Circuit Court for Prince George's County
Case No. CT-12-1375X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED CASES

No. 2615, September Term, 2018

No. 2680, September Term, 2018

No. 3378, September Term, 2018

DANIEL LEE JAMES

CORY KNIGHT

ANTONIO DOMINIQUE MCCLENNON

v.

STATE OF MARYLAND

Kehoe,
Arthur,
Wells,
JJ.

Opinion by Wells, J.

Filed: February 28, 2020

In this consolidated appeal, appellants, Daniel James, Cory Knight, and Antonio McClennon, challenge their convictions for first-degree and second-degree assault, armed carjacking, carjacking, conspiracy to commit armed carjacking, and use of handgun in the commission of a felony. The convictions resulted from a trial in which the appellants were tried jointly for assaulting Lashanda Jackson and taking her vehicle at gunpoint.[1] Because the circuit court did not abuse its discretion or otherwise err, we affirm the convictions.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Carjacking

On February 20, 2017, sometime between 11:30 and 11:45 p.m., Lashanda Jackson parked her 1999 Mercedes Benz SUV at her apartment building, located at 4141 Southern Avenue in Capitol Heights. As she was gathering her things, two men rushed up to the driver's door. One man pointed a gun at Jackson and demanded the vehicle's keys. Jackson obeyed, slid out of the Mercedes, and held up the key. The man grabbed it. As the men examined the key, Jackson walked toward her building, went to a neighbor's apartment, and called 911.

During the call with 911, Jackson gave the dispatcher a physical description of the two men, including what they wore. Jackson described both men as wearing hats "more like a durag" or a "skull cap" than a "sports cap." Later that night, at the police station, Jackson identified a picture of a firearm that reminded her of the gun the man pointed at

[1] Emilio Carr was also tried with the appellants. Carr's case ended in a mistrial and forms no part of these consolidated appeals.

her. Jackson also noted that her car "key" was unique in that it was black, rectangular, and thick. It also had two buttons: one jack-knifed the ignition key from a groove into the ready position; the other, for the emergency alarm, was missing.

About an hour after Jackson was carjacked, Officer Bryan Stevens of the Seat Pleasant Police Department was on patrol when he stopped a Toyota Yaris for a traffic violation in the 5700 block of Martin Luther King, Jr. Highway. Appellant, Cory Knight was driving, co-appellant Daniel James was in the passenger seat, co-appellant Antonio McClennon was sitting behind the driver, and Emilio Carr, was sitting behind the passenger.

Officer Stevens called for backup and the occupants were removed from the car. Inside the Yaris, Officer Stevens observed a loaded handgun on the floor behind the driver's seat, a ski mask on the back seat, and what he described as a Mercedes "key fob" in a cup holder in the center console. The four men were arrested. Later, a second, identical ski mask was found in the hood of Knight's jacket.

After viewing a photo array, Jackson identified Knight as one of her assailants. Jackson identified the key the police found in the Yaris as the one to her vehicle. The police test fired the gun and it was deemed operable. Jackson's Mercedes SUV was recovered several days later at the Hechinger Mall located in Northeast Washington, D.C. The key found in the Yaris unlocked the Mercedes.

B. The Trial

The appellants' joint trial began on September 4, 2018. Jackson testified that she never saw any of the appellants prior to trial. She confirmed that she had described the man with the gun as "light-skinned," approximately 5' 6" tall and 160 pounds. The other assailant was, according to Jackson, "dark-skinned, 5' 8' tall and 200 pounds. Both men wore all-black clothing. As for the gun, Jackson admitted she previously identified a revolver as the weapon used. Jackson testified that the material of the ski mask recovered was similar to the material of the "skullcap" that her assailants wore.

Seat Pleasant Police Officer Stevens testified regarding the traffic stop and the search of the Yaris. Officer Stevens testified that he stopped the Yaris about an hour after Jackson was assaulted and her car taken. Officer Stevens testified as to the location of each of the appellants when they were in the vehicle. He also testified as to the location of each of the items he found.

Detective Michael Washington testified that he was the lead detective and was assigned to the Robbery Suppression Team of the Prince George's County Police Department. Det. Washington's testimony made clear that the gun recovered from the Yaris had a magazine that inserted into the stock of the gun; it was not a revolver. Det. Washington testified that the police declined to do DNA tests on the gun or the Mercedes, because: (1) Jackson said her two assailants wore gloves, and (2) Det. Washington knew that Officer Stevens had handled the gun. Knight consented to give a DNA sample, but the police declined to do any DNA testing.

The jury ultimately convicted the appellants of first-degree and second-degree assault, armed carjacking, carjacking, conspiracy to commit armed carjacking, and use of a firearm in the commission of a crime of violence. The jury was unable to reach a decision as to Carr and the court declared a mistrial in his case. The court sentenced each appellant to an aggregate of 80 years and suspended all but 36 years' imprisonment.

Additional facts will be supplied as necessary.

DISCUSSION

In some instances, two appellants make the same allegation of error. In those instances, each appellant's discrete arguments will be discussed under that topic. An argument raised solely by an appellant will be discussed separately.

I. Severance (James and McClennon)

Rule 4-253 governs joinder and severance in criminal trials. Subsection (c) grants discretion to the trial court in deciding a party's motion for severance:

> If it appears that any party will be prejudiced by the joinder for trial of counts, charging documents, or defendants, the court, *may, on its own initiative* or on motion of any party, order separate trials of counts, charging documents, or defendants, *or grant any other relief as justice requires*.

(Emphasis added). The appropriate standard of review "when reviewing a severance determination in cases of codefendant joinder," as is found here, then, "remains whether the trial court abused its discretion." *State v. Hines*, 450 Md. 352, 366 (2016).

To determine whether joinder would be prejudicial, the trial judge must engage in a three-part analysis. *Id.* at 369–70. *First*, the court must determine whether non-mutually admissible evidence will be presented, and *second*, whether presentation of that evidence will cause unfair prejudice to the defendant moving for severance. *Id.* *Finally*, the court uses its discretion to determine how to address any unfair prejudice, which may include granting the motion to sever the offenses or the trials of the codefendants, "or by granting other relief, such as, for example, giving a limiting instruction or redacting evidence to remove any reference to the defendant against whom it is inadmissible." *Id.*

In *Hines*, the Court of Appeals identified only two instances where a Maryland appellate court held a trial court abused its discretion in denying a defendant's motion to sever: *Day v. State*, 196 Md. 384 (1950) and *Erman v. State*, 49 Md. App. 605 (1981). *Hines*, 450 Md. at 379–83. In both cases, the Court found the co-defendant was prejudiced by the admission of evidence and was "unwilling to assume the jury was able to follow the limiting instructions given by the trial judge." *Hines*, 450 Md. at 383–84. *Hines* marked the third and most recent in this line of cases, holding the circuit court's redactions of admitted statements were insufficient for preventing undue prejudice to the defendant. *Id.* at 383–85. The Court acknowledged the trial judge's discretion to address potential prejudice in ways not limited to granting severance, including making adequate redactions. *Id.*

When an appellant establishes that the trial court erred in admitting or excluding evidence, our courts may still determine if the error was harmless beyond a reasonable

doubt. *Taylor v. State*, 407 Md. 137, 164–65 (2009) (citing *Bellamy v. State*, 403 Md. 308, 332–33(2008)). The Court of Appeals adopted the harmless error analysis in *Dorsey v. State*, 276 Md. 638 (1976), stating:

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

Id. at 659. And in *Taylor*, the Court of Appeals explained, "[t]o say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." 407 Md. at 165.

Here, the issue of severance originated during a pre-trial hearing, in which the State noted its intention to elicit co-defendant Knight's statement to Det. Washington about the location of the victim's carjacked vehicle:

> **[PROSECUTOR]:** The Supreme Court . . . held that *Bruton*[2] did not apply . . . where the confession of one defendant admitted at trial does not refer to a codefendant and the implication is only circumstantial at trial so long as the court gives an instruction to the jury, and it will be presumed by the court that juries can accept instructions and follow them by the court. And the instruction should be that the defendant's statement here, Mr. Knight, should only be applied towards him. Because he gave information of knowledge that the victim's carjacked car was at a specific location. And there is no intention by the State to elicit testimony or reference to codefendants, that should be admittable (sic) under *Richardson v. Marsh* [481 U.S. 200 (1987)]

[2] *Bruton v. United States*, 391 U.S. 123 (1968).

understanding that the Court would give jury the instruction that it should be held only against Mr. Knight.

James and Carr, through their respective counsel, did not object to the admission of Knight's testimony on the condition that the State would use the statement solely to incriminate Knight:

> **[CARR'S COUNSEL]**: As long as it does not reference Mr. Carr's involvement or alleged involvement, subject to any objection in the future, we would be okay with that proffer at this juncture.
>
> **THE COURT**: Mr. Hiller [counsel for James], Mr. Wilson [counsel for McClennon], are you in the same boat?
>
> **[JAMES' COUNSEL]**: Yes. The main problem I have with this is if during the State's case she elicits that from the officer, I believe Mr. Clark [counsel for Knight], during the State's case, could ask that more context be given and, in fact, elicit more out of the detective in terms of additional things that his client said, okay, to give that context. [. . .]
>
> **THE COURT**: Well, as I understand it, Mr. Clark . . . you are not going to go into any more, that's why you asked. All she wants to do is talk about that one clip [the statement], right?
>
> **[KNIGHT'S COUNSEL]:** Correct. [. . .]
>
> ***
>
> **[JAMES' COUNSEL]**: My main concern is the expansion. I think Mr. Clark would be entitled to pursue that and expand the statement. If he is not going to –
>
> **THE COURT**: -- sounds like he is not so –
>
> **[JAMES' COUNSEL]**: As of right now, I guess, it's not going to be a huge issue. Obviously if, he changes his mind during trial but –
>
> **THE COURT**: Okay.

Significantly for this appeal, McClennon's counsel objected to this initial admission of the statement:

> **[MCCLENNON'S COUNSEL]**: [. . .] I do understand this is a narrowly tailored statement. . . . I guess, the State is alleging they are using this as an additional way to tie the other three in because this was four individuals found in the vehicle, one of the individuals knows where the vehicle is that was carjacked. They are all stopped for the same reason. This is tying my client to this individual by what he says, not by how he got it or the inference isn't going to be that he heard about where the car is, inference is going to be that he was involved in getting the care there. There is no way of getting more of that out.
>
> ***
>
> **[MCCLENNON'S COUNSEL]:** [. . .] As the State said, all he is saying is I know where the car is. There is not going to be any implication of knowledge how they know where the car is. I think that's going to be unfair to my client as well as the others because the inference is going to be he was part of the crime. The fact they are all four together, the fact that the key is in the vehicle, there is going to be a natural inference. We can't even ask about the codefendant, how did you hear about it, did you know about it or is this hearsay.
>
> I believe I personally would ask that this be not allowed, suppressed or severed because in preparing for my case I wasn't prepared for that. This is something we all knew about in April . . . At any point in time the State could have let us know this is what we plan to do . . . This part of the case actually throws a huge issue to my client's defense because it does force that inference, that what he is saying not only is true but that he was part of the reason that car was there. Because there is no follow-up and we are not allowed to ask, did you hear about it, how did you know. All we are going to go on is what was said and it was true.
>
> It's highly prejudicial. I ask the case be severed. If the State chooses to use this or if this not be severed, then the State not be allowed to use it against my client.
>
> **THE COURT**: The State is not going to be allowed to use it against your client. It's only going to be used only to the extent it's going to be permitted

> to be used at all, it's against Mr. Knight. It doesn't implicate any of the other Defendants.
>
> **[MCCLENNON'S COUNSEL]**: As I explained, four in the vehicle, he is the driver of the vehicle, to instruct the jury, hey, don't pay attention to that except for him is a virtual impossibility.
>
> **THE COURT**: I heard what you said and I said what I said. It's being offered and it's admitted only as to the person who spoke it. And that's the sum and substance of it. [. . .]

Soon thereafter, however, the court excluded the statement from trial. During the State's case-in-chief, and before the State examined Det. Washington, Knight's counsel informed the court that Knight, in reality, provided two separate videotaped statements about the location of the carjacked vehicle: one to Det. Washington and another to an FBI agent. In the first statement, Knight told Det. Washington the location of the victim's car. In the second statement to the FBI agent, Knight stated that James gave him the location and assumed James knew this fact because "they" (the co-defendants) told him.

After a lengthy sidebar between Knight's counsel, the prosecutor, and the judge, the court found that admitting the statement in any capacity would cause *Bruton* confrontation issues between the co-defendants in a joint trial. The judge consequently sustained Knight's objection to the statement and it was not presented to the jury.

A. McClennon

Reviewing the evidence at trial, we conclude that the trial court was legally correct to have excluded Knight's statement. Thus, applying *Hines*' tripartite test to McClennon's claim of error, we hold that because the court properly excluded Knight's statement, McClennon cannot meet the first prong of *Hines*: non-mutually admissible evidence was

not presented at trial. Here, the circuit court properly recognized that Knight's statement was prejudicial to McClennon and his co-defendants and excluded it.

We find no merit in McClennon's argument that he was nonetheless prejudiced because his case had been pending for about a year. The court ruled on the admissibility of Knight's statement on the second day of trial, after denying McClennon's motion to sever the previous day. McClennon argues that because of this delay, his counsel could not adequately prepare for trial, not that he was prejudiced from the introduction of inadmissible evidence. From *Hines*, we note that within the meaning of Rule 4-253, "prejudice," is "only" that which "result[s] to the defendant from the reception of evidence that would have been inadmissible against that defendant had there been no joinder." *Hines*, 450 Md. at 369. And although the distinction made there appears to have been between admissible and inadmissible evidence, rather than between admitted and unadmitted evidence, our research could find no precedent for establishing prejudice from denial of a motion to sever based on anything other than the introduction of inadmissible evidence to a jury.

Further, we cannot glean from the record any other way in which the court's denial of the motion to sever might have prejudiced McClennon's trial preparations such that it affected the verdict. After all, McClennon wanted Knight's statement excluded and it was. McClennon does not offer any explanation in his brief as to prejudice other than the bald assertion. We conclude that the circuit court's delayed ruling on the inadmissibility of the statement did not influence the jury's verdict. Therefore, we hold that the court's decision

not to sever the trial did not unfairly prejudice McClennon and was not an abuse of discretion.

Further, we hold that any error made in denying McClennon's motion to sever was harmless in light of the court's subsequent ruling of inadmissibility of the only evidence McClennon claims was prejudicial. Applying the harmless error test adopted in *Dorsey*, we review the record to determine whether the error—"the evidence complained of [] whether erroneously admitted or excluded"—had any effect on the verdict. *Dorsey*, 276 Md. at 659. On review, we note that not only was Knight's statement not admitted, but it was not referenced in opening statements, closing arguments, or at any other time in front of the jury by the witnesses or counsel. When McClennon moved for severance, he stated "If the State chooses to use this or if this not be severed, then the State [should] not be allowed to use it against my client." The court ultimately granted one of those requests by prohibiting introduction of the evidence entirely. The ground for McClennon's motion to sever was rendered moot.

B. James

The State urges us not to consider the joinder issue with regard to James, as it argues that the issue is not preserved. The State reasons, *first*, that James never properly moved to sever under Maryland Rule 4-252 prior to the start of trial. Notwithstanding James' failure to file a motion to sever, the State, recognizing that McClennon requested severance during jury selection, also contends that James now attempts to piggy back off McClennon's motion to sever. In light of the record, we agree with the State.

Maryland Rule 8-131(a) informs us that, generally, "the appellate court will not decide any issue other than subject matter or personal jurisdiction unless it plainly appears by the record to have been raised in or decided by the trial court [. . .]" However, we, as the reviewing court, are given the discretion to decide such an issue "if necessary or desirable to guide the trial court or avoid the expense and delay of another appeal." *Id.* The record clearly indicates that James' counsel filed an omnibus motion to suppress "any statements '[b]y co-defendant(s), for use in a joint trial where the co-defendants do not testify, who implicate [James] and deprive [James] of the right to confrontation" on June 16, 2017. Rule 4-252(a)(5) states that a motion to sever is a mandatory motion that "shall be raised in conformity with this Rule, and **if not so raised [is] waived** unless the court, for good cause shown, orders otherwise[.]" (emphasis added). The State, however, responded in writing one month later indicating that James' motion did not comply with the Rule and specifically asked him to "file specific motions based on law and the facts." James' counsel did not file a response and instead withdrew motions on November 3, 2017.

The record also shows that at no time during the trial proceedings did James' counsel request for severance, object to the court's denial of McClennon's severance request, or otherwise expressly ask for severance. In cases involving multiple defendants, we have required that "each defendant . . . lodge his own objection in order to preserve it for appellate review and may not rely, for preservation purposes, on the mere fact that a co-defendant objected." *Williams v. State*, 216 Md. App. 235, 254 (2014). "One defendant, of course, may expressly join in an objection made by a co-defendant but he must expressly

do so. *It is not implicit*." *Id*. (emphasis added) (internal citations omitted). Because James did not lodge his own objection or join co-counsel's objection, we hold that he did not properly preserve the issue and shall end our analysis here.

Even if we determined that James properly preserved the issue of severance, we would reach the same conclusion we did after analyzing McClennon's same assignment of error. James cannot meet *Hines*' first requirement, namely, that non-mutually admissible evidence must be presented at trial. We determined that the trial court properly excluded Knight's statement as presenting a clear violation of *Bruton*. *See* Section a. of this Discussion. James cannot meet the threshold requirement to show prejudicial joinder.

Further, we determine that James' additional arguments are without merit. *First*, James argues that a "constitutionally-protected connection [that] popped up continuously in the case and could not be reasonably separated from the jury" goes unfinished. James contends that the circuit court erred in proceeding with a joint trial "regardless of the risks of significant *Bruton* Constitutional violations throughout this case." James, however, does not say what constitutionally-protected connection "popped up" for the duration of the trial. Rule 8-504(a)(6) requires an appellate brief contain an "[a]rgument in support of the party's position on each issue." Indeed, this Court has held that when an "appellant offers no support for his position, we shall not address it." *Darling v. State*, 232 Md. App. 430, 465-66 (2017). The Court of Appeals has similarly maintained that it is not the duty of the reviewing court "merely because a point is being mentioned as being objectionable at some point in a party's brief, to scan the entire record and ascertain if there be any ground, or

grounds, to sustain the objectionable feature suggested." *Van Meter v. State*, 30 Md. App. 406, 408 (1976) (citing *State Roads Comm. V. Halle*, 228 Md. 24, 32 (1962)).

Second, even if it was our duty to ascertain what argument(s) James attempts to make, it is not apparent that James is referring to Knight's statements to law enforcement about where the stolen car was located. James concedes that Knight's statement was excluded completely. It is therefore difficult to conclude that a confrontation violation occurred based on a piece of evidence that the trial court excluded because of an obvious *Bruton* violation. Assuming the argument James attempts to make is predicated on this statement, it cannot be said that a confrontation violation or prejudice followed because, as we have stated, the evidence was never before the jury.

II. Sufficiency (McClennon and Knight)

"In reviewing the sufficiency of the evidence to sustain a criminal conviction, it is the duty of this Court to determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Taylor*, 346 Md. at 457 (citations omitted). This Court does "not inquire into the credibility of witnesses or weigh the evidence to ascertain whether the State has proven their case beyond a reasonable doubt; that is the responsibility given to the trier of fact." *Briggs v. State*, 348 Md. 470, 475 (1998). Additionally, the Court clarified its only concern is

> whether the verdict was supported by sufficient evidence, direct or circumstantial, which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt. The judgment of

> the circuit court will not be set aside unless clearly erroneous, with due regard given to the opportunity of the trial court to judge the credibility of the witnesses.

Taylor, 346 Md. at 457 (citations omitted).

A. McClennon

McClennon argues that based on the evidence presented at trial, the fact-finder would necessarily have had to engage in speculation to convict him of the charges, because Jackson did not identify him as an assailant, nor was there any forensic evidence that put McClennon in possession of the keys or firearm. McClennon asserts that the only evidence putting him in possession of the gun or the key was that he was merely a passenger in a vehicle where neither item was in plain view. Finally, McClennon posits that even if he was in possession of the firearm, the State's evidence was insufficient to show that the firearm the police found in the Yaris was the same firearm brandished at Jackson. McClennon points to the obvious discrepancy between Jackson's identification of the weapon as a revolver, and the fact that the firearm recovered from the Yaris was a semi-automatic handgun.

Preliminarily, the State notes that because McClennon's motion for judgment of acquittal was limited to Counts five (5) (armed carjacking), seven (7) (first-degree assault) and eight (8) (use of a handgun in a crime of violence), his sufficiency claim is unpreserved as to Count six (6), conspiracy to commit armed carjacking. The State's overarching argument is that the bases for McClennon's sufficiency claims rest on conflicts in the

evidence or the weight given the evidence—arguments not appropriate for appellate review. The State contends that McClennon's arguments imply there should be a finding of insufficiency if *any other* inference from the evidence might have been reasonable. The State asserts that the appropriate test is whether *any* rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.

At trial, the State's theory was that the appellants, either as principals or accomplices, were in constructive possession of the gun and key. McClennon, citing *Taylor*, *supra*, posits that circumstantial evidence alone may be sufficient for conviction if, as taken as a whole, it does not require the factfinder to resort to speculation. There, the Court of Appeals explained that if only circumstantial evidence is to form the basis for a conviction, that evidence must amount to more than "strong suspicion or mere probability," and instead "must ... afford the basis for an inference of guilt beyond a reasonable doubt." 346 Md. at 458 (citations omitted).

In *Taylor*, the Court reversed the defendant's conviction for possession of marijuana, when he was in a hotel room in which marijuana smoke was observed, and two other persons in the room had marijuana concealed in bags within their personal belongings, to which the defendant did not have access. *Id.* at 455–56. Critical to the Court's decision to reverse, no persons in the room were observed smoking marijuana, no marijuana or paraphernalia was found on the defendant, and the defendant had no possessory interest in the hotel room. *Id.* at 459. Although the Court said it could be inferred the defendant was aware of the presence of marijuana in the room and that it had

been smoked, his presence near the concealed marijuana and his awareness of it being smoked were not sufficient to establish his possession, which requires actual dominion and control over the substance. *Id.*

McClennon finds additional support for his position in *Parker v. State*, 402 Md. 372 (2007). There the Court of Appeals held that "[a] possession conviction normally requires knowledge of the illicit item," and "an individual ordinarily would not be deemed to exercise 'dominion or control' over an object about which he is unaware." *Id.* at 407. The Court explained that dominion or control over the item may be demonstrated "either directly or inferentially," and that "[p]ossession may be actual or constructive and may be exclusive or joint." *Id.* (citations omitted). Ultimately, the Court held that the evidence did "not show directly or support a rational inference" of the defendant's possession of a firearm that was obtained from the second floor of a building in which the defendant had no possessory interest, and where there was no evidence the defendant had been on or had access to the second floor. *Id.* at 407–09.

Here, at the close of the State's case-in-chief, McClennon moved for acquittal on Counts five (5) (armed carjacking), seven (7) (first-degree assault), and eight (8) (Use of a Handgun in a Crime of Violence). The trial court responded:

> **THE COURT**: I'm going to deny that motion for the same reason I denied Defendant Carr's motion. I think there is sufficient evidence for the jury to find that the Defendant participated, at the very least, as an accomplice in this case. I think all of the facts in this case are that the gunman had the gun and the ski mask on the seat beside him and, again, the key fob in the console and the gun. I'm going to deny the motion.

In denying Carr's motion for acquittal, the court noted that the evidence showed that Carr, like the three appellants here, was "in the Yaris within an hour of the crime, which retained two people suspected of – or identified as committing the crime as well as the instrumentalities of the crime, the ski mask on the seat where [Carr] was sitting and the gun found on the left side, under the driver's seat, which is certainly in arms distance of [Carr]."

McClennon's chief argument on sufficiency—that he could not have possessed the weapon because there was no evidence to show that he was aware of its presence, and that the gun recovered from the Yaris was not the same as the one Jackson identified—is merely an assertion of alternative evidentiary inferences. While the Court of Appeals in *Taylor* explained that a conviction is improper if it requires the jury to speculate as to which of two, equally supported versions of events is correct, this "does not preclude a conviction based on a credibility determination emanating from disputed evidence." 346 Md. at 458–59. In short, a conviction based upon multiple inferences may stand when the inferences rested on the jury's determination that some evidence or testimony was more credible than other evidence or testimony. The Court of Appeals has explained that if evidence sufficiently supports the inference made by the factfinder, the appellate court should defer to those inferences, rather than examining the record in search of other facts that might support a conflicting inference. *State v. Smith*, 374 Md. 527, 547 (2003).

McClennon's argument that he did not possess the firearm necessarily rests on his assertion that there was no evidence to support that he was aware of the weapon, which

was "underneath the driver's seat" and "not in plain view." We disagree. The facts of the instant case are unlike those in *Parker*, *supra*, in that they allow for a rational inference McClennon was aware of the handgun. The record contains varying descriptions about the location of the handgun when found by Officer Stevens. For instance:

> **[PROSECUTOR]**: What did you find *behind the driver's seat*?
>
> **OFFICER STEVENS**: It was a loaded handgun.
>
> ***
>
> **[PROSECUTOR]**: Now you testified that you found a gun *in the back seat or in the floorboard behind the driver's seat*; is that right?
>
> **OFFICER STEVENS**: Yes.

After the State showed Officer Stevens a photo of the handgun in the vehicle:

> **[PROSECUTOR]**: And when you testified earlier that you found the gun in State's Exhibit 10, *at the feet of Antonio McClennon*, who was seated in the back seat behind the driver, is this a picture of where it was located?
>
> **OFFICER STEVENS**: Yes.
>
> **[PROSECUTOR]**: Is this an angle of the butt of the gun sticking out, the handle?
>
> **OFFICER STEVENS**: Yes.

And when the State asked Officer Stevens to which defendant the gun was closest, Officer Stevens explained it was McClennon:

> **OFFICER STEVENS**: Because where the placement of the gun – where I saw it at it was *closer to the foot of the Defendant in the back seat*.

Finally, when counsel for McClennon cross-examined Officer Stevens, the following exchange occurred:

> **[MCCLENNON'S COUNSEL]**: Where was the gun found, sir?
>
> **OFFICER STEVENS**: It was *in the back seat, the driver's seat, back seat.*
>
> **[MCCLENNON'S COUNSEL]**: I'm sorry. I need you to be a little more specific.
>
> **OFFICER STEVENS**: It was *underneath the driver's seat, to the rear.*
>
> **[MCCLENNON'S COUNSEL]**: That's a very very articulated point. It was not behind the driver's seat, was it? It was under the driver's seat, wasn't it?
>
> **OFFICER STEVENS**: It was *underneath the driver's seat, to the rear.*

(emphasis added).

From this testimony, one could draw different conclusions as to how visible and how close the gun was to McClennon. Weighing the credibility of witnesses to determine how visible the handgun was to McClennon was a task for the fact-finder. *See, e.g.*, *State v. Raines*, 326 Md. 582, 590 (1992). Based on the evidence adduced, a reasonable juror could have found that McClennon had no knowledge of the gun or the ski mask. After all, the jury heard the same evidence against Carr (who was in the backseat of the Yaris with McClennon) but could not reach a unanimous decision as to his culpability. The jury heard the same evidence but reached a different conclusion about McClennon. Under the circumstances, we see no reason to disturb the jury's findings

We are mindful of the caution in *Taylor* that "mere proximity to the [item], mere presence on the property where it is located, or mere association, *without more*, with the

person who does control the . . . property on which it is found, is insufficient to support a finding of possession." 346 Md. at 460 (emphasis supplied). Here, however, the State's evidentiary support for McClennon's agency does not consist solely on his proximity to the firearm in the Yaris.

The "*more*" that *Taylor* requires is that a ski mask similar to what the victim described was found on the Yaris' backseat in plain view and next to McClennon. A second mask was found inside the hood of a jacket worn by defendant James, whom the victim identified from a photo array as one of the carjackers. A rational fact finder could infer that McClennon wore the mask found on the backseat while committing the carjacking. A rational factfinder could have inferred that McClennon had to have seen the mask and was also aware of the gun in the vehicle, given the victim testified that both items were used in the carjacking.

Additionally, as noted by the trial court in denying Carr's motion for acquittal, the defendants were stopped in the Yaris within an hour of Jackson's report of the carjacking. Det. Washington testified that an hour would have been sufficient for the appellants to have left the scene of the carjacking, left the stolen vehicle off at the location where it was recovered, and reached the location where Officer Stevens stopped the Yaris. A reasonable fact-finder could have inferred there would be little time for McClennon, to have been picked up from a location separate from those stops.

As for Jackson's report to police that a "revolver" was used in the carjacking, while the police recovered a semi-automatic handgun from the Yaris, weighing and resolving

conflicting evidence was a task for the jury. We addressed the issue of unclear or contradictory testimony in *Reeves v. State*, 192 Md. App. 277 (2010), where a criminal defendant disputed the sufficiency of descriptions made of him by the victim and police officers, in proving he was involved in a carjacking. We explained, "[t]o the extent that [the victim's] and the officers' identifications of appellant were allegedly vague or inaccurate, the jury accepted their testimony, and we will not disturb that determination." *Id.* at 307. We do the same here. In sum, we hold a rational factfinder could have found the essential elements of the crimes beyond a reasonable doubt and inferred that McClennon was complicit in these crimes.

B. Knight

Knight raises the same issues of sufficiency as McClennon regarding constructive possession of the key and the gun. He posits that his mere presence near the supposed evidence of the crime is insufficient to convict him. Finally, he argues that he was found "guilty by association" with his co-appellants.

For the reasons we discussed in analyzing McClennon's sufficiency claims, we reject Knight's arguments regarding what inferences a rational juror could draw from the evidence adduced at trial. Here, as discussed, the handgun was found on the floor behind Knight's seat. The Mercedes' key was found in plain sight in a cupholder of the Yaris' center console, inches from where Knight was sitting at the time of the stop. As was the case in our analysis of these issues with McClennon, weighing the credibility of witnesses to determine whether Knight was in constructive possession of the gun and key was the

jury's job to resolve as the factfinder. *Raines*, 326 Md. at 590. Additionally, as discussed, the fact that Knight was found driving the Yaris in a location and at a time which could have permitted him to participate in the carjacking were inferences from the evidence that the jury was tasked with resolving. Based on the evidence adduced at Knight's trial, we see no reason to disturb the jury's findings.

As for Knight's "guilt by association argument," he cites for support our decision in *Williams v. State*, 15 Md. App. 320 (1972). There, two Baltimore City police officers were on patrol when they pulled alongside Williams and he ran from the police officers. *Id*. at 322. As Williams fled, the officers noticed that Williams took a bag out of his pocket. *Id*. at 322-23. The police officers picked up the bag and caught Williams. *Id*. The bag contained 125 capsules of heroin. *Id*. At trial, Williams testified in his own defense. *Id.* at 325. During the State's cross-examination of Williams, the State asked him if he knew a group of people were well-known drug offenders. *Id*. at 325-27. A jury convicted Williams and he appealed, raising, among other issues, the "guilt by association" argument.

We held that while cross-examination is generally left to the sound discretion of the trial court, a guilty verdict could not rest on prejudicial evidence that seemingly linked Williams with notorious drug dealers. We said,

> [t]o permit these convictions to stand, based in part as they are, on irrelevant and dangerously inflammatory evidence, is to permit guilt by association in its most rampant form. . . .We limit our holding to the casual associations alluded to in the instant case. We are not here concerned with a case where the accused has been shown to have been in long and intimate association with known narcotics dealers, nor under circumstances that clearly indicate

> that the parties were at the time and place observed, engaged in illegal activities.

Id. at 328.

Williams is unavailing, chiefly because the State neither advanced a guilt by association theory at trial, nor argued one in closing. The mere fact the Knight was subject to a joint trial, where the jury heard evidence of the alleged criminal agency of several co-defendants, is not the type of prejudicial evidence or inferences that *Williams* prohibited. Knight was found driving a car with several others within an hour of a carjacking with evidence linking him to the crime. The jury was free to infer what it liked from that evidence; they chose to convict. For the reasons discussed, the evidence was sufficient to convict Knight.

III. Partial Verdict (James and Knight)

Preliminarily, we note that under Maryland Rule 8-503(f), James incorporates Knight's arguments in his brief. James does not make a separate argument. Consequently, as the discussion will focus on Knight's argument, we understand that James is making the same argument.

A circuit court's decision to accept a partial jury verdict is reviewed under an abuse of discretion standard. *Simms v. State*, 240 Md. App. 606, 619 (2019) ("The Maryland Rules, however, provide for judicial discretion in the acceptance of partial verdicts"). In *Simms*, early in a jury deliberation of a homicide trial, the jury sent several notes saying they were deadlocked. *Id*. at 614-17. When defense counsel suggested the court take a

partial verdict, the trial judge dismissed the offer and seemed to suggest that all parties must mutually agree before the court could take a partial verdict. *Id*. We held that, contrary to what the trial judge thought, all parties do not have to agree to take a partial verdict. At the request of a single party, the circuit court, in its discretion, may take a partial verdict provided that all jurors agree to some, but not all counts *Id.* at 624-625.

Additionally, in *State v. Fennell*, 431 Md. 500, 522 (2013), the Court of Appeals held that "the mere theoretical availability of partial verdicts does not necessitate further inquiry by the trial court where, for example, no party has requested a partial verdict be taken or the jury does not indicate that it has reached one." However, the Court also said, "because it is not implicated in the present case, we need not consider the trial judge's discretion as it pertains to accepting … a partial verdict where the jury has not intimated that it may have reached one, but rather counsel requests a partial verdict to be entered." *Id*. at 521, n.14. The Court reiterated that it is solely within the court's discretion to inquire whether a jury has reached a partial verdict before deciding to accept or reject a partial verdict. *Id.* at 522. Most importantly, a trial court may not accept a "tentative" verdict. *Id.* at 524.

Here, the jury sent several notes to the court, the second note being the first to inform the court that the jury could not reach a unanimous decision.[3] As the jury's inability to reach a unanimous verdict came after only "about two and a half hours" deliberation and

[3] A second issue raised in the note was a query about who was required to pay for a DNA test. That issue will be discussed later in this opinion.

"two days of trial," the court, after consulting with counsel, excused the jury for an hour-long lunch break.

Shortly after it reconvened, the jury sent a third note, stating that it could not reach a unanimous verdict. "[W]e are not at a unanimous decision and two jurors are still convinced of his innocence, while the majority are convinced of conviction. Where do we go from here?" After consulting with counsel, and deciding it would give the *Allen* charge, the court said:

> **THE COURT**: What I'm going to do is bring them back and ask if they have been able to reach a unanimous verdict as to any charge against any Defendant, first. So try to get some clarity on that. And assuming they are not – I'm not going to ask what that is but assuming they are not, we will have some sense and then I will read 201, jury's duty to deliberate. And I will, given the fact that the note references – the first note talked about whether they had to find everybody guilty or not. This note references his implying a single Defendant innocence or conviction (sic). I'm going to read again 308, which is the instruction I read the first time and refer them to – which says, there are four Defendants. [Y]ou must return a separate verdict for each charge against each Defendant. Although they are charged with the same offenses, you must consider the evidence as it relates to each Defendant separately. You must consider each separate charge to each Defendant. I'm not going any further than to reiterate what I told them already. Bring the jury in.

Once in the courtroom, the foreperson stated that the jury had reached unanimous verdicts on some charges against some defendants. With regard to the unresolved charges against any defendant, the court gave the *Allen* charge, and ordered the jury to continue their deliberations.

Within 20 minutes of resuming deliberations, the jury foreperson sent a fourth note stating that "we are still at the same impasse with two of the jurors again." The State asked the court to take a partial verdict on any unanimous counts the jury reached as to any defendant. Counsel for all four defendants requested a mistrial. While the court did not immediately rule on the motions for mistrial, the court, instead, announced that it would take a partial verdict and declare a mistrial as to any counts or defendants on which the jury could not agree.

> **THE COURT**: Okay. Well, given they said they reached a unanimous verdict as to some counts as to some Defendants, what I am going to do is, pursuant to Rule 4-327, I'm going to take a partial verdict. I'm going to accept the verdicts as to which they have reached unanimous agreement and I'm going to declare a mistrial as to the remaining counts.
>
> All right. So I'm going to call the jury in and walk our way through what they have agreed on and what they haven't.

Once the jury had reassembled in the jury box, the court said:

> **THE COURT**: All right, ladies and gentlemen. As I understand it, you have reached a unanimous agreement as to some counts and some Defendants and you have been unable to reach a unanimous agreement as to others.
>
> **THE FOREPERSON**: We reached a unanimous decision on three. We are not able to reach a unanimous decision as to one.
>
> **THE COURT**: Okay. One Defendant you mean?
>
> **THE FOREPERSON**: One Defendant.
>
> **THE COURT**: Okay. Well then what we are going to do, is I'm going to have the clerk walk us through these. But I'm going to ask you first, have you reached a unanimous decision as to Cory Knight?
>
> **THE FOREPERSON**: Yes.
>
> **THE COURT**: Have you reached a unanimous decision as to Emilio Carr?

> **THE FOREPERSON**: Emilio Carr, no.
>
> **THE COURT**: Have you reached a unanimous decision as to Daniel James?
>
> **THE FOREPERSON**: Yes.
>
> **THE COURT**: Have you reached a unanimous decision as to Antonio McClennon?
>
> **THE FOREPERSON**: Yes.
>
> **THE COURT**: Okay. And so we are clear, you have not reached a unanimous decision as to Emilio Carr, as to any of the charges against him; is that true?
>
> **THE FOREPERSON**: Right. That is correct.

The court then declared a mistrial as to Carr and took verdicts as to the appellants.

Knight argues that the court's acceptance of a partial verdict, where the jury convicted three, but not all four co-defendants, was error because, the jury had not reached a final verdict and the court did not ask whether the jury wanted to deliberate further. Knight argues that under *Simms*, discussed *supra*, and *Blueford*, the trial judge needed to ascertain whether the jury completed its deliberations with respect to Knight, McClennon, and James prior to declaring a mistrial as to Carr.

Blueford v. Arkansas, 566 U.S. 599 (2012), concerned the Supreme Court's affirmance of lower court rulings that Blueford could be retried on all counts where a jury that was considering capital murder and lesser included offenses reported in open court that they were unanimous regarding acquittal on capital and first-degree murder but were deadlocked on the manslaughter and negligent homicide counts, and had not yet voted on negligent homicide. *Id.* at 603-604. The court gave the jury the *Allen* charge and sent them

back to deliberate. *Id*. at 604. Within minutes, the jury returned announcing that it was still deadlocked. *Id*. The court then declared a mistrial. *Id*. Later, the State chose to retry Blueford on all charges, including capital murder and first-degree murder. After retrial, he was convicted. *Id*.

Blueford's appeal focused chiefly on the fact that the first jury had announced that it voted to acquit him of the two most serious offense and to retry him under the circumstances amounted to double jeopardy. *Id*. The Arkansas Supreme Court affirmed the convictions, concluding that Blueford's constitutional right to not being tried twice for the same crime was not offended, as the jury's announcement was not a verdict. *Id*. at 604-05. The Supreme Court agreed. The Court held that Blueford could be retried on the capital and first-degree murder counts because the verdicts were not final. *Id*. at 606. "The foreperson's report was not a final resolution of anything." *Id*. To be a final verdict, the Court held, the trial judge must accept jury's verdict, and affirmatively state that the jury's deliberations will cease. *Id*. at 608.

The Court of Appeals, in *State v. Fennell*, 431 Md. 500, 522 (2013), clarified that "the mere theoretical availability of partial verdicts does not necessitate further inquiry by the trial court where, for example, no party has requested a partial verdict be taken or the jury does not indicate that it has reached one." The Court made clear that it is wholly within the trial court's discretion to make whatever inquiries it deems necessary before deciding to accept a partial verdict. *Id.* at 522. This, the Court stressed, was so that the trial court did not accept "tentative" or incomplete verdicts. *Id.* at 524.

From these cases we conclude that the circuit court properly took a partial verdict. Here, the jury made clear that they reached a final verdict as to each of the appellants but not for Carr. Contrary to what Knight argues, the jury made clear, after three notes and the *Allen* charge, that it was unable to reach a verdict as to Carr but had definitively reached unanimous verdicts as to Knight, McClennon, and James. Further, we note that when the foreperson announced the verdicts, neither of the appellants' counsel raised an objection or suggested that further deliberations would have been fruitful. As we view the record, the trial judge properly exercised his discretion. We conclude that the court's action is in accord with *Simms* and *Fennell* because the court determined that a unanimous verdict as to some defendants had been definitively reached, but not as to one defendant. We perceive no error.

IV. DNA Query in the Second Jury Note (Knight and James)

In the jury's second note, in addition to informing the court that the jury was deadlocked, the jury also queried: "Does DNA have to be paid by the Defendants or is it law that it must be done automatically by the police?" Knight claims that the court's response to the question was error in that the answer shifted the burden of proof to the defendants to explain why no genetic testing was performed. James also claims error and joins Knight's argument.

The State argues that Knight's trial counsel's response to the jury's question was not an objection as defined under the Rules, and therefore the issue is not preserved for review. We agree with the State and explain.

An exposition of what happened is instructive. After the court read the jury's second note to counsel, each defendant's attorney gave their opinion of what the court should do.

> **[CARR'S COUNSEL]**: Your Honor, with the latter part of the question, the DNA part, if you will, I think most counsel are in agreement the Court cannot answer that question and should somehow direct it to what they heard so far in the case, I don't know the exact wording. But essentially not address that component of the question. As far as the first part [that the jury was deadlocked] I suppose the Court could give an *Allen* charge I suppose but it hasn't been that long.
>
> **[KNIGHT'S COUNSEL]**: I know that, Your Honor, might be thinking of sending them to lunch[.] [I]s that something you want to do now and come back, instruct them to continue deliberating and that they have all the evidence[?]
>
> **[JAMES' COUNSEL]**: I agree with [Knight's counsel] and [Carr's counsel]. Sending them to lunch, excusing them to lunch now and telling them when they come back they are to continue to deliberate. As far as the second part [the DNA question], I don't think they should be instructed[,] just to focus on the evidence they have.
>
> **[MCCLENNON'S COUNSEL]**: I agree with counsel. It's too early for an Allen charge and the second part [the DNA question] should not be answered at all.
>
> **[PROSECUTOR]**: To the substance the State would agree, it's early. I propose the language of asking them to continue to deliberate and ask for the DNA portion, a general response with the language you have heard all of the testimony and evidence that there is in this trial and that's what you must base your decision on.

As noted in Section III of this opinion, the court agreed to let the jurors go to lunch. The court also agreed with counsel that it was too soon to issue the *Allen* charge. As to the DNA question, the court said, "And my answer to the DNA stuff is that there is no law that applies and there is no evidence before them as to those issues. All right. Okay."

The prosecutor then worried aloud that the "no law applies" language the court proposed conflicted with defense evidence presented as to why they declined to do DNA testing. The court noted that the jurors wanted to know whether there was a specific "law" as to who has to pay for DNA testing – the defendants or the police. The court then modified its response. "I'm going to tell them there is no law that applies. They have all of the evidence available to them for their deliberations."

As the jurors were filing in, all counsel asked for a bench conference with the court. Carr's attorney said:

> **[CARR'S COUNSEL]**: After talking at the table with counsel, we are worried that the term "the law" not applying, to that effect, may imply a burden shift.
>
> **THE COURT**: No. What I'm going to say is, there is no law that applies. They have asked what the law is and I'm going to say that there is no law with regard to that.
>
> **[KNIGHT'S COUNSEL]**: If I could suggest, alternatively, there is no requirement by law either way or that anybody has to do anything.
>
> **[JAMES' COUNSEL]**: That is correct and the police are not required.
>
> **THE COURT**: Do you all agree with that?
>
> **[CARR'S COUNSEL]**: I'm okay with that.

The court then addressed the jury.

> **THE COURT**: All right. Ladies and gentlemen, so I got your second note here[;] it has two questions. **I'll deal with the second question first. Does DNA have to be paid by the Defendant or is it the law that it must be done automatically by the police? The answer to that is there is no law either way.**

(emphasis added).

Maryland Rule 4-323(a) states that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." Further, in joint trials each defendant must separately object to preserve an issue for appellate review. In *Williams v. State*, 216 Md. App. 235 (2014), Judge Moylan wrote:

> Under Maryland law, in cases involving multiple defendants **each defendant must lodge his own objection in order to preserve it for appellate review and may not rely, for preservation purposes, on the mere fact that a co-defendant objected**. One defendant, of course, may expressly join in an objection made by a co-defendant but he must expressly do so. It is not implicit.

Id. at 254 (emphasis added). As we see it, Carr's attorney's bench conference comment, was not an objection. The comments were statements of concern that counsel hoped would sway the judge to further modify its response; it was not an objection. Further, even if Carr's counsel's statement was an objection, it was not one that Knight (or James) expressly joined. Knight and James' counsel were both present at the bench conference and did not lodge separate, clear objections to the answer that the court gave. For these reasons, we conclude that Knight and James' objections to the court's answer to the DNA question are not preserved for review.

V. Testimony of Knight's "Role" as Driver

Knight's final assignment of error is that the trial court erred in allowing Det. Washington to testify that Knight's "role" was as that of driver of the Yaris. Knight asserts

that this testimony was prejudicial because it implied that Knight had a "role" in the carjacking. Knight concedes that at trial, his attorney did not object to this line of questioning. Nonetheless, Knight asks this Court to exercise its discretion and recognize plain error. We decline to do so.

We have consistently said that "appellate invocation of the 'plain error doctrine' 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Myers v. State*, 243 Md. App. 154, 186 (2019) (*quoting Morris v. State*, 153 Md. App. 480, 507 (2003)). "Plain error review tends to afford relief to appellants only for 'blockbuster' errors." *Id*. (*quoting United States v. Morgan*, 393 F.3d 1, 13 (1st Cir. 2004)). We are guided by a four-prong test:

> First, there must be an error or defect – some sort of deviation from a legal rule – that has not been intentionally relinquished or abandoned … by the defendant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the defendant's substantial rights, which means that the defendant must demonstrate that the error affected the outcome of the trial court proceedings. Fourth and finally, if the above three prongs are satisfied, the appellate court has the discretion to remedy the error – discretion that ought to be exercised only if the error seriously affects fairness, integrity or public reputation of judicial proceedings. Meeting all four prongs is difficult, as it should be.

Carroll v. State, 240 Md. App. 629, 662 (2019) (*quoting Givens v. State*, 449 Md. 433, 469 (2016)) (cleaned up).

Here, the prosecutor asked Det. Washington, the lead investigator, where Knight was seated in the Yaris when it was stopped "and what role he played[.]" Det. Washington answered that Knight "was seated in the driver's seat during the duration of this incident."

The prosecutor's next question began: "Okay, given his role as driver of the Toyota Yaris…." Despite the evidence showing that the exchange showed that Knight was the operator of the Yaris, he argues that the use of the word "role" implied that he was involved in the carjacking.

The fact is that the other evidence presented gave the jury a sufficient basis to sustain Knight's convictions, even without the mention of the word "role." Some of the evidence against Knight included that the victim had identified Knight as one of her assailants after viewing a photo line-up, which Knight does not challenge. He was found in the Yaris with the victim's key fob in a cupholder inches from where Knight was sitting. A semiautomatic handgun was under his seat and a ski mask similar to the one used in the assault was found within his reach on the backseat of the car. Additionally, Knight was found near the scene of the crime less than an hour after it occurred. As we view the evidence, the mention of the word "role" is not the type of "blockbuster" alleged error that we should plainly recognize.

VI. **Admission and Authentication of Evidence (James)**

James argues that the trial court erred when it admitted the ski masks based solely on the victim's agreement that the cloth-like material of the recovered ski masks was consistent with that of the headgear of the attackers. He reasons that the victim did not have sufficient knowledge of what the assailants wore on their heads during the attack to provide the foundation for their admission into evidence.

The State responds that the witness had sufficient knowledge to meet the "low bar" of evidence authentication. Even if she did not, the State further rebuts that James was not prejudiced by the authentication because testimony of other witnesses properly authenticated the evidence. We agree with the State.

Whether there is sufficient authenticating evidence to admit the proffered evidence is a preliminary question to be decided by the trial court and is reviewed on appeal for an abuse of discretion. *Griffin v. State*, 419 Md. 343, 346 (2011); *Carpenter v. State*, 196 Md. App. 212, 230 (2010). Maryland Rule 5-901 requires "authentication or identification as a condition precedent to admissibility" that "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 5-901(a). Of specific applicability to the current issue, the Rule states that "[c]ircumstantial evidence, such as appearance, contents, substance, internal patterns, or other distinctive characteristics, that the offered evidence is what it is claimed to be[]" may be used to authenticate or identify evidence in conformity with the Rule. Rule 5-901(b)(4).

The State is correct in its assertion that the Rule sets a relatively low bar for authentication and identification. "The burden of proof for authentication is slight, and the court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so." *Johnson v. State*, 228 Md. App. 27, 59 (2016) (citing *Dickens v. State*, 175 Md. App. 231, 239 (2007)) (emphasis in original) (internal quotations and citations omitted).

In James' view, the victim could not authenticate the ski masks because she did not have any "tactile interaction" with the material of the head covering in order to provide an accurate description. The witness, so James argues, merely described the head coverings as being made out of "cloth-like" material, which she saw only "for a brief second" during the attack. James finds further issue with the witness' description of the ski masks, concluding that the description she initially provided police/investigators (durag, maybe a skull cap) "[is] at least partly" at odds with what she testified she saw and is therefore not specific or sufficiently detailed. We disagree.

In the case of physical evidence, the object "need not be positively connected with the accused or the crime in order to render it admissible." *Trial Handbook for Maryland Lawyers* § 22:3 (citing *Daniels v. State*, 213 Md. 90 (1957)). "Only probability of connection with the accused or with the crime is required for admission into evidence." *Id.* (citing *Parker v. State*, 7 Md. App. 167 (1969), *cert. den.* 402 U.S. 984 (1971)). The item need not be positively identified in order to be admitted as identification goes to the weight of the evidence rather than to admissibility. *Himmel v. State*, 9 Md. App. 395 (1970). Nor must the item be distinguishable from other items of the same make and type. *See id.* (holding that a wristwatch seized during a search of the defendant's residence that was indistinguishable from other watches of the same make and type was admissible at defendant's trial for a daytime housebreaking of a residence from which a watch of the same make and type was stolen). With that in mind, we conclude that the circuit court did not abuse its discretion in permitting the ski masks into evidence via the victim's testimony.

At trial, the State proffered testimony from the victim as to the events on the night of the carjacking. In such testimony, the victim described the suspects' clothing as follows:

> **[PROSECUTOR]**: [. . .] Can you describe what it looked like they [the suspects] were wearing on their heads?
>
> **[JACKSON]**: Um, as I told the officer that night, I would describe it more like a durag, the one holding the gun as opposed to a sports cap, if you will. And the same for the other, I couldn't tell if they were skull caps or a durag, because I couldn't see behind their head.
>
> **[PROSECUTOR]**: Basically, would it be fair to say it was a cloth on their head, it wasn't a type of hat with a bill?
>
> **[JACKSON]**: Yes.

The State then attempted to admit the two ski masks for the first time:

> **[PROSECUTOR]**: I'm showing you State's Exhibit 12 and 13. . . Did you have an opportunity to look at what is inside State's Exhibit 12 and 13?
>
> **[JACKSON]**: Yes, I have.
>
> **[PROSECUTOR]**: Your Honor, State would [sic] admit State's Exhibit or move to admit State's Exhibit 12 and 13.

At this time, McClennon and Carr's counsel objected to the admission, which the court sustained. However, the State continued:

> **[PROSECUTOR]**: [. . .] When you described earlier the type of – you used the word hat, you further described it as sort of like a skull cap. When you looked at State's Exhibit 12 was that consistent with the type of material worn on the suspect's [sic] head?

[JACKSON]: It is.

The State then again moved to admit Exhibit 12 into evidence. It was through this testimony that one ski mask was entered into evidence, although not without objection. However, as we stated above, authentication is a low bar that does not require a positive identification from a testifying witness. It was sufficient for the Jackson to testify that the ski masks introduced as Exhibits 12 and 13 by the State were of the same color and material that she identified during the 911 call and later to a police officer. We acknowledge that Jackson described the ski masks to the 911 operator and the police officer as "more like a durag . . . as opposed to a sports cap," and "couldn't tell if they were skull caps or a durag," which is not quite the same as a ski mask. However, the difference is not so vast that it would preclude Jackson from correctly identifying the material of which she spoke directly after the carjacking during trial. Nor, then, would it preclude Jackson from being the source of authentication for the admission of the masks into trial. Also, as we have previously outlined, veracity is not the benchmark of admissibility; rather, it is left to the jury, once admitted, to decide whether the victim's memory of the masks is credible. Conversely, our conclusion would be different had Jackson testified that the ski masks presented were in fact those the suspects wore during the carjacking, considering no chain of custody had yet to be established. *See Johnson v. State*, 240 Md. App. 200, 211 (2019). However, even if we did not so hold, we conclude that James was not prejudiced by Jackson's authentication because testimony given by both Det. Washington and Officer Stevens provided sufficient grounds to authenticate the evidence via "chain of custody."

When an item proffered for evidence is not unique, *i.e.* the witness cannot be expected to identify it, then a more detailed foundation is required. In such instances, the proponent must establish the "'chain of custody', *i.e.*, account for its handling from the time it was seized until it is offered into evidence." *Johnson v. State*, *supra*, 240 Md. App. at 211 (citing *Lester v. State*, 82 Md. App. 391, 394 (1990)). Showing a proper chain of custody "ensures physical evidence has been properly identified and that it is in substantially the same condition as it was at the time of the crime." *Id.* (citing *Amos v. State*, 42 Md. App. 365, 370 (1979)). Chain of custody is sufficient if, when viewed in the light most favorable to the proponent of the evidence, it shows a reasonable probability that the evidence is the same as the evidence that was seized and that there has been no tampering or substitution. *Cooper v. State*, 434 Md. 209, 227 (2013). However, chain of custody does not require proof beyond a reasonable doubt. *Johnson*, 240 Md. App. at 211. Rather, the proponent "need prove only that there is a reasonable probability that no tampering occurred." *Id*. (internal quotations and citations omitted).

At trial, both Det. Washington and Officer Stevens provided testimony as to when, where, and how they recovered the ski masks. Officer Stevens, who stopped the Toyota Yaris in which the co-defendants were driving on the night of the carjacking, testified that, although he could make out no appreciable difference between Exhibits 12 and 13, the masks looked like the one he saw in the backseat of the Toyota Yaris between McClennon and Carr. Det. Washington also testified that Exhibit 12 was the ski mask he received from Officer Stevens because he personally placed it in the bag, which was sealed with an

evidence sticker. Det. Washington further testified that he himself recovered a second mask, referring to Exhibit 13. The State followed up by playing a video clip for the jury showing Det. Washington removing the mask from James' sweatshirt. Det. Washington then testified that he put this mask into a bag and sealed it with an evidence sticker and identified Exhibit 13 as the bag containing the mask he recovered from James' sweatshirt. Although James argues that chain of custody "was lacking in this case," we hold differently, given the testimony of Officer Stevens and Det. Washington does not evince a break in the chain of custody and James did not make an objection to this point at trial. We see no error.

VII. Discovery (James)

Finally, James contends that the trial court committed error when it did not find the State committed a discovery violation in failing to disclose that (1) the police recovered Jackson's vehicle, and (2) the key recovered from the Toyota Yaris unlocked Jackson's recovered vehicle. The State avers that James did not preserve this issue for review. If the State did in fact commit a discovery violation, however, it argues that James was not prejudiced.

As to the State's preservation argument, it reasons that James' attorney's failure to "show [the court] where [James was] entitled to" the detective's testimony that the key retrieved from the Toyota Yaris "worked" on the stolen vehicle in discovery did not preserve the issue for review. The State also argues that James' attorney did not object

during Det. Washington's testimony regarding the vehicle's recovery and its location, thereby waiving any preservation. *See* Rule 8-131(a). We agree with the State.

> Maryland Rule 5-103(a) states in pertinent part that
>
> > Error may not be predicated upon a ruling that admits or excludes evidence unless . . . [in] case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, *stating the specific ground of objection, if the specific ground was requested by the court or required by rule*[.]

(Emphasis added). Similarly, Rule 4-323 informs us that the objecting party need not state the grounds for objection unless the court either through its own initiative or through that of a party so requests. When the court does in fact request grounds for the objection and informs the parties that it will overrule without grounds, the Court of Appeals has repeatedly held that failure to provide grounds is the equivalent to a failure to preserve. *Bazzle v. State*, 426 Md. 541, 561-62 (2012); *Boyd v. State*, 399 Md. 457, 474-76 (2007). It is clear from the record that the trial court requested grounds from James' counsel for his objection regarding the recovery of the stolen vehicle and the matching key:

> **THE COURT**: Why are you entitled to it in discovery?
>
> **[MCCLENNON's COUNSEL]**: Any processing done to the car?
>
> **[JAMES' COUNSEL]**: And determine whether or not the fob goes to the vehicle.
>
> **THE COURT**: Show me where [the State] is required to give it to you in discovery? [sic]
>
> **[JAMES' COUNSEL]**: That the fob goes to the vehicle?
>
> ***

> **THE COURT**: Okay. Show me where you are entitled to it in discovery and if you are, then I will deal with it. If you are not, then I will deal with that too.
>
> **[JAMES' COUNSEL]**: Your Honor, I can't find it specifically.
>
> **THE COURT**: Then objection overruled.

As the Court reasoned in *Bazzle*, this rule is not so fickle as to require the exact words "I request grounds." 426 Md. at 561. Rather, it is sufficient that the court made plain to the objecting party that it required grounds ("show me where") for the objection, and without said grounds, it would overrule. *Id*. at 562. Similarly, it also cannot be that the rule would likewise require the exact words "I would overrule." In our estimation, in the context of the discussion between defense counsels and the court, the trial court's statement "I will deal with that too" put the parties on notice that, if no grounds were stated, the court would overrule the objection. As such, we conclude that James did not properly preserve the issue of the State's alleged discovery violation and we end our analysis.

VIII. Substitution of Counsel (McClennon)

In his final assignment of error, McClennon argues that the court erred in allowing a different attorney to stand-in for his counsel of record during jury deliberations and subsequent proceedings, including the verdict-taking and a bond revocation hearing that occurred after the guilty verdict. For the reasons we explain, we perceive no error.

Before the court sent the jury to begin its deliberations, the court specifically addressed McClennon about the substitution of counsel. With his counsel of record present

beside him, the court informed McClennon that another attorney would be his counsel for the rest of the day's proceedings.

> **THE COURT**: Record reflect all of the Defendants are present. All counsel are present.
>
> Mr. McClennon, your lawyer told me, I assume he told you, that he has somewhere else he has to be today. So, after we send the jury out, somebody else is going to cover for him. It that okay?
>
> **MCCLENNON**: Yes, sir.

After the jury retired to start deliberations, the court instructed McClennon's counsel of record to "leave a number for whoever is covering for you needs to get in touch with you in case there is something specific in the note (sic)."

McClennon complains that because the court had to give a supplemental jury instruction regarding which side would have to pay for DNA testing, doing so required the presence of his counsel of record. And McClennon claims he did not knowingly, voluntarily, and intelligently waive his counsel of record's appearance. He posits that criminal defendants have the right to a public defender or a court appointed attorney if they cannot afford private counsel and he was denied that right.

McClennon finds support in *State v. Wischhusen*, 342 Md. 530 (1996), which he argues holds that a defendant's right to counsel should be explained to him and he should be provided with options for proceeding with different counsel. McClennon asserts that he did not voluntarily consent to the substitution of counsel. Rather, he argues the court simply informed him that his trial counsel had to leave, and another attorney would replace

him. McClennon concludes that his "consent" fell short of satisfying the Sixth Amendment and the waiver inquiry outlined in *Wischhusen*.

The State argues that McClennon's claim is either unpreserved or was affirmatively waived. The State disputes McClennon's interpretation of *Wischhusen*, asserting that unlike the defendant there, who waived counsel and proceeded pro se, McClennon consented to another attorney assisting him. The State's argument is that the inquiry *Wischhusen* articulated is not required since McClennon was not waiving his right to the assistance of counsel.

The State maintains that *Annis v. State*, 14 Md. App. 670 (1972) controls. There, this Court held a defendant had satisfactorily elected to proceed with stand-in counsel when he failed to object to the substitution. *Id*. at 672-73. The State points out that McClennon did not object to substitute counsel at any time, including when the same counsel represented him in discussions with the court regarding disposition of the DNA note, discussed in Section IV of this opinion. Further, the State notes that McClennon did not object to substitute counsel when a mistrial was declared for Carr, the verdict was returned, during a discussion of the revocation of McClennon's bail, nor at sentencing, when his counsel of record was present.

We agree with the State. Here, McClennon did not waive counsel and elect to represent himself. For this reason, we do not conclude that the court should have engaged in a Rule 4-215(b) waiver inquiry as it was obvious that McClennon did not desire to relinquish counsel's representation. For the same reason, we also conclude that

Wischhusen is inapposite. There, the trial judge informed the defendant that his counsel did not intend to be present when the judge re-instructed the jury in response to a jury question. *Id.* at 533. The judge told the defendant he had spoken with his counsel by phone and his counsel approved of the judge's proposed response. *Id.* at 534–35. The judge also informed the defendant it was his right to have counsel present and if the defendant wished, the judge would require counsel to be present before responding to the jury. *Id.* at 534. The defendant replied he would waive his counsel's physical presence for the jury re-instruction. *Id.* at 535. The Court of Appeals held the defendant's waiver of counsel during the jury's re-instruction in response to their note was knowing and intelligent. *Id.* at 544.

Here, the issue is whether McClennon agreed with the substitution of counsel, rather than electing to proceed without representation. We find *Annis* to be helpful, if not dispositive. There, the defendant retained a private attorney who represented him during the arraignment and trial. 14 Md. App. at 671. On the morning of sentencing, a different attorney appeared and explained to the court the defendant's retained counsel asked him to go in his place that day. *Id.* Although the defendant protested his sentence, he did not object to representation by the substitute counsel. *Id.* at 672.

This Court recognized that a defendant's Sixth Amendment right to assistance of counsel applies during sentencing and concluded that the defendant had assistance of counsel at that time. *Id.* This Court also acknowledged that while the defendant was entitled to the assistance of the attorney that he had hired, he waived that right by giving "no indication whatsoever that he was not willing to have [substitute counsel] represent

him, standing silent when [his retained attorney's] absence and [substitute counsel's] presence were explained to the court and making no protest at any time below, despite ample opportunity to do so." *Id.* at 672–73.

On this point, this Court distinguished Annis' situation from the defendant in *English v. State*, 8 Md. App. 330 (1969). There, we held the defendant's right to assistance of his privately retained counsel was denied because "the defendant expressly protested the representation of the attorney appearing at trial as not the one he had employed to represent him." *Annis*, 14 Md. App. at 673. *See also Baker v. State*, 35 Md. App. 641, 642 (1977) ("Appellant's acquiescence in [substitute counsel's] representation of him until after jeopardy had attached constituted a waiver of his right to be represented by [his retained counsel]"). As Annis raised no objection, any opposition he might have had to substitute counsel was effectively waived.

We conclude that the holdings *Annis* and *English* guide our disposition of McClennon's claim of error. Had McClennon objected in any way to representation by substitute counsel, the court could have conducted further inquiry, and consistent with the holding in *English*, made McClennon's supposed dissatisfaction with counsel manifest. Absent any objection and given McClennon's express consent to the assistance of substitute counsel, we conclude the court did not err because McClennon did not give the court the opportunity to take any other action.

McClennon does not raise an issue of substitute counsel's competence. Further, at the court's express instruction, if he felt it necessary, substitute counsel could have

contacted McClennon's counsel of record to consult with him. We conclude, as we did in *Baker*, that to hold that a defendant's acquiescence in the substitution of counsel did *not* constitute waiver "would open the door to inordinate possibilities of manipulative abuse of the judicial system." 35 Md. App. at 642. We conclude that the court committed no error in allowing the substitution of counsel absent McClennon's objection.

CONCLUSION

The appellants raise a number of overlapping and discrete claims of error. Having examined each claim, we conclude that each of the appellants' allegations are without merit and affirm the judgment of the Circuit Court for Prince George's County.

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