

Circuit Court for Baltimore City
Case No. 122200018

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1456

September Term, 2024

DIONTE JOHNSON

v.

STATE OF MARYLAND

Wells, C.J.
Arthur,
Beachley, Donald E.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, C.J.

Filed: May 15, 2026

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

After his first trial ended in a mistrial, a jury sitting in the Circuit Court for Baltimore City convicted Dionte Johnson, appellant, of attempted first-degree murder, reckless endangerment, and related firearm offenses. The court sentenced Johnson to life in prison with all but 45 years suspended, followed by 5 years of supervised probation.

On appeal, Johnson presents three questions, which we rephrase:

- I. Did the trial court improperly restrict defense counsel’s cross-examination of the victim?
- II. Did the trial court err by admitting a surveillance video without an adequate foundation?
- III. In the interim between Johnson’s first and second trials, did the trial court err by denying his motion to dismiss the charges on double jeopardy grounds?

We answer these questions in the negative and affirm the judgments of the circuit court.

BACKGROUND

On the afternoon of March 27, 2022, Johnson, known by the nickname “Zoo,” and his then-friend, Alvin Harris, argued inside a corner store on East Biddle Street. Johnson twice told Harris, “I’ll kill your bitch ass,” before leaving the store in a hurry. Harris also left the store, heading towards his home.

Johnson soon approached Harris from behind at the intersection of East Biddle Street and North Bradford Street, saying, “Hey, let me holl[e]r at you real quick.” Johnson walked towards and past Harris before turning around and shooting Harris twice in the back of his neck.

A 911 call came in at 4:37 p.m. and officers from the Baltimore City Police Department (“BPD”) responded to the scene. Harris was lying on the ground in the middle

of the street barely breathing. He was transported to Johns Hopkins Hospital, where he underwent emergency surgery and remained hospitalized for many months. One of the bullets damaged Harris' spinal cord, rendering him a quadriplegic.

Detective Jeffrey Converse with the Eastern District Detective Unit was the primary investigator. He obtained surveillance video from Okay Liquors, located next to the crime scene, that captured the shooting. The shooter was wearing a dark colored hooded sweatshirt and jeans with flared bottoms that were bleached white at the inseams.

Detective Converse showed the video to Detective Hunter Jewitt, who recognized the distinctive blue jeans worn by the shooter from an Instagram account he followed with the username, "Nonfiction_Zoo." Detective Jewitt did not know the identity of the person operating that account, however.

Detective Converse also showed the surveillance video to Detective Timothy Romeo, who worked in the Eastern District's intelligence unit. Detective Romeo recognized the shooter in the video as Johnson. Based upon that information, Detective Converse obtained a warrant for Johnson's arrest.

Thereafter, on April 25, 2022, Detective Converse was able to speak to Harris for the first time in the hospital. Harris viewed a photo array which included a photo of Johnson in the third position. Harris did not identify anyone from the array. It was apparent to Detective Converse that Harris was frightened to cooperate.

In May of 2022, Harris left a voicemail message for Detective Converse asking him to return to the hospital and meet with him again. Detective Converse met with Harris on

May 24, 2022. Harris told Detective Converse he knew the identity of the shooter and that he was the person in the third photo in the photo array shown to him the prior month. The State, however, did not disclose the existence of this second meeting and positive identification by Harris to defense counsel until after Johnson’s first trial had commenced, causing a mistrial.

In addition to the above facts, the State adduced the following evidence at Johnson’s second trial.

A responding officer testified that he found a Maryland State identification card on the ground less than a block away from the crime scene, picked it up, and gave it to Detective Converse. The ID, which was admitted into evidence, belonged to Johnson.

Over objection, the State introduced the relevant surveillance video from Okay Liquors showing the shooting as State’s Exhibit 5B (hereinafter “Exhibit 5B”).

Harris testified that he had known Johnson, who is a few years younger than him, for many years. He made an in-court identification of Johnson.

Harris explained that Johnson lived with his mother near the corner store where the men argued. When Johnson ran out of the corner store, Harris believed he was going home to get a weapon. Harris also left to go home, but Johnson returned quickly with a gun and shot him.

Harris viewed Exhibit 5B and identified himself and Johnson in the video. He also identified his friend Pedro, who ran up after the shooting and put pressure on Harris’s gunshot wounds.

When Harris first spoke to the police, he lied and told them he did not know who shot him because he was “nervous and scared to really cooperate with the police after somebody had just tried to kill [him] and he still running around.”¹ Less than two months later, after he had “more time to really think about circumstances[,]” Harris contacted Detective Converse. Harris told the detective he “wasn’t really being truthful with him when they [were] in the hospital and [that he] recognize[d] the individual who shot [him] from the photos and his name was Zoo and he’s in picture three.”

Harris acknowledged that he sold drugs in the area. On March 27, 2022, he had \$2,000 in cash with him, which he left behind in the corner store.

Detective Converse testified that he did not record either meeting with Harris at the hospital because Harris asked that the interactions not be recorded.

Detective Romeo testified that he was familiar with Johnson from numerous street interactions, as well as from social media. He saw Johnson on the street “very often.” Less than two weeks before the shooting, Detective Romeo spoke to Johnson on the street for 5 to 10 minutes. He recognized Johnson on Exhibit 5B and from the Instagram account.

The parties stipulated that Johnson had a prior conviction that disqualified him from possessing a regulated firearm and ammunition.

Johnson elected not to testify and did not call any witnesses.

¹ The arrest warrant was issued on March 29, 2022, but Johnson was not arrested until July 2, 2022.

The jury convicted Johnson of attempted first-degree murder, reckless endangerment, use of a handgun in the commission of a crime of violence, illegal possession of a regulated firearm, discharging a handgun in Baltimore City, and wearing, carrying or transporting a handgun. Johnson was sentenced to life in prison, suspending all but 45 years, followed by 5 years of supervised probation. This timely appeal followed. Additional facts are included where relevant in our discussion of the issues.

DISCUSSION

I. The Court Did Not Err In Restricting the Cross-Examination of Harris

Before turning to the specific ruling challenged by Johnson, we set out the governing legal framework. The Confrontation Clause of the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights “guarantee a criminal defendant the right to confront the witnesses against him.” *Martinez v. State*, 416 Md. 418, 428 (2010). This right “includes the opportunity to cross-examine witnesses about matters relating to their biases, interests, or motives to testify falsely.” *Id.* These constitutional principles are “incorporated in Maryland Rule 5-616(a)(4), which provides that ‘[t]he credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at . . . [p]roving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely.’” *Peterson v. State*, 444 Md. 105, 122 (2015). To pass constitutional muster, a trial court must allow a “threshold level of inquiry[,]” which entails exposing the jury to “the facts from which

jurors . . . could appropriately draw inferences relating to the reliability of the witness[.]” *Martinez*, 416 Md. at 428 (cleaned up).

A defendant’s constitutional right to cross-examine witnesses is not boundless, however, and managing the scope of cross-examination is a matter that lies within the sound discretion of the trial court. *Simmons v. State*, 392 Md. 279, 296 (2006). Trial courts have “wide latitude to establish reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *Pantazes v. State*, 376 Md. 661, 680 (2003) (emphasis added).

In deciding whether a trial court’s restriction of defense counsel’s cross-examination violated the defendant’s constitutional rights under the Confrontation Clause, our standard of review “takes into account both the defendant’s constitutional right of confrontation and the discretionary authority of the trial judge to assert ‘control over the mode and order of interrogating witnesses and presenting evidence[.]’” *Manchame-Guerra v. State*, 457 Md. 300, 311 (2018) (quoting *Peterson*, 444 Md. at 124). The trial court must determine if questions are “repetitive, probative, harassing, confusing, or the like.” *Peterson*, 444 Md. at 124 (citing Md. Rule 5-611). Because “the trial court has its finger on the pulse of the trial while an appellate court does not,” we review those decisions for abuse of discretion. *Id.* In contrast, when the trial court restricts cross-examination “based on its understanding of the legal rules that may limit particular questions or areas of inquiry[.]” its determination is “reviewed under a less deferential standard.” *Id.* If a

defendant “alleges a violation of the Confrontation Clause, an appellate court must consider whether the cumulative result of those decisions, some of which are judgment calls and some of which are legal decisions, denied the [defendant] the opportunity to reach the ‘threshold level of inquiry’ required by the Confrontation Clause.” *Id.*

Additional Facts

At a bench conference during cross-examination of Detective Converse, defense counsel proffered that Harris “could in fact have legitimately been charged with possession with intent to distribute and it may be an influential factor in what level of cooperation he may decide to give law enforcement officers.” She was able to elicit from the detective that narcotics were recovered from Harris’ person. The quantity and type of narcotics was not elicited.

On direct examination, Harris testified that he was selling drugs on March 27, 2022, and he had \$2,000 in cash he had “accumulated.” The prosecutor asked Harris why he did not wish to be recorded during his first interview with the police in April 2022. He explained that growing up where he did, “snitching is really, like that is a terrible thing for real[.]”

During cross-examination, defense counsel asked Harris about his drug dealing. He agreed that on the day he was shot, he was “selling drugs.” He explained that he sold drugs “[a]round the neighborhood.”

The challenged rulings occurred when defense counsel began questioning Harris about prior threats and violence directed against him. We quote directly from the record in the interests of clarity:

[DEFENSE COUNSEL:] Mr. Harris, this is not the first time you were shot; is it?

[PROSECUTOR]: Objection, Your Honor.

THE COURT: Sustained.

[DEFENSE COUNSEL:] Mr. Harris, you've been a witness before, correct?

[PROSECUTOR]: Objection, Your Honor.

THE COURT: Sustained.

[DEFENSE COUNSEL:] There are other people out there that in your line of work, drug dealing, had some beefs with you; is that correct?

[PROSECUTOR]: Objection, Your Honor.

THE COURT: Sustained.

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

THE COURT: You may.

The following transpired at the bench conference:

[DEFENSE COUNSEL]: Your Honor, I believe I can cross-examine the witness as to any motive that he may have to point out somebody else could avoid danger with another person, particularly when he's already testified how dangerous culture of a snitch [sic] and so the fact that he has. He did respond to that.

THE COURT: Well - -

[DEFENSE COUNSEL]: Where I come from, you don't snitch, you don't talk back to other people.

THE COURT: I'm not going to engage, [counsel]. That's your position.

[DEFENSE COUNSEL]: I don't understand the Court's ruling as to why I would not be able to ask him if it's dangerous for him to be in drug dealing, that other people may have wanted to kill him.

THE COURT: Because it's speculation.

[DEFENSE COUNSEL]: I mean not if he knows it. I'm asking if he knows that to be the truth.

THE COURT: Okay. All right. I understand your position.

[DEFENSE COUNSEL]: Your Honor, in order to fully cross-examine this witness, I do need to be able to delve into other activities he was involved, other things that may be going on in his mind, other concerns that he had, may have about being prosecuted, other situations that he may have had that he's concerned that are coming back. I mean at this point, the Court is narrowing my ability to cross-examine which is essentially the most State's key witness in terms of what may be going on in his mind and motivation that he may have to not be completely and fully truthful to law enforcement before today and today's questioning and, and today's testimony.

THE COURT: All right. Well, you mentioned a case.^[2] Do you have that cite?

[DEFENSE COUNSEL]: I do not but I can get it for the Court. That has to do with promises of leniency.

THE COURT: Well, you just mentioned that is one of the things - -

[DEFENSE COUNSEL]: Right, but it is, yes. I can find it for the Court if the Court was willing to take a recess. I'll be happy to look it up.

THE COURT: I didn't, I'm looking for you.

² Defense counsel had referenced a case supporting her position during her cross-examination of Detective Converse.

[DEFENSE COUNSEL]: I know because it's like, it's a Hispanic name, it's like M-A-N-C-H-, I believe, Manchmugaro³. But it is - - it had to do with a person who wasn't actually even charged for something and the State had made no promise whether they would or would not charge, but it's considered to be thought of processing.

THE COURT: Uh, the only cases that I'm finding at this time are cases in which people had potential of the OP(s) that were nol pros and they weren't charged. So I'm not seeing it.

[DEFENSE COUNSEL]: I can get the cite for the Court if the Court allows me to, but I would probably need a ten-minute recess to find it.

THE COURT: I don't - - is that the area of inquiry that you're getting to?

[DEFENSE COUNSEL]: I am. I do intend to go into that next. The fact that he was - - the drugs were recovered from him and he was never charged and the fact that other individuals had a motive to shoot.

THE COURT: All right. Okay. Well, we'll, we'll take care of that when we, when we get to it.

[DEFENSE COUNSEL]: Okay.

During her resumed cross-examination of Harris, defense counsel asked him if he agreed that “dealing drugs in Baltimore City is a dangerous business?” Over the State’s objection, Harris was permitted to respond: “At the end of the day, that had nothing to do with what was going on.” Defense counsel pressed him, asking him to confirm his prior testimony that he was selling drugs on March 27, 2022. Harris reiterated, “That had nothing to do with what is going on right now.” When asked if he was suggesting that “nobody else

³ Defense counsel was referring to our Supreme Court’s decision in *Manchame-Guerra*, 457 Md. at 300, which we will discuss below.

was unhappy with [him]” he answered, over the State’s objection on relevancy grounds, “No.”

Defense counsel then returned to the subject of a prior shooting:

[DEFENSE COUNSEL]: You had in fact been shot in dealing drugs before, had you not?

[PROSECUTOR]: Objection.

THE COURT: Sustained.

[HARRIS]: **No.**

(Emphasis added.) The court granted a motion to strike the question. The following colloquy ensued:

[DEFENSE COUNSEL]: Mr. Harris, on the day that you were shot, you had a significant amount of drugs on you that day; did you not?

[HARRIS]: No.

[DEFENSE COUNSEL]: Recovered from your person?

[HARRIS]: I wasn’t even told that. Even if I was, like I don’t even know nothing about that. Like, that’s not even relevant to what’s going on right now.

[DEFENSE COUNSEL]: Well, you may not have - -

[HARRIS]: The fact of the matter is, I know who shot me and I know what beef I was in when this happened and I know why.

[DEFENSE COUNSEL]: Mr. Harris - -

[HARRIS]: What are you talking about?

[DEFENSE COUNSEL]: Mr. Harris, maybe you weren’t told you had drugs on you, but you did in fact have drugs on you.

[HARRIS]: All right. Well, what did that have to do by being shot by your -
-

[PROSECUTOR]: Objection, Your Honor.

THE COURT: Sustained. He answered the question.

[DEFENSE COUNSEL]: Are you saying you don't recall whether or not you had drugs on you?

[PROSECUTOR]: Objection, asked and answered.

THE COURT: Sustained. He answered the question directly.

[DEFENSE COUNSEL]: I'm sorry, Your Honor. I didn't hear the answer.

THE COURT: He said, no.

[HARRIS]: I didn't, I didn't, I didn't, I didn't know. No[]one told me I was recovering drugs.

[DEFENSE COUNSEL]: I have no further questions.

The following day, defense counsel provided the court with case law on the issue of expectation of a benefit but noted that because Harris was no longer on the witness stand, she was unable to supplement her cross-examination. The court reasoned that the cases presented to it were “distinguishable” because in this case there was “no charge” and “no evidence from any of the detectives or any other person that there was a threat of a charge.”

In closing, defense counsel argued that Harris was motivated to lie and point the finger at Johnson, who already had been charged with the crime before police interviewed Harris, because he was a drug dealer who was in possession of narcotics when he was shot.

Parties' Contentions

Johnson contends the trial court violated his rights under the Confrontation Clause of the Sixth Amendment by improperly restricting defense counsel's cross-examination of Harris. Specifically, he asserts defense counsel was not permitted to question Harris about his motive to testify in the State's favor or to impeach him concerning his hope or expectation of receiving a benefit from cooperating with the State.

The State contends the trial court properly regulated defense counsel's cross-examination of Harris, providing appropriate leeway to permit impeachment of his credibility but prohibiting speculative questions and those lacking a proper foundation.

Analysis

We begin with Johnson's argument that the court erred by not permitting defense counsel to cross-examine Harris about his hope or expectation of receiving a benefit from cooperating with the State. He relies primarily upon our Supreme Court's decisions in *Martinez*, 416 Md. at 418, and *Manchame-Guerra*, 457 Md. at 300.

In *Martinez*, the defendant sought to impeach the credibility of a surviving victim in a double stabbing that killed a second victim. 416 Md. at 421. The surviving victim faced unrelated charges for felony theft, unauthorized use of a vehicle, and possession of drug paraphernalia. *Id.* at 423. Those charges were *nolle prossed* six days before the victim testified at a pretrial motions hearing. *Id.* When the victim testified at trial, he was being detained on a writ of body attachment because he had failed to appear on the first day of trial. *Id.* at 422. Just before he testified, defense counsel sought the court's permission to

question the defendant about the prior charges, arguing it could show his bias. *Id.* at 423–24. Defense counsel later asked permission to inquire about the victim’s current detention, again arguing that to the extent the victim believed the State controlled the keys to his release, it could also show bias. *Id.* at 426. The court ruled that defense counsel could not inquire on either subject. *Id.* at 425–26.

On appeal, our Supreme Court reversed. Relying upon its recent decision in *Calloway v. State*, 414 Md. 616 (2010), the Court reasoned the “issue of bias is often generated by circumstantial evidence, and does not disappear merely because the witness denies any reason to be biased.” *Martinez*, 416 Md. at 430 (quoting *Calloway*, 414 Md. at 638, in turn quoting *Leeks v. State*, 110 Md. App. 543, 557–58 (1996)). Thus, questions directed at showing a witness is “biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely” under Md. Rule 5-616(a)(4) “should be prohibited only if (1) there is no factual foundation for such an inquiry in the presence of the jury, or (2) the probative value of such an inquiry is substantially outweighed by the danger of undue prejudice or confusion.” *Martinez*, 416 Md. at 430 (quoting *Calloway*, 414 Md. at 638). The Court held that because defense counsel laid a “solid factual foundation” for inquiry into the victim’s potential bias based on his prior, *nolle prossed* charges and his detention during trial, and because the defendant’s interest in making that inquiry was not outweighed by potential confusion or unfair prejudice to the State, the trial court violated the defendant’s right of confrontation under the federal and Maryland constitutions by precluding the inquiry. *Martinez*, 416 Md. at 431–32.

Eight years later, in *Machame-Guerra*, 457 Md. at 300, the Court again reversed a conviction on similar grounds. There, an eyewitness to a fatal shooting had pending criminal charges when he testified as a State’s witness at the defendant’s murder trial. *Id.* at 303. Those charges also had been pending, along with an active bench warrant, the first time the witness was interviewed by the police relative to the defendant’s case. *Id.* at 305.

At trial, defense counsel proffered the above facts to the court and provided the court with records of the witness’s charges. *Id.* at 306. The prosecutor responded that though the detective who interviewed the eyewitness was aware of his pending criminal charges, he did not discuss the charges with the witness, nor had any agent of the State offered him a deal. *Id.* The trial court did not allow defense counsel to question the witness about those charges, reasoning that the witness had not been convicted and there was an insufficient factual basis that the alleged underlying criminal conduct occurred. *Id.* at 307.

Consistent with *Calloway* and *Martinez*, our Supreme Court held that defense counsel “proffered sufficient circumstantial evidence that, viewed from [the witness]’s perspective, could have led him to expect or hope for a benefit in connection with his pending charges in return for his testimony.” *Id.* at 320. The Court emphasized defense counsel had proffered that the charges were pending in the same jurisdiction as the defendant’s trial; the nature of the charges; that they had been pending for 18 months prior to the trial; and that the detective knew of the charges when he first interviewed the witness. *Id.* at 321. Because the probative value of the inquiry into the eyewitness’s bias was not

outweighed by danger of confusion or unfair prejudice to the State, the disallowance of the inquiry was reversible error. *Id.* at 321–22.

In so holding, the Court distinguished its decision in *Peterson*, 444 Md. at 105. There, the defendant sought to cross-examine a State’s witness about an alleged expectation of a benefit arising from an unspecified pending charge in the same jurisdiction, as well as a misdemeanor charge and a violation of probation charge in Virginia. *Id.* at 126–29. The Court held as a threshold matter that the defendant had not preserved his claimed error but concluded that even if preserved, the trial court did not err by disallowing inquiry about the pending charges. *Id.* at 141–42. It reasoned the “pending charges are not the impeachment evidence; rather, they are part of the factual predicate for asking the permitted question about bias or motive.” *Id.* at 135. The existence of a pending charge, standing alone, is not a sufficient factual predicate, however. *Id.* The Court explained:

[t]here must be some evidence—either direct (*e.g.*, an agreement with the prosecution to resolve charges in return for testimony) or circumstantial (*e.g.*, release of witness from custody, dismissal of charges, a decision to forgo charges, postponement of disposition of a violation of probation charge) that the witness has an expectation of benefitting from the testimony with respect to the pending charges.

Id. at 135–36 (footnotes omitted). The Court held that defense counsel’s vague proffer had not established a sufficient factual predicate to support questioning the witness about an expectation of benefit and, in any event, the court had allowed other inquiry of the witness that met the threshold under the Sixth Amendment.

We now return to this case. Johnson asserts defense counsel should have been permitted to probe whether Harris believed cooperating with the State “would allow [him] to avoid prosecution for his activities as a drug dealer.” He analogizes his case to *Martinez* and *Manchame-Guerra*, arguing “Harris may have believed the State would refrain from charging him – with possession, possession with intent to distribute, or other prior drug crimes – if he testified to certain information at Johnson’s trial.” He maintains the court improperly focused upon the lack of pending charges, emphasizing that a decision to forgo charges also may motivate a witness to testify favorably for the State.

We are satisfied that the trial court permitted defense counsel appropriate leeway to explore Harris’ bias or expectation of a benefit arising from his perception of an alleged decision to forgo charging him with drug crimes. Unlike in *Calloway*, *Martinez*, and *Machame-Guerra*, where defense counsel was precluded from making any inquiry into witnesses’ pending charges, here counsel was permitted to inquire about Harris’ drug dealing activities and whether he was in possession of a “significant quantity” of drugs when he was shot. Harris readily admitted on direct and cross-examination that he dealt drugs in the neighborhood, including on the day he was shot. He denied being in possession of a “significant quantity” of drugs, however.⁴ He also denied being told this fact by the police. The jury was free to believe or disbelieve Harris’ testimony. *See Calloway*, 414 Md.

⁴ Though defense counsel argued extensively about her right to cross-examine Harris about his bias or expectation of a benefit, she did not make a proffer to the court about the quantity or type of drugs found on Harris.

at 638 (“The issue of bias is often generated by circumstantial evidence, and does not disappear merely because the witness denies any reason to be biased.”).⁵

The trial court permitted defense counsel to inquire into the underlying basis for any bias Harris might have arising from an alleged decision to forgo charging him with drug crimes. Having permitted this threshold level of inquiry under the Sixth Amendment, the court did not abuse its discretion by its control of the method of interrogating those biases, including by precluding repetitive or cumulative questions.

Johnson also contends the court improperly restricted his cross-examination of Harris relative to an alleged prior shooting and about others with a motive to kill him. Defense counsel made no proffer to the trial court about the bases for these questions, even after Harris denied having been shot previously in relation to drug dealing, and, significantly, did not proffer to the court how a prior shooting was relevant to any bias Harris might have to testify falsely that Johnson shot him. The court did not abuse its discretion by ruling that these questions were speculative given the absence of a factual predicate for asking them.

⁵ When defense counsel sought to inquire further about drugs found on Harris’s person, the trial court sustained the State’s objections on the basis that the question had been asked and answered. Defense counsel did not thereafter ask Harris whether he expected that if he testified favorably for the State, he could avoid being charged with a drug crime. Consequently, it is arguable that Johnson did not adequately preserve this issue. *See Peterson*, 444 Md. at 138 (reasoning that issue was unpreserved where defense counsel never “attempted to ask [the witness] about an expectation of benefit with respect to pending . . . charges”).

II. The Court Did Not Err in Admitting the Surveillance Camera Footage.

Johnson contends the trial court abused its discretion by admitting Exhibit 5B into evidence because it was not properly authenticated. We review a trial court’s decision to admit or exclude evidence for an abuse of discretion. *Reddick v. State*, 263 Md. App. 562, 579 (2024) (citing *Gerald v. State*, 137 Md. App. at 304). “[F]or a trial court to admit a video, there must be sufficient evidence for a reasonable juror to find by a preponderance of the evidence that the video is authentic.” *Mooney v. State*, 487 Md. 701, 728 (2024). Videos may be authenticated through a variety of means, including the “‘pictorial testimony’ and ‘silent witness’ theories of authentication. *Washington v. State*, 406 Md. 642, 652 (2008). “[T]he pictorial testimony theory of authentication allows photographic [or video] evidence to be authenticated through the testimony of a witness with personal knowledge” of what it purports to represent. *Id.* “[T]he silent witness method of authentication,” frequently applied to surveillance videos, “allows for authentication by the presentation of evidence describing a process or system that produces an accurate result.” *Id.* A video also may be authenticated through circumstantial evidence under Rule 5-901(b)(4).⁶ *Mooney*, 487 Md. at 728.

Here, Detective Converse testified that he went to Okay Liquors, a private business with an address on East Biddle Street, on the day of the shooting. He spoke to the owner of the business and the owner permitted Detective Converse and a second BPD detective

⁶ Rule 5-901(b)(4) specifies that circumstantial evidence “such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics,” may be used to show “that the offered evidence is what it is claimed to be.” Md. Rule 5-901(b)(4).

to access the system and search for footage of the shooting. Detective Converse described the location of internal and external cameras that captured surveillance footage. He explained that he input a time “shortly before” the “call for service,” which was received at 4:37 p.m. He knew the footage was from the same day and time as the shooting because of the “time stamp in the upper left hand corner.” He was able to download the footage he viewed at the store to a flash drive. He testified the videos offered as exhibits at trial were the same as the videos he viewed on March 27, 2022, and they had not been altered in any way.

When the State moved to admit Exhibit 5B (and related exhibits from the same surveillance cameras), Johnson objected, arguing that because Detective Converse did not verify that the time and date stamps were functioning properly, the videos had not been properly authenticated. Counsel suggested the system could be off by five hours or five days. The court overruled the objection and admitted the exhibits.

On appeal, Johnson reasserts this argument. We perceive no error. The video depicts a man being shot from behind in the neck at the precise location where Harris was shot, and the date and time stamp is consistent with the date and time the shooting occurred. Detective Converse’s testimony about how the locations of the cameras and the method he used to search the surveillance system, coupled with the strong circumstantial evidence that this was a video of Harris being shot, provided strong support for authentication. Moreover, Harris viewed Exhibit 5B and identified both himself and Johnson in the video. He also identified his friend Pedro, who ran up after the shooting and applied pressure to

Harris’ gunshot wounds. Harris’ identification of the individuals depicted in the footage bolstered the video’s authenticity. Together, this evidence was more than sufficient for a reasonable juror to find by a preponderance of the evidence that Exhibit 5B is what it purports to be. Johnson’s argument that Detective Converse failed to verify the accuracy of the date and time stamp goes to weight, not admissibility.

III. Double Jeopardy Did Not Bar this Trial After the First Trial Ended in a Mistrial.

Johnson contends that, in between his first and second trials, the trial court abused its discretion by denying his motion to dismiss the charges on double jeopardy grounds. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states: “No person shall be subject for the same offence to be twice put in jeopardy of life or limb[.]” U.S. CONST. amend. V. This clause protects defendants from being tried or punished twice for the same offense. *See Ware v. State*, 360 Md. 650, 708 (2000) (stating the clause “protects against successive prosecution as well as cumulative punishment”). The Fourteenth Amendment and state common law provide for the clause’s recognition in Maryland. *See id.*

The Double Jeopardy Clause’s bar on retrials does not apply in three situations: (1) when a defendant successfully appeals their conviction; (2) when a defendant consents to a mistrial; and (3) when there is a “manifest necessity” to declare a mistrial. *See Jeffers v. United States*, 432 U.S. 137, 152 (1977). At issue in this appeal is whether Johnson consented to the mistrial and, if not, whether the trial court erred by determining that there was manifest necessity to grant a mistrial.

Additional Facts

Four days before Johnson’s first trial was set to commence, the prosecutor and Detective Romeo met with Harris. On that date, Harris stated that he knew Johnson by the nickname “Zoo” and by his real name; that he and Johnson argued on March 27, 2022; that Johnson threatened to kill him; and that he saw Johnson’s picture in the photo array shown to him by the police, but did not identify him because he was scared. The prosecutor disclosed this statement to defense counsel by telephone the same day and provided a summary of the substance of this conversation the following day.

After a jury was empaneled and the State called two BPD officers as witnesses, the prosecutor alerted the court that Detective Converse had just informed the prosecutor “he realized that the discovery file of his file that was provided to the State’s Attorney’s Office was missing one page.” The prosecutor already had advised defense counsel of this issue.

The missing page was a “progress note” (“Note 41”) dated May 24, 2022. The prosecutor proffered to the court that Note 41 memorialized a phone call from Harris to the police after his April 25, 2022, interview at the hospital “in which he indicated that he did know [who] the shooter was in that photo array and after identified a specific number in that photo array but would not give a name until the suspect had been arrested.”

Defense counsel proffered to the court that, until receiving the supplemental disclosure three days before trial, she had been under the impression that Harris denied knowing the identity of the shooter. The prosecutor confirmed this timeline, adding that when he spoke to Harris on July 24, 2023, he specifically asked Harris if he had any

additional conversations with the police since they showed him the photo array, and he said no.

The court advised the parties that in its assessment, Note 41 was “crucial and probative” and was not disclosed to the defense until trial. The court observed that its preliminary inclination was not to allow the May 2022 identification to come into evidence but directed the parties to reconvene the following morning to address the issue more thoroughly.

The next day, the court heard argument concerning the appropriate remedy for the discovery violation. Defense counsel first asked the court to preclude Harris from testifying, but if the court deemed that sanction “too harsh,” stated that she would be “forced to ask for a mistrial[.]” Defense counsel emphasized that excluding the May 2022 identification would be impossible if Harris were to testify because she would not be able to cross-examine him about his more recent identification of Johnson without opening the door to it. She then reiterated that her first choice of sanction was preclusion of Harris’ testimony, and her second choice of sanction was a mistrial.

The State responded that excluding the victim’s testimony about the shooting which rendered him a quadriplegic would amount to a “gross miscarriage of justice[.]” He argued the information contained in Note 41 was not substantially different from the information disclosed a few days before trial. He suggested the court could preclude Detective Converse from testifying about the May 2022 conversation with Harris as a sanction for the late disclosure. After the court rejected that suggestion—reasoning that Johnson had a

right to place the timing of the recent identification before the jury and could not do that if Harris testified—the prosecutor “joined in defense’s request for a mistrial.”

The court emphasized that if it made “a determination that the police officer [failed to disclose Note 41] either through gross negligence or a willful lack of disclosure, jeopardy would therefore attach at that time and then the matter would have to be dismissed.” It left that determination for another day and declared a mistrial.

One month later, the circuit court held a hearing on Johnson’s motion to dismiss the charges on double jeopardy grounds. In his motion, Johnson argued that he faced a Hobson’s choice⁷ of proceedings between trial in the face of this new evidence or pursuing a mistrial. He argued that because the mistrial was the result of the State’s failure to comply with the discovery rules, it amounted to misconduct and jeopardy attached. He also argued that there was not manifest necessity to declare the mistrial.

The State called Detective Converse and Harris as witnesses at the hearing. Detective Converse testified that BPD uses “Lotus notes” as its recordkeeping system and that each time a report is entered in the system, it is date stamped. When he was preparing a file to provide to the State’s Attorney’s Office in this case, he went into Lotus notes and printed each progress report individually. He testified that he printed the reports and turned

⁷ As our Supreme Court has explained, the term “Hobson’s choice” “refers to the paradox of an apparently free choice when in reality there is no alternative.” *Simpson v. State*, 442 Md. 446, 464 n.8 (2015).

the file over to the State’s Attorney’s Office on July 8, 2022.⁸ When he did so, he inadvertently did not include Note 41.

According to Detective Converse, during the first trial on July 31, 2023, he was sitting outside the courtroom reviewing his case file when he realized the mistake. He immediately notified the prosecutor and, after the prosecutor notified defense counsel, spoke to her as well. Detective Converse said he did not intend to withhold Note 41.

In response to a question from the court, Detective Converse stated he believed he told someone within the State’s Attorney’s Office about Harris’ positive identification of Johnson, but he could not recall with certainty.

Harris testified that when he told the police he recognized someone from the photo array, he asked them “not to say that [he] remembered who number three was[.]”He did not, however, ask them *not* to take notes about it.

Johnson argued the Double Jeopardy Clause barred retrying him because there was no manifest necessity for the trial court to declare a mistrial. He emphasized that the trial court rejected the alternative remedy of excluding Harris’ testimony before determining a mistrial was necessary.

The court found that the discovery violation resulted from “human error,” and there was no prosecutorial misconduct that caused the mistrial. Citing *United States v. Dinitz*, 424 U.S. 600 (1976), the court denied the motion for mistrial on that basis.

⁸ Initially, Detective Converse testified that he printed the reports on May 24, 2022, but the prosecutor later clarified that the actual date was July 8, 2022.

Standard of Review

“[W]e review the granting or denial of a motion to dismiss *de novo*.” *State v. Fabien*, 259 Md. App. 1, 12–13 (2023). This Court examines “without deference a trial court’s conclusion as to whether the prohibition on double jeopardy applies.” *Scott v. State*, 454 Md. 146, 167 (2017). Whether the State intentionally caused a mistrial is a factual finding. *Fields v. State*, 96 Md. App. 722, 742 (1993). We “will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.” Md. Rule 8-131(c).

Analysis

On appeal, Johnson contends the court erred by analyzing the double jeopardy issue “as if the mistrial was declared with [his] consent.” Because his attorney made clear that her first choice was exclusion of Harris’ testimony and this was a “reasonable alternative to mistrial,” Johnson maintains the State bore the burden to show there was manifest necessity for the mistrial.

The State contends Johnson “suggested a mistrial as one of two potential alternatives” and did not object to the grant of the mistrial. In any event, the State maintains the mistrial was manifestly necessary.

We begin with the issue of consent. Defense counsel requested a mistrial as one of two alternatives the court could consider in addressing the discovery violation that arose during trial. Though she made clear that preclusion of Harris’ testimony was her first choice, she specified her “second choice of sanction” was a mistrial. Counsel did not clarify

her position when the prosecutor stated he would “join” defense counsel’s request for a mistrial, nor did she object when the court declared a mistrial. We are satisfied on this record that Johnson requested a mistrial.⁹

The general rule is, “where the defendant moves for a mistrial, . . . the Double Jeopardy Clause is no bar to retrial.” *Oregon v. Kennedy*, 456 U.S. 667, 673 (1982). But that general rule is subject to an exception for “prosecutorial or judicial overreaching,” *i.e.*, instances in which the trial judge or prosecutor engaged in some impropriety that necessitated the declaration of a mistrial at the behest of the defendant. *Giddins v. State*, 163 Md. App. 322, 336 (2005). Prosecutorial conduct sufficient to justify a mistrial on a defendant’s motion “does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.” *Kennedy*, 456 U.S. at 675–76. The Supreme Court explained:

Where prosecutorial error even of a degree sufficient to warrant a mistrial has occurred, “[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.” [*United States v. Dinitz*, 424 U.S. 600, 609 (1976)]. Only where the governmental conduct in question is intended to “goad” the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.

Id. at 676.

⁹ This is unlike the situation presented in *State v. Fennell*, 431 Md. 500, 515 n.9 (2013), in which our Supreme Court reasoned that defense counsel’s mere acquiescence in the grant of a mistrial was insufficient where, in the face of a partial mistrial, counsel had asked the court to accept a partial verdict on the three charges at issue. Here, it was defense counsel, not the court, who first requested a mistrial, and her acceptance of that decision was more than mere acquiescence.

Here, following an evidentiary hearing, the court found as a fact that the failure to turn over Note 41 was not intentional or the product of bad faith, but rather was inadvertent human error—a finding that was amply supported by Detective Converse’s testimony and not clearly erroneous. Thus, we would affirm the denial of Johnson’s motion to dismiss.

Even if we agreed with Johnson that the mistrial was granted over his objection, which we do not, we hold that the grant of the mistrial was manifestly necessary. After jeopardy has attached, retrial is barred if a mistrial is declared over a defendant’s objection or without his consent, “unless there is a showing of ‘manifest necessity’ to declare the mistrial.” *State v. Woodson*, 338 Md. 322, 329 (1995). “Manifest necessity” justifying a mistrial only exists if “1) there was a high degree of necessity for the mistrial; 2) the trial court engaged in the process of exploring reasonable alternatives to a mistrial and determined that none was available; and 3) no reasonable alternative to a mistrial was, in fact, available.” *State v. Baker*, 453 Md. 32, 49 (2017) (cleaned up); *see also Quinones v. State*, 215 Md. App. 1, 17 (2013) (“[I]n order to determine manifest necessity to declare a mistrial, the trial judge must weigh the unique facts and circumstances of each case, explore reasonable alternatives, and determine that no reasonable alternative exists.”).

If “reasonable alternatives to a mistrial, such as a continuance, are feasible [to] cure the problem[,]” retrial is barred by the Fifth Amendment. *Id.* at 18 (quoting *Cornish v. State*, 272 Md. 312, 320 (1974)). On the other hand, if the court’s action “is necessary to protect the interest of the defendant,” *Cornish*, 272 Md. at 319, or the court finds that a trial error will almost certainly result in reversal upon appeal, *State v. Crutchfield*, 318 Md. 200,

209 (1989), a mistrial is permissible. “To meet the ‘high degree’ of necessity, the Supreme Court has recognized that there must be no reasonable alternative to the declaration of a mistrial.” *Hubbard v. State*, 395 Md. 73, 91 (2006). Accordingly, in analyzing manifest necessity, the first and third factors are often examined in conjunction. *Id.*

Our Supreme Court’s decision in *Hubbard*, which Johnson relies upon, is instructive. There, the trial court suppressed a pretrial identification of one co-defendant (Earl) by a state’s witness and also ruled that she would not be permitted to make an in-court identification of Earl. It did not suppress that same witness’s pretrial identification of the other co-defendant (Hubbard). The State nevertheless opted to proceed with a joint trial and, at trial, sought to call the witness to identify Hubbard. Prior to doing so, however, the State raised a “conundrum,” pointing out that it expected Hubbard’s counsel to attempt to cross-examine the witness by raising the fact that she also identified numerous other persons who were not charged in relation to the crime. The prosecutor argued that she should be able to rehabilitate the witness by showing that the witness identified Earl. Defense counsel for both co-defendants vociferously disagreed and the court would not allow it, instead raising the issue of a mistrial *sua sponte*. The co-defendants objected to the mistrial. After considering and rejecting possible remedies—all of which pertained to limitations upon the examination of the witness—the court granted a mistrial, finding a manifest necessity to do so. The co-defendants were convicted in a second trial and appealed.

Their consolidated appeals reached our Supreme Court, which reversed, reasoning the State had not satisfied its burden to show there was “no reasonable alternative to the declaration of a mistrial[.]” *Id.* at 91. This was so because the need for a mistrial resulted from “two mutually antagonistic decisions made by the state – the first, to proceed against Hubbard and Earl jointly, and the second, to call [the witness] to the stand in the joint trial.” *Id.* at 93. In the face of these decisions, there was a reasonable alternative to a mistrial—the exclusion of that witness’s testimony against Hubbard. *Id.* Though the prejudice to the State occasioned by excluding the testimony was relevant, the Court emphasized the “State created the conundrum; it also cannot be the beneficiary of a manifest necessity analysis.” *Id.* at 94.

Here, unlike in *Hubbard*, though the failure to disclose Note 41 unquestionably was caused by the State, it was not a knowing or intentional decision. Rather, it was an inadvertent mistake that, once discovered, was immediately brought to the attention of all the parties. Second, the court thoroughly explored alternatives to a mistrial and found them unreasonable. Precluding the victim and sole eyewitness to the non-fatal shooting from testifying about the crime was not a proportional response to the discovery failure. Likewise, attempting to limit Detective Converse’s or Harris’ testimony was not feasible without depriving Johnson of the ability to impeach Harris’ credibility based upon the timing of his identification. Though not expressly considered, a continuance also could not have cured the prejudice to Johnson because defense counsel had presaged the evidence in her opening statement, including Harris’ failure to identify Johnson when first shown the

photo array. After carefully considering the unique facts, the court did not err by determining that the only reasonable option to prevent prejudice to Johnson occasioned by the discovery violation was to declare a mistrial.

**JUDGMENTS OF THE CIRCUIT COURT
FOR BALTIMORE CITY AFFIRMED.
APPELLANT TO PAY THE COSTS.**