Circuit Court for Harford County
Case No. 12-K-16-1333

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2515

September Term, 2017

RICARDO C. MUSCOLINO

v.

STATE OF MARYLAND

Meredith,*
Berger,
Moylan, Charles E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: December 15, 2020

*Meredith, Timothy E., J., now retired, participated in the hearing of this case while an active member of this Court, and after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

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

Following a nine-day jury trial in the Circuit Court for Harford County, Ricardo Muscolino, appellant, was convicted of the second-degree murder of his wife, Lara Muscolino, and of a handgun charge related to that crime. He was sentenced to a total of fifty years in prison. In this appeal, Muscolino contends that the trial court erred in denying his pretrial motion to suppress footage from a surveillance camera; erred and abused its discretion in the course of the jury-selection process; and erred in permitting the medical examiner to testify that it was "possible" that three of Mrs. Muscolino's bullet wounds were caused by the same bullet. Mr. Muscolino presents four questions (which we have reordered chronologically):

1. Did the lower court err in denying Mr. Muscolino's motion to suppress [a video recording from a home security camera]?

2. Did the trial court err in refusing to ask a voir dire question regarding bias based on the race of defense counsel?

3. Did the lower court err in placing limitations on the jury selection process that impeded Mr. Muscolino's right to a fair and impartial jury, to due process and to the effective assistance of counsel such that a mistrial should have been granted?

4. Did the lower court err in permitting improper testimony by the medical examiner?

For the reasons that follow, we shall affirm the judgments of the circuit court.

FACTS AND PROCEDURAL HISTORY

Sometime before 11:30 p.m. on August 31, 2016, Lara Muscolino was shot and fatally wounded while lying in her bed at her home on Windswept Court in Fallston, Maryland. Following the shooting—the sounds of which were recorded by a Nest

surveillance camera in the Muscolinos' living room—Mr. Muscolino left the house and, within minutes, presented himself at a nearby police station, requesting that he be placed in handcuffs and announcing to officers that he was "involved in the incident" on Windswept Court that had just been called in to 911. Paramedics and police responded to the Muscolinos' home and transported Lara Muscolino to Bayview Hospital, where she died the next morning.

About a week after the murder, appellant's 15-year-old daughter (hereafter "Daughter") told her foster father, Matthew Kreager, that there was a "Nest Drop Cam" surveillance camera located in the living room of the Muscolinos' home. Police had not discovered this camera during their initial search on the night of the murder. Because the surveillance video recorded by that camera was automatically saved on the internet, Daughter was able to access the recording online by logging in to her mother's account. Mr. Kreager notified Harford County Sheriff's Office investigators of the existence of the recording device and gave them the log-in information he had been provided by Daughter. Detective Seth Culver, the lead detective on the case, and Detective Michael Wilsynski viewed and recorded (on a cell phone) the surveillance video the Nest camera had recorded at the time of Lara Muscolino's shooting. The video recording showed appellant entering the house on the night of the shooting, and going up the stairs toward the bedrooms. Five gunshots are heard on the recording, and then appellant is seen coming back downstairs and exiting the house. After viewing the recording online, the

detectives sought and obtained a search warrant to get a copy of that video recording from the Nest company.

Appellant was charged with first-degree murder and use of a handgun in the commission of a crime of violence. He filed a motion to suppress the surveillance video recording of the shooting, and the court denied the motion. In the first issue on appeal, appellant argues that "no reasonable person would have understood that either [Mr.] Kreager or [Daughter] had actual authority to consent to a search of the video," and that the inevitable discovery doctrine is not applicable here.

Trial began with jury selection on October 23, 2017. Appellant, who is white, was represented by a team of four attorneys, three of whom were African-American. Prior to the commencement of jury selection, appellant asked the court to ask the venire: "[W]ould any juror let the race or have any serious, strong feelings about the race of the defense lawyers in this case?" The court declined to ask the requested question, and that ruling is the subject of the second issue on appeal.

Appellant retained a jury consultant to assist with his defense in this case. The court refused to allow the jury consultant to participate in jury selection to a degree acceptable to appellant, and this is the subject of the third issue on appeal.

Finally, appellant complains that the court erred in permitting the medical examiner, Dr. Melissa Brassell, to testify that it was "possible" that "wound paths of the left hand, left shoulder and left side of the neck are due to a single bullet pathway." Appellant objected at trial, and argued that, because Dr. Brassell used the word

"possible," and did not use the words "to a reasonable degree of medical certainty," it was error to admit her opinion about the single bullet pathway. Appellant further asserts that his mistrial request based upon the admission of this testimony should have been granted.

DISCUSSION

I. Motion to Suppress

The standard for appellate review of a trial court's ruling on a motion to suppress evidence was summarized as follows by the Court of Appeals in *McFarlin v. State*, 409 Md. 391 (2009):

> ["]In reviewing a circuit court's grant or denial of a motion to suppress evidence, we ordinarily consider only the evidence contained in the record of the suppression hearing. The factual findings of the suppression court and its conclusions regarding the credibility of testimony are accepted unless clearly erroneous. We review the evidence and the inferences that may be reasonably drawn in the light most favorable to the prevailing party. We undertake our own constitutional appraisal of the record by reviewing the law and applying it to the facts of the present case.["]

Id. at 403 (quoting *Rush v. State*, 403 Md. 68, 82–83 (2008) (citations and internal quotation marks omitted in *McFarlin*)); *accord Peters v. State*, 224 Md. App. 306, 325 (2015).

In this case, appellant moved to suppress the surveillance video downloaded from the Nest Drop Cam that was located in the appellant's living room. This camera was not discovered when the house was searched by police on the night of the shooting, but it was seized when police returned to search the house pursuant to a second warrant on

September 9. The testimony at the suppression hearing disclosed the following information.

About a week after the murder, Daughter became suspicious that a person who had access to the home was stealing from the then-unoccupied house. Daughter knew of the operable security camera in the living room, and logged into the Nest website using Lara's e-mail address. Daughter testified that she discovered that Lara's e-mail address was also her username on the Nest website, and that, once Daughter logged in with that username, she could prompt Nest to e-mail her a link (using Lara's e-mail address) to reset the password. As it turned out, Lara's e-mail password was the same password that the family used to log in to iTunes. So Daughter was able to access Lara's e-mail and then change the password for Nest to one that provided Daughter access to the Nest surveillance recordings saved on the Nest website. Daughter told her custodial foster parent, Mr. Kreager, about the surveillance camera and her ability to access the recordings on the internet, and Mr. Kreager persuaded her to provide that information to him, which he then provided to the police. Daughter testified at the suppression hearing:

> [APPELLANT'S COUNSEL]: Okay. And how did you get on the Nest account?
>
> [DAUGHTER]: Well, I had the username and password at that point. So I just logged in.
>
> Q. And what did you do next?
>
> A. Um, I started going back to see if I could find any evidence of [suspected person] stealing.
>
> Q. And what happened next?

A. Um, so I went on. I went back -- so, right. On the timeline I described earlier there's, like, these little, like, circles and those circles represent, like, movement that the camera picks up. So I was going through the circles and I could see my [suspected person] walking around. So I was looking for any, like, if I could see her walking out with stuff.

Q. Let me see if I can clarify that a little bit by asking a couple more questions. The little circle that points you to a portion of the tape shows what?

A. Movement.

Q. So the camera is motion sensitive?

A. Um, yeah, I guess so.

Q. And so you were looking for movement for what reason?

A. Because I'd rather not waste my time going through, like, all of it. I just wanted to see the movement part.

Q. Okay. So you just went from movement indicator to movement indicator?

A. Mm-hm.

Q. Did you see your [suspected person] walking around in any part of the house?

A. Yes.

Q. And was this after your mother's death?

A. Yes.

Q. And what did you see your [suspected person] doing?

A. Um, walking around. At one point she was looking in, like, the plants. Um, I saw her go upstairs. I saw her -- there was one point where I saw -- so my mom had, like, a purse and I saw her -- and I

think [suspected person] was in this, too -- [suspected person] . . . and her daughter going through the purse and, like, taking things.

Q. Now, at what point, if any, did you have any interaction verbally with Mr. Kreager? And where was he?

A. So we were both in the kitchen and, like, kind of almost, like, as soon as he saw it he was telling me that I should give the password to the police. Like, multiple times he told me that.

Q. What words, to the best that you can recall, did he use?

A. Like, you have to give it to the police.

Q. And did you respond immediately when he said you have to give it to the police --

A. No.

Q. -- this first time?

A. No.

Q. And to the best of your recollection, how many times did he say you have to give it to the police?

A. Um, like three or four.

Q. And did you respond the second time he said you have to give it to the police?

A. Mm-mm.

Q. And what happened the third time that he said it?

A. So this is why I said three or four, because I can't remember if he told me three times or four times. But I believe after the third time I told him -- oh. So I was getting irritated at this point and I, like, told him I forgot the password.

Q. Now, what did he do when you said that?

A. Just the same things, like, you have to give it to the police.

Q. And why didn't you say okay the first time?

A. Um, because --

Q. Let me rephrase my question. Did you want to give it to the police?

A. No.

Q. Is that why you didn't react to him the first time he said you have to give it to the police?

A. Yes.

Q. And did you want to give it to the police the second time he said you have to give this to the police?

A. No.

Q. And did you want to give it to the police if there was a third time when he said it?

A. No.

* * *

Q. Why did you tell him that you didn't know the password?

A. Because -- because -- because I was irritated, really. It was, like, a sarcastic thing to say.

[THE COURT]: I'm sorry?

[THE WITNESS]: It was sarcasm.

[THE COURT]: You were being sarcastic?

[THE WITNESS]: Yes.

Nevertheless, Daughter did eventually provide Mr. Kreager with the log-in information, and Mr. Kreager provided that information to the police.

Mr. Kreager testified that he was a co-worker and friend of Lara Muscolino, and the Muscolino children were placed with Mr. Kreager and his wife, who were already approved foster parents, within a day or so of Lara's murder.[1] Mr. Kreager testified that, the next day, he had received a call that led to Daughter telling him about the surveillance camera, and willingly providing the password to access the online recordings. He testified:

> [MR. KREAGER]: Yeah. That Saturday I received a call from [a person who had access to the home] saying that she secured some assets because she was worried someone was going to go in the house and take things out while no one was in there. [Daughter], at that time, was upset about this. So when we went back in the house to get belongings, I said, ["]Doesn't your mom still have the camera set up here somewhere in the living room?["] And she said, ["]Oh yeah, she has that.["] And then we noticed that -- well, she noticed that a grandfather clock was missing at the time. So that made her very upset. So after going home she pulled up her laptop and started reviewing the footage of that camera.
>
> [THE STATE]: Now, were you with her when she did that?
>
> A. I was next to her, yes.
>
> Q. Did you observe anything? What did you observe on the screen?
>
> A. You just see [the suspected person] coming into just the house through the kitchen area and that's all you could see because of the angle of the camera. You really couldn't see the front door. So you

[1] The murder occurred late on the evening of Wednesday, August 31, 2016. Lara Muscolino was pronounced dead on the morning of Thursday, September 1. Mr. Kreager testified that the Muscolino children were placed in his custody on the Friday after Lara's death, which would have been September 2.

couldn't see where the clock was. That was the main thing she was worried about. It was over on this side.

Q. So after she pulled that up, did she seem to have any difficulty accessing it?

A. No.

Q. After you viewed that, what happened next? Was there any discussion?

A. Um, not really, no. We just -- I asked her how that worked, you know, because I've never seen that kind of software before. She was just showing me just kind of going back, like, in time and stuff like that during the first weekend. So that was over the September 3rd/4th weekend or whatever. Just to see who was in the house while no one was in there.

Q. Did there come a time when you contacted Detective Culver?

A. Yeah. So when I talked to Detective Culver, I mentioned to him that [Daughter] was upset that assets were being taken out of the home. At that point I told him there is a camera but we didn't see assets leaving the house at that time. And then Detective Culver then mentioned he knew nothing about the camera. He mentioned, ["]Oh, there's a camera in there?["] And I said, ["]Yeah, there's a camera that looks at the living room/kitchen area.["] So that's how he knew about it.

Q. And how did the conversation progress?

A. He said, ["]Well, you know, I didn't know about the camera["] -- this is Detective Culver -- ["]there could be evidence on there. Would it be okay if I have permission to look at that?["] And I said, ["]Well, I have to talk with [Daughter] because she would have the passwords and all that stuff.["] I knew nothing about the system, really. I said, ["]I'll talk to her and get back to you.["]

Q. And did you do that?

A. I did, yes. I spoke to her. I said, ["][Daughter], I talked to Detective Culver about the assets and all that stuff and I told him what we had

seen and he said he would like to look at that because there could possibly be evidence that he could use.[”]

Q. And what did she say?

A. She said okay.

Q. And did she provide you with any information?

A. Mm-hm, yeah. Username and password.

Q. And what did you do with that?

A. I sent that to Detective Culver.

Q. And did she indicate any problems with doing that?

A. No, no.

Q. And when you talked to Detective Culver, you provided him with the username and password?

A. That’s correct.

Q. You didn’t know that beforehand?

A. No.

Q. And did you place any limitations on him as far as what he could look at or when?

A. No.

Q. No?

A. No.

Q. And did [Daughter]?

A. No.

Detective Seth Culver of the Criminal Investigation Division, Major Crimes Unit of the Harford County Sheriff's Office was the lead investigator on the case. He testified that he was part of the team that searched the Windswept Court home in the early morning hours of September 1, 2016, pursuant to a warrant. He testified that, at that time, he did see a ceiling-mounted bubble camera in the kitchen during that initial search, but the police determined that camera was inoperable.

Detective Culver testified that, on the afternoon of September 9, 2016, he received a call from Mr. Kreager, who told him that there was a working surveillance camera inside the Muscolino house; that it could be accessed remotely using an app; and that Daughter had the username and password. Detective Culver had met Daughter and had spoken to her before, and he had found her to be "[o]ne hundred percent cooperative and supportive of the investigation." When Mr. Kreager gave him the password and username, there were no limitations as to what he could look at. Detective Culver then downloaded the app and entered the username and password that Daughter had provided Mr. Kreager.

Detective Culver testified that he had "three primary concerns" with regard to the need to preserve any evidence recorded by the surveillance camera:

> I had three primary concerns. Doing a little bit of research on the Nest website, my main concern was the retention of the video. Once a video is recorded -- the device is activated by motion sensor. So once it's recorded, it goes into the company's cloud system. I didn't know what the retention time for that was, so it could have been deleted at any moment.

> Secondly, I did not know who had access to that device, other than myself. So once you log on, it can be deleted, altered. The whole account can be deleted.
>
> Number three, Nest Labs, you couldn't directly talk to someone via phone. You had to send them an email for a request. I had never dealt with Nest Labs before and I didn't know what the response time was.

Detective Culver e-mailed Nest Labs and asked them to preserve the video. But he had never worked with Nest Labs before; the company is located in California; and he did not know what to expect for a response time.

So, after receiving the username and password from Mr. Kreager on September 9, Detective Culver viewed the video at issue on his desktop computer at the office between 4 and 5 p.m. that day, while Detective Wilsynski simultaneously used his cell phone to record the playback (as they watched) in order to preserve it. Detective Culver described what the recording showed:

> [DET. CULVER]: It was August 31st. The video started around 11:23 hours [sic]. I observed [Daughter] and Ricardo Muscolino in the residence near the kitchen side. [Daughter] went up the stairs. The family dog was let out. Mr. Muscolino went into the kitchen; got a glass of water; went up the stairs; entered the bedroom; and the door closed.
>
> [THE STATE]: How could you see he entered the bedroom?
>
> A. The camera was located in the living room, so it had a view of the kitchen downstairs and bedrooms. It was an open rail so you could see up to the bedrooms. Once he enters the bedroom, it takes about four to five minutes and then you hear five gunshots. And between the shots, the victim was screaming. He exits the bedroom; closes

> the door; there's nothing in his hands and he exits the residence the same way he came in, through the kitchen area.[2]

Detective Culver testified that he then prepared a warrant application, which was entered into evidence as State's Exhibit 2 at the suppression hearing. It stated, in pertinent part:

> On Friday, September 9, 2016, Detective Culver learned from the victim's oldest daughter, [Daughter], that there was an operable home security surveillance camera located in the main living area that had been set up by her mother. That system could be accessed remotely by any common electronic device with an internet connection and with the proper username/passcode. It was unknown if Ricardo Muscolino had access to the surveillance system or if access had been made available to anyone else. With that uncertainty and the potential for evidence to be destroyed, Detective Culver was granted access to the system and was provided with the proper username/password. Access was garnered through an internet based application used to review saved recordings. Detective Culver reviewed the footage during the time frame of the crime which revealed significant evidence that furthers the investigation.
>
> It showed Ricardo Muscolino entering the victims' bedroom alone. Minutes later, five gunshots were heard and Ricardo Muscolino fled the residence. No other person entered or exited the victim's bedroom prior to the incident or after until the authorities.
>
> Based on the updated information, Detective Culver believes that the surveillance system and the unaccounted ammunition casing are of significant evidentiary value.
>
> Detective S. Culver has been employed with the Harford County Sheriff's Office since March 2007. While attending the academy, your affiant received specialized training in criminal investigations to include investigations of robberies, thefts and other person's crimes. Your affiant

[2] Investigators initially had recovered four shell casings: three from the murder scene, and one from the bedding in which Lara was wrapped when she was transported to Bayview Hospital. So the audio recording of the sound of a fifth gunshot was of interest to them.

> is a member of the Criminal Investigation Division of the Harford County Sheriff's Office. During his tenure as a member of the Harford County Sheriff's Office, your affiant has conducted numerous criminal investigations, which have resulted in arrests, convictions and evidence seizures. Your affiant has also authored and assisted on numerous search and seizure warrants that have resulted in evidence seizures relating to the crimes of Murder, Home Invasion, Robbery, Burglary, Theft and CDS.
>
> Your affiant knows through his training, knowledge and experience that surveillance systems can capture incidents by recording which provides significant evidentiary information to criminal investigations. Surveillance system recordings can provide dates, time frames, witness identification, suspect identification and an accurate account of events.

The warrant application was signed by a judge of the District Court for Harford County just after 9 p.m. on September 9. The search of Windswept Court pursuant to the September 9 warrant began at 10:15 p.m., and concluded at 11:55 p.m. Detective Culver testified that he received a call back from Nest Labs, in response to his earlier call, while he was meeting with the judge who would sign the September 9 warrant. Nest Labs left Detective Culver a voice mail indicating that it "needed more details to provide the footage." Detective Culver returned the call during the September 9 search, provided the details Nest Labs needed, and the Nest representative "stated over the telephone they were going to preserve the footage."[3] Nest Labs told Detective Culver during that call that the footage would have been deleted within 24 hours had Nest not received Detective Culver's preservation request. Detective Culver testified that he would have obtained a

[3] The warrant issued on the evening of September 9 was for the Nest camera equipment and a fifth shell casing. Once Detective Culver was assured by Nest Labs that the surveillance recording would be preserved, he no longer felt the need to rush to get a warrant for the actual recording. A warrant for the recording was issued to Nest Labs on October 3, 2016, but the camera itself was recovered from the house on September 9.

warrant for the Nest camera upon learning that there was an active surveillance camera inside a murder scene, even if he had not been provided with the log-in information by Mr. Kreager.

Detective Michael Wilsynski testified that he is a detective in the Criminal Investigations Division, Evidence Collection Unit of the Harford County Sheriff's Office. Detective Wilsynski photographed the crime scene on the night of the murder, and he was called in to assist Detective Culver with preserving the video recording as it played on Culver's computer on the afternoon of September 9. He also assisted with photographing the search that was conducted pursuant to the warrant that was executed on the evening of September 9. After he learned from Detective Culver that there was an active surveillance camera in the house, Detective Wilsynski went back through the crime-scene photographs he had taken in the early-morning hours of September 1. He noticed that the Nest camera had been there all along, on top of a cabinet in the living room. Detective Wilsynski testified that the search on the night of September 9 yielded a Dock Sport handgun box, sixteen 9-mm rounds, forty .38 Special rounds, a CCTV device, Lara's passport, one .38 Special bullet, the Nest Drop Camera, and the fifth spent shell casing.

The court denied appellant's motion to suppress the video recording recovered from the Nest Camera, and explained:

> [T]he Court finds that Detective Culver's observation of the surveillance video was lawful under the apparent authority to consent exception to the warrant requirement. Further, even if the officer's conduct was deemed a violation of the Defendant's expectation of privacy, under the inevitable

> discovery doctrine[,] the surveillance video and any evidence obtained from viewing the video is admissible.

(Footnote omitted.)[4]

Appellant argued before the circuit court, and argues on appeal, that the police should not have relied on the apparent consent provided by Mr. Kreager but should have investigated how Mr. Kreager obtained consent from Daughter. At the motions hearing, appellant argued:

> Well, let's talk about what we believe is the standard for an officer in a position such as this officer when he's trying to ascertain, as he must, what the circumstances were under which there was consent. He has an obligation, we believe, according to the cases that we've cited to this Court, to ask it himself. This is not just third party consent. This is third party consent plus plus. Ordinarily, the third party consenter and the witness are facing each other. They are talking directly to each other. The officer has a chance to make an assessment of whether or not it is even reasonable to ask for a person to give such consent because under the circumstances, if he had bothered to think about it, or even if he did, this is an extraordinarily invasive electronic trespass that he wants to make.
>
> So we take the position, Your honor, as do the cases that we've cited, that when he has no knowledge about the circumstances under which he is seeking consent and when he may or may not know the family dynamic, he doesn't have the ability to assess credibility, doesn't know whether the person is scared, he doesn't know anything about the circumstances, and especially when you're talking about a young child, you have the obligation to assess all the circumstances before you understand whether it's even reasonable to consent or to request consent from a 14-year-old about a tape[.]

[4] The omitted footnote indicated that the State had also argued that the video was admissible under the exigent circumstances exception to the warrant requirement, but that the court did not need to reach that issue given its ruling.

Appellant also argued that inevitable discovery did not apply "because no second warrant for the home was planned and no warrant was going to be sought until Culver viewed the footage illegally and discovered information helpful to his case." (But this assertion fails to credit Detective Culver's testimony that he would have sought a warrant for the Nest Camera upon learning that it was present and functioning in a crime scene, regardless of whether he had been given the log-in information.)

A. Apparent Authority

We observed in *Redmond v. State*, 213 Md. App. 163, 176-177 (2013), that a search conducted pursuant to consent granted by a party with apparent authority is permitted without a warrant:

> The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, prohibits "unreasonable searches and seizures." "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States Dist. Court*, 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). Thus, "searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). "Nevertheless, because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). "Such reasonableness exceptions, however, must be narrow and well-delineated in order to retain their constitutional character." *United States v. Yengel*, 711 F.3d 392, 396 (4th Cir.2013).
>
> "A search conducted pursuant to valid consent, *i.e.*, voluntary and with actual or apparent authority to do so, is a recognized exception to the warrant requirement." *Jones v. State*, 407 Md. 33, 51, 962 A.2d 393 (2008). The voluntariness, *vel non*, of a consent is a question of fact determined under the totality of the circumstances based upon standards set forth in *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). *See also Scott v. State*, 366 Md. 121, 140–42, 782 A.2d 862 (2001)

> (discussing the *Schneckloth* analysis). The *Schneckloth* Court held that to meet its burden of proving valid consent, thus overcoming the presumption of unreasonableness, the government must show "that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." 412 U.S. at 248, 93 S.Ct. 2041. The "knowledge of a right to refuse is a factor to be taken into account," but the lack of such knowledge does not make any consent given *per se* involuntary. *Id.* at 249, 93 S.Ct. 2041.

(Footnote omitted).

We also observed, in *State v. Rowlett*, 159 Md. App. 386, 396 (2004), that, even in the absence of the consent of the property owner or of someone with common authority over the property,

> the consent of a third party may still be sufficient to validate a warrantless search if that party has "'apparent authority.'" [*Illinois v.*] *Rodriguez*, 497 U.S. [177] at 187, 110 S.Ct. 2793 [(1990)] (quoting *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964)). **That is to say, if the facts available to the officer at the time of the search would "'warrant a man of reasonable caution'" to believe that "the consenting party had authority over the premises," then the consenting party has apparent authority over the premises and may lawfully consent to a search of it.** *Id.* at 188, 110 S.Ct. 2793 (quoting *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)); *see also United States v. Mitchell*, 209 F.3d 319, 324 (4th Cir.2000); *Wilkerson v. State*, 88 Md. App. 173, 185-86, 594 A.2d 597 (1991).

(Emphasis added.)

In this case, the facts available to Detective Culver at the time he was alerted by Mr. Kreager that a previously-overlooked surveillance camera was still active inside the house and could be accessed via the internet were that: 1) Mr. Kreager was the Muscolino children's foster caretaker, who had custody of the three Muscolino children because their mother was murdered and their father was in detention; 2) Mr. Kreager had been

entirely supportive of the investigation; 3) Daughter was fifteen years old; 4) Daughter had also been supportive of, and cooperative with, the investigation; 5) Daughter had accessed the camera's recordings specifically to see if someone was removing property from the house; 6) Daughter had accessed her mother's Facebook account previously; and 7) Daughter had provided the username and password for the Nest Cam recordings to Mr. Kreager. Detective Culver testified that he had no concerns "at all" about Daughter's authority to consent to his accessing the video, because the fact that "[a] person who has a username and password to a system tells me the person has access to the system and authority to access it."

In a written opinion denying the motion to suppress, the court explained:

> [Appellant's] argument that Det. Culver unreasonably relied on [Daughter]'s apparent authority to consent is unpersuasive. This Court finds that Det. Culver's testimony establishes that he had no reason to doubt, and, therefore, no need to further investigate the circumstances surrounding [Daughter]'s authority to consent, or her voluntary consent in providing Mr. Kreager with the login information for the Nest account. Furthermore, although Det. Culver did not speak directly with [Daughter] to gain access to the username and password, but did so through Mr. Kreager, his prior dealings with Mr. Kreager as well as [Daughter] would have "warrant[ed] a man of reasonable caution to believe that the consenting party had authority" to do so. Frobouck [v. State], 212 Md. App. [262] at 275 [(2013)].
>
> Det. Culver testified that he had no concerns about [Daughter]'s authority to consent, specifically stating "a person who has a username and password to a system tells me the person has access to the system and authority to access it." [. . .] It was reasonable for [ ] Det. Culver to reach this conclusion since prior to obtaining the username and password, he had also known that [Daughter] had access to her mother's Facebook account and had been on the account and shared the information she saw on it with her father. Therefore, in his prior dealings with [Daughter] and the information he had received from the investigation, there was nothing to

> suggest that she had any restrictions in accessing any web-based accounts connected to her family and/or home. Furthermore, the information about the Nest Drop Cam came to light after the Detective received a telephone call from Mr. Kreager about [Daughter]'s concerns that items were being removed from the Muscolino home, which then led to Mr. Kreager's disclosure about the Nest Drop Cam video surveillance. The circumstances in which this disclosure was made would lead a reasonable person to believe that the person accessing the account and viewing the video has the authority to do so[, e]specially since the existence of the Nest Cam device and the video surveillance was unknown to the Detective, as well as any of the officers who searched the home on September 1, 2016, but it was known to [Daughter], as well as Mr. Kreager. Thus, contrary to the [appellant's] assertion, there was no ambiguity surrounding [Daughter]'s apparent authority to consent.

The court further found that the testimony of Daughter and her younger sister—suggesting that Mr. Kreager had pressured Daughter to make an involuntary disclosure of the Nest account login information—"was not believable" and that "Mr. Kreager's account of asking [Daughter] if she would give the username to Det. Culver was credible." This is a credibility finding to which we defer on appeal. Similarly, the court found that, in any event, "there was no reason why Det. Culver would have known that Mr. Kreager acted in any way that would suggest undue pressure." "The Court finds that it was reasonable for Det. Culver to rely on [Daughter's] apparent authority to consent, even though he did not speak to [Daughter] directly."

Although appellant asserts in his brief that, under all the circumstances, "no reasonable person would believe [that] Daughter had apparent authority to consent to accessing the video footage," we must consider the evidence in the light most favorable to the prevailing party, and when viewed in that light, we perceive no error in the denial of the motion to suppress. The court found Detective Culver's testimony credible. Under

the circumstances known to Detective Culver at the time that he was alerted to the presence of the Nest Drop Cam recordings and provided with the login information that had been obtained from Daughter, it was reasonable for him to believe that Daughter had the authority to consent to the detective's access to the online recording.

B. Inevitable Discovery

Appellant argues that the Nest recording of the incident would never have been discovered if the police had not improperly accessed Lara Muscolino's account without authorization, and because the later-acquired warrant was based upon observations made during the unauthorized viewing of the recording, the recording should have been excluded from evidence. The State responds that, even if Det. Culver had not acquired Mrs. Muscolino's username and password before obtaining a warrant, the police would have nevertheless been able to obtain a search warrant after Mr. Kreager apprised them of *the existence* of the camera at the crime scene. We agree that the Nest recording would have been obtained even if the police had not used Lara Muscolino's username and password to view the recording before seeking a warrant.

In *Peters*, 224 Md. App. at 349-50, we made the following observations regarding the inevitable discovery doctrine:

> Under the inevitable discovery doctrine, "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." *Miles v. State*, 365 Md. 488, 520–21, 781 A.2d 787 (2001) (citing *Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984)). **The inevitable discovery doctrine is an "exception [that] permits the government to cleanse the fruit of poison by demonstrating that the evidence acquired through improper exploitation would have been discovered by law**

enforcement officials by utilization of legal means independent of the improper method employed." *Stokes v. State*, 289 Md. 155, 162–63, 423 A.2d 552 (1980). As the Court of Appeals explained in *Williams*, supra:

> In sum, the State has the burden of proving, by a preponderance of the evidence, that the evidence in question inevitably would have been found through lawful means. This standard embodies two ideas—that there was a lawful method for acquiring the evidence and that the evidence inevitability *would* have been discovered. When challenged evidence inevitably would have been discovered lawfully regardless of police misconduct, the deterrence effect of exclusion is minimal, and exclusion of the evidence would put police in a worse position than they would have been without any illegal conduct. **The inevitable discovery doctrine necessarily involves an analysis of *what would have happened* if a lawful investigation had proceeded, not what actually happened. The analysis of what would have happened had a lawful search proceeded should focus on historical facts capable of easy verification, not on speculation.**

372 Md. at 417–18, 813 A.2d 231 (citations omitted, [italicized] emphasis in original); *see also Stokes*, 289 Md. at 166, 423 A.2d 552 (observing that the State must meet "the basic requirement . . . by competent evidence that there was a prescribed and utilized department procedure which would have, in fact, absent the [illegality] . . . uncovered the disputed evidence"); *Hatcher v. State*, 177 Md. App. 359, 397, 935 A.2d 468 (2007) ("The State must show, by a preponderance of the evidence, that the lawful means which made discovery inevitable were being actively pursued prior to the illegal conduct.").

(Bold emphasis added.)

Even if we were to assume *arguendo* that the search pursuant to Daughter's consent was unlawful, the evidence would still have come in under the inevitable discovery doctrine. Here, there is a virtual certainty that, even if Detective Culver had not viewed the video on the afternoon of September 9 prior to seeking a warrant, Detective Culver would have sought a warrant for it, "probably the next business day." The

information lawfully provided to Detective Culver by Mr. Kreager about the existence of the security camera at the crime scene that was operable during the shooting would have been sufficient to support an application for a warrant independent of anything learned during the detectives' allegedly-unauthorized viewing of the recording. To accept appellant's argument to the contrary would require us to conclude that Detective Culver would have opted to forego seeking a search warrant after learning that there was an active surveillance camera inside a murder scene. We agree with the suppression court's conclusion that "Det. Culver's testimony combined with the evidence of the ongoing investigation establishes that the Nest Drop Cam video footage would have inevitably been discovered through a court authorized warrant obtained by Det. Culver, which is a lawful investigative means," and "the State has met its burden to establish that even if there was not a valid consent, the unlawfully obtained evidence would have been discovered through lawful means."

II. Voir dire

A. Standard of review

In *Collins v. State*, 452 Md. 614, 628 (2017), the Court of Appeals observed: "We review a judge's conduct of voir dire for abuse of discretion and, when a judge's approach provides reasonable assurance that prejudice will be discovered, the judge has acted within his or her discretion." The Court of Appeals also made clear in *Collins* that the "broad discretion we accord judges in the conduct of voir dire" is "'tempered by the

importance and preeminence of the right to a fair and impartial jury . . . .'" *Id*. at 623 (quoting *Dingle v. State*, 361 Md. 1, 14 (2000)). The *Collins* Court added: "In the end, '[t]he standard for evaluating a court's exercise of discretion during the voir dire is whether the questions posed and the procedures employed have created a reasonable assurance that prejudice would be discovered if present.'" *Id*. at 623-24 (quoting *White v. State*, 374 Md. 232, 242 (2003)).

In *Collins*, 452 Md. at 622-24, the Court of Appeals summarized general principles applicable to voir dire in Maryland:

> Voir dire is a flexible process in this state, not bound by statutory prescriptions, *see Davis v. State*, 333 Md. 27, 34, 633 A.2d 867 (1993), but instead built over time through our case law. We have made plain that, in this state, "the sole purpose of voir dire is to ensure a fair and impartial jury by determining the existence of cause for disqualification, and not as in many other states, to include the intelligent exercise of peremptory challenges." *Stewart*, 399 Md. at 158, 923 A.2d 44; *see also Pearson v. State*, 437 Md. 350, 356–57, 86 A.3d 1232 (2014); *Dingle v. State*, 361 Md. 1, 13–14, 759 A.2d 819 (2000); *Davis*, 333 Md. at 35–36, 633 A.2d 867 (stating that voir dire covers "two areas of inquiry that may uncover cause for disqualification: (1) an examination to determine whether prospective jurors meet the minimum statutory qualifications for jury service; or (2) an examination of a juror conducted strictly within the right to discover the state of mind of the juror in respect to the matter in hand or any collateral matter *reasonably liable* to unduly influence him" (internal quotation marks, ellipses, and citation omitted)).
>
> We grant to the trial court significant latitude in the process of conducting voir dire and the scope and form of questions presented to the venire. "[N]o formula or precise technical test exists for determining whether a prospective juror is impartial." *White*[*v. State*], 374 Md. [232] at 241, 821 A.2d 459 [(2003)]. And we have said repeatedly that the trial judge is vested with broad discretion in the conduct of *voir dire*, subject to reversal for an abuse of discretion. *Pearson*, 437 Md. at 356, 86 A.3d 1232; *see also Burch v. State*, 346 Md. 253, 293, 696 A.2d 443 (1997); *Perry v. State*, 344 Md. 204, 218, 686 A.2d 274 (1996); *Hill v. State*, 339 Md. 275,

> 279, 661 A.2d 1164 (1995). Yet, "[u]ndergirding the voir dire procedure and, hence, informing the trial court's exercise of discretion regarding the conduct of the voir dire, is a single, primary, and overriding principle or purpose: to ascertain the existence of cause for disqualification." *Dingle*, 361 Md. at 10, 759 A.2d 819 (citation and internal quotation marks omitted). "[W]e do not require perfection in its exercise." *Wright v. State*, 411 Md. 503, 514, 983 A.2d 519 (2009). **The "trial court reaches the limits of its discretion only when the voir dire method employed by the court fails to probe juror biases effectively."** *Id.* at 508, 983 A.2d 519.
>
> * * *
>
> Regardless of the leeway we grant trial courts in the process of conducting voir dire, we require that certain substantive elements be incorporated. **If relevant to the case and requested** by one of the parties, **we have held that it is reversible error for a trial court not to question the venire regarding racial, ethnic, cultural or religious bias**; whether more or less credence would be given to a police officer simply because of that officer's position; and whether the venire harbors an unwillingness to convict a defendant of a capital crime. ***See Hernandez v. State*, 357 Md. 204, 232, 742 A.2d 952 (1999) (holding trial judge erred by failing to inquire into prospective jurors' possible racial or ethnic bias after being requested to do so by defendant); *Hill*, 339 Md. at 285, 661 A.2d 1164 (same); *Bowie v. State*, 324 Md. 1, 15, 595 A.2d 448 (1991) (same);** *Casey v. Roman Catholic Archbishop of Balt.*, 217 Md. 595, 606–07, 143 A.2d 627 (1958) (holding that the trial judge erred by failing to inquire into prospective jurors' possible religious bias); *Langley v. State*, 281 Md. 337, 348–49, 378 A.2d 1338 (1977) (holding that trial courts must inquire into undue weight given to police officer testimony). ***Yet, even for these mandatory subjects of inquiry, generally, "neither a specific form of question nor procedure is required." Bowie*, 324 Md. at 13, 595 A.2d 448.**

(Emphasis added; footnotes omitted.)

B. The request for a voir dire question about defense counsel.

All the Maryland voir dire cases of which we are aware focus on discovering the existence of a venireperson's bias for or against either the parties or the witnesses to be called in the case. We have not been directed to, nor are we aware of, any cases requiring

the court to ask a question on voir dire asking the prospective jurors about their bias for or against counsel in the case based on race or ethnicity.

In this case, the issue arose as follows. During a discussion among the court and counsel for the parties regarding proposed voir dire questions that had been submitted by each side, the following colloquy ensued:

> [THE COURT]: . . . I don't know whether or not it's necessary in this case but I will leave that up to the defense. Question No. 15: "Would any juror let the race or ethnicity of the defendant or witnesses affect your ability to render a fair and impartial verdict?" I generally see the defense wants that. If they don't want it, I don't include it.
>
> [APPELLANT'S COUNSEL]: Well, we don't like the form of the question because of the last part. They can't self-assess on this. **Would any juror** let the race or **have any serious, strong feelings about the race of the defense lawyers in this case?** That's it. Period.
>
> [THE COURT]: The defense lawyers -- I'm talking about the defendant. I don't believe that question about the defense lawyers is an appropriate question to ask the jurors. The question is whether or not there is any issue about race concerning the defendant.
>
> [APPELLANT'S COUNSEL]: No.
>
> [THE COURT]: So you don't want that?
>
> [APPELLANT'S COUNSEL]: But there is a legitimate concern about the race of his lawyers because if you're biased against black people, we don't want jurors on there who may discount what we have to say. I think that's pretty obvious.
>
> [THE COURT]: Well, I believe the question that is asked, No. 12, I usually ask a variation of that. "Does any member of the panel have any religious, moral, philosophical, or any other personal reason that would affect your service?" That's it. Or, taking it further, "to sit in judgment of another person."

[APPELLANT'S COUNSEL]: That doesn't cover the situation, Your Honor, because we're black people[,] and jurors -- is the Court taking the position -- this is more rhetorical than anything because you don't have to answer my question. I understand that. But Judge, we're black. We have people in this county who don't like black people. There are people in this county who are prejudiced against black people. We want to know who they are because we don't want them on this jury. Because we're black lawyers. That's simple and straightforward. We represent the defendant. There's no earthly reason why the question shouldn't be asked as to our race.

Look, Your Honor. It would be mandatory if the defendant was black. We both agree on that. It would be mandatory if there were black witnesses in the case. The case law extends it even if there's a white defendant and a white prosecutor. But the point is, Judge, we have a right not to have to overcome a juror's prejudice against black people when we argue this case. Simple and straightforward.

[THE COURT]: Thank you. Anything from the State on that?

[THE STATE]: Yes, your Honor. Your Honor, the question, just to give the flip side to show, I guess, the rather ridiculous nature of the question, we would be compelled to ask jurors if they were prejudiced against women since there are two female State's Attorneys, and also prejudiced against white women because we're the prosecutors in the case. Prejudice goes both ways. There can be racism on both sides.

[THE COURT]: I could also ask the question whether or not they would be prejudiced against a Hispanic judge hearing this matter.

[APPELLANT'S COUNSEL]: No, Judge --

[THE COURT]: I'm not going to ask that. I don't believe it is a question that should be asked. I believe there are variations of questions that could be asked, particularly when I ask at the end if there's any reason whatsoever that I have not inquired about that may affect your service. I think that should be sufficient. So I'm not going to ask the question you want me to ask, Mr. [appellant's counsel].

[APPELLANT'S COUNSEL]: One last sentence, Judge. They may not know you're talking about race if you ask that. That's why the question is

> specifically formulated to get at race. The question is narrowed. It dances around it.
>
> [THE COURT]: I don't believe it dances around it because interestingly enough, Mr. [appellant's counsel], I have asked that question and I have had jurors come back with issues with either African Americans or Hispanics. I believe that question covers it all.
>
> [APPELLANT'S COUNSEL]: Well, just because some people get it, Judge, doesn't mean we're not entitled to want to make sure that all of them get it. That's what the question is about.
>
> [THE COURT]: I don't believe you're entitled to that question, so I'm not going to ask it.

During the voir dire questioning of the entire panel, the trial judge asked two general questions about potential biases: (1) "Does any member of the jury panel have any social, religious, moral, philosophical or any other personal reason that may affect your service in this case?" (2) "Members of the panel, is there any other reason that I have not already inquired about that may affect your service or that you want to bring to my attention?" Numerous jurors responded affirmatively to each of these catchall questions. The court had instructed the members of the panel: "If you hear a question and you're not sure whether or not you should stand, do stand, give your number when called upon, and then we'll inquire from you a little later why you weren't sure whether or not to stand."

The jury selection process took nearly two full days. After the court concluded asking questions of the entire panel, each juror who had responded affirmatively to any of the questions was called in to a separate room where the juror was asked follow-up questions by the judge, after which attorneys for each side were given the opportunity to

ask the juror additional questions. The overwhelming majority of the panel had answered at least one question because the plenary session asked whether jurors had any "strong feelings" about firearms, the charge of murder, or violence between individuals who are involved in a relationship. A large portion of the panel also responded affirmatively when the court asked if serving on a jury for two weeks would create a hardship. *But cf. Wright v. State*, 411 Md. 503, 512 (2009) ("The proper inquiry is not how many jurors *were* struck, but how many jurors *should have been* struck.").

The record does not reflect the racial composition of either the jury that was eventually seated in the case or the two venire panels.

Appellant contends that the court committed reversible error in refusing to ask the venire: "Would any juror . . . have any serious, strong feelings about the race of the defense lawyers in this case?" Appellant asserts that, "when requested, it is mandatory that the trial judge ask a voir dire question aimed at exposing one's racial biases." In support of that contention, appellant cites *Wright v. State*, 411 Md. 503, 511 (2009), *White v. State*, 374 Md. 232, 242 (2003), *Dingle v. State*, 361 Md. 1 (2000), *Hernandez v. State*, 357 Md. 204, 219 (1999), and *Hill v. State*, 339 Md. 275, 285 (1995). But none of those cases held that it is mandatory that a question be asked pertaining to racial bias against defense counsel. And no such question appears in Maryland State Bar Association's MODEL JURY SELECTION QUESTIONS FOR CRIMINAL TRIALS, published in 2018 [https://perma.cc/SCG4-4XAK (last visited on December 2, 2020)]. That publication includes a model question for inquiring about possible bias based upon

personal traits (including race) of *the defendant*—Model Question 15—but no question that would inquire about prejudice against a party's attorney. There are, however, two model catchall questions—Model Questions 31 and 32—which ask: "Do you hold any moral, religious, or ethical conviction or belief that would prevent you from weighing the evidence and returning a fair and impartial verdict?" "Is there anything not yet mentioned that could affect your ability to make a fair and impartial judgment in this case? In other words, is there anything you haven't yet told us that could affect your ability to base your judgment solely on the evidence presented in the courtroom, or to follow the law as the court will instruct you?"

Although we agree that prejudice against an attorney for either party to a proceeding would constitute grounds to strike a juror for cause, we are unwilling to hold that a trial judge who declined to ask a requested voir dire question for which there was no precedent committed an abuse of discretion in the conduct of jury selection. As noted above, the Court of Appeals stated in *Collins*, 452 Md. at 624, even for the "mandatory subjects of inquiry," no specific question or procedure is required. "*In the end, the standard* for evaluating a court's exercise of discretion during the voir dire *is whether the questions posed and the procedures employed have created a reasonable assurance* that prejudice would be discovered if present." *Id.* at 623-24 (emphasis added; internal quotation marks and citation omitted).

Here, the trial court asked two catchall questions, which were similar to Model Questions 31 and 32, and then conducted extensive individual interviews, during which

appellant's counsel were permitted to ask follow-up questions. Although the trial judge *could have* posed a question more directly targeted at discovering prejudice against counsel for either party, we are satisfied that "the questions posed and the procedures employed have created a *reasonable* assurance that prejudice would [have been] discovered if present." *Id*. (emphasis added).

III. Jury consultant

Appellant retained a jury consultant to assist with jury selection, and contends on appeal that the trial court abused its discretion because it "placed numerous restrictions on the jury selection process both individually and collectively, that operated in such a manner as to deny Mr. Muscolino's right to a fair and impartial jury, the right to due process and the right to the effective assistance of counsel." Appellant complains that the court abused its discretion in: 1) not allowing him to have advance access to the list of prospective jurors before the first day of trial; 2) not permitting the jury consultant to be in the jury room where the court and counsel conducted the individual questioning of jurors during voir dire; 3) not allowing appellant's team of attorneys to communicate electronically with the jury consultant during voir dire; and 4) providing "insufficient time [only 30 minutes] to consult with [the] jury consultant" before the parties were required to begin exercising their alternating strikes to jurors pursuant to Maryland Rule 4-313(b). *See Pietruszewski v. State*, 245 Md. App. 292, 303, *cert. denied*, ___ Md. ___, 2020 WL 6578422 (2020). We conclude that none of these rulings by the trial judge,

either individually or collectively, regarding the participation of a non-attorney jury consultant constituted an abuse of discretion by the trial court.

Maryland Rule 4-312(c) provides:

> **(c) Jury list.**
>
> (1) *Contents*. Subject to section (d) of this Rule, before the examination of qualified jurors, each party shall be provided with a list that includes each [prospective] juror's name, city or town of residence, zip code, age, gender, education, occupation, and spouse's occupation. Unless the trial judge orders otherwise, the juror's street address or box number shall not be provided.
>
> (2) *Dissemination*.
>
> (A) Allowed. A party may provide the jury list to any person employed by the party to assist in jury selection. With permission of the trial judge, the list may be disseminated to other individuals such as the courtroom clerk or court reporter for use in carrying out official duties.
>
> (B) Prohibited. Unless the trial judge orders otherwise, a party and any other person to whom the jury list is provided in accordance with subsection (c)(2)(A) of this Rule may not disseminate the list or the information contained on the list to any other person.

The Rule requires that each party be provided with a list of possible jurors before voir dire, but is silent as to a how long before, stating simply "before the examination of qualified jurors." When defense counsel requested advance access to the list at a hearing four days before trial was scheduled to begin, the motion judge expressed concern about dissemination of personal information about prospective jurors, and, although it indicated it appreciated trial counsels' desire to have the information earlier, the court said: "I'm going to exercise [my] discretion and in light of the security issues with respect to the

privacy of jurors and . . . weighing that or balancing that against the right of counsel to formulate appropriate voir dire questions for use by the Court[,] and deny the motion."

The Court of Appeals has held: "The decision as to the method and extent of courtroom security is left to the sound discretion of the trial judge." *Miles v. State*, 365 Md. 488, 570 (2001). A trial judge has a similar degree of discretion with respect to the method and extent of providing for security of a jury list. We perceive no abuse of discretion in the court's decision to provide the list of prospective jurors to counsel at the beginning of jury selection on the first day of trial.

Next, appellant contends that the court abused its discretion in not allowing his jury consultant to be present in the room where the court and counsel conducted individual follow-up questioning of jurors regarding their responses to voir dire questions. This issue arose as follows. On October 23, 2017, the first day of voir dire, appellant asked for his jury consultant to be permitted to be present in the room where the follow up questioning was conducted, and the following colloquy ensued:

> [APPELLANT'S COUNSEL 1]: Your Honor, I mentioned to you earlier and asked Ms. Celeste O'Keefe, our jury consultant who is a consultant retained by [appellant], to assist in the jury selection process. We're asking that if we were in the -- for example, if we were doing this in open court, Ms. O'Keefe would be there and she'd have a chance to listen to what's going on and draw some assessment and actually consult with us as we were doing this in open court. Because we're doing this in chambers, Ms. O'Keefe now doesn't have the ability and we don't have the ability to consult with her as we are eyeballing and discussing the potential jurors. And she doesn't get the chance to see those jurors as we're discussing it and hear their answers. Now, I understand if we had done this at the bench outside she may not be able to be at the bench, but at least we would have the ability to have one of us go back and consult with her as it's happening real time.

We're now in the jury room. We're just asking she be allowed to sit in the corner over here so that we could consult with her, if necessary, during the process. It is virtually impossible to do that with her being outside in the courtroom and us being in here. And there is no harm, no foul to the State, none to the Court. There's no inconvenience because just as she sits in the courtroom, she would sit in here. She's not going to interact with the jurors. She's not going to say anything to the jurors. So there's just no, at least that I can see it, no rational reason not to allow her in to listen and consult with us as a paid volunteer.

[APPELLANT'S COUNSEL 2]: And Your Honor, we can't get the benefit of her service. Ninety percent of her service is her ability to hear what the juror is saying and their demeanor as they answer questions.

* * *

[THE STATE]: Your Honor, the State would object. Ms. O'Keefe is not a member of the Bar. Just because we are back here in the jury deliberation room doesn't make this any more [sic] a formality. Non-members of the Bar are not permitted to sit at the trial table. They are not permitted to participate in any way, shape, or form. Her being back here in still the formal setting, the formal courtroom setting even though it's removed from the courtroom, is still inappropriate. They certainly had the option to pick a consultant who was also a member of the Bar who could also be entered into the case. But it's inappropriate for someone who is not a licensed -- and it's the whole purpose of having lawyers licensed. Once they pass the Bar then they're allowed to sit at trial table and participate in the proceedings. She will be participating in the proceedings, in the State's position, in inappropriate fashion.

[THE COURT]: Anything further?

[APPELLANT'S COUNSEL 1]: Yes, Judge. Let me respond in a couple ways. Number one, [appellant] has a right to have a fair trial. He has the right to have a public trial. The Sixth Amendment certainly protects him in this regard and it's a very important aspect of his Sixth Amendment right to counsel to have people involved in his counsel representation involved.

Let me back up, Judge. The suggestion that the reason why Ms. O'Keefe shouldn't be in here is because no one other than counsel is ever allowed at the trial table is just not accurate. Many cases are tried around

> this country where the State or the government, for example, has a case agent who is a police officer, a detective, etc. and they sit at the trial table. Throughout this country. So the suggestion that the reason why Ms. O'Keefe should not be in here is because no one other than attorneys are allowed to sit at trial table is just false. It's not -- even in the State of Maryland there's a case agent exception.
>
> [THE COURT]: Thank you. It is the trial judge's discretion the manner in which jury selection is conducted. [Appellant] has the assistance of counsel, four counsel, to assist him in selecting a jury in this matter. Although you have hired a paid consultant, that does not mean she has a right to be involved in the court proceedings. And I actually take issue with your remarks that it would not be disruptive to this Court. Having her in here to go back and forth and consulting with her after each juror, whether it's done here or whether it's done at sidebar, I would find that rather disruptive, quite frankly. I don't believe [appellant] has an absolute right to that. He has a right to have an attorney represent him to help him select this jury, and that's what he has. He has four. So your request is denied.
>
> [APPELLANT'S COUNSEL 1]: Your Honor, thank you, and I'm not asking you to change your mind, even though I would love you to. My point is that if that's the aspect that the Court finds difficult, whether we consult with her during the jury selection, we'll allow her to keep her notes, take her notes and consult with us when the jurors are not here and we're back in the courtroom where it will not be disruptive. So we'd make sure her involvement would not be disruptive.
>
> [THE COURT]: When the Court calls a juror in, I deal with challenges for cause after the juror leaves the jury room. We're going to be dealing with those. The only thing that we're going to be doing back in the courtroom is when you ultimately get to select the jury. And before the jury selection process, I give the attorneys an opportunity to review their lists and strategize as to which jurors they want to keep and don't want to keep. I believe that would be sufficient. Thank you.

Voir dire questioning of individual jurors continued until 8:42 p.m. on October 23, and resumed the next morning. Although appellant's request to have his jury consultant present in the jury room for individual voir dire had been denied the day before, the State raised an objection that it appeared to the prosecutors that appellant's attorneys, while in

the jury room, were communicating electronically with the jury consultant, who was outside the jury room. The transcript reflects the following exchange:

> [THE STATE]: There is another issue, though, I think needs to be addressed, and that is it is apparent from what has transpired that [Appellant's Attorney 3] is receiving communications from outside while he's in the courtroom -- and this is still technically the courtroom -- and that is improper. Everyone is supposed to have phones off except for calendars and so on. It's obvious that Miss -- I'm sorry, the young lady [that] was given the jury list, left the courtroom, gave it to someone, and [Appellant's Attorney 3] is receiving messages while we are in session. Your Honor, that is improper because we all are advised that Internet is supposed to be turned off, and to get outside messages from someone who was actually told they couldn't be in here, Miss . . . O'Keefe. That's just a way of circumventing that.
>
> [APPELLANT'S ATTORNEY 1]: Judge, I gotta tell you, this is really some reaching. I don't even understand the State's angst over this. I just don't understand it. Nothing that we're doing is impeding the State's right to a fair trial here. Nothing. All we're doing is assisting our client in receiving a fair trial when he's facing the most serious charge one can face. I don't understand this angst that they seem to have about everything that we're doing. We do it this way, it's a problem. Whatever we do, it's a problem with them that they have some angst over and I don't understand it. Do they not want him to receive a fair trial? Should he just capitulate and say, I'm guilty? I don't understand this at all.
>
> [THE COURT]: I don't get the sense from the argument that the issue is precluding Mr. Muscolino from having a fair trial. That's pretty far removed from everything --
>
> [APPELLANT'S ATTORNEY 1]: But it's not.
>
> [THE COURT]: Let me finish, [Appellant's Attorney 1].
>
> [APPELLANT'S ATTORNEY 1]: I'm sorry, Judge.
>
> [THE COURT]: Mr. Muscolino has had the benefit of four attorneys in here. I was clear about the ruling I made previously concerning not allowing the jury consultant in the jury room and I agree with the State that by then using electronic devices, it does circumvent that ruling. And I do

have a rule that I do not allow attorneys to use electronic devices and attorneys do ask me, ["]Can I turn my phone on to check my calendar?["]

So to the extent you have been receiving communications, it's unbeknownst to me. I do understand attorneys take notes with their computers and I don't have issues with that, but in terms of communicating to anyone outside, that is prohibited. So I'm going to instruct you not to do that in the jury room at all.

[APPELLANT'S COUNSEL 3]: Yes, Your Honor. And my understanding is we're all turning our cell phones off? Because we've all been sending and receiving messages.

[THE COURT]: Yes. I don't want text messages in here and not at the trial table. When I told the jurors to put cell phones away, I saw things on the trial table. I heard them beep. If you need to type on your computer because you're taking notes, I'll allow that, but no communications. Do you understand?

[APPELLANT'S COUNSEL 1]: Yes, Your Honor.

[APPELLANT'S COUNSEL 2]: Your Honor, let me add something to what [Appellant's Counsel 1] says. In the modern age, lawyers use cell phones extensively during trial. We do it to do legal research. We use it to message our staff if we need them to do something. We do it for a complete variety of things. Your Honor, what we were doing was communicating which jurors were no longer in consideration so we could narrow our investigation. We were also receiving the results of that investigation so that we could use it contemporaneously when we're talking to a juror. Now, I don't see anything wrong with that. I believe we have a First Amendment right to do that. I believe that proper trial preparation requires that and there's nothing either unethical or wrong about it.

Now, I understand the Court's legitimate concern that there can be some interference by non-lawyers or people who forget to turn off the indicators that the cell phone is working, but we know the ethical rules and you have nothing to fear from us. I think this is a rule that is aimed at the public at large, which is largely unsophisticated with the dos and don'ts. So how are we supposed to get the assistance that we really have the right to get unless we use a device the way we've been using it?

[THE COURT]: I don't agree with that, [Appellant's Counsel 2]. I've been pretty clear about my rules concerning that, about my rules about what happened in here concerning the consultant. While I understand we have modern technology and there are different ways of receiving information, it ultimately is up to the trial judge who has the discretion in terms of how electronic devices are used in the courtroom. There's not an automatic right to use it.

So I have made my ruling. I'm going to stick with that ruling and I'm going to ask you, unless you need it to type, do not have on the electronic devices. And quite frankly, just put them away because they are distracting.

[APPELLANT'S COUNSEL 2]: Well, I object.

[APPELLANT'S COUNSEL 1]: Your Honor, can I just ask, since you have the discretion and obviously we did not understand it the way you are wording it now, I do know there are many courts who say to turn phones off in the courtroom. You're not the only one. I acknowledge that. But since you said you do have the discretion, the Rule that we just read in fact says the list can be disseminated to people who are hired to assist. If Ms. O'Keefe can't be in here and we can't communicate with her outside, it almost defeats the purpose of the Rule to have her be able to get the list to assist us if we can't communicate with her when we can use the information. Because if we communicate with her after the fact, for example, if we didn't communicate with her a moment ago we wouldn't have -- I hear what you're saying about him trying to get off jury duty, but we don't know. I think that that was a benefit to all, including the State, to have the information we got. I'm not saying everything we do is going to be a benefit to all because it's not designed to be a benefit to all, not even a benefit to the defendant, but, since you do have the discretion, can we apply to you to allow us on this occasion to use the information in this case? We know it's not going to be an all-the-time event, but I'd ask you to use your discretion and not just rely on "this is the way it normally is."

[THE COURT]: I personally don't always just subscribe to "this is the way it is." Yesterday when you made your request concerning the consultant I considered it and I made my ruling that I felt it was disruptive, and I continue[] to feel that way. It is disruptive. I also informed you that I would give you an opportunity prior to the selection process to consult with her regarding any assistance in selection. But I made it clear that Mr. Muscolino is receiving the assistance of four attorneys in this case. He is

> entitled to have the assistance of counsel. I do not find that my rulings in any way impede that right that he has.
>
> So I am sticking with my ruling. We are moving forward. I will give you an opportunity, as I said yesterday, before we start the selection process, as I do in all my cases, for you to review your lists over again to determine strategically how you want to go about the selection and then we will select at that point.
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> [APPELLANT'S COUNSEL 2]: One last thing --
>
> [THE COURT]: [Appellant's Counsel 2], I am not --
>
> [APPELLANT'S COUNSEL 2]: I just --
>
> [THE COURT]: No, [Appellant's Counsel 2]. No more.
>
> [APPELLANT'S COUNSEL 2]: All right. I'll make my record later.

Appellant argues to this Court that the trial court's refusal to permit his team to communicate electronically with his jury consultant after the court had already ruled that the jury consultant could not be in the jury room was an abuse of discretion. He contends that, instead of exercising discretion, the court applied a hard and fast rule that it did not allow attorneys to use electronic devices, without "consider[ing] the particular circumstances of the case." Appellant further contends that the court's actions with regard to the jury consultant impaired his right to due process, an impartial jury, and effective assistance of counsel.

But appellant cites no case standing for the proposition that a defendant is entitled, under the Constitution, to the unfettered use of a jury consultant. This appears to us to be a matter in which a trial judge has broad discretion. As the Court of Appeals noted in *City of Bowie v. MIE Properties, Inc*., 398 Md. 657, 684 (2007):

> As a general proposition, "[t]rial judges have the widest discretion in the conduct of trials, and the exercise of that discretion should not be disturbed on appeal in the absence of clear abuse. Thus, 'a trial judge maintains considerable latitude in controlling the conduct of a trial subject only to an abuse of discretion standard.'" *Tierco Md., Inc. v. Williams*, 381 Md. 378, 426, 849 A.2d 504, 534 (2004) (quoting *Johns Hopkins Hosp. v. Pepper*, 346 Md. 679, 700, 697 A.2d 1358, 1368 (1997)) (citations omitted).

Here, it was within the trial court's discretion to decline to permit the jury consultant to sit in on the questioning of individual jurors, and also within the trial court's discretion to restrict use of electronic devices for communications between counsel and the jury consultant.

Finally, appellant contends that his attorneys were not granted adequate time to consult with the jury consultant prior to the exercise of their peremptory strikes. After nearly two full days of voir dire questioning, the court stated that it would give the parties fifteen minutes to review their notes before beginning to strike jurors. Appellant asked for 45 minutes, and, when the trial judge refused to grant that much time, appellant's counsel asked: "How about 30 minutes?" The court agreed to give the parties 30 minutes, and a recess began at 6:36 p.m. When the court reconvened 37 minutes later at 7:13 p.m., appellant asked for "at least another hour and a half." The State objected, noting that the jurors had already had a long day. The court denied the request for additional time to prepare for striking the jury. At that point, appellant moved for a mistrial, asserting that not giving him "enough time to go over a lengthy number of strikes" was "a fundamental denial of basic justice." The motion for mistrial was denied, and a jury was selected.

Appellant now argues that the court's refusal to allow more than 30 minutes to consult with his jury consultant was an "arbitrary limit[ation] on counsel's access to and consultation with the jury consultant," and therefore, deprived him of the effective assistance of counsel.

As noted above, trial judges "have the widest discretion in the conduct of trials, and the exercise of that discretion should not be disturbed on appeal in the absence of clear abuse." *MIE*, 398 Md. at 684 (internal quotation marks omitted). We conclude that, given the late hour, it was not an abuse of discretion for the trial court to grant the parties just 30 minutes to prepare to exercise their peremptory strikes, and therefore, it also was not an error for the court to deny the motion for mistrial.

IV. Dr. Brassell's testimony

Appellant's final issue on appeal concerns one answer given during the testimony of Dr. Melissa Brassell, the assistant medical examiner who performed the autopsy of Lara Muscolino. Dr. Brassell testified over objection that, "dependent on body position and bullet trajectory, it is possible that wound paths of the left hand, left shoulder and left side of the neck are due to a single bullet pathway." Appellant contends that it was error to permit Dr. Brassell to testify about this "possible" wound path, pointing out that the doctor did not affirm that this opinion was expressed with a reasonable degree of medical certainty. This evidence, asserts appellant, was "so prejudicial that, overall, it denie[d] the movant a fair trial," and accordingly "a mistrial [should have been] granted." He contends that the evidence was "extremely prejudicial" because it allowed the State "to

argue that [Mrs. Muscolino] was in a defensive position when shot, when, in fact, nothing in evidence, other than the inadmissible report and testimony of the medical examiner, permitted such a conclusion."

Quoting Judge Lawrence Rodowsky's concurring opinion in *Mayor and City Council of Baltimore v. Theiss*, 354 Md. 234 (1999), the State responds that medical experts "are not required to render their opinions with the talismanic words 'reasonable medical certainty' or 'reasonable medical probability' in order for the opinion to be admissible." *Id*. at 261. But we note that Judge Rodowsky also pointed out in *Theiss* that "such evidence must be sufficiently probable and not be based on speculation or conjecture." *Id*. at 262.

We conclude that Dr. Brassell's testimony was admissible to provide a possible explanation, based on the doctor's expertise, of why six bullet wounds were detected but only five shots were heard on the Nest recording.

But, regardless of whether the court erred in admitting this one portion of Dr. Brassell's testimony, we agree with the State that any error was, at most, harmless. We conclude from our review of the extensive evidence in this case, which was admitted during a nine-day trial at which approximately 180 exhibits were introduced, that any error in the admission of this bit of testimony was harmless beyond a reasonable doubt.

In *Taylor v. State*, 407 Md. 137, 164-65 (2009), the Court of Appeals said:

> We recently addressed the application of the harmless error rule in *Bellamy v. State,* 403 Md. 308, 332–33, 941 A.2d 1107, 1121 (2008) (internal citations omitted), when Judge Glenn T. Harrell, Jr., writing for the Court, noted:

> In *Dorsey v. State*, . . . we adopted the test for harmless error announced by the Supreme Court in *Chapman v. State*[, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)] . . . . As adopted in *Dorsey*, the harmless error rule is:
>
> > When an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.
>
> In performing a harmless error analysis, we are not to find facts or weigh evidence. Instead, "what evidence to believe, what weight to be given it, and what facts flow from that evidence are for the jury . . . to determine." "'Once it has been determined that error was committed, reversal is required unless the error did not influence the verdict; the error is harmless only if it did not play any role in the jury's verdict. The reviewing court must exclude that possibility beyond a reasonable doubt.'" "'**To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record**.'" The "harmless error rule . . . has been and should be carefully circumscribed." Harmless error review is the standard of review most favorable to the defendant short of an automatic reversal.

(Emphasis added.)

"Everything else the jury considered on the issue in question [*i.e.*, whether appellant murdered Lara Muscolino], as revealed by the record" included the following.

The surveillance video from the Nest Cam recorded both audio and video, and showed the interior of the Muscolinos' home on August 31, 2016. The recorded video relevant to this incident showed a six-minute, seven-second period of time during which appellant entered the kitchen and walked up the stairs to the bedroom he shared with Lara Muscolino and closed the door; Lara is then heard saying: "Stop it, don't point that thing at me," and "Stop it, Ricardo." Lara is then heard saying Daughter's name, and five gunshots, interspersed with Lara's screaming, rang out. Appellant is then seen abruptly exiting the bedroom and leaving the house.

Thereafter, at approximately 11:30 p.m., two 911 calls were received by Harford County Emergency Services reporting the shooting at Windswept Court. At 11:31.41, a female called. This call was placed by Daughter, and the audio of her sixteen-and-a-half-minute conversation with the 911 operator was played for the jury and admitted into evidence as State's Exhibit 16. In this call, Daughter told the operator that she believed her father had just shot her mother.

At 11:32.34, there was a hang-up call, and at 11:33.33, a man called from the same number and told the 911 operator: "go to 2303 Windswept Court." The phone number of latter two calls was identified as appellant's.

Within minutes, at 11:43 p.m., appellant appeared at the Northern Precinct of the Harford County Sheriff's Office to turn himself in. Lieutenant Steven Dunlop, the shift commander on duty at the time, testified that he did not even know what appellant was referring to when he said he was wanted and asked to be cuffed, but, upon listening to the

radio dispatch, Lt. Dunlop realized the address on appellant's license was the same as that in the call for response to a shooting on Windswept Court in Fallston that had just come across the radio.

Also admitted into evidence as State's Exhibit 167 was the recording of two calls about the murder between appellant and a friend, Ilkhan Omar, made while the appellant was incarcerated and awaiting trial for the instant offense. The jury heard appellant make a variety of inculpatory statements during the recordings, including that "the kids were locked up inside their rooms. They didn't see the stuff; you know that, right? . . . it was not in front of the kids," and "I fucked everything up."

We are persuaded, beyond a reasonable doubt, that the medical examiner's testimony that it was "possible" that one bullet caused three wounds to Lara's left side did not influence the jury's verdict that appellant murdered Lara Muscolino because it was clear that five shots were fired while appellant was in his wife's bedroom, and the medical examiner's testimony about the possibility of a single bullet causing multiple wounds was unimportant in relation to everything else the jury considered. *DeVincentz v. State*, 460 Md. 518, 560–61 (2018) (an error in admitting evidence is harmless if the "error was unimportant in relation to everything else the jury considered in reaching its verdict").

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