UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1341

September Term, 2013

DARNELL SEWELL

v.

STATE OF MARYLAND

Krauser, C.J.,
Zarnoch,
Reed,

JJ.

Opinion by Reed, J.

Filed: June 11, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant Darnell Sewell seeks our review of the circuit court's conduct of his trial, in the hopes that he may obtain a reversal of his conviction.

This appeal arises from a series of shootings in the Brooklyn and Curtis Bay neighborhoods of Baltimore City. Appellant was tried and convicted of reckless endangerment, two counts of unlawful possession of a regulated firearm, and six counts of attempted first-degree murder in the Circuit Court for Baltimore City. The circuit court imposed sentences, which resulted in a term of life imprisonment with all suspended but sixty years, and terms of probation for each suspended sentence. Appellant now appeals his conviction and presents several questions for our review, which we have consolidated and rephrased for clarity:[1]

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[1] Appellant originally presented six questions for our review:

1. Did the trial court err when it granted the State's motion for joinder?
2. Did the trial court err when it permitted Saint Brown to testify about the effect the first incident had on him?
3. Was the evidence insufficient to support Mr. Sewell's convictions relating to the third incident involving Damien Moulden, Raykron Kasey and Antwann Parks because the State failed to prove agency?
4. Was the evidence insufficient to support Mr. Sewell's convictions for attempted first-degree murder relating to the second and third incidents involving Darrell Funderburk, Autumn Lasley, Damien Moulden, Raykron Kasey, and Antwann Parks because the State failed to prove the element of premeditation?
5. Did the court commit plain error when it instructed the jury on accomplice liability with respect to the second and third incidents?
6. Must Mr. Sewell's convictions and sentences for possession of a regulated firearm be merged?

I. Whether the circuit court erred where it granted the State's motion for joinder;

II. Whether the circuit court erroneously admitted irrelevant witness testimony;

III. Whether the circuit court erred where it denied appellant's motions for judgment of acquittal of his attempted first-degree murder convictions for the second and third shooting incidents;

IV. Whether the circuit court committed plain error in giving the jury an instruction on accomplice liability with regard to the second and third incidents;

V. Whether the circuit court erred where it did not merge appellant's convictions for the unlawful possession of a regulated firearm.

We answer his questions in the negative, and, accordingly, we shall affirm appellant's convictions and explain further below.

FACTUAL AND PROCEDURAL BACKGROUND

The events leading to this appeal all took place between July 9 and 14, 2011, in the South Baltimore neighborhoods of Brooklyn and Curtis Bay.

The first incident occurred in the late evening of July 9, 2011, outside the Brooklyn's Bar and Grill establishment in the Brooklyn neighborhood. During the 11 o'clock hour, Saint Brown, the owner of the aforementioned establishment, became aware of a commotion outside his bar after two seemingly upset women came into his bar. The disturbance outside the bar involved appellant, his cousins Yaakove Bond, nicknamed "Fu" or "Foo," and Tevon Williams, nicknamed "Tay" or "Tayo," and a man named Christopher.

According to the trial testimony and exhibits, the incident outside the bar stemmed from appellant's erstwhile membership in the Bloods gang. According to appellant, he and

his cousins ran into Christopher and his friends outside the bar. The encounter was unpleasant from the start, with appellant claiming that Christopher was "cussing," acting "very disrespectful[ly]," and challenging appellant to fight. The apparent reason for the fight was that Christopher was still a member of the Bloods and he took umbrage to appellant's decision to leave the organization.

Appellant's testimony and eyewitness testimony about what happened next is in conflict. It appears that, as the argument grew heated, a gun was brandished and Christopher ran toward the doors of the bar, calling for help. Appellant, Mr. Bond, and Mr. Williams apparently ran toward the bar, chasing after Christopher, but were blocked by Mr. Brown and a security guard. As Mr. Brown and others pleaded for calm, appellant fired the gun while exclaiming "what it is."[2]

The three men eventually left the scene, going in different directions—Mr. Williams on foot, Mr. Bond on a red scooter, and appellant in a black sedan. At some time after the incident, Mr. Williams was arrested in a house raid and was questioned by a detective regarding the Brooklyn bar incident. He also identified appellant in a photo array, and stated appellant had his hair braided in cornrows at the time. Additionally, after the shooting, a police officer responded to the scene and recovered four 9 millimeter shell casings from the sidewalk outside the bar.

The second incident occurred just hours after the first, in the early morning hours of July 10, 2011. There were many people out and about around 2 a.m. on July 10 near 8th

[2] The testimony indicates the meaning of this expression is "what's up."

Street in Brooklyn, including Darrell Funderburk and his girlfriend Autumn Lasley. Mr. Funderburk and Ms. Lasley were enjoying the warm temperatures and were sitting outside a friend's house on 8th Street, drinking beer and playing cards. The couple decided to walk to the nearby 7-11 convenience store. During that time, Mr. Funderburk saw two men get out of a car and also saw an individual on a red scooter riding up and down the block.

While walking, something disconcerting grabbed Ms. Lasley's attention and she began to pull at Mr. Funderburk. Behind them, there was a couple and the woman was apparently sick and vomiting. Mr. Funderburk thought Ms. Lasley was trying to draw his attention to the sick woman, and dismissed his girlfriend's exhortations. Mr. Lasley persisted, however, and at that point he looked up to see two men in front of him, one of who uttered the fateful words—"what it is." Mr. Funderburk responded, while backing up, that "[i]t ain't nothing." The man with the gun again said "what it is" and then began firing. Mr. Funderburk and Ms. Lasley ran, but one of the bullets fired struck Mr. Funderburk in the leg. Mr. Funderburk managed to escape while the shooter continued firing. Mr. Funderburk eventually collapsed in the front yard of his home.

Baltimore City Police Department Sergeant Mark Benjamin and Officer Christopher Rodriguez heard the shots fired and immediately headed toward the shooting. There, they saw Mr. Funderburk collapse and also stopped the man on the red scooter—Mr. Bond—who was riding past the scene and "bagged" his hands to have them tested for gunshot residue. A gunshot residue analysis expert testified that no gunshot primer residue particles were recovered from Mr. Bond's swab samples, but rather, found gunshot residue associated particles, which could be indicative of not only the discharge of a firearm, but

also being in close proximity or handling one. Officer Rodriguez also recovered four 9 mm casings near the intersection of 8th Street and Washburn Avenue.

In addition, Jennifer Smith, a woman who lived across the street from the 8th Street house, that was the central point of the scene, described the shooting. She recalled seeing the man on the red scooter and also a dark-colored car come near the house. She further described seeing a man exit the rear passenger door, who had his hair styled "more [in] corn rows than dreads," who then begin firing at the 8th Street house. She threw herself to the floor when the shots began, and after they stopped, she looked out of her window and saw the scooter and the dark car heading away from the scene.

Hours after this second incident, a third incident occurred in neighboring Curtis Bay, near the 4000 block of Pascal Avenue. Damien Moulden, Antwann Parks, and a friend named Ray were all in Mr. Moulden's car around 2 a.m. on July 10, driving toward Mr. Moulden's friend's home. While driving to the friend's house, Mr. Moulden turned onto a side street in order to make a three-point turn. It was then he saw three men walking in the street toward the car. The men turned around and Mr. Moulden was about to begin moving forward when shots rang out. Mr. Moulden immediately accelerated away from the shots before stopping the car at the top of the hill, getting out of the car, and running to his friend's house. It was at his friend's house he discovered he had been shot twice in the right hand.

Mr. Moulden's car was struck by bullets nine times, but he was unable to get a clear look at who shot his car. Notwithstanding this failure to get a clear look of who was the shooter, Mr. Moulden tentatively identified appellant from a photo array, writing on the

back of the array "The guy I picked looked kind of familiar. It's possibly the guy who may have shot at my car the night of the incident." In addition, although Mr. Moulden testified to the car being struck nine times, responding officers recovered ten 9 mm cases near the intersection of Tompkins Street and Pascal Avenue.

The final incident occurred several days later, in the evening of July 14, 2011, again in the Brooklyn neighborhood. David Alston was waiting for a bus in the evening near the 1000 block of East Patapsco Avenue. When he turned his head to see whether or not the bus was coming, instead of a bus, he saw three men walking toward him. All three men had white t-shirts covering their faces, and one of the men in particular was wearing black trousers and a white tank-top shirt. Mr. Alston looked away and then when he looked back, the man in the black trousers opened fire and struck him in the back. Mr. Alston quickly ran away in the westbound direction of Patapsco Avenue, boarded a bus, and went straight to the hospital.

Sheena Shields, a witness, gave a similar account. Ms. Shields was walking down Patapsco Avenue with a friend when they saw the three men. One of the men put a t-shirt around his face, and Ms. Shields' friend told her she saw a gun. When Ms. Shields turned around, she saw the man with the t-shirt on his face holding the gun. Ms. Shields and her friend quickly walked away and then they heard the shots. When the shots ceased, Ms. Shields was curious as to what had occurred and she ran back toward the scene, where she saw all three of the men, elated, jumping up and down while cheering. The man holding the gun then turned to one of his companions, who was wearing a blue and white striped shirt, and handed him the gun.

Ms. Shields, it turns out, may have been on Patapsco that evening for a different reason. On July 22, 2011, she was arrested for prostitution and, at the police precinct, was shown two photo arrays. She was unable to identify anyone from the arrays, but it appears the police were seeking an identification of Mr. Williams and another associate. Then, several days later, on August 4, 2011, she was shown another photo array, in which she identified appellant as the man holding the gun. She also made an in-court identification of appellant, but noted that he did not have cornrows at the time, but rather, an "afro" style haircut of about an inch in length.

A canvassing detective, Detective Timothy Copeland, recovered a 9 mm shell casing on July 18, 2011, from a neighborhood woman who stated she found the casing near the intersection of Patapsco Avenue and West Bay Avenue. When he went to that location, another woman approached him and gave him an additional shell casing. According to a testifying firearms examiner, the shell casings recovered from that most recent incident matched the casings recovered from the other three incidents. Her conclusion was that all the casings were consistent with being fired from a Glock handgun or a Smith and Wesson Sigma handgun.

Appellant was charged in each of the four incidents. For the July 9, 2011, incident in front of the Brooklyn Bar and Grill, he was charged with wearing, carrying and transporting a handgun, illegal possession of a regulated firearm, reckless endangerment, and unlawfully discharging a firearm within Baltimore City. For the July 10, 2011, incident near 8th Street, on the complaints of Mr. Funderburk and Ms. Lasley, he was charged with two counts of attempted first-degree murder, two counts of attempted second-degree

murder, one count of first-degree assault, one count of second-degree assault, two counts of wearing, carrying and transporting a handgun, one count of illegal possession of a regulated firearm, two counts of attempted robbery, one count of reckless endangerment, and one count of unlawfully discharging a firearm within Baltimore City. For the third incident on July 10, 2011, in Curtis Bay, on the complaints of Messrs. Moulden, Parks, and Raykron Kasey, he was charged with three counts of attempted first- and second-degree murder, three counts of first- and second-degree assault, three counts of reckless endangerment, three counts of wearing, carrying, and transporting a handgun, one count of illegal possession of a regulated firearm, and one count of unlawfully discharging a firearm within Baltimore City. Finally, for the incident on July 14, 2011, on the complaint of Mr. Alston, he was charged with attempted first- and second-degree murder, first- and second-degree assault, reckless endangerment, wearing, carrying, and transporting a handgun, illegal possession of a regulated firearm, and unlawfully discharging a firearm within Baltimore City.

The State filed a motion for joinder, which the circuit court granted and joined the four cases. The consolidated case proceeded to trial, which was held from April 12, 2013, to April 25, 2013. The case was then submitted to the jury, which returned a verdict finding appellant guilty of reckless endangerment and unlawful possession of a regulated firearm for the first incident; guilty of two counts of attempted first-degree murder for the second incident; guilty of three counts of attempted first-degree murder for the third incident; and guilty of attempted first-degree murder and unlawful possession of a regulated firearm for

the final incident. Appellant was sentenced on August 2, 2013, to a cumulative term of life imprisonment with all but sixty years suspended, plus terms of probation.

Appellant timely noted his appeal on August 19, 2013.

DISCUSSION

I. JOINDER

A year prior to the commencement of trial, on March 5, 2012, the State filed a Motion for Joint Trial of Offenses pursuant to Maryland Rule 4-253(b), seeking to have appellant tried jointly for the four incidents.

A. Parties' Contentions

The dispute between appellant and the State regarding the grant of the joinder motion is focused on the mutual admissibility of the evidence presented. Appellant contends that none of the evidence presented was sufficiently distinct to prove identity, and assuming, *arguendo*, that the evidence was mutually admissible, it was unfairly prejudicial. The State, however, disagrees and explains that the evidence of "other crimes," per *Faulkner*, 314 Md. at 634, was mutually admissible to prove appellant's identity. It urges this Court to affirm the trial court's exercise of its discretion.

B. Standard of Review

Matters of joinder are ordinarily committed to the discretion of the trial judge. *Frazier v. State*, 318 Md. 597, 607 (1990); *accord Galloway v. State*, 371 Md. 379, 395 (2002); *Carter v. State*, 374 Md. 693, 704–05 (2003). Accordingly, we review that decision for an abuse of discretion. *Carter*, 374 Md. at 705. We determine an abuse of discretion has occurred where no reasonable person would take the view adopted by the trial court or

where the trial court takes action without reference to any guiding principles and the ruling runs contrary to fact and logic. *See Beyond Sys., Inc. v. Realtime Gaming Holding Co., LLC*, 388 Md. 1, 28 (2005) (citations omitted) (internal quotation marks omitted).

C. Analysis

Rule 4-253(b) explains that "[i]f a defendant has been charged in two or more charging documents, either party may move for a joint trial of the charges. In ruling on the motion for joinder, the court may inquire into the ability of either party to proceed at a joint trial." The justification for joinder is to promote judicial efficiency, but that consideration must cede to any potential prejudice if the proffered evidence is not mutually admissible. *McKnight*, 280 Md. at 608–09. In *Solomon v. State*, 101 Md. App. 331, 341 (1994), we explained that *McKnight* created a substantive overlap between the law of joinder and the law of "other crimes" evidence. That is, the determination of mutual admissibility depends not on whether the evidence is offered to prove criminal propensity, but on whether "other crimes" evidence is offered to prove the accused's motive, intent, absence of mistake, identity, common scheme or plan, or where "several offenses are so connected in point of time or circumstance[] that one cannot be fully shown without [proof of] the other." *Id.* at 351–54; *accord Garcia-Perlera v. State*, 197 Md. App. 534, 547 (2011).

Maryland's test for analyzing the joinder of offenses was enunciated in *Conyers v. State*, 345 Md. 525 (1997). As stated in *Conyers*:

> [T]he analysis of jury trial joinder issues may be reduced to a test that encompasses two questions: (1) is evidence concerning the offenses or defendants mutually admissible; and (2) does the interest in judicial economy outweigh any other arguments favoring severance? If the answer to both

> questions is yes, then joinder of offenses or defendants is appropriate. In order to resolve question number one, a court must apply the first step of the "other crimes" analysis announced in [*State v.*] *Faulkner*[, 314 Md. 630 (1989)]. If question number one is answered in the negative, then there is no need to address question number two; *McKnight* [*v. State*, 280 Md. 604 (1977)] mandates severance as a matter of law.

Id. at 553.

Accordingly, for this Court to determine whether joinder was proper, we must examine whether the evidence of the offenses at issue was "mutually admissible." *Id.* To resolve that question, we must, per *Conyers*, apply step one of the *Faulkner* analysis—*i.e.*, "whether the evidence is *prima facie* admissible because it fits within any exception to the presumptive rule of exclusion, such as the exceptions discussed in *Solomon,* [101 Md. App. at 353–54]." *Conyers*, 345 Md. at 550 (citing *Faulkner*, 314 Md. at 634). Because joinder is a procedural matter, only the first step of the *Faulkner* analysis is necessary as the remainder of the steps are meant to assist the trial judge in determining the *admissibility* of other crimes evidence for substantive purposes. *Conyers*, 345 Md. at 551. If that first step of the *Faulkner* analysis is met, then we are able to answer that the evidence is mutually admissible, and we proceed to balance the need for judicial economy against any arguments favoring severance. *See id.* at 553.

In the present matter, we think that joinder was proper. We have stated previously that ballistics evidence is admissible as other crimes evidence of identity because "[w]e can think of few characteristics of a crime as unique or identical as bullets fired from the same gun." *Simms v. State*, 39 Md. App. 658, 664 (1978), *cert. denied*, 283 Md. 738 (1978).

Here, a firearms examiner qualified as an expert examined the 9 mm shell casings recovered from the scene of each incident, and concluded that the bullets were fired from the same gun—a Glock or Smith and Wesson Sigma. There are several witnesses to the shootings, including the victims and two witnesses who described the shooter as having his hair in cornrows. The ballistics evidence as well as several consistent identifications across the incidents of a shooter with cornrows supports the inference that appellant was the shooter in all four incidents. *Cf. id.* at 665 (concluding ballistics evidence establishing same gun used in several crimes along with identification of defendant as shooter in one incident supported inference defendant was the shooter in another incident). Moreover, there was eyewitness testimony that appellant was the shooter in the first and fourth incidents, which, along with the ballistics evidence, leads to the reasonable inference that appellant was the shooter in the second and third incidents. *See Govostis v. State*, 74 Md. App. 457, 466 (1988), *cert. denied*, 313 Md. 7 (1988) (citation omitted) ("Evidence of possession of an object *before* and *after* an event with which that object is associated creates, in turn, a reasonable inference of possession of the object *during* the event.").

The incidents also took place in both temporal and geographic proximity to each other, which can demonstrate appellant's identity. *See Garcia-Perlera*, 197 Md. App. at 548 (determining that evidence of multiple crimes taking place in houses within walking distances of each other, among other evidence, could prove defendant's identity).

At least two witnesses state they heard appellant utter the phrase "what it is" in the first two incidents before he fired the gun. *See Faulkner*, 314 Md. at 638 (stating that

evidence of other offenses may be received under the identity exception if it shows the defendant's identity from a remark made by him).

The evidence presented in support of appellant's identity is voluminous, and, therefore, meets the first step of the *Faulkner* analysis. Consequently, we are able to answer in the affirmative that the evidence presented of appellant's identity is mutually admissible for the four incidents. Moreover, considering the similarity of all the incidents in this case, we cannot see how judicial economy would be respected by scheduling four different trial dates, impaneling four different juries, managing four separate dockets replete with all manner of motions, etc. We do not think appellant's claims of prejudice can outweigh the judicial economy realized from joining the four cases together. We hold the circuit court properly exercised its discretion in granting the State's motion for joinder of charges.

II. Relevance of Witness Testimony

On the second day of trial, Mr. Brown, the owner of the shuttered Brooklyn's Bar and Grill, where the first incident took place, testified regarding that incident. During redirect examination of Mr. Brown, the following exchange took place:

> [STATE'S ATTORNEY:] You indicated that you spoke with the shooter, correct?
>
> [MR. BROWN:] Yes.
>
> [STATE'S ATTORNEY:] After speaking with the shooter, he shot into the air?
>
> [MR. BROWN:] Yes, he did.
>
> [STATE'S ATTORNEY:] Why did you then turn around and go inside your bar?

> [MR. BROWN:] I – at that point, obviously, he – I could see it in his face. He was gone. There was no rationalizing with this guy. There was no trying to talk him [down].
>
> He was done, and I felt, when he said "What it is" and looked me in my eyes, that what he really was saying was say something else, and I would've said anything else, he would've shot me. So I – I just left.
>
> My concern at that point was to get my people in the bar in the kitchen and get them back out of the way in case he started through – through the bar or he tried to come in there.
>
> . . . .
>
> [STATE'S ATTORNEY:] *How has this experience affected you?*
>
> [MR. BROWN:] Well besides –
>
> [DEFENSE COUNSEL]: *Objection.*
>
> [MR. BROWN]: – having to shut down the bar –
>
> [DEFENSE COUNSEL]: *Objection. Objection. Objection.*
>
> THE COURT: I'm going to overrule the objection. Go ahead.
>
> [MR. BROWN]: *Besides having to shut down the bar and lose a lot of money on that, I always remember – and actually, having to sit through this case just brought it up again.*
>
> *Looking at him in this – in this courtroom, I have to remember that he fired that gun in my face and I feel like that he could've – he could've shot me with it. So it's always in my mind.*

(Emphasis added).

A. Parties' Contentions

Appellant argues that the emphasized colloquy entailed testimony that was irrelevant to the determination of the identity of the shooter, and, therefore, does not meet

the definition of relevant evidence in Maryland Rule 5-401.[3] He contends that Mr. Brown's testimony did not increase or decrease the likelihood that he was in fact the perpetrator, and that the testimony had a highly prejudicial effect. Accordingly, the trial court abused its discretion in admitting the objectionable evidence, and the admission of the evidence was not harmless error. The State disagrees, explaining that the colloquy was relevant to the reliability of Mr. Brown's identification of appellant, and also to his credibility as a witness. Were this Court to find that the evidence was erroneously admitted, the State further urges we find that the admission was harmless error.

B. Standard of Review

A trial court's weighing of the relevance of evidence is generally within its broad discretion. *Clark v. State*, 218 Md. App. 230, 241 (2014) (citations omitted). That discretion is not unlimited, as trial courts may not admit irrelevant evidence. *Id.* Our review requires us to determine, first, whether the evidence is legally relevant, and, second, if relevant, "whether the evidence is inadmissible because its probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined in Maryland Rule 5-403."[4] *Id.* Accordingly, we review the trial court's determinations for an abuse of

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[3] Md. Rule 5-401 provides:

> "Relevant evidence" means evidence having 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.

[4] Md. Rule 5-403 provides: (continued…)

discretion. *Shemondy v. State*, 147 Md. App. 602, 612–13 (2002), *cert. denied*, 373 Md. 408 (2003).

C. Analysis

We do not think the portion of Mr. Brown's testimony appellant finds objectionable was necessary to support the reliability of Mr. Brown's identification of appellant as the shooter, and was erroneously admitted.

The law of extrajudicial identification procedures is particularly helpful here, considering Mr. Brown identified appellant as the shooter in a February 8, 2012, photo array procedure. Although the array is not at issue in this case, we think some of the reliability factors enunciated in *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972), can assist our analysis.

Biggers set forth several factors that could assist a court in determining whether an identification is reliable notwithstanding a suggestive identification procedure. *See Turner v. State*, 184 Md. App. 175, 181 (2009); *James v. State*, 191 Md. App. 233, 253 (2010), *cert. denied*, 415 Md. 338 (2010). The factors pertinent to our discussion are:

- The opportunity of the witness to view the criminal at the time of the crime;
- The witness' degree of attention.

(continued…)

> Although relevant, evidence may be excluded 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.

Biggers, 409 U.S. at 199–200.[5]

Certainly, the testimony indicates that Mr. Brown had the opportunity to view appellant at the time of shooting. He vividly describes appellant's face when he attempted to speak to appellant: "*I could see it in his face. He was gone.* There was no rationalizing with this guy. There was no trying to talk him [down]." (emphasis added).

Nevertheless, this segment of testimony demonstrates nothing about Mr. Brown's attention to the scene. We do not think this testimony provides relevant information under the second *Biggers* factor, which considers how much attention a witness was paying to the events unfolding. We have previously explained that this factor counsels in favor of reliability where the witness' attention is "riveted on the scene." *Turner*, 184 Md. App. at 187. Mr. Brown's testimony was riveted not on the scene, but on appellant's face and state of mind. Ostensibly, the line of questioning was designed to elicit a response regarding how vivid Mr. Brown's memory of the shooting was. What Mr. Brown testified to, however, was appellant's emotional state at the time, and also his own—"I have to remember that he fired that gun in my face and I feel like that he could've – he could've shot me with it. So it's always in my mind."

Mr. Brown's testimony conveyed nothing regarding his attention the scene of that shooting. The testimony contained no additional details about appellant, or specific details about the scene and other individuals present. The testimony was solely focused on

[5] The other *Biggers* factors are: the accuracy of the witness' prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation; and the length of time between the crime and confrontation.

appellant's emotional reaction and, most objectionable to appellant, Mr. Brown's emotional reaction to the shooting.

Though the offending testimony was not relevant, that error was harmless. The prejudicial effect of Mr. Brown's testimony is minimal, considering the mere drop in a bucket that these few lines of testimony represent—and especially considering this trial went on for ten days. The record is replete with testimony and evidence demonstrating appellant's participation in the shooting at Mr. Brown's bar, and the other shootings as well. Moreover, the testimony was not used for any inappropriate purpose, such as bolstering witness testimony. The State's Attorney, in her closing argument, chose to reiterate Mr. Brown's recollection of the events of that night and how he could "never forget" what transpired. She did not lend the prestige of her office to vouch for Mr. Brown's credibility, nor did she suggest there was additional information not presented to the jury that would support Mr. Brown's testimony. *See Spain v. State*, 386 Md. 145, 152–54 (2005) (explaining that bolstering occurs where "a prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity . . . or suggests that information not presented to the jury supports the witness's testimony." (citation omitted) (internal quotation marks omitted))

We hold that the trial court abused its discretion in admitting this excerpt of Mr. Brown's testimony, but that the error was harmless.

III. SUFFICIENCY OF THE EVIDENCE

A. Parties' Contentions

Appellant attacks the sufficiency of the evidence that supported his convictions for attempted first-degree murder in the second and third incidents. First, he explains that his convictions arising from the third incident must be reversed because the State failed to prove criminal agency beyond a reasonable doubt. He contends the evidence was insufficient to demonstrate that he was the individual who fired a gun at the car in which Moulden, Parks, and Kasey were passengers. Second, he explains that the State failed to prove the necessary element of premeditation for attempted first-degree murder in the second and third incidents.

The State argues initially that appellant's argument regarding criminal agency is not preserved for our review. Even if we determine that appellant's agency argument is preserved, the State explains that, although Mr. Moulden was unable to make a definitive identification of appellant, the remaining body of evidence was more than sufficient to support his conviction in that respect.

Additionally, the State explains that the evidence presented sufficiently proves premeditation. It explains that a reasonable jury could determine that, because of the appreciable length in time between the second and third incidents, and the nature of those incidents, that appellant made the conscious decision to kill. Accordingly, the evidence sufficiently supports a jury finding of premeditation.

B. Standard of Review

When reviewing whether the State has presented sufficient evidence to sustain a conviction, we examine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *accord Hobby v. State*, 436 Md. 526, 537–38 (2014). Our purpose in this inquiry

> is not to undertake a review of the record that would amount to, in essence, a retrial of the case. Rather, because the finder of fact has the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence. We recognize that the finder of fact has the ability to choose among differing inferences that might possibly be made from a factual situation, and we therefore defer to any possible reasonable inferences the trier of fact could have drawn from the admitted evidence and need not decide whether the trier of fact could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence.

Titus v. State, 423 Md. 548, 557–58 (2011).

Generally, we will review the sufficiency of the evidence only

> when the defendant moves for judgment of acquittal at the close of all the evidence and argues precisely the ways in which the evidence is lacking. The issue of sufficiency of the evidence is not preserved when the defendant's motion for judgment of acquittal is on a ground different than that set forth on appeal.

Hobby, 436 Md. at 540 (discussing Md. Rule 4-324).

C. Analysis

(i) Criminal Agency

The State argues that appellant's criminal agency argument is not preserved for our review. An appellate court will decide only those issues the record plainly demonstrates were raised in or decided by the trial court. Md. Rule 8-131(a). The trial court questioned *sua sponte* the sufficiency of the evidence as to the criminal agency issue rather than upon motion of the appellant, per Rule 4-324(a). Because appellant's trial counsel did not raise the motion of his own volition, the State contends that appellant's criminal agency argument is not preserved.

Subsection (b) of Rule 4-324 explains that "If the court . . . *determines on its own motion* that a judgment of acquittal should be granted, it shall enter the judgment or direct the clerk to enter the judgment and to note that it has been entered by direction of the court." (emphasis added). The emphasized language indicates that sufficiency of the evidence may be raised by the trial court *sua sponte*. This is what happened here with regard to the criminal agency issue, and per subsection (a) of the rule, appellant renewed his motion on all sufficiency arguments. Appellant's criminal agency argument is preserved for our review.

To secure a conviction, the State must prove not only the elements of a crime beyond a reasonable doubt, but criminal agency by the same standard as well. *State v. Simms*, 420 Md. 705, 722 (2011). Where pertinent, criminal agency may include proof beyond a reasonable doubt of the defendant's presence at the scene. *Id.* Appellant argues that the

State could not prove beyond a reasonable doubt that he was the individual that fired a gun at Messrs. Kasey, Moulden, and Parks.We do not agree.

An eyewitness identification of the criminal actor in a first-degree murder is not necessary to prove criminal agency. In *Snyder v. State*, 104 Md. App. 533, 551 (1995), *cert. denied*, 340 Md. 216 (1995), we held that circumstantial evidence may be legally sufficient to prove a defendant's criminal agency in a first-degree murder conviction. We explained that "appellant's discovery of the body, his conduct on the day of the murder, statements that he made before and after the murder, and his conduct subsequent to the murder, was sufficient to establish his guilt." *Id.*; *accord Hricko v. State*, 134 Md. App. 218, 269 (2000) (explaining that, in *Snyder*, although there was "no direct evidence of the husband's criminal agency . . . the encircling web of circumstantial evidence was inescapable.").

Mr. Moulden's inability to identify definitively appellant as the shooter does not overshadow the circumstantial evidence supporting appellant's conviction for attempted first-degree murder. There is sufficient evidence to link appellant to the Pascal Avenue scene. The ten 9 mm shell casings recovered there match the weapon used in the other three incidents—including the first where Mr. Brown definitively identified appellant as the shooter. Furthermore, the first, second, and third incidents each occurred in close temporal and geographical proximity to each other.

Significant here, as in *Snyder*, is appellant's conduct subsequent to the shooting. According to jail calls placed by appellant while incarcerated to an unidentified woman, appellant believed he could defeat the charges against him if critical witnesses did not

testify. In the fourth of seven calls placed, appellant described the acquittal of an individual charged with shooting at appellant and his sister in an unrelated incident. Appellant believed that, because many of the witnesses refused to appear in court to testify, the shooter in that incident was not convicted and "was home in like – like a month and a half, two months later . . . ." To that end, appellant explained to the woman at the other end of the call:

> So I'm hoping that they show me some type of love like that, man. *If n*[—]*s don't show up, yo, I should be good*.
>
> . . . .
>
> But I need to make sure like – *I need to make sure like don't nobody come, like no witnesses, no nothing. You feel me?*

(Emphasis added).

In the fifth call, appellant explained that "Tayo," his cousin Tevon Williams, knew Mr. Moulton before the third incident:

> Tayo know *the dude by One Stop* that be with the n[—]s. Just tell Tayo to tell him to holla at his mans and them and tell them like, yeah, see what's going on like. You feel me?
>
> . . . .
>
> For real though. *Tayo know the n*[—]*s, because the n*[—]*a homebody live down there by One Stop with this tall n*[—]*a with dreads.* Tayo know his n[—]a. You feel me? Because *that's Tayo's man for real for real from Annapolis.* So tell Tayo *to tell his man from Annapolis to tell his mens to do right*, man.

(emphasis added). Evidence introduced at trial indicated that Mr. Moulton was born in Annapolis and, at the time of the shooting, he resided in Baltimore next to a corner store called the One Stop. He also testified that, at the time, he had his hair styled in dreadlocks.

These phone calls placed by appellant during his incarceration are clear instances of "statements . . . made before and after the [incident], and . . . conduct subsequent to the [incident] . . . sufficient to establish . . . guilt." *See Snyder*, 104 Md. App. at 551. These phone calls demonstrate appellant's plan to either intimidate or pressure witnesses in order to prevent their in-court testimony. We think a reasonable jury could infer that appellant hatched this plan after hearing of the apparent "success" of the individual who shot at him and his sister in obtaining an acquittal. Evidence of efforts to intimidate a witness or induce a witness not to testify is generally admissible as substantive evidence of guilt, as long as the threats or attempts are connected to the defendant. *See Washington v. State*, 293 Md. 465, 468 n.1 (1982); *see also* Md. Crim. Pattern Jury Instruction 3:28: Bribery or Witness Intimidation as Consciousness of Guilt (2013) ("Bribery or witness intimidation is not enough by itself to establish guilt, but may be considered as evidence of guilt."). Appellant's apparent efforts to plan to induce several witnesses, including Mr. Moulton, not to testify to his role as the shooter in the third incident is circumstantial evidence that would support appellant's criminal agency. This evidence, as well as the ballistics evidence and evidence of the temporal and geographical proximity of the incidents, persuades us that there was sufficient evidence of criminal agency for a rational jury to find appellant guilty of attempted first-degree murder beyond a reasonable doubt.

(ii) Premeditation

To obtain a conviction for first-degree murder, the State must prove beyond a reasonable doubt that the killing was "deliberate, premeditated, and willful." Md. Code, Criminal Law Article ("C.L.") § 2-201 (West 2014). Accordingly, the State must demonstrate that the defendant was willful in that he possessed the intent to kill; that he was deliberate in that he had conscious knowledge of the intent to kill; and that the killing was premeditated in that the defendant had sufficient time to have considered that intent to kill. *See Wood v. State*, 209 Md. App. 246, 317 (2012), *aff'd*, 436 Md. 276. Alternatively stated, premeditation requires that "the design to kill must have preceded the killing by an appreciable length of time." *Tichnell v. State*, 287 Md. 695, 717 (1980). It is not necessary for premeditation to have existed "for any particular length of time." *Id.* at 717–18. Premeditation may be established from circumstantial evidence. *Wood*, 209 Md. App. at 318.

We have explained that the time necessary to establish deliberation need not be long. *See Morris v. State*, 192 Md. App. 1, 32 (2010). This is because an "appreciable length of time" is simply an amount of time necessary to convince the fact-finder that the intent to kill was formed not by ill-tempered mind, but one that is "fully conscious." *See id.* (quoting *Mitchell v. State*, 363 Md. 130, 148–49 (2001)). The time taken by a defendant between the first and second shots of a single-action gun is sufficient to demonstrate premeditation. *See Hunt v. State*, 345 Md. 122, 161 (1997). We have determined that sufficient time for premeditation existed where a defendant has held a gun to the victim's head, enunciated his murderous intent, heard the pleas of the victim, and then committed the act. *Morris*,

192 Md. App. at 33. Premeditation could also be formed in the time during which a burglar retrieved a knife from the kitchen and transported it to a stairway to use it against the victim. *See Colvin v. State*, 299 Md. 88, 108–09 (1984) (citing *Taylor v. State*, 226 Md. 561, 567–68 (1961)).

The evidence presented here was sufficient such that a rational jury could find beyond a reasonable doubt that there was premeditation in the second and third incidents. The facts of the second incident are akin to *Morris*, albeit without a fully realized murder. The testimony adduced at trial allows for an inference of premeditation. Appellant took the time to confront his victim, Mr. Funderburk, with his cryptic message—"what it is"—before raising the gun. Mr. Funderburk had the time to respond, like the victim in *Morris*, before the shooter repeated his message and fired. From the time that the confrontation began to the time that the tenth bullet was fired, we think that appellant had ample time to consider the action he took. There is nothing to suggest that appellant's action in the second incident was "the immediate offspring of rashness and impetuous temper." *See Willey v. State*, 328 Md. 126, 133 (1992).

The third incident has hallmarks of premeditation as well. The same gun was used in both the second and third incidents, and they occurred close in space and time—seven-tenths of a mile and ninety minutes apart. Moreover, upon spotting Mr. Moulden's car, the shooter did not begin firing. In fact, the three men walked past Mr. Moulden's car, perhaps in an effort to verify who the passengers were. It was only *after* they walked past the car did the shooter turn around and begin firing. The gun was carried the 0.7 miles from where the shooter assailed Mr. Funderburk and, after taking several moments to consider the

occupants of the car, fired that weapon. Again, the shooter had time to consider his intent to kill, spanning from the time he transported his weapon from the scene of the second incident to the moment he passed Mr. Moulton's car. That he began firing at that point persuades us the intent to kill during the third incident was premeditated.

We hold that there was sufficient evidence such that a reasonable factfinder could find beyond a reasonable doubt that there was premeditation in the second and third incidents.

IV. JURY INSTRUCTION ON ACCOMPLICE LIABILITY

Appellant has requested that we exercise our discretion to review for plain error the trial court's instruction to the jury regarding accomplice liability. It is appellant's contention that the instruction was improper because the evidence presented by the State did not support a jury instruction on appellant's liability as an accomplice for all four incidents.

Maryland Rule 4-325(e) explains the procedure set forth for objections to instructions given to the jury:

> *No 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. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

(Emphasis added).

We will decline to review this contention because appellant has not properly preserved the issue for our review. *See Stabb v. State*, 423 Md. 454, 464–65 (2011) (explaining Rule 4-325(e) procedure). The transcript of appellant's trial reveals no instance during the discussion regarding proposed jury instructions, as well as during the recitation of the instructions, where appellant's trial counsel raised an objection as to an instruction regarding appellant's liability as an accomplice.

Moreover, we shall not exercise our discretion to examine for plain error. Plain error "vitally affects a defendant's right to a fair and impartial trial." *Diggs v. State*, 409 Md. 260, 286 (2009) (citations omitted). Accordingly, this level of review is sparingly invoked because the error must be "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Id.* (citations omitted). We have explained that we do not lightly employ plain error review, particularly upon the request of an appellant. *See Garner v. State*, 183 Md. App. 122, 151–52 (2008), *aff'd*, 414 Md. 372 (2010) ("We know, of course, that the possibility of plain error is out there, and on a rare and extraordinary occasion we might even be willing to go there. One must remember, however, that a consideration of plain error is like a trip to Angkor Wat or Easter Island."). This is especially the case for jury instructions due to the difficulty in demonstrating facts that are sufficiently compelling to invoke plain error review. *Steward*, 218 Md. App. at 566; *see also Martin v. State*, 165 Md. App. 189, 198 (2005), *cert. denied*, 391 Md. 115 (2006) (explaining that the bar for plain error, "high in all events, nowhere looms larger than in the contest of alleged instructional errors.").

We shall not invoke the extraordinary remedy of plain error for a jury instruction that appellant did not objection to.

V. MERGER OF CONVICTIONS

A. Parties' Contentions

Appellant's final contention is that his convictions for the possession of a firearm by a disqualified individual must be merged. He argues that the State failed to prove that his possession of the handgun used in the incidents was not continuous. As a result, he was in continuous possession of the firearm and could not be convicted of the same crime twice. The State, however, argues that there is sufficient evidence to support an inference that appellant was not the shooter in the second and third incidents. Accordingly, appellant's possession of the gun was interrupted and the imposition of separate sentences for the handgun offenses was proper.

B. Analysis

The Fifth Amendment to the United States Constitution guarantees that no individual be punished twice for the same offense, and that protection is extended to the states via the Fourteenth Amendment to the federal constitution. *Snyder v. State*, 210 Md. App. 370, 396 (2013), *cert. denied,* 432 Md. 470 (2013) (citing *Benton v. Maryland*, 395 U.S. 784, 787 (1969)). Although the Maryland Declaration of Rights does not contain a double jeopardy provision, there is a common law analogue. *Id.* (citing *Kendall v. State*, 429 Md. 476, 479 (2012)). As is relevant to this dispute, the protection against double jeopardy prevents the imposition of multiple punishments for the same offense. *Id.* (citation omitted).

Section 5-133(b) of the Public Safety Article ("P.S.") of the Maryland Code proscribes the possession of a regulated firearm by a disqualified individual. Because appellant had prior convictions, he fell within the purview of this statute. He argues, however, that the State was unable to prove that his possession of the firearm was interrupted, and per *Webb v. State*, 311 Md. 610 (1988), he was punished twice for the same offense.

In *Webb*, defendant Webb was convicted twice for the unlawful wearing, carrying, and transporting of a handgun for two incidents that occurred three hours apart. *Id.* at 612–13 (explaining defendant was convicted for two handgun incidents at 1:30 a.m. and 4:30 a.m. on May 13, 1986). In reversing Webb's convictions, the Court of Appeals explained, first, a wearing and carrying offense is a possession offense, and, therefore, continuous in nature. *Id.* at 615 ("When mere possession of a prohibited article is a crime, the offense is a continuing one because the crime is committed each day the article remains in possession, as there is a continuing course of conduct." (citations omitted)). Second, it further explained that multiple convictions for wearing and carrying offenses would be warranted if the State, for example, had proved that Webb's unlawful possession was interrupted by some lawful use ("wearing, carrying, or transporting [the gun] 'within the confines of real estate . . . upon which he resides[.]'"); that Webb had removed the weapon from his actual or constructive possession; or that the handgun used in the first incident was different from that used in the second incident. *Id.* at 618. Based on the record before it, the Court determined the State could not establish more than one handgun was used in the two incidents or that his carrying of the weapon was intermittent, and, therefore, Webb had

uninterrupted unlawful possession of a handgun warranting only one sentence. *Id.* at 618–19.

We need not consider whether multiple handguns were used as the shell casings recovered indicate that the same firearm was used in all four incidents. The rest of the evidence presented, however, could raise a reasonable inference that appellant's possession of the handgun was interrupted.

In the second incident, there is a conflict in the evidence that would support appellant's role either as an accomplice or as the shooter. Mr. Funderburk testified that he was unable to identify appellant as the shooter, but stated that appellant was one of the two men who got out of the car. Ms. Smith was able to identify appellant as the shooter and as one of the men who exited the car at the scene. The description of appellant she gave at trial, however, was different from the description she gave to the investigating detective. The evidence presented places appellant at the scene of the second shooting, but does not concretely establish appellant as the shooter there. We think it reasonable that a jury could infer that appellant was not in actual or constructive possession of the weapon. *See McDonald v. State*, 141 Md. App. 371, 380 (2001) (holding that defendant had constructive possession of gun where police officer saw defendant reach down to place something on floorboard of vehicle, observed the butt of a handgun sticking out between defendant's feet, and appellant was closest to weapon). That the jury acquitted appellant of unlawful possession of a regulated firearm is consistent with the evidence presented.

The evidence for the third incident allows for similar inferences. Mr. Moulden and his friends were the only people who witnessed the shooting. Moreover, the shooting

occurred from behind as the rear window and trunk of Mr. Moulden's car were struck by the hail of bullets. This would make it highly unlikely that Mr. Moulden could get a clear look at appellant, particularly after the shooting began and he explained that he immediately "hit the gas" and drove away from the shooter in order to escape. His inability to confirm that appellant was in fact the shooter is supported by his statement to the police when making the identification from the photo array that it was "possibl[e]" that appellant was the gunman. Again, the jury's acquittal of appellant for the wearing and carrying charge arising from the third incident is supported by the evidence presented.

The evidence for the fourth incident provides greater support to the reasonable inference that appellant was the shooter. Ms. Shields consistently identified appellant as the shooter, both from a photo array and in court. Significantly, according to a statement given to the responding officer by the victim, Mr. Alston, appellant was wearing black trousers and a white tank-top shirt. This is significant because Ms. Shields further testified that she saw the possessor of the gun hand the weapon over to one of his companions who was wearing a different shirt—a blue and white striped shirt. This evidence reasonably supports an inference that appellant, not the man in the blue and white striped shirt, was the shooter.

We think the evidence supports the reasonable inference that appellant was not in continuous possession of the weapon between the first and fourth incidents. Accordingly,

per *Webb*, we find that the evidence supports the imposition of separate sentences for wearing and carrying and there are no grounds for merger of those sentences.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.