APPENDIX

APPENDIX

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APPENDIX A

IN THE COURT OF APPEALS

OF MARYLAND

No. 5

September Term, 2021

[Filed: June 27, 2022]

Circuit Court for Montgomery County
Case No. 132904C
Argued: September 13, 2021

STATE OF MARYLAND	)
	)
v.	)
	)
RONY GALICIA	)
	)

*Getty, C.J.,
*McDonald
Watts
Hotten
Booth
Biran
Raker, Irma S. (Senior Judge, Specially Assigned),
JJ.

App. 2

Opinion by McDonald, J.
Watts and Raker, JJ., dissent.

Filed: June 27, 2022

*Getty, C.J., and McDonald, J., now Senior Judges, participated in the hearing and conference of this case while active members of this Court. After being recalled pursuant to Md. Constitution, Art. IV, §3A, they also participated in the decision and adoption of this opinion.

In June 2017, on the eve of their high school graduation, two teenagers were ambushed and shot multiple times while they sat in a parked car in a cul-de-sac in Montgomery County. Four men, including Respondent Rony Galicia, were charged and ultimately convicted of the murders in three separate trials. The Court of Special Appeals reversed Mr. Galicia's conviction on the basis of two evidentiary issues that arose during his trial. We reach a different conclusion on both of those issues.

The first issue is whether the trial court abused its discretion when it declined to allow Mr. Galicia to cross-examine one of the State's witnesses about out-of-court statements allegedly made by one of his co-defendants. We hold that the State's direct examination of that witness did not prejudice Mr. Galicia such that it triggered a right to elicit otherwise inadmissible evidence on cross-examination. We also hold that, even if the particular statement Mr. Galicia sought to introduce – in which one of his co-defendants allegedly told the co-defendant's girlfriend that his younger brother, also a co-defendant, had "shot them

guys, too" – could fit within a hearsay exception for a statement against the *declarant's* penal interest, the trial court did not abuse its discretion in limiting the proposed cross-examination.

The second issue arises from a prosecution witness' trial testimony about the tracking of Mr. Galicia's location on the evening of the murders through data generated by cell phones and other electronic devices. That issue is whether a witness must be qualified as an expert to testify that a user of a smartphone may turn off the location tracking feature of an application on the phone. We hold that a user's ability to adjust the location tracking feature of a smartphone is within the understanding of the average lay person and that a witness whose testimony referred to that ability did not have to be qualified as an expert.

I

Background

A. The Murders

Late on the evening of June 5, 2017, two high school seniors who were scheduled to graduate the next day from their school in Germantown were murdered while they sat in a car parked in a cul-de-sac in Montgomery Village. One of the teenagers, Shadi Najjar, had an extra ticket to the graduation ceremony, hoped to sell it, and had made an arrangement over Snapchat[1] to meet the supposed purchaser at that location. His

[1] Snapchat is a social media platform that provides free messaging and photo and video sharing for its users.

friend, Artem Ziberov, waited with him. Mr. Najjar was shot three times in the head at close range and once in the thigh. Mr. Ziberov was shot at least 10 times in the neck, chest, back, and arms. Ballistic and forensic evidence established that multiple guns were used in the attack.

B. The Charges and the Trial of Mr. Galicia

Four individuals were arrested and charged with the murders: Jose Ovilson Canales-Yanez, Edgar Garcia-Gaona, his younger half-brother Roger Garcia, and Mr. Galicia.[2] All four were convicted in the Circuit Court for Montgomery County of various charges related to the murders as a result of three separate trials. This appeal arises out of a trial of Mr. Galicia, Mr. Garcia-Gaona, and (for a time) Mr. Garcia.[3]

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[2] At the trial of this case, and in some of the related appellate filings, the defendants were frequently identified by first names or nicknames – *i.e.*, Mr. Canales-Yanez was referred to as "Ovilson" or "O"; Mr. Garcia-Gaona as "Edgar"; Mr. Garcia as "Roger" or "Johann"; and Mr. Galicia as "Rony" or "Ru."

[3] Mr. Canales-Yanez opted for a bench trial, while the other three defendants elected trial by jury.

At his bench trial, Mr. Canales-Yanez was convicted of two counts of first-degree murder, one count of conspiracy to commit murder, four firearms offenses, and armed robbery. Those convictions were affirmed on appeal. *Canales-Yanez v. State*, 244 Md. App. 285 (2020), *aff'd*, 472 Md. 132 (2021).

At the jury trial, Mr. Garcia-Gaona was convicted of conspiracy to murder Mr. Najjar, two counts of first-degree murder, two counts of use of a firearm in the commission of a felony, and armed robbery of Mr. Najjar – the same charges on which Mr. Galicia was found guilty at that trial. Mr. Garcia-Gaona's convictions were

This appeal involves two discrete evidentiary issues that arose during the State's case with respect to Mr. Galicia. Mr. Galicia has not disputed that the State's evidence presented at trial, if believed by the jury, was sufficient to support his convictions. There is no need to review that evidence in detail to address the issues before us. To provide some context for the two specific issues before us, we describe briefly the theory of the State's case and of Mr. Galicia's defense.

1. The Prosecution's Theory of the Case

In its opening statement and closing arguments, the prosecution laid out its theory of the case: On December 14, 2016, Mr. Canales-Yanez's pregnant wife had arranged to sell marijuana to Mr. Najjar. At the agreed-upon time for the transaction, Mr. Najjar drove up to her, reached through the car window, grabbed the bag of marijuana from her hand, and drove off without paying. In the process, he ran over her foot. As a result, she was hospitalized; her unborn child apparently was unharmed. Later that day, Mr. Canales-Yanez

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affirmed on appeal. *Garcia-Gaona v. State*, 2021 WL 130513 (Md. Ct. Spec. App. Jan. 14, 2021), *cert. denied*, 474 Md. 725 (2021).

Mr. Garcia initially went to trial with his older brother and Mr. Galicia, but a mistrial was declared as to him after his attorney fell ill mid-trial and was unable to continue. Mr. Garcia was later convicted of two counts of second-degree murder and two firearms charges in a separate trial. The Court of Special Appeals affirmed those convictions. *Garcia v. State*, 253 Md. App. 50 (2021). This Court granted a writ of *certiorari* to review an issue in that case unrelated to Mr. Galicia's appeal here. The Court has heard argument in Mr. Garcia's appeal, which remains pending.

repeatedly attempted to reach Mr. Najjar by phone, without success.

According to the prosecution, Mr. Canales-Yanez decided to take revenge on Mr. Najjar for the injury to his wife. He enlisted his friends, Mr. Garcia-Gaona and Mr. Galicia, in that effort. Their opportunity arose in June 2017 when Mr. Najjar advertised over Snapchat that he had an extra ticket to his high school graduation the next day that he would be willing to sell. According to the prosecution, the conspirators obtained the assistance of Mr. Garcia-Gaona's brother, Mr. Garcia, who had recently graduated from the same school as Mr. Najjar. Mr. Garcia communicated with Mr. Najjar over Snapchat on June 5, 2017, and arranged to meet at a cul-de-sac in Montgomery Village to purchase the graduation ticket.

Mr. Ziberov accompanied Mr. Najjar that evening. Mr. Najjar sent a message to Mr. Garcia via Snapchat that he had arrived at the agreed-upon location. At approximately 10:30 p.m. that evening, according to the prosecution, the conspirators arrived and shot Mr. Najjar and Mr. Ziberov with three, or possibly four, different guns as the two teenagers waited in the car for the rendezvous. Mr. Garcia-Gaona destroyed Mr. Najjar's cell phone in an apparent effort to eliminate evidence of the victim's Snapchat communications with his brother.

The State called 43 witnesses and introduced more than 500 exhibits. In addition to the evidence that is the subject of this appeal, the State presented, among other things, the testimony of Victoria Kuria, Mr. Garcia's then-girlfriend, who said that she had

observed Mr. Galicia and the other defendants in the Garcia family trailer on the night of the murders; ballistics and forensic evidence linking the defendants in different ways to the crime (including DNA evidence that linked Mr. Galicia to shell casings at the scene of the shooting); recorded jail calls between Mr. Garcia-Gaona and Mr. Galicia, a police interview of Mr. Galicia while he was in custody on other charges; and historical cell site analysis concerning locations of the defendants' cell phones.

2. Mr. Galicia's Theory of the Case

In the defense's opening statement and closing argument, Mr. Galicia's attorney told the jury that, although she agreed with the State that Mr. Canales-Yanez, Mr. Garcia-Gaona, and Mr. Garcia had participated in the murders, Mr. Galicia was not part of the conspiracy. The defense questioned the credibility of Ms. Kuria; questioned the accuracy of forensic evidence that connected Mr. Galicia to the crime; and presented records related to Mr. Galicia's Xbox to support an inference that Mr. Galicia had spent that evening in his room watching a movie on that device. Four character witnesses testified on his behalf. Mr. Galicia elected not to testify in his own defense.

3. The Verdict

On November 19, 2018, the jury returned a verdict finding Mr. Galicia guilty of two counts of first-degree premeditated murder, two counts of first-degree felony murder, conspiracy to commit murder, two counts of use of a firearm in the commission of a felony, and

armed robbery. On January 22, 2019, the Circuit Court sentenced Mr. Galicia to consecutive terms of life imprisonment without the possibility of parole on the two first-degree murder convictions, a concurrent life term on the conspiracy count, and consecutive terms totaling 60 years' incarceration on the firearms and robbery counts.

4. Mr. Galicia's Appeal

Mr. Galicia filed a timely appeal. In an unreported opinion, the Court of Special Appeals reversed his convictions and ordered a new trial. *Galicia v. State*, 2021 WL 130513 (Md. Ct. Spec. App. Jan. 14, 2021).[4] The intermediate appellate court held that: (1) the trial court improperly restricted Mr. Galicia's counsel from questioning a prosecution witness about out-of-court statements allegedly made by his co-defendant, Mr. Garcia-Gaona, that were impliedly exculpatory as to Mr. Galicia and that should have been admitted under an exception to the hearsay rule for statements against penal interest; and (2) the trial court erred when it allowed a lay witness to testify that a cell phone user such as Mr. Galicia has the ability to turn off location tracking associated with the user's Google accounts – testimony that offered a potential explanation for a gap in the location tracking data associated with Mr. Galicia's Google accounts that included the date of the murders. The State filed a petition for a writ of *certiorari*, which we granted to review the two grounds

[4] As noted earlier, that opinion also affirmed the convictions of Mr. Garcia-Gaona resulting from the same trial. *See* footnote 3 above.

on which the intermediate appellate court reversed Mr. Galicia's convictions.

II

Hearsay and the Scope of Cross-Examination

The first issue before us arises from the trial judge's refusal to allow Mr. Galicia's attorney to cross-examine a prosecution witness about out-of-court statements that his co-defendant Mr. Garcia-Gaona allegedly made to her. Counsel sought to pursue that line of questioning after the State had elicited that witness' testimony about other out-of-court statements by Mr. Garcia-Gaona and had introduced those statements solely against Mr. Garcia-Gaona.

Before we describe the trial proceedings and analyze the issue, it is useful to review briefly the general principles governing the admissibility of hearsay and the two pertinent exceptions to the hearsay rule, as well as principles governing the scope of cross-examination by defense counsel in a criminal case. Finally, we summarize the standards that an appellate court applies in reviewing a trial court's rulings on such issues.

A. Relevant Legal Principles

1. The Hearsay Rule and its Exceptions

Hearsay generally

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial …, offered in evidence to prove the truth of the matter asserted." Maryland Rule 5-801(c). While a "statement"

for purposes of this definition is generally an oral or written assertion, it may also consist of nonverbal conduct, if intended by the declarant as an assertion. Maryland Rule 5-801(a). The "declarant" is the person who made the out-of-court statement, but who is not testifying about the statement at trial.

As a general rule, hearsay is not admissible in evidence at trial. Maryland Rule 5-802. As the Supreme Court has explained, the theory underlying this general rule is "that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements – the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine – are generally absent for things said out of court." *Williamson v. United States*, 512 U.S. 594, 598 (1994).

The general principle that hearsay is inadmissible, however, is subject to many exceptions that are compiled in several rules. *See* Maryland Rules 5-802.1 through 5-804. Two related, but quite distinct, exceptions are pertinent to this appeal: (1) an exception for out-of-court statements by a party-opponent; and (2) an exception for out-of-court statements that are "against the penal interest" of the declarant.

Statement by Party-Opponent

A commonly invoked exception to the hearsay rule pertains to a "statement by a party-opponent." That exception encompasses an out-of-court statement that was made by an opposing party and that is offered in evidence against that party. Maryland Rule 5-803(a).[5]

Such a statement is admissible even if the declarant – *i.e.*, the party-opponent – is available to testify. In addition, there is no requirement that the statement be adverse to the interests of the declarant. There is occasionally confusion on that score, as this exception was often referred to at common law as an exception for "admissions" by a party-opponent. *See* Joseph F. Murphy, Jr., et al., Maryland Evidence Handbook (5th ed. 2020) §805 ("Admissions"). Of course, it is often the case that such a statement will be favorable to the party who seeks to introduce it and therefore adverse

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[5] The rule provides, in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> (a) Statement by party-opponent. A statement that is offered against a party and is:
> (1) The party's own statement, in either an individual or representative capacity; ….

Maryland Rule 5-803(a)(1). Other subsections of the rule concern how statements made by others may be attributed to a party-opponent for purposes of the rule. Maryland Rule 5-803(a)(2)-(5). This rule is based on a similarly-worded provision in the Federal Rules of Evidence, except that the federal rule defines an out-of-court statement by a party-opponent as non-hearsay rather than hearsay that is admissible under an exception. *See* Federal Rule of Evidence 801(d)(2).

to the party-opponent who made the statement – that is why the proponent seeks to introduce it in the first place. But it is not a necessary element of this exception.

In a criminal prosecution, it is common for the prosecution to introduce, on the basis of this exception, prior out-of-court statements of a defendant – the prosecution's party-opponent. For example, the prosecution may introduce prior statements of a defendant made to the police, to friends, or to strangers. In fact, it is so common for the State to introduce prior statements of a defendant, and this exception is so well understood, that frequently no objection is made that requires explicit invocation of the exception. Generally, such an out-of-court statement is relevant because it connects the defendant in some way to the crimes charged in the case. But, as indicated above, the statement need not be against the defendant's interest on its face, so long as it is the defendant who allegedly made it. *See* Lynn McLain, Maryland Evidence: State and Federal (Aug. 2021 update), §801(4):1. Such statements are admissible by the State against the defendant who made the out-of-court statement, subject to the bounds of relevance,[6] and other factors that affect a court's discretion whether to admit evidence.[7]

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[6] *See* Maryland Rule 5-402 (relevant evidence generally admissible).

[7] *See* Maryland Rule 5-403 (relevant evidence may be excluded on grounds of prejudice, confusion, or waste of time).

The admission of an out-of-court statement of a defendant in a criminal case becomes more complicated in a multi-defendant trial. The hearsay statement of one defendant does not qualify as a statement by a party-opponent as to other defendants and therefore is not admissible by, or against, a co-defendant on the basis of that exception. *See Payne v. State*, 440 Md. 680, 707-10 (2014). Moreover, if a defendant's out-of-court statement inculpates a co-defendant, the admission of the statement may raise an issue under the Confrontation Clauses of the federal and State constitutions,[8] as a limiting instruction that tells the jury to compartmentalize the statement as to one defendant may not always be effective. *See Bruton v. United States*, 391 U.S. 123 (1968) (introduction of confession of non-testifying defendant that also implicates co-defendant violates confrontation right of co-defendant). However, the Confrontation Clauses are not implicated by the admission of the out-of-court statement against the defendant who allegedly made it, as that defendant cannot complain of an inability to cross-examine the declarant. McLain, Maryland Evidence, §801(4):1(c). To deal with potential issues under the Confrontation Clauses, a trial court typically requires the testimony or document containing the out-

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[8] United States Constitution, Sixth Amendment; Maryland Declaration of Rights, Article 21. This Court has recently held that Article 21 and the Sixth Amendment Confrontation Clause are not completely coextensive. *See Leidig v. State*, 475 Md. 181 (2021). However, *Leidig* addressed the question of whether an out-of-court statement was "testimonial," a distinction first outlined by the Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004). That distinction is not relevant to the issue currently before the Court.

of-court statement to be redacted to remove a specific reference to a co-defendant[9] and instructs the jury to consider that statement solely as to the defendant who allegedly made it.[10]

Statement Against Penal Interest

A separate exception to the general principle that hearsay is inadmissible applies to an out-of-court statement that would potentially expose the declarant to criminal prosecution. Maryland Rule 5-804(b)(3). In the words of the rule, this exception applies to a statement "which … at the time of its making … so tended to subject the declarant to … criminal liability … that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true …. A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." *Id.*[11]

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[9] *See Richardson v. Marsh*, 481 U.S. 200 (1987). A redaction must be effective and not point directly to the non-confessing co-defendant. *See Gray v. Maryland*, 523 U.S. 185 (1998).

[10] The pattern jury instructions developed by a committee of the Maryland State Bar Association ("MSBA") include an example of such an instruction. *See* MSBA, Maryland Criminal Pattern Jury Instructions (2d ed. 2012), MPJI-Cr 3:09 ("Evidence Applicable to Only One Defendant – Jury to Limit Consideration").

[11] This rule is substantially similar to Federal Rule of Evidence 804(b)(3). Like the federal rule, it also encompasses other types of statements against the interest of the declarant – *e.g.*, statements that are against the speaker's "pecuniary or proprietary interest,"

The rationale for the exception is that there are circumstantial guarantees of sincerity and accuracy when one makes a statement adverse to one's own interests. *State v. Standifur*, 310 Md. 3, 11 (1987); McLain, Maryland Evidence, §804(3):1(a). As a shorthand, this is often referred to as the exception for a "statement against penal interest." *See, e.g., Gray v. State*, 368 Md. 529 (2002).

This exception is narrower than the exception for a statement by a party-opponent in several respects. First, a statement against penal interest is admissible only if the declarant is unavailable as a witness – a condition that does not apply to the exception for an out-of-court statement by a party-opponent. Second, the content of the statement must fit the description of the rule – *i.e.*, it must be so adverse to the declarant's interest that a reasonable person would not have made it unless it was true. That condition does not apply to the exception for a statement by a party-opponent. Finally, in a criminal case, there must be "corroborating circumstances" that indicate that the out-of-court statement is trustworthy; there is no corroboration requirement for a statement by a party-opponent.

If it happens that the out-of-court statement in question was made by an adverse party in the case, this exception is subsumed within the broader

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that would subject the speaker to civil liability, or that would render invalid a claim by the speaker against another. Maryland Rule 5-804(b)(3). Only the portion of the rule concerning statements against penal interest pertains to this case.

exception outlined above for statements by a party-opponent. *See* McLain, Maryland Evidence, §804(3):1(a). Thus, in a criminal case, the prosecution is unlikely to rely on this exception in introducing an out-of-court statement by a defendant, as the statement would also be readily admissible against that defendant under the broader exception.

Summary

As noted above, these two exceptions to the general hearsay rule are quite distinct, but they are often confused. *See Aetna Casualty & Surety Co. v. Kuhl*, 296 Md. 446, 456 n.2 (1983) (noting the "all too common error of failing to distinguish between" the two hearsay exceptions in a case where both exceptions were invoked).

An out-of-court statement is admissible as a statement by a party-opponent if it is introduced (1) by a party adverse to declarant (2) against the declarant and if (3) it otherwise satisfies the threshold general rules concerning admission of evidence.

An out-of-court statement is admissible as a statement against penal interest if (1) the declarant is unavailable, (2) the statement is genuinely adverse to the declarant's penal interest, and (3) corroborating circumstances clearly indicate the trustworthiness of the statement.

2. Scope of Cross-Examination and the Confrontation Clauses

As noted above, the Confrontation Clauses guarantee a defendant in a criminal case the right to

cross-examine a witness who provides evidence against the defendant. *Pointer v. Texas*, 380 U.S. 400, 404 (1965). Accordingly, a trial court must allow defense counsel a "threshold level of inquiry" in questioning the State's witnesses. *Peterson v. State*, 444 Md. 105, 121-22 (2015). Once that threshold is met, the trial court has considerable discretion to limit the scope of cross-examination to prevent, among other things, "prejudice, confusion of the issues, and inquiry that is repetitive or only marginally relevant." *Manchame-Guerra v. State*, 457 Md. 300, 309 (2018) (quotation marks and citation omitted). For example, under Maryland Rule 5-611(b)(1), "cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." *See also* Maryland Rule 5-616 (impeachment and rehabilitation of witnesses). "Within that limit a defendant should be free to cross-examine in order to elucidate, modify, explain, contradict, or rebut testimony given in chief." *Smallwood v. State*, 320 Md. 300, 307 (1990).

3. Standards of Appellate Review

With respect to the admission or exclusion of evidence, an appellate court applies the abuse of discretion standard to a trial court's assessment whether evidence is relevant to an issue in the particular case, or whether its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or waste of time. *See, e.g., Dejarnette v. State*, 478 Md. 148, 175 (2022); *Merzbacher v. State*, 346 Md. 391 404-05 (1997).

The standard of review of a trial court's application of the hearsay rules to out-of-court statements can be more nuanced. Whether a particular out-of-court statement qualifies for admission under a hearsay exception is ultimately a question of law that is reviewed without deference to the trial court. *Wise v. State*, 471 Md. 431, 442 (2020). However, the outcome may hinge on certain fact findings by the trial court – *e.g.*, whether a statement is reliable[12] – for which the appellate court applies a more deferential standard of review. *Id.*; *see also Gordon v. State*, 431 Md. 527, 538 (2013); *Hailes v. State*, 442 Md. 488, 499 (2015).

A similar dichotomy applies to review of a trial judge's exercise of authority over the scope of cross-examination for abuse of discretion. This Court has explained:

> In controlling the course of examination of a witness, a trial court may make a variety of judgment calls under Maryland Rule 5-611 as to whether particular questions are repetitive, probative, harassing, confusing, or the like. The trial court may also restrict cross-examination based on its understanding of the legal rules that may limit particular questions or areas of inquiry. Given that the trial court has its finger on the pulse of the trial while an appellate court does not, decisions of the first type should be

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[12] *See, e.g., State v. Matusky*, 343 Md. 467, 486 (1996) ("The trial court's assessment of the declaration's reliability is a fact-intensive determination which we shall not ordinarily reverse unless it is clearly erroneous.").

> reviewed for abuse of discretion. Decisions based on a legal determination should be reviewed under a less deferential standard. Finally, when an appellant alleges a violation of the Confrontation Clause, an appellate court must consider whether the cumulative result of those decisions, some of which are judgment calls and some of which are legal decisions, denied the appellant the opportunity to reach the "threshold level of inquiry" required by the Confrontation Clause.

Peterson v. State, 444 Md. 105, 124 (2015).

B. The Testimony, the Objection, and the Appeal

At the time of the murders, Luz DaSilva, a 27-year old working single mother, lived with Mr. Garcia-Gaona and their five-month-old daughter in a townhome in Gaithersburg. On the day after the murders, Mr. Garcia-Gaona confessed his involvement in the crime to her. Although initially fearful to report what he had said, she called the police about 10 days later after seeing the grieving father of one of the victims in a television news report.

1. Ms. DaSilva's Trial Testimony and Mr. Galicia's Objections

Ms. DaSilva was called as a witness by the State on the Friday of the first week of testimony at the trial. She testified about various topics, a number of which implicated one or more of the defendants in the murders. In addition to describing certain observations of, and statements made to her by, Mr. Garcia-Gaona, she identified the co-defendants in photos and videos,

testified as to the close personal relationship that Mr. Garcia-Gaona had with both Mr. Canales-Yanez ("like brothers") and Mr. Galicia ("pretty close"), testified that, after the night of the murders, Mr. Canales-Yanez had received permission from Mr. Garcia-Gaona to leave a case of bullets at their townhome behind a television because they were "hot," and authenticated Mr. Galicia's voice on a call she had with him.

The issue before us in this appeal arises from a brief but important slice of Ms. DaSilva's testimony. That testimony concerned what Mr. Garcia-Gaona told her about his own participation in the murders while they watched the television news report the day after the crime. The State offered that testimony under the hearsay exception for a statement by a party-opponent, and the trial court admitted it only against Mr. Garcia-Gaona. However, it became the subject of an objection by Mr. Galicia's lawyers that extended over several bench conferences,[13] including well after Ms. DaSilva had completed her testimony.

Direct Examination of Ms. DaSilva – Part 1

Ms. DaSilva, who had known Mr. Garcia-Gaona since they were both teenagers, testified that she had reconnected with him during 2016. She moved in with him in his family's trailer in a trailer park in Germantown. The two of them later moved out and into a townhome in Gaithersburg, where they lived at the time of the murders.

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[13] Mr. Galicia was represented by two attorneys. Both made arguments in support of this objection at the bench conferences in the trial court, although the laboring oar was his lead counsel.

Ms. DaSilva testified that, around midnight on the evening of the murders, she was at their residence waiting for Mr. Garcia-Gaona to come home. In an exchange of text messages, he told her that Mr. Canales-Yanez was driving him home; shortly thereafter, she saw him arrive in a car typically driven by Mr. Canales-Yanez. She was about to testify regarding a conversation the next day about the murders that she had with Mr. Garcia-Gaona when Mr. Galicia's counsel objected and a bench conference ensued.

Bench Conference #1

Mr. Galicia's counsel asked the court to give a limiting instruction to the jury that the testimony should be considered only against Mr. Garcia-Gaona. The State agreed that the court should give such an instruction. The judge was ready to give the jury a limiting instruction[14] but, at the request of Mr. Garcia-Gaona's counsel, agreed to wait until Ms. DaSilva gave the anticipated testimony. The prosecutor advised the court that she had instructed Ms. DaSilva not to mention anything that Mr. Garcia-Gaona told her about the participation of his co-defendants in the murder.

At that point, Mr. Galicia's counsel announced her intention to cross-examine Ms. DaSilva about what Mr. Garcia-Gaona "did say and what he didn't say." She

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[14] In preliminary instructions to the jury prior to opening statements, the court had forewarned the jury that some evidence might be admitted to one or more, but not all, defendants and that it would provide a limiting instruction in that circumstance.

suggested that Ms. DaSilva would say that Mr. Garcia-Gaona, while implicating both Mr. Garcia and Mr. Canales-Yanez, had *not* told her that Mr. Galicia was involved in the murders during their conversation. Counsel characterized the predicted cross-examination as "exculpatory information."

Counsel and the court all appeared to agree that the State could elicit testimony from Ms. DaSilva concerning Mr. Garcia-Gaona's out-of-court statements to her under the hearsay exception for statements by a party-opponent, but that the exception did not apply to the proposed cross-examination by Mr. Galicia's counsel. Mr. Galicia's counsel instead argued that the out-of-court statement that she hoped to elicit – or perhaps more precisely, the out-of-court statements allegedly inculpating other co-defendants and the *lack* of an out-of-court statement concerning her client – would be admissible as a matter of "completeness of [Mr. Garcia-Gaona's] statements," as well as under the hearsay exception for a statement against penal interest or a residual hearsay exception.[15] The trial court appeared to be skeptical of that argument. It stated that Ms. DaSilva should not discuss the participation of the co-defendants during the State's direct examination and that the request of Mr. Galicia's counsel would be re-considered before cross-examination began.[16]

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[15] *See* Maryland Rule 5-803(24). Mr. Galicia has not relied on the residual hearsay exception on appeal.

[16] Mr. Galicia's counsel also used the occasion to renew a motion to sever his trial from that of his co-defendants, but the trial judge

Direct Examination of Ms. DaSilva – Part 2

When the State's direct examination of Ms. DaSilva resumed, she testified that, during her conversation with Mr. Garcia-Gaona the day after the murders, she had asked him what had happened. In response, according to Ms. DaSilva, he had confessed to his participation in the murders, which were receiving prominent coverage on the television news. She testified:

Q: And what did he say about what he himself did?

A: What he himself did? That he basically was, was in the situation with the shooting. He basically - -

Q: How did he describe it?

A: That it was like a seven-second movie.

Q: Did he, those words, did he actually say, it was like a seven-second movie?

A: Yes.

Q: And what else did he say about what happened?

A: That that day he took the cellphone from the boys, smashed it, and then after they just started shooting them.

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pointed out that trying Mr. Galicia separately would not provide better grounds for admitting an out-of-court statement – or the absence of a statement – by Mr. Garcia-Gaona.

Q: And did, how was he - - how did he appear to you at the time he was telling you these things?

A: Nothing surprising, just, you know, like a bit nervous, jittery.

Q: What was going on on the television?

A: The news.

Q: And what was on the news?

A: The case about the two boys that got murdered on June 5th.

Q: Is that how it came up?

A: Yes.

Ms. DaSilva went on to testify that Mr. Garcia-Gaona told her that the murders were set up through Snapchat, that she was surprised, and that she had not called the police as a result of that conversation because she was "scared." She then testified on other matters related to the case, which were not based on the statements that Mr. Garcia-Gaona had made to her the day after the murders. During that testimony, Mr. Galicia's counsel made an objection, which resulted in a bench conference.

Bench Conference #2

After the court and counsel finished discussing a separate issue that had initially resulted in the bench conference, Mr. Galicia's counsel returned to the topic of her desired cross-examination of Ms. DaSilva. She seized on Ms. DaSilva's use of the word "they" when

recounting Mr. Garcia-Gaona's description of the shooting. Mr. Galicia's counsel asserted that Mr. Galicia was prejudiced by Ms. DaSilva's use of that pronoun.[17] Mr. Galicia's counsel reiterated her desire to cross-examine Ms. DaSilva about that statement in the hope that Ms. DaSilva would say that Mr. Garcia-Gaona had not mentioned Mr. Galicia as one of the shooters. The trial court deferred ruling on that request until it was counsel's turn to cross-examine the witness.

Direct Examination of Ms. DaSilva – Part 3

The direct examination of Ms. DaSilva on matters other than Mr. Garcia-Gaona's statements to her continued, and the prosecution soon indicated that it was ready to conclude the direct examination. After a recess for lunch, the trial court again took up the cross-examination issue out of the jury's presence.

Bench Conference #3[18]

The trial court reprised Ms. DaSilva's testimony concerning Mr. Garcia-Gaona's statement to her about the circumstances of the shooting and her use of the

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[17] Mr. Galicia's counsel, who herself had told the jury in opening statement that there were multiple shooters involved in the murders, did not explain how the generic pronoun "they" specifically implicated her client.

[18] This discussion among the court and counsel – and the later ones on this topic – took place while the jury was out of the courtroom and therefore likely did not occur at the bench. We use the label "bench conference" as a shorthand to indicate that each took place outside the presence of the jury.

word "they" in recounting what he had said about the shooting. The court noted that the jury had already heard other evidence that there were multiple shooters and that Ms. DaSilva's use of the word "they" had not specifically implicated any co-defendant.[19] The court reiterated its intention to give a limiting instruction that would direct the jury to consider that testimony only as to Mr. Garcia-Gaona – the maker of the out-of-court statement.

Mr. Galicia's counsel argued that her client had been prejudiced by the testimony. She proposed that the court sever either her client or Mr. Garcia from the trial. In counsel's view, that would eliminate any prejudice if counsel were to ask Ms. DaSilva to whom she believed Mr. Garcia-Gaona was referring when she testified that he had said "*they* just started shooting."

Mr. Galicia's counsel then presented the court with a "transcript" of an audio recording of a 90-minute conversation between Ms. DaSilva and a police detective in a police car shortly after midnight on June 17, 2017. That conversation took place shortly after Ms. DaSilva had called the police to tell them of Mr.

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[19] The court noted that, if Mr. Galicia's counsel were allowed to ask Ms. DaSilva whether Mr. Garcia-Gaona had implicated Mr. Galicia, the jury would expect Mr. Garcia's attorney to do the same and, assuming that Ms. DaSilva would testify as Mr. Galicia's counsel had represented, Ms. DaSilva would say that Mr. Garcia-Gaona had directly inculpated his younger brother, a co-defendant in the case. Thus, the court foresaw a *Bruton*-type issue arising if it permitted Mr. Galicia's attorney to elicit hearsay statements of Mr. Garcia-Gaona aside from his confession of his own involvement.

Garcia-Gaona's involvement in the murders.[20] Mr. Galicia's counsel stated that she wished to "introduce the complete statement from that witness" – presumably referring to statements that Ms. DaSilva attributed to Mr. Garcia-Gaona in her conversation with the detective (as opposed to the entire 91-page transcript of Ms. DaSilva's conversation with the detective, which wandered over many topics). Mr. Galicia's counsel also said that she wanted to introduce "all of the statements"[21] that Mr. Garcia-Gaona made to Ms. DaSilva about who was involved in the murders under the "rule of completeness."[22] She argued that

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[20] The document was marked as a defense exhibit and made part of the record. The audio recording itself was not introduced or otherwise made part of the record. No one testified that the document was a fair and accurate verbatim rendering of the content of the audio recording or identified its source. However, the parties have apparently accepted it as accurate and have referred to it as a "transcript." And so will we.

[21] Counsel did not identify at that time the precise universe of statements to which she was referring. As we shall see, at a later bench conference concerning this objection, she specified 10 items on which she wished to cross-examine Ms. DaSilva concerning the co-defendants; however, only a couple of those items pertained to statements of Mr. Garcia-Gaona.

[22] The common law doctrine of "verbal completeness" provides that, when one party introduces a portion of a statement into evidence, the opposing party may introduce "the remainder of what was said on the same subject at the same time." *Otto v. State*, 459 Md. 423, 449 (2018) (citations and internal quotation marks omitted). However, "evidence that is otherwise inadmissible as hearsay [does not] become admissible solely because it is derived from a single writing or conversation." *Id.* at 451 (citation and internal quotation marks omitted). *Cf.* Maryland Rule 5-106 (rule of completeness

such action was necessary to "cure the prejudice" and referred to the "curative admission doctrine."[23]

Mr. Galicia's counsel moved the admission of the transcript for the purpose of preserving the issue for appeal. The trial court allowed the transcript to be marked, but not admitted. The court once again reiterated that it would give a limiting instruction, which it did after the jury returned to the courtroom.[24]

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with respect to writings and recorded statements). Mr. Galicia has not relied on the doctrine of verbal completeness in his brief or argument in this Court.

[23] The curative admission doctrine "in rare instances allows otherwise irrelevant and incompetent evidence to repair the damage caused by previously admitted highly prejudicial incompetent inadmissible evidence." *Conyers v. State*, 345 Md. 525, 546 (1997) (citation and internal quotation marks omitted). Mr. Galicia's brief in this Court alludes to the curative admission doctrine in a footnote as an alternative basis for affirming the decision of the Court of Special Appeals – although the intermediate appellate court itself concluded that the curative admission doctrine did not apply to this case because Mr. Garcia-Gaona's out-of-court statement to Ms. DaSilva was properly admitted during direct examination under an exception to the hearsay rule. 2021 WL 130513 at *19 n.12.

[24] Mr. Garcia-Gaona's counsel took a somewhat contrary position that Ms. DaSilva should be permitted to use the word "they" in testifying about his client's out-of-court statement – presumably to facilitate the argument that he later made in closing argument that his client was referring to third parties other than himself as the shooters. Counsel did not cite any legal authority for that position and the jury did not accept the argument, as it convicted Mr. Garcia-Gaona on all counts.

Limiting Instruction

The court gave the following instruction:

> [T]his is another occasion that I mentioned to you at the beginning of the trial where there are certain times during the trial where certain evidence is being offered as against certain defendants and not against all defendants. So that, that admonition applies to the testimony that you heard from Luz [DaSilva] regarding any conversation she may or may not have had with Edgar [Garcia-Gaona] following June 5th of 2017. Any of that testimony is offered only against Edgar [Garcia-Gaona] and against no other defendant and should not be considered by you in any way against any other defendant.
>
> Each of these defendant[s are] entitled to have the case decided separately on the evidence that applies to that defendant only. So the testimony was offered against Edgar [Garcia-Gaona] and not against the others.

At the end of the trial, the court reminded the jury of the limiting instruction and reiterated that it was to consider the evidence only as to the defendant against whom it was admitted. After the court gave the limiting instruction, the prosecution completed its direct examination with a few questions that do not pertain here. Mr. Galicia's counsel then proceeded to cross-examine Ms. DaSilva.

Cross-Examination of Ms. DaSilva

During cross-examination by Mr. Galicia's counsel, Ms. DaSilva confirmed that Mr. Garcia-Gaona had confessed his own involvement, and she again recounted her motivation for calling the police. Mr. Galicia's counsel elicited from her the names of other friends and family of Mr. Garcia-Gaona, one of whom Ms. DaSilva agreed was a "closer" friend of Mr. Garcia-Gaona than Mr. Galicia was. Counsel did not directly question her about her use of the pronoun "they" in her testimony regarding Mr. Garcia-Gaona's confession to her that "they" had "just started shooting."

Counsel for Mr. Garcia-Gaona also cross-examined Ms. DaSilva about various sources of acrimony between her and Mr. Garcia-Gaona prior to her decision to call the police. Counsel did not question her about Mr. Garcia-Gaona's confession to her.[25]

Redirect Examination of Ms. DaSilva

In its redirect examination of Ms. DaSilva, the State briefly re-visited her previously stated reason for calling the police, suggested that Mr. Garcia-Gaona was responsible for the other issues in their relationship, and noted that Mr. Garcia-Gaona was no longer close to some of the friends mentioned in cross-examination.

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[25] Counsel for Mr. Garcia cross-examined Ms. DaSilva only briefly to establish that his client had not been part of a trip that Mr. Garcia-Gaona, Mr. Caneles-Yanez, and Mr. Galicia took to Ocean City shortly before the murders.

At that point Ms. DaSilva was excused from the stand and the State called several other witnesses before the court recessed for the weekend.

Bench Conference #4

The trial resumed the following Monday. At the outset, before the jury returned to the courtroom, the court declared a mistrial in the case against Mr. Garcia because his attorney had a medical emergency and was unable to continue. Mr. Galicia's counsel again moved for his trial to be severed from Mr. Garcia-Gaona's trial. Counsel also renewed the request to cross-examine Ms. DaSilva about whom she believed Mr. Garcia-Gaona was referring to when she said he had told her that "*they* just started shooting." Counsel again cited the "curative admission doctrine" and referred the court to two appellate decisions. The court once again denied the motion to sever the trials but reserved judgment on the cross-examination request.

Eight more prosecution witnesses testified that day, after which the court dismissed the jury until Wednesday.[26] After the jury was dismissed, the court and counsel discussed some pending evidentiary issues, including the further examination of Ms. DaSilva proposed by Mr. Galicia's counsel.

Bench Conference #5

During the colloquy between the court and counsel, Mr. Galicia's attorney directed the court to specific excerpts in the transcript of the conversation between

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[26] The court did not sit on Tuesday, which was an election day.

Ms. DaSilva and the police detective in which there were references to Mr. Canales-Yanez, his wife, and Mr. Garcia. The State pointed out that some of the references concerned not statements of Mr. Garcia-Gaona to Ms. DaSilva, but things Ms. DaSilva had learned from others.[27] The trial judge noted that nothing in those excerpts appeared to be "exonerating evidence" with respect to Mr. Galicia, but said he would review the transcript and return to the issue when the trial resumed on Wednesday.

Bench Conference #6

The following Wednesday, the jury heard testimony from three more prosecution witnesses. After the jury was dismissed for the day, the discussion concerning the possibility of recalling Ms. DaSilva to the stand and the transcript of her conversation with the detective resumed. The trial judge indicated that he had reviewed the transcript with the understanding that the defense was seeking to admit specific excerpts from it. Mr. Galicia's counsel clarified that she was not seeking to admit the document itself and explained that she was "seeking to introduce the live testimony, the complete testimony from Luz DaSilva that includes what [Mr. Garcia-Gaona] told her regarding with whom he committed the crime, which is a self-statement against penal interest."

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[27] Mr. Galicia's counsel pointed to 10 specific excerpts of the document by page and line. Only a couple of those excerpts clearly concerned statements by Mr. Garcia-Gaona to Ms. DaSilva. Some of the excerpts concerned statements by Mr. Canales-Yanez's wife or observations made by Ms. DaSilva herself.

A lengthy colloquy followed concerning the source of the misunderstanding. Mr. Galicia's counsel stated that the transcript amounted to a "proffer" of Mr. Garcia-Gaona's "complete statement" to Ms. DaSilva. The court responded that the document was "nowhere near a transcript of what [Mr. Garcia-Gaona] said," but rather a "rambling" account of information that Ms. DaSilva may have learned from various sources, including Mr. Garcia-Gaona.[28] Defense counsel pointed to a specific excerpt as an occasion on which Ms. DaSilva had stated whom Mr. Garcia-Gaona had identified as the shooters, but the court noted that it appeared in context to involve Ms. DaSilva identifying people depicted in a photograph. During the bench conference, the Assistant State's Attorney proffered that, based on her pretrial interviews of Ms. DaSilva, Ms. DaSilva would say that it was difficult to obtain information from Mr. Garcia-Gaona and that Ms. DaSilva herself did not know who "they" were.

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[28] The Court of Special Appeals noted the trial court's description of the conversation between Ms. DaSilva and the detective as "rambling" and characterized it as an improper adverse comment on the credibility of Ms. DaSilva. 2021 WL 130513 at *30. In the context of the conversation depicted in that document, that adjective is not so much an evaluation of Ms. DaSilva's credibility as a description of the nature of the conversation. If the 91-page document is an accurate account, the conversation did indeed wander from topic to topic, occasionally interrupted by another detective who was attending to Ms. DaSilva's infant daughter. And the rambling nature of the conversation does not seem unusual for two people sitting in a car in the middle of the night or for a detective attempting to establish rapport in an initial interview with a young woman who had just contacted police with important information about a double murder and who expressed concern about her own safety.

The trial court then recounted his own review of the transcript by page and line and noted that Ms. DaSilva attributed statements to Mr. Garcia-Gaona in very few instances, that Mr. Garcia-Gaona only clearly identified his younger brother as a participant in the shooting, and that nothing in the transcript indicated whether Mr. Garcia-Gaona had said that Mr. Galicia or Mr. Canales-Yanez were – or were not – involved.

The trial court pointed to one portion of the transcript in which Ms. DaSilva said that she had been surprised when Mr. Garcia-Gaona had said that his younger brother, Mr. Garcia, had been one of the shooters. In that excerpt, Ms. DaSilva was reported as telling the detective that "[Mr. Garcia-Gaona] was surprised that his little brother took out a gun and just shot them guys, too" and "that his brother, [Roger Garcia], took out the gun too and shot the guys as well."[29]

The court offered to recall Ms. DaSilva and ask her, outside the presence of the jury, if Mr. Garcia-Gaona ever told her that Mr. Galicia was not involved in the murders. If she said yes, the court would allow her to testify to that effect before the jury. If she said no, "that's it." Mr. Galicia's counsel objected to the form of the proposed question, and never took the court up on the offer to recall Ms. DaSilva to clarify the matter.

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[29] That excerpt, which had not been specified by Mr. Galicia's attorney as part of her proffer, was located in the transcript at some remove from the part of the transcript where Ms. DaSilva related Mr. Garcia-Gaona's confession of his own involvement.

Bench Conference #7

The trial court addressed the issue for the final time the next morning before the jury returned to the courtroom – by then, nearly a week after Ms. DaSilva had completed her testimony. The court summarized Ms. DaSilva's testimony, the prior bench conferences, and the limiting instruction it had given. The trial judge stated that he had reviewed the cases cited by Mr. Galicia's counsel and that those cases did not support allowing counsel for Mr. Galicia to recall Ms. DaSilva to ask her "questions about what [Mr. Garcia-Gaona] didn't say about [Mr. Galicia]."

Closing Argument

One week later, after the presentation of additional evidence by the State, the evidence introduced by Mr. Galicia, and a brief rebuttal case by the State, the parties made closing arguments. In its closing and rebuttal arguments summarizing the evidence in the case, and more specifically in describing Mr. Garcia-Gaona's statements to Ms. DaSilva and the evidence against Mr. Galicia, the State did not mention Ms. DaSilva's use of the word "they" in her testimony about Mr. Garcia-Gaona's confession to her.

In her own closing argument, Mr. Galicia's attorney reiterated her opening statement that there were three shooters involved in the murder (and that Mr. Galicia was not one of them), characterized Ms. DaSilva as a "hero" who "exonerate[d]" Mr. Galicia, and argued that another witness who linked Mr. Galicia to the planning of the murders was not credible.

2. The Appeal

In reversing the convictions of Mr. Galicia, the Court of Special Appeals focused on two aspects of Ms. DaSilva's testimony about Mr. Garcia-Gaona's out-of-court confession to her: (1) Ms. DaSilva's use of the plural pronoun "they" when testifying that he had told her that "*they* just started shooting" and (2) the trial court's ruling that Mr. Galicia's counsel could not elicit, on cross-examination of Ms. DaSilva, a separate out-of-court statement of Mr. Garcia-Gaona that identified his younger brother as one of the shooters. 2021 WL 130513 at *29-32.

In the intermediate appellate court's view, Mr. Galicia's rights under the Confrontation Clauses were violated by the trial court's decision not to allow Mr. Galicia's counsel to elicit other out-of-court statements by Mr. Garcia-Gaona from Ms. DaSilva after she used the plural "they" in describing Mr. Garcia-Gaona's admission to her during her direct examination. The court reasoned that, because the State presented other evidence placing Mr. Galicia with the other three alleged shooters on the night of the murders, the undefined use of "they" implied that Mr. Galicia was included. The court concluded that, although the jury had been instructed that the statement was to be considered only against Mr. Garcia-Gaona, Ms. DaSilva's use of "they" triggered Mr. Galicia's right to recall Ms. DaSilva "to probe the meaning of 'they'" and whether Ms. DaSilva understood Mr. Garcia-Gaona's statement to include Mr. Galicia among the shooters.

The intermediate appellate court also held that the alleged out-of-court statement by Mr. Garcia-Gaona to

Ms. DaSilva that Mr. Garcia had "shot them guys, too," which was described in the transcript of her police car conversation with the detective, was admissible under the exception for a statement against the penal interest of the declarant. The court determined that this statement was adverse to Mr. Garcia-Gaona's own penal interest, that Mr. Garcia-Gaona was unavailable as a witness, and that the necessary corroborating circumstances required for admission under Maryland Rule 5-804(b)(3) existed. The intermediate appellate court further reasoned that exclusion of that statement, coupled with the admission of Mr. Garcia-Gaona's confession that "they just started shooting" was not harmless beyond a reasonable doubt. The court stated that "when the defendant is the proponent of a statement against penal interest and it is central to his or her defense, the [trial] court should not impose 'insurmountable evidentiary hurdles' to its admission." 2021 WL 130513 at *31.

C. Analysis

Mr. Galicia's counsel cross-examined Ms. DaSilva at some length. The issue is whether the trial court abused its discretion when it limited the scope of that cross-examination in one respect, based on the court's assessment of the admissibility of the hearsay evidence that Mr. Galicia's counsel hoped to elicit from Ms. DaSilva.

1. "They"

As outlined earlier, during the testimony of Ms. DaSilva, the State introduced Mr. Garcia-Gaona's confession to her on June 6, 2017, that he had been

involved in the murders of the two high school students the day before. As the State indicated at that time, that out-of-court statement was admissible against Mr. Garcia-Gaona under the exception for a statement by a party-opponent. Initially, Mr. Galicia took the position that the statement was admissible only against Mr. Garcia-Gaona and that the court should give the jury a limiting instruction to that effect. The State immediately agreed that a limiting instruction would be appropriate, and the court ultimately gave that instruction, telling the jury to consider that evidence only as to Mr. Garcia-Gaona. No one has alleged any error in the admission of that evidence under the exception for a statement by a party-opponent or in the limiting instruction that was given.

When Ms. DaSilva used the generic plural pronoun "they" in recounting Mr. Garcia-Gaona's description of the shooting, Mr. Galicia's counsel asserted that her client had been prejudiced by the use of that pronoun and asked for a severance, or leeway to introduce other hearsay statements of Mr. Garcia-Gaona, or both. Mr. Galicia's counsel asserted that Ms. DaSilva's testimony had placed "that idea in [the jury's] head that 'they' included Rony Galicia" and thereby prejudiced her client. The use of the pronoun "they" became the linchpin for subsequent discussions in which Mr. Galicia's attorneys sought to introduce hearsay to "cure" the alleged prejudice. The relief sought and the rationale for it morphed over the course of multiple bench conferences, during which the claim of prejudice was never explained with any greater precision.

Indeed, the basis for the claim of prejudice was unclear at best. Ms. DaSilva's use of the pronoun "they" to describe the shooters was perfectly consistent with Mr. Galicia's own theory of the case, which his attorney had described in some detail in her opening statement – that there were multiple shooters, including Mr. Garcia-Gaona, but not including Mr. Galicia. Nothing in the out-of-court statement elicited by the State against Mr. Garcia-Gaona contradicted that theory,[30] and nothing in the bench conferences that followed ever clarified what prejudice might have occurred or why there was something to "cure."[31] The trial judge was understandably perplexed.

With respect to this issue, the Court of Special Appeals concluded that Ms. DaSilva's use of the word "they" triggered a right for Mr. Galicia's counsel "to elucidate what [Mr. Garcia-Gaona] meant by the word 'they.'" 2011 WL 130513 at *32. In the intermediate appellate court's view, the limitation on Mr. Galicia's

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[30] Of course, there was substantial other evidence in the case from other witnesses, as well as Ms. DaSilva, that pointed to Mr. Galicia as one of the conspirators. But none of that was part of the out-of-court statement elicited by the State and Mr. Galicia's counsel had the opportunity to cross-examine the witnesses who presented that evidence.

[31] Given that Mr. Garcia-Gaona's statement was admissible against him under the exception for statements by a party-opponent and given the absence of prejudice to Mr. Galicia in Ms. DaSilva's use of the pronoun "they," there is no occasion to consider the curative admission doctrine, which is triggered only when inadmissible, prejudicial evidence is improperly admitted. *See* footnote 23 above.

cross-examination of Ms. DaSilva violated Mr. Galicia's rights under the Confrontation Clauses.

In our view, there was no violation of the Confrontation Clauses. As indicated earlier, in *Bruton*, the Supreme Court held that a defendant's right to confront the witnesses against him was violated by the prosecution's introduction of a non-testifying co-defendant's confession that expressly named the defendant as a participant in the crime, even though the trial court had given an instruction that told the jury to consider the confession only against the declarant-defendant. *Bruton*, 391 U.S. at 127-28. The Court suggested that redaction of the co-defendant's name from the confession might have avoided a violation of the Confrontation Clause – a suggestion that it later confirmed in *Richardson v. Marsh*, 481 U.S. 200 (1987) (holding that redaction of confession to eliminate co-defendant's name, together with limiting instruction that confession was to be considered only against the declarant-defendant, successfully avoided *Bruton* issue).

Of course, a redaction of a non-testifying defendant's confession to eliminate a reference to a co-defendant must be sufficiently generic to avoid an implicit identification of that co-defendant. A redaction did not suffice in *Gray v. Maryland*, 523 U.S. 185, 192 (1998), where a non-testifying defendant's confession that he and certain other named people had beaten the victim was replaced with the phrase "me, deleted, deleted, and a few other guys." The Court held that such a redaction called attention to the fact that names had been removed that "obviously refer[red] to

someone" and violated the *Bruton* rule. 523 U.S. at 195-96. On the other hand, a redaction that simply identified the assailants as "me and a few other guys" would suffice. *Id*. The Court acknowledged that such a redaction, coupled with additional evidence outside of the confession, might still lead the jury to infer that the co-defendant was involved in the crime, but that did not create a *Bruton* problem.

If the mere reference to other, unspecified co-conspirators in the form of "and a few other guys" does not run afoul of the Confrontation Clauses, neither does a generic plural "they" in the phrase "they just started shooting them."[32] Both the State and Mr. Galicia's defense agreed that there were multiple shooters. Certainly, the State hoped to persuade the jury, through evidence other than Mr. Garcia-Gaona's statement, that Mr. Galicia was one of the several shooters, just as Mr. Galicia's defense hoped to persuade the jury that he was not – or at least raise a reasonable doubt that he was. Ms. DaSilva's testimony concerning Mr. Garcia-Gaona's confession to her was

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[32] In its Confrontation Clause analysis, the Court of Special Appeals relied almost exclusively on a comparison to its prior decision in *Adam v. State*, 14 Md. App. 135, 142-43 (1972), a decision that preceded the Supreme Court decisions in *Richardson* and *Gray*. 2021 WL 130513 at *32. In *Adam*, one of the two defendants had used the plural pronoun "we" in an out-of-court statement confessing his own participation in the crime. The Court of Special Appeals did not analyze the *Bruton* issue in detail, but characterized the confessing defendant's use of the pronoun "we" as "innocuous" in context – perhaps presaging the Supreme Court's decision in *Richardson* – and observed that any potential *Bruton* issue was eliminated when that defendant took the stand and was thus available for cross-examination by the co-defendant's counsel.

neutral on who, in addition to Mr. Garcia-Gaona, those shooters were. Thus, there was no violation of Mr. Galicia's rights under the Confrontation Clauses.

In his brief before us, Mr. Galicia does not argue that his rights under the Confrontation Clauses were violated. Instead, he makes a more amorphous argument that his due process right to call witnesses on his behalf was violated. This argument appears to have two parts. First, Mr. Galicia continues to argue that Ms. DaSilva's use of the pronoun "they" in her testimony was prejudicial to him, even though the jury was told (at the request of his counsel) that it was admitted only against Mr. Garcia-Gaona – which he now views as inadequate. Second, from that premise of prejudice, he argues that his counsel was entitled to cross-examine Ms. DaSilva to elicit hearsay statements – or the lack thereof – in order to lay a foundation for an argument that Mr. Garcia-Gaona had identified for Ms. DaSilva all of the participants in the shooting during their conversation the day after the murders and that Mr. Galicia was absent from that roster.

In fact, it was never clear, from either the transcript of Ms. DaSilva's police car conversation or otherwise, that she would actually testify that Mr. Garcia-Gaona had exculpated Mr. Galicia. At most, Mr. Galicia's counsel argued that, based on the defense interpretation of the transcript, Mr. Garcia-Gaona had impliedly asserted that Mr. Galicia was not involved because there were a few references to Mr. Garcia and to Mr. Canales-Yanez, but not to him, during some

portions of that conversation.[33] As discussed below, defense counsel did not accept the trial court's offer to ask Ms. DaSilva, outside the presence of the jury, for clarification, nor did defense counsel elect to recall Ms. DaSilva as part of the defense case.

2. Alleged Out-of-Court Statement Inculpating Roger Garcia

Near the outset of Ms. DaSilva's testimony, Mr. Galicia's counsel announced her intention to cross-examine Ms. DaSilva about what Mr. Garcia-Gaona "did say and what he didn't say" about the participation of his co-defendants in the murders. During the ensuing bench conferences, it became

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[33] With respect to Ms. DaSilva's police car conversation, Mr. Galicia cites the McLain treatise for the proposition that the lack of a reference to him as a shooter in the portion of that conversation where she described statements Mr. Garcia-Gaona made to her was the "absence of a statement" that did not qualify as hearsay and that was independently admissible as circumstantial evidence that he was not a shooter. *See* McLain, Maryland Evidence §801:4(b)((i), (c). However, silence or the failure of a person to make a particular statement "is usually too inconclusive to be admitted" and therefore is often excluded not only as hearsay, but also on relevance grounds. Murphy, Maryland Evidence Handbook, §703. For a similar reason, two hearsay exceptions relating to the absence of statements or information both apply in circumstances in which it would be a "regular" practice to make a statement or record such that the absence of a statement or record or statement is significant. *See* Maryland Rule 5-803(7), (10). The clear import of Mr. Galicia's effort to introduce evidence of the content of Mr. Garcia-Gaona's out-of-court conversation with Ms. DaSilva was to establish an implied assertion by Mr. Garcia-Gaona that Mr. Galicia was not one of the shooters, which would bring it within the realm of hearsay.

evident that, using the transcript of Ms. DaSilva's police car conversation with the detective on July 17, 2017, counsel sought to elicit from her out-of-court statements by Mr. Garcia-Gaona that clearly implicated his younger brother in the murders and, less clearly, Mr. Canales-Yanez. She also hoped to elicit from Ms. DaSilva the absence of such a statement by Mr. Garcia-Gaona implicating Mr. Galicia.

In its opinion, the Court of Special Appeals focused primarily on whether the hearsay exception for a statement against penal interest applied to Mr. Garcia-Gaona's alleged out-of-court statement to Ms. DaSilva that Roger Garcia "took out a gun and just shot them guys, too" – the most specific excerpt from the 91-page transcript in which Ms. DaSilva indicated that Mr. Garcia-Gaona had identified another participant in the shooting.

Focusing on Ms. DaSilva's use of the word "too" in her conversation with the detective, the intermediate appellate court held that this statement about Roger Garcia's involvement in the shooting was admissible as a statement against Edgar Garcia-Gaona's own penal interest.[34] It further held that Mr. Galicia was entitled

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[34] It appears from the opinion of the intermediate appellate court that it may have been under a misimpression as to the basis for the admission of Mr. Garcia-Gaona's out-of-court confession of his own involvement and as to whether it was also admitted against Mr. Galicia. In two instances, the opinion states that the State had introduced Mr. Garcia-Gaona's confession against Mr. Garcia-Gaona himself under the exception for a statement by a party-opponent and *also against Mr. Galicia under the exception for a statement against penal interest*. 2021 WL 130513 at *18, *21. A

to adduce that testimony. That holding was the primary basis on which the court reversed Mr. Galicia's convictions.

In their arguments before this Court, the parties have debated at some length whether that particular

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later part of the opinion indicates that the State introduced this statement against Mr. Garcia-Gaona *as a statement against penal interest*. *Id*. at *29.

In fact, as indicated in Part II.B. of this opinion, the State had relied on the hearsay exception for a statement by a party-opponent and had introduced Mr. Garcia-Gaona's confession only against Mr. Garcia-Gaona himself. Although the exception for a statement against penal interest would also have supported admission of that testimony against Mr. Garcia-Gaona, there was no need for the State to rely on that narrower hearsay exception. There is no indication in the record that the State ever purported to introduce Mr. Garcia-Gaona's confession against *any* of his co-defendants *on any ground*.

The hearsay exception for statements against penal interest was first invoked by Mr. Galicia's counsel with respect to her desired cross-examination of Ms. DaSilva, and the out-of-court statements in question were those in which Mr. Garcia-Gaona allegedly inculpated his brother and Mr. Canales-Yanez in his conversation with Ms. DaSilva.

As indicated in Part II.A. of this opinion, the two hearsay exceptions are often confused with one another. The confusion in this case is also understandable in light of the many references to the exception for statements against penal interest in the several bench conferences concerning Mr. Galicia's objection. In addition, a portion of the State's brief addressing a severance issue in the Court of Special Appeals discussed whether Mr. Garcia-Gaona's confession would be admissible under that exception in a hypothetical separate trial involving only Mr. Galicia. But it is clear from the record of this case that the State did not purport to do so in this trial.

out-of-court statement *inculpating Roger Garcia* was genuinely adverse to *Mr. Garcia-Gaona's* penal interest.[35] To reach a conclusion that it was against the penal interest of Mr. Garcia-Gaona requires a lot of work by the word "too" when it is unclear whether, in using that word, Ms. DaSilva was quoting the declarant or adding her own emphasis to the statement.

The Court of Special Appeals suggested that a defendant in a criminal case faces a lower threshold to admit a statement against a declarant's penal interest if the out-of-court statement is offered to exculpate the defendant. 2021 WL 130513 at *25, *31. That is not the case. As originally adopted, Maryland Rule 5-804(b)(3), like its federal counterpart, explicitly imposed a *heightened* corroboration requirement when a statement against interest was offered to exculpate the accused. The last sentence of the rule, in its original form, stated: "A statement tending to expose the declarant to criminal liability and *offered to exculpate the accused* is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." In 2010, both the federal and Maryland rules were amended to adopt a "unitary approach" that applies the same standard whether the proponent of the statement is the defense or the prosecution. *See*

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[35] There does not appear to be much dispute about the other two elements of the exception – the unavailability of the declarant and the trustworthiness of the statement. The State concedes that Mr. Garcia-Gaona, as a co-defendant at the trial, was unavailable. There also appears to be no dispute that the statement – insofar as it inculpated Roger Garcia – was trustworthy as the State agrees that Mr. Garcia was a participant in the murders.

2010 Amendments, Advisory Committee Notes to Fed. R. Evid. 804; 165th Report of the Standing Committee on Rules of Practice and Procedure (August 24, 2010) at p.4.

The Court of Special Appeals relied in particular on this Court's decision in *Gray v. State*, 368 Md. 529 (2002). In that case the defendant was on trial for a crime as to which another individual had admitted committing in out-of-court statements; that individual invoked his Fifth Amendment right not to testify at the trial. This Court held that the defendant was entitled to introduce evidence of those admissions as a statement against the penal interest of the individual who made them. Referring to the trial court's exclusion of the admissions and a separate ruling concerning the same witness, the Court concluded that "the trial court's evidentiary rulings effectively blocked [the defendant's] ability to present a defense that, under the facts of this case, he was entitled to present." 368 Md. at 547. As a result, it reversed the defendant's conviction.

The Court of Special Appeals cited *Gray* – as well as a decision of its own[36] – for the proposition that "when a criminal defendant is the proponent of a statement against penal interest that exculpates him and

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[36] *Roebuck v. State*, 148 Md. App. 563 (2002). *Roebuck* involved an out-of-court statement of a co-defendant who had been convicted in a separate trial and who had both inculpated himself and exculpated the defendant in the out-of-court statement. As in *Gray*, the focus of the court's analysis was on the reliability of the out-of-court statement, not whether it was against the declarant's penal interest.

inculpates another, the defendant's right to present a defense is implicated and, if corroboration is present, the balance shifts in favor of admission." 2021 WL 130513 at *25. The importance of a hearsay statement to a party's case does not bear on its admissibility under Maryland Rule 5-804(b)(3). In *Gray*, the Court first applied the three-pronged test to determine that the statement was admissible as a statement against penal interest. The Court's explanation that the defendant had been denied his ability to present a defense went to its ultimate conclusion that the error was prejudicial and not harmless. 368 Md. at 547. Nowhere did the *Gray* Court suggest that a defendant's abstract "right to present a defense" altered its threshold admissibility determination. As this Court has previously explained, the right to present a defense does not include the right to admit incompetent evidence. *See Kelly v. State*, 392 Md. 511, 537 (2006) (noting that a defendant's right to compulsory process does not "confer a right to present inadmissible evidence").

In this case, the trial court never definitively ruled on whether Mr. Garcia-Gaona's statement that his brother "shot them guys, too" was independently admissible as a statement against the declarant's penal interest. That may have been because, by itself, any out-of-court statement Mr. Garcia-Gaona may have made inculpating his younger brother had no bearing on the case against Mr. Galicia. Testimony by Ms. DaSilva that Mr. Garcia-Gaona had inculpated his younger brother potentially had probative value in Mr. Galicia's defense only if two other propositions were also true: (1) Ms. DaSilva would testify that Mr.

Garcia-Gaona had said Mr. Galicia was not involved or had made no similar statement inculpating Mr. Galicia and (2) it appeared that Mr. Garcia-Gaona's statements to her were a comprehensive description of the participants and events surrounding the murders.

It was never established at trial what exactly Ms. DaSilva would say as to either proposition. As to the first proposition, during one of the later bench conferences, the trial judge offered to have Ms. DaSilva returned to the courtroom and questioned outside the presence of the jury on the topic of what Mr. Garcia-Gaona may have told Ms. DaSilva about Mr. Galicia's involvement in the offense. Mr. Galicia's counsel objected to the form of a question the court proposed to ask her and never pursued the idea of clarifying, outside the presence of the jury, what her testimony would be. Instead, Mr. Galicia's defense elected to rely solely on the transcript of Ms. DaSilva's police car conversation with the detective for its proffer.

As to the second proposition, the proffer relied upon by Mr. Galicia's defense counsel does not appear to include a comprehensive description by Mr. Garcia-Gaona for Ms. DaSilva of the circumstances of the murders. After reviewing the entire transcript of the police car conversation, as well as the excerpts spotlighted by Mr. Galicia's counsel, the trial judge was skeptical that the conversation – which ranged over many topics, most of them unrelated to her conversation with Mr. Garcia-Gaona on the day after the murders – represented an exhaustive account of her conversation with Mr. Garcia-Gaona. From our own review of the transcript, that skepticism appears well

taken. At the very least, we cannot say that the trial judge abused his discretion in declining to allow Mr. Galicia's counsel to pursue a line of cross-examination that would elicit out-of-court statements (or non-statements) that were not clearly admissible under an exception to the hearsay rule and that would directly inculpate Mr. Garcia, who was still one of his co-defendants at the time Ms. DaSilva was on the stand.

3. Summary

Under the circumstances of this case, the trial court did not abuse its discretion when it declined to allow Mr. Galicia's counsel to cross-examine Ms. DaSilva about an alleged out-of-court statement by Mr. Garcia-Gaona concerning Mr. Garcia based on Ms. DaSilva's police car conversation with the detective. Even if Mr. Garcia-Gaona's statement to her inculpating his younger brother could be properly characterized as a statement against *Mr. Garcia-Gaona's own penal interest*, that evidence would only have been probative as to Mr. Galicia's involvement if adduced in conjunction with some evidence that Mr. Garcia-Gaona was purporting to provide a complete account of the murders to Ms. DaSilva that did not include Mr. Galicia. Defense counsel did not pursue the opportunity to recall Ms. DaSilva to clarify whether she could actually provide that testimony. "The fundamental rationale in leaving the matter of prejudice [or not] to the sound discretion of the trial judge is that the judge is in the best position to evaluate it. The judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able to ascertain the demeanor of the witnesses and to note

the reaction of the jurors and counsel to inadmissible matters. That is to say, the judge has his finger on the pulse of the trial." *State v. Hawkins*, 326 Md. 270, 278 (1992).

III

Testimony Concerning Location Tracking

The second issue before us is whether expert testimony is necessary to introduce location data passively collected by "smartphones" and the ability of an individual to turn location tracking off.

At Mr. Galicia's trial, the State introduced records and elicited testimony through a witness from Google[37] concerning internet searches and location tracking conducted on Mr. Galicia's two Google accounts. There was a gap in the location tracking data in the Google account that Mr. Galicia was using at the time of the murders for a period of several weeks that included the date of the crime. The witness testified that a user of a device could turn off Google's location tracking. Mr. Galicia's counsel objected to the testimony concerning both the search records and the location tracking data on the ground that the State was required to present expert testimony to admit that evidence. The trial court overruled that objection. In the end, neither the State nor the defense referred to the location tracking testimony in closing argument.

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[37] Google LLC, a subsidiary of Alphabet, Inc., is a well-known technology company, that, among other things, operates a widely-used internet search engine, is an email service provider, and produces various consumer electronic products.

The admission of the testimony about the search and location tracking data became one of the issues in Mr. Galicia's appeal. Although the Court of Special Appeals held that it was not necessary to present expert testimony concerning the internet search records, it came to the opposite conclusion concerning the location tracking data. It held that the trial court erred in allowing a lay witness to testify about a cell phone user's ability to turn off certain location tracking functions on the phone as the court did not consider that function to be within the realm of common knowledge.

A. Trial Testimony and Objection

Daniel O'Donnell, a custodian of records on the legal investigation support team at Google, stated that his job was to provide user data in response to law enforcement inquiries that Google receives in the form of subpoenas, court orders, and search warrants. The State did not seek to qualify Mr. O'Donnell as an expert witness.

Mr. O'Donnell primarily introduced records of internet searches conducted from Mr. Galicia's two accounts before and after the murders. That testimony established that, during April 2017, prior to the murders, internet searches were conducted from those accounts for firearms matching those used in the shooting. One such search was conducted shortly after the murders in June 2017; in closing, the State

suggested that Mr. Galicia was looking to replace a weapon used in the shooting that had been discarded.[38]

Before and during Mr. O'Donnell's testimony, there were lengthy bench conferences during which Mr. Galicia's counsel argued that it was not appropriate for a lay witness to explain the contents of Google search and location history records. In defense counsel's view, Mr. O'Donnell's testimony would be based on specialized knowledge, training, and experience. The trial court ruled that Mr. O'Donnell would be allowed to testify and defense counsel could object on a question-by-question basis.

During the direct examination of Mr. O'Donnell, Mr. Galicia's counsel repeatedly objected to questions about the scope of Google's recordkeeping.[39] Defense counsel eventually requested a continuing objection, which was acknowledged by the trial court, as the State presented the data from Mr. Galicia's two Google accounts in spreadsheet form and asked Mr. O'Donnell to explain how Google compiles search and location history records. As indicated above, only the location history records are at issue before us.

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[38] The police never located any of the murder weapons.

[39] Among other things, Mr. Galicia's counsel argued that the records were not admissible under the business records exception to the hearsay rule because the records were user-generated and the custodian of records did not have a "duty to report." The court overruled this objection, likening the records to incoming and outgoing call logs about which a custodian of records from a telephone company would be allowed to testify.

The relevant portion of Mr. O'Donnell's testimony was as follows:

Q: Is there any other types of records that Google keeps from its accountholders?

A: Yes.

Q: Can you tell us what else?

A: It depends on the products and services that the user is registered with. It could be anything from their, the contents of their e-mails, photos that they've uploaded, their location history, if they've opted into that service.

Q: When you, now, when you say, if they've opted into that service when you said location history, can you explain what you meant by that?

A: Sure. So depending on what the product and service is, the user does have functionality to enable or disable the tracking of that data. Location history is one of those services. So a user can opt out of tracking their location history, either by device or across their Google account.

* * *

Q: So Mr. O'Donnell, what is location history data? Can you just give us an overall look at services?

> A: Yes. So it is data that is collected from devices that a user has logged into with their Google account. It's taken from a number of different sources, and it's collected for business purposes to provide estimates, or geographic coordinates for where that device has been.

The State then asked Mr. O'Donnell if there was any location data from June 5, 2017 (the date of the murders), associated with either of Mr. Galicia's accounts. After consulting data from a flash drive that he had compiled for the trial, Mr. O'Donnell stated that there was a "gap" in that there were no logs for that date, although there were logs for other dates. Mr. O'Donnell also testified that the location history data associated with one account began on August 3, 2017, two months after the murders. On cross-examination, Mr. Galicia's counsel elicited testimony that the "gap" associated with the other account was a period of months. In particular, the exhibit pertaining to that account shows an absence of location data for the period between April 11, 2017 and June 8, 2017.

B. Decision of the Court of Special Appeals

The Court of Special Appeals devoted most of its discussion of Mr. O'Donnell's testimony to the admissibility of the search records. It concluded that the search records were properly admitted without expert testimony. 2021 WL 130513 at *33-35. However, with regard to the location tracking data, it concluded that "[h]ow and under what circumstances Google tracks location data related to searches and other activity on a device is not within the realm of common

knowledge, and many laypeople would be unaware that that function can be enabled or disabled." *Id*. at *35. Accordingly, it held that a witness who testified on that subject should have been qualified as an expert.

C. Analysis

1. Standard of Review

An appellate court typically reviews a trial court's ruling on the admission of evidence for abuse of discretion. *Portillo Funes v. State*, 469 Md. 438, 478 (2020). An abuse of discretion occurs where "a trial judge exercises discretion in an arbitrary or capricious manner or … acts beyond the letter or reason of the law." *Cooley v. State*, 385 Md. 165, 175 (2005). In some circumstances, the admissibility of particular evidence is a legal question, in which case an appellate court accords no special deference to a trial court. *Brooks v. State*, 439 Md. 698, 708 (2014).

The rules of evidence distinguish between the types of opinions and inferences that can be expressed by a lay witness and those for which the witness must be qualified as an expert. Lay witness opinion or inference testimony "is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Maryland Rule 5-701. By contrast, "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 may be introduced only through the testimony of an expert witness properly qualified under Maryland Rule 5-702. *Johnson v. State*, 457 Md.

513, 530 (2018) (citation and internal quotation marks omitted). "If a court admits evidence through a lay witness in circumstances where the foundation for such evidence must satisfy the requirements for expert testimony under Maryland Rule 5-702, the court commits legal error and abuses its discretion." *Id*.

2. Whether the "Location History" Testimony Required an Expert Witness

The resolution of this issue essentially depends on which of two decisions of this Court is more pertinent. The State relies on *Johnson*, *supra*, while Mr. Galicia argues that an earlier decision in *State v. Payne*, 440 Md. 680 (2014), is the more appropriate precedent.

Payne

In *Payne*, a police detective testified about the locations of the defendants' cell phones at critical times in relation to the murder with which they were charged. The detective had collected thousands of pages of raw phone records from the cell phone service provider and then pared them down into a Call Detail Record that reflected communications to or from the defendants' phones over a two-day period. 440 Md. at 685. He used the records to compile single-page exhibits listing information relevant to each call, including the geographic coordinates of the cell towers to which the phones connected during each call. *Id.* at 686. The times of the calls and locations of the cell towers were related to the time and place of the murder. Through the detective, the State entered into evidence both the single-page exhibits listing the relevant call data, as well as maps showing the

pertinent cell towers in relation to the crime scene. *Id*. at 685-89.

The State did not qualify the detective as an expert witness when he testified at trial. Defense counsel objected to the detective's testimony about how he interpreted the raw phone records, arguing that only an expert witness could interpret that data. 440 Md. at 685-89. In preliminary questioning conducted outside the presence of the jury, the detective testified that his procedure required "matching certain data points associated with a cell phone call to a table available on an unnamed 'secure Web site' or on 'an Excel spread sheet that comes with the records,' to determine the latitude and longitude of the corresponding cell tower." *Id*. at 686-87. Neither the secure web site nor the Excel spreadsheet was entered into evidence. The trial court overruled the defense objection and allowed the detective to testify without being qualified as an expert. *Id*. at 687.

This Court reversed the conviction. In doing so, the four-judge majority opinion concluded that the detective had "engaged in a process . . . that was beyond the ken of an average person" and offered conclusions regarding the communication path of calls that required expert qualification. 440 Md. at 700. The majority opinion rejected the State's argument that a lay person with the same information and instructions could have determined the locations of the cell towers, concluding that "additional training and experience were required to parlay the process from which [the detective] derived the communication path of each call." *Id*. at 700-01. A Call Detail Record "contains a

string of data unfamiliar to a layperson and is not decipherable based on 'personal experience[,]'" so the detective had to rely on specialized knowledge or experience to eliminate extraneous data and isolate the pertinent calls. *Id.* at 701. The Court contrasted the Call Detail Records with "entries typical of a cell phone bill where a juror could 'rely upon his or her personal experience' to understand their meaning." *Id.*

Johnson

In *Johnson*, the Court held that a custodian of records for the Maryland Transit Administration ("MTA") police did not need to be qualified as an expert in order to testify regarding the times and locations recorded by a mobile GPS tracking device used by the defendant, who was an MTA police officer at the time of the offense. 457 Md. 513. The device, known as a "Pocket Cop," generated a report showing its location at specific times and the duration of time spent at each location. *Id.* at 521. The custodian of records, who was also an MTA police supervisor, explained the basic function of the device and testified to the contents of two entries from the report, which showed how long the defendant had spent at two locations related to the crime. *Id.* at 526.

The Court noted that trial courts frequently admit business records through witnesses who are not experts in the technology that produced those records. "Expert testimony about how a clock works is not necessary every time an employee's timesheet is offered into evidence. The same is true for GPS entries." 457 Md. at 532; *see also Gross v. State*, 229 Md. App. 24, 36 (2016) (expert testimony not necessary to admit GPS location

data where the witness simply read the GPS data as it appeared in the records).

The Court distinguished the MTA police GPS records that were the subject of the police supervisor's testimony from the telephone company Call Detail Records that were the subject of the detective's testimony in *Payne*. The holding in *Payne* specifically concerned the process that the detective had used to glean relevant location evidence from records that had not been created for that purpose and that were not decipherable by a lay person. "[T]he detective was not simply reciting information from the business records, but applying specialized knowledge to translate the voluminous records into something the jury could understand." *Johnson*, 457 Md. at 534. Even when testimony does not constitute an opinion, "an expert [is] needed to explain the process for attaching significance to data that would not be *comprehendible* by a lay person." *Id.* at 535 (emphasis added). By contrast, in *Johnson*, the GPS records had been created to track the locations of officers, the police supervisor read the entries as they appeared in the report, and the content of that report was not beyond the comprehension of the average juror. *Id*.

Application to the Location Tracking Records in this Case

In the time since *Payne* was decided, almost eight years ago, and *Johnson* was decided, more than four years ago, smartphones[40] have become ever more

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[40] Merriam-Webster defines "smartphone" as "a cell phone that includes additional software functions (such as email or an

ubiquitous and the location tracking capabilities of those devices and their applications (or "apps") ever more familiar. Smartphone ownership among American adults grew from 35% in 2011 to 85% in 2021, and ownership among adults aged 18-49 is greater than 95%.[41] While few could explain the technology used by phones and the network of towers and satellites with which they constantly communicate, the fact that they collect data about users' habits, including location, is widely understood: "A cell phone's identification of its location is one of its essential virtues. A cell phone must be found by a service provider for it to be used as a phone." *State v. Copes*, 454 Md. 581, 587 (2017). There has been, and will continue to be, much debate over which aspects of this pervasive yet rapidly evolving technology are within the common knowledge. The question currently before us, however, concerns not so much the technology behind location tracking, but rather the understanding that a user may exercise some control over this feature and the data that it generates.

Even had location tracking technology – and the average person's familiarity with it – stood still over the past decade, this case is plainly closer to the simple recitation of the data exemplified in *Johnson* than it is to the interpretive process at issue in *Payne*. The

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Internet browser)." *Smartphone*, Merriam-Webster, https://www.merriam-webster.com/dictionary/smartphone (2022), available at perma.cc/TKD4-CJ4T.

[41] Mobile Fact Sheet, Pew Research Center (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/mobile/, available at perma.cc/6TUE-2DA4.

location tracking records introduced during Mr. O'Donnell's testimony were the data generated by Google's standard recordkeeping practices; it is evident that he used no specialized skill to reformat or translate any of the raw data. Mr. Galicia argues that the records were not self-explanatory, and that Mr. O'Donnell had to decipher the categories of information in those records. However, the gap in the chronological listing is obvious in the exhibit. The more significant issue is whether Mr. O'Donnell relied on specialized knowledge in explaining that a user has the ability to enable or disable the tracking of that data, thereby ascribing significance to that gap.

Google's location history tracking is a consumer feature designed to be understood and managed by accountholders. When a court considers whether testimony is beyond the "ken" of the average layman, the question is not whether the average person is already knowledgeable about a given subject, but whether it is within the range of perception and understanding. "Testimony elicited from an expert provides useful, relevant information when the trier of fact would not otherwise be able to reach a rational conclusion; such information 'is not likely to be part of the background knowledge of the judge or jurors themselves.'" *Payne*, 440 Md. at 699, quoting David H. Kaye, et al., *The New Wigmore: Expert Evidence* §1.1 (2d ed. 2010). Some smartphone users – and the minority of Americans who do not own smartphones – may not personally have experience toggling their location tracking on and off, but the simple fact that a mobile electronic device allows its users to customize the data they share with the manufacturer, the cell

phone service provider, and various apps is common knowledge in modern society. That a user's customized or default settings may impact the records kept by those entities does not require specialized knowledge to understand.

Mr. Galicia argues that Google's recordkeeping is so "opaque" as to be beyond the understanding of a lay person. The evidence that he cites for this proposition references news reports of Google continuing to record location data through a user's "Web and App Activity" – a separate category of data recorded by Google – even when the user has manually disabled "Location History" tracking.[42] That *more* user location data may be recorded *elsewhere* on one's phone is not relevant to the narrow issue before the Court; Mr. Galicia does not argue that Google's data collection practices make the "Location History" record any less intuitive.

Mr. O'Donnell's statement that a user can opt out of location history tracking was properly within the scope of lay witness testimony under Maryland Rule 5-701. The inference that this testimony was intended to help the jury draw – that Mr. Galicia could have manually disabled location tracking around the time of the murders – was well within the understanding of the average lay person.

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[42] Ryan Nakashima, *AP Exclusive: Google tracks your movements, like it or not*, AP (Aug. 13, 2018), https://apnews.com/article/north-america-science-technology-business-ap-top-news-828aefab64d4411bac257a07c1af0ecb.

IV

Conclusion

For the reasons set forth above, we hold:

(1) The trial court did not abuse its discretion when it declined to allow Mr. Galicia's counsel to elicit on cross examination of Ms. DaSilva an out-of-court statement allegedly made by Mr. Garcia-Gaona that inculpated his younger brother in the shooting.

(2) The witness who introduced records from Google concerning Mr. Galicia's two accounts need not have been qualified as an expert to testify that an account holder has the ability to turn off a location tracking function associated with those accounts.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY RESPONDENT.

IN THE COURT OF APPEALS

OF MARYLAND

No. 5

September Term, 2021

STATE OF MARYLAND	)
	)
v.	)
	)
RONY GALICIA	)
	)

*Getty, C.J.,
*McDonald
Watts
Hotten
Booth
Biran
Raker, Irma S. (Senior Judge, Specially Assigned),

JJ.

Dissenting Opinion by Watts, J., which Raker, J., joins.

Filed: June 27, 2022

*Getty, C.J., and McDonald, J., now Senior Judges, participated in the hearing and conference of this case while active members of this Court. After being recalled pursuant to Md. Const., Art. IV, § 3A, they also participated in the decision and adoption of this opinion.

Respectfully, I dissent. In this case, in the Circuit Court for Montgomery County, a jury found Rony Galicia, Respondent, guilty of two counts of first-degree murder and other crimes related to the brutal murder of two victims on the evening of June 5, 2017. At a joint trial of Galicia and co-defendants, the State offered testimony of Luz DaSilva, the former girlfriend of co-defendant Edgar Garcia-Gaona. On direct examination, in response to a question about what transpired on the night of the murder, DaSilva testified that Garcia-Gaona told her that "that day he took the cellphone from the boys, smashed it, and then after they just started shooting them." The State's case theory was that all of the co-defendants were present at the scene of the murder and shot the victims. Galicia disputed being present at the scene and any involvement in the shooting, insisting that he was at home watching Netflix.

Against this backdrop, the case involves two errors by the circuit court that require reversal. First, the circuit court erred in limiting the ability of Galicia to cross-examine DaSilva when she testified that, days after the murders in the case, Garcia-Gaona told her that "they just started shooting them." Garcia-Gaona was one of four co-defendants, along with Galicia, Jose Ovilson Canales-Yanez, and Garcia-Gaona's half-brother Roger Garcia, who is also known as "Johann." DaSilva's testimony about Garcia-Gaona's use of the word "they" made it unclear to the jury which of the other three co-defendants he was referring to and unfairly prejudiced Galicia.

Underlying the prejudice concerning DaSilva's testimony is that when being interviewed by a detective, DaSilva advised that Garcia-Gaona implicated Roger Garcia in the murder by saying that "he was surprised that his little brother took out a gun and just shot them guys, too" and saying "[t]hat his brother[] Johan[n] took out the gun too and just shot the guys as well." DaSilva also advised the detective that Garcia-Gaona implicated Canales-Yanez by saying that Garcia-Gaona sold a gun to Canales-Yanez before the murders and that Garcia-Gaona and Canales-Yanez traveled together in Canales-Yanez's wife's vehicle on the date of the murders. DaSilva's statements to the detective during the interview about Garcia-Gaona's implicating Roger Garcia and Canales-Yanez indicate that, when DaSilva testified that Garcia-Gaona said that "they just started shooting them[,]" he (Garcia-Gaona) was not in actuality referring to Galicia at all.

The circuit court, however, precluded Galicia from cross-examining DaSilva about Garcia-Gaona's use of the word "they" and about his statements implicating Roger Garcia and Canales-Yanez. From my perspective, Galicia had a right under the Sixth Amendment's Confrontation Clause and Article 21 of the Maryland Declaration of Rights to cross-examine DaSilva about the matter because DaSilva's testimony that Garcia-Gaona said that "they just started shooting them" plainly could have been understood by the jury as implicating Galicia. In addition, Garcia-Gaona's statements implicating Roger Garcia and Canales-Yanez were admissible and would have indicated that Galicia was not one of the shooters.

The next issue concerns the testimony of Daniel O'Donnell, a Google records custodian, offered against Galicia. The State did not attempt to qualify O'Donnell as an expert witness, but O'Donnell was allowed to testify regarding Galicia's Google account "location history" data, and testified that there was a "gap" in Galicia's location history, which corresponded to the date of the murder. The circuit court's second error was allowing O'Donnell to testify as a lay witness that there was a "gap" in the "location history"[1] of Galicia's Google account on the date of the murders. Maryland Rules 5-801 and 5-802 "prohibit the admission as 'lay opinion' of testimony based upon specialized knowledge, skill, experience, training or education." Ragland v. State, 385 Md. 706, 725, 870 A.2d 609, 620 (2005).

Because the State has not proven beyond a reasonable doubt that either of the errors described above was harmless, I would affirm the judgment of the Court of Special Appeals, which issued a thorough and well-reasoned opinion in which it reversed Galicia's convictions and remanded the case for a new trial.

With certainty, the circuit court should have allowed Galicia to cross-examine DaSilva about Garcia-Gaona's use of the word "they." The Confrontation

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[1] O'Donnell testified, among other things, that "location history" "is data that is collected from devices that a user has logged into with their Google account. It's taken from a number of different sources, and it's collected for business purposes to provide estimates, or geographic coordinates for where that device has been." According to O'Donnell, a person with a Google account "can opt out of tracking their location history, either by device or across their Google account."

Clause of the Sixth Amendment and Article 21 of the Maryland Declaration of rights enshrine the right of a criminal defendant to cross-examine witnesses. See Manchame-Guerra v. State, 457 Md. 300, 309, 178 A.3d 1, 6 (2018). To safeguard this right, a circuit court must "allow the defense a 'threshold level of inquiry' that puts before the jury 'facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.'" Id. at 309, 178 A.3d at 6 (citations omitted). Within the contours of the subjects discussed on direct examination, a defendant "should be free to cross-examine in order to elucidate, modify, explain, contradict, or rebut testimony given in chief." Smallwood v. State, 320 Md. 300, 307, 577 A.2d 356, 359 (1990) (citations omitted). In this case, given that DaSilva's testimony plainly could have been understood to implicate him, Galicia had a right under the Confrontation Clause to ask DaSilva to explain what she meant when she testified on direct examination that Garcia-Gaona told her that "they just started shooting them." At a minimum, Galicia's counsel should have been allowed to ask DaSilva whether Garcia-Gaona ever mentioned him while making inculpatory statements to her.[2]

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[2] I am unpersuaded by the State's reliance on State v. Rosado, 39 A.3d 1156 (Conn. App. 2012) for the proposition that Galicia was improperly attempting to use Garcia-Gaona's failure to mention him as evidence that he was not involved. Unlike Rosado, id. at 1165, this case does not involve a defendant who sought to treat as exculpatory the circumstance that a declarant did not mention the defendant by name when describing events that the declarant witnessed. Nor does this case involve a defendant who attempted to introduce evidence of the "absence of a statement" as an

Galicia should have also been allowed to elicit from DaSilva Garcia-Gaona's statements implicating Roger Garcia and Canales-Yanez, which were admissible under the "statement against penal interest" exception to the rule against hearsay under Maryland Rule 5-804(b)(3). The circumstances of this case satisfy all three requirements for that hearsay exception. First, as the State acknowledges on brief, "the declarant"—*i.e.*, Garcia-Gaona—was "unavailable as a witness[.]" Md. R. 5-803(b). Second, Garcia-Gaona's statements implicating Roger Garcia and Canales-Yanez "so tended to subject [Garcia-Gaona] to . . . criminal liability . . . that a reasonable person in [his] position would not have made the statements unless the person believed them to be true." Md. R. 5-804(b)(3). And finally, "corroborating circumstances clearly indicate the trustworthiness of the statement[s]." Id.[3]

Garcia-Gaona's statements implicating Roger Garcia and Canales-Yanez were self-inculpatory and a reasonable person in his position would not have made

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exception to the hearsay rule, *i.e.*, under a hearsay exception, as evidence that he was not involved in the charged offense. Instead, this case involves a defendant who sought to prevent a hearsay statement from inculpating him by asking on cross-examination whether the declarant was referring to him when the declarant used the word "they."

[3] Although Garcia-Gaona's statements implicating Roger Garcia and Canales-Yanez were hearsay within hearsay because they were contained within DaSilva's statements to the detective, the State does not contend that Garcia-Gaona's statements implicating Roger Garcia and Canales-Yanez were inadmissible on the ground that no hearsay exception applied to DaSilva's statements to the detective.

the statements unless the person believed them to be true. By indicating that he had seen the murders, Garcia-Gaona admitted to DaSilva he was at the murder scene at the time. Even more significantly, Garcia-Gaona admitted to DaSilva that he participated in the murders. DaSilva told the detective that Garcia-Gaona "was, like, but all that matters is that we already got it done and it happened just like the movies. You know that we just went over there quick as s[***] and just got them and then that was it." As far as DaSilva's statements to the detective reveal, at no point did Garcia-Gaona deny participating in the murders or indicate that his participation in the murders differed from that of any of the other three co-defendants. In other words, unlike the declarant who made a self-serving statement in Jackson v. State, 207 Md. App. 336, 358, 52 A.3d 980, 992, cert. denied, 429 Md. 530, 56 A.3d 1242 (2012), Garcia-Gaona did not attempt to deflect guilt from himself to someone else.[4]

Multiple corroborating circumstances indicated the trustworthiness of Garcia-Gaona's statements

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[4] Also unpersuasive is the State's contention that Garcia-Gaona's statements implicating Roger Garcia and Canales-Yanez were not statements against penal interest because a reasonable person in Garcia-Gaona's position would not have believed that law enforcement officers would obtain Snapchat messages that linked Roger Garcia to the murders. Nothing in the plain language of Maryland Rule 5-804(b)(3) states or implies that, for a statement to be against penal interest, a reasonable person in the declarant's position would have believed that the person would eventually get caught. Instead, what is required is "that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true." Md. R. 5-804(b)(3).

implicating Roger Garcia and Canales-Yanez. Just days after the murders, Garcia-Gaona confessed to DaSilva—his girlfriend and the mother of his children—in the home that they shared. Garcia-Gaona was not in custody and confessing to law enforcement officers in an attempt to curry favor with them. Unlike the defendant's father who was ostensibly lying to protect his son in Stewart v. State, 151 Md. App. 425, 455, 827 A.2d 850, 868 (2003), cert. denied, 377 Md. 276, 833 A.2d 32 (2003), Garcia-Gaona did not try to protect any of the other co-defendants. To the contrary, when talking to DeSilva, Garcia-Gaona implicated two of the other co-defendants, one of whom is his half-brother. In addition, DaSilva told the detective that "they set them up. They had that plan already up. I know it was through Snapchat that they did that." DaSilva also told the detective that Garcia-Gaona said that "they took their phone, they crushed it, whatever, you know, they probably smashed it or whatever the type of way they did it." These statements are consistent with the State's theory of the case, and the evidence offered by the State, that Roger Garcia lured one of the victims to the murder scene using Snapchat messages and that the murderers smashed that victim's phone to destroy evidence of those messages.

The State has not met its burden to prove beyond a reasonable doubt that the circuit court's error was harmless. Garcia-Gaona's statement that "they just started shooting them" clearly implicated Galicia. In the absence of any clarification on cross-examination about Garcia-Gaona's use of the word "they," it cannot be said beyond a reasonable doubt that his statement did not affect the jury's decision to find Galicia guilty.

The circuit court's preliminary advice to the jury, prior to opening statements, that some evidence might be admitted as to one or more but not all of the defendants and that, if so, the court would provide a limiting instruction, was not a substantive instruction, was necessarily provided before the presentation of evidence in the case, and could have in no way caused the jury to consider the statement "they just started shooting them" as not implicating Galicia. Likewise, the circuit court's limiting jury instruction that DaSilva's testimony regarding Garcia-Gaona's statement "was offered only against [him] and not against the others" did not cure the prejudice. In the context of a joint trial, limiting instructions are at times unable to cure prejudice. See Gray v. Maryland, 523 U.S. 185, 188 (1998). In this case, the circuit court's limiting instruction did not include an explanation that the word "they" did not include or pertain to Galicia. As such, the limiting instruction did not cure the prejudice resulting from the circuit court's error because the instruction ran the risk of drawing more of the jury's attention to Garcia-Gaona's statement and could reasonably have been interpreted by the jury to mean that, although the "they" referred to in Garcia-Gaona's statement included Galicia, the jury should not consider the circumstance. Clearly, this would have been a difficult instruction for any juror to have followed.

As to the second issue, it was error to allow O'Donnell, a lay witness, to give testimony that only an expert could properly provide—namely, that there was a "gap" in the "location history" of Galicia's Google account on the date of the murders. O'Donnell's

inference that there was a "gap" in the "location history" was not "rationally based on [his] perception"—*i.e.*, what he saw or heard. Md. R. 5-701. Instead, the inference was based on O'Donnell's understanding of the "location history" data based on his specialized knowledge and training as an employee of Google.

An average member of the general public would not have the specialized knowledge and training necessary to identify and explain a gap in the "location history" of a Google account—and has likely never even heard of "location history"—to say nothing of being able to discern that there is a "gap" in a user's "location history" just by looking at data from Google. Interpreting such data is nothing like looking at "commonly used devices such as clocks, scales, and thermometers." Johnson v. State, 457 Md. 513, 531, 179 A.3d 984, 994 (2018). When one looks at a clock, scale, or thermometer, there is no need to draw an inference—the device says what it means and means what it says. By contrast, when one looks at "location history" data from Google, only by having specialized knowledge or training could one draw an inference could that there is a "gap" in the data. A gap in location history data from Google and an explanation for the gap would not be obvious to a layperson.

In other words, understanding how to evaluate Google "location history" data is a matter that is not within the purview of the general public, and only a properly qualified expert witness could draw such an inference. As the Court of Special Appeals determined, "[h]ow and under what circumstances Google tracks

location data related to searches and other activity on a device is not within the realm of common knowledge, and many laypeople would be unaware that that function can be enabled or disabled." Galicia v. State, No. 3350, Sept. Term, 2018, 2021 WL 130513, at *35 (Md. Ct. Spec. App. Jan. 14, 2021). The Court of Special Appeals determined that through testimony that a gap existed in Galicia's location history, the State was trying to show that he had disabled it himself, and that expert testimony was required to "elucidate how and when that data is stored; how a user enables and disables location tracking; and whether gaps can be explained by other circumstances beyond disabling location tracking." Id. And, I agree. "[B]ecause the technology that resulted in the ['location history' data] exceeds what is generally available to and understood by the public, expert testimony was required under the circumstances of this case to explain the [data]." Id. at 538, 179 A.3d at 998 (Watts, J., dissenting).

I am unpersuaded by the State's assertion that the circuit court's error in allowing O'Donnell's testimony was harmless because Detective Michael Miglianti—an expert for the State in the field of digital forensics—testified that there was a gap in the call logs and text messages on Galicia's phone on the date of the murders and that the most likely explanation was that they were deleted. Detective Miglianti did not testify about the alleged "gap" in the "location history" of Galicia's Google account. O'Donnell's testimony concerning the alleged "gap" in the location history of Galicia's Google account was far more inculpatory than testimony regarding the gap in the call logs and text messages on Galicia's phone because the alleged "gap" in the

"location history" of Galicia's Google account meant that a method of ascertaining his whereabouts on the date of the murders had been eliminated. Although a person may decide to delete call logs or text messages for any number of reasons, an alleged decision to turn off the "location history" of a Google account for a day could be interpreted as an indication that the person did not want others to know where the person was that day and as an act indicating a consciousness of guilt.[5] As such, it cannot be established beyond a reasonable doubt that allowing O'Donnell to testify as a lay witness that there was a "gap" in the "location history" of Galicia's Google account had no effect on the outcome of the case and was harmless error.

For the above reasons, respectfully, I dissent.

Judge Raker has authorized me to state that she joins in this opinion.

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[5] Although a DNA witness for the State testified that Galicia was a contributor of DNA found on shell casings recovered from the location of the shooting and the expert opined that it was possible to transfer DNA to a firearm cartridge when loading a firearm, the expert's testimony did not establish Galicia's presence at the scene of the shooting. Thus, O'Donnell's testimony concerning a gap in Galicia's Google location history and DaSilva's unexplained testimony that "they just began shooting" was highly prejudicial in that it could have been interpreted by the jury as not only linking Galicia to the scene, but also as incriminating him as one of the shooters and as evidence of consciousness of guilt.

APPENDIX B

UNREPORTED*

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

[Filed: January 14, 2021]

Circuit Court for Montgomery County
Case Nos. 132903C & 132904C

No. 3350
September Term, 2018

RONY GALICIA)
v.)
STATE OF MARYLAND)

No. 3358
September Term, 2018

EDGAR GARCIA-GAONA)
v.)
STATE OF MARYLAND)

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

Meredith,*
Wells,
Eyler, Deborah S., JJ.
Senior Judge, Specially Assigned

JJ.

Opinion by Eyler, Deborah S., J.

Filed: January 14, 2021

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

A jury in the Circuit Court for Montgomery County convicted Rony Galicia and Edgar Garcia-Gaona, the appellants, of the first-degree murders of Shadi Najjar, age 17, and Artem Ziberov, age 18; conspiracy to murder Shadi; two counts of use of a firearm in the commission of a felony; and armed robbery of Shadi.[1]

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[1] The parties refer to the victims by their initials, presumably because Shadi was a juvenile. The victims' full names appear in a reported opinion of this Court in an appeal by an accomplice, Jose Ovilson Canales-Yanez, who elected a bench trial. *See Canales-Yanez v. State*, 244 Md. App. 285, *cert. granted*, 468 Md. 543 (2020). Accordingly, we shall use the victims' names and, for ease of discussion, shall refer to them by their first names. We use the spelling of Artem's last name provided by his mother at trial and appearing elsewhere in the record. Also for ease of discussion, we shall refer to the appellants and Roger Garcia, a codefendant, by

The court sentenced each defendant to consecutive terms of life in prison without the possibility of parole for the murders; a concurrent term of life in prison for conspiracy to murder; and 60 years, collectively, for the firearm and armed robbery counts.

The appellants noted separate appeals, which were consolidated for oral argument. We are issuing one opinion resolving both appeals. The appellants present five questions for review, which we have rephrased and combined into four, as follows:

Rony and Edgar:

I. Did the circuit court err by granting the State's pretrial motion to join the appellants' trials and by denying Edgar's motions to sever made during trial?

Rony:

II. Did the trial court err by precluding Rony from introducing, either on cross-examination or in his case, evidence that in statements Edgar made to his girlfriend, he inculpated himself and others and did not inculpate Rony?

III. Did the trial court err by permitting a lay witness to testify about Google records showing Rony's search history and to suggest that there was a "gap" in location data linked to his devices?

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their first names and we shall refer to Jose Ovilson Canales-Yanez by his middle name, Ovilson, or his nickname, "O." We shall refer to some of the fact witnesses by their first names as well.

Edgar:

IV. Did the trial judge err by not recusing himself?

For the reasons explained, we shall affirm the judgments against Edgar, reverse the judgments against Rony, and remand in part for further proceedings, not inconsistent with this opinion, on the charges against Rony.

FACTS AND PROCEEDINGS

At 10:30 p.m. on June 5, 2017, Shadi and Artem were murdered as they sat in Shadi's Honda Civic on Gallery Court, a cul-de-sac in Montgomery Village. Shadi was shot three times in the head at close range and once in the left thigh. Artem sustained ten gunshot wounds to his neck, chest, back, left arm, and right arm. They died immediately. The two friends were set to graduate from Northwest High School in Germantown the next day. The murders received widespread media coverage in the Montgomery County area.

On June 17, 2017, Edgar and his half-brother Roger Garcia (also known as Johann) were arrested for the murders of Shadi and Artem and related crimes. Jose Ovilson Canales-Yanez, who was Edgar's best friend, was arrested for the same crimes later that day. During the ride to the station house, Edgar told Roger not to "say anything." Edgar said, "we did good," "O doesn't say anything," and that he did not think they would be convicted.

In July 2017, the State obtained an indictment against Edgar and Roger and moved to join them for trial.[2]

Rony was close friends with Edgar and Roger. He was arrested on November 16, 2017 on unrelated charges. Then, on December 1, 2017, he was charged with the same crimes. Thereafter, the State obtained an indictment against Edgar, Roger, and Rony, dismissed the first indictment, and moved to join Rony with Edgar and Roger for trial. Rony opposed joinder. The court held a hearing during which Edgar moved to sever. The court granted the motion for joinder and denied the motion to sever.

Trial began on October 22, 2018. Evidence was presented over ten days. The State called 41 witnesses in its case-in-chief and introduced over 500 exhibits. At the outset of the fifth day of evidence, the court declared a mistrial in the case against Roger because his attorney became medically unable to participate.[3] The trial continued against Rony and Edgar. In his case, Rony called ten witnesses. Edgar did not call any witnesses. The State called two rebuttal witnesses.

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[2] Ovilson was indicted but did not elect a jury trial, so he was tried separately, in January 2018. He was convicted of first-degree murder of Shadi and of Artem, and related crimes and was sentenced to two consecutive life terms plus 20 years.

[3] The case against Roger was retried to a jury in December 2019. He was convicted of the second-degree murders of Shadi and Artem and related crimes. The court sentenced him to serve an aggregate of 100 years. His appeal from the judgments of conviction is pending in this Court. *See Garcia v. State*, No. 2355, Sept. Term 2019.

The State's theory of prosecution was that the murders were committed by Ovilson, Edgar, Roger, and Rony and that Shadi was the target. According to the State, the four men conspired to kill Shadi in retaliation for his robbing and injuring Kara Yanez, Ovilson's wife, on December 14, 2016. That day, Shadi had arranged to buy marijuana from Kara. He drove his Honda Civic to a prearranged meeting place, drove up next to Kara, reached out the window, grabbed the bag of drugs she was holding, and sped off. As he did so, his car ran over Kara's foot, injuring her. Ovilson was present and witnessed his wife being robbed and injured. Cell phone records revealed that, after the robbery, Ovilson placed three calls to Shadi's cell phone, none of which were answered.

The State's evidence showed that Roger's Snapchat account, named "Rogerloudpack," was used to lure Shadi to the location where he and Artem were killed. On May 31, 2017, Roger added Shadi's Snapchat account as a "friend." Shadi reciprocated, making the two accounts mutual friends who could communicate by the Snapchat direct messaging "chat" function.

On June 5, 2017, the day of the murders, Shadi posted on Snapchat that he was selling an extra ticket to the June 6, 2017 Northwest High School graduation ceremony. At 8:16 p.m., Roger, who had attended that high school, reached out to Shadi via the Snapchat chat function and asked whether the ticket was still available. At 9:46 p.m., Roger arranged to meet Shadi near "East Village" at "Gallery C[our]t, Montgomery Village[,] 2C, MD 20886" to buy the ticket. At 10:00 p.m., Shadi messaged Roger, "Here[.]" Roger responded

that he was at an ATM machine and would be there in less than 10 minutes. At 10:25 p.m., Roger asked Shadi for a description of his car. Shadi immediately responded, "Blue," to which Roger replied, "Alright[.]" At 10:29 p.m., Shadi sent a chat message to another Snapchat user. That was the last activity on Shadi's Snapchat account. The police never found Shadi's cell phone.

That night, home security cameras belonging to Gordon Gipe, a resident of Gallery Court, recorded the sounds of multiple gunshots at 10:30 p.m. Gipe furnished the police with the recordings, which were moved into evidence at trial. Barbara Covington was sitting on the front porch of her sister's house on Gallery Court when the shootings happened. She testified that she saw an old gray van enter the cul-de-sac "very, very slowly[,]" drive around the cul-de-sac, and begin to exit, still driving extremely slowly. As it did so, "red and blue flares c[ame] out of the driver's side of the vehicle" and there were sounds like firecrackers. She went inside and upstairs to look out the window. From there, she saw another vehicle "parked on the side as you would enter the cul-de-sac and the lights were still on . . . but it was at a standstill."

Two former girlfriends of defendants testified for the State: Victoria Kuria was Roger's girlfriend at the time of the murders, and Luz DaSilva was Edgar's girlfriend and the mother of one of his children at that time. On the evening of the murders, Victoria had been at a trailer in Germantown ("the trailer") where Roger was living with members of his extended family. She

testified about the men she saw at the trailer that night and what they were doing. Luz had been at home on the night of the murders, at a townhouse she shared with Edgar, and had seen Edgar being dropped off around midnight from a car she knew Ovilson drove. She testified about incriminating information Edgar gave her. We shall address the testimony of both these witnesses in detail in our discussion of the issues.

The State called FBI Special Agent Richard Fennern as an expert in historical cell site analysis. He identified the locations of the cell towers that interacted with the four suspects' cell phones on June 5, 2017. A cell phone linked to Rony pinged off a tower close to the trailer at 8:09 p.m. and, at 9:00 p.m., pinged off a tower at a location consistent with Rony's being at a townhouse on Appledowre Way in Germantown, where he was living at the time. There was no further activity associated with Rony's cell phone until after midnight on June 6, 2017, when it again connected to cell towers near Appledowre Way. Activity linked to Edgar's and Roger's cell phones placed them at the trailer between 8:00 p.m. and 9:00 p.m. Ovilson's cell phone activity showed that he arrived at the trailer closer to 9:30 p.m. At 9:53 p.m., Edgar received an incoming call from a phone that pinged off a tower northwest of the trailer, in the same tower segment as Appledowre Way. Over objection by Rony's counsel, Special Agent Fennern testified that this ping was consistent with Edgar's having been at the Appledowre Way townhouse where Rony was living. There was no further cell activity associated with Edgar's phone until the following day.

Special Agent Fennern further testified that Ovilson's cell phone activity after 10:00 p.m. on June 5 was consistent with his cell phone's moving toward the location of the murders. And, at 10:31 p.m., Roger's cell phone pinged off a cell tower near Gallery Place. After that ping, Roger's phone either was turned off or was out of range of any AT&T tower, as numerous incoming calls were routed straight to voicemail. After the murders, at 10:44 p.m., and again at 11:41 p.m., Ovilson's cell phone pinged off towers near the trailer.

The police executed search warrants for the trailer, Kara's parents' house (where Ovilson was living), and the townhouse where Edgar and Luz were living. At the trailer, they seized Smith and Wesson .40 caliber ammunition from a dresser and a .380 caliber live round on the ground inside a shed connected to Roger's bedroom. At the townhouse, they seized a box of Blazer brand .40 caliber Smith & Wesson cartridges. A latent fingerprint lifted from the outside of the box was matched to Ovilson.

Ballistics evidence established that at least three and possibly four firearms were used in the murders. Three different calibers of cartridge casings were recovered at the scene: six MAXXtech brand .45 automatic casings, eleven Blazer brand .40 Smith & Wesson casings, and thirteen 9mm Luger casings, manufactured by four different companies. Detective Grant Lee, the State's firearms and tool-marks examiner, opined that the .45 caliber and .40 caliber casings were fired from the same firearms, respectively. The thirteen 9mm casings were divided into two groups with similar characteristics. According

to Detective Lee, seven of the 9mm casings, all manufactured by Speer, were "identified as being fired from the same firearm[.]" The other six 9mm casings, which included several different manufacturers, also were identified as having been fired from the same firearm, but not necessarily the same firearm that had fired the other seven 9mm casings. Detective Lee was unable to opine whether the two groupings of casings were fired from the same firearm or from two different firearms.

Detective Lee also examined bullets and bullet fragments recovered at the scene and during the autopsies. They were the same three calibers as the casings. He examined the live .380 round found at the trailer and opined that it had been chambered in the same 9mm handgun as one of the 9mm casings found at the scene but had been ejected from the gun without being fired, likely because it did not fire properly from the handgun.

A recording of a police interview Rony gave on November 16, 2017 was moved into evidence and played for the jury. As noted, Rony had been arrested on an unrelated charge that day. While he was in police custody, Detective Frank Springer collected a DNA sample and questioned him. During the interview, Rony gave his address as the trailer and said he had been living at Appledowre Way before then. After Rony was asked about his cell phone number, Detective Springer advised him that the police investigation into the June 5, 2017 murders revealed that he previously had used a cell phone with the area code "760." Rony denied ever using a phone with that number. When

asked whether he remembered the night of June 5, 2017, he replied that he had arrived at the trailer around 8:00 p.m. and had left around 9:00 p.m. He recalled seeing Victoria there. He remembered learning about the murders later, when he was in New York with a friend.

To "try to bluff," Detective Springer lied to Rony, telling him that the police had found evidence that "the address of the actual murder [scene] [came] up on [Rony's] phone." Expressing disbelief, Rony said, "Hell, no. I mean, shit, I would know something like that. And I'm, no, no. That was, that can't be my shit. What phone would that be?" Detective Springer asked if he ever had handled a gun belonging to Roger or Ovilson, or a gun magazine or bullets. Rony denied ever having done so. He repeatedly said that all he had done with his friends on June 5, 2017 was play Mario Kart and smoke marijuana. He claimed to have walked home.

The jurors were instructed that they could consider Rony's statements to the police only against him, and not against Edgar. (The mistrial on the charges against Roger already had been declared when the recorded interview of Rony came into evidence).

The State presented evidence that swabs taken from the .40 caliber casings and the 9mm caliber casings found at the scene were analyzed for DNA, but the results were inconclusive. An analysis of a mixed sample obtained from swabs of the six .45 caliber bullet casings found at the scene of the shootings yielded a "mixed DNA profile of at least two contributors indicative of a major male contributor." Rony's DNA

was determined to be consistent with that of the major male contributor in the mixed sample.

In his case, Rony presented an alibi defense based upon activity on his Xbox gaming system in his room at Appledowre Way between 9:02 p.m. on June 5, 2017 and 12:10 a.m. on June 6, 2017, associated with the Netflix application on that device. He called Andres Holbrook, a Microsoft employee, to explain how the Xbox system works and to authenticate his subscriber records for that account, which showed activity on June 5, 2017. Holbrook testified that if a user starts a television program on the Netflix application, it automatically plays three episodes back-to-back before going into "idle mode." There was no evidence presented about what programs were played from the Netflix account on June 5, 2017, or the duration of the programs. A witness from Comcast testified that the IP address associated with Rony's Xbox on June 5, 2017 was located at the Appledowre Way townhouse.

Rony also called his landlords, who testified that there was a lock on his bedroom door at the townhouse on Appledowre Way and that ordinarily Rony locked his door when he wasn't home. They did not access his room or let others do so. A private investigator testified that the driving distance between the trailer and Rony's residence as of June 5, 2017 was 5 minutes and that the walking distance was 15 minutes. Finally, Rony called four witnesses who testified to his character for peacefulness.

We shall include additional facts as relevant to our discussion of the issues.

DISCUSSION

I.

Prejudicial Joinder
(Rony & Edgar)

a.

Rule 4-253 governs joinder and severance in criminal cases in the circuit court. Two or more defendants may be tried jointly if "they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Md. Rule 4-253(a). However, "[i]f it appears that any party will be prejudiced by the joinder for trial of . . . defendants, the court may, on its own initiative or on motion of any party, order separate trials[.]" Md. Rule 4-253(c).

The joinder and severance Rule advances the "policy favoring judicial economy and its purpose is 'to save the time and expense of separate trials under the circumstances named in the Rule, if the trial court, in the exercise of its sound discretion deems a joint trial meet[4] and proper.'" *State v. Hines*, 450 Md. 352, 368 (2016) (quoting *Lewis v. State*, 235 Md. 588, 590 (1964) (footnote in *Hines* omitted)). Nevertheless, "[t]he interest in efficiency and 'judicial economy' should not outweigh the interest in ensuring that a defendant is afforded a fair trial." *State v. Zadeh*, 468 Md. 124, 151

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[4] As the *Hines* Court noted, "one definition of the word meet is 'fitting: proper.'" 450 Md. at 368, n.6.

(2020) (citing *Erman v. State*, 49 Md. App. 605, 616 (1981)).

"[A] trial court's decision to sever or join the trials of multiple criminal defendants or multiple counts is ordinarily committed to the sound discretion of the trial judge and is reviewed for abuse of discretion." *Hemming v. State*, 469 Md. 219, 240 (2020) (citing *Hines*, 450 Md. at 366; *Galloway v. State*, 371 Md. 379, 395 (2002); and *McKnight v. State*, 280 Md. 604, 608 (1977)). A circuit court abuses its discretion by ordering joinder or not granting a motion to sever when "(1) non-mutually admissible evidence will be introduced; (2) the admission of the evidence causes unfair prejudice; and (3) such prejudice cannot be cured by other relief." *Zadeh*, 468 Md. at 145 (citing *Hines*, 450 Md. at 369-70).

b.

Rony contends the circuit court abused its discretion by granting the State's pretrial motion to join his trial with that of Edgar and Roger without "consider[ing] the potential for procedural prejudice that joinder would cause in the circumstances of this case, due to the high likelihood of antagonistic defenses." Although he acknowledges that Maryland case law holds that "prejudice," as used in Rule 4-253, means "damage from inadmissible evidence," he does not point to any evidence that was introduced at trial that was not mutually admissible, *i.e.*, admissible at the joint trial of the defendants and admissible if he had been tried alone. Citing *Sye v. State*, 55 Md. App. 356, 362 (1983), and opinions of other state courts and the Ninth Circuit Court of Appeals, he asserts that the high likelihood of

antagonistic defenses militated against joinder, and therefore the court abused its discretion. Edgar joins in this contention, arguing that for the same reasons, the court erred in denying his pretrial motion to sever.

The State responds that "antagonistic defenses" is not a recognized basis for severing the trials of codefendants under Rule 4-235. With respect to the specific evidence Edgar asserts was not mutually admissible against him, the State maintains that that evidence either *was* mutually admissible or was non-prejudicial, or both, and, in any event, we should decline to consider these assertions because Edgar does not explain how he was prejudiced by the introduction of the evidence.

It was undisputed that Edgar, Roger, and Rony (and Ovilson) were alleged to have "participated in the same . . . series of acts or transactions constituting" the offenses surrounding the deaths of Shadi and Artem. *See* Md. Rule 4-253(a). The disputed issue concerned prejudice. At the pretrial hearing on the State's motion for joinder that Rony opposed and that was met by a motion for severance by Edgar, the court was not advised of any anticipated evidence that was not mutually admissible, however. Indeed, at the close of the hearing, the court advised the parties to file motions *in limine* for redactions and to preclude admission of any non-mutually admissible evidence they took issue with. Rony did not do so and Edgar only did so later, orally, during jury selection, as we shall discuss below.

We reject Rony and Edgar's contention that the court abused its discretion in its pretrial rulings on

joinder/severance based on the codefendants' having "antagonistic defenses." In *Zadeh*, the Court of Appeals reaffirmed that "[t]he heart of the analysis in ascertaining whether severance is warranted is whether undue prejudice will result from the introduction and admission of . . . non-mutually admissible evidence." 468 Md. at 149; *see also Wilson v. State*, 148 Md. App. 601, 651 (2002) ("In order for [a defendant] to prevail [on a motion for severance], it is his burden to demonstrate the existence of prejudice which, . . . is that the joint trial resulted in *inadmissible* evidence having been offered against him") (emphasis in original); *Fisher v. State*, 128 Md. App. 79, 136 (1999), *aff'd in part, vacated in part on other grounds*, 367 Md. 218 (2001) ("Indeed, mutual admissibility is not the key criterion for trial joinder, it is the only criterion."); *Eiland v. State*, 92 Md. App. 56, 76 (1992), *rev'd on other grounds sub nom. Tyler v. State*, 330 Md. 261 (1993) (rejecting hostile or antagonistic defenses as a basis for severance and holding that the "mere fact that a joint trial may place a defendant in an uncomfortable or difficult tactical situation does not compel a severance. Only the threat of damaging inadmissible evidence does that[.]"). To be sure, a court may consider the presence of antagonistic defenses in exercising its discretion under Rule 4-235(c); but their existence, standing alone, does not mandate severance and it is not an abuse of the court's discretion to grant joinder or deny severance in the face of that type of procedural prejudice.

c.

Separately, Edgar contends the trial court abused its discretion by denying motions for severance he made during jury selection and trial. He also takes issue with the number of limiting instructions given to the jury that, in his view, were confusing and evidenced the need for severance. The State disagrees that the court abused its discretion in its rulings or that its limiting instructions were complex or difficult to follow.

1. Victoria's Kuria's Statement to Jasmine Jones.

As noted, Victoria was Roger's girlfriend at the relevant time. On direct examination, Victoria testified that on June 5, 2017, around 5:00 p.m., she went to the trailer to see Roger. Rony, Edgar, and a man known as Joker were there. After she smoked some marijuana with Roger and Rony, she and Roger had sex and she then fell asleep. She awoke around dusk[5] to find seven men in the room: Roger, Rony, Edgar, Ovilson, Joker, and two African American men she did not know. Edgar and Rony were sitting on the couch. Rony was holding his cell phone and looking at it. Ovilson and Roger were standing near Rony, also looking at his cell phone. Edgar was looking at his own cell phone. Victoria overheard one of the men mention "East Village" and "court." She noticed a black pistol on the nightstand next to the bed. She had never seen it before.

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[5] The parties stipulated that "sundown occurred . . . at 8:32 p.m." on June 5, 2017.

Feeling uncomfortable, Victoria gathered her belongings and left. As she walked past Rony, she saw him looking at a street map on his phone and "using his fingers to zoom in and out, and he was scrolling." She noticed a silver or gray SUV parked outside the trailer. When she got home, she immediately texted Roger, "Talk to me. Roger." Roger did not respond until the next morning. When she later asked Roger why he had not answered her text that night, he became "very defensive" and gave her conflicting accounts of what he had been doing.

According to Victoria, Roger told her he anticipated that the police might question her. He asked her to tell them she "left his house [the trailer] later than [she] actually did[,]" specifying "10:45." He also asked her to say that he, she, and Joker were the only people at the trailer on the evening of June 5, 2017.

Soon after Roger, Edgar, and Ovilson were arrested on June 17, 2017, Victoria told her then-boss, Jasmine Jones, that she thought Roger, Edgar, and "Edgar's best friend" were involved in the murders.[6]

Evidence was adduced that the police learned from Jasmine Jones on June 23, 2017 that Victoria might have information about the murders. On June 29, 2017, Detective Springer interviewed Victoria. Victoria testified that, in that interview, she lied about what she had seen on the night of June 5, 2017, to protect

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[6] Defense counsel learned of this when Jones testified at Ovilson's trial. Jones did not testify at the trial in this case. Defense counsel also learned that Victoria had made a second statement to Jones, recanting her first statement.

Roger because she "really cared" about him. The substance of that interview was not elicited by the prosecutor.

Victoria further testified that, on October 11, 2017, she was interviewed a second time by Detective Springer and that this time she told him what she in fact had seen at the trailer, starting at 5:00 p.m. on June 5, 2017 (as recounted above). She explained that, during that interview, she used names for everyone except Rony. She gave a physical description of him because, at the time, she did not know his name.[7] Victoria testified that she had broken up with Roger after her first interview with the police and told the truth in her second police interview because she "wanted [her] sanity back" and it had been "eating at [her] conscience."

On October 27, 2017, Victoria met with Detective Paula Hamill, the lead investigator on the case, and viewed photographs of suspects. After that, Detective Hamill obtained a search warrant for Rony's DNA.

On the first day of jury selection, Edgar's lawyer filed a motion *in limine* to preclude the State from eliciting Victoria's first statement to Jasmine Jones. He argued that the statement was hearsay, more specifically a prior consistent statement only admissible by the State for its truth if, on cross-examination, one of the defendants suggested that Victoria's testimony "was either fabricated, improper motive [sic], or improperly influenced." *See* Md. Rule 5-

[7] When Rony was arrested, Victoria learned his name and that he was the person with the nickname "Ru."

802.1(b).[8] Edgar's lawyer represented that he intended to "leave that door closed" so the statement would not be admissible by the State.

The prosecutor responded that she did not plan to question Victoria about her first statement to Jones but was reserving the right to use it to rehabilitate Victoria's credibility on redirect if one of the defendants impeached her credibility on cross. Although this was a reference to Rule 5-616(c)(2), which permits a prior consistent statement to be used for rehabilitation, not for its truth, Edgar's lawyer proceeded to argue as if that outcome would result in the statement's admission for its truth, including arguing that that was a reason for severance:

> . . . . So, it might be what's admissible in their case [against another defendant, if he challenged Victoria's credibility] is not admissible in our case. So, if we have not chosen to open the door, if this was a separate trial, we did not open the door, that jury would not be hearing that evidence. But if they open the door in their cross and the State is then permitted to ask them those questions, the jury can't be asked to hear that evidence for only [Rony] or [Roger]'s case, but ignore it for our case.

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[8] Under that rule a prior consistent statement made by a declarant who testifies at trial and is subject to cross-examination is not excluded by the rule against hearsay "if the statement is offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive[.]"

The prosecutor responded that that was not a "basis for severance" under *Hines* because evidence of Victoria's first statement to Jones, if it was a prior consistent statement, would not be "damaging" to Edgar in the sense that it would inculpate him; it merely would rehabilitate Victoria's credibility after she already had inculpated him by testifying about what she had seen at the trailer on the night of June 5, 2017.

After some argument, the judge reserved ruling. Two days later, while jury selection continued, the court denied Edgar's motion for severance. After reiterating its understanding of the basis for the motion *in limine* and the related motion to sever, the court stated:

> [T]he test for severance of multiple codefendants is whether or not there's non-mutually admissible evidence, that may unfairly prejudice one of the defendants. [In *Hines*] it was similar to a *Bruton* issue where one of the codefendants offered a statement and in that statement it implicated the codefendant. And the objection was they had no ability to cross-examine the witness. And because that statement was admissible against one defendant but not against a complaining codefendant and there was harm, that that was reversible error[.] . . . . In our case, the evidence that is being spoken about is mutually admissible. That in the event that a witness is impeached that that evidence would be admissible against all defendants in this case. So, because of that we

> are not in a situation where we are dealing with non-mutually admissible evidence. We're dealing with mutually admissible evidence that would be admitted against every defendant in this case under the rules of evidence, should the circumstance arise. The fact that [Edgar] is taking the tac[k] not to do that, that's his choice. But that doesn't make it non-mutually admissible. Under the rules it would be mutually admissible if offered. So, I'll deny the motion for severance based upon that ground.

In response to further argument by Edgar's counsel, the court amplified its ruling, noting that, in its view, the issue was "not whether or not [Victoria's first statement to Jones] would be admitted if [Edgar's counsel] chose not to ask the question. It's whether it would be admissible if you did."

As it happened, the assumptions made during that argument were not borne out when Victoria testified. The State did not elicit Victoria's first statement to Jones on direct or redirect examinations. Nor was the statement elicited on cross examination by Edgar or Roger. It was elicited, however, by Rony's lawyer, on cross-examination, but not as a prior consistent statement. Rather, Rony's lawyer elicited it as a prior inconsistent statement.

As noted, during her second police interview, Victoria only gave a physical description of Rony, and did not name him, because she did not know his name. She was familiar with him as someone who hung around at the trailer. She first learned his name after he was arrested, a month after her second police

interview. On cross-examination, Rony's lawyer asked Victoria whether it was true that she "gave different versions of events to different people at different times[?]" Victoria answered, "Yes." Counsel then inquired about "the first time . . . [Victoria] talked about this case[,]" which was to Jones shortly "after Roger was arrested." Edgar's lawyer objected for the same reasons as argued in "[his] pretrial motion [*in limine*]."[9] (He did not mention severance, however.) The court overruled the objection and granted Edgar a continuing objection to any testimony about Victoria's "[p]rior consistent statement."

When cross-examination resumed, the following exchange occurred:

> [Rony's Counsel]: So when you talked to [Jones], you told [her] what you thought you knew about what happened on June 5th, correct?
>
> [Victoria]: Yes. I also told her about the things that I saw, the things that I heard, and what time I left [the trailer].
>
> [Rony's Counsel]: All right. And the three people that you told [Jones] about is [sic] Roger, Edgar,

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[9] The transcript incorrectly labels the objecting party as one of Roger's attorneys, but it is clear from context that it is one of Edgar's attorneys.

and Edgar's best friend, [Ovilson], right?

[Victoria]: Yes.

Rony's lawyer then questioned Victoria about her second statement to Jones, in which she recanted what she had told her originally, and about her two statements to the police, which already had been covered on direct.

At the conclusion of Victoria's testimony, the jurors were instructed that they only could consider Victoria's testimony about the statements Roger had made to her after the murders against Roger, and not against Edgar or Rony.[10] (This all took place before the mistrial as to Roger).

Through her questioning, Rony's lawyer suggested that Victoria had been telling the truth in her first statement to Jones, in which she had made no reference to Rony, and had lied when she later told Detective Springer that she had seen Rony (by description) at the trailer on the night of the murders. It was evident that Rony's counsel was eliciting Victoria's first statement to Jones as a prior inconsistent statement, that is, a statement identifying the men she thought had participated in the murders as Roger, Edgar, and Ovilson, in contrast to her testimony at trial (and in her second police interview), in which she identified the men she had seen at the

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[10] Edgar acknowledges that Victoria's testimony about what she saw at the trailer on June 5, 2017, was mutually admissible against him and his codefendants.

trailer on the evening of June 5, 2017 as those three and Rony.

Edgar asserts that Victoria's testimony about her first statement to Jones would not have been admissible if he had been tried alone, *i.e.*, was non-mutually admissible, and that it unfairly prejudiced him because it implicated him, Roger, and Ovilson in the murders but did not implicate Rony, and the ballistics evidence supported the presence of *at least* three shooters at the scene. He further maintains that the statement was a prior consistent statement by Victoria that bolstered her credibility.

The State assumes for the sake of argument that Victoria's statement to Jones would not have been admissible had Edgar been tried alone. It maintains, however, that the statement did not prejudice Edgar, within the meaning of that term in *Hines*, much less unduly so, and that any prejudice was cured by the trial court's limiting instruction, which was not confusing.

As discussed above, in a multiple defendant criminal case, it is an abuse of discretion for the court to deny a motion to sever when evidence that would not be admissible against one defendant if he were tried alone will be introduced at a joint trial, to the undue prejudice of that defendant, and the prejudice cannot be cured. For purposes of this opinion, we shall assume, as the State does, that the evidence in question here was not mutually admissible. On the second prong, we are persuaded that the evidence was not unfairly prejudicial to Edgar, however.

The Court of Appeals' decisions in *Hines* and *Zadeh* are instructive on what may constitute unfair prejudice in this context. In *Hines*, 450 Md. at 352, Tevin Hines and Dorien Allen were tried jointly for the murder of one victim and attempted murder of a second victim. The victims were robbed and shot in the morning as they were trying to buy heroin in Baltimore City. The surviving victim described one assailant as wearing distinctive clothing. An officer had seen Allen earlier in the day in such clothing, with Hines, at a convenience store.

The police located Allen and brought him in for questioning by two detectives. Allen claimed he had been home when the shootings happened, with his friend "Mike," which was not his real name, and about whom he knew little except that he lived in the 300 block of Lyndhurst Avenue. When the detectives played surveillance footage from a convenience store showing him and Hines together at the same time he was claiming to have been at home, Allen acknowledged that he was in the video but claimed not to know the other man. The interview was recorded, and throughout it "the detectives made statements of disbelief as to Allen's version of the events[.]" *Id*. at 357.

The State moved to try Allen and Hines jointly. Hines moved to sever, arguing that the State intended to move Allen's recorded statement into evidence, the statement was not mutually admissible against him, and he would be unfairly prejudiced by its admission. Specifically, Hines argued that the detectives' commentary and statements of disbelief during Allen's

interview were not admissible against him. Hines further argued that he would be deprived of his Sixth Amendment confrontation right because Allen was not going to testify so he would not be able to cross-examine him about what he had said during the interview.

The court ruled that part of Allen's statement to the police was admissible; denied the motion for severance; and agreed to give a limiting instruction advising the jurors that Allen's statement only was evidence against Allen and was not to be considered against Hines. Allen's statement was redacted to remove any reference to Hines. In the statement as admitted, Allen gave the police "Mike's" address and told them he went to "Mike's" house on the day of the shooting. One of the detectives then confronted Allen with the existence of the video from the convenience store and told him they knew he was with a friend. In the face of his continued insistence that the only person he was with that day was "Mike," the police accused Allen of lying about that and said the person he was with lived at 301 Lyndhurst Avenue. The detective later testified that 301 Lyndhurst Avenue was Hines's address.

Hines appealed his convictions and his case ultimately reached the Court of Appeals. The Court addressed whether the trial court "err[ed] in denying a severance in accordance with Rule 4-253(c)" and whether "any error in admitting Allen's statement [was] harmless." *Id*. at 366. As a threshold matter, the Court held that the "per se prejudice" rule requiring severance as a matter of law in offense joinder cases when evidence on individual offenses is not mutually

admissible in a jury trial does not apply to joinder of codefendants. *See McKnight v. State*, 280 Md. 604 (1977); *Graves v. State*, 298 Md. 542, 545-46 (1984); *Wieland v. State*, 101 Md. App. 1, 10 (1994). The Court emphasized, however, that the analysis to be used in defendant joinder cases does not differ dramatically from the *McKnight* analysis. A court confronting a "severance question" in the context of defendant joinder or offense joinder must "first determine whether there is non-mutually admissible evidence, and then must ask whether the admission of non-mutually admissible evidence results in any unfair prejudice to the defendant." *Hines*, 450 Md. at 374. Prejudice is not presumed in a defendant joinder case because it is "foreseeable that in some instances, evidence that is non-mutually admissible may not unfairly prejudice the defendant against whom it is inadmissible because the evidence does not implicate or even pertain to that defendant." *Id*. at 375-76.

The Court concluded that Hines had been "significantly prejudiced by the actual admission of evidence that, although admissible against Allen, was inadmissible against [him]." *Id*. at 383. Given the trial court's denial of the motion to sever, it was obligated to "adequately redact[ ] Allen's statement so that it would not implicate Hines." *Id*. at 383. It failed to do so. In the Court's view, the prejudice to Hines was clear:

> Even as redacted to omit any express reference to Tevin Hines, Allen's statement implicated Hines in a damaging way, which resulted in prejudice to Hines. The statements Allen made about "Mike" were played for the

> jury along with the detectives' statements of disbelief. This, coupled with the detectives' interest in "Mike" and questions about the man in the surveillance video (who was clearly Hines) unequivocally indicated to the jury that the detectives knew "Mike" to be fictional, knew that the man in the video and the man Allen claimed to have spent his morning with was in fact Hines, and were simply trying to get Allen to admit it. The statement further implicated Hines insofar that the jury heard separate testimony that Hines lives at 301 Lyndhurst. In the statement, Allen said "Mike" lives on the 300 block of Lyndhurst and Detective Carew indicated that he knew "Mike" lived at 301 Lyndhurst. Finally, we note that this was all in the context of Allen's statements being lies that were obvious to the detectives and invariably, the jury.

Id. at 384 (footnotes omitted). The Court held that because Allen's statement would not have been admissible against Hines in a separate trial and was unduly prejudicial to Hines, the trial court abused its discretion by denying his motion to sever; and that error was not harmless beyond a reasonable doubt.

In *Zadeh*, 468 Md. at 124, Hussain Ali Zadah and Larlane Pannell-Brown were tried jointly for the murder of Cecil Brown, Pannell-Brown's husband. Police were called to Pannell-Brown's house after a neighbor heard her screaming. She told the officers she had found her 73-year old husband unconscious in the

backyard, bleeding from his head. He had been killed by blunt force trauma.

When the police interviewed Pannell-Brown, she claimed she had called her husband at work that morning and asked him to look at her truck when he got home because it was making a strange noise. He got home around 10:00 a.m. and shortly thereafter she left to make a deposit at the bank. When she returned, she found his body in the backyard. The detective interviewing her asked to examine her cell phone to confirm the time she spoke to her husband; she consented. The phone showed no record of a call to Brown but did show a call to a contact labeled "Ali," at 6:41 a.m. Pannell-Brown told the police "Ali" was a friend who was going to detail her truck and that she had called him about that. She also said she was helping Ali's wife and baby in Jamaica to immigrate to the United States.

One of the Browns' sons contacted the police and told them that Pannell-Brown was having an affair with a man named "Ali"; that "Ali" drove a silver Jaguar station wagon; and that Ali worked at a rental car facility. When confronted with this information, Pannell-Brown continued to maintain that she and "Ali" were "merely friends." *Id*. at 135.

Two detectives went to the rental car facility and learned that "Ali" was Zadeh. Upon meeting the detectives, Zadeh asked whether they were there to "talk about 'the lady's husband that died.'" *Id*. He said he had met Pannell-Brown through a co-worker and she was helping him with an immigration issue. The detectives asked Zadeh if he had a car and he replied

that he did not and that he took the subway to work. When asked for permission to inspect his phone, which appeared to be in his pocket, Zadeh denied having a phone with him.

The police located a Jaguar station wagon parked near the rental car facility and determined that it was registered to Pannell-Brown. They obtained a search warrant for the vehicle, and by the time they executed it, the vehicle was being driven by Zadeh. The search revealed a swab of suspected blood and other evidence. In a search of the Brown residence, the police found a life insurance policy on Pannell-Brown's life designating Zadeh as the sole beneficiary of her policy and her retirement benefits; a taser flashlight; a box for a "tactical stun flashlight"; and undated, handwritten notes detailing homemade poisons. *Id*. at 137. The internet search history on a home computer and on Pannell-Brown's cell phone revealed searches into whether certain energy drinks are harmful to persons over age 70 and into what could cause sudden cardiac arrest or heart failure.

Zadeh moved to sever his trial from Pannell-Brown's trial, arguing that at a joint trial the State would be introducing non-mutually admissible evidence that would prejudice him. The court denied the motion, ruling that the evidence largely would be mutually admissible and to the extent non-mutually admissible evidence was introduced, any prejudice could be cured by a limiting instruction.

At trial, the State introduced evidence that on the morning of the murder, Pannell-Brown and Zadeh exchanged text messages in which she told him, "When

I text you, come out side[,]" to which he replied, "OK, from what door??" *Id*. at 140. She responded, "The bedroom[.]" *Id*. Subsequently, Pannell-Brown's son testified that his mother referred to the door leading to the backyard from their home as his father's "bedroom door." *Id*. at 142. Zadeh objected to his testimony, arguing that it was inadmissible hearsay that was highly prejudicial considering the text message evidence. Ultimately, the court agreed and struck that testimony.

Another one of Brown's sons testified, over Zadeh's objection, that Pannell-Brown had told him that when she saw her husband lying in the yard, she ran over and grabbed him. This son noticed that Pannell-Brown did not have any blood on her, however. The court gave a limiting instruction that that testimony only could be considered against Pannell-Brown.

A neighbor testified that Pannell-Brown and Brown were having financial difficulties in the year before the murder and that Pannell-Brown confided in her that she was frustrated because Brown was unemployed, and that she had started seeing someone else. Zadeh's counsel objected to this testimony and the court agreed to give another limiting instruction.

Zadeh also challenged the admissibility of testimony from Pannell-Brown's daughter-in-law about statements Pannell-Brown allegedly made "regarding her finances, as well as statements encouraging [the daughter-in-law] to 'get a friend on the side' too." *Id*. at 142.

Non-mutually admissible evidence concerning Pannell-Brown's statement to an employee of her mortgage company and evidence that one month after her husband's murder, she contracted to sell the home they owned jointly, also was introduced at trial and was the subject of additional limiting instructions as to Zadeh.

Before the close of evidence, Zadeh moved for a mistrial on the ground of improper joinder. The court denied his motion. Zadeh and Pannell-Brown both were convicted by the jury of second-degree murder.

The Court of Appeals reversed Zadeh's conviction. Relying on the test set forth in *Hines*, it held that "(1) non-mutually admissible evidence was introduced; (2) the admission of that evidence prejudiced Mr. Zadeh; and (3) the limiting instructions were insufficient to cure the prejudice." *Id*. at 147. The Court emphasized that "where a limiting instruction or other relief is inadequate to cure . . . prejudice [caused by the introduction of non-mutually admissible evidence], the denial of severance is an abuse of discretion." *Id*. at 148. After discussing *Hines*, the Court reasoned that Zadeh had been "similarly prejudiced" by the non-mutually admissible evidence introduced at his joint trial. *Id* at 149. It emphasized the cumulative effect of the non-mutually admissible evidence, including the testimony about the "bedroom door" that ultimately was stricken from the record, but could not be erased from the minds of the jurors. The Court noted that "[a]fter all the limiting instructions and categorizing of statements by Ms. Pannell-Brown that the trial judge determined were only admissible against Ms. Pannell-

Brown, even the most attentive and intelligent juror would have had a difficult time determining what evidence was admissible against which defendant." *Id.* 150. Once it became apparent to the trial court that "there was significantly more non-mutually admissible evidence than he originally thought, the only available and appropriate remedy was a mistrial." *Id.* at 151. The court abused its discretion by denying the motion.

We return to the case at bar. Victoria's first statement to Jasmine Jones, made soon after Roger, Edgar, and Ovilson were arrested, is unlike the highly prejudicial evidence admitted at the trials in *Hines* and *Zadeh*. Before the statement was elicited on cross-examination of Victoria by counsel for Rony, Victoria had implicated Edgar on direct examination, testifying that she had seen him, along with Roger, Rony, and Ovilson, in the trailer on the night in question, and that he was sitting on the couch next to Rony while Rony was looking at a map on his phone and when one of the men used the words "East Village" and "the court." Victoria also had testified on direct that in her second interview with the police, she had told them she had seen Edgar, Roger, Ovilson, and Rony (by physical description) at the trailer on the night of June 5, 2017, and what they had been doing. (Cell site evidence likewise placed Edgar at the trailer between 8:00 p.m. and 9:53 p.m., and Edgar did not deny that he was present at the trailer that night.)

Victoria's testimony about her first statement to Jones did not add any substantive factual evidence beyond what she already had testified to on direct. She did not imply in that statement that she knew

additional facts that inculpated Edgar in the murders, other than those she had testified about on direct. In closing argument, Edgar's lawyer relied upon Victoria's second statement to the police, which was consistent with her trial testimony, *and her first statement to Jones*, to argue that Victoria *was telling the truth* about what she had seen at the trailer on June 5, 2017. Edgar's lawyer emphasized that Victoria's testimony showed that Edgar, unlike the other men present at the trailer, was not looking at the map on Rony's cell phone and was not involved in planning or carrying out the murders.

In *Hines*, Allen's obviously false statements to the police and the police commentary about that statement directly implicated Hines in the crimes. In *Zadeh*, the jury heard significant non-mutually admissible evidence bearing upon Pannell-Brown's motive for killing her husband and ascribing an incriminatory meaning to a text message exchange between her and Zadeh on the morning Brown was murdered; and they were asked to put that evidence out of their minds when deliberating on whether Zadeh participated in the crime. Here, by contrast, Victoria's first statement to Jones, elicited on cross, was cumulative of her testimony about Edgar on direct and was not inconsistent with Edgar's defense. Also, the limiting instruction that Edgar asserts was confusing did not pertain to Victoria's testimony about seeing Edgar at the trailer, as it was not testimony about anything Roger had told her.

Because the admission of non-mutually admissible evidence was not prejudicial to Edgar, the trial court

did not abuse its discretion by denying Edgar's motions to sever.[11]

2. Luis "Luigi" Rodriguez Stipulation

The State called Detective Michael Miglianti as an expert in digital forensics. On cross-examination, Rony's counsel elicited that, at 9:36 p.m. on June 5, 2017, a contact labeled "Luigi" had texted Edgar "you ready?" to which Edgar instantly responded, "Yeah, hurry up." The same contact called Edgar at 9:52 p.m. and again at 9:53 p.m. During a bench conference in anticipation of this testimony, the State argued that Rony was improperly attempting to point the finger at "Luigi" as the fourth shooter. Rony's lawyer responded that she was not introducing the evidence for that

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[11] Edgar also complains about evidence elicited from Victoria on cross examination by counsel for Roger pertaining to a conversation Roger's lawyer had with Victoria when she was trying to hire him to represent Roger. Although the prosecutor lodged numerous objections during this line of questions, some of which were sustained, Edgar's lawyer objected only once, during a bench conference initiated by the State. He argued that Roger's lawyer was "making himself a witness in this case" and renewed his motion to sever. Rony's lawyer also renewed his motion to sever. The court disagreed that counsel was making himself a witness but sustained the State's objection to the line of questioning counsel was embarking on. The court did not rule on the renewed motions to sever and counsel did not request a ruling.

We conclude that Edgar did not preserve any objection to Victoria's testimony on cross-examination by Roger's counsel aside from the objection noted above, which did not concern non-mutually admissible evidence. Furthermore, Edgar makes no argument in this Court as to how he was unfairly prejudiced by Victoria's testimony in this regard. For these reasons, we decline to address this contention.

purpose, but rather to counter a potential argument by the State that at 9:53 p.m., when Edgar's phone pinged off a tower near Appledowre Way, he was picking Rony up. That would be inconsistent with Rony's defense, which was that he went home around 9:00 p.m. and did not reconnect with his codefendants that night. Rony's lawyer intended to argue that the text messages suggested that Edgar had left the trailer to meet Luigi, not to get Rony.

In its rebuttal case, the State called Luigi. He testified that he had texted Edgar because he wanted to "pick something up from Edgar" and that the text messages had nothing to do with the murders.

The State then sought to recall Detective Miglianti to testify about Google location data associated with Luigi's cell phone. The prosecutor proffered that this would show that Luigi was not near the trailer on the night of June 5, 2017, which would counter any potential defense theory that Luigi, not Rony, was the fourth shooter. Rony's lawyer objected. Ultimately, Rony and the prosecutor agreed to stipulate to two facts: 1) Luigi was not at the trailer at any time on June 5, 2017, and 2) Edgar was not in the vicinity of Appledowre Way at 9:53 p.m. on June 5, 2017. Edgar's lawyer refused to join in the stipulation, although he said he did not intend to argue that Luigi was an alternative suspect. He emphasized that this was why he had opposed joinder. The court left it to the parties to work out the stipulation.

The next day, Edgar's lawyer advised the court that he had agreed to the second part of the stipulation, but that he would not join the first part (that Luigi was not

at the trailer on June 5, 2017). Consequently, the court instructed the jurors that there were "several stipulations that were entered into between the parties," which it divided into "two groups":

> The first group is stipulations entered between the State and [Rony]. The State and [Rony] agree that the evidence would show that [Luigi] was not at or around the trailer on June 5, 2017. The State and [Rony] also agree that Mr. Rodriguez took no part in these murders.
>
> These facts are now not in dispute and should be considered proven in the case involving [Rony]. Now, the second group of stipulations relates to all the parties . . . . Additionally, all parties agree that [Edgar] did not go to or around Appledowre Way on June 5, 2017. These facts are not now in dispute and should be considered as proven for both cases.

In closing, Edgar's lawyer argued that the cell site evidence was consistent with Edgar's having left the trailer to meet Luigi around 9:53 p.m. He suggested that Roger and Ovilson and one or two of the other men in the trailer participated in the shooting, but Edgar did not.

In rebuttal closing, the prosecutor countered that the substance of Edgar's text to Luigi, "Yeah, hurry up," did not support the theory that Edgar and Luigi had plans. Rather, it showed that Edgar had other plans that did not include Luigi. Further, the prosecutor argued that evidence that Edgar traveled a short distance from the trailer at 9:53 p.m. was not

inconsistent with his having joined back up with Roger, Ovilson, and Rony before 10:30 p.m.

In this Court, the State concedes that the stipulation between it and Rony, that "[Luigi] was not at or around the trailer on June 5, 2017" and "took no part in these murders[,]" would not have been admissible in a trial against Edgar alone. The focus, again, is on prejudice. The State maintains that the stipulation did not directly pertain to Edgar, did not inculpate him, and did not even conflict with his defense.

The stipulation that Luigi did not participate in the murders did not prejudice Edgar. Given that Luigi communicated solely with Edgar on June 5, 2017, any theory that he had participated in the crimes would have inculpated, not exculpated Edgar. Likewise, the stipulation that Luigi was not around the trailer on June 5, 2017 was consistent with Edgar's position that he left the trailer to meet with Luigi and never reassembled with Roger and Ovilson (or Rony) prior to the shootings.

3. Testimony by Mary Hardy.

Finally, Edgar complains about testimony by Mary Hardy, the State's forensic biologist, who analyzed the DNA samples. On direct, Hardy testified that she was unable to reach any conclusion from the DNA samples taken from the .40 caliber and 9mm caliber shell casings because the samples yielded partial, mixed DNA profiles that were not "suitable for comparison." The only sample yielding a DNA profile suitable for comparison was taken from the .45 caliber casings.

That also was a mixed profile, but it included one major male contributor.

Hardy testified that she first compared the known samples for Shadi, Artem, Edgar, Roger, and Ovilson against that major male contributor DNA profile and excluded them as sources. She could not reach any conclusion about the minor profile in the sample. Subsequently, upon receiving a DNA sample from Rony, she determined that he was included as the major male contributor. She opined that "the probability of randomly selecting an *unrelated* individual with a DNA profile matching the major DNA profile obtained from the sample is approximately one in 50 quadrillion." (Emphasis added).

On cross-examination, Rony's lawyer clarified that the statistic quoted above did not apply to a "related population," hinting at the possibility that one of Rony's relatives also could be consistent with the major male profile.

On redirect, the prosecutor asked Hardy if she knew that Roger and Edgar were "truly related" and were "brothers." Edgar's lawyer objected on the basis that the question was outside the scope of cross. The court overruled the objection, concluding that it was appropriate redirect examination in response to Rony's counsel's cross.

The prosecutor continued by asking Hardy to compare Edgar's DNA sample to Roger's DNA sample and to identify "loci at which the data is the same?" Edgar's lawyer objected. The court asked the prosecutor to explain why the comparison was relevant.

She responded that she was trying to show that Rony's counsel's line of questioning about "related" persons was "somewhat misleading" because Roger and Edgar were half-brothers but their DNA profiles only matched at three loci. Edgar's lawyer responded that it was not appropriate for Hardy to be making any comparison of Roger and Edgar's DNA profiles because she already had testified that they had been excluded from the only DNA profile that was suitable for comparison. He renewed his motion to sever, arguing that the testimony was "highly inflammatory[,]" "prejudicial[,]" and lacked any "probative value[.]" The court overruled the objections and implicitly denied the motion to sever.

On resumed redirect examination, Hardy testified that Edgar's and Roger's profiles were identical at five "sex determining areas" and at two other loci but were otherwise not identical. Their DNA profiles were not introduced into evidence or otherwise put before the jury.

Edgar did not argue that Hardy's testimony was non-mutually admissible, but that it was irrelevant and inflammatory. Likewise, he does not argue on appeal that the evidence was non-mutually admissible. That the evidence was elicited to rebut a point raised by Rony's lawyer on cross-examination of Hardy did not transform it into non-mutually admissible evidence. Because Edgar has not shown that the evidence at issue during Hardy's testimony was non-mutually admissible, we have no basis to conclude that the trial court abused its discretion by implicitly denying his motion to sever made during Hardy's testimony.

II.

Edgar's Statements to Luz DaSilva (Rony)

a.

When the murders took place, Luz and Edgar were living at a townhouse on Lamont Lane. (They broke up before the trial). On the night of June 16, 2017, Luz called the police and reported that she had information about the murders. She was interviewed on June 17, 2017, shortly after midnight, by Detective Beverly Glenn. The interview took place in Detective Glenn's patrol car, in front of the Lamont Lane townhouse. It lasted 92 minutes. Luz had her baby daughter with her. Edgar was not home at the time.

During the interview, Luz provided Detective Glenn with significant information about the murders, including details about the precipitating incident involving Kara, the connections between Edgar, Roger, and Ovilson, and how the victims were lured to the murder scene over Snapchat. In parts of the interview, it is unclear whether Edgar or others were the source of the information Luz was relating to the detective. Because for purposes of this appeal, we are concerned only with what Edgar told Luz that Luz then told the detective, we set out those portions of the interview in which Luz recounted what Edgar told her, and the circumstances surrounding the making of those statements.

Luz told Detective Glenn that, around midnight on June 5, 2017, Edgar was dropped off at home. He got out of the car Ovilson drives. He brought milk for the

baby, as she had asked. She knew he was nervous about something because he was acting jittery, as he often did when he had done something wrong. The next morning, she left early for work and Edgar stayed home with the children. When she returned home in the afternoon, she asked him "what's going on?" He replied, "oh, nothing. Just watch the news," and turned on the local television news. They watched a segment about the murders and she "saw his face" and asked him, "why did you do this?" Edgar said, "oh, you already know what's up, you already know . . . . [A]ll that matters is that we already got it done and it happened just like the movies. You know that we just went over there quick as shit and just got them and then that was it." Luz asked Edgar why he did it and he told her, "you already know why, . . . because those are the guys that ran over Kara[.]" In an apparent aside to Detective Glenn, Luz clarified that "Kara" was Ovilson's wife.

After explaining that Roger had contacted one of the victims on Snapchat, Luz told Detective Glenn that Edgar had told her "that they had to break [one of the victim's] phone so that, you know they wouldn't find any information and stuff like that before they did all that shooting." Detective Glenn asked Luz how Edgar had obtained the phone. Initially, Luz replied that she did not know, but she then said Edgar had told her "they had asked for their phone and they had broken it." Detective Glenn asked Luz whether Edgar had told her how he got to the murder scene and she replied, "They went driving in Ovilson's wife's car."

Later in their conversation, Detective Glenn asked Luz: "So, Edgar told you it was he and O. and –" Luz interrupted and completed the sentence, "And his brother[,]" that is, Roger. Luz also told Detective Glenn that Edgar had a 9mm firearm and that she had seen Ovilson with a gun as well. Luz inferred that "Johann," *i.e.* Roger, also had a gun because Edgar had expressed "surprise[] that his little brother took out a gun and just shot them guys, too" and he had said he "never thought that [Roger] would do something like that."

Luz repeated to Detective Glenn what Edgar had told her about the murders:

> Just give me your phone, they said, and broke it right there. And that's what Edgar told me, out of his mouth. They grabbed their phone, like they just said give me your phone and then after, you know they just went through it and just broke it right there and then that's when they just, the seven shot, seven second shot, whatever happened with the seconds, killed the guys and just ran off.

Luz told the detective Edgar said, "they killed them. Like if it was a movie, they said, within like seven seconds or so. Like if it was nothing."

At trial, a transcript of Luz's police interview was marked as Defense Exhibit 18-A. It was not received in evidence but was available to the court and the parties and is important to the issues raised by Rony.

b.

Luz was called to testify by the State on the fourth day of evidence, before the mistrial on the charges against Roger. She explained that, for about six months in 2016, she and Edgar lived in the trailer with her two older children, Edgar's father, his sister, Roger, and a roommate. Edgar's family kicked her out of the trailer at the end of 2016. She briefly moved in with her mother but, right before she gave birth to her daughter with Edgar, she and Edgar moved into a townhouse at 125 Lamont Lane, in Gaithersburg, and were living there when the murders were committed. Edgar and Ovilson were very close friends, "like brothers." Edgar and Rony were "pretty close too."

Luz testified that on the night of June 5, 2017, she was home taking care of the baby and her two older children. She texted Edgar a little after 11:00 p.m., asking when he would be home. She was frustrated with him because she had to get up early for work and the baby kept waking up. Edgar replied at 11:14 p.m. that Ovilson was about to drop him off. At 11:48 p.m., when Edgar still was not home, Luz texted him again, saying, "come on, Edgar." Edgar was dropped off around midnight. Luz saw him climb out of a gray Saturn she knew to be a vehicle Ovilson drove.

According to Luz, the next day, Edgar told her about his involvement in the murders. She testified that he said the murders were "like a seven-second movie" and "he took the cellphone from the boys, smashed it, and then after they just started shooting them." She further testified that, ten days later, on June 16, 2017, Ovilson and Kara visited her and Edgar at the Lamont Lane

townhouse. Before they left, Ovilson asked Edgar if he could leave a box of bullets there because "it was hot outside." Luz understood Ovilson to mean the police were looking for him. He placed the box of ammunition behind the television. Later that night, she contacted the police and reported that she had information about the homicides. She sent a photograph of the box of bullets via text message to Detective Michael Carin. As noted, her police interview began shortly after midnight on June 17, 2017.

c.

During Luz's direct examination, before the prosecutor broached the subject of precisely what Edgar told her about the murders, Rony's lawyer asked for a limiting instruction "that statements made by Edgar to [Luz] are only to be considered against Edgar." The prosecutor advised the court that Luz had been told she could not mention anything Edgar had told her about Rony or Roger.

Rony's lawyer responded that this restriction was prejudicial to Rony because, in her police interview, Luz had said Edgar had told her he was with Ovilson and Roger on the night of the murders but had made no mention of Rony. The prosecutor disagreed, arguing that if Rony had been tried alone, he would not have been able to introduce Edgar's hearsay statements to Luz about Ovilson or Roger, and, for the same reasons, he could not elicit those statements in a joint trial. Rony's lawyer countered that those statements would be admissible under the declaration against penal interest exception to the rule against hearsay. The prosecutor responded that that exception is narrow and

does not include statements implicating others in a crime. The court agreed, emphasizing that Edgar's statements to Luz implicating others only would come in under the declaration against penal interest exception if there were an ongoing conspiracy, but the parties had stipulated that any conspiracy had ended on June 5, 2017.

Luz's direct examination resumed. She testified that Edgar had admitted to her that he was involved "in the situation with the shooting[,]" that he had described the murders as "like a seven-second movie," and, in Luz's words, that he had told her "he took the cellphone from the boys, smashed it, and then after they just started shooting them."

Before cross examination started, Rony's lawyer argued that because Luz had testified that Edgar had said "they just started shooting them," she, on Rony's behalf, should be permitted to cross-examine Luz about who Edgar was implicating by this. Rony's lawyer maintained that what Edgar had said in that regard was reliable because he was implicating himself *and* others, not just pointing the finger at Ovilson and Roger to escape culpability. The trial judge responded that he had not yet decided whether it would be appropriate for Rony's lawyer to question Luz about whether Edgar ever had mentioned Rony in connection with the murders.

After a recess, the court revisited the issue. In the judge's view, the State had introduced Edgar's self-incriminating statements to Luz as a statement of a party opponent as to Edgar *and* as a declaration against penal interest as to all the codefendants. Luz

had testified that "they" started shooting, which could implicate other codefendants, not just him. The judge emphasized that the jurors knew that multiple people were involved in the shootings and, in her testimony, Luz had said nothing to indicate that Edgar had told her who else was involved. If Rony's lawyer were permitted to ask Luz whether Edgar had mentioned Rony, the jurors would expect Roger's lawyer to ask her the same question about Roger. That would cause a "problem," however, because, according to Luz, Edgar had directly implicated Roger (by saying he was surprised his little brother, *i.e.*, Roger, had joined in the shooting), so Roger's lawyer could not follow suit.

The judge ruled that he would instruct the jurors that Luz's testimony was being offered only against Edgar and could not be considered with respect to the other defendants. Rony's lawyer objected because, even with that instruction, Luz's testimony that Edgar said "they just started shooting them" would lead the jurors to assume that "they" included Roger *and* Rony. At that point, Rony's lawyer renewed her motion to sever Rony's case from his codefendants or, alternatively, to sever Roger's case to eliminate the "problem" the court had identified. The court responded that if Rony's case were tried separately, Edgar's statements to Luz, to the extent they were exculpatory as to Rony, would not be admissible because Edgar would not be a party-opponent; that the word "they" was not prejudicial in a case with multiple shooters; and that the court only was giving the limiting instruction out of an abundance of caution.

Before cross-examination began, the court instructed the jurors:

> So before we begin the cross-examination of the witness, this is another occasion that I mentioned to you at the beginning of the trial where there are certain times during the trial where certain evidence is being offered as against certain defendants and not against all defendants. So that, that admonition applies to the testimony that you heard from Luz regarding any conversation she may or may not have had with Edgar following June 5th of 2017. Any of that testimony is offered only against Edgar and against no other defendant and should not be considered by you in any way against any other defendant.
>
> Each of these defendant [sic] is entitled to have the case decided separately on the evidence that applies to that defendant only. So that testimony was offered only against Edgar and not against the others.

On cross-examination, in conformity with the court's ruling, Rony's lawyer did not question Luz about what Edgar had told her.

At the outset of the next day of trial, the court declared a mistrial on the charges against Roger. Rony's lawyer asked the court to reconsider its earlier ruling given that any potential prejudice to Roger had been eliminated by the mistrial. The court reserved on that request.

At the end of the day, the court asked Rony's lawyer whether there were specific excerpts from Luz's recorded interview that she was seeking to move into evidence. Rony's lawyer went through Defense Exhibit A-18 page by page and identified statements Luz ascribed to Edgar that inculpated Ovilson and/or Roger but did not reference Rony.

At the close of the next day of trial, the court heard additional argument on the topic. The court was under the impression that Rony's lawyers were seeking to introduce a redacted version of Defense Exhibit A-18; counsel clarified that she wanted to recall Luz as a live witness to testify to "everything that Edgar Garcia told her . . . pertaining to the commission of the murder[s], which he confessed to her he committed. Which would include with whom he committed [the murders] with." She argued that Edgar's statements would be admissible as declarations against penal interest and under the curative admission doctrine[12] to cure the prejudice caused by Luz's testimony that Edgar had told her "they" just started shooting.

The court characterized Defense Exhibit A-18 as "[Luz] rambling on about what she thinks she

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[12] The Court of Appeals defines the doctrine of "curative admissibility" as one which "in rare instances allows otherwise irrelevant and incompetent evidence to repair the damage caused by previously admitted incompetent inadmissible evidence." *Clark v. State*, 332 Md. 77, 88 (1993), *superseded by Rule on other grounds by State v. Heath*, 464 Md. 445, 460 & n.7 (2019). Because, for the reasons to be discussed, we conclude that Edgar's statement to Luz properly was admitted as a declaration against his penal interest, this doctrine has no application here.

may have learned from friends, relatives, TV announcements, radio broadcasts, talking to Kara, talking to [Ovilson], talking to people at the trailer. And maybe four occasions in the entire transcript does she say Edgar told me this, Edgar told me that." Agreeing that the transcript was not limited to what Edgar had told Luz, Rony's other lawyer argued nevertheless that it represented the best proffer of what Luz meant when she testified that Edgar had said "they" just started shooting. He pointed to the portion of the transcript where Detective Glenn said to Luz, "So, Edgar told you it was he and O. and –" and Luz had interjected, "[a]nd his brother [Roger]."

The trial judge disagreed that that excerpt implicated Edgar, Ovilson, and Roger in the murders, noting that it immediately followed a discussion of images on Edgar's Facebook page. Rony's lawyer argued that in the context of the entire interview, it was clear that Detective Glenn was asking about the murders and that Luz was responding in kind:

> [W]e're not quibbling with you about, and we're not suggesting that we want to introduce hearsay statements about, you know, Luz D[a]Silva's discussions with Kara Yanez or watching the news or anything like that. She used the word ["they"].
>
> We're trying to cure that. And I think that's absolutely essential to do. And I also think beyond just the curative admission doctrine, which is specifically intended for this precise purpose and this precise situation, is that, you know, I would submit respectfully to the Court

> that your view of the statement against penal interest is too narrow where the defense is seeking to introduce the statement against penal interest. And here Edgar, everything about Edgar's statement indicates it's trustworthy and reliable. The State's relied on it. There's corroborating circumstances. And who ["they"] is is the conspiracy and it's all intertwined and there's nothing that suggests that it's unreliable in any way.

Counsel for Rony cited *Gray v. State*, 368 Md. 529 (2002), for the proposition that Edgar's statement to Luz was affirmatively admissible in Rony's case and also argued, more narrowly, that it was admissible to cure the prejudice caused by Luz's use of the word "they." At the very least, he argued, he should be permitted to recall Luz to ask her whether Edgar ever said anything to her about Rony, testimony the trial court had agreed was potentially an appropriate subject for cross-examination but had disallowed because it could prejudice Roger, who by then no longer was in the case.

The prosecutor responded that there was nothing to cure given the court's limiting instruction that Luz's testimony about her conversations with Edgar after the murders only could be considered against Edgar. Under *Hines*, Luz's testimony that Edgar said "they just started shooting" did not obviously implicate Rony and, consequently, was not unduly prejudicial. The prosecutor proffered, moreover, that in her discussions with Luz, it had become clear to her that Luz "doesn't

even know who 'they' is" and "would not be able to answer that question."

The court found that there were "six or seven" instances in Defense Exhibit A-18 when Luz specified that Edgar had told her something. Although Edgar implicated his brother – Roger – he did not implicate Rony or Ovilson, in the court's view. Rony's attorney disagreed but argued that even if Luz only said that Edgar had implicated Roger, that still should be admissible to cure the prejudice and he should be able to directly ask her "whether Edgar said that Rony was with them when they shot the victims."

The court reasoned that Edgar's statement to Luz that he and at least one other person, *i.e.* "they," shot the victims was admissible as a statement by a party opponent *and* as a statement against his own penal interest and was admissible against Rony, but that Edgar's statements to Luz that only implicated Roger, such as when he told her he was surprised that his brother took out a gun and started shooting, were not admissible because they did not inculpate Edgar. Nevertheless, the court decided to review more cases before definitively ruling that other statements made by Edgar to Luz were not admissible.

The next morning, the trial court ruled that Rony would not be permitted to present evidence that Edgar did not mention Rony in what he told Luz or that Edgar mentioned others as accomplices in the murders. The court emphasized that the facts were unlike those in cases "where one person was charged and another person claimed to have done it." The court reasoned that Supreme Court and Maryland case law made clear

that a trial court must carefully exclude a declarant's statements that were "not against penal interest" and the "absence of a statement" inculpating Rony was not against Edgar's penal interest.

d.

Rony's focus in Issue II is on the court's rulings that he could not introduce evidence that, in speaking to Luz, Edgar implicated Roger and Ovilson in the murders and did not implicate him (Rony). In presenting their arguments on this issue, the parties devote some of their discussion to the related requests for severance of the charges against Rony or Roger prior to the mistrial on the charges against Roger. We need not address those arguments, however, because, after Roger was no longer in the case, Rony renewed his request to admit the pertinent evidence, by recalling and cross-examining Luz, and the court denied the request. By then, severance no longer was an issue.

Carving out the severance arguments, Rony contends Edgar's statements to Luz implicating himself, Roger, and Ovilson in the murders were admissible by Rony as a declaration against penal interest, under Rule 5-804(b)(3), and that, once Luz testified that Edgar said "they" started shooting, it was prejudicial for the court to preclude him from introducing that evidence, which would show that while Edgar implicated others, he did *not* implicate Rony. Without being allowed to put on evidence of who "they" were and were not, the jury was left to think

that Rony was one of "them."[13] Rony maintains that the court's limiting instruction did not cure that prejudice.

The State responds that Edgar's statement to Luz, that he took Shadi's phone and "they just started shooting them[,]" was admissible against Rony as a declaration against Edgar's penal interest and the court correctly admitted it. Even if the statement were not admissible against Rony, it was not unduly prejudicial and any prejudice to Rony was cured by the limiting instruction. The State maintains that the court properly precluded Rony from introducing those parts of Edgar's statement to Luz "directly implicating Roger but allegedly omitting Rony's name," however, because they were not declarations against Edgar's penal interest and thus were inadmissible hearsay with respect to Rony.

e.

Rule 5-804(b)(3) makes admissible a hearsay statement

> which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest, *so tended to subject the declarant to civil or criminal liability*, or so tended to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. *A statement tending to expose the declarant to*

[13] Rony also maintains that these explanatory statements by Edgar were admissible under the curative admissibility doctrine.

> *criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.*

(Emphasis added). "The rationale for admission of such statements is that 'there is a circumstantial guarantee of sincerity when one makes a statement adverse to one's interest.'" *West v. State*, 124 Md. App. 147, 166 (1998) (quoting 6 Lynn McLain, *Maryland Evidence* § 804(3).1 at 467 (citations omitted)). To be admissible under the exception, "the proponent of the statement [against penal interest] must convince the trial court that 1) the declarant's statement was against his or her penal interest; 2) the declarant is an unavailable witness; and 3) corroborating circumstances exist to establish the trustworthiness of the statement." *Jackson v. State*, 207 Md. App. 336, 348 (2012) (cleaned up).

The proponent of a declaration against penal interest bears the burden "to establish that it is cloaked with 'indicia of reliability' . . . [which] means that there must be a 'showing of particularized guarantees of trustworthiness.'" *Simmons v. State*, 333 Md. 547, 560 (1994) (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)). "The trial court's evaluation of the trustworthiness of a statement is 'a fact-intensive determination' that, on appellate review, is subject to the clearly erroneous standard." *Stewart v. State*, 151 Md. App. 425, 447 (2003) (quoting *State v. Matusky*, 343 Md. 467, 486 (1996)). The ultimate determination of "whether the evidence was sufficiently reliable for admissibility" falls "within the [trial] court's discretion

to determine[.]" *Wilkerson v. State*, 139 Md. App. 557, 577 (2001). "[W]hen an otherwise discretionary decision is premised upon legal error, that decision is necessarily an abuse of discretion because 'the court's discretion is always tempered by the requirement that the court correctly apply the law applicable to the case.'" *Bass v. State*, 206 Md. App. 1, 11 (2012) (quoting *Arrington v. State*, 411 Md. 524, 552 (2009)).

In *State v. Standifur*, 310 Md. 3 (1987), the Court of Appeals considered the admissibility of a declaration against penal interest offered by the State, in which the declarant implicated himself and others in the crime. Two defendants were indicted for housebreaking and theft in which a gun was stolen and later recovered by the police at a gun store. The police were directed by the person who sold the gun to the store to "Sly," who had sold him the gun, and Sly told the police he had gotten the gun from the defendants. Sly disappeared before the defendants' separate trials. At each trial, over objection, the court allowed the police officer who interviewed Sly to testify about what Sly had told him about the gun sale. The courts ruled that because Sly believed the gun he was purchasing was stolen, *i.e.*, that he was receiving stolen goods, his statements to the police to that effect were declarations against his penal interest and were admissible against the defendants.

The Court of Appeals held that the trial court erred in so ruling. It emphasized that a declaration against penal interest is admissible as an exception to the rule

against hearsay under Maryland common law[14] and that the case concerned "a specific class of declarations against penal interest – those offered by the State to inculpate a defendant in a criminal case." *Id*. at 9-10. In assessing the admissibility of Sly's statements, the Court looked to Federal Rule of Evidence (FRE) 804(b)(3)[15] (which is substantively identical to current Md. Rule 5-804(b)(3)) and to the advisory committee note that stated:

> [A]ll statements implicating another person [need not] be excluded from the category of declarations against interest. Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to

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[14] *Standifur* was decided before the Maryland Rules of Evidence were adopted in 1994.

[15] In its current form, that rule provides:

> (3) Statement Against Interest. A statement that:
>
> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
>
> (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

> curry favor with the authorities and hence fail to qualify as against interest . . . . On the other hand, the same words spoken under different circumstances, *e.g.*, to an acquaintance, would have no difficulty in qualifying. The rule does not purport to deal with questions of the right of confrontation.

Id. at 11 (quoting Advisory Committee Note to FRE 804(b)(3)).

The Court reasoned that the advisory note and the history of the federal rule made clear that, in deciding whether a statement against penal interest is reliable, trial courts must consider the totality of the circumstances surrounding the making of the statement and "treat as 'inevitably suspect' a statement made to persons in authority and implicating a codefendant, even though the statement also contains an admission of the declarant's culpability." *Id*. at 13. The Court divided statements inculpating a criminal defendant into two classes, collateral and noncollateral:

> A noncollateral statement is one in which the facts inculpating the defendant are found in the portion of the statement directly against the declarant's interest. A collateral inculpatory declaration is one in which the inculpatory material is not found in the portion of the statement directly against the declarant's interest, but instead appears in another portion of the statement.

Id. at 15-16.

Both classes of statements are admissible if they satisfy certain threshold tests. First, the trial court must

> carefully consider the content of the statement in the light of all known and relevant circumstances surrounding the making of the statement and all relevant information concerning the declarant, and determine whether the statement was in fact against the declarant's penal interest and whether a reasonable person in the situation of the declarant would have perceived that it was against his penal interest at the time it was made.

Id. at 17. Second, the trial court "should . . . consider whether there are present any other facts or circumstances, including those indicating a motive to falsify on the part of the declarant, that so cut against the presumption of reliability normally attending a declaration against interest that the statements should not be admitted." *Id*. Third, "[a] statement against interest that survives this analysis, and *those related statements so closely connected with it as to be equally trustworthy*, are admissible as declarations against interest." *Id*. (emphasis added).

Applying those principles, the Court held that the trial court erred in admitting Sly's statement to the police. Although his statement objectively was against his own penal interest, "a reasonable person in Sly's position would [not] have understood the disserving nature of the statement when he made it" and "that the totality of circumstances under which the statement

was made militate against a finding of the requisite reliability." *Id.* The Court emphasized that the statement was made in what amounted to a custodial interrogation; that when it was made, Sly was fearful of violating his parole and apparently wished to "curry favor with the authorities"; and that Sly's "motive of personal gain" was "an important factor to be considered." *Id.* at 19-20.

In *Williamson v. United States*, 512 U.S. 594 (1994), the Supreme Court recognized a similar distinction between the collateral and noncollateral portions of a confession. In that case, the police conducted a traffic stop of a rental car driven by Reginald Harris and, during a consent search of the vehicle, discovered a large quantity of cocaine in two suitcases. In an interview with a DEA agent, Harris said he had picked up the cocaine from an unnamed person and was to deliver it to Williamson at a predetermined location. In a subsequent interview, Harris admitted to having lied about many aspects of his story. He told the DEA agent that he was transporting the cocaine to Atlanta for Williamson; that Williamson had been driving in front of Harris in a second rental car; and that Williamson knew that the police had seized the cocaine.

Williamson was charged with possession with intent to distribute cocaine and related charges. Harris was granted immunity but refused to testify at Williamson's trial and was held in contempt. The district court permitted the DEA Agent to recount Harris's statements to him, over defense objection. After conviction, Williamson appealed on this point and his case reached the Supreme Court.

The Court reversed, holding that "statement" as used in FRE 804(b)(3) does not refer to a full statement, such as the entirety of a recorded police interrogation, but to "'a single declaration or remark'" within an overall declaration. *Id.* at 599 (quoting *Webster's Third New International Dictionary*, 2229, defn. 2(b) (1961)). If the converse were true, then "even if [a complete statement] contain[ed] both self-inculpatory and non-self-inculpatory parts[, it] would be admissible so long as in the aggregate the confession sufficiently inculpat[ed the declarant.]" *Id.* That interpretation would contradict the underlying rationale of the rule, which rests "on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." *Id.* In contrast, "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." *Id.* at 599-600. The Court stated that there was "no reason why collateral statements, even ones that are neutral as to interest, should be treated any differently from other hearsay statements that are generally excluded." *Id.* at 600 (internal citation omitted). Applying those principles, the Court concluded that the district court had erred by not conducting a fact-intensive inquiry to determine which of Harris's statements truly were self-inculpatory and which merely were collateral statements that inculpated Williamson only (and potentially curried favor for Harris).

The Court of Appeals adopted the *Williamson* analysis as part of Maryland law in *State v. Matusky*,

343 Md. at 490. There, the Court held that the trial court had interpreted Rule 5-804(b)(3) "too broadly, erroneously admitting collateral portions of [a] hearsay declaration that did not directly incriminate the declarant." *Id*. at 470. The defendant, Michael Matusky, was tried on two counts of first-degree murder in the stabbing deaths of two women. Richard White, the estranged husband of one of the victims, also was charged in relation to the murders. At issue was whether statements White made to his fiancé inculpating Matusky were admissible at Matusky's trial. White had told the police that he had spent the day of the murders shopping with his fiancé. She had corroborated that account in her statement to the police. Later, she retracted her statement and admitted that she had lied, at White's urging, and that he had told her he had been drinking in a bar on the day of the murders, in violation of his probation. She also told police that White had told her that he knew who had committed the murders and implicated Matusky.

After White invoked his Fifth Amendment privilege, making him unavailable as a witness, the trial court permitted White's fiancé to testify about White's statements to her. She testified that White had told her that on the night of the murders, he and Matusky were drinking together at a bar; that Matusky had told White he wanted to kill the women; and that White had tried to talk him out of it. Thereafter, White drove Matusky to the victims' house in Matusky's car and stayed in the car while Matusky went inside and stabbed the victims. Aside from White's fiancé's testimony, the only evidence linking Matusky to the crimes was a shoeprint outside the victims' house that

could not conclusively be linked to him. Matusky testified in his own defense and denied any involvement in the murders.

Matusky was convicted and his appeal reached the Court of Appeals, which held that the trial court had erred by admitting White's statements to his fiancé. The Court reasoned that the declaration against penal interest exception "is predicated on the assumption that the declarant would not make a statement adverse to his or her penal interest unless that declarant believed it to be true." *Id*. at 477 (citing *Standifur*, 310 Md. at 11). That "rationale support[ed] admitting individual statements that are contrary to the declarant's penal interest," but it was less clear "whether [it] applie[d] to other portions of a hearsay declaration that d[id] not directly implicate the declarant." *Id*. at 477-78 (footnote omitted).

The Court explained that some commentators have reasoned that if a declaration is self-inculpatory, the entire declaration should be admissible, whereas other commentators have taken opposite and intermediate positions. *See* 5 J. Wigmore, *Evidence in Trials at Common Law* § 1465, at 339-41 (Chadbourn rev. 1974 & 1996 Supp.) ("All parts of the speech or entry may be admitted which appear to have been made while the declarant was in the trustworthy condition of mind which permitted him to state what was against his interest"); B. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 Harv. L. Rev. 1, 60-61 (1944) (arguing that none of the collateral portions of a statement against interest should be admitted); C. McCormick, *Handbook of the Law of*

Evidence § 279(d), at 677 (E. Cleary ed., 2d ed. 1972) (arguing that self-serving collateral statements included among a statement against interest be excluded, but that neutral collateral statements be admitted). The Court noted that *Standifur* adopted the intermediate position advanced by Professor McCormick, articulating the three-part test set out already.

The *Matusky* Court reasoned that the third part of the *Standifur* test, which permits a trial court to admit "[a] statement against interest that survives [the first two prongs], and *those related statements so closely connected with it as to be equally trustworthy*[,]" requires "the trial judge [to] parse the entire declaration to determine which portions of it are directly contrary to the declarant's penal interest, and which collateral portions are so closely related as to be equally trustworthy." 343 Md. at 482 (emphasis in original). It held that the trial court had failed to "parse" White's statements to his fiancé to determine which portions were collateral and unrelated to the statements directly against his penal interest. The trial court "should have redacted those portions of White's declaration identifying Matusky as the murderer and suggesting Matusky's motive for the crime." *Id*. at 485. Those "portions of the declaration did not directly incriminate White" and, because of their "non-incriminating" character, were "not as trustworthy as self-incriminating statements, because they serve[d] to shift blame from White to Matusky." *Id*.

For guidance on remand, the Court of Appeals discussed how a trial court should parse a lengthy

statement, only parts of which are self-inculpatory. It adopted the reasoning in *Williamson*, which differs from *Standifur* in one "central" way: "that 'proximity' between the self-inculpatory and 'collateral' portions no longer guarantees admissibility." *Id.* at 491. Rather, "'when ruling upon the admission of a narrative under this rule, a trial court must break down the narrative and determine the separate admissibility of each "single declaration or remark."'" *Id.* at 492 (quoting *State v. Mason*, 460 S.E.2d 36, 45 (W.V. 1995), in turn quoting *Williamson*, 512 U.S. at 599). "The test for admissibility to be applied to each statement within a declaration is whether a reasonable person in the declarant's circumstances would have believed the statement was adverse to his or her penal interest at the time it was made." *Matusky*, 343 Md. at 492.

These cases all have analyzed the burden on the State, as the proponent of a declaration against penal interest, when the statement inculpates the declarant *and* a criminal defendant and is offered at the defendant's trial. When a criminal defendant is the proponent of a statement against penal interest that exculpates him and inculpates another, the defendant's right to present a defense is implicated and, if corroboration is present, the balance shifts in favor of admission. *See Gray v. State*, 368 Md. at 547 (holding that the trial court "effectively blocked [the defendant's] ability to present a defense that, under the facts of this case, he was entitled to present"); *Roebuck v. State*, 148 Md. App. 563, 594 (2002) (finding that the defendant has a constitutional right to present a defense and must not be subject to an "insurmountable evidentiary hurdle" in doing so) (citation omitted).

Corroboration may be found in the circumstances attendant to the making of the declaration, the nature of the statements made, or other evidence verifying the substance of the declaration against interest. *Gray*, 368 Md. at 545-46 (analyzing the statements made and other evidence corroborating them); *Roebuck*, 148 Md. App. at 581-85 (discussing the many sources for corroboration of a statement against interest exculpating a defendant).

In *Gray*, a jury convicted the defendant of the first-degree murder of his wife, Bonnie Gray ("Bonnie"), whose partially nude body was found in the trunk of her car about a week after the defendant reported her missing. She had been shot three times in the head, stabbed in the chest, had ten lacerations to her head, and five of her fingers had been severed. At trial, the defense theorized that the murderer was Brian Gatton, who, allegedly, had been involved in a sexual relationship with Bonnie. Gatton invoked his Fifth Amendment privilege. The defense sought to call Evelyn Johnson to testify about statements Gatton made to her implicating himself in Bonnie's murder. The State moved *in limine* to preclude that testimony. The defense proffered that Johnson would testify that, after Bonnie disappeared but before her body was found, Gatton told her "I took care of her[.]" *Id*. at 535 (footnote omitted). Johnson also would have testified that "on a subsequent occasion Gatton came to her house when her husband was away and raped her." *Id*. Days later, Gatton threatened her, saying that if she told anyone about the rape, "'he would take care of [her] just like he had took care of [Bonnie].'" *Id*. at 535-36. According to Johnson, Gatton "pulled a small

handgun from his boot and also a hunting knife from a 'case' on his belt, showing them to [Johnson], and saying, '[T]his is what I killed her with.'" *Id.* at 536.

Relying upon *Matusky*, the trial court ruled that, although the statements Gatton was alleged to have made to Johnson were against his own penal interest when made, they lacked sufficient indicia of trustworthiness and therefore were inadmissible at trial. The Court of Appeals held that that was error. It began by summarizing the distinctions between the issue in *Matusky* and in the case before it:

> In *Matusky*, the declaration against penal interest was sought to be introduced by the State, and the statement was alleged to be against the defendant's penal interest, not against the penal interest of an alternate suspect. It was an inculpatory statement as to the defendant; however, the statement was not made by Matusky, but was made by a codefendant who was being tried separately. The declarant in *Matusky*, who was also unavailable, would have been, if present to testify, a witness whom Matusky would have had a constitutional right to confront. Here, the declaration was sought to be introduced by the defendant, and thus the defendant's constitutional right to confront the witnesses *against* him is not implicated. Judge Raker, for the Court, noted in *Matusky* that when a declaration *against interest of a defendant* is at issue, the confrontation clause requires additional assurances of reliability before such declarations

> against interest should be admitted. The statement in this case was exculpatory as to petitioner but inculpatory as to Gatton, the person petitioner alleged committed the crime.

Id. at 538-39 (emphasis in original). The Court noted that *Matusky*, *Standifur,* and *Williamson* all involved declarations against penal interest that inculpated the defendant and were being offered by the State against the defendant. The Court emphasized that "[a] substantial part of the balance of our discussion in *Standifur* was almost exclusively limited to the attempts of the prosecution to have admitted in evidence statements of codefendants, that tend to inculpate the other defendants and exculpate the codefendant declarant." *Id*. at 542.

The Court reasoned, moreover, that the credibility of the "in-court relator" of an out-of-court declarant's statement was, like any other live witness, a matter for the finder of fact to decide, not for the trial court to decide as a gatekeeper. *Id*. at 545. Only the reliability of the out-of-court declaration, based upon the attendant circumstances, was relevant to the question of admissibility.

In assessing the credibility of Gatton's alleged statements to Johnson, the Court looked to their substance and the circumstances surrounding their making. It reasoned that although Gatton may have had a motive to fabricate after he raped Johnson, because he was trying to intimidate her so she would not report the rape to authorities, he had no such motive when he made the pre-rape statements, including that he "took care of [Bonnie]." *Id*. at 545-46.

Other evidence also corroborated the statements, including that Gatton was involved in a "love triangle" with Bonnie; that he was jealous when she went home to the defendant; and that after the murder he was in possession of jewelry like that worn by Bonnie. *Id*. at 546. Further, the statements clearly would subject Gatton to criminal liability and, because of his relationship with Bonnie, were of the type to be believed by authorities if reported. For all these reasons, the Court held that the statements were sufficiently reliable to be admitted and that the trial court improperly excluded them, thereby preventing the defendant from fully presenting his defense of lack of criminal agency.

In *Roebuck*, 148 Md. App. at 568, this Court relied upon *Gray* to hold that a trial court erred by not permitting the defendant to introduce statements by his cousin and codefendant, Rolston James, Jr., who had been tried separately for the same murder, that inculpated James and were "arguably exculpatory as to [the defendant]." The State had charged three men, including James and Roebuck, with the murder of a 14-year old boy. One codefendant, Miller, cooperated and the State *nol prossed* the charges against him. Roebuck and James both gave statements to the police while in custody. Roebuck told the police that he and James walked into a wooded area with the victim and James cut the victim's throat, stabbed him repeatedly, and then shot him with a handgun; and his involvement was limited to handing James the handgun when James asked for it.

In his statement, James confessed to having committed the murder in Roebuck's presence, telling police that he "snapped[.]" *Id.* at 570. His memory of the crime was "a blur[,]" however. *Id.* at 571. He could not say for certain whether he stabbed the victim, but he remembered that he was holding a knife and that Roebuck was "hitting" and "beating" James and "[b]egging [him] to stop." *Id.* He did not remember if he had the gun or if Roebuck had the gun. *Id.*

James was tried first. The State relied upon James's custodial statement at his trial and he was convicted. While James's appeal was pending, Roebuck was tried. James's attorney advised that he would invoke his Fifth Amendment privilege if called as a witness. Miller testified that he waited in the car while James and Roebuck walked the victim into a wooded area; that James had a knife; and that, when James and Roebuck returned to the car, the victim was not with them and James was holding a gun and his hand was bleeding. The State also introduced Roebuck's statement to the police.

In his case, Roebuck sought to introduce James's statement to police. The court ruled that James's statement was inadmissible as a declaration against penal interest because the corroborating circumstances were insufficient to support its trustworthiness. The court emphasized that James and Roebuck were cousins and that aspects of James's statement suggested he was taking the blame to protect Roebuck.

On appeal, we reversed. After discussing *Standifur* and *Matusky*, we elucidated factors bearing upon the reliability of a declarant's statement against penal

interest. If the declarant's statement exculpates the accused, the existence of a close or familial relationship between the declarant and the accused weighs against reliability. A statement that inculpates the declarant, and no one else, however, weighs in favor, as does the temporal proximity of the statement to the crimes charged and the consistency of the declarant's statement. Spontaneous statements are deemed more reliable than statements made in the context of a custodial interrogation.

Considering those factors and the Court of Appeals' decision in *Gray*, we held that the trial court erred by excluding James's statement to the police. We noted the trial court's reliance upon the familial relationship between James and Roebuck and James's desire not to get Roebuck in trouble as the grounds for excluding the statement, and disagreed that either ground adequately supported exclusion of a statement that was "arguably exculpatory as to a defendant and thus central to the defense case." *Id*. at 590. We also disagreed that James's statement was otherwise uncorroborated, reasoning that it was consistent with Miller's testimony and with the State's theory that Roebuck was present during the murder and gave James the gun but did not stab or shoot the victim. We also found it troubling that at James's trial, the State was the proponent of his statement, which it relied upon, but that it took the opposite position at Roebuck's trial. In sum, we held that:

> [W]e are mindful that "the exclusion of a statement exculpating an accused could result in an erroneous conviction." [*State v. Anderson*, 416

> N.W.2d 276, 280 (Wis. 1987)]. Moreover, given a defendant's constitutional right to present a defense, *id*. at 279, a defendant should not be subjected "to an insurmountable evidentiary hurdle" to obtain admissibility of a hearsay statement that is central to the defense and has been sufficiently corroborated. *Id*. at 280. Ultimately, it is for the fact finder to assess the veracity of the declaration. *Id*.

Id. at 594.

A statement against penal interest nevertheless must bear indicia of reliability to be admitted when a criminal defendant is the proponent. In *Stewart*, 151 Md. App. at 425, we held that the trial court did not err by refusing to admit at the defendant's trial for murder and assault a statement by his father, who was tried separately for the same crimes, in which the father inculpated himself and exculpated his son. In the statements, which were made to police officers after the defendant's father was arrested, he said he was responsible for the murder and that his son didn't have anything to do with it. The defendant's father also asserted that he acted in self-defense. The trial court found neither statement sufficiently trustworthy to be admitted because the father was "operating here to shield his son, but also to some degree looking after his own interest." *Id*. at 440 (emphasis omitted).

We reasoned that although the case was like *Gray* and *Roebuck*, and unlike *Standifur* and *Matusky*, because the defendant was the proponent of the statements, the similarities ended there. The trial court properly considered that the father's statement to

the correctional officer was exculpatory as to a close relative and was not fully inculpatory as to the declarant; that it was inconsistent with other statements he had given the police; and that it was not reasonable to believe that the father was the sole combatant in an incident that seriously injured two people and killed another.

Likewise, in *Jackson*, 207 Md. App. at 336, we upheld a trial court's ruling excluding a written statement made by Jones, Jackson's codefendant in a murder trial. Jones pled guilty to the crimes. The day after the murder, Jackson took Jones to his lawyer's office and the lawyer wrote out a statement based upon an oral account relayed by Jones, which exculpated Jackson completely, claiming he was not present at the home where the shooting occurred. The statement was not fully self-inculpatory, as Jones claimed he had started shooting when he thought one of the residents was pulling out a gun. At an evidentiary hearing held during Jackson's trial outside of the presence of the jury, Jones testified he had met with Jackson's lawyer, that the lawyer wrote the statement while Jones spoke, that Jones signed it after "skimming" it, and that it was not true.

The trial court found that the statement "was not truly inculpatory because Mr. Jones included references to acting in self-defense" and that the various observations that Jackson was neither present nor involved in the crimes were "collateral to the statement as a whole." *Id*. at 346. The statement also was inconsistent with later statements Jones made at

his plea hearing and at the evidentiary hearing before the circuit court.

In affirming, we reasoned that, although Jones's written statement was "arguably inculpatory[,]" and, therefore against his penal interest when made, the "circuit court's findings of fact were not clearly erroneous and its ultimate decision to exclude the statement based on insufficient indicia of reliability was not an abuse of discretion." *Id.* at 358. We emphasized the "complete dearth of indicia of reliability or corroborating evidence" and the "plethora of evidence that indicated that Mr. Jones's statement to [Jackson's] defense counsel was unreliable, untrustworthy, uncorroborated, and, therefore, inadmissible as a statement against penal interest." *Id.* at 363.

Several federal court opinions have held that statements made outside of a custodial setting that inculpate the declarant and other parties have inherent reliability, are not subject to the more stringent test set out in *Williamson* and are not precluded from admission under *Williamson*. In *United States v. Ebron*, 683 F.3d 105 (5th Cir. 2012), *cert. denied*, 571 U.S. 989 (2013), the Fifth Circuit Court of Appeals considered whether a district court erred by admitting statements made by a deceased coconspirator, Mosley, in the murder of an inmate at a federal penitentiary. Mosley had made the statements to another inmate, Lamont Bailey, and Bailey testified that Mosley told him he and the defendant "went in [the victim's cell] and put in the work," and that Mosley "stabbed [the

victim] so many times that they had to take breaks." *Id*. at 132-33.

Relying upon *Williamson*, the defendant argued that Mosley's statements that were not directly self-inculpatory were collateral and therefore inadmissible against him. The Fifth Circuit held that the defendant's reading of *Williamson* was overly broad because there, the Supreme Court was assessing statements made during a custodial interrogation, whereas Mosley's statements were made to a fellow inmate "outside a custodial context" that "does not provide the same set of incentives that create the risk of an unreliable statement." *Id*. at 133 (footnote omitted). That distinction was "consequential" and persuaded the Fifth Circuit that the district court had not erred. *Id*. at 133-34.

Likewise, in *United States v. Smalls*, 605 F.3d 765, 767 (10th Cir. 2010), the Tenth Circuit Court of Appeals held in an interlocutory appeal brought by the Government that a district court had erred by excluding "the entirety of an accomplice's nontestimonial statement to a fellow inmate implicating the accomplice and [the defendant] in a murder." Unbeknownst to the accomplice, the fellow inmate he confided in was a confidential informant who surreptitiously recorded their conversation. The court ruled that the accomplice's statement, which implicated himself, the defendant, and one other man in the suffocation of another inmate, should have been admitted as a statement against the declarant's penal interest. Like in *Ebron*, the *Smalls* court focused on the circumstances attendant to the making of the

statement, emphasizing that the accomplice "most certainly was not seeking to curry favor with authorities in recounting the specifics of [the] murder to [the confidential informant] or seeking to shift or spread blame to his alleged co-conspirators so as to engender more favorable treatment from authorities." *Id*. at 783. The declarant's mistaken belief that he was engaged in a "casual conversation" with a fellow inmate "ma[de] all the difference, providing a 'circumstantial guaranty' of reliability not found in statements, arrest, custodial or otherwise, knowingly made to law enforcement officials." *Id*.

The substance of the accomplice's statements also bore indicia of trustworthiness. He did not seek to deflect blame to his coconspirators, but "repeatedly opined that because all three men were involved in [the] murder, none of them could say anything." *Id*. at 785. He claimed that one inmate had put a bag over the victim's head, the declarant had held his hands, and the other coconspirator had held his feet. There might have been some parts of the declarant's statement that required redaction because they were not self-inculpatory – such as a remark stating that one of the other men was the "ring leader" – but the Tenth Circuit held that most of the statement was sufficiently against the declarant's penal interest to be admissible against the defendant.

We return to the instant case. On direct examination of Luz, the State moved into evidence, as a declaration against penal interest, Edgar's statement that he "took the cell phone from the boys, smashed it, and then after they just started shooting them."

Although the court instructed the jury that Edgar's statements to Luz only could be considered against Edgar, Rony took the position that because Edgar's statement made clear that he and at least one other person shot the victims, he was entitled to elicit, through Luz, that Edgar had implicated Roger and Ovilson as others who participated and had not implicated Rony. To accomplish this, Rony first sought to admit, also through Luz, Edgar's statement that he "was surprised that his little brother [Roger] took out a gun and just shot them guys, too[.]" As noted, that statement was excluded by the trial court.[16]

Initially, we must assess "whether a reasonable person in [Edgar's] circumstances would have believed [each] statement was adverse to his . . . penal interest at the time it was made." *Matusky*, 343 Md. at 492. The transcript of Luz's interview by Detective Glenn, which we have summarized above, was available to the court and the parties. It makes plain what a reasonable person in Edgar's circumstances would have believed. In the statement admitted by the State, Edgar told Luz how the victims were lured to the scene over Snapchat, that he was present at the scene of the murders, and that he took one of the victim's cell phone from his hand and smashed it, so the police would not be able to recover information from it. Although Luz told Detective Glenn that Edgar said then "*they* just started shooting them," (emphasis added), it is apparent that, when Edgar was speaking to Luz, he was including himself among the people who were shooting. In the

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[16] Rony also attempted to admit additional statements, but on appeal he focuses primarily upon this statement by Edgar.

same conversation, he also told Luz that "all that matters is that *we* already got it done and it happened just like the movies. You know that *we* just went over there quick as shit and just got them and then that was it." (Emphasis added). At no time in his conversation with Luz did he say anything to distinguish, or attempt to distinguish, himself from the shooters. On the contrary, he was recounting the events of the shootings as they unfolded and was acknowledging that he was part of the group committing the murders. Clearly, a reasonable person in Edgar's position would have understood that he was admitting his agency in the murders of the two teenagers, thereby subjecting himself to criminal liability.

Edgar's statement that he was "surprised that [Roger] took out a gun and just shot them guys *too*" (emphasis added) also was against his own penal interest. In this statement, Edgar not only inculpated Roger as a shooter but, by using the word "too," also inculpated himself as a shooter. Furthermore, he was providing a first-person account of execution-style murders to which there were no witnesses beyond the conspirators. A reasonable person in Edgar's position would know that admitting his presence at the scene of the crimes with his brother, who lured the victims to that location on Snapchat, likely would subject himself to criminal liability. This was not the type of collateral statement inculpating only a third party that this Court and the Court of Appeals have ruled should have been excluded. The trial court's finding that this statement by Edgar was not against his own penal interest was clearly erroneous.

A statement against penal interest also must be shown to have "particularized guarantees of trustworthiness." *Simmons*, 333 Md. at 560 (citation omitted). The trial court did not engage in an on-the-record fact intensive assessment of the reliability of Edgar's statements to Luz implicating himself and Roger in the murders. It was clear from the trial judge's remarks that he was concerned with Luz's credibility and lack of precision in relaying the statements made by Edgar, characterizing her interview with Detective Glenn as "rambling on about what she thinks she may have learned." As the Court of Appeals emphasized in *Gray*, however, the credibility of the in-court-relator of an out-of-court statement is a matter reserved to the factfinder. 368 Md. at 545.

In our view, the circumstances attendant to the making of Edgar's statements all weighed in favor of trustworthiness. Luz testified that Edgar confessed his involvement in the murders on June 6, 2017, the day after the double homicide.[17] *See Roebuck*, 148 Md. App. at 583-84 ("When a statement against interest is made soon after the event in issue, that factor generally weighs in favor of trustworthiness."). Although Luz prompted the initial statement by asking Edgar why he

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[17] At the beginning of her interview by Detective Glenn, Luz said Edgar made the statements to her "immediately" upon coming home after the shootings. She later clarified that he did not make the statements that same night, but the following day, after she returned home from work in the afternoon. This was consistent with her testimony that he asked her to turn on the local news, which would not have been reporting on the murders soon after midnight on June 6, 2017.

was acting strangely, the statements that followed were made spontaneously. *See id.* at 584 ("[C]ourts tend to regard as reliable those statements that are made spontaneously").

Significantly, Edgar's statements to Luz were not made in the context of a custodial interrogation. As the drafters of the federal rule recognized, and as the Court of Appeals quoted with approval in *Standifur*, the same words spoken to interrogating officers and to an acquaintance, especially when those words inculpate someone other than the declarant, are not equally reliable. In the latter scenario, there is no reason to suspect the statement was "'motivated by a desire to curry favor with the authorities.'" *Standifur*, 310 Md. at 11 (quoting Advisory Committee Note to FRE 804(b)(3)); *see also Ebron*, 683 F.3d at 133 (statements made to a third party "outside a custodial context" do not "provide the same set of incentives that create the risk of an unreliable statement"). In contrast to custodial statements, courts have found that statements made to friends and family are more trustworthy. *See Smalls*, 605 F.3d at 783 (statements made in a casual conversation create a "'circumstantial guaranty' of reliability not found in statements, arrest, custodial or otherwise, knowingly made to law enforcement officials"); *People v. Cortez*, 369 P.3d 521, 540 (Cal. 2016) ("A conversation with a close family member in an apartment [the declarant] frequented – [did] not suggest that [he] was trying to improve his situation with police" and, conversely, "promoted truthfulness.").

Unlike in *Jackson* and *Stewart*, in which the declarants made statements exculpating the defendant but did not fully inculpate themselves, or *Matusky*, in which the declarant's statement to his fiancé primarily shifted blame for two murders onto the defendant, here Edgar did not deflect blame for his involvement in the murders. To the contrary, he gloated about the speed and efficiency with which he, Roger, and, implicitly, Ovilson, carried out the crimes, describing it as being like a scene from a movie.

When the person a declarant exculpates is closely related to the declarant, as was the case in *Stewart*, that detracts from the statement's reliability. *See* 151 Md. App. at 454 (noting that "the relationship between the declarant and an accused is a key consideration" when the declarant exculpates the accused). Conversely, Edgar's statement inculpating not only himself but also Roger adds to, rather than detracts from, the reliability of the statement because he would be less likely to lie about Roger's involvement given that they are brothers. And, like the statement deemed admissible in *Smalls*, which equally inculpated three inmates in a murder, Edgar's statement that he was surprised that Roger participated in the shooting "too" exposed himself and Roger to the same degree of criminal liability.

As in *Gray*, other evidence corroborated many aspects of Edgar's statement to Luz, adding to its overall trustworthiness. Edgar told Luz that he took Shadi's cell phone and smashed it, which meshed with the fact that the police did not recover Shadi's cell phone even though other evidence showed that he was

using it on June 5, 2017, up until the minute before he was killed. Edgar told Luz that Ovilson drove the men in Kara's vehicle, which was consistent with Victoria's statement to the police about seeing that vehicle outside the trailer and with eyewitness testimony describing an old van or SUV. The motive Edgar identified for the shootings – Ovilson's anger about Shadi's robbery of Kara in December 2016 – was corroborated by statements Shadi had made to a friend and by evidence that Kara was treated for injuries to her foot and that Ovilson had witnessed the incident. The State did not dispute the credibility of Edgar's statements to Luz, which it relied upon to prove Edgar's criminal agency. Roger's participation in the crime also was central to and consistent with the State's theory of the crime. In closing argument, the prosecutor emphasized that everything that Luz told the police she had learned from Edgar was corroborated.

Gray and *Roebuck* make clear that when the defendant is the proponent of a statement against penal interest and it is central to his or her defense, the court should not impose "insurmountable evidentiary hurdle[s]" to its admission. *Roebuck*, 148 Md. App. at 594. Here, the totality of the circumstances surrounding the making of the statements, coupled with the substance of the statements, yields to the conclusion that both were admissible as statements against Edgar's penal interest.

The error in admitting one of those statements, but not the other, was not harmless beyond a reasonable doubt. Rony's defense was lack of criminal agency. He

maintained that although he was friends with Edgar, Roger, and Ovilson, and spent time with them at the trailer on June 5, 2017, he went home before they began communicating with Shadi over Snapchat and before they drove to Gallery Court to commit the murders. He relied upon the historical cell site evidence that placed his cell phone near Appledowre Way at 9:00 p.m., not at the trailer; upon the evidence that his X-Box was activated around the same time and did not go idle until midnight; and upon the ballistics evidence, which was inconclusive as to whether there were three or four firearms used in the shootings.

Importantly, the excluded statement by Edgar implicating Roger in the shooting, coupled with Luz's testimony placing Edgar with Ovilson on the night of the shooting, was consistent with Victoria's first statement to Jones, naming Roger, Edgar, and "Edgar's best friend" – Ovilson – as having been involved in the murders. In closing, Rony's attorney argued that Luz was the "hero" of the case for coming forward to share what she knew and that Victoria was the "villain" because, although she initially was truthful when she spoke to Jones, she later lied at the urging of the police by identifying Rony as the person looking at a map on his cell phone in the trailer. The trial court's ruling prevented Rony's counsel from eliciting evidence to show that, in confessing his own involvement to Luz, Edgar also inculpated Roger and Ovilson, but not Rony. This was critical evidence considering the jurors could have found that there only were three shooters. Accordingly, we shall reverse Rony's convictions and remand for further proceedings.

Relatedly, we also agree with Rony that the trial court improperly restricted him from cross-examining Luz about Edgar's confession to elucidate what Edgar meant by the word "they," if she knew, and to determine whether Edgar ever mentioned Rony in his statements. This error also was not harmless beyond a reasonable doubt. We explain.

"The Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment . . . provides, in pertinent part, that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Langley v. State*, 421 Md. 560, 567 (2011) (quoting U.S. Const. amend. VI) (internal citation omitted). Likewise, Article 21 of the Maryland Declaration of Rights guarantees that "in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him; to have process for his witnesses; [and] to examine the witnesses for and against him on oath[.]" The reach of these provisions has been interpreted coextensively. *See, e.g., Manchame-Guerra v. State*, 457 Md. 300, 309 (2018).

"Limitation of cross-examination should not occur . . . until after the defendant has reached his 'constitutionally required threshold level of inquiry.'" *Smallwood v. State*, 320 Md. 300, 307 (1990) (quoting *Brown v. State*, 74 Md. App. 414, 419 (1988)). A criminal defendant may cross-examine to "elucidate, modify, explain, contradict, or rebut testimony given in chief[,]" or to inquire as to "facts or circumstances inconsistent with testimony[.]" *Id.* "'[T]he accused does

not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence[,]'" however. *Taneja v. State*, 231 Md. App. 1, 10 (2016) (quoting *Taylor v. Illinois*, 484 U.S. 400, 410 (1988)).

This Court's decision in *Adam v. State*, 14 Md. App. 135 (1972), is instructive. Adam and codefendant Green were being tried jointly for storehouse breaking and related crimes. In the State's rebuttal case, a witness testified that, on the night of the crimes, Adam told the witness "we are going to pull a job." *Id* at 142. Adam and Green were convicted. On appeal, Green argued that admission of this testimony was a *Bruton* violation. We agreed that the "use of the plural pronoun 'we'" by Adam, who was with Green in the "critical period" before the crimes were committed, potentially incriminated Green because the "jury could not help but infer that when Adam said 'we,' he was referring to himself and Green." *Id*. Nevertheless, we concluded that because Adam testified in sur-rebuttal that he never said, "we are going to pull a job," but instead said, "Bruce was going to pull a job," referring to another friend, and because "Green was not denied the right to a meaningful confrontation and cross-examination," there was no Sixth Amendment violation. *Id*. at 142-43.

Here, Luz testified that Edgar said that "he" took Shadi's cell phone and smashed it and that "they" started shooting. As in *Adam*, the plural pronoun "they" necessarily included more than one person. Because Luz had been instructed not to testify about Edgar's references to anyone else in what he said to

her, the word "they" was not otherwise defined. The State presented other evidence placing Rony with Edgar, Roger, and Ovilson in the "critical period" before the murders and theorized that all four men participated in the shooting. Edgar's use of the word "they" (or "we") [18] in speaking to Luz clearly prejudiced Rony, as it implied that he was included just as the State was seeking to prove he was. At a minimum, Rony's lawyer should have been allowed to recall Luz to probe the meaning of "they" (or "we") to determine whether Edgar ever had mentioned Rony in his statements to her. The transcript of Luz's interview by Detective Glenn, which included references to Roger and Ovilson being involved in the crimes but not to Rony, supported cross-examination into that inquiry. Any evidence that Edgar did not mention Rony in relation to the crimes was relevant and admissible to explain and elucidate Luz's testimony on direct. For the same reasons we already have discussed, this error was not harmless.

III.

Testimony of Google Custodian of Records (Rony)

The State called Daniel O'Donnell, Google's custodian of records, to identify search records from two Google accounts linked to Rony. Before O'Donnell testified, Rony's lawyer objected to a lay witness testifying about the search records, arguing that expert testimony was required to explain their meaning.

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[18] As noted above, Edgar was including himself in the group of shooters, not distinguishing himself as being separate from them.

Counsel argued that a lay person looking at the records would need "testimony to explain it and that testimony is based on specialized knowledge, skill and experience." The State responded that O'Donnell merely would testify that the records were maintained in the ordinary course of business and "explain . . . what they show[,]" "[l]ike that a user using their Gmail account on the date stated here searched for those words and that's basically what the document says." Defense counsel countered that there was no way to tell from the records whether the websites listed were visited by the user or whether the terms were "pushed" from advertisements or cookies.

The trial court expressed skepticism that expert testimony was necessary for jurors to understand the meaning of search records, stating that on "June 10th at 9:35:23, UTC" there was a search for "Smith and Wesson, 9-millimeter." It reserved on the defense objection until O'Donnell began testifying.

O'Donnell testified that "search history records" show "what the user input into the Google search bar to search for those terms." The records capture "both queries and clicks," meaning what words a user searched for and what links were clicked from the search results. If the record states "visited" followed by a URL, that "indicates that the user clicked on a link from their search results to that URL."

O'Donnell identified search records showing that, in January 2017, a user associated with Rony's account searched "are 380 rounds the same as a 38" and that, in April 2017, a user from the same account searched for "9mm ruger." He also identified search records

showing that five days after the murders, on June 10, 2017, a user on Rony's account searched for a "Smith and Wesson 9mm." All this evidence came in over objection. The prosecutor argued in closing that, in this latter search, Rony was trying to find a firearm to replace the 9mm firearm he was forced to dispose of after the shootings.

The State also elicited from O'Donnell that Google can store other types of records for its accountholders. He explained that, depending upon the "products and services that the user is registered with[,]" Google may store the "contents of their emails, photos that they've uploaded, [and] their location history, if they've opted into that service." A user can "enable or disable the tracking of [location] data." He further explained that location history can pinpoint the "geographic coordinates" for where a device was when it was logged into a Google account. The prosecutor asked O'Donnell whether there was location history data associated with Rony's accounts on June 5, 2017. Over objection, he testified that there were not any "logs of location history for [June 5, 2017]" but there were logs for other dates associated with one of Rony's two accounts. O'Donnell then was asked whether there was "a gap" in the location history data. Over objection again, O'Donnell testified that "there [did] appear to be a . . . gap in the dates."

On appeal, Rony contends the trial court erred by permitting a lay witness to opine about the meaning of the Google search records. Specifically, he asserts that O'Donnell should not have been permitted to testify that search terms "sandwiched between indecipherable

symbols" were "user input" into the Google search bar or that location data was missing for a particular date. That type of testimony is based on the witness's specialized skill and knowledge and improperly was received through a lay witness.

The State responds that O'Donnell "offered lay testimony properly confined to his role as custodian of records" and that the trial court did not abuse its discretion by admitting that testimony. It analogizes the Google search records, which it characterizes as "simple, self-explanatory, and easily understood by a layperson," to GPS tracking records, which this Court and the Court of Appeals have held may be admitted without the need for expert testimony. Likewise, it maintains that O'Donnell properly was permitted to testify that there was no location data logged for June 5, 2017, but that location data was logged for other dates.

Under Rule 5-701, lay witness testimony "in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." By contrast, expert testimony is "based on specialized knowledge, skill, experience, training, or education . . . [and] need not be confined to matters actually perceived by the witness." *Ragland v. State*, 385 Md. 706, 717 (2005). "Testimony elicited from an expert provides useful, relevant information when the trier of fact would not otherwise be able to reach a rational conclusion; such information 'is not likely to be part of the background knowledge of

the judge or jurors themselves.'" *State v. Payne,* 440 Md. 680, 699 (2014) (quoting David H. Kaye, *et al.*, *The New Wigmore: A Treatise on Evidence: Expert Evidence* § 1.1 (2d ed. 2010)).

We review the decision to admit or exclude testimony, including the determination whether expert testimony is required on a particular subject matter, for abuse of discretion. *See Gross v. State*, 229 Md. App. 24, 32 (2016); *Mack v. State*, 244 Md. App. 549, 572-73 (2020). A trial judge abuses his or her discretion by "'exercis[ing] discretion in an arbitrary or capricious manner or . . . act[ing] beyond the letter or reason of the law.'" *Kelly v. State*, 392 Md. 511, 531 (2006) (citation omitted).

Rony relies on *State v. Payne,* 440 Md. at 680, in which the Court of Appeals held that a police detective who was not qualified as an expert witness should not have been permitted to testify about his interpretation of cell phone records. The Court reasoned that a "Call Detail Record contains a string of data unfamiliar to a layperson and is not decipherable based on 'personal experience'" and that the detective's interpretation of those records to determine the cell towers that the defendants' cell phones connected required expert testimony. *Id*. at 701.

The State argues that the admission of GPS data is most analogous to the admission of the Google search records here. In *Johnson v. State*, 457 Md. 513, 531 (2018), the Court held that lay opinion about GPS tracking was admissible, reasoning that although a "user may not understand precisely how a GPS device works, the same is true for other commonly used

devices such as clocks, scales, and thermometers." A layperson has a "common sense understanding of what information the device conveys – time, weight, temperature – and of the margin of error to which such devices are ordinarily subject[.]" *Id*. Consequently, "the times and locations reflected in GPS data in a business record do not necessarily require expert testimony to be admissible." *Id*. at 532. The Court noted that a "party opposing admission is free to cross-examine the sponsoring witness concerning any defects in the data . . . or to present its own expert to contest the accuracy of a particular device." *Id*. at 533. *See also Gross*, 229 Md. App. at 29 (finding that a truck repair supervisor was properly allowed to testify as a lay witness about GPS data from a tracker his employer installed on delivery trucks).

Recently, in *Mack*, 244 Md. App. at 557, this Court held that a trial court did not abuse its discretion by allowing a police officer to testify, as a lay witness, that "surfaces that are course or rubberized or uneven typically do not yield latent [fingerprints]." We emphasized 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.'" *Id*. at 570 (quoting *Johnson*, 457 Md. at 530) (second alteration and emphasis in *Mack*). We concluded that the officer's testimony was properly admitted as it fell within the realm of common knowledge.

We agree with the State that O'Donnell's Google search testimony – that the Google search records reflected search terms entered in the Google search bar and that the "visited" record reflected websites visited as a result of those searches – was information that the ordinary juror would be aware of "by virtue of common knowledge," like the GPS data admitted in *Johnson* and *Gross*. Google and other search engines are ubiquitous and nearly everyone is familiar with how they operate, including the autofill functions that suggest search terms as a user types. That O'Donnell could not explain the meaning of the "indecipherable symbols" in the Google search records and how they related to the searches did not make the search records inadmissible or render his testimony about the data Google stored infirm. This properly was the subject of cross-examination and defense counsel ably exposed the weaknesses in the data.

We reach a contrary conclusion, however, regarding O'Donnell's testimony about "location history" data stored on devices associated with Rony's Google accounts. How and under what circumstances Google tracks location data related to searches and other activity on a device is not within the realm of common knowledge, and many laypeople would be unaware that that function can be enabled or disabled. By eliciting testimony from O'Donnell that there was a "gap" in the location history data associated with Rony's Google account, the State was attempting to show that Rony intentionally disabled location data on June 5, 2017, so his movements to and from the murder scene would not be recorded. The relevance of a gap in location data required expert testimony to elucidate how and when

that data is stored; how a user enables and disables location tracking; and whether gaps can be explained by other circumstances beyond disabling location tracking.

Given that Rony's defense was that he was at home watching Netflix when the murders were committed, we cannot conclude that the error in admitting this testimony was harmless beyond a reasonable doubt. If the jurors relied on O'Donnell's testimony about the "gap" in location data to draw an inference that Rony was attempting to hide his movements on June 5, 2017, that would directly undercut his defense. Accordingly, this is another ground upon which reversal of Rony's convictions is required.

IV.

Recusal
(Edgar)

Finally, Edgar contends the trial judge abused his discretion by denying a motion for recusal made by Rony before trial, and joined by Edgar later, when it was renewed during jury selection.[19] The basis for the motion was that the trial judge had presided over Ovilson's bench trial, and therefore had knowledge of the relevant facts and had formed opinions about the guilt or innocence of the defendants in this trial.

During jury selection, in response to the question whether any venire member knew about the case from sources outside the courtroom, a prospective juror

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[19] Rony does not appeal from the denial of the motion to recuse.

advised the trial judge that he remembered seeing on the news that people selling spare tickets were murdered. The trial judge responded that the evidence at trial would reflect that information and asked the juror if he would be able to decide the case based only upon the evidence presented at trial. Rony's lawyer asked the trial judge not to respond by confirming what evidence would be presented at trial. Subsequently, another prospective juror advised that he was aware that the trial judge had presided over Ovilson's trial; that Ovilson had been convicted; and that Ovilson had been sentenced to life in prison. At that point, Rony's lawyer renewed her motion for recusal and Edgar joined. Edgar's counsel argued that the trial judge's "knowledge of the facts that will or – did come out in the previous trial might be influencing *voir dire*, so." The court denied the motion.

An impartial and disinterested judge is fundamental to a defendant's right to a fair trial. *Jefferson-El v. State*, 330 Md. 99, 105 (1993). Because a trial judge is presumed to be impartial, however, "[t]he person seeking recusal bears a 'heavy burden to overcome the presumption of impartiality.'" *Karanikas v. Cartwright*, 209 Md. App. 571, 579 (2013) (quoting *Attorney Grievance Comm'n v. Blum*, 373 Md. 275, 297 (2003)).

We review a trial court's denial of a motion for recusal for abuse of discretion. *Surratt v. Prince George's Cnty.*, 320 Md. 439, 465 (1990). A judge should disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. Md. Rule 18-102.11.

Here, there was nothing in the trial judge's conduct of *voir dire* that reasonably called his impartiality into question. As Edgar acknowledges, the mere fact that the trial judge had presided over Ovilson's bench trial did not preclude him from presiding over Edgar's jury trial arising from the same crimes. *See Carey v. State*, 43 Md. App. 246, 249 (1979) ("Participation in prior legal proceedings involving related parties or issues is simply not grounds for a judge to recuse himself."). The two statements the trial judge made to two prospective jurors at the bench did not reveal any bias or partiality on his part; they simply confirmed the basic contours of the evidence, which was in dispute. Unlike the case Edgar relies upon, *In re George G.*, 64 Md. App. 70, 80-81 (1985), *superseded by statute on other grounds as stated in In re Demetrius J.*, 321 Md. 468 (1991), here there was no suggestion that the trial judge had prejudged the evidence against Edgar (or his codefendants). *See id.* (holding that the trial judge, who had presided over a codefendant's juvenile delinquency proceeding, should have recused himself after he said, "You might be able to prove he is innocent," referencing the juvenile defendant). We perceive no abuse of the trial court's broad discretion and shall affirm.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AGAINST APPELLANT RONY GALICIA REVERSED AND CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY MONTGOMERY COUNTY.

JUDGMENTS AGAINST APPELLANT EDGAR GARCIA-GAONA AFFIRMED. COSTS TO BE PAID BY APPELLANT GARCIA-GAONA.

APPENDIX C

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

[Dated: November 2, 2018]

Criminal No. 132901

STATE OF MARYLAND)
)
v.)
)
ROGER GARCIA,)
)
Defendant.)

Criminal No. 132903

STATE OF MARYLAND)
)
v.)
)
EDGAR GARCIA-GAONA,)
)
Defendant.)

Criminal No. 132904

STATE OF MARYLAND)
)

v.)
)
RONY GALICIA,)
)
Defendant.)
_____)

JURY TRIAL

Rockville, Maryland November 2, 2018

DEPOSITION SERVICES, INC.
12321 Middlebrook Road, Suite 210
Germantown, Maryland 20874
(301) 881-3344

* * *

[pp. 85-93]

record, I wanted there to be no confusion about the jail calls that I was going to have witness Luz identify the voices on, but there's going to be no dispute as to the voices of the defendants on the phone. They may dispute their admissibility but that the voices are the ones of the defendants, and I think it's quite obvious when it's Edgar and Roger because they're actually -- they say their names at the beginning of the calls, but there are times when they actually call co-defendant Rony Galicia, and so I just -- I was talking with Mr. Mercer. I don't believe there's going to be a dispute as to Mr. Galicia's voice on the other end of those calls. They may dispute their admissibility for other reasons. Is that correct?

MR. MERCER: That's correct.

THE COURT: Okay.

MS. AYRES: So that eliminates my need to play those calls for Ms. Dasilva, although I do have one more question for her.

THE COURT: Okay.

MS. RAQUIN: And can we --

THE COURT: Okay. So I think in dealing with the issue that we were discussing right before the break, so it deals with the issue of statements made by Luz Dasilva regarding a conversation that she had with Edgar Gaona-Garcia after June 5th. So it's, it's -- the parties have agreed that the, any conspiracy between the parties ended on June 5th and therefore those statements were not offered by a coconspirator during the course of a conspiracy. So the statement was offered by the State as a statement against penal interest by Edgar against Edgar, and so I went back --

MS. AYRES: And as a statement of a party opponent.

THE COURT: What's that?

MS. AYRES: And as a statement of a party opponent.

THE COURT: Statement of a party opponent. So -- and then following a discussion at the bench about how to proceed, the State indicated they were going to lead the witness to have her testify about what Edgar said about his own conduct.

So I went back and listened to, on CourtSmart, about what she actually said, and she, when asked a question, she said that he -- we were talking about him being in the situation with the shooting, and then she said he said, he described it as a seven-second movie. And then when she was asked can you describe what happened, Luz said, they and then she corrected herself and said he took the cellphone from the boys and smashed it; then after they just started shooting them. So that -- based upon that statement, Ms. Raquin indicated that she wanted to now talk to this -- or ask questions of the witness about whether or not, during the statement made by Edgar to her, that, that he ever mentioned that Rony was involved in the case.

So in, in considering that, my gut reaction was that it was not hearsay, which after doing more reading about it, it's not a hearsay issue. It's really a circumstantial evidence issue about whether or not his failure to mention Rony in the statement is circumstantial evidence that Rony did not participate.

So the issue that arises in the event that that were to happen is this, that if -- well, first of all, let's start with, with the fact that when she, when she says he used the word they, no one else's name was mentioned as to who they were. No other defendant in this cases, in this cases name was used, and so there's no, there's no violation there of the fact that a -- this defendant's statement implicated any other defendant in this case, because no other names were used.

So the jury has already heard evidence that there's more than one person involved in the shooting. The question is, who is involved in the shooting? So there's

no evidence that was presented through that statement that implicated any of the other co-defendants.

So with that as background, in the event that Ms. Raquin is permitted to ask this witness, well, did Edgar say that Rony was involved, and she -- if her answer is no, then, of course, the jurors are going to expect the other lawyers to ask the same question, well, did he say that my client was involved or my client was involved, and based upon what I understand the statement is, they're not going to ask that question because, apparently, he did say at least one of their names. Is that right?

MS. AYRES: Yes.

THE COURT: Okay. So the problem that creates is that now there's an implication that the jury can infer that he did mention the other people involved in this case if he's allowed -- if she's allowed to answer the question did the witness mention Rony? That creates the problem, as I see it.

So I think the way to deal with this is to deal with it the way we indicated in the beginning of the trial, which is to tell the jury that certain pieces of evidence are being offered as against one defendant only, to simply instruct them that the testimony of Liz, Liz, Luz Dasilva about any conversation she may have had with Edgar Gaona-Garcia after the June 5th, 2017, were offered against him only and as to no other defendant and they're not to consider it in any way in considering the actions of other co-defendants and leave it at that.

MS. RAQUIN: And we object to that, and there's a couple more things that I want to add.

THE COURT: Yes.

MS. RAQUIN: When the State initially said that they were going to elicit statements, admissions by Edgar, they did so having instructed their witness to only refer to him. This is not what the witness has done. The witness has mentioned they, which the jury is going to conclude that Rony could be part of that they, which is extremely prejudicial to us when we know that this witness, Luz Dasilva, never mentioned Rony as being included in the they. So the State created their own issue by having their own witness testify to they twice.

The witness also testified that the method by which the plan was set up was through the use of Snapchat, which already implicates Roger because it's his Snapchat account which was used in order to set up the murders. And finally, the State also implicated through the witness Luz the fact that Edgar was dropped off that day by the gray silver vehicle, which she couldn't see who was driving, which, again, we are left with the jury believing that Rony Galicia could be the driver or that he could be involved in they took the phone and they shot the victims.

So that creation of they, the fact that the witness testified to they creates circumstantial, exceptional circumstances that requires us to renew our motion to sever. Like you said, Judge, the only reason why our statement or question to the witness -- when Edgar said they, he never mentioned Rony -- the only reason why you're precluding this question at this time is because Roger is tried with us.

So if you sever us from this case or if you sever Roger from this case, then the question -- there will be no prejudice to any other party and the question with Edgar told you that they took the phone and that they shot, that he never said to you that Rony was one of the they, and, and, and that's what you are preventing us from doing based on your ruling, which is a denial of our right to present a defense, which is also denying Mr. Galicia a right to receive a fair trial.

And the jury has heard they in combination with the State's questions, which were, you know, can you tell us what he himself has done or has said, which obviously is leaving the witness to wonder, there's more information that this witness has, which at the end of the trial, the State will argue they all participated in it, and it's only fair for us to be able to confront the testimony from this witness that they is not a statement that includes Rony Galicia in, in the conspiracy. And, and, and there is no -- when Edgar Garcia is admitting to having committed murder, the, and he, when he's admitting who he's committed murder with, he's admitting to the conspiracy, which include --

THE COURT: But he didn't admit who he did it with.

MS. RAQUIN: Well, in the --

THE COURT: That's the whole point.

MS. RAQUIN: -- in the statement to -- in his statement to Luz, as we have it in her transcript -- which for purposes of the record I would actually mark and move. It's the interview from Luz Dasilva, which

takes place on June 17th, which is before Edgar is arrested and before Roger is arrested, before the search warrant is even conducted on Lamont Lane. So that's Defense Exhibit A-18 -- in that statement Luz Dasilva mentioned that Edgar Garcia told her that the only two people involved were Jose Canales-Yanez and Roger and he goes into several details about how it went down, how they planned it, who had a gun. It has information regarding Luz's reaction, that she was surprised to find out that Roger was involved. There is no discussion whatsoever about Rony having been a participant in any way in the murder or in the conspiracy to commit murder, and we think that it is absolutely proper and fair for the jury to hear that when the witness is referring to they, the witness is not referring to Rony Galicia because that's not what the statements were that Edgar Garcia made to her.

And, and, and Your Honor, this is -- there's no reason to doubt the statement of Edgar. I mean, the State is calling the witness in support of their theory that Edgar Garcia is the one who committed murder. He's implicating himself, which is clearly a statement against penal interest.

(The document referred to was marked as Defendant's Exhibit No. A-18 for identification.)

THE COURT: Right.

MS. RAQUIN: The mention of the other two as part of the conspiracy is so closely linked to his admission to the conspiracy -- obviously, a conspiracy requires an agreement with at least another person -- so his

admission that he conspired to commit murder with Roger and Jose Canales-Yanez is so closely related to the admission that the State is seeking to introduce to begin with, that it's only fair for us to ask that witness who --

THE COURT: But that part of the statement is not admissible.

MS. RAQUIN: I disagree that it is, under the rule of completeness, Your Honor. We have a partial statement.

THE COURT: Okay.

MS. RAQUIN: They can mean Rony and Roger and O. It can mean all of the three, which is not --

THE COURT: It could mean none of the three. That's the whole point.

MS. RAQUIN: Well, it couldn't be, it couldn't mean none -- well, I --

THE COURT: The whole point is, it could be --

MS. RAQUIN: -- you know, Judge, the only thing we want --

THE COURT: -- it could be none of the three.

MS. RAQUIN: And let me -- the only thing we want is that when Edgar said they -- or when he said I murdered, I committed murder, they, based on the testimony, we only want to be able to mention and to clarify that they at the time that Edgar Garcia said that to Luz did not include Rony Galicia --

THE COURT: Okay.

MS. RAQUIN: -- and that's only --

THE COURT: So in terms of your request for a severance, in a severance case, Edgar would not be a party and therefore that would not be a statement of a party opponent. It wouldn't even be in your trial. So the severance doesn't solve anything here. The only reason why that is admitted in this case is because Edgar is a co-defendant. He is a party opponent, and that's the reason why it came in. So severance doesn't solve the problem because the statement wouldn't even be used in a separate, separate trial.

So I think the, the other part of this statement is not admissible because you all have agreed that the conspiracy was over. So therefore the only part that would be admissible would be the part that deals with his own conduct, and so the fact -- the only reason why I'm considering giving a limiting instruction is because she used the word they. She didn't say who was involved. The jury has already heard a lot of evidence that there's more than one person involved. So there's nothing harmful about using the term they. The harmful part would have been had he said the names of any of the co-defendants. So in exercising an abundance of precaution, that's why I'm going to give the limiting instruction.

All right. Let's go.

APPENDIX D

[SEAL]
IN THE
COURT OF APPEALS
OF MARYLAND

No. 5

September Term, 2021

[Filed: August 10, 2022]

State of Maryland	)
v.	)
Rony Galicia	)
	)

MANDATE

Certiorari to the Court of Special Appeals (Circuit Court for Montgomery County)

On the 27th day of June, 2022 it was ordered and adjudged by the Court of Appeals:

Judgment of the Court of Special Appeals reversed. Costs in this Court and in the Court of Special Appeals to be paid by Respondent.
Opinion by McDonald, J.
Dissenting Opinion by Watts, J., which Raker, J., joins.

On the 10th day of August, 2022 it was ordered and adjudged by the Court of Appeals:

ORDERED, by the Court of Appeals of Maryland, that the Motion for Reconsideration be, and it is hereby, DENIED.