UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0576

September Term, 2015

RONALD JEFFERSON SHORT

v.

STATE OF MARYLAND

Krauser, C.J.,
Berger,
Reed,

JJ.

Opinion by Berger, J.

Filed: July 19, 2016

Ronald Jefferson Short, appellant, was convicted by a jury sitting in the Circuit Court for Prince George's County of first-degree murder; use of a handgun during the commission of a crime of violence; wearing, carrying, or transporting a handgun; and two counts of possession of a regulated firearm after a disqualifying conviction.[1] Appellant asks four questions on appeal:

> I. Did the suppression court err when it denied appellant's motion to suppress three items seized by the police?
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> II. Did the trial court abuse its discretion when it admitted into evidence a recorded jail call between appellant and his girlfriend?
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> III. Did the trial court err when it admitted into evidence three videos from appellant's cell phone?
>
> IV. Did the trial court err in denying appellant's motion for a new trial?

For the reasons that follow, we shall affirm the judgments.

FACTS

The State's theory of prosecution was that during the early morning hours of November 14, 2012, appellant lured Reginald Z. McNeil to an area in Mount Rainier, Maryland, where he shot and killed him because the victim had failed to pay for drugs appellant had "fronted" to him. Testifying for the State, among others, was a friend of the victim who was with him shortly before he was killed, appellant's girlfriend, appellant's

[1] The court sentenced appellant to consecutive sentences of life imprisonment without the possibility of parole for murder, 20 years for use of a handgun, and 15 years for one of his convictions for possession of a firearm after a disqualifying conviction. The court merged his remaining convictions.

prison cell mate, and several police officers. The defense theory of the case was lack of criminal agency. Appellant presented no testimonial evidence. Viewing the evidence in the light most favorable to the State, the following was established.

Andrea Stubbs testified that she knew the victim for about two weeks prior to the shooting. On the night preceding the murder, the victim picked up Stubbs and two others and they went to a motel. According to Stubbs, while at the motel, the victim received several phone calls from someone nicknamed "Bin Laden," who wanted to "meet up" with the victim. Stubbs understood that the meeting was for Bin Laden to "front [the victim] work," meaning that Bin Laden would give the victim "Molly"[2] to sell and the victim would pay appellant later. The victim was reluctant to meet Bin Laden but Bin Laden was persistent. Indeed, Stubbs spoke to Bin Laden during one of the phone calls, and Bin Laden said he would pay Stubbs's rent if she brought the victim to him.

At some point the victim relented about meeting Bin Laden, and all four left the motel and drove to Mount Rainier where he had told the victim to meet him. They got lost at one point, and Stubbs spoke to Bin Laden for further directions. Eventually, they parked in an area where Bin Laden had instructed. The victim stepped outside the car, waited for a while, and then walked off. They waited for the victim to return, but he did not. They called him

[2] The parties stipulated that "Molly" was the drug also known as Ecstasy or MDMA – 3,4-methylenedioxy-methamphetamine.

several times on his cell phone, but he never picked up. They eventually heard and saw emergency vehicles drive into the area.

At approximately 4:40 a.m., the police responded to the 3800 block of 37th Street in Mount Rainier in response to shots at the scene. The first officer on the scene found the victim lying on the ground near an alley. No one else was present. The victim was transported to a hospital where he was pronounced dead. The police recovered several .40 caliber shell casings and an unfired .40 caliber cartridge from the crime scene. Lieutenant Patrick Hampson of the Prince George's County Police Department, who supervised the murder investigation, testified that he spoke with Stubbs and the others in the car and learned that the victim had been on the phone with someone nicknamed Bin Laden before he was shot. Using the victim's phone records, the police tracked, by GPS, the last incoming phone number on the victim's phone to a phone located at 1854 Central Place in Washington, D.C.

Just after midnight on November 15, 2012, about 20 hours after the murder, Lieutenant Hampson and other officers went to the Central Place address – a two-story apartment house. Lieutenant Hampson and three officers went to the second floor apartment while several other officers went to the back of the house. The police at the back of the house saw a silhouette of a male figure looking out the second-floor, back window. The man turned back into the room after a gun was heard being racked. A short time later, the same man again returned to the window and looked out.

In the meantime, Lieutenant Hampson knocked on the door of the second floor apartment and heard inside the sound of a gun being "racked to load[.]" A male voice yelled, "[W]ho the fuck is it[?]" The lieutenant identified himself as a police officer, and the door opened. He spoke to an older woman, who identified herself as the leaseholder, Tara Sanders. She invited the lieutenant and the three officers inside.

Once inside, the lieutenant told Sanders that he wanted to speak to everyone in the apartment and Sanders called for everyone to come into the living room. Appellant and Tiara Payton, Sanders's daughter and appellant's girlfriend, emerged from Payton's bedroom, from which the police had seen the man looking out the back window. When the lieutenant asked appellant his name, he started to say "Bin" but stopped and said his name was Reginald Short. The lieutenant noticed that appellant's voice matched the voice he had heard when he had knocked on the door. The lieutenant told the group that someone appellant knew had been seriously injured, and he asked appellant if he would help them with the investigation by coming to the police station to look at a photograph. Appellant agreed. The lieutenant noticed that although appellant appeared "very laid back," he was in fact sweating profusely and shaking.

Lieutenant Hampson asked appellant if they could search him before he got in the police car, explaining that appellant would be riding unhandcuffed in the front seat with one of his detectives. Appellant agreed. As he held his arms out, appellant told the lieutenant that he had something in his back pocket that he had found earlier on the sidewalk. The

lieutenant removed from appellant's pocket a handgun magazine, which could hold 10 bullets. After the pat-down, appellant began walking towards the front door. The lieutenant picked up a cell phone from the table that appellant had had in his hand when he had walked out of the back bedroom. The lieutenant asked appellant if he would mind if he brought "it with me to the station so you have it after we're done talking[.]" Appellant said, "Cool." The lieutenant then walked appellant downstairs where he sat in the front seat of a police car and was driven to the police station.

Lieutenant Hampson returned to the apartment and spoke with Sanders and Payton. He asked if he could search the apartment and both agreed, signing consent forms that were admitted into evidence. The police found a .40 caliber Glock semi-automatic handgun and several unfired .40 caliber cartridges in a shoe box on the top shelf of the closet in Payton's bedroom. At the police station, appellant told the police his nickname was "Bin Laden" and gave his cell phone number, which matched the phone number of the incoming and outgoing calls to the victim's cell phone shortly before the victim was killed.

Payton testified that she lived with her mother and several others at the Central Place apartment, and appellant, whom she had dated for about five months before the murder, sometimes stayed there with her. On the night before the victim was shot, November 13, appellant was present at the apartment but left before midnight. When Payton woke up the next morning, appellant was again present. Just before the police arrived the next night, she and appellant had been in her bedroom and he had given her a gun. She gave the gun back

to him, and he placed it in her closet. Several hours after appellant was taken to the police station, the police recorded a telephone call between appellant and Payton. In the conversation, appellant told her to put the gun in the trash can. He also told her that he had wanted to throw the gun out the window when the police had arrived, but the police were in the backyard.

Jamonte Bryant and appellant were cell mates at the Prince George's County Detention Center in Upper Marlboro for several months after appellant was arrested. Bryant testified that while they were roommates appellant had told him about a man he had killed. Appellant said he had "fronted" $2,000 worth of Molly to one of his clients. Appellant expected the man to pay him back in a certain time frame, and when he did not, he called him. The man said he did not have the money and suggested that appellant front him some more Molly. Appellant thought he "was being played" and wanted to get back at the man. The two agreed to meet in Mount Rainier. Once there, appellant had told the man to walk out to him because he had heard a woman "in the background," and appellant did not want "nobody to see[.]"

According to Bryant, appellant and the man met and shook hands. The man asked appellant for more Molly, and appellant caught the man off guard, shooting him with his Glock with an extended clip. Appellant said he "emptied the clip on him," focusing on his

face.[3] At one point the gun jammed, and he pulled the slide back to unjam it. Appellant told Bryant that he got caught at his "baby mother's house," where he had tried to throw the gun into the backyard, but the police had surrounded the house. Bryant testified that he contacted the State's Attorney's Office with what appellant had told him in the hope that the State, in exchange for the above information, would help in reducing a sentence he had recently received – a 15-year sentence with all but five years suspended for first-degree assault. Bryant further testified that the State, however, had made no promises in return for his testimony.

The police downloaded several videos and photographs from appellant's cell phone, and the parties stipulated that the cell phone account on that phone had been open for about six months before the murder. The State introduced into evidence three videos and several photographs. The first video showed appellant with a large amount of cash. The second video showed appellant with a baggie of "wadded" cash. The third video showed appellant with a baggie that the parties stipulated contained Molly. The videos were played for the jury without sound. Regarding the photographs, one photograph showed a handgun, a baggie of money, and several baggies of Molly. Two photographs showed the same handgun on a gray tile floor.

[3] The autopsy report stated that the victim suffered 20 different gunshot wounds, including those to his forehead, right cheek, right side of his head, upper left chest with evidence of stippling from close-range firing, and several gunshot wounds to his forearms, hip, thigh, and knee.

The State also introduced evidence that 17 voice calls occurred between appellant's phone and the victim's phone between November 10, 2012 and November 14 at 4:30 a.m. A Prince George's County police sergeant, who was admitted as an expert in the field of "cell phone technology and cell site tracking," testified that at 10:40 p.m. on November 13, several hours before the shooting, appellant's phone connected to a tower in the vicinity of Sanders's apartment. At 4:27 a.m., a call was placed from the victim's phone to appellant's phone. A few minutes later, a call was placed from appellant's phone to the victim's phone that connected to a tower in the Mount Rainier area. At 5:01 a.m., a call was placed from appellant's cell phone that again connected to a tower near Sanders's apartment. The distance between the crime scene and Sanders's apartment was about two miles, about a ten minute drive.

A firearms expert testified that he compared test-fired cartridge casings fired from the Glock recovered from Payton's closet to the spent cartridge casings recovered from the crime scene. The expert concluded that the shell casings found at the shooting scene had been fired from the Glock. Additionally, the bullet and bullet fragments recovered during the autopsy of the victim were consistent with .40 caliber bullets. The expert also testified that the recovered Glock was "visually similar" to the firearm depicted in the photographs downloaded from appellant's cell phone. Moreover, the magazine on the handgun in the photographs was also "visually consistent" with the magazine found in appellant's back pocket. The State introduced evidence that the Glock contained DNA from Payton's brother

and two other contributors whose DNA was present in an insufficient quantity to include or exclude appellant. The parties stipulated that appellant had a prior conviction for a disqualifying crime.

DISCUSSION

I.

Appellant argues that the suppression court erred when it denied his motion to suppress three items seized by the police while they were at Sanders's apartment: the handgun magazine from appellant's back pocket, the cell phone from the table, and the Glock from Payton's closet. The State responds that the suppression court did not err because it properly concluded that the items were obtained by the police pursuant to voluntary consent from either appellant, his girlfriend, or her mother. We agree with the State.

When reviewing the denial of a motion to suppress, the record at the suppression hearing is the exclusive source of facts for our review. *State v. Rucker*, 374 Md. 199, 207 (2003). We accept the facts as found by the suppression court, unless clearly erroneous, and we review the evidence in the light most favorable to the prevailing party, in this case, the State. *Carter v. State*, 367 Md. 447, 457 (2002). Nevertheless, this Court must make its own independent constitutional appraisal by reviewing the law and applying it to the facts of the case. *Jones v. State*, 111 Md. App. 456, 466 (citing *Ornelas v. United States*, 517 U.S. 690 (1996)), *cert. denied*, 344 Md. 117 (1996).

Lieutenant Hampson was the only witness to testify at the motion to suppress the three items in question. His suppression hearing testimony was largely consistent with his trial testimony. At the suppression hearing, Lieutenant Hampson testified that just after midnight on November 15, 2012, he knocked on the door of the second floor apartment at 1854 Central Place in Washington, D.C. Three other officers were behind him in the stairway. A woman, later identified as Tara Sanders, the leaseholder of the apartment, answered the door. Lieutenant Hampson asked if the officers could come in and Sanders responded, "[S]ure. . . . Come on in." He and the other officers walked into the living room.

Lieutenant Hampson testified that he asked if he could speak to everyone in the apartment, and Sanders called everyone into the living room. Present in the living room were, among others: Sanders; her adult daughter, Tiara Payton; Sanders's adult son; appellant; and several children. Lieutenant Hampson explained that police were investigating an incident that resulted in a serious injury to someone nicknamed "Zay," who they believed was appellant's friend. Appellant said he did not know the person. When the lieutenant asked if he could show him a picture of the victim to see whether appellant could help them learn who had hurt him, appellant said, "I'm happy to help, whatever I can do." The lieutenant then asked if he would mind going to the police station to look at the picture. Appellant stood up from the table at which he had been sitting and said, "[A]ll right. I'm ready. Let's go."

At that point, the lieutenant asked appellant if he would mind being searched before he got into the police car just to make sure he did not have any weapons. Appellant replied, "[S]ure. Go ahead." Appellant then told the lieutenant that he had something in his back pocket that he had found earlier on the sidewalk. The lieutenant pulled a handgun magazine from appellant's pocket as he patted him down. After the pat-down, appellant started to walk toward the front door when the lieutenant noticed that the cell phone that appellant had in his hand when he came out of the bedroom was lying on the table. When the lieutenant asked him if the cell phone on the table was his, appellant replied, "[Y]eah." The lieutenant asked if he could bring it to the station, and appellant replied, "[S]ure." The lieutenant then escorted appellant outside to the police car where he was driven to the police station. According to the lieutenant, at no time during the encounter did the police have their guns out, there was no shouting, and appellant was never handcuffed. Additionally, appellant was told several times that he was not under arrest.

Lieutenant Hampson returned to the apartment and asked Sanders and Payton, if the police could search the apartment. Both woman agreed orally and then signed separate consent to search forms and acknowledgments of their possessory relationship to the apartment. During the subsequent search, the police found a .40 caliber Glock in a shoe box in the closet of Payton's bedroom.

At the conclusion of Lieutenant Hampson's testimony, defense counsel argued that the police lacked probable cause to support the lieutenant's seizure of the cell phone, and

the police lacked reasonable articulable suspicion to support the seizure of the handgun magazine. Defense counsel "submitted" on the seizure of the Glock. The State responded that appellant consented to the seizure of the cell phone, as well as to the search of his person and subsequent seizure of the handgun magazine. The State additionally argued that the seizure of the Glock was supported by Sanders' and Payton's consent to search the apartment. After hearing the parties' arguments, the suppression court agreed with the State. It is from this ruling that appellant appeals.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. CONST. amend. IV. The Fourth Amendment, applicable to the States through the Due Process Clause of the Fourteenth Amendment, protects against unreasonable government searches and seizures. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The Fourth Amendment generally prohibits warrantless searches and seizures so where there is no warrant, the State has the burden of proving that an exception to the warrant requirement existed at the time the search was conducted. One such exception is a search conducted pursuant to consent. *Abeokuto v. State*, 391 Md. 289, 334 (2006).

The voluntariness of a consent is a question of fact determined under the "totality of all the circumstances" based upon the standards set forth in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). *Scott v. State*, 366 Md. 121, 140-42 (2001), *cert. denied*, 535 U.S. 940 (2002). The *Schneckloth* Court held that the State bears the burden of proving by a

preponderance of the evidence that the consent was freely and voluntarily given, and not the product of duress or coercion. *McMillian v. State*, 325 Md. 272, 284-85 (1992) (citing *Schneckloth*, 412 U.S. at 248-49).

A. Cell phone

Appellant argues that the suppression court erred in concluding that he consented to the seizure of his cell phone because the voluntariness of his consent was "undercut by the coercive circumstances," namely, the presence of several police officers at the apartment and Lieutenant's Hampson's request for the appellant to come to the police station. We disagree.

The uncontradicted evidence presented at the suppression hearing was that: although four officers were present in the apartment, none displayed their weapon; appellant was never told that he was a suspect in the investigation; he was repeatedly told he was not in custody; and the conversation between appellant and Lieutenant Hampson was "very casual." Additionally, as the State points out, the State elicited uncontradicted evidence that in addition to the police officers, appellant was in the presence of his girlfriend; his friend, Payton's brother; and other adult members of the Sanders family. Therefore, to the extent that there was arguably "coercive pressure" to consent to the search, the other factors mentioned above mitigated any such coercion. Under the circumstances presented, we are persuaded that the suppression court's conclusion that appellant voluntarily and freely consented to the police seizure of his cell phone was not in error.

B. Handgun magazine

Citing *Terry v. Ohio*, 392 U.S. 1 (1968), appellant argues on appeal that the police lacked reasonable, articulable suspicion to believe that he was armed and dangerous to support the pat-down of him and subsequent seizure of the magazine from his back pocket. As the State correctly points out, the suppression court found that the search of appellant was justified not under *Terry*, *supra*, but because appellant consented to the search. Appellant makes no argument why the court's ruling was wrong. *Cf. Klauenberg v. State*, 355 Md. 528, 552 (1999) (arguments not adequately presented in a party's brief will not be considered on appeal). Accordingly, we shall affirm the suppression court's ruling regarding the seizure of the handgun magazine.

C. Handgun

Appellant baldly contends that the suppression court had "an insufficient factual basis" to conclude that Sanders and Payton consented to the search of Payton's bedroom. Because he puts forth no argument to support his contention, we readily dismiss it. *See Klauenberg*, *supra*. Appellant acknowledges, as he must, that we have upheld searches in which a parent consents to a police search of the bedroom used by adult children. *See State v. Rowlett*, 159 Md. App. 386 (2004) (holding that a defendant's mother has the authority to consent to the search of her adult child's room in her house); *State v. Miller*, 144 Md. App. 643, 655-56 (holding that a father had the authority to consent to the search of his adult son's bedroom in the father's house), *cert. denied*, 370 Md. 270 (2002). Without more, we

find no error by the suppression court in concluding that Sanders and Payton voluntarily and freely consented to the search of Payton's bedroom.

II.

Appellant argues that the trial court abused its discretion in admitting a "recorded jail call" between himself and Payton. Appellant argues that the recording had little probative value because it was cumulative of evidence already admitted at trial, and, citing *Arca v. State*, 71 Md. App. 102, *cert. denied*, 310 Md. 276 (1987), he argues that it was unduly prejudicial because it alerted the jury to the fact that he was incarcerated, undermining the presumption of innocence. The State responds that we should decline to consider appellant's argument because he has failed to produce a sufficient record to show that the call informed the jury that appellant was incarcerated when the call was made. We agree with the State.

There is no evidence that the jury was aware that the call was a "jail call" and we decline to "delve through the record to unearth factual support favorable to appellant[.]" *Van Meter v. State*, 30 Md. App. 406, 408, *cert. denied*, 278 Md. 737 (1976). During the examination of Payton, the State introduced into evidence and played for the jury an audiotape of a telephone call between Payton and appellant. The call was not transcribed. Nothing in Payton's examination about the call suggested in any way that appellant was incarcerated. We further note that the trial court instructed the jury at the conclusion of trial that it was not to consider whether or not appellant was incarcerated in judging his guilt,

stating: "Please don't concern yourself as to whether or not the defendant is incarcerated. Failure to make bond reflects nothing but an economic circumstance. It has no bearing whatsoever on guilt or innocence. It should not [be] considered by you in any way or even discussed by you." Without a factual basis to support appellant's argument, we decline to hold that the trial court erred in admitting the recording of the call between appellant and Payton.

III.

Appellant argues that the trial court erred in admitting three videos downloaded from his cell phone because the videos showed inadmissible other crimes evidence – that he was in possession of drugs and currency at some undetermined earlier time. Specifically, he argues that: 1) the videos were irrelevant because motive is not an element of murder; 2) the trial court failed to make a "specific determination" that he participated in the alleged illegal acts by clear and convincing evidence; and 3) the trial court abused its discretion in concluding that the probative value of the video evidence substantially outweighed the danger of unfair prejudice.

Evidence of prior bad acts is generally not admissible at trial "to prove that [the defendant] is guilty of the offense for which he is on trial." *State v. Faulkner*, 314 Md. 630, 633 (1989) (quotation marks and citation omitted). This is because prior bad acts evidence "may tend to confuse the jurors, predispose them to a belief in the defendant's guilt, or prejudice their minds against the defendant." *Id.* (citations omitted). "Evidence of other

crimes may be admitted, however, if it is substantially relevant to some contested issue in the case and if it is not offered to prove the defendant's guilt based on propensity to commit crime or his character as a criminal." *Id.* at 634 (citations omitted). Md. Rule 5-404 (b) provides a list of some of the recognized exceptions of the other crimes evidence rule:

> Evidence of other crimes, wrongs, or 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, or absence of mistake or accident.

We have recognized that the exceptions listed in the Rule are not exhaustive and that there is inevitably overlap. *Page v. State*, 222 Md. App. 648, 663 ("The label we put on an exception, therefore, is not that important, just so long as the evidence of 'other crimes' possesses a special or heightened relevance and has the inculpatory potential to prove something other than that the defendant was a 'bad man.'") (quotation marks and citation omitted), *cert. denied*, 445 Md. 6 (2015).

For "other crimes" evidence to be admissible, the trial court must conduct a threefold determination. First, the trial court must find the evidence "has special relevance, *i.e.*[,] is substantially relevant to some contested issue in the case and is not offered simply to prove criminal character[.]" *Harris v. State*, 324 Md. 490, 500 (1991). *See also Page*, 222 Md. App. at 661. This is a legal determination and does not involve any exercise of discretion. *Faulkner*, 314 Md. at 634 (citations omitted). Second, the trial court must determine that the accused's involvement in the other crimes is established by clear and convincing

evidence. We review the trial court's determination applying the clearly erroneous standard. *Faulkner*, 314 Md. at 634-35 (citations omitted). Third, and lastly, the trial court must weigh the necessity for and probative value of the evidence against its "potential for unfair prejudice[.]" *Harris*, 324 Md. at 500. *See also Page*, 222 Md. App. at 661. This part of the analysis we review for abuse of discretion. *Faulkner*, 314 Md. at 635 (citations omitted). Unfair prejudice involves more than damage to a party's case. *Weiner v. State*, 55 Md. App. 548, 555 (1983), *aff'd*, 302 Md. 550 (1985). Rather, it means "an undue tendency to persuade the jury to decide the case on an improper basis, usually an emotional one." *Id.*

Prior to admission of the videos that showed appellant with cash and Molly, defense counsel moved to preclude the State from using the videos, arguing that the videos had no probative value and were "totally prejudicial." The State countered that the videos showed that appellant was a drug dealer and the motive for the shooting was a "Molly deal going wrong." After hearing the parties' arguments, the trial court ruled that the videos were admissible "other crimes" evidence under Md. Rule 5-404(b), stating:

> It is not admissible to show conformity, when it can be admissible under those exceptions and I will be glad to give the jury whatever limiting instruction you want but I really do think they are admissible.
>
> I think the probative value of that evidence far outweighs any prejudicial value. If there is some residual prejudicial value it can be cured by telling the jury they can consider that only for the limited purpose of whatever you want.

The trial court ruled, however, that the sound portion of the videos should not be played before the jury.

The three videos were then played for the jury during the direct examination of one of the detectives involved in the investigation. None of the videos were longer than 30 seconds, and they were played without sound. In the first video, appellant is seen with a large amount of cash placed in piles on the floor. The second video shows appellant with a baggie of "wadded" cash. The third video shows appellant with a large baggie of what the parties stipulated was Molly.

Applying the three-prong test of *Faulkner*, *supra*, we are persuaded that the trial court did not err in admitting the videos. First, the videos had special relevance. Criminal agency and identity were contested issues in this case, and we have recognized that evidence relevant to establish motive and intent may also be relevant to establish identity. *Page*, 222 Md. App. at 663 (and cases cited therein). Here, the videos showing appellant in possession of a large sum of cash and Molly demonstrated appellant's motive and intent to commit the shooting in this case. *See Johnson v. State*, 9 Md. App. 327, 333 (1970) ("Any fact which supplies a motive for the crime . . . is admissible.") (citation omitted), *cert. denied*, 258 Md. 728 (1970).

Second, appellant's involvement in possessing the money and drugs was shown by clear and convincing evidence. There was no dispute that appellant was the person in the videos, and the State introduced evidence that appellant's phone from which the videos were

downloaded had only been active for around six months prior to the shooting. Although the trial court did not spell out this part of its reasoning, the court specifically stated that it was admitting the video as other crimes evidence under Rule 5-404(b). We are mindful that a trial court is not required "to spell out in words every thought and step of logic" taken to reach its conclusion. *Lee-Bloem v. State*, 183 Md. App. 376, 386 (2008) (quotation marks and citation omitted). This is because judges are presumed to know the law and apply it correctly. *Medley v. State*, 386 Md. 3, 7 (2005) (quotations and citations omitted); *see also Dickens v. State*, 175 Md. App. 231, 241 (2007).

Lastly, we discern no abuse of discretion by the trial court in admitting the videos. Certainly the evidence was prejudicial, as is most evidence introduced against an accused, but we cannot conclude that the trial court abused its discretion in ruling that it was not so unfairly prejudicial to preclude its admission. Evidence that the murder was motivated by a drug dispute was already before the jury, and evidence that appellant was in possession of large sums of cash and Molly before the murder was relevant to show motive and identity. Under the circumstances, we perceive no error in the admission of the videos.

IV.

Lastly, appellant argues that the trial court should have granted his new trial motion. Appellant alleged two grounds for a new trial: 1) a *Brady* violation based on contradictory testimony about how the police came to seize the handgun magazine from appellant's pocket, and 2) the trial court did not include in its first-degree murder jury instructions an

instruction on the element of malice. The State counters that appellant has failed to preserve his argument for our review, but even if preserved, it lacks merit. We shall first set forth the background for the alleged *Brady* violation to provide context for our analysis.

Lieutenant Hampson testified, both at the suppression hearing and at appellant's trial, that while in Sanders' apartment: appellant consented to the lieutenant searching his person for weapons; that just prior to the search, appellant disclosed that he had something in his pocket; and, that pursuant to the pat-down, the lieutenant removed a handgun magazine from appellant's pocket. Detective Jesse Stewart, one of the responding officers to the apartment house, testified that he was initially stationed at the rear of the apartment but that later he went inside the apartment. When questioned on cross-examination if he remembered patting down appellant inside the apartment, the detective twice testified, "I don't remember that[.]" Counsel asked, "So you're not saying it didn't happen. You're just saying you can't remember?" Detective Stewart replied, "I'm just saying I can't remember." When pressed again, "Weren't you the one who actually recovered the magazine out of the jeans[?]" he replied, "Oh, yeah." When questioned on redirect examination by the State, Detective Stewart said, "I think I was the one in the bathroom who recovered [the magazine]." Appellant did not object to the testimony or request a mistrial.

As related above, appellant was ultimately convicted of first-degree murder and handgun crimes relating to the shooting death of the victim. A little more than two months

after he was convicted, defense counsel filed a motion for a new trial under Md. Rule 4-331. He did not specify which subsection. A week later, a hearing was held on his motion.

In his written motion and at the motions hearing, defense counsel alleged two grounds for a new trial. First, Detective Stewart's testimony suggested that appellant was searched without his consent, making the search illegal and the magazine subject to suppression. Defense counsel argued that the testimony should be imputed to the State and the State's failure to disclose the detective's testimony prior to the suppression hearing constituted a *Brady* violation. Defense counsel argued that the violation was prejudicial because had the illegally recovered magazine been suppressed, there would have been no connection between appellant and the handgun recovered from Payton's bedroom closet. Second, defense counsel argued that the trial court erred in its jury instructions for first-degree murder because it did not mention malice, an element of the crime. Defense counsel admitted that he did not object to the jury instruction given by the court.

After hearing the parties' arguments, the motions court ruled on the *Brady* contention as follows:

> As I recollected, there was no deliberate withholding of any Brady material. There was no deliberate coming forth with evidence that would have mandated a pre-trial suppression hearing.
>
> That type of thing happens in trials, particularly with skillful attorneys. I think [defense counsel] did – I wouldn't use the words led him down the path, but you did a very effective job of getting him to say something that was different from what the others had said.

As to the first-degree murder jury instruction, the trial court ruled:

> [I]t is 100 percent correct that we always use the terms malice aforethought as being an essential ingredient in first degree murder. However, we tell the jury what malice aforethought means by telling them that the killing has to be willful, deliberate, and premeditated. That's what malice means and that's what we tell them, that first degree murder is the intent to kill another person with willfulness, deliberation, and premeditation.
>
> So while the word "malice" is not used, that's what malice is, willfulness, deliberation, and premeditation.

The court then denied the motion.

A. Md. Rule 4-331

Appellant is not entitled to the remedy of a new trial under Md. Rule 4-331. That Rule grants relief by way of a new trial "on three progressively narrower sets of grounds but over the course of three progressively longer time periods." *Isley v. State*, 129 Md. App. 611, 623 (2000), *overruled on other grounds*, *Merritt v. State*, 367 Md. 17, 24 (2001). The Rule provides, in pertinent part:

> (a) **Within ten days of verdict.** On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial.
>
> (b) **Revisory power.** (1) Generally. The court has revisory power and control over the judgment to set aside an unjust or improper verdict and grant a new trial:
>
> * * *
>
> (B) in the circuit courts, on motion filed within 90 days after its imposition of sentence.

> Thereafter, the court has revisory power and control over the judgment in case of fraud, mistake, or irregularity.
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> * * *
>
> (c) **Newly discovered evidence.** The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule:
>
> > (1) on motion filed within one year after the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment or a belated appeal permitted as post conviction relief[.]

(Emphasis added).

Appellant does not specify which of the above subsections applies. Appellant quotes subsection (a) at one point in his brief, but clearly that subsection does not apply here. Appellant filed his motion 10 weeks after the verdict, not within the ten days as required by the Rule. Subsection (c) does not apply, as appellant has never argued (below or on appeal) that the detective's testimony and/or the trial court's jury instruction constituted newly discovered evidence that could not have been discovered by due diligence within ten days after the verdict.

Rule 4-331(b) is also inapplicable. That subsection is generally limited to errors that occur "on the face of the record (the pleadings, the form of the verdict) and not with the evidence or the trial proceedings[.]" *Ramirez v. State*, 178 Md. App. 257, 280 (2008)

(quotation marks and citation omitted), *cert. denied*, 410 Md. 561 (2009). *See also Isley*, 129 Md. App. at 624-29 (discussing in detail the limited concerns under which a person may bring a new trial motion under Md. Rule 4-331(b)). *But see Washington v. State*, 191 Md. App. 48, 123 (2010) (noting that we have sometimes considered appeals of a motion court's denial of a motion for new trial based on trial error), *cert. denied*, 415 Md. 43 (2010).

Clearly, appellant's two grounds for a new trial concern the trial proceedings and do not appear on the "face of the record." Nor can appellant rely on the court's power to revise a judgment in case of "fraud, mistake, or irregularity." The word "mistake" has "uniformly been interpreted to mean jurisdictional error only." *Ramirez*, 178 Md. App. at 281 (quotation marks and citations omitted). "Irregularity" generally means "irregularity of process or procedure." *Id*. (quotation marks and citation omitted). Appellant does not allege that the State deliberately withheld knowledge of the detective's contradictory testimony. *Cf. White v. State*, 419 Md. 265, 279 (2011) (suggesting that fraud requires a deliberate and knowing concealment).

Even if appellant's arguments were properly brought under Rule 4-331(b), however, we would have found appellant's new trial arguments without merit. On appeal, we review a motion court's order denying a motion for a new trial for abuse of discretion. *Cooley v. State*, 385 Md. 165, 175 (2005). An abuse of discretion occurs where "no reasonable person would take the view adopted by the [trial] court." *Fontaine v. State*, 134 Md. App. 275, 288 (quotation marks and citations omitted) (brackets in original), *cert. denied*, 362 Md. 188

(2000). "Thus, where a trial court's ruling is reasonable, even if we believe it might have gone the other way, we will not disturb it on appeal." *Id*. We have also stated that "the breadth of a trial [court's] discretion to grant or deny a new trial is not fixed and immutable[.]" *Mack v. State*, 166 Md. App. 670, 684 (quotation marks and citation omitted), *cert. denied*, 392 Md. 725 (2006). Such discretion "will expand or contract depending upon the nature of the factors being considered, and the extent to which its exercise depends upon the opportunity the trial [court] had to feel the pulse of the trial, and to rely on [its] own impressions in determining questions of fairness and justice." *Id*. (quotation marks and citations omitted). "Because so much depends on the inherent 'sense' of justice of the trial judge, the only judicial figure who had his thumb on the actual pulse of the trial, the judge's exercise of discretion in evaluating credibility [of the evidence] is indispensable." *Jackson v. State*, 164 Md.App. 679, 713 (2005), *cert. denied*, 390 Md. 501 (2006).

B. *Brady* contention

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the United States Supreme Court held that "the suppression by the [State] of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the [State]." The withholding of evidence is material if there is a reasonable probability that the disclosure of the suppressed evidence would have led to a different outcome at trial. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)

(citation omitted). *See also Strickler v. Greene*, 527 U.S. 263, 281 (1999) ("[S]trictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.").

There are numerous cases that hold that evidence disclosed before the close of trial is not considered suppressed as that term is used in *Brady*. *Williams v. State*, 416 Md. 670, 691 (2010) (cases cited therein). *See also United States v. Agurs*, 427 U.S. 97, 103 (1976) (stating that a *Brady* violation involves the discovery, *after* trial, of information that was known to the State but unknown to the defense). Thus, regardless of whether the State was aware prior to trial of the lieutenant's and officer's contradictory version of events as to how the police recovered the magazine from appellant's pocket, appellant was made aware of the contradiction during trial. Accordingly, there was no *Brady* violation.

Moreover, even if the detective's testimony could be considered a *Brady* violation and the magazine should have been suppressed, appellant failed to establish that he was prejudiced by the admission of the magazine. Appellant argues he was prejudiced because if the magazine had been excluded from evidence, "there would have been no direct connection" between himself and the murder weapon recovered from Payton's bedroom. Appellant is incorrect, for there was ample evidence connecting appellant to the murder weapon. Payton testified that just before the police arrived, appellant had the Glock at the apartment, that he had tried to give it to her, and that when she gave it back to him he "put

it up" in the closet. Additionally, the State introduced evidence that appellant called Payton shortly after his arrest and told her to throw the gun away, and that he had been unable to throw the gun out the back window when the police came to the apartment because the house was surrounded. Under the circumstances presented, even if appellant's new trial motion had been proper under Rule 4-331(b), we are persuaded that the trial court did not abuse its discretion in denying appellant's motion.

C. Jury instruction

Lastly, appellant argues that the trial court erred because it erroneously instructed the jury on first-degree murder without mentioning or explaining the element of malice. The State disagrees, as do we.

Appellant admits, as he must, that the trial court instructed the jury on first-degree murder consistent with Md. Pattern Jury Instruction - Cr.4:17 (first-degree murder), which does not mention the word malice. Before the Court of Appeals's approval of the Md. Pattern Jury Instructions in 1990, most appellate opinions that discussed the law of first-degree murder described malice as an indispensable element of that crime. However, in 1990, malice was omitted from the pattern jury instructions, apparently in recognition of the inherent confusion of the use of that word in the instruction. *See* Comment to MPJI-Cr 4:17. In *Bruce v. State*, 318 Md. 706, 732 (1990), the Court of Appeals recognized that change in the pattern jury instruction and held that malice was not required to be used as part

of a jury instruction on first-degree murder, especially where justification, excuse or mitigation are not generated by the evidence.

Without some change in the law, of which appellant has not informed us, we decline to overrule the Court of Appeals decision in *Bruce*. We further note that we encourage the use of the pattern jury instructions, *Sydnor v. State*, 133 Md. App. 173, 184 (2000), *aff'd*, 365 Md. 205 (2001), *cert. denied*, 534 U.S. 1090 (2002), and we have upheld in other cases the same pattern jury instruction used here. *See Pinkney v. State*, 151 Md. App. 311, 331-32, *cert. denied*, 377 Md. 276 (2003) and *Willey v. State*, 328 Md. 126, 131 (1992). Accordingly, we find no abuse of discretion in declining to grant appellant's motion for new trial on grounds that the trial court erred in not including the word malice in its jury instructions on first-degree murder.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.