Circuit Court for Prince George's County
Case No. CT180245X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1405

September Term, 2020

DARIUS WILSON

v.

STATE OF MARYLAND

Graeff,
Ripken,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: February 3, 2022

*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.

A jury, sitting in the Circuit Court for Prince George's County, found the appellant, Darius Wilson, guilty of first-degree murder and use of a firearm in the commission of a felony or crime of violence. The court sentenced Wilson to life imprisonment with a consecutive term of 20 years' incarceration. Wilson presents three questions for our review:

> 1. Was the evidence sufficient to sustain the convictions?
>
> 2. Where Mr. Wilson expressed dissatisfaction with his attorney in two letters to the court prior to sentencing, did the trial court err and/or abuse its discretion in failing to treat Mr. Wilson's expression of dissatisfaction as a request to discharge counsel and give him an opportunity to explain the reasons for his request, as required by *State v. Brown*, 342 Md. 404 (1996), and its progeny?
>
> 3. Was the trial court's failure to instruct the jury on the crime of use of a firearm in the commission of a crime of violence a fundamental error?

For the reasons to be discussed, we shall affirm the judgment.

BACKGROUND

The State's case established that Wilson lured Rondell Foo to the back of a townhouse in District Heights and shot him in November 2017. Foo's sister, Monica Tilghman, testified that she had spoken to Foo through text messages on the day of the shooting. Foo lived with their grandparents at 6604 District Heights Parkway. When Tilghman arrived at their grandparents' home to pick up her children, she noticed that Foo was not present, his video game had been paused, and his headphones and jacket were still in the house. Tilghman thought that this was strange because it was cold outside, and Foo was known for always having his headphones with him.

Ronald Davis testified that he owned a townhome around the 6300 block of Sunvalley Terrace in District Heights. On the day of the shooting, when Davis was on his way home from work, his cousin approached him and said that there was a body on the sidewalk. Davis's cousin showed him the location of the body. Davis tried to feel for a pulse, checked for breathing, and called 9-1-1.

Corporal Jerry Montgomery responded to the 6300 block of Sunvalley Terrace on the day of the shooting. The police had information that shots had been fired and the deceased was on a dimly lit pathway. A search of the area revealed 5 shell casings and a fired bullet, which was found under Foo's body.

Foo did not have a cell phone on him, and he lived within walking distance of where his body was found. Detective Jose Chinchilla obtained Foo's phone records from the phone company and saw that Foo's final call was made to (804) 252-0331. To track that phone number, Detective Chinchilla obtained a court order, which revealed that the phone was still active around Belwood Street.

Kelcey Ward, a crime scene investigator, responded to the 6200 block of Belwood Street with Detective Chinchilla the day after the shooting. There, Ward recovered a flip phone from a pile of leaves in a storm drain beneath a popped manhole. A post-it note was on the back of that phone. Written on that note was the phone number (804) 252-0331.

That cell phone contained minimal contacts, and it had only completed three calls. The first call was to the carrier service to activate the phone. The second phone number belonged to the owner of the store where the phone had been bought — Carlos Harris of Top Communication — a business located less than five minutes in driving distance from

Sunvalley Terrace. The third number on the phone was (202) 246-9987, which belonged to Foo.

The cell phone recovered from the storm drain contained text messages that were exchanged with Foo's phone. The cell phone from the storm drain had texted "Dis durty" to Foo's phone, and Foo's phone responded "Bet[.]" Foo's phone then sent the message "Call back[,]" followed by "I'm back here[.]"

Within the Sunvalley Terrace community, Detective Chinchilla located a townhome that had surveillance cameras on its front and side. Sergeant Kenneth Sinibaldi contacted the homeowner of that townhome and recovered video from those cameras. That video showed between 6:00 p.m. and 6:30 p.m. on the day of the shooting. The video showed a car arrive and a person riding a bicycle. Another person walked up to the car and entered the car. The individual on the bicycle rode away. Another individual walked on the back side of the townhome community. That individual was carrying a handgun.

Detective Chinchilla contacted Calvin Smith based on information that Smith had been bragging that he committed the murder. The police also received a tip that the person on the bicycle may have been the person who committed the murder. When police spoke with Smith, he did not confess to the murder. Smith was shown the video obtained by Sergeant Sinibaldi and Smith identified Wilson on the video. Detective Chinchilla did not consider Smith a suspect because police determined that Smith had called the police minutes before the murder from further up the street where his bicycle had been stolen.

Detective Chinchilla then spoke with Wilson at the Criminal Investigation Division. Wilson acknowledged that his nickname was Durty, and Wilson identified himself in a still

photo from the surveillance video. Wilson explained that he had been visiting friends in the neighborhood that evening and had not seen Foo. Wilson provided the detectives with his cell phone number, (240) 486-8382, and denied having any knowledge of the murder.

Doctor Nikki Mourtzinos, an Assistant Medical Examiner with the Office of the Chief Medical Examiner, was admitted as an expert in forensic pathology. Doctor Mourtzinos performed an autopsy on Foo. Doctor Mourtzinos testified that Foo had suffered eleven gunshot wounds, which caused eighteen to twenty holes in his body. Foo's cause of death was multiple gunshot wounds and his death was a homicide.

Wilson testified as follows about the day of the shooting. On that day, he went to the neighborhood where he grew up to hang out. He had plans to meet with Travis Davis. He took an Uber to the location and hung out in front of his friend's house. He then got into his friend, Vito's, car. After talking to Vito, Wilson walked behind some houses to urinate. Around that time, he heard gunshots and left the area.

Wilson explained that he had known Foo for about nine years. They met while playing basketball and maintained a friendship. Wilson testified that the last time that he had been in contact with Foo was "probably two days" before the shooting, and he talked to Foo by phone at least twice a week.

Wilson stated that his nickname was not Durty. According to Wilson, the detective assumed that was his nickname, but he went by "D money[,]" which he had tattooed on his arm. We supply additional facts as necessary below.

DISCUSSION

I. The timeliness of Wilson's notice of appeal.

The State moves to dismiss this appeal. The State argues that Wilson failed to timely file a notice of appeal. To explain why we disagree, we must examine the timeline of events and the circumstances that caused the circuit court to address clerical matters after the sentencing hearing.

The jury found Wilson guilty of first-degree murder, which was count one on the indictment and the verdict sheet. Second-degree murder was count two on the indictment and the verdict sheet. The jury followed an instruction on the verdict sheet and did not render a verdict for count two — second-degree murder — because it had found Wilson guilty of count one — first-degree murder. The jury found Wilson guilty of count three on the verdict sheet, which was described as "use of a firearm in the commission of a felony or crime of violence." Counts three and four of the indictment charged Wilson with use of a firearm in the commission of a felony and use of a firearm in the commission of a crime of violence, respectively. Section 4-204(b) of the Criminal Law Article prohibits use of a firearm in the commission of a felony or crime of violence. Md. Code, Crim. Law ("CL") § 4-204(b).

The court's docket entry from the date of the verdict incorrectly stated that Wilson had been found guilty of three counts:

> DOCKET ENTRY: Verdict
>
> Count 1 Common Law Murder – Murder First Degree – Guilty
> Count 2 Use of Firearm in a Crime of Violence – Guilty
> Count 3 Use of Firearm in a Felony – Guilty

The jury, however, found Wilson guilty of two offenses: first-degree murder and one violation of CL § 4-204(b) — use of a firearm in the commission of a felony or crime of violence. The court sentenced Wilson for those two offenses on December 18, 2020.

The court sentenced Wilson to life imprisonment for first-degree murder. As to the guilty verdict for the CL § 4-204(b) violation — use of a firearm in the commission of a felony or crime of violence — the trial court said that it was sentencing Wilson to a consecutive term[1] of 20 years' incarceration for "[c]ount 2, use of a handgun in a crime of violence[.]" Wilson then filed two notices of appeal, one on January 13, 2021 and another on February 8, 2021.

The State argues that the judgment became final on March 4, 2021, which is when the trial court held another hearing and addressed a clerical matter on a docket entry. As explained above, that docket entry, from the date of the verdict, incorrectly stated that Wilson had been found guilty of three counts: first-degree murder, use of a firearm in a crime of violence, and use of a firearm in a felony. The court thus amended that docket entry:

> It is hereby ordered that the Docket Entry dated December 05, 2019 is hereby amended as follows:
>
> Verdict:

[1] At the sentencing hearing on December 18, 2020, the court stated that it was sentencing Wilson to a consecutive term of twenty years' incarceration. But the docket entry from that sentencing hearing states that the twenty-year sentence is to be served concurrently. And the commitment document addressed to the Commissioner of Correction, filed on March 11, 2021, also states that the twenty-year sentence for the CL § 4-204(b) violation is to be served concurrently. Although the parties did not address this discrepancy on appeal, Wilson's brief that was filed in this Court states that he was sentenced to twenty years, consecutive, for the CL § 4-204(b) conviction.

Count 1 Common Law Murder – Murder First Degree — Guilty
Count 2 Use of a Firearm in a Crime of Violence — Guilty
Count 3 No verdict taken/was not submitted to the Jury for any consideration

All other conditions to remain the same[.]

At the March 2021 hearing, the court also discussed the numbering of the counts on the docket entry from the sentencing hearing. That docket entry stated that the defendant was sentenced for counts one and two. The court noted that count two was not a use of a firearm charge; it was the second-degree murder charge: "So the sentence is correct, and so there is going to be a clerical change that . . . Count Three is the use charge, as opposed to Count Two."

After the March 2021 hearing, Wilson did not file another notice of appeal or amend his earlier notices of appeal. The State thus argues that Wilson's notice of appeal was untimely because it was prematurely filed.

Maryland Rule 8-202(a) provides that a party must file their notice of appeal "within 30 days after entry of the judgment or order from which the appeal is taken." Although it is not jurisdictional, this requirement is a "binding rule on appellants" unless "waiver or forfeiture applies to a belated challenge to an untimely appeal." *Rosales v. State*, 463 Md. 552, 568 (2019). Md. Code § 12-301 of the Courts & Judicial Proceedings Article grants a right to appeal from a final judgment. "A conviction and imposition of a sentence is . . . a final judgment entered on the charges brought against a defendant." *State v. Simms*, 456 Md. 551, 565 (2017).

The court sentenced Wilson on December 18, 2020. Wilson filed a notice of appeal on January 13, 2021. That notice of appeal was "within 30 days after entry of the judgment

or order from which the appeal is taken." Md. Rule 8-202(a). *See also Simms*, 456 Md. at 565. At the March 2021 hearing, the court changed nothing substantive about Wilson's sentence. The court addressed clerical matters at that hearing. Indeed, at that hearing, the court said, "We do not need to resentence Mr. Wilson. He was sentenced for the crimes for which he was found guilty[.]" As a result, we are not persuaded by the State's argument that Wilson was then required to file another notice of appeal or amend his earlier notice of appeal. *See Shabazz v. Bob Evans Farms, Inc.*, 163 Md. App. 602, 619 n.2 (2005) (a notice of appeal was timely when it was filed within a week after the clerk entered a judgment, and the appellant did not need to file another notice of appeal after the court made a change to the judgment that "was clerical only, to conform to the ruling actually made by the court"). Wilson's January 2021 notice of appeal was timely.

II. Wilson failed to preserve his challenge to the sufficiency of the evidence.

We now turn to Wilson's argument about the sufficiency of the evidence. Wilson moved for judgment of acquittal at the close of the State's case-in-chief and the defense case. Wilson argued that the State had failed to prove criminal agency. The trial court denied each of those motions. The State then put on a rebuttal case by calling Detective Chinchilla to testify. At the close of the rebuttal case, Wilson did not move for judgment of acquittal.

"A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, *at the close of all the evidence*." Md. Rule 4-324(a) (emphasis added). We have held that when the State reopened its case and

presented more evidence, the defendant's previously denied motion for judgment of acquittal became a legal nullity, which failed to preserve a challenge to the sufficiency of the evidence. *Howell v. State*, 56 Md. App. 675 (1983). In *Howell*, because "[t]here was no motion for judgment of acquittal when the State finally rested its reopened case[,]" the challenge to the sufficiency of the evidence had not been preserved for appellate review. *Id*. at 684-85. Under *Howell*, to preserve a challenge to the sufficiency of the evidence, a motion for judgment of acquittal must be made or renewed after the State reopens its case. *Id*. at 684. In this context, there is no meaningful distinction between a reopened case and a rebuttal case under *Howell*. Thus, to preserve a challenge to the sufficiency of the evidence, a motion for a judgment of acquittal must be made or renewed after the State puts on a rebuttal case: at the close of all the evidence. Wilson failed to make or renew a motion for judgment of acquittal after the State's rebuttal case. Applying *Howell*, his challenge to the sufficiency of the evidence is not preserved for our review. *Id*.

III. Even if Wilson's challenge to the sufficiency of the evidence had been preserved, the evidence is sufficient to sustain his convictions.

Even if Wilson's challenge to the sufficiency of the evidence had been preserved, we would determine that the evidence is sufficient to sustain his convictions. Wilson argues that the State failed to prove his participation and criminal agency in these offenses.

When reviewing the sufficiency of the evidence supporting a criminal conviction, we ask "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." *McClurkin v. State*, 222 Md. App. 461, 486

(2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "In applying that standard, we give 'due regard to the [fact-finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Id.* at 486 (quoting *Harrison v. State*, 382 Md. 477, 488 (2004)).

The evidence was sufficient for a rational juror to conclude that Wilson shot Foo. Surveillance footage showed Wilson, minutes before the murder, leave a car in the Sunvalley Terrace community, load a handgun, put the gun in his pocket, and walk behind the townhomes. Around that time, Foo — whom Wilson knew and communicated with through text messages — received a text message that said "Dis Durty[.]" The State presented proof that Wilson was nicknamed Durty. Foo's phone responded "Bet[.]" Foo's phone then sent the message "Call back[,]" followed by "I'm back here[.]" Considering this evidence, a rational juror could conclude that Wilson lured Foo to the back of the townhouse and shot Foo with the gun that Wilson had in the surveillance footage.

Wilson makes arguments about the circumstantial nature of the State's case. Wilson points to information that was presented at trial, such as Calvin Smith bragging that he had committed the murder and tips received by police that implicated another individual as the one who shot Foo. When addressing the sufficiency of the evidence, however, we do not "retry the case" or "re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185 (2010). These arguments concern the weight of the evidence, not its legal sufficiency. At any rate, this information was presented

at trial, and the jury still decided to find Wilson guilty. These arguments do not entitle Wilson to the relief that he seeks.

IV. Wilson's post-trial letters to the court did not indicate that he wished to discharge his counsel.

Wilson claims that the trial court erred because it failed to give him an opportunity at sentencing to explain the basis for his request to discharge his counsel. The court's inquiry, according to Wilson, was required because of two letters that he sent to the court after the trial, but before sentencing. Wilson asks this Court to grant him a new sentencing proceeding. But neither of Wilson's letters requested to discharge his counsel. And even if Wilson's letters constituted a request to discharge his counsel, Wilson stated that he did not wish to discuss the matter at sentencing.

After Wilson was found guilty on December 5, 2019, he sent the court two letters. First, Wilson sent a letter on June 18, 2020. That letter alerted the trial court that his counsel had failed to provide him with a copy of the discovery before trial:

> I am writing this letter in regards to my case. I'm letting you know that my lawyer failed at giving me my discovery in a informal matter before my trial date, so I can also go over it in a rigorous manner. I was not aware that my lawyer was supposed to give me my discovery before trial, this is my 1st time dealing with a circuit court case. I believe I'm dealing with an Inefficient Council, because I was handed my discovery after my trial date. I understand you can't do nothing for me, but I just want it to go on record of what's going on. Thank you!

Second, Wilson sent a letter to the court on October 29, 2020. In that letter, Wilson reiterated his concern about discovery:

> I want to address the issue again containing my lawyer not giving me my Discovery packet till after my trial. I see that you informed him with a letter for him to correspond, but he has failed to do that. Your honor this

> shows you what type of attorney I'm dealing with. I'm acknowledging that this attorney is not dutiable to his duties. Mr. Snoddy when I received my discovery packet, he sent in another attorney by the name of - Alex Kaufman and he seen me on this date 1-29-20 I have proof of that date that was my first [and] only time seeing Mr. Kaufman again. I ask if you can address this matter at my sentencing.

Wilson appeared with trial counsel for sentencing on December 18, 2020. At that time, Wilson assured the trial court that he did not want to discuss the issues he had raised in his letters:

> THE DEFENDANT: Your Honor, I have something -- I have something to say real quick.
>
> THE COURT: Well, sir, Mr. Wilson, hang on. I offered you the opportunity to speak, and I know you've written me, and if there are any issues you have with respect to what you have written to me about, I can't do anything about that.
>
> That's something you'll have to deal with after -- after this matter is concluded in another -- in another forum, but at least I can't address that issue -- the issues that you've raised in your letters to me, which have been shared with your attorney.
>
> Is that what you wanted to talk to me about?
>
> THE DEFENDANT: No, sir. I was about to speak on an appeal situation.

We review *de novo* whether Wilson's statements of dissatisfaction with his attorney constituted a request to discharge counsel. *See State v. Davis*, 415 Md. 22, 29 (2010). Although Md. Rule 4-215 does not apply to requests to discharge counsel after trial has begun, "the trial court must determine the reason for the requested discharge before deciding whether dismissal [of counsel] should be allowed." *State v. Brown*, 342 Md. 404, 428 (1996). That inquiry is triggered by a request to discharge counsel. To trigger that inquiry, all that is required is a "statement from which a court could conclude reasonably

that the defendant may be inclined to discharge counsel." *Williams v. State*, 435 Md. 474, 486-87 (2013). But a mere expression of dissatisfaction with counsel, without more, does not require the court's inquiry. *See Wood v. State*, 209 Md. App. 246, 287-88 (2012), *aff'd*, 436 Md. 276 (2013) (a Md. Rule 4-215(e) inquiry was not required when the appellant stated "that he had been 'having problems' with [counsel]" and indicated "that he did not feel [counsel] was effectively representing him"). The statements must show a "present intent to seek a different legal advisor[.]" *Davis*, 415 Md. at 33. The court's inquiry is required only when the defendant indicates that they "may be inclined to discharge counsel." *Williams*, 435 Md. at 487.

Caselaw establishes that the court must inquire when the defendant has expressed some desire to fire their attorney or obtain new counsel. In the following cases, the court was required to inquire. In *State v. Weddington*, the defendant expressed dissatisfaction with counsel and wrote to the court: '"Also I begging the court To Reasign me a Attorney or Allow me to get my own?"' 457 Md. 589, 595 (2018). In *State v. Graves*, defense counsel alerted the court that the defendant '"has informed me that he would prefer to have John Robinson represent him in this matter[.]"' 447 Md. 230, 235 (2016). In *Gambrill v. State*, defense counsel told the court that the defendant '"indicates that he would like to hire private counsel in this matter."' 437 Md. 292, 294 (2014). In *Williams v. State*, the defendant sent a letter to the circuit court that criticized his attorney's representation and requested '"New representation From the Public defender's office."' 435 Md. at 489.

By contrast, Wilson's letters contained no suggestion that he wished to fire his counsel, obtain different counsel, or represent himself. Wilson explained that his purpose

was to make a record of the events. Indeed, Wilson even acknowledged that there was nothing that the court could do for him. Wilson's complaints did not indicate that he wanted to discharge his counsel. The circuit court thus did not have to inquire further.

Wilson's letters did not implicitly request to discharge counsel. But even if we were to determine that the letters implicitly requested to discharge counsel, no error occurred. At sentencing, the trial court asked Wilson whether he wanted to discuss any of the issues in his letters. Wilson responded "No, sir[,]" and stated that he wanted to talk about "an appeal situation." That response did not require the court to question Wilson further.

V. The court instructed the jury on use of a firearm in the commission of a felony without separately instructing the jury on use of a firearm in the commission of a crime of violence. Wilson's unpreserved claim about that omission is not subject to plain error review.

The State charged Wilson with first-degree murder, second-degree murder, use of a firearm in the commission of a crime of violence, and use of a firearm in the commission of a felony. Section 4-204(b) of the Criminal Law Article provides:

> (b) A person may not use a firearm in the commission of a crime of violence, as defined in § 5-101 of the Public Safety Article, or any felony, whether the firearm is operable or inoperable at the time of the crime.

CL § 4-204(b). The court instructed the jury on use of a firearm in the commission of a felony.[2] Without objection, the court did not give a separate instruction on use of a firearm

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[2] The instruction was given to the jury as follows:

> The Defendant is charged with the crime of use of a firearm in the commission of a felony. The felonies in this case are first-degree murder and second-degree murder. In order to convict the Defendant, the State must prove that the Defendant committed first-degree murder or second-degree

(continued…)

in the commission of a crime of violence. Defense counsel also did not object to the verdict sheet, which described count three as "use of a firearm in the commission of a felony or crime of violence." As explained above, the jury found Wilson guilty of first-degree murder and "use of a firearm in the commission of a felony or crime of violence."

Wilson claims that we should conduct plain-error review of the trial court's omission of an instruction on use of a firearm in the commission of a crime of violence. But Wilson concedes that under our decision in *Martin v. State*, 165 Md. App. 189 (2005), harmless error review applies. Wilson requests that we re-examine *Martin* and require automatic reversal under these circumstances. We decline that request.

Plain-error review involves four prongs:

> First, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the . . . court proceedings. Fourth and finally, if the above three prongs are satisfied, [an appellate court] has the discretion to remedy the error—discretion which

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> murder and that the Defendant used a firearm in the commission of the first-degree murder or second-degree murder.
>
> A firearm is a weapon that fires, is designed to fire or may readily be converted to a [sic] fire, a projectile by the action of an explosive or the frame or receiver of such a weapon. A firearm includes an antique firearm, handgun, rifle, shotgun, short barrel rifle, short barrel shotgun, starter gun or any other firearm, whether loaded or unloaded. Use of a firearm includes brandishing, displaying, striking with, firing or attempting to fire a firearm in furtherance of first-degree murder or second-degree murder.
>
> A person uses a firearm when he uses it to create fear of harm. The Defendant need not injure anyone with the firearm. Mere possession of a firearm at or near the crime is not sufficient.

> ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Rich, 415 Md. 567, 578 (2010) (cleaned up). The record shows that these prongs are absent here.

During closing argument, defense counsel referenced that Wilson was charged with use of a firearm in the commission of a crime of violence. When the trial court asked whether the defense was satisfied with the jury instructions as provided, defense counsel did not notify the court about the lack of a separate instruction for use of a firearm in the commission of a crime of violence. Before that exchange, defense counsel also reviewed the verdict sheet, which described count three as "use of a firearm in the commission of a felony or crime of violence." Defense counsel confirmed with the court that he was satisfied with the verdict sheet. Wilson thus affirmatively waived his complaint about the lack of a separate instruction on use of a firearm in the commission of a crime of violence.

The pattern jury instruction for use of a firearm in the commission of a felony or crime of violence contains the phrases "felony(ies)" and "crime(s) of violence." Maryland Criminal Pattern Jury Instructions 4:35.4(B) ("MPJI-Cr"). Those phrases are swapped depending on which one applies. First-degree murder is statutorily classified as both a felony (CL § 2-201(b)(1)) and a crime of violence (Md. Code, Public Safety § 5-101(c)(11)). The jury found that Wilson used a firearm in the commission of first-degree murder. The pattern jury instruction for use of a firearm in the commission of a crime of violence would have specified that first-degree murder is a crime of violence. MPJI-Cr

4:35.4(B). As a result, any error in the trial court's instruction was harmless beyond a reasonable doubt. *See Martin*, 165 Md. App. at 204.

In *Martin*, the trial court failed to give the jury an instruction on a conspiracy charge. *Id*. at 198. The defendant did not request that instruction nor did the defendant object to the court's failure to give that instruction. *Id*. at 195. This Court ruled that the failure to give that instruction was not a structural error, and we declined to conduct plain-error review:

> In sum, we hold that the total failure to instruct on a charged offense is not structural or fundamental error mandating reversal. Rather, such failure is subject to plain error review. On the record before us, we decline to exercise our discretion to conduct such review.

Id. at 205-06. The issue here is less egregious: the trial court did not fail to instruct the jury on the use of a firearm offense entirely. The court instructed the jury on use of a firearm in the commission of a felony. The jury found that Wilson used a firearm in the commission of first-degree murder. First-degree murder is statutorily classified as both a

felony and a crime of violence. Applying *Martin*, the court's instruction here does not present a structural error, and it does not warrant plain-error review.[3]

APPELLEE'S MOTION TO DISMISS DENIED. JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[3] Wilson urges us to reconsider and overrule *Martin*. There are two exceptions to the application of stare decisis: "an appellate court may overrule a case that either was clearly wrong and contrary to established principles, or has been superseded by significant changes in the law or the facts." *Kazadi v. State*, 467 Md. 1, 27-28 (2020) (cleaned up). Neither exception applies here. When this Court decided *Martin*, we conducted a careful analysis and held that the court's unobjected "failure to instruct on a charged offense is not structural or fundamental error mandating reversal. Rather, such failure is subject to plain error review." *Martin*, 165 Md. App. at 205-06. We also noted that we were "mindful of additional authority for the proposition that a jury charge omission dictates automatic reversal." *Id*. at 202.

We are unpersuaded by Wilson's reliance on *State v. Waine*, 444 Md. 692 (2015), in support of his claim that *Martin* should be overruled. In *Waine*, the Court of Appeals followed stare decisis by upholding *Unger v. State*, 427 Md. 383 (2012), and held that the trial court's advisory only jury instruction constituted structural error not subject to harmless error review. *Waine*, 444 Md. at 705. The advisory only jury instruction gave "the jury permission to disregard any or all of the court's instructions, including those bedrock due process instructions on the presumption of innocence and the State's burden of proving the defendant's guilt beyond a reasonable doubt." *Id*. at 704. The trial court here provided the pattern jury instructions on the binding nature of the instructions (MPJI-Cr 2:00), the presumption of innocence, and the State's burden of proving the defendant's guilt beyond a reasonable doubt (MPJI-Cr 2:02). As we have explained, the court instructed the jury on use of a firearm in the commission of a felony, and the jury found Wilson guilty of using a firearm to commit a predicate offense (first-degree murder) that is statutorily classified as both a felony and a crime of violence. We decline Wilson's request to overrule *Martin*.