Circuit Court for Prince George's County
Case No. CT170605X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2091

September Term, 2019

LAWRENCE SYLVESTER ROGERS

v.

STATE OF MARYLAND

Kehoe,
Friedman,
Ripken,

JJ.

Opinion by Ripken, J.

Filed: July 12, 2021

A jury, sitting in the Circuit Court for Prince George's County, convicted Lawrence Rogers ("Rogers") of four counts of first-degree murder, one count of attempted first-degree murder, and related offenses. He was sentenced to four consecutive life sentences without the possibility of parole, one consecutive life sentence with the possibility of parole, and an additional 115 consecutive years. He filed this appeal contending that the trial court erred on several grounds and seeks to have his convictions reversed. Because we discern no error, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 9:30 p.m. on June 24, 2016, police officers in Prince George's County responded to a call for a shooting at 3119 Orleans Street in District Heights. Upon arrival, they observed Jonathan Givens ("Givens") lying down in the front yard with gunshot wounds. Givens, still conscious, told the officers that there were others inside the house who also were shot. As the officers entered the house, they observed two more victims. Carlina Gray ("Gray") was unresponsive with multiple gunshot wounds. On the couch was Allen Wayne Rowlett ("Rowlett"), who was also unconscious with a single gunshot wound. In a bedroom down the hall, the police found Jan Marie Parks ("Parks"), who was unresponsive with multiple gunshot wounds. Harold Williams ("Williams") was lying on his back against Parks and was responsive but unable to speak due to multiple gunshot wounds. Gray, Rowlett, and Parks were pronounced dead on the scene. Givens and Williams were transported to a local hospital for immediate care. Williams was paralyzed from the neck down and never regained his ability to speak. After six months of intensive care, he died of complications resulting from multiple gunshot wounds.

The medical examiner who performed the autopsies on Gray, Rowlett, and Parks concluded that the cause of death for all three individuals was gunshot wounds, and the manner of death was homicide. The medical examiner who performed the autopsy on Williams concluded that the cause of death was complications from multiple gunshot wounds. He similarly concluded the manner of death was homicide.

The sole surviving victim, Givens, recalled the events leading up to the shooting as follows: on the night of the 24th, he got off work between 4:30 and 5 p.m. and returned to his house on 3119 Orleans Avenue where he lived with his girlfriend, Gray, and his friend, Williams. The three had planned to go to the racetrack that Friday night along with Williams' girlfriend, Parks, and their other friend, Rowlett. At approximately 8 p.m., after Parks and Rowlett arrived, Givens took his dog for a 15–20 minute walk. When he returned, the front door was closed. He attempted to open the door, and it shut back, as if "someone had closed the door" on him. Givens walked along the side of his house, and as he approached the side door, he heard Gray say, "why are you doing this," followed by gunshots.

Two to three minutes later, Givens saw an individual run "outside in front of the house" and around the corner. He described the individual as "tall, dreads coming down the side," "slender built," "basically brown skinned," and wearing a white t-shirt and jeans. The individual fired a shot at Givens, which grazed his arm. Givens attempted to run away and was hit with a second shot that shattered his hip and caused him to fall to the ground. The individual subsequently fled.

During a canvass of the area, officers recovered video surveillance footage from a

neighboring house on Orleans Avenue. In it, they observed a man running from the front of Givens' driveway toward the rear yard, putting a silver handgun in his waistband, and jumping over the fence heading back toward Marlboro Pike. The individual depicted on the video was a black male with dreadlocks wearing blue jeans and a white t-shirt. The police also recovered video surveillance from a BP Gas Station taken approximately fifteen minutes before the murders, which depicted the same individual. Still shots taken from both videos were released to various news outlets in the area.

Gary Savoy ("Savoy") and his family were at the Forestville Laundromat near Eddie Leonard's Carryout to do laundry on June 24th. According to Savoy, a dark-skinned individual who was tall and slender with blue jeans, a white t-shirt, and dreadlocks approached Savoy and asked to use his cell phone. The individual made two or three calls, appeared "antsy and fidgety" when nobody answered his calls, and left. As the individual was leaving, Savoy asked what to say if someone called back, and the individual stated: "tell them 'L' called." Savoy said that the individual thereafter walked into Eddie Leonard's and stood looking out the window "like something was wrong." After speaking with Savoy, officers reviewed surveillance from Eddie Leonard's Carryout & Laundromat and observed the same individual depicted in the Orleans Avenue neighbor's videos.

Torey Harper ("Harper") contacted the police after seeing the still shot from the video on the news. He stated that on the night of the 24th, he pulled over at the Exxon gas station off Marlboro Pike to fill up his white van. A man approached his van and offered money in exchange for a ride. Harper described the man as "skinny and tall," "with dreads hanging down" and wearing a white t-shirt and blue jeans. Harper agreed to give the man

a ride, and the two drove in Harper's van toward Washington, D.C. Harper stated that at one point, they came upon police lights and yellow tape and "[w]here it was visible that you could see the actual police lights and yellow tape, [the individual's] body kind of slumped down," and the individual he was giving a ride to put his head down.

Harper recalled that the individual asked to be taken to Popeye's initially, then someone's house a few streets down, and finally a hotel. Harper complied, and when they arrived at the house, the individual asked to use Harper's phone. After the individual made a call, a woman with an infant child came out and got into Harper's van. The individual also asked to use Harper's identification to check into the hotel, which Harper refused. He then asked to be taken to his house "a hundred feet right past [the woman's house]" to retrieve his own identification. Harper was instructed not to park too close to the house. Harper then dropped the three off at a hotel near Hampton Road.

After speaking with Harper, police reviewed surveillance footage from the Exxon Station and identified the same individual from previous videos approaching Harper in the parking lot and getting into his van. Officers then reviewed footage from the Motel 6 on Hampton Park Boulevard—based on Harper's statements—and were able to examine the motel records, which included a receipt with a photocopy of Lawrence Roger's identification. Based on this information, the police obtained an address and an arrest warrant for Lawrence Rogers.

On June 29, 2016, ten to fifteen police officers arrived at 427 Burbank Street, Apartment 4, to execute the arrest warrant. The officers knocked on the door and announced their presence, upon which they heard "talking and scrambling around." They

heard a male voice say, "give us a minute," and the officers knocked again. Approximately three to five minutes later, Sherrod Palmer ("S. Palmer") opened the door, and the officers entered the apartment and detained S. Palmer and a female. Both stated they were the only two in the apartment. The officers continued scanning the rooms looking for people and calling out "police" and "come out with your hands up." They moved bins that were placed in front of a closet in the bedroom. When they opened the closet door, they observed Rogers standing inside with his hands upraised. The officers placed him in handcuffs and transported Rogers from the location.

After Rogers was in police custody and the officers who had executed the arrest warrant had departed, an additional team of police officers went to the Burbank Street apartment. They spoke with Christine Palmer ("C. Palmer"), who was the leaseholder of the apartment and had arrived after Rogers' arrest. The police also spoke to her son, S. Palmer. C. Palmer and S. Palmer consented to a search of the apartment. In the hall closet, police found a black nylon backpack containing a gun and several rounds of ammunition.

Prior to trial, the State sent the defense a notice of intent to call an expert in cellular telephone and social media technology to testify as to the manner in which cell phone towers receive and process calls, as well as to interpret Rogers' cellular records. A week before trial, the defense received from the State the list of witnesses the State expected to call at trial, and the expert witness was not listed. Defense counsel inquired further into records related to the aforementioned expert's potential testimony—specifically the plotting and triangulation of cell phone records to determine Rogers's phone's location on specified dates—and the State informed the defense that no expert plot or map had been

produced. Defense counsel requested a continuance to obtain and analyze said mapping, which the defense claimed would be potentially exculpatory. The court denied the continuance.

At trial, the State offered into evidence the surveillance videos from the neighboring house on Orleans Avenue, Eddie Leonard's Carryout & Laundromat, the BP Gas station, and the Exxon Gas Station. The State called Harper and Savoy as witnesses, both of whom stated that the individual depicted in the videos was the same individual they encountered on the night of the murders, and Harper further identified that individual as Rogers. Additional witnesses were called by the State.

Among the other witnesses the State called was Officer Bradley Golway, the officer who first responded to the shooting. On cross-examination, defense counsel asked Officer Golway whether he had ever been called to the house for any other purpose prior to that night. The court sustained an objection from the State reasoning that the answer would call for hearsay and would be irrelevant "in the absence of more substantive evidence."

The medical examiner who performed the autopsies on Gray, Rowlett, and Parks as well as the medical examiner who performed the autopsy on Williams were also called to testify. Each described the manner and cause of death. Throughout this testimony, defense counsel objected on numerous occasions to pictures of the victims arguing that they were graphic and would inflame the jury. The objections were overruled.[1]

[1] The trial court overruled objections to the photographs that Rogers contends on appeal are graphic and cumulative. The court sustained an objection to a photograph that is not relevant on appeal.

The State also called C. Palmer and S. Palmer. C. Palmer testified that Rogers was good friends with her sons S. Palmer, and Jeremiah Palmer ("J. Palmer"). She also stated that J. Palmer went by the nickname "MyMy," and that Rogers' nickname is "L." In his testimony, S. Palmer gave a different story than what he told the police on the night of Rogers' arrest. S. Palmer testified that, on that night when the police arrived, he and his girlfriend were having sex in the living room and Rogers was in the bathroom. According to S. Palmer, he delayed opening the door for police because he had to put on clothes. He further testified that he had seen Rogers with a backpack in the days before the police came and that Rogers had said he was going to leave it in the closet.

The State called a firearms expert who testified that "there were nine millimeter Luger caliber fired cartridge cases and nine fired bullets that were consistent with nine millimeter caliber," and the bullets and cartridge cases recovered from the scene were fired from the same firearm. He further testified that the bullets and casings were fired from the firearm recovered from the nylon backpack—a 9mm Luger Taurus Model Millennium PT111 Pro, semiautomatic pistol. Additionally, the State moved into evidence a serology report containing deoxyribonucleic acid (DNA) findings resulting from swabs of the handgun, the magazine, and the ammunition found in the backpack. The serology report indicated the DNA findings were inconclusive.

The State also introduced evidence obtained following Rogers' arrest. First, there were numerous letters Rogers had written while incarcerated. In one letter, he stated that he was going to "take da crazy route to do s**t pleading insanity." In another, he asked his mother to lie to the psychiatrist and say that he had split personalities. The State also

played a telephone call Rogers made from jail, where Rogers said "MyMy got something for me at his house that I need. Need you to take it out of there you know get rid of it."

The defense called a neighbor who lived across the street from Givens. He stated that on the night of the 24th, he looked out his window and saw Givens lying in front of his house, which prompted him to call 911. As he was calling, he stated that he saw another man "come in and come out" of the house, and described that individual as about 5'6," "[with] a belly," and wearing light blue jeans and a white t-shirt. He saw this individual then walk in the other direction away from his house.

During jury instructions, defense counsel objected to the instructions on flight or concealment of the defendant and concealment or destruction of evidence. The court overruled these objections. Defense counsel also moved for judgment of acquittal arguing that "[t]his is ultimately a circumstantial case," and "I don't believe the evidence could amount to a finding of guilt by any reasonable jury, and on that basis I ask you to grant Rogers judgment of acquittal on each and every count." The court denied the motion.

The jury convicted Rogers of four counts of first-degree murder, one count of attempted first-degree murder, five counts of use of a firearm in the commission of a crime of violence, one count of possession of a regulated firearm after a disqualifying conviction, and one count of carrying a handgun. Rogers was sentenced to four consecutive life sentences without the possibility of parole, one consecutive life sentence with the possibility of parole, and an additional 115 consecutive years. This timely appeal followed.

Additional facts will be provided as they become relevant.

ISSUES PRESENTED FOR REVIEW

On appeal, Rogers presents seven questions for our review, which we have condensed and rephrased as the following:[2]

I. Was there sufficient evidence to support Rogers' convictions?

II. Did the trial court err in instructing the jury on flight, concealment, and destruction of the evidence?

III. Did the trial court err in excluding testimony inquiring into previous drug activity?

IV. Did the trial court abuse its discretion in admitting evidence of graphic photos and DNA reports?

V. Did the trial court err in denying a continuance after the failure to produce phone records?

VI. Did counsel's failure to produce phone records and failure to subpoena J. Palmer amount to ineffective assistance of counsel?

[2] Rephrased from:

1. Is conjecture from Mr. Rogers' alleged presence near the crime scene insufficient to withstand his conviction?
2. Was instructing the jury on flight, concealment, and destruction of evidence without the instruction being supported by the facts reversible error?
3. Was prohibiting counsel from asking Ofc. Golway about drug activity at the crime scene an abuse of discretion?
4. Did the trial court violate Mr. Rogers' constitutional right to a fair trial by admitting graphic photographs of the victims' injuries that inflamed the jury?
5. Did the court abuse its discretion by admitting inconclusive, irrelevant, and confusing reports about mixed DNA on the alleged murder weapon?
6. Did the court violate Mr. Rogers' right to a fair trial by denying a continuance after the state and counsel failed to produce potentially exculpatory phone records?
7. Did counsel's failure to subpoena Jeremiah Palmer violate Mr. Rogers' constitutional right to counsel and a fair trial?

We combine Rogers' two evidence admission issues, 4 and 5, into a single question (Issue IV). Rogers' issues 6 and 7 included claims for ineffective assistance of counsel, which we address as Issue VI.

DISCUSSION

I. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S CONVICTIONS.

Rogers initially contends that the evidence was insufficient to support his convictions. He maintains that based on the evidence, no juror could have reasonably concluded that he committed the murders. First, he argues that there was insufficient evidence to convict him of the murder of Williams because he was not the proximate cause of Williams' death. Next, he contends that all other convictions were based on mere conjecture, and no reasonable jury could have found him guilty. As a preliminary matter, we will address the State's contention that Rogers did not preserve these arguments for appeal. We will then discuss the standard of review, and finally address each of Rogers' legal arguments.

A. Preservation

In moving for judgment of acquittal, the defense must state with particularity all the reasons for doing so. Md. Rule 4-324(a). "In a criminal action, when a jury is the trier of fact, appellate review of sufficiency of evidence is available only when the defendant moves for judgment of acquittal at the close of all the evidence and argues precisely the ways in which the evidence is lacking." *Testo v. State*, 205 Md. App. 334, 384 (2012) (quoting *Anthony v. State*, 117 Md. App. 119, 126 (1997)). Put differently, "[t]he issue of sufficiency of the evidence is not preserved when [defendant's] motion for judgment of acquittal is on a ground different than that set forth on appeal." *Id.* (quoting *Anthony*, 117 Md. App. at 126). "The language of the rule is mandatory, and review of a claim of

insufficiency is available only for the reasons given by [the defendant] in his motion for judgment of acquittal." *Whiting v. State*, 160 Md. App. 285, 308 (2004) (citations omitted).

Rogers moved for acquittal on all counts stating that "[t]his is ultimately a circumstantial case." Specifically, he argued: there was no eyewitness identification; the videos did not clearly identify the individual; only one witness identified the individual in the videos as Rogers; there was no DNA evidence; and there was no confession. On appeal, Rogers similarly claims that the evidence is insufficient because his conviction was based entirely on circumstantial evidence that amounts to mere conjecture. However, in support of this claim on appeal, he alleges seven specific issues at trial made the evidence insufficient: he did not cause the death of Williams; there was no DNA or eyewitness evidence linking him to the crime; there were at least two perpetrators; surveillance videos do not demonstrate any illegal activity; the State ignored evidence by failing to get additional surveillance cameras and a statement from J. Palmer; S. Palmer's testimony was unreliable; and the jail call and letters were irrelevant.

We note that every issue except for the first one relates to evidence being circumstantial. The claim that Rogers was not the proximate cause of Williams' death is not related to circumstantial evidence, but rather is an argument that the State failed to prove one of the elements required for conviction. As such, we address that issue separately.

Although on appeal Rogers lists different issues he now claims related to the circumstantial aspects of the case, his circumstantial evidence argument nonetheless mirrors that which he made at trial and is hence preserved. However, Rogers' argument

that he was not the proximate cause of Williams' death is made for the first time on appeal and is thus unpreserved. Notwithstanding his failure to preserve the proximate cause argument, we are satisfied that the evidence was sufficient to convict Rogers.

B. Standard of Review

The standard of review for determining whether sufficient evidence exists to support a conviction on appeal 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." *State v. Coleman*, 423 Md. 666, 672 (2011) (quoting *Facon v. State*, 375 Md. 435, 454 (2003)). Our focus is whether "the verdicts were supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 479 (1994). Finally, "[w]e must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether the [appellate court] would have chosen a different reasonable inference." *Cox v. State*, 421 Md. 630, 657 (2011) (alteration in original) (quoting *Bible v. State*, 411 Md. 138, 156 (2009)).

C. Murder of Williams

To warrant a murder conviction, there must be "a direct causal link between the accused's actions and the victim's death." *Stewart v. State*, 65 Md. App. 372, 379 (1985). If such a link is established, "no more is required" to satisfy the element of causation. *Id.* Thus, for a causation challenge, the test is "whether any rational trier of fact could have found beyond a reasonable doubt that the [accused's] felonious acts caused [the victim's]

death." *Id.* at 383–84. To establish causation, "it is almost always sufficient that the result would not have happened in the absence of the conduct—or but for the defendant's actions." *State v. Thomas*, 464 Md. 133, 174 (2019) (citation and internal quotation marks omitted).

Williams died of complications relating to a bone infection, blood infection, sepsis, and pneumonia eleven months after being shot by Rogers. The question is whether these conditions would have occurred "in the absence of" the shooting. We hold that a reasonable jury could conclude that a direct causal link existed. The autopsy revealed that one bullet entered in the mid portion of Williams' neck and partially severed his spinal cord, rendering him a quadriplegic. As a result, all of Williams' automatic body functions ceased, and he required permanent feeding tubes, artificial machines to breathe, a catheter, and a colostomy. His physical state led to bed sores—some as deep as to the bone, causing bone infection—as well as blood infection, sepsis, and pneumonia, which eventually led to his death. The causal link was supported by testimony from the medical examiner who performed Williams' autopsy and indicated that, in his expert opinion, complications from multiple gunshot wounds caused Williams' death.

As noted, Rogers contends for the first time on appeal that there was insufficient evidence to support that he was the actual cause of Williams' death. According to Rogers, the fact that the death certificate lists "natural causes" as the cause of death confirms that the shooting was not the proximate cause because "sepsis and pneumonia [are] both very common among long-term hospital patients like Williams." However, the death certificate was filled out by a physician at a rehabilitation center and prior to a relative informing the

police that Williams had died. Certainly, the referenced death certificate is not dispositive of the issue. An autopsy was subsequently performed. The medical examiner concluded, and the jury was entitled to accept, that the cause of death was complications from multiple gunshot wounds and the manner of death was homicide.

D. Remaining Convictions

Rogers also lists various issues with the jury's inferences based on the evidence. As we previously noted, he contends that there was no direct evidence—DNA or otherwise—linking him to any crime, there were at least two perpetrators of the crime, the surveillance videos do not depict illegal activity, the State ignored evidence, witness testimony was inherently unreliable, and the jail call and letters were irrelevant. As we explain below, the evidence was sufficient.

"Circumstantial evidence is sufficient to sustain a conviction, but not if that evidence amounts to only a strong suspicion or mere probability." *Corbin v. State*, 428 Md. 488, 514 (2012) (quoting *Smith v. State*, 415 Md. 174, 185 (2010)). "[T]he inferences made from circumstantial evidence must rest upon more than mere speculation or conjecture." *Id*. In viewing the evidence and "all reasonable inferences deducible from the evidence" in the light most favorable to the State, it is necessary that the evidence "afford the basis for an inference of guilt beyond a reasonable doubt." *Smith*, 415 Md. at 185–86 (quoting *Taylor v. State*, 346 Md. 452, 458 (1997)).

Included among the facts most favorable to the State's case are that: 1) five victims were shot on June 24th at Orleans Avenue; 2) the sole surviving victim described the shooter as a black male with dreadlocks wearing a white t-shirt and jeans; 3) an individual

matching the description was seen on multiple surveillance cameras at the house and in the surrounding area following the shooting; 4) two witnesses in the area also described an individual matching the description as acting erratically; 5) one of the two witnesses from whom a cell phone was borrowed was told by the individual to tell return callers "L" called; 6) C. Palmer indicated Rogers went by the nickname "L"; 7) the second of the two witnesses testified that he dropped the individual off at the Motel 6 on Hampton Suite Boulevard; 8) Rogers' ID appears on a receipt for a hotel room at the Motel 6 on the night of the shooting; 9) the gun that forensics analysis linked to the shooting was found in a backpack in the apartment where Rogers was found hiding; 10) J. Palmer had previously told the police that the backpack belonged to Rogers, Rogers left it in the closet, and J. Palmer did not touch it or move it; 11) Rogers made calls from jail stating "MyMy (identified by both S. Palmer and C. Palmer as J. Palmer) got something for me at his house that I need . . . Get rid of it," and 12) Rogers sent multiple letters from jail saying that he "was going to take da crazy route" and requesting his mother to fabricate a mental illness from which he suffers. Presented with this and other evidence, a jury could rationally infer Rogers was guilty beyond a reasonable doubt of shooting the five victims.

We thus conclude that the inferences made by the jury were supported by the facts. This Court does not consider whether the jury *could have* made other inferences, as Rogers contends. Rather, we are concerned with only what the jury actually determined. *See Acquah v. State*, 113 Md. App. 29, 54 (1996) ("The jury is the trier of fact and is not obligated to believe the explanations or denials offered by the defendant."). The jury was free to accept all, part, or none of the evidence presented, and here it weighed the evidence

and concluded beyond a reasonable doubt that Rogers was guilty of the crimes charged. As such, we hold the evidence was sufficient to support all convictions.

II. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON FLIGHT, CONCEALMENT, AND DESTRUCTION OF THE EVIDENCE.

Rogers next contends that the trial court erred in instructing the jury on flight or concealment and destruction of the evidence. According to Rogers, the instructions were not supported by the facts and were baseless. We first, address the standard of review for jury instructions, and second, address each instruction in turn.

A. Standard of Review

A court may, "and at the request of any party shall, instruct the jury as to the applicable law and extent to which the jury instructions are binding." Md. Rule 4-325(c). This rule has been interpreted consistently as requiring a requested instruction where "(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given." *Dickey v. State*, 404 Md. 187, 197–98 (2008). The decision of whether to give a requested jury instruction is reviewed for an abuse of discretion. *Page v. State*, 222 Md. App. 648, 668 (2015). In reviewing a lower court's decision, "jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate." *Fleming v. State*, 373 Md. 426, 433 (2003). If the given instruction is not supported by evidence in the case, the trial court abused its discretion. *Rustin v. Smith*, 104 Md. App. 676, 680 (1995).

B. Flight or Concealment

For an instruction on flight or concealment[3] to be proper, the finder of fact must be reasonably able to draw four inferences from the evidence:

> [1] that the behavior of the defendant suggests flight; [2] that the flight suggests consciousness of guilt; [3] that the consciousness of guilt is related to the crime charged or a closely related crime; [4] and that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime.

Thompson v. State, 393 Md. 291, 312 (2006). "To be characterized as consciousness of guilt evidence, it is not necessary that the evidence conclusively establish a defendant's guilt." *Jones v. State*, 213 Md. App. 483, 509 (2013). Rather, we look to whether the evidence could support an inference that the defendant's conduct indicates consciousness of guilt. *Id.*

All four inferences could reasonably be drawn from the facts presented. Rogers was observed on multiple surveillance cameras, one of which depicted him running from the house where the victims were shot and tucking a handgun in his waistband. Witnesses who interacted with him the night of the shooting also testified to his erratic behavior, attempts to contact others, and attempts to solicit a ride out of the area where the crime was committed. He was later found hiding in a closet blocked by bins. This conduct certainly could lead to inferences that Rogers' behavior was not innocent, as he implies, but rather suggested that first, he was fleeing the scene of the crime, second, his flight was indicative

[3] Maryland Pattern Jury Instruction 3:24 is titled "Flight or Concealment of Defendant." In the instruction, the terms "flight" and "concealment" are used interchangeably, thus we do not distinguish between the two.

of a consciousness of guilt, third, the consciousness of guilt was related to the multiple homicides with which he was later charged, and fourth, this consciousness of guilt suggests actual guilt.

Rogers contends that his hiding in the closet did not suggest flight as he was mimicking the reactions of both S. Palmer and the woman in the apartment. Even though the other two did not hide, according to Rogers, their scrambling around and taking a few minutes to open the door for law enforcement was the functional equivalent of hiding. We disagree. A brief delay before opening the door does not equate to intentionally concealing oneself in a closet blocked by bins. Moreover, as the trial court noted, the instruction on flight was given based not solely on Rogers hiding in the closet, but rather on the collective evidence presented. The court considered "the surveillance videos in the neighborhood, and the actions of the defendant including borrowing a phone to try to call someone, paying someone to take him from the neighborhood of the homicides, and then while in that car, ducking down as they passed the police," as well as the fact that Rogers took his "head covering off at some point."

Rogers also argues that his conduct did not suggest consciousness of guilt because the videos do not depict why he was running, and do not demonstrate any abnormal conduct because it is a common reaction to use someone's cell phone, pay someone for a ride, and duck when police drive by. Again, we disagree. As noted, the surveillance video from the neighbor's house depicted Rogers running from the scene of the shooting, tucking a gun into his waistband, and jumping over the fence, all of which is not a "common reaction." Likewise, his attempt to contact others, solicit rides, and hide from police, all while acting

"like something was wrong" further supports a reasonable inference of consciousness of guilt.

Taken collectively, these facts could reasonably lead to inferences regarding Rogers' flight and his consciousness of guilt, thereby warranting a flight or concealment instruction. Because the instruction was a correct statement of law, was warranted by the specific facts, and was not fairly covered in other instructions, we hold the court did not abuse its discretion in giving the instruction.

C. Destruction or Concealment of the Evidence

Rogers contends that the court also erred in giving an instruction on destruction or concealment because he did not *actually* conceal or destroy any evidence. However, he misapplies the instruction. The trial court's instruction provided, in part: "You must first decide whether the defendant *attempted* to conceal or destroy evidence in this case."[4] Thus, it is not necessary that he actually destroy or conceal evidence. For an instruction on concealment or destruction of evidence, it is sufficient that the defendant attempt to conceal or destroy evidence.

[4] The trial court's instruction followed Maryland Criminal Pattern Jury Instruction 3:26. MPJI-Cr 3:26 states:

> You have heard that the defendant _____ evidence in this case . . . . You must first decide whether the defendant _____ evidence in this case. If you find that the defendant _____ evidence in this case, then you must decide whether that conduct shows a consciousness of guilt.

The pattern jury instruction further provides that the court may insert into the blanks alleged conduct including "attempted to conceal, concealed, attempted to destroy, destroyed."

We hold that the State produced sufficient evidence that at a minimum demonstrated that Rogers attempted to conceal or destroy evidence. Specifically, the jury heard evidence that Rogers had been at the Palmer apartment and that the murder weapon was found in a backpack in the apartment in which he was arrested. The jury also heard a recording of a phone call Rogers made while incarcerated where he told a third party that MyMy (J. Palmer) had something at his house that he needed to get rid of. We conclude, as the trial court did, the jury "could infer that this phone call by the defendant was an attempt to conceal or destroy the murder weapon," thereby warranting an instruction on concealment or destruction of evidence. Accordingly, the court did not abuse its discretion in giving the instruction.

III. ROGERS FAILED TO PRESERVE HIS CHALLENGE TO OFFICER GOLWAY'S TESTIMONY.

Rogers next contends that the trial court erred in excluding testimony from Officer Golway on cross-examination about prior drug activity at the house. He believes that the court erred in determining that such testimony 1) would call for hearsay, and 2) was irrelevant. The State argues that Rogers did not preserve this issue for appeal. We first provide additional background information, then address the State's preservation argument. Because we ultimately conclude that the issue was not preserved for appeal and there is not sufficient information to discern whether the unanswered question would be hearsay or irrelevant, we cannot reach the merits of Rogers' contention.

A. Background

The State called Officer Golway as a witness, and the defense asked on cross-examination whether he had ever been called out "for any purposes to this particular house prior to that night." The State objected, arguing that the answer was too attenuated to have any relevance, and the following colloquy occurred:

> [COURT]: What is the answer going to be?
>
> [Defense]: There are multiple comments from neighbors who were interviewed by law enforcement that there was excessive traffic at the location of the incident that they had complained about, and several of them specifically mentioned that they thought that it was a drug house. I wanted to know if he has any information regarding those complaints from before.
>
> ***
>
> [Defense]: Well, to the extent that I don't know what his answer will be, I have to say I don't know what his answer is going to be. But I have specific information that is derived entirely from the State's discovery to ask the question, and he is one of what I assume will be multiple potential witnesses who may be able to comment on that, particularly [as] he is a patrol person.
>
> [COURT]: What is the relevance of any prior calls for service to that house in this case?
>
> [Defense]: In this case, if it turns out that he is familiar with the complaints about drug activity there, I think that it would be helpful to the jury to know that there are potential I guess suspects that would otherwise be insufficiently addressed in this case. Since I anticipate that there is no direct link with my client and these individuals for the defense. Being able to say, look, if there was a lot of drug activity at this house then we are no longer talking about a lovely little suburban house full of middle aged people just getting shot randomly. Well, there might be very specific reasons why those people wound up getting murdered. It seems to be like an avenue that is worth pursuing. Again, I don't know what this particular witness will say.
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> ***
>
> [COURT]: I will sustain the objection. The answer to the question presumably is, yes, he had responded to a call for service. Beyond that that would call for hearsay. I presume the relevance is somewhat limited in the absence of more substantive evidence. I'm not pre-closing your right to bring

out evidence as to other explanations. I will not with this witness allow that question.

B. Preservation

An "appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). In addition, Rule 5-103(a)(2) requires that to preserve a claim that the court erroneously excluded evidence, the party must prove that they are prejudiced by the ruling and "the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered." "The most common method of preserving a claim that the trial court erred is to proffer the substance and relevance of the excluded evidence." *Devincentz v. State*, 460 Md. 518, 535 (2018). However, a proffer is not necessary "where the tenor of the questions and the replies they were designed to elicit is clear." *Id.* (quoting *Peregoy v. W. Md. Ry. Co*., 202 Md. 203, 209 (1953)).

The question at issue here is whether Officer Golway had ever been called to the house for any purpose. When the court asked the defense to proffer Officer Golway's answer, he acknowledged that he did not know. The defense went on to explain that neighbors speculated during police interviews over whether the house was a drug house, and defense counsel wanted to know whether Officer Golway had any information regarding prior complaints. In regards to relevancy, the defense further stated that "it would be helpful to the jury to know that there are potential . . . suspects that would otherwise be insufficiently addressed in this case." The defense further reiterated that he did not know the contents of the answer.

We hold that the broad question did not clearly generate the issue, and the reply the defense intended to elicit was unclear. The defense was unsure as to how Officer Golway would reply, and so he declined to proffer the answer. Although the trial court presumed that the answer would be "yes," we decline to so speculate. There was no evidence presented that Officer Golway had been to the house prior to that night, nor did defense counsel attempt to introduce evidence indicating that he had. Rather, his theory that Officer Golway might have information concerning neighbor's complaints amounts to conjecture. Moreover, the subsequent testimony developed throughout trial from various witnesses about drug use did not elucidate the intention of the broad question, because the fact that drugs and drug paraphernalia were recovered has no bearing on whether a patrol officer had been previously called to the house. In sum, there is no way for us to know what the answer could have been, and we cannot determine whether a hypothetical answer would constitute inadmissible hearsay or was relevant.

C. Harmless Error

Although we cannot determine hearsay or relevancy in the absence of a proffer or a clearly discernable "tenor of the questions," we are satisfied that even if the court erred in excluding the testimony, any error was harmless beyond a reasonable doubt. An error is harmless where "a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *Newton v. State*, 455 Md. 341, 353 (2017).

First, even if Officer Golway's answer would have helped establish a history of drug usage at the house, that inference could have been drawn from other evidence or elicited

from a different line of questioning. *See Velez v. State*, 106 Md. App. 194, 216–17 (1995) (holding no error where elicited later in trial). Although the court did not allow defense counsel to ask Officer Golway about prior visits to the house, it allowed the defense to pursue the theory that the shooting may have been drug related. An officer who searched the house after the shooting testified that he located drug paraphernalia on the body of one of the victims as well as a scale in the kitchen. The medical examiner also testified that cocaine metabolites were discovered during the autopsies of some of the victims. The State elicited testimony from police concerning paraphernalia recovered that was suspected to be associated with crack cocaine. Finally, Givens himself testified that he and the other victims frequently used cocaine. Thus, although Officer Golway's answer about calls prior to that night might have shown illegal drug activity, the presumed purpose of the question was ultimately satisfied through other evidence adduced at trial.

Second, sustaining the objection in no way contributed to the guilty verdict given the presence of overwhelming evidence of guilt. *See Rubin v. State*, 325 Md. 552, 578 (1992) (holding error to be harmless where "the evidence of guilt was overwhelming."). Put differently, even with the potentially favorable testimony excluded, the remaining evidence—discussed in Part I—does not give rise to a reasonable doubt. *Id.* at 579. In light of the cumulative evidence, any error was harmless.

D. Importance of Proffer

Before moving to the next issue, we briefly note the importance of presenting a formal proffer. Rule 8-131(a) permits a reviewing court in its discretion to review an unpreserved issue "if necessary or desirable to guide the trial court." Without a formal

proffer as to the contents and relevancy of the excluded testimony, the reviewing court cannot exercise that discretion, as discerning whether a trial court erred in excluding testimony would be speculative. Thus, absent the proper foundation, this Court is unable to determine if the excluded testimony is inadmissible hearsay.

IV. THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE GRAPHIC PHOTOS AND INCONCLUSIVE DNA REPORTS.

Rogers next contends that the court erred in admitting certain evidence. Specifically, he takes issue with the graphic photos of the victims, which he argues inflamed the jury. He also contends that the court erred by admitting the DNA report because it was inconclusive, and thus did not help the jury determine guilt, although he did not object to the expert testimony describing such DNA reports. He argues that the prejudicial impact of each far outweighs any probative value. We first provide additional background, then address each contention in turn.[5]

[5] The State argued that Rogers' challenge to the DNA Reports is unpreserved because there was no objection to the expert's testimony summarizing his findings. However, when the State moved to admit the reports as evidence, defense counsel stated the following at the bench:

> I guess my concern is that the reports being inconclusive do not amount to relevant evidence. I mean I don't know what issue in the case these would be relevant to. I'm concerned about confusion. Submitting technical data to the jury for them to consume unaddressed, and for that reason I would oppose putting it into evidence. They have heard a full explanation from the witness.

The court responded: "Objection overruled." We hold that defense preserved this issue on appeal.

A. Background

At trial, the State showed photographs depicting the victims, the victims' wounds, and pools of blood. Rogers objected to several of the photographs, arguing that they were "graphic without adding any evidentiary value," and they did not demonstrate anything germane to the case because the defense had stipulated to many of the facts concerning the victims' death. Rogers also objected to photographs depicting the victim autopsies, "pools of blood" at the crime scene, Williams' bed sores, and the feeding tube inserted into Williams' abdomen.

The State also called a DNA expert to testify as to the serology report which outlined the DNA findings from swabs of the handgun, magazine, and ammunition. Rogers did not object to the testimony. As to the swabs from the various cartridges, the expert testified that all the items failed to yield a DNA profile, and thus no conclusions could be made regarding those items. As to the swabs from the handgun, he testified that they yielded a partial mixed DNA profile from at least two contributors, and at least one of which had to be male. However, "due to the limited data available and the possibility of missing genetic information, no further conclusions could be made regarding the mixed profile." He testified to similar results from the magazine swabs. He stated they yielded a mixed profile from at least three contributors, and at least one was male, but no conclusions could be made regarding the mixed DNA profile. The State moved to admit the DNA report describing these findings into evidence, and the defense objected stating that the evidence was not relevant because no conclusions were drawn. The court overruled the defense's objection and allowed the report into evidence.

B. Admitting Graphic Photos for the Jury

"Whether a photograph is of practical value in a case and admissible at trial is a matter best left to the sound discretion of the trial judge," *Grandison v. State*, 305 Md. 685, 729 (1986), and that decision will not be disturbed unless "plainly arbitrary." *State v. Broberg*, 342 Md. 544, 552 (1996). To determine whether a photograph is admissible, the trial judge must make a two-part assessment: first, that the photograph is relevant, and second, that the prejudicial effect does not substantially outweigh the probative value. *Thompson v. State*, 181 Md. App. 74, 95 (2008). The Court of Appeals has noted that:

> Among the scores of this Court's opinions involving the admission or exclusion of photographic evidence, it is extremely difficult to find cases in which this Court has held that the trial court's ruling, as to the admission or exclusion of photographs, constituted reversible error. The very few cases finding reversible error are ones where the trial courts admitted photographs which this Court held did not accurately represent the person or scene or were otherwise not properly verified.

Mason v. Lynch, 388 Md. 37, 52 (2005).

Cumulative and graphic photographs are relevant to assist the jury in understanding a case or in aiding witness testimony. *Grandison*, 305 Md. at 730. This rule applies even if the photos represent no issue in controversy. *Broberg*, 342 Md. at 553–54. In *Grandison*, the defendant objected to photos of autopsies and victims arguing that such pictures were inflammatory to the jury, and they were unnecessary given that he had stipulated to many of the facts illustrated by the pictures. *Grandison*, 305 Md. at 730. The Court of Appeals held that the admission of the photographs was a proper exercise of discretion given that they depicted "the condition of the victim and location of injuries upon the deceased" as well as "the wounds of the victim." *Id.* In addition, the Court held that such graphic and

cumulative photos are not inflammatory "solely on the basis that they do not represent any issue in controversy." *Id.* Rather, because "the photographs are mere graphic representations of undisputed facts already in evidence, their introduction could not be held to have injured the accused." *Id.* Finally, the Court did not find any indication of prejudicial error resulting from admission of photographs, "particularly in light of the overwhelming evidence against the accused." *Id.* at 729.

Applying these principles, Rogers' argument fails. The photographs were relevant in depicting the conditions of the victims and causes of death. As in *Grandison*, Rogers' stipulation to certain facts does not bar the admission of the photographs and does not make the photographs inflammatory despite being graphic or cumulative. Moreover, with respect to the photographs of Williams, Rogers disputes that he actually caused the death of Williams. The photographs of Williams' gunshot wounds, bed sores, and infected tissue are illustrative of an existing controversy contested by Rogers. Last, we fail to see prejudice resulting from the admission of these photographs in light of the extensive evidence against Rogers.

C. Admitting the Expert's DNA Report

All relevant evidence is admissible. Md. Rule 5-402. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Md. Rule 5-401. We have repeatedly reaffirmed that "[t]rial judges generally have wide discretion when weighing the relevancy of evidence," although "trial judges do not have discretion to admit irrelevant evidence." *Clark v. State*, 218 Md. App. 230, 241 (2014). We

review relevancy determinations under a de novo standard. *Under Armour, Inc. v. Ziger/Snead, LLP*, 232 Md. App. 548, 552 (2017). Rogers argues that the trial court erred in admitting the DNA reports because they were irrelevant given the reports did not link anyone to the crime and did not clarify who used the alleged murder weapon.

The issue of relevancy of inconclusive DNA reports was before this Court in *Clark v. State*. *Id.* at 237. In *Clark*, an expert witness testified as to the results of her DNA reports stating that the swabs yielded a partial-mixed DNA profile, the mixed DNA profile was from at least two contributors, and she was unable to reach any further conclusions. *Id.* at 240. She also testified that the defendant could not be included or excluded as a potential contributor. *Id*. The defendant argued that the inconclusive results yielded no suspect and were thus irrelevant, and were highly prejudicial because the jurors may have placed "heavy weight . . . on the failure of the scientific DNA evidence to exclude [him] as one of those who handled the gun." *Id.* at 237–38. We rejected his argument and held that the inconclusive results of DNA testing performed on a gun "may well have been relevant to show that the State performed a DNA test at all." *Id*. at 241. Without such report, the defense could argue that no test was done to potentially exclude him as a suspect. *Id.* We further concluded that any error was harmless, as the report provided no information to the jury about who had the gun. *Id.* at 243.

Rogers' argument against admission of the DNA reports mirrors the argument made in *Clark*. As in *Clark*, although the expert testified that the results were inconclusive, his testimony about the DNA results was relevant in both illustrating to the jury that a DNA test had been conducted, and that such test did not rule out Rogers as a contributor.

Moreover, the expert did not inform the jury that Rogers could be neither included nor excluded, but rather stopped after he stated that no conclusions could be made. Like *Clark*, the admission of the inconclusive—but relevant—DNA reports was within the trial judge's discretion, and we see no error in admitting such reports.

Finally, even if admission of the DNA results was error, we are convinced beyond a reasonable doubt that any error is harmless.[6] The Court of Appeals has explained, "in a harmless error analysis, the issue is not what evidence was available to the jury, but rather what evidence the jury, in fact, used to reach its verdict." *Dionas v. State*, 436 Md. 97, 109 (2013).

The DNA reports explain, and the expert testified, that the partial DNA profiles yielded no conclusions. Thus, the DNA reports and expert testimony provided no information to the jury about whether Rogers had held the gun. Admission of such reports could not have impacted the jury verdict, particularly when viewed in conjunction with the other evidence presented indicating guilt. In addition, although the defense objected to admission of the DNA reports, no such objection was made as to the expert testimony regarding the reports. Thus, introduction of the reports detailing the expert's findings was

[6] We note that this is the second harmless error argument we address. Although "the cumulative adverse effect of multiple errors might well compel a reversal even if each contributing error, standing alone, could be dismissed as harmless," such a review is judged based on actual findings of error. *Muhammad v. State*, 177 Md. App. 188, 324–25 (2007). Even assuming *arguendo* that there were errors, we conclude beyond a reasonable doubt that the errors had no cumulative prejudicial impact. *See Newton*, 455 Md. at 353. The hypothetical errors are admitting inconclusive DNA reports that do not implicate Rogers and excluding testimony that helps establish drug activity at the crime scene. Viewed collectively, these hypothesized errors have no bearing on the rest of the evidence presented, and thus no influence on the jury's verdict.

cumulative, as the information was already admitted. We conclude that the court did not err in admitting the inconclusive DNA reports, and even if such admission was erroneous, it was of no importance to the jury in reaching their verdict.

V. THE TRIAL COURT DID NOT ERR IN DENYING A CONTINUANCE.

Next, Rogers argues that the trial court erred in denying his request for a continuance. According to Rogers, he was entitled to a continuance based on the failure of both the State and the defense to produce "potentially exculpatory phone records." He asserts such records constitute *Brady* material. We first provide additional background information, then discuss Rogers' claim that the records constitute *Brady* material, and finally address whether the court erred in denying a continuance.

A. Background

Prior to trial, consistent with discovery rules, the State sent a notice of intent to call an expert witness in cellular telephone and social media technology. In the notice, the State proffered that the witness would testify as to the manner in which cell phone towers receive and process calls, the construction of towers and individual sectors and how that factors into the directionality of calls, and the reading and interpretation of the Rogers' detailed cellular records.

At trial, Rogers requested a continuance because he concluded it appeared the State was not "engag[ing] an expert to do the kind of plotting of cell towers and placement of the phone and the location." Defense counsel stated:

> What has come to my attention in the last I would say week before this trial is my client's desire that this material be used affirmatively in the defense case. Affirmatively because it is his belief that that material would qualify as

> Brady, that it would assist him with regard to showing that his whereabouts were not near or at the scene of the crime at the time of the crime.

Upon inquiry from the court as to why Rogers had not attempted to get the cell phone records and an expert, defense counsel responded: "At least in part because we believed that it had already been done. We received an expert witness [notification for an expert in] cell tower triangulations. We were told it would be part of the State's case. It has been in since April 26th of 2017."

The State responded that the expert notice was filed anticipatorily, as it did not have any call detail records or associated mapping at the time. The State further responded that it had provided numerous copies of cell phone records throughout discovery, had inquired multiple times about the existence of plottable call detail records, and forwarded all information received to Rogers**.** The State further commented:

> In an effort to make sure that there was nothing missing from anybody's file, I asked for the umpteenth time again last week, and the lead detective, who had been gone for upwards of a year during the pendency of this case, did provide me with a printout of call detail records that had tower locations associated with them that the police had received in response to a court order that was obtained in the subsequent—subsequent to the police obtaining the arrest warrant for the defendant.

Such records were forwarded to Rogers immediately. The State finally noted that "[t]o date, the State has not had those records plotted, and does not intend to use them or to call any witness to discuss the contents of those records, or any plotting."

Upon consideration of the parties' arguments, the court denied the continuance stating:[7]

[7] The court also noted that Rogers had "repeatedly said and filed a motion to dismiss saying that his rights to a speedy trial have been denied." In addition, the court pointed out that at

> The defendant was arrested over three years ago on these charges in the District Court. The indictment was issued nearly two and a half years ago. This is the sixth trial date. This was continued once by consent regarding out of state witnesses initially. One, two, three, four times by the defendant. One time by the State because the medical examiner wasn't available and cell phone records.

The court further elaborated on the cell phone tower records, stating:

> With regard to the cell tower information, first of all it sounds like all that has been provided repeatedly, or the cell phone information. If the defendant maintains that he wasn't there, he had an alibi, and that his cell records would support that, at some time prior to the past week he could have raised that some time over the last three years.
>
> ***
>
> I find that this request for a continuance lacks any merit for the reasons I have said. It is done merely for strategy in the hopes that at some point after six, seven, eight or nine trial dates perhaps the State won't be able to get all their ducks lined up in a row. I will not allow that to happen.

B. No *Brady* Violation

We begin by noting that the "potentially exculpatory phone records,"—or more specifically, the State's choice not to plot the tower locations associated with the cell records—do not constitute a *Brady* violation. Under *Brady v. United States*, "the suppression by the prosecution 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 prosecution." 373 U.S. 83, 87 (1963). Even assuming *arguendo* that the cell phone records would have been favorable to Rogers, his argument still fails as the State did not suppress the evidence. As the State notes and as Rogers

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the motions hearing the week prior, it "reminded counsel that this case was set for Monday and not a word, not a peep was said about the possibility of a continuance."

acknowledges, no *Brady* violation exists where the information was available to the defendant "through reasonable and diligent investigation." *Yearby v. State*, 414 Md. 708, 723 (2010). In fact, the State had provided cell phone records to the defense in discovery multiple times and did not create a plot or map based on the cell phone records. Rogers does not dispute that the information was available to him; rather, he contends that he did not obtain the information or retain an expert to avoid duplicative discovery. In sum, the notice of intent to call an expert witness and history of communication between defense counsel and the State concerning the cell phone records serves as evidence that Rogers knew that the "potentially exculpatory" information existed. *See Yearby*, 414 Md. at 724 ("If the defendant has actual or constructive knowledge of the allegedly withheld exculpatory information, there cannot be a *Brady* violation."). Accordingly, we find no *Brady* violation, and continue our analysis.

C. Denial of a Continuance

"The grant or denial of a continuance is within the sound discretion of the trial court." *Nichols v. State*, 6 Md. App. 644, 646 (1969). These decisions are reversed "only in 'exceptional instances where there was prejudicial error'" and the trial court acted arbitrarily. *Prince v. State*, 216 Md. App. 178, 203–04 (2014) (quoting *Thanos v. Mitchell*, 220 Md. 389, 392 (1959)). Such an abuse of discretion occurs only "where no reasonable person would take the view adopted by the trial court, or where the court acts without reference to any guiding rules or principles." *Id*. at 203–04 (citations and internal quotation marks omitted).

A court's denial of a continuance will constitute an abuse of discretion only if the requesting party demonstrates:

> (1) that he had a reasonable expectation of securing the evidence of the absent witness or witnesses within some reasonable time; (2) that the evidence was competent and material, and he believed that the case could not fairly be tried without it; and (3) that he had made diligent and proper efforts to secure the evidence.

Id. at 204 (quoting *Smith v. State*, 103 Md. App. 310, 323 (1995)).

This Court upheld a trial court's denial of a continuance in *Prince* where the defendant sought to develop expert testimony about his mental state. *Id.* The defendant provided no information by which a court could have found a reasonable expectation of securing the information; rather, his "expectation" amounted to little more than a "hope." *Id.* In addition, he was uncertain of the content of the information and thus could not assert that it was competent and material. *Id.* Finally, he did not make diligent efforts because he delayed trying to secure the information. *Id.* at 204–05.

As in *Prince*, the court was within its discretion to deny Rogers' request for a continuance. First, Rogers gave no basis by which the court could have determined a reasonable expectation of securing plotted cell phone records. In fact, the State had inquired numerous times about the existence of such records and was informed that there were no call details with associated tower locations. Second, even if such records existed, Rogers provides no evidence they would be competent and material to trial. To be sure, Rogers did not suggest that cell phone records would exculpate him until a week before trial when he did so to counsel. At that point, trial had been rescheduled six times over three years without any mention of exculpatory records. Finally, Rogers did not make diligent and

proper efforts to secure the information. As noted, he did not insist on using this information until a week before trial, despite having three years to seek and secure any such records. Further, he was in possession of the same records that the State possessed, as the State provided cell phone records numerous times throughout discovery. Accordingly, we hold the court did not abuse its discretion in denying Rogers a continuance for production of a plot of the cell phone records and an expert to testify thereto.

VI. WE DECLINE TO REACH THE MERITS OF ROGERS' INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Rogers' final contention concerns an ineffective assistance of counsel claim. He asserts that he was denied his constitutional right to a fair trial based on his counsel's 1) failure to obtain the previously discussed cell phone records, and 2) failure to subpoena J. Palmer as a witness. As noted, a week before trial, Rogers informed his counsel that he wanted to affirmatively use the cell phone records because he believed them to be exculpatory. Additionally, Rogers asserts that calling J. Palmer as a witness would have been helpful because J. Palmer could have provided testimony about the backpack, exculpating Rogers.

The most appropriate way to raise an ineffective assistance of counsel claim is through a post-conviction proceeding. *Mosley v. State*, 378 Md. 548, 558–59 (2003). Although "a post-conviction proceeding generally is the preferable method in order to evaluate counsel's performance," "there may be exceptional cases where the trial record reveals counsel's ineffectiveness to be 'so blatant and egregious' that review on appeal is appropriate." *Id.* at 561–63 (quoting *Johnson v. State*, 292 Md. 405, 435 n. 15 (1982)). In

such a case, the trial record "clearly must illuminate why counsel's actions were ineffective" so appellate courts may avoid "the perilous process of second-guessing." *Id.* at 561 (quoting *Johnson*, 292 Md. at 435 n.15). Thus, direct review of ineffective assistance of counsel claims is permissible "only when [1] the critical facts are not in dispute and [2] the record is sufficiently developed to permit a fair evaluation of the claim." *Id.* at 566 (quoting *In re Parris W.*, 363 Md. 717, 726 (2001)).

Neither of Rogers' bases for his ineffective assistance of counsel claim are appropriate for us to review on direct appeal. There is nothing in the trial record that reveals ineffectiveness that is "blatant and egregious." In the absence of a clearly developed record, we will not engage in "the perilous process of second guessing," and thus decline to hear Rogers' ineffective assistance of counsel claims.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.