UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2522

September Term, 2013

ROBERT MOORE

v.

STATE OF MARYLAND

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

JJ.

Opinion by Eyler, Deborah S., J.

Filed: June 16, 2016

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

A jury in the Circuit Court for Baltimore City convicted Robert Gary Moore, the appellant, Anthony Roach, and Quincy Chisolm of conspiracy to murder Alex Venable, his family members, and their associates. Moore also was convicted of first-degree murder of Venable; four counts of attempted first-degree murder of Venable's associates, Thomas McNeil, Tavin Baker, and Derrick Vaughn[1]; and five counts of use of a handgun in the commission of a crime of violence. He was sentenced to six sentences of life in prison plus 100 years' imprisonment, to run consecutively.[2]

Moore, Roach, and Chisolm all noted appeals. On August 18, 2014, their appeals were consolidated in this Court. Thereafter, counsel for Moore filed a motion to strike his appearance, which was granted by this Court on June 9, 2015. On October 16, 2015, Moore's appeal was severed from Roach and Chisolm's appeal, and Moore was granted a continuance to proceed *pro se*.

Moore poses sixteen questions presented. In its brief, the State has rephrased, reorganized, and consolidated Moore's questions. We shall adopt the questions as restated by the State. They are:

[1] Two of Moore's attempted first-degree murder convictions arose from attempts to murder Vaughn on April 28, 2011, and again on January 17, 2012.

[2] For his conviction, Chisolm was sentenced to life imprisonment, all but 40 years suspended, with a mandatory five years' supervised probation upon release. In addition to Roach's conspiracy conviction, he was convicted of attempted first-degree murder of Venable's brother, Allen Venable, use of a handgun in the commission of a felony or crime of violence, and being a convicted person in possession of a regulated firearm. He was sentenced to two life sentences, to run consecutively.

I. Did the lunch between Hooker and her brother during trial not violate the sequestration order or demonstrate misconduct on the part of the prosecutors?

II. Did the trial court properly decline to postpone the specially scheduled trial?

III. Did the trial court properly admit Mackall's testimony that Moore said he planned to harm the prosecutor?

IV. Was the protective order not based on a fabrication?

V. If preserved, did the trial court properly exercise its discretion in controlling the scope of the State's opening statement and closing arguments?

VI. If considered, did the trial court properly reseat alternate juror number 3, and is any error harmless?

VII. If preserved, did the trial court properly instruct the jury as to other crimes evidence, and was any error harmless?

VIII. Where Moore voluntarily absented himself from trial, did the trial court properly exercise its discretion to admit a photograph of Moore in orange clothing so that he could be identified by witnesses, and was any error harmless?

IX. Did the trial court properly rule during Deminds' testimony on redirect examination?

X. To the extent the issue is preserved, did the trial court properly respond to complaints from or about juror no. 5?

XI. Did the trial court properly respond to a jury note asking if it was possible to have a hung jury?

XII. Did the trial court properly exercise its discretion to give a supplemental jury instruction on concurrent intent in response to a jury question?

XIII. If preserved, did the trial court properly exercise its discretion to strike three prospective jurors for cause?[3]

[3] Moore worded his questions presented as follows:

I. Did the trial court abuse its discretion for not ordering a sequestering violation and for not ordering a mistrial?

II. Did the prosecutors commit prosecutorial misconduct for intentionally disobeying the courts sequester order?

III. Did the prosecutors commit prosecutorial misconduct for intentionally suppressing the brunch meeting?

IV. Did the prosecutors commit prosecutorial misconduct for being untruthful to the dignity of the court about the true origins for the Writ?

V. Did the trial court abuse its discretion for not allowing the postponement to prepare for trial?

VI. Did the trial court abuse its discretion for allowing unsupported case law, and for allowing unreasonable and unsupported testimony by witness Terry Mackall concerning the Prosecutor?

VII. Did prosecutors commit prosecutorial misconduct for referring the [sic] facts not in evidence and misstatement of facts?

VIII. Did prosecutors commit prosecutorial misconduct for referring the facts [sic] not in evidence?

IX. Did the trial court abuse it's [sic] discretion for denying defense side of the party strikes under Md. Rule 4-313?

X. Did the trial court abuse it's [sic] discretion for revealing Appellant's prior felony drug conviction to the jury?

XI. Did the trial court abuse it's [sic] discretion for showing jailhouse orange jumpsuit photo to the Jury?

(Continued…)

On April 6, 2016, this Court heard oral arguments on Roach and Chisolm's consolidated appeal. In an unreported opinion filed on April 26, 2016, we affirmed their convictions. *See Roach & Chisolm v. State*, Nos. 2523 & 2711, Sept. Term 2013 (filed Apr. 26, 2016). In this appeal, Moore raises several issues that we addressed in that opinion, and we shall make reference to our decisions in that appeal where appropriate.[4] For the following reasons, we shall affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

(…continued)

> XII. Did the trial court abuse it's [sic] discretion for not ordering a mistrial for excessive leading and prosecutorial misconduct for suborning witness to commit perjury?
>
> XIII. Did the trial court abuse it's [sic] discretion for overwhelming prejudice for not **vior during** [sic] and order a mistrial for Juror #5 on three different issues?
>
> XIV. Did the trial court abuse it's [sic] discretion for not answering the jury note concerning Hung Jury?
>
> XV. Did the trial court abuse its discretion for giving the jury instructions on concurrent intent?
>
> XVI. Did the trial court abuse it's [sic] discretion for striking three citizens from the venire?

(Emphasis in original.)

[4] Moore filed a reply brief on June 8, 2016, responding to the State's brief, which was filed on May 12, 2016. Pursuant to Rule 8-502(a)(3), "[t]he appellant may file a reply brief no later than the earlier of 20 days after the filing of the appellee's brief or ten days before the date of scheduled argument." Because Moore's reply brief was not filed within 20 days after the State's brief, *i.e.*, June 1, 2016, we will not consider it. We note that it does not advance any arguments that have merit in any event.

We adopt the following facts as recited in *Roach & Chisolm*, *supra*:

The evidence adduced at trial established that on April 27, 2011, at around 8:00 p.m., Darian Kess was stabbed to death in his apartment located in a complex off The Alameda, in Northeast Baltimore. Kess was Moore's cousin. Earlier that evening, Kess was in his apartment with Maria Randle and Rokia Lewis. Kess decided to order food and left the apartment to borrow carryout menus from a neighbor. Randle and Lewis saw that when he returned he was accompanied by three men whose faces were covered with a "t-shirt type material." One man had a grip on Kess's arm and was holding a gun to his head.

The men ordered Randle and Lewis to lie face-down on the floor in the living room, which they did. Randle could not see anything, but overheard one of the men demand money from Kess and say he knew that Kess "hit like 30 today." Two of the men walked Kess around the apartment while the third man stayed in the living room with Randle and Lewis.

After about 10 minutes, the two men brought Kess back into the living room. Randle heard a noise that "sounded like . . . some type of liquid or something was hitting the floor." The three men ran out of the apartment. Randle waited about five minutes, stood up, and saw Kess lying on the floor, holding his neck with one hand and "bleeding real bad, losing a lot of blood." He had been stabbed. Lewis assisted Kess while Randle went door-to-door in the apartment building seeking help. (The men had stolen her cell phone.) A neighbor called 9-1-1. About 30 minutes later, an ambulance arrived and transported Kess to The Johns Hopkins Hospital ("Hopkins"). Randle reported the incident to the Baltimore City Police Department ("BCPD"). Kess died three days later.

On the night of the stabbing, Moore and his wife, Sarah Hooker, went to the hospital to see Kess. The next morning, April 28, 2011, Hooker contacted Randle by phone to find out what had happened. Randle did not want to discuss the events over the phone and agreed to meet with Hooker. Hooker drove a black SUV with dark, tinted windows, and picked Randle up at around noon. Moore and Hooker's brother, Donnie Adams, were in the vehicle. Randle described the events of the previous night. Moore asked her if she would be able to identify any of the assailants' voices and she responded yes. Hooker then drove the group to the 1900 block of North Collington Avenue, between East 20th Street and North Avenue, stopping in front of a row house in the middle of the block. According to Randle, "four or five" people exited the row house and approached the SUV. Moore and Adams got out of the vehicle and asked the people if they knew anything about Kess's stabbing. Randle, who remained inside the

SUV out of sight, recognized a voice as being one of the assailants. Moore and Adams got back in the SUV and Hooker drove Randle to the hospital to see Kess. Randle had no further contact with Hooker, Moore, or Adams.

That same day, Gloria Johnson was standing in the 1900 block of North Collington Avenue with a group of people, including Venable and a man she knew as "Kevin." An SUV pulled up and two men got out. Adams, who she knew from the neighborhood, was one of them. Adams briefly spoke to Venable. Johnson overheard Adams say he would "come back and spray the block." Adams and the other man got back in the SUV and drove away. Johnson walked down the street to a carryout store to buy a pack of cigarettes and returned ten minutes later. She saw someone come "out of 20th onto Collington" and start shooting in the area where she had been standing. Later, in a photo array she identified Adams as the shooter. She wrote on the photo array: "This is Donnie [Adams]. He came on the 1900 block of Collington and stated, I will spray this block and he was talking to Venable."

Venable, [McNeil, and Vaughn] all sustained gunshot wounds and were transported by ambulance to Hopkins. Venable died of his wounds. McNeil was shot three times in the stomach, twice in the right arm, and once in the left arm. He underwent surgery to remove the bullets from his stomach and place a metal plate in his right elbow. He remained in the hospital for a month. Vaughn was shot in his left leg. He was treated and released that day.

At trial, Adams testified pursuant to a plea agreement with the State. [Adams plead guilty to conspiracy to commit murder and conspiracy to distribute controlled dangerous substances ("CDS") in exchange for a 10- to 20-year sentence. At the time he testified, his sentencing was pending.] He stated that he had spoken to Kess on the afternoon of April 27, 2011, while Kess was selling drugs in the 1900 block of North Collington. They discussed how much money Kess had made that day. Venable, Vaughn, and McNeil were standing nearby when that conversation took place. Kess believed they overheard the conversation and were involved in Kess's stabbing later that night.

Adams's testimony conflicted in some minor respects with that of Randle and Johnson. According to Adams, the day after the stabbing, Hooker picked him up at around 10:00 a.m. Randle and Moore already were in the SUV. Randle was there to let them "know who did it." He and Moore "were going to handle it" and "take care of it." Hooker drove them to North Collington Avenue. Adams got out of the SUV to speak to Venable. He denied making any threats. He got back in the SUV. Randle identified Venable as one of the assailants at Kess's apartment the night before. They drove away, let Randle "out of the car" "[o]nce it got back to

North Avenue[,]" and then parked the car at the corner of North Avenue and Castle Street. Moore contacted Roach and it was Roach who shot Venable.

Hooker likewise testified pursuant to a plea agreement with the State. [Hooker anticipated that she would be sentenced to 15 years' imprisonment for conspiracy to commit murder and conspiracy to distribute cocaine, in lieu of a sentence of 16 years to life.] She explained that Moore and his associates were drug dealers in the area of North Collington and North Avenues. Venable and his associates were rival drug dealers. On April 28, 2011, she contacted Randle and picked her up in a black SUV she had rented. She drove Randle, Moore, and Adams to the 1900 block of North Collington Avenue. After they left there, she dropped Randle off at the hospital and dropped Adams off on Preston Street. Moore called Roach, and she and Moore went to Gary Williams's house to meet him. Tavon Price was there. Moore said he "wanted something done about" Kess's stabbing.

Hooker testified that Roach and Price were responsible for shooting Venable, McNeil, and Vaughn on April 28, 2011 (the "April 28 Shooting"); that she, Moore, Adams, Chisolm, Roach, Price, Emanuel Deminds, and Taylor Flemming agreed to retaliate against Venable for killing Kess; and that the April 28 Shooting was the first of several retaliatory acts that Moore and she orchestrated against Venable, his family members, and their associates.

Tavon Baker was one of Venable's associates. On June 7, 2011, he was shot while standing in the 2000 block of East Lafayette Street, in front of Hasan Rahman's house (the "June 7 Shooting"). Rahman testified that he saw Moore, who he had known "practically all [his] life," walking east on East Lafayette Street in Baker's direction. Moore's hands were behind his back. When Moore raised his left arm, Rahman saw a gun in his hand. Rahman yelled, "He got a gun" and Baker ran up a side alley. Moore followed Baker and fired the gun several times. Baker ran into the back yard of a row house and through an open basement door. He hid inside. He realized he had been shot in his left foot. Police arrived moments later. They transported Baker by ambulance to Hopkins. His gunshot wound was treated and he was released three hours later.

[Venable's brother, Allen Venable ("Allen")] was shot on the morning of September 16, 2011 (the "September 16 Shooting"). He, Edwin Willis, and their friend Robert Foster were walking southbound in the 2100 block of North Collington Avenue, toward Allen's father's house. As they approached the intersection of North Collington and Cliftwood Avenues, two men rounded the corner with guns in their hands. The men opened fire. Allen turned and ran north on North Collington, not stopping until he

reached a gas station three blocks away. Officer Robert Crane of the BCPD happened to be there, and Allen reported the shooting to him. Allen was treated for a gunshot wound to his left buttock. At trial, he identified Roach as one of the shooters.

Hooker testified that on September 16, 2011, she rented a silver Lexis and drove Roach and Chisolm to the corner of Cliftwood and Collington Avenues. The two men got out of the Lexis and shot Allen. Later, Moore gave Roach and Chisolm cocaine in exchange for their carrying out the September 16 Shooting.

Willis was not wounded in the September 16 Shooting, but was shot three days later (the "September 19 Shooting"). That day, he and Rahman were standing outside Rahman's house, in the 2000 block of East Lafayette Street, "talking to some girls," including Rahman's niece. Rahman noticed a black minivan driving west on East Lafayette Street. It stopped in the 2100 block of that street. Willis also noticed "a suspicious van." Two men got out and started shooting at Willis. He tried to run away but was shot. He did not see who shot him. Area residents came outside to assist and called an ambulance. Willis was shot in his neck, left shoulder, right buttock, and the left side of his face. The bullet fractured bones in his face. He was taken to Hopkins for treatment. In a photo array, Rahman identified Chisolm and Moore as the shooters.

At trial, Rahman testified that Hooker was the driver of the minivan. [Rahman testified that he recently had been arrested on a drug charge and for violating his parole. He entered into a plea agreement with the State, agreeing to testify against Roach, Chisolm, and Moore in exchange for the State dropping the parole violation charge, which carried a possible sentence of 10 years' imprisonment.] Hooker corroborated Rahman's testimony, admitting that she rented the minivan and was driving it on September 19, 2011. She identified Chisolm and Roach as the shooters, and further testified that Moore gave them cocaine for committing the shooting.

In November of 2011, Moore was incarcerated after being convicted of an unrelated drug charge. Notwithstanding Moore's incarceration, he and Hooker continued to plan additional retaliatory acts, over the telephone. These telephone calls were recorded and 44 of them were played at trial.

In December of 2011, Adams was incarcerated on an unrelated handgun charge. He was attacked and severely stabbed in prison. Hooker and Moore believed the stabbing was in retaliation for their attacks on Venable, his family members, and their associates over the previous months. Moore called Hooker and told her "to go up" to "North and Collington" and "shoot anybody in the block."

On January 1, 2012, Chisolm was arrested in connection with the September 16 and 19 Shootings.

On January 7, 2012, Officer Nathaniel McCullough of the BCPD responded to a call about an incident at 1935 North Collington Avenue (the "January 7 Shooting"). He found Vaughn in the living room of the house, holding his abdomen. His clothes were bloodstained. Officer McCullough called a medic. Vaughn was transported to Hopkins, where he underwent surgery to remove a bullet from his abdomen. Vaughn testified that he could not remember any of the details of the shooting or the shooter's identity.

Deminds also testified pursuant to a plea agreement with the State. [Deminds plead guilty to conspiracy to commit murder and conspiracy to distribute CDS. At the time of his testimony, his sentencing was pending, and he anticipated that he would receive a 15-year sentence.] He stated that Hooker and Moore paid him to shoot Vaughn on January 7, 2012, and that Chisolm was supposed to participate in the shooting. Hooker tried to reach Chisolm by phone, without success. (Apparently, Hooker did not realize that Chisolm was incarcerated.) Deminds testified that Roach told him that he (Roach) had shot Venable, McNeil, and Vaughn on April 28, 2011.

We include additional facts as pertinent to this appeal.

DISCUSSION

I.

At the outset of trial, the court imposed a rule on witnesses. Adams testified for the State on October 18, 2013. Hooker, who, as noted above, is Adams's sister, testified on October 29, 30, and 31, 2013. Each time Hooker left the stand before her testimony concluded, the court instructed her that she was not permitted to discuss her testimony with anyone else.

Before Hooker's last day on the witness stand (October 31, 2013), the prosecutors obtained a writ for Adams to come to the courthouse that day and made arrangements for Hooker and Adams to go to lunch together, accompanied by the prosecutors and

correctional officers. The prosecutors did not inform the defense about the lunch. Chisolm's lawyer noticed Adams in the hallway outside the courtroom and wondered why he was there. When court resumed after the lunch break, he asked the prosecutors why Adams was present and learned about the lunch.

The defense brought the lunch to the court's attention, and, at a bench conference, the prosecutors disclosed that they had arranged the lunch because both Adams and Hooker were facing long prison terms and they thought it was "a nice thing to do." The court allowed defense counsel to cross-examine Hooker about the lunch. When Hooker completed her testimony, Chisolm moved for a mistrial. Counsel for Moore and for Roach joined in the motion.

Moore's lawyer argued that the lunch was a benefit the prosecutors had arranged for Hooker to induce her to testify favorably for the State. He maintained that the prosecutors had violated their professional duties by doing so and that they had acted with the "objective of manipulating, influencing and . . . controlling the testimony of [Hooker] during the course" of her testimony. He asserted that a mistrial was necessary because the prosecutors had violated their ethical duties by using the court to issue a writ so that they could affect the testimony of a witness who was still on the stand and that it made no difference that defense counsel had been given the opportunity to cross-examine Hooker about the lunch.

The next day, the court questioned Adams and Hooker about the lunch. They both said that they had known nothing about it in advance; that the lunch had lasted for

approximately 20 minutes; and that during the lunch they had not discussed the case and had been supervised by correctional officers. The court found that the lunch did not violate the sequestration order because Hooker and Adams did not discuss the case. The court also found that the prosecutors' actions amounted to a discovery violation. It held them in criminal contempt and imposed a $100 fine for their actions.[5] It denied defense counsels' motion for a mistrial and permitted them to question Adams and Hooker about the lunch in front of the jury.

(a)

Moore contends the trial court abused its discretion in ruling that the lunch meeting between Hooker and Adams was not a violation of the sequestration order, and that its ruling was reversible error. The State responds that there was no sequestration order violation because there was no evidence that Adams and Hooker discussed their testimony (or the case) during the lunch.

This same contention was raised, unsuccessfully, in *Roach & Chisolm*, *supra*. There, we held that

> "[t]he general purpose of the sequestration of witnesses has been to prevent . . . [witnesses] from being taught or prompted by each other's testimony." *Tharp v. State*, 362 Md. 77, 95 (2000) (alteration in original) (internal quotation marks and citations omitted); *Jones v. State*, 11 Md. App. 468, 480–81 (1971) ("The purpose of the rule is to prevent prejudice, and its essential purpose is to prevent one prospective witness from being taught by hearing another other witness's testimony[.]"). Even when the rule is

[5] In an unreported opinion, this Court reversed and vacated the prosecutors' contempt convictions.

> violated, "it is within the sound discretion of the trial judge to determine whether to admit the testimony of the witness[.]" *Id.* at 481.
>
> There is nothing in the record that would support a finding that the lunch was a violation of the rule on witnesses by the prosecutors or their witnesses. Both Adams and Hooker testified that the lunch lasted 20 minutes and that they did not discuss the case. Indeed, correctional officers were present and could have testified had that been the case. And, even if a violation had occurred (and again, there is no evidence that it did), the court acted prudently by providing defense counsel the opportunity to further cross-examine Hooker and Adams to their satisfaction.

Slip op. at 33 (alteration in original). For the same reasons, Moore's contention that the lunch meeting violated the court's sequestration order lacks merit.

(b)

Moore further contends the trial court abused its discretion by not granting a mistrial based on the prosecutors' misconduct. The State counters that the court properly found that the prosecutors had committed a discovery violation by not disclosing the lunch to the defense in advance, and a mistrial was not warranted because Moore was afforded the opportunity to cross-examine both Hooker and Adams about the lunch meeting, and therefore was not prejudiced by the prosecutors' not having disclosed it in advance.

> A mistrial is no ordinary remedy and "[a] request for a mistrial in a criminal case is addressed to the sound discretion of the trial court and the exercise of its discretion, in a case involving a question of prejudice which might infringe upon the right of the defendant to a fair trial, is reviewable on appeal to determine whether or not there has been an abuse of that discretion by the trial court in denying the mistrial." *Wilhelm v. State*, 272 Md. 404, 429 (1974). [The Court of Appeals has] stated that "the declaration of a mistrial is an extraordinary act which should only be granted if necessary to serve the ends of justice." *Jones v. State,* 310 Md. 569, 587 (1987), *vacated on other grounds,* 486 U.S. 1050[–51] (1988).

Cooley v. State, 385 Md. 165, 173 (2005) (first alteration in original) (parallel citations omitted).

The prosecutors' actions did not necessitate a mistrial. When confronted about the lunch meeting, the prosecutors readily conceded that they had arranged it because it was a "nice thing to do." The court responded appropriately by providing defense counsel with the opportunity to question both Adams and Hooker before the jury, about any perceived benefit. The court properly considered alternative remedies and determined that further cross-examination would cure any prejudice to Moore, Roach, and Chisolm. Under the circumstances, the trial court did not abuse its discretion by denying Moore's motion for a mistrial.

II.

For reasons we shall address below, the State filed a motion for a protective order before trial, which was granted. Under the terms of the protective order, the State was required to provide all discovery to defense counsel by December 14, 2012, except for the names, addresses, and statements of civilian witnesses. This information was to be provided to defense counsel 45 days before trial. The protective order stated that defense counsel could share with their clients the general information in the statements, but, until two days before trial, could not share the names of the witnesses. Defense counsel were also prohibited from providing their clients with copies of the witnesses' statements.

Trial was specially scheduled to begin on October 17, 2013. The trial judge who was specially assigned to the case was not the judge who granted the protective order.

On September 9, 2013, Moore's lawyer filed a "Motion to Dismiss for Failure to Comply with Discovery Order, or in the Alternative, to Postpone Specially Set Trial Dates and Request for Emergency Hearing." In the motion, Moore's lawyer argued that the State had produced discovery on August 17, 2013, and that "none of Defense Counsel understood, nor anticipated, that the discovery would be so voluminous." He asserted that "the State failed to comply with the terms supporting the Court's Order."

A hearing on the motion was held on September 30, 2013. Moore's lawyer argued that the October 17, 2013 trial date should be postponed because he had not anticipated the large amount of discovery that would be produced and he did not have sufficient time to review the information with Moore before trial. He maintained that because the State was continuing to supplement its August 17, 2013 production, his ability to review the discovery was being hindered. Moore's lawyer conceded that he did not file a motion for reconsideration after the motion for protective order was granted, nor did he seek other relief from the issuing judge.

The State responded that it had produced all of the relevant discovery on August 13, 2013, well before the 45-day deadline prescribed in the protective order; that the supplements to the discovery were minor changes to transcripts and statements that already had been produced; and that a postponement was not a proper remedy under the circumstances.

The trial court denied Moore's motion. It found that all defense counsel were aware of the terms of the protective order; that the State had fully complied with the

protective order's terms; and that defense counsel should have raised the issue that they had inadequate time to prepare with the judge who issued the protective order. The court explained that, because the case was specially set, it did not have the authority to grant a postponement, and that dismissal was not an appropriate remedy under the circumstances.

On appeal, Moore contends the trial court abused its discretion by denying his motion to postpone the trial date. He argues that, because the trial date was not postponed, his lawyer was not "actually prepared sufficiently enough for trial" and failed to "digest impo[r]tant evidence" and to interview a "crucial witness" for the defense. As a consequence, he (Moore) was denied "adequate and sufficient representation."

The State counters that the trial court did not abuse its discretion by denying the postponement request under the circumstances, especially given that defense counsel did not seek any remedy from the judge who issued the protective order. It also maintains that Moore's argument that his trial counsel was ineffective is better suited for decision on post-conviction, but, if we address it, Moore has not met the "standard for prejudice set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)."

In *Roach & Chisolm*, Roach similarly contended that the trial court abused its discretion by denying his motion to postpone the trial date based on the State's failure to comply with the terms of the protective order. We disagreed.

> Roach's argument that the trial court abused its discretion by denying his motion to dismiss or, in the alternative, to postpone the trial . . . lacks merit. As the court found, the State did not violate the terms of the protective order. There was no basis on which to grant Roach's motion to

> dismiss. With respect to the terms of the protective order and whether they unduly restricted the period of time in which defense counsel had to prepare for trial, counsel for Roach at no time asked the court to reconsider or revise the document production timeframe as set forth in the protective order, despite having ample time to do so. In this circumstance, the court did not abuse its discretion by denying Roach's postponement request or taking steps to have the Administrative Judge consider a postponement.

Slip op. at 52–53 (footnote omitted).

We reach the same conclusion here. Moore's lawyer did not file a motion to reconsider with the judge who granted the protective order. Later, he agreed to specially set the trial. At the September 30, 2013 hearing, the court correctly stated that because the trial had been specially set, only the administrative judge had the authority to postpone the trial. The court correctly found that the State had complied with the terms of the protective order. The court did not abuse its discretion in denying Moore's request for a postponement.[6]

III.

Before trial, the State sought to introduce evidence of a plot by Moore to murder one of the prosecutors handling the case. The State proffered that in December of 2012, while Moore was incarcerated awaiting trial, he conversed with a fellow inmate, Terry

[6] We agree with the State that Moore's argument that he was denied effective assistance of counsel should be addressed in a petition for post-conviction relief. *See Robinson v. State*, 404 Md. 208, 211 (2008) ("We will not review [Moore's] claim on this point because we do not find any exception to the general rule that such claims be brought in a post-conviction proceeding applicable in this case."); *see also Smith v. State*, 394 Md. 184, 199–200 (2006) (stating the general rule, with exceptions not applicable here, is that claims of ineffective assistance of counsel are better suited for post-conviction relief).

Mackall, about a plan to murder the prosecutor. Mackall wrote a letter to the prosecutors informing them about Moore's plan. Further investigation by the BCPD substantiated that Moore had been threatening to kill the prosecutor. The trial court permitted Mackall to testify at trial for the limited purpose of establishing Moore's consciousness of guilt.

Moore contends the trial court abused its discretion by allowing Mackall to testify. He argues that, in doing so, the trial court erroneously relied on *United States v. Hayden*, 85 F.3d 153 (4th Cir. 1996), which is distinguishable[7]; and that because there was no evidence to corroborate Mackall's testimony, it should not have been admitted. The State counters that Mackall's testimony about what Moore told him was admissible as a statement of a party opponent. It maintains that the State was under no obligation to corroborate Mackall's testimony, and any discrepancies between his testimony and that of other witnesses was "fodder for cross-examination and closing argument[.]"

[7] In *Hayden*, the Fourth Circuit held that the trial court did not abuse its discretion by admitting into evidence an anonymous letter that included threats against a potential witness. The witness testified that the defendant was the only person who could have written the letter because its contents referred to money he owed the defendant for drugs. The court reasoned that the letter and the witness's testimony about its contents were admissible to establish the defendant's consciousness of guilt. Moore argues that his case is distinguishable because the prosecutor did not receive a threatening letter from him, and that Mackall's letter stating that Moore had made threats against her was unreliable.

Moore's argument fails for several reasons. First, the court did not need a physical letter threatening the prosecutor to admit testimony about Moore's own statements to show his consciousness of guilt. Second, Mackall testified at trial and was subject to cross-examination, and the reliability of his testimony was ultimately up to the jury. Finally, in *Copeland v. State*, 196 Md. App. 309 (2010), on which the trial court also relied, we held that testimony from a witness about threats made by a defendant is admissible as "an 'other purpose' that will overcome the presumption of exclusion that is attached to 'other crimes' evidence" under Rule 5-404(b).

In *Roach & Chisolm*, we rejected an argument that the trial court abused its discretion by allowing Mackall to testify because his testimony was inadmissible other crimes or bad acts evidence. We explained that evidence that is admitted solely as proof of "consciousness of guilt" is not being used to show propensity, but for an "other purpose," so as to overcome the presumption of exclusion that attaches to other crimes or bad acts evidence; and that was the sole purpose for which Mackall's testimony was admitted. Although Moore makes a somewhat different argument here than was made in *Roach & Chisolm*, the fact remains that Mackall's testimony about Moore's plan to kill the prosecutor was admissible to show consciousness of guilt on Moore's part. There is no authority that required the State to corroborate Mackall's testimony about Moore's own statement. Any inconsistencies between Mackall's testimony and that of other witnesses' was for the jury to resolve.

IV.

As mentioned above, the State filed a motion for a protective order, under Rule 4-263(m)(1), seeking to withhold the names, addresses, and statements of witnesses it expected would testify at trial. The State argued that witnesses in this case had expressed "fears of retaliation" to the police, and the State believed Moore and his associates were planning "future attacks against" potential witnesses. The motion was filed on August 13, 2012.

On November 14, 2012, the court held an evidentiary hearing on the motion. The State called three witnesses, Special Agent Bernard Malone, Detective Keith Kienle, and Officer Phillip Smith.

At the time of the hearing, Special Agent Malone had been a member of the Drug Enforcement Administration ("DEA") for fifteen years. He testified that he investigated Moore's drug organization, intercepted wiretapped telephone conversations, and identified ties between Moore's group and a "violent prison-based gang" known as the Black Guerrilla Family ("BGF"). He described the various shootings carried out by Moore and his associates. He further testified that "the violence associated with" Moore's organization and the BGF resulted in "extreme reluctance in the community to generate cooperating witnesses and cooperating informants." A cooperating informant working with Special Agent Malone disclosed that if Moore and his associates found out who was providing information to the police, "they would take care of it" and "they would eliminate the witness."

Detective Kienle, a member of the Violent Crime Impact Section of the BCPD, testified that he was involved in the underlying investigation and provided details of each of the shootings that were carried out in furtherance of the conspiracy.

Officer Smith was qualified as an expert in "the areas of gang and gangs, the operation of gangs, specifically the operation of BGF." He testified that BGF members are known to target witnesses who cooperate in criminal prosecutions, and that they will

threaten witnesses and "their family [and] loved ones" with violence to force them to recant their testimony.

The court granted the State's motion for a protective order, finding that there was a "wealth of evidence regarding witness' serious existing fears" and that the "State's evidence in favor of the protective order . . . clearly outweighs concerns regard[ing] the Defendants' Sixth Amendment rights."

On appeal, Moore contends the prosecutors engaged in misconduct by presenting "facts not in evidence" and misstating facts at the protective order hearing and by eliciting testimony that he was the leader of a drug organization affiliated with the BGF. The State counters that the evidence adduced at the protective order hearing sufficiently showed good cause for a protective order, and the trial court did not abuse its discretion in granting the State's request.

In *Roach & Chisolm*, we held:

> In the case at bar, the State met its burden to show good cause why a protective order was needed. It adduced evidence that Moore's drug organization had ties to the BGF, a violent gang, and that Moore was planning to "take care of" and "eliminate" witnesses who were cooperating with the prosecution. The court's finding that witnesses having information supportive to the State were facing the prospect of violence against them was supported by the evidence and not clearly erroneous. The court did not abuse its discretion by granting the protective order.

Slip op. at 52.

In this case, there is absolutely no evidence in the record of prosecutorial misconduct. The State proved that a protective order was necessary under the circumstances with properly admitted evidence. And, for the reasons stated in *Roach &*

Chisolm, the trial court's factual finding that the "life of any State witness was in danger once the witness was identified" was not clearly erroneous, *Lancaster v. State*, 410 Md. 352, 380 (2009) (citations omitted), and the court did not abuse its discretion in granting the State's motion for a protective order. *Coleman v. State*, 321 Md. 586, 603–04 (1991).

V.

Moore contends the prosecutors committed additional acts of misconduct by referencing in their opening statement and arguing in closing "facts not in evidence" that he was the leader of a fictitious gang known as the "Untouchable Crew," and arguing in closing that the guns he referred to in recorded jail phone calls were the guns that were used to carry out the five shootings.

The State responds that neither issue is preserved for review, and, if preserved, the arguments properly were made. Specifically, the prosecutor's comments about the "Untouchable Crew" were references to Moore's own words in his recorded jail phone calls; and the prosecutor's argument about the guns was a proper inference from facts in evidence.

(a)

We agree with the State that neither issue has been preserved for review. There was no objection made to either comment by the prosecutor. "Ordinarily, the appellate court will not decide any . . . issue [other than jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). "The review of the unpreserved objection to statements made during the State's closing

argument would not serve either purpose of guiding the circuit court or avoiding another appeal[.]" *White v. State*, 223 Md. App. 353, 402 (2015).

(b)

The arguments lack merit in any event. In general, a party is permitted in closing argument to "'discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence[.]'" *Mitchell v. State*, 408 Md. 368, 380 (2009) (quoting *Wilhelm*, 272 Md. at 412). "What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case." *Smith & Mack v. State*, 388 Md. 468, 488 (2005).

With respect to the prosecutor's reference to the "Untouchable Crew," during the evidence phase of the trial, the State played a recorded jail phone call between Moore and Hooker in which Moore said, "You know, we gotta get a name for our motha fuckin crew. You hear me?" He then said, "We the untouchables yo. Definitely." In opening statement, the prosecutor told the jurors that they would hear that call. In closing argument, the prosecutor argued that Moore carried out the June 7th Shooting because Baker was "running his mouth" about the "Untouchable Crew."

There was nothing improper about these comments. The prosecutor predicted in opening that there would be evidence that Moore ran with the "Untouchable Crew," the predicted evidence was admitted, and the prosecutor referenced it in closing.

Similarly, in closing argument the prosecutor discussed a specific recorded telephone call in which Moore said he wanted "the guns gone." The prosecutor argued

that the guns Moore was referring to were "the guns that [were] used in these shootings." The facts adduced at trial supported this inference. Hooker testified that she and Moore supplied .9mm, .45 caliber, and .40 caliber guns to Chisolm, Roach, and Deminds to carry out the shootings. Officers of the BCPD recovered bullet casings from the crime scenes of each shooting. BCPD crime lab technicians testified that they analyzed the casings, that the casings were consistent with the guns that Hooker testified were lent to carry out the shootings, and that the same guns were likely used to carry out each shooting. Thus, the prosecutor's argument was not based on a fact not in evidence; it was based on a properly drawn inference from facts in evidence.

VI.

During jury selection, Juror 6355 was accepted by the State and all three codefendants as Alternate 3. Later, Roach's lawyer attempted to use one of his peremptory challenges to strike Juror 6355.[8] The State made a *Batson* challenge, arguing that of Roach's last fifteen challenges, eleven were "individuals of the Caucasian race."[9]

[8] Rule 4-313(a)(2) provides, in pertinent part, that "[e]ach defendant who is subject on any single count to a sentence of life imprisonment . . . is permitted 20 peremptory challenges and the State is permitted ten peremptory challenges for each defendant." Here, the conspiracy charge carried a possible sentence of life imprisonment. *See* Md. Code (2002, 2012 Repl. Vol., 2015 Supp.), § 2-201(b)(1) of the Criminal Law Article ("CL") (stating life imprisonment as possible sentence for first-degree murder); *see also id.* at § 1-202 (limiting the punishment for conspiracy to commit first-degree murder to the punishment for first-degree murder).

[9] *See Batson v. Kentucky*, 476 U.S. 79 (1986). "In *Batson*, the United States Supreme Court held that using peremptory challenges to exclude prospective jurors solely on the basis of race violates the Equal Protection Clause of the Fourteenth (Continued…)

Of those eleven, three were white males, including Juror 6355. Roach's lawyer argued that Juror 6355 is an accountant and she routinely strikes accountants because she has found them "to be problematic in the past." The court found the State had "met its burden to show that there was a non-neutral reason to strike" Juror 6355 and reseated him as Alternate 3.

Counsel for Chisolm then moved to strike Juror 6355. The State objected, arguing that Chisolm's counsel had stricken "three white males in a row," "all around the same age[.]" Chisolm's lawyer responded, "I too have a problem with accountants[.]" The court found a "*prima facie* violation. The reasons are not neutral." It again reseated Juror 6355.

At that point, Moore's lawyer asked, "[M]ay I take exception to the court's ruling[?]" The court stated, "It's not yours to take." Nevertheless, Moore's lawyer complained that Juror 6355 was "tainted" because he had been stricken by defense counsel twice and reseated by the court twice, and "that that will create prejudice as to Mr. Moore's interests." The court noted his exception.

Moore contends the trial court erred by prohibiting Roach and Chisolm from using peremptory strikes to remove Juror 6355. He argues that "the [S]tate was allowed to use their strikes as they wanted," but the defense "wasn't given that same [r]ight[.]" He

(…continued)
Amendment" to the United States Constitution. *Collini v. State*, 227 Md. App. 94, 99 n.3 (2016). In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), *Batson* was extended to prohibit the use of peremptory challenges based solely on gender. *Id.*

maintains that the judge erred by telling his trial counsel that the objection about Juror 6355 being "tainted" was "not [his] to make." He argues that jury selection is a "collective process" and "all three defendants [were] [a]ffect[ed] by the decision of th[e] same jury."

The State responds that Moore did not preserve this issue for review because he did not use one of his own peremptory challenges to strike Juror 6355, and he cannot challenge the *Batson* rulings the trial court made about the strikes by Roach and Chisolm. The State further argues that any error by the court was harmless because as an alternate, Juror 6355 was "not one of the twelve jurors who found Moore guilty."

We agree with the State that the issues are not preserved. In essence, Moore is arguing that the court erred in finding that Roach and Chisolm committed *Batson* violations, and that as a result he (Moore) was prejudiced by Juror 6355's being named to the jury. "[I]n cases involving multiple defendants, each defendant must lodge his own objection in order to preserve it for appellate review and may not rely, for preservation purposes, on the mere fact that a co-defendant objected." *Williams v. State*, 216 Md. App. 235, 254, *cert. denied*, 438 Md. 741 (2014). *See also Ezenwa v. State*, 82 Md. App. 489, 515 (1990); *Osburn v. State*, 301 Md. 250, 253 (1984). An exception to this rule, not applicable here, is when the court makes clear that its ruling applies to all defendants. *See Bundy v. State*, 334 Md. 131, 146–47 (1994).

The court's rulings on the *Batson* violations were specific to Roach and Chisolm. The court found that Roach had "a non-neutral reason to strike" Juror 6355 because

eleven of his last fifteen strikes were of "individuals of the Caucasian race," and three of the eleven were "white males," including Juror 6355. With respect to Chisolm, the court found a "*prima facie* violation" because his last three strikes, including Juror 6355, were white males, and that Chisolm's reasons for striking the jurors were "not neutral." Indeed, the court's ruling could not have applied to "all defendants" because the *Batson* challenge raised by the State required the court to analyze the challenges used by Roach and Chisolm, individually.

Moore's argument that "jury selection is a collective process" because "all three defendants [were] [a]ffect[ed] by the decision of th[e] same jury" lacks merit. Rule 4-313 provides that the allotted number of peremptory challenges are guaranteed to "[e]ach defendant[.]" *See also Sharp v. State*, 78 Md. App. 320, 322–26 (1989) (explaining that peremptory challenges are specific to each *individual* defendant). While one defendant might have many reasons to strike a prospective juror, a codefendant may have an equal number of reasons to ensure that that same juror remains on the jury. In this case, Roach's and Chisolm's attempts to use their peremptory challenges and the court's subsequent finding that those attempts violated *Batson* did not give Moore standing to challenge the court's ruling on appeal. To preserve the issue for appeal, Moore would have had to use his own peremptory challenge to strike Juror 6355, and the court would have had to deny that request. He did not, therefore he did not preserve, and indeed

waived, any argument that Juror 6355's participation adversely affected his interests. The court's statement that trial counsel's objection was "not [his] to make" was correct.[10]

Even if Moore had attempted to use a peremptory challenge to strike Juror 6355 and the court had abused its discretion by denying the request, all of which is sheer speculation, the ruling would have been harmless beyond a reasonable doubt because Juror 6355 did not participate in deliberations. Juror 6355 was reseated as Alternate 3. During the trial, two jurors were excused, and Alternates 1 and 2 took their places. At the end of the case, Alternates 3, 4, 5, and 6 were thanked and excused. Thus, Alternate 3, *i.e.*, Juror 6355, "could not have affected the jury's verdict." *Morton v. State*, 200 Md. App. 529, 539 (2011).

VII.

The court gave the following jury instruction:

> You have heard evidence that the Defendant committed the crime of controlled dangerous substance [("CDS")] possession with intent to distribute, which is not a charge in this case. You may consider this evidence only from the question of identity, common scheme or plan, preparation, motive, intent, opportunity or knowledge. However, you may not consider this evidence for any other purpose. Specifically, you may not

[10] Additionally, Moore's argument below—that Juror 6355 was "tainted" because the court had reseated him twice—is different from his argument on appeal, *i.e.*, that the court improperly curtailed Roach and Chisolm's use of their peremptory challenges, further establishing that Moore's challenge was not preserved for appeal. *See Gutierrez v. State*, 423 Md. 476, 488 (2011) ("[W]hen an objector sets forth the specific grounds for his objection . . . the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified." (Alteration in original) (citations omitted)).

> consider it as evidence that the Defendant is of bad character or has a tendency to commit crime.[11]

The following day, while the jury was deliberating, the court received a note from a juror stating: "May I please have a copy of the law related to the charges and some extra pencils?" The court told the Clerk to prepare written instructions and to provide the instructions to counsel so they could review them before copies were sent to the jurors. After counsel reviewed the written instructions, the following conversation took place:

> [COUNSEL FOR MOORE]: With respect to instruction 3:23, indicates "you have heard the Defendant committed the crime of [CDS] possession with intent to distribute," I do not believe that that was testimony offered in the trial. There was testimony that Mr. Moore had been convicted, but not what he was convicted for. So I'd move to strike that language, Your Honor.
>
> THE COURT: All right. All right. Let's strike that language.
>
> [COUNSEL FOR MOORE]: Yes, Your Honor.
>
> THE COURT: We'll change it to "You've heard that the Defendant committed a crime."
>
> [COUNSEL FOR MOORE]: Yes, Your Honor.

Moore contends the trial court abused its discretion by instructing the jury that he had a prior conviction for possession with intent to distribute a CDS. He argues that his "prior conviction was . . . exposed to the jury, which highly could ha[ve] influence[d] the jury's decision under bad character reasoning." (Emphasis omitted.) He further argues that the court's decision to later strike the reference to the possession with intent to

[11] The court began its instructions by informing the jury that it would refer to Moore, Roach, and Chisolm collectively as "the Defendant."

distribute charge in the written instruction provided to the jury did not cure the prejudice caused by the court's previous oral instruction.

The State responds that Moore's counsel did not object to the instruction, and therefore this question is not preserved for review. And, even if preserved for review, the issue lacks merit because the instruction was generated by the evidence. It stated that Moore had "committed," not that he had been "convicted of," the "crime of [CDS] possession with intent to distribute"; and that was accurate because Hooker had testified that Moore had given Roach and Chisolm cocaine for carrying out the September 16 and September 19 Shootings. The State also asserts that any error was harmless beyond a reasonable doubt because the court gave a limiting instruction.

The State is correct that this issue is not preserved for review. Moore's counsel did not object to the instruction after the court gave it to the jury. *Johnson v. State*, 223 Md. App. 128, 152 (2015); Md. Rule 4-325(e). He only argued that the instruction should be altered later, when a written version of the instructions that already had been given was being prepared.[12]

The issue lacks merit in any event. The instruction did not state that Moore had a *prior conviction* for possession with intent to distribute CDS, but only that the jury had heard evidence that Moore "*committed* the crime of [CDS] possession with intent to

[12] Moore argues that the prejudice that resulted from the court's oral instruction was that the jury learned that he had a *conviction* for possession with intent to distribute a CDS. Moore does not provide any citation to the record showing that any prior conviction, including any prior conviction for that crime, was disclosed to the jury.

distribute." (Emphasis added.) Indeed, no information about a prior conviction was revealed. As the State points out, the court's instruction was based on the evidence that Moore had given Roach and Chisolm cocaine for carrying out the September 16 and September 19 Shootings. Thus, the evidence supported that Moore had "committed the crime of [CDS] possession with intent to distribute, which is not a charge in this case[.]"

Moreover, the court specifically instructed the jurors that they "may not consider [that the defendants committed the crime of possession with intent to distribute CDS] as evidence that the Defendant is of bad character or has a tendency to commit crime." "Maryland courts long have subscribed to the presumption that juries are able to follow the instructions given to them by the trial judge, particularly where the record reveals no overt act on the jury's part to the contrary." *Spain v. State*, 386 Md. 145, 160 (2005) (citations omitted). Thus, the prejudice Moore complains occurred was adequately addressed by the court's limiting instruction, which was a correct statement of law, and any error was harmless beyond a reasonable doubt. *Dorsey v. State*, 276 Md. 638, 659 (1976).

VIII.

Over the course of the trial, Moore, represented by counsel but acting on his own accord, loudly protested that the court did not have jurisdiction over him, interrupted the court repeatedly, objecting to "all silent contracts," and physically resisted being brought into the courtroom. During jury selection, while the potential jurors were at lunch, Moore became combative and the court ordered him escorted from the courtroom. Two

days later, Moore was brought back into the courtroom, but continued to shout objections to "all silent contracts." He was again removed.

On numerous occasions, the court asked the correctional officers if Moore was willing to walk from the court's holding area to the courtroom, and each time the officers reported that Moore refused to walk up the stairs to the courtroom. Moore subsequently was excluded from the courtroom for safety reasons.

Because Moore voluntarily absented himself from trial, witnesses for the State could not identify him in court for the jury. For this reason, for purposes of identification, the State showed its witnesses an enlarged photograph of Moore, taken from a photographic array that the BCPD had put together. It showed him from the shoulders up, wearing a white t-shirt with "about three inches" of an orange jumpsuit showing. The State modified the photograph so it did not show Moore's State Identification Number ("SID") or any reference to the Department of Corrections. On two occasions, the State asked the court if it could publish the photograph to the jury. In both instances, Moore's lawyer objected and argued that the photograph was "extremely prejudicial." The court overruled the objection. It explained:

> This court does not find this photograph overly prejudicial. In fact, the probative value outweighs the prejudicial impact under the circumstances. The circumstances being that Mr. Moore by his conduct has elected not to be here and this court is still doing what it can to get Mr. Moore here. As Mr. -- the court hopes to have some sort of wheelchair or other device to get Mr. Moore to the courtroom on tomorrow, but that does not mean that he would be seen by the jury. If he's still out of control then he will not be seen by the jury. So we will do what we can.

Later, the photograph was admitted into evidence, over objection.

Moore contends the trial court abused its discretion by "admitting this prejudicial jail photo into evidence and allowing the prosecutors to show it to the jury more than once[.]" He argues that the photo prejudiced him "by degenerating [sic] his image in front of the jury."

The State responds that the decision to admit photographic evidence lies within the trial court's discretion; that the court did not abuse its discretion under the circumstances; and that even if it did, any error was harmless beyond a reasonable doubt because "there was an abundance of evidence at trial that Moore had been incarcerated in the past."

"The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment" of the United States Constitution, and "[t]he presumption of innocence . . . is a basic component of a fair trial under our system of justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). A criminal defendant cannot be compelled to attend trial in prison clothing "because it serves as a 'constant reminder' that the accused is in custody, and presents an unacceptable risk that the jury will consider that fact in rendering its verdict." *Knott v. State*, 349 Md. 277, 286–87 (1998) (citing *Estelle*, 425 U.S. at 503). Furthermore, "compelling a defendant to stand trial in prison attire is 'repugnant to the concept of equal justice embodied in the Fourteenth Amendment,' in that usually only those who cannot afford to post bail prior to trial are so compelled." *Id.* at 287 (quoting *Estelle*, 425 U.S. at 505–06). "Essential to a finding of constitutional violation is the element of compulsion." *Id.*

Here, Moore was not present at trial, due to his own misbehavior, and as a consequence the State had to show witnesses a photograph of him for them to use to identify him. Moore is in no position to challenge the State's use of the photograph, as he was responsible for making it necessary for the State to use a photograph of him. Under the circumstances, it is clear that the court did not compel Moore "against his will, to be tried in jail attire." *Estelle*, 425 U.S. at 507.

The photograph was not unduly prejudicial, as the only indication that Moore was wearing prison garb was the "three inches" of orange jumpsuit material. *Cf. Savoy v. State*, 218 Md. App. 130, 159 (2014) ("When the identity of the perpetrator is an issue in the case, that the jury may recognize photos as mug shots and infer that the defendant had prior contacts with the judicial system is insufficient prejudice to warrant reversal." (citing *Straughn v. State*, 297 Md. 329, 336–37 (1983)). The trial court did not abuse its discretion by admitting the photograph into evidence.

IX.

As mentioned above, Deminds testified pursuant to a plea agreement with the State. On direct examination, the State played for Deminds a recorded jail phone call between Hooker and Moore. Deminds was present with Hooker when the call took place. In the recording, Moore asks Hooker, "[D]id you take him [sic] care of him for what . . . he did?" Deminds understood Moore's question to Hooker to mean, "did [Hooker] thank [Deminds] for taking care of what they asked me to do," *i.e.*, carrying out the January 7th Shooting of Vaughn.

On cross-examination, Deminds stated that Moore never directly spoke to him or thanked him for his participation in the January 7th Shooting.

On redirect, the State replayed the recorded jail phone call to rehabilitate Deminds and to confirm that although Moore did not personally thank him for shooting Vaughn, he understood Moore's conversation with Hooker to be a thank you for carrying out the January 7th Shooting. After the call was replayed, the following took place:

> [THE STATE]: Mr. Deminds, were you able to hear that call?
>
> [DEMINDS]: Yes.
>
> [THE STATE]: And at the end of that call -- who were the voices in that call?
>
> [DEMINDS]: Sarah Hooker and Robert Moore.
>
> [THE STATE]: And were you present with Ms. Hooker that day?
>
> [DEMINDS]: Yes.

At that point, Moore's lawyer objected and the court conferred with counsel at the bench. Moore's lawyer argued that "[t]here's absolutely nothing about thank you in that call and there's nothing that [the State] can get Mr. Deminds to say that suggests Mr. Moore said thank you to him." The prosecutor responded:

> I really didn't think it was specifically said, "Thank you for taking care of that." I thought it [was] coded language for the call that I initially played because often whether or not any -- all of these calls, they use coded language for almost everything that they talk about. So I really did not -- and that's why I was trying to have him explain it and have them --
>
> THE COURT: You would go to --
>
> [THE STATE]: -- play the call so he could explain it.

> THE COURT: -- you would go to the call and say the comment about taking care of Ms. Hooker and you have to take it step by step. If you go outside of [cross-examination], I will sustain the objection.

The prosecutor did not ask Deminds any further questions.

(a)

Moore contends the questions the prosecutor asked Deminds on redirect examination are one example of several instances in which the prosecutors "excessively and astronomically lead [their] witnesses through the whole trial[.]" He argues that, for this reason, the trial court abused its discretion by not declaring a mistrial. However, Moore does not cite to anywhere in the record where his trial counsel moved for a mistrial on the ground that the State's questions were "excessively and astronomically" leading. "'Because [Moore's] arguments were not raised below, they are not preserved for appellate review.'" *Paige v. State*, 226 Md. App. 93, 122 (2015) (quoting *Robinson v. State*, 209 Md. App. 174, 202 (2012)); *see also* Md. Rule 8-131(a). To the extent he asks us to review for plain error, we decline to do so. *Pickett v. State*, 222 Md. App. 322, 339–40 (2015).

(b)

Moore further contends the prosecutor suborned perjury by means of the questions posed to Deminds on redirect. He argues that he (Moore) never thanked Deminds; that the prosecutor knew that to be the truth because Deminds had testified on cross-examination that he never was personally thanked by Moore; and that, by replaying the

call and asking Deminds, "[W]ere you able to hear that call?" the prosecutor caused Deminds to testify, falsely, that Moore had personally thanked him.

This argument was not raised or decided below and therefore is not preserved for our review. Md. Rule 8-131(a). It has no merit in any event. "Mere conflicts of testimony . . . do not constitute subornation of perjury." *Grandison v. State*, 341 Md. 175, 241 (1995) (citations omitted). *See also* Md. Code (2002, 2012 Repl. Vol., 2015 Supp.), § 9-101 of the Criminal Law Article ("CL") (defining perjury); *id.* at § 9-102 (providing elements of subornation of perjury). The record clearly shows that the prosecutor attempted to rehabilitate Deminds on redirect, and when she was unable to do so, ended the examination. The prosecutor's conduct was hardly improper, and certainly did not rise to the level of suborning perjury.

X.

Moore maintains that Juror 5 was incompetent to serve and should have been removed and replaced by an alternate juror. He contends the court's failure to remove Juror 5 in three instances was reversible error.

(a)

On October 25, 2013, during trial, the court discussed with counsel at a bench conference a note it had received from Juror 5.

> THE COURT: All right. We have a security concern from a juror. "How safe are we supposed to feel with all of your sheriffs asleep?"
>
> [COUNSEL FOR MOORE]: What was that? I didn't hear that, Your Honor.

> THE COURT: "How safe are we supposed to feel with all these sheriffs asleep?"
>
> [COUNSEL FOR ROACH]: I'm sorry? "Supposed to feel?"
>
> THE COURT: Yes. I'm not seeing any of the sheriffs asleep.
>
> [COUNSEL FOR MOORE]: Which juror is that, Your Honor?
>
> THE COURT: I'm sorry?
>
> [COUNSEL FOR MOORE]: Which juror is that?
>
> THE COURT: No. 5. And I know that there's been standing at times, but I'm not aware of anyone sleeping. I'll hear from you before I fashion an answer.

All three defendants moved for a mistrial. Counsel for Chisolm asked the court to question Juror 5 to determine "whether she has any concerns about her safety and whether she feels that she can still be impartial and give both sides a fair trial based upon those fears." The State responded that a mistrial was not an appropriate remedy. It argued that the court should not question Juror 5 individually because that would only "draw attention to the fact that there's security[.]"

The court denied the mistrial motions. It stated that it would allow the witness on the stand to complete his testimony and then decide how to address Juror 5's note. Later, the court again discussed with counsel at the bench how to proceed.

> THE COURT: I don't want to single out Juror No. 5. I will tell you that I've observed her and she is paying attention.
>
> [COUNSEL FOR MOORE]: Very good.

THE COURT: And but I feel I need to respond to her concern and I brought you up here to get some thoughts before I decide what I'm going to do in response. Excuse me. Anyone?

[COUNSEL FOR MOORE]: Your Honor, I had just upon the jury entering after receiving the note, tried to pay a little bit of attention to Juror No. 5 and literally, I think she seems engaged. I don't think that she seems to be looking around the courtroom and more distracted by who might be in here and what's going on from the witness stand, so I --

THE COURT: Let me suggest this. Should I simply say, "I received the note and if there are any other concerns, please let me know?"

[COUNSEL FOR MOORE]: Yes.

THE COURT: Does anyone have a problem with that?

[COUNSEL FOR CHISOLM]: My request --

[THE STATE]: No. No.

[COUNSEL FOR CHISOLM]: Your Honor, my request, and it's still my request, was that the juror be *voir dired* about whether her concerns about courtroom safety can -- will effect [sic] her ability to be fair or not.

THE COURT: Okay.

[COUNSEL FOR ROACH]: I'm inclined to go with [Chisolm's lawyer]. I think she needs to be *voir dired*.

THE COURT: All right. What the Court is going to do is, and the record should reflect that, without the Court saying anything, the sheriffs have been standing the entire time since the break. But again, I'll reiterate this Court never saw any sheriff sleeping.

What this Court will do is, since there is a split on what to do, the Court has to do what is the appropriate thing to do. Because Juror No. 5 appears to be engaged and appears to be unaffected by any concerns that she had before, the Court is not going to *voir dire* her now.

The Court will simply say that the Court received the note and if there are other concerns about the contents of the note, to write another note. If you all still feel the same way before deliberations and before I -- I'm saying you all. If [Chisolm and Roach's lawyers feel] the same way,

> what I will do is I will *voir dire*, possibly *voir dire*, the juror before dismissing the alternates. All right?
>
> [COUNSEL FOR MOORE]: Your Honor, while I do recognize what the Court is saying and I, you know, visually believe I see what the Court sees, I would request that the Court would alter the language to say "ongoing concerns" as opposed to "new concerns."
>
> THE COURT: I'm simply going to say "any concerns about the note."
>
> [COUNSEL FOR MOORE]: Okay.

The court then informed the jury that it had received a note that it had "not responded to yet." The court stated, "If there are any concerns about the contents of this note, send me another note and I will address it." The court did not receive any additional notes from the jurors about safety concerns.

On appeal, Moore argues that the trial court abused its discretion by not questioning Juror 5 about the note. This argument is not preserved for review. Moore's counsel stated that Juror 5 had been paying attention and did not appear distracted or concerned with her safety. He agreed with the trial court that it should address the jury collectively and not "single out" Juror 5. His only request was that the court "alter the language to say 'ongoing concerns' as opposed to 'new concerns.'"

The court did not abuse its discretion by declining to question Juror 5 in any event. Rule 4-326(d)(2)(C) mandates that upon receiving a communication from a juror which "pertains to the action," the court must, "before responding to the communication, direct that the parties be notified of the communication and invite and consider, on the record, the parties' position on any response." *See also State v. Harris*, 428 Md. 700, 716 (2012)

(holding a juror's note "pertain[s] to the action" when its contents "implicates, and may impact, a juror's ability to continue deliberation"). The court fully complied with Rule 4-326(d); after receiving Juror 5's note, it discussed the contents with counsel and provided counsel an opportunity to provide input as to how the court should respond.

The court is not bound by counsel's input, however. *See Choate v. State*, 214 Md. App. 118, 151 (2013) ("[T]he conduct of a criminal trial is committed to the sound discretion of the trial court[.]" (citations omitted)); *see also Bruce v. State*, 351 Md. 387, 393–94 (1998) (holding a trial court's decision to deny a request to interrogate members of an empaneled jury to ascertain prejudice is reviewed for abuse of discretion). "'Where the decision or order of the trial court is a matter of discretion it will not be disturbed on review except on a clear showing [that the decision was] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Appraicio v. State*, 431 Md. 42, 51 (2013) (quoting *Atkins v. State*, 421 Md. 434, 447 (2011)).

Moore speculates that because Juror 5 was concerned with safety, she must have "had a prejudgment that [he] was violent, and ergo, predestined to being guilty," and that the court abused its discretion by denying Roach's and Chisolm's lawyers' requests to *voir dire* her. There is nothing in the record to support that claim. Juror 5's question did not reveal that she was presumptively prejudiced against the defendants because she feared for her safety. Indeed, after discussing the note, the court and Moore's counsel both observed Juror 5 and noted that she was engaged and did not appear distracted. The court monitored the sheriffs' conduct throughout the afternoon and observed that they

had "been standing the entire time" and that it did not see any sheriffs sleeping. The court then instructed the jury that it received the note and if they had any further concerns, they should send additional notes. None of the jurors, including Juror 5, sent any additional notes. "Where there exists more than one reasonable course a trial judge may take with respect to a discretionary decision, our job is not to weigh merely whether one option is better than the other." *Nash v. State*, 439 Md. 53, 86 (2014). The court's actions were reasonable under the circumstances.

(b)

On November 5, 2013, during Deminds's testimony, the prosecutor revealed at a bench conference that she had noticed Juror 5 "on or off for the last two days . . . sleeping, not taking notes" and that she did not appear to "be paying attention." Moore contends the court erred in not removing Juror 5 at that time. Again, this argument was not preserved for review, and it lacks merit in any event. The court asked if defense counsel had noticed Juror 5 sleeping and Moore's lawyer responded, "I have not." Moore provides no citation to the record to show that his counsel moved to strike Juror 5 or sought to replace her with an alternate, nor does he provide any other cites to support his claim that Juror 5 "wasn't interested in the outcome of the case and didn't care to be a part of the deliberat[ion] process."

(c)

On November 14, 2013, during deliberations, Juror 5 sent a note stating, "Please send me home because I am having a problem." After conferring with counsel, the court

brought the jurors into the courtroom and stated, "To the person who made a request to go home, that request is denied. Whoever that person is, you may not go home. You must continue with this jury."

Later, the court received a second note that stated:

> Juror No. 5 is being highly unruly and not cooperating with the other jurors and I don't feel comfortable with her yelling and swearing at me in front of the other jurors. I am trying to conduct civilized discussions but she's making it very hard.

The court conferred with counsel and responded:

> Let me say that no juror can be excused until you have completed your assignment, all right. And this Court will not accept any juror being disrespected. This Court will not accept unruly conduct. This Court will not accept profanity used towards any juror or swearing at any juror. That is totally unacceptable. And this Court expects that you will treat each other with the same courtesy that I see here in the courtroom. If there are any further concerns about that please write a note and I will have to address it. But I trust that that will not be the case form this point forward. And that's all I'm going to say at this time, ok? All right.

Moore contends the trial court abused its discretion by requiring Juror 5 to continue to deliberate. He argues that the "combination of [Juror 5's] misconducts and the Judge not *voir diring* Juror [5] to examine the multiple problems, and telling her to go back to deliberation was tantamount in coercing a verdict, in which [he] was convicted and sentenced to over six consecutive life sentences." The State responds that the court acted "well within its discretion in this case."

In *Roach & Chisolm*, we explained:

> An "instruction given in response to a jury question" is reviewed for abuse of discretion. [*Appraicio*, 431 Md. at 51]. "Trial courts must avoid giving answers [to jury questions] that are 'ambiguous, misleading, or

> confusing.'" *Id.* (quoting *Battle v. State*, 287 Md. 675, 685 (1980) (quoting *Midgett v. State*, 216 Md. 26, 41 (1958))).

Slip op. at 62 (second alteration in original). There, Chisolm similarly argued that the court's responses to the questions sent from members of the jury on November 14, 2013, were "confusing and coercive." We disagreed, holding that

> the court's responses to the November 14, 2013 notes were appropriate. The notes do not reveal that any juror could not continue service; the jurors did not send further notes alerting the court to any problems with their deliberations; and the court's responses were in no way confusing or misleading.

Id. at 63. Moore's argument on appeal is virtually the same as Chisolm's and, for the same reasons, has no merit.

XI.

On November 13, 2013, during deliberations, a juror sent a note stating:

> I need help! We as a group are having a tough time coming to a conclusion on some of these charges. What should I do? *Is it possible to have a hung jury?* I really don't know how to handle this.

(Emphasis added.)

Moore's lawyer argued that the court should instruct the jury, "Yes, it is possible to have a hung jury," but that it should "continue to deliberate." The State objected to the court instructing the jury that it was possible to have a hung jury because it did not "want to give them an out so early on in deliberations." The court brought the jurors into the courtroom; read them the "Duty to Deliberate" instruction in Maryland Criminal Pattern Jury Instruction ("MCPJI") 2:01; and stated, "This court is encouraging you to continue

to deliberate with a view of reaching a verdict. You will write additional notes as you deem necessary."[13]

Moore contends the trial court abused its discretion by so instructing the jury; rather, the court simply should have answered the jury's question in the affirmative.

The State counters that the court did not abuse its discretion by instructing the jury as it did because "[t]he jury had only been deliberating for a short period of time (less than three days) after hearing five weeks of evidence" and "there were no further notes indicating that the jury was unable to reach a verdict."

We stated in *Roach & Chisolm*:

> MCPJI 2:01 is a standard *Allen* charge. A trial judge's decision to give that instruction is reviewed for abuse of discretion. [*Nash*, 439 Md. at 90]; *see also Kelly v. State*, 270 Md. 139, 144 (1973). "We have long held 'that the decisions as to whether . . . [an] *Allen*-type charge should be used and "when to employ it . . . are best left to the sound discretion of the trial judge."'" *Nash*, 439 Md. at 92 (quoting *Mayfield v. State*, 302 Md. 624, 630 (1985) (quoting *Kelly*, 270 Md. at 143)).

Slip op. at 62 (second alteration in original). We further held:

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[13] Maryland Criminal Pattern Jury Instruction 2:01 reads:

> The verdict must be the considered judgment of each of you. In order to reach a verdict, all of you must agree. In other words, your verdict must be unanimous. You must consult with one another and deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. During deliberations, do not hesitate to reexamine your own views. You should change your opinion if convinced you are wrong, but do not surrender your honest belief as to the weight or effect of the evidence only because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict.

> Here, the court's response to the November 13, 2013 question, asking whether it was "possible to have a hung jury," was not an abuse of discretion. There was no indication that the jury was deadlocked, none of the jurors indicated that they could not reach a guilty or not guilty verdict, and giving the *Allen* charge instruction in response was appropriate under the circumstances. *See Nash*, 439 Md. at 93 (stating that a deadlock need not exist for the court to give an *Allen* charge).

Id. at 63. For those same reasons, the court's response to the jury's question, "Is it possible to have a hung jury?" was not an abuse of discretion.

XII.

On November 13, 2013, the court received another note from the jury that stated:

> Your Honor,
>
> How are multiple victims of a single crime treated with respect to the charge of 1st Degree Murder/Attempted murder? If intent, willfulness, deliberation, and pre-meditation have been established for the shooting of one victim of the crime, do those elements need to be re-established individually for the shooting of each victim? Is it per victim or per incident?

(Emphasis in original.)

The court and counsel discussed how to proceed. Their discussion focused solely on the April 28 Shooting, the only shooting that involved multiple victims, *i.e.*, Venable, McNeil, and Vaughn. The State argued that the court should provide a supplemental instruction on transferred intent or, alternatively, on concurrent intent. Moore's lawyer argued that the court should give a "floating mens rea instruction" and objected to "any reading of the instructions" requested by the State.

The court agreed with the prosecutors and instructed the jury on concurrent intent. Counsel for all three codefendants moved for a mistrial, which the court denied. As

mentioned, Moore was convicted of attempted first-degree murder of McNeil and Vaughn with respect to the April 28 Shooting.

Moore contends the facts did not support an instruction on concurrent intent, and the trial court abused its discretion by providing that supplemental instruction to the jury. We disagree.

Rule 4-325(c) states:

> The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

In *Harrison v. State*, 382 Md. 477 (2004), the Court of Appeals explained the difference between transferred intent and concurrent intent.

> In transferred intent, the intended harm does not occur to the intended victim, but occurs instead to a second . . . victim. The actual result is an unintended, unanticipated consequence of intended harm. For example, consider a defendant who shoots a single bullet at the head of A, standing with B and C. If the defendant misses A and instead kills B, the defendant's intent to murder A will be transferred to allow his conviction for B's murder. *The intent is concurrent, on the other hand, when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity.*

Id. at 491 (emphasis added) (citations omitted). In other words, "[w]here the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone." *Id.* at 492 (citations omitted.)

In this case, the evidence adduced at trial established that on April 28, 2011, Hooker drove Moore, Adams, and Randle to the 1900 block of North Collington Avenue, between East 20th Street and North Avenue. The group stopped in front of a row house in the middle of the block and "four or five" people exited the row house and approached the SUV. Gloria Johnson testified that she saw Adams and another man get out of the vehicle and speak to Venable. Adams said he would "come back and spray the block." Adams and Hooker testified that Moore directed Roach and Price to shoot Venable. Later, Johnson saw someone come "out of 20th onto Collington" and start shooting in the area where Venable was standing. The facts clearly show that Moore orchestrated the April 28 Shooting; that he ordered Roach to carry out the shooting; and that Roach and Price went to the 1900 block of North Collington and shot generally in the area where Venable was standing, creating a "zone of harm" in which McNeil and Vaughn were shot. As we held in *Roach & Chisolm*, "[a] concurrent intent instruction was generated by the facts surrounding the April 28 Shooting, and the instruction given by the court was a correct statement of the law." Slip op. at 46.

XIII.

Moore contends that the court abused its discretion by striking Jurors 8282, 8128 and 8318 for cause. He argues that none of the "challenges for cause were supported [by] any evidence that either the venire person was not qualified, or that the venire person would not be fair" and "the circuit court abused [its] discretion by granting the [S]tate's motions to strike them for cause."

The State responds that Moore's lawyer did not object to the State's motion to strike each of the three jurors below, and therefore the issue is not preserved for our review. On the merits, the State argues that the evidence was sufficient to establish that each of the three jurors harbored potential bias and the court did not abuse its discretion in striking each juror for cause.

It is clear from the record that Moore's trial counsel did not object to the State's moving to strike any of the three jurors. Indeed, when the State moved to strike each juror the court asked each defense counsel whether he or she had any exceptions. In each instance, counsel for Moore replied "No objection." Moore cannot now complain that the court abused its discretion by striking jurors when he failed to object below. *See* Md. Rule 8-131(a).

Even if preserved, as we held in *Roach & Chisolm*, the court had an "opportunity to question [each] juror and observe [each jurors'] demeanor," *State v. Cook*, 338 Md. 598, 615 (1995); it "adequate[ly] inquir[ed] into the likelihood of bias before electing to strike [each] juror," *Wyatt v. Johnson*, 103 Md. App. 250, 264 (1995) (citing *King v. State*, 287 Md. 530, 537 (1980)); and it had a reasonable basis to strike each juror. Specifically, Juror 8282 stated that she had been arrested and charged with drug possession; that she did not believe she was treated fairly by the police and prosecutors; and that her assigned public defender did not adequately represent her. Juror 8128 disclosed that she had a work assignment due that week; that her daughter is a lobbyist and is involved in "shielding of records of persons that have criminal backgrounds"; and

that she would be influenced by the work her daughter does. Finally, Juror 8318 had a medical appointment scheduled for the first day of trial to review the results of an MRI done a month before and to find out whether she would need shoulder surgery. The court did not abuse its discretion by striking the potential jurors to "impanel a fair and impartial jury." *Dingle v. State*, 361 Md. 1, 14 (2000).

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