Circuit Court for Baltimore City
Case No. 123094002

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2063

September Term, 2024

TYYEA L. GEE

v.

STATE OF MARYLAND

Reed,
Kehoe, S.,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: March 6, 2026

A jury in the Circuit Court for Baltimore City found appellant, Tyyea L. Gee, guilty of murder in the first degree, conspiracy to commit murder in the first degree, and related firearms offenses. The trial court imposed a life sentence plus an additional thirty-five years' imprisonment. In this appeal, appellant presents three questions:

> 1. Did the trial judge's failure to give guidance to the jury during deliberations have a coercive effect, depriving appellant of due process and a fair trial?
>
> 2. Did the trial court abuse its discretion in instructing the jury on flight?
>
> 3. Is the evidence legally insufficient to sustain appellant's convictions of first-degree murder and conspiracy?

Because we find neither error, abuse of discretion, nor denial of due process, and because the evidence is sufficient to sustain the convictions, we shall affirm.

BACKGROUND

At the time of the crimes, appellant, his female companion, Jaquanna Smith,[1] and their family were living temporarily in the home of Larry Leas. Mr. Leas and his family lived in a first-floor apartment in the Brooklyn Homes housing project in south Baltimore.

Ms. Smith owned a pit bull named "Duke." On January 13, 2023, shortly before noon, Duke broke free from his chain and began running around the neighborhood, where he encountered another man who was walking his leashed pit bull in an alley behind Mr. Leas's apartment.[2] The two dogs attacked each other and were locked together. A crowd

[1] Sometimes she was referred to as "Rita."

[2] The dog's owner was not the murder victim.

gathered near the dogs, as the bystanders struggled to find a way to separate the dogs safely. Ultimately, the dogs were separated, and Duke had sustained a bloody wound to his neck.

Tierra Barton was the romantic partner of the victim, Ronnie Gibson, and they lived a few blocks away in the same community.[3] She was driving through the alley when the dogs became engaged with each other in front of her vehicle, forcing her to stop. She declared that if Duke had come near her, she would have shot him. Upon hearing Ms. Barton's remark, Ms. Smith became angry. Appellant approached Ms. Barton's vehicle and appeared to brandish a handgun. Ms. Barton drove away and told Mr. Gibson. Mr. Gibson rushed out of their home and drove back to 9th Street, near Mr. Leas's (and appellant's) home, with Ms. Barton as a passenger, leaving their toddler with her sister.

Upon arriving, Mr. Gibson exited the vehicle and spoke with "Mr. Jake," who operated a retail business from a white box truck, known in the neighborhood as the "Candy Bus." That bus was parked on 9th Street, two doors from Mr. Leas's home. Mr. Jake lived in the first house on the other side of 9th Street from appellant's home.

Mr. Gibson walked to the back yard of the home next door to Mr. Leas's, looking for appellant and (according to Mr. Leas) making verbal threats to the people there. Appellant reappeared, accompanied by an unidentified man (called "Light Skin" by the witnesses and detectives). Either or both appellant and "Light Skin" spoke to Mr. Gibson, declaring, "You're looking for Rita [i.e., Jaquanna Smith]. Oh, you're looking for him."

[3] Ms. Barton and Mr. Gibson had a son, who, at the time of trial, was three years old.

When Mr. Gibson saw appellant and "Light Skin" approach, he fled across 9th Street, followed by appellant and "Light Skin," both of whom were armed with handguns.[4]

Mr. Gibson went to the front door of Mr. Jake's home, where he was shot to death by appellant and "Light Skin." Police were called, and they responded to the crime scene shortly afterward.

Police detectives obtained statements from Mr. Leas and Ms. Barton. Mr. Leas identified appellant from a photographic array as one of the shooters. Ms. Barton identified Ms. Smith from a photographic array, writing: "The reason for everything!! Owner of the loose pit bull. The person who called shooter # 1 and shooter # 2 to the scene and they chased and murdered my boyfriend."

An evidence technician recovered ballistic evidence, including five spent shell casings and one live round. A firearms examiner would later opine that, upon microscopic examination of the ballistic evidence, the evidence was consistent with two firearms having been used to kill the victim. No firearm was ever recovered, and therefore, it was impossible to perform test firings. A search of appellant's home in east Baltimore (not the home where he lived temporarily with Mr. Leas at the time of the murder) on March 9, 2023, yielded a pair of "Flint Jordan 13s," which were the same type of shoe appellant was wearing on the day of the murder, as determined from surveillance camera footage.

[4] Unfortunately for Mr. Gibson, he either did not hear or ignored Ms. Barton's urgent plea to get back in their vehicle.

On April 4, 2023, an indictment was returned, charging appellant with murder in the first degree, conspiracy to commit murder in the first degree, use of a firearm in the commission of a crime of violence, and possession of a firearm after having been convicted of a disqualifying offense.[5] One year later, a four-day jury trial was held. The jury found appellant guilty of all charges.

The court sentenced appellant to life imprisonment for first-degree murder, merged the conviction for conspiracy, and imposed consecutive sentences of twenty years' imprisonment for use of a firearm in the commission of a crime of violence, and fifteen years' imprisonment for illegal possession of a regulated firearm.[6] A timely appeal was filed.

Additional facts are included where pertinent to the discussion of the issues.

DISCUSSION

I.

Before addressing appellant's first claim of error, we first set forth the factual and procedural context. Trial began on a Tuesday, and the trial court advised potential jurors that trial was anticipated to "last approximately four days[.]" Jury selection consumed the entire first day. Presentation of evidence took place the next two days and into part of Friday, and jury deliberations began at 2:40 p.m. on Friday.

[5] As of the time of trial, "Light Skin" has never been found.

[6] The first five years of each sentence for the two firearms offenses was without the possibility of parole.

At 3:01 p.m., proceedings resumed without the jury present because the jurors had sent a note to the court, inquiring why a certain witness had not been called. At that time, the court declared its intention "to let them deliberate until 4:15, 4:30, and then" have them return Monday. The court sent a written response to the jurors' note, explaining that the jury had already "received all of the evidence presented in this case." It then declared, "If the Jury has not had a question or a verdict by 4:30, more likely than not, I'm letting them go home."

At 4:27 p.m., proceedings resumed without the jury present because there was a second note, asking, "Is it possible to have a description of what each charge means?" The court proposed sending the jury a written copy of the instructions it had given but that it would wait until Monday morning to do so, and that it would send the jury home for the evening. But when the clerk left to bring the jury into the courtroom, the jury informed the court that it had reached "a unanimous verdict."

At 4:38 p.m., the jury entered the courtroom, and the court received its verdict,[7] finding appellant guilty of first-degree murder, conspiracy to commit murder, use of a firearm in the commission of a crime of violence, and unlawful possession of a firearm by

[7] Immediately before it did so, the court addressed the jurors in relevant part:

> You all can be seated. Ladies and gentlemen, good afternoon. Again, I've received your message. We were prepared to give you the instructions, but I wasn't going to give them to you until Monday morning. But before we can get them back to you all, there was a note that said that you had a unanimous verdict.

a prohibited person. The jury was polled as trial counsel requested, but he did not otherwise object to the court's actions in receiving the verdict.

Appellant contends that the trial court erred in failing to inform the jurors that they could continue deliberations the following Monday and that, as a result, the jurors rushed to judgment and returned a verdict late on Friday afternoon, in violation of his right to a fair trial. He acknowledges that trial counsel did not object to the procedures followed in responding to the juror notes or in receiving the verdict. He asserts, nonetheless, that the trial court, sua sponte, should have "inform[ed] the jurors before they began deliberations how long they would be expected to deliberate, and advise[d] them that the deliberations could be continued on Monday"; that under the circumstances, "an important question asked by the jury ['a description of what each charge means'] was not answered"; that at minimum, "when the jurors indicated that they had reached a verdict, the trial judge should have asked the jurors if they needed more time to deliberate or if they needed an answer to their question before the trial judge took the verdict"; and that the "likelihood that the jurors felt rushed to come to a verdict, and the certainty that they did so without receiving the definitions they had requested from the trial judge, compromised [his] constitutional rights to a fair trial and to due process."

The State counters that this is a case of "unpreserved squared" because, not only was the issue raised on appeal neither raised in nor decided by the trial court, but furthermore, appellant has not asked us to review for plain error. The State further asserts that appellant has failed to direct us to any decision where a trial court "was *required*, on its own initiative, to take the specific measures he identified[,]" and thus, any purported

error was not plain. On the merits of the claim, the State contends that the trial court did not abuse its discretion. Relying upon *Nash v. State*, 439 Md. 53 (2014), the State asserts that this case falls outside the "single situation" identified in that case[8] where a trial court's duty, sua sponte, to voir dire a jury mid-trial is triggered, and thus, the trial court here did not abuse its discretion. The State further asserts that, at the time when the jury indicated it had reached a verdict, "any inquiry by the court regarding the verdict and deliberations carried great risk[,]" potentially conveying to the jury the message that it should "reconsider what it had already decided."

Analysis

Maryland Rule 4-323(c) provides:

> (c) **Objections to other rulings or orders.** — For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

Maryland Rule 8-131(a) provides in relevant part:

[8] In *Nash*, 439 Md. at 84, the Court declared:

> Under the holdings of [*Dillard v. State*, 415 Md. 445 (2010),] and [*Johnson v. State*, 423 Md. 137 (2011)], when a party moves for a mistrial following an allegation of juror misconduct, but does not request *voir dire* of the jury, a trial judge must conduct *voir dire sua sponte* if he or she lacks sufficient information regarding the juror's conduct from which to determine (1) whether a presumption of prejudice attaches, or, (2) whether a mistrial motion should be denied.

> Ordinarily, an appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

Appellant acknowledges that trial counsel never objected to the trial court's actions (or inaction) in responding to the juror notes or in receiving the verdict. Under Rules 4-323(c) and 8-131(a), that failure to make a contemporary objection results in a forfeiture of his appellate claim of error.[9] *Yates v. State*, 202 Md. App. 700, 722 (2011), *aff'd*, 429 Md. 112 (2012).

In passing, we note that, had this claim been preserved, we would still conclude that the trial court did not abuse its discretion. Telling the jurors, ahead of time, how long they were expected to deliberate could have been unduly coercive, as would second-guessing the jurors after they had informed the court that they had reached a unanimous verdict, in effect asking them whether they wished to reconsider their decision. *See State v. Fennell*, 431 Md. 500, 523-24 (2013) (noting that a trial court "treads a fine line" when it inquires into a jury's deliberations and that it "must neither pressure the jury to reconsider what it had actually decided nor force the jury to turn a tentative decision into a final one" (quotation marks and citations omitted)).

[9] Appellant has not, in the alternative, asked that we review his unpreserved claim for plain error, and we decline to do so on our own. *Ray v. State*, 206 Md. App. 309, 351 (2012), *aff'd*, 435 Md. 1 (2013).

II.

Appellant contends that the trial court abused its discretion in giving a flight instruction. He asserts that there was insufficient evidence of flight to generate the instruction because "the testimony of the two eyewitnesses," Mr. Leas and Ms. Barton, did not establish that he had fled after the shooting. He further asserts that this purported instructional error was not harmless "because telling the jurors that flight may [be] considered as evidence of guilt may have influenced the jurors to convict" him.

The State counters that this claim is unpreserved because trial counsel failed to object after the court delivered its instructions. On the merits of the claim, the State contends that the flight instruction was generated by the facts. The State points to Detective Ryan Diener's testimony, while State's Exhibit 13 was broadcast to the jury, describing video footage depicting "one of the two suspects in this case after the incident, fleeing the area on foot." The State further contends that several parts of Mr. Leas's testimony supported the trial court's decision to give the flight instruction: on direct examination, he testified that, after the shooting, appellant was "trying to get out of harm's way" by "go[ing] in another direction" while "the other assailant [went] in another direction"; and during cross-examination, Mr. Leas, when asked whether appellant and the other shooter "[ran] in the same direction[,]" replied that they went "in two different directions." As a fallback position, the State asserts that, even if the flight instruction should not have been given, any error was harmless because the jury was instructed that it had to decide in the first instance whether there was evidence of flight.

Additional Facts Pertaining to the Claim

Detective Ryan Diener of the Baltimore City Police Department assisted in the investigation of the case. Through his testimony, as well as Certificates of Records of Regularly Conducted Business Activity, the State introduced into evidence four DVDs containing surveillance video collected from CitiWatch cameras and cameras operated by the Housing Authority of Baltimore City ("HABC").[10] During his direct examination, while characterizing State's Exhibit 13 (the DVD containing footage from HABC cameras), Detective Diener stated, without objection: "This camera [Camera 01] captures one of the two suspects in this case after the incident, fleeing the area on foot."

Mr. Leas, another State's witness, testified that, immediately after the shooting, appellant was "basically trying to get out of harm's way, trying to get out of harm's way[,] [s]o, he goes in another direction and the other assailant goes in another direction." Later, during cross-examination, trial counsel asked Mr. Leas what happened immediately after the shooting, and the following occurred:

> [MR. LEAS]: After that, I see Mr. Gee pick hisself up and get away from the commotion. The other assailant went the other way and I just see Mr. Gibson laying there.
>
> [TRIAL COUNSEL]: All right. You keep using the word, assailant. Now, who described this person, this other person, as the assailant?
>
> [MR. LEAS]: Light Skin, actually, Light Skin.
>
> [TRIAL COUNSEL]: Light Skin, okay. Who first used the word, assailant? Who described him as an assailant to you at first?

[10] HABC owns the Brooklyn Homes community, the apartment complex where the murder occurred.

[MR. LEAS]: Oh, no, that's the word I just be using.

[TRIAL COUNSEL]: Okay, all right. They didn't run in the same direction.

[MR. LEAS]: No.

[TRIAL COUNSEL]: They went in two different directions.

[MR. LEAS]: Yes.

After the close of all the evidence, the court convened a bench conference to address proposed jury instructions. Trial counsel objected to the State's proposed flight instruction, and the following colloquy occurred:

THE COURT: It's [3:24]. So tell me why you do not want that one to give me your argument.

[TRIAL COUNSEL]: Well, Your Honor, I think there's evidence in this particular case, you know, of there has to be -- for the flight instruction you've given, we would argue that there has to be specific evidence of that there was some sort of flight. In this particular case, simply not remaining at the scene of the crime does not give, assuming everything else in favor of the State, does not give rise to a flight instruction.

THE COURT: So running is not flight?

[TRIAL COUNSEL]: Well, there's no evidence.

THE COURT: Evidence of flight?

[TRIAL COUNSEL]: There's no evidence that there was any running. One person -- we would argue, that there's evidence of one person, which is the other, another alleged individual walking up 10th Street. There's no other indication. And it's specific there was another individual that there was any running or flight on behalf of Mr. Gee. That's what we would argue.

THE COURT: Mr. [Prosecutor]?

[PROSECUTOR]: There was testimony that they went in opposite directions, indicating that there was flight after the shooting.

THE COURT: Anything else you wish to say, Mr. --

[TRIAL COUNSEL]: Nothing in that regard, Your Honor.

THE COURT: Okay. The Court is going to get -- I think there's enough evidence to support giving the flight instruction that right after the shooting, both of them and I -- maybe it's just my memory, that I remember that there was evidence that both of them fled from the scene in opposite directions. And so I'm going to give the flight instruction.

The trial court thereafter instructed the jury in relevant part[11]:

A person's flight 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 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. If you decide there is evidence of flight, you then must decide whether this flight shows a consciousness of guilt.

[11] Compare with Maryland Pattern Jury Instruction-Criminal ("MPJI-Cr") 3:24:

Flight immediately after a crime was committed or immediately after being accused of committing a crime is not enough by itself to establish guilt. Flight under these circumstances may be motivated by a variety of factors, some of which are fully consistent with innocence. On the other hand, awareness of one's guilt of the charged crime(s) may be a motivating factor for flight under these circumstances.

You first must decide whether the defendant engaged in flight immediately after the crime was committed or immediately after being accused of the crime. If you find that the defendant engaged in such conduct, then you must decide whether he did so because he was conscious of his guilt of the charged crime(s). If you find this was the defendant's motivation, then you may consider the defendant's conduct as evidence of his guilt of the charged crime(s).

The court, while instructing the jury on the elements of use of a firearm in the commission of a crime of violence, misspoke and stated that one of the predicate crimes of violence that the State must prove is "voluntary murder." After the court had concluded giving instructions, the prosecutor and trial counsel alerted the court to its misstatement. The following then occurred:

> THE COURT: Okay. So can I say to them that if I use the term voluntary murder instead of voluntary manslaughter, my intent was voluntary manslaughter?
>
> [PROSECUTOR]: Yes, that's fine.
>
> [TRIAL COUNSEL]: Yes, Your Honor.
>
> THE COURT: That's fine? Okay. No problem. I don't even know I'm saying it. Okay. So that's the only thing with the instructions?
>
> [PROSECUTOR]: Yes.
>
> [TRIAL COUNSEL]: Yes, Your Honor.

The court and the parties next addressed several errors in the proposed verdict sheet, which were resolved to everyone's satisfaction. The court then briefly addressed the jury:

> Ladies and gentlemen, at this time, it was brought to my attention that instead of me saying voluntary manslaughter, I said voluntary murder. My intent was voluntary manslaughter. So it's a lot of words. And so I made an error. So my apologies.

Trial counsel did not object to the flight instruction.

Analysis

Preservation

Maryland Rule 4-325(f) applies to claims of instructional error and provides:

> (f) **Objection.** — No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

Although the rule requires that a party note an objection *after* the trial court has instructed the jury, it has been interpreted as allowing "substantial compliance" rather than strict compliance. *Gore v. State*, 309 Md. 203, 208 (1987). "Several conditions" must be satisfied for there to be substantial compliance with Rule 4-325(f):

> there must be an objection to the instruction; the objection must appear on the record; the objection must be accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless.

Gore, 309 Md. at 209.

Although it is better practice to renew an objection to a jury instruction after the court has given the instructions, we assume without deciding that there was substantial compliance with Rule 4-325(f) in this case. For one thing, the trial court, after hearing trial counsel's argument against giving a flight instruction, declared, unequivocally, that it would give that instruction. Moreover, the attention of both the court and counsel was consumed, immediately upon the conclusion of jury instructions, by the trial court's misstatement in giving a different, unrelated instruction and by errors in the verdict sheet.

And finally, by eschewing a hyper-technical application of the preservation rule and addressing the merits of this claim, we avoid an inevitable postconviction claim.[12]

Merits of the Claim

Maryland Rule 4-325(c) governs a trial court's duty to instruct the jury and provides:

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

Pursuant to Maryland Rule 4-325(c),

> a circuit court *must* give a requested jury instruction when three criteria are met: "(1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given."

Danshin v. State, 491 Md. 520, 532-33 (2025) (further citation omitted; emphasis added) (quoting *Rainey v. State*, 480 Md. 230, 255 (2022)). And yet, a "trial court's decision to give a jury instruction or not to give a jury instruction is reviewed for abuse of discretion." *Lewis v. State*, 263 Md. App. 631, 646 (2024) (citing *Carroll v. State*, 428 Md. 679, 689 (2012), and *Thompson v. State*, 393 Md. 291, 311 (2006)).

[12] The trial court was fully apprised of trial counsel's objection, and the prosecutor had a full opportunity to respond. Thus, there is no unfair prejudice to the State in addressing the merits of this claim.

This seeming inconsistency is resolved by recognizing the critical distinction between instructions on the applicable law and those concerning factual or evidentiary inferences:

> In a criminal jury trial, the trial court "may, and at the request of a party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." Md. Rule 4-325(c). A trial judge is required to give instructions on the law. These types of instructions "may cover such things as the burden of proof, presumption of innocence, and the elements of the crimes charged." *Harris v. State*, 458 Md. 370, 405 (2018). "However, instructions as to facts and factual inferences are normally *not* required." *Id.* (citing *Patterson v. State*, 356 Md. 677, 684 (1999)). For example, in *Harris*, we explained that a "missing witness instruction" concerned "an inference to be drawn from the evidence—or lack thereof—" and therefore, a trial court has discretion *not to give* the instruction "even if a party requests" it "and the necessary predicate for such an instruction has been established." *Id.* at 405-06 (citing *Robinson v. State*, 315 Md. 309, 319 n.7 (1989)).

Hollins v. State, 489 Md. 296, 307-08 (2024).

The flight instruction at issue here is an instruction concerning factual inferences, and thus, whether to give the instruction was discretionary. *Id.* at 308. Because, however, an exercise of discretion predicated upon an error of law is an abuse of discretion, *Trimble v. State*, 491 Md. 378, 405 (2025), and because the error alleged here is a question of law, our review is de novo. *Hollins*, 489 Md. at 309.

The dispute in this case centers on whether the second criterion under Rule 4-325(c), that "the requested instruction is applicable under the facts of the case," was satisfied. *Rainey*, 480 Md. at 255 (cleaned up). "In order for a jury instruction to be applicable under the facts of a particular case, '[t]he requesting party must only produce "some evidence" to support the requested instruction, and [the reviewing court] views the facts in the light most favorable to the requesting party.'" *Danshin*, 491 Md. at 533 (quoting *Rainey*, 480

Md. at 255). In *Dykes v. State*, 319 Md. 206 (1990), the Supreme Court of Maryland defined the burden of production a proponent of a jury instruction must satisfy:

> *Some evidence* is not strictured by the test of a specific standard. It calls for no more than what it says—"some," as that word is understood in common, everyday usage. It need not rise to the level of "beyond reasonable doubt" or "clear and convincing" or "preponderance." The source of the evidence is immaterial; it may emanate solely from the defendant.

Id. at 216-17. This is a "low bar." *Danshin*, 491 Md. at 532. Indeed, the evidence supporting the giving of an instruction may be "overwhelmed by evidence to the contrary[,]" but so long as there is any evidence in support of the instruction, the proponent has met their burden. *Dykes*, 319 Md. at 217. Whether a proponent of a jury instruction has satisfied the burden of producing "some evidence" "is akin to assessing the sufficiency of the evidence[.]" *Jarvis v. State*, 487 Md. 548, 564 (2024). As in sufficiency of the evidence, a proponent of a jury instruction "must meet this burden as to each element[.]" *Id. Accord Dishman v. State*, 352 Md. 279, 292 (1998) (declaring that "[t]he task of this Court on review is to determine whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired"). We "review the evidence in the light most favorable to the" proponent of the instruction. *Hollins*, 489 Md. at 309.

The Supreme Court of Maryland has "adopted the four-prong test outlined by the United States Court of Appeals for the Fifth Circuit in *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977), for assessing the probative value of evidence indicating consciousness of guilt." *Rainey*, 480 Md. at 257. The four prongs are:

> 1. The behavior of the defendant suggests flight.
>
> 2. The flight suggests a consciousness of guilt.
>
> 3. The consciousness of guilt relates to the crime charged or closely related crime.
>
> 4. The consciousness of guilt suggests actual guilt of the crime or closely related crime.

Id. A "flight instruction should not be given unless the four inferences explicated in *Myers* reasonably may be drawn." *Thompson*, 393 Md. at 312. Only the first *Myers* prong is at issue here.

We have thoroughly reviewed the four video discs that were introduced into evidence. The only depiction of either suspect after the shooting[13] is of the unidentified suspect, "Light Skin," walking along 10th Street and removing his coat just as he leaves the field of view. It appears that the only evidence of flight is Detective Diener's possible mischaracterization of State's Exhibit 13, which, he claimed, depicted "one of the two suspects in this case after the incident, fleeing the area on foot[,]" and a weak inference that might be drawn from Mr. Leas's testimony. During direct examination, Mr. Leas testified that "he [i.e., appellant] [was] basically trying to get out of harm's way" and that "he goes in another direction and the other assailant goes in another direction." During cross-examination, when asked whether appellant and Light Skin "[ran] in the same

[13] One of the videos depicts a man, wearing a backpack, who runs across the field of view, crosses 10th Street, and begins walking south. That man resembles neither Mr. Gibson nor either of the shooters.

direction" after the shooting, Mr. Leas replied, "No." He then was asked whether "[t]hey went in two different directions[,]" and Mr. Leas replied, "Yes."

This evidence truly is "overwhelmed by evidence to the contrary." *Dykes*, 319 Md. at 217. Nonetheless, taken in the light most favorable to the State as the proponent of the instruction, it constitutes "some evidence" sufficient to generate the flight instruction. *Id.* at 216-17. Moreover, even if we might have exercised our discretion differently and refused the State's requested instruction, *Hollins*, 489 Md. at 308, we cannot say that no reasonable judge would have given the instruction, *Trimble*, 491 Md. at 406, and therefore, we conclude that the trial court did not abuse its discretion in giving the requested flight instruction.

III.

Finally, appellant contends that the trial court erred in denying his motion for judgment of acquittal because the evidence is insufficient to sustain his convictions for first-degree murder and conspiracy to commit first-degree murder. According to appellant, the credibility of one of the State's witnesses, Mr. Leas, "was called into question by his self-interest in helping the police to avoid a possible violation of probation[,]" and the testimony of another State's witness, Ms. Barton, "defies common sense." He asserts that "there was no forensic evidence linking" him to the crimes charged, and the "video footage recovered did not capture the moment of the shooting." According to appellant, the State failed to "present evidence sufficient to establish premeditation, an intent to kill, or the existence of an agreement between the two assailants[,]" nor did it present sufficient evidence of appellant's criminal agency. Appellant relies in part upon a line of decisions

including *Wilson v. State*, 319 Md. 530 (1990), and *West v. State*, 312 Md. 197 (1988), which stand for the proposition that "a conviction upon circumstantial evidence *alone* is not to be sustained unless the circumstances are inconsistent with any reasonable hypothesis of innocence." *West*, 312 Md. at 211-12.

The State counters that there is no difference under Maryland law between direct and circumstantial evidence and, thus, appellant's reliance upon *West* and *Wilson* is misplaced. After extensively cataloging the evidence in this case, the State examines that evidence in the light of what it was required to prove and concludes that there is sufficient evidence of both first-degree murder and conspiracy to commit first-degree murder.

Additional Facts Pertaining to the Claim

Following the close of the State's case,[14] trial counsel moved for judgment of acquittal, arguing as follows:

> [TRIAL COUNSEL]: The first-degree murder, we believe that there is [in]sufficient evidence to allow this matter to go to the Jury. As to the issue of premeditation, which is the element of first-degree murder, we believe that indeed the only evidence is that there was an altercation. Mr. Gibson was present at the fence -- next to a fence, which was a house which was allegedly resided in by Mr. Gee -- or at least Ms. Smith, Mr. [Gee's] mother of his children. And it's alleged that Mr. [Gee] came upon this and allegedly chased after or pursued Mr. [Gibson] when he left the area.[15]

[14] The defense presented no evidence.

[15] The most sensible interpretation of the last two sentences of this paragraph requires us to assign two different meanings to "Mr. G." The unaltered text reads as follows:

> Mr. Gibson was present at the fence -- next to a fence, which was a house which was allegedly resided in by Mr. Gee -- or at least Ms. Smith, Mr. G's

(continued…)

> There is no indication that there was any premeditation. I'm not even believing that it in fact was Mr. Gee or that Mr. Gee had a firearm or Mr. Gee had a firearm and discharged it toward and struck Mr. Gibson. There's no indication of premeditation, so we believe that it should be allowed to go to the Jury.
>
> As to the issue of first-degree murder -- I'm sorry, a particular -- there must be a specific intent to kill. It must be deliberated to support a first-degree murder. It looks like Tichnell v. State, which was found in 287 Md. 695. It can be inferred that the proper circumstances must exist to allow it to be inferred. So, in this case, we would argue the proper circumstances do not exist. As to second-degree murder -- I'm sorry, my notes got put back in the wrong order.
>
> Again, second-degree murder requires there to be at least some element of intent. And as a matter of fact, it requires the Defendant -- the fact that he intended to commit the act and did so. We would rely on the previous argument in regard to that.
>
> In regard to Count III, Conspiracy, we don't believe that the evidence is sufficient to allow that to go to the Jury. There's no evidence. Again, there had to be some element or evidence introduced to support a conspiracy charge that the Defendant did actually, at least thus far, combine with somebody more so than an act, we would argue, in unison. Again, it's alleged that this was an act in unison, but I would indicate to the Court there's no evidence of any preparation. Even believing, like most favorable to the State, we believe that it should not go to the Jury as to Count III.

After hearing argument by the prosecutor, the trial court denied appellant's motion.[16]

> mother of his children. And it's alleged that Mr. G came upon this and allegedly chased after or pursued Mr. G when he left the area.

[16] Appellant has sufficiently complied with the particularity requirement of Maryland Rule 4-324(a) to preserve his claim for appeal, and the State does not contend otherwise in its brief.

Analysis

In reviewing a claim that the evidence is insufficient to sustain a conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In conducting that review, we do not reweigh the evidence or retry the case. *Koushall v. State*, 479 Md. 124, 148-49 (2022). Rather, we give deference to the fact finder's ability to "measure the weight of the evidence[,]" to "judge the credibility of witnesses[,]" and to "choose among differing inferences that might possibly be made from a factual situation[.]" *State v. Manion*, 442 Md. 419, 431 (2015) (quotation marks and citations omitted).

Initially, we observe that appellant's bald assertions concerning the purported lack of credibility of Mr. Leas and Ms. Barton are irrelevant to our analysis. Those concerns go to the weight, not the sufficiency, of the evidence. *Id.*

Appellant's reliance upon *West* and *Wilson* is misplaced. Those decisions represent an anachronistic view of the purportedly inferior quality of circumstantial versus direct evidence and have not been followed by more recent decisions of the Supreme Court of Maryland. *See, e.g.*, *Smith v. State*, 415 Md. 174, 184-85 (2010) (explaining that the *Jackson* standard "applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone"); *Hebron v. State*, 331 Md. 219, 226 (1993) ("Maryland has long held that there is no difference between direct and circumstantial evidence."). Although it is not our role to overrule a precedent of our Supreme Court, *Foster v. State*, 247 Md. App. 642, 651 (2020),

we nonetheless are obligated to follow a more recent decision directly on point when there is an apparent conflict between the more recent decision and an earlier decision by our high Court. *See, e.g.*, *State v. Kanaras*, 357 Md. 170, 182-83 (1999) ("The [Appellate Court] in the case at bar, in holding that it could entertain an appeal from the trial court's refusal to correct an allegedly illegal sentence, was entirely justified in relying upon [*State v. Griffiths*, 338 Md. 485 (1995)], as *Griffiths* is the most recent opinion of this Court concerning the issue.").

Murder in the First Degree

"Common law murder is the unlawful 'killing of one human being by another with the requisite malevolent state of mind and without justification, excuse, or mitigation.'" *Garcia v. State*, 480 Md. 467, 475 (2022) (quoting *Ross v. State*, 308 Md. 337, 340 (1987)). "A murder is in the first degree if it is . . . a deliberate, premeditated, and willful killing[.]" Md. Code (2002, 2021 Repl. Vol.), Criminal Law Article ("CR"), § 2-201(a)(1). For a killing to be deliberate, "'there must be a full and conscious knowledge of the purpose to kill[.]'" *Willey v. State*, 328 Md. 126, 133 (1992) (quoting *Tichnell v. State*, 287 Md. 695, 717 (1980)). To be premeditated, the fact finder "must find that the defendant had sufficient time to consider the decision whether or not to kill and weigh the reasons for or against such a choice." *Id.* at 138. To be willful, "'there must be a specific purpose and intent to kill[.]'" *Id.* at 133 (quoting *Tichnell*, 287 Md. at 717). And of course, the State must prove beyond a reasonable doubt that the defendant's conduct caused the victim's death. *State v. Daughtry*, 419 Md. 35, 73 (2011).

The autopsy report and the testimony of the pathologist established that Mr. Gibson was shot four times, including once in the back of his head and once in the back of his neck. That fact alone is sufficient to establish the intent to kill. Mr. Leas's pre-trial identification of appellant as one of the shooters,[17] admitted into evidence at trial, is sufficient to establish appellant's criminal agency. Moreover, the firearms examiner's testimony that the spent shell casings were consistent with two different weapons having been fired is sufficient to establish that both appellant and "Light Skin" discharged weapons, further establishing criminal agency. Furthermore, there was testimony and video evidence that appellant and "Light Skin" chased Mr. Gibson immediately before he was killed, and there was testimony and video evidence showing that appellant brandished a handgun in the presence of Ms. Barton. The second time that appellant and "Light Skin" appeared, they wore masks, from which the jury could infer that they sought to conceal their identities. These facts are sufficient to establish premeditation. The evidence is sufficient to sustain appellant's conviction of premeditated first-degree murder.

Conspiracy to Commit Murder in the First Degree

A conspiracy is "'the combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means.'" *Khalifa v. State*, 382 Md. 400, 436 (2004) (quoting *Townes v. State*, 314 Md. 71, 75 (1988)). Under Maryland law, the essence of a conspiracy is the unlawful agreement, which "'need not be

[17] In addition, Mr. Leas told police detectives that both appellant and "Light Skin" were carrying guns.

formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design.'" *Id.* (quoting *Townes*, 314 Md. at 75). A conspiracy "'may be shown by circumstantial evidence from which an inference of common design may be drawn.'" *McClurkin v. State*, 222 Md. App. 461, 486 (2015) (cleaned up) (quoting *Armstead v. State*, 195 Md. App. 599, 646 (2010)). The "'crime is complete when the unlawful agreement is reached, and no overt act in furtherance of the agreement need be shown.'" *Khalifa*, 382 Md. at 436 (quoting *Townes*, 314 Md. at 75).

The same evidence that proved that appellant murdered Mr. Gibson is sufficient to permit the jury to infer that appellant and "Light Skin" were acting in concert and that, therefore, they had entered into a conspiracy to murder Mr. Gibson. Both times that appellant and "Light Skin" were at the scene, they arrived together, and the second time, they both wore masks. Moreover, there was testimony and video evidence suggesting that appellant and "Light Skin" chased Mr. Gibson across 9th Street immediately before they killed him. Furthermore, the ballistics evidence, consistent with the hypothesis that two different weapons had been discharged, further establishes that appellant and "Light Skin" were acting in concert. The evidence is sufficient to sustain appellant's conviction of conspiracy to commit first-degree murder.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS ASSESSED TO APPELLANT.