Circuit Court for Washington County
Case No. C-21-CR-21-000090

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 103

September Term, 2024

NAJEE RASHOD RAYMOND

v.

STATE OF MARYLAND

Graeff,
Albright,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: July 11, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Md. Rule 1-104(a)(2)(B).

A jury in the Circuit Court for Washington County convicted appellant, Najee Raymond, of burglary in the first degree (home invasion), burglary in the fourth degree, possessing a handgun in a vehicle, possessing a handgun on person, assault in the second degree, and illegal possession of a firearm.[1] The court sentenced appellant to 25 years of imprisonment, all but 18 years suspended, on the conviction for home invasion; three years, consecutive, on the conviction for handgun in a vehicle; and ten years, concurrent, on the conviction for assault in the second degree. The court merged the remaining convictions.

On appeal, appellant presents the following questions for this Court's review, which we have rephrased slightly, as follows:

1. Were the verdicts legally inconsistent?
2. Was the evidence legally sufficient to support appellant's home invasion and handgun convictions?
3. Did the circuit court abuse its discretion in refusing to give a missing witness instruction?
4. Did the circuit court abuse its discretion in requiring appellant to stand before the jury and smile for 60 seconds so that it could determine whether appellant had gold teeth and facial tattoos?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

[1] The jury acquitted appellant on the charges of conspiracy to commit home invasion, burglary in the third degree, conspiracy to commit burglary in the third degree, conspiracy to commit burglary in the fourth degree, use of a firearm in a crime of violence or in a felony, conspiracy to use a firearm in a crime of violence or in a felony, assault in the first degree, conspiracy to commit assault in the first degree, conspiracy to commit assault in the second degree against Gabriel Gresczyk, assault in the second degree against Jenna Gresczyk, conspiracy to commit assault in the second degree against Jenna Gresczyk, assault in the second degree as to the minor, A.G., conspiracy to commit assault in the second degree as to the minor, A.G., assault in the second degree as to the minor, G.A.G., conspiracy to commit assault in the second degree as to the minor, G.A.G.

FACTUAL AND PROCEDURAL BACKGROUND

On April 11, 2020, two men entered the Gresczyk family home in Hagerstown, Maryland. Multiple witnesses testified at the two-day jury trial beginning on December 5, 2022.

I.

Mr. Gresczyk's Testimony

Gabriel Gresczyk testified that he, his wife, and their two children resided at a duplex located in Hagerstown. On April 11, 2020, as Mr. Gresczyk and the children ate lunch, someone knocked on the front door. Mr. Gresczyk opened the door to a "gentleman . . . who seemed kind of confused." Mr. Gresczyk had never seen the man before, and he suggested that the man had knocked on the door to the wrong house. Mr. Gresczyk told him to have a good day and closed the front door. As Mr. Gresczyk turned away from the front door, he saw another man, who he had never seen before, "coming in [his] back door, walking from [his] kitchen into [his] living room." Mr. Gresczyk, thinking this entry was a mistake, asked the man to "leave please." In an attempt to guide the man out of the house, Mr. Gresczyk touched the man, and the man became aggressive, "saying, don't f-ing touch me. Don't ever put your f-ing hands on me." The man was yelling, he started to "g[e]t up in [Mr. Gresczyk's] face," and he proceeded to jab or spear Mr. Gresczyk with his fingers.

Mr. Gresczyk stated that the man had the wrong place and needed to get out of the house. He told the man: "I got a wife, family. I don't want none of this. Please leave." At that point, the man pulled up his shirt, exposing "the butt of a gun," and he threatened:

"I know where you live. I'll go where I want." The man then exited through the front door. During the incident, Mr. Gresczyk was "freaking scared out of [his] mind." When asked if he sustained any injuries, Mr. Gresczyk testified that his nose was bleeding.

After the two individuals left, Mr. Gresczyk directed his wife to call 911. He opened the front door to get a look at the vehicle that the individuals were driving, but they sped off. Mr. Gresczyk described the vehicle to the 911 operator as a charcoal gray minivan, and he provided a partial tag number.[2] After the call to 911, police arrived, and Mr. Gresczyk relayed what had occurred.

Approximately one month after the incident, Mr. Gresczyk viewed a photo array. He testified that he was unable to identify appellant because the black and white photographs "were not . . . distinguishable enough." At trial, Mr. Gresczyk identified appellant as the person who entered his home on April 11, 2020.

[2] The State introduced the 911 call into evidence and played the recording in open court. Mr. Gresczyk noted the following to the 911 operator:

> [Mr. Gresczyk]: Somebody just walked into my house, punched me in the face, and then left.
>
> OPERATOR: Okay.
>
> [Mr. Gresczyk]: A black male with gold teeth, you know, gray (inaudible – one word) minivan. He just left on Willard Street out to . . . Jefferson and took a right on Jefferson. He just walked in my house in front of my children, showed a gun in his waist, punched me in the face, and then fucking left.

II.

Mrs. Gresczyk's Testimony

Mrs. Gresczyk testified that she was upstairs when she heard a knock at the front door. She heard Mr. Gresczyk say something like, "no problem man," and she heard the door close. She then heard voices downstairs and Mr. Gresczyk asking, "why are you in my house?" She went downstairs and saw Mr. Gresczyk standing at the bottom of the stairs while another man stood in front of him. As Mrs. Gresczyk began yelling at the man standing in front of her husband, she saw another man standing in the doorway of the front door.

Mrs. Gresczyk then asked: "[A]re you looking for Lo," the Gresczyks' neighbor. The man standing at the front door, "who looked very stunned, kind of shook his head yes." At that point, Mrs. Gresczyk announced that she was going to call Lo, and she turned to walk up the stairs. The man standing in front of Mr. Gresczyk said: "I don't give a who you call. I know where you live. I will be back. And you will be in my truck."[3] Mrs. Gresczyk turned to go upstairs, and she heard the door slam. She then heard Mr. Gresczyk say he was calling 911, and she heard him talking on the phone, giving a description of the vehicle.

Mrs. Gresczyk testified that, with respect to the man standing inside the home, she saw the right side of his face, and he was wearing a purple Ravens hoodie. She could see

[3] The transcript reflects the words "truck" and "trunk" interchangeably.

braids, gold teeth, and eyes. Mrs. Gresczyk identified appellant in a photo array, and she identified him during trial as the person inside her home on April 11, 2020.

III.

Officers Joseph Williamson & Jonathan Moczydlowsky

Joseph Williamson, an officer with the Hagerstown Police Department, testified that, after the incident occurred, he spoke with Mr. Gresczyk at his home. Mr. Gresczyk provided a description of the individuals involved and the first few letters of the license plate on their vehicle. Officer Williamson checked city camera footage and located a vehicle matching the description provided to him. He observed two males in the vehicle, and the driver appeared to be wearing a purple sweatshirt. He could not identify anyone in the vehicle.

Jonathan Moczydlowsky, a patrol officer for the City of Hagerstown, testified that, when the call came in about a home invasion, he began checking cameras in the area. He located a vehicle matching the description given, and he noted that one of the individuals in the vehicle was wearing a purple sweatshirt. After locating the vehicle on the footage, Officer Moczydlowsky went to search for the vehicle. He observed the vehicle at approximately 5:30 p.m., two hours after the home invasion call came in, "not far from where the crime had occurred," and he decided to try and stop the vehicle. He caught up to the vehicle as the driver parked it. The driver identified himself as Juvion Jackson, and Officer Moczydlowsky detained him as a suspect in the home invasion. At the time of the stop, Officer Moczydlowsky observed a "light-skinned" woman in the car with Mr.

Jackson. Mr. Jackson possessed a photo ID that appeared to be of the vehicle's female occupant. Officer Moczydlowsky did not observe appellant in the vehicle.

IV.

Corporal Allison Herman

Allison Herman, a Corporal for the Worcester County Sheriff's Office, testified that she presented a photo line-up that included appellant to Mrs. Gresczyk on May 12, 2020.[4] Mrs. Gresczyk reviewed the photos for a couple minutes. She immediately stated "no" when presented with the first, second, fourth, fifth, and sixth photographs. When presented with the third photograph, Mrs. Gresczyk asked if she would be able to look through the array a second time. Corporal Herman responded yes, and Mrs. Gresczyk then said "possibly," in reference to the third photograph. During Mrs. Gresczyk's second viewing of the photo array, she said "yes" to the third photo, stating that she was 90% certain that the person in the photo was the person who came through her door during the home invasion. She then stated: "I do not feel comfortable giving one hundred percent on anything because it's a month ago, and [conscience]-wise, I can't do it."

V.

Detective Jesse Patterson

Jesse Patterson, a detective with the Hagerstown Police Department, testified that, after interviewing the Gresczyks, he reviewed the city camera footage. He observed the

[4] Corporal Herman presented the photo line-up that included appellant to Mrs. Gresczyk because the Gresczyks lived in Worcester County at the time.

minivan, and the driver was wearing a purple shirt. He noted a front seat passenger in the minivan, who appeared to have a brown complexion, and he observed the minivan turn onto Liberty Street where the home invasion occurred.

Based on Officer Moczydlowsky's interaction with Mr. Jackson, Detective Patterson began conducting surveillance in the area where Mr. Jackson lived. Detective Patterson arranged a photo line-up of Mr. Jackson, and another officer presented it to the Gresczyks. Mrs. Gresczyk identified Mr. Jackson.

Detective Patterson then issued an arrest warrant for Mr. Jackson, and Mr. Jackson turned himself in to the Washington County Sheriff's Office on May 1, 2020. Several days later, Detective Patterson interviewed Mr. Jackson for approximately one hour. Detective Patterson testified that, through his interview with Mr. Jackson, he received information about the second individual involved in the home invasion, which led him to identify appellant. He testified that he obtained a photo of appellant, and he identified the person in the photo as the person sitting at the defense table.

VI.

Juvion Jackson

Mr. Jackson testified that, on April 11, 2020, he drove his van to a house on Liberty Street with the intent to enter the property. He knocked on the door, a person answered, and the person closed the door. A friend had travelled with him to the house on Liberty Street.

Mr. Jackson testified that he told police that the friend who was with him was appellant, "but that's not who was with [him]." He testified that he "sent a couple of papers to recant [his] statement, so it shouldn't be a surprise either." He acknowledged that, during his interview with detectives, he gave a physical description of the person who was with him that day, a description that "would favor [appellant]." He testified that he told the police "whatever they wanted to hear," and he pled guilty to one of the charges against him.

Pursuant to Maryland Rule 5-802.1(a), the State admitted into evidence Mr. Jackson's recorded interview with police.[5] At the beginning of his interview, Mr. Jackson denied any involvement in the home invasion, stating that he lent his minivan to someone the afternoon of the home invasion, and he used that individual's car until his minivan was returned. He described the individual as a black male named Najee who had tattoos on his face and gold teeth. Mr. Jackson stated that the minivan was registered to his sister-in-law,

[5] Maryland Rule 5-802.1(a) provides:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> (a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and was signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement.

Tiffany,[6] and after lending the minivan to the individual, he and his wife took the individual's car to Walmart.

Eventually, Mr. Jackson acknowledged that he was at the house on the day of the incident. He told the officers that he went to the house with appellant to confront an individual named Rob, and he did not realize that appellant was carrying a gun until the incident inside the house occurred.

Mr. Jackson testified that, on March 11, 2021, he wrote a letter recanting the statement he made to police.[7] At the time he made the statement to police, he was willing to implicate anyone in order to get himself out of trouble. He had no agreement with appellant to invade or burglarize the home nor did they have any discussion about using a gun. He gave the police appellant's name because he "figured [he] could tell them any name and they would believe [him]." He "could tell them the sky was purple," given that the officers were listening to everything he said, and "it didn't matter what [he] told them." He testified that he gave the officer "the first name that came to [his] head."

[6] During the interview, Detective Patterson asked Mr. Jackson for Tiffany's last name, but his response was inaudible. Defense counsel identified her as Tiffany Carlson during his argument for a missing witness instruction.

[7] Mr. Jackson read the letter in open court. The letter states:

> I, Javion Jackson recant my statement on Najee Raymond. I falsely accused him of my case. I actually do not know him and only did it based on heated emotions with a loved one. I knew I was coming to jail and figured a place to blame on somebody who I had issues with to get a better deal. I don't feel right putting him in a situation he has nothing to do with. I let my personal problems cloud my judgment and made a decision that could affect his life, and that is not right.

After the jury convicted appellant and the court sentenced him, this appeal followed. We will include additional facts, as warranted, in the discussion that follows.

DISCUSSION

I.

Verdicts

Appellant contends that the verdict finding him guilty of "home invasion," or burglary in the first degree, was legally inconsistent with other verdicts that the jury rendered.[8] Specifically, he asserts that the conviction of home invasion was inconsistent with his acquittal on the charges of third-degree burglary, first-degree assault, conspiracy

[8] The verdicts rendered by the jury were as follows (emphasis added):

Home invasion: Guilty
Conspiracy to commit home invasion: Not guilty
Burglary third degree: Not guilty
Conspiracy to commit burglary third degree: Not guilty
Burglary fourth degree: Guilty
Conspiracy to commit burglary fourth degree: Not guilty
Handgun in vehicle: Guilty
Handgun on person: Guilty
Firearm use in violent crime: Not guilty
Conspiracy to use a firearm in violent crime: Not guilty
Assault first degree: Not guilty
Conspiracy to commit assault first degree: Not guilty
Assault second degree (Gabriel Gresczyk): Guilty
Conspiracy to commit assault second degree (Gabriel Gresczyk): Not guilty
Assault second degree (Jenna Gresczyk): Not guilty
Conspiracy to commit assault second degree (Jenna Gresczyk): Not guilty
Assault second degree (minor A-G): Not guilty
Conspiracy to commit assault second degree (minor A-G): Not guilty
Assault second degree (G-A-G): Not guilty
Conspiracy to commit assault second degree (minor G-A-G): Not guilty
Regulated firearm, illegal possession: Guilty

to commit first-degree assault, and use of a firearm in the commission of a crime of violence. Appellant acknowledges that trial counsel failed to argue that the verdicts were legally inconsistent until filing his motion for new trial, and therefore, that the issue is not preserved for review, "but he submits that this case is uniquely appropriate for plain error review."

The State contends that we should decline to address appellant's unpreserved inconsistent verdict claim. It asserts that plain error is inappropriate in this case, noting that the court cannot resolve an alleged inconsistent verdict in the absence of a request from the defendant, who might wish to accept the benefit of an inconsistent acquittal. *Givens v. State*, 449 Md. 433, 476 (2016) ("When inconsistent verdicts are rendered, the [trial court] may not, *sua sponte*, send the jury back to resolve the inconsistency, because it is the defendant who is entitled, should he [or she] so wish, to accept the benefit of the inconsistent acquittal.") (alterations in original) (quoting *Tate v. State*, 182 Md. App. 114, 135 (2008)).

A.

Preservation

The Supreme Court of Maryland has made clear that, "to preserve for review any issue as to allegedly inconsistent verdicts, a defendant in a criminal trial by jury must object to the allegedly inconsistent verdicts or otherwise make known his or her position before the verdicts become final and the trial court discharges the jury." *Givens*, 449 Md. at 472-

73. As the Court noted, there are multiple reasons for this rule. *See id.* at 473-76. It described one of those reasons, as follows:

> [Q]uite often[,] a defendant's optimal choice will be to remain silent, thus waiving his [or her] challenge to the inconsistent verdicts and accepting the conviction that may be inconsistent. A defendant, aware of his or her guilt, or the overwhelming evidence of guilt, of all of the crimes of which he or she stands charged, may choose to accept the jury's lenity. A defendant may be wise to accept the inconsistent conviction and accompanying sentence, rather than look a gift horse in the mouth. If the defendant objects to the inconsistent verdicts, the jury, given a second chance, may choose to remedy the error in a manner [that is] not in the defendant's favor.

Id. at 475-76 (alterations in original) (quoting *Price v. State*, 405 Md. 10, 40 n.9 (2008) (Harrell, J., concurring)). "Under Maryland case law, a jury's verdict is final when the trial court accepts the verdict after the jury has hearkened to the verdict and/or been polled." *Id.* at 478.

Here, after the jury foreperson announced the verdicts, appellant did not object for any reason. The jury hearkened to the verdict, and the court asked appellant: "Any request to the jury?" Counsel for appellant replied: "No." The court excused the jury, and the jury exited the courtroom. Defense counsel asked the court to postpone sentencing and to order a presentence investigation report ("PSI"). The court granted the requests.

At that point, appellant asked: "What's going on?" The following colloquy then occurred:

> [Appellant]: Isn't it double jeopardy if you have one person already saying home evasion, then you're trying to get the next person with home evasion to try on them twice. You try them, and you capped out.
>
> [Defense counsel]: Well, that's something - - the Court's not going to give you an opinion on.

> THE COURT: I can't give you legal advice. You certainly can talk to [defense counsel]. If he thinks there's any motions that need to be filed on your behalf, he's happy to do that.
>
> [Appellant]: And you're convicted of home evasion, but not first-degree assault. That's an element of home evasion.
>
> THE COURT: Well, you can talk to [defense counsel], and he can file any motions that he thinks are appropriate.
>
> [Appellant]: And handgun. You have to have a handgun for you to be convicted, or video, or description of a gun.
>
> THE COURT: [Defense counsel], you need to talk to [defense counsel] and …
>
> [Defense counsel]: Well, that's -- that's something for appeal.
>
> [Appellant]: I've got to have two more people.
>
> [Defense counsel]: That's something for appeal.
>
> THE COURT: He - - he can file motions on your behalf. You can file an appeal. Whatever - - whatever you wish.
>
> [Defense counsel]: On appeal, you can't file until after sentencing.

As the record reflects, appellant questioned the verdict only after it became final and the jury was discharged. Under these circumstances, his appellate argument that the jury rendered inconsistent verdicts is not preserved for this Court's review.

B.

Plain Error

Appellant contends that, even though he did not preserve the issue, we should exercise our discretion to engage in plain error review. As indicated, the State contends

that plain error review is inappropriate in this case, asserting that appellant has failed to meet the "necessary preconditions to the discretionary exercise of plain error review."

Plain error review is a doctrine that permits this Court to review, at its discretion, an "unpreserved error." *Winston v. State*, 235 Md. App. 540, 568, *cert. denied*, 461 Md. 509 (2018). Plain error review is "reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Newton v. State*, 455 Md. 341, 364 (2017) (quoting *Robinson v. State*, 410 Md. 91, 111, (2009)), *cert. denied*, 538 U.S. 1067 (2018). "It is 'rare' for the Court to find plain error." *Id.* (quoting *Yates v. State*, 429 Md. 112, 131 (2012)). *Accord Morris v. State*, 153 Md. App. 480, 507 (2003) (appellate review based on plain error is "a rare, rare phenomenon"), *cert. denied*, 380 Md. 618 (2004).

To be eligible for plain error review, there must be an error that meets three conditions:

> (1) the error must not have been "intentionally relinquished or abandoned, i.e., affirmatively waived"; (2) the error must be "clear or obvious rather than subject to a reasonable dispute"; and (3) the error must have affected the "substantial rights" of the appellant, which means "he must demonstrate that it affected the outcome of the district court proceedings." *State v. Rich*, 415 Md. 567, 578, 3 A.3d 1210 (2010) (cleaned up). Even if these three requirements are met, this Court should exercise its discretion to review the error only if it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.*

Mungo v. State, 258 Md. App. 332, 370, *cert. denied*, 486 Md. 158 (2023).

Under the circumstances here, we decline to exercise our discretion to engage in plain error review of this issue. *See Morris*, 153 Md. App. at 506-07 (noting that the five

words, "[**w**]**e decline to do so**," are "all that need be said, for the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation").

II.

Sufficiency of the Evidence

Appellant argues that the evidence presented by the State was legally insufficient to support his home invasion and handgun convictions. He asserts that the State did not prove that he: (1) had the intent to commit a crime of violence upon entering the Gresczyk home; (2) possessed a handgun as opposed to a different type of firearm; and (3) possessed a gun inside the van.

The State contends that appellant's claim regarding the sufficiency of the evidence to support the home invasion conviction is unpreserved for our review. In any event, it argues that the evidence was legally sufficient to support that conviction, as well as the other two challenged convictions.

A.

Standard of Review

"Upon review of a criminal conviction for sufficiency of the evidence, we 'consider the evidence adduced at trial sufficient if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt.'" *Howard v. State*, 261 Md. App. 592, 605 (2024) (quoting *Beckwitt v. State*, 249 Md. App. 333, 351 (2021)). Whether the evidence presented was direct or circumstantial, we "defer to the finder of fact and to any

reasonable inferences a jury could have drawn in reaching its verdict." *Id.* (quoting *Mohan v. State*, 257 Md. App. 65, 74 (2023)). "Although circumstantial evidence alone is sufficient to sustain a conviction, the inferences made from circumstantial evidence must rest upon more than mere speculation or conjecture." *Id.* at 606 (quoting *Corbin v. State*, 428 Md. 488, 514 (2012)).

B.

Home Invasion

Before addressing the sufficiency of the evidence to support the conviction of home invasion, we address the State's argument that appellant's claim in this regard is not preserved for this Court's review. Pursuant to Maryland Rule 4-324(a), a criminal defendant who moves for judgment of acquittal is required to "state with particularity all reasons why the motion should be granted." A defendant must "argue precisely the ways in which the evidence should be found wanting and the particular elements of the crime as to which the evidence is deficient." *Mulley v. State*, 228 Md. App. 364, 388 (2016) (emphasis omitted) (quoting *Hobby v. State*, 436 Md. 526, 539 (2014)). "[A] motion which merely asserts that evidence is insufficient to support a conviction, without specifying the deficiency, does not comply with Rule 4-324 and thus does not preserve the issue of sufficiency for appellate review." *Id.* at 387-88 (alteration in original) (quoting *Johnson v. State*, 90 Md. App. 638, 649 (1992)). "[A] defendant may not tell the trial court that the evidence was insufficient for one reason, but then urge a different reason for the insufficiency on appeal." *Winston*, 235 Md. App. at 574.

Here, at the close of the State's case, defense counsel moved for judgment of acquittal. When asked if he wanted to be heard, he stated:

> Ah. Simply that this case reeks of reasonable [doubt]. And, um. I think that there is sufficient rationale. Certain things could not have occurred. For example, the conspiracy charge. The only testimony has been that we didn't communicate. And that's verbatim what [Mr.] Jackson said. That there was no communication between himself and either [appellant] or anyone else. So, I - - I think the conspiracy counts, which require a specific agreement to do something, we don't have that. We've got them entering at a slightly different time. We've got [Mr.] Jackson doing one thing. We've got allegedly [appellant] doing another thing. But they didn't agree, as far as I can tell, to commit the burglary, to commit conspiracy, to any of the conspiracy counts. And then I can get into the other counts later with greater specificity. But at this point, that's - - that would be this motion where we would be.

The State argued that reasonable doubt was to be decided by the jury. The prosecutor noted that Mr. Jackson told the police that they were going to the house because "he had a beef with somebody," and appellant volunteered to come and help, indicating "some type of an implicit agreement, if not an explicit agreement."

The court asked defense counsel if he had anything further to say, but counsel said that he would "leave it where it is right now." The court denied the motion.

Appellant rested, and he then renewed his motion and moved to dismiss all charges. Counsel made the following argument:

> As to the conspiracy counts, I believe the testimony has been very clear that there was basically no contact between Mr. Jackson and the alleged second perpetrator, in this case [appellant]. And I do not believe that under any scenario the Court can - - or the State has showed the - - ah, the conspiracy count, which would be count two, conspiracy home invasion, count four, conspiracy burglary. Handgun in vehicle. I don't know where the facts are in that case, but I certainly did not hear any testimony about there being a handgun belonging to my client in a vehicle. Firearm use in a violent crime.

> One person saw what was the butt of the handle, allegedly. Nobody else saw anything else as it relates to an alleged gun. Conspiracy for first degree assault, same thing. Count 18, conspiracy assault in the first degree. Same with Count 21, assault in the second degree. Same with a second count of assault in the second degree. They double up because of the various adult parties that were in there, as I - - I can gather. And that would be my argument as to those counts.

After the State argued that the evidence was sufficient, defense counsel responded again, arguing about the sufficiency of the conspiracy count.

As the record reflects, defense counsel made no argument below, as appellant does on appeal, that the evidence was insufficient to support the home invasion charge because there was no evidence that he had the intent to commit a violent crime when entering the house. Appellant notes in his reply brief that counsel said in his motion: "[T]his case reeks of reasonable amount….Certain things could not have occurred." He argues that this "was enough to preserve the matter for appellate review, albeit barely so." We are not persuaded. Defense counsel did not raise with particularity below the claim that the State presented insufficient evidence to support the home invasion conviction based on a lack of evidence that he had an intent to commit a violent crime upon entering the Gresczyks' home. Accordingly, this issue is not preserved for appellate review.

We note briefly that, even if the issue was preserved for review, we would conclude that the issue is without merit. To be sure, as appellant notes, to convict of home invasion the State had to show, "at the time of the breaking and entering, the intent to commit a crime of violence." *Accord Reed v. State*, 316 Md. 521, 526 (1989). Here, there was evidence in support of that element of the offense. Mr. Jackson told the police that he was

mad at Rob, and he agreed with the officer's statement that he and appellant were going to his house to "beat his ass." The State argues:

> This evidence, "if believed and given maximum weight," (*Starke v. Starke*, 134 Md. App. 663, 678 (2000)), was sufficient to allow a rational juror to conclude that Raymond had the intent to commit a crime of violence when he broke and entered into the Gresczyk residence. He had, after all, accompanied Jackson there to "fight" someone, armed himself with a gun, entered the rear door, argued with Mr. Gresczyk and struck him in the nose—causing it to bleed—and threatened him on the way out.

We agree.

C.

Handgun Convictions

Appellant next contends that the evidence was insufficient to sustain his "handgun convictions."[9] In support, he makes two arguments. First, he asserts that, although Mr. Gresczyk testified that he saw appellant with a gun, there was no evidence that established that what he saw "actually was a *handgun* as opposed to a different type of firearm—real or fake— that would not qualify as a handgun under" Md. Code Ann., Crim. Law ("CR") § 4-203(a)(1)(i). Second, he argues that the evidence was not sufficient to support his conviction under CR § 4-203(a)(1)(ii) for carrying a handgun in a vehicle because there

[9] As indicated, appellant was found guilty of three handgun charges based on violations of the following statutes: (1) Md. Code Ann., Crim. Law ("CR") § 4-203(a)(1)(i) (2024 Supp.) (prohibiting the wearing, carrying, or transporting of a handgun on or about the person); (2) CR § 4-203(a)(1)(ii) (prohibiting the wearing, carrying, or knowing transport of a handgun in a vehicle); and (3) Md. Code Ann., Pub. Safety ("PS") § 5-133(b) (2024 Supp.) (prohibiting the possession of a regulated firearm by a prohibited person). In his reply brief, he clarifies that he is not challenging his conviction under the Public Safety Article.

was no evidence that appellant was "in the van, much less . . . that he had a gun with him inside the van." He asserts, therefore, that the "handgun in [a] vehicle conviction rested on pure speculation" and must be reversed.

The State contends that the evidence presented at trial was sufficient to support appellant's two convictions of wearing, carrying, or transporting a handgun in violation of CR § 4-203, corresponding to his person and a vehicle. It asserts that the evidence "supported the reasonable inference" that appellant carried a handgun as defined by CR § 4-201(c)(1), noting that appellant stipulated that the gun Mr. Gresczyk saw was a regulated firearm, i.e., a handgun, and Mr. Gresczyk gave an affirmative answer to the statement that "the only thing in the world it could be [was] a handgun." The State further argues that, based on the evidence presented, the jury could reasonably infer that appellant wore, carried, or transported the handgun in the vehicle that "Mr. Gresczyk saw fleeing the scene."

As indicated, CR § 4-203(a)(1)(i) provides that a person may not "wear carry, or transport a handgun . . . on or about the person," and § 4-203(a)(1)(ii) provides that a person may not "wear, carry or knowingly transport a handgun . . . in a vehicle." CR § 4-201(c) defines a handgun as "a pistol, revolver or other firearm capable of being concealed on the person," which "includes a short-barreled shotgun and a short-barreled rifle," but "does not include a shotgun, rifle, or antique firearm."

In "cases involving the use of a statutorily defined weapon, the State is obligated to prove, beyond a reasonable doubt, that the weapon meets the statutory definition."

Howard, 261 Md. App. at 613. "[E]vidence to support a conviction for a handgun crime is insufficient unless a jury can find beyond a reasonable doubt that the weapon used met the statutory definition of a handgun." *Id.* at 624 (quoting *Brown v. State*, 182 Md. App. 138, 166 (2008)). The identity of the weapon "as a handgun can be established by testimony or by inference." *Id.* (quoting *Brown*, 182 Md. App. at 166).

Here, Mr. Gresczyk testified that, when appellant "pulled his shirt up," he saw a gun. The following exchange then occurred:

> [Defense counsel]: Even though in your information to the police, you didn't mention the gun. All you said, was uh, the man lifted his sweatshirt to reveal a handgun in his waistband. Now, are you meaning to say that you saw the whole gun or just a black piece coming up from [appellant's] waist?
>
> [Mr. Gresczyk]: The handle of the gun.
>
> [Defense counsel]: Alright, and-and you didn't necessarily know it could have been a cell phone. Correct?
>
> [Mr. Gresczyk]: No.
>
> [Defense counsel]: So, the only thing in the world it could be is a handgun?
>
> [Mr. Gresczyk]: Correct.

Mr. Gresczyk subsequently explained the basis for his conclusion that appellant had a gun tucked into his waistband.

> [State]: How-how do you know that it was the handle of a gun?
>
> [Mr. Gresczyk]: Nobody tucks a cell phone into their waist.
>
> [State]: Do you have any familiarity with guns or handguns?
>
> [Mr. Gresczyk]: I was raised around firearms.

[State]: So, you've seen the butts of guns before?

[Mr. Gresczyk]: Yeah. Pellet guns, BB guns, real guns, small guns, big guns.

[State]: And-and this was consistent …

[Mr. Gresczyk]: Yes.

[State]: …what you saw was consistent with the butt of a gun, a handgun? And seeing the defendant here in court today, you said you could identify him as the person that was in that house?

[Mr. Gresczyk]: Absolutely.

Moreover, in addition to Mr. Gresczyk's testimony, the court instructed the jury that appellant stipulated that the gun at issue in the case was a regulated firearm, which "means a handgun which is a firearm with a barrel less than 16 inches in length and includes a signal pistol, a starter pistol or a blank pistol." There was sufficient evidence to support appellant's conviction for possession of a handgun on his person.

With respect to the conviction for carrying a handgun in a vehicle, we agree with appellant that there was no direct evidence that appellant had the gun with him in the minivan. Nevertheless, the jury could infer that the appellant had the weapon that Mr. Gresczyk saw on him when he left the house and "sped off" in the minivan. The evidence was legally sufficient to support appellant's conviction.

III.

Missing Witness Instruction

Appellant contends that the court abused its discretion in refusing to give a missing witness instruction. This argument is premised on his assertion that the State should have

called two witnesses: Mr. Jackson's wife and her sister-in-law, the owner of the minivan. Although acknowledging that what either witness "might have said on the witness stand is somewhat 'speculative,'" he asserts that their testimony was material because they "undoubtedly would have been able to say whether [a]ppellant or someone else was in the van with [Mr.] Jackson at the time of or in the vicinity of the home invasion."

The State contends that the court properly exercised its discretion in declining to give a missing witness instruction to the jury. It asserts that neither witness was peculiarly available to the prosecution, and to the extent that they were, their testimony would not "have elucidated the transaction in a material way."

A.

Proceedings Below

During the discussion regarding jury instructions, defense counsel asked for a missing witness instruction, stating that the two women discussed by the State "could and should have [been] called." The State objected to giving the instruction because: (1) appellant had not identified the witnesses he intended to name as missing; and (2) if appellant was referring to Mr. Jackson's interview where he talked about his wife and those related to his wife, no statement was made "that they had any information relative to [appellant] and this particular portion of the case." The State said: "There's nothing to go on that's saying that they had important testimony regarding an issue in this case, because there was just nothing produced."

Defense counsel noted that the names of the women were in the pleadings provided by the State, specifically, the owner of the minivan, Tiffany Carlson, and Mr. Jackson's wife, Leticia. He argued that it was important who was driving the car and who was in the car "because the police followed this car" and observed a woman in the car. He asserted that Mr. Jackson's wife "could have testified that following . . . the alleged home invasion, [appellant] was there or not there, or it was me in the car with my husband, any of a variety of different things that she could offer."

The court found that the witnesses were available to appellant, as well as to the State, and appellant had not proffered information that either woman could have given important testimony on an issue in the case because there was no testimony that a woman was in the home or in the car as it drove away. The court declined to give the missing witness instruction.

B.

Analysis

"The missing witness rule is 'that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.'" *McDuffie v. State*, 115 Md. App. 359, 365 (1997) (quoting *Woodland v. State*, 62 Md. App. 503, 510 (1985)). "A missing witness instruction calls the jury's attention to the *absence* of evidence (*i.e.,* the imagined testimony of the missing witness), allows the jury to attribute that absence to one of the parties, and permits the jury to draw a negative inference

against that party for failing to produce that evidence." *Harris v. State*, 458 Md. 370, 390 (2018).[10]

To invoke the missing witness rule, the moving party must establish, and the court must find, several prerequisites. *Id.* at 404. Those basic prerequisites were described by the *Harris* Court as follows:

> (1) There is a witness
>
> (2) Who is peculiarly available to one side because of a relationship of interest or affection
>
> (3) Whose testimony is important and non-cumulative
>
> (4) Who is not called to testify

Id. To show that a missing witness was peculiarly available to one side, the proponent of the instruction must show "either that the witness is physically available only to the opponent or that the witness has the type of relationship with the opposing party that pragmatically renders his testimony unavailable to [the moving party]." *Dansbury v. State*, 193 Md. App. 718, 746 (2010) (quoting *Chi. Coll. of Osteopathic Med. v. George A. Fuller Co.*, 719 F.2d 1335, 1353 (7th Cir.1983)).

[10] The pattern instruction contained in Maryland Criminal Pattern Jury Instructions Cr 3:29 (3d ed. 2024) provides as follows:

> You have heard testimony about (witness's name), who was not called as a witness in this case. If a witness could have given important testimony on an issue in this case and if the witness was peculiarly within the power of the [State] [defendant] to produce, but was not called as a witness by the [State] [defendant] and the absence of that witness was not sufficiently accounted for or explained, then you may decide that the testimony of that witness would have been unfavorable to the [State] [defendant].

The "trial court has discretion not to give a missing witness instruction even if a party requests the instruction and the necessary predicate for such an instruction has been established." *Harris*, 458 Md. at 405-06. Conversely, the "trial court has no discretion to give a missing witness instruction where the facts do not support the inference." *Id.* at 406. "A trial court abuses its discretion when no reasonable person would take the view adopted by the trial court, or when the ruling is clearly against the logic and effect of facts and inferences before the court." *Lewis v. State*, 263 Md. App. 631, 664 (2024) (quoting *Prince v. State*, 255 Md. App. 640, 652 (2022)).

Here, the court did not abuse its discretion in declining to give the missing witness instruction. As the court noted, the record does not reflect that Tiffany Carlson, the registered owner of the minivan, or Leticia, Mr. Jackson's wife, were peculiarly available to the State. Appellant does not contend that they were not physically available to him, and we are not persuaded that they had the type of relationship with the State that pragmatically rendered their testimony unavailable to appellant. Appellant's argument that these witnesses were aligned with the State because Mr. Jackson was so aligned fails, given that Mr. Jackson recanted at trial his statement to the police implicating appellant. Moreover, appellant acknowledges that any testimony from these witnesses was "speculative," and the trial court properly determined that, based on the proffer, there was no showing that the witness' potential testimony would have been important to the charges at issue.

IV.

Displaying Appellant to the Jury

Appellant contends that the circuit court abused its discretion in requiring appellant to stand before the jury and smile so the jury could see whether he had gold teeth and facial tattoos. He concedes that such a display was not in violation of his Fifth Amendment privilege against self-incrimination. *See Doye v. State*, 16 Md. App. 511, 524 (in affirming ruling compelling appellant to expose forearm to the jury, this Court noted that the privilege against self-incrimination protects "only communicative or testimonial statements rather than 'identifying physical characteristics'") (quoting *United States v. Wade*, 388 U.S. 218, 222-23 (1967)), *cert. denied*, 268 Md. 747 (1973).

Appellant argues, however, that requiring him to stand before the jurors "and bare his teeth for 60 seconds" was unfairly prejudicial. He asserts that it afforded the jury "a far superior opportunity to view [a]ppellant and his various facial features than either of the eyewitnesses had," and this demonstration created "an unfair comparison and placed undue emphasis on that aspect of the evidence."

The State contends that the court properly exercised its discretion in requiring appellant to show his face and teeth to the jury. It notes that the identity of the assailant was in dispute, and the victims identified him, in part based on his distinctive gold teeth and facial tattoos. It asserts that, under these circumstances, and given the court's observation that court conditions may not have permitted the jury to see whether appellant had gold teeth, the court did not abuse its discretion in determining that allowing the jury

to see appellant's face and teeth was substantially more probative than prejudicial. It states that the court "thoughtfully and thoroughly tailored its ruling to the courtroom conditions and the centrality of identity to the case."

A.

Proceedings Below

At the conclusion of the State's evidence, the State, relying on *Rainey v. State*, 252 Md. App. 578 (2021), *aff'd*, 480 Md. 230 (2022), requested that the court direct appellant "to present himself to the jury for facial tattoos and for the gold teeth." The State argued that, pursuant to *Rainey*, a defendant's "physical attributes may be evidence at trial."

Defense counsel argued that appellant had sat in court for two days and the jury could have observed his physical characteristics throughout the trial. Under these circumstances, he argued that presenting appellant to the jury would reveal nothing that could not readily be observed in court. He asserted that, to bring appellant before the jury box "and have him show certain things places far too much weight on just the physical as it does the entire case itself," and the request amounted to a "stunt by the State."

After hearing argument on the issue, the court granted the State's request. It noted, with respect to the jury's ability to observe facial tattoos, that the lighting in the courtroom where the testimony was taken "was so poor that I could not see very well whether [appellant] had or did not have facial tattoos in the lighting in that courtroom as I sat there. I do feel like I can see better in the lighting in this courtroom." With respect to "whether [appellant] does or does not have gold teeth," the court noted that was a particularly

identifying characteristic talked about by the victim and Detective Patterson. The court stated that it did not believe that the jury had been able to see whether appellant had gold teeth and that was "something that would not be available to them unless [appellant] is smiling or showing his teeth."

After some back and forth between defense counsel and the court regarding how appellant would present himself to the jury, the court proposed the following:

> My feeling is that I don't think anything should be specifically said to the jury except that there's been a request. Doesn't have to say who's requesting it. There's been a request to have [appellant] appear, you know, before the jury specifically so that they can observe him. And then, [appellant], you would display your teeth through a smile. You could smile at the jury. That would be something that doesn't add additional sort of prejudicial, you know, appearance to it. I don't think it would be fair to you to require you to display your teeth in some other way, but a smile is a pleasant way to do that. Something that would not be off-putting to the jury. And then they can see, and again, the tattoo in certain light is visible in certain light. It was not visible to me in courtroom three, but it is visible to me in courtroom one. The lighting is different in these two courtrooms. So, I think it would be reasonable to have [appellant] stand at the end of the trial table where [the prosecutor] is. [Defense counsel], if you'd like to be up there with him to sort of manage how this is presented to the jury, I'm fine with that.
>
> * * *
>
> Here's what I would come up with. I will take your suggestions though beyond this. I think [appellant] should stand sort of roughly in the middle of the - - of the area centered to where the jury is, probably at the end of that trial table, with you is fine, and stand there for a few minutes. . . [S]tand there so that the jury can observe him and give a smile. A smile is the least prejudicial, I would think. I don't want to require him to bar his teeth or something that - - that may have a more difficult - - may seem more unpleasant to the jury. A smile is the most pleasant thing I can think of so that the jury can observe his teeth, whether they are gold or not gold. And I would point out if they're not gold, that's a big factor in his favor, I would say. So, we can talk about the period of time, although I don't want to seem that this is too directive. I feel like for the jury's purposes, if they feel like

> this is not compelled by the Court, it may be more beneficial to Mr. Raymond. But that's really your call.
>
> * * *
>
> If you want me to time it, and there can be a ding at the end, and then [appellant], again, the Court's instructing you to allow the jury to see your teeth. I think a smile is the most pleasant way for that to happen. I think it would not be - - I think the jury would find that to be the most pleasant countenance that you could present. A smile is always - - always good. So that would be my plan. After 60 seconds, then [defense counsel], you and [appellant] can come back and sit down, and we won't make any more fuss about it than that.

At the conclusion of the colloquy, the court brought the jury back into the courtroom and explained that defense counsel and appellant were "going to come over for a moment and stand over here." After a long pause, presumably during which appellant presented himself to the jury, the court stated: "I think we're good." The State then rested.

B.

Analysis

Appellant does not, for good reason, contend that the evidence regarding his facial features was irrelevant. *See State v. Summers*, 413 S.E.2d 299, 300 (N.C. Ct. App. 1992) (order to defendant to display his teeth to the jury was relevant where the victim described her assailant as a man with missing teeth); *State v. Gonzalez*, 856 N.W.2d 580, 583, 588 (Wis. 2014) (display of defendant's platinum teeth was material and permissible where the identity of the assailant was the central issue in dispute and the victim stated that one of the people involved had platinum teeth); *State v. Square*, 433 So. 2d 104, 109 (La. 1983)

(defendant's display of his teeth to the jury "was relevant and material to defendant's identification").

Here, appellant's teeth and facial tattoos were two of the specific identifying factors that witnesses used to describe the home invader. Similarly, as in the cases cited, *supra*, one of the material facts to be proved was whether appellant was the person who committed the home invasion. Accordingly, appellant's teeth and facial tattoos were relevant to the case because the presence or absence of gold teeth and facial tattoos was both probative and material to appellant's identification.

Appellant contends, however, that the court's order was unfairly prejudicial. To justify exclusion of otherwise relevant evidence under that theory, the "danger must not simply outweigh 'probative value' but must, as expressly directed by Rule 5-403, do so '*substantially*.'" *Montague v. State*, 471 Md. 657, 696 (2020) (quoting *Molina v. State*, 244 Md. App. 67, 135 (2019)). The balancing of prejudicial and probative value is "committed to the sound discretion of the trial court." *Id.* at 675 (quoting *Portillo Funes v. State*, 469 Md. 438, 479 (2020)).

Here, as indicated, the display of appellant's teeth was clearly relevant to the identity of the assailant.[11] The court considered that the jury likely could not otherwise have seen his teeth and the facial tattoos, and it weighed steps to reduce unfair prejudice. Under these

[11] In opening and closing argument, defense counsel made clear that appellant's defense was that he was not the assailant.

circumstances, we cannot conclude that the court abused its discretion in compelling appellant to display his teeth to the jury.

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