Circuit Court for Anne Arundel County
Case No. 02-K-11-002647

UNREPORTED*

IN THE APPELLATE COURT**

OF MARYLAND

No. 1900

September Term, 2021

WILLIAM LLOYD MCDONALD

v.

THE STATE OF MARYLAND

Leahy,
Reed,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: September 6, 2023

*This is an unreported opinion. The 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).

**During the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

On August 12, 2006, at approximately 2:15 a.m., Benjamin Curtis and Rhonda Briscoe were robbed at gunpoint in the parking lot outside of 'My Place' bar in Anne Arundel County, Maryland. During the robbery, Mr. Curtis was shot in the head and died from his injuries shortly thereafter. Ms. Briscoe survived. The only physical evidence obtained from the crime scene that night was a shell casing and a bullet fragment used to kill Mr. Curtis, which was later determined through ballistic testing to be matched to a .40 caliber Glock handgun.

There were no leads in the case until Labor Day weekend of 2006 when police in New Jersey pulled over a vehicle that matched the description of another vehicle involved in an unrelated drive-by shooting. Inside of the vehicle was a man named Carlos Wells and, during the stop, New Jersey police also recovered a .40 caliber Glock handgun. New Jersey police subsequently contacted the Anne Arundel County Police Department ("Anne Arundel Police") after learning that the .40 Glock recovered during the stop matched the description of a stolen .40 Glock that had been used in the murder of Mr. Curtis.

Detective Shelly Powell, lead investigator on Mr. Curtis's murder, drove to New Jersey to interview Mr. Wells, who revealed that he borrowed the .40 Glock from the appellant, William Lloyd McDonald. Once Mr. McDonald became a suspect, police interviewed Kimberly Finch, Mr. McDonald's girlfriend at the time, who initially denied any knowledge or involvement in Mr. Curtis's murder.

The case went cold until 2011 when Ms. Finch, upon receiving immunity from the State, changed her testimony and revealed that in the early morning hours of August 12,

2006, Mr. McDonald called her, requesting she pick him up from a location near My Place bar and drive home "a different way." When Ms. Finch arrived, Mr. McDonald jumped into the trunk of her car, and she drove them back to their apartment. Upon arriving at the apartment, Mr. McDonald allegedly told Ms. Finch that "he shot somebody." Ms. Finch explained to police that not long after Mr. Curtis's murder, she received a call from Carlos Wells, an acquaintance of hers, asking to borrow a gun from Mr. McDonald. She stated that Mr. McDonald provided a gun to Mr. Wells shortly before Mr. Wells was stopped in New Jersey.

After police gathered additional evidence based on the new information provided by Ms. Finch, in December 2011, Mr. McDonald was indicted on seven counts including, among others, first-degree murder of Mr. Curtis and armed robbery of Mr. Curtis and Ms. Briscoe.

Mr. McDonald's first trial on all seven counts in the Circuit Court for Anne Arundel County, Maryland, ended in a mistrial on October 17, 2013.[1] During Mr. McDonald's second trial in May 2015, the State successfully introduced into evidence two letters purportedly written by Mr. McDonald to his childhood friend, Adrian Lincoln (the "Lincoln Letters" or "Letters"), in which Mr. Lincoln is asked to kill Carlos Wells as soon as possible. *See McDonald v. State*, No. 2094, Sept. Term 2015, slip op. at 8-9 (filed Feb. 12, 2018) ("*McDonald I*"). Over defense counsel's objection, and without reviewing the

[1] The trial ended with a mistrial due to "the State's failure to disclose that a witness[, Kim Finch,] had received immunity for her testimony." *McDonald I*, No. 2094, slip op. at 2 n.2.

content of the Letters, the trial court admitted the Lincoln Letters, stating "**[The Letters] say what they say. I have no idea. I haven't seen what the content of the letters are.**" *Id.* at 11 (emphasis in original). Following a jury trial, Mr. McDonald was convicted of, among other things, first-degree felony murder of Mr. Curtis and armed robbery of both Mr. Curtis and Ms. Briscoe. Mr. McDonald noted a timely appeal, and in *McDonald I*, we reversed all of his convictions and remanded the case for a new trial. We held that "the trial court abused its discretion in failing to evaluate the need for and probative value of the Lincoln letters weighed against their prejudicial value." *Id.* at 24.

In October 2021, Mr. McDonald was tried for the third time in the underlying case. The State, over defense counsel's objection, once again attempted to introduce into evidence the first Lincoln Letter.[2] This time, the court not only reviewed the contents of the Letter but conducted the precise step-by-step analysis required to admit it. To reduce its prejudicial effect, upon the request of defense counsel, the court redacted the portions of the Letter which alluded to other crimes Mr. McDonald may have committed. The jury convicted Mr. McDonald on all counts, and, on January 10, 2022, the court sentenced him to life without the possibility of parole plus 45 years to be served consecutively to the sentence Mr. McDonald then serving in another case. Mr. McDonald noted a timely appeal and presents three questions quoted below:

[2] During Mr. McDonald's second trial, the State successfully introduced into evidence both Lincoln Letters. *See McDonald I*, No. 2094, slip op. at 8-10. The second Lincoln Letter "appeared to be a follow-up [letter] after [Mr.] Lincoln did not respond to the first letter or carry out its request." *Id.* at 9-10. During the third trial, the State sought to introduce only the first Lincoln Letter.

I. Did the trial court err in admitting the evidence of the 'Lincoln Letter'?

II. Did the trial court violate McDonald's constitutional right of confrontation and right to present a defense?

III. Did the trial court err in instructing the jury on concealment or destruction of evidence as 'consciousness of guilt?

The record on appeal reveals that the trial court meticulously followed the step-by-step analysis required by Maryland Rule 5-404(b) and related decisional law in determining the admissibility of the Lincoln Letter; therefore, we hold that the judge did not err or abuse her discretion by admitting a redacted version of the Letter into evidence over defense counsel's objection. We also discern no abuse of discretion in how the trial court limited defense counsel's cross-examination of Kim Finch and Detective Powell. Finally, we hold that the trial court did not abuse its discretion in giving the challenged instruction on concealment or destruction of evidence, which was, contrary to Mr. McDonald's contentions, neither misleading nor prejudicial. Accordingly, we affirm.

BACKGROUND

On December 16, 2011, Mr. McDonald was indicted on the following counts: first-degree murder, second degree murder, manslaughter of Benjamin Curtis (Count I); armed robbery of Benjamin Curtis (Count II); armed robbery of Rhonda Briscoe (Count III); use of a handgun in a felony (Count IV); use of a handgun in the commission of a crime of violence (Count V); possession of a firearm after having been convicted of a crime of violence (Count VI); possession of a regulated firearm after being convicted of a

disqualifying offense (Count VII). As previously noted, Mr. McDonald's first trial ended in a mistrial.

The Second Trial

Mr. McDonald was tried a second time before a jury in the Circuit Court for Anne Arundel County over eight days beginning on May 5, 2015. *See McDonald I*, No. 2094, slip op. at 2. The State successfully introduced into evidence the Lincoln Letters, purportedly written by Mr. McDonald to Adrian Lincoln. The Letters contained numerous requests to kill "Carlos," a potential witness against Mr. McDonald, along with detailed and gory instructions on how to commit the murder. *Id.* at 8-10. Over defense counsel's objection, and without reviewing the content of the Lincoln Letters, the trial court admitted the Letters, stating: "**[The Letters] say what they say. I have no idea. I haven't seen what the content of the letters are.**" *Id.* at 11 (emphasis in original). Mr. McDonald was convicted of first-degree felony murder, second-degree felony murder, two counts of armed robbery, use of a handgun in the commission of a violent crime, and possession of a firearm after conviction of a crime. *Id.*

On appeal, we reversed Mr. McDonald's convictions, concluding that "the trial court abused its discretion in failing to evaluate the need for and probative value of the Lincoln Letters weighed against their prejudicial value." *Id.* at 24. In other words, "there was no finding to review." *Id.* at 23. In remanding the case to conduct a new trial, we explained that

> because in this case the threshold determination is whether the **Lincoln Letters were relevant to the underlying prosecution in this case to prove**

> **consciousness of guilt**, the evidence must demonstrate a causal link between the following four inferences: (1) from McDonald's writing and sending the letters to Adrian Lincoln, a desire to conceal evidence; (2) from a desire to conceal evidence, a consciousness of guilt; (3) from a consciousness of guilt, a consciousness of guilt of the murder of Mr. Curtis; and (4) from a consciousness of guilt of the murder of Mr. Curtis, actual guilt of the murder. *See Thomas*, 372 Md. at 356. Even if we could get past this first hurdle under *de novo* review, we would have to embark on an analysis under the second prong as to whether the evidence was sufficient in this case to deduce, by clear and convincing evidence, that McDonald solicited Lincoln to engage in the murder of Carlos.
>
> * * *
>
> Finally, we review the third prong of the prior bad acts evidence test—the court's weighing of the probative value of the evidence against its prejudicial effect—for abuse of discretion. [] As we have now stated repeatedly, **the record before us is bare as to any weighing that the court may have engaged in before admitting the letters into evidence**. The trial court summarily denied the objection and specific request to "make a weighing to determine whether or not [the letters are] more prejudicial than probative" under Maryland Rule 5-404(b). **Not only did the court neglect to place any reasoning on the record as to why the probative value of the letters outweighed their prejudicial nature,[] it failed to make an independent review of the contents of the letters**.

McDonald I, No. 2094, slip op. at 22-23 (emphasis added) (cleaned up). In a footnote, we clarified that in no way were we "stating or implying that the evidence presented was not sufficient to support a decision that there was clear and convincing evidence that McDonald solicited Lincoln to murder Carlos." *Id.* at 23 n.9.

Following our mandate issued on March 22, 2018, the State proceeded to re-try Mr. McDonald on the same counts.[3]

[3] The State entered *nolle prosequi* on Counts IV (use of a handgun in commission of a violent crime/felony) and VII (possession of a regulated firearm).

The Evidence Presented in the Underlying Trial

The following testimony and evidence were presented at Mr. McDonald's third trial, which began on October 18, 2021, and ended on October 28, 2021.

The Crime

Rhonda Briscoe testified that she and Benjamin Curtis were friends that "socialized at the same club," the New Star Inn, on a regular basis. The New Star Inn was located "across the street from Fort Meade in Odenton, Maryland," and "right next to" My Place bar. On the night of August 12, 2006, Ms. Briscoe went to New Star Inn where she encountered Mr. Curtis. At some point during the evening, Mr. Curtis convinced Ms. Briscoe "to check out this American Legion club in Baltimore," which they did. The two drove over to the American Legion club in Mr. Curtis's SUV, leaving Ms. Briscoe's car in the parking lot behind New Star Inn and My Place bar. When they returned around approximately 2:15 a.m., Ms. Briscoe "didn't realize how late it was, because when [they] got there, all the cars were gone" and "the club was closed." While they were inside the SUV, a man holding a gun approached and told them, "this is a stickup." The gunman ordered Ms. Briscoe not to look at him and demanded her purse, Mr. Curtis's wallet, and their cell phones.

After Mr. Curtis handed over the items, the gunman proceeded to get in the back seat of the SUV. As he rummaged through the purse, the gunman stated, "come on, man, I know you got more money than that." Mr. Curtis reached into the console in the middle of the SUV and handed over some more cash. Turning to Ms. Briscoe, the gunman said,

"that's a cute little thing you got there; take off your shirt." As Ms. Briscoe struggled to unbuckle the belt around her shirt, the gunman demanded, "what's taking you so long?" When Ms. Briscoe finally managed to remove her shirt, Mr. Curtis "turned and he started attacking him." Wearing only her bra, Ms. Briscoe exited the SUV and ran towards the nearby gate at Fort Meade. Shortly after fleeing, Ms. Briscoe "heard a loud boom" that "sounded like a cannon." As she looked behind her, Ms. Briscoe testified that her assailant shouted, "you'd better stop, you'd better come back here or I'm going to shoot you too." Ms. Briscoe kept running until she reached Fort Meade gate and told security that somebody "behind my Place [bar]" just "robbed and shot my friend."

Upon hearing Ms. Briscoe's account of the robbery and gunshot, the security personnel on duty that night at Fort Meade immediately responded to the scene outside of My Place bar where they discovered Mr. Curtis still inside of the SUV. Fort Meade Officer William Russell Johnson, a shift lieutenant on duty that night, testified that when he and another officer arrived at the SUV, "[they] could hear somebody moaning" and "gurgling" from inside the car and "radio[ed] for dispatch to call EMS immediately" because "[he] saw blood pouring out of [Mr. Curtis's] head." Officer Johnson discovered Mr. Curtis's head "face down" with his "body [] completely twisted" and "wedged in between the two seats . . . of the truck." EMS arrived and removed Mr. Curtis from the SUV whereupon he was transported to Maryland Shock Trauma and pronounced dead at 4:15 a.m.

The Investigation

Corporals Martin Freeman and Ronald Gamble of the Anne Arundel Police Department were among the officers who responded to the scene in the early morning hours of August 12, 2006. While attempting to provide emergency aid to Mr. Curtis, Cpl. Gamble testified that he found a projectile in the rear floorboard of the SUV. The parties stipulated at trial that Cpl. Freeman handed to the technician the plastic bag containing the projectile that was recovered from Mr. Curtis's SUV at the crime scene. No other physical evidence of value was recovered from the scene that night.

Detective Shelly Powell served as the lead investigator for the homicide investigation of Mr. Curtis's murder in 2006 and testified at trial that she learned that the cell phones belonging to Mr. Curtis and Ms. Briscoe were taken during the robbery. Det. Powell provided the cell phone numbers to the Career Criminal Unit ("CCU") to trace the location of the phones, but that investigation only led to the apartment, on Pamela Road in Glen Burnie, of someone who found Ms. Briscoe's phone. That person took the detectives to the place where he found the cell phone, which was by the pool for the Quarterfield Crossing Apartment complex.[4] Det. Powell testified that she and another detective searched the swimming pool area and located "another cell phone between two air conditioning units[.]" This cell phone was later identified as Mr. Curtis's phone.

[4] Police later discovered that Mr. McDonald lived with Kim Finch during that time at Quarterfield Crossing Apartments.

On August 26, 2006, Craig Robinson, an evidence crime scene coordinator with the Anne Arundel County Police Department, searched Mr. Curtis's car for a second time and located a shell casing "wedged in the back seat" of the vehicle. This, along with the projectile recovered from the SUV, were sent for testing. Mr. Torin Suber, a firearm and tool mark examiner with the Maryland State Police, testified that he and his forensic team were able to determine that the bullet fragment recovered from Mr. Curtis's SUV came from a .40 caliber or 10-millimeter Glock handgun.

Carlos Wells

Carlos Wells,[5] one of the State's key witnesses, became involved in the murder investigation after he was arrested in New Jersey on September 4, 2006. New Jersey police pulled over Mr. Wells's vehicle because it matched the description of a vehicle involved in an unrelated shooting. During the stop, New Jersey Police seized a handgun and arrested Mr. Wells. New Jersey police then ran a National Crime Information Center ("NCIC") check on the handgun and, upon learning that the handgun was reported stolen from Maryland, they sent an intelligence bulletin notifying the Anne Arundel Police that Mr. Wells was arrested with a Glock handgun. Det. Powell drove the shell casing recovered from the SUV to New Jersey for comparison ballistic testing, which matched the shell casing recovered from Mr. Curtis's SUV to the Glock handgun recovered from Mr. Wells.

[5] Between Mr. McDonald's second trial in 2015 and his third trial in 2021, Mr. Wells suffered a traumatic brain injury. Without objection, the trial court determined that Mr. Wells's memory was so impaired as to make him effectively unavailable under Maryland Rule 5-804. Consequently, during the underlying trial, the court permitted the State to play the videorecording of Mr. Wells's testimony from the second trial.

During that trip, Det. Powell also interviewed Mr. Wells, who was then in custody at a detention center in Atlantic City.

The parties stipulated during the underlying trial that, prior to Mr. Curtis's murder on August 12, 2006, Mr. McDonald was in possession of a Glock .40 caliber model handgun. Mr. Wells testified during the second trial that he borrowed a .40 Glock from Mr. McDonald. Mr. Wells first met Mr. McDonald in 2003 while they both worked at Reliable Contracting. In August 2006, Mr. Wells met up with Mr. McDonald to borrow the .40 Glock handgun that was later seized a month later by police over Labor Day Weekend. Mr. Wells testified that he received the .40 Glock directly from Mr. McDonald shortly before Labor Day weekend of 2006. Based on his conversation with Mr. Wells, Det. Powell returned to the Quarterfield Apartment Complex to speak with Ms. Finch—the same apartment complex where detectives had found pieces of the victims' cell phones.

Kim Finch

Ms. Finch admitted at trial that she was interviewed by police at least twice between 2006 and 2007, but at that time, she denied any knowledge or involvement in Mr. Curtis's murder or the events of August 12, 2006. The case went cold for several years until 2011 when Ms. Finch, upon receiving immunity from the State, changed her testimony and revealed to police that in the early morning hours of August 12, 2006, she "got a call from [Mr. McDonald] telling me . . . [to] come and get him" near a bar called Eagle's Nest, which was located a few minutes walking distance from My Place bar. When Ms. Finch arrived, Mr. McDonald came out, told her to "pop the trunk," and proceeded to "jump[] in

the trunk" before ordering her to drive a different way home than her usual route. Upon arriving at their apartment, Mr. McDonald told her that "he shot somebody" who "just slumped over and [Mr. McDonald] ran." Ms. Finch explained that she usually did the laundry for the two of them, but she never saw the clothes Mr. McDonald was wearing after that night; however, a few months later, he told her to throw away the Nike shoes that he wore that night. Ms. Finch also revealed that Mr. McDonald told her that Mr. Wells asked to borrow a gun from him shortly after the events of August 12, 2006.

Admission of the Lincoln Letter

Detective Frank Springer with the Montgomery County Police Department first became involved with the case around September 2006. During his time working on the case, Det. Springer met with and spoke to a man named Adrian Lincoln. In May 2011, Det. Springer testified that he received a letter from Adrian Lincoln, which was later introduced at trial.

Ms. Finch and Mr. Lincoln's mother, Saundra Lamb, testified that Mr. Lincoln was a close childhood friend of Mr. McDonald. Both witnesses also identified Mr. McDonald's handwriting and testified that Mr. McDonald was the likely author of the Lincoln Letter. Diane Lawder, a forensic handwriting expert, concluded that, based on a comparison of the Lincoln Letter to other known exemplars of Mr. McDonald's handwriting, the Letter was probably written by Mr. McDonald. Following the testimony elicited from these witnesses, the State sought to introduce the Lincoln Letter that was purportedly written by Mr. McDonald. The Letter is addressed to "Adrian" and was signed by "William." In the

Letter, which carried the instruction, "Burn this letter once you read it. A.S.A.P.," William writes:

> Adrian,
>
> This is my last stamp. I had no other way of contacting you so don't be mad. I know that you have a lot [of] feeling[s] towards me right now and how I let myself get back into "trouble". All that's understandable even though I didn't do sh*t. . . . I need your help Adrian. I need money, support, even some gangster sh*t from you. I need you to help Kim out with my lawyer (f**k what you saying cause this time it's for my life), I need your support to both these b***es cause they both need it, and I need you for once [to] put your nuts on the line [f]or me like you know I'd do for you at any given moment. I'm scared [] for the first time in my life of another[.] . . . This n****** all the way in New Jersey and committing crimes but want to include me. What happened to the code of the streets – I don't know. Get my s**t kicked in and now they down my neck. The n****** told them that he thinks I commit [sic] crimes in Silver Spring. That's why the po-po's is out there like that. With that I think you understand what I need you to do. You ain't dumb and I know you can handle it. This is my life [Adrian]. My life!! . . . Call Kim and tell her you need to meet her[.] . . . Let her explain to you everything about the n****** (the rat) his name is Carlos and go from there. She knows where his people's live and everything.

William then explains what Carlos looks like and how to find him:

> If you can't find him out there then go to their house and have his mom[] call him (over the speaker phone), tie (duct tape) them up and wait (in the back rooms) for him. He's short, stocky, cornrows, dirty looking, with a gap in his mouth. You can have Danielle knock on the door while you off to the side and go from there.[] It's two bedrooms in the back. His girl and mother live[] there[.] [I]f he's there then once he opens that door or comes to the door, Bye-Bye[.] If a woman comes to the door and says that he's there or not kick that b***h in and grab her… you understand the rest. . . .

William clarified what was at stake:

> [T]he rest of my life is on the line. . . . I ain't got time for sentencing and all this bullshit. N****** I'm your man one thousand grand and I'm in a jam that I need your help. There shouldn't be no thinking or nothing about this sh*t. 25 to life is what I'm facing[.] I can't risk this b***h getting locked up because if he does it's guaranteed that he could appear in court. I beat this if

> this b***h is dead[.] I can't stress enough how much I need this shit done. . . .

William then gives explicit instructions on how to murder Carlos:

> Don't say my name or anything else but [get his family] to call him and get him there. . . . Duct tape [his family] in the back and wait for him. Take the phones off the hook and cell phones from them (make sure you are masked up). Matter of fact put them b***hes in the bathroom (where no phones are at). If you shoot him it'll make noise, but if you cut this n******'[s] throat and in the heart and neck (make sure you masked up) then you in and out.

Finally, William reminded Adrian of what he has done for him:

> When you need/wanted me to handle sh*t with you about your cousin, [] I was ready on the drop of a dime. That's how I need you. Please dog, I can't die in this b***h. Why [bring] your sister? Cause if they see you they might be reluctant to open the door. With her, they open the door even if he's home . . . so it works out better. Plus I don't want them to see your face anyway. You used me to pick money up for you once, you used her to confront the n**** about you[r] cousin, why not now. F**k the courts and juries and sh*t. This n***** a Rat and my life is on the line[]. Serious[ly] think about what I'm asking you and waste no time with it cause everyday he's home is another day he can get locked up, and with him locked up, I'm no good. . . . This shouldn't be no thought process anyway cause I'm asking you and you already know what I'm facing. I might leave in a week and be down in MCI-J so write back a.s.a.p. I know you thinking why would you risk catching a charge and coming back to jail for me, and like I told myself when you asked me to put myself out there for you. [] [Y]ou asked me to, and because I knew that you had sh*t already planned out so I trusted you. . . .

After a lengthy discussion about whether to admit the Lincoln Letter, the court began its analysis by determining whether the Letter was relevant:

> THE COURT: When I look at [Maryland Rule] 5-401 with regard to relevancy, **for the letters to be admitted [a]s consciousness of guilt[], the Court must find that they are relevant.**
>
> Evidence is relevant if it has any tendency – not singular tendency, not only one tendency, not only specific dot-to-dot, drawing the line, without a doubt, without a shadow of a doubt.

Any tendency to make the existence of any fact that is of consequence in this case to the determination of the action more probable or less probable than it would be without the evidence.

The State is seeking to use the document for evidence of consciousness of guilt. And so the Court spent some time over the weekend reviewing the cases, Thomas and Wagner and a few others that talked about them.

Evidence of consciousness of guilt -- referring to evidence of a person's behavior after the commission of a crime -- may be admissible as circumstantial evidence, from which guilt may be inferred, and is considered relevant to the question of guilt because the particular behavior provides clues to the person's state of mind.

Now guilty behavior alone however is not automatically relevant and admissible as consciousness of guilt. To be relevant, we must be able to say that the fact that the accused behaved in a particular way renders more probable the fact of their guilt.

We can look to Thomas v[.] State, 372 Maryland 342. It is a 2002 case. Relevance depends on the degree of confidence with which certain inferences may be drawn.

* * *

THE COURT: **The question is, in my mind, one, is it relevant?** The State offers and argues that it is relevant because it links the gun to Mr. McDonald. The 40 caliber to Mr. McDonald.

That is relevant without a doubt. . . .

* * *

So, whether or not Mr. McDonald had a 40 caliber gun, Glock, which shot the projectile that killed Mr. Curtis is relevant.

(Pause.)

THE COURT: Then, **if it is relevant does it meet, as the Court of Special Appeals in '18 laid a roadmap out**, do we get to the next – sort of the next portions of the analysis?

* * *

Simply because there is a possibility there exists some innocent or even alternative explanation for the conduct doesn't mean that it cannot be proffered here in this case.

And I would cite to Wagner, 213 Maryland App., 419, which is a 2013 case. So . . . the analysis then went to the following.

> "Because a reasonable person could find that the evidence demonstrates a casual link between the following four inferences" – and I agree, **the State must meet the inferences in the letters to be admissible for the purposes of consciousness of guilt.**

(Emphasis added).

Upon determining that the Letter was relevant, the court next addressed the contents of the Letter, and the four inferences that the State must prove for the Letter to be admissible:

> THE COURT: **With regard to the contents of the letter, there is no question, the Defendant requests Adrian kill the witness Carlos Wells. There is no question that that witness is significant.**
>
> He is who ties the gun to Mr. McDonald, the gun he possessed -- Mr. Wells -- in New Jersey. That he had Labor Day weekend, which was approximately . . . two weeks after the murder of Mr. Curtis.
>
> There is evidence of other crimes, which usually would be inadmissible. The question then as the Court looks at it if we get to the fourth prong, is to have the discussion about probative versus prejudicial.
>
> **And I have said before, [the Letter] certainly [is] prejudicial. There is no doubt about that. A reasonable person could find the evidence demonstrates a causal link between the following four inferences as outlined in the 2018 opinion.**

(Emphasis added). Afterwards, the court proceeded to conduct the four-stage analysis outlined in *Thomas v. State*, 372 Md. 342 (2002) ("*Thomas I*"), and *Wagner v. State*, 213 Md. App. 419 (2013), required to admit the Letter:

> **From McDonald's writing, sending the letters to Adrian, a desire to conceal evidence -- the evidence would be the testimony offered by Mr. Wells with a connectivity of the gun, prevent him from testifying about that -- from a desire to conceal that testimony, consciousness of guilt because why would you want to prevent him from connecting the gun unless the gun is going to tie him to a crime.**
>
> * * *

> **The next step becomes from the consciousness of guilt, a consciousness of guilt of the murder of Mr. Curtis**. And again, the letters mention the 25 to life, which is the punishment. The letters are written after Carlos is arrested in New Jersey, Labor Day weekend, 2006.
>
> **The last step then becomes a consciousness of guilt to the murder of Mr. Curtis.** Do we get to actual guilt of murder?
>
> Well obviously, if we have a consciousness of the guilt for that murder, then actual guilt of murder, again referencing the acknowledgment that "I would be convicted of murder and the sentence that I would be facing."
>
> **So it meets the four pronged test. Or the Court finds it meets that test.**

(Emphasis added).

Moving next to the clear and convincing evidence standard, the court held as follows:

> The next question is clear and convincing evidence. That letter is what the letter is. A specific request for Mr. Lincoln to kill Mr. Wells. I don't think anybody thinks this wasn't.
>
> The Court need only find by clear and convincing evidence. The Court finds again, based on what I have in evidence right now of Ms. Lamb indicating it is Mr. McDonald's letter.
>
> I mean, the handwriting, the references to Kim his girlfriend, the reference to Adrian and their prior relationships, I don't have any doubt that Mr. McDonald wrote the letter.
>
> **The Court finds by clear and convincing evidence that Mr. McDonald solicited Adrian Lincoln to engage in the murder of the witness, Carlos Wells.**

(Emphasis added). Finally, the court weighed the prejudicial nature of the Letter against its probative value:

> **So then the last step is probative versus prejudicial, and that is the one that has kept me up all night. I should say, most of the weekend. In reading the cases -- what other undue prejudice will result from its admission?**

So I looked at the contents of the letter, literally reading them section by section to see whether or not -- and if it falls into a variety of different segments, or discussions if you will.

The other bad acts, the importance of the trial court having to look at those to see whether or not they would be more prejudicial, the prior bad acts that the Court sees in the written language potentially could be something in Silver Spring.

Prior bad acts would be that Mr. McDonald had done something for Mr. Lincoln. The reference however was pretty innocuous. "You used me to pick money up for you once. You used her to confront the neighbor about your cousin."

* * *

THE COURT: But there is no other reference to other crimes that would be of such prejudicial nature contained in the document.

(Pause.)

THE COURT: I don't believe that there is anything related to prior bad acts other than -- well, certainly the solicitation if one constitutes that as a bad act.

Then could the jury infer that [Mr. McDonald's] other activities would, as they say, inflame the jury into believing that he committed this crime? No because none of them are substantial or significant.

The issue of consciousness of guilt in this case is highly probative. And although the Court finds that the letter is prejudicial, I find that the probative nature of the letter outweighs the prejudicial nature to Mr. McDonald. He attempted to dispose of a key witness in this case.

That is probative and outweighs the prejudicial nature of the other commentary contained in the document. So I am going to let the letter in.

(Emphasis added).

Counsel for Mr. McDonald reiterated his objection to the admission of the Lincoln Letter, pointing out that the word "gun" was never mentioned To reduce its prejudicial effect, upon the request of defense counsel, the court agreed to redact the following portions of the Letter before publishing it to the jury:

- "the n***** told them that he thinks I commit crimes in Silver Spring"

- "When you need/wanted me to handle sh*t with you about your cousin, n***** I was ready on the drop of a dime."
- "You used me to pick money up for you once"
- "I might leave in a week and be down MCI-J"
- "and like I told myself when you asked me to put myself out there for you cause you asked me to, and because I knew that you had sh*t already planned out"

Additionally, the court agreed with defense counsel that the State would not be permitted to read out loud the contents of the Lincoln Letter to the jury.[6] Instead, the redacted Letter was projected on a screen in the courtroom and the jury was provided with a copy of the Letter during its deliberations.

Jury Instructions

At the close of the case, the court heard arguments on jury instructions. Over defense counsel's objection, the court agreed to include, among others, the following criminal pattern jury instruction entitled "Concealment or Destruction of Evidence as Consciousness of Guilt:"

> You have seen evidence that the defendant attempted to prevent Carlos Wells from testifying in this case. Attempting to conceal or destroy evidence is not enough by itself to establish guilt but may be considered as evidence of guilt Concealment or destruction of evidence may be motived by a variety of factors, some of which are fully consistent with innocence.
>
> You must first decide whether the defendant attempted to prevent Carlos Wells from testifying in this case, then you must decide whether that conduct shows a consciousness of guilt.

[6] The court did, however, allow the State to read the Letter to the jury in closing.

After deliberating for approximately two days, the jury returned a verdict of guilty on all counts. At defense counsel's request, the court polled the jury, and thereafter, set the case for sentencing on January 10, 2022.

At the sentencing hearing on January 10, the State delineated Mr. McDonald's prior convictions, which included, among other things, first-degree burglary, armed robbery, use of a handgun, first-degree assault, and theft. The State explained that, at the time of Mr. Curtis's murder, Mr. McDonald had just been released on parole in April 2006 for an armed robbery that occurred in 2003. After hearing from Ms. Briscoe and Mr. Curtis's family, Mr. McDonald requested allocution during which he maintained his innocence. The court merged the conviction for armed robbery of Mr. Curtis (Count II) into the felony murder conviction, and then the court imposed a total sentence of life without the possibility of parole, plus 45 years to be served consecutively to the sentence that Mr. McDonald was already serving.

On January 13, 2022, Mr. McDonald filed a motion to modify his sentence, which was held sub curia. Then, on February 4, 2022, Mr. McDonald noted a timely appeal.

DISCUSSION

I.

The Lincoln Letter

A. Parties' Contentions

Mr. McDonald argues that reversal is required again because the State failed to tie the Lincoln Letter to the murder of Mr. Curtis. In other words, the Letter was irrelevant

because, in addition to being "undated" and "unclear when it was written," it "did not specifically reference this shooting, [Mr.] Curtis, or this case, let alone anything about any gun." Mr. McDonald claims that the evidence elicited at trial did not satisfy the second and third stages of the inferential chain required by *Thomas v. State*, 372 Md. 342, 353 (2002) ("*Thomas I*"); namely, that the State failed to establish how Mr. McDonald's act of writing and sending the Lincoln Letter implies a consciousness of guilt, and how a consciousness of guilt implies actual guilt for Mr. Curtis's murder. Specifically, Mr. McDonald contends that consciousness of guilt cannot be inferred from the letter because "it was just as likely that [Mr.] McDonald was attempting to conceal evidence of crimes that he was being implicated in [by Mr. Wells] but that he did *not* commit." (Emphasis supplied by Mr. McDonald). He argues, in the alternative, that even if the Letter was relevant, it was far more prejudicial than probative because it showed that "[Mr.] McDonald was involved in multiple other criminal events referenced in a letter that was ostensibly a solicitation for murder[.]" According to Mr. McDonald, the letter "compelled the conclusion that [Mr.] McDonald was of 'criminal disposition,' was of 'unsavory character,' and was a bad person;" such that "the jury might have convicted [him] based upon general criminal disposition or might have improperly inferred guilt . . . based on character."

To the contrary, the State contends that the trial court properly admitted the Lincoln Letter, and notes that, before admitting it, the court "articulated its analysis for the record, following the 'roadmap' of the issue" laid out in *McDonald I*. With respect to the first step

under Maryland Rule 5-404(b), the State avers that the Letter was relevant to show consciousness of guilt and satisfied the following four-stage chain of factual inferences required by *Thomas I.* More specifically, the State asserts:

> In the context of soliciting the killing of a witness or witness intimidation,[] as at issue here, that four-stage chain of inferences would be expressed as follows: (1) from McDonald's writing of the letter to solicitation of killing Wells; (2) from soliciting the killing of Wells to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning Curtis's murder; and (4) from consciousness of guilt of Curtis's murder to actual guilt of the murder.

The State avers that the first inference is easily satisfied and is not contested by Mr. McDonald. As to the second-stage inference and Mr. McDonald's contention that the Lincoln Letter is devoid of any mention of a gun or Mr. Wells's arrest in New Jersey, the State contends that the trial court "appropriately recognized that the letter itself was not the only source of evidence to draw on" including Mr. Wells's testimony and the ballistics evidence that identified the murder weapon. The State points also to the statements in the Letter that Wells "is all the way in New Jersey and committing crimes but want to include me."

With regard to Mr. McDonald's argument that the State failed to satisfy the third-stage inference because the Lincoln Letter could have indicated Mr. McDonald's consciousness of guilt for *different* crimes, the State argues that the trial court properly recognized the Letter's reference to "25 years to life is what I'm facing" pointed toward Mr. McDonald's consciousness of guilt for the underlying crimes because "life imprisonment is the penalty for first-degree felony murder." The State describes

McDonald's contention—that the letter equally supports the inference that McDonald wanted to stop Wells from implicating him in crimes that he had *not* committed— as "farfetched and beside the point." "It [is]far less reasonable to infer that an innocent person would solicit another person's brutal murder in order to prevent that person from falsely implicating them than it is to infer that a *guilty* person would solicit such a murder to prevent themselves from being *correctly* implicated." Finally, the State avers that Mr. McDonald's "authorship of the letter was established by clear and convincing evidence" and that the "probative value of the letter, as redacted, was not substantially outweighed by the risk of unfair prejudice."

B. Evidence of "Other Crimes"

As the Supreme Court of Maryland[7] explained in *State v. Faulkner*, we review the trial court's decision to admit "other crimes" evidence pursuant to Maryland Rule 5-504(b) as follows:

> . . . . [The trial court] first determines whether the evidence fits within one or more of the *Ross* [*v. State*, 276 Md. 664 (1976)] exceptions. **That is a legal determination and does not involve any exercise of discretion**. . . .
>
> If one or more of the exceptions applies, the next step is to decide whether the accused's involvement in the other crimes is established by clear and convincing evidence. . . . **We will review this decision to determine whether the evidence was sufficient to support the trial judge's finding.**

[7] During the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland. . . .").

> If this requirement is met, the trial court proceeds to the final step. The necessity for and probative value of the "other crimes" evidence is to be carefully weighed against any undue prejudice likely to result from its admission. . . . **This segment of the analysis implicates the exercise of the trial court's discretion**. . . .

314 Md. 630, 634-35 (1989) (emphasis added) (cleaned up). The circuit court, "in its role as the evidentiary sentry—must conduct [this] threefold determination before permitting the evidence to be presented to the jury." *Page v. State*, 222 Md. App. 648, 661 (2015).

Ordinarily, "all relevant evidence is admissible" and "[e]vidence that is not relevant is not admissible." Md. Rule 5-402. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401; *see also Snyder v. State*, 361 Md. 580, 592 (2000) (noting that evidence is relevant when "in conjunction with all other relevant evidence, the evidence tends to make the proposition asserted more or less probable").

Evidence of "other crimes" may be admitted if they are "substantially relevant to some contested issue in the case and if [they] not offered to prove the defendant's guilt based on propensity to commit crime or his character as a criminal." *Faulkner*, 314 Md. at 634 (citing *Ross*, 276 Md. at 669). Referred to as the *Ross* exceptions, "evidence of other crimes may be admitted when it tends to establish (1) motive, (2) intent, (3) absence of mistake, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, and (5) the identity of the person charged with the commission of a crime[.]" *Ross*, 276 Md. at 669-70. The *Ross* exceptions are codified in Maryland Rule 5-404(b), which provides:

> Evidence of other crimes, wrongs, or other acts including delinquent acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith. **Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident**, or in conformity with Rule 5-413.

Md. Rule 5-404(b) (emphasis added). The exceptions identified in this rule "are 'neither mutually exclusive nor collectively exhaustive.'" *Emory v. State*, 101 Md. App. 585, 616 (1994) (quoting C. MCCORMICK, *Evidence* § 190 at 558 (E. Cleary, ed., 3d ed. 1994)).

If the court determines that the evidence sought to be admitted is relevant, "the court must 'decide whether the accused's involvement in the other crimes is established by clear and convincing evidence[.]'" *Page*, 222 Md. App. at 661 (quoting *Faulkner*, 314 Md. at 634-35)). Finally, the court must weigh "[t]he necessity for and probative value of the 'other crimes' evidence" against "any undue prejudice likely to result from its admission[.]" *Id.* The court may exclude otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Md. Rule 5-403. "Not until the court determines that the evidence can clear these hurdles may the court open the gates for the admission of 'other crimes' evidence" *Page*, 222 Md. App. at 661-62.

Generally, "evidence of a defendant's prior criminal acts may not be introduced to prove that he is guilty of the offense for which he is on trial" because evidence of other crimes "may tend to confuse the jurors, predispose them to a belief in the defendant's guilt, or prejudice their minds against the defendant." *Faulkner*, 314 Md. at 633 (quoting *Straughn v. State*, 297 Md. 329, 333 (1983)) (cleaned up); *see also Wilder v. State*, 191 Md. App. 319, 343 (2010), *Wynn v. State*, 351 Md. 307, 317 (1998).

i. Special Relevance Under Consciousness of Guilt

"Evidence of a prior bad act may be admissible if it has 'special relevance' to the case, meaning that it 'is substantially relevant to a contested issue in the case, and is not offered merely to prove criminal character.'" *Page*, 222 Md. App. at 662 (quoting *Terry v. State*, 332 Md. 329, 334 (1993)). Whether or not evidence is relevant is a determination that is not made in isolation. "Instead, the test of relevance is whether, in conjunction with all other relevancy evidence, the evidence tends to make the proposition asserted more or less probable." *Snyder*, 361 Md. at 592 (citing *Spector v. State*, 289 Md. 407, 434 (1981)). Our decisional law has established that, for evidence of consciousness of guilt to be relevant, four inferences must be satisfied by clear and convincing evidence. *See, e.g.*, *Thomas I*, 372 Md. at 352-53 (recognizing the chain of four inferences required to admit evidence of the defendant's refusal to provide a blood sample as relevant evidence of consciousness of guilt); *Snyder*, 361 Md. at 596 (identifying the four inferences necessary to admit evidence that defendant failed to inquire about the progress of the police investigation into his wife's murder). In *McDonald I*, we outlined the four inferences the State was required to demonstrate to admit the Lincoln Letter as evidence of consciousness of guilt:

1. From Mr. McDonald's writing the letters to Adrian Lincoln requesting that he kill Carlos Wells, a desire to conceal evidence;
2. From a desire to conceal evidence, a consciousness of guilt;
3. From a consciousness of guilt, a consciousness of guilt of the murder of Mr. Curtis; and
4. From a consciousness of guilt of the murder of Mr. Curtis, actual guilt of the murder.

McDonald I, No. 2094, Sept. Term 2015, slip op. at 22 (filed Feb. 12, 2018) (citing *Thomas I*, 372 Md. at 356)).

In *Thomas I*, the Supreme Court of Maryland vacated the defendant's conviction for felony murder after concluding that "there [was] no evidence in this record for the jury to have found that any alleged consciousness of guilt on petitioner's part was connected to a consciousness of guilt of the murder[.]" *Thomas I*, 372 Md. at 356-57. The defendant argued that the trial court erred in admitting, as evidence of consciousness of guilt, the fact that he resisted when police sought to obtain a blood sample from him, pursuant to a search warrant, three years after the victim died. *Id.* at 346. In reversing the defendant's conviction, the Court held that the defendant's "refusal to submit to the drawing of his blood was [not] connected sufficiently to the murder charge" to establish that "any alleged consciousness of guilt on [defendant's] part was connected to a consciousness of guilt of the murder" of the victim. *Id.* at 356-57. More specifically, the court held that there was no evidence in the record, either direct or circumstantial, that the defendant was aware police wanted to test his blood in connection with the victim's murder almost three years prior. *Id.* at 357. Therefore, "[f]or the evidence to have value as evidence of consciousness of guilt, and then as evidence as guilt of the murder, there must be evidence to support an inference from [defendant's] conduct to a consciousness of guilt for the particular crime charged." *Id.* at 357-58.

Following the remand from *Thomas I*, the defendant was retried, convicted, and noted a second appeal, arguing once again that the State failed to establish the necessary

foundation to establish consciousness of guilt by admitting evidence of his refusal to submit to blood testing. *See Thomas v. State*, 397 Md. 557, 565-66, 575 (2007) ("*Thomas II*"). This time, however, the Court affirmed the defendant's conviction, holding that the State offered evidence sufficient to satisfy the third inference (from a consciousness of guilt, a consciousness of guilt of the murder of the victim). *Id.* at 576. Unlike the first trial, during the second trial, an officer testified that he told the defendant the warrant and blood test were "in reference to [the victim's] death," which "provided a reasonable basis for the jury to find that the [defendant] was aware that the police wanted his blood in connection to the . . . murder[.]" *Id.* at 576-77. The Court concluded that

> **[s]imply because there is a possibility that there exists some innocent, or alternative, explanation for the conduct does not mean that the proffered evidence is *per se* inadmissible.** If it was the position of the [defendant] that he feared needles, or that the drawing of blood violated some religious belief he held, or any other innocent explanation for his conduct, it was incumbent upon him to generate that issue. He had the opportunity at trial to offer alternative theories explaining his resistance to the blood test, and the record is completely devoid of any such evidence. . . .

Id. at 578 (citing James H. Chadbourn et al., 2 WIGMORE ON EVIDENCE, § 276(e), at 130 (3d. ed. 1979)) (emphasis added).

C. Analysis

Mr. McDonald argues that, as in past trials, the State did not establish the necessary foundation to admit the Lincoln Letter into evidence to establish consciousness of guilt. We do not agree. During Mr. McDonald's third trial the court meticulously followed the three-step analysis required by law to admit the Letter as 'other crimes' evidence of Mr. McDonald's consciousness of guilt. As the court noted, the first inferential step ("[f]rom

Mr. McDonald's writing the letters to Adrian Lincoln requesting that he kill Carlos Wells, a desire to conceal evidence") is largely irrefutable.[8] There is no question that Mr. McDonald asked Mr. Lincoln to kill Mr. Wells out of concern about Mr. Wells' potential testimony. Mr. McDonald primarily attacks the second and third inferential steps building to consciousness of guilt.

Turning to the second inference, ("[f]rom a desire to conceal evidence, a consciousness of guilt"), we do not find Mr. McDonald's contention that the Letter does not reference at any point the .40 Glock handgun or Mr. Wells's "arrest" in New Jersey dispositive. The Letter, when viewed "in conjunction with all other relevant evidence," tends to make more probable the proposition that Mr. McDonald's desire to conceal evidence implies a consciousness of guilt for the underlying crimes. *See Snyder v. State*, 361 Md. 580, 592 (2000). The "other relevant evidence" includes (1) the mention of "Carlos" being "all the way in New Jersey and committing crimes but want to include me"; (2) the reference to "Kim" knowing how to contact "Carlos," (3) the Letter having been signed by "William"; and (4) the fact the .40 Glock handgun Mr. Wells possessed was

[8] In his brief, Mr. McDonald states that "[a]ssuming for argument's sake that the letter was penned by [Mr.] McDonald and that it constituted an attempt to conceal evidence, this case concerns the last three inferences: '…from attempt at concealment to consciousness of guilt; from consciousness of guilt to consciousness of guilt concerning the crime charged; from consciousness of guilt concerning the crime charged to actual guilt of the crime charged." While Mr. McDonald maintains that he is not the author of the Letter, we note that the State presented sufficient evidence at trial for the judge to conclude, by clear and convincing evidence, that Mr. McDonald wrote the Letter. In addition to the text of the Letter, the State presented testimony by a forensic handwriting expert and the testimony of Kim Finch and Saundra Lamb, who each stated from personal knowledge that Mr. McDonald was the likely author of the Letter.

ballistically identified and stipulated to at trial as the weapon used in the robbery and murder. Therefore, the trial court did not err when it concluded that consciousness of guilt could be inferred from Mr. McDonald's desire to prevent Mr. Wells's testimony "because why would [Mr. McDonald] want to prevent him from connecting the gun unless the gun is going to tie [Mr. McDonald] to a crime." The court explained that this consciousness is underscored by the writer's belief that "[i]f Carlos [Wells] is unable to testify, [Mr.] McDonald can't be convicted." Indeed, as expressed in the Letter: "I beat this [conviction] if the b***h [Carlos Wells] is dead." We discern no error in the court's determination.

We likewise conclude that the trial court did not err when it addressed the third inferential step ("[f]rom a consciousness of guilt, a consciousness of guilt of the murder of Mr. Curtis"), by finding the Letter's reference to "25 years to life is what I'm facing," combined with the fact that life imprisonment is the penalty for first-degree murder, implied a consciousness of guilt of the robbery and murder. We are unpersuaded by Mr. McDonald's argument the that the Letter could have indicated Mr. McDonald's consciousness of guilt for other unrelated crimes. While the author's statement "[Carlos Wells] told them that he thinks I commit crimes in Silver Spring," introduces the possibility that the Letter is motivated by guilt of other crimes, the record does not reflect that the timing of the Letter follows those crimes as closely. In any case, "[s]imply because there is a possibility that there exists some innocent, or alternative, explanation for the conduct does not mean that the proffered evidence is *per se* inadmissible." *Thomas v. State*, 397 Md. 557, 578 (2007) ("*Thomas II*") (citation omitted).

We also find no merit to Mr. McDonald's complaint that the redaction of portions of the Letter to remove the references, among others, to crimes committed in Silver Spring "destroyed the context that provided the only reasonable inference that may be drawn—that the attempt to conceal evidence by eliminating a witness was because of accusations that [Mr.] McDonald was involved in ***other crimes***." (Emphasis supplied by Mr. McDonald). The Letter was redacted ***at the request of defense counsel***, and defense counsel explicitly consented to the redaction of that very line during the redaction colloquy.

As the State notes, Mr. McDonald does not provide argument in his brief challenging the court's determination on the fourth inferential step ("[f]rom a consciousness of guilt of the murder of Mr. Curtis, actual guilt of the murder").

To be sure, the Letter is prejudicial to the extent that "[a]ll evidence, by its nature, is prejudicial[,]" especially "other crimes" evidence. *Williams v. State*, 457 Md. 551, 572 (2018). In weighing the prejudicial nature of the Letter against its probative value, however, we review the trial court's decision for abuse of discretion, and we hold that the trial court did not abuse its discretion in finding that the Letter's probative value outweighed any *unfair* prejudice to Mr. McDonald.

II.

Scope of Cross-Examination

Mr. McDonald argues that the trial court erred in foreclosing certain lines of questioning on cross-examination of Det. Powell and Ms. Finch, thereby violating his constitutional right to confront the witnesses against him.

A. Standard of Review

As a general matter, the "trial courts have broad discretion in determining the scope of cross-examination." *Cagle v. State*, 235 Md. App. 593, 617 (2018) (citing *Martin v. State*, 364 Md. 692, 698 (2018)). That discretion must be exercised by balancing "the probative value of an inquiry against the unfair prejudice that might inure to the witness" so as to prevent "a discussion of collateral matters which will obscure the issue and lead to the fact finder's confusion." *State v. Cox*, 298 Md. 173, 178 (1983). Of course, because an "undue restriction of the fundamental right of cross-examination may violate a defendant's right to confrontation[,]" we must determine whether the trial court abused its discretion by imposing "limitations upon cross-examination that inhibited the ability of the defendant to receive a fair trial." *Pantazes v. State*, 376 Md. 661, 681-82 (2003).

B. Propriety of Limitations on Cross-Examination

It is well-established that "[t]he Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant the right to confront the witnesses against him or her" *Pantazes*, 376 Md. at 680, and that the witnesses' "reliability be assessed by 'testing in the crucible of cross-examination.'" *State v. Snowden*, 385 Md. 64, 79 (2005) (quoting *Crawford v. Washington*, 541 U.S. 36, 37 (2004)).

The fundamental right to cross-examine witnesses "includes the right to impeach credibility, to establish bias, interest or expose a motive to testify falsely." *Pantazes*, 376 Md. at 680., Md. Rule 5-616(a). Nonetheless, the right to cross-examination is not

boundless and "trial judges retain wide latitude . . . to impose ***reasonable*** limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (emphasis added). Thus, under this balancing test, "[a] judge must allow a defendant wide latitude to cross-examine a witness as to bias or prejudices . . . but the questioning must not be allowed to stray into collateral matters which would obscure the trial issues and lead to the factfinder's confusion." *Smallwood v. State*, 320 Md. 300, 307-08 (1990) (internal citations omitted). As with all evidence, "the court has the discretion to limit the examination, under Rule 5-403, if the court finds that the probative value of the evidence is outweighed by unfair prejudice." *Pantazes*, 376 Md. at 687. Finally, Maryland Rule 5-611 requires the court to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Md. Rule 5-611(a).

C. Det. Powell's Testimony

During cross-examination of Det. Powell, defense counsel attempted to impeach her with a statement contained in the affidavit she wrote in support of the search warrant to obtain DNA samples from Mr. McDonald. After Det. Powell admitted that, to her

knowledge, nothing taken from the items collected at the crime scene matched Mr. McDonald, defense counsel asked about the statements contained in her affidavit:

> [DEFENSE COUNSEL]: I am going to show you what has been marked for identification purposes only as Defendant's Exhibit D. Could you flip through that and tell me if you know what that is?
>
> [DET. POWELL]: This is an application for a search warrant.
>
> * * *
>
> [DEFENSE COUNSEL]: -- did you write that report?
>
> [DET. POWELL]: Yes. Yes, ma'am.
>
> [DEFENSE COUNSEL]: And that was for the purpose of what?
>
> [DET. POWELL]: That was for the purpose of saliva samples, major case prints to include palm, hand and fingerprints.
>
> * * *
>
> [ASSISTANT STATE'S ATTORNEY]: Objection. Can we approach?

At the bench conference, the following colloquy occurred:

> [DEFENSE COUNSEL]: **In her warrant, she says that there is always transfer of DNA.**
>
> [ASSISTANT STATE'S ATTORNEY]: Okay this is not -- I let them go with the DNA and that really wasn't the appropriate witness, but this would not -- she is not an expert to be able to say there is always a transfer. So it is irrelevant.
>
> * * *
>
> THE COURT: All right. So what is it that you want to ask her?
>
> [DEFENSE COUNSEL]: What she -- in her affidavit, what she under oath -- that there is a transfer -- always a transfer of DNA.
>
> * * *
>
> THE COURT: **That is not what it says. It says, "It is aware that there --- specifically homicide, there is always a transfer of fluids, fibers and or" -- which means there could have been an and or material and it would be clear -- there is always a transfer of fluids, fibers and or materials from a person to person, person to object, or an object to an object. And that under laboratory scrutiny, these items can be of significant evidentiary value.**

> **So now the question you want to ask her is was this contained in her affidavit? You can ask her, yes.**
>
> * * *
>
> It is a string along sentence. It is a conjunctive consecutive sentence, Counsel, so her affidavit -- there is a transfer of materials, that there is a transfer of fibers, . . . there could be there is a transfer of some but not a transfer of others **but she can't testify to that if she doesn't have the experience to testify about which ones or under which circumstances** --
>
> * * *
>
> THE COURT: . . . There was no challenge [to the warrant]. . . . Meaning general conclusory, commentary contained in here is that during incidents of this nature . . . **You want to ask it as an absolute -- the Court is not going to permit you to ask it as an absolute, Counsel because I don't read it as an absolute.**
>
> **Anything that says and/or is not an absolute. So the Court is not going to permit you to ask that question.**

(Emphasis added). Immediately thereafter, the court recessed for a lunch break. When cross-examination resumed, defense counsel attempted to ask Det. Powell "what are those results" from the DNA testing, but was prevented from doing so by the State's sustained objection.

Mr. McDonald contends that the trial court violated Mr. McDonald's constitutional right to confront Det. Powell about certain statements contained in her affidavit made in support of the search warrant for Mr. McDonald's DNA. Mr. McDonald avers that the defense established, without objection, that the DNA taken from Mr. McDonald did not match any of the items processed at the crime scene. He says that defense counsel then sought to confront Det. Powell with a statement in her affidavit to show that Det. Powell "was overreaching in her claims in order to obtain a warrant." The verbatim statement in the affidavit was:

> Your affiant is aware that during incidents of this nature, specifically homicide, there is always a transference of fluids, fibers and/or materials from a person to a person, person to an object, or an object to an object, and that under laboratory scrutiny these items can be of significant evidentiary value.

In the colloquy at the bench, defense counsel explained her intent to show that "in [Det. Powell's] warrant, she says there is always transfer of DNA." Mr. McDonald complains that the trial court precluded this question because it did not interpret Det. Powell's verbatim words "as an absolute" statement that could be used to impeach her, and further inquiry was foreclosed because the defense was not mounting a "challenge to [the] warrant." Further, Mr. McDonald complains that the trial court disallowed defense counsel's question to Det. Powell about, "whether she was aware that the DNA results from evidence taken from Curtis' Ford Expedition did not match to [Mr.] McDonald." He says the court mis-construed the question as a solicitation for hearsay, whereas defense counsel only sought "to demonstrate that [Det.] Powell continued the direction of her investigation in the face of contrary DNA evidence[.]".

The State counters that the court properly sustained its objection because the verbatim compound sentence in the affidavit, referring to "transference of fluids, fibers, **and/or** materials . . ." cannot provide foundation for the defense's proffered "absolute" question, whether "there is always transfer of DNA[.]" (Emphasis added). The State notes that the court also precluded Det. Powell from conveying the results of the DNA testing because she was not an expert in DNA and "would simply be conveying hearsay from the forensic experts who had performed the DNA testing."

We find no abuse of discretion and hold that the court properly sustained the State's objection to defense counsel's *paraphrase* of Det. Powell's statement. The court reasoned that defense counsel's rendition, "*that there is always a transfer of DNA*" constituted an "absolute' statement," whereas the verbatim statement suggested multiple possibilities in the disjunctive. (Emphasis added). Therefore, the court disallowed this *phrasing* of the question because the defense counsel's characterization of Det. Powell's words would have been more likely to impugn her credibility in the eyes of the jury than the actual words themselves. As noted, the right to cross-examination is not boundless and the court "retain[s] wide latitude . . . to impose reasonable limits on such cross-examination," *Van Arsdall*, 475 U.S. at 679, as well as "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence[.]" Md. Rule 5-611(a). Here, the court's restriction on counsel's representation was reasonable.

D. Kim Finch's Testimony

Ms. Finch acknowledged, on cross-exanimation, that she had given multiple statements to police and to prosecutors between 2006 and 2007 regarding her knowledge—or lack thereof—of Mr. Curtis's murder. Defense Counsel then asked:

> [DEFENSE COUNSEL]: And do you recall having a meeting in April of 2012 with the State and police detectives?
>
> [KIM FINCH]: **No, I don't remember.**
>
> [DEFENSE COUNSEL]: Do you recall being told by a detective what to say?
>
> [ASSISTANT STATE'S ATTORNEY]: Objection.

(Emphasis added). At the subsequent bench conference, the parties discussed a document consisting of a page of handwritten notes that had been in discovery. Defense counsel proffered that the document supported the claim that police instructed Ms. Finch to say that the gun had been lent to Carlos Wells after, and not before, August 12, 2006. The court explained to defense counsel how she needed to ask the question to avoid sustaining an objection:

> If you want to ask a question, 'didn't you tell an officer this,' **you can do that. Okay?** You know 'when you talked to Detective So-and-So, isn't it true that you told him and didn't you tell him that?' Okay?
>
> But you are making -- **the manner in which you are asking the questions continues to be difficult.**
>
> With regard to this, what is the specific question that you want to ask?
> [DEFENSE COUNSEL]: I want to ask did police tell her to say the gun was lent after the shooting?
>
> * * *
>
> [ASSISTANT STATE'S ATTORNEY]: [Defense counsel] asked that, and **[Ms. Finch] said she doesn't remember.** And then [Defense counsel] went on to give her the entire context of [the document].
> THE COURT: **Yes. So if she doesn't remember, you can't just simply make the statement.**
>
> [DEFENSE COUNSEL]: **Sure. Understood.**

(Emphasis and punctuation added for clarity). After the bench conference concluded, however, defense counsel asked only one more question of Ms. Finch, which was unrelated to any conversation she allegedly had with the police. Thereafter, defense counsel concluded her cross-examination

Before this Court, Mr. McDonald argues that the trial court erred in precluding him from confronting Ms. Finch about why she changed her testimony after having previously lied to detectives about her activities the night of Mr. Curtis's murder, once law

enforcement gave her an immunity agreement in June of 2011. According to Mr. McDonald, Ms. Finch claimed "that it was her conscience that motivated her" to come forward, when in fact "the substance of her testimony was truly rooted in the information the State had given her about the offense[,]" possibly "regarding the timing when the gun was lent[.]" Mr. McDonald argues that the trial court erred in precluding Ms. Finch from answering whether she recalled "being told by a detective what to say" about when Mr. McDonald lent the .40 Glock handgun to Mr. Wells. Mr. McDonald notes that, as "[t]here was no physical evidence connecting McDonald to this crime," Ms. Finch's testimony "was of critical import to the State's case," and any "error in precluding the defense's efforts to uncover [a lack of credibility] was not harmless."

The State responds that the trial court correctly sustained its objection when defense counsel asked Ms. Finch whether she "recall[ed] being told by a detective what to say [in testimony]" on a certain date immediately after she stated she did not remember any conversation with the detectives on that date. The State notes that after the court reprimanded defense counsel, stating "if she doesn't remember, you can't simply make the statement," the defense counsel made no attempt to refresh Ms. Finch's memory, and did not pursue the issue further.

We conclude that the trial court did not err or abuse its discretion in instructing defense counsel, "if [the witness] doesn't remember [an event], you can't just simply make the statement" about event based on a contemporaneous record. Ms. Finch testified that she did not remember any conversation with the police on a particular date, and defense

counsel's pursuit of the substance of the purported conversation—such as "being told by a detective what to say"—served no purpose except to put words in the witness' mouth. The trial court did not preclude defense counsel from attempting to refresh Ms. Finch's memory or from asking other relevant questions about what she told the police. We discern no abuse of discretion by the trial court.

III.

Jury Instructions

A. Parties' Contentions

Finally, Mr. McDonald argues that the circuit court erred in instructing the jury on concealment and destruction of evidence as "consciousness of guilt."[9] First, Mr. McDonald asserts that the instruction was not warranted because the Letter should never have been admitted, as "the State failed to produce sufficient evidence in support [of] the admission of the letter as "consciousness of guilt[.]" Second, Mr. McDonald takes issue with the opening of the jury instruction in which the trial court "assumed facts in dispute in favor of the State;" commencing "You have seen evidence that the Defendant attempted to prevent Carlos Wells from testifying in this case." Mr. McDonald complains that "[i]t was disputed at trial, as a matter of fact, that the letter amounted to an attempt to prevent [Mr.] Wells from testifying in this case" and, "in undertaking the analysis on

[9] We note that Mr. McDonald, in his brief, cites to Maryland Pattern Criminal Jury Instruction ("MPJI-Cr") 3:24 entitled "Flight or Concealment of Defendant" instead of MPJI-Cr. 3:26, which addresses "Concealment or Destruction of Evidence as Consciousness of Guilt." *Compare* MPJI-Cr. 3:24 *with* MPJI-Cr. 3:26.

admissibility[,] the trial court assumed its conclusions as *proven facts*" by "the language it used in giving the instruction[.]" (Emphasis supplied by Mr. McDonald). According to Mr. McDonald, "the fact that the trial court made factual conclusions in order to support those four inferences in determining the Lincoln letter *admissible*" to show consciousness of guilt "did not relieve the jury of its responsibility to determine those facts for itself[.]" (Emphasis supplied by Mr. McDonald).

The State counters that the trial court properly instructed the jury on concealment or destruction of evidence as consciousness of guilt, and points out that the court's instruction conformed to Maryland Criminal Pattern Jury Instruction 3:26. According to the State, Mr. McDonald argues that the instruction should not have been given for the "same reasons he claims the letter to [Mr.] Lincoln should not have been admitted: that the four-stage chain of inferences to show consciousness of guilt was not satisfied." The State maintains that the four inferences were satisfied.

B. Applicable Law Governing Jury Instructions

We review a trial court's decision to give a particular jury instruction under an abuse of discretion standard. *Stabb v. State*, 423 Md. 454, 465 (2011) (citing *Gunning v. State*, 347 Md. 332, 351 (1997)); *see also Sidbury v. State*, 414 Md. 180, 186 (2010). "Where the decision or order of the trial court is a matter of discretion it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Atkins v. State*, 421 Md. 434, 447 (2011) (quoting *Gunning*, 347 Md. at 351-52).

Maryland Rule 4-325 tasks the trial court with instructing the jury. "An 'instruction' includes any 'communication from the judge to the jury made after the close of the evidence.'" *Perez v. State*, 201 Md. App. 276, 282 (2011) (quoting *Lansdowne v. State*, 287 Md. 232, 243 (1980)); *see also* Md. Rule 4-325(a) ("The court shall give instructions to the jury at the conclusion of all the evidence and before closing arguments and may supplement them at a later time when appropriate. In its discretion the court may also give opening and interim instructions."). Subsection (c) of Rule 4-325 provides that "[t]he 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" and the court "need not grant a requested instruction if the matter is fairly covered by the instructions actually given." Md. Rule 4-325(c).

The consciousness of guilt jury instruction is intended "to assist the jury to fulfill their role as factfinders by determining **first, whether the post-crime behavior occurred, and second, whether the post-crime behavior was motivated by consciousness of guilt or other factors consistent with innocence.**" *Rainey v. State*, 480 Md. 230, 256 (2022) (citing *Dickey v. State*, 404 Md. 187, 197 (2008)) (emphasis added).

A key purpose of the judge's instructions "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." *Chambers v. State*, 337 Md. 44, 48 (1994). To generate a jury instruction on "consciousness of guilt," "there must be at least 'some evidence' to support each of the

four inferences" of the *Thompson*[10] analysis. *Rainey*, 480 Md. at 257-58 (citing *Dishman v. State*, 352 Md. 279, 292 (1998)). As our Supreme Court noted, "[t]his is a low and 'minimum' threshold" that "may be satisfied by witness testimony." *Id.* at 258 (citations omitted). Finally, "Appellate courts in Maryland strongly favor the use of pattern jury instructions." *Minger v. State*, 157 Md. App. 157, 161 n.1 (2004); *see also Green v. State*, 127 Md. App. 758, 771 (1999) ("[T]he wise course of action [for trial judges] is to give instructions in the form, where applicable, of our Maryland Pattern Jury Instructions" as "[m]any of these instructions have been passed upon by our appellate courts.").

Critically, with respect to evidence presented at trial, Rule 4-325(d) provides:

> **In instructing the jury, the court may refer to or summarize the evidence in order to present clearly the issues to be decided**. In that event, the court shall instruct the jury that it is the sole judge of the facts, the weight of the evidence, and the credibility of the witnesses.

Md. Rule 4-325(d) (emphasis added). Nonetheless, while "the court may refer to or summarize evidence in its instructions, it must be careful not to comment on the weight of the evidence" because (1) "the jury is the sole judge of the facts of the case" and (2) "when a judge comments on the weight of the evidence, jurors are likely, because of the authoritativeness of the judge's position, to be influenced by him or her." *Ashe v. State*, 125 Md. App. 537, 553-54 (1999) (citations omitted).

[10] Much like *Thomas v. State*, 372 Md. 342, 351 (2002), in *Thompson v. State*, 393 Md. 291, 312 (2006), the Supreme Court of Maryland adopted the same four-stage inferences but in the context of a flight jury instruction.

Although "it is generally improper for a trial judge to show his or her opinion of those matters upon which the jury will eventually pass," *Fagan v. State*, 110 Md. App. 228, 243 (1996) (quoting *Gore v. State*, 309 Md. 203, 214 (1987)), we have held that it was harmless error for a trial court to summarize testimony or facts presented at trial. *See Ashe*, 125 Md. App. at 554 (holding that the error was harmless when "the court simply summarized Officer Gibson's testimony with respect to whether appellant was in custody" because "the trial judge disclosed to the jury that its recollection of the testimony was controlling with respect to the voluntariness issue"); *see also id.* at 554 (concluding that "the trial judge's next statement, 'These are some of the facts as I remember them,' was a harmless comment leading into his summary of the evidence" and was not "an invasion of the jury's fact-finding role.").

In *Rainey v. State*, 480 Md. 230 (2022), the Supreme Court of Maryland addressed an instruction that was factually similar to the instruction at issue in the present case on concealment or destruction of evidence. The instruction read, in full:

> **You have heard that the Defendant destroyed or concealed evidence in this case.** Concealment or destruction of evidence is not enough, it is not enough by itself to establish guilt, but may be considered as evidence of guilt. Concealment or destruction of evidence may be motived by a variety of factors, some of which are fully consistent with innocence. **You must first decide whether the Defendant destroyed or concealed evidence in this case**. If you find that the Defendant destroyed or concealed evidence in this case, then you must decide whether that conduct shows a consciousness of guilt.

Id. at 247 (emphasis added). *Rainey* involved a matter of first impression wherein the Court was asked to determine whether it was reversible error for a circuit court to give a jury instruction on destruction or concealment of evidence "based on evidence that the

defendant cut off his dreadlocks between the time of the crime and the arrest." *Id.* at 240. Mr. Rainey argued that the trial court erred when (1) it failed to place its *Thompson* inference analysis on the record, and (2) in using the pattern jury instruction, the court "presupposed [Mr. Rainey's] guilt, which invaded the province of the jury." *Id.* at 251-52. More specifically, Mr. Rainey contended that "it was error not to provide a tailored alteration of appearance instruction because the label, alteration of appearance, is more neutral, and therefore less prejudicial, compared to destruction or concealment of evidence." *Id.* at 252.

The Supreme Court of Maryland concluded that "there was sufficient evidence for the jury to infer that the act of cutting off dreadlocks suggested a desire to destroy or conceal an identifying characteristic, which in turn, tended to establish [Mr. Rainey's] consciousness of guilt for the murder[.]" *Id.* at 260-61. Moreover, the Court held that the evidence offered by the State, which included eye-witness testimony, surveillance video, and forensic evidence establishing the desire to conceal or destroy evidence did "double duty" as evidence to support a *Thompson* inference. *Id.* at 262 (citing *Wright v. State*, 474 Md. 467, 491-92 (2021)). Indeed, the Court further held that the "circuit court is not required to expressly the state the four *Thompson* inferences," or other "reasoning for giving a consciousness of guilt jury instruction on the record[.]" *Rainey*, 480 Md. at 267.

With respect to the way in which the trial court phrased the jury instruction, the Court concluded that:

> We also find harmless the statement by the circuit court that "You have heard [evidence] that the Defendant destroyed or concealed evidence[.]"

> According to [Mr. Rainey], this statement prejudiced the jury by suggesting that the defendant conclusively destroyed evidence. This argument is unpersuasive because the circuit court emphasized to the jury in the instruction that they "*must first decide whether the Defendant destroyed or concealed evidence in this case.*" . . . The circuit court also cautioned the jury that even if they find that destruction or concealment of evidence occurred, they "*must decide whether that conduct shows a consciousness of guilt.*" *See Wright*, 474 Md. at 494, 255 A.3d at 88 ("We are confident that the jury would consider the entire jury charge and employ its common sense to reach the conclusion that it should consider the relevance of [Petitioner's destruction of concealment of evidence] only if it first identified him as the person who [cut his hair].").

Id. at 271-72 (emphasis in original) (cleaned up). Notably, the Court considered that the pattern instruction "was one statement among a comprehensive jury instruction that spanned dozens of pages in the trial transcript and lasted approximately thirty minutes." *Id.* at 272.

Similarly, in *Collins v. State*, the defendant alleged, among other things, that the trial judge "usurped the jury's fact-finding function" when he instructed the jury:

> Now, [the defendant] has admitted on the stand that she possessed the [controlled] substance, so the State, really, has met, by the defendant's admission, its burden of proof of that one element of the first offense, possession.

89 Md. App. 273, 280 (1991). We concluded that the trial judge did not err in this instruction because "[t]his instruction accurately summarized appellant's own testimony" as the "appellant at trial chose to admit that she possessed cocaine and paraphernalia, choosing to fight the case on the ground that she did not intend to distribute the cocaine found on her at the time of her arrest." *Id.* at 280 . We further held that

> **A trial judge is permitted to summarize the testimony in his or her instructions to the jury, so long as he or she tells both sides of the story and instructs the jury that "it is the sole judge of the facts, the weight of**

> **the evidence, and the credibility of the witnesses.**" Rule 4-325(d). While in this case there was no "other side" to tell, the trial judge later instructed the jury that it was the "sole determiner of the facts." Therefore, the challenged instruction wholly complied with the Rule and was not erroneous.

Id. at 280-81 (emphasis added). The defendant in *Collins* made a more substantive challenge to another instruction by that trial judge. *Id.* at 281. The instruction read:

> There would be no justification for you to conclude that the defendant was not guilty of the second count, since she has taken the stand, and admitted that she possessed both the cocaine and the pipes to smoke the cocaine.

Id. Although we held that this instruction "usurps the fact-finding function of the jury" and was clearly erroneous, we discerned that "in the circumstances of [the] case" the error was harmless. Specifically, we concluded:

> [A]ppellant's trial counsel made a conscious tactical decision to concede that she was guilty of two possession charges, and chose to contest only the possession with intent to distribute charge, specifically the intent element. **Therefore the jury most assuredly would have returned a guilty verdict on the two possession charges, regardless of the trial judge's erroneous instruction[.]**

Id. at 281 (emphasis added).

C. Analysis

Mr. McDonald first complains that the State failed to generate sufficient evidence to warrant a jury instruction on "consciousness of guilt." The record does not reflect this. Although not required to do so, the trial court meticulously recorded its thorough and detailed analysis of the four *Thompson* (or *Thomas*) inferences before admitting the Lincoln Letter into evidence. *See Rainey*, 480 Md. at 267. Moreover, there was more than "some evidence" to support each of the four inferences, including, among other things, the testimony of two witnesses, the testimony of a forensic handwriting expert, and the

contents of the Lincoln Letter itself. Because we found no abuse of discretion or error in the court's analysis of the Letter's admissibility to show consciousness of guilt, we conclude that there was sufficient evidence to generate *some* instruction on "consciousness of guilt."

Mr. McDonald next asserts that the trial court erred in how it characterized the evidence in the first line of the jury instruction, *i.e.*, "**You have seen evidence that the defendant attempted to prevent Carlos Wells from testifying in this case**." (Emphasis added). More specifically, Mr. McDonald argues that the trial court improperly summarized the facts of the case and usurped the role of the jury in evaluating the authenticity of the Lincoln Letter. We disagree, for several reasons.

First, as in *Rainey*, the first line in the second paragraph of the very same jury instruction unambiguously instructs the jury that: "You must first decide whether the defendant attempted to prevent Carlos Wells from testifying in this case, then you **must decide whether that conduct shows a consciousness of guilt.**" *See, e.g.*, *Rainey*, 480 Md. at 271-72 (the Court finding similar argument unpersuasive because the circuit court emphasized to the jury in the same instruction that they "*must first decide whether the Defendant destroyed or concealed evidence in this case.*") (emphasis in original) (footnote omitted). In other words, it was for the jury to decide *first* whether Mr. McDonald did, in fact, write the letter to Adrian Lincoln asking him to kill Carlos Wells. *If, and only if*, the jury decides that Mr. McDonald wrote the Letter, *i.e.*, that Mr. McDonald attempted to prevent Mr. Wells from testifying in this case, then the jury must determine "whether that

conduct shows a consciousness of guilt. *See, e.g.*, *id.* ("The circuit court also cautioned the jury that even if they find that destruction or concealment of evidence occurred, they '*must decide whether that conduct shows a consciousness of guilt.*'") (emphasis in original).

Second, it is evident that the circuit court utilized Maryland Pattern Jury Instructions 3:24 ("Flight or Concealment of Defendant") *and* 3:26 ("Concealment or Destruction of Evidence as Consciousness of Guilt") to instruct the jury. Maryland Pattern Criminal Jury Instruction 3:24 reads in full:

FLIGHT OR CONCEALMENT OF DEFENDANT

> **A person's flight [concealment] immediately after the commission of a crime, or after being accused of committing a crime, is not enough by itself to establish guilt, but it is a fact that may be considered by you as evidence of guilt. Flight [concealment] under these circumstances may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether there is evidence of flight [concealment]. If you decide there is evidence of flight [concealment], then you must decide whether this flight [concealment] shows a consciousness of guilt.**

MPJI-Cr. 3:24 (bold emphasis in original). The only alteration the court made to the instruction above was to present the words "flight" and "concealment" in the alternative, as follows:

> A person's ***flight or concealment*** immediately after the commission of a crime, or after being accused of committing a crime, is not enough by itself to establish guilt, but it is a fact that may be considered by you as evidence of guilt. ***Flight or concealment*** under these circumstances may be modified by a variety of factors, some of which are fully consistent with innocence. You must first decide whether there is evidence of flight or concealment. If you decide there is evidence of ***flight or concealment***, you then must decide whether this ***flight or concealment*** shows a consciousness of guilt.

See MPJI-Cr. 3:24 (emphasis added).

As noted, in addition to the instruction above, the circuit court also utilized Maryland Pattern Jury Instruction 3:26, which provides the following fill-in-the-blank pattern jury instruction:

> **You have heard that the defendant _____ evidence in this case. Concealment or destruction of evidence is not enough by itself to establish guilt, but may be considered as evidence of guilt. Concealment or destruction of evidence may be motivated by a variety of factors, some of which are fully consistent with innocence.**
>
> **You must first decide whether the defendant _____ evidence in this case. If you find that the defendant _____ evidence in this case, then you must decide whether that conduct shows a consciousness of guilt.**

MPJI-Cr 3:26 (bold emphasis in original). The "Notes on Use" appended to the pattern jury instruction instruct the court to: "Insert in the three blanks the alleged conduct of the defendant (*e.g.*, attempted to conceal, concealed, attempted to destroy, destroyed)." *Id.* The court executed these instructions as follows:

> You have seen evidence that the Defendant attempted to prevent Carlos Wells from testifying in this case. Attempting to conceal or destroy evidence is not enough by itself to establish guilt but may be considered as evidence of guilt. Concealment or destruction of evidence may be motivated by a variety of factors, some of which are fully consistent with innocence.
>
> You must first decide whether the Defendant attempted to prevent Carlos Wells from testifying in this case and if you find the Defendant attempted to prevent Carlos Wells from testifying in this case, then you must decide whether that conduct shows a consciousness of guilt.

Mr. McDonald can point to no caselaw—and we have found none—that has held it was an abuse of discretion for the court to summarize the evidence in this way using the fill-in-the-blank instruction. Undeniably, here, the court was "precise" and "tailored the consciousness of guilt instruction to specifically describe" the evidence presented at trial.

Rainey, 480 Md. at 274. Thus, the trial court followed exactly the cautionary guidelines laid out in *Rainey* with respect to this pattern jury instruction. As noted, Rule 4-325(d) expressly permits a trial court to "refer to or summarize the evidence in order to present clearly the issues to be decided" so long as the instruction also instructs "the jury that it is the sole judge of the facts, the weight of the evidence, and the credibility of the witnesses." Md. Rule 4-325(d).

Third, we note that defense counsel's objection was to the inclusion of this instruction in its entirety, and not specific to the first sentence or the issue of authentication. *See Wright v. State*, 474 Md. 467, 486-87 (2021) (holding, in the context of a flight instruction, that "[i]n order for the limitation on the flight instruction to be applicable, defense counsel must expressly and unambiguously state—prior to the jury charge—that the defense solely contests the identity of the defendant as the fleeing offender"). When the court reviewed jury instructions with counsel at the bench before issuance, defense counsel objected to the inclusion of the instruction as a whole:

> [DEFENSE COUNSEL]: To preserve the record, my previous objections dealing with the letter, I would note for the record that the only proof that Mr. McDonald attempted to prevent Mr. Wells from testifying in this case is in fact a letter. **So I would object to this jury instruction.**
>
> THE COURT: Okay. Duly noted. And overruled.

(Emphasis added).

The defense argues for the first time on appeal that the circuit court improperly "relieved the jury of its independent responsibility to make those underlying factual determinations" to show that the Lincoln Letter "amounted to an attempt to prevent Wells

from testifying in [the] case," or "that the letter constituted evidence of guilt." The record bears out, however, that the jury had received evidence demonstrating the authenticity of the Lincoln Letter. First, two witnesses—Ms. Finch, Mr. McDonald's former girlfriend and Ms. Lamb, Adrian Lincoln's mother—both testified that, based on their personal experience and knowledge of Mr. McDonald's handwriting, that Mr. McDonald was the likely author of the Lincoln Letter. Second, the State called Diane Lawder, a forensic document examiner from the Maryland State Police, who testified as an expert witness that Mr. McDonald was likely the author of the Lincoln Letter.

Although Mr. McDonald did not have the burden of proof on this issue, he did not present any evidence to rebut the allegation that he was the author of the Letter. The Letter was then published to the jury by projecting it on a screen for the jury to read following Ms. Lawder's testimony.

Third, prior to deliberations, the court provided the jury the following instructions on evidence and witness credibility:

> **WHAT CONSTITUTES EVIDENCE**
>
> In making your decision, you must consider the evidence in this case; that is
>
> (1) **testimony from the witness stand**;
>
> (2) **physical evidence or exhibits admitted into evidence**;
>
> (3) Stipulations.
>
> In evaluating the evidence, you should consider it in light of your own experiences. **You may draw any reasonable conclusion from the evidence that you believe to be justified by common sense and your own experiences.**
>
> The following things are not evidence, and you should not give them any weight or consideration:

(1) any testimony that I struck or told you to disregard and any exhibits that I struck or did not admit into evidence; and

(2) questions that the witnesses were not permitted to answer and objections of the lawyers.

When I did not permit the witness to answer a question, you must not speculate as to the possible answer. If after an answer was given, I ordered that the answer should be stricken, you must disregard both the question and the answer.

During the trial, I may have commented on the evidence or asked a question of a witness. You should not draw any conclusion about my views of the case or of any witness from my comments or my questions.

Opening statements and closing arguments of lawyers are not evidence. They are intended only to help you to understand the evidence and to apply the law. Therefore, if your memory of the evidence differs from anything the lawyers or I may say, you must rely on your own memory of the evidence.

* * *

CREDIBILITY OF WITNESSES

You are the sole judge of whether a witness should be believed. In making this decision, you may apply your own common sense and life experiences.

In deciding whether a witness should be believed, you should carefully consider all the testimony and evidence, as well as whether the witness's testimony was affected by other factors. You should consider such factors as:

(1) the witness's behavior on the stand and manner of testifying;

(2) whether the witness appeared to be telling the truth;

(3) the witness's opportunity to see or hear the things about which testimony given;

(4) the accuracy of the witness's memory;

(5) whether the witness has a motive not to tell the truth;

(6) whether the witness has an interest in the outcome of the case;

(7) whether the witness's testimony was consistent;

(8) whether other evidence that you believe supported or contradicted the witness's testimony;

(9) whether and the extent to which the witness's testimony in court differed from the statements made by the witness on any previous occasion; and

(10) whether the witness has a bias or prejudice.

You are the sole judge of whether a witness should be believed. You need not believe any witness, even if the testimony is uncontradicted. You may believe all, part, or none of the testimony of any witness.

* * *

EXPERT OPINION TESTIMONY

An expert is a witness who has knowledge, skill, experience, education, or special training in a given field and therefore is permitted to express opinions in that field. You should consider an expert's testimony together with all the other evidence. In weighing the opinion portion of an expert's testimony, in addition to the factors that are relevant to any witness's credibility, you should consider the expert's knowledge, skill, experience, training or education, as well as the expert's knowledge of the subject matter about which the expert is expressing an opinion. **You should give expert testimony the weight and value you believe it should have. You are not required to accept an expert's testimony, even if it is uncontradicted. As with any other witness, you may believe all, part, or none of the testimony of any expert.**

(Emphasis added).

Fourth, the trial judge instructed the jury in its first instruction that "You are the ones to decide the facts and apply the law to those facts." We observe that, as in *Rainey*, the challenged pattern instruction "was one statement among a comprehensive jury instruction that spanned dozens of pages in the trial transcript[.]" *Rainey*, 480 Md. at 272.

Accordingly, we conclude that the court *did* present to the jury the question of authenticity of the Lincoln Letter. *See* LYNN MCCLAIN, MARYLAND EVIDENCE § 901:1(b), at 848-49 (3d ed. 2013) ("The setting of a low bar for authentication is based on the same principles that have led to the creation of particular presumptions: probability of accuracy and relative access to the evidence. In the relatively rare case where authenticity is

genuinely contested, the opposing party is likely to be able to easily present testimony refuting authenticity, and the issue becomes a classic one of credibility for determination by the jury.") (footnote omitted). The Lincoln Letter was an exhibit admitted into evidence and its authenticity was attested to by three witnesses, one of whom was an expert in forensic handwriting. The jury was thus permitted to: (1) evaluate the Letter and draw reasonable conclusions from it, and (2) evaluate the credibility of the three witnesses who testified as to the Letter's authenticity. The jury was also instructed on what constitutes evidence such as "testimony from the witness stand," and "physical evidence or exhibits admitted into evidence." The court also told the jury that in evaluating the evidence they "may draw any reasonable conclusion from the evidence that [they] believe to be justified by common sense and [their] own experiences[.]" The court reminded the jury that they "are the ones to decide the facts and apply the law to those facts" including "whether a witness should be believed."

Finally, even if the first sentence of the court's instruction using Maryland Pattern Criminal Jury Instruction 3:26 could be misread to suggest that the court averred that the jury had seen *persuasive* "evidence that the defendant attempted to prevent Carlos Wells from testifying in this case[,]" the same instruction clarified that they, the jury, "must decide whether the defendant attempted to prevent Carlos Wells from testifying in this case."

For all of the reasons stated above, we find no error or abuse of discretion by the trial court in instructing the jury using Maryland Pattern Criminal Jury Instruction 3:26.

Still, given that this instruction was at issue in *Rainey* and now this case, we invite the Maryland Criminal Pattern Jury Instruction Committee to revisit the instruction to consider whether it is possible to reconstruct it in order to avoid similar appeals.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.