Circuit Court for Baltimore County
Case No. C-03-CR-19-3178

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1351

September Term, 2021

CORY DWAYNE FENNELL

v.

STATE OF MARYLAND

Nazarian,
Reed,
Zic,

JJ.

Opinion by Zic, J.

Filed: February 8, 2023

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

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

At 11:17 a.m. on August 4, 2019, when Derrick Towe-Williams approached a vehicle on the street near his residence in Randallstown, Maryland, neighbors' security surveillance cameras recorded his death. Cory Dwayne Fennell, appellant, and Markus Haggins were charged with Mr. Williams' murder. A jury in the Circuit Court for Baltimore County credited the State's "attempted robbery gone wrong" theory, that Mr. Haggins and Mr. Fennell "set up" Mr. Williams by arranging to purchase marijuana from him, but instead of Mr. Fennell robbing Mr. Williams while Mr. Haggins drove the getaway car as planned, Mr. Fennell shot Mr. Williams. Both co-defendants were convicted of first-degree felony murder, attempted robbery with a dangerous weapon, use of a handgun in the commission of a crime of violence, and possession of a regulated firearm after a disqualifying conviction for a crime of violence.

Although their appeals have been consolidated because they present overlapping records and issues, each case has been separately argued and reviewed in this Court.

QUESTIONS PRESENTED

In this appeal, Mr. Fennell presents four questions for our review:[1]

1. [Whether] the evidence [was] legally []sufficient to sustain [Mr. Fennell's] convictions for attempted robbery, use of a firearm in a crime of violence, and felony murder[.]

2. [Whether] the trial court commit[ted] plain error in permitting [Special] Agent Wilde to offer opinion evidence [because] he was not offered or accepted as an expert witness[.]

[1] In his appeal, Mr. Fennell's co-defendant, Mr. Haggins, challenges his convictions on comparable voir dire, expert testimony, and sufficiency grounds, and further contends that the trial court erred or abused its discretion in denying his motion to sever his trial. *See Markus Haggins v. State*, No. 1325, Sept. Term, 2021.

3. [Whether] the trial court err[ed] in propounding compound voir dire questions during jury selection[.]

4. [Whether Mr. Fennell was] deprived of the right to be present and to counsel [when] the trial court conducted a hearing upon Mr. Haggins' motion for severance in the absence of Mr. Fennell and his counsel[.]

For the reasons explained below, we shall affirm the circuit court's judgments.

BACKGROUND

Surveillance footage recovered from residences on Southall Road in Randallstown, Maryland shows that at 11:17 a.m. on August 4, 2019, Mr. Williams walked up to a gold Chevrolet Suburban that had stopped on the street a few houses away from his. Before Mr. Williams could open the rear passenger door, a person wearing a mask jumped out of the front passenger seat.[2] When Mr. Williams took steps toward him, the masked individual shot Mr. Williams in the chest, then in the back.

Based on evidence developed by police investigators that Mr. Fennell and Mr. Haggins arranged to buy marijuana from Mr. Williams, while planning to rob him instead, the State charged both Mr. Fennell and Mr. Haggins with first-degree felony murder, attempted robbery with a dangerous weapon, use of a firearm in the commission of a crime of violence, and possession of a firearm after a disqualifying conviction.[3]

After police arrested Mr. Haggins and Mr. Fennell together, Mr. Fennell admitted to shooting Mr. Williams ("I did it") and simultaneously exculpated Mr. Haggins ("He didn't do nothing" and "I don't want any promises. I just want him to know I took my

[2] The encounter occurred before the COVID-19 pandemic made masks common.

[3] Both co-defendants were charged with various related and lesser-included offenses, but only these four charges proceeded to trial.

charge. He had nothing to do with it."). Mr. Fennell moved to suppress these statements on the ground they were improperly elicited after he invoked his right to counsel, in violation of his Fifth and Sixth Amendment rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Finding that there was "a clear and unequivocal invocation of the right to remain silent," the suppression court granted Mr. Fennell's motion to exclude his ensuing statements, which included both his inculpatory admission and his exculpatory declarations regarding Mr. Haggins' involvement.

Mr. Haggins then moved to sever his trial from Mr. Fennell's, arguing that Mr. Fennell's statements were admissible in Mr. Haggins' defense under the hearsay exception for statements against the declarant's penal interest. At a hearing on April 30, 2021, the circuit court heard from Mr. Haggins and the State. Having not been notified of the motion or hearing, neither Mr. Fennell nor his counsel were present.

The court denied Mr. Haggins' severance motion, ruling that Mr. Fennell's statements would not be admissible in a separate trial of Mr. Haggins. *See* Md. Rule 5-804(b)(3). The court explained that, although the inculpatory parts of Mr. Fennell's statement to police were "against his penal interest," he "is an unavailable witness . . . because he will invoke his Fifth Amendment right," and "this statement has been suppressed." The court explained that statements exculpating Mr. Haggins would not be admissible in a separate trial because "they are not the corroborating circumstances which would support trustworthiness of the statements." In turn, the court found no "prejudice in trying the [d]efendants together" and denied the motion to sever.

At trial, the State's prosecution theory was that Mr. Fennell and Mr. Haggins "set up what Mr. Williams believed would be a drug deal" but, instead, was a plan to rob him that went "bad."

According to Mr. Williams' mother, her son sold small quantities of marijuana to family and friends. Daniel Todd, a close friend of Mr. Williams, testified that Mr. Williams knew Mr. Haggins, who previously lived a few houses away on the same street as Mr. Williams.

To link Mr. Fennell and Mr. Haggins to the murder, the State presented evidence from cell phones, surveillance cameras, and the vehicle carrying the shooter and driver. Cell phone records showed calls and texts between Mr. Haggins and Mr. Fennell beginning early in the morning on August 4, 2019, attempting unsuccessfully to arrange a drug purchase with someone unrelated to this investigation. At 8:58 a.m., Mr. Haggins texted Mr. Fennell, "hit him for an OZ right quick." At 11:12 a.m., Mr. Fennell called Mr. Williams, with the call lasting 43 seconds. Five minutes later, Mr. Williams called Mr. Fennell, at 11:17 a.m. That call lasted 24 seconds and corresponded to events captured by surveillance videos.

The arrival of Mr. Haggins' vehicle, Mr. Williams' approach, Mr. Williams' death, and the flight of Mr. Haggins' vehicle appear on footage recovered from the residences on Southall Road. At 11:08 a.m., a gold 2004 Chevrolet Suburban featuring a Virginia license plate, distinctive "after market rims," and a back window sticker, came into view. That vehicle was later determined to be registered to Mr. Haggins. The

Suburban paused at the intersection of Shenton Road, before going on to park in front of one of the houses on Southall Road.

At the same time he made the 11:17 a.m. call to Mr. Fennell, Mr. Williams walked toward the Suburban while holding his cell phone to his ear. When Mr. Williams approached the rear passenger door, a masked and armed person jumped out of the front passenger seat. After Mr. Williams "took a few steps towards" him, the individual fired, causing Mr. Williams, with "blood on his chest," to turn and flee. The assailant fired several more shots at Mr. Williams as he ran down the street. The assailant got back in the Suburban, which drove off with the front passenger door still open.

Mr. Williams died on the sidewalk. He had two bags containing 16 grams of likely marijuana with a street sale value "between $180 and $350" and $48.47 on his person. His cause of death was close-range gunshot wounds to his chest and back.

Mr. Williams' cell phone was within his reach at the time of his death. His mother, who rushed to the scene, "took it in the house for his best friend, Daniel [Todd], to have." Shortly after Mr. Williams was shot, Mr. Todd "got the phone numbers that the victim had recently spoken to" from Mr. Williams' mother, who screenshot them from her son's phone.[4] Mr. Todd "proceeded to dial those numbers and tried to . . . hear anything or find out what [he] could from the numbers [he] dialed." The first two numbers he reached were friends who were distressed to hear about Mr. Williams' death.

[4] By the time a forensic examiner obtained Mr. Williams' cell phone, it could not be examined because "it was too dangerous to even power on or charge." Because blood had seeped in, wetting the inside, "it could short out the board in the phone," and the board could have heated up and caught on fire.

At 11:56 p.m., Mr. Todd called Mr. Fennell's number. When "[s]omeone answered," Mr. Todd "told them to basically come back because Derrick is dead and the person responded by saying, 'Derrick sold drugs. Derrick is a drug dealer.'" After that, Mr. Fennell's phone never made or received another call. Later that evening, though, text messages sent from Mr. Haggins' phone show that Mr. Fennell was "using Mr. Haggins' phone to send messages."

Investigators obtained records showing that one of the last cell phone numbers with which Mr. Williams communicated was the number assigned to Mr. Fennell's phone. Also, Mr. Fennell's cell phone made frequent calls and texts to the number assigned to Mr. Haggins' cell phone.

On the morning of the shooting, Mr. Haggins and Mr. Fennell exchanged a series of messages consistent with attempting to set up a drug purchase with another individual. Mr. Haggins texted Mr. Fennell, "hit him for an OZ right quick," and an expert in drug transactions testified that that referred to buying an ounce of marijuana. At 9:59 a.m., after several intervening messages reporting that "[h]e ain't answer," Mr. Haggins texted Mr. Fennell that he was "OMW" (on my way), and Mr. Fennell replied, "At the gas station."

Special Agent Mathew Wilde, with the FBI's Cellular Analysis Survey Team, conducted a historical cell site analysis of Mr. Haggins' and Mr. Fennell's phones, then mapped calls and movements in relation to the site and time of Mr. Williams' death. He testified, without objection, that after 10:00 a.m. on August 4, 2019, both phones were "consistently in the same general areas," including near the Southall Road site of the

shooting between 11:05 and 11:16 a.m. This positioning includes the critical period when Mr. Fennell called Mr. Williams at 11:12 a.m., and when Mr. Williams called Mr. Fennell at 11:17 a.m.

On August 5, 2019, the day after Mr. Williams' death, police surveilled an address listed on the Suburban's registration. When they sighted Mr. Haggins, investigators followed him to a residence in Baltimore, which was later determined to belong to his aunt and uncle. Pursuant to a warrant, police seized Mr. Haggins' Suburban, which was parked inside a fence behind that house. The vehicle contained paperwork addressed to Mr. Haggins. Forensic examiners recovered latent fingerprints from the interior front passenger window, then matched two of them to Mr. Fennell.

Two days after Mr. Williams' death, on August 6, 2019, Mr. Fennell and Mr. Haggins were arrested while they were walking together in a parking lot. Mr. Fennell had the cell phone associated with Mr. Haggins in his pocket and tried to give it away to bystanders. At police headquarters, the two were interviewed separately.

Mr. Fennell and Mr. Haggins each stipulated to being prohibited from possessing a firearm.

DISCUSSION

I. THE CIRCUIT COURT DID NOT ERR IN CONDUCTING THE HEARING ON MR. HAGGINS' MOTION TO SEVER IN THE ABSENCE OF MR. FENNELL AND HIS COUNSEL.

Mr. Fennell asserts that the circuit court erred in conducting Mr. Haggins' severance hearing "in the absence of counsel and the accused," which "violated two basic rights: to counsel, and to be present at a critical stage of the proceedings." In Mr.

Fennell's view, "basic fairness required that [his] counsel be present for the severance hearing" in order to "weigh in" on the motion "given the discretionary nature of the decision whether to sever," given that "the joinder of defendants has given rise to case-law which a lay defendant alone would not be expected to be familiar with," and given that "the outcome of" that hearing could have "totally reshape[ed] the prosecution" in ways that "impacted [him] as much as they did [Mr.] Haggins." In addition, Mr. Fennell argues that his "absence at this stage of the proceedings" violated Maryland Rule 4-231(b) and its "constitutional underpinnings" protecting a criminal defendant's right "to be physically present in person at a preliminary hearing."

The State counters that "[t]here was no deprivation of Mr. Fennell's right to counsel and right to be present when he was absent for a hearing on his co-defendant's motion to sever the cases for trial." The State argues that, even if the motion court were to decide that Mr. Fennell's statements were admissible in Mr. Haggins' defense, "input" from Mr. Fennell would still be unnecessary because "the cases would *have* to be severed, lest Mr. Fennell's incriminating statement be used against him" in violation of the order granting Mr. Fennell's motion to suppress those statements. In any event, the State continues, the court "did not find the statement admissible and denied the motion to sever," so "[n]one of [Mr.] Fennell's rights were impacted nor did the court's hearing change anything regarding his case."

A. Right to Counsel

Because it is a purely legal question, we review de novo the issue of whether a defendant had the right to counsel at a particular proceeding. *See generally Smallwood v.*

State, 237 Md. App. 389 (2018) (reviewing Maryland law regarding the right to counsel and finding defendant had constitutional right to counsel at resentencing hearing).

Criminal defendants have a right to counsel under the Sixth Amendment to the United States Constitution, applicable through the Fourteenth Amendment, Article 21 of the Maryland Declaration of Rights, and the due process component of Article 24. *DeWolfe v. Richmond*, 434 Md. 444, 456-57 (2013); *Lopez v. State*, 420 Md. 18, 33 (2011). The Sixth Amendment right to counsel attaches at "every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). This right is not "confined to representation during the trial on the merits." *Id.* at 133 (quoting *Moore v. State of Michigan*, 355 U.S. 155, 160 (1957)).

Here, Mr. Fennell's "substantial rights" could not have been affected at Mr. Haggins' hearing for his motion to sever. To be sure, joinder of defendants affects the substantial rights of the defendants involved because not all evidence admissible against one defendant is necessarily admissible against all defendants. *State v. Hines*, 450 Md. 352, 368-69 (2016). Joinder implements the established "policy favoring judicial economy, and its purpose is 'to save the time and expense of separate trials under the circumstances named in the Rule, if the trial court, in the exercise of its sound discretion deems a joint trial . . . proper.'" *Id.* at 368 (citation omitted). In ruling on a request for severance, the court asks whether

> (1) non-mutually admissible evidence will be introduced; (2) the admission of that evidence will unfairly prejudice the defendant requesting severance; and (3) any unfair prejudice

> that results from admitting the non-mutually admissible evidence can be cured either by severance of the defendants or some other relief such as limiting instructions or redactions.

State v. Zadeh, 468 Md. 124, 148 (2020).

Severance does not pose the same concerns as joinder. *See id.* (discussing purpose of joinder and circumstances under which joinder is appropriate; indicating that the default is to conduct separate trials of defendants). When Mr. Haggins filed his motion to sever, the court had already joined the cases for trial, without objection, and granted Mr. Fennell's motion to suppress his post-arrest statements. In his motion, Mr. Haggins asked the court to determine only whether, if Mr. Haggins were tried separately, Mr. Fennell's statements would be admissible in Mr. Haggins' defense under the hearsay exception for statements against interest. If the statements were admissible in Mr. Haggins' defense, the court would have been *required* to sever the cases because the statements were still inadmissible against Mr. Fennell on *Miranda* grounds. *See id.* Conversely, if the challenged statements were inadmissible under that hearsay exception, then there would have been no grounds for severance. *See id.* Mr. Fennell's substantial rights with respect to these statements, therefore, could not have been affected at Mr. Haggins' motion hearing. It follows that Mr. Fennell did not have a right to counsel at Mr. Haggins' hearing, and his right to counsel was not violated when the court conducted the hearing in the absence of Mr. Fennell and his counsel.

B. Right to Be Present

A criminal defendant's "common law right to be present at all critical stages of the trial" has been guaranteed under Article 5 of the Maryland Declaration of Rights and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *State v. Hart*, 449 Md. 246, 264-65 (2016). In Maryland, the right to be present "is implemented by Maryland Rule 4-231, which states: 'A defendant shall be present at all times when required by the court.'" *Hart*, 449 Md. at 264. This right "is rooted largely in the right to confront witnesses" and "vindicates two primary interests: enabling the defendant to assist in the presentation of a defense, and ensuring the appearance of fairness in the execution of justice." *Id*. (quoting *Pinkney v. State*, 350 Md. 201, 209 (1998)).

"When a violation of a criminal defendant's right to be present is at issue, we apply the harmless error analysis." *Hart*, 449 Md. at 262. In this context, harmless error occurs if "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." *Id*. (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

Here, the court did not require Mr. Fennell or his counsel to be present in court, perhaps in recognition that there was no danger to Mr. Fennell that the severance hearing could result in his statements being admitted during his own trial. *See* Md. Rule 4-231(a). In September 2019, shortly after charges were filed in this case, the State

successfully moved for a joint trial of Mr. Haggins and Mr. Fennell.[5] Neither Mr. Fennell nor his trial counsel opposed joinder. Then, in March 2021, after the court granted Mr. Fennell's motion to suppress his post-arrest statements, Mr. Haggins moved to sever his case for trial. Neither Mr. Fennell nor his counsel were present for the hearing on April 30, 2021 for Mr. Haggins' motion. The record shows that they were not served with the motion, the hearing notice, or the order denying the motion. According to the record, the court did not require Mr. Fennell's presence at the severance hearing. The circuit court denied Mr. Haggins' motion to sever. Therefore, Mr. Fennell's rights were not impacted in this hearing—and, as discussed above, could not have been impacted in this hearing—so even if the circuit court erred, such error was harmless.

The better, albeit unrequired, practice may have been to notify Mr. Fennell and his counsel of the motion and hearing in Mr. Haggins' case. But the failure to do so in this case was harmless because Mr. Fennell was not prejudiced by the hearing conducted in his absence. *See Hart*, 449 Md. at 262. Based on our independent review of this record, we conclude beyond a reasonable doubt that adjudicating Mr. Haggins' severance motion in Mr. Fennell's absence "could not have prejudiced" Mr. Fennell's defense because

[5] Under Maryland Rule 4-253(a), "the court may order a joint trial for two or more defendants charged in separate charging documents if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Yet when "it appears that any party will be prejudiced by the joinder for trial of . . . defendants, the court may, on its own initiative or on motion of any party, order separate trials of . . . defendants, or grant any other relief as justice requires." Md. Rule 4-253(c).

there was no possibility that, as a result of that proceeding, his suppressed statements would be admissible at his trial. *See id.*

We also note that, although the parties do not explicitly argue that the circuit court committed a structural error, Mr. Fennell contends that his right to be present is a right of constitutional dimension, which effectively characterizes the error as structural. Structural errors elude the application of harmless-error review because of their "'unquantifiable' . . . effect on the framework of a trial." *State v. Jordan*, 480 Md. 490, 507 (2022) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)). "[A]n error may be structural if the right at issue . . . protects . . . the right to conduct [one's] own defense," such as the right to be present. *Jordan*, 480 Md. at 507 (citation and quotation marks omitted). The United States Supreme Court and Supreme Court of Maryland (at the time named the Court of Appeals of Maryland),[6] however, have

> found structural errors in relatively few cases, including a complete denial of counsel; a judge who lacks impartiality; the exclusion of individuals from a grand jury because of race; . . . interference with a defendant's right of self-representation at trial, . . . [or] "giving [an] advisory only jury instruction"; giving a flawed reasonable doubt jury instruction; violating a defendant's right to a public trial; and failing to swear-in a jury.

[6] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland . . . .").

Id. at 507-08 (citations omitted). In the present case, for the reasons explained above, we do not view lack of notice or Mr. Fennell's absence from Mr. Haggins' severance hearing as structural error that unconstitutionally impaired Mr. Fennell's right to conduct his defense.

II. THE CIRCUIT COURT DID NOT ERR OR ABUSE ITS DISCRETION BY ASKING COMPOUND VOIR DIRE QUESTIONS.

Mr. Fennell contends that the trial court erred in propounding compound voir dire questions that ran afoul of the procedural framework established by *Dingle v. State*, 361 Md. 1, 21 (2000), *Pearson v. State*, 437 Md. 350, 361-64 (2014), and *Collins v. State*, 463 Md. 372, 396 (2019). The State counters that Mr. Fennell's claim concerning questions about "'trial participants or witnesses,' is wrong in part and unpreserved in part." Regarding the court's "question concerning prospective jurors' previous jury trial experience," the State argues that "the circuit court did not err in how it posed its two-part questions."

"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, guaranteed by Art[icle] 21 of the Maryland Declaration of Rights, is given substance." *Dingle*, 361 Md. at 9 (internal citations omitted). This Court "review[s] the trial judge's rulings on the record of the voir dire process as a whole for an abuse of discretion, that is, questioning that is not reasonably sufficient to test the jury for bias, partiality, or prejudice." *Washington v. State*, 425 Md. 306, 314 (2012).

The Supreme Court of Maryland has disapproved compound voir dire questions that ask whether prospective jurors have "strong feelings" about a certain experience or association that would affect their ability to be fair and impartial. *Dingle*, 361 Md. at 21. As the Court has explained, it is for the trial court, not the prospective juror, to "decide whether, and when, cause for disqualification exists for any particular venire person." *Id.* at 14. In *Pearson*, the Court held that trial courts should not pair required voir dire questions about whether members of the jury panel have "strong feelings" about certain crimes or trial participants with such an improper invitation for individual jurors to decide for themselves whether they can be fair and impartial. 437 Md. at 363-64. In *Collins*, the court explained that a "strong feelings" question is improper when asked in a compound form that allows the individual panel members to determine whether their "strong feelings" about the charges in that case would make it "difficult for [them] to fairly and impartially weigh the facts." 463 Md. at 397.

"An appellate court reviews for abuse of discretion a trial court's decision as to whether to ask a *voir dire* question." *Pearson*, 437 Md. at 356. Because "Article 21 of the Maryland Declaration of Rights 'guarantees a defendant the right to examine prospective jurors to determine whether any cause exists for a juror's disqualification,'" any "[f]ailure to allow questions that may show cause for disqualification is an abuse of discretion constituting reversible error." *Lopez-Villa v. State*, 478 Md. 1, 10 (2022) (citations omitted). "Yet, it remains a requirement that '[t]o preserve any claim involving a trial court's decision about whether to propound a [*voir dire*] question, a defendant must object to the court's ruling.'" *Id.* (citation omitted).

As grounds for his voir dire challenge, Mr. Fennell cites questions asked by the court during voir dire conducted during two days of jury selection. After an introductory statement about the purpose of voir dire, the court explained:

> Now, I'm going to ask these questions in two very broad forms. I'm going to explain what that means. In some situations if you have an affirmative response to the question, I'm going to ask you to stand. I'm going to go around the room and get your call-in number so we know which question you are responding to, but in some situations I'm going to ask you to remain standing. Once I've gotten everybody's call-in number, invariably I will have a follow[-]up question and that follow[-]up question is going to be this, for whatever reason you answered the first part of my question, would that prevent you or substantially impair you from reaching a fair and impartial verdict if selected as a juror in this case. I would say to you if it would not, have a seat, and if you think it might, please remain standing.

The court continued by describing the plan for individual voir dire, emphasizing that the purpose of the "two part process" "is simply to ensure that we get a fair and impartial jury who will decide the case based on the evidence presented and the [c]ourt's instructions on the law."

The court then proceeded to group voir dire, asking members of the jury panel whether anyone knew any of the trial participants, including the judge, prosecutor, defense counsel, and co-defendants. Only one person answered yes (Juror 62), but that individual was later questioned individually and determined to be able to render a fair and impartial verdict despite having worked with the voir dire and trial judges.

Next, the court asked panel members whether they knew any of the witnesses, prompting another affirmative answer (Juror 199). After noting the juror's number, the

court continued to the next question, without asking that individual whether he or she could be fair and impartial given that acquaintance.

The court then asked about prior service on a jury, as follows:

> Now, my next question is if you have an affirmative response to this question, I want you to stand and I'm going to go around the room and get your call-in number, but I'm going to ask you to remain standing and I'll have a follow-up question if you have a response to this question.
>
> The question is have any of you ever served on a trial jury before? That's a trial jury. Not Grand Jury. Trial jury. Whether civil or criminal, whether federal or state. If you have prior jury service officers [sic], please stand.
>
> Very good. All right. Probably the best thing to do is to start back there. Okay. Go ahead.

After noting the 25 members of the jury panel who responded by standing, the court continued with the following instructions:

> Now, as I told you earlier, if you had an affirmative response to some of these questions, we were going to identify your call-in number and have a follow[-]up question and here is my follow[-]up question.
>
> For those of you who had prior jury service, whether state or federal, whether civil or criminal, would that prior experience prevent you or substantially impair you from rendering a fair and impartial verdict if selected as a juror in this case? If it would not, have a seat. If you think that it might, please remain standing.
>
> And everybody has had a seat.

The court continued by asking about racial bias, the presumption of innocence, credibility of witnesses including police officers and defense witnesses, "strong feelings concerning the allegations of a murder," charges of "a similar offense" against

themselves or an immediate family member, and any other reason for concern about participating in the case.

Next, the court questioned prospective jurors about fellow members of the panel:

> So you all had a chance to see each other this morning, haven't you? Interact, hang out. . . .
>
> Do any of you think you might know any other member of the jury panel?

When six jurors (Jurors 36, 83, 121, 144, 278, and 295) stood in response, the court followed up:

> For whatever reason you responded to that last question, would the fact that you think you might know somebody else in the panel prevent you or substantially impair you from rendering a fair and impartial verdict if selected as a juror in this case? If it would not, have a seat. If you think that it might, please remain standing.
>
> Everybody has had a seat.

Before beginning to voir dire individual jurors, the court reviewed the procedure for doing so, then invited counsel to raise any concerns about the group voir dire:

> THE COURT: Anything additional from anybody before we ask the jurors to start coming in?
>
> [COUNSEL FOR MR. FENNELL]: Your Honor, I just have one question.
>
> THE COURT: Sure, Ma'am.
>
> [COUNSEL FOR MR. FENNELL]: *On the questions about the prior jury service and then knowing if you know anybody, you asked that question would that render you fair and impartial.* Are you bringing them in for further voir dire?
>
> THE COURT: No, I'm not.

> [COUNSEL FOR MR. FENNELL]: *I would object to those for the record because you are putting the decision on the juror whether they are fair and impartial.*
>
> THE COURT: Well, you know, I understand that's what -- I understand your argument and having done extensive research on voir dire, and when I say extensive, going back to 1905, it's my understanding that the Court requires a two-part question. Part one, to use Judge Murphy's example, have you ever been a member of the Red Cross. The answer is yes. Part two is would that prevent you or substantially impair you from rendering an impartial verdict. If the answer is no, then I don't need to follow up. The whole purpose of voir dire is not to give information to Counsel to exercise peremptory challenges, but rather to exercise challenges for cause.
>
> So I think this is not a *Dingle* situation. So your objection is noted.

(Emphasis added.)

Ultimately, four members of the venire panel who identified themselves as having prior jury service (Jurors 32, 55, 63, 65) were seated, and another (Juror 122) was seated as an alternate. None of the jurors who identified themselves as knowing another juror were seated. Counsel for Mr. Fennell accepted the empaneled jury "subject to [the] prior exception that [she] stated on the record."

The State contends that Mr. Fennell did not object to one of the voir dire questions he is now challenging, regarding whether prospective jurors knew any witnesses. In the State's view, Mr. Fennell waived that objection because his counsel limited the objection to "questions about the prior jury service and then knowing if you know anybody," which necessarily referred to "whether panelists knew other members of the voir dire panel." In any event, the State argues, "any error was harmless" because "[t]he witness question

was not compound and only one person answered affirmatively" (Juror 199), who was not selected to serve.

Under Maryland Rule 4-323(c), governing the method for objecting to rulings and orders other than evidentiary rulings, "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." Rule 4-323(d) further elaborates that "[a] formal exception to a ruling or order of the court is not necessary." When reviewing an appellate claim of error during voir dire, however, "the plain language of [Maryland] Rule 4-323(c) twice references that an objection or indication of disagreement must be made contemporaneous with the court's action." *Lopez-Villa*, 478 Md. at 12. Otherwise, "the trial court is unable to correct, and the opposing party is unable to respond to, any alleged error in the action of the court." *Id*. at 13.

We acknowledge the ambiguity in the objection made by Mr. Fennell's counsel, but we need not resolve whether it encompassed the court's question about whether jurors knew any of the witnesses because the court did not ask the only individual who responded affirmatively (Juror 199) about his or her ability to be fair and impartial, and because that individual was not selected to serve as a juror or alternate, rendering any error harmless. With respect to the other two voir dire questions challenged by Mr. Fennell, we are not persuaded the court erred or abused its discretion.

In contrast to the improper "strong feelings" questions addressed in *Dingle*, *Pearson*, and *Collins*, the fact-based questions in this case merely asked members of the venire to stand (1) if they had previously served in a jury trial, and (2) if they knew

another juror. The court then asked jurors who stood a separate question, instructing them to remain standing if they felt such experiences "might" affect their ability to be fair and impartial in this case. All of these jurors sat, indicating that no one expressed a level of concern that triggered individual voir dire.

Unlike the questions disapproved in *Dingle* and its progeny, this voir dire elicited objective factual information about prior jury service and acquaintances within the venire panel, which were not inquiries "directly related to the crime, the witnesses, or the defendant." *Collins*, 463 Md. at 377. Nor did the court improperly "combine[] two questions" by asking jurors to subjectively self-assess whether they had such "strong feelings" about those core matters that it would be "difficult for the prospective juror to be fair and impartial." *See id.* Consequently, we do not view the challenged questions as improperly compound such that they shifted from the court to the jurors the decision regarding whether the jurors' subjective feelings about the crime, the witnesses, or the defendant impaired their ability to render an impartial verdict. *See id.* at 376-77 (explaining that collateral matters that may have undue influence over prospective jurors are "biases [that are] directly related to the crime, the witnesses, or the defendant") (citations omitted); *Thomas v. State*, 454 Md. 495, 508 (2017) ("[T]he questions should focus on issues particular to the defendant's case so that biases directly related to the crime, the witnesses, or the defendant may be uncovered.") (quoting *Dingle*, 361 Md. at 10).

We conclude that, to the extent Mr. Fennell preserved his objection, the circuit court did not err or abuse its discretion in conducting the challenged voir dire.

III. THE CIRCUIT COURT DID NOT COMMIT PLAIN ERROR IN ADMITTING SPECIAL AGENT WILDE'S OPINION TESTIMONY.

Mr. Fennell contends that the trial court erred in permitting FBI Special Agent Mathew Wilde to offer testimony about historical cell site analysis, including identifying the cell tower with which the two phones recovered from Mr. Haggins and Mr. Fennell communicated around the time of the shooting. Although expert testimony is undisputedly required for such evidence, Special Agent Wilde was neither proffered, nor accepted as an expert witness. *See State v. Payne*, 440 Md. 680, 701-02 (2014); *Hall v. State*, 225 Md. App. 72, 93 (2015).

The State argues that plain error review is unwarranted because "the admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal." The State further argues that failure to admit Special Agent Wilde as an expert appears to have been a mere oversight given that the State had previously moved to admit four other experts without objection.

As Mr. Fennell concedes, neither his trial counsel nor Mr. Haggins' counsel objected on any ground, either to Special Agent Wilde's testimony or to his written report, in the circuit court. Mr. Fennell asks this Court to exercise its discretion to grant plain error relief. For the reasons that follow, we decline to do so.

A party that does not make timely objections to a witness's testimony "will be considered to have waived them and he cannot now raise such objections on appeal." *Breakfield v. State*, 195 Md. App. 377, 390 (2010) (quoting *Caviness v. State*, 244 Md.

575, 578 (1966)). Only when there are "compelling, extraordinary, exceptional or fundamental" circumstances that threaten a defendant's right to a fair trial do we consider unpreserved objections to evidence. *See State v. Brady*, 393 Md. 502, 509 (2006) (quoting *Conyers v. State*, 354 Md. 132, 171 (1999)).

Plain error review involves four steps:

> (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; (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 [trial] court 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) (quoting *State v. Rich*, 415 Md. 567, 578 (2010)), *cert. denied*, 138 S. Ct. 665 (2018). Granting plain error relief is, and should remain, "a rare, rare phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003). More specifically, the Supreme Court of Maryland has explained that an appellate court

> will intervene in those circumstances only when the error complained of was so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial. In that regard, we review the materiality of the error in the context in which it arose, giving due regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald inattention.

Robinson v. State, 410 Md. 91, 111 (2009) (citation and quotation marks omitted).

In this case, during the fourth day of trial, the State presented four witnesses who were accepted as experts before testifying, respectively, about latent prints, cell phone

extraction, forensic pathology, and firearms and toolmark examination. Then, when Special Agent Wilde was called to testify, the State elicited extensive background information about his experience, education, and training in analyzing historical call detail and phone records as a member of "a group of about 75 special agents and task force officers" on the FBI's Cellular Analysis Survey Team. The State then moved his resume into evidence.

Yet neither counsel nor the court expressly addressed whether he could testify as an expert. Instead, he proceeded to review the contents and conclusions set forth in his written report, which was admitted into evidence without objection. As the State points out, however, "[t]his was not a situation in which a person who was unqualified to offer expert testimony opined as to matters outside the scope of his expertise." Special Agent Wilde undisputedly worked for a specialized FBI unit dedicated to examining cell phone location data, has had 400+ hours of specialized training, recertifies his qualifications annually, and has been qualified to give expert testimony in court 98 times.

Even viewed in the light most favorable to Mr. Fennell, the apparently inadvertent omission of obtaining a formal ruling that Special Agent Wilde could testify as an expert did not prejudice Mr. Fennell. Given the evidence of Special Agent Wilde's extensive and unchallenged qualifications to give such expert opinions, the admission of his testimony and report without a formal judicial declaration of his expertise appears to be technical error—the "result of bald inattention." *See Robinson*, 410 Md. at 111. It did not affect Mr. Fennell's "substantial rights" in a manner that "seriously affect[ed]" either

"the outcome of" his trial or "the fairness, integrity or public reputation of judicial proceedings." *Newton*, 455 Md. at 364 (quoting *Rich*, 415 Md. at 578).

Whether the prosecutor's failure to seek expert designation resulted from an inadvertent mistake, or defense counsels' failure to challenge his testimony and report resulted from a tacit waiver, the lack of expert qualification did not affect Mr. Fennell's "substantial rights," much less warrant the extraordinary relief of reversal. *See Rich*, 415 Md. at 578.

Granting plain error relief in this case would undermine the important function of the preservation rules in protecting "fairness to the trial court, which should be permitted to resolve as many issues as possible so as to avoid unnecessary appeals," and "fairness to opposing parties, who should be afforded the opportunity to respond to any alleged error in the court's ruling in their favor." *Lopez-Villa*, 478 Md. at 13 (citations and internal quotation marks omitted). Moreover, none of the circumstances warranting plain error relief are present here. Therefore, we will not exercise our discretion to grant plain error relief.

IV. THE EVIDENCE IS SUFFICIENT TO ESTABLISH ATTEMPTED ROBBERY.

Mr. Fennell challenges the sufficiency of the evidence supporting his convictions for felony murder, attempted robbery with a dangerous weapon, and using a firearm in the commission of a crime of violence on the ground that "the evidence was insufficient to establish an attempted robbery." In Mr. Fennell's view,

> [t]he video depicts a shooting resulting in death, but in no way establishes the intent to rob or the execution of the robbery. While [Mr.] Williams had both drugs and cash on

> his person, his assailants made no effort to take control of these items, either before or after the shooting. While an intent to rob may arise after an application of force, . . . [h]ere, there was no attempt to rob [Mr.] Williams either before or after the shots were fired. In fact, this crime looks much more like the premeditated murder of a rival drug dealer than it does like a botched robbery. If the idea was to rob [Mr.] Williams, that could easily have been accomplished by allowing him to enter the vehicle, as he was apparently planning to do, and at that point to confront him with a gun and take his valuables. But for whatever reasons, the perpetrators clearly intended to kill, not to rob. The evidence of intent to rob and of a substantial step toward a robbery beyond preparing to rob, was legally insufficient.

The State responds that Mr. Fennell "is wrong" about the sufficiency of the evidence because the "[s]urveillance video depicting the killing was consistent with the State's theory of the crime," that Mr. Fennell and Mr. Haggins "planned to rob [Mr.] Williams, and . . . [Mr.] Fennell attempted to do so before fatally shooting" him.

This Court recently reviewed the standards governing a sufficiency challenge to a felony murder conviction predicated on a robbery or attempted robbery:

> A murder "committed in the perpetration of or an attempt to perpetrate . . . robbery" is murder in the first-degree. Crim. Law § 2-201(a)(4)(ix). We have defined robbery as "the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence or putting in fear." *Thomas v. State*, 128 Md. App. 274, 299 (1999). . . . "In order to sustain a conviction for felony-murder, the intent to commit the underlying felony must exist prior to or concurrent with the performance of the act causing the death of the victim." *State v. Allen*, 387 Md. 389, 402 (2005).

Purnell v. State, 250 Md. App. 703, 718-19, *cert. denied*, 476 Md. 252 (2021).

Both at trial and in this appeal, the State's prosecution theory has been that the predicate felony for first-degree felony murder was attempted robbery. "A defendant is guilty of an attempted armed robbery if, 'with intent to commit [armed robbery], he engages in conduct which constitutes a substantial step[7] toward the commission of that crime whether or not his intention is accomplished.'" *Bates v. State*, 127 Md. App. 678, 688 (1999), *overruled on other grounds by Tate v. State*, 176 Md. App. 365 (2007) (quoting *Young*, 303 Md. at 311 (adopting substantial step test for attempts in general)). "Violence to a person with an intent to steal and the larceny not consummated is not robbery but attempted robbery." *Purnell*, 250 Md. App. at 721 (quoting *Cooper v. State*, 14 Md. App. 106, 117 (1972)). Consequently, "the fact that the intended robbery was not consummated does not preclude the attempted robbery from supporting a felony-murder conviction." *Purnell*, 250 Md. App. at 722 (citing Crim. Law § 2-201(a)(4)(ix) ("A murder is in the first degree if it is: . . . committed in the perpetration of or an attempt to perpetrate: . . . robbery . . . .")).

When evaluating whether evidence was sufficient to convict on a first-degree felony murder charge, our task is "to assess whether any rational trier of fact could have found that [the] [a]ppellant killed [the] [d]ecedent during the commission or attempted commission of a felony specified under Crim[inal] Law § 2-201(a)(4)(i-xii)." *Purnell*,

[7] A "substantial step" is conduct that is "strongly corroborative of the actor's criminal intention." *Young v. State*, 303 Md. 298, 311 (1985). Such conduct includes but is not limited to "searching for or following the contemplated victim of the crime" or "possession of materials to be employed in the commission of the crime." *Id.* at 312.

250 Md. App. at 718. As we pointed out in *Purnell*, another attempted robbery/felony murder case:

> "When dealing with the issue of legal sufficiency in a jury trial, we are dealing only with the satisfaction of the burden of production." Importantly, "[i]n examining the satisfaction of that burden of production, the test of the legal sufficiency of the evidence to support the conviction is the same in a jury trial and in a bench trial." In either case, "the relevant question is whether, after viewing the evidence in the light most favorable to the [State], any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."
>
> Moreover, because this is a challenge to the *legal* sufficiency of the evidence, we review the sufficiency of the evidence *de novo*. When reviewing the legal sufficiency of evidence to sustain a verdict, we are "not concerned with what a factfinder . . . d[id] with the evidence." Instead, we are concerned with what a factfinder "could have done with the evidence." Accordingly, we will assess the evidence presented against [a]ppellant at trial in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of first-degree [felony] murder based on that evidence.

Id. at 710-11 (citations omitted).

We agree with the State that the jury could reasonably have inferred "that [Mr.] Williams'[] death was the result of a botched robbery" based on the following evidence presented at trial:

- Mr. Williams was known to sell marijuana to family and friends. Haggins knew Mr. Williams because he used to live on the same street about three houses away.

- On the morning of Mr. Williams' death, Mr. Haggins texted Mr. Fennell, asking him to take him somewhere when he woke up and stating that he wanted "a OZ real quick," which the State's primary detective and narcotics investigator testified was slang for obtaining marijuana.

- When the person whom Mr. Fennell first contacted did not answer, Mr. Fennell called Mr. Williams.

- By 10:00 a.m., Mr. Haggins was en route to pick up Mr. Fennell, and their cell phones remained in the same area through the time of Mr. Williams' death and beyond.

- At 11:08 a.m., surveillance cameras recorded the Chevrolet Suburban registered to Mr. Haggins driving past Mr. Williams' house, then pulling over along the curb a few houses away.

- According to Detective Mark C. Fisher, lead investigator, many drug transactions in Baltimore County are conducted via car in a parking lot or on a street.

- A 43-second call from Mr. Fennell's phone to Mr. Williams' phone occurred at 11:12 a.m. Five minutes later, at 11:17 a.m., a 24-second call from Mr. Williams' phone connected to Mr. Fennell's phone.

- A videorecording shows Mr. Williams approaching the Suburban while holding a phone in a manner consistent with being on his 11:17 a.m. call to Mr. Fennell's phone.

- When Mr. Williams moved to open the back passenger door, a man wearing a mask and carrying a handgun emerged from the front passenger seat.

- Two fingerprints on the interior window of that front passenger door were later matched to Mr. Fennell.

- When Mr. Williams stepped toward him, the masked individual fired, hitting Mr. Williams in the chest. As Mr. Williams attempted to flee, the masked individual fired again, hitting him in the back.

- The shooter returned to the Suburban, which drove away with the front passenger door still open. Police identified Mr. Haggins as the registered owner of the vehicle, which they recovered the next day hidden behind his relatives' house.

- Mr. Williams died on the sidewalk, with fatal gunshot wounds to his chest and back. His cell phone lay next to his hand. He was carrying $48.47 and

two bags of marijuana weighing a total of 16 grams with a street value of $180 to $350, depending on its grade and strength.

- The last call made on Mr. Williams' phone was to Mr. Fennell's phone number. When Mr. Williams' friend called that number at 11:56 p.m. that day, he told the person who answered, "Derrick is dead." The person responded that Mr. Williams was dealing drugs. That was the last contact logged by Mr. Fennell's phone.

Based on this evidence, the State argued in closing that Mr. Haggins and Mr. Fennell planned to steal marijuana and/or money from Mr. Williams. The prosecutor asked the jury to find that, because Mr. Haggins knew Mr. Williams, Mr. Fennell set up a fake buy using his own phone so the transaction could not be connected to Mr. Haggins. Mr. Haggins drove his vehicle while Mr. Fennell rode in the front passenger seat, disguised himself, and armed himself with a handgun.

We agree with the State, that the jury could reasonably infer from the evidence presented at trial that Mr. Haggins and Mr. Fennell jointly planned to rob Mr. Williams when he came out to the vehicle to exchange marijuana for money. Mr. Fennell took a substantial step toward the robbery before shots were fired by arranging the transaction, arming and masking himself, and confronting Mr. Williams at gunpoint. *See Young*, 303 Md. at 311-12. The jury was free to conclude that, after the victim approached the would-be robbers' vehicle in a manner that threatened their anonymity and/or their plan, the encounter escalated from an attempted robbery to a completed murder. The fact that other inferences could be drawn did not preclude the jury from making that finding. *See Smith v. State*, 415 Md. 174, 183 (2010) (recognizing that the jury "has the 'ability to choose among differing inferences that might possibly be made from a factual situation,'"

which is "the fact-finder's role, not that of an appellate court"). Nor is it dispositive that there was no attempt to take anything from Mr. Williams after he was shot. *See Purnell*, 250 Md. App. at 721.

For these reasons, we conclude that the evidence was sufficient to support the conviction for attempted robbery. In turn, the evidence was also sufficient to support the guilty verdicts on the first-degree felony murder and firearm use charges, with attempted robbery being the predicate felony with respect to both of these other convictions. We therefore affirm the judgments of the circuit court.

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