Circuit Court for Montgomery County
Case No. 123592

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2516

September Term, 2016

RAMINDER KAUR

v.

STATE OF MARYLAND

Wright,
Kehoe,
Shaw Geter,

JJ.

Opinion by Kehoe, J.

Filed: June 7, 2019

After a trial by a jury in the Circuit Court for Montgomery County in 2014, Raminder Kaur was convicted of first-degree murder, conspiracy to commit first-degree murder, and the use of a handgun in a crime of violence. She filed a motion for a new trial based upon assertions of ineffective assistance of counsel. Representing the State at the motions hearing were the assistant state's attorneys (the "Prosecution Team") who represented the State at trial. Through discovery, the Prosecution Team obtained access to the file of Ms. Kaur's defense counsel. The file contained a considerable amount of privileged information, including communications between Ms. Kaur and her lawyers, communications between her lawyers and their support staff, and her lawyers' investigative and strategic work-product. After an evidentiary hearing, the circuit court granted Ms. Kaur's motion and ordered a new trial. Ms. Kaur then filed a motion for a protective order to bar the Prosecution Team from representing the State at the second trial. Although the court declined to disqualify the Prosecution Team, it granted other relief that the court thought was sufficient to protect Ms. Kaur's constitutional rights. At the second trial, Ms. Kaur was again found guilty on all counts.

She raises two issues on appeal:

> 1. Did the trial court err in failing to protect Ms. Kaur from being tried by a prosecution team with extensive knowledge of Ms. Kaur's privileged communications with her defense counsel, communications among counsel about trial strategy, and investigative and strategic work product?
>
> 2. Did the trial court abuse its discretion in excluding expert testimony on the cognitive processes that could cause an eyewitness to mistake the gender of

> a perceived individual, where a principal issue at trial was the accuracy of eyewitnesses' recollections that they saw a woman at the scene of the crime?

Ms. Kaur's first contention raises a difficult issue of first impression in Maryland. In the absence of definitive guidance from the Court of Appeals, we conclude that Ms. Kaur was obligated to demonstrate that any putative error on the trial court's part was prejudicial. We hold that she failed to do so. As to the second issue, we hold that the trial court did not abuse its discretion in excluding expert testimony about the cognitive processes of eyewitnesses. We will affirm the convictions.[1]

Background

The Murder of Preeta Gabba

On October 12, 2013, Preeta Gabba, the former wife of Baldeo Taneja, was shot and killed outside of her home in Germantown, Maryland. We adopt the facts as summarized by Judge Sharer for this Court in *Taneja v. State*, 231 Md. App. 1 (2016), *cert. denied*, 452 Md. 549 (2017):

> Preeta Gabba was shot three times at close range, resulting in her death, while walking in Germantown, Montgomery County, at about 7:45 on the morning of October 12, 2013. Her former husband, Baldeo Taneja, and his wife, Raminder Kaur, were charged in Gabba's murder. They were tried together and convicted by a jury of first-degree premeditated murder, conspiracy to

[1] Because of a series of events that we will presently explain, Ms. Kaur's attorney-client privilege is currently in tatters. This fact is recognized by appellate counsel for both parties. Ms. Kaur's briefs and the State's brief were filed under seal, and the versions available to the public have been heavily redacted. To the extent possible, this opinion avoids specific discussions of privileged or other sensitive information pertaining to Ms. Kaur's interactions with her counsel, as well as their work product.

commit first-degree premeditated murder, and use of a handgun in the commission of a felony.

* * *

The State's theory of prosecution was that Taneja and Kaur conspired to kill Gabba, and that it was Kaur who fired the fatal shots. The State's case was largely circumstantial and centered on motive and opportunity. The State produced evidence that the gun used to kill Gabba was found in the rear seat of Taneja and Kaur's car 30 hours after the murder, and that Taneja had purchased the gun five weeks earlier. The defense argued lack of criminal agency and, more particularly, that others had motive to kill Gabba.

Viewing the evidence in the light most favorable to the State, the following was adduced at Taneja's trial.

Gabba and Taneja were married in India in 2002, and continued to live there for several years. In 2006, Taneja moved to the United States; Gabba followed in 2009. They lived in the Germantown area, but not together. Two years later, Gabba and Taneja divorced, and soon afterward Taneja married Kaur and moved to Nashville, Tennessee. Gabba remained in the Germantown area[.]

On the morning of Gabba's murder, she was en route to her job, walking from her home to the bus stop, as she had done regularly for the preceding three years. Three eyewitnesses testified to the events at the murder scene.

[A woman] was driving her teenage son to his school in the 19700 block of Crystal Rock Drive, a residential area, when they heard several gunshots. [The woman] slowed her car and saw two women ahead of her. One of the women, later identified as Gabba, started crossing the street in the middle of the block, while the other woman was close behind her. As Gabba fell into the street in front of [the witness's] car, the second woman ran away. [The witness] and her son described the woman who ran away, in part, as wearing a bright orange scarf. They initially described both women as African-American, although, at trial, both were less positive about their race. Neither saw anyone else in the immediate area at the time.

A man living in an apartment about 100 yards from where the shooting occurred testified that he heard gunshots and looked out his window. He saw a woman, later identified as Gabba, lying on the ground, and ten feet away another woman, who exhibited a slight limp, was running away. The witness

described the woman who was running away as in her late 40's or early 50's with "brownish" skin color and wearing a bright head scarf. Like the [driver and her son], he initially told the police that the woman was African–American, but, at trial, was less positive of her race.

Suspicion quickly fell on Taneja and Kaur. Several hours after the murder, around 3:30 p.m., Montgomery County Police Department homicide detectives called Taneja's cell phone, but it went directly to voice mail, as did several additional calls. Warrants were obtained for Taneja and Kaur, who were arrested in Tennessee around 2:00 p.m. the day following the murder, as they were driving away from their home. One of the detectives observed that Kaur walked with a limp.

The police searched the car and recovered a backpack containing a wig, black hair dye, a black hoodie, and a plastic bag. In the plastic bag was a .357 Ruger LCR revolver, which later testing and examination determined to be the murder weapon. The plastic bag also contained a holster for the .357 Ruger, and a 100 Ruger revolver. Inside Kaur's purse the police found a note in her handwriting that read: "You calm down. We are now in Tennessee near my home." A global positioning system device (GPS) was recovered from the front console of the car. Inside Taneja's wallet was a piece of paper on which Kaur had written Gabba's address.

A search of Taneja's residence recovered documents with a note on top in Kaur's handwriting that read, "Dragon story and other court documents." The police also recovered a composition notebook with different handwriting that read, in part, "No brass, no evidence."

* * *

Two firearm and tool mark identification experts testified that the three bullet specimens recovered from Gabba's body were all fired from the .357 Ruger LCR revolver that was recovered from Taneja's car. Taneja's DNA was found on both guns seized from his car.

The State also presented evidence to support its theory of Taneja's and Kaur's motive to kill Gabba, including that, in 2009, when Gabba moved to the United States from India, Taneja and Gabba were experiencing marital discord. While Gabba lived in a condominium in Germantown with one of Taneja's sons, Taneja and Kaur lived nearby and held themselves out as husband and wife.

In 2010, Gabba and Taneja began divorce proceedings, which became "very contentious" even though they had little property and no children together. The State introduced evidence that during the divorce proceedings, Taneja asked his son and Kaur to spy on Gabba, and that Taneja referred to Gabba as "Dragon Lady," as did his son and Kaur. At one point during the divorce proceedings, Gabba, acceding to Taneja's demand, left the family home. She later returned, pursuant to a court order, to find that Taneja had erected walls so she had access only from the entry door to her bedroom.

The State presented evidence that, although the divorce became final in July 2011, Taneja failed to honor their divorce agreements, and their interactions continued to be acrimonious. Indeed, at the time of Gabba's murder, Taneja still had not transferred their property in India as required by the divorce settlement, despite several requests by Gabba.

Additional evidence was offered by the State relating to Taneja's [obligation] to pay alimony in the amount of $2,400 each month for three years. Alimony was to terminate upon the death of either party. By February 2013, Taneja had fallen three months behind in his alimony obligation, prompting Gabba to send several demands for payment, via e-mail. Eventually, her attorney filed a contempt petition against Taneja who, in response, filed a counterclaim for $100,000. The contempt hearing was scheduled for October 10, 2013, two days before the murder, but several days before the hearing, their attorneys negotiated an agreement whereby Taneja agreed to pay the arrears within 90 days. The State also presented evidence of Taneja's and Kaur's opportunity to kill Gabba.

About five weeks before Gabba's murder, Taneja attended a day-long gun training class in Tennessee. The class included four hours of instruction and four hours of shooting range experience that would allow him to obtain a "handgun carry permit." In his testimony, the instructor recalled that, at the first class, Taneja entered the classroom with a woman and sat in the last row. When the woman was asked to leave because she had not paid to attend the class, Taneja moved to the first row. The instructor particularly remembered Taneja because he took "a ton of" notes. Among the instructor's recommendations to the class participants was that they purchase a revolver rather than a semiautomatic, because the latter requires much more training for accuracy than a revolver. He further remembered telling the class that a semiautomatic "spits out" shell casings that can later be matched to the gun, but a revolver does not.

On September 28, 2013, two weeks before the murder, Taneja purchased two revolvers from a gun store in Tennessee: a .357 Ruger LCR, which was described as a snub-nosed revolver designed with a "concealed hammer" so it would not get hung up on clothing, and a 100 Ruger GP. Additionally, Taneja purchased a holster for the .357 and ammunition for both guns. Kaur was present in the store when Taneja purchased those items.

Around 7:00 p.m. on October 11, the night before the murder, Taneja and Kaur checked into the Red Roof Inn in Germantown, about eight miles from where Gabba was shot. From the GPS recovered from Taneja's car, the police learned that at 9:58 a.m. the next morning—October 12—the GPS device traveled toward the District of Columbia.

The evidence disclosed that both Taneja and Kaur were involved in Amway distribution and sales, Taneja since the early 1990's. On the weekend of October 11–13, 2013, Amway held a "Free Enterprise" weekend conference at the Washington Hilton, involving thousands of Amway members. The event started Friday night at 6:00 p.m. and lasted until Sunday at 3:45 p.m. Taneja's Amway sponsor testified that Taneja was aware of the importance of attending the conference.

At 10:44 a.m. on the morning of the murder, Taneja purchased two tickets for the conference. About 30 minutes later, the GPS revealed a stop near the Washington Hilton, a distance of about 19 miles from the Red Roof Inn. At 11:37 a.m., Taneja and Kaur entered the conference, where they were seen by Taneja's Amway sponsor and his wife shortly after they arrived. A short time later the sponsor texted Taneja, inviting him and Kaur to join their group for lunch. Taneja texted back that he could not make it because Kaur was not feeling well. The sponsor's wife testified that Kaur had not appeared unwell when she had seen her earlier. From the GPS device, the police determined that Taneja and Kaur attended the three-day event for less than an hour, leaving the D.C. area shortly after noon. Their car continued westward, stopping in Farragut, Tennessee around midnight. Their travel resumed the following morning around 9:30 and concluded at their home about noon.

The First Trial

The State charged Ms. Kaur and Taneja with first-degree murder, conspiracy to commit first-degree murder, and the use of a handgun in a crime of violence. They were tried

jointly. The Prosecution Team consisted of Marybeth Ayres, Esq. and Jessica Hall, Esq., two experienced attorneys in the Montgomery County Office of the State's Attorney. Ms. Kaur was represented by Alan Drew, Esq., an attorney in the Office of the Public Defender for Montgomery County, who was assisted by Stephen B. Mercer, Esq., Chief Attorney of the OPD's Forensic Division and director of its litigation support group.

Three eyewitnesses testified as to the shooting of Ms. Gabba. None of them were able to identify the shooter but their descriptions of that person's height and weight more closely resembled Taneja, rather than Ms. Kaur. However, all three eyewitnesses also described the shooter as a woman. (We will discuss the eyewitness testimony in more detail later in this opinion.) In its closing argument, the State asserted that an eyewitness account, even under stressful circumstances, was reliable as to a person's gender and race. The jury found Ms. Kaur and Taneja guilty on all counts. This court affirmed Taneja's convictions in *Taneja*, 231 Md. App. at 3–9 (2016).

Ms. Kaur's Motion for a New Trial

After the trial, on behalf of Ms. Kaur, Mr. Mercer filed a motion for a new trial pursuant to Md. Rule 4-331(a) on the basis of ineffective assistance of counsel. The motion alleged that Mr. Drew failed to prepare for trial and had incorrectly advised Ms. Kaur that the trial court would not permit her to testify in her own defense. Attached to the motion was an affidavit, prepared by Mr. Mercer, and signed by Ms. Kaur and by Mr. Drew. Mr. Mercer

did not file an accompanying motion to limit public inspection of the affidavit. *See* Md. Rule 16-912.[2] The affidavit claimed Mr. Drew was deficient in the following ways:

> That Mr. Drew was unprepared for trial and failed to meet with Ms. Kaur at crucial times leading up to trial.
>
> That Mr. Drew did not raise the issue of Ms. Kaur's competency to the trial court.
>
> That Mr. Drew failed to issue out-of-state subpoenas for documents relating to possible defenses.
>
> That Mr. Drew misinformed Ms. Kaur as to who would testify at her trial, and that he did not give timely notice of two expert witnesses to the State, who were thereafter barred from testifying.
>
> That Mr. Drew failed to disclose and/or call character witnesses to testify as to Ms. Kaur's character traits, religious and cultural beliefs, and her relationship with her husband.

The State responded by filing five motions to subpoena the entire investigative and trial files of Mr. Drew and Mr. Mercer, as well as their investigators, experts, and law clerks. At a hearing on the State's motions, Ms. Kaur's counsel requested that limitations be placed on what materials the State could receive because the State was seeking "the entirety of the files of two lawyers and an investigator of the Office of the Public Defender without regard to the specific ineffective assistance claims [Ms. Kaur] made here."

[2] At the time Ms. Kaur's motion for new trial was filed, Rule 16-1009 permitted a party to file a motion to seal or otherwise limit inspection of a court record. As of July 1, 2016, Rule 16-1009 has been replaced by Rule 16-912.

The court granted the State's motions for subpoenas and ordered the defense to turn over Ms. Kaur's entire defense file. The court reasoned that the language in Ms. Kaur's ineffective assistance of counsel claim was so broad that it opened the door to "everything that [her] attorney did and didn't do in preparing her defense in this case[,]" and so the State should have access to the entire defense file. The court found it difficult to conceive of "what would be in the file that wouldn't be relevant," noting the possible exception of evidence of other crimes. If any documents were irrelevant to the issues raised by Ms. Kaur's motion for a new trial, the court suggested to Ms. Kaur that she could file a motion for a protective order for those specific documents.[3]

After a multi-day evidentiary hearing followed by oral argument, the court ultimately concluded that the interests of justice required granting Ms. Kaur a new trial.[4]

[3] In fact, Ms. Kaur did so, filing a motion to seal a transcript from the last day of the post-conviction hearing. Later, Ms. Kaur requested, and the court granted, her motion to seal the court's ruling on her motion for a protective order.

[4] Both Mr. Drew and Mr. Mercer testified at the hearing on the motion for a new trial. Therefore, Ms. Kaur was represented by other counsel in that proceeding.

Ms. Kaur's Motion for a Protective Order

After the court's ruling on her motion for a new trial, Ms. Kaur filed a motion for a protective order "prohibiting the State of Maryland from using at the retrial the privileged information disclosed during the motion for new trial proceedings." In the motion, Ms. Kaur made three requests: (1) that the court should enter a protective order barring the evidentiary use of Ms. Kaur's privileged disclosures; (2) that the State be required to retry Ms. Kaur using a new prosecution team untainted by the privileged disclosures; and (3) that an evidentiary hearing be held to assess the extent of the taint stemming from the disclosure of Ms. Kaur's communications with her prior counsel and their work product. According to Ms. Kaur, her right to a fair trial demanded the appointment of a new prosecution team. She contended that once the State has been exposed to a defendant's privileged information, the State has an obligation to show that there has been no derivative use of the privileged materials. Ms. Kaur was particularly concerned that the Prosecution Team was now aware of any and all trial strategies the defense could pursue at the second trial. Given the extent of the exposure, the Prosecution Team would use the privileged information to its advantage thereby violating her Sixth Amendment rights.

The State opposed the motion. First, the State noted that the Prosecution Team did not intend to use any of the privileged information contained in the case file at Ms. Kaur's retrial. Second, the State noted that, if Ms. Kaur testified at the second trial, her testimony from the post-conviction hearing could be used for impeachment purposes, as could her affidavit and the testimony of any other witnesses at that hearing. Finally, the State argued

that Ms. Kaur's request to bar the Prosecution Team should be denied as unreasonable and unnecessary.

After a hearing, the court granted Ms. Kaur's motion in part and denied it in part. The court found that (1) Ms. Kaur expressly waived her attorney-client privilege; (2) Ms. Kaur's concerns about disclosure of the defense's trial strategy were unfounded because the trial strategy would be different for the second trial due to the change in circumstances; and (3) in any event, any strategy involving expert testimony would be known by the State by virtue of the defense having to disclose its expert witnesses. Specifically as to its finding of waiver, the court concluded that pursuant to *Bittaker v. Woodford*, 331 F. 3d 715 (9th Cir. 2003)—a case that we will presently discuss in detail—Ms. Kaur expressly waived the attorney-client privilege by filing her motion for a new trial based upon ineffective assistance of counsel and so was not entitled to any of the relief she sought.

According to the court, Ms. Kaur waived the attorney-client privilege when she:

> published her affidavit in a public forum which was quickly picked up by the Washington Post, the newspaper of wide circulation, and placed all of this information in the public domain. And that is the classic definition of an express waiver under *Bittaker*, in which all of her communications then are exposed and available to the State.

Based on these findings, the court concluded that "there is little to no evidence that the defendant is suffering or has suffered from the disclosure of a two and half year old strategy that was crafted for a very different procedural circumstance out of a joint trial."

Nevertheless, the court "fearing another round of post-trial proceedings" crafted a remedy as though Ms. Kaur had implicitly waived the attorney-client privilege under

Bittaker.[5] The court noted that pursuant to *United States v. Morrison*, 449 U.S. 361, 364 (1981), its remedy must "be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." In order to protect Ms. Kaur's Sixth Amendment rights, the court prohibited the State from making use of any of the privileged information it acquired, as well as making use of any information contained in Ms. Kaur's affidavit. The privileged information included "any testimony relating to the attorney-client communication that [Ms. Kaur] or her attorney produced at a hearing . . . on this matter." Then, the court reserved on ruling whether the State could use any non-privileged testimony of Ms. Kaur or another witnesses' testimony as impeachment evidence at the second trial.

Finally, and critically to Ms. Kaur's first appellate contention, the court refused to bar the Prosecution Team from retrying the case, finding that such a step was:

> unnecessary to protect [Ms. Kaur] against any prejudice suffered by result of her pursuing her ineffective assistance claim. Any advantage that the prosecutor might have had has been substantially, if not entirely, eliminated by the Court's order on this motion.

[5] The court's remedy was designed to avoid a second-round of post-conviction proceedings. It explained:

> [R]eally only the defendant can waive the privilege, the attorney can't waive the privilege. So, if by the attorney making this decision and waiving her privilege, he's denied her, you know, the protection she otherwise would have had, we'll be right back here four or five years from now, is my concern.

In reaching this result, the court gave significant weight to the State's competing interest in using its experienced attorneys, who have been working on the case for the previous two and a half years, to prosecute the case at retrial. In conclusion, the court explained its justification:

> To afford [Ms. Kaur] the protection she seeks because of disclosures that were made in this case where no protective order was ever sought at any time until now just when counsel asked that this record be sealed in part and where this information was so widely disseminated because of the nature of the case . . . that the Court reasonably concludes it would be extremely difficult to find, certainly, anybody in the State's Attorney's Office currently who hadn't been exposed to that information, and quite probably, anybody in the criminal bar in Montgomery County who hadn't been exposed to that information because it was so widely covered, which means that if I were to require the State to find somebody who had not been exposed to the information, they would almost certainly have to go out of county or find somebody who was a junior or inexperienced [attorney who was not] around when this case was tried two and a half years ago. And I think that is an unreasonable and unnecessary remedy in this case and that the remedy instead that I have tailored, I think, addresses any prejudice that the defendant has suffered.

The Second Trial

At Ms. Kaur's second trial, the defense theorized that Taneja, acting alone and disguised as a woman, shot Ms. Gabba. Supporting the defense's theory was the evidence of the eyewitnesses[6] who, just as in the first trial, provided descriptions of the unidentified shooter's height and weight which more closely matched Taneja's, rather than Ms. Kaur's appearance. (Additionally, as we will explain later, Ms. Kaur also pointed to evidence that

[6] Two of the eyewitnesses testified at the second trial. The third did not, but a police officer read his notes of his interview of the witness to the jury.

Taneja had purchased a disguise just prior to Ms. Gabba's murder.) However, all three eyewitnesses also described the shooter as a woman. (We will discuss the eyewitness testimony in more detail later in this opinion.)

Anticipating that the prosecution would again argue that an eyewitness's identification of race and gender were particularly reliable, the defense sought to call Margaret Kovera, Ph. D., a social psychologist, as an expert witness on the perception, encoding, storage, and retrieval of witnessed events. In her brief, Ms. Kaur asserts that she was "entitled to have an expert who [could] explain how memory works to the jury." The defense proffered that Dr. Kovera would testify that the State's position "is scientifically not true." Specifically, Dr. Kovera would opine that "[t]here are counterintuitive nature aspects to how [] memories are stored in the first place and in how they're retrieved," and that, as a result, the eyewitnesses could have mistaken a man for a woman. For reasons we explain later, the trial court excluded Dr. Kovera's testimony.

At the conclusion of the second trial, the jury again found Ms. Kaur guilty on all charges. She was sentenced to life imprisonment for first-degree murder and conspiracy to commit first-degree murder, and to five years' imprisonment for the use of a handgun in the commission of a crime of violence, all to run concurrently. Ms. Kaur filed a timely appeal.

Analysis

Our analysis is divided into two parts.

In Part 1, we discuss Ms. Kaur's arguments that she is entitled, at the very least, to a new trial because the trial court permitted the Prosecution Team to participate in the second trial. Going to the heart of Ms. Kaur's appellate contentions, there are no reported Maryland decisions that squarely address whether the trial court commits reversible error by refusing to disqualify prosecutors when they *lawfully* obtain knowledge of a defendant's privileged communications. In the two reported cases in which the prosecutors (at least allegedly) obtained such knowledge through improper means, both this Court and the Court of Appeals held that a defendant must demonstrate prejudice before obtaining a new trial. Ms. Kaur asserts that she is entitled to a presumption of prejudice because the Prosecution Team had access to her prior counsels' unredacted files. Because Maryland requires a defendant to demonstrate prejudice when prosecutors obtain access to confidential information through unlawful means, it is difficult for us to conclude that there should be a presumption of prejudice when the prosecutors have acted lawfully, and, in any event, Ms. Kaur has failed to persuade us to the contrary. As an alternative, Ms. Kaur argues that she was, in fact, prejudiced by the trial court's ruling. These arguments are unpersuasive.

Then, in Part 2, we conclude that the trial court did not abuse its discretion when it excluded Dr. Kovera's testimony.

1. The Participation of the Prosecution Team in the Second Trial

Ms. Kaur and the State approach the primary issue in this case very differently.

Ms. Kaur argues that the acquisition of her privileged information by the State was wrongful. Based on that premise, Ms. Kaur suggests that we hold that any wrongful acquisition of a defendant's privileged information by the State is presumptively prejudicial to her. Conceding that there is no Maryland case directly on point, Ms. Kaur urges us to adopt the reasoning of cases such as the Supreme Court of Nebraska's decision in *State v. Bain*, 292 Neb. 398, 872 N.W. 2d 777 (2016). If we do not adopt the approach taken in *Bain*, she argues that she was prejudiced because the Prosecution Team used her privileged information to its advantage at the second trial. Ms. Kaur points to several instances at her second trial in which, according to her, the Prosecution Team made clear use of her privileged information. Finally, Ms. Kaur asserts that the prejudice done to her is so overwhelming that the charges against her be dismissed entirely, or, at the very least, she be granted a new trial.

The State begins with a different premise. According to the State, its acquisition of Ms. Kaur's privileged information was not wrongful. Rather, the State contends that Ms. Kaur waived the attorney-client privilege by filing her post-conviction motion for a new trial based on ineffective assistance of counsel, and her accompanying affidavit. These documents, according to the State, placed Ms. Kaur's privileged information in the public sphere. For this reason, asserts the State, *Bain* is factually distinguishable. The State suggests that *Bittaker v. Woodford*, 331 F. 3d 715 (9th Cir. 2003), provides a more useful analytical approach to this case than does *Bain*. Acknowledging that the Prosecution Team had been exposed to Ms. Kaur's privileged information as a result of the post-conviction

proceeding, the State denies that the Prosecution Team used any privileged information to its advantage at Ms. Kaur's second trial. In any event, the State asserts that Ms. Kaur has not preserved these issues for appellate review because her trial counsel failed to make a timely objection to the circuit court's rulings at her second trial.[7]

Both parties view the analysis in *Bittaker* as instructive but urge us to draw different conclusions from it. In that case, the Ninth Circuit explained that a waiver of the attorney-client privilege may come in two forms: express or implied. 331 F. 3d at 719. Based on the distinction drawn in *Bittaker*, the State contends that the trial court was correct in finding that Ms. Kaur expressly waived the attorney-client privilege. The State also asserts that, by failing to file her affidavit under seal, Ms. Kaur placed the affidavit and its contents in the "public forum." The affidavit then entered the "public domain" when the *Washington Post* circulated its contents. Therefore, reasons the State, Ms. Kaur waived her privilege.

[7] We can dispose of the latter contention quickly. Just prior to the second trial, a hearing was held on a motion, filed by Ms. Kaur, to limit the use of her prior testimony from the post-conviction hearing. In ruling on that motion, the court reiterated its prior ruling that Ms. Kaur:

> generated this issue by filing the motion for new trial and, therefore . . . waived the privilege when she pursued as part of the motion for a new trial that her first attorney was . . . ineffective[.] [We have] sort of been down that road already, [and I] made my bed so to speak.

As the issue was raised to, and decided by, the trial court, there was no reason for defense counsel to object later in the trial. "The purpose of Maryland's preservation rule, Maryland Rule 8–131(a), is '(a) to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings, and (b) to prevent the trial of cases in a piecemeal fashion.'" *Blanks v. State*, 406 Md. 526, 538 (2008) (quoting *Robinson v. State*, 404 Md. 208, 216–17 (2008)).

Ms. Kaur counters that she did not waive her attorney-client privilege for purposes of her second trial. Ms. Kaur interprets *Bittaker* to suggest that the prosecution's proper use of a defendant's privileged materials was limited to litigating the defendant's ineffective assistance of counsel claim, and that the information could not be used by the prosecution for any other purpose. Further, she argues that the trial court's finding of express waiver with respect to both the defense team's case files and the affidavit was erroneous. According to Ms. Kaur, handing over her defense file to the State did not constitute an express waiver because the file was disclosed pursuant to a court order in preparation of a proceeding that placed at issue the nature of the privileged material. She asserts that any waiver that resulted from the filing of her affidavit filed in connection with her motion for a new trial was limited to adjudication of that motion.

We agree with the State that Ms. Kaur waived the attorney-client privilege when she filed her motion for a new trial with its supporting affidavit. Delineating the scope of her waiver is a different and more difficult issue.

A.

The attorney-client privilege "is a rule of evidence which prohibits the disclosure of the substance of a communication made in confidence by a client to his attorney for the purpose of obtaining legal advice." *Blair v. State*, 130 Md. App. 571, 605 (2000) (quoting *Levitsky v. Prince George's County*, 60 Md. App. 484, 491 (1982)). The privilege is "the oldest of the privileges for confidential communications known to the common law." *Newman v. State*, 384 Md. 285, 300–01, (2004); (quoting *Upjohn Co. v. United States*, 449

U.S. 383, 389 (1991)). Although "never given an explicit constitutional underpinning," the existence of the privilege is reflected in the Maryland Attorney's Rules of Professional Conduct,[8] as well as the Maryland Code, specifically, Md. Code (1974, 2013 Repl. Vol.) Courts & Judicial Proceedings Article ("CJP") § 9-108.[9] Related to, but distinct from, the attorney-client privilege is the work product doctrine. "The work-product doctrine, meanwhile, belongs to the lawyer rather than the client, and serves to protect materials from discovery that are not subject to another privilege." *Pratt v. State*, 39 Md. App. 442, 446 n. 2 (1978), *aff'd*, 284 Md. 516 (1979) (internal quotation marks omitted).

Generally, the State's intrusion into the attorney-client privilege will violate a criminal defendant's Sixth Amendment right to counsel. S*ee, e.g.*, *Haley v. State*, 398 Md. 106, 130-31 (2007). However, the attorney-client privilege is not absolute. *Newman v. State*, 384 Md. 285, 302 (2004). Because the client holds the privilege, only the client may waive the privilege, and may do so either intentionally or unintentionally. *Greenberg v. State*, 421 Md. 396, 404 (2011). Regardless of whether the client waives the privilege intentionally or unintentionally, the privilege is deemed waived if the client's "conduct touches a certain

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[8] Md. Rule 19-301.6(a) states:

> An attorney shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by section (b) of this Rule.

[9] Section 9-108 states:

> "A person may not be compelled to testify in violation of the attorney-client privilege."

point of disclosure when fairness requires the privilege to cease." *Greenberg*, 421 Md. at 404 (internal quotation marks and citation omitted). Further, the client "may waive his right to confidentiality [] either expressly or implicitly[.]" *City of College Park v. Cotter*, 309 Md. 573, 591 (1987).

Several Maryland cases have addressed the principle of implied waiver. In *State v. Thomas*, 325 Md. 160 (1992), the defendant asserted he received ineffective assistance of counsel when his attorney allowed him to be interviewed by a psychiatrist for a competency evaluation, post-verdict but pre-sentence, without the presence of counsel. 325 Md. at 169. On the issue of whether the defendant waived the attorney-client privilege by filing a post-conviction motion, the Court of Appeals stated:

> We adopt the universally accepted rule that the [attorney-client] privilege is waived by the client in any proceeding where he or she asserts a claim against counsel of ineffective assistance and those communications, and the opinions based upon them are relevant to the determination of the quality of counsel.

Id. at 174; *see also CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 433 (2012) (A party implicitly waives the attorney-client privilege when the defendant attempts to use the privilege as both a "sword and shield."); and *Parler & Wobber v. Miles & Stockbridge*, 359 Md. 671 (2000) ("[A] privileged party cannot fairly be permitted to disclose as much as he pleases and then to withhold the remainder to the detriment of the [other party]." (internal quotation marks and citations omitted)).

The Court's analysis in *Bittaker* is particularly instructive. After being convicted in California state court and exhausting his state post-conviction remedies, Bittaker filed a

federal habeas corpus petition. 331 F.3d at 716. In his petition, Bittaker raised a variety of ineffective assistance of counsel claims, resulting in a necessary disclosure of information falling within the attorney-client privilege. *Id.* The District Court entered a protective order that: (1) prohibited use of Bittaker's privileged material for any purpose other than litigating the habeas proceeding; (2) prohibited use of any of the privileged information for any purpose other than Bittaker's habeas corpus petition; and (3) prohibited dissemination of the privileged information to other persons or offices, particularly to law enforcement agencies. *Id.* at 717 n.1.

The State of California appealed, contending that Bittaker waived the attorney-client privilege in its entirety, and asserting that the state could not be prohibited from using or disseminating the privileged information. *Id.* at 717. The Court of Appeals for the Ninth Circuit framed the issue before it as whether the waiver extends "only to litigation of the federal habeas petition, or is the attorney-client privilege waived for all time and all purposes—including the possible retrial of the petitioner, should he succeed in setting aside his original conviction or sentence?" *Id.*

In answering that question, the *Bittaker* Court rejected a broad interpretation of the waiver rule because it would "no doubt inhibit the kind of frank attorney-client communications and vigorous investigation of all possible defenses that the attorney-client and work product privileges are designed to promote," and could potentially compel a defendant to choose between asserting an ineffective assistance of counsel claim, thereby

taking a risk that the prosecution will use the defendant's statements against him, or "retaining the privilege but giving up his ineffective assistance claim." *Id*. at 722-23.

Instead, the Court held that a narrower waiver rule would better serve the interest of the courts, the interest of the state "in safeguarding the attorney-client privilege in criminal cases [while] ensuring that the state's criminal lawyers continue to represent their clients zealously," and finally, the interest of the defendant "in obtaining a fair adjudication of his petition and securing a retrial untainted by constitutional errors." *Id*. at 722. The court further observed that although Bittaker "created this dilemma for himself" by bringing an ineffective assistance of counsel claim, the "scope of the required disclosure should not be so broad as to effectively eliminate any incentive to vindicate [one's] constitutional right[]s." *Id*. at 724 (quoting *Greater Newburyport Clamshell Alliance v. Public Service Co. of New Hampshire*, 838 F. 2d 13, 21-22 (1st Cir. 1988)).

In its analysis, the Court distinguished between express and implied waivers. As to the former, the Court explained (emphasis added):

> An express waiver occurs when *a party* discloses privileged information to a third party who is not bound by the privilege, or otherwise shows disregard for the privilege by making the information public. Disclosures that effect an express waiver are typically within the full control of the party holding the privilege; *courts have no role in encouraging or forcing the disclosure*—they merely recognize the waiver after it has occurred. . . . [O]nce documents have been turned over to another party voluntarily, the privilege is gone, and the litigant may not thereafter reassert it to block discovery of the information and related communications by his adversaries. . . .

Id. at 719–20 (citations and footnotes omitted).

In contrast to an express waiver, an implied waiver "allocates control of the privilege between the judicial system and the party holding the privilege." *Id.* at 720 (internal citations omitted). The *Bittaker* Court went on to describe the doctrine of implied waiver (emphasis in original):

> The court imposing the waiver does not order disclosure of the materials categorically; rather, the court directs the party holding the privilege to produce the privileged materials *if* it wishes to go forward with its claims implicating them. The court thus gives the holder of the privilege a choice: If you want to litigate this claim, then you must waive your privilege to the extent necessary to give your opponent a fair opportunity to defend against it. Essentially, the court is striking a bargain with the holder of the privilege by letting him know how much of the privilege he must waive in order to proceed with his claim.

Id. at 720.

When imposing the waiver under an implied circumstance, three considerations require a trial court's attention. First, a court "must impose a waiver no broader than needed to ensure the fairness of the proceedings before it." *Id.* at 721. Thus, when tailoring the scope of the waiver, a court should keep in mind the fairness of the litigant and the needs of the opposing party. *Id*. Second, the holder of the privilege may abandon the claim giving rise to the waiver at any time, thereby preserving the confidentiality of the privileged communications. *Id*. And finally, the holder of the privilege "is entitled to rely on the contours of the waiver the court imposes, so that it will not be unfairly surprised in the future by learning that it actually waived more than it bargained for in pressing its claims." *Id.* As a litigant bound by the terms of the court's order, the party receiving and using the privileged information "implicitly agrees to the conditions of the waiver"; the party may

reject the materials if it does not wish to be bound by the conditions, but it must do so "*before* any disclosure is made." *Id*.

When it ruled on the State's subpoenas for the investigative and trial files of Messrs. Drew and Mercer, the trial court did not place express limitations upon the State's possible use of the information contained in those files for purposes other than litigating the motion for a new trial. (We don't fault the trial court in this regard because the court was not asked by either party to do so.) Nonetheless, the Court's analysis in *Bittaker* is instructive. It is clear to us that the waiver in the present case does not fall neatly into an express/implied waiver dichotomy.

We first address the waiver, if any, resulting from Ms. Kaur's motion for a new trial. For the reasons expressed in *Bittaker*, we conclude that Ms. Kaur did not expressly waive the attorney-client privilege by doing so; rather, we conclude that Ms. Kaur implicitly waived her attorney-client privilege for purposes of the post-conviction hearing. It is unreasonable to treat Ms. Kaur's claim of ineffective assistance of counsel as constituting a comprehensive waiver of attorney-client privilege and work product for all purposes. Such a result would present Ms. Kaur with a choice between asserting an ineffective assistance of counsel claim or "retaining the privilege but giving up his ineffective assistance claim." *Bittaker*, 331 F.3d at 722-23. We agree with the *Bittaker* Court that placing a defendant in such a dilemma is fundamentally unfair.

Throughout the post-conviction proceedings, Ms. Kaur and her defense team made it clear that they intended to waive the attorney-client privilege only for the purposes of those

proceedings. At a hearing on the State's subpoena for the entire defense file, an attorney intervening on behalf of the Public Defender's Office told the court there was "s*ome* waiver of privilege and protection and confidential treatment to which a client is entitled under Rule 1.6 of the Rules of Professional Conduct, but that waiver *is limited and it's limited to the claims with respect to ineffective assistance of counsel that are at issue*." (emphasis added). The scope of the waiver arose again during the hearing on the motion for a new trial. Just before Mr. Drew testified, Ms. Kaur's new counsel told the court that Ms. Kaur understood that she "waive[d] any privilege that she would otherwise enjoy with respect to her communications with Mr. Drew and/or any work product privilege that he might have as well." Counsel added that Ms. Kaur had "no objection to Mr. Drew testifying regarding that their relationship—*as it applies to this motion*." (emphasis added). These statements made by her counsel at the hearing on the motion for a new trial align with the implied waiver doctrine in *Bittaker*: that if a party wishes to litigate an ineffective assistance of counsel claim, then that party must waive its privilege "to the extent necessary to give your opponent a fair opportunity to defend against it." *Bittaker*, at 720. It is clear that Ms. Kaur, by filing an ineffective assistance claim, intended to waive the attorney-client privilege only to the extent necessary to litigate those claims—that is, within the confines of the post-conviction proceedings.

There remains the issue of Ms. Kaur's affidavit. The circuit court found that the affidavit constituted an express waiver (emphasis added):

> by virtue of the fact that defendant, through her attorneys, published the affidavit in a public forum which was quickly picked up by the Washington Post, the newspaper of wide circulation, and placed all of this information in the public domain. And that is the classic definition of express waiver under *Bittaker*, in which case, all of her communications then are exposed and available to the State for *any and all purpose*.

Ms. Kaur's affidavit in support of her motion for a new trial contained substantive information about privileged conversations between Ms. Kaur and Mr. Drew regarding her case, as well as references to trial strategy decisions and other attorney work-product. The affidavit was not filed under seal, nor did Ms. Kaur—or, to be precise, nor did Mr. Mercer, her attorney who prepared the affidavit and filed the motion—seek a court order to limit access to the affidavit. Whatever the professional considerations might have been for this approach, the affidavit and its contents were available for public inspection and were, in fact, made public by a subsequent article in the *Washington Post*. From this, the State asks that we conclude, as did the trial court, that Ms. Kaur therefore expressly waived the attorney-client privilege for all purposes.

Although there is some merit in the State's position, there are countervailing considerations. The one that is dispositive in our view is that the terms of the trial court's protective order was consistent with an implied, and not an express, waiver. We conclude that the better approach is to treat Ms. Kaur's waiver as an implied one.[10]

[10] At the hearing on Ms. Kaur's protective order, the State conjectured that Mr. Mercer filed the affidavit without a protective order in order to disperse the information to the public and create sympathy for Ms. Kaur for any future trial. This has not been proven.

(Footnote continued.)

B.

We turn to Ms. Kaur's request that we adopt the principles articulated in *State v. Bain*, 292 Neb. 398, 872 N.W. 2d 777 (2016), and conclude that she was presumptively prejudiced because the Prosecution Team had access to her privileged information. In *Bain*, the Nebraska Supreme Court espoused the view that a prosecutor's possession of a defendant's confidential defense strategy is "presumptively prejudicial." 292 Neb. at 418. Ms. Kaur asks that this Court now adopt the "presumptively prejudicial" standard here. Her argument is unpersuasive because *Bain* is factually distinguishable.

Bain was charged with various felonies arising out of his assaults on his former wife. *Id.* at 401–02. In some fashion—the Court's opinion does not explain how this occurred—prosecutors obtained copies of privileged communications between Bain and one of his attorneys. *Id.* at 400. The prosecutors retained this material for a period of 10 months, and, although the prosecutors involved eventually withdrew from the case, it was not clear from the record whether they had communicated their theories of the case to the special prosecutor eventually appointed to prosecute the case against Bain. *Id.* at 422. Bain was

In any event, both fairness and practicality suggest that we limit the scope of the waiver arising out of the filing of the affidavit. The circuit court correctly noted that "only the defendant can waive the privilege." *See* Maryland Rule 19-301.6(a) ("[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation. . . ."). The court was concerned that treating the filing of the affidavit constituted as a comprehensive waiver of Ms. Kaur's privilege for all purposes might well result in another round of post-conviction proceedings. We share that concern.

convicted on several charges. *Id.* at 402. On appeal, he asserted that the prosecutor's access to his communications with his attorney constituted a presumptive violation of his Sixth Amendment right to counsel. *Id.* at 403–04. The Nebraska Supreme Court agreed:

> [A] presumption of prejudice arises when the State becomes privy to a defendant's confidential trial strategy. Federal courts are consistent on two points: (1) *any* use of the confidential information to the defendant's detriment is a Sixth Amendment violation that taints the trial and requires a reversal of the conviction; and (2) a defendant cannot know how the prosecution could have used confidential information in its possession. We believe these holdings cannot be reconciled except through a presumption of prejudice.
>
> But we hold that the presumption is rebuttable—at least when the State did not deliberately intrude into the attorney-client relationship. As other courts have suggested, some disclosures of confidential information to the State might be insignificant. Or the State could prove that it did not use the confidential information in any way to the defendant's detriment. For example, the State could prove that it did not derive its evidence and trial strategy from the disclosure of a defendant's trial strategy by showing that it had legitimate, independent sources for them.

Id. at 418 (footnotes omitted; emphasis in original).

What distinguishes *Bain* from the case before us is the way that the prosecutors obtained access to the privileged communications. Although the Court's opinion is not entirely clear as to how the disclosure in *Bain* occurred, there is nothing in the opinion that suggests that Bain either expressly or impliedly waived his attorney client privilege. Neither *Bain* nor the cases it cited in the relevant parts of its analysis addressed a scenario in which the prosecutor obtained access to privileged communications by means of an unsealed court paper and resort to legal process in order to prepare for a hearing on the

issue whether defense counsel had been inadequate.[11] We agree with the State that, under these circumstances, "[a]ny discussion of prejudice resulting from a governmental 'intrusion' or a violation of a defendant's constitutional right to counsel . . . is inapplicable under the facts of this case."

Moreover, the approach articulated in *Bain* is not consistent with the reasoning of Maryland cases involving cases in which the State, or its agents, did intrude into the attorney-client relationship. In *Wiener v. State*, 290 Md. 425 (1981), an undercover agent went to work as a law clerk for a local public defender as part of an investigation of possible

[11] As to the parts of its analysis that are relevant to the issues before us, the *Bain* Court relied on *Weatherford v. Bursey*, 429 U.S. 545, 547-48 (1977) (An undercover agent participated in a meeting between the defendant and his counsel.); *United States v. Morrison*, 449 U.S. 361, 362 (1981) (Federal agents covertly met with the defendant to undermine her relationship with her lawyer.); *Bishop v. Rose*, 701 F.2d 1150, 1151–52 (6th Cir. 1983) (Jail employees discovered a letter from the defendant to his lawyer, turned it over to the prosecutor who read it and used its contents to cross-examine defendant at trial.); *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995) ("[T]he prosecutor intentionally learned about a defendant's trial preparations and used the information at trial."); *United States v. Levy*, 577 F.2d 200, 204 (3rd Cir. 1978) ("[The] DEA, which at all times was aware that its informer was represented by the attorney for a co-defendant, attempted to obtain information about the present matter and, at the very least, did learn [critical details of] the defense strategy[.]"); *United States v. Mastroianni*, 749 F.2d 900, 903 (1st Cir. 1984) (An informant attended meetings between defendant and his defense counsel and was later "partially debriefed" by government agents.); and *U.S. v. Danielson*, 325 F.3d 1054, 1068, 1071 (9th Cir. 2003); (The prosecution obtained privileged information about the defendant's trial strategy through the means of an informant.); *State v. Lenarz*, 301 Conn. 417, 420–21 (2011) (In violation of a court order, police searched defendant's computer for privileged attorney-client communications and turned the information over to prosecutors.); *State v. Fuentes*, 179 Wash. 2d 808, 816 (2014) (Police detective surreptitiously listened to defendant's conversations with his attorney.).

improprieties in that office. *Id.* at 428–29. Although instructed to minimize any intrusion into privileged matters, the agent was briefed by an OPD investigator as to a statement made by Wiener to the investigator. *Id.* at 430. In reversing Wiener's convictions, the Court first held that the State had intruded into the attorney-client relationship. *Id.* at 431. The Court stated (emphasis added):

> *[A]bsent at least a realistic possibility of injury to the accused or benefit to the State, there can be no sixth amendment violation. It is also clear that the ultimate risk of non-persuasion as to presence of prejudice is on the accused, as the moving party on the motion to dismiss.* . . . Once an agent of the State has surreptitiously invaded the relationship between an accused and his attorney, the accused is not limited to proving a sixth amendment violation by extracting from the undercover agent, his law enforcement principals or the prosecutors, admissions that communications between the accused and his attorney have been passed on by the informant. *Depending upon the facts directly established by the evidence, prejudice may properly be inferred*.

Id. at 434. The Court remanded the case without affirmance or reversal for the trial court to hold an evidentiary hearing on Wiener's claim of prejudice.[12] *Id.* at 438.

[12] The Court commented:

> If the trial court concludes on the restricted remand that there has been no prejudice in fact resulting to Wiener from the intrusion, then the motion to dismiss should be denied. If the trial court concludes that prejudice has resulted, then the approach should be to neutralize the taint by tailoring suitable relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial. . . . Full recognition of Wiener's right to counsel and to a fair trial could be afforded, in that event, by a new trial for which the trial court shall appoint a special prosecutor [who] is to be an attorney from private practice who had and has no exposure to any of Wiener's communications to his counsel.

290 Md. 438–39.

In *Carter v. State*, 149 Md. App. 509 (2003), the State acquired confidential documents in a search of the defendant's jail cell, and later, over the defendant's objection, used the documents on direct examination of an investigative officer for the case over the defendant's objection. 149 Md. App. at 513. On appeal, this Court held that the circuit court erred by receiving the documents into evidence. *Id*. at 520. We reasoned that "in addition to the protections afforded by the attorney-client privilege and the attorney-work product privilege, a defendant awaiting trial on criminal charges has a Sixth Amendment right to counsel. That constitutional right is violated when the attorney-client privilege of a person confined pending trial on criminal charges is 'undermined by state agents.'" *Id*. at 520-21 (quoting *State v. Warner*, 150 Ariz. 123 (1986)). Although we vacated the defendant's convictions, we did so only because "a Sixth Amendment violation occurs when the prosecution makes beneficial use of" privileged information. *Id*. at 522 (quoting *Bishop v. Rose*, 701 F. 2d 1150, 1157 (6th Cir. 1983)).

In summary, *Bain*, and the cases it relied upon, involved *improper intrusions* by prosecutors or their agents into a defendant's privileged communications, and the courts in those cases concluded that a defendant was presumptively prejudiced by such conduct. In contrast, the Maryland decisions have not adopted a presumption of prejudice even when the State obtained the confidential information through improper means. Indeed, *Wiener* holds that even when the State acquires information by improper means, the burden is on the defendant to demonstrate "at least a realistic possibility of injury to the accused or benefit to the State" before a court will find a violation of the Sixth Amendment. 290 Md.

at 434. Against this backdrop, it is difficult to conceive how Maryland law, as it now stands, presumes prejudice on behalf of a defendant when the privileged information is acquired by the State through an express or implicit waiver by the defendant. Based upon the Court's analysis in *Wiener*, we conclude that Ms. Kaur must demonstrate to this Court that there was "at least a realistic possibility" that she was harmed in the second trial by the State's access to her privileged information, or that the State used such information to its advantage in the second trial. We will now address that issue.[13]

C.

According to Ms. Kaur, allowing the same Prosecution Team to retry her case prejudiced her in several ways.

First, she asserts that the Prosecution Team benefitted in the second trial because they became aware of various possible defense strategies and attorney-client communications as a result of their access to her lawyer's files. These matters included cultural norms, the

[13] Although there is not a basis for us to reverse Ms. Kaur's convictions under the current state of Maryland law, we nonetheless believe that the better course might have been for the trial court to have barred the Prosecution Team from directly or indirectly participating in the second trial. To be sure, this would have resulted in additional expense to the State, but such a remedy is hardly unprecedented in Maryland. *See, e.g.*, *Wiener*, 290 Md. at 438-39; *Lykins v. State*, 288 Md. 71, 85–86 (1980) ("The appointment of a special prosecutor may be accomplished in one of three ways. (1) The trial court may invoke the powers vested in it under [Courts and Judicial Proceedings Article] § 2-102(a) . . . and designate some attorney as assistant counsel for the State. (2) As was done in *State v. Ensor and Compton*, 277 Md. 529 (1976), the Attorney General may be requested to designate one of his assistants to be appointed by the trial court as assistant counsel for the State. (3) The State's attorney may request the Governor to require the Attorney General under Constitution Article V, § 3 to aid the State's attorney in prosecuting the action."

inter-personal dynamics of Taneja's and Ms. Kaur's relationship, Ms. Kaur's ability to testify at the second trial, and the importance placed on the wig found in Taneja and Ms. Kaur's vehicle.

Ms. Kaur argues that because the Prosecution Team learned what these defense strategies were, the defense was hindered in its representation of Ms. Kaur at the second trial. As an example, she asserts that the Prosecution Team had access to "emails from Mr. Mercer, an integral member of both the first trial and retrial defense teams, [that] revealed his strong belief that the most viable defense was to identify Mr. Taneja as the shooter (the strategy the defense pursued in the retrial), rather than a third-party woman (the strategy pursued by Ms. Kaur's counsel in the first trial)."[14] {App. Brief at15–16}

Second, Ms. Kaur asserts that the Prosecution Team used what it learned from the privileged information in the second trial. Specifically, Ms. Kaur indicates that the Prosecution Team changed its own strategy regarding the DNA evidence found on the murder weapon between the first and second trials, and that the change could only have been caused by the Prosecution Team's access to a letter Ms. Kaur wrote to her attorney on the issue.

[14] As we will explain later in greater detail, we read the record differently. The trial transcripts demonstrate that the defense at the first trial did not assert that there was a third-party shooter. Rather, the defense maintained that Taneja murdered Ms. Gabba. This was Ms. Kaur's strategy in the second trial as well.

The State argues that the trial court's remedy was appropriate. It asserts that in light of "the uniqueness of Ms. Kaur's motion, its procedural context, Ms. Kaur's [] waiver, and the State's ability to prosecute Ms. Kaur with a different team," the trial court correctly balanced the State's interests and Ms. Kaur's rights by allowing the Prosecution Team in Ms. Kaur's first trial and her post-conviction proceeding to participate in her second trial. As to the Prosecution Team's knowledge of the defense's trial strategy, the State contends that the only trial strategy exposed was the one used in the first trial, and, in any event, there is no way of knowing what the defense's strategy would be in the second trial given the drastic change in circumstances. Although the State does not contest that the Prosecution Team was exposed to all of Ms. Kaur's privileged information, it denies using the information to its advantage at the second trial.

Although we review a trial court's decision to grant or deny a protective order under the abuse of discretion standard, *see Tanis v. Crocker*, 110 Md. App. 559, 573 (1996), we review whether the trial court violated Ms. Kaur's Sixth Amendment rights *de novo*. *See Khalifa v. State*, 382 Md. 400, 417 (2004). The Court of Appeals has stated that:

> When a claim is based upon a violation of a constitutional right it is our obligation to make an independent constitutional appraisal from the entire record. But this Court is not a finder of facts; we do not judge the credibility of the witnesses nor do we initially weigh the evidence to determine the facts underlying the constitutional claim. It is the function of the trial court to ascertain the circumstances on which the constitutional claim is based. So, in making our independent appraisal, we accept the findings of the trial judge as to what are the underlying facts unless he is clearly in error. We then re-weigh the facts as accepted in order to determine the ultimate mixed question of law and fact, namely, was there a violation of a constitutional right as claimed.

Harris v. State, 303 Md. 685, 697-98 (1985).

We have reviewed the transcripts from both trials and conclude that Ms. Kaur's claims of prejudice are not persuasive.

We begin with Ms. Kaur's assertions that the she was prejudiced because the State was exposed to various defense strategies.

Cultural Norms and Ms. Kaur's Relationship with Taneja

Ms. Kaur argues that the Prosecution Team obtained insight into a possible defense that could have been raised by Ms. Kaur in the second trial, namely, that Ms. Kaur's alleged participation in the murder of Ms. Gabba could be explained—or at least placed in proper context—by reference to cultural norms and relationship issues between Ms. Kaur and Taneja. However, this issue was introduced at Ms. Kaur's first trial by *defense counsel* in his opening statement. Speaking to the jury, Mr. Drew stated:

> I want you to listen to the Indian culture which is a little bit different than what we have here in the U.S. There, all of the women in India . . . who are Ms. Kaur's age . . . serve their husband. If you want to use words to describe an Indian woman in a relationship to a man, I would suggest you use the word subservient, submissive, and self-sacrificing. You know, not to the point where they commit a crime, but that was what their role was.
>
> And I would suggest to you that this was ingrained in Raminder Kaur from a very early childhood on. That's the way she treated her [first] husband before he died. . . . That's the way she was expected. And I use the word expected to treat Mr. Taneja. And she did this. Sometimes begrudgingly. Because like any other person, she wants to be treated nicely. And not to be mistreated or abused.
>
> And what you will find out in this case that Mr. Taneja, there are some words that describe him and his relationship with Raminder Kaur. One of those words would be domineering. And one would be overbearing. And I want

> you to look at the relationship that existed in the marriage. Raminder Kaur was at the beck and call of Mr. Taneja.
>
> * * *
>
> And when she got here, she was expected to do things. But it was—this was not meant to be a loving relationship. This was to have a woman who would essentially attend to every whim that Mr. Taneja had.

Thus, it was defense counsel's statements at the first trial, and not access to the privileged information, that put the Prosecution Team on notice as to a potential "cultural norms" strategy.

Was Ms. Kaur Effectively Precluded from Testifying at the Second Trial?

Ms. Kaur asserts that she was prejudiced because the Prosecution Team's exposure to her privileged files made it impossible as a practical matter for her to testify at the second trial because the prosecution would have had an unfair advantage in cross-examining her. She points out that Ms. Ayres informed the trial court during closing argument on the motion for a new trial that the Prosecution Team had "been able to look and scour [Messrs. Drew's and Mercer's file] for a year," and that she had "made a list . . . of all the negatives that [would] befall [sic] the defendant from testifying."

Defense counsel revisited this issue immediately prior to the second trial, when Ms. Kaur filed a motion in limine to limit the scope of the State's cross-examination in the event that Ms. Kaur chose to testify. Her counsel presented the court with a copy of the transcript of Ms. Kaur's direct examination during the hearing on the motion for a new trial, redacted to delete "the portions that related to attorney-client privilege." He also

asserted that Ms. Ayres's cross-examination of Ms. Kaur at the same hearing was "essentially intertwined with attorney-client privilege because it's clear from the examination that Ms. Ayres [had] reviewed all of the work product and attorney-client privilege files" that were disclosed to the State in discovery. *Id.* Defense counsel requested that the trial court permit Ms. Kaur:

> to be heard after [her direct] testimony on the question of whether any of [the privileged material] can be used for impeachment. But as a practical matter, as Ms. Ayres prepares for her cross-examination, we think it would be a violation of the Court's [protective] order for her to review anything other than the non-attorney client privilege portion of the direct. . . . [R]eviewing the other things[15] . . . would necessarily get her into [Ms. Kaur's] attorney-client privilege communications.

After a three-way discussion between counsel and the trial court, Ms. Ayres stated that, for purposes of cross-examination regarding inconsistences between Ms. Kaur's testimony at trial and her direct examination from the new trial hearing, she was willing to rely solely upon her recollection of Ms. Kaur's prior testimony. However, she expressed a concern about having "the exact wording and phrasing to use when the defendant testifies." The trial court thereupon directed her to delegate the task of reviewing the transcript for exact

[15] From the context, it is clear that defense counsel was referring to those parts of Ms. Kaur's testimony that related to privileged communications with her previous counsel.

wording to an assistant.[16] Finally, the court stated that it would address further concerns about the scope of the State's cross-examination after the conclusion of Ms. Kaur's direct testimony and before the State's cross-examination.

From this colloquy, it is quite clear that the trial court was concerned about the possibility of unfair advantage to the State if Ms. Kaur testified. It is also clear that the court reserved any ruling on the scope of possible cross-examination until Ms. Kaur completed her direct testimony. Of course, the issue became moot because Ms. Kaur eventually elected not to testify. In light of this, and absent a proffer of what Ms. Kaur's direct testimony would have been, her bald assertion that she was prejudiced is nothing more than an invitation for us to presume that she was prejudiced by the trial court's denial of her request to disqualify the Prosecution Team. The current state of Maryland law does not permit us to take such a step.

The Wig(s)

Ms. Kaur asserts that the Prosecution Team's access to emails between Messrs. Drew and Mercer "provided ideas about the overarching theory of the defense, including whether to argue that the shooter was a third party or Mr. Taneja wearing a wig[.]"As a result, Ms.

[16] Specifically, the court stated:

> So then it is so ordered that [Ms. Ayres] will not review the transcript in its entirety, that she will delegate to another member of their office who will not be conducting the . . . cross-examination, to review the transcript and find the portions she's specifically looking for . . . in the cross.

Shortly thereafter, the court amended its order to require the staff member to maintain a written log of "what pages were identified for you that you actually reviewed."

Kaur contends that the Prosecution Team exploited this knowledge to its benefit at the second trial with the introduction of a witness not used at the first trial.

Some additional information will place this contention in context. None of the eyewitnesses at either trial testified that the shooter wore a wig. However, when the police searched Taneja and Ms. Kaur's vehicle, they found packaging that contained a black wig with streaks of grey. The packaging was from Performance Studios, a costume store in Nashville, It turned out, however, that the wig in the package had not been sold by Performance Studios—the Performance Studios packaging originally contained another wig that was not recovered by police. This discrepancy was not addressed by the State during the first trial, and, in its closing, the State noted to the jury that "a black and grey wig" was found in the defendants' vehicle. Neither Mr. Drew nor Mr. Jezic, Taneja's attorney, addressed the possibility that there might have been a second wig in their closing arguments.

The materials disclosed to the State prior to the hearing on the motion for a new trial included an email from Mr. Mercer to Mr. Drew that pointed out that there was a receipt from Performance Studio that suggested that Taneja was in possession of a second wig at the time of the shooting.

At the second trial the State called Charles Tubbs, an employee of Performance Studios, who testified about wigs. Additionally, in both its opening statement and closing argument, the State addressed the discrepancy between the black and grey wig and the Performance Studios packaging.

Ms. Kaur attributes the differences in the approach that the Prosecution Team took to the wig issue in each trial to its access to her privileged information. Because it is not clear from the record whether the State had an independent source for the information about a possible second wig, we will assume for purposes of analysis that Ms. Kaur is correct. This brings us to the question of prejudice.

Ms. Kaur has provided no explanation for how she was prejudiced. The State's theory of the case did not change between trials. In each, the State theorized that Ms. Gabba's murderer could have been either Taneja or Ms. Kaur, but that it was more likely Ms. Kaur. And, in the second trial, the jury was instructed that Ms. Kaur could be found guilty as an accomplice to murder.[17] None of the eyewitnesses to the shooting testified that the shooter

[17] After instructing the jury as to first-degree murder, second-degree murder, and conspiracy, the court instructed the jury as to accomplice liability. The court explained:

> The defendant may be guilty of murder as an accomplice, even though the defendant did not personally commit the acts that constitute that crime. In order to convict the defendant of murder as an accomplice, the State must prove that the murder occurred, and that the defendant, with the intent to make the crime happen, knowingly aided, counseled, commanded, or encouraged the commission of the crime, or communicated to a participant in the crime that she was ready, willing, and able to lend support if needed. A person need not physically be present at the time and place of the commission of the crime in order to act as an accomplice.

The State also made the possibility of accomplice liability abundantly clear at the close of the first trial. In its closing argument, the State asked the jury rhetorically: "Did they act together in this case? Is there accomplice liability? Baldeo did not act alone." And in its rebuttal closing, the State argued: "[T]here can be no doubt ladies and gentlemen, that Ms. Kaur committed this murder, that Mr. Taneja committed this murder, that they did it together, and that he was an accomplice, that she was the shooter."

was wearing a black and grey streaked wig, or, for that matter, any wig at all. Rather, the eyewitnesses all agreed that the shooter had dark hair, and possibly dreadlocks or cornrows.

Certainly, Ms. Kaur is correct that the State called Mr. Tubbs, the Performance Studio employee, in the second trial but not in the first. When he was on the stand, a prosecutor showed Mr. Tubbs the black and grey wig and the packaging. He testified that Performance Studios carried the wig depicted on the packaging in the fall of 2013, and that the packaging came from his store. But that is all the testimony the Prosecution Team elicited from Mr. Tubbs on direct examination.

On cross-examination, defense counsel elicited from Mr. Tubbs that: (1) on September 28, 2013 (the date of the receipt), his store sold only one wig of the kind pictured on the packaging, and that the receipt reflected that fact; (2) Taneja visited Performance Studios on September 28 and purchased a wig; (3) although many wigs in the store are unisex, the particular wig contained in the packaging "was intended for a man to be used"; and (4) the September 28 receipt indicated that other items were purchased at the same time by the same person, including a prosthesis designed to make one's face look older and olive-beige makeup used to change one's apparent skin color. All of this evidence supported Ms. Kaur's theory that Taneja disguised himself before fatally shooting Ms. Gabba. In short, Mr. Tubbs's testimony provided no support to the State's case but significant support to Ms. Kaur's. We fail to see how Ms. Kaur was prejudiced when the State called Mr. Tubbs.

A Change In Trial Strategy?

We turn to Ms. Kaur's contention that the Prosecution had unfair insight into possible defense strategies. According to Ms. Kaur, her lawyers argued in the first trial that Ms. Gabba was shot by a third party even though one of her lawyers thought that a more viable strategy would be to identify Taneja as the shooter. She posits that the State had an advantage in the second trial and was better able to address her contention in that Taneja was the shooter. In reality, Ms. Kaur's strategy in both trials was the same—Taneja, and not Ms. Kaur, was responsible for Ms. Gabba's death. For example, in his opening statement in the first trial, Mr. Drew stated:

> Well I suspect the State is going to put into evidence a receipt concerning the purchase of this weapon and is probably going to call at least one clerk from the gun store to testify. And when you see this receipt in this case I want you to look whose name is filled in on the receipt. It is not that of Raminder Kaur, it is of Baldeo Taneja. The receipt is not in Ms. Kaur's name.
>
> * * *
>
> Everyone who purchases a gun in the United States has to fill out an application to purchase the gun so that a background check can be run to see whether or not they're suitable for the gun purchase. And when you see this application you are not going to see the name of Raminder Kaur. The name you are going to see on that application for the gun purchase is that of Baldeo Taneja.
>
> * * *
>
> And I want you to look at who was enrolled in [the gun training] course and listen to [the course instructor] about that because what I suspect you're going to hear in this case is Baldeo Taneja took the course. And [the instructor] will also testify that Raminder Kaur never enrolled in that class. The reason that's important obviously is whether Raminder Kaur is capable of shooting this weapon and killed Preeta Gabba.

* * *

> Raminder Kaur had no motive in this case to kill Preeta Gabba, none whatsoever.
>
> * * *
>
> Now, since [Ms. Kaur] didn't drive, the only way that she could get around was to go with [Taneja]. . . . In so many instances, you will see Ms. Kaur with Mr. Taneja not because of anything other than if she's going to her own errands. And she's going to go shopping at Kroger's. Or she's going to go shopping at K-Mart or any other store. The only way she's going to get there so she can fulfill her job as a dutiful wife, was to travel with him.
>
> * * *
>
> And I suggest to you when you look at the video from the gun store, you will see . . . Ms. Kaur standing in the background with her arms folded. Not engaging any other part of the transaction. I want you to also listen to the finances of the family. Mr. Taneja was in charge of the finances.
>
> * * *
>
> [Ms. Kaur's] job was to clean, cook, and shop. And then I will suggest to you that there will be no evidence in this case that Raminder Kaur was capable of shooting Ms. Gabba. That she didn't conspire with Mr. Taneja to kill Ms. Gabba. That she never ever used a handgun. It would be an impossibility. She doesn't know how to use a gun.

And in his closing statement, Mr. Drew focused on Ms. Kaur's lack of a motive, stating:

> But [Taneja] was angry. And [the State's] theory is that he was motivated to do this. Where is the evidence that he, in some way, got his former living companion, his new wife, on the wagon to become involved in a shooting? Where is the evidence? Where from the 31 witnesses is there any facts upon which you can infer that Ms. Kaur joined in this endeavor? There isn't any.
>
> * * *

> And I suggest to you that there is absolutely no evidence that she had any ill will towards Ms. Gabba. In fact, I don't think that there is any evidence that they knew one another.
>
> * * *
>
> And when Ms. Hall was addressing me in court today a word she frequently used was "they." The pronoun they. Respectfully, whether there was a "they" is up to you to decide in this case or not. But she constantly attempted to influence you in saying "they."
>
> * * *
>
> We heard from Ms. Lobosco, Emily Lobosco, our DNA expert. She told you there was only one person's DNA on [the murder weapon] and it wasn't Ms. Kaur's DNA. So there's no way Ms. Kaur had a gun based on DNA evidence in this case. None.

At no time did the defense argue or provide evidence that a third party shot and killed Ms. Gabba. The defense's strategy at the first trial was the same at the second trial: that Taneja alone was responsible for the murder of Ms. Gabba, and that Ms. Kaur was his unwilling companion.

The DNA Evidence

Ms. Kaur also asserts that the Prosecution Team used her privileged information to its advantage at the second trial. She asserts that the Prosecution Team's strategy regarding DNA evidence in the first trial was different from its approach in the second trial and that this change was attributable to its access to a letter Ms. Kaur wrote to her attorney that was disclosed in discovery. *See Carter*, 149 Md. App. at 522 (quoting *Bishop v. Rose*, 701 F. 2d 1150, 1157 (6th Cir. 1983) (holding that "a Sixth Amendment violation occurs when

the prosecution makes beneficial use of" privileged information.). Again, further information is necessary to place the contention in context.

When Taneja and Ms. Kaur were stopped by the police after returning to Tennessee, two firearms were recovered from their vehicle. The police tested the firearms and determined that one was used to kill Ms. Gabba. The police also tested DNA samples from the firearm. Forensics found only Taneja's DNA on the murder weapon. Analysts also found trace amounts of DNA from two other contributors on the weapon, but were unable to match the DNA with Ms. Kaur or any other person. At the second trial, the Prosecution Team argued that Taneja had cleaned the guns using polish and a silicon cloth when they returned to their home in Nashville. Ms. Kaur asserts that the Prosecution Team only made this argument because it knew the contents of a letter Ms. Kaur had written to Mr. Drew, about what she and Taneja did with the firearms after Ms. Gabba's murder. This assertion is not supported by the record. Throughout both trials, the Prosecution Team alleged that Taneja had cleaned the murder weapon after murdering Ms. Gabba.

At the first trial, the Prosecution Team told the jury:

> [Y]ou're going to find during the course of this trial that when these weapons were sold, they were also sold a cleaning cloth, a silicon cleaning cloth. And what happens when they get back to Tennessee with the murder weapons is they want to clean the guns in order to eliminate any traces of [Ms. Kaur's] DNA because she's the shooter, she's the one who actually fired the shots that killed Preeta Gabba. And so, [Taneja] takes the guns out, takes the cleaning cloth out, wipes the guns clean, eliminates all of [Ms. Kaur's] DNA, but in doing so leaves behind his own DNA. And so, when these guns are ultimately tested you're going to hear that [Taneja's] DNA is all over the guns because he wiped [Ms. Kaur's] off. And ultimately you're going to find that there are two other possible sources of DNA on the guns,

> and the State's going to argue too that that's [Ms. Kaur] and it's the salesperson who handled these guns before giving them to [Ms. Kaur]."

This point was reiterated by the Taneja's trial counsel in his own opening statement: "This is the DNA report that you've heard about from both Mr. Drew and Ms. Hall, okay? Swabbed from the [murder weapon] are mixed DNA provides of three individuals. One was Baldeo Taneja, as he cleaned the gun."

The Prosecution Team made this argument again at Ms. Kaur's second trial, noting that the police found:

> "an opened silicone cloth for cleaning guns, that . . . is specific for cleaning guns, and the cloth was thrown out. The guns were cleaned . . . . And in cleaning the guns, you'll hear Baldeo Taneja left his DNA on the guns."

Then, Ms. Kaur's attorney responded:

> The forensic DNA evidence links Baldeo Taneja to the murder weapon and to that second gun. There is no DNA evidence linking Ms. Kaur to either the murder weapon or the second gun.
>
> * * *
>
> That DNA, it is Baldeo Taneja, his DNA matches the DNA found on the [murder weapon]. There is no DNA evidence linking Ms. Kaur to the [murder weapon].
>
> * * *
>
> The State told you about cleaning cloths that they found in the trash at [Taneja and Ms. Kaur's] home[.] . . . Hear from [the State] about those cleaning cloths, and see whether there's any evidence, any evidence at all, that Raminder Kaur ever used those cleaning cloths or had anything to do with them."

At both trials, the Prosecution Team buttressed these arguments with the testimony of three individuals. First, Naomi Lobosco, a forensic scientist at the Montgomery County

Police Department Crime Laboratory, testified at both trials that she could identify only Taneja's DNA on the murder weapon with any reasonable certainty, but that trace amounts of DNA from two unidentified persons was found on the weapon. In both trials, Ms. Lobosco testified that DNA can be removed from a firearm by wiping it with a cloth. At both trials, pictures taken of the silicon packaging and cloth, found Taneja and Ms. Kaur's home, were admitted into evidence.

Shawn Cole, who works at Specialty Firearms II, a gun store in Nashville, also testified in both trials. He testified that on September 28, 2013, Taneja and Ms. Kaur came into the store and purchased two firearms—the ones discovered by the police in their car—as well as ammunition, a cleaning rod, a bottle of oil, a cleaning cloth, and a pocket holster. Mr. Cole specifically identified a silicon cleaning cloth on the receipt showing a list of items Taneja purchased that day. That same testimony was elicited on cross-examination by Ms. Kaur's attorney.

Finally, in both trials, Lynette Mace, an officer in Metro Nashville Police Department, Forensic Services Division, testified that, during the search of Taneja's and Ms. Kaur's home in Nashville, she discovered a silicon cleaning cloth and its packaging in a trash bag. Additionally, she testified that the silicon cloth's primary purpose is to clean firearms.

The transcript extracts quoted or summarized in the preceding paragraphs undercut Ms. Kaur's assertion that the State changed its approach to the DNA evidence from one trial to the next as a result of its exposure to privileged information. Indeed, the State's approach to the DNA evidence in both trials was consistent and, to the extent that it varied

(and it didn't in any material manner), the State's approach in the second trial reflects the defendants' opening statements from the first trial.

In summary, although the Prosecution Team admitted that it had knowledge of the privileged communications, *see 100 Harborview Drive Condo. Council of Unit Owners v. Clark*, 224 Md. App. 13, 61 n.16 (2015) ("[A]ttorneys cannot unlearn what has been disclosed to them in discovery."), Ms. Kaur has not demonstrated that she was prejudiced in the second trial as a result. And, as we have previously noted, "absent at least a realistic possibility of injury to the accused or benefit to the State, there can be no sixth amendment violation." *Wiener*, 290 Md. at 443. There is no basis for us to disturb Ms. Kaur's convictions based upon her first appellate contention.

2. Dr. Kovera's Testimony

We now turn to Ms. Kaur's second contention on appeal: whether the trial court abused its discretion in excluding the testimony of Margaret Kovera, Ph.D., a psychologist who would have testified as to how an eyewitness's memory functions, particularly under stress.

Three eyewitnesses who witnessed the murder of Ms. Gabba testified. First, a driver testified that she was driving down Crystal Rock Drive when she heard "popping sounds." The driver slowed her car when she saw "two ladies standing on the left side of the road" in front of her. The driver testified that she saw the first woman (Ms. Gabba) fall into the road as the second woman (the shooter) ran away. She described the second woman as wearing a bright orange scarf, which was wrapped around her head, not her neck; a loose,

brown coat; that her skin tone was "dark," and that she was possibly African-American; and that the second person's body type was similar to Ms. Gabba's. After the second woman fled, the driver got out of her vehicle to check on Ms. Gabba. She realized that there had been a shooting only when she saw that Ms. Gabba was bleeding profusely.

The second witness was the driver's son, who was also in the car. He testified that he saw a person who "seemed like a woman" standing next to Ms. Gabba, and described the person as overweight, slightly taller than Ms. Gabba, and wearing a scarf around her head. He described the second person's skin tone as "light-brownish."

Finally, a police officer read to the jury his notes of his interview with the third witness.[18]Another witness testified at the first trial about what he witnessed from his bedroom window 100 yards away from the scene of the murder. He also noted the presence of a bright scarf on the second woman. When asked about the speed at which this woman was leaving the scene, the witness testified that: "It wasn't fast paced. I'm not going to say running. It seemed like she was limping in a way. Not necessarily handicapped limping, but like some kind of cakey [sic] movement." As to appearance, he testified that the woman had "dark hair color, black I guess . . . . Skin was dark . . . like dark brownish looking." He also told police that she may have had dreads, but "wasn't clear if what I saw were dreads."

It was the State's theory that the second person was Ms. Kaur, and that she was the shooter.

[18] The witness testified at the first trial but not at the second.

Ms. Kaur sought to call Dr. Kovera as an expert witness to testify: *first*, that witnesses process and store visual information using "gender schemes";[19] *second*, how the use of disguises can reduce the accuracy of a witness's ability to accurately identify the gender of an individual; and *third*, how an eyewitness's memory might function, particularly under stress.

The State filed a motion *in limine* to exclude Dr. Kovera's testimony. The State asserted that an expert in the field of eyewitness identification was unnecessary. First, the State argued that the testimony of the eyewitnesses is not beyond the ken of the average juror to understand. Second, the State contended that an expert in identification and the effects of stress on memory was not needed because no identification was made in this case. None of the eyewitnesses testified that they saw the shooter's face. Additionally, none of the eyewitnesses actually saw the shooting occur. Therefore, according to the State, the witnesses could not have been under stress because they had not realized that Ms. Gabba had just been shot. For this reason, the State likened this case to *Bomas v. State*, 181 Md. App. 204 (2008) (discussed *infra*), in which the court excluded expert testimony to rebut

[19] In this context, the term "schema" refers to "a collection of basic knowledge about a concept or entity that serves as a guide to perception, interpretation, imagination, or problem solving." https://dictionary.apa.org/schema (last visited May 18, 2019). In her brief, Ms. Kaur indicates that Dr. Kovera would have explained to the jury that the term refers to "organized set[s] of gender-related beliefs that subconsciously influence their perceptions about whether an individual is a man or a woman"

the testimony of non-victim witnesses who, at first, did not realize that they had witnessed a shooting.

The defense countered that Dr. Kovera's testimony was necessary given that the State was relying on the equivocal statements of the three eyewitnesses for its case. The defense argued that the *Bomas* court recognized that "there are many aspects of eyewitness testimony and memory that are not intuitive to the average layperson, average juror," and so Dr. Kovera's testimony was appropriate given the eyewitnesses' statements that Ms. Gabba's shooter was a woman. By way of example, the defense reasoned that the science surrounding eyewitness testimony is helpful to the jury "to explain that if [the witnesses] see a scarf, for example, they could then assume it's a woman. That would be an assumption that a person would make through the use of the schema." According to the defense, *Bomas* recognized that those kind of assumptions are not "a matter of common sense," and that "[t]here are counterintuitive nature aspects to how your memories are stored in the first place and in how they're retrieved."

The trial court agreed with the State, finding:

> There is really no eyewitness identification. The best that can be said for the State's evidence in this case is the witnesses, the two that have testified so far, have indicated that [the shooter] was a female. They have described her, although at one point apparently described her to the police, the person, that is the shooter, as an African-American, but later clarified that they were saying it was the same color as the person who was deceased. There has been some testimony with respect to just relative height as it relates to the deceased, and some testimony generally with respect to body type. And that's the extent, well, and some descriptions of clothing.
>
> * * *

> So it was proffered that the psychologist would testify as to the effects of stress. First off, there's no evidence really in this case that at the time that perception was made by the witnesses, at the time they observed the shooter, that they were under the effects of any stress.
>
> The testimony was that they heard some noise. The driver of the car described it as firecrackers. The passenger, her son, described it as gunshots, but later explained that he only figured they were gunshots after he later figured out or learned or discovered that the victim had been shot.
>
> And the driver of the vehicle testified that she didn't really realize it was gunshots until after the woman collapsed in front of her car. She got out of the car, she went to the woman, and its only when she saw the blood oozing out underneath the woman that she at that point realized that what she had heard were gunshots. So there's no real evidence that at the time they made the observation, they were under any stress.
>
> Certainly I don't dispute that they were both under stress having after the fact realized that they'd just witnessed a shooting, and the police arriving, et cetera. But *Bomas* specifically speaks to that issue, and says that the effects of stress are not beyond the ken of the average juror, so you would not need an expert to testify about the effects of stress on any identification.

The court granted the State's motion *in limine*, excluding Dr. Kovera from testifying.

A.

Ms. Kaur argues that the trial court abused its discretion in barring Dr. Kovera's testimony because Ms. Kaur was thus precluded "from presenting scientific evidence critical to her defense" as to the mechanics of perception and memory, which thereby permitted the State to provide uncontroverted testimony about the gender of Ms. Gabba's shooter.

Ms. Kaur contends the substance of Dr. Kovera's testimony was not within the ken of the ordinary juror as the trial judge reasoned, and that, pursuant to *Bomas v. State*, 412 Md.

392, 416 (2010), the judge should have considered "scientific advances [that] have revealed (and may continue to reveal) a novel or greater understanding of the mechanics of memory that may not be intuitive to a layperson." 412 Md. 392, 416. Moreover, she asserts that the trial court abused its discretion by refusing to "consider the scientific studies underlying Dr. Kovera's testimony, or even allow *voir dire* on why schematic processing, disguise, and their effects on perception and memory formation and recall are not intuitive."

The State counters that the court did not abuse its discretion because the court's reasoning "reflects a thoughtful consideration of the facts, the case law, and an understanding of the benefits of expert testimony[.]"

B.

A court may admit expert testimony if it:

> determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

Md. Rule 5-702.

Generally, trial courts have "wide latitude in deciding whether to qualify a witness as an expert or to admit or exclude particular expert testimony," and it is admissible only if relevant to the case. *Alford v. State*, 236 Md. App. 57, 71 (2018) (internal quotations omitted). Although "abuse of discretion" is a protean concept:

> It is nevertheless clear that a ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not

> have made the same ruling. Abuse occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law.
>
> * * *
>
> When the trial court exhibits a clear failure to consider the proper legal standard in reaching a decision, such an action constitutes an abuse of discretion. Abuse of discretion is not limited solely to those occurrences when a trial court misapplies a legal standard. A trial court also abuses its discretion when no reasonable person would take the view adopted by the trial court or when the court acts without reference to any guiding rules or principles. An abuse of discretion may also be found where the ruling under consideration is clearly against the logic and effect of facts and inferences before the court or when the ruling is violative of fact and logic.

Kusi v. State, 438 Md. 362, 385–86 (2014) (citations and quotation marks omitted).

We conclude that the trial court did not abuse its discretion when it granted the prosecution's motion to exclude Dr. Kovera's testimony.

In *Johnson v. State*, 457 Md. 513 (2018), the Court of Appeals indicated that "[e]xpert testimony is required 'only when the subject of the inference . . . is so particularly related to some science or profession that is beyond the ken of the average layman[; it] is not required on matters of which the jurors would be aware by virtue of common knowledge.'" 457 Md. at 530 (quoting *Bean v. Department of Health and Mental Hygiene*, 406 Md. 419, 432 (2008)). Concerning the reliability of eyewitness testimony, expert testimony "is admissible where it will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" *Bomas v. State*, 181 Md. App. 204, 211 (2008), *aff'd* 412 Md. 392 (2010) (internal quotations omitted). In this context, the Court of Appeals' analysis in *Bomas* is particularly instructive.

In *Bomas*, an off-duty police officer, Detective Kenneth Bailey, heard gunshots while stopped in traffic. 412 Md. 392, 395 (2010). Detective Bailey observed a male, later identified as defendant Bomas, shoot and kill another male and flee the scene. *Id*. Detective Bailey unsuccessfully pursued Bomas, and later could only describe the shooter as "a black male." *Id*.

Sometime later, Bomas was identified as the shooter by an eyewitness to the murder, Jimmy Dower. *Id*.at 396. Dower identified Bomas from a photo array, and the police also showed the array to Detective Bailey. *Id*. From the array, Detective Bailey also identified Bomas as the shooter. *Id*. Prior to being brought to trial, Bomas moved to suppress the eyewitness identifications. *Id*. Although Dower repudiated his identification of Bomas, the court denied Bomas' motion, finding that the photo array and Detective Bailey's identification were not impermissibly suggestive. *Id*. at 397.

At a pretrial hearing, Bomas proffered the testimony of David Schretlen, Ph.D., a licensed psychologist and an expert in the field of neuropsychology. *Id*. Dr. Schretlen was to testify that:

> (1) a "trained observer," such as a police officer, has no better ability to remember faces than a lay person, (2) a witness's confidence in his testimony is not correlated with the accuracy of his identification, (3) stress and the passage of time adversely affect one's ability to recall events or people, (4) a police photo array can influence a witness's identification of a suspect, and (5) juries tend to believe eyewitness testimonies in spite of "effective cross examination."

Id. Bomas also proffered that Dr. Schretlen would testify as to the effects of stress on the memory, particularly when a person observes a crime being committed. *Id*.

The motions judge excluded Dr. Schretlen's testimony, finding that "it would be unhelpful to a jury and that a jury was capable of appropriately evaluating and weighing the eyewitness identifications." *Id*. at 401. Bomas was subsequently convicted by a jury. *Id*. at 403. Bomas appealed to this Court, which affirmed the circuit court's ruling. *Id*. The Court of Appeals then granted Bomas's petition for writ of certiorari.

The Court affirmed. It held that the motions court:

> carefully considered the proffered testimony's foundation, relevance to the facts of the case, and helpfulness to the jury. The Circuit Court was entitled to conclude, as it did, that the topics covered by the proffered testimony were inadmissible for at least one of the following reasons: the testimony (1) lacked adequate citation to studies or data, (2) insufficiently related to the identifications at issue, and/or (3) addressed concepts that were not beyond the ken of laypersons.

Id. at 423.

The Court began its analysis with a discussion of *Bloodsworth v. State*, 307 Md. 164 (1986), in which the trial court also excluded expert testimony for issues arising with eyewitness testimony. *Id*. at 404. On appeal of that issue, the Court upheld the decision, holding that "the proper standard for the admissibility of expert testimony on eyewitness reliability is 'whether [the expert's] testimony will be of real appreciable help to the trier of fact in deciding the issue presented[,]'" and that "'[t]he admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal.'" *Id*. (quoting *Bloodsworth*, 307 Md. at 184-85).

Then, the Court looked to other jurisdictions for guidance on how to handle expert testimony on eyewitness identification. *Id.* at 407. The Court found that:

> Other jurisdictions embrace a discretionary approach generally, but either require or favor the admission of expert testimony on eyewitness identification when the prosecution's case relies solely on eyewitness testimony. Some jurisdictions appear to generally disfavor expert testimony on eyewitness identification, but favor it when the State has no substantial corroborating evidence. Finally, there is a prohibitory approach which excludes all expert testimony on eyewitness identification. To our knowledge, only three jurisdictions have retained this *per se* exclusion.

Id. at 407-08.

Based on the guidance of other jurisdictions, the Court considered Bomas's arguments and reviewed the facts of the case and came to several conclusions. First, that the factors of eyewitness identification are not beyond the ken of the average juror. *Id*. at 416. The Court found that "the effects of stress or time are generally known to exacerbate memory loss and, barring a specific set of facts, do not require expert testimony for the layperson to understand them in the context of eyewitness testimony." *Id*. Second, the Court concluded that the test for admissibility of expert testimony, previously stated in *Bloodsworth*, still applied. *Id*. That test is "whether [the expert's] testimony will be of real appreciable help to the trier of fact in deciding the issue presented." *Id*. Third, Md. Rule 5-702 sufficiently circumscribes the trial court's discretion when deciding to admit or exclude expert testimony. *Id*. at 417. The Court found that Rule 5-702 "entrusts the trial court with the task of determining whether an expert is qualified to give testimony about an issue, whether there is a foundation for the expert's proffered testimony, and the

relevance of the proffered testimony." *Id*. at 418. The Court feared that, if it adopted a standard that expert testimony on eyewitness testimony is presumptively helpful to a jury as Bomas suggested it do, a case could become unnecessarily complicated and encourage a "battle of the experts." *Id*. at 419. According to the Court, "[d]ueling experts could interject differing interpretations of statistics and scientific studies on identification, leaving the jury more confused than aided by the expert opinions." *Id*.

The Court applied the "appreciable help to the trier of fact" test to the circuit court's decision to exclude the testimony of Dr. Schretlen, and held that the court did not abuse its discretion. *Id*. at 419-20. The Court found that the testimony of Dr. Schretlen was "extremely vague, general, and inconclusive," and that Dr. Schretlen had nothing to support his statements. *Id*. at 420. Thus, the motions court was within its right to exclude Dr. Schretlen's testimony under Rule 5-702 which calls for a "sufficient factual basis" to support the expert's testimony. *Id*. The Court also found that portions of Dr. Schretlen's testimony would be unhelpful to the jury, and that other portions were within the grasp of a layperson. *Id*. at 421-22. Finally, the Court found that Dr. Schretlen's testimony as to the effects of stress on the memory would be confusing to the jury. *Id*. at 422. Specifically, the Court reasoned that:

> Dr. Schretlen's testimony insufficiently related to the facts of the case because the lone study he cited involved individuals who had directly experienced the high stress event, whereas Bailey and Dower witnessed the shooting at a distance. The testimony also shed little light on how to quantify the stress levels of the eyewitnesses who are not the subjects of the stress-inducing event. Indeed, according to Dr. Schretlen, individuals experience stress differently. Dr. Schretlen also conceded that low to moderate levels of

> stress might actually be beneficial to memory. Other than the prisoners of war study, Dr. Schretlen acknowledged that very few studies of stress during violent events have been performed because such studies would not gain academic approval to proceed.

Id.

When applying the "appreciable help to the trier of fact" test from *Bomas* and *Bloodsworth* to the court's decision to exclude Dr. Kovera's testimony, we conclude that the court did not abuse its discretion. Ms. Kaur argues that Dr. Kovera's testimony is key to this case because she would have testified as to the effects of stress on eyewitness testimony. But as the Court of Appeals in *Bomas* indicated, the effects of stress on memory are not beyond the ken of the average juror. The trial court reiterated this conclusion in its own ruling on the State's motion *in limine*. Further, the trial court observed that any stress on the part of the eyewitnesses arose *after* the witnesses had all made their observations of Ms. Gabba and the shooter. All three witnesses testified that they saw two women standing in the road *before* they realized that the woman lying in the street, Ms. Gabba, had been shot by the second woman. Thus, Dr. Kovera's testimony as to stress would have been inapplicable to the observations made by the witnesses in this case.

Ms. Kaur's argument is unpersuasive for another reason as well. According to Ms. Kaur, Dr. Kovera's testimony was particularly important in light of the fact that no identification was made by any of the eyewitnesses. But, as the trial court noted, there was no eyewitness identification as none of the eyewitnesses identified either Taneja or Ms. Kaur as the shooter. Rather, the witnesses gave very simple descriptions of the shooter. All

testified that the shooter wore a bright orange scarf around her head, that she was similar in height and body type to Ms. Gabba and that she had light-brown skin coloration. One testified that the second woman walked with a slight limp. It was within the purview of the jury, as the fact-finder, to weigh the statements and credibility of the three eyewitnesses.

The trial court did not abuse its discretion when it concluded that Dr. Kovera proffered testimony would not have been helpful to the jury.

THE JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY ARE AFFIRMED. APPELLANT TO PAY COSTS.