Circuit Court for Dorchester County
Case No. C-09-CR-18-000272

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 965

September Term, 2019

ANTOINE STEVENSON

v.

STATE OF MARYLAND

Reed,
Wells,
Zic,

JJ.

Opinion by Reed, J.

Filed: February 2, 2022\

After a jury trial in the Circuit Court for Dorchester County, Antoine Maurice Stevenson, appellant, was convicted of attempted first and second-degree murder, first and second-degree assault, wearing, carrying, or transporting a handgun on or about a person, and use of a handgun in the commission of a crime of violence. He was sentenced to life imprisonment for attempted first degree murder and a consecutive term of 20 years for use of a handgun in the commission of a crime of violence, the first five years to be served without the possibility of parole. The remaining counts were merged for sentencing purposes. This timely appeal followed.

QUESTIONS PRESENTED

Appellant presents the following four questions for our consideration:

> I. Did the circuit court err in admitting evidence of a handgun found during his arrest two days after the shooting?
>
> II. Did the circuit court err in allowing Detective McCray to testify as a firearms expert where that was not properly disclosed in discovery?
>
> III. Did the circuit court err in allowing a lay witness, Vincent Stallings, to estimate the caliber of a firearm, which he did not see, based on his military experience?
>
> IV. Did the circuit court err in refusing to instruct the jury on imperfect self-defense?

For the reasons set forth below, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On October 8, 2018, Vincent Stallings went to 809 Hubbard Street in Dorchester County to bring some oysters to his friend McKinley Potter, who is known by the nickname Tink. Potter lived in a home that was divided into four apartments and his apartment was

on the bottom floor. Stallings arrived at Potter's home sometime between 8:30 p.m. and 9:00 p.m., parked on Hubbard Street, and walked toward the house. He saw appellant, whom he knew as "Money," and another man he did not know on the front porch. Appellant said "something negative" to Stallings, specifically, "[t]here goes that fat MF." Stallings responded, "Hey, man, if I've done something to offend you, you should let me know . . . and we don't have to go through this." Appellant had a phone to his ear and he put up his finger and said, "[h]old on for a minute."

At that point, Danielle Adams, whom Stallings knew as "Pretty," who lived in an upstairs apartment, told Stallings, to "[c]ome here for a minute." As Stallings went up the stairs, appellant followed him into Adams's apartment, put his phone away, got "up in [Stallings's] face." Appellant said, "[y]o, what you doing, trying to do? Disrespect me?" When appellant made a threatening move as if to hit him, Stallings tackled him to the floor. They fell into a bedroom. Appellant was on his back and Stallings was on top of him with his hands around his neck, but not choking him. At that point, someone jumped on Stallings's back. Stallings "went into panic mode" and "started going airborne." The man on Stallings's back said, "I'm just trying to get you off of him." As that man eased up on Stallings, Stallings started easing off of appellant. Stallings saw that the man who had jumped on his back was the same man he had seen on the front porch with Money.

As Stallings got up, he saw that his flip-flops were no longer on his feet. Something "just said" to him "[g]et the H out of here. Get gone now." Stallings went to the door and started going down the steps. He turned back and "could see something being exchanged . . . like maybe someone was grabbing somebody trying to stop them." According to

Stallings, "it didn't look right." He did not know what was going on, "but it made [him] feel real uncomfortable." He hurried down the stairs. When he got to the front porch, Stallings could hear someone coming after him. Stallings saw Potter's pick-up truck backed up near the house. He "started hollering for Tink" as appellant chased him around the pick-up truck. Appellant fired a gun and shot Stallings in the back. Stallings testified that the gun was small, but admitted that he did not see the gun, only "maybe a little bit of the barrel" or the muzzle. Stallings leaned against the pick-up truck and saw appellant walk toward the street. Appellant took off the shirt he had been wearing and walked away wearing a white tank top. Stallings did not see the other man exit the apartment.

After the shooting, Potter came out of the back of the house. Stallings told Potter that Money had shot him. Potter could not find his phone, so Stallings ran over to his truck and drove himself to Dorchester General Hospital. Stallings was subsequently transferred to Shock Trauma where he spent six days. The bullet, which lodged in Stallings's lung, was not removed from his body. Police did not recover any shell casings from the scene of the shooting.

While at Dorchester General Hospital, Stallings was shown a photographic array, but he did not identify appellant in any of the photographs. At Shock Trauma, he was shown another array from which he identified a photograph of appellant as the person who shot him.

Detective Stephen Hackett and another officer from the Cambridge Police Department arrested appellant. The arrest was captured on a police-worn body camera. The officers approached appellant, who was with four other men, all of whom fled when

the officers approached. As appellant was fleeing, Detective Hackett observed him pull a gun out of his waistband and discard it in front of a trash can. Detective Hackett heard "metal hitting metal." Detective Hackett stayed with the gun, which was found in front of a trash can, while the other officer chased and apprehended appellant. The gun was a .32 caliber revolver, the cylinder of which had separated from the gun. There was one round of ammunition in the cylinder, one spent shell casing, and two rounds that came out of the cylinder. Detective Sergeant Greg McCray test fired the gun and concluded that it was operable, but he could not say with certainty that the gun recovered from appellant was the same gun used to shoot Stallings. No ballistics match could be performed because the bullet that struck Stallings remained in his body.

We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I.

Appellant contends that the circuit court abused its discretion by admitting evidence about the gun that was found at the time of his arrest. Prior to trial, appellant filed a motion in limine to exclude evidence of the gun, arguing that there was insufficient evidence that the gun was the same one used to shoot Stallings on October 8, 2019. At a hearing on the motion, the defense asserted that any connection between the gun recovered at the time of his arrest and the gun used to shoot Stallings was "very vague." Defense counsel argued:

> Mr. Stallings told the Cambridge Police Department that he believed the gun that shot him was small. I believe he also stated that he thought the gun was black, but that's only because he didn't see it. And he said, he

> generally said that he never actually saw the gun, but did at one point say he believed it was an automatic when the – Corporal Benton asked if it was a revolver or semiautomatic, his response on two different occasions was automatic.
>
> The gun that was recovered on October 10th was a revolver, a small revolver. So I think the, the – I would submit to the court that the relevancy of the gun is based on whether it is or at least arguably could be the shooting weapon in this case and I think the State's evidence of an actual connection is, is very slim in this case and which just increases the likelihood of unfair prejudice to the defendant.
>
> And it basically creates other crimes. It basically amounts to other crimes or bad acts issues in that the jury could believe that Mr. Stevenson's a bad guy carrying around a gun, he is more likely to have done any shooting; which is just the type of impermissible character evidence that by [Maryland Rule] 5-404 is designed to protect against.

The State countered that Stallings told police that the gun was small and he believed it to be a small caliber weapon. The State made the following proffer:

> And what I will proffer what he [Stallings] will testify to is that he believed it to be small caliber because of the fact that when he was struck with the gun or with the bullet, that he didn't fall to the ground and that he would expect to fall to the ground if he was shot with a bigger caliber gun.
>
> He also says that he did not actually see the gun, but that he believed it to be an automatic. And again, we would proffer to the court that he believed it to be an automatic or semiautomatic because in his experience 90 percent of the guns on the street are automatics and so that's what he believed it to be.
>
> The police searched I would say hours for a casing at the scene relative to where the victim stated that it happened and there was no casing found, which – while that is not dispositive, it certainly leans towards the possibility that it was in fact a revolver.
>
> Mr. Stallings, the victim, would also say that he believes the gun to be black because if it were silver he would have seen it from the light that is literally overhead. . . . [a]nd that he would have seen something, [if] he believed it to be silver.

The State pointed out that the revolver recovered at the time of appellant's arrest was a .32 caliber revolver, "which is small in the types of ammunition that would be used."

The court denied appellant's motion in limine. It noted the short time between the shooting and the recovery of the gun and that the small caliber of the gun recovered at the time of appellant's arrest "would seem consistent with Mr. Stallings's impression of the gun as far as the size of the cartridge and the explosion that it creates or the sound of the explosion that it creates." The court concluded that the fact that appellant was allegedly in possession of a small caliber weapon two days after the shooting of Stallings was probative and that the probative value of that evidence outweighed any potential prejudice.

A. Standard of Review

Our review of the admissibility of evidence depends on whether the "ruling under review was based on a discretionary weighing of relevance in relation to other factors or on a pure conclusion of law." *Parker v. State*, 408 Md. 428, 437 (2009) (quoting *J.L. Matthews, Inc. v. Md.-Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 92 (2002)). Generally, the admission of evidence is committed to the sound discretion of the trial court. *State v. Young*, 462 Md. 159, 169-70 (2018). A court may admit relevant evidence, but it has no discretion to admit evidence that is irrelevant. *Smith v. State*, 218 Md. App. 689, 704 (2014) (citing Md. Rule 5-402). A ruling that evidence is legally relevant is a conclusion of law, which we review *de novo*. *Id.* *See also State v. Simms*, 420 Md. 705, 724-25 (2011); *Parker*, 408 Md. at 437 (the *de novo* standard applies "[w]hen the trial judge's ruling involves a legal question[.]").

Establishing relevancy "is a very low bar to meet." *Williams v. State*, 457 Md. 551, 564 (2018). Evidence is relevant if it has any tendency to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Relevant evidence is generally admissible. Md. Rule 5-402 ("Except as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. Evidence that is not relevant is not admissible."). "Once a relevancy determination is made, courts 'are generally loath to reverse a trial court unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion.'" *Portillo Funes v. State*, 469 Md. 438, 479 (2020) (quoting *Merzbacher v. State*, 346 Md. 391, 404-05 (1997)).

Courts may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. We review that decision for abuse of discretion. *See e.g.*, *Carter v. State*, 374 Md. 693, 705 (2003); *Muhammad v. State*, 177 Md. App. 188, 273-74 (2007). "We determine whether a particular piece of evidence is unfairly prejudicial by balancing the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case." *Smith*, 218 Md. App. at 705. When weighing the probative value of proffered evidence against its potentially prejudicial nature, a court abuses its discretion "where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any

guiding rules or principles." *Webster v. State*, 221 Md. App. 100, 112 (2015) (alteration in original) (citations and quotation marks omitted).

B. Analysis

Appellant contends that there was insufficient evidence tying the gun to the shooting of Stallings and that evidence of the gun should have been excluded either because it was irrelevant or because it was unfairly prejudicial. He argues that the fact that no shell casings were found at the scene of the shooting and Stallings's belief that the gun used to shoot him was a small caliber weapon, even though he admittedly did not see the weapon, did not constitute sufficient evidence connecting the gun that was found to the charged offenses. Appellant maintains that admitting evidence of the gun found during his arrest without reliable evidence linking it to the shooting for which he was on trial essentially amounted to admitting evidence of other crimes or bad acts. In support of his contention, appellant directs our attention to three cases, *Williams v. State*, 342 Md. 724 (1996), *disapproved of on other grounds, Wengert v. State*, 364 Md. 76, 89 n.4 (2001); *Anderson v. State*, 220 Md. App. 509 (2014), and *Smith v. State*, 218 Md. App. 689 (2014). In each of those cases, the State offered prejudicial evidence without linking it to the crime charged.

In *Williams*, the defendant was charged with two counts of first-degree murder, multiple counts of robbery, burglary, theft, and other crimes. *Williams*, 342 Md. at 731. The trial court admitted into evidence, over defense objection, a crowbar and a can of mace found in Williams's possession at the time of his arrest. On appeal, the State argued that the crow bar and mace were offered to prove "'that Williams had the ability to burglarize

the victims' home and subdue its occupants[,]" that they were relevant to connect Williams to the burglary because the items were found in his possession soon after the crime was committed, and that "'the jury could infer that Williams was attempting to flee, with evidence of the crimes, after seeing' news broadcasts indicating he was a suspect." *Id.* at 737-38.

The Court of Appeals disagreed. It held that the trial court abused its discretion in admitting those items in evidence because there was "simply no evidence in the record establishing any connection between the crowbar and mace and the crimes with which Williams was charged." *Id.* at 738. The Court noted that there was "insufficient evidence adduced at trial to support a finding that Williams broke into the house[,]" and there was "no indication that the crow bar was used to gain entry into the house" or any "signs of forced entry into the home." *Id.* Nor was there any indication that Williams had the crowbar or mace in his possession at the time he allegedly committed the crimes and they were not taken from him until the day of his arrest, approximately four days after the crimes were committed. *Id.* The Court stated that because "there was no evidence linking the crow bar or mace to the crimes with which Williams was charged, there is a strong probability that the jury may have inferred from the evidence that Williams was a person of general criminal character. The danger of this kind of unfair prejudice substantially outweighed any minimal probative value of the crowbar and the mace." *Id.* at 739.

It is pertinent to note that Williams also challenged the admission in evidence of two pairs of handcuffs that were seized from a briefcase found during a search of his room. *Id.* He argued that "'only speculation'" connected the handcuffs to the murders. *Id.* The

Court disagreed. It noted that the evidence showed that the victims' bodies were "found face down on their bed with their hands behind their backs in an unnatural position." *Id.* The Court held that "it would be logical for the jury to infer that the victims' hands were bound behind their backs before they were shot." *Id.* In addition, because there "was no evidence of ligature marks on the victims' hands or wrists which might have indicated that rope was used," the Court concluded that "it might also be reasonable to infer that handcuffs were used in the murders." *Id.* For those reasons, the Court concluded that "the probative value of the handcuffs outweighed any prejudicial effect" and the trial court did not abuse its discretion in admitting the handcuffs. *Id.*

In *Anderson*, the defendant was charged with two counts of first-degree rape. *Anderson*, 220 Md. App. at 511. The victim testified that a firearm was used in the rape. *Id.* Two weeks after the day the victim maintained she was raped, police searched Anderson's apartment in connection with a different case and found a handgun. *Id.* Although the handgun could not be shown to be the weapon used during the rape, the trial court ruled that it was admissible to impeach by contradiction Anderson's testimony that he did not have a handgun in his apartment at the relevant time. *Id.* On appeal, we held that the trial court abused its discretion in admitting evidence of the handgun, which "had virtually no probative value." *Id*. We noted that "the danger that its admission would unduly prejudice [Anderson] and would confuse and mislead the jurors greatly outweighed any probative value it might have had." *Id.*

In *Smith*, the defendant was convicted of involuntary manslaughter and use of a handgun in the commission of a felony. On appeal, Smith argued that the trial court erred

in admitting evidence relating to eight firearms that he owned and to ammunition found in his apartment. *Smith*, 218 Md. App. at 703. He maintained that the evidence was irrelevant and unfairly prejudicial because the weapons and ammunition were unrelated to the shooting at issue and because "'[i]t's not illegal to have other guns and other ammo.'" *Id.* at 704. We agreed, stating:

> Neither the State nor the trial judge articulated how this evidence was relevant to whether Mr. Smith committed the alleged crimes. The fact that Mr. Smith legally possessed guns and ammunition does not make the weapons relevant to the victim's death, and we cannot see from this record how the inclusion of this evidence would help prove the offense charged. Without a more direct or tangible connection to the events surrounding *this shooting*, the evidence of the other weapons and ammunition owned by Mr. Smith failed the probativity/prejudice balancing test, and the trial court erred by admitting it.

Id. at 704-05.

In support of its argument that the trial court did not err or abuse its discretion in admitting the gun evidence, the State directs our attention to *Grymes v. State*, 202 Md. App. 70 (2011). In that case, Grymes, who was convicted of robbery and second-degree assault, argued that the trial court abused its discretion in admitting in evidence a gun that police found lying on the floor behind a row of washing machines in the laundry room of an apartment. *Grymes*, 202 Md. App. at 100-01. The gun, which was not found in Grymes's possession, was a fully loaded, black, .38 caliber Colt revolver with black handles that "was mottled with rust on the muzzle and the handle." *Id.* at 101. Grymes argued that there was no evidence linking the gun to him and that the gun did not match the descriptions given by the victim. *Id.* at 101. We disagreed. Although there was no forensic evidence or eyewitness testimony linking the gun to the crime, there was sufficient evidence to create

a "reasonable probability" that the gun was connected to Grymes. *Id.* at 104. We noted that the

> State produced evidence that [Grymes] was seen with a revolver style handgun prior to the crime; that [Grymes] used a .38 caliber revolver style handgun to commit the crime; and that a .38 caliber revolver style handgun was found in the laundry room of the apartment building where [Grymes] was living. Moreover, the evidence was that the laundry room was searched because [a witness] told police that [Grymes] may have hidden his gun in that location. Both [the witness and the victim] described the gun as being black, although [the victim] also described it as silver.

Id. at 104.

We concluded that it was for the jury to weigh the evidence and make the ultimate determination on that point. *Id.*

With these cases in mind, we turn to the issue before us. As in *Grymes*, and as with the handcuffs in *Williams*, there was sufficient evidence in the instant case to create a reasonable probability that the gun was connected to appellant. Appellant was arrested, and the gun found, two days after the shooting took place. Detective Hackett observed appellant pull the gun out of his waistband and discard it. The gun was a .32 caliber revolver and the cylinder contained three live rounds and a single spent shell casing. Stallings believed that the gun was black because he did not see any light reflecting from the barrel, and the gun recovered was a dark color. Stallings testified that he "knew" the gun was a small caliber because of the sound and because he did not drop to the ground after being shot. Detective Sergeant Greg McCray, who testified as an expert in firearms, opined that large caliber ammunition is generally louder than small caliber ammunition and that .45, .40, and 9 millimeter caliber ammunition are all larger than .32 caliber

ammunition. He also testified that a revolver does not expel a shell casing and that no shell casings were found at the scene of the shooting, thus supporting an inference that the shooter used a revolver. He also acknowledged that a semiautomatic gun could jam and fail to expel a casing. Stallings suffered a single gunshot wound and Potter testified that he heard "a shot." There was no testimony of multiple gunshots.

All of this evidence connected the gun to the shooting and established a reasonable probability that the revolver recovered after appellant discarded it was used to shoot Stallings. Although appellant points to Stallings's statement to the police that the gun used to shoot him was an automatic, Stallings testified that this was simply his assumption because "99 percent of the time when people use guns or have them in the street, most of them are automatic." This discrepancy went to the weight of the evidence, not its admissibility.

Evidence that appellant possessed the gun used to shoot Stallings just two days prior was probative and not unfairly prejudicial if considered for that limited purpose. The court did not abuse its discretion in determining that the probative value of the gun evidence outweighed any risk of unfair prejudice. Moreover, the court gave the following limiting instruction to the jury:

> You have heard testimony that on October 10th, 2018 Antoine Stevenson possessed a firearm. It's in evidence as State's Exhibit 22. This testimony has a limited purpose in this trial and if you believe that State's Exhibit 22 could have been the firearm used to shoot Vincent Stallings you may, but are not required, to consider State's Exhibit 22 as circumstantial evidence that the defendant had the means to commit the crime on October 8th, 2018. If you do not believe that State's Exhibit 22 could have been the firearm used to shoot Vincent Stallings, you may not consider that exhibit

> for any other purpose. Specifically, you may not consider it as evidence that the defendant is of a bad character or has a tendency to commit a crime.

For these reasons, reversal is not required.

II.

Appellant contends that the trial court committed reversible error when it permitted Detective Sergeant Greg McCray to testify as an expert witness although he was not disclosed as such in discovery. He maintains that the State's notice of its intention to use Detective McCray as an expert witness "was entirely inadequate under Md. Rule 4-263." We disagree and explain.

Discovery in criminal cases is governed, in part, by Maryland Rule 4-263(d)(8), which provides:

> (d) **Disclosure by the State's Attorney.** Without the necessity of a request, the State's Attorney shall provide to the defense:
>
> * * *
>
> (8) Reports or statements of experts. As to each expert consulted by the State's Attorney in connection with the action:
>
> (A) the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion;
>
> (B) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and
>
> (C) the substance of any oral report and conclusion by the expert[.]

On February 21, 2019, Detective McCray test fired the weapon recovered at the time of appellant's arrest. He prepared a report that documented the test fire and concluded that the gun was operable. On March 4, 2019, the State filed its "Second Supplemental"

notice of discovery and provided the defense with a copy of the gun operability report and a supplemental police report. Thereafter, on March 27, 2019, appellant filed a motion in limine seeking to exclude gun evidence and the testimony of Detective McCray.

In his motion in limine, appellant noted that in addition to the charges in the instant case, he was also the defendant in another case, No. C-09-CR-18-000273, in which he was "charged with possession of a firearm and related charges, with an incident date of October 10, 2018[.]" We shall refer to that case as "the firearms case." On March 25, 2019, defense counsel received an email from the State "disclosing for the first time," Detective McCray "as an 'expert in firearms'" who was "expected to testify consistent with his repot [sic] but also about Firearms in general (different calibers, revolver v. automatic, etc.)." There is no dispute that the report and discovery notice referenced the firearms case but not the instant case. A copy of the prosecutor's email was attached to appellant's motion in limine. After receiving the prosecutor's email, defense counsel telephoned the prosecutor to get clarification about the case to which the expert disclosure applied. The State clarified that the expert disclosure applied to the instant case.

In his motion in limine, appellant argued that he received the gun operability report "under a case caption that exclusively referenced" the firearms case, and that the report contained details about the firearm, a test fire, and a finding that the gun was operable, but did not contain any other opinions or analyses. Appellant asserted that "the casual 'disclosure' in the email [was] not sufficient to adequately disclose an expert and the grounds for his opinion under Md. Rule 4-263 outside of the simple opinion that he was able to fire the weapon[.]" Appellant suggested that the State had the information, but

"decided to wait until **the week before trial** in an attempted murder case to disclose a purported expert[.]" He claimed that the late disclosure "render[ed] the Defense unable to consult with an independent expert and adequately prepare for an effective cross-examination" and noted the "overly-vague disclosure" regarding Detective McCray's testimony about "firearms in general and the basis for his opinion[.]"

A hearing on the motion in limine was held on April 1, 2019. The State argued, in part:

> With regards to Sergeant McCray, the State initially didn't really believe that Sergeant McCray would have to be disclosed as an expert, but in an abundance of caution it did disclose him as an expert in case there were some opinion that he wanted to give that was not something that Your Honor would determine a lay or an officer would be able to give.
>
> But his report as to the operability of the gun and him being disclosed as a witness was also present from the moment discovery – or the operability was done.
>
> So the State would ask that Your Honor to allow the State to use the fact that he is recovered with this gun, that is again small in not only size, but in the type of bullets that are used from it and it is a revolver and that Detective Sergeant McCray be able to testify as to those limited points that the State has proffered to the court and to defense.

The court denied the motion in limine, stating:

> With respect to Sergeant McCray, certainly a police officer with his years of experience would be able to be qualified as an expert in certain things regarding the operation of guns. Certainly he can testify it's different calibers; the difference between a semiautomatic and a revolver; the difference in a semiautomatic and an automatic; one is a pistol and different sounds.
>
> Now, what he can't do is say, for instance, a .32 sounds like this and a .22 sounds like this. He's going to have to testify in generalities that the larger the cartridge, the more powder, the more explosion. The greater the explosion, the greater the sound. Not get into anything ballistic wise.

At trial, defense counsel, after referring to his motion in limine, was granted a continuing objection to Detective McCray being qualified as an expert in firearms. Thereafter, Detective McCray testified that he test fired the gun, which was a .32 caliber revolver, and found it to be operable. After being accepted, over objection, as an expert in firearms, he testified about various calibers of ammunition and opined that "typically the smaller the caliber, the less the sound" and "[t]he bigger the caliber, the bigger the sound." He also explained that the weapon at issue was a revolver, that the shell casings are not ejected automatically from revolvers as they are from semiautomatic or automatic weapons, that he would not expect to find a shell casing when a shooter uses a revolver, that the presence of a single spent shell casing in a revolver suggests that the gun was fired once, and that it was possible that throwing the gun at a metal trash can could have broken the firing pin.

Appellant argues that the trial court erred in declining to find a discovery violation and in permitting Detective McCray to testify as an expert in firearms even though the State failed to "disclose its intention to use him as such until the week before trial began, did not disclose his report under the right case number, and offered no indication of what his expert opinions would be." He maintains that because the firearms operability report was disclosed in a different case, it did not put him on notice that the State would be calling a firearms expert to testify at trial in the instant case.

Although the discovery rules make clear that the State must disclose discovery material within 30 days of the first appearance of counsel or the defendant, discovery is an ongoing process. Maryland Rule 4-263(j) clearly provides that:

> Each party is under a continuing obligation to produce discoverable material and information to the other side. A party who has responded to a request or order for discovery and who obtains further material information shall supplement the response promptly.

The record before us does not reveal when the State disclosed Detective McCray as a witness, but it is clear that, at the latest, appellant knew he was a witness when he testified at a suppression hearing on March 4, 2019. That same day, the State provided defense counsel with a second supplemental notice of discovery and provided defense counsel with Detective McCray's firearms report, albeit under a case caption referencing another case involving appellant. The report described the test fire, noted that the .32 caliber revolver was operable, and that it was missing a pin to hold the cylinder in place. On the day before trial, the State proffered the scope of Detective McCray's testimony. Defense counsel acknowledged the proffer and expressed his understanding that the detective was expected to testify about the different calibers of guns, the difference between a revolver and a semi-automatic weapon, different sounds made when firing different caliber guns, and "the rather obvious fact that larger guns make louder sounds." These disclosures satisfied the State's duty to provide a prompt supplemental report. Even though the firearms report was disclosed with a discovery notice that referenced appellant's gun possession case, and not the instant case, that issue was clarified in defense counsel's telephone conversation with the prosecutor.

Appellant does not direct our attention to any particular prejudicial expert opinions that were not properly disclosed or any testimony he was unable to address. Appellant does not argue that Detective McCray's testimony exceeded the scope of the State's

proffer. Moreover, not all of Detective McCray's testimony was expert in nature. His testimony about the revolver with three live cartridges and one spent shell casing was merely a reference to what Detective Hackett recovered at the time of appellant's arrest and discussed during his testimony. In addition, the inference that a revolver containing a spent shell casing was fired one time was obvious and even the defense agreed that the "fact" that "larger guns make louder sounds" was "rather obvious."

Even assuming, however, that there was some failure on the part of the State to disclose properly its intention to call Detective McCray as a firearms expert, in violation of the discovery rules, we would find that error to be harmless. *See Hutchinson v. State*, 406 Md. 219, 227 (2008) (when trial court errs in finding no discovery violation, its ruling is reviewed for harmless error); *Dorsey v. State*, 276 Md. 638, 659 (1976) (error is harmless if "reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict").

"The purpose of discovery is to avoid surprise at trial and to give the defendant sufficient time to prepare a defense." *Hutchinson*, 406 Md. at 227 (citing *Hutchins v. State*, 339 Md. 466, 473 (1995)). Our focus is on "the harm resulting from the nondisclosure." *Thomas v. State*, 397 Md. 557, 574 (2007). "Under Rule 4-263, a defendant is prejudiced only when he is unduly surprised and lacks adequate opportunity to prepare a defense, or when the violation substantially influences the jury." *Id.* In *Thomas*, the Court of Appeals recognized that trial courts should "impose the least severe sanction that is consistent with the purpose of the discovery rules," that exclusion "should be ordered only in extreme

cases," and that when "remedial measures are warranted, a continuance is most often the appropriate remedy." *Thomas*, 397 Md. at 572-73.

The alleged discovery violation in the instant case was not so extreme as to warrant the exclusion of Detective McCray's testimony. There was no suggestion of bad faith on the part of the prosecutor. Appellant knew in advance of trial that Detective McCray performed the test fire and prepared the gun operability report. Further, Appellant knew that Detective McCray would testify about the different calibers of guns, the difference between a revolver and a semi-automatic weapon, the different sounds made when firing different caliber guns, and "the rather obvious fact that larger guns make louder sounds." Appellant did not request a continuance to prepare for trial or retain an expert witness, and he does not point to any testimony that he was unable to address. Under the circumstances, we conclude that appellant was not unduly surprised and had sufficient time to prepare his defense. Accordingly, even if there was some violation of the discovery rules, such error would be harmless.

III.

Appellant next argues that the trial court erred in allowing Stallings to testify about the caliber of the gun used to shoot him, which he admittedly did not see. During direct examination, Stallings testified about what he told police:

> [PROSECUTOR]: Okay. Did there come a time where police, and to me it doesn't – I'm not asking which police, but did there come a time when police asked if you saw the gun?
>
> [STALLINGS]: Yes.
>
> Q. Okay. And, and what did you tell them?

A. I told them, yes, I seen it.

Q. Are you sure you told them you saw the actual gun?

A. I seen the barrel.

Q. Okay.

A. And, and of course, you know, it's a gun the way you're holding it. It wasn't a cup of coffee.

Q. But could you tell them anything about the gun that you knew?

A. Initially I knew it was a small caliber because of the sound; because I've been in the military and I handled weapons before. So I knew it was a small caliber and it didn't drop me to the ground.

Q. And what do you mean, "drop you to the ground." What do you mean by that?

A. Like if it was a .9 millimeter, .45 or a .357 or something when he fired it, it would have took me straight to the ground.

Q. Okay. So you –

[DEFENSE COUNSEL]: Objection.

[STALLINGS]: There's no way I would have been standing. So I knew –

[PROSECUTOR]: What – stop for one second.

THE COURT: He's giving his opinion as to why he determined what size the gun was. The objection is overruled.

Thereafter, Stallings testified:

[PROSECUTOR]: So what if anything did you tell him you believed it was?

[STALLINGS]: I told him I believed it was a .22.

Q. Or was there –

A. Or a .32. I mean .380. Something small.

Appellant asserts that reversal is required because Stallings "testified as a lay witness about the estimated caliber of the weapon used to shoot him based on his experiences in the military." He argues that "[l]acking any ballistic or forensic evidence, [the] State relied on [Stallings's] testimony to link the firearm found during [appellant's] arrest to the shooting of Mr. Stallings." We disagree.

Preliminarily, we note that on direct examination, Stallings testified, without objection, that he was shot with "a small gun." Although he did not actually see the gun itself, he saw "maybe a little bit of the barrel and the way [appellant] was holding it[.]" As a result, appellant's objection to Stallings's testimony about the small size of the gun was not preserved properly for our consideration. Md. Rule 4-323(a) ("An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived."); Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any . . . issue [other than jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court[.]"). Appellant's objection was limited to Stallings's testimony that if the gun had been "a []9 millimeter, .45 or a .357 or something when he fired it, it would have took me straight to the ground."

The admission of opinion testimony by lay witnesses is addressed in Md. Rule 5-701, which provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful

> to a clear understanding of the witness's testimony or the determination of a fact in issue.

Maryland Rule 5-702 addresses testimony by expert witnesses, stating:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

In *Johnson v. State*, 457 Md. 513, 530 (2018), the Court of Appeals discussed the applicable standard of review, stating, in part:

> Whether evidence is properly admitted at trial is typically reviewed on an abuse of discretion standard. *Hopkins v. State*, 352 Md. 146, 158, 721 A.2d 231 (1998). However, in some circumstances, the admissibility of a particular item of evidence is a legal question on which we accord no special deference to a trial court. *Brooks v. State*, 439 Md. 698, 708-09, 98 A.3d 236 (2014). . . . Expert testimony is *required* "only when the subject of the inference . . . is so particularly related to some science or profession that is beyond the ken of the average layman[; it] is not required on matters of which the jurors would be aware by virtue of common knowledge." *Bean v. Department of Health and Mental Hygiene*, 406 Md. 419, 432, 959 A.2d 778 (2008) (citations and internal quotation marks omitted). If a court admits evidence through a lay witness in circumstances where the foundation for such evidence must satisfy the requirements for expert testimony under Maryland Rule 5-702, the court commits legal error and abuses its discretion. *See Ragland v. State*, 385 Md. 706, 726, 870 A.2d 609 (2005). . . . Once a trial court makes a finding of relevance and admits evidence, we generally do not reverse the trial court's decision "unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Merzbacher v. State*, 346 Md. 391, 404-05 (1997).

Expert testimony was not required here. Stallings's testimony did not rest on specialized knowledge or training, but was rationally related to his own observations. He had experience handling guns, recognized the sound of the gun shot, which he described

as sounding "like a firecracker," observed the way appellant carried the gun and the barrel of the gun, and testified that he did not drop to the ground after being shot. From these observations, he concluded that the weapon used to shoot him was a "small caliber" gun. That conclusion was based on his own perception and experience. The only purpose for Stallings's reference to specific calibers of weapons was to explain that he believed he was shot with "[s]omething small."

Even if the trial court had erred in allowing Stallings to testify that if the gun had been "a []9 millimeter, .45 or a .357 or something when he fired it, it would have took me straight to the ground[,]" we would conclude that such error was harmless. If the objection to that testimony had been sustained, the jury still would have heard Stallings's testimony that he believed the gun he was shot with was a small caliber weapon. Moreover, Stallings's testimony was related to whether the revolver recovered at the time of appellant's arrest was used to shoot Stallings on October 8, 2018. There was other evidence linking appellant and the revolver to the shooting. Stallings identified appellant as his shooter. Potter's testimony also placed appellant at the scene of the shooting. He stated that there was no one at the scene except Stallings, who had been shot, and appellant. No shell casing was found at the scene of the shooting and Detective McCray testified that shell casings are not ejected automatically from a revolver. Stallings believed the gun used to shoot him was black because it did not reflect any light. The gun recovered at the time of appellant's arrest was a dark colored revolver with a single spent shell casing in the cylinder. From this evidence, we can state beyond a reasonable doubt that any error in admitting Stallings's testimony about specific calibers of guns or the caliber of the gun used to shoot him was

harmless. *Dorsey v. State*, 276 Md. 638, 659 (1976) (an error is harmless if we are satisfied that there is no reasonable possibility that the evidence at issue contributed to the guilty verdict).

IV.

Appellant argues that the trial court erred in refusing to instruct the jury on imperfect self-defense. Maryland Rule 4-325(c) provides that a trial 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 rule requires the trial court to give a requested instruction if "'(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given.'" *Wright v. State*, 247 Md. App. 216, 229 (2020) (quoting *Dickey v. State*, 404 Md. 187, 197-98 (2008)).

In reviewing whether an instruction is applicable to the facts of the case, our task is "to determine whether the proponent 'produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired.'" *Molina v. State*, 244 Md. App. 67, 148 (2019) (quoting *Bazzle v. State*, 426 Md. 541, 550-51 (2012)). The threshold for establishing that an instruction on a point of law applies to the facts of the case is low: the requesting party must be able to point to "some evidence" in the record to support the requested instruction. *Page v. State*, 222 Md. App. 648, 668 (2015). This determination is a question of law for the trial judge and our review is without deference. *Molina*, 244 Md. App. at 148. In determining whether there is "some evidence" to support

the jury instruction, we view the facts in the light most favorable to the requesting party. *Page*, 222 Md. App. at 668-69. "Some evidence is 'a fairly low hurdle.'" *Molina*, 244 Md. App. at 148 (quoting *Arthur v. State*, 420 Md. 512, 526 (2011)). "'It calls for no more than what it says – "some," as that word is understood in common, everyday usage.'" *Id.*

We review a trial court's decision to propound or not propound a requested jury instruction under an abuse of discretion standard. *Stabb v. State*, 423 Md. 454, 465 (2011). A trial court's decision whether to give a jury instruction "will not be disturbed on review except on a clear showing of an abuse of discretion, that is, discretion manifestly unreasonable or exercised on untenable grounds, or for untenable reasons." *State v. Sayles*, 472 Md. 207, 230 (2021) (quoting *Appraicio v. State*, 431 Md. 42, 51 (2013)).

Maryland recognizes two forms of self-defense – perfect self-defense and imperfect self-defense. *State v. Smullen*, 380 Md. 233, 251 (2004). "Perfect self-defense is a complete defense and results in the acquittal of the defendant." *Roach v. State*, 358 Md. 418, 429 (2000). "Imperfect self-defense, by contrast, is not a complete defense." *State v. Faulkner*, 301 Md. 482, 486 (1984). It "operates to negate malice, an element the State must prove to establish murder[,]" and thereby, "mitigates murder to voluntary manslaughter." *Id.* To generate a claim of perfect self-defense, the defendant must generate evidence to show each of the following four elements:

> (1) The accused must have had reasonable grounds to believe himself in apparent imminent or immediate danger of death or serious bodily harm from his assailant or potential assailant;
>
> (2) The accused must have in fact believed himself in this danger;

> (3) The accused claiming the right of self-defense must not have been the aggressor or provoked the conflict; and
>
> (4) The force used must have not been unreasonable and excessive, that is, the force must not have been more force than the exigency demanded.

State v. Marr, 362 Md. 467, 473 (2001) (quoting *Faulkner*, 301 Md. at 485-86 and *Dykes v. State*, 319 Md. 206, 211 (1990)). Imperfect self-defense includes the same elements, with the exception that, with respect to the first element, the accused need only have a subjective belief that he or she is in imminent danger of death or serious bodily harm, even if the belief is not objectively reasonable. *Id.*

Appellant requested that the court give the jury the pattern instruction for imperfect self-defense.[1] Defense counsel objected to the court's failure to give that instruction

[1] Maryland's pattern jury instruction for imperfect self-defense provides, in part:

> Voluntary manslaughter is an intentional killing, which is not murder because the defendant acted in partial self-defense. Partial self-defense, sometimes called imperfect self-defense, does not result in a verdict of not guilty, but rather reduces the level of guilt from murder to manslaughter.
>
> You have heard evidence that the defendant killed (name) in partial self-defense. You must decide whether, based on this evidence, the defendant acted in partial self-defense.
>
> For partial self-defense to apply, you must find that the defendant [was not the initial aggressor] [was the initial aggressor but did not raise the degree of force used in the fight to the deadly level].
>
> You also must find that the defendant actually believed [he][she] was in immediate or imminent danger of death or serious bodily harm.
>
> [If the defendant actually believed [he][she] was in immediate or imminent danger of death or serious bodily harm, even though a reasonable person would not have so believed, that is partial self-defense and the verdict should be guilty of voluntary manslaughter instead of murder.]
>
> [If the defendant used greater force to defend [himself][herself] in light of the threatened or actual force than a reasonable person would have

arguing that the evidence permitted an inference, "no matter how allegedly unbelievable, that there was a physical altercation at that address that was initiated and asserted by Mr. Stallings." He argued that

> as people left Danielle Adams apartment, Mr. Stallings called out to Mr. Potter. According to Mr. Potter's testimony, called out for Tink to come out, "We're going to end this now." I think that allows an inference that Mr. Stallings was continuing to be the physical aggressor in this case where a rational person would have had a, a fear of physical violence, whether that was reasonable or unreasonable for imperfect self defense.

The court denied the request for the instruction, stating:

> As to the failure to give the self defense instruction, the court finds that the evidence before the jury does not generate that issue and to send them down that road would be confusing at best.
>
> The evidence that we have is that the fight was over in the house upstairs and the only reason there was a continuation of interaction between the defendant and the victim was because the defendant descended the stairs and came outside. Had that not happened, one would assume that Mr. Stallings would have got in his vehicle and left. So the court believes that the evidence is, is just too limited (inaudible words) to give that instruction.

> used, but the defendant actually believed that the force used was necessary, and the defendant made reasonable effort to retreat, that is partial self-defense and your verdict should be guilty of manslaughter and not guilty of murder.]
>
> [[The defendant does not have to retreat if [[he][she] was in [his][her] home] [retreat was unsafe][the avenue of retreat was unknown to the defendant][the defendant actually believed that [he][she] could not safely retreat, even though a reasonable person would not have so believed][the defendant was being robbed][the defendant was lawfully arresting the victim]].
>
> In order to convict the defendant of murder, the State must prove beyond a reasonable doubt, that the defendant did not act in partial self-defense. If the defendant acted in partial self-defense, your verdict should be guilty of manslaughter and not guilty of murder.

MPJI-Cr 4:17.2(C2).

Appellant argues that Stallings initiated the physical altercation when he tackled appellant to the ground and put his hands around his neck. He also points to Potter's testimony that Stallings called to him from outside, saying, "[c]ome outside. We're getting ready to finish this." According to appellant, this evidence was sufficient to establish a *prima facie* case that he actually believed he was in imminent danger and needed to defend himself. Appellant contends that it is immaterial that he did not testify about his own state of mind because that could be determined by consideration of his acts, conduct, and words. We are not persuaded.

In order to generate the instruction, appellant bore the burden of showing "some evidence" that he had not been the aggressor or provoked the conflict. *Page*, 222 Md. App. at 668. The evidence showed that appellant was the aggressor at the time of the shooting. Although Stallings was the first to engage in a physical altercation, he left the apartment and exited the building. Appellant pursued Stallings, thus becoming the aggressor. Stallings's statement to Potter to "[c]ome outside. We're getting ready to finish this," which was followed by a gunshot, did not change the fact that the initial altercation in the apartment ended when appellant left and went outside, or the fact that appellant pursued Stallings, thus becoming the aggressor. Nor was there any direct or circumstantial evidence of appellant's state of mind at the time of the shooting. The initial altercation in the apartment does not support an inference that appellant was subjectively in fear of Stallings at the time of the shooting because appellant voluntarily pursued Stallings after he left the apartment. For all these reasons, the evidence did not generate the issue of imperfect self-defense.

JUDGMENT OF THE CIRCUIT COURT FOR DORCHESTER COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.