Circuit Court for Baltimore City
Case No. 123006013

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1482

September Term, 2024

DATUAN BLANCHARD

v.

STATE OF MARYLAND

Wells, C.J.
Arthur,
Beachley, Donald E.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Beachley, J.

Filed: April 10, 2026

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

On June 20, 2024, a jury in the Circuit Court for Baltimore City convicted appellant Datuan Blanchard of two counts of first-degree murder, two counts of conspiracy to commit murder resulting in death, two counts of conspiracy to commit murder, and two counts of use of a firearm in the commission of a crime of violence. The court imposed life sentences without parole for each of the murder convictions, life sentences for each of the conspiracy to commit murder resulting in death convictions, and 20 years' imprisonment for each of the firearm convictions. The conspiracy to commit murder convictions were merged with the conspiracy to commit murder resulting in death convictions.

Appellant presents six questions for our review:

1. Did the trial court err by allowing the prosecutor's improper and prejudicial closing argument?

2. Did the trial court err by refusing to allow testimony of Detective Dennis Bailey about London Griffin's prior inconsistent statement to him during a video recorded interview under Rules 5-613 and 5-616, as impeachment evidence, and/or the recorded statement itself, under Rule 5-802.1, as substantive evidence?

3. Did the trial court abuse its discretion, and/or fail to exercise discretion, in refusing to provide written instructions to the jury, after it asked during deliberations for the definition of first-degree murder?

4. Did the trial court err by allowing the admission of a jail call recording into evidence?

5. Are Mr. Blanchard's convictions and sentences for use of a firearm during the commission of a crime of violence illegal, and/or alternatively, did the trial court commit plain error in its instructions?

6. Did the trial court err by imposing separate sentences for conspiracy?

For the reasons to be discussed, we shall vacate one of the conspiracy convictions, but otherwise affirm.

FACTS AND PROCEEDINGS

On August 12, 2022, shortly after 8:30 p.m., Leion Davis, Jr. and William Ferebee were shot multiple times while sitting in a parked car on the 4000 block of Wabash Avenue in Baltimore City. Both men died from their wounds. Police found a total of 25 cartridge casings of two different calibers surrounding the vehicle. A woman who lived nearby heard the gunshots. She told police that she looked out her window and saw a red or maroon sedan with tinted windows speeding away. Police used a license plate reader to find the car the woman had reported seeing. They quickly learned that London Griffin had reported a car stolen that matched the description of the fleeing vehicle. Ms. Griffin's car was found abandoned and set on fire off North Franklintown Road the same evening.

Ms. Griffin was dating appellant at the time of the incident and lived with him, their child, and appellant's family. She initially reported that the vehicle had been stolen on August 12, 2022. The officer who interviewed Ms. Griffin about the stolen vehicle noted that she "was extremely nervous for somebody who was just reporting her vehicle stolen." Police later interviewed her a second time about her vehicle and she "just repeated everything [she] said to the first officer." Ms. Griffin was arrested on December 1, 2022, and charged with making a false statement to police. At that time, Ms. Griffin recanted her report that her car had been stolen. She instead told police that appellant, who frequently borrowed her car, had called her shortly after 8:30 p.m. on August 12 and asked her to

report that her car had been stolen. Ms. Griffin also told police that appellant later informed her that he was involved in the shooting—that he drove his cousins Marquise Pack and Tyreek Gray to and from the scene of the crime, and that his cousins shot the victims. Ms. Griffin ultimately pleaded guilty to being an accessory to murder after the fact. As part of the plea agreement, she agreed to testify at appellant's trial.

A two-day trial was held in June of 2024. Ms. Griffin testified for the State concerning statements appellant made to her after the shooting. She stated that when appellant called her asking that she report her car as stolen, she could hear appellant's cousins in the background. She next saw appellant "a couple of days after" the shooting, and asked him whether her car was actually stolen, and "what really happened[.]" Appellant told her that he and his cousins "went on a mission, a hit." She then mentioned to appellant that she saw a post on Instagram about a shooting, and appellant "told [her] that he drove and [Mr. Pack] and [Mr. Gray] killed . . . that was the murder they did." When she asked him why they did it, appellant told her "[i]t was for money[,]" but provided no other details. Ms. Griffin testified that she believed appellant had received "[p]robably, like, $1200" for his role in the shooting, but could not remember where she got that information.

Other witnesses at trial included medical examiners, police officers, and an FBI special agent qualified as an expert in cellular record analysis. The FBI agent testified that appellant's cell phone, as well as cell phones belonging to Mr. Pack and Mr. Gray, were in the vicinity of the shooting shortly before and after it occurred. All three cell phones appear

to have been turned off or were in airplane mode at the time of the shooting. The phones then quickly traveled toward the location where Ms. Griffin's car was later found. The medical examiners testified that Mr. Davis was shot twenty-three times and Mr. Ferebee was shot eight times. The police officers testified that valuable items were left in the victims' car, including a handgun in the lap of one of the victims, which had not been fired. The car also contained cash, jewelry, and drugs.

The State presented a recording of a December 30, 2023 telephone call appellant made from the jail to an unknown woman. The recording was played for the jury over appellant's objection. Because the contents of this call are relevant to multiple issues on appeal, we set forth a full recitation of the portion of the call played to the jury[1]:

Female:	So what they like, they thinking they got something up on you or what?
The Defendant:	This shit, this shit's weird, I ain't gonna lie it's like naw - (inaudible).
Female:	That's good.
The Defendant:	A lot of shit, a lot of the shit is just circumstantial. Like, they can't, they can't really use a lot of the shit they got, but it's just like, I can't really say too much. It's just crazy. I ain't gonna lie.
Female:	Yeah, I hear what you're saying. I'm sorry to even hear that. Cuz that is crazy.

[1] Because there are discrepancies in the transcript concerning language used by appellant and the unknown female, we have made minor corrections based on our listening to the call.

The Defendant:	Yeah, like they started gettin' on some 69[2] shit, you feel me, so it's like they got –
Female:	What? Ha! You said what?
The Defendant:	They started gettin' on some 69 shit, so they got that for real, so –
Female:	You lying.
The Defendant:	I swear.
Female:	Who? Oh, you ain't got to tell me but, what?
The Defendant:	Yeah, man. Crazy shit.
Female:	You f**king lying. What the f**k?
The Defendant:	I don't know. This shit's still beautiful though but this shit just wild, it's a lot of wild ass shit, like certain shit I can't say on this phone, but it just like –
Female:	No (inaudible). Wow. (Inaudible) knowing all that now.
The Defendant:	Huh?
Female:	I said well what's up with you though, you worried? (Inaudible).
The Defendant:	I ain't gonna lie, I'm cool. I figure that shit was gonna happen anyway. (Inaudible), I ain't even trippin' for real.
Female:	Huh?
The Defendant:	I said I'm cool, I felt like that shit was gonna happen anyway, I ain't even trippin' for real, I'm all right.
Female:	You should be trippin', like who are they talking about, (inaudible), who you talking about? You should be trippin'.

[2] As indicated *infra*, the term "69" apparently refers to a snitch.

The Defendant: I don't know (inaudible). I already done went through all that shit before so it's like all them emotions, all them feelings, like I'm probably ain't never coming home and all that, and I done been through all that shit already (inaudible).

Female: Never coming home? Damn, Datuan.

The Defendant: That's what I'm sayin'.

Female: You are young as shit, like what the f**k are you talking about, you're talkin' about (inaudible).

The Defendant: What you say?

Female: I said like this is just crazy like, I know you throw me (inaudible), 3 to 5, maybe 5 at the most, you feel me, you talking about 75 life like what? Your life hasn't even really start yet. You telling me it's going to start in June?

The Defendant: Right. And that's what I'm sayin', I've already been through all that shit and that shit already been on my mind for months at a time, so I don't even be thinkin' about that shit no more.

Female: (Inaudible).

The Defendant: I just hope that I beat this shit. This shit is possible, it's like it's a lot of loopholes in my case, like it's possible I can beat it, gotta hope the shit go right.

After the jury had been deliberating for approximately one hour, they sent a note reading: "What is the definition of first degree murder[?] SPECIFICS Please[.]" The trial court rejected defense counsel's suggestion to send the jury written instructions, opting instead to again read the first-degree murder instruction to the jury. The jury returned its verdict fifteen minutes after returning to deliberate.

The jury found appellant guilty of two counts each of first-degree murder, conspiracy to commit murder, conspiracy to murder resulting in death, and use of a firearm in a crime of violence. On September 12, 2024, the court sentenced appellant to two consecutive sentences of life without parole on the first-degree murder convictions, separate consecutive life sentences for the conspiracy to murder resulting in death convictions, and 20 years' imprisonment for each of the use of a firearm convictions. The convictions for conspiracy to murder were merged with the convictions for conspiracy to murder resulting in death. This timely appeal followed.

DISCUSSION

I. THE STATE'S CLOSING ARGUMENT

Appellant first argues that the State improperly vouched for Ms. Griffin in its closing arguments when it stated that "[s]nitches don't lie, they're telling the truth[,]" and "[p]eople that turn State's evidence are not lying . . . . People don't dislike them because they're lying. They're telling the truth." According to appellant, "[t]hese comments impermissibly conveyed the prosecutor's belief that Ms. Griffin's testimony was truthful and should be trusted."[3]

[3] The State contends that this issue has not been preserved for appellate review because defense counsel did not object a second time when the State continued its argument after the first objection was overruled. We disagree. It is not necessary to object to comments immediately following an overruled objection when it is obvious at the time of objection that those comments will follow. *See Johnson v. State*, 325 Md. 511, 514-15 (1992) (holding that objection reached comments made immediately after objection was overruled because it "was perfectly clear what would follow"—further objections would obviously not prevail and would only highlight the remark); *Hagez v. State*, 110 Md. App.

Proper evaluation of appellant's argument requires an assessment of the State's closing argument that focused substantially on Ms. Griffin's credibility, as reflected in the following relevant portions of the prosecutor's argument:

> We know that for some time, Ms. Griffin stood by that lie about the car [being stolen] because she was protecting her boyfriend and thinking about her child. We also know that some months later, she finally told the truth. And we know that what she told police, Detective Bailey, was the truth because it was corroborated by other evidence in the case, which we'll get to. So who is London Griffin? You heard Her Honor talk about how you can judge credibility. Let me make it very clear, you all are the judge of credibility, not me, not these defense attorneys. You get to decide who was credible.
>
> So how do [you] know when someone is credible? Who is London Griffin? She was a young, working mother who was thrust into this horrible, horrible act by him (indicating). She had nothing against him, she had no reason to lie for him, she was with him. And you heard her testify. You were able to look right into her eyes, judge her demeanor, judge her body language, listen to all the words she said. You are the judge of credibility. She had no motive to lie on him, she had all the motive in the world to tell the truth because she was charged criminally – she was charged criminally, she was found guilty of accessory after the fact to murder, she was given a criminal record based off him putting her in it (indicating), and she must abide by that cooperation agreement, she must tell the truth.
>
> . . .
>
> [During the jail call, the defendant stated], well, we got the 69 shit. Now, the young people on this jury, there's some young people on this jury, you know what that is, it's a Tekashi 69, everyone knows what that is, he's a rapper, I use that loosely. He's a rapper that was charged criminally out in California and he turned State's evidence against a gang. So now he's known as a snitch, a rat. That's why he references 69. You all know that. For those of you that don't know, listen to some of the younger people in the jury and

194, 225 (1996) (noting that "[i]t would have been pointless" to renew an objection "because the judge had just said that he would allow such argument").

> explain it to them.[4] It's important because he says now they have that against me. And the girl that he's talking to obviously know[s] how serious that is because she goes "Huh?" and then he repeats it and then she says, "Who", like who flipped and he says I can't talk about it. That's important. When somebody flips against you, ladies and gentlemen, they're seen as a snitch and a rat and that's fine. That's the stop snitching code, that offends the code of the streets, but nobody is upset at people that turn State's evidence because they think they're lying, they're upset that they flipped in the first place. They think that's something you shouldn't do. It's not because you're lying. Snitches don't lie, they're telling the truth –
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [THE STATE]: People that turn State's evidence are not lying, they're intimate to the event, that's the whole point, they know what happened. People don't dislike them because they're lying. They're telling the truth. It just offends people's sensibilities. So I guess London Griffin is 69 in this case. Like she wanted to be in this at all. Like she – he told her to lie for him and she didn't. And now she's got a criminal record.

"[A] trial court has broad discretion when determining the scope of closing argument." *Cagle v. State*, 462 Md. 67, 75 (2018) (citing *Ware v. State*, 360 Md. 650, 682 (2000)).

> What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case. Thus, the propriety of prosecutorial argument must be decided contextually, on a case-by-case basis. Because a trial court is in the best position to evaluate the propriety of a closing argument as it relates to the evidence adduced in a case, the exercise of its broad discretion to regulate closing argument will not be overturned unless there is a clear abuse of discretion that likely injured a party.

Colkley v. State, 251 Md. App. 243, 293-94 (2021) (quoting *Carroll v. State*, 240 Md. App. 629, 663 (2019)).

[4] We note that appellant does not challenge the prosecutor's explanation of the phrase "69," despite no evidence having been presented regarding its meaning.

During closing arguments, a prosecutor "is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Spain v. State*, 386 Md. 145, 152 (2005) (quoting *Degren v. State*, 352 Md. 400, 429 (1999)). Because "assessing the credibility of witnesses during a criminal trial is often a transcendent factor in the factfinder's decision whether to convict or acquit a defendant[,] . . . it is common and permissible generally for the prosecutor . . . to comment on, or attack, the credibility of the witnesses presented." *Id.* at 154. However, a prosecutor may not "vouch" for or against the credibility of a witness. *Id.* at 153. "Vouching typically occurs when a prosecutor 'place[s] the prestige of the government behind a witness through personal assurances of the witness's veracity . . . or suggest[s] that information not presented to the jury supports the witness's testimony.'" *Id.* (alterations in original) (quoting *U.S. v. Daas*, 198 F.3d 1167, 1178 (9th Cir. 1999)). "[W]here a prosecutor argues that a witness is being truthful based on the testimony given at trial, and does not assure the jury [of] the credibility of the witness based on his own personal knowledge, the prosecutor is engaging in proper argument and is not vouching[.]" *Colkley*, 251 Md. App. at 295 (quoting *U.S. v. Walker*, 155 F.3d 180, 187 (3rd Cir. 1998)).

Appellant compares the present case to *Lee v. State*, 405 Md. 148 (2008). In *Lee*, the defendant was charged with attempted murder after allegedly shooting Richard Cotton. *Id.* at 153-54. Cotton was called as a defense witness at trial and testified that Lee was not the person who shot him. *Id.* at 154. During closing arguments, the State argued that Cotton was not credible because "[u]nder no circumstances, if you live by the law of the

streets of Baltimore, do you help police[.]" *Id.* at 157. The Supreme Court held that the State's comments were improper because

> [t]here was nothing in the record, nor was there any testimony or evidence, . . . as to what constituted "the law of the streets" in this context. The prosecutor's comments left the jurors to speculate what was contemplated by the phrase, which is not "of such general notoriety as to be a matter of common knowledge."

Id. at 168.[5]

Appellant posits that "[j]ust as the law of the streets argument in *Lee* was based on facts not in evidence, there was no evidence in the record in this case to support the State's blanket classification of State's witnesses as truthful." However, as suggested in *Lee*, the prosecution is not limited to relying on facts in evidence, but may also reference "matter[s] of common knowledge." *Id.* at 167 (quoting *Wilhelm v. State*, 272 Md. 404, 445 (1974), *abrogated on other grounds by Simpson v. State*, 442 Md. 446 (2015)). Appellant concedes that the definition of "snitch" is common knowledge, and it is a fair inference that individuals who commit crimes generally have unfavorable views of snitches because they may have intimate knowledge of the crimes committed. *See Moore v. State*, 194 Md. App. 327, 360 (2010) (stating that the term "snitch" is a matter of common knowledge), *rev'd on other grounds*, 422 Md. 516 (2011).

[5] We note that the *Lee* Court did not base its decision solely on the "law of the streets" comment. The Court held that the *cumulative* effect of the prosecutor's argument "that a victim's testimony was not credible because he was following 'the law of the streets,' that the jury should protect their community and clean up the streets, and that the jury should teach the defendant not to abide by the 'law of the streets' in settling disputes" was prejudicial. *Id.* at 160.

We agree with the State's observation that context matters. Here, the prosecutor's comment that "[s]nitches don't lie, they're telling the truth" referred to appellant's use of the term "69," a synonym for "snitch." From this, the prosecutor encouraged the jury to infer that appellant knew that Ms. Griffin had material information related to the crimes and likely communicated that to the police. Indeed, appellant's statement that the police "started gettin' on some 69 shit, so they got that for real" combined with his assertion that he was "never coming home" permitted a rational inference that he believed Ms. Griffin would testify truthfully. Moreover, the alleged improper comments were made in the context that Ms. Griffin had intimate knowledge of the crimes because she was found guilty of accessory after the fact and that she was required to testify truthfully pursuant to a cooperation agreement with the State. Regardless of whether these inferences are logical or correct, the prosecutor's comments did not stray outside of the evidence presented and common knowledge, did not suggest that the prosecutor knew something the jury did not, and therefore, did not constitute improper vouching. *See Donati v. State*, 215 Md. App. 686, 730-31 (2014) ("Counsel is free to use the testimony most favorable to his side of the argument to the jury, and the evidence may be examined, collated, sifted and treated in his own way. Moreover, if counsel does not make any statement of fact not fairly deducible from the evidence his argument is not improper, although the inferences discussed are illogical and erroneous." (quoting *Wilhelm*, 272 Md. at 412)).

Considering the totality of the prosecutor's arguments related to Ms. Griffin's trial testimony as a State's witness, we conclude that the trial court did not abuse its discretion

in overruling appellant's objection to the prosecutor's closing argument.

II. PRIOR INCONSISTENT STATEMENTS

Appellant next argues that the court erred in refusing to allow him to elicit testimony concerning a prior inconsistent statement. Specifically, appellant argues:

> Defense counsel was not permitted on cross-examination of Det. Bailey to inquire about Ms. Griffin's statement to the detective, that [appellant] "never told her that he received any money" in relation to the shooting, a statement which was inconsistent with her trial testimony, that he told her the shooting "was for money" and that he received $1200.

"A ruling on the admissibility of evidence ordinarily is within the trial court's discretion." *Thomas v. State*, 213 Md. App. 388, 405 (2013) (quoting *Hajireen v. State*, 203 Md. App. 537, 552 (2012)). Under Rule 5-613(b), extrinsic evidence of a prior inconsistent statement of a witness is admissible in certain circumstances. "Before the requirements of Rule 5-613(b) come into play, however, the prior statement of the witness must be established as inconsistent with his [or her] trial testimony." *Thomas*, 213 Md. App. at 406 (quoting *Hardison v. State*, 118 Md. App. 225, 237-38 (1997)). Black's Law Dictionary defines a prior inconsistent statement as "[a] witness's earlier statement that conflicts with the witness's testimony at trial." *Prior inconsistent statement*, BLACK'S LAW DICTIONARY (12th ed. 2024). If there is no conflict, the prior statement would constitute cumulative evidence, which a court has discretion to exclude. *See* Rule 5-403; *Holmes v. State*, 236 Md. App. 636, 674 (2018); *Stevenson v. State*, 94 Md. App. 715, 721 (1993).

At trial, Ms. Griffin provided the following testimony concerning appellant's motive:

[THE STATE]: How did the conversation start about that murder, that particular murder?

[MS. GRIFFIN]: Oh. I asked him, like, what really happened, like, did the car really got stolen. And he was going, like, no. They went on a mission, a hit. So that's what they call it – a hit.

Q: And what other details was he able to give you about the mission?

A: It was for money.

Q: And was he able to provide any more detail about the money aspect?

A: No. I just know that he didn't really get any money.

Q: Did you ever see him with money?

A: Not that much.

Q: Do you know how much he got?

A: Probably, like, 1,200.

. . .

Q: Did the defendant make any comments about how much anyone else received?

A: No.

On cross examination, appellant's counsel asked Ms. Griffin, "you, at one point, said that Datuan didn't get any money. Do you remember saying that? Today?" Ms. Griffin responded, "I said that? I don't remember saying that today." When asked how she knew that appellant received $1,200, Ms. Griffin explained that she did not remember how she knew that information. Defense counsel continued this line of questioning:

[DEFENSE COUNSEL]: And do you remember on [the day you were arrested] telling the detective that Datuan didn't tell you he got any money and that you never saw him with money before or after this?

[MS. GRIFFIN]: I don't remember. You asked me do I remember saying that?

Q: Yeah.

A: No. . . . This happened a couple of months ago – like, a couple of years ago, so I don't remember.

Defense counsel then had Ms. Griffin listen to a recording of a portion of her December 2022 interview with police. The following colloquy ensued:

[DEFENSE COUNSEL]: Did you have an opportunity to listen to what you told police on that day, which was December 1st, 2022?

[MS. GRIFFIN]: I still don't remember saying that. . . . I still don't remember.

Q: But you heard yourself in there saying that –

. . .

A: I'm saying I don't – I'm saying I don't remember when I heard him say that he had that money.

Q: Say it again?

THE COURT: She said, I can't remember.

[DEFENSE COUNSEL]: You can't remember Datuan telling you that he got money from it?

[MS. GRIFFIN]: Yes, I don't –

Q: Okay.

A: – remember.

Defense counsel did not attempt to play the recording of Ms. Griffin's police interview for the jury at that time.

During cross-examination of Detective Dennis Bailey, who interviewed Ms. Griffin after her arrest, defense counsel asked, "And specifically regarding your interview with Ms. Griffin, she specifically told you that Datuan never told her that he received any money for this?" The court sustained the State's objection to this question. During the ensuing bench conference, defense counsel explained that Ms. Griffin's statements during the police interview were admissible as prior inconsistent statements and moved to admit a portion of the recorded interview into evidence. The court denied the motion.

There is no inconsistency between Ms. Griffin's testimony and the statement defense counsel suggested she made in her interview with Detective Bailey.[6] Appellant

[6] The record does not contain a transcript of the recording that appellant sought to introduce and had Ms. Griffin listen to. However, the State provided the following transcript of the relevant portion of the recording in its appellate brief, which appellant agrees is accurate:

OFFICER 2:	Did he tell you why they killed?
GRIFFIN:	I guess for money or something.
OFFICER 1:	So they do it for money?
GRIFFIN:	Uh-huh.
OFFICER 1:	We know a name of an individual who's paying the money.
GRIFFIN:	Uh-huh.
OFFICER 1:	Do you know the name?

argues that Ms. Griffin's statement to the detective that appellant "'never told her that he received any money' in relation to the shooting" was inconsistent with her trial testimony that appellant "told her that the shooting 'was for money' and that he received $1,200." However, Ms. Griffin's statements to Detective Bailey did not contradict her trial testimony. First, she testified at trial that appellant told her the shooting "was for money[,]" which was consistent with her December 2022 police interview that they committed the crime for money. Additionally, Ms. Griffin consistently stated that she never saw appellant with any substantial money and, more significantly, she never testified or told the police that appellant himself told her he received money for committing the crime. In response to the question, "Do you know how much he got?," Ms. Griffin responded somewhat equivocally, "probably, like 1200." Ms. Griffin never testified that appellant told her he received $1,200, and she was insistent that she could not remember where she obtained that information.

Because Ms. Griffin's prior statements were not inconsistent with her trial testimony, the court properly exercised its discretion in sustaining the State's objection to

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GRIFFIN:	No.
OFFICER 1:	Has Datuan mentioned to you –
GRIFFIN:	No. He haven't mentioned to me anything. I haven't seen him with no money. I haven't seen him, nothing. So my understanding, I believe [the cousins] have got some money, but [Datuan], I haven't seen anything.

(Emphasis removed).

defense counsel's inquiry of Detective Bailey, and in disallowing the admission of the recording.

III. SUPPLEMENTAL JURY INSTRUCTIONS

Appellant next argues that the court erred in refusing to provide the jury with written instructions after the jury sent a note asking for clarification of the definition of first-degree murder. He argues that by applying "a hard and fast rule" to never provide written jury instructions, the court failed to affirmatively exercise its discretion. The State responds that the court did not fail to exercise its discretion merely by following its own general practice, and that it was not an abuse of discretion for the court to orally instruct the jury on first-degree murder in response to the jury's note.[7]

After the jurors had been deliberating for approximately one hour, they submitted a note to the court asking, "What is the definition of first degree murder[?] SPECIFICS Please[.]" As the court and counsel were beginning to discuss this note and a second note not relevant to this appeal, the jury buzzer rang again. The courtroom clerk responded and

[7] The State argues that appellant failed to preserve this issue for our review by failing to object when the trial court refused to send back written instructions, instead responding "Understood." We disagree. Defense counsel made clear what he was asking the court to do, and the court's refusal was unequivocal. *See Watts v. State*, 457 Md. 419, 428 (2018) ("If the record reflects that the trial court understands the objection and, upon understanding the objection, rejects it, this Court will deem the issue preserved for appellate review." (citing *Sergeant Co. v. Pickett*, 283 Md. 284, 290 (1978))). Further objection likely would have been futile, and acknowledging an understanding of the ruling is not equivalent to acquiescing in the ruling. *See Montague v. State*, 244 Md. App. 24, 60 (2019) (objection to jury instructions may be preserved where subsequent objections "would be futile or useless" (quoting *Bowman v. State*, 337 Md. 65, 69 (1994))); *Beverly v. State*, 349 Md. 106, 118 (1998) ("showing polite deference" to the court when it is clear that the court will not change its mind is not acquiescence).

then returned to the courtroom, advising the court the jury was "asking about those papers they wanted. I told them that we were going over it right now." In response to the jury's inquiry, the court proposed to again read the pattern jury instruction for first-degree murder, and commented: "You know, I really hate to tell jurors you all need to pay attention because I'm not going to repeat this 12 times." After the court discussed its proposed response to the second note, it asked if counsel had any other thoughts on the matter:

> THE COURT: So do[es] anybody have anything other than those two answers or any of those two responses?
>
> [DEFENSE COUNSEL]: Yes. We would, and I'm not sure how [the prosecutor] feels but we would propose for the first question, especially because now that they've asked and it's such an involved instruction, we would propose sending that instruction back.
>
> THE COURT: No, I'm not.
>
> [DEFENSE COUNSEL]: With the jury. Understood.
>
> THE COURT: I do not do that. And if I were to send that one back, I think that would give the wrong message to the jury, that that is more important than anything else.
>
> [DEFENSE COUNSEL]: I wouldn't be against sending all of the instructions back at this point either. Just saying.
>
> THE COURT: I don't send jury instructions back.
>
> [DEFENSE COUNSEL]: I understand.
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> THE COURT: I made that clear from the very beginning[8] and I don't know why or when that became a practice of some judges but no.

[8] Early on the first day of trial, the jury sent a note asking one of the attorneys to speak louder due to some acoustics issues in the courtroom. After discussing the note at

"The main purpose of a jury instruction is to aid the jury in clearly understanding the case, to provide guidance for the jury's deliberations, and to help the jury arrive at a correct verdict." *Williams v. State*, 232 Md. App. 342, 358 (2017) (quoting *Appraicio v. State*, 431 Md. 42, 51 (2013)). "[W]hen a jury asks a question that reflects confusion on an issue, the trial judge must respond to the question in a way that clarifies the confusion if the question involves an issue central to the case." *Mulley v. State*, 228 Md. App. 364, 377 (2016) (quoting *Lee v. State*, 186 Md. App. 631, 665 (2009)). Rule 4-325(c) states:

> The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. *The court may give its instructions orally or, with the consent of the parties, in writing instead of orally.* The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

(Emphasis added).

A court abuses its discretion when it fails to exercise discretion. *Cagle*, 462 Md. at 75 (quoting *101 Geneva LLC v. Wynn*, 435 Md. 233, 241 (2013)). Here, the court applied its general rule of not providing written instructions to the jury with little indication that it considered whether that rule was appropriate under these specific circumstances. *Compare id.* at 75-78 (court did not fail to exercise discretion by declining to deviate from usual

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the bench, the prosecutor asked if the trial court wanted them to initial the note. The court responded: "I don't do all that. I'm up here – I always – . . . Always have the lawyers up and see it, I don't do the initial – . . . I don't send the jury instructions back. . . . I don't know who started all that, I don't do the 'All rise for the jury,' doesn't happen in here." Additionally, on the second day of trial, while discussing the proposed jury instructions, the prosecutor mentioned that there was not a written copy of the instructions available. The court responded: "Well, that's not my fault, I told you all I don't give them to the jury and that you need to look at them."

practice where the court did not "reject [the] request out of hand" but instead "carefully reviewed" the request), *with Gunning v. State,* 347 Md. 332, 351-52 (1997) (court failed to exercise discretion where "the denial was based on the application of a uniform policy," and not "consideration of the particular circumstances[.]").

Assuming *arguendo* that the trial court's course of action in the present case was a failure to exercise discretion, we hold that any error was harmless. To hold an error harmless, "we must be convinced, beyond a reasonable doubt, that [it] in no way influenced the verdict." *Rainey v. State*, 252 Md. App. 578, 602 (2021) (quoting *Weitzel v. State*, 384 Md. 451, 461 (2004)). An instructional error does not require reversal "where the jury instructions, taken as a whole, sufficiently protect the defendant's rights and adequately covered the theory of the defense." *Carroll v. State*, 428 Md. 679, 689 (2012) (quoting *Fleming v. State*, 373 Md. 426, 433 (2003)).

We initially point out that the jury note requesting "SPECIFICS Please," does not suggest that the jurors were requesting a written copy of the instructions. Second, appellant does not argue that the pattern jury instruction read in response to the jury note was erroneous or misleading. Instead, appellant focuses on the complexity of the issues in the case, "including premeditation [and] culpability as an accomplice and coconspirator." However, the jury note asked only for the definition of first-degree murder and we agree with the State that the instruction for first-degree murder is relatively short and

straightforward.[9] In addition, appellant did not request the court to again read the instructions related to conspiracy and accomplice liability, and there is no indication that the jury was confused or unable to accurately remember the court's instructions on these more nuanced issues. Indeed, we note that the jury returned its verdict only fifteen minutes after resuming deliberations.

We therefore conclude that, even if the court failed to exercise its discretion, any error in failing to provide the jury with a written instruction for first-degree murder was harmless beyond a reasonable doubt.

IV. ADMISSION OF JAIL CALL

Appellant argues that the court erred in admitting the recording of the jail call. He argues that the jail call was not relevant because the statements he made in the call "are no more likely to have been made by an individual who was guilty than an individual who

[9] In response to the jury note, the court gave the following oral instruction to the jury:

> The defendant is charged with the crime of murder. First degree murder is the intentional killing of another person with wilfulness, deliberation, and pre-meditation. In order to convict the defendant of first degree murder, the State must prove one, that the defendant caused the death of Leion Davis, Jr. and/or William Ferebee and that the killing was wilful, deliberate, and pre-meditated. Wilful means that the defendant actually intended to kill Mr. Davis and/or Mr. Ferebee. Deliberate means that the defendant was conscious of the intent to kill. Pre-meditated means that the defendant thought about the killing and that there was enough time before the killing, though it may have been brief, for the defendant to consider the decision whether or not to kill, and enough time to weigh the reasons for and against the choice. The pre-meditated intent to kill must be formed before the killing.

was not guilty." Additionally, he argues that any probative value of the call was outweighed by the risk of unfair prejudice.

The State responds that the jail call was relevant as evidence of consciousness of guilt, because the conversation showed "how a factually guilty person would speak, not a factually innocent person."[10]

We review without deference to the trial court whether evidence is relevant. *Ford v. State*, 462 Md. 3, 46 (2018). On the other hand, "[a]n appellate court reviews for abuse of discretion a trial court's determination as to whether evidence is inadmissible under Maryland Rule 5-403[,]" concerning whether the evidence is more unfairly prejudicial than probative. *Id.*

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 than it would be without the evidence." Rule 5-401. Generally, "all relevant evidence is admissible. Evidence that is not relevant is not admissible." Rule 5-402. "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." Rule 5-403. "[I]f relevant, circumstantial evidence regarding a defendant's conduct may be admissible under

[10] The State also correctly notes that any argument by appellant that portions of the call should have been redacted was not preserved, as appellant did not request any redactions before the trial court. *See Woodlin v. State*, 484 Md. 253, 293-94 (2023); *Colkley*, 251 Md. App. at 282-84.

M[aryland] Rule 5-403, not as conclusive evidence of guilt, but as a circumstance tending to show a consciousness of guilt." *Ford*, 462 Md. at 47 (alterations in original) (quoting *Decker v. State*, 408 Md. 631, 640 (2009)). To be relevant as evidence of consciousness of guilt, the conduct

> must satisfy four inferences: (1) from the defendant's conduct, a desire to evade prosecution or conceal evidence; (2) from a desire to evade prosecution or conceal evidence, consciousness of guilt; (3) from consciousness of guilt, consciousness of guilt with respect to the charged offenses; and (4) from consciousness of guilt with respect to the charged offenses, actual guilt.

Wagner v. State, 213 Md. App. 419, 465 (2013) (citing *Thomas v. State*, 397 Md. 557, 576 (2007)). "The proper inquiry is whether the evidence *could* support an inference that the defendant's conduct demonstrates a consciousness of guilt. If so, the evidence is relevant and generally admissible." *Ford*, 462 Md. at 50 (quoting *Thomas*, 397 Md. at 577). The possibility of innocent explanations for the defendant's conduct does not by itself render the evidence inadmissible. *Id.* at 52.

Here, appellant made multiple statements during the jail call that could support an inference of consciousness of guilt. Appellant stated, "They started gettin' on some 69 shit, so they got that for real[.]" He also stated that he was "probably . . . never coming home[,]" but that there were "a lot of loopholes in [his] case, like it's possible [he] can beat it[.]" As discussed in Part I, *supra*, the term "69" in this context means "snitch," and appellant's recognition that Ms. Griffin would testify against him created a reasonable inference that she had knowledge of material facts related to the crime. We also note that appellant did not suggest in the jail call that the person he was referring to was lying.

Moreover, appellant's reference to "69" in close proximity to his statement that he was "probably . . . never coming home" indicates that he believed the State's case against him was strong enough that he would be convicted and receive a lengthy sentence. From this, the jury could infer that appellant knew he was guilty of serious criminal conduct. Additionally, appellant's statement that his case had "a lot of loopholes" and "it's possible [he] can beat it" suggests a "desire to evade prosecution." *See Wagner*, 213 Md. App. at 465 (citing *Thomas*, 397 Md. at 576). Any possible innocent explanations for appellant's comments could be weighed by the jury, but did not render the jail call irrelevant or inadmissible.

Having determined that the jail call was relevant, we turn to appellant's argument that its admission was more prejudicial than probative. A determination of whether relevant evidence should be excluded because its probative value is substantially outweighed by danger of unfair prejudice is "left to the sound discretion of the trial judge." *Thomas v. State*, 168 Md. App. 682, 713 (2006) (quoting *Malik v. State*, 152 Md. App. 305, 324 (2003)), *aff'd* 397 Md. 557 (2007). Evidence is "unfairly prejudicial if it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which he [or she] is being charged." *Ford*, 462 Md. at 59 (alteration in original) (quoting *Odum v. State*, 412 Md. 593, 615 (2010)).

Appellant points to two specific comments in the jail call that he argues render the entirety of the jail call more unfairly prejudicial than probative. First, he references the comment "A lot of the shit is just circumstantial, I mean, they can't really use a lot of what

they got[.]" Appellant argues that "[h]is belief that the State was precluded from using certain evidence might mislead [the] jury to believe that other evidence existed but the State was precluded from admitting it." While it is possible that members of the jury might have reached that conclusion, it is equally plausible that they might have concluded that appellant erroneously believed that circumstantial evidence is not admissible or is insufficient to sustain a conviction. Indeed, this is the meaning the State suggested in its closing argument: "He says a lot of it is just circumstantial, they can't use all that they have or something. Well, it doesn't matter if it's circumstantial, obviously he doesn't know the jury instruction about circumstantial evidence that Her Honor just read to you." In either case, it is unlikely that the jury would place so much emphasis on this single comment within a several-minute-long recording that it disregarded the other evidence.

Second, appellant argues that "his statement that he had 'been through all this shit already[]' very likely would be perceived by the jury as admission of having been previously incarcerated and/or charged with committing other crimes." We disagree. While discussing the possibility that he might be incarcerated for the remainder of his life, appellant stated, "I've already been through all that shit and that shit already been on my mind for months at a time, so I don't need to be thinking about that shit no more." The jury was informed that Ms. Griffin made a statement to police implicating appellant on December 1, 2022, and that this jail call was recorded on December 30, 2023, over a year later. This background knowledge provides context as to the meaning of appellant's comments—he had been thinking about the outcome of this case for a long time and did

not wish to dwell on it during the jail call. Nothing in the conversation suggests that he was referring to any prior arrest, and the State made no such insinuations. We therefore conclude that the trial court did not abuse its discretion in determining that the probative value of the jail call was not substantially outweighed by the danger of unfair prejudice.

V. ERRONEOUS JURY INSTRUCTION

The court provided the following instructions related to the charge of use of a firearm in the commission of a crime of violence:

> The defendant is charged with the crime of use of a firearm in the commission of a crime of violence. The crimes of violence in this case are the murder of Leion Davis, Jr., conspiracy to murder Leion Davis, Jr., and that conspiracy resulting in the death of Leion Davis, Jr., conspiracy to murder Leion Davis, Jr., the murder of William Ferebee, conspiracy with others to murder William Ferebee and that that conspiracy resulted in Ferebee's death and the conspiracy with others to murder Leion Ferebee [sic].
>
> In order to convict the defendant, the State must show that the defendant committed those crimes of violence and that the defendant used a firearm in the commission of those crimes of violence.

Both appellant and the State agree that this instruction is erroneous because the conspiracy charges are not predicate "crimes of violence" for the purpose of a conviction for use of a firearm in the commission of a crime of violence. *See* Md. Code (2002, 2021 Repl. Vol.), § 4-204(b) of the Criminal Law Article. However, neither party raised any objection to the jury instructions at trial. Appellant asks that we exercise plain error review.

Maryland Rule 4-325(f) provides, in relevant part, that "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury[.]" The Rule also provides that an appellate court

may "take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object." Rule 4-325(f). "There are, however, limitations upon the consideration of plain error review: (1) there must be error (that the defendant did not affirmatively waive); (2) the error must be 'clear and obvious,' *i.e.*, not subject to reasonable dispute; and (3) the error must be material, meaning that it affected the outcome of the trial." *Steward v. State*, 218 Md. App. 550, 566 (2014) (quoting *Kelly v. State*, 195 Md. App. 403, 432 (2010)).

"Even if an appellant is able to satisfy the threshold burden of proving a plain and material error, the Court need not recognize the error." *Id.* (citing *Sine v. State*, 40 Md. App. 628, 632 (1978)). Generally, "we reserve plain error relief 'for errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Pietruszewski v. State*, 245 Md. App. 292, 323 (2020) (quoting *Yates v. State*, 429 Md. 112, 130-31 (2012)). In deciding whether to exercise plain error review, we consider: "the opportunity to use an unpreserved contention as a vehicle for illuminating an area of law; the egregiousness of the trial court's error; the impact of the error on the defendant; and the degree of lawyerly diligence or dereliction." *Steward*, 218 Md. App. at 566 (citing *Morris v. State*, 153 Md. App. 480, 518-24 (2003)). "In that regard, we review the materiality of the error in the context in which it arose, giving due regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald inattention." *Id.* (quoting *Alford v. State*, 202 Md. App. 582, 617 (2011)). Even so, we will recognize plain error "only when the error was 'so material to the rights of the

accused as to amount to the kind of prejudice [that] precluded an impartial trial.'" *Newton v. State*, 455 Md. 341, 364 (2017) (alteration in original) (quoting *Diggs v. State*, 409 Md. 260, 286 (2009)). Moreover, "[b]ecause of the difficulty of demonstrating facts that are sufficiently compelling to invoke plain error review, it remains 'a rare, rare, phenomenon,' especially when the alleged error involves a missing or erroneous jury instruction." *Steward*, 218 Md. App. at 566-67 (quoting *Morris*, 153 Md. App. at 507); *see also Taylor v. State*, 236 Md. App. 397, 447 (2018) ("In the context of erroneous jury instructions, the plain error doctrine has been used sparingly." (quoting *Conyers v. State*, 354 Md. 132, 171 (1999))).

As we stated in *Jones-Harris v. State*, 179 Md. App. 72, 96 (2008), "[i]t is true . . . that the error here was plain. But besides being 'plain' the error must also be reversible to even reach the threshold requirement for recognizing plain error." "The mere existence of error, in and of itself, has very little to do with the distinct question of why the appellate court, in its discretion, would wish to take official notice of the error[.]" *Morris*, 153 Md. App. at 511. Courts have recognized plain error in jury instructions where "the error was likely to unduly influence the jury and thereby deprive the defendant of a fair trial." *Campbell v. State*, 243 Md. App. 507, 537-38 (2019) (quoting *State v. Brady*, 393 Md. 502, 507 (2006)). Here, the verdict sheet asked "Do you find that the Defendant used a firearm *in the commission of the murder* of" Leion Davis, Jr. and William Ferebee. (Emphasis added). The guilty verdict for use of a firearm in the commission of the murder of Davis and Ferebee is entirely consistent with the guilty verdicts for the lead charges of first-

degree murder. In short, it is unlikely that the verdict would have been different if the jury instruction had not included the conspiracy counts as predicates for use of a firearm in the commission of a crime of violence.[11] We decline to exercise our discretion to consider this unpreserved claim.

VI. SEPARATE SENTENCES FOR CONSPIRACY CONVICTIONS

Finally, appellant argues that the trial court erred in imposing separate sentences for two related conspiracy convictions. The State agrees, as do we. Appellant was charged with four separate counts of conspiracy: conspiracy to murder Leion Davis, Jr. resulting in death (Count 2), conspiracy to murder Leion Davis, Jr. (Count 3), conspiracy to murder William Ferebee resulting in death (Count 6), and conspiracy to murder William Ferebee (Count 7). The trial court sentenced appellant to life imprisonment on Count 2 and merged Count 3 with Count 2. The court also sentenced appellant to life imprisonment on Count 6 and merged Count 7 with Count 6.

"If a defendant is convicted of and sentenced for multiple conspiracies when, in fact, only one conspiracy was proven, the Double Jeopardy Clause has been violated." *Savage v. State*, 212 Md. App. 1, 26 (2013). "The 'unit of prosecution' for conspiracy is 'the

[11] For this same reason, we reject appellant's alternative argument that his convictions and resulting sentences are illegal "because the jury was not asked to specify upon which 'crime of violence' it relied when convicting him of the handgun charge." A jury's guilty verdict "must be set aside if it could be supported on one ground but not on another, and the reviewing court [is] uncertain which of the two grounds was relied upon by the jury in reaching the verdict." *Mills v. Maryland*, 486 U.S. 367, 376 (1988). Because the verdict sheet specified that the use of a firearm was "in the commission of . . . murder," and the same language was used when the verdict was announced in open court, there is no ambiguity in the verdict, and the resulting sentence is not illegal.

agreement or combination, rather than each of its criminal objectives.'" *Id.* at 13 (quoting *Tracy v. State*, 319 Md. 452, 459 (1990)). "In other words, the conviction of 'a defendant for more than one conspiracy turns on whether there exists more than one unlawful agreement.'" *Id.* (quoting *United States v. Nyhuis*, 8 F.3d 731, 734 (11th Cir. 1993)).

The State did not argue in this case that appellant entered into multiple separate agreements; instead, the State's position was that all conspiracy charges were related to a single agreement. Additionally, the jury was not instructed that it had to find the existence of multiple agreements in order to convict appellant of multiple conspiracies. Accordingly, one of appellant's convictions for conspiracy to murder resulting in death must be vacated.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED WITH THE EXCEPTION THAT ONE OF APPELLANT'S CONSPIRACY CONVICTIONS (AND RELATED SENTENCE) SHALL BE VACATED. CASE REMANDED TO CIRCUIT COURT FOR THE PURPOSE OF CORRECTING APPELLANT'S SENTENCE CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANT.