Circuit Court for Harford County
Case No. 12-K-15-1355

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2371

September Term, 2016

JAMES ALLEAN ASHFORD

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Graeff,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 22, 2018

Appellant, James Ashford, was charged in the Circuit Court for Harford County with first degree murder, first degree assault, reckless endangerment, use of a firearm in the commission of a crime of violence, and illegal possession of a regulated firearm. A jury acquitted him of first degree murder, but it convicted him of the lesser included offense of second degree murder, as well as all the remaining charges. The court sentenced appellant to a 40-year total term of active incarceration.[1]

On appeal, appellant presents two questions for this Court's review, which we have rephrased slightly, as follows:

> 1. Did the trial court abuse its discretion when it denied appellant's motion for a mistrial or, in the alternative, when it denied his motion to exclude?
>
> 2. Do appellant's sentences for first degree assault and use of a firearm in the commission of that assault merge into his sentences for second degree murder and use of a firearm in the commission of that murder?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On August 25, 2015, officers from the Harford County Sheriff's Office responded to the Busby trailer park in Perryman, Maryland. The original call was for an assault with a vehicle, and after the police were dispatched, they were advised of a possible shooting.

[1] The court sentenced appellant to: (1) 30 years for the second degree murder conviction, all but 25 years suspended; (2) five years, concurrent, for the conviction of first degree assault; (3) 20 years, consecutive, for the conviction of use of a firearm, all but ten years suspended; (4) five years, concurrent, for the second conviction of use of a firearm; and (5) 15 years, consecutive, for the conviction of illegal possession of a regulated firearm, all but five years suspended. This resulted in a sentence of 65 years, all but 40 years suspended, to be followed by five years of supervised probation.

When the officers arrived on the scene, they found appellant lying down, injured, in the street. Joshua Walter was slumped over the steering wheel of a nearby minivan, with what proved to be a fatal gunshot wound to his chest.

At trial, there was no dispute that appellant shot Mr. Walter, and Mr. Walter hit appellant with a minivan. Rather, the primary issue was whether appellant acted intentionally and with premeditation or in self-defense.

The State's primary witness was Dimitri Ashford, appellant's son, who was 12 years old at the time of trial. Dimitri testified that, during the summer of 2015, he lived with his mother, Mary Ashford, and Mr. Walter, in Darlington, Maryland, approximately 30-35 minutes away from the Busby trailer park.[2] On August 24, 2015, the night before the incident, Ms. Ashford dropped Dimitri off at appellant's trailer for a visit. After the two had dinner, appellant fell asleep on the couch, and Dimitri slept in the backroom. At approximately 3:00 a.m., Dimitri woke up, called his mother, and asked her to come pick him up.

Ms. Ashford testified that, when she arrived, she realized that she was low on gas and needed gas money from appellant to get home. She was unable to wake appellant, however, so she stayed with Dimitri overnight in appellant's trailer.

Dimitri testified that, when he woke up the next morning, he heard his mother and appellant talking. He then heard appellant leave for work. Moments later, appellant

[2] Ms. Ashford was appellant's wife, from whom he was separated.

returned to the trailer, ran to the back bedroom, and then ran back outside, holding a gun in his hand. Dimitri was familiar with the gun and had seen it several times before.

Dimitri then saw appellant running up the street of the trailer park towards Mr. Walter's van.[3] Appellant fired the handgun twice in the air over the van, and then, a third time, into the van itself. On cross-examination, Dimitri agreed that the first two shots were "warning shots" that were not intended to strike the van. After the appellant fired the third shot into the van, Dimitri saw appellant and Mr. Walter engage in a short "tussle" or "wrestle," after which appellant walked away from the van. It was at that point, according to Dimitri, that Mr. Walter hit appellant with the van.

Dimitri then went to appellant, who told him to hide the gun underneath a nearby trailer. Appellant also told Dimitri not to speak to the police. When asked on redirect examination why he hid the gun, Dimitri replied: "I was afraid [appellant] was going to end up shooting me."

After the police arrived, they took Dimitri to the sheriff's office for an interview. Dimitri agreed that he initially lied to the police, but eventually, Dimitri told the police where the gun was located.

On cross-examination, Dimitri confirmed that Mr. Walter did not get along with appellant, and he had once described appellant as a "piece of shit." Approximately one month before this incident, Mr. Walter stated that he was going to "kill [appellant] one

[3] The evidence indicated that Mr. Walter was looking for Ms. Ashford, and he was concerned about infidelity.

day." Appellant, similarly, did not like Mr. Walter. Appellant previously had told Dimitri: "I'm going to go find [Mr. Walter] and shoot up his mom's house."

Ms. Ashford had been living with Mr. Walter for several years prior to this incident. Appellant did not like Mr. Walter, and Ms. Ashford testified that appellant "has always been confrontational with most people." Indeed, in March 2015, appellant came to her residence, pointed a gun at her and her grandson and stated: "Where's [Mr. Walter]? He took my family – he took my life, I'm going to take his." Approximately two months after that, in June 2015, appellant sent Ms. Ashford a text message, which read, in part: "If [Mr. Walter] shows I'm shooting him. Please think I'm playing."

On the night before the shooting, Ms. Ashford went to appellant's trailer to pick up Dimitri. When she could not wake up appellant to obtain gas money for the return trip to Darlington, she slept overnight in the back bedroom. She did not tell her boyfriend, Mr. Walter, where she was going when she left at 2:00 a.m. The next morning, she realized that Mr. Walter had been trying to call her all night, leaving angry text messages and calling her a "slut." Ms. Ashford eventually spoke with Mr. Walter, at approximately 8:00 a.m. She was able to explain the circumstances and calm him down.

Shortly after that phone call, however, Dimitri told Ms. Ashford that he heard "hollering" outside between appellant and Mr. Walter. Ms. Ashford walked out of the trailer and saw appellant lying on the ground and Mr. Walter backing his van away from the area. Ms. Ashford did not see the shooting or appellant being struck by the van.

Mr. Walter later died from the gunshot wound to his chest, and the manner of death was determined to be homicide. The handgun used in the homicide was a .32 caliber revolver. When it was found underneath a nearby trailer, the six-shot revolver contained three fired caliber casings and three remaining live .32 caliber rounds. The medical examiner recovered a fired bullet from the victim's right lung during the autopsy.

As part of the investigation, Detective Donald Kramer, a member of the Harford County Sheriff's Office, spoke to Christine Stallings, Mr. Walter's mother. Ms. Stallings advised that Mr. Walter called her during the incident, and the call was recorded on her Verizon account voicemail.[4] During this voicemail, a male twice stated: "He fucking shot me."

Appellant testified in his own defense. On the day in question, appellant got up and got ready to go to work in Glen Burnie, where he worked as a car detailer. Because he was going to drive through Baltimore City with a lot of cash that day, and he was worried about crime, he decided to carry his handgun with him when he left his trailer. Although the gun carried six rounds, it had only four live rounds in it that day.

When he left his trailer, he went to his car parked nearby. Realizing that the car was low on oil, appellant started walking to his truck to get oil, which he had parked down the street. He saw Mr. Walter arriving in his Pontiac minivan. Mr. Walter was yelling something, so appellant walked up to the driver's side window. Mr. Walter was upset with

[4] As discussed in more detail, *infra*, Detective Kramer made a copy of the voicemail on a pocket recorder, and he then transferred that recording to a CD, which Detective Kramer and Ms. Stallings testified was a fair and accurate recording of the voicemail.

Ms. Ashford, and he called her vulgar names. Appellant advised him that "my wife and I need to discuss what is best for our kids right now," to which Mr. Walter replied: "[I]f she is living in my house, asshole, how is she your wife?" Mr. Walter then punched appellant in the mouth.

Appellant testified that he then turned and started running back toward his other car to retrieve his cell phone. He heard Mr. Walter's engine revving, looked over his shoulder, and then was hit by Mr. Walter's minivan. Appellant's left leg was "ripped" from the impact. Appellant testified that Mr. Walter then backed up and ran over his left foot. When appellant heard the engine "roar" again, he "pulled out the pistol out and fired one shot." Appellant testified that, if Mr. Walter had hit him, he "would have died."

After Appellant fired the gun, he jumped over a nearby fence to avoid further injury from Mr. Walter's minivan. As he did so, the handgun "flew out of [his] hand." Appellant testified that he did not know what happened to the gun after that. He denied telling Dimitri to hide the gun. He also denied sending a text to Ms. Ashford threatening Mr. Walter.

We shall include additional detail in the following discussion.

DISCUSSION

I.

Appellant contends that the circuit court abused its discretion when it declined to grant a mistrial after Detective Kramer testified that he heard three gunshots on a voicemail recording, or, in the alternative, in not excluding the recording after Detective Kramer made this comment during trial. The State contends that the trial court properly exercised

its discretion in denying the mistrial. It asserts that appellant's alternative argument is not preserved and is devoid of merit.

A.

Proceedings Below

This first contention involves a recording of a call that Ms. Stallings, the victim's mother, received from her son on the day of the incident. Pursuant to an unopposed motion to supplement the record, a transcript of the recording was prepared for purposes of this appeal. That transcript provides as follows:

> DETECTIVE KRAMER: This is Detective Donald Kramer, of the Harford County Sheriff's Office, CID. Today is 8/26/15. I'm currently assisting in the investigation from 8/25/15, homicide under C.C. Number 201500211707. Detective Tammy Burns (phonetic) is the primary investigator.
>
> We are going to tape a voice message which was left by the homicide victim during the shooting incident on 8/25. This message was from his cell phone to his mother's Verizon voice service. His mother's name is Christine Stallings (phonetic). This access information was gleaned on yesterday's date by myself from the homicide victim's mother at her home.
>
> (Audio recording was played.)
>
> VOICEMAIL RECORDING: Two new messages. Six saved messages are in your mailbox. Main menu. To review your messages, press one. First message.
>
> MALE VOICE: (Indiscernible) see his new wife. Motherfucker.
>
> (Static.)
>
> MALE VOICE: He fucking shot me. He fucking shot.
>
> (Static.)

> DETECTIVE KRAMER: That concludes the voicemail from Ms. Stallings' Verizon voice messenger. For the record, the numbers dialed was first 410-638-9710. Once you gain access, you then will dial 410-836-1456. And when prompted, pin number 1228 will be entered. And the voicemail will play.
>
> Ms. Stallings was instructed on yesterday's date to not delete the message for further investigative measures. That concludes.
>
> (Voicemail audio was concluded.)

Ms. Stallings testified during a motion in limine hearing that she received a voicemail from her son, stating that he had been shot.[5] Ms. Stallings testified that she allowed the Harford County Sheriff's Office to record that voicemail from her landline, and that the exhibit offered at the hearing was a fair and accurate copy of that voicemail.

Detective Kramer testified that he met Ms. Stallings at her home and listened to the voicemail. The recording was recorded on "Verizon Messenger," a service outside the home, as opposed to a traditional answering machine. Detective Kramer obtained a copy of the voicemail by recording it on a handheld pocket recorder, as he accessed and played the message again back at the sheriff's office. Detective Kramer agreed that the static heard on the voicemail recording could have been caused by him shuffling papers in the sheriff's office or moving the pocket recorder itself during recording. Detective Kramer agreed that he was not able to clearly determine what happened during the recording, other than a "scuffle, and there was one clear statement made by a person on the recording." He also testified at the hearing that he heard "[l]oud noises that could have been gunshots."

[5] There was evidence that Mr. Walter's cellphone was found next to him on the driver's seat of the minivan.

The detective agreed that the exhibit introduced at the motions hearing was a fair and accurate representation of the voicemail he heard on Stallings' phone. On cross-examination, Detective Kramer agreed that he did not contact Verizon and ask for a better copy of the voicemail or attempt to have the original saved.[6]

Despite counsel's argument that the recording should be excluded because of its poor quality, the court ruled that the voicemail recording was admissible. It stated, as follows:

> The Court is going to allow the recording in. I have had the opportunity now to not only hear different people testify, but to also hear the recording. But it's going to be limited. Once again, the testimony that I have is by two of the witnesses is that this fairly and accurately portrays what they heard on the recording. And that is fine and dandy, but the standard isn't that. It's an issue of whether or not it fairly and accurately portrays or reflects what was audibly going on at the time. And obviously it does not in certain respects because, and I don't know how to do this without totally ticking off Madam Reporter, but there is obvious static we are hearing.

The court recognized that aspects of the recording were problematic:

> And I know there was a cross-examination question about the police officer surmising as to, well, you know, that sound was consistent with gunfire. I know [defense witness] was testifying, well, that could be, also could be a number of other things. Well that's where I agree with the defense. We are not going to get into conjecture. I don't think that is fair to anybody. And so I understand that it is important.

The court ultimately determined, however, that the recording was relevant in three respects:

[6] Ms. Stallings was instructed not to delete the message. She also saved it "[a]s often as [she] could," but the voicemail was deleted automatically after a period of 30 days without being resaved.

Number one is, there was very clearly the statement by the decedent, and pardon my language, I'm quoting, what was said is something along the lines of "he fucking shot me." That you can clearly hear. That is relevant and admissible.

The fact that there was some verbal exchange, and while I can't tell what exactly that was, I heard the word "wife" in there, and that corroborates Dimitri to some degree as to part of his story. And that is relevant.

And then the third issue I think the State is pointing out is that by having this voicemail message on the server, the Verizon server, has a time showing when this occurs.

* * *

So for those three reasons, the static doesn't interfere with those three purposes. And so having heard everything and heard and considered all this at length, and I have given this an awful lot of thought, I'm going to grant the motion in part and deny it in part.

And so I will allow the State to put this in but it's going to come in with the limited purpose as to the three items we just discussed. And I'm going to caution the jury orally right before it comes in as to its limited admissibility, and I'm more than happy to do that in two fashions. Number one, tell them what it is limitedly admitted for, and I'm more than happy to tell them what it's not admitted for and it's not to be used for, and that would address the defendant's concerns, and valid concerns. I will do that orally right before it comes in, and I am more than happy to include it in the written instructions when it goes to the jury.

I also will invite counsel on both sides to be a part of drafting that instruction. So hopefully we can come up, without waiving any objection of course, but hopefully then we'll get everybody's input on how to phrase that.

At trial, Detective Kramer testified, regarding the recording, as follows:

Q. And what was the general nature of the recording that she had on her service?

A. The nature of the recording was her son in open line or intentionally sent open line where her son -- I believe it was her son, she told me this, was apparently in some sort of scuffle. There is a lot of noise. There is [sic] three apparent gunshots heard –

The court sustained defense counsel's objection to this testimony and advised the jury that the "answer is stricken and you are to disregard the last answer."[7]

The CD of the voicemail was then admitted into evidence, without objection. The court advised the jury, as follows:

> Ladies and gentlemen of the jury, the recording of the voice mail is admitted but for three limited purposes: That is to play a statement made by Mr. Walter; to play an apparent exchange between Mr. Walter and Mr. Ashford, and to lay the foundation for determining the time of the incident. The recording is not admitted to portray any alleged gunshots, a crash, or anything else, and you are not to use this voice mail for any purpose other than the three aforementioned reasons. In other words, you are not to speculate about the meaning of any of the sounds you discern or that you think you discern from this recording, The recording is not meant to be interpreted as a recording of the entire incident. So it is admitted with those limitations.[8]

After Ms. Stallings testified that the digital recording at issue was a fair and accurate depiction of the voicemail she heard on her phone, but before the recording was played for the jury, the court instructed the jury again, as follows:

> [T]he recording of the voice mail is admitted for three limited purposes: And that is, to play a statement made by Mr. Walter; to play an apparent exchange between Mr. Walter and Mr. Ashford; and to lay the foundation for determining the time of the incident. The recording is not admitted to portray any alleged gunshots, a crash or anything else, and you are not to use this voice mail for any purpose other than the three aforementioned reasons. In other words, you are not to speculate about the meaning of any of the sounds

[7] The prosecutor advised the court that he thought he made clear to Detective Kramer not to say anything about gun fire, and he readvised the witness.

[8] At a subsequent bench conference, and after noting that the parties had "jumped the gun" on admission of the CD exhibit, the court clarified that it was going to reinstruct the jury about the recording before the exhibit was published.

> you discern or that you think you discern from this recording. The recording is not meant to be interpreted as a recording of the entire incident.

The recording was then played for the jury.

Appellant moved for a mistrial based on Detective Kramer's statement that three gunshots were heard on the recording. The prosecutor stated his belief that he had told the witness not to "discuss the perception of the gunshot in this particular case." Defense counsel requested "that a mistrial be granted or the tape be excluded."

The court denied the motion for a mistrial, stating:

> Okay. We have already dealt with the admissibility of the tape. I have been very specific about that. I'm going to deny the motion. He did say it. Certainly not happy about it, particularly the time we spent dealing with the motion and everything. However, I sustained the objection. I struck it. I told them to disregard it. On top of that, I have read not once but twice so far the instruction and frankly, I was watching the jury and they were paying close attention to me when I did that. I certainly intend, if it comes up again, to do that. It will be in the written instructions. And if they ask to hear this thing, I'm going to give it to them again at that point in time.
>
> So like I said, I certainly am not happy that he said it but I don't think it has had any impact whatsoever. I think what I have told them has overcome anything that he blurted quickly because -- and when I was telling them, I was speaking very slowly and demonstratively and I could tell they were all riveted and listening. Sometimes jurors are kind of doing their own thing but this group was literally hanging on my every word. And I purposefully read it very slowly so that they would get the import of what I was telling them.
>
> Respectfully, your motion is denied.

During jury instructions, the court again informed the jury to consider the recording only for the limited purposes it had described earlier, and it instructed the jury not to "speculate about the meaning of any of the sounds [it] discern[s] or think that [it] think[s]

[it] discern[s] from [the] recording." At appellant's request, the court restated this instruction once more before closing arguments.[9]

The jury was instructed once more after deliberations began. The court explained:

> We have received a communication from the jury that reads as follows, and I think we were all expecting this one: Can we get the voice message played for us. And the answer is obviously yes. So we'll bring them on out. And defense has requested that I once again read the limiting instruction. I'm happy to do it.
>
> The jury was brought in and the followed occurred:
>
> THE COURT: Okay. I have received a communication from Madam Foreperson requesting to hear the audio CD. . . . [The Prosecutor] has the laptop, and he will play [the CD] for you. And if you wish to hear it a second time, a third time, whatever, remember just so indicate. But once again, I've already instructed you several times during the trial and the final instructions, but let me instruct you again as to the limited admissibility of this piece of evidence that you are going to hear again.
>
> The recording of the voicemail is admitted for three limited purposes. That is to play a statement made by Mr. Walter, an apparent exchange between Mr. Walter and Mr. Ashford, and lay the foundation for determining the time of the incident.
>
> The recording is not admitted to portray any alleged gunshots, crash, or anything else. And you are not to use this voicemail for any purpose other than the three aforementioned reasons. In other words, you are not to speculate about the meaning of any of the sounds you discern or that you think you discern from this recording. The recording is not meant to be interpreted as a recording of the entire incident.
>
> So once again, keep that in mind as you listen to this.

[9] Prior to giving the instruction before closing argument, the court observed that "at this point, I think they might throw things at me. If you want me to [give the instruction], I will. They heard it so many times now."

The recording was then played for the jury. The parties stated that they had no objection as to how this procedure was conducted.

B.

Mistrial

Appellant argues that the circuit court abused its discretion when it denied his motion for a mistrial. He contends that Detective Kramer's testimony regarding the gunshots heard in the voicemail was crucial to the State's case. He argues that the recording corroborated the State's theory of the case, and Dimitri's claim, that appellant "fired three shots from his gun." It also conflicted with appellant's defense theory that he fired only one shot from his gun in self-defense. Appellant asserts that the detective's testimony "could not be cured with an instruction" because, after Detective Kramer testified about the gunshots, "the jury was put on notice that it might in fact be possible to hear gunshots on the voicemail, thus making it highly likely that the jury listened to the voicemail with the intent of trying to discern whether they too could hear the sound of three gunshots."

The State contends that the court properly exercised its discretion in refusing to grant a mistrial. Initially, it states that Detective Kramer's testimony that he heard "three apparent gunshots" was not "inadmissible evidence per se" because it was "within the range of permissible lay opinion," and it was "consistent with other evidence, including Dimitri's eyewitness account and the three shell casings found in [appellant's] revolver." Accordingly, it argues that, although the testimony contravened the court's ruling regarding

the scope of testimony regarding the recording, the "risk of unfair prejudice" to appellant, "if it existed at all, was significantly less than that in the typical case involving a motion for a mistrial, in which there is no dispute about the inadmissibility of the evidence." In any event, the State asserts that the circuit court properly exercised its discretion in denying the motion for mistrial because: (1) the reference to the gunshots was "isolated and, according to the trial court, 'blurted quickly'"; (2) the prosecutor did not "solicit the reference"; (3) Detective Kramer was not "the principal witness upon which the entire prosecution depended"; (4) there is "no dispute," based on other evidence admitted at trial, that appellant shot Mr. Walter; and (5) the court's curative instruction was "timely, accurate, and effective."

A mistrial is an extreme remedy that is warranted only under extraordinary circumstances. *Nash v. State*, 439 Md. 53, 69, *cert. denied*, 135 S.Ct. 284 (2014). *See Anderson v. State*, 78 Md. App. 471, 493 (1989). Appellate courts generally "'review the denial of a motion for a mistrial under the abuse of discretion standard.'" *Scribner v. State*, 219 Md. App. 91, 106 (quoting *Dillard v. State*, 415 Md. 445, 454 (2010)), *cert. denied*, 441 Md. 63 (2014). An "'[a]buse occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law.'" *Small v. State*, 235 Md. App. 648, 702 (quoting *Campbell v. State*, 373 Md. 637, 665-66), *cert. granted*, 187 A.3d 35 (2018). "'Ordinarily, the exercise of that discretion will not be disturbed upon appeal absent a showing of prejudice to the accused,' and '[i]n order to warrant a mistrial, the prejudice to the accused must be real and substantial.'"

Wagner v. State, 213 Md. App. 419, 462 (2013) (quoting *Washington v. State*, 191 Md. App. 48, 99 (2010)).

When assessing whether the declaration of a mistrial is necessary, the "determining factor" is "'whether "the prejudice to the defendant was so substantial that he was deprived of a fair trial."'" *Winston v. State*, 235 Md. App. 540, 569-70 (quoting *Kosh v. State*, 382 Md. 218, 226 (2004)), *cert. denied*, 458 Md. 593 (2018). The trial judge must evaluate the circumstances of the case, and "[i]n assessing the prejudice to the defendant, the trial judge first determines whether the prejudice can be cured by instruction." *Kosh*, 382 Md. at 226. *See Carter v. State*, 366 Md. 574, 589-90 (2001). "If a curative instruction is given, it must be timely, accurate, and effective." *Carter*, 366 Md. at 589. "'Unless the curative effect of the instruction ameliorates the prejudice to the defendant, the trial judge must grant the motion for a mistrial.'" *Cooley v. State*, 385 Md. 165, 173 (2005) (quoting *Kosh*, 382 Md. at 226).

The Court of Appeals has identified five factors relevant to the determination of whether a mistrial is required, including: (1) "whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement"; (2) "whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement"; (3) "whether the witness making the reference is the principal witness upon whom the entire prosecution depends"; (4) "whether credibility is a crucial issue"; and (5) "whether a great deal of other evidence exists." *Jackson v. State*, 230 Md. App. 450, 467-68 (2016) (quoting *Carter*, 366 Md. at 590). As this Court explained in *McIntyre v. State*, 168 Md. App. 504, 524 (2006), "no single factor is determinative in any case, nor are the factors themselves

the test." "Rather, the factors merely help to evaluate whether the defendant was prejudiced." *Id.*

With regard to the relevant factors, we note that Detective Kramer's reference to "three apparent gunshots" was an isolated incident, which the trial court stated was "blurted quickly" *See Washington*, 191 Md. App. at 100 (a "blurt" or a "blurt out" is "an abrupt and inadvertent nonresponsive statement made by a witness during his or her testimony."). *See also State v. Hawkins*, 326 Md. 270, 277 (1992) (a police officer's references to "polygraph" were non-prejudicial "blurts" where they were not solicited or pursued by the prosecutor). Detective Kramer's testimony was not solicited by the prosecutor, who asked the question: "[W]hat was the general nature of the recording that she had on her service?" And Detective Kramer was not the State's primary witness.

Moreover, in this case where there was no dispute that appellant shot Mr. Walter, and there was ample evidence that he did so with criminal intent, rather than in self-defense. Appellant's son, Dimitri, testified that appellant fired three shots, and he told Dimitri to hide the gun and not to speak with the police, indicating appellant's consciousness of guilt. *See Wagner*, 213 Md. App. at 465 ("This desire to conceal evidence is consistent with consciousness of guilt regarding his actions, as well as actual guilt."). In addition, the six-shot revolver that was recovered had only three live rounds remaining, which corroborated a finding that three shots had been fired from that gun. Under these circumstances, we are not persuaded that Detective Kramer's testimony was so unfairly prejudicial that the jury was misled in their consideration of the remaining evidence.

This is especially the case given the trial court's prompt and repeated instructions to the jury regarding the voicemail recording. In addition to immediately sustaining appellant's objection to Detective Kramer's statement and instructing the jury to disregard the testimony, the jury was instructed at least five different times to the limited bases for which the voicemail was only being admitted, and that the jury should not "use this voicemail for any purpose other than the three aforementioned reasons." *See Brooks v. State*, 68 Md. App. 604, 613 (1986) ("While a defendant is entitled to a fair trial, he is not entitled to a perfect one; and when curative instructions are given, it is presumed that the jury can and will follow them."), *cert. denied*, 308 Md. 382 (1987). The circuit court did not abuse its discretion in denying appellant's motion for a mistrial.

C.

Exclusion of the Recording

Appellant next contends that the court abused its discretion in refusing to exclude the voicemail. He asserts that, "[o]nce Detective Kramer informed the jury that he heard three 'apparent gunshots' when he listened to the voicemail, the danger of unfair prejudice – the jury would speculate that the noises were gunshots – outweighed any probative value the voicemail may have had."

We note, initially, that we are not persuaded by the State's preservation argument. At the end of the argument on the mistrial motion, defense counsel specifically requested "that a mistrial be granted or the tape be excluded." This statement was sufficient to preserve the issue for appeal.

The contention, however, fails on the merits. "[R]elevant evidence is admissible, under Maryland Rule 5-402, subject to the court's exercise of discretion to exclude it, under Maryland Rule 5-403, 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *Odum v. State*, 412 Md. 593, 615 (2010). Here, we agree with the State that the recording was highly probative because it was a recording of the incident for which appellant was on trial, in which Mr. Walter could be heard saying: "He fucking shot me." The trial court did not abuse its discretion in declining to exclude the recording based on the isolated blurt by Detective Kramer, and instead giving the repeated limiting instruction to the jury. Appellant's contention to the contrary is without merit.

II.

Appellant next contends that the circuit court erred when it failed to merge his sentences for first degree assault and use of a firearm into his sentence for second degree murder.[10]

The State contends that appellant "properly received separate sentences for second-degree murder, first-degree assault, and using a handgun to commit each of those offenses." It asserts that the convictions for second degree murder and first degree assault were based on separate acts, i.e., assault based on the action of firing shots over Mr. Walter's van and

[10] He asks the this Court to "vacate [his] concurrent five-year sentence for first-degree assault, as well as the concurrent five-year sentence for use of a firearm in the commission of that assault."

murder based on the action of firing the third shot into Mr. Walter's chest. Accordingly, the State argues that separate sentences are warranted.

"The merger of convictions for purposes of sentencing derives from the protection against double jeopardy afforded by the Fifth Amendment of the federal Constitution and by Maryland common law." *Brooks v. State*, 439 Md. 698, 737 (2014). As the Court of Appeals has explained:

> Double jeopardy "bars multiple punishments and trials for the same offense." [*State v. Long*, 405 Md. 527, 536 (2008)] (citing *United States v. Wilson*, 420 U.S. 332, 343, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975)).
>
> In order for two charges to represent the same offense for double jeopardy purposes, they must be the same "in fact" and "in law." *See Anderson v. State*, 385 Md. 123, 131, 867 A.2d 1040 (2005). To determine whether charges are the same in fact, we look to whether they arise out of the same incident or course of conduct. *Id.* To determine whether two offenses arising out of the same incident are the same in law, we apply the "same elements" test set forth by the Supreme Court of the United States in [*Blockburger v. United States*, 284 U.S. 299 (1932)]. *Anderson*, 385 Md. at 131, 867 A.2d 1040. "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Thomas v. State*, 277 Md. 257, 265, 353 A.2d 240 (1976) (quoting *Blockburger*, 284 U.S. at 304, 52 S.Ct. 180).

Scriber v. State, 437 Md. 399, 408 (2014).

In *Sifrit v. State*, 383 Md. 116, 138-39 (2004), the Court of Appeals held that assault in the first degree would merge into second degree murder under the rule of lenity where the convictions arise out of the same act. Here, however, as indicated, the State argues that the two convictions did not arise out of the same act.

When determining whether the charges are part of the same act or transaction, we

examine whether the "defendant's conduct was 'one single and continuous course of conduct,' without a 'break in conduct' or 'time between acts.'" *Morris v. State*, 192 Md. App. 1, 39 (2010) (quoting *Purnell v. State*, 375 Md. 678, 698 (2003)). *See also Graham v. State*, 117 Md. App. 280, 289, *cert. denied*, 348 Md. 206 (1997). Separate acts that result in "separate insults to the person of the victim may be separately charged and punished even though they occur in very close proximity to each other and even though they are part of a single criminal episode or transaction." *State v. Boozer*, 304 Md. 98, 105 (1985). *Accord Latray v. State*, 221 Md. App. 544, 562 (2015).

In *Alexis v. State*, 437 Md. 457, 486 (2014), the Court of Appeals explained:

> The burden of proving distinct acts or transactions for purposes of separate units of prosecution falls on the State. Accordingly, when the indictment or jury's verdict reflects ambiguity as to whether the jury based its convictions on distinct acts, the ambiguity must be resolved in favor of the defendant.

(quoting *Morris*, 192 Md. App. at 39)

Here, the record makes clear that the State proceeded on the theory that there were separate acts. The prosecutor made this clear during the argument on the motion for judgment of acquittal at the end of the State's case-in-chief, stating that there were two separate assaults: "[o]ne that coincides with the homicide, which is the actual shooting of Mr. Walter; the other being the shots taken over his vehicle under a second degree assault theory of intent to frighten" by use of a firearm. And the prosecutor made clear in closing argument that there were two separate acts, telling the jury that appellant "committed first-degree assault by taking two shots over Mr. Walter's van . . . in an attempt to frighten him,"

and the murder occurred when Appellant "fired that gun the third time . . . through the open window" of Mr. Walter's van.

Based on our review of the record, we are persuaded that there was no ambiguity in this case. The case was based on the theory that the first degree assault charges were for the two warning shots that Dimitri saw appellant shoot over the victim's van, and the murder charge was based on the firing of the third shot that hit Mr. Walter. Thus, the convictions were based on separate acts and the court properly imposed separate sentences. The sentences for second degree murder and first degree assault with a firearm do not merge. *See Johnson v. State*, 228 Md. App. 27, 49-50 (merger not required when "verdict sheet, coupled with the trial court's instructions regarding the verdict sheet and the prosecutor's closing argument," made clear that each of the offenses charged were based on separate acts), *cert. denied*, 450 Md. 120 (2016).

With respect to the sentence for use of a firearm, the General Assembly has clearly provided that a sentence for such a conviction does not merge with the sentence for the underlying crime. *See* Md. Code (2012 Repl. Vol) § 4-204(c)(1)(i) of the Criminal Law Article ("CR") ("A person who violates this section is guilty of a misdemeanor and, in addition to any other penalty imposed for the crime of violence or felony, shall be sentenced to imprisonment for not less than 5 years and not exceeding 20 years."); *Cagle v. State*, 235 Md. App. 593, 613-14 ("A plain reading of the relevant portions of section 4-204 prohibits a person from using a firearm in the commission of a crime of violence, and it contemplates that the sentence shall be 'in addition to any other penalty imposed for the

crime of violence or felony[.]'") (quoting CR § 4-204(c)(1)(i)), *cert. granted*, 549 Md. 169 (2018). Appellant's claim that his sentences merge is without merit.

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