UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2278

September Term, 2013

KHIRY MONTAY MOORE

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: July 14, 2016

Following a jury trial in the Circuit Court for Prince George's County in March of 2008, Khiry Montay Moore, appellant, was found guilty of first-degree felony murder, second degree depraved heart murder, involuntary manslaughter, three counts of attempted robbery with a dangerous weapon, two counts of first-degree assault, conspiracy to commit robbery with a dangerous weapon, and multiple counts of use of a handgun in the commission of a felony or crime of violence. Moore filed a timely appeal of his convictions, and the Court of Appeals overturned them. *Moore v. State*, 422 Md. 516 (2011).

Moore was retried before a jury in the circuit court on June 24 to 28 of 2013. The jury found Moore guilty of first-degree felony murder, three counts of robbery with a dangerous weapon, two counts of first-degree assault, and multiple counts of use of a handgun in the commission of a felony or crime of violence. The jury acquitted Moore of second-degree murder and conspiracy to commit robbery with a deadly weapon. On July 26, 2013, the court sentenced Moore to a term of life in prison, with all but sixty-eight years suspended.

In his timely filed appeal, Moore raises four questions for our consideration which we have rephrased as follows:

> 1. Did the motions court err in denying Moore's motion to suppress the statements of two co-conspirators?
>
> 2. Did the trial court err in admitting a witness's written statement as a prior inconsistent statement under Maryland Rule 5-802.1(a)?
>
> 3. Did the trial court abuse its discretion in admitting autopsy photographs?

4. Did the trial court err by allowing the State's improper rebuttal closing argument?

Discerning neither error nor abuse of discretion, we shall affirm the judgments of the circuit court.

FACTS

On the night of March 11, 2007, Tyrelle White, Thomas Gilbert-Turner, and Maurice Powell were returning home after seeing a movie in Washington D.C. They had traveled home via the Metro, departed the rail system at the Addison Road Station, and proceeded to walk eastbound along Central Avenue towards the area of Daimler Drive. It was dark and foggy that night. Upon walking past the area of the apartment complex located on Cindy Lane, a group of four to five young black men began to follow them on foot. Believing they were about to be robbed, White, Gilbert-Turner, and Powell crossed the street and then, when the group also crossed over and began to yell at the men, they began to run.

As White, Gilbert-Turner, and Powell turned the corner onto Daimler Drive, one of the group members fired three shots from a handgun. Powell was struck twice, once in the back of his head and once in the back of his arm, and immediately fell face-first to the ground. White and Gilbert-Turner ran to Powell's home and got help. Powell was pronounced dead at the scene of the shooting. Three spent .9 millimeter cartridge casings were located by the police.

During the course of their investigation, the police identified Jamal Holder, Tavon Burke, Steven Scott, Charles Dutch, and Khiry Moore as the young men who had

followed White, Gilbert-Turner, and Powell on March 11, 2007. In written statements, Holder and Burke said that on the evening of March 11, 2007, they were hanging out with Moore and Scott in one of the Central Garden Apartment buildings when Moore showed them a black, automatic .9 millimeter handgun that he was carrying. When the group left the apartment building, they saw three young men across the street. Upon seeing the young men, Moore said, "They look fresh," meaning they had good clothes on, "let's get them," to see if they had any money.

Moore, Scott, and Dutch crossed the street to approach the young men, while Burke and Holder stayed back. Burke saw his friends begin to run, and then he and Holder heard two or three gunshots and saw muzzle flashes from the gun. Moore, Scott, and Dutch ran back to the apartments, where they all convened in the laundry room. In the laundry room, Moore said that he shot at the group of young men, and that he saw one of the young men fall to the ground.

Scott, Dutch, and Moore were arrested. Scott and Dutch eventually agreed to plead guilty to conspiracy to commit armed robbery and to testify against Moore. Scott and Dutch's statements to the police were submitted as evidence. In their statements, Scott and Dutch admitted that they participated in the attempted robbery of White, Gilbert-Turner, and Powell, and that they saw Moore shoot Powell in the course of the attempted robbery.

ANALYSIS

I. Admission of Statements and Testimony of Scott and Dutch

In Moore's first appeal, the Court of Appeals reversed his convictions on the basis that his inculpatory statement to police officers was not voluntary. *Moore v. State*, 422 Md. at 533. In remanding the case for a new trial, the Court of Appeals ordered that, "direct and/or derivative evidence of the inculpatory statements made during his post-arrest custodial interrogation will be inadmissible during the State's case-in-chief, as well as during the State's case in rebuttal." *Id*. Prior to Moore's retrial, defense counsel moved for the suppression of the statements of Scott and Dutch, as derivative of Moore's suppressed statements. He also asked that Scott and Dutch be precluded entirely from testifying at trial. On June 10, 2013, the circuit court issued a written opinion and order denying the suppression motion.

Moore contends that the motions court erred in denying his motion to suppress the statements of Scott and Dutch. According to Moore, the trial court's error was that it mistakenly applied a "fruit of the poisonous tree" analysis, rather than analyzing whether the statements were "derived from" Moore's inadmissible statement.

Review of a lower court's ruling on a motion to suppress is limited to the evidence adduced at the motions hearing and the facts are viewed in the light most favorable to the prevailing party. *Elliott v. State*, 417 Md. 413, 427-28 (2010). Unless clearly erroneous, this Court defers to the lower court's findings of fact. *Wilkes v. State*, 364 Md. 554, 569 (2001). The lower court's legal rulings are reviewed *de novo*. *Id*.

Preliminarily, we note that the terms "derivative evidence" and "fruit of the poisonous tree" are frequently used interchangeably in Maryland cases. *See, e.g., In re Darryl P.*, 211 Md. App. 112, 145 (2013) (stating that the "fruit of the poisonous tree" is simply a descriptive term for evidence derived from an illegality (citing *Nardone v. United States*, 308 U.S. 338, 341 (1939))). Moore cites no authority for his assertion that a fruits analysis differs from a derivative evidence analysis and provides no guidance as to what a proper derivative evidence analysis entails. We cannot identify any better method for identifying derivative evidence than a fruits analysis. *See Miles v. State*, 365 Md. 488, 520-21 (2001) (applying the fruits analysis to determine whether evidence obtained after the initial illegality was purged of any taint even where exclusion of derivative evidence was provided for by wiretapping statute). We conclude, therefore, that, in the absence of any objection from the defense, the circuit court did not err by defaulting to a fruit of the poisonous tree analysis in order to determine whether the prior statements of Scott and Dutch were admissible at Moore's second trial.

Under the 'fruit of the poisonous tree' doctrine, evidence tainted by police misconduct "may not be used directly or indirectly against the accused." *Miles*, 365 Md. at 520 (citation omitted). This tainted evidence may, however, be admitted if the State can demonstrate that it was discovered by "means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (internal quotation omitted). There are three ways to "purge the taint" of the original illegality:

> First, evidence obtained after initial unlawful governmental activity will be purged of its taint if it was inevitable that the police would have discovered the evidence. Second, the taint will be purged upon a showing that the evidence was derived from an independent source. The third exception . . . will allow the use of evidence where it can be shown that the so-called poison of the unlawful governmental conduct is so attenuated from the evidence as to purge any taint resulting from said conduct.

Miles, 365 Md. at 520-21 (internal citations omitted). An analysis of attenuation requires consideration of the following: 1) the temporal proximity between the actual illegality and the evidence the defendant seeks to be suppressed; 2) the presence of intervening circumstances; and 3) the purpose and flagrancy of the official misconduct. *Cox v. State*, 421 Md. 630, 652-53 (2011).

In its Memorandum of Findings and Conclusions, the circuit court made the following findings, which we are persuaded are not clearly erroneous:

> 1. Prior to the unlawful interrogation of Defendant, the Police Department's investigation had resulted in photographic identification of Dutch, Scott and Defendant as persons who followed Powell's group as the group began running just before gunshots were heard; witness statements regarding Defendant's possession of a gun and descriptions of the gun; witness statements regarding Defendant being present during the course of events prior to the shooting of Powell and that Defendant was part of the group that was last following Powell's group; witness statements regarding an encounter with Defendant subsequent to the shooting and statements attributed to Defendant from which no conclusion could reasonably be drawn other than that he was the shooter; and statements of witness regarding why Defendant and his group were interested in Powell's group.
>
> 2. The Police Department's investigation of the [March 11, 2007] fatal shooting of Powell prior to the unlawful interrogation resulted in no evidence pointing to anyone being the shooter other than Defendant.

3. The primary illegality concerned Detective Turner's failure to comprehend that, given the number of times that Defendant requested to speak with his mother, Defendant's initial waiver of the right to remain silent had dissipated. There was no outright expression of the withdrawal of the waiver. The illegality was not blatant.

4. Without the benefit of interrogation of Defendant, Dutch or Scott, there was a reasonable basis for presentment of applications for statements of charges against Dutch and Scott.

5. Even had Defendant not been interrogated, it would have been incumbent on the Police Department to seek to interrogate Dutch and Scott.

6. The statements of Dutch and Scott were not taken right on the heels of the unlawful interrogation of Defendant. Defendant's interrogation occurred March [21, 2007]; it was not until March 27, 200[7] that the first of the statements of the co-defendants was obtained.

7. The statements of Dutch and Scott were knowingly and voluntarily made.

8. The plea agreements entered into by Dutch and Scott were entered into more than nine months after the unlawful interrogation of Defendant. Without regard to the statement obtained during the unlawful interrogation of Defendant, each had incentive to obtain the best deal possible, growing in significant measure from statements of witnesses.

9. Each plea agreement requires of each co-defendant that he testify truthfully; presumably, the testimony would entail testimony consistent with each of the statements obtained from them.

It is clear that based solely on the statements of Holder and Burke, the police had enough evidence of Scott's and Dutch's involvement in the attempted robbery to necessitate that the police bring them in for an interview. Thus, it was inevitable that the police would interview Scott and Dutch in the course of their investigation.

During the interrogations of Scott and Dutch, the questioning detective relied on all of the statements he had obtained from Holder, Burke, and Moore, both individually and collectively, in addition to "evidence" that he fabricated that did not really exist. Moore's confession was just one piece of information, among many others, that the detective utilized to encourage Scott and Dutch to confess. To the extent the detective did disclose Moore's admissions in his efforts to get Scott and Dutch to talk, we are not persuaded that the information the police ultimately obtained from Scott and Dutch was any different than the statements they would have obtained had Scott and Dutch been interviewed prior to Moore's arrest. In the end, all of the evidence obtained by the police indicated that Moore was the person who fired the gunshots that killed Powell. We conclude, therefore, that the voluntary statements made by Scott and Dutch, though they occurred after Moore's confession, were not derived from his confession.

Under all the circumstances, we conclude that the circuit court did not err by concluding that the statements of Scott and Dutch were not derived from Moore's involuntary statement to the police. Accordingly, we further conclude that the court did not err by allowing the admission of the statements obtained from Scott and Dutch at Moore's trial.

II. Prior Inconsistent Statement

During Jamal Holder's testimony on direct examination, Holder attested that he was unable to remember the events of March 11, 2007. The prosecutor approached the bench and argued that Holder's professed loss of memory was feigned. He moved to

admit Holder's written statement as substantive evidence pursuant to Md. Rule 5-802.1(a). The following exchange occurred:

> [THE STATE]: Your Honor, at this point, Your Honor, I would at this point proffer to the Court that the witness' memory los[s] is feigned. He clearly remembers an incident over the course of the last six years. He remembers women that claim that he's the father of their child. He remembers Mr. Moore and seeing him over in that area. He remembers a whole lot of stuff during that time.
>
> However, it is just specific questions regarding this incident and all he has professed is to have no memory of whatsoever, and I think, Your Honor, going back all the way to the initial [Nance/Hardy] case itself, the memory loss is one of the prime ways that the Court construes an inconsistent statement, the Court can take.
>
> And Your Honor, I believe that clearly he's showing Your Honor that his answers to the questions are indicative of someone who does have memory but just refuses to admit that he has any memory of this incident whatsoever.
>
> The State would move his prior statements in as substantive evidence under [Md. Rule] 5-802.1. I think it clearly is "I don't remember any of this" is inconsistent with the statement, written statement that he made to the Grand Jury, statements to the police and to the Grand Jury that he made a couple days subsequent to his written statement.
>
> [DEFENSE COUNSEL]: Your Honor, if this witness didn't have other issues I might not object, but given the fact that he has admitted to using PCP, he's admitted to being severely shot in multiple places in his body and his overall health issues from that, I think is consistent with, you know, him having memory issues and not necessarily fabrication, so I would object at this point.
>
> [THE STATE]: Your Honor, I would point out that he certainly indicated that he's been shot, he remembers how long he was in the hospital before getting out and what his injuries were, and he has certainly been able to

recount certain incidents that he's been incarcerated for over the last several years.

If it's an item that he feels he's safe to talk to me about he remembers that, but it is the other incidents that he shows he can't.

THE COURT: Which prior statement are you seeking to have -

[THE STATE]: Your Honor, there's two.

THE COURT: - as substantive evidence?

[THE STATE]: He provided a written statement to Detective Turner on March the 14th of 2007 and then he subsequently was brought into the Grand Jury on March the 15th of 2007.

[DEFENSE COUNSEL]: Your Honor, if I could raise one issue. I have a copy of his written statement. I do not have a copy of his Grand Jury.

THE COURT: Has that been provided to the defendant?

[THE STATE]: Your Honor, I do not know what was provided initially. I know that I have not received a request. I cannot give it without a Court order, I can't provide a copy of the Grand Jury testimony of the witness.

Your Honor, I thought the statute that I was aware of was if the defense requested a Grand Jury statement, the Court orders it, then we have to turn it over, but we're not permitted to just turn over a Grand Jury statement in discovery.

[DEFENSE COUNSEL]: There was a request from [prior counsel] I do have in the file to the State's Attorney's Office.

[THE STATE]: Your Honor, I can't do anything. It has to be an actual order that goes through [the administrative judge].

I'm having to provide [defense counsel] a copy of the Grand Jury testimony if that's the issue.

> THE COURT: I guess if you - you have to provide it.
>
> Where is it?
>
> [THE STATE]: I have it, it's right here if you would like to read it.
>
> THE COURT: It seems as if you are going to be using it during the course of the trial, I am going to allow the prior statement that was given to Detective Turner to be used as substantive evidence. I'm not going to allow it with regard to the Grand Jury transcript.

The written statement was then admitted into evidence "over the objection of the defendant." Moore contends that the circuit court erred by failing to make a determination on the record that Holder's memory loss was disingenuous.

Maryland Rule 5-802.1 provides that certain prior statements by a witness who testifies at trial and is subject to cross-examination concerning the statement are admissible as an exception to the rule against hearsay. In pertinent part, the Rule requires that the prior statement be "inconsistent with the declarant's testimony," and that it was "recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement[.]" Md. Rule 5-802.1(a)(3). A prior statement is inconsistent if it positively contradicts the witness's testimony. *Nance v. State*, 331 Md. 549, 564 n.5 (1993). It also may be inconsistent by implication if the witness would be expected to testify fully about a matter but gives only partial testimony; if the witness denies, even indirectly, that an event occurred; or if the witness claims that he does not remember an event that he does remember. *Id*.; *Corbett v. State*, 130 Md. App. 408, 425 (2000). "When determining whether inconsistency exists between

testimony and prior statements, 'in case of doubt the courts should lean toward receiving such statements to aid in evaluating the testimony.'" *McClain v. State*, 425 Md. 238, 250 (2012) (citation omitted).

The Court of Appeals has plainly stated that a trial court is not required to make an express finding that a witness is feigning memory loss prior to allowing the admission of a prior inconsistent statement under Md. Rule 5-802. *See McClain*, 425 Md. at 251-52 (holding that neither the plain language of the Rule nor case law require an express finding). *See also Wagner v. Wagner*, 109 Md. App. 1, 50 (1996) (opining that a trial judge is presumed to know the law "even in the absence of a verbal indication of having considered it").

Insofar as the present ruling was concerned, the sole question before the circuit court was whether Holder's memory loss was feigned, in which case, the prior inconsistent statement would be admissible as substantive evidence under Md. Rule 5-802.1(a) or if Holder's memory loss was genuine, in which case, the evidence was not admissible. The prosecutor argued that Holder was feigning memory loss as to the shooting because his memory was clear with respect to other events. Based on Holder's testimony regarding his use of PCP, defense counsel argued that Holder's lack of memory might not have been fabricated. In its ruling, the court specified that Holder's prior statement was being admitted as "substantive evidence." The record thus makes clear that the court admitted Holder's prior statement as substantive evidence because it was inconsistent with his trial testimony. We are persuaded that in so doing, the court

implicitly found that Holder's memory loss was feigned. We discern no error in the court's determination.

III. Admission of Autopsy Photographs

Prior to trial, defense counsel moved to exclude three photographs of the victim taken at the scene of the shooting and two of the five photographs taken by the medical examiner during his autopsy of the victim. The circuit court ruled that the crime scene photos were cumulative to the autopsy photographs and excluded them from evidence as more prejudicial than probative. According to the court, however, the probative value of the five autopsy photographs exceeded any prejudice that would accrue to Moore as a result of their admission. At trial, the autopsy photographs were separated from the autopsy report and admitted as State's Exhibits 21-25. Defense counsel objected to the admission of Exhibits 22 and 23, which depicted the victim's face and upper chest region and the right side of the victim's face, shown in profile. On appeal, Moore contends that these two photographs were "cumulative" and that they were more prejudicial than probative.

When considering the admission of photographic evidence, trial courts utilize a two-part test. "[F]irst, the judge must decide whether the photograph is relevant[.]" *State v. Broberg*, 342 Md. 544, 555 (1996). A photograph is relevant if it "'assist[s] the jury in understanding the case or aid[s] a witness in explaining his testimony . . . .'" *Mason v. Lynch*, 388 Md. 37, 49 (2005) (quoting *Hance v. State Roads Comm'n*, 221 Md. 164, 172 (1959)). "[S]econd, the judge must balance its probative value against its prejudicial

effect." *Broberg*, 342 Md. at 555. "The admissibility of photographs under this state's law is determined by a balancing of the probative value against the potential for improper prejudice to the defendant . . . . This balancing is committed to the trial judge's sound discretion." *Bedford v. State*, 317 Md. 659, 676 (1989) (internal citations omitted). "'The trial court's decision will not be disturbed unless plainly arbitrary, . . . because the trial judge is in the best position to make this assessment.'" *Lovelace v. State*, 214 Md. App. 512, 548 (2013) (quoting *Ayala v. State*, 174 Md. App. 647, 679 (2007).

Photographs are admissible "to illustrate testimony of a witness when that witness testifies from first-hand knowledge[.]" *Washington v. State*, 406 Md. 642, 652 (2008) (citation omitted). In this case, the autopsy photographs were relevant to illustrate the testimony of the medical examiner, who testified regarding his observations of the injuries suffered by the victim and his conclusions regarding the cause of the victim's death. State's Exhibit 22 showed the exit wound at the tip of the victim's nose, about which the medical examiner had testified. The medical examiner also testified that the victim had scrapes or abrasions to his face, cheek, and forehead suffered after the victim was shot, when he collapsed to the ground. State's Exhibit 23 showed, on the right side of the victim's face, an abrasion and laceration above the right eyebrow, an abrasion to the right side of the face next to the right eye, and an abrasion to the lip. Both of the contested photographs were probative, therefore, to illustrate the medical examiner's testimony.

Moreover, the contested photographs were not cumulative to the other three autopsy photographs. One of the three photographs was a full-body view of the victim as he appeared upon arrival at the morgue; a second photograph showed the entrance wound of a bullet on the back of the victim's head; and the third photograph showed the entrance wound of a different bullet on the back of the victim's arm, which lodged in the muscles of the upper arm. Thus, each of the admitted photographs illustrated a different aspect of the victim's injuries.

As the Court of Appeals has recognized, even though photographs "may be more graphic than other available evidence . . . we have seldom found an abuse of a trial judge's discretion in admitting them in evidence." *Hunt v. State*, 312 Md. 494, 505 (1988). Whereas the photographs admitted at Moore's trial were relevant and not cumulative, we conclude that the circuit court did not abuse its discretion in admitting them.

IV. Improper Rebuttal Closing Argument

At the very beginning of the State's rebuttal closing argument, the following occurred:

> [THE STATE]: Thank you, [defense counsel], and thank you, ladies and gentlemen. Now, I am not going to come up here and try to suddenly put you up here. I trust you to know what the right thing to do is. You know the right thing to do is to find Mr. Moore guilty of murdering Mr. Powell in every single offense that's listed on that verdict sheet.
>
> [DEFENSE COUNSEL]: Objection, Your Honor. Can we approach very briefly?
>
> THE COURT: Yes, you may.

> [DEFENSE COUNSEL]: I apologize. I do not like objecting during closing argument, but he's telling them to do the right thing. That's an impermissible argument.
>
> THE COURT: I'll overrule the objection. Move on. It's not totally inconsistent with what was admitted. I understand, but I sustained the objection. Thank you.

Moore contends that the circuit court erred by overruling the defense objection to the State's rebuttal closing argument, which, he contends, improperly "appealed to the passions of the jury and asked the jurors to abandon their neutral role" and encouraged the jurors to "do the right thing" out of obligation to their community.

Counsel is generally afforded "great leeway" when making closing arguments to the jury. *Degren v. State*, 352 Md. 400, 429 (1999). There are, however, "limits in place to protect a defendant's right to a fair trial." *Id*. at 429-30. It is "improper for counsel to appeal to the prejudices or passions of the jurors, or invite the jurors to abandon the objectivity that their oaths require." *Mitchell v. State*, 408 Md. 368, 381 (2009) (citations omitted). During rebuttal argument, a prosecutor is permitted to address "issues raised by the defense in its closing argument." *Degren*, 352 Md. at 433; *see also Moore v. State*, 194 Md. App. 327, 362 (2010) ("The State is entitled to respond to argument presented by the defense with proper argument.") (Citation and emphasis omitted), *rev'd on other grounds*, 422 Md. 516 (2011).

The trial court is in the best position to evaluate the propriety of a closing argument in the context of the evidence adduced in a case. *Mitchell*, 408 Md. 368, 380-81 (2009). On review, this Court will not disturb the trial judge's judgment in that regard

"unless there is a clear abuse of discretion that likely injured a party." *Ingram v. State*, 427 Md. 717, 726 (2012); *Grandison v. State*, 341 Md. 175, 225 (1995). A trial court abuses its discretion when its "ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective." *McLennan v. State*, 418 Md. 335, 354 (2011) (citation omitted). Reversal is not automatically reqired even where a particular comment has been objected to and is deemed to have been improper. *Hill v. State*, 355 Md. 206, 223-24 (1999); *Degren*, 352 Md. at 432-37 & n.14. Rather, reversal is required only "where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Lawson v. State*, 389 Md. 570, 592 (2005) (quoting *Spain v. State*, 386 Md. 145, 158 (2005)).

Moore relies on the Court of Appeals's decision in *Hill v. State*, 355 Md. 206 (1999) to support his contentions that the State's rebuttal argument was improper. In *Hill*, the prosecutor repeatedly insisted to the jury "that they had a responsibility to keep their community safe from people like Hill[,]" beginning with the opening statement, when the prosecutor said, "[i]n the end, we're going to ask you to do the just thing, the right thing, the thing that protects all of us and keeps this community safe." *Id*. at 211-12.

In the instant case, reading the closing arguments in their entirety, the prosecutor's exhortation to do the "right thing" did not seek to compel the jurors to act out of any desire to preserve their own interests or the safety of their community. Instead, in this

case, the prosecutor asked the jurors to do the "right thing" by deciding the case based upon all of the evidence. The prosecutor's comment was especially relevant in light of defense counsel's suggestion in his closing argument that the jurors would not "feel good" about returning guilty verdicts in light of Scott's testimony that he was the shooter and that Moore was not present.[1] The prosecutor did not err by reminding the jurors of their duty to decide the case based on the evidence, rather than their emotions.

We discern nothing misleading in the prosecutor's argument. Under all the circumstances, we conclude that the circuit court did not abuse its discretion by overruling defense counsel's objection to the State's rebuttal closing argument.

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

[1] On cross examination, Scott claimed for the first time in the course of the investigation and trial that it was his own idea to approach the young men and try to rob them. He further claimed that it was he, not Moore, who had the handgun and who fired the shots that killed Powell. In fact, Scott claimed, Moore was not even present for the attempted robbery.