Circuit Court for Baltimore City
Case No. 120323032

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 945

September Term, 2022

MICHAEL YATES

v.

STATE OF MARYLAND

Wells, C.J.,
Nazarian,
Beachley,

JJ.

Opinion by Nazarian, J.

Filed: September 13, 2023

* 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 Maryland Rule 1-104(a)(2)(B).

Michael Yates was charged with possession of a regulated firearm and possession of ammunition under the Maryland statute that prohibits individuals previously convicted of a disqualifying crime from possessing them. He moved to dismiss the charges on the ground that they violate his rights under the Second Amendment to the Constitution of the United States. The Circuit Court for Baltimore City denied the motion. Mr. Yates's first trial ended in a hung jury, but he was tried again and convicted of both crimes.

On appeal, Mr. Yates argues that the trial court denied his motion to dismiss improperly because the statutes under which he was convicted violate his Second Amendment right to keep and bear arms in self-defense. He argues as well that the trial court erred in admitting two recorded telephone calls from jail into evidence and in instructing the jury not to consider the potential punishment or penalty while deliberating on his possible guilt. We affirm.

I. BACKGROUND

On the evening of October 21, 2020, Baltimore Police Detectives Raymond Burgos and Richard Whittaker and a squad of officers in full uniform responded to a tip about illegal activity in the 6400 block of O'Donnell Street. With guidance from a police helicopter, the officers converged from two directions on a tent in a field. Once inside the tent, Detective Whittaker encountered three individuals, two women and a man called "X," with whom Detective Whittaker was familiar from prior investigations. After a brief conversation with "X," officers continued through the tent and Detectives Burgos and Whittaker discovered Mr. Yates. Detective Whittaker spotted a handgun lying on the

ground between Mr. Yates's feet. He secured the firearm, which was loaded with seven rounds in the magazine, and arrested Mr. Yates.

Mr. Yates was charged with one count of possession of a regulated firearm, in violation of Maryland Code (2003, 2022 Repl. Vol.), § 5-133(c) of the Public Safety Article ("PS"), and one count of illegal possession of ammunition, under PS § 5-133.1(b).[1] Section 5-133(c) provides that a person may not possess a regulated firearm if the person previously has been convicted of a crime of violence[2] or any of several felony controlled dangerous substance offenses, including distribution. PS § 5-101(c)(3). Section 5-133.1 provides that a person may not possess ammunition if the person is prohibited from possessing a regulated firearm under, among others, PS § 5-133(c).

On July 1, 2022, Mr. Yates filed a motion to dismiss the charges. He argued, as he argues here, that PS §§ 5-133(c) and 5-133.1 violate the Second Amendment to the Constitution of the United States. The State opposed the motion, and the court denied it. He was tried before a jury over the course of July 5–6, 2022, and that trial concluded in a hung jury. Mr. Yates was tried again before a new jury on July 7, 2022.

At the outset of the second trial, Mr. Yates renewed his earlier motions and objections, the State renewed its earlier arguments, and the court stated that it would stand

[1] Mr. Yates also was charged initially with one count of possession of a firearm after having been convicted of a drug felony in violation of Maryland Code (2002, 2021 Repl. Vol.), § 5-622 of the Criminal Law Article, but the State later *nol prossed* this charge and it was never submitted to the jury.

[2] The definition of "crime of violence" includes, among other things, second-degree assault. *See* PS § 5-101(c).

by its rulings but considered the renewed arguments preserved for appellate review. Additionally, the State and Mr. Yates stipulated, as they had during the first trial, that "[Mr. Yates] was previously convicted of a crime that disqualifies him from possessing a regulated firearm and ammunition under Public Safety Article § 5-133(c) and 5-133.1."[3] The only question for the jury, then, was whether Mr. Yates possessed a regulated firearm and ammunition.

Detectives Whittaker and Burgos both testified at trial. They recounted the night of the arrest and provided testimony about their body camera footage from that night, which was admitted into evidence. In addition, Detective Whittaker testified about his background knowledge of phone calls from jail. The trial court then admitted into evidence, over Mr. Yates's objection that the evidence was "more prejudicial than probative," recordings of two telephone calls made from the correctional facility at which Mr. Yates was held after his arrest. The first call was placed two hours after Mr. Yates's arrest on October 21, 2020, and the ID pin on the call was unlisted. But the person who made the call from jail repeatedly said his name was "Mike" and that "X" was at the scene too. "Mike" explained that "they" swarmed him and reported what police found at the scene:

UNKNOWN: (Unintelligible) did they get any shit off you?

[3] Because of this stipulation, no evidence was presented at either the first or second trial detailing the crimes of which Mr. Yates had previously been convicted. However, at sentencing, the State noted that "for [Mr. Yates's] criminal history, it's 11 prior convictions between 1998 and 2015. . . . There were four felony drugs offenses, six possession of CDS offenses and one second degree assault . . . ."

> MR. YATES:[4] No. It wasn't on me. It's right there on the ground. Reason why I did it, I don't ever do that. . . .
>
> * * *
>
> Shit (unintelligible). It was right there. Like, it wasn't on me. It wasn't directly on me. It was right there on the ground.

The second call, on October 26, 2020, was to the same phone number as the first. The caller stated again that his name was "Mike" and "Mikey Baltimore" before also giving the unknown recipient Mr. Yates's ID number and the address of the correctional facility so that the recipient could send the caller a money order.

At the close of arguments, the State asked the court to read the following supplemental jury instruction, taken from Professor David Aaronson's treatise on criminal jury instructions in Maryland,[5] to the jury:

> You should not be swayed by sympathy, prejudice or public opinion. The question of punishment or p[e]n[al]ty in the event of a conviction should not enter into or influence your deliberations in any way.
>
> You should not guess or speculate about the punishment. Your job will be complete after finding the defendant not guilty or guilty.
>
> In the event that you find the defendant guilty, the duty of imposition [of] punishment rest[s] solely on the Court. Under your oath as jurors, you should weigh the evidence in the case and determine whether you find the defendant guilty or not guilty, based solely upon the evidence and the law on which you've been instructed. Punishment must not be part of your

[4] In the trial transcript, the in-jail caller who identifies himself as "Mike" is labeled "Mr. Yates." Because Mr. Yates has never claimed that that person was not in fact him we've maintained the trial record's labels for the speakers on the call.

[5] *See* David Aaronson, *Maryland Criminal Jury Instructions and Commentary* § 1.51 (3d ed. 2009).

consideration.

The State argued that the instruction embodied a correct statement of the law. The State informed the court as well that it had spoken with some of the holdout jurors from the first trial and found that they were concerned with the penalty if Mr. Yates was convicted, which was why the State wanted to emphasize to the jury that they are not to consider penalties in their verdict. Mr. Yates conceded that the instructions stated the law correctly, but objected that the additional instruction wasn't warranted:

> [Y]esterday's jury was yesterday's jury. Nothing has come up in today's proceedings that raise the requirement of this instruction. It's not a Maryland Pattern Instruction. . . . If the State had concerns about a juror, not, you know, concerning themselves with punishment, the State had the opportunity to exercise peremptory strikes, so we would object.

The trial court elected to include the supplemental jury instruction because it was "an appropriate and accurate statement of the law":

> All right. At this point, I do believe it's an accurate statement of law, and I believe that it could be instructive for this jury.
>
> * * *
>
> Frankly, everything that [the State] said regarding the last jury, I don't think is relevant. My—the reason that I'm inclined to give this is because I think it's an appropriate and accurate statement of the law, and I believe it could be instructive regarding this case.
>
> It really doesn't have anything to do with the fact that our last jury hung.

The case was then submitted to the jury for deliberation with the supplemental instruction, and the jury found Mr. Yates guilty of both the charges. On August 3, 2022, the trial judge sentenced Mr. Yates to a total of eleven years' imprisonment, and Mr. Yates filed a timely

appeal. Additional facts are supplied below as necessary.

II. DISCUSSION

This appeal presents three issues:[6] *first*, whether the lower court erred in failing to dismiss the charges because the statutes under which Mr. Yates was charged violated his rights under the Second Amendment; *second*, whether the recorded telephone calls from jail were admitted into evidence properly; and *third*, whether the trial court erred in instructing the jury that penalty and punishment were not to be considered in their deliberations. For the reasons that follow, we hold that the circuit court properly denied the motion to dismiss, did not abuse its discretion in admitting the recorded telephone calls into evidence, and did not abuse its discretion when it instructed the jury not to consider

[6] Mr. Yates phrased his Questions Presented in his brief as follows:

> 1. Did the lower court err in failing to dismiss the charges, where they criminalized Mr. Yates' core Second Amendment right to protect himself in self-defense?
>
> 2. Did the lower court err in admitting recorded telephone calls made from jail?
>
> 3. Did the lower court err in instructing the jury that it could not consider penalty or punishment as it deliberated?

The State phrased its Questions Presented as follows:

> 1. Did the trial court correctly deny Yates's motion to dismiss because the prohibition of possession of firearms and ammunition by persons convicted of violent crimes and drug felonies does not violate the Second Amendment?
>
> 2. Did the trial court soundly exercise its discretion in admitting recordings of Yates's jail calls?
>
> 3. If reviewed, did the trial court properly instruct the jurors not to consider the issue of what Yates's sentence might be if he were convicted?

penalty or punishment as it deliberated.

A. The Circuit Court Denied Mr. Yates's Motion To Dismiss Properly.

On appeal, Mr. Yates argues that the circuit court erred in denying his motion to dismiss the charges. He doesn't dispute that he committed the conduct prohibited by PS §§ 5-133(c) & 5-133.1—he admits that he is a prohibited person who possessed a regulated firearm and ammunition. Instead, he argues that these statutes are unconstitutional because they violate his Second Amendment right to keep and bear arms in self-defense.

"'The standard of review of the grant or denial of a motion to dismiss is whether the trial court was legally correct.'" *Fooks v. State*, 255 Md. App. 75, 88 (*quoting Myers v. State*, 248 Md. App. 422, 430–31 (2020)), *cert. granted*, 482 Md. 141 (2022). Thus, "'[w]e review the denial of a motion to dismiss de novo.'" *Id.* (*quoting Myers*, 248 Md. App. at 431). Likewise, "the proper scope of a constitutional right, and its application to a particular set of facts, are issues of law,'" and are therefore also subject to *de novo* review. *Id.* (cleaned up).

The Second Amendment to the Constitution of the United States provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The amendment "applies to the states by way of the Due Process Clause of the Fourteenth Amendment." *Fooks*, 255 Md. at 89.

Mr. Yates acknowledges that his argument that the statutes under which he was charged violate the Second Amendment is foreclosed by our decision in *Fooks*. He argues,

though, that *Fooks* was decided wrongly, and that our analysis in that case was inconsistent with the Supreme Court's decision in *New York Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ---, 142 S. Ct. 2111, 2126 (2022). He contends that under *Bruen*, the State bore the burden of proving that the statutes under which Mr. Yates was convicted, statutes that prohibit people with certain prior convictions from possessing firearms and attendant ammunition, are consistent with our nation's historical tradition of firearm regulations, and that the charges against Mr. Yates should have been dismissed because the State cannot meet this burden. But for all of the reasons we articulated in *Fooks* (which remains good law, at least for now[7]), our holding in that case is not inconsistent with *Bruen*, and the

[7] We and the parties all recognize that on November 18, 2022, our Supreme Court granted *certiorari* not only to review our opinion in *Fooks*, but also to consider a broad set of questions addressing the impact of *Bruen* on the analytical framework governing Second Amendment challenges to gun laws. *See* 482 Md. at 141; *Cases Pending Before the Supreme Court of Maryland*, Maryland Courts, available at https://mdcourts.gov/coappeals/pendingcases (last visited Aug. 28, 2023), *archived at* https://perma.cc/63VA-HE24 (granting certiorari to consider "1) In view of existing Supreme Court precedent in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010), and in light of the Supreme Court's recent interim decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, No. 20-843, 597 U.S. --- (June 23, 2022), what is the proper analytical framework to apply to constitutional challenges to Maryland's firearms laws? 2) Did [the Appellate Court] fail to apply the proper analytical framework to the constitutional challenges in this case? 3) Is Md. Code § 5-133(b)(2) of the Public Safety Article unconstitutional, or unconstitutional as applied to this case?"). And in light of that grant, we intended to await the Court's opinion in *Fooks* before deciding this case. But on August 15, 2023, after briefing and oral argument, the Court stayed its proceedings in *Fooks* pending a "final disposition by the United States Supreme Court in [*United States v.*] *Rahimi*," No. 22-915 (Oct. Term 2023), after which the Court anticipates supplemental briefing. Order, *Fooks v. State*, No. 24, Sept. Term 2022 (Md. Aug. 15, 2023), available at https://mdcourts.gov/data/opinions/coa/2023/24a22pc.pdf (last

Continued . . .

Second Amendment does not prohibit states from criminalizing the possession of firearms by people convicted of serious crimes.

As we explained in *Fooks*, "[t]he analytical starting point in any modern-day Second Amendment case is the Supreme Court's decision in [*District of Columbia v.*] *Heller*." 255 Md. at 89. In *Heller*, 554 U.S. 570, 573 (2008), the Supreme Court of the United States reviewed the District of Columbia's ban on the possession of handguns in a residence and concluded that the Second Amendment does not confer merely "'the right to possess and carry a firearm in connection with militia service'" but rather protects "'an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.'" *Fooks*, 255 Md. App. at 89 (*quoting Heller*, 554 U.S. at 577). Because DC's prohibition on handguns in the home for self-defense infringed "the right of *law-abiding*, responsible citizens to use arms in defense of hearth and home," *Heller*, 544 U.S. at 635 (emphasis added), the Court held, the prohibition was unconstitutional. But the Court emphasized that "[l]ike most rights, the right secured by the Second Amendment is not unlimited," and highlighted evidence of a historical understanding of lawful limits on the right to keep and bear arms. *Id.* at 626 ("From Blackstone through the 19th-century cases, commentators and courts routinely

visited Aug. 28, 2023), *archived at* https://perma.cc/CK5F-VYCV. To await a final decision in *Fooks* now risks delaying resolution of this case for well over a year. So although we recognize that our Supreme Court could ultimately adopt a different view of whether or how to apply *Bruen* to cases like this, *Fooks* states the governing law for the time being, and Mr. Yates remains free to pursue further review of his fully preserved arguments as he wishes.

explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."). And the Court made a point of cautioning that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id.* at 626. Nor did the Court mean to speak exhaustively: it identified those "presumptively lawful regulatory measures only as examples; [its] list d[id] not purport to be exhaustive." *Id.* at 627 n.26.

In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court reiterated its holding in *Heller* that "individual self-defense is 'the *central component*' of the Second Amendment right," *id.* at 776 (*quoting Heller*, 554 U.S. at 599), and explained that "*Heller* makes it clear that this right is deeply rooted in this Nation's history and tradition." *Id.* at 768 (cleaned up). But the Court emphasized again that it had "made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,'" *id.* at 786 (*quoting Heller*, 554 U.S. at 626–27), and "does not imperil every law regulating firearms." *Id.*

Bruen addressed the constitutionality of state limitations on firearm licensing schemes. 142 S. Ct. at 2111. Ultimately, the Court held that a New York statute that conditioned an individual's license to carry a firearm on proof of a "proper cause" requirement was unconstitutional because it "prevent[ed] *law-abiding citizens* with ordinary self-defense needs from exercising their right to keep and bear arms." *Id.* at 2156

(emphasis added). In reaching this conclusion, the Court articulated the standard for assessing regulations that interfere with the Second Amendment:

> We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. at 2129–30 (*quoting Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)).

The Court explained that in adopting this standard, it was creating a one-step approach and rejecting the "two-step" framework around which the "the Courts of Appeals ha[d] coalesced" in the years since *Heller* and *McDonald*,[8] *id.* at 2125, although maybe it's better described as a threshold-plus-one: the court *first* must determine whether "the Second Amendment's plain text covers an individual's conduct" and, if it does, *then* require "[t]he government . . . [to] justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2129–30. Indeed, in *Bruen*, the Court worked through its analysis as though these were two separate steps, deciding

[8] For all intents and purposes, the two-step approach that the Court in *Bruen* rejected was essentially the same test that the Court articulated in *Bruen* but with an additional step: "if the historical evidence . . . [was] inconclusive or suggest[ed] that the regulated activity [was] *not* categorically unprotected," courts would engage in means-end scrutiny to determine whether the law burdened the right at issue too severely. 142 S. Ct. at 2126 (cleaned up). In *Bruen*, the Court held that this means-end scrutiny step is unnecessary because if you reach it at all, the regulation is not sufficiently rooted in history and, therefore, is invalid. *Id.* at 2127.

first that "[t]he Second Amendment's plain text . . . presumptively guarantee[d] petitioners" the right to engage in the regulated conduct before, *second*, placing "the burden . . . on [the government] to show that [the regulation] [was] consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2135.

Although some courts elsewhere have concluded otherwise,[9] we read nothing in the *Bruen* opinion as disavowing the core principle espoused in *Heller* that "longstanding prohibitions on the possession of firearms by felons," *Heller*, 554 U.S. at 626, and other such similar regulations are "*presumptively lawful* regulatory measures . . . ." *Id.* at 627 n.26 (emphasis added); *see also Bruen*, 142 S. Ct. at 2162 ("'[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications

[9] For example, in *United States v. Rahimi*, 61 F.4th 443, 450–61 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (Jun. 30, 2023), the United State Court of Appeals for the Fifth Circuit held that references to "law-abiding citizens" excludes only groups historically stripped of Second Amendment rights, and not to a defendant subject to a domestic violence protective order:

> In other words, *Heller*'s reference to "law-abiding, responsible" citizens meant to exclude from the Court's discussion groups that have historically been stripped of their Second Amendment rights, i.e., groups whose disarmament the Founders "presumptively" tolerated or would have tolerated. *See* 554 U.S. at 627, n.26, 128 S. Ct. 2783 ("We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."). *Bruen*'s reference to "ordinary, law-abiding" citizens is no different. *See* 142 S. Ct. at 2134.

Id. at 452.

on the commercial sale of arms.'" (Kavanaugh, J., concurring) (*quoting Heller*, 554 U.S. at 626–27)). And because it would make no sense for the government to bear the burden of proving that a presumptively lawful regulation is, indeed, lawful, we read *Bruen* to establish a two-step test, where the second step (in which the government has the burden of proving that the regulation is valid) kicks in only after a determination that the regulated conduct falls within the scope of "the Second Amendment's plain text." 142 S. Ct. at 2129.

In *Fooks*, decided within a week after the Supreme Court issued its decision in *Bruen*, we addressed a constitutional challenge very similar to the one at issue in the case now before us. Mr. Fooks had been convicted of violating PS §§ 5-133(b)(2) and 5-205(b)(2), which prohibited him from possessing a firearm because of his prior conviction for constructive criminal contempt after he failed to pay child support. 255 Md. at 81–82. Like Mr. Yates, he argued on appeal that his charges should have been dismissed because PS §§ 5-133(b)(2) and 5-205(b)(2) were unconstitutional both facially and as applied to him. *Id.* at 88.

We disagreed, and we declined to require the State to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation," *Bruen*, 142 S. Ct. 2130, because, we held, Mr. Fooks had failed to demonstrate preliminarily that "the Second Amendment's plain text cover[ed] [his] conduct." *Fooks*, 255 Md. App. at 101. We found that because Mr. Fooks was "not[] . . . a law-abiding citizen," his conduct "fell outside the scope protected by the Second Amendment," *id.* at 106, so the statutes that criminalized that conduct were "presumptively lawful, and Mr.

Fooks ha[d] failed to rebut that presumption." *Id.* at 97. And our holding was consistent with *Heller* and *Bruen* because the Court in *Heller* took care to note that "prohibitions on the possession of firearms by felons" are "presumptively lawful," and "nothing in *Bruen* even purport[ed] to question, let alone alter, this principle":

> The Court [in *Heller*] . . . cautioned that "nothing in our opinion should be taken to cast doubt on the [ ] prohibitions on the possession of firearms by felons and the mentally ill, . . . or laws imposing conditions and qualifications on the commercial sale of arms." The Court identified "these presumptively lawful regulatory measures only as examples" and its list did "not purport to be exhaustive."
>
> * * *
>
> *Bruen* didn't deal at all with limitations grounded in prior criminal behavior. The majority opinion refers repeatedly to law-abiding citizens' rights to own and carry handguns and takes care to note that its analysis builds on *Heller* and *McDonald*, which, as we discussed just above, expressly did not cast doubt on laws limiting disqualified persons' access to guns. *See also* [*Bruen*, 142 S. Ct. at 2162] ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sales of arms.") (Kavanaugh, J., concurring) (*quoting Heller*, 554 U.S. at 626–27).
>
> * * *
>
> We recognize that the Supreme Court's presumption [in *Heller*] that the Second Amendment did not apply to "prohibitions on the possession of firearms" only explicitly mentioned those classified as "felons and the mentally ill . . . ." But the Court also stated explicitly that this classification was an example and was not meant to be an all-inclusive list, and nothing in *Bruen* even purports to question, let alone alter, this principle.

Id. at 89–91, 96–97 (some citations omitted).

In addition to the language we noted in *Fooks*, other language in *Bruen* supports the principle that gun regulations on convicted people are lawful presumptively. By concluding that the petitioners in *Bruen* were clearly "part of 'the people' whom the Second Amendment protects" because they were "ordinary, law-abiding, adult citizens," the Court implied that people who aren't "ordinary, law-abiding, adult citizens" are *not* protected by "the plain text of the Second Amendment . . . ." 142 S. Ct. at 2134. In discussing who and what the Second Amendment protects, the Court explained that the amendment "'surely elevates above all other interests the right of *law-abiding*, responsible citizens to use arms' for self-defense." *Id.* at 2131 (emphasis added) (*quoting Heller*, 554 U.S. at 635). And the Court cautioned explicitly that "nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes, . . . which often require applicants to undergo a [criminal] background check" and "are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'" *Id.* at 2138 n.9 (*quoting Heller*, 554 U.S. at 635).

Like the statutes at issue in *Fooks*, the statutes at issue in this case limit only the rights of convicted people. Consistent with *Heller* and *Bruen*, we held in *Fooks* that the conduct regulated by these types of statutes "f[alls] outside the scope protected by the Second Amendment," such that the statutes are presumptively valid. *Fooks*, 255 Md. App. at 106. Like Mr. Fooks before him, Mr. Yates has failed to rebut this presumption by showing that the statutes are unconstitutional in all potential applications or as applied to him. And because his arguments "fail at the first analytical step," *id.* at 91, the State was

not required to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130. And for these reasons, the trial court did not err in denying Mr. Yates's motion to dismiss the charges against him.

B. The Circuit Court Did Not Err In Admitting The Recorded Telephone Calls From Jail.

Mr. Yates argues that the recorded telephone calls he made from jail after his arrest were admitted into evidence improperly because their prejudicial value vastly outweighed their probative value. At his first trial, Mr. Yates objected to the recorded calls "as being more prejudicial than probative . . . because of the fact the jail calls simply indicate that he is in jail." The State responded that the first call was probative because it was placed two hours after his arrest and involved "the defendant describing that he's been arrested, and then talking about . . . the handgun in particular . . . . [H]e's asked about the gun and he says it wasn't on me, it was right there on the ground." The State asserted that the second call was probative because it was "the same voice, same phone number, and in the call Mr. Yates gives his ID number," which was necessary to identify Mr. Yates as the caller in the first call that was placed with no pin ID. The court overruled Mr. Yates's objection, found that the calls' "probative value outweigh[ed] the prejudicial effect" and admitted the call recordings into evidence:

> I certainly understand that any jail call by it's nature is prejudicial . . . and sometimes . . . unfortunately, there's no way to sterilize that.
>
> * * *
>
> I recognize that just by their nature they are prejudicial, but given the content that . . . [the State] just read in, I do find that their probative value outweighs the prejudicial effect.

So over your objection, am going to allow the calls . . . .

At the outset of the second trial, Mr. Yates renewed his objections, the State renewed its responses, and the trial court sustained its prior ruling and considered the renewed objections preserved for appellate review. During the second trial, Mr. Yates made a general objection to the recorded telephone calls and the trial court overruled it.

On appeal, Mr. Yates argues again that the jail calls were admitted improperly because they were substantially more prejudicial than probative. He claims that "[t]he calls prejudiced Mr. Yates by their constant reference to his pre-trial incarceration, and this prejudice vastly outweighed their probative value." He asserts that the phone calls served as a "constant reminder" of his pre-trial incarceration, and that that reminder "intruded upon [his] presumption of innocence." And, he contends, the State failed to meet its burden of proving that the error of admitting the calls was harmless.

The State counters that the trial court acted within its discretion and admitted the recorded telephone calls properly because they held significant probative value that was not outweighed by their prejudicial value. The State contends that the first call had particular probative value because the State was required "to show that [Mr. Yates] had 'control over the firearm, whether actual or indirect,'" and in the call, Mr. Yates "discussed the circumstances in which the gun was found at his feet." And the second call "allowed the jury to conclude that [Mr.] Yates had also made the first call . . . ." The State argues further that the evidence was not unfairly prejudicial because the recorded telephone calls did not serve as a "constant reminder" that Mr. Yates was in jail, and "[i]t would not have

surprised the jurors, nor significantly prejudiced [Mr.] Yates, [for jurors] to learn that [Mr.] Yates spent at least some time in jail, as they knew he had been arrested." This was a discretionary call on the trial judge's part and on these facts, we agree with the State.

Under Maryland Rule 5-403, even relevant evidence "may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice . . . ." (Emphasis added). Where, as here, the evidence offered is relevant and the only issue on review is whether the trial judge properly weighed its probative value against its risk of creating unfair prejudice, we apply an abuse of discretion standard of review. *State v. Simms*, 420 Md. 705, 725 (2011). Under this standard, a trial court's ruling "will not be reversed simply because the appellate court would not have made the same ruling." *North v. North*, 102 Md. App. 1, 14 (1994). Rather, we defer significantly to the trial court's decision and uphold it "[s]o long as the [court] applies the proper legal standards and reaches a reasonable conclusion based on the facts before it." *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 436 (2007).

Evidence is probative "'if it tends to prove the proposition for which it is offered.'" *Consolidated Waste Indus., Inc. v. Standard Equip. Co.*, 421 Md. 210, 220 (2011) (*quoting Johnson v. State*, 332 Md. 456, 474 (1993)). The mere fact that evidence may cause prejudice and a negative impact on one party does not make the evidence inadmissible. *See Burris v. State*, 435 Md. 370, 392 (2013) ("In balancing probative value against prejudice we keep in mind that the fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in Rule 5-403."

(cleaned up)). Evidence is unfairly prejudicial where it "might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which the defendant is being charged." *Id.* (cleaned up). And in this balancing test, the more probative evidence is, the greater its risk of creating unfair prejudice must be to tilt the scales against its admission. *See id.*

No one disputes that the calls were relevant and probative. In the first call, Mr. Yates informed the person he called that a person named "X" was at the scene of his arrest, that "they" swarmed him, and when asked if the police recovered anything off of his person he said, "[i]t wasn't on me. It's right there on the ground." This evidence was relevant and probative as a means of corroborating the testimony of the detectives and with the body camera footage, and it went toward proving that Mr. Yates had indirect possession of the firearm, a necessary element of the charges in this case. And the second call was relevant and probative because it showed that the first call was made by Mr. Yates.

We do not dismiss the possibility that the calls, having been made from jail, may have prejudiced Mr. Yates. But we cannot say that the trial court abused its discretion in finding that the danger of that prejudice did not outweigh the probative value of the evidence substantially. The court could have concluded reasonably that the calls were highly probative, probative enough that they would need to create a great deal of prejudice to warrant exclusion. The court also could have concluded reasonably that the calls, although clearly made from jail, were not meaningfully prejudicial. Indeed, even without the calls, there was plenty of other evidence from which the jury could have inferred that

Mr. Yates was in jail prior to trial. For instance, the jury easily could have made the inference that Mr. Yates was incarcerated before trial based on his arrest, which would have come out during the examinations of both detectives notwithstanding the jail calls.

We also are not convinced that the recorded telephone calls served as a "constant reminder" to the jury of Mr. Yates's incarceration comparable to a court requiring a defendant to stand trial in a full prison garb. *Compare Estelle v. Williams*, 425 U.S. 501, 504–05 (1976) (A State may not compel a defendant to stand trial in full prison garb based on "a recognition that the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment."). The recordings were played to the jury only once during trial and referenced only intermittently, so they hardly served as a "constant reminder" that Mr. Yates was, at some point before trial, in jail. And unlike when a defendant appears in full prison garb, there was no obvious visual component for jurors to notice each time they glanced at Mr. Yates. *See United States v. Arayatanon*, 980 F.3d 444, 450 (5th Cir. 2020) ("The admission of [the defendant]'s jail calls did not pose the same constant and visible risk of prejudice as shackling, prison garb or other external signs of a defendant's incarceration or perceived threat to the community at large."). The trial court did not abuse its discretion in weighing the probative value of the call recordings against the risk of unfair prejudice. And because we assign no error to the court's decision to admit the calls, we need not address Mr. Yates's harmless error argument.

C. The Circuit Court Did Not Err In Instructing The Jury Not To Consider Penalty Or Punishment.

At the conclusion of the second trial, the State sought a supplemental instruction

directing the jury not to consider any potential penalty or punishment in their deliberations. The State requested the instruction after the prosecutor learned from a juror in the first trial that some of the holdout jurors raised concerns about the potential punishment from a guilty verdict. The prosecutor wanted to emphasize that consideration of punishment was not within the role of the jury. Mr. Yates objected to the supplemental instruction and argued that the hung jury in the first trial raised no concerns for the second and that no issues raised in the second trial warranted that instruction. Even so, both parties agreed that the instruction was an accurate statement of the law. Over the initial objection from Mr. Yates, the trial court decided to give the supplemental instruction. The court explained that it decided to give the instruction not because of what occurred in the first trial, but rather because the court felt that the instruction would be helpful to the jury:

> I do believe it's an accurate statement of law, and I believe that it could be instructive for this jury.
>
> * * *
>
> Frankly, everything that [the State] said regarding the last jury, I don't think is relevant. My—the reason that I'm inclined to give this is because I think it's an appropriate and accurate statement of the law, and I believe it could be instructive regarding this case.
>
> It really doesn't have anything to do with the fact that our last jury hung.

After the court instructed the jury, the court asked if counsel wanted to approach the bench about the instruction, but Mr. Yates declined the opportunity.

In this Court, Mr. Yates raises the same arguments that he raised in the circuit court. The State argues that regardless of whether there was an indication that the jury expressed

concerns over punishment, the trial court was well within its discretion to give the instruction. The State also contends that this issue was not properly preserved for appellate review because defense counsel did not object to the instruction after it was given to the jury.

1. The issue is preserved for appellate review because Mr. Yates objected to the instruction and the trial court understood and ruled on that objection.

Mr. Yates urges us to find his objection to the jury instruction preserved the issue for appellate review despite the fact that he made no formal objection after the trial court instructed the jury. He offers three separate theories under which he claims we should find that this issue is reviewable: (1) substantial compliance, (2) ineffective assistance of counsel, or (3) plain error. The State argues that none of these theories applies in this case.

Under Maryland Rule 4-325(f), "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly *after* the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury." (Emphasis added.) Although the best practice is strict compliance with the Rule, "an objection that falls short of that mark may survive nonetheless if it substantially complies with Rule 4-325(e)."[10] *Watts v. State*, 457 Md. 419, 427 (2018)

[10] Rule 4-325 was amended, effective July 1, 2021, to add a new 4-325(e) and change the name of the original. In the current Rule 4-325, what was previously 4-325(e) is now Rule 4-325(f), but they are substantively the same. Any case issued before the

Continued . . .

(*citing Bennett v. State*, 230 Md. 562, 569 (1963)). The standard for finding that an objection complied substantially is that "'[t]here must be an objection to the instruction; the objection must appear on the record; the objection must be accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless.'" *Id.* at 426 (*quoting Gore v. State*, 309 Md. 203, 209 (1987)). The Supreme Court of Maryland has emphasized that even "a cryptic objection 'substantially complies' with the last requirement of the rule—that the objection states the grounds of the objection—if 'the ground for objection is apparent from the record.'" *Taylor v. State*, 473 Md. 205, 227 (2021) (*quoting Gore*, 309 Md. at 209). In *Clemons v. State*, defense counsel objected initially to expert testimony, but the trial court allowed a *voir dire* examination before admitting the witness as an expert, and defense counsel did not renew his objection after it was overruled. 392 Md. 339, 362 (2006). The Court concluded that the issue was preserved because "the trial judge clearly understood that he was ruling on the defense's prior objection during voir dire," and "to require [the defendant] to restate his objection minutes after he originally made it *would be to elevate form over substance* . . . ." *Id.* at 362–63 (emphasis added); *see also Watts*, 457 Md. at 428 ("If the record reflects that the trial court understands the objection and, upon

amendment date that refers to 4-325(e) is referring to the portion of that rule that is now 4-325(f). *See* Md. Rule 4-325 Annotations (LexisNexis 2023) ("The 2021 amendment added (e) and redesignated accordingly; and added Section (e) and redesignated accordingly in source note.") (amended July 1, 2021).

understanding the objection, rejects it, this Court will deem the issue preserved for appellate review.").

Here, Mr. Yates's challenge to the jury instruction was preserved for appellate review. After the State requested the jury instruction, defense counsel stated on the record that "[w]e'll object." His objection was supported by an explanation of the grounds for the objection when his counsel reasoned that "yesterday's jury was yesterday's jury. Nothing has come up in today's proceeding that raise the requirement of this instruction." The trial court then clarified on the record that it understood Mr. Yates's argument and ruled on his objection, stating, "I believe that [the instruction] could be instructive for this jury. So, over [defense counsel]'s objection, I'm going to give the Aaronson 1.51 juror is not concerned with punishment [instruction]." And finally, to renew the objection after the court instructed the jury would have been futile because, before the instruction was read to the jury, Mr. Yates attempted a second time to argue that the instruction wasn't necessary and the court explained for a second time that it was not convinced:

> [COUNSEL FOR MR. YATES]: Before Mr. Clerk does, may I just add one more thing, is that I actually did talk to the hold-out jurors, and among their concerns was no one expressed, and one did ask what the maximum penalty was. I didn't hear the concerns expressed that they were worried about the penalty.
>
> * * *
>
> [THE COURT:] It really doesn't have anything to do with the fact that our last jury hung. All right. Can we go get the jury, please.

Although it would have been better practice for defense counsel to object to the supplemental jury instruction after the trial court gave it, Mr. Yates complied substantially

with Rule 4-325(f) and preserved the issue for our review.

2. The trial court acted within its discretion when it instructed the jury not to consider penalty or punishment.

Under Maryland Rule 4-325(c), "[t]he court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given." Except in death penalty and insanity cases, "the sole function of the jury in a criminal case in Maryland is to pass on whether the defendant is guilty as charged." *Chambers v. State*, 337 Md. 44, 48 (1994). A jury is not to consider the potential punishment or penalty that may be imposed when assessing the guilt or innocence of a defendant. *See Mitchell v. State*, 338 Md. 536, 540 (1995) ("As a general rule, a jury should not be told about the consequences of its verdict—the jury should be focused on the issue before it, the guilt or innocence of the defendant, and not with what happens as a result of its decision on that issue.").

On appellate review, jury instructions "'[m]ust be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate.'" *Cost v. State*, 417 Md. 360, 369 (2010) (*quoting Fleming v. State*, 373 Md. 426, 433 (2003)). We give considerable deference to the trial court's discretion to instruct the jury, and reverse only on a clear showing that discretion was abused. *Mitchell*, 338 Md. at 540.

In this case, the jury instructions, taken as a whole, were not misleading and correctly stated the law that the jury was not to consider penalty or punishment in their deliberation. Indeed, both parties agree that the instruction with which Mr. Yates now takes issue stated the law correctly and the trial court stated explicitly that it was providing the instruction because "it's an appropriate and accurate statement of the law, and . . . it could be instructive regarding this case." The court provided its reasoning not once, but twice and assured both parties that its decision "really d[id]n't have anything to do with the fact that our last jury hung." Moreover, the instructions adequately addressed the issues presented in the case, and there was no indication that Mr. Yates was prejudiced by the supplemental instruction.

Although Mr. Yates acknowledges that a jury should have no concern as to the consequences of its factfinding, he argues that it was error in this case to "inform[] the jury of this principle where there has been no indication that jurors have, or would, improperly factor the issue of punishment into consideration." As support for this proposition, he notes that in both *Tripp v. State*, 36 Md. App. 459 (1977),[11] and in *Mitchell v. State*, 338 Md. at 536, instructions similar to the one at issue here were given only because, in those cases,

[11] *Superseded on other grounds by statute*, Md. Code (1982, 1988 Repl. Vol.) § 12-111 of the Health-General Article, *as recognized in Erdman v. State*, 315 Md. 46, 52 (1989) (regarding "the propriety of jury instructions with respect to the disposition of a defendant found to be not criminally responsible").

"the issue of punishment had been injected into the case."[12] That may be true, but it doesn't mean that the trial court is precluded from providing an instruction about punishment in all other instances, and Mr. Yates has not cited any cases where we have found an instruction like this one inappropriate.

Mr. Yates's comparison of the instruction in this case to the one that we found inappropriate in *Stabb v. State*, 423 Md. 454, 460 (2011), is inapt. In *Stabb*, the trial court instructed jurors "that there is no legal requirement that the State utilize any specific investigative technique or scientific test to prove its case." *Id.* (emphasis omitted). Although recognizing that this was a correct statement of law, our Supreme Court held the instruction inappropriate because it "directed effectively the jurors not to consider the absence of . . . corroborating physical evidence," and thus "relieved the State of its burden to prove [the defendant] was guilty beyond a reasonable doubt, [and] invaded the province of the jury." *Id.* at 472. Since punishment is decidedly not the province of the jury, the instruction in the case before us presents no such issue. For the same reason, we disagree with Mr. Yates that "where—as here—the court gratuitously addresses the issue [of punishment], this instruction may improperly minimize the solemnity of the task at hand,

[12] In *Tripp*, the defendant, "for transparent tactical reasons, wanted the jury to be assured that if they found [him] not guilty by reason of insanity, the judge could still order him confined for further mental examination." 36 Md. App. at 484. In *Mitchell*, in the course of deliberations, the jury sent a note, asking, "If the decision of the group is a hung jury, will the case be dismissed and John Mitchell walk, or will he be retried?" 338 Md. at 538. The trial court informed jurors their "question is not going to be answered, it's none of your concern," and propounded an "*Allen* charge," cautioning jurors not to change their votes solely to reach a verdict. *Id.* at 539.

and cause jurors to ignore the gravity of their decision." Indeed, the "gravity of their decision"—at least in terms of the potential punishment the defendant may face—is exactly what the law requires jurors to ignore. The trial court did not abuse its discretion in giving the instruction, and we affirm Mr. Yates's convictions.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. APPELLANT TO PAY COSTS.