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

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3350
September Term, 2018

RONY GALICIA
v.
STATE OF MARYLAND

No. 3358
September Term, 2018

EDGAR GARCIA-GAONA
v.
STATE OF MARYLAND

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] 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?

[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 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.

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?

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

[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.

Rony and Edgar. In his case, Rony called ten witnesses. Edgar did not call any witnesses. The State called two rebuttal witnesses.

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

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

"[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.

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

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

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 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,

[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.

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 5-802.1(b).[8] Edgar's lawyer represented that he intended to "leave that door closed" so the statement would not be admissible by the State.

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

[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 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.

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, 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.

[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.

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 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

[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**.**

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 purpose, but rather to counter a potential argument by the State that at 9:53 p.m., when Edgar's phone pinged

[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.

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 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

[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.

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*

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

> *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.*

(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 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)).

[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.

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

[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 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").

[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.

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

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

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. 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 e-mails, 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.

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

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