Circuit Court for Baltimore City
Case No. 113294009

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2720

September Term, 2015

RODRIGUEZ PURNELL

v.

STATE OF MARYLAND

Arthur,
Shaw Geter,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: July 3, 2017

After his first trial ended in a mistrial because of a hung jury, Rodriguez Purnell was convicted of first-degree murder, use of a handgun in the commission of a crime of violence, and possession of a firearm by a convicted felon. The Circuit Court for Baltimore City sentenced Purnell to life imprisonment. He took this timely appeal. For the reasons that follow, we shall affirm the judgments.

FACTUAL AND PROCEDURAL HISTORY

At about 11:00 a.m. on the morning of Sunday, March 17, 2013, Terrence "T.J." Rheubottom was shot four times, from behind, while sitting in a car in the 1800 block of Ruxton Avenue in Baltimore City. He died.

Moments after the fatal shooting, a witness, later identified as Jill Jackson, placed a 911 call. Ms. Jackson described the gunman, who was fleeing from the crime scene, as a "young," "tall black guy with a black leather jacket on, black jeans[,]" a "black hat," and "white tennis shoes" with green on the bottom.

Approximately 20 minutes later, Ms. Jackson called 911 a second time to say that her daughter Kendra had said that the shooter's "name is Piper" and that he lives "on the corner of Bentalou" Street, which is one block east of where the shooting occurred. In both 911 calls, Ms. Jackson stated that she wanted to remain anonymous and did not want the police to come to her house.

In part because of the information from the 911 calls, the police began to suspect that Purnell, whose nickname is "Piper" and who lived on North Bentalou Street, was the gunman.

On April 4, 2013, police executed a warrant for an unrelated crime on the house of Davon "Day-Day" Johnson, who was seen leaving Purnell's house shortly after the murder. In a recorded statement that he gave while he was in custody, Johnson told the police that Purnell was the shooter.

On the night before the shooting, Johnson said, T.J., the victim, had pulled a gun on Purnell. Purnell "was mad about it." Purnell came to Johnson's house, told Johnson what happened, and said that "he was to going to hurt" or "kill" T.J. The next day, Johnson said, Purnell was "still mad." "[H]e said he was going to get him." About "an hour" after "T.J. got wacked," Purnell told Johnson that he "did it" and that "the gun jammed," so he "couldn't get all the . . . bullets out." At another point, Johnson quoted Purnell as saying, "I tried to empty that bitch, but it jammed on me."

Johnson proceeded to identify Purnell in a photographic array. On the back of the form, Johnson wrote: "He was (Piper) saying that TJ pulled a gun out on him and he said he was going to get him meaning killing him and the next day in the morning he told me he killed him."

In September 2013, Ursula Dickson, also known as Latonya Harris, told the police that she had seen Purnell shoot T.J. Rheubottom. Dickson also identified Purnell in a photo array. On the back of the form, she wrote: "I picked this photo because I know for sure that this is the person I saw shoot T.J[.] I know the shooter as Piper[.]"

The police obtained a search warrant for Purnell's home. Inside his bedroom they found "a black leather jacket and white sneakers with green on the bottom," as described in the 911 call. Purnell was arrested shortly thereafter.

While he was in jail awaiting trial, Purnell made a number of recorded telephone calls.

In a call with an unknown woman on April 23, 2014, Purnell repeatedly called "Day-Day" [i.e. Johnson] "a bitch." The woman responded: "I kind of figured that from the story he told me." The conversation continued:

> PURNELL: . . . yeah [Day-Day] a bitch, [he] all in my paperwork.
>
> Female: I heard.
>
> PURNELL: Bitch ass . . . .
>
> Female: He in your paperwork though? That crazy.
>
> PURNELL: [Day-Day]'s telling. . . .
>
> * * * *
>
> PURNELL: He making statements and all that shit man.
>
> Female: He is?
>
> PURNELL: Oh yea, [he]'s telling on me.
>
> Female: Oh my goodness.
>
> PURNELL: Oh yeah [his] shit all in my black and white. . . .[1]
>
> Female: Mm mm mm, that was your man.
>
> * * * *
>
> PURNELL: Yeah he's all in my shit . . . . It's cause of me that bitch ass is still breathing. I had to save his bitch ass life so many times . . . .

[1] Purnell's mention of his "black and white" is an apparent reference to documents disclosed in discovery.

On April 30, 2014, Purnell called "Big Shorty," to whom he had written a letter, to emphasize that Big Shorty had to "hop on that shit ASAP." Big Shorty said he was "already on top of it," but said he "ain't seen him yet." Purnell responded, "Yeah, you see . . . Flip or LJ walk through . . . ?" Later in the conversation, Big Shorty said, "I ain't really have no, I ain't really be having no rats for real you feel me, yo." Purnell ended the conversation by saying, "just make sure you take care of that shit for me right. . . . Make sure you take care of all that shit for me . . . ."

On May 5, 2014, Purnell called an unidentified man (not Big Shorty):

> PURNELL: . . . you gotta understand something right, you gotta understand something right. Yo, I go to court next month yo, gotta take care of that shit for me . . . . I don't really got time to be like playing around man, I gotta go to court next month man.
>
> Male: Yeah, but listen, this is what you telling me. You're saying, you say, you say Clo right?
>
> PURNELL: Yeah.
>
> Male: And then you say Day-Day right?
>
> PURNELL: Yeah.
>
> Male: Alright well that's what I'm saying, you feel me? Like the Clo situation, Clo's locked up so I can't get in contact with Clo. And Yo? You feel me?
>
> PURNELL: No, see the Clo situation, that all you gotta do, you gotta get, I just wrote you a letter . . . you going everything going to be in the letter. I just sent that shit out last night, yo.
>
> Male: Alright.
>
> PURNELL: Holler at LJ man. LJ know where [inaudible] at man. You gotta get to Flip man. . . .

* * * *

Yeah yo like, they go to court next month . . . man, so. . . I need that shit took care of like ASAP man like. Yeah. . . .

* * * *

PURNELL: Man, this shit ain't looking too good . . . I ain't even gonna lie to you, this shit ugly. . . .

On June 25, 2014, Purnell placed a call to Big Shorty, but the call was answered by someone named Mark. In the call Purnell lamented, "Motherfucker that . . . Day-Day man terrible[.]" The person on the other end replied, "Man don't even start on [him] man (inaudible) I'm just waitin, you feel me?"

On July 9, 2014, Purnell called an unidentified woman. He complained to her that "Day-Day" was "try[ing] to send [him] to jail . . . for the rest of [his] life." When the woman expressed disbelief, Purnell told her, "That shit in black and white." The woman said to Purnell that Johnson was "probably down there sitting on the steps," and Purnell directed her to go down and ask him "what he gonna do." She did not find Johnson, but she handed the phone to another man who expressed shock that Johnson would testify against Purnell:

PURNELL: . . . [T]hat motherfucker, that . . . Day-Day trying to send me to jail man.

Male: Who?

PURNELL: . . . [T]hat motherfucker, that . . . Day-Day trying to send me to jail man.

Male: Who?

PURNELL: Day-Day.

Male: Fuck outta here.

PURNELL: Man that shit, I'm not lying, [he's] all in my black and white man.

* * * *

Male: And you seen that with your eyes?

PURNELL: Man listen, man this shit . . . my lawyer gave me . . . this shit in black [and] white man this, yeah, this ain't shit nobody had said this shit the lawyer gave me man. This shit [is Johnson's] statements . . . .

Male: If it's true though don't he got to go up there though?

PURNELL: Yeah he gotta go up there that's why I was trying to holler at him, what the fuck you gonna do yo you gonna try to send me to jail for the rest of my life or what? Man that shit, I'm not lying, [he's] all in my black and white man.

* * * *

Male: . . . [B]ut why the fuck he going up?

PURNELL: Man that's the same thing I'm trying to figure out . . . .

Male: That shit crazy yo, that man talking about, that man he talking about how much he want you to come home, that crazy.

* * * *

PURNELL: I'm a send that shit uptown . . . you will see that for yourself, yeah you gonna see that shit for yourself.

On July 14, 2014, Purnell spoke to Johnson. He warned Johnson, "[W]hen I go back to the courtroom, make sure you don't be in that courtroom man. . . . I'm just telling you man, when I go back you gonna know, them people going to tell you when I go back man, you feel me[?]" Purnell made sure that Johnson understood his message:

> So when I go back man just don't be in that courtroom man, you know it's simple because I got that shit in black and white . . . So all that shit you acting like you don't know what's going on, you can fool them . . . man but I got that shit right here man. Just don't come in that courtroom . . . , that's all I'm saying man I mean.

At Purnell's first trial, which took place in August 2014, Day-Day Johnson appeared only after having been picked up on a bench warrant. On the stand, Johnson disavowed his recorded statements and denied that Purnell had called him from jail. The State introduced his recorded statements and played the recording of the call that Purnell made to him from jail.

Purnell's first trial ended in a hung jury, which resulted in a mistrial. Between the time of the first trial and the trial that is the subject of this appeal, Johnson was murdered.

At the retrial, the State played Johnson's prior testimony, which included the recording of his interview with the police. After finding that Ursula Dickson (a.k.a. Latonya Harris) was feigning memory loss on the witness stand, the court allowed the State to admit her statement that she saw Purnell shoot the victim. *See* Md. Rule 5-802.1(a). The State called Ms. Jackson to testify regarding the two 911 calls she made, which were admitted into evidence over defense counsel's objection. Over objection, the State also introduced the recorded jail calls.

The jury convicted Purnell of first-degree murder, use of a handgun in the commission of a crime of violence, and possession of a firearm by a convicted felon.

QUESTIONS PRESENTED

Purnell presents three questions for review, which we quote:

1. Did the trial court commit clear error when it allowed testimonial hearsay in lieu of the declarant, in violation of Appellant's Sixth Amendment Right to Confrontation?

2. Did the trial court abuse its discretion when it admitted jail calls to be played in the retrial?

3. Did the court abuse its discretion in allowing a sleeping juror to continue their [sic] duties?

For the reasons discussed below, we answer all questions in the negative. Consequently, we shall affirm the convictions.

DISCUSSION

I. Ms. Jackson's Second 911 Call

During a bench conference on the first day of trial, the parties discussed the admissibility of Ms. Jackson's second 911 call, in which she said that her daughter Kendra had said that the shooter's name was Piper and that he lived on the corner of Bentalou Street. The following colloquy occurred:

> [DEFENSE COUNSEL]: Now, Your Honor, also, there's a number of 911 calls and, I guess, [the judge in the first trial] basically ruled on their admissibility as well. However, one concern I need to put on the record, and I don't know what exactly [his] reasoning was is it involves a caller, who I think will be called as a witness, named Jill Jackson. She called --
>
> THE COURT: Jill Jackson?
>
> [DEFENSE COUNSEL]: Jill Jackson. She places a call where she gives a generalized description, as a number of people do, of the person running away from the scene. And later -- she says it's 20 minutes later. It might not be that exact frame of time.
>
> But this is reflected on 911 calls, she calls back and claimed to be able to identify the shooter, which is based, it turns out, on strictly hearsay and speculative and suppositional information from her daughter, who

wasn't actually observing anything, but acting as a young person sometimes will, hearing a description says, oh, that sounds like Piper. . . .

[DEFENSE COUNSEL]: So applying the analysis from the Langley case[2] that's used with these 911 calls, I would say that, first of all, you can argue that the first call meets the Langley factors. It's not really testimonial present sense impression. However, when we get to the later one, it's no longer present sense impression because the original incident has passed.

The lady is calling specifically as a follow-up and she's acting on a second level of hearsay information now, again, through the substantive analysis, gleaned from her daughter, and it's not even something that in itself carries any indicia of reliability because a daughter is just . . . essentially reacting.

THE COURT: Okay. Give me one second. How many 911 calls are there in total that you were planning on using?

[STATE]: There's four tracks we're playing in total. I'm not sure how many --

THE COURT: Four, all for M[s]. Jackson?

[STATE]: No.

THE COURT: Oh.

[STATE]: There's several from other individuals and several for M[s]. Jackson, but this was already litigated in the first one.

THE COURT: That was my next question.

[STATE]: The same arguments that were made by [defense counsel in the first trial] and made by [defense counsel in this trial], the Court heard these arguments about hearsay and determined that they -- because 911

[2] Counsel was referring to *Langley v. State*, 421 Md. 560 (2011), which found no Confrontation Clause violation in the admission of 911 calls made by a person who did not testify at trial. The Court reasoned that because the caller made the calls during an ongoing emergency, they were not testimonial hearsay, which is inadmissible under the Confrontation Clause. *Id.* at 577-80.

tapes are non-testimonial, Davis v. Washington[3] supports that, they come in.

THE COURT: Okay. So any change that -- anything different as far as that 911 call which would give me a reason to reconsider [the judge in the first trial's] ruling?

[DEFENSE COUNSEL]: Your Honor, I would say that while I respect [the judge in the first trial], and I know he certainly entertains these motions with particularity, I disagreed with the original ruling for the reasons that I put on the record. And if my argument is --

THE COURT: That's not a basis to review it though. He had very competent counsel. [Defense counsel in the first trial] is very competent. He had a very competent judge. The ruling was made. There's no change of circumstance so far as that issue is concerned, so the Court is not going to entertain that motion.

[DEFENSE COUNSEL]: Okay. Once again, Your Honor, because I don't think this strictly is a law of the case situation, and that it could be reconsidered even just on a fairly nuanced legal reading, I would ask the Court to entertain a continuing objection to the introduction of that particular 911 call. I'm referring not to Ms. Jackson's first call, but to the follow-up call in which the name of "Piper" is introduced.

THE COURT: Okay. As stated, since it was already litigated [at the first trial], and Mr. Purnell had counsel at that trial, the Court is not going to re-entertain that motion.

The next day, defense counsel asked the court and the State whether they had planned to begin testimony with the 911 calls. The State responded that it was. The following colloquy ensued:

[3] In *Davis v. Washington*, 547 U.S. 813 (2006), the Supreme Court held that the Confrontation Clause did not prohibit the introduction of hearsay statements in a 911 call in which the caller was requesting assistance. The Court reasoned that those statements were not "testimonial," within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004).

[DEFENSE COUNSEL]: Okay. I would like to note a continuing objection specifically to the segment of the calls in which Ms. Jackson is placing a followup call where she's gleaned information from Kendra.

And as I incorporated it in my prior argument about how that brings in another level of hearsay.

THE COURT: And this was something that was argued [in the first trial], correct?

[DEFENSE COUNSEL]: Yes.

[THE COURT]: Objection is noted.

The State played audio recordings of Ms. Jackson's two 911 calls. The transcript of the second 911 call reads, in pertinent part, as follows:

911: 911 operator 1002 what's the address of the emergency?

[MS. JACKSON]: Well we don't need an address, the person has been killed. I'm calling because I just called there about 20 minutes [ago] and I gave you guys I, I gave you guys a description. My daughter says his name is what Kendra. What's his name? His name they call him Piper.

911: Okay and where do you want the police to come to?

[MS. JACKSON]: I don't want the police to come to my house period because I'm anonymous.

911: Okay.

* * * *

[MS. JACKSON]: I, I called there and gave them a description.

911: Okay.

[MS. JACKSON]: Now I'm calling back with a name. My daughter said his name is Piper. They call him Piper. He lives on Bentalou.

911: Okay and you got the person who did the shooting?

[MS. JACKSON]: Yes.

911: Okay and you said Piper PIPER?

[MS. JACKSON]: Yes Piper and he and he lives in on Bentalou Street.

911: Okay does she know the address where he live at?

[MS. JACKSON]: No you don't know his address do you Kendra? No she don't know. She just they just know it's on the corner of Bentalou.

911: Okay and do you want to leave your name or number ma'am?

[MS. JACKSON]: No ma'am I'm anonymous.

911: Thank you.

During Ms. Jackson's direct examination two days later, the State asked her if she told the 911 operator the name of the person who she thought the shooter might have been. Defense counsel objected and the following colloquy occurred:

THE COURT: The tape was already played.

[DEFENSE COUNSEL]: We went through this and I just want to make the record very clear, okay? That is pure hearsay. Okay. She didn't know the name. She got it from a remark that she overheard from her daughter and that was that.

THE COURT: But it was already in the tape that was played, correct? I said, that phone call was played.

[DEFENSE COUNSEL]: I just – I want the record to be replete with my objections to this.

[STATE]: Yes, Your Honor. Just so to answer your question, yes, it was played. Again, it[']s non-testimonial. It's an ongoing emergency, which is I'm asking her what she told them in her 911 call, not what something happened outside of the 911 call.

THE COURT: Okay. Overruled.

The State played the recording of Ms. Jackson's second 911 call. Shortly after the 911 call was played, the State asked Ms. Jackson whether Kendra was the daughter she had talked about earlier; she said, yes. The State asked Ms. Jackson whether she remembered a description or name that Kendra gave her; Ms. Jackson replied, "She said, 'Piper.'" Defense counsel registered a continuing objection, which the court noted.

Purnell contends that the admission of Kendra's identification through Ms. Jackson's 911 call violated his rights under the Confrontation Clause of the Sixth Amendment and that the circuit court erroneously admitted the statements as nontestimonial statements made in the midst of an "ongoing emergency." *See generally Langley v. State*, 421 Md. 560 (2011). Purnell also contends that Kendra's statement was "hearsay within hearsay," and thus inadmissible.

The State responds that we should decline to consider Purnell's claims because there is no record upon which to consider the matter. Alternatively, the State argues that any error was harmless.[4]

A. Confrontation Clause

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses

[4] Purnell does not challenge the introduction of the 911 calls, except insofar as they contain Ms. Jackson's statement about what her daughter Kendra told her. Aside from Ms. Jackson's account of what her daughter said, there were no constraints on the State's use of her statements, even if they were deemed to be testimonial, because Ms. Jackson testified and was subject to cross-examination at trial. *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004); *Lawson v. State*, 389 Md. 570, 588-89 (2005).

against him[.]" The Supreme Court has interpreted this language to prohibit a state from introducing an out-of-court declarant's "testimonial" hearsay statements against a criminal defendant. *See generally Crawford v. Washington*, 541 U.S. 36 (2004); *State v. Norton*, 443 Md. 517 (2015); *Taylor v. State,* 226 Md. App. 317 (2016). If the statements are not testimonial, however, the Confrontation Clause is not implicated. *Davis v. Washington*, 547 U.S. 813, 821 (2006). "If the statement is deemed . . . nontestimonial, it need only conform to Maryland's rules regarding hearsay." *Marquardt v. State*, 164 Md. App. 95, 120 (2005).

Whether a statement is testimonial or non-testimonial is determined by the statement's primary purpose:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. at 822.

The Supreme Court has explained that even if 911 operators are not law enforcement officials, "they may at least be agents of law enforcement when they conduct interrogations of 911 callers." *Id.* at 823 n.2.

We review whether statements admitted at trial were admitted in violation of a defendant's rights under the Confrontation Clause without deference to the trial court's ruling. *Langley v. State*, 421 Md. at 567.

B. Hearsay

An out-of-court statement is inadmissible hearsay unless the statement falls within a recognized exception to the hearsay rule. Md. Rule 5-802. "If one or more hearsay statements are contained within another hearsay statement, each must fall within an exception to the hearsay rule in order not to be excluded by that rule." Md. Rule 5-805. A trial court "'has no discretion to admit hearsay in the absence of a provision providing for its admissibility.'" *Gordon v. State*, 431 Md. 527, 536 (2013) (quoting *Bernadyn v. State*, 390 Md. 1, 8 (2005)).

"[T]he trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review." *Gordon v. State*, 431 Md. at 538. "Accordingly, the circuit court's legal conclusions are reviewed de novo, but the trial court's factual findings will not be disturbed absent clear error." *Id.* (citation omitted).

C. Analysis

In support of its argument that we should not consider Purnell's confrontation claim, the State asserts that in the first trial the court rejected the same confrontation claim that Purnell makes in this appeal. When Purnell raised this issue at the second trial, a second judge adhered to her colleague's earlier ruling because defense counsel pointed to no change in circumstances to justify revisiting the matter. In Purnell's retrial, the court made no findings of fact or conclusions of law to explain or justify its ruling. The findings and conclusions, if any, were made during the first trial, but the transcripts from

that proceeding are not part of the record and presumably were not before the circuit court at the second trial.

According to the State, Purnell does not contend that the court abused its discretion in adhering to the evidentiary ruling from his first trial. Instead, the State says, Purnell proceeds as though the necessary findings and conclusions are available in the retrial record for our review, which they are not. As the State puts it, "[t]his Court thus has no way of knowing what evidence supports or undermines the confrontation claim." For that reason, the State maintains that Purnell's merits argument is "beyond review" and that we "should therefore decline to consider the matter further." We find the State's position unsatisfactory.

Assuming, for the sake of argument, that the relevant consideration is whether the trial judge abused her discretion in adhering to her colleague's ruling in the first trial, we find it difficult to evaluate the exercise of discretion in this case without some indication that the trial judge knew and understood why her colleague had done what he did. The need for some information about the basis for the previous ruling is particularly acute in evaluating the response to the subtle and challenging evidentiary questions at hand, which involve double-hearsay (Kendra's statement, as reported by Ms. Jackson); the need for factual findings to support the admission of Kendra's hearsay statement under an exception to the hearsay rule (e.g., findings sufficient to support the admission of her statement as an excited utterance or as a statement of present sense impression); and the further need for additional findings, mandated by Confrontation Clause analysis, about whether Kendra's hearsay statement was or was not testimonial. Defense counsel

pressed these issues on the court, but the court declined to engage with them once the State asserted that her colleague had, for some undisclosed reason, resolved them against the defense.

We agree with the State that we have "no way of knowing what evidence supports or undermines the confrontation claim." In the specific circumstances of this case, however, we disagree that Purnell bears the consequences of our inability to identify the evidence, if any, that might support the introduction of Kendra's hearsay statement despite the obstacles imposed by the hearsay rule and the Confrontation Clause. Simply put, we cannot conclude that the trial court correctly exercised its discretion in adhering to the earlier ruling without information about whether and why the trial judge had reason to believe that the earlier ruling was sound.[5]

Nonetheless, the error, if any, in admitting Kendra's statement was, in our view, harmless beyond a reasonable doubt. *See Dorsey v. State*, 276 Md. 638, 659 (1976).

First, after Ms. Jackson testified about what her daughter said, and after the jury heard the recordings of the 911 calls, the State introduced the same information, without objection, through Detective Aaron Cruz. When asked whether he learned of potential names or locations of the shooter when he reviewed the 911 calls, Detective Cruz responded:

> Yes. Also, while we were still at the crime scene, apparently, the same 911 caller called approximately 20 minutes later stating that -- we misunderstood it originally, but the way it originally sounded is that, I saw

[5] We would not reach the same conclusion if this case involved a less challenging evidentiary issue, such as a discretionary ruling about the scope of cross-examination or a routine weighing of probative value versus unfair prejudice.

> the shooter. The shooter is a person named Piper who lives on the corner of 1800 North Bentalou. But it turned out to be that her daughter provided that information.

This detective's answer recounted the key aspects of Ms. Jackson's second 911 call, in which she said that she had called 20 minutes earlier and told the operator: "My daughter said his name is Piper. They call him Piper. He lives on Bentalou. . . . on the corner of Bentalou."

"This Court and the Court of Appeals have found the erroneous admission of evidence to be harmless if evidence to the same effect was introduced, without objection, at another time during the trial." *Yates v. State*, 202 Md. App. 700, 709 (2011), *aff'd*, 429 Md. 112 (2012); *accord Robeson v. State*, 285 Md. 498, 507 (1979); *Berry v. State*, 155 Md. App. 144, 170 (2004). Alternatively, a previous objection is deemed to have been waived (or, more precisely, forfeited) "if, at another point during the trial, evidence on the same point is admitted without objection." *See DeLeon v. State*, 407 Md. 16, 31 (2008). In either event, the admission of Kendra's double-hearsay statement is not grounds for reversal.[6]

Furthermore, we are not at all convinced that Kendra's statement contributed to the guilty verdicts. Purnell complains that the admission of the statement prejudiced him

[6] It makes no difference that defense counsel had a continuing objection to the introduction of the second 911 call, in which Ms. Jackson recounted what Kendra said. "[I]f the improper line of questioning is interrupted by other testimony or evidence and is thereafter resumed, counsel must state for the record that he or she renews the continuing objection." *Hall v. State*, 119 Md. App. 377, 390 (1998). Defense counsel made the continuing objection on the day before Detective Cruz testified. The "continuing objection was severed by [an entire day of] intervening testimony and not renewed." *Choate v. State*, 214 Md. App. 118, 151 (2013).

only because it "influenced the subsequent police investigation" by focusing it on him. The harmless-error rule, however, is not concerned with the evidence or information that led to a defendant's apprehension; it is concerned with whether inadmissible evidence "'contributed to the rendition of the guilty verdict.'" *Clark v. State*, 218 Md. App. 230, 241-42 (2014) (quoting *Dionas v. State*, 436 Md. 97, 108 (2013)).

Purnell did not argue that Kendra's statement prejudiced him in the eyes of the jury or influenced the jury's guilty verdict in any way. But "[l]ooking to the other evidence on the record, we are confident that the statement would not have persuaded the jury to render a guilty verdict when it would not have otherwise done so." *Gutierrez v. State*, 423 Md. 476, 499-500 (2011).

The overall strength of the State's case against Purnell weighs heavily in favor of the conclusion that any error in the admission of the statement was harmless beyond a reasonable doubt. *See McClurkin v. State*, 222 Md. App. 461, 484-85 (2015); *Frobouck v. State*, 212 Md. App. 262, 284-85 (2013). On the day before the killing, Purnell told Day-Day Johnson that he intended to kill the victim; just after the killing, Purnell confessed to Johnson that he had murdered the victim; Ursula Dickson (a.k.a. Latonya Harris) saw Purnell shoot the victim; the police recovered a black leather jacket and white sneakers with green on the bottom from Purnell's room, the same attire that Ms. Jackson told the 911 operator that the shooter was wearing when she saw him running from the scene in broad daylight on the morning of the murder; and Purnell flagrantly displayed his consciousness of his guilt in the recorded jail calls, in which he tried to deter Johnson from testifying. In evaluating the demeanor of the witnesses, the jury could have found

still more evidence of Purnell's guilt in Johnson's ineffective disavowal of his recorded statements and in Dickson's (a.k.a. Harris's) feigned failure of recollection of the murder that, she previously said, she had witnessed.

Accordingly, we do not hesitate in concluding that the admission of Kendra's statement was harmless beyond a reasonable doubt. *See Dorsey v. State*, 276 Md. at 659; *accord Yates v. State*, 429 Md. at 123-24; *Potts v. State*, 231 Md. App. 398, 409-10 (2016); *McClurkin v. State*, 222 Md. App. at 484-85; *Webster v. State*, 221 Md. App. 100, 119-20 (2015); *Frobouck v. State*, 212 Md. App. at 283-85.

II. Purnell's Jail Calls

At trial, Purnell moved to exclude recordings of his jail calls, in which he seemed intent on discouraging Johnson from attending his trial.

Although the challenged recordings had been admitted at his first trial, Purnell argued that Johnson's murder constituted a change of circumstance, such that the risk of unfair prejudice substantially outweighed the calls' probative value. In deciding that it would admit the recordings, the court disagreed.

On appeal, Purnell principally argues that the State offered these calls to show that he intimidated Johnson from testifying and may have been involved in Johnson's murder between the first trial and the retrial. Purnell maintains that the court abused its discretion in admitting these calls because it merely deferred to the rulings of the court in the first trial, without taking into account the new circumstance of Johnson's murder. He

argues that the prejudicial nature of these calls outweighed their probative value. We reject Purnell's contentions.[7]

Evidence is relevant if it tends 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. A court may admit relevant evidence, but it has no discretion to admit evidence that is irrelevant. *Smith v. State*, 218 Md. App. 689, 704 (2014) (citing Md. Rule 5-402). A ruling that evidence is legally relevant is a conclusion of law, which we review de novo. *See id.*

Even if evidence is relevant, however, a court may exclude it "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. We review that decision for abuse of discretion. *See*, *e.g.*, *Carter v. State*, 374 Md. 693, 705 (2003).

When weighing the probative value of proffered evidence against its potentially prejudicial nature, a court abuses its discretion "where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles." *Webster v. State*, 221 Md. App. 100, 112 (2015) (citations and quotation marks omitted). For the court to have abused its discretion, "[t]he decision under consideration has to be well removed from any center mark imagined by the

[7] Although it is not entirely clear which calls (or which parts of which calls) Purnell is challenging, his trial counsel limited the objection to concerns related to Johnson.

reviewing court and beyond the fringe of what that court deems minimally acceptable." *King v. State*, 407 Md. 682, 697 (2009). The decision "will not be reversed simply because the appellate court would not have made the same ruling." *Id.*

Here, the jail calls were extremely relevant to show Purnell's consciousness of guilt. "Evidence of threats to a witness, or attempts to induce a witness not to testify . . . is generally admissible as substantive evidence of guilt when the threats or attempts can be linked to the defendant[.]" *Washington v. State*, 293 Md. 465, 468 n.1 (1982); *see also Copeland v. State*, 196 Md. App. 309, 315 (2010) ("[t]hreats are admissible because they demonstrate consciousness of guilt"); *Saunders v. State*, 28 Md. App. 455, 459 (1975) ("an attempt by an accused to suborn a witness is relevant and may be introduced as an admission by conduct, tending to show his guilt"). By capturing Purnell's own words in what his lawyer described as the "frantic" tone in which he revealed how he was "obsessed" with Johnson's testimony, the jail calls afforded powerful evidence of Purnell's consciousness of his guilt.

In arguing that the court abused its discretion in admitting the jail calls, Purnell argues that "the prejudicial nature of the jail calls outweighed their probative value." His argument misstates the relevant balancing test. Under Rule 5-403, the court does not weigh the probative value of a piece of evidence against the prejudicial effect on a party. *See Burris v. State*, 435 Md. 370, 392 (2013) (citing *Odum v. State*, 412 Md. 593, 615 (2010)). Indeed, it would be meaningless to attempt to do so, because evidence is often highly probative precisely because of its prejudicial effect on a party's case. A lawyer

would not be doing her job if she refrained from introducing evidence that was prejudicial to her adversary's case.

Under Rule 5-403, the relevant inquiry is whether the "probative value" of a piece of evidence "is *substantially* outweighed by the danger of *unfair* prejudice[.]" (Emphasis added). Here, the recorded calls were undoubtedly quite prejudicial to Purnell's case, but the court did not abuse its "broad discretion" (*Muhammad v. State*, 177 Md. App. 188, 273-74 (2007)) in concluding that the danger of *unfair* prejudice did not *substantially* outweigh their probative force.

In advocating a contrary conclusion, Purnell asserts that the court abused its discretion because Johnson's absence, coupled with the substance of the calls, permitted the jury to infer that Purnell was involved in Johnson's murder. Yet at no time was the jury informed that Johnson was dead, much less that Purnell was involved in his death. In fact, the court strictly prohibited anyone from mentioning that Johnson was dead, or the reason why Johnson failed to appear in court. For all the jury knew, Johnson had voluntarily absented himself from the trial. Accordingly, we conclude that the court did not abuse its discretion in admitting Purnell's jail calls.[8]

[8] Alternatively, Purnell argues that the trial court should have engaged in an "other crimes evidence" analysis Md. Rule 5-404(b), because, he says, the State sought to admit the calls to prove that Purnell engaged in witness intimidation. At trial, however, Purnell did not challenge admission of the calls on this basis. Therefore, he did not preserve his argument that the court should have engaged in an "other crimes evidence" analysis. Md. Rule 8-131(a); *Ware v. State*, 360 Md. 650, 675 (2000) (citing *Klauenberg v. State*, 355 Md. 528, 541-42 (1999)). The argument is an appellate afterthought.

III. Sleeping Jurors

Md. Rule 4-312(g)(3) provides that, "[a]t any time before the jury retires to consider its verdict, the trial judge may replace any jury member whom the trial judge finds to be unable or disqualified to perform jury service with an alternate." A juror's inability to remain awake during the proceedings may create a basis for disqualification. *See Hall v. State*, 223 Md. 158, 177 (1960); *Williams v. State*, 231 Md. App. 156, 198-99 (2016), *cert. dismissed*, 452 Md. 47 (2017); *Schwartz v. Johnson*, 206 Md. App. 458, 495 (2012).

To adequately support a claim for disqualification, the complaining party "is required to prove that the misconduct actually occurred and that he [or she] was prejudiced thereby." *Wright v. State*, 24 Md. App. 309, 313 (1975); *see also Williams v. State*, 231 Md. App. at 198; *Schwartz v. Johnson*, 206 Md. App. at 495.

Purnell argues that the court abused its discretion when it did not take any curative measures to ensure the attentiveness of two jurors who, he says, fell asleep during the trial. In neither instance, however, did Purnell request that the juror be disqualified. In fact, in both instances, the State – not Purnell – brought the jurors' conduct to the court's attention.

At the start of the afternoon session on the second day of trial, the State asked to approach the bench, and the following colloquy occurred:

> [STATE]: I believe the Court's already aware of this as well, but we just wanted to put on the record that Juror Number 4 appears to be continuously sleeping. I know. The Court has certainly made attempts to

try to wake him up with water and whatnot, but I just wanted to put on the record that we've noticed it.

THE COURT: Okay. So, I mean, are you prepared to get rid of him or you don't feel that --

[STATE]: Maybe not at this time, Your Honor, but we do have a lot of testimony that's going to be played on tape. It may be -- it's going to require a lot of attention and if it continues to happen, we may ask for one of the alternates instead.

[DEFENSE COUNSEL]: Your Honor, I would say -- just that he be individually voir dired rather than, you know, as an intermediate step, before he's actually dismissed or replaced.

THE COURT: What do you want me to ask him, "Have you been sleeping?"

[DEFENSE COUNSEL]: No, but ask him if there are barriers to his attention, you know. I mean, phrase it delicately, but just find out if he's really all there or not. That's just my helpful suggestion.

THE COURT: Okay.

The record does not reflect whether the court did or did not individually voir dire Juror No. 4 or take any other curative measures. Nor, however, did Purnell either object to the failure (if any) to voir dire the juror or request that the juror be removed.

In a bench conference during the fourth day of trial, the State called another sleeping juror to the court's attention:

[STATE]: Your Honor, while we're here, I actually wanted just to bring to the Court's attention. Juror No. 8 has been nodding in and out.

THE COURT: Well, I gave him -- I gave him some water.

[STATE]: Okay. I've noticed him through the trial.

THE COURT: Yeah. And I've noticed it too. That's why I sent him over a glass of water.

Defense counsel remained silent during this interaction.

On this record, Purnell has not preserved his contention that the court abused its discretion by allowing Juror No. 8 to remain on the jury. "When counsel fails to object, or request curative action, the alleged error ordinarily is waived." *Cantine v. State*, 160 Md. App. 391, 407 (2004) (citing *Hill v. State*, 355 Md. 206, 219 (1999), Md. Rule 8-131(a), and Md. Rule 4-323(c)). Here, the State expressed its concern about Juror No. 8, but defense counsel remained silent and requested no curative action. The silence may well have been strategic – the defense may not have wanted to lose Juror No. 8. In any event, because Purnell did not complain of the juror's inattentiveness let alone ask the court to replace him, he cannot do so now.

Likewise, Purnell has failed to preserve his argument that the court abused its discretion by allowing Juror No. 4 to remain on the jury without taking any curative measures. As before, the State raised the issue of the juror's attentiveness, and defense counsel did not ask the court to replace the juror. As before, counsel's approach may well have been strategic – he may have thought that Juror No. 4 was a good juror for the defense or that the juror would be replaced by an alternate who was not as good for the defense. Purnell cannot fault the trial court for failing to do something that he never asked it to do.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.