Circuit Court for Montgomery County
Case No.: C-15-CR-22-000527

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1766

September Term, 2023

MARVIN JEWEL-SYNCERE FRAZIER

v.

STATE OF MARYLAND

Leahy,
Ripken,
Hotten, Michele D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Hotten, J.

Filed: June 23, 2025

*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 April 7, 2023, a jury sitting in the Circuit Court for Montgomery County convicted Marvin Frazier, appellant, of the following six charges: Count I, attempted first-degree murder of Nashiem Attoh; Count II, first-degree assault of Attoh; Count III, use of a firearm in the commission of a crime of violence against Attoh; Count IV, first-degree assault of Christian Jordan; Count V, use of a firearm in the commission of a crime of violence against Jordan; and Count VI, illegal possession of a firearm. On November 2, 2023, the court sentenced Frazier as follows:

- On Count III, five years' incarceration;
- On Count I, twenty-five years, suspend all but ten, to run consecutive to the sentence on Count III;
- On Count IV, ten years to run consecutive to the sentences imposed on Counts I and III;
- On Count V, five years to run concurrent with the sentences on Counts I, III, and IV; and
- On Count VI, five years concurrent with the sentences in Counts I, III, IV, and V.

The court did not sentence Frazier on Count II because that count merged into Count I. In total, the executed portion of Frazier's sentence at the time of sentencing was twenty-five years' active incarceration, plus another five years of supervised probation upon release from incarceration.

On appeal, Frazier presents nine questions for our review:

1. Did the trial court err by admitting into evidence two performances of rap "remixes" which were performed and, in part, composed by the Appellant?
2. Did the trial court err in refusing to propound a missing witness jury instruction?

3. Was the Appellant deprived of a fair trial by evidence of prior misconduct for which he was not on trial?

4. Was the Appellant deprived of a fair trial due to prosecutorial misconduct?

5. Was the evidence insufficient to sustain a conviction?

6. Was the Appellant deprived of a fair trial due to ineffective assistance of counsel?

7. Was characterization of the Appellant's involvement with a social/music group called "The Black Mob" erroneously admitted as evidence of gang activity, in violation of the First Amendment to the United States Constitution?

8. Did the trial court err in failing to rule that a self-defense jury instruction was generated at the conclusion of the State's case, despite evidence having been adduced that would logically generate such an instruction, essentially forcing the Appellant to testify and abrogating his rights under the Fifth Amendment to the United States Constitution?

9. Did the trial court err in failing to propound a jury instruction regarding duress?

For the reasons that follow, we affirm the judgment of the circuit court.

BACKGROUND

On August 8, 2020, Frazier shot Attoh in what the State alleged was an attempted murder, but what Frazier claimed was self-defense. To fully inform our analysis of the events at issue here, we begin around four months before the shooting.

On April 16, 2020, Frazier attended a memorial cookout in honor of a friend, Tray Dawkins, who had been killed one year prior to the event. After spending about thirty minutes at the cookout, Frazier left with two friends and drove to the home of another friend, Sevaughn Simpson, to "hang out." However, when Frazier parked his car outside of Simpson's house and exited, he immediately heard what he described as "around like 15, 18, 20 shots." Upon hearing the gunshots, Frazier got back in the car and directed the

driver to "get to the other side of the complex" away from the gunshots. Frazier did not see who had fired the shots. In the months that followed, Frazier heard "multiple rumors" regarding who may have been responsible for the April 16 shooting. The "main rumor" was that an individual known as Ruga Chris from the group "Hittsquad" had fired the shots at Frazier.

Throughout the events of this case, Frazier was a member of the group "Black Mob." The evidence at trial differed as to the nature of the group. Frazier described Black Mob as a "music group" that makes rap music. The State, however, called Detective Rodney Campbell as an expert in gang investigations,[1] who testified that Black Mob is a gang that generally operates in the Germantown area of Montgomery County. Campbell further testified that Hittsquad is another gang that operates in Montgomery County, and that Black Mob and Hittsquad are "rivals to each other." While Frazier did not know Ruga Chris at the time, he was aware of him from music videos he had posted on social media, and knew him to be a member of Hittsquad.

On August 8, 2020, Frazier was "hanging out with a couple friends" when he received a call from his cousin Donte Johnson inviting him to a "studio session." Frazier testified that they regularly went to a studio in Silver Spring where they would "record music, listen to some different beats, you know, just bounce ideas off each other, just you know, make music." This time, however, Frazier and Johnson went to a studio in Montgomery Village, which is the area where Hittsquad operated. Frazier arrived at the

[1] Detective Campbell was also a fact witness in this case since he was the officer who investigated and eventually arrested Frazier.

studio at around 9 or 10 p.m., so it was dark outside. While entering the studio, Frazier noticed someone standing outside. Thinking this individual was also with his cousin, Frazier attempted to shake his hand. However, the individual hesitated, and when Frazier looked at his face, he thought the individual looked familiar. As he was walking into the studio, Frazier realized that he recognized the individual as Ruga Chris. Ruga Chris was later identified as Christian Jordan, one of the victims in this case.

At this point, Frazier testified that he was concerned for his safety because he believed Jordan had "tried to kill [him] before[.]" Frazier voiced this concern to Johnson, who initially assured him that the man they had seen outside was not Jordan. However, once they were in the studio, Frazier pulled up Jordan's Instagram page on his phone and showed it to Johnson and one other individual who was familiar with the Montgomery Village area. They both confirmed that the individual standing outside was the same person depicted on the Instagram page. Frazier decided at this point that he wished to leave the studio, so he asked Johnson to talk to Jordan to "see if there's going to be a problem with me leaving." A few minutes later, Johnson returned to the studio with Jordan and two other individuals, one of whom was later identified as Nashiem Attoh. Johnson had asked Jordan if there was going to be any problem with them leaving the studio, to which Jordan apparently responded, "[I]t's not a problem with you [Johnson], you good, but he [Frazier] know what time it is, we not going to miss this time." Frazier took this to mean that they were actively trying to kill him.

In response to the apparent threat from Jordan, Frazier pulled out his gun and tried to leave the studio. As he was leaving, however, another individual grabbed him and tried

to stop him from leaving. Then, Frazier saw a man, later identified as Attoh, move toward the door and reach for a bag, which Frazier believed contained a gun. Frazier grabbed the bag and was pulling on it to prevent Attoh from reaching the gun. However, Frazier eventually lost his grip and Attoh "got loose and went outside." At some point during the ensuing melee, Frazier struck Jordan in the head with his gun. When Attoh returned, Frazier saw a gun appear in the doorway and immediately fired one shot.[2] Frazier testified that he did not fire any more shots, and proceeded to leave the studio with Johnson. The events in the studio were all caught on video.[3]

After he left the studio, Frazier eventually went to Baltimore, where he spent the night at a family member's house. Then, Frazier took a bus to Atlanta the next morning where he spent "a couple weeks" staying with some friends. Frazier later went to Florida, where he stayed for "[a] year and some change." Then, around March of 2022, Frazier returned to Baltimore for the birth of his daughter. When he returned to Maryland, Frazier was apprehended by Detective Campbell and other Montgomery County police officers at a Tropical Smoothie Café.

Frazier was charged in the Circuit Court for Montgomery County on May 19, 2022, and tried from April 3-7, 2023. During the trial, the circuit court made several rulings that Frazier now challenges on appeal. For example, the court admitted into evidence two rap songs, "Shoulda Ducked" and "Hit Bout It," including a music video of Hit Bout It. The

[2] Frazier claims that the State "distorted the record" by falsely asserting that Frazier shot both Jordan and Attoh, when in fact only Attoh was struck. However, Frazier provides no record citation to support this claim.

[3] The video was admitted at trial as State's Exhibit 36.

court also denied Frazier's requests for a missing witness jury instruction and a duress instruction. Additionally, when a State's witness made reference to a prior arrest of Frazier during his testimony, the court denied Frazier's motion for a mistrial and instead gave a curative instruction. The jury convicted Frazier on all six counts, and he was sentenced on November 2, 2023. This timely appeal followed on November 8, 2023.

DISCUSSION

I. The Circuit Court did not Err or Abuse its Discretion in Admitting Rap Lyrics as Evidence of Frazier's State of Mind at the Time of the Shooting

Frazier challenges the admission of two rap songs that he performed within the year following the shooting, titled "Shoulda Ducked" and "Hit Bout It." An audio recording of "Shoulda Ducked" was played for the jury during the State's direct examination of Detective Campbell, and a music video of "Hit Bout It" was played during the State's cross-examination of Frazier. Frazier now argues that both songs should have been excluded as irrelevant evidence or, alternatively, because their probative value was substantially outweighed by their potential for unfair prejudice.

For evidence to be admitted, it must be relevant. Md. Rule 5-402. "[T]rial judges do not have discretion to admit irrelevant evidence." *Akers v. State*, 490 Md. 1, 25 (2025) (quoting *State v. Simms*, 420 Md. 705, 724 (2011)). Whether evidence is relevant "is a conclusion of law that we review de novo." *Id.* at 24. Even where it is relevant, however, "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." Md. Rule 5-

403. This Court reviews a trial court's ruling on the admissibility of evidence under Rule 5-403 for an abuse of discretion. *Akers*, 490 Md. at 25.

Evidence is relevant if it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Generally, evidence is relevant if it is both material and probative. *Akers*, 490 Md. at 26. "Evidence is material if it bears on a fact of consequence to an issue in the case[,]" *id.*, while "[e]vidence is probative if it is 'related logically to a matter at issue in the case[.]'" *Id.* (quoting *Snyder v. State*, 361 Md. 580, 591 (2000)).

Here, Frazier admits that he shot Attoh, so his identity as the shooter is not a matter at issue in this case. Rather, Frazier claims that he shot Attoh in self-defense, so the matter at issue in this case is Frazier's intent. In other words, the issue in this case is whether Frazier shot Attoh out of necessity, or out of a pre-determined, deliberate intent to harm. To prove the latter, the State offered rap lyrics that were composed and performed by Frazier.[4] There was no evidence as to when the lyrics were composed or performed, but Detective Campbell testified that he first saw the song "Shoulda Ducked" on Soundcloud in April of 2021, about eight months after the shooting on August 8, 2020.

[4] In his reply brief, Frazier claims that he "did not write the instrumental tracks or themes, and the remixes cannot fairly be construed clearly as statements of intent." However, this directly contradicts Frazier's own opening brief, where he stated in a heading that the lyrics were "*composed* and performed by the Appellant." Additionally, in his opening brief, Frazier described the song "Shoulda Ducked" as including "lyrics from the original song interspersed with *lyrics authored by the Appellant*."

The Supreme Court of Maryland considered the admissibility of rap lyrics as substantive, case-in-chief evidence, in *Montague v. State*, 471 Md. 657 (2020). There, the Court explained that rap lyrics are admissible as substantive evidence of a defendant's guilt when there is a "strong nexus between the specific details of the artistic composition and the circumstances of the offense for which the evidence is being adduced." *Id.* at 688 (quoting *State v. Skinner*, 95 A.3d 236, 251-52 (N.J. 2014)). "The closer the nexus between a defendant's rap lyrics and the details of an alleged crime," the Court explained, "the lower the danger of admitting the lyrics as unfairly prejudicial propensity evidence of the defendant's bad character." *Id.* at 692.

Here, the State offered the "Shoulda Ducked" lyrics to prove Frazier's intent, and argued that "nothing is more probative as to his mental state when those shots came out than this song." Frazier, however, contends that the lyrics have "minimal-if-any probative value" and are "packed with potential for unfair prejudice." The lyrics include a reference to an individual in a wheelchair, which Frazier admitted was a reference to Attoh. However, he argues that the wheelchair reference is irrelevant since Attoh would be in a wheelchair regardless of Frazier's intent. Aside from the wheelchair reference, Frazier argues that the song was generally a "racist, misogynistic, profane diatribe, extolling mindless violence as a lifestyle," and had no nexus to the details of the shooting on August 8, 2020.

This case is distinguishable from *Montague*, where the matter at issue was the identity of the shooter. *See Montague*, 471 Md. at 667, 673 (holding that Montague's rap lyrics were relevant and therefore admissible "because they make it more probable *that Mr. Montague shot and killed Mr. Forrester*" and because they "make it more probable *that*

Mr. Montague was the shooter") (emphasis added). Here, Frazier admits that he shot Attoh, so identity is not at issue. Rather, the matter at issue here is Frazier's intent at the time of the shooting; *i.e.*, whether or not his purpose in shooting Attoh was self-defense. This does not mean, however, that *Montague* is unhelpful in deciding this case.

In *Montague*, the Court's task was to determine whether the events described in Montague's rap lyrics bore a "close factual and temporal nexus between the rap lyrics and the details" of the alleged crime. 471 Md. at 694. This Court's task is related, but somewhat different. Rather than looking for a close nexus between the lyrics and the details of the crime itself, we must examine Frazier's rap lyrics and determine if they include any statements bearing on *why* Frazier shot Attoh. If the "lyrics 'describe details that mirror' the circumstances surrounding" the shooting, then the lyrics may be probative of Frazier's state of mind and, therefore, relevant to determining whether he acted in self-defense. *Id.* at 692 (quoting *Holmes v. State*, 306 P.3d 415, 419 (Nev. 2013)). We hold that they are.

Several lyrics in the song "Shoulda Ducked" indicate an intent to shoot Attoh out of revenge, rather than self-defense. For example, Frazier raps, "He should have ducked. But he got plucked. *He out of luck*." These statements were presumably about Attoh, since Frazier admitted that the later reference to an individual in a wheelchair was a reference to Attoh. The statement, "He out of luck," implies that prior to the shooting, Attoh had been lucky not to be shot. This could be interpreted to mean that Attoh "had it coming" since Frazier had heard rumors that the people who shot at him in April of 2020 were Hittsquad members.

Later in the song, Frazier raps, "The streets going to keep accepting snitches[.]" This implies that Frazier shot Attoh because he was a "snitch," thereby contradicting Frazier's testimony that he shot Attoh out of fear for his life.[5] Again, later in the song, Frazier raps, "They can stop right now, talking about who he hit." This could be a reference to Hittsquad's bragging about taking shots at Frazier in April, with Frazier proclaiming that his shooting of Attoh would put an end to the "talking." In the next line, Frazier warns, "He can telling them I'm killing them like who he it." This could be interpreted as a warning to other Hittsquad members that if they take shots at him, he would kill them like he tried to kill Attoh.

Later, Frazier raps, "I hate a petty hustling bitch[.]" This could be another reference to Attoh, and potentially another reason why Frazier shot him. Frazier also raps, "They think we cool," implying that he may have shot Attoh to look "cool" in the eyes of fellow Black Mob members. Again, Frazier raps, "Bitch ass out of luck. He knew his time up." Like the earlier reference to Attoh being "out of luck," this reference to his time being up could be interpreted to mean that Frazier had been planning to shoot Attoh as revenge for the April shooting of Frazier.

Each of these lyrics, standing alone, would have very minimal probative value regarding Frazier's intent. However, when viewed together, and in the context of Frazier's

[5] In *Montague*, the Court held that "[w]hen an otherwise close factual and temporal nexus exists between defendant-authored rap lyrics and an alleged crime, the inclusion of 'stop snitching' references may support the admissibility of the lyrics as substantive evidence." *Montague*, 471 Md. at 690. Thus, Frazier's reference to "snitches" further supports the admissibility of the lyrics.

gang affiliation and the shooting of Frazier by a rival gang just four months earlier, the "lyrics 'describe details that mirror' the circumstances surrounding" the shooting, and are therefore relevant to determining Frazier's state of mind at that time. *Montague*, 471 Md. at 692 (quoting *Holmes*, 306 P.3d at 419). Thus, the circuit court did not err in finding the lyrics admissible.

Moving to the second step of the analysis, we must determine whether the "Shoulda Ducked" lyrics, though admissible, were so unfairly prejudicial that it was an abuse of discretion for the circuit court not to exclude them from evidence. "To reverse the trial judge's decision to admit [Frazier's] rap lyrics, that decision must be 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Montague*, 471 Md. at 695 (quoting *Faulkner v. State*, 468 Md. 418, 460 (2020)).

Here, as in *Montague*, "we also hold that the trial judge did not abuse his discretion in admitting [Frazier]'s rap lyrics under Rule 5-403." *Id.* While the lyrics are undoubtedly prejudicial, given their "racist, misogynistic, [and] profane" content, the circuit court was well within its discretion to find that the prejudicial effect of the lyrics did not "substantially outweigh[]" their probative value.[6] Md. Rule 5-403. In *Hannah v. State*, 420 Md. 339 (2011), the Court excluded Hannah's rap lyrics because they were highly prejudicial and

[6] Frazier claims that the State's use of the lyrics in a "line-by-line cross-examination," and during closing argument, amplified their prejudicial effect. Even accepting this as true, however, we still find that the prejudicial effect did not so substantially outweigh the probative value of the lyrics such that the circuit court abused its discretion in allowing them into evidence.

"*probative of no issue* other than the issue of whether he ha[d] a propensity for violence." *Id.* at 355 (emphasis added). Here, however, Frazier's rap lyrics are highly probative of his state of mind at the time of the shooting, because they offer several reasons for shooting Attoh that contradict his own version of events. At trial, Frazier claimed that he shot Attoh out of fear for his life, but the lyrics offer a different explanation, suggesting that he shot Attoh out of revenge and for status within the Black Mob. Given the "heightened probative value" of the lyrics as "direct proof" of Frazier's state of mind, the circuit court did not abuse its discretion in admitting his rap lyrics under Maryland Rule 5-403. *Montague*, 471 Md. at 688.[7]

The second song that Frazier challenges on appeal, "Hit Bout It," was introduced in the form of a music video. According to Frazier, the video was a remix between "Hit Bout It" and "Shoulda Ducked," and contained lyrics from one song interspersed with lyrics from the other. Frazier does not cite any particular lyrics that he found to be unfairly prejudicial. Rather, he generally complains that the video was "replete with profane language, loud noises, bright lights, and actors brandishing guns throughout the video[.]" He claims that there was "no purpose for introducing these lyrics other than to show

[7] In a last gasp attempt to salvage his argument, Frazier raises for the first time in his reply brief the contention that the circuit court ignored its own *in limine* rulings when it admitted the rap lyrics. "[A]ppellate courts ordinarily do not consider issues that are raised for the first time in a party's reply brief." *Gazunis v. Foster*, 400 Md. 541, 554 (2007); *see also Fearnow v. Chesapeake & Potomac Tel. Co.*, 342 Md. 363, 384 (1996) (explaining that appellate courts retain the discretion to consider arguments raised for the first time in a reply brief but that they do not abuse their discretion in refusing to do so). Since Frazier failed to raise the issue of the circuit court ignoring its *in limine* rulings in his opening brief, we decline to consider this argument.

propensity to sing about a 'street lifestyle' and to cause the jury to believe that the Appellant was prone to violence[.]"

Although the video of Frazier and other individuals brandishing guns is certainly prejudicial, we cannot say that the circuit court abused its discretion in finding that the video was not so unfairly prejudicial as to substantially outweigh its probative value. During the music video, Frazier at one point identifies the group as the Black Mob, and raps "he had it on him and got hit with it." These lyrics, combined with the presence of other alleged gang members in the video, lend further support to the State's theory that Frazier shot Attoh in a bout of gang-related revenge rather than necessary self-defense. Thus, the circuit court did not abuse its discretion in admitting the "Hit Bout It" music video.

II. The Circuit Court did not Abuse its Discretion in Denying Frazier's Request for a Missing Witness Jury Instruction

In a criminal jury trial, the trial court "may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." Md. Rule 4-325(c). "A trial judge is required to give instructions on the law[,]" including "such things as the burden of proof, presumption of innocence, and the elements of the crimes charged." *Hollins v. State*, 489 Md. 296, 308 (2024) (quoting *Harris v. State*, 458 Md. 370, 405 (2018)). "However, instructions as to facts and factual inferences are normally *not* required." *Id.* (emphasis in original). A missing witness instruction "is of the latter variety." *Harris*, 458 Md. at 405.

When a trial court gives a missing witness instruction, it "instructs the jury that, if a witness likely could have given important evidence in the case and it was peculiarly within the power of one party to produce that witness but the witness was not called and the individual's absence was not adequately explained, the jury may infer that the witness would have testified unfavorably to that party." *Id.* at 377. By "call[ing] the jury's attention to the *absence* of evidence[,]" a missing witness instruction "allows the jury to attribute that absence to one of the parties, and permits the jury to draw a negative inference against that party for failing to produce that evidence." *Id.* at 390 (emphasis in original).

In *Harris*, the Supreme Court of Maryland explained that a "missing witness instruction" concerns "an inference to be drawn from evidence—or the lack thereof—" and "[t]hus, a trial court has discretion not to give a missing witness instruction even if a party requests the instruction and the necessary predicate for such an instruction has been established." *Id.* at 405-06. As such, "[w]e review a trial court's decision to give a jury instruction concerning inferences to be drawn from the absence of evidence for abuse of discretion." *Id.* at 406. However, "'[t]he threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law' and thus is reviewed de novo[.]" *Hollins*, 489 Md. at 309 (quoting *Bazzle v. State*, 426 Md. 541, 550 (2012)).

In this case, Frazier requested two missing witness jury instructions: one for Detective Everett Cammack,[8] and another for Christian Jordan. We must first determine whether there was "some evidence" in the record to generate the instructions, and if so, we

[8] Frazier refers to Detective Cammack in his brief as Detective Commack. However, the detective's name is spelled "Cammack" in the trial record.

must then determine whether the circuit court abused its discretion in denying the requested instructions. *See Jarvis v. State*, 487 Md. 548, 564 (2024) (explaining that the requesting party must produce "some evidence" to generate a desired jury instruction).

To generate a missing witness instruction, the requesting party must point to some evidence of the following "basic prerequisites:"

> (1) There is a witness
>
> (2) Who is peculiarly available to one side because of a relationship of interest or affection
>
> (3) Whose testimony is important and non-cumulative
>
> (4) Who is not called to testify.

Harris, 458 Md. at 404.

The first and fourth prerequisites are easily satisfied here, because Frazier identified two potential witnesses—Detective Cammack and Jordan—who were not called to testify. Thus, the question of whether the missing witness instructions were generated turns on whether there was "some evidence" that Detective Cammack and Jordan were "peculiarly available" to the State, and that their testimony would be "important and non-cumulative." *Harris*, 458 Md. at 404.

Frazier contends that Detective Cammack was "peculiarly available" to the State, because "[a]s lead investigator, he would have worked hand in glove with the State's Attorney's Office, and forged a relationship with that office that he obviously would not have had with anyone on the defense side." The State, however, points out that Detective Cammack is now retired, and argues that there is no authority finding that former officers

are "peculiarly available" as a matter of law. Frazier also contends that Detective Cammack's testimony, "perhaps concerning the thoroughness of the investigation, would not have been helpful to the State." The State, however, argues that this fails to show why Detective Cammack would have provided important testimony.

As to Jordan, Frazier contends that he was "peculiarly available" to the State because "the prosecution had at its disposal a sheriff's office staffed with persons experienced in locating people and serving them with process." The State, however, notes defense counsel's own opening statement, wherein counsel described Frazier and Jordan as people who do not "cooperate with the police." The State also points to evidence that the "main victim" was reluctant to testify, that another witness testified only because of a motion to compel, and that "talking to the police" can "make you a target[,]" according to Frazier. Frazier further contends that Jordan's testimony "would not have furthered the State's case." Again, however, the State argues that this fails to show why Jordan would have provided important testimony.

To demonstrate that a missing witness is "peculiarly available" to an opposing party, the party requesting a missing witness instruction must show "either that the witness is physically available only to the opponent or that the witness has the type of relationship with the opposing party that pragmatically renders his testimony unavailable to the opposing party." *Bereano v. State Ethics Commission*, 403 Md. 716, 742 (2008) (quoting *Chi. Coll. of Osteopathic Med. v. George A. Fuller Co.*, 719 F.2d 1335, 1353 (7th Cir. 1983)).

Here, Frazier merely contends that Detective Cammack and Jordan were "more available to the State than to the defense[,]" not that they were *only* available to the State. Thus, there is no contention that the missing witnesses were not physically available to both parties. Additionally, in neither case does Frazier demonstrate the type of relationship between the missing witnesses and the State that would pragmatically render their testimony unavailable to Frazier. Given its past relationship with Detective Cammack, it may have been *easier* for the State's Attorney's Office to secure him as a witness. This, however, did not pragmatically render Detective Cammack's testimony unavailable to Frazier. Additionally, given the resources of the sheriff's office, it may have been *easier* for the State to secure Jordan as a witness. Again, however, this did not pragmatically render Jordan's testimony unavailable to Frazier. As the circuit court pointed out, Frazier could have issued a subpoena for either witness.

Frazier also fails to show why Detective Cammack and Jordan would have given "important and non-cumulative" testimony. Frazier claims that Detective Cammack may have testified "concerning the thoroughness of the investigation," but he fails to explain what the testimony might have revealed about the thoroughness of the investigation. At trial, the circuit court pointedly asked defense counsel to explain what evidence he would have adduced from Detective Cammack if he were there. Defense counsel explained that Detective Cammack would testify about "evidence collection, coordinating, but mostly – I think most legitimately the witness information, interviews, that sort of thing." The circuit court pressed him further, asking "how does that evidence move the needle in either direction in this case?" In response, defense counsel admitted, "I don't know, frankly. I

don't know everything that could come out." He then proceeded to speculate as to the thoroughness of Detective Cammack's investigation, saying "maybe he didn't do anything. Maybe he interviewed one person and – and just decided to just say goodbye to everybody else." As he was unable to clearly articulate why Detective Cammack's testimony would be "important and non-cumulative," Frazier failed to generate a missing witness instruction as to Detective Cammack.

Frazier also fails to give any explanation for what Jordan might have testified about. Frazier claims that Jordan's testimony would not have furthered the State's case. However, he offers no argument as to why the testimony would be unhelpful to the State or, if so, why that would make it important or non-cumulative. Thus, Frazier also failed to generate the missing witness instruction as to Jordan.

Even assuming, arguendo, that the missing witness instructions were generated by the evidence, the circuit court properly acted within its discretion to deny the requested instructions. A trial court abuses its discretion

> where no reasonable person would take the view adopted by the trial court ... or when the court acts without reference to any guiding principles, and the ruling under consideration is clearly against the logic and effect of facts and inferences before the court ... or when the ruling is violative of fact and logic.

Sibley v. Doe, 227 Md. App. 645, 658 (2016) (cleaned up) (citations omitted). In *Hollins*, a circuit court abused its discretion when it denied a requested jury instruction simply because the requested instruction was not a pattern instruction. 489 Md. at 316-17. The Court found that this was "akin to adopting a uniform policy[.]" *Id.* at 316.

Here, unlike in *Hollins*, the circuit court gave reasoned explanations for denying both requested missing witness instructions. As to Detective Cammack, the circuit court heard defense counsel's arguments that he "gathered the names and information on all of the people that were there"; that it was "rational to think that a lot of those people would have had very important information"; and that they "could have overheard what was being said." After considering defense counsel's argument, the court denied the instruction as to Detective Cammack, finding that Frazier failed to show that his testimony "would have [been] material." Additionally, with respect to Jordan, the circuit court explained, "I'm not inclined to give it with respect to Christian Jordan because I don't find that the State had some special power to produce him any more so than you would have." Given the court's reasoned explanations for its decisions, it did not abuse its discretion in denying the requested missing witness instructions.

III. The Circuit Court did not Abuse its Discretion with Respect to Two Instances of Alleged "Prior Misconduct" Evidence

Maryland Rule 5-402 lays out a "general policy of admission of relevant evidence": relevant evidence is generally admissible, and evidence that is not relevant is inadmissible. *Woodlin v. State*, 484 Md. 253, 264 (2023). However, one exception to this general policy is Maryland Rule 5-404(b), which bars the introduction of "[e]vidence of other crimes, wrongs, or other acts ... to prove the character of a person in order to show action in the conformity therewith[,]" otherwise known as "propensity evidence[.]" *Woodlin*, 484 Md. at 264-65. Rule 5-404(b) does allow the admission of other bad acts evidence for other purposes, "such as proof of motive, opportunity, intent, preparation, common scheme or

plan, knowledge, identity, [and] absence of mistake or accident[.]" Md. Rule 5-404(b). Thus, "notwithstanding the inadmissibility of other bad acts evidence to prove propensity, such evidence 'may be admissible for other purposes,' including, but not limited to, the enumerated purposes." *Browne v. State*, 486 Md. 169, 187 (2023) (quoting Md. Rule 5-404(b)).

Here, Frazier challenges the circuit court's decisions relating to two alleged incidents of other bad acts evidence. First, he points to the direct examination of Detective Campbell. On direct examination, the State inquired into how long and how well Detective Campbell knew Frazier, so as to establish that the face and voice on the videos were in fact Frazier's. Detective Campbell testified that he had spent over ten hours with Frazier, spread over three or four interviews. Then, Detective Campbell was asked to identify a series of photographs of Frazier and he responded, "These are photos I took from an arrest we had of Mr. Frazier." The State then asked Detective Campbell if the photos were from the arrest in the instant case in March of 2022, to which he responded, "This is an arrest prior to that one[.]" Frazier moved for a mistrial, which the court denied. However, the court granted a curative instruction, and instructed the jury to disregard the testimony about the prior arrest. On appeal, Frazier argues that the circuit court abused its discretion in failing to "afford maximum relief" when it denied his motion for a mistrial.

A trial judge's ruling on a motion for mistrial is reviewed for an abuse of discretion. *Simmons v. State*, 436 Md. 202, 212 (2013). In *Rainville v. State*, 328 Md. 398 (1992), the Supreme Court of Maryland identified several factors relevant to the evaluation of whether a mistrial is an appropriate remedy, including:

> whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists....

Id. at 408 (brackets in original) (quoting *Guesfierd v. State*, 300 Md. 653, 659 (1984)).

Here, we agree with the State and hold that the *Rainville* factors support the circuit court's decision. First, Detective Campbell's reference to a prior arrest was a single, isolated statement. Frazier did not argue below that the statement was solicited by counsel, nor does it appear from the record that it was anything more than an inadvertent and unresponsive statement.[9] Additionally, Frazier did not argue below that Detective Campbell was the "principal witness upon whom the entire prosecution depends[.]" *Rainville*, 328 Md. at 408. Frazier also did not argue that Detective Campbell's credibility was a crucial issue in this case, nor does it appear that it was, since the State relied on other witnesses and video evidence to prove its case. Finally, there was a "great deal of other evidence" in this case, including video footage of the shooting, testimony by the main victim and Frazier himself, as well as testimony by several other witnesses. *Id.* at 408. For these reasons, the circuit court did not abuse its discretion in denying Frazier's request for a mistrial.[10]

[9] At a bench conference following the challenged testimony, the prosecutor explained to the trial judge, "He volunteered that, so. That was not what I asked." She went on to explain, "I'm not trying to plan it." This exchange supports a finding that the statement was inadvertent and unresponsive to the State's question.

[10] Frazier also claims, without citation, that reversal is required because in *Rainville*, the Supreme Court of Maryland held that even a single reference to a defendant's prior (continued)

Next, Frazier points to his own cross-examination by the State. On cross-examination, the State elicited testimony from Frazier that he went to Atlanta following the shooting, and then to Florida. Then, the State asked whether that was "despite the court order to be living here in Maryland[,]" to which defense counsel objected. The basis of defense counsel's objection was apparently that the jury could infer, from the fact that a court order was in place preventing him from leaving Maryland, that Frazier had been involved in some prior criminal activity. The circuit court overruled Frazier's objection, explaining that his leaving Maryland despite having a court order to stay was relevant to show consciousness of guilt. On appeal, Frazier argues that the circuit court erred or abused its discretion in permitting the question about the court order.

Before evidence of prior bad acts or crimes may be admitted, the trial court must engage in a three-step analysis. *State v. Faulkner*, 314 Md. 630, 634-35 (1989). First, the court must decide whether the evidence falls within an exception to Rule 5-404(b). *Id.* at 634. Second, the court must decide "whether the accused's involvement in the other crimes

arrest was so prejudicial that no instruction could cure the harm. However, this case is distinguishable from *Rainville*. In that case, the defendant was charged with raping and otherwise sexually abusing a seven-year-old girl. *Rainville*, 328 Md. at 399. On direct examination by the State, the victim's mother made a reference to the defendant's being held in jail on similar charges of sexually assaulting the victim's nine-year-old brother. *Id.* at 401. The circuit court denied defense counsel's motion for a mistrial, and instead gave a curative instruction. *Id.* at 401-02. The Supreme Court of Maryland reversed, however, finding that the reference "had such a devastating and pervasive effect that no curative instruction, no matter how quickly and ably given, could salvage a fair trial for the defendant." *Id.* at 411. Here, unlike in *Rainville*, Detective Campbell made a vague reference to a prior arrest of Frazier, giving no indication of the reason for the prior arrest. There was no indication, as there was in *Rainville*, that Frazier's prior arrest was for the same or similar conduct as that with which he was charged here. Thus, the reference to Frazier's prior arrest was not so "devastating and pervasive" as to be incurable. *Id.* at 411.

is established by clear and convincing evidence." *Id.* Finally, the court must balance the necessity for, and the probative value of, the other crimes evidence against any undue prejudice likely to result from its admission. *Id.* at 635.

The *Faulkner* test does not apply here, however, because the circuit court did not actually admit any prior bad acts evidence. While the jury could infer, from the presence of a court order prohibiting Frazier from leaving the state, that Frazier committed some "prior bad act" to warrant the order, the order is not in and of itself a bad act. As the circuit court explained below, there "could be any number of reasons why he's court ordered." At the bench conference following Frazier's objection, the court explained to the prosecutor that it would not "let [her] get into the details . . . why there's a court order[,]" and warned her to "[t]read very carefully on this." Thus, we review only whether the reference to a prior court order was relevant, and, if so, whether it could survive the balancing test under Rule 5-403.

Here, evidence that Frazier fled Maryland, despite a court order to stay, is relevant to establish Frazier's intent at the time of the shooting. The key issue in this case was Frazier's intent, *i.e.*, whether he acted to hurt Attoh or to protect himself. Flight may constitute evidence of consciousness of guilt, *see Decker v. State*, 408 Md. 631, 640 (2009), and the fact that Frazier had to violate a court order to flee the state supports an even stronger inference of consciousness of guilt. Since Frazier's consciousness of guilt would make it less probable that he shot Attoh in self-defense, the reference to the prior court order is relevant.

Additionally, the circuit court did not abuse its discretion in allowing the question under Rule 5-403. While the reference to a prior court order carries some potential for prejudice, in that the jury could infer some prior bad act that led to the order, that prejudice is minimal. First, the circuit court did not allow the State to elicit any details concerning why Frazier had a court order to remain in Maryland. And, second, it likely would not have surprised the jury to find out that Frazier engaged in some prior bad acts leading to a court order, considering it was already established earlier in the trial that Frazier was an active gang member. Thus, any prejudicial effect from the reference to a prior court order did not substantially outweigh the probative value of the evidence in disproving Frazier's self-defense claim. For these reasons, the circuit court did not abuse its discretion in allowing the question.

IV. Frazier was not Deprived of a Fair Trial Due to Prosecutorial Misconduct

Frazier argues that he was deprived of a fair trial due to prosecutorial misconduct for several reasons. First, Frazier contends that "[t]hroughout the course of the trial, and in closing arguments, the State's Attorney consistently and deliberately misquoted the rap lyrics to the song 'Shoulda Ducked,' so as to make them seem more nefarious and incriminating than the actual lyrics." Second, Frazier refers to Detective Campbell's testimony about a prior arrest, as discussed earlier, and argues that "this was not an inadvertent error, but was intentionally designed to clue the jury in to the fact that the Appellant had a past history of arrests." Third, Frazier argues that "[t]hroughout the trial and during closing argument, the State relied heavily on bashing the character of the Appellant, repeatedly calling him the 'face of the Black Mob,' and making improper

arguments suggesting that the jury had a duty to keep the citizens safe from this type of element."[11] Finally, Frazier argues that "[e]vidence of the Appellant's alleged statement to the police regarding the incident during the transport was improperly admitted in cross-examination when the Appellant testified."

Nowhere in this section of his opening brief does Frazier supply any citations to the record or to any legal authority supporting his arguments. For example, Frazier claims that "the State's Attorney consistently and deliberately misquoted the rap lyrics to the song 'Shoulda Ducked,'" but he does not cite any instances in the record where this actually occurred.[12] Frazier claims that Detective Campbell's testimony about a prior arrest "was

[11] Frazier also claims, in his reply brief, that the State falsely described the Black Mob as having a "structured command system" in direct contradiction to the State's own witness, Detective Campbell, who described the Black Mob as having a "bull's-eye command structure." However, Frazier cites to no instance in the record where the State described the Black Mob as having a "structured command system."

[12] In his reply brief, Frazier does cite some instances where he alleges the State "maliciously misquoted" his rap lyrics into "fabricated confessionals." For example, the song "Shoulda Ducked" includes the lyric "now his bitch ass in a wheelchair," which Frazier claims the State misquoted as "put his bitch ass in a wheelchair." We first note that the cited transcript page does not include the words "put his bitch ass in a wheelchair." Rather, during a discussion with the trial judge over the probative value of the lyrics, the prosecutor described the lyric as referencing "putting someone in a wheelchair." Additionally, this brief description of the lyric to the trial judge, outside the presence of the jury, does not appear to be a malicious or deliberate misquotation of the lyric.

Other lyrics that Frazier alleges were deliberately misquoted are "spinning your wheels while I'm spending cash," and "he from the village, tried to make a play, but didn't make the cut." The first lyric does slightly misquote the actual lyric in "Shoulda Ducked," which reads, "Spending your band when I'm spending that cash." However, Frazier supplies no evidence that the lyric was misquoted deliberately or maliciously, and in response to the misquoted lyric, Frazier testified, "That's not a lyric in the song, ma'am." The State moved on to other lyrics after Frazier's correction. Finally, Frazier is correct to point out that "he from the village, tried to make a play, but didn't make the cut" is a slight misquotation. The correct lyric was "He from the village, he didn't make the cut, he

(continued)

intentionally designed to clue the jury in to the fact that the Appellant had a past history of arrests[,]" but he points to no evidence in the record suggesting that the testimony was intended by the prosecutor.[13] Frazier claims that the State made "improper arguments suggesting that the jury had a duty to keep the citizens safe from this type of element[,]" but he does not cite any legal authority holding that such arguments would be improper. And finally, Frazier claims that an "alleged statement to the police regarding the incident during the transport was improperly admitted[,]" but he does not provide any record citations for the "alleged statement," nor does he cite any legal authority to explain why the statement was "improperly admitted."

"As this Court has stated, '[w]e cannot be expected to delve through the record to unearth factual support favorable to [the] appellant.'" *Rollins v. Cap. Plaza Assocs., L.P.*, 181 Md. App. 188, 201 (2008) (quoting *von Lusch v. State*, 31 Md. App. 271, 282 (1976)) (brackets in original). Additionally, "[n]ot only will we not delve through the record to unearth factual support for [the appellant], but we also will not '*seek out law to sustain [his] position*.'" *Id.* at 202 (quoting *von Lusch*, 31 Md. App. at 285) (emphasis in original). Since Frazier fails to support his arguments in this section with any citations to the record or to legal authority, we are not inclined to address them.

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should've ducked." Again, however, Frazier fails to explain why this misquotation was deliberate or malicious. Thus, even if we were to credit Frazier for including citations to the record in his reply brief that should have been included in his opening brief, we would still find those citations inadequate to warrant reversal.

[13] In fact, as indicated earlier, the prosecutor explained to the trial judge that Detective Campbell "volunteered" the information about a prior arrest and it was "not what [she] asked." The prosecutor went on to explain that she was "not trying to plan it." The trial judge apparently agreed, finding that "[i]t was inadvertent; it was not intentional."

Even if we were inclined to address Frazier's arguments despite their lack of citation, some of them were waived at trial. For example, Frazier did not argue at any point during the trial that the State "misquoted" the rap lyrics, nor did he object on any of the three occasions when the State referred to him as the "face of the Black Mob." Additionally, while Frazier did preserve his objection to Detective Campbell's testimony about a prior arrest, he offers no evidence to dispute the circuit court's finding that the statement was unintentional, and therefore not a result of prosecutorial misconduct. Finally, Frazier's argument that the State committed prosecutorial misconduct by failing to provide the alleged statement in discovery also fails. First, the record indicates that the State did in fact provide the statement to defense counsel prior to trial, albeit at the last minute,[14] and second, Frazier admitted that earlier disclosure of the statement would not have changed his decision to testify.[15] Thus, we have no reason to find that the State committed

[14] In response to defense counsel's objection, the prosecutor explained,

> So Judge, just so the Court knows, I have an obligation, when I know of conversations, to turn them over. I not only told [defense counsel], I put Detective Campbell on the phone with [defense counsel] so that – so that he could hear exactly what it was, the conversation. The conversation that was turned over was during transport.

Then, after the trial judge dismissed the jury so the parties could discuss the matter further, the prosecutor elaborated that she "called [defense counsel] on the cell phone, on speaker phone, with Detective Campbell, and [she] had Detective Campbell tell [defense counsel] exactly what the nature of that conversation was." When given a chance to respond, defense counsel did not dispute the State's characterization of events, stating, "[The prosecutor] is correct, I have no doubt, that as soon as Detective Campbell made her aware, she did call me, let me know, and I do recall him being there."

[15] When asked whether he was arguing that Frazier would not have testified "just over this issue," defense counsel responded, "Of course not."

prosecutorial misconduct, and therefore hold that the circuit court did not abuse its discretion in allowing the State to cross-examine Frazier with the statement.

V. Frazier's Sufficiency of the Evidence Argument is Unpreserved and does not Warrant Plain Error Review

Frazier next argues that the trial evidence was insufficient to sustain a conviction. He admits that this argument is unpreserved "due to trial counsel's failure to renew his motion for judgment of acquittal at the end of the defense case,"[16] and therefore asks this Court to review his argument under the plain error doctrine.

"Appellate courts will exercise their discretion to review an unpreserved error under the plain error doctrine only when the unobjected to error is compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *In re Matthew S.*, 199 Md. App. 436, 462 (2011) (cleaned up) (citations and internal quotation marks omitted). Our decision to review an unpreserved issue under the plain error doctrine has been described as "a rare, rare phenomenon." *Id.* at 463 (citations omitted).

Here, Frazier supplies no argument that would warrant our rare use of plain error review. He claims that the "investigation in this case was weak, speculative, and designed to counter the Appellant's assertion of self-defense rather than to uncover the truth." However, Frazier cites nothing in the record to support these claims, nor does he establish that the circuit court committed a "compelling, extraordinary, exceptional or fundamental" error that deprived him of a fair trial in allowing the case to go to the jury. *In re Matthew*

[16] "[A] defendant is required to renew a motion for judgment of acquittal at the close of all the evidence or to argue anew why the evidence is insufficient to support a particular conviction." *Hobby v. State*, 436 Md. 526, 540 (2014).

S., 199 Md. App. at 462. Frazier merely argues, again without citation, that "[n]o reasonable trier of fact could have found the Appellant guilty of the charges for which he was convicted, in light of the lack of credible evidence presented by the State, and the Appellant's strong presentation of self-defense." To the contrary, however, the State presented ample evidence, in the form of both video footage and witness testimony, upon which a rational trier of fact could have found Frazier guilty. Thus, absent citations and any clear explanation as to why we should exercise our rarely used power of plain error review here, we hold that Frazier's arguments in this section fail for lack of preservation.

VI. Any Claim Frazier has of Ineffective Assistance of Counsel is Best Heard Within the Post-Conviction Setting

Having acknowledged, in the previous section of his opening brief, that trial counsel failed to properly preserve his sufficiency of the evidence argument, Frazier next argues for reversal on the grounds of ineffective assistance of counsel. Frazier first contends that his trial counsel provided ineffective assistance by failing to renew Frazier's motion for judgment of acquittal at the close of all the evidence. Additionally, Frazier claims that his trial counsel provided ineffective assistance when he failed to object to questions asked by the State on cross-examination regarding the court order prohibiting Frazier from leaving Maryland. These two incidents, Frazier argues, demonstrate that counsel's performance "fell below an objective standard of reasonableness" and that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

Appellate courts "rarely consider ineffective assistance of counsel claims on direct appeal." *Bailey v. State*, 464 Md. 685, 703 (2019). This rule is not absolute, however. *Id.* "[W]here the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim, there is no need for a collateral fact-finding proceeding, and review on direct appeal may be appropriate and desirable." *Id.* (quoting *In re Parris W.*, 363 Md. 717, 726 (2001)); *see also Mosley v. State*, 378 Md. 548, 561 (2003) ("[T]he trial record clearly must illuminate why counsel's actions were ineffective because, otherwise, the Maryland appellate courts would be entangled in 'the perilous process of second-guessing' without the benefit of potentially essential information.") (quoting *Johnson v. State*, 292 Md. 405, 435 (1982)).

Here, as in *Bailey*, "the trial record does not 'clearly illuminate' why counsel's actions were ineffective." 464 Md. at 705. In his brief, Frazier does not point to anything in the record that might shed light on trial counsel's reasons for taking the allegedly ineffective actions. Instead, he merely cites the Supreme Court of Maryland's decision in *Gross v. State*, 371 Md. 334 (2002), for the proposition that failure to preserve a valid issue for appeal constitutes ineffective assistance of counsel.[17] However, Frazier's citation to *Gross* is misplaced.

Unlike this case, which involves a direct appeal from Frazier's conviction, the appeal in *Gross* stemmed from a *postconviction* proceeding. *Gross*, 371 Md. at 343-45. Additionally, while the Court in *Gross* acknowledged that failure to preserve an issue for

[17] Frazier does not include a pincite in his citation to *Gross v. State*, leaving this Court to guess where in that opinion he finds support for his proposition.

appeal *could* constitute ineffective assistance of counsel, it did not hold that such failure *always* constitutes ineffective assistance. *See id.* at 350 ("[I]n assessing the effectiveness of trial counsel in failing to preserve issues . . . the questions of whether counsel's performance was adequate and whether it prejudiced the petitioner both will turn on the viability of the omitted claims, *i.e.*, whether there is a reasonable possibility of success."). At this stage, absent any clear indication from the record, it is just as likely that trial counsel's actions were "unprofessional errors" as they were strategic trial decisions. Determining which of these is the correct explanation for trial counsel's actions is a question of fact most appropriately resolved in a postconviction proceeding at the circuit court.

VII. Frazier's Argument that the Circuit Court Erred in Admitting Evidence of his Gang Affiliation was not Preserved

Frazier next argues that the circuit court violated both the First Amendment and Section 9-804 of the Criminal Law Article ("CL § 9-804")[18] when it admitted evidence

[18] Section 9-804 of the Criminal Law Article provides that:

(a) A person may not:

(1) participate in a criminal organization knowing that the members of the criminal organization engage in a pattern of organized crime activity; and

(2) knowingly and willfully direct or participate in an underlying crime, or act by a juvenile that would be an underlying crime if committed by an adult, committed for the benefit of, at the direction of, or in association with a criminal organization.

(b) A criminal organization or an individual belonging to a criminal organization may not:

(1) receive proceeds known to have been derived directly or indirectly from an underlying crime; and

(2) use or invest, directly or indirectly, an aggregate of $10,000 or more of the proceeds from an underlying crime in:

(continued)

characterizing his involvement with the Black Mob as gang affiliation. He contends that the State failed to "adduc[e] proper proof" that the Black Mob met the statutory criteria to constitute a criminal gang, and that therefore, Frazier's First Amendment right to freedom of assembly had necessarily been abrogated. Frazier's argument fails for multiple reasons.

First, the issue of Frazier's gang affiliation is unpreserved because Frazier failed to object to testimony that the Black Mob was a gang.[19] Frazier's arguments are also unpreserved because he never raised the First Amendment or CL § 9-804 at trial. Additionally, even if Frazier's arguments were preserved, they still fail on the merits. Frazier was not charged with violating CL § 9-804, and that section does not address admission of evidence, nor does it contain any exclusionary rule prohibiting evidence of gang affiliation that does not meet the statutory criteria. Thus, the State was under no burden to follow CL § 9-804 when eliciting testimony about the Black Mob's status as a gang. And, finally, Frazier presents no authority holding that a violation of CL § 9-804 necessarily constitutes a violation of the First Amendment. For these reasons, Frazier's challenge to the circuit court's admission of "gang-affiliation" evidence fails.

(i) the acquisition of a title to, right to, interest in, or equity in real property; or

(ii) the establishment or operation of any enterprise.

(c) A criminal organization may not acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property through an underlying crime.

[19] Defense counsel did not object to (1) an exhibit showing Detective Campbell's gang-related training and experience; (2) the State's request to qualify Detective Campbell as an expert "in the area of Gang Investigations"; or (3) the substance of Detective Campbell's gang-related testimony, including when he testified that he was "familiar with a gang by the name of Black Mob," that he was "familiar with their command structure," that Black Mob and Hittsquad "are rivals to each other," that "[m]embers of both organisations [sic] do carry weapons," and that "Mr. Frazier is a member of Black Mob."

VIII. The Circuit Court did not Err in Denying Frazier's Request for a Self-Defense Instruction at the Close of the State's Case

Frazier next contends that the circuit court erred when it denied his request for a self-defense jury instruction at the close of the State's case. He argues that the evidence produced during the State's case—including the video footage of the shooting and the testimony of Detective Campbell—were sufficient to generate the self-defense instruction. By denying the instruction, Frazier argues, the court effectively forced him to testify if he wanted to have his self-defense argument heard by the jury, thereby abrogating his Fifth Amendment right against self-incrimination.

As the State points out, Frazier's claim is an unusual one. In the typical case in which an appellant challenges a circuit court's decision to deny a requested jury instruction, the instruction is not given to the jury. Here, however, the circuit court *did* ultimately instruct the jury on both perfect and imperfect self-defense. The State argues that there is no legal authority supporting Frazier's claim that the circuit court's refusal to grant the instruction earlier in the trial could be a basis for reversing his conviction, and Frazier does not point to any such authority in his briefs. The State notes that a defendant's decision whether to testify is a matter of trial strategy, which "seldom turns on the resolution of one factor." *Dallas v. State*, 413 Md. 569, 578 (2010) (citation omitted). Frazier does not address this argument in his briefs. However, even assuming—without deciding—that the timing of the circuit court's grant of the self-defense instruction *could* be a basis for reversal, we still hold that the circuit court acted properly in denying the self-defense instruction at the close of the State's case.

A party is entitled to a requested jury instruction only if they can point to "some evidence" supporting "each element" of the requested instruction. *Jarvis*, 487 Md. at 564. Perfect self-defense requires the following four elements:

> (1) The accused must have had *reasonable* grounds to believe himself in apparent imminent or immediate danger of death or serious bodily harm from his assailant or potential assailant;
>
> (2) The accused must have in fact believed himself in this danger;
>
> (3) The accused claiming the right of self-defense must not have been the aggressor or provoked the conflict; and
>
> (4) The force used *must have not been unreasonable* and excessive, that is, the force must not have been more force than the exigency demanded.

Id. at 555 (quoting *Porter v. State*, 455 Md. 220, 234-35 (2017)) (emphasis added). "[I]mperfect self-defense modifies the first and fourth requirements of perfect self-defense[.]" *Id.* at 555-56. Rather than require a reasonable belief, imperfect self-defense merely "requires the defendant to show that he or she actually (i.e., subjectively) believed that: (1) he or she was in danger; [and] (2) the amount of force he or she used was necessary[.]" *Id.* at 556. Present in both instructions, therefore, is a requirement that the defendant at least have an actual or subjective belief that he or she is in danger. "While it is not inconceivable that without testimony from the accused as to a state of fear, other evidence might be sufficient to permit an inference as to an accused's subjective beliefs," such an outcome is rare. *Lambert v. State*, 70 Md. App. 83, 98 (1987). As Judge Moylan has recognized, "As a practical matter . . . it is frequently only the defendant who can testify as to his own state of mind at the time of the killing." Charles E. Moylan, Jr., *Criminal Homicide Law* Sec. 9.4, at 167 (2002).

Here, Frazier provides no reason in his briefs, and we find no reason in the record, to disagree with the trial judge's decision to deny the self-defense instruction at the close of the State's case. Frazier claims support for his argument in Detective Campbell's testimony and in the video footage admitted at trial. However, nowhere in his briefs does Frazier explain what part of Detective Campbell's testimony, or what part of the video footage, evidences his subjective belief at the time of the shooting. As explained earlier, we will not search the record for evidence supporting Frazier's arguments when he fails to supply that evidence in his briefs. Thus, although a defendant's testimony will not be necessary to generate a self-defense instruction in every case, we hold that it was here.

IX. The Circuit Court Properly Denied Frazier's Request for a Jury Instruction on Duress

Frazier's final argument is that the circuit court erred in denying his request for a jury instruction on duress. He contends that the duress instruction was generated by his testimony that he was "terrified" because of an "imminent threat against his life [that] was made by the victims[,]" who he argues "initiated the confrontation in the instant case[.]"

Under Maryland Rule 4-325(c), a requested jury instruction must be given "when (1) it 'is a correct statement of the law;' (2) it 'is applicable under the facts of the case;' and (3) its contents were 'not fairly covered elsewhere in the jury instruction[s] actually given.'" *Jarvis*, 487 Md. at 564 (quoting *Rainey v. State*, 480 Md. 230, 255 (2022)). "A requested jury instruction is applicable if the evidence is sufficient to permit a jury to find its factual predicate." *Rainey*, 480 Md. at 255 (quoting *Bazzle*, 426 Md. at 550). In other words, the instruction must be given if the requesting party has "produce[d] 'some

evidence' sufficient to raise the jury issue." *Jarvis*, 487 Md. at 564 (quoting *Arthur v. State*, 420 Md. 512, 525 (2011)).

The "some evidence" standard is a "fairly low hurdle," and need not even rise to the level of a preponderance. *Arthur*, 420 Md. at 526. "It calls for no more than what it says—'some,' as that word is understood in common, everyday usage." *Dykes v. State*, 319 Md. 206, 216-17 (1990). "[B]ecause whether 'some evidence' exists is viewed in the light most favorable to the requesting party, ... both the source of that evidence and its weight compared to the other evidence presented at trial are immaterial." *Jarvis*, 487 Md. at 564 (citations omitted). "If there is any evidence relied on by the defendant which, if believed, would support his claim ..., the defendant has met his burden." *Dykes*, 319 Md. at 217. However, it is a burden nonetheless, and "[t]he defendant must meet this burden as to each element of the defense" to generate the requested instruction. *Jarvis*, 487 Md. at 564.

To generate an instruction on duress, a defendant must point to some evidence that he was "compelled by the duress to commit the crime." *McMillan v. State*, 428 Md. 333, 355 (2012). There must be some evidence that the duress was

> present, imminent, and impending, and of such a nature as to induce well grounded apprehension of death or serious bodily injury if the act is not done. It must be of such a character as to leave no opportunity to the accused to escape. Mere fear or threat by another is not sufficient nor is a threat of violence at some prior time.

Id. at 354-55 (quoting *Frasher v. State*, 8 Md. App. 439, 449 (1970)). "Duress is premised on the notion that when a person faces a 'choice of evils, the law prefers that he avoid the greater evil by bringing about the lesser evil.'" *Hayes v. State*, 247 Md. App. 252, 291 (2020) (quoting *Sigma Reprod. Health Ctr. v. State*, 297 Md. 660, 676 (1983)); *see also*

State v. Crawford, 308 Md. 683, 691 n.1 (1987) ("The typical duress case . . . has involved a situation in which *A* has ordered *B* to engage in certain conduct prohibited by the criminal law or else suffer certain consequences.") (citation omitted) (emphasis in original).

Here, Frazier fails to point to any evidence generating a duress instruction. He claims that he was entitled to a duress instruction because he had been threatened, and as a result of those threats, he feared for his life. But as the State points out, this is a "garden-variety self-defense claim – that someone made a threatening comment to the defendant and the defendant thought that another person was about to shoot him." Thus, the circuit court correctly found that a duress instruction was not applicable to the facts of this case. Additionally, even if the duress instruction was applicable here, it was fairly covered by the self-defense instructions given by the court. *See Crawford v. State*, 61 Md. App. 620, 622 (1985) ("Included within the broader concept of self-defense is the narrower defense of necessity, *i.e.*, that the duress of the circumstances compelled the commission of the crime, thus making the offense excusable.").

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.