anything like that before we -- bring the jury in?
>
> [STATE]: Not from the State's perspective.
>
> [DEFENSE COUNSEL]: Not prior to the jury coming out, Your Honor.

(Cleaned up). Then near the conclusion of *voir dire*, the court asked: "So I will first ask you, before we move on to the couple of issues that we have with jurors, are there any other voir dire questions that you believe need to be asked in a different manner or that I have omitted and have not asked that you want to ask?" Defense counsel did request a "victims' advocacy question," but he did not inform the trial court that the previously requested "strong feelings" question had been omitted. Subsequently, the court asked counsel:

> THE COURT: So my last question would be the catch-all question.
>
> Are you ready for me to ask that question?
>
> [DEFENSE COUNSEL]: Yes.

B. The Parties' Contentions

Mr. Vetra contends that, on request, a trial court must ask prospective jurors if they have strong feelings about specific crimes for which a defendant is charged. He posits that the trial court erred by not issuing his requested "strong feelings" question, despite his counsel's failure to object to the court's omission or rephrasing of the question.

Relying on *Collins v. State*, 463 Md. 372 (2019) and related cases, Mr. Vetra argues that the question the court asked, if considered a "strong feelings" question, was erroneous

as it was phrased in a compound form. Furthermore, he contends the question was not an adequate replacement for a properly phrased "strong feelings" question because it did not go "directly to one of the charged offenses."

Acknowledging that defense counsel failed to object, Mr. Vetra avers that we should apply plain error review to vacate his convictions. He argues that plain error review is appropriate because the trial court's failure to ask a properly worded "strong feelings" question subjected him to "an indeterminate amount of potential bias among the jurors, and thereby denied him his right to a fair trial."

The State counters that plain error review is "exceedingly rare" and that Mr. Vetra waived his claim of error, thereby foreclosing plain error review. The State points out that defense counsel did not object to the compound *voir dire* question asked by the trial court, nor did counsel object to the court's omission of his requested *voir dire*, despite three opportunities to do so. The State presses that even if Mr. Vetra could satisfy all of the factors identified by the Court of Appeals for granting plain error review (discussed next), this Court should exercise "its 'unfettered discretion' to decline [Mr. Vetra's] request for plain error review" because, "[l]ooking at the case from the 30,000-foot view, [Mr.] Vetra received a fair trial."

C. Plain Error Review

A defendant has a right to "an impartial jury." U.S. Const. amend VI; Md. Decl. of Rts. Art. 21. "*Voir dire*, the process by which prospective jurors are examined to determine whether cause for disqualification exists, is the mechanism whereby the right to a fair and

impartial jury . . . is given substance." *Dingle v. State*, 361 Md. 1, 9 (2000) (emphasis added) (citations omitted). "On request, a trial court must ask a *voir dire* question if and only if the *voir dire* question is 'reasonably likely to reveal [specific] cause for disqualification[.]'" *Pearson v. State*, 437 Md. 350, 357 (2014) (alterations in original) (quoting *Moore v. State*, 412 Md. 635, 663 (2010)). Particularly relevant here, "on request, a trial court is *required t*o ask a *properly-phrased* . . . 'strong feelings' question."[8] *Collins v. State*, 463 Md. 372, 396 (2019) (emphasis added). The *Collins* Court explained that a properly phrased "strong feelings" question must be phrased in a "non-compound" form. *Id.*

Normally, an "appellate court reviews for abuse of discretion a trial court's 'rulings on the record of the *voir dire* process as a whole.'" *Id.* at 391. Here, the parties agree that the trial court was required, under *Pearson* and *Collins*, to ask Question No. 14, a mandatory "strong feelings" question, as requested by Mr. Vetra. *See also Kazadi v. State*, 467 Md. 1, 46 (2020) (holding that *voir dire* questions "aimed at uncovering a juror's inability or unwillingness to honor . . . fundamental rights" are "mandatory on request").

[8] In *State v. Shim*, the Court established that "[w]hen requested by a defendant, and regardless of the crime, the court should ask the general question, 'Does any member of the jury panel have such strong feelings about [the charges in this case] that it would be difficult for you to fairly and impartially weigh the facts."' 418 Md. 37, 54 (2011). However, in *Pearson v. State*, the Court abrogated, in part, its holding in *Shim* to clarify that the ultimate decision of impartiality should be left to the trial court, not the perspective juror. 437 Md. at 364. As such, the Court amended the phrasing of what is considered a proper "strong feelings" question to: "Do any of you have strong feelings about [the crime with which the defendant is charged]?" *Id.* at 363; *see also Collins*, 463 Md. at 379 (reaffirming the Courts holding in *Pearson* that, "on request, a trial court is required to ask a properly-phrased—*i.e.* non-compound—'strong feelings' question.").

The parties also agree that defense counsel did not properly object to the court's *voir dire* questioning. Thus, Mr. Vetra asks us to undertake plain error review.

Although, as reflected in Maryland Rule 8-131(a),[9] this Court has the discretion to review unpreserved errors, this discretion is rarely exercised because "fairness and judicial efficiency require ordinarily that all challenges to a trial court's ruling [] be presented first to the trial court." *Wright v. State*, 247 Md. App. 216, 228 (2020). Maryland courts have repeatedly declared that plain error review "1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Id.* (quoting *Morris v. State*, 153 Md. App. 480, 507 (2003)).

The Court of Appeals has articulated four factors to guide an appellate court in determining when plain error review is appropriate:

> (1) "there must be an error or defect—some sort of 'deviation from a legal rule'—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant";
>
> (2) "the legal error must be clear or obvious, rather than subject to reasonable dispute";

[9] Maryland Rule 8-131(a) provides:

> **Generally.** The issue of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

> (3) "the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the . . . proceedings'"; and
>
> (4) "the error must 'seriously affect[]' the fairness, integrity or public reputation of judicial proceedings."

Newton v. State, 455 Md. 341, 364 (2017) (paragraph breaks added) (quoting *State v. Rich*, 415 Md. 567, 578 (2010)).

Regarding the first two conditions, the State argues that a properly phrased "strong feelings" question is mandatory *only* on request, and that "Mr. Vetra abandoned the issue three times over." Further, the State contends that the trial court asked a "'strong feelings question'—albeit an improperly phrased one"; thus, it is not clear that the court erred in the first place.

Considering the third condition, the State posits that Mr. Vetra has not established that the failure of the court to ask a properly worded "strong feelings question" was "so serious that it affected the outcome of the trial proceedings." Finally, the State asserts that the trial court conducted an "otherwise thorough voir dire process" and that Mr. Vetra "has not established that he was denied a fair and impartial trial."

We have observed that "each one of the four conditions is, in itself, a necessary condition for plain error review." *Winston v. State*, 235 Md. App. 540, 568 (2018), *cert. denied*, 458 Md. 593 (2018). Consequently, our analysis "need not proceed sequentially through the four conditions" but we may instead "begin with any one of the four and may end its analysis if it concludes that that condition has not been met." *Id.*

D. Analysis

This issue here turns on the threshold condition for plain error review: "there must be an error or defect—some sort of 'deviation from a legal rule'—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant." *Newton*, 455 Md. at 364. It is well established that "[f]orfeiture is the failure to make a timely assertion of a right, whereas waiver is the 'intentional relinquishment or abandonment of a known right.'" *Savoy v. State*, 420 Md. 232, 241 (2011) (quoting *State v. Rich*, 415 Md. 567, 580 (2010) (quoting in turn *United States v. Olano*, 507 U.S. 725, 733 (1993))). This distinction is important as "[w]aived objections cannot be reviewed on appeal (save for the rare case in which a reviewing court, as a matter solely of its discretion, forgives the waiver), whereas forfeited objections are reviewable for plain error." *Joyner v. State*, 208 Md. App. 500, 517 (2012).

In *Yates v. State*, this Court examined whether trial counsel's "acquiescence" to a jury instruction constituted waiver or forfeiture. 202 Md. App. 700, 722 (2011). There, "at the conclusion of the instructions," the court asked "whether counsel had any objections" to which counsel responded: "None." *Id.* In concluding that this constituted a mere forfeiture we noted:

> We do not view this as an affirmative waiver of his right to challenge the jury instruction. Rather, his failure to object constituted a forfeiture of his right to raise the issue on appeal, but it did not preclude this court from deciding whether to exercise its discretion to engage in plain error review.

Id.

We reached a different conclusion in *Choate v. State*, declining, there, to "take the extraordinary step of noticing plain error where . . . [Mr. Choate] affirmatively (as opposed to passively) waived his objection by expressing his satisfaction with the [jury] instructions actually given." 214 Md. App. 118, 130 (2013). In that case, Mr. Choate agreed that the jury should be instructed as to factors (i) and (iii) of first-degree rape but objected to an instruction as to factor (ii). *Id.* at 129. The Court, however, found that factor (ii) was appropriate, at which time, the State asked that a corresponding instruction be given and defense counsel agreed. *Id.* In holding that the objection was waived, we noted that Mr. Choate's counsel failed to renew his objection to a jury instruction on factor (ii); and then replied, "Satisfied, Your Honor," when the court asked counsel whether they were satisfied with the instructions. *Id.* at 129-30. *See also Booth v. State*, 327 Md. 142, 180 (1992) (finding that any potential error was waived when counsel "affirmatively advised . . . that there was no objection to the instruction").

We have clarified that a defendant "preserves the issue of omitted *voir dire* questions under [Maryland] Rule 4-323 by telling the trial court that he or she objects to his or her proposed questions not being asked."[10] *State v. Smith*, 218 Md. App. 689, 700-

[10] Maryland Rule 4-323(c) establishes:

> **Objections to other rulings or orders.** For purposes of review by the trial court or on appeal for 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 that 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 had no

(Continued)

01 (2014). In a case factually closer to the present, we held that a party who fails to object to an intentionally omitted *voir dire* question "[waives] his right to the requested question" if the trial court asks for "any further comment or objection to the *voir dire* questions that [have] been asked" and defense counsel responds in the negative. *Brice v. State*, 225 Md. App. 666, 679 (2015) (citing *Gilmer v. State*, 161 Md. App. 21, 33, *vacated in part on other grounds*, 389 Md. 656 (2005)). In *Brice*, although defense counsel requested a "police witness question in his written proposal to *voir dire*," he waived Mr. Brice's right to the question by "responding 'No' to the court's request for any further comment or objection to the *voir dire* questions that had been asked." 225 Md. App. at 679.

Returning to the present case, although Mr. Vetra requested a "strong feelings" question in his pretrial submission, for some unexplained reason the court omitted it during *voir dire*. Nonetheless, in addition to the questions that the trial court did offer during *voir dire*,[11] the trial court asked counsel, both before and during *voir dire* questioning, whether

> 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.

[11] Among the questions that the court asked the venire, the closest one to the question offered by Mr. Vetra was the following (set out above and repeated here):

> Ladies and gentleman, do you feel that the nature of this case is such, and it's an alleged violent crime, do you feel the nature of this case is such that it would be difficult for you to render a fair and impartial verdict?"

We agree with Mr. Vetra that this compound question does not qualify as a properly-phrased "strong feelings" question, and we will not consider whether this question, or any other question the court asked during *voie dire*, could substitute for Question 14. *Collins*, 463 Md. at 379.

any questions needed to be added or modified. Specifically, prior to *voir dire*, the following colloquy took place:

> THE COURT: Is there anything else, preliminarily, that we need to discuss that we haven't already discussed in chambers with regard to voir dire challenges anything like that before we -- bring the jury in?
> . . . .
>
> [DEFENSE COUNSEL]: Not prior to the jury coming out, Your Honor.

Then, as the court was finishing its *voir dire* questioning, the court solicited counsel once again,

> THE COURT: . . . .[B]efore we move on to the couple of issues that we have with jurors, are there any other voir dire questions that you believe need to be asked in a different manner or that I have omitted and have not asked that you want to ask?

Defense counsel responded by requesting additional *voir dire* regarding some of the prospective juror's occupations, but again, he did not request a "strong feelings" question**.** After denying this request the court asked:

> THE COURT: All right . . . . Any other question that you wish to ask before I get to the catch-all question?
> . . . .
>
> [DEFENSE COUNSEL]: . . . .I am requesting the victims' advocacy question.
>
> THE COURT: Okay. All right. . . . Let me ask that question.

Finally, at the end of *voir dire*, the following discussion ensued:

> THE COURT: . . . . So my last question then would be the catch-all question.
>
> Are you ready for me to ask that question?
>
> [DEFENSE COUNSEL]: Yes.

Applying the principles established in *Choate*, *Booth*, and *Brice*, we conclude that defense counsel did more than fail to object, and therefore, affirmatively waived the trial court's omission of his requested "strong feelings" question. Not only did defense counsel fail to object at all, he did more than merely "acquiesce," as was the case in *Yates*. Indeed, trial counsel affirmatively advised the court, several times, that the given *voir dire* questions were acceptable. We hold, therefore, that Mr. Vetra affirmatively waived his right to raise this issue on appeal. Even considering the remaining factors that guide our decision whether to exercise plain error review, we cannot say the trial court's error in this case was so "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Savoy*, 420 Md. at 243 (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)). The record establishes that the trial court repeatedly solicited the agreement and participation of counsel during *voir dire* and conducted an otherwise thorough *voir dire* process. Other than the bare allegation that he was subjected to "an indeterminate amount of potential bias among the jurors," Mr. Vetra has not articulated the prejudice caused by the court's omission of Question 14, or how that omission "affected the outcome of the trial proceedings." *Newton*, 455 Md. at 364. For all of these reasons, we decline to exercise our discretion to engage in plain error review.

II.

Testimony Regarding Mr. Vetra's Behavioral Change

A. Marzec's Direct Examination

The State elicited testimony during Detective Marzec's direct examination regarding Mr. Vetra's alleged change in behavior during his interview with Detective Marzec. The following colloquy ensued after the State asked: "What did you notice about Patrick Orrie Vetra when you were questioning him about the robbery?"

> THE COURT: What's the objection?
>
> [DEFENSE COUNSEL]: Well, there are two problems.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: One is that I believe that the reality of the situation is that he was trying to question Mr. Vetra about robberies generally, not about a robbery in particular.
>
> So there are relevance problems, and the question is not accurate based upon the facts as I know them, because he wasn't asking about a particular robbery at the Corner Market.
>
> He is asking about robberies in the area, generally. This happens a number of months after the fact.
>
> * * *
>
> And my expectation of what the answer is going to be, and this is anticipatory at this point, but my anticipation is that he is going to say that his behavior changed, his pulse quickened, that sort of thing. Nothing of substance gets said, and then he invokes, which is not going to be admissible to --
>
> The change in behavior is the only thing that could potentially be admissible. Given that it's in response to questioning actually about

> robberies, generally, in the area that are supposed to have happened some months prior.

The State then proffered that Detective Marzec would testify that Mr. Vetra "did appear nervous" and that after asking Mr. Vetra about his whereabouts on the day of the Corner Market robbery, he responded that he was "at inpatient treatment." Detective Marzec knew that to be false based on records he had previously obtained from the treatment facility.

The Court then dismissed the jury to allow the State to instruct Detective Marzec as to the parameters of admissible testimony regarding Mr. Vetra's alleged change in behavior. While the jury was dismissed, defense counsel noted:

> Could I just make it clear for the benefit of the [c]ourt and Madam State that I continue to object to the idea of the behavioral change language if the [c]ourt wants to be considering that or Madam State wants to be talking about that. I just wanted to let the [c]ourt know.[12]

Before direct examination resumed, the State offered another proffer from Detective Marzec. According to Detective Marzec, he asked Mr. Vetra about, "specifically, the Corner Market robbery." Following this proffer, the following colloquy ensued:

> [DEFENSE COUNSEL]: I will just say, and this is not on point, I don't allege that it's on point, but Court[]s have said things like nervousness and a bulge in someone's clothing is not enough to search them. . . .
>
> * * *
>
> In other words, there is a -- there is a lack of foundation to say that it's relevant for any purpose other than permits the jury to speculate as to why someone's behavior would change.

[12] Following this objection, the trial court directed both parties to search for relevant case law supporting their positions on the admissibility of the change of behavior evidence.

And so I contend that it's prejudicial. It's more prejudicial than probative of any fact that's actually in contest between the parties.

THE COURT: Uh-huh.

[DEFENSE COUNSEL]: That's what I'm -- that's what I'm trying to say as it relates to behavioral change in evidence.

* * *

THE COURT: Okay. [State].

[THE STATE]: Thank you, Your Honor.

First, I would say that everything that [defense counsel] just said is great for cross-examination or closing argument, but also it becomes particularly relevant when [Defendant's] opening statement was, it wasn't Mr. Vetra, it was some other man with blue eyes.

So then when he's being questioned specifically about this incident, and he is showing signs of nervousness, I'm not saying that that -- and I would never make the argument that that in and of itself, but that in addition to all of the other pieces of evidence can be considered by the jury and should be considered by the jury.

THE COURT: Uh-huh.

Well, based upon, just initially, I don't know that anybody has moved in limine or anything like that, but just based upon what I'm hearing is that [Defense Counsel] is making a relevancy argument and if I find that the evidence is relevant, he's making an argument that the evidence, probative value of that evidence would be substantially outweighed by the danger of unfair prejudice[].

Based upon what has been proffered, I find that the evidence has a tendency, however slight, to show -- to prove a fact that's a consequence to the action, this defendant's participation. And the probative value, I just don't find is outweighed by the danger of unfair prejudice in that, and you alluded to it, that the defendant has the ability to cross-examine the officer on those points and also make commentary during the argument. So that's the way I see it.

Following this discussion, in the presence of the jury, the State asked Detective Marzec: "When you were talking to him about signing his *Miranda* form, did you tell Mr. Vetra why you were there?" Detective Marzec answered that he told Mr. Vetra that he was there to "discuss **robberies** that occurred specifically at the Corner Market." (Emphasis added). Defense counsel objected and the following discussion ensued:

> THE COURT: May I have the basis for your objection?
>
> [DEFENSE COUNSEL]: The basis of my objection is relevance. The basis for my objection is that the testimony is more prejudicial than probative of any fact in contest. The problem is that this is now a bell that cannot be unrung. My understanding is that we were talking about a robbery on a date certain. Now, we are talking about robberies at the Corner Market.
>
> * * *
>
> The use of the plural robberies, at the Corner Market is a huge problem, and I could ask Madam Court Reporter if she heard the S, I'm sure she did, because it was pretty clear, and I'm moving to strike and asking for a mistrial because I don't know how I cross-examine - - I really don't.

In response, the State argued that the comment could be stricken or cleaned up to make clear that Detective Marzec was questioning Mr. Vetra about one specific robbery at the Corner Market. After hearing argument from both sides, the court ruled:

> [THE COURT]: . . . I'm going to order that both the question and the answer be stricken and that the jury be instructed that they are to disregard both the question and the answer.
>
> And as to your motion for mistrial, I'm going to deny your motion for a mistrial, and I'm going to instruct that [the prosecutor], essentially, ask a preliminary leading question that leads the witness on that one issue -- so that you are able to sufficiently control the witness.

Following a curative instruction, the State proceeded to ask Detective Marzec: "When you went to interview Patrick Vetra, did you tell him that you were there to investigate the robbery at the Corner Market on December 14, 2017?" Defense counsel objected to the question on "the grounds previously stated," which the court overruled. Detective Marzec answered the State's question in the affirmative and went on to testify that when questioned about the Corner Market robbery, he observed Mr. Vetra's "breathing become deeper" and "his chest visibly rise and fall as he sat there."

B. Vetra's Challenges on Appeal

Mr. Vetra's question presented challenges only the court's failure to grant his motion for mistrial.[13] But much of his briefing focuses on his antecedent contention that the trial court committed reversible error when it improperly admitted, as consciousness of guilt evidence, testimony that his behavior changed when Detective Marzec questioned him about the Corner Market robbery. Specifically, Mr. Vetra argues that the State did not properly moor the alleged change in behavior testimony to questioning regarding the December 14, 2017 armed robbery of the Corner Market for which he was charged. Mr. Vetra also contends that the jury was not given the opportunity to consider that an additional officer, from another jurisdiction, was interviewing him about unrelated robberies.

[13] The question, as presented in Mr. Vetra's opening brief is:

> "Did the trial court err in denying a motion for a mistrial in light of testimony that Mr. Vetra's behavior changed in response to questions about non-specific robberies?"

Mr. Vetra insists that a mistrial was warranted because this error was "neither harmless nor curable by instruction." In support of this contention, he notes that this testimony was elicited by the State and came from Detective Marzec, a key witness. Mr. Vetra argues that the State's case was not "unassailably strong" and that the court's instruction to the jury to disregard the question about non-specific robberies did not properly link the change in behavior to the December 2017 robbery of the Corner Market.

To the contrary, the State argues that the evidence was properly admitted and that Mr. Vetra was well within his right to argue to the jury that an alternate cause triggered his behavioral change. The State asserts that the elicited testimony was sufficiently tethered to the crime charged as Detective Marzec confirmed, both in his proffer and subsequent testimony, that he noticed Mr. Vetra's behavioral change "[w]hen he began questioning [him] about the Corner Market robbery."

C. Standards of Review

Mr. Vetra's multifaceted challenge requires several standards of review. His challenge to the evidentiary ruling requires us to employ a two-step inquiry:

> [F]irst, [an appellate court must consider] whether the evidence is legally relevant, and, if relevant, then whether the evidence is inadmissible because its probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined in Maryland Rule 5-403. During the first consideration, we test for legal error, while the second consideration requires review of the trial judge's discretionary weighing and is thus tested for abuse of discretion.

Santiago v. State, 458 Md. 140, 161 (2018) (quoting *State v. Simms*, 420 Md. 705, 725 (2011)). Then, we review the court's decision to deny Mr. Vetra's motion for mistrial

under an abuse of discretion standard. *Wilder v. State*, 191 Md. App. 319, 335 (2010). As explained below, because we conclude that the court properly admitted the consciousness of guilt evidence, Mr. Vetra lacks the predicate error to support his request for a mistrial.

D. Analysis

Generally, "all relevant evidence is admissible." Md. Rule 5-402. 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. Maryland courts have consistently noted that "[h]aving 'any tendency' to make 'any fact' more or less probable is a very low bar to meet." *Williams v. State*, 457 Md. 551, 563 (2018) (citing *State v. Sims*, 420 Md. 705, 727 (2011)).

"If relevant, circumstantial evidence regarding a defendant's conduct may be admissible under Maryland Rule 5-403, not as conclusive evidence of guilt, but as a circumstance tending to show a consciousness of guilt." *Ford v. State*, 462 Md. 3, 47 (2018) (quoting *Decker v. State*, 408 Md. 631, 640 (2009)) (cleaned up). Consciousness of guilt is circumstantial evidence that refers to "[a] person's behavior after the commission of a crime." *Thomas v. State* (*Thomas I)*, 372 Md. 342, 351 (2002). This type of evidence is often relevant because "the particular behavior provides clues to the person's state of mind." *Id.* at 352. "[W]e must bear in mind that [circumstantial evidence] may be just as relevant as direct evidence, and, that our cases do not require any 'greater degree of certainty [] when evidence is circumstantial than when it is direct . . . .'" *Molina v. State*, 244 Md. App. 67, 127 (2019) (quoting *Hebron v. State*, 331 Md. 219, 226-27 (1993)). In

determining relevance, "we must not view a piece of circumstantial evidence 'in a vacuum, devoid of consideration of the other circumstances in the case.'" *Id.* (quoting *Smith v. State*, 423 Md. 573, 590 (2019)); *see also Sewell v. State*, 239 Md. App. 572, 614 n.12 (2018) (same). The Court of Appeals has noted that consciousness of guilt evidence "can take various forms, including flight after a crime, escape from confinement, use of a false name, and destruction or concealment of evidence." *Ford*, 462 Md. at 47 (citations and quotation marks omitted).

The "probative value of guilty behavior depends upon the degree of confidence with which certain inferences may be drawn." *Decker v. State*, 408 Md. 631, 641 (2009) (cleaned up). Evidence of consciousness of guilt relating to concealment of evidence is probative if the following four inferences can be made: (1) from the defendant's behavior to a desire to conceal evidence; (2) from a desire to conceal evidence to a consciousness of guilt; (3) from a consciousness of guilt to a consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt. *Ford*, 462 Md. at 49 (quoting *Thomas I*, 372 Md. at 356).

Mr. Vetra's challenge centers on the third prong. Many courts, including the Court of Appeals, have "emphasize[d] the importance of connecting a defendant's consciousness of guilt to a consciousness of guilt for the *specific crime alleged*," and have required that there be an "evidentiary basis, either direct or circumstantial, to connect a defendant's consciousness of guilt to the particular crime charged." *Thomas I*, 372 Md. at 354-55 (emphasis added). In some instances, the Court of Appeals has held that a defendant's

conduct was simply "too ambiguous and equivocal to be admissible as evidence of consciousness of guilt." *Id.* at 355, 357-58; *Snyder v. State*, 361 Md. 580, 596 (2000).

In *Thomas I*, the Court of Appeals addressed whether a trial court erred in "admitting as evidence of consciousness of guilt the fact that petitioner resisted, when, pursuant to a search warrant, the police sought to obtain a sample of his blood." 372 Md. at 344. At the police station, Mr. Thomas read the warrant but then stated, "You ain't getting it." *Id.* at 346. Eventually, Mr. Thomas was "restrained forcibly on the ground, and a nurse from a local hospital drew a blood sample." *Id.* Evidence presented by the State that Mr. Thomas resisted the blood sample was admitted at trial. *Id.* at 347-48.

On appeal, Mr. Thomas argued that "the evidence is irrelevant because it is ambiguous in that the demand for the blood occurred more than three years after the murder and that his conduct was susceptible to many possible innocent explanations." *Id.* at 349. The Court of Appeals determined that the State presented "no evidence . . . either direct or circumstantial, that [Mr. Thomas] was aware that the police wished to test his blood in connection with the murder" for which he was on trial. *Id.* at 357. Thus, "[t]he jury should not have been permitted to draw an inference of guilt from [Mr. Thomas's] conduct" because "there is no evidence connecting [Mr. Thomas's] refusal to allow the officers to draw his blood and a consciousness of guilt to the murder" for which he was charged. *Id.* at 358.

The Court of Appeals revisited the issue following a new trial. *Thomas v. State (Thomas II)*, 397 Md. 557 (2007). This time, the Court held that Mr. Thomas's refusal to

submit to a blood test was admissible as evidence of consciousness of guilt. *Id.* at 579-80. During Mr. Thomas's second trial, the State offered testimony from a detective who related that he advised Mr. Thomas that "the warrant and blood test were 'in reference'" to the murder for which he was on trial. *Id.* at. 576-77. The Court of Appeals ruled that the evidence was relevant as it "*could* support an inference that the defendant's conduct demonstrates a consciousness of guilt." *Id.* at 576-77 (quotations and citations omitted). The Court noted that if Mr. Thomas wished to provide the jury with an alternate explanation, he was free to do so but it was "incumbent upon him to generate the issue." *Id.* at 578.

In Mr. Vetra's case, we hold that the trial court correctly found that the evidence of Mr. Vetra's change in behavior was relevant. His nervous behavior and heavy breathing upon the officer's questioning tended to establish his consciousness of guilt for the armed robbery. The evidence also tended to show—especially when considered in conjunction with the faulty alibi that Mr. Vetra gave Detective Marzec for the day of the crime—that Mr. Vetra was trying to conceal his whereabouts and activities on the day in question. Therefore, the fact that Mr. Vetra "behaved in this particular way rendered more probable the fact that he was guilty." *Ford*, 462 Md. at 51 (citing *Decker*, 408 Md. at 641).

Next, we hold that the State laid a proper foundation to admit the circumstantial evidence of Mr. Vetra's consciousness of guilt. Mr. Vetra argues that the following exchange was improper:

> [STATE] . . . . When you were in talking to [Mr. Vera] about signing his Miranda form, did you tell [him] why you were there?

> [WITNESS] I told Mr. Vetra I was there to discuss **robberies** that occurred specifically at the Corner Market.
>
> [STATE] Okay.
>
> [DEFENSE COUNSEL]: I'm going to object and ask for permission to approach, Your Honor.

(Emphasis added). Although Mr. Vetra argues that "[t]he jury heard testimony about robberies at the Corner Market generally," the record is clear that the court (1) sustained defense counsel's objection, (2) struck the answer, and (3) struck the preceding question. More significantly, however, the prosecutor then asked Detective Marzec:

> [STATE] When you went to interview Patrick Vetra, did you tell him that you were there to investigate the robbery at the Corner Market December 14, 2017?
>
> [WITNESS] Yes, ma'am.

Clearly, with the question focused on the robbery that occurred on December 14, 2017 at the Corner Market, the jury was presented with evidence that Mr. Vetra's alleged change in behavior was specifically tethered to the crime for which he was being tried. Our holding, therefore, that the State laid a proper foundation in this case for the admission of consciousness of guilt evidence runs parallel to the holding in *Thomas II*, 397 Md. at 576-77. To the extent that Mr. Vetra argues that there was another reason for his behavioral change, we note that "it was incumbent upon him to generate that issue." *Id.* at 578.

In sum, the record establishes that the trial court properly instructed the State to narrow the questioning to the December 14, 2017 robbery of the Corner Market, while instructing the jury to disregard the previous ambiguous question and answer. We discern

no error in the trial court's determination that the change of behavior evidence was relevant, and we conclude that the court did not abuse its discretion by determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. And, finding no error to support Mr. Vetra's motion for mistrial, we conclude, *a fortiori*, that the court did not abuse its discretion in denying it.

III.

Testimony Concerning Invocation of Constitutional Rights

A. Detective Marzec Cont.

Immediately following the exchange discussed above, the State asked Detective Marzec if Mr. Vetra offered an alibi for his whereabouts on the date of the robbery. Specifically, the State asked Detective Marzec:

> [STATE]: When you observed that behavioral change, did you ask [Mr. Vetra] any questions about his location on December 14, 2017?
>
> [WITNESS]: I did.
>
> [STATE]: What did you ask him?
>
> [WITNESS]: I asked Mr. Vetra where he was on December 14, 2017.
>
> [STATE]: What was Mr. Vetra's response?
>
> [WITNESS]: Mr. Vetra's response was that he was in inpatient treatment on that date.
>
> [STATE]: Okay. What, if any, response did you have to Mr. Vetra's statement about being at inpatient on the day of the robbery?
>
> [WITNESS]: I advised Mr. Vetra that I knew he was not in inpatient until after that date.

> [STATE]**: After this interaction between the two of you, did Mr. Vetra wish to be questioned any further?**
>
> [WITNESS]**: No further questions were asked.**

(Emphasis added). Defense counsel objected and requested permission to approach. At the bench conference, the following colloquy ensued:

> [DEFENSE COUNSEL]: Invocations of rights to silence are not admissible. This has been discussed. I think it is highly prejudicial. I move to strike, I object, and I ask for a mistrial.
>
> THE COURT: All right. [State].
>
> [STATE]: Your Honor, I believe by saying he didn't wish to answer anymore questions, that was not him saying he wanted a lawyer. However, if -- I will -- the State believes the appropriate remedy would be to strike the question and answer and move on.
>
> THE COURT: Uh-huh.
> Okay.
> [Defense counsel].
>
> [DEFENSE COUNSEL]: The problem is he did say he wanted a lawyer in reality. And it's tremendously prejudicial coming particularly on the heels of this line of questioning, and I made everyone aware that I thought it was problematic.
>
> THE COURT: Uh-huh.
> Okay.
> All Right.
> At this point, I am going to sustain the objection.
> And I am going to instruct the jury to disregard both the question and the fleeting response that came out of Detective Marzec's -- from Detective Marzec. I will give this further contemplation, but at this time, I deny the motion for a mistrial.

Following this discussion, the court instructed the jury to disregard both the question and the answer, and the State resumed its questioning of Detective Marzec.

B. Analysis

According to Mr. Vetra, Detective Marzec's testimony implied that he ended the interview by invoking his Constitutional rights to counsel and to remain silent, and the court's action (sustaining his counsel's objection and issuing a curative instruction), "was insufficient to cure the error." The State agrees that evidence of the invocation of Fifth and Sixth Amendment rights by a defendant is inadmissible. However, the State denies that the challenged colloquy would cause a reasonable juror to assume that Mr. Vetra had invoked his Constitutional rights. Even assuming some prejudice was generated from the exchange, the State asserts that it "did not transcend the curative effect of the court's instruction to disregard the question and answer."

As mentioned above, we review the denial of a motion for mistrial under an abuse of discretion standard. *Simmons v. State*, 436 Md. 202, 212 (2013); *Carter v. State*, 366 Md. 574, 589 (2001). Our inquiry here is focused on the degree of prejudice incurred by Mr. Vetra. *State v. Hawkins*, 326 Md. 270, 276 (1992) ("The question is one of prejudice to the defendant."). We decide whether the prejudicial effect of the error warranted a mistrial by evaluating the trial judge's chosen remedy to see if it was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Stabb v. State*, 423 Md. 454, 465 (2011). We generally give the trial court "wide berth" in choosing the appropriate remedy, and we have repeatedly instructed that declaring a mistrial "is an extreme remedy not to be ordered lightly," *Nash v. State*, 439 Md. 53, 68, 69 (2014). *See*

also Vaise v. State, 246 Md. App. 188, 239 (2020) ("[D]eclaring a mistrial is an extreme remedy not to be ordered lightly.").

Maryland courts look to the following factors in considering whether a mistrial is required:

> [W]hether the reference to [the 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[.]

Guesfeird v. State, 300 Md. 653, 659 (1992) (applying these factors when an inadmissible reference was made to a lie detector test); *Rainville v. State*, 328 Md. 398, 408 (1992) (stating that the factors in *Guesfeird* are "equally applicable" to "different kind[s] of inadmissible and prejudicial testimony."). However, "these factors are not exclusive," *Komas v. State*, 316 Md. 587, 594-95 (1989), and the calculation is "open-ended and fact-specific." *Washington v. State*, 191 Md. App. 48, 100 (2010).

We begin by acknowledging the bedrock principle of law that "[e]vidence of post-arrest silence, after *Miranda* warnings are given, is inadmissible for any purpose" *Grier v. State*, 351 Md. 241, 258 (1998) (citing *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966) ("The prosecution may not . . . use at trial the fact that he stood mute or claimed his privilege in the face of accusation."). "Testimony regarding evidence that a defendant, post-*Miranda* warnings, invoked his or her right to counsel, generates the same concern as the invocation of the right to silence." *Jamsa v. State*, 248 Md. App. 285, 309 (2020) (citing *Harris v. State*, 458 Md. 370, 415-16 (2018)). This is because courts would be

"naive if we failed to recognize that most laymen view an assertion of the Fifth Amendment privilege as a badge of guilt." *Grier*, 351 Md. at 263 (quoting *Walker v. United States*, 404 F.2d 900, 903 (5th Cir. 1968)). Additionally, Maryland precedent makes plain that invocation of these Constitutional rights is of "dubious [evidentiary] value," *Kosh v. State*, 382 Md. 218, 227 (2004), and when improperly admitted, "reversal is the norm rather than the exception," *Coleman v. State*, 434 Md. 320, 345 (2013) (citation and quotations omitted).

In *Jamsa v. State*, the defendant was arrested after an undercover police officer "believed that he had witnessed a possible drug transaction." 248 Md. App. at 292. At trial, defense counsel argued that it was "inappropriate" to present the jury with a video clip in which Mr. Jamsa invoked his right to counsel. *Id.* at 299. Defense counsel argued that this "could be interpreted by the jury as an indication that his client was going to get a lawyer because he was guilty." *Id.* Despite these arguments, the jury heard, "on the tape, [Mr. Jamsa] being advised of his *Miranda* rights" followed by appellant stating "that he refused to talk anymore and invoked his right to an attorney." 248 Md. App. at 309. Given the extremely prejudicial nature of these comments, we held that the error was not harmless beyond a reasonable doubt and noted that while the State's case was strong, it was "not overwhelming." *Id.* at 312.

By comparison, the prejudicial nature of the testimony admitted in Mr. Vetra's case was not nearly of the magnitude as that admitted in *Jasma*. The prejudicial effect of Detective Marzec's statement depends largely on the supposition that the jury would

understand that "no further questions were asked" meant that Mr. Vetra invoked his right to counsel. An equally reasonable interpretation was that Detective Marzec was satisfied with the evidence he had collected or that Mr. Vetra simply did not want to answer any more questions. Simply stated, the testimony did not directly imply that Mr. Vetra invoked his right to counsel and, thus, was not inherently prejudicial.

Furthermore, Detective Marzec's statement was single, isolated, and, as the trial court noted, "fleeting." And, although Detective Marzec was a critical witness for the State, the record does not suggest that the prosecution depended on his testimony. Rather, the State presented ample additional evidence from which the jury could have convicted Mr. Vetra. Among other things, the State presented video evidence of the suspect leaving the scene of the crime; testimony from the store clerk identifying Mr. Vetra; DNA evidence establishing that Mr. Vetra was a "major contributor" on the BB gun used in the robbery; video evidence of the suspect getting on a bike Mr. Vetra was known to use; testimony that the same bike was left in a yard of close geographic proximity to the Corner Market; and a purported confession to Mr. Brown.

Finally, we conclude that the court's remedy—sustaining defense counsel's objection and instructing the jury to disregard—was proportionate and reasonable to cure any prejudice originating from Detective Marzec's ambiguous statement. *Nash*, 439 Md. at 86-87; *see also Dillard v. State*, 415 Md. 445, 465 (2010) (jurors are presumed to follow the court's curative instructions); Md. Rule 5-104(a) (the admissibility of evidence is left to the sound discretion of the trial court).

Accordingly, for the foregoing reasons, we hold that the trial court did not abuse its discretion in denying Mr. Vetra's motion for a mistrial.

IV.

Testimony Concerning Prior Incarceration

A. Randy Brown

On the second day of trial, the State called a family friend of Mr. Vetra, Mr. Randy Brown, to testify about two conversations he had with Mr. Vetra regarding the Corner Market robbery. During his testimony, the State asked Mr. Brown: "Did there come a time when you and the defendant were discussing the Corner Market robbery **prior to it happening?**" (Emphasis added). Mr. Brown responded that this conversation happened while the two "were incarcerated at Naylor Mill Road." Defense counsel objected and made the following argument:

> I'm going to move to strike and ask for a mistrial. My belief based upon my review of records and time lines is that Mr. Vetra at the time of this incarceration that's in question was incarcerated for something unrelated to this event.
>
> In order to effectively cross-examine the individual, I will end up having to reveal information very probably about this other criminal event which ought not to have come before this jury.
>
> The discussion, I think he just said, was that was concerning the Corner Market robbery prior to it, but I might be wrong about that. He might have said after the Corner robbery event, but either way, the reality of the situation is the point in time that they are incarcerated, the timeline is going to be such that it's going to be clear to this jury if they can do any sort of basic math that this incarceration is for something other tha[n] the Corner Market robbery because we know that Mr. Vetra wasn't arrested on that until March of 2019.

> So that's what I would say. It's other crimes evidence. It's highly prejudicial, and there is no way for me to combat it without opening the door to a discussion of other criminal activity.

After hearing argument from the State, and conducting a lengthy discussion with the parties as to the appropriate remedy, the court made the following ruling:

> THE COURT: Okay.
>
> So I find that the question was -- the question that the prosecutor asked and the eliciting of this information that has been brought before for the jury was inadvertent.
>
> So I'm going to deny the mistrial. It was also a very fleeting statement that I believe can be cured with an instruction that the objection is sustained, the testimony is stricken, and the jury shall disregard that testimony.
>
> I'm going to allow [the State] to use the technique of leading just to bring the witness's attention to the time and temporal proximity within which you are questioning him to help him understand -- . . . but not to lead him as to this substance -- . . . of what has been -- what has been said. But I am making the calculation that this evidence, again, is relevant and it's probative value is not substantially outweighed by the danger of unfair prejudice. I don't think it can be helped as to where the confession took place.
>
> I think this is fodder for cross-examination if that's where -- you know, if that's what you believe you need to do to adequately represent your client and give him a fair trial today.

The court subsequently instructed the jury that defense counsel's objection was sustained and that the jury was to disregard the answer that was elicited by the prosecutor.

B. Analysis

Mr. Vetra challenges the trial court's decision not to grant his motion for a mistrial following testimony that he was incarcerated prior to being charged with the armed robbery of the Corner Market. Specifically, he argues that Mr. Brown's testimony "allowed the

jury to draw the exact impermissible inference of guilt based on prior bad acts that [Maryland] Rule 5-404(b) is intended to prevent." Further, Mr. Vetra posits that a mistrial was the only sufficient remedy, as the error was not harmless beyond a reasonable doubt and the curative instruction could not cure the prejudice that he incurred.

The State responds, relying on *Donati v. State*, 215 Md. App. 686, 738 (2014), that the thrust of Maryland Rule 5-404(b) is "to keep prosecutors from using 'propensity evidence' to suggest that because the defendant is a person of criminal character it is more probable that he committed the crime for which he is on trial." According to the State, Mr. Brown's statement did not "necessarily have the effect of establishing criminal propensity" because he "did not say *why* [Mr.] Vetra was 'incarcerated.'" Further, the State avers that even if the statement was impermissible Rule 5-404(b) evidence, the trial judge cured any prejudice by striking the testimony and issuing a curative instruction.

Before we address these contentions directly—a quick review of the applicable Maryland law.

Prior bad act evidence "refers to activity or conduct which although not necessarily criminal, after taking into consideration the facts of the particular case, is evidence that tends to reflect adversely on or impugns a person's character." *Snyder v. State*, 210 Md. App. 370, 393 (2013). Maryland Rule 5-404(b) governs the admission of "Other Crimes, Wrongs, or Acts" and provides:

> Evidence of other crimes, wrongs, or other acts . . . is not admissible to prove the character of a person in order to show action in the conformity therewith. Such evidence, however, 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[.]

As explained above, whether to grant a mistrial is a decision that "lies within the sound discretion of the trial judge and [] the trial judge's determination will not be disturbed on appeal unless there is an abuse of discretion." *Carter v. State*, 366 Md. 574, 589 (2001). As general rule, "judges are accorded broad discretion in determining whether a particular instruction should be given on a particular occasion, although statutes, court rules, and case law may place limits on the judge's discretion." *Id.* at 584. In determining whether a curative instruction to disregard inadmissible evidence is sufficient to cure prejudice, we consider the instruction's "efficacy" and determine whether "the prejudice to the defendant was so substantial that he was deprived of a fair trial." *Kosmas v. State*, 316 Md. 587, 594 (1989). This determination is guided by the *Guesfeird* factors articulated *supra.* 300 Md. at 659.

In *Rainville v. State*, the Court of Appeals, applying the *Guesfeird* factors, held that the curative instruction given could not cure the prejudice caused by the "other crimes, wrongs or acts" testimony. 328 Md. 398, 410-11 (1992). There, the defendant was charged with raping and sexually abusing a young girl. *Id.* at 399. At trial, the victim's mother testified that the defendant was "in jail for what he had done to [the victim's brother]." *Id.* at 401; 407. The trial court denied Mr. Rainville's motion for a mistrial and instructed the jury not to consider the referenced testimony. *Id.* at 402.

The Court of Appeals explained that although the comment was a single, isolated, and unsolicited statement, it "almost certainly had a substantial and irreversible impact

upon the jurors, and may well have meant the difference between acquittal and conviction." *Id.* at 410. The Court reasoned that the State's case "rested almost entirely upon the testimony of a seven-year-old girl" who the defendant "adamantly denied ever having touched." *Id.* at 409. Further, the Court acknowledged the lack of physical evidence proffered and recognized that conflicting witness testimony had been presented. *Id.* The Court concluded:

> [T]he State's evidence that does not hinge at least in part upon the determination of [the defendant's] credibility is hardly of sufficient strength to permit us to find beyond a reasonable doubt that the inadmissible evidence did not in any way influence the verdict.

Id. at 411 (quoting *Kosmas*, 316 Md. at 598). Thus, the Court remanded for a new trial. *Id.*

Conversely, in *Mitchell v. State*—a case more analogous, factually, to Mr. Vetra's case—we held that a mistrial was not warranted when a witness testified that he hadn't seen the defendant because a friend of his indicated that the defendant "was locked up." 132 Md. App. 312, 323, 328-29 (2000), *rev'd on other grounds*, 363 Md. 130 (2001). In ruling that the trial court did not err in denying a motion for a mistrial, we noted that it was "not presented with a situation nearly as compelling as that in *Rainville*." *Id.* at 328. We observed that the witness's credibility was called into question both before and after the "locked up" comment was made and that the remark was a "single, isolated statement that was wholly unresponsive to the State's question, and the court's curative instruction was adequate to overcome any taint." *Id.* at 328-29. We concluded, therefore, that the trial judge did not abuse her discretion and noted that "while a defendant is entitled to a fair

trial, he is not entitled to a perfect one; and when curative instructions are given, it is presumed that the jury can and will follow them." *Id.* at 329 (quoting *Brooks v. State*, 68 Md. App. 604, 613 (1986), *cert. denied*, 308 Md. 382 (1987)).

Applying, here, the factors set out in *Guesfeird*, and the lessons from *Rainville* and *Mitchell*, we hold that the trial judge properly struck the improper testimony, issued a curative instruction, and denied the motion for a mistrial. We first note that Mr. Brown's statement regarding Mr. Vetra's previous incarceration was "single" and "isolated." Unlike the statement in *Rainville*, Mr. Brown's statement did not implicate Mr. Vetra in any specific crime and, principally, did not implicate Mr. Vetra in a prior robbery. Immediately following the response, defense counsel objected and asked "permission to approach." Following the bench conference, the court ordered that "[t]he testimony that was elicited by the prosecutor is stricken, and the jury shall disregard the last statement of the . . . witness." Thereafter, there were no additional references to Mr. Vetra's previous incarceration or "Naylor Mill Road" made in the presence of the jury.

Second, the record reveals that Mr. Brown's answer was nonresponsive to the State's question. Mr. Brown and Mr. Vetra allegedly had two conversations regarding the Corner Market robbery, one proceeding and the other following the incident. While the State was trying to elicit testimony regarding the pre-crime conversation, which allegedly occurred at Mr. Vetra's fathers' home, Mr. Brown responded by referring to their post-crime conversation, which actually occurred at the Wicomico County Corrections Center. The trial court in this case correctly ruled that the question and response by Mr. Brown,

that he had a conversation with Mr. Vetra while the two "were incarcerated at Naylor Mill Road," was an inadvertent violation of Rule 5-404(b).

Third, and unlike in *Rainville*, the State presented testimony from various other witnesses and proffered physical and video evidence linking Mr. Vetra to the crime. This evidence included testimony from Miss Cathy, the clerk working the store at the time of the robbery. The State also offered testimony from Ms. Sanney, who explained that Mr. Vetra was the major contributor of DNA on the BB gun used in the robbery.

Fourth, the record demonstrates that Mr. Brown's credibility was sufficiently impeached, by both sides, before and after the "Naylor Mill Road" statement. Indeed, one of the first questions the State asked Mr. Brown was: "And why are you at ECI?"[14] to which Mr. Brown responded: "Resisting arrest charge." Defense counsel commenced cross-examination by impeaching Mr. Brown as to his three previous theft convictions. Defense counsel also elicited that Mr. Brown had requested that the State's Attorney "cut time off of his sentence" in exchange for his cooperation.

Finally, as detailed above, the State presented an abundance of evidence sufficient to support Mr. Vetra's convictions. As in *Mitchell v. State*, we observe here that "while a defendant is entitled to a fair trial, he is not entitled to a perfect one." 132 Md. App. at 329. Under the circumstances presented in this case, we hold that the trial court did not abuse its discretion in denying Mr. Vetra's motion for a mistrial.

[14] ECI stands for the Eastern Correctional Institute, which is a Maryland State prison located in Somerset County.

Cumulative Error

Lastly, Mr. Vetra argues that the cumulative effect of the alleged evidentiary errors was not harmless beyond a reasonable doubt and, thus, warrants reversal. He contends that the trial court made specific findings as to the admission of Mr. Vetra's behavioral change, his invocation of rights, and his prior incarceration. He asserts that the temporal proximity between Detective Marzec's testimony about Mr. Vetra's behavioral change and Detective Marzec's testimony which allegedly referenced Mr. Vetra's invocation of Constitutional rights was especially prejudicial. This allowed the jury to "draw two, mutually reinforcing impermissible inferences of guilt."

The State responds that, even taken together, the weight of the alleged evidentiary errors still culminates in a finding of harmless error beyond a reasonable doubt. The State avers that the trial court properly addressed Mr. Vetra's objections, and the "case [against Mr. Vetra] was particularly strong."

The phenomenon of cumulative errors comes into play "only in the context of multiple findings of harmless error." *Muhammad v. State*, 177 Md. App. 188, 325 (2007). In a case with two or more findings of harmless error, "the cumulative prejudicial impact of the errors may be harmful even if each error, assessed in a vacuum, would have been deemed harmless." *Id.* In evaluating the cumulative prejudice, it is "the told prejudicial impact that we measure, not the source or sources of the impact." *Jordan v. State*, 246 Md. App. 561, 602 (2020).

Reversal is warranted, under harmless error review, "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.'" *Newton v. State*, 455 Md. 341, 353 (2017) (citing *Simpson v. State*, 442 Md. 446, 457 (2015)). Among the factors to consider are "the nature, and the effect, of the purported error upon the jury . . .; and the strength of the State's case, from the perspective of the jury." *Rainey v. State*, 246 Md. App. 160, 185 (2020).

The Court of Appeals, in *Williams v. State*, addressed when cumulative prejudice may rise to the level of reversable error. 342 Md. 724, 753 (1996). There, Mr. Williams was arrested and charged with murdering a couple at their Annapolis weekend home. *Id.* at 731-32. On appeal, the Court found that the trial court had made several highly prejudicial evidentiary errors. *Id.* at 753-74. Specifically, the trial court improperly allowed the State to impeach a defense witness as to a juvenile delinquency adjudication. *Id.* at 754. This error was especially prejudicial, the Court found, given that the only direct evidence of Mr. Williams's guilt was rebutted by the impeached defense witness's testimony. *Id.* Additionally, the Court found the trial court's error in restricting Mr. Williams's "cross-examination of the State's DNA expert" to have been prejudicial. *Id.* Next, the Court concluded that the admission of a "crow bar and mace seized from [Mr. Williams] at the time of his arrest" was unduly prejudicial as there was "no evidence linking either item to the crimes with which [Mr. Williams] was charged." *Id.* The Court also reasoned that "the charge of burglary against [Mr. Williams] should never have been sent to the jury because there was no evidence of a breaking." *Id.* The Court concluded

by noting that: "Given the cumulative effect of these errors, we cannot conclude beyond a reasonable doubt that the jury's verdict was not influenced. Thus, we must reverse Mr. Williams's convictions and remand this case for a new trial." *Id.* at 755.

Here, initially, we note that Mr. Vetra alleges three evidentiary errors apart from the unpreserved error by the Court to give the venire his requested "strong feelings" question. In reviewing these alleged errors, we observe that in each instance, the trial court struck the impermissible testimony and issued a curative instruction to the jury; therefore, our inquiry is limited to evaluating any cumulative prejudice that remained following the trial court's remedies. Taking all assignments of error together, we find, beyond a reasonable doubt, that they in no way influenced the verdict. In other words, we conclude that in each instance standing alone, and considered together as a whole, the accrued prejudice was harmless beyond a reasonable doubt—the fractions still do not add up to more than the whole. *Jordan*, 246 Md. App. at 602.

In regard to the first assignment of error, as we pointed out, the record establishes that the trial court conducted a thorough and fair *voir dire* process, and Mr. Vetra has failed to show how the court's failure to ask his requested "strong feelings" question affected the outcome of the trial proceedings. In regard to Mr. Vetra's second challenge on appeal, as detailed above, the trial court properly struck the inadequate question and response, and we discern no error in the ultimate admission of the change of behavior testimony.

In his third assignment of error, Mr. Vetra argues the stricken testimony revealed to the jury that he invoked his Constitutional right to counsel. However, the transcript

demonstrates that the colloquy was equivocal and could have been interpreted to mean many things, including, simply, that the interview just ended. Still, in response to defense counsel's objection, the court offered the jury a curative instruction to disregard the question and the answer. We have concluded that the colloquy had little prejudicial effect, if any.

Finally, we agree with Mr. Vetra, as did the trial judge in this case, that Mr. Brown's testimony about being "incarcerated at Naylor Mill Road" with Mr. Vetra was a violation of Maryland Rule 5-404(b). Still, as explained above, the statement did not imply what Mr. Vetra was incarcerated for; and, to cure any resulting prejudice, the court instructed the jury to disregard it. Even though Mr. Brown's statement violated Rule 5-404(b), we conclude that the evidence presented by the State far outweighed any prejudicial effect. *See Brown v. State*, 364 Md. 37, 42 (2001) (holding that even assuming *arguendo* that the trial court erred in admitting a handgun derived from an improper search, the Court was convinced that "the collective effect of the other evidence . . . so outweighs the prejudicial nature of the admission of the gun and the weapons examination that there is no reasonable possibility that the jury's verdict would have been different had the evidence been excluded.").

As noted above, the State presented testimony from the cashier at the time of the robbery, Miss Cathy, who identified Mr. Vetra at trial as the person who robbed the Corner Market. The State presented testimony from a forensic DNA analyst that Mr. Vetra's DNA was the major male contributor on the BB gun used in the robbery. A bicycle, which was

later identified as Mr. Vetra's bicycle, was found disabled in a yard within close geographic proximity to the Corner Market, tracking the location shown in the surveillance video of the suspect fleeing the scene of the crime. Thus, given that no prejudicial evidence was actually admitted by the court, we conclude, beyond a reasonable doubt, that there is no reasonable possibility that any cumulative prejudice affected the jury's verdict.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.