UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2435

September Term, 2013

CHARLES SPRIGGS

v.

STATE OF MARYLAND

Meredith,
Woodward,
Sharer, J., Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: August 10, 2015

Following a jury trial in the Circuit Court for Anne Arundel County, appellant, Charles Spriggs, was convicted of first-degree murder, use of a firearm in the commission of a crime of violence, carrying a handgun, and conspiracy to commit first-degree murder.[1]

Appellant noted a timely appeal and presents four questions for review, which we have slightly rephrased and reordered to facilitate review:[2]

1. Did the trial court err in admitting evidence of appellant's prior bad acts?

2. Did the trial court err in admitting two recorded telephone calls into evidence?

3. Did the trial court err in giving consciousness of guilt jury instructions?

4. Was the evidence sufficient to sustain appellant's convictions?

For the reasons that follow, we affirm the judgments of the circuit court.

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[1]The court sentenced appellant to life imprisonment for first-degree murder, life imprisonment, concurrent, for conspiracy to commit first-degree murder, and five years, consecutive, for use of a firearm in the commission of a crime of violence. For sentencing purposes the court merged the handgun conviction.

[2] Appellant's questions were:

1. Was the evidence sufficient to sustain the convictions because the testimony of his alleged accomplice was not corroborated?

2. Did the trial court err in giving consciousness of guilt jury instructions?

3. Were the trial court's rulings admitting evidence of Appellant's prior bad acts erroneous?

4. Did the trial court err when it permitted the state to introduce into evidence two recorded telephone calls, where Appellant did not manifest an adoption or belief in the statements made by a third party and the third party was not acting as Appellant's agent?

BACKGROUND

The genesis of this appeal is a shooting that occurred on January 23, 2013, in the Annapolis Bywater community. Howard Durley was found dead, lying face down on the ground in the backyard of 1908 Copeland Street. Because he was not the shooter, the State prosecuted appellant for Durley's murder under the theory of accomplice liability.

On July 29, 2013, William Chase, who fired the fatal shots, pleaded guilty to Durley's murder. Chase, however, testified at trial that he killed Durley only because appellant told him to. He explained that he had no intention of killing Durley prior to appellant's instruction. According to Chase, he did not know Durley and had no reason to kill him. At the time of appellant's trial, Chase was awaiting sentencing. Chase understood that the State would recommend a sentence of life, with all but 55 years suspended, in return for his cooperation and truthful testimony at appellant's trial.

Prior to his arrest, Chase lived at 1902-D Copeland Street with his sister, Ashley West. Chase met appellant, who he considered to be his older cousin, when Chase's family moved to Annapolis.[3] Between October 2012 and January 23, 2013, Chase saw appellant frequently. Chase testified that he would "do things" for appellant, who would pay him for completing the tasks.

[3] At the time of the murder, Chase was 19 years old and appellant was 25.

Through spending time with appellant, Chase became aware that appellant and Shequita Sledge were in a relationship, lived together, and had a son together. Chase, however, noted that appellant's relationship with Sledge deteriorated in December 2012, and, shortly thereafter, appellant moved in with his sister, Lekitia Hall. Chase believed that appellant and Sledge would reconcile, so when he saw Sledge with Durley on New Year's Eve, he thought that Sledge was cheating on appellant. Chase told appellant that he had seen Durley and Sledge together.

During the month of January 2013, Chase saw appellant text Sledge every day and saw appellant call Sledge on numerous occasions. Chase drove with appellant, in appellant's car, on several occasions to look for Sledge, or drive past Durley's house. On one occasion, appellant told Chase that he was going to get someone to kill Sledge or that he would run Sledge over with his car. Chase testified that appellant initially owned a .38 hand gun, but then traded that gun for a nine millimeter. Chase stored the gun and the bullets for appellant on a shelf in his room at West's house.

On January 23, 2013, Chase was at West's house taking care of his girlfriend, who was sick. Around 6:00 p.m. appellant called Chase and asked if he wanted to drink. Two or three hours later, appellant showed up at West's house, intoxicated, with a bottle of alcohol to share with Chase. The two men sat in West's kitchen drinking and smoking. West returned home and appellant told her that Sledge was going to send the police to the house.

West sent a message to Sledge, and then went to Sledge's house, at appellant's behest, to "see who [is] in there."

Chase and appellant followed West to Sledge's house, but waited outside while West went inside to talk to Sledge. When appellant started fumbling with the door handle to try to get inside, Sledge saw Chase and appellant outside. Sledge walked away from the window and appellant put his face up to the front door to try to hear what was going on. Appellant handed Chase a straight razor and told Chase to "flat [Sledge's] tires." Chase complied and stabbed all four tires of Sledge's car with the straight razor. When Chase returned, appellant was still standing at Sledge's front door.

When appellant saw someone leave Sledge's house he asked Chase to see who it was. Seeing the back door of West's house open, he assumed that it had been West who left Sledge's house. Appellant and Chase went back to West's house and asked West who was in the house with Sledge. West responded that no one was in the house, and that Sledge had just left the house. Appellant and Chase left West's house and walked in the direction that Sledge had supposedly gone.

While they were walking, appellant saw Durley. According to Chase, it looked like Durley had just left Sledge's house through the back door. Appellant also thought that Durley had been at Sledge's house and appellant told Chase to get the gun from West's house. Chase ran to get the gun and brought it to appellant, who was waiting at Sledge's

back door. Appellant and Chase put on ski masks and followed Durley toward the playground.

Appellant confronted Durley at the playground about Durley's relationship with Sledge, but Durley denied that he was with Sledge. At that point, Chase could tell that appellant was becoming angry. As appellant and Durley argued – for at least five to ten minutes - appellant gave Chase his keys and told Chase to go start the car. Chase left the playground, started the car, and sat in the driver's seat with the engine running waiting for appellant. After about 10 minutes, Chase got out of the car and walked back to the playground to make sure appellant was all right. Appellant and Durley were still at the playground talking. As Chase walked over to appellant and asked what he was doing, appellant handed Chase the gun and told him to "kill the nigger." Appellant gave Chase a nod, and Chase shot Durley. As Durley fled, Chase ran after him. When Chase caught up to Durley, Durley fell to the ground, and Chase fired a second shot at him. Chase observed that Durley was not moving and ran back toward the playground.

When Chase got back to the playground, he saw a phone on the ground where Durley had been standing, and he picked it up and put it in his pocket. Chase then met up with appellant, got into appellant's car, and they drove away. In the car Chase told appellant that Durley was dead, and appellant made a phone call and told the person on the other end of the call that he killed Durley. Appellant drove to a nearby Safeway and Chase threw Durley's

phone out the window. Appellant told Chase that they had to get rid of the weapon, so he pulled the car over, and Chase threw the gun into a sewer.

After disposing of the gun, Chase and appellant parted ways. Chase walked down the street and threw his ski mask and gloves into a different sewer. Eventually Chase called his uncle Barry, who picked him up and took him to his home in the Bywater community. Chase told his uncle what had happened, washed his hands and clothes, and called his mother to ask her to bring him a change of clothes. Chase's mother then drove Chase to the Annapolis police station for questioning.

At the police station, Chase initially lied to the detectives and told them that he was not involved and that appellant shot Durley. In Chase's third statement to the police, after he was arrested and charged with the murder of Durley, he admitted his participation in the shooting of Durley. Then, on June 17, 2013, Chase took police officers to the locations where he and appellant disposed of the gun, gloves, and masks.

Sledge witnessed a portion of the events that occurred on the evening of January 23, 2013. Sledge testified that she ended her relationship with appellant in the beginning of December 2012, and told appellant that he had 30 days to move out of her house. According to Sledge, appellant was upset about the break-up and he started following her.

Around the same time, Sledge began dating Durley, who had been friends with appellant. On New Year's Eve, Sledge was out with Durley and they ran into Chase. Shortly thereafter, Sledge received text messages from appellant asking if she was with Durley.

After this exchange, appellant's demeanor towards Sledge changed. According to Sledge, appellant became angry and upset and would constantly call, text, and follow her, even though she told him to stop.[4] Sledge testified, over defense counsel's objection, that on one occasion, appellant threatened to kill her and Durley. Appellant specifically told Sledge that he would have one of his friends kill her as she drove her taxi and make it appear as a robbery.

According to Sledge, Durley arrived at her house around 5 p.m., stayed for an hour or two, and then returned around 9 p.m. Around 11 p.m., West knocked on Sledge's front door and Sledge let her inside. While Sledge and West were talking, Sledge heard a knock at her front door. Sledge and West looked out the front window and saw appellant and Chase. Sledge did not answer the door, West left from the back door, and Sledge went to talk to Durley, who had been waiting upstairs.

Durley told Sledge that he had to meet his cousin and that he would call when he returned. Sledge told Durley that appellant was outside and asked Durley if he was sure that he wanted to leave. Durley told Sledge to lock the door behind him and he left by the back door. Sledge followed Durley downstairs, locked the door behind him, and started washing dishes in the kitchen sink. While washing dishes, Sledge heard a knock at the front door and asked who was there. The person responded "H," which was Durley's nickname, but Sledge

[4] The text messages from appellant consisted of asking Sledge to call him, asking where she was, asking if she was with Durley, asking Sledge to take him back, and telling Sledge that he loved and missed her.

recognized appellant's voice, so she did not open the door. Immediately thereafter, Durley phoned her. Sledge testified that she felt scared after her conversation with Durley.

Sledge walked to her son's room, which faced the back of the house, looked out the window, and saw Durley outside walking toward Copeland Street. Then, she saw appellant and Chase walking toward Durley "[a]nd they kind of sort of like meet up." When appellant asked Durley if he had just left Sledge's house, Durley responded "No, I just came from Copeland from meeting my cousin." Appellant told Durley that he saw him leaving Sledge's home, but Durley continued to deny being there. The three men continued to walk away from Sledge's house and once they reached the playground area, Sledge could no longer hear what they were saying, but she could tell that they were still talking based on their hand gestures.

Sledge continued to watch the playground and saw "the fire from the gun go off[,]," but she could not tell whether appellant or Chase fired the gun because of how close they were standing to each other. Then, Durley, appellant, and Chase ran and Sledge lost sight of them.[5] When Sledge saw the men running, she called Durley three times, but he did not answer. Then, appellant and Chase reappeared in Sledge's view as they "came back from the direction they ran to and past the other side of the playground[.]"

Sledge ran outside to look for Durley and saw that all four of her tires were flat. Sledge spotted Durley lying on the ground, but she could not get to him immediately because

[5] Sledge testified that Durley was in front and Chase and appellant were behind him.

of a fence. When Sledge finally reached Durley's side, she knew he was dead. She stayed with Durley and held him until the police arrived. Sledge found Durley's phone on the ground next to his body, used it to call his family, and then turned the phone over to the police. While at the Annapolis City Police Department, Sledge spoke to appellant, who asked what had happened in the Bywater community. Sledge said that she did not know, but appellant accused her of turning his name into the police. He told her he had nothing to do with what happened.

Johnnetta Jones' bedroom window faced out onto the playground. Jones knew appellant, Chase, Durley, and West, but not Sledge. As far as Jones knew, Chase and Durley did not know each other, but she knew that Chase and appellant were best friends.[6] Jones testified that she saw Chase and appellant together a lot in the days proceeding the shooting.

On the night of January 23, 2013, Jones opened her window and heard male voices arguing. The arguing was coming from the playground and she heard one of the men say "I am not a bitch." Jones saw two people standing in front of the bench and a third person standing by the climbing bars, but was not able to see their faces in the darkness. Jones continued to look outside and made eye contact with a man she recognized as Durley. Then, Jones turned away from the window because "[i]t didn't seem like anything was going on[.]"

After Jones turned away from the window, she heard a gunshot. She immediately turned around, looked out the window, and saw "two guys running towards the back[.]"

[6] West also testified that Chase did not know Durley.

Jones ultimately identified Chase by his scarf as one of the two men who ran toward the back, and confirmed that Chase ran after the other man. Jones testified that the third man remained at the playground and stood there watching. Then, as the two men ran out of her view she heard a second gunshot. Jones saw the man who remained run off to the left, and then saw Chase run through the playground. Jones tried to run after Chase, but she could not catch up to him, so she ran in the other direction where she discovered Durley lying face down, dead. According to Jones, there was a height difference between Chase, who was shorter, and the man who stayed at the playground watching, who she described as "pretty big" and "stocky."[7]

The medical examiner concluded that Durley died from two gunshot wounds, one to the left upper chest and one to the back left side of the head. He testified that he would have expected Durley to be able to run after being shot in the chest, but also opined that without medical treatment both gunshots were individually fatal.

Additional facts will be discussed below, as they pertain to each question presented.

DISCUSSION

1. Prior bad acts

Sledge testified, over defense counsel's objection, that appellant threatened to kill her and Durley. According to Sledge, appellant told her that he would have one of his friends

[7] According to Motor Vehicle records, Chase was 5'7" and 142 pounds and appellant was 5'11" and 200 pounds.

kill her and make it look like a robbery while she was driving her cab. Chase also testified that, on one occasion, appellant told him that he was going to get someone to kill Sledge and/or that he would run Sledge over with his car.

On appeal, appellant argues that the trial court erred in admitting evidence that he threatened Sledge because "[t]hreats made to Ms. Sledge in a case where Mr. Durley is killed are not connected." Appellant further argues that even if the evidence was relevant, the prejudice of the testimony outweighed any probative value.

The State responds that the threats against Sledge were relevant to show appellant's anger and jealousy about her relationship with Durley. The State argues that the testimony was relevant: (1) to show appellant's motive to kill Durley; and (2) to corroborate Chase's testimony that appellant ordered him to kill Durley. Finally, the State contends that the probative value of the evidence outweighs any prejudice. Alternatively, the State posits that any error in admitting the testimony was harmless.

"The admission of other crimes evidence is vested within the sound discretion of the trial court and we will not overrule the decision of the trial court unless there has been an abuse of discretion." *Copeland v. State*, 196 Md. App. 309, 316 (2010) (internal quotation marks omitted).

"While, generally, evidence of a defendant's prior bad acts is inadmissible, Maryland Rule 5-404(b) recognizes situations in which evidence of prior criminal or wrongful acts may

be admitted. Rule 5-404(b) sets forth a non-exhaustive list of special circumstances." *Id.*

Maryland Rule 5-404(b) provides, in pertinent part:

> Evidence of other crimes, wrongs, or acts including delinquent acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

Appellant's threats to kill Sledge were relevant to show his motive and intent to kill Durley in the weeks proceeding the shooting. Sledge testified that appellant's threat to have her killed was directed at both herself and Durley. Further, Sledge explained that appellant was jealous and angry about her relationship with Durley. Sledge's testimony regarding appellant's threat was also relevant to corroborate Chase's testimony that appellant told him that he was going to get someone to kill Sledge or that appellant would run Sledge over with his car. Finally, Sledge's testimony that appellant threatened to have one of his friends kill her and Durley was relevant because appellant ultimately ordered his friend, Chase, to commit the crime.

Testimony regarding appellant's threat was highly probative because it established that appellant had a motive to kill Durley due to his relationship with Sledge. The evidence of the threats also corroborated Chase's testimony that he shot Durley at appellant's direction. Under the circumstances, the probative value of the evidence outweighed the potential for prejudice. Any prejudice from the testimony was minimal in light of the court's instruction that the evidence could only be considered as it related to appellant's motive,

intent, and the impression it made on Chase, and could not be considered as evidence of appellant's bad character or his tendency to commit crimes. *See Dillard v. State*, 415 Md. 445, 465 (2010) ("Jurors generally are presumed to follow the court's instructions[.]").

The court did not abuse its discretion in admitting the testimony.

2. Telephone calls

Defense counsel asked the court to exclude several recorded telephone calls that appellant made to his cousin, Timothy Johnson, from the county jail, while he was held in pretrial custody. The court, however, determined that Johnson was either acting as appellant's agent or had authority to speak on appellant's behalf, and therefore, concluded that the calls were admissible under Md. Rule 5-803(a).

Both phone calls were made on July 31, 2013. Sledge testified that she received a phone call from Johnson, whom she knew as "Cuz" or "Cuz Cuz".[8] Sledge identified appellant's voice and Johnson's voice on the recording. Sledge testified that, at the time the phone call was made, she did not realize that the conversation was a conference call, or that appellant was on the phone. Thereafter, the recording was played aloud for the jury.

The conversation was initiated by appellant, who asked Johnson to call Sledge for him. Before calling Sledge, Johnson asked appellant three times what he should say to Sledge. Appellant responded that Johnson should say to Sledge "I know you ain't gonna go

[8] Sledge identified the person she knew as "Cuz" in a photo lineup. MVA records indicated that Cuz's full name was Timothy Charles Johnson.

to court," and that he should ask her about what she was going to say in court. Sledge answered the phone and Johnson asked if she was "going to court" on appellant. Appellant interjected and told Johnson to say to Sledge, "You wanna go holler at the lawyer with me?" Johnson offered Sledge money and pressured her to go to the lawyer's office and tell the lawyer that she did not see anything. Appellant interjected and told Johnson to say "Can we go up there tomorrow, yo?" After Sledge left the call, appellant asked Johnson why he did not ask Sledge if they could go to the lawyer's office tomorrow.

Sledge received a second call from Johnson the same day, but this time she knew that appellant was also on the call. A recording of this phone call was also played for the jury. This call, again, began between appellant and Johnson. Appellant told Johnson that he should have talked to Sledge himself because he could have gotten her to go to his lawyer's office. Appellant, again, told Johnson to ask Sledge if she would go to his lawyer's office that day. Johnson responded that he would text Sledge, but appellant told him not to text, so Johnson called Sledge instead.

Sledge initially did not answer the phone, so Johnson called her from a different phone number, and included appellant in the conversation through a conference call. Sledge answered the phone and appellant, himself, asked Sledge if she was "gonna go holler at [his] lawyer tomorrow?" Sledge responded that she was still thinking about everything and she ended the call.

Appellant argues that the court erred in admitting the phone calls because the statements were hearsay, and did not fall within any exception to the rule. Appellant further argues that the prejudice of the phone calls outweighed their probative value. The State responds that the phone calls were relevant to show appellant's consciousness of guilt, and that the statements were appellant's admissions and/or tacit admissions. Finally, the State posits that any error was harmless.

"'Whether evidence is hearsay is an issue of law.'" *Thomas v. State*, 429 Md. 85, 98 (2012) (quoting *Bernadyn v. State*, 390 Md. 1, 8 (2005)). Accordingly, when determining whether a hearsay exception is applicable, "we review the trial judge's ruling for legal error rather than for abuse of discretion; that is because hearsay is never admissible on the basis of the trial judge's exercise of discretion." *Id*.

Maryland Rule 5-801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Under Maryland Rule 5-802, "[e]xcept as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible."

Maryland Rule 5-803(a) provides that the following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> (a) Statement by Party-Opponent. A statement that is offered against a party and is:

> (1) The party's own statement, in either an individual or representative capacity;
>
> (2) A statement of which the party has manifested an adoption or belief in its truth;
>
> (3) A statement by a person authorized by the party to make a statement concerning the subject[.]

To the extent that the phone calls included hearsay, appellant's statements were admissible as his own statements, and Johnson's statements were admissible as either statements appellant adopted or as statements made by a person authorized to make statements on appellant's behalf.

On both occasions, Johnson called Sledge at appellant's request. Before calling Sledge, appellant told Johnson what to say. During the phone calls, appellant interjected when he wanted to add to, or make changes to, Johnson's statements. By failing to correct or disavow Johnson's statements, appellant manifested his belief in the statements through his silence, adopting them as his own. *See Wilson v. State*, 148 Md. App. 601, 669 (2002) (quoting *Henry v. State*, 324 Md. 204, 241 (1991)) ("A party may make a 'tacit admission,' adopting, by his or her silence, another person's statement.").

For Johnson's statements to be considered to have been adopted by appellant, and thus become appellant's tacit admissions, the following factors must be met:

> (1) the party heard and understood the other person's statement; (2) at the time, the party had an opportunity to respond; (3) under the circumstances, a reasonable person in the party's position, who disagreed with the statement,

> would have voiced that disagreement. The party must have had first-hand knowledge of the matter addressed in the statement.

Wilson, 148 Md. App. at 669 (quoting *Henry*, 324 Md. at 241-42).

The recording made clear that appellant heard and understood Johnson's statements to Sledge. At the beginning of the phone call, Johnson asked Sledge if she was going to testify against appellant. Then, appellant interrupted Johnson and told him to ask Sledge if she would go to his lawyer's office with Johnson. Johnson asked Sledge to go to the lawyer's office, offered her money to go, and told her to tell the lawyer that she did not see anything the night of the murder. Appellant did not interrupt Johnson during these statements; but when Johnson told Sledge to go to the lawyer's office before the end of the month, appellant interjected and told Johnson to ask Sledge if she would go to the office "tomorrow." Appellant could obviously hear Johnson's end of the conversation because after Sledge ended her participation in the call, appellant asked Johnson why he did not tell Sledge to go to the attorney's office "tomorrow."

Appellant also had the opportunity to respond to Johnson's statements to Sledge and did so on two occasions during the first phone call. Under the circumstances, a reasonable person in appellant's position who disagreed with Johnson's statements would have voiced such disagreement. After Johnson's conversation with Sledge, appellant criticized Johnson for not telling Sledge to go to his attorney's office the following day. Appellant, however,

did not comment on any of Johnson's other statements, which he could and most likely would have, if Johnson said anything that appellant did not agree with.

Accordingly, the statements made in the phone calls were admissible under Rule 5-803(a). The court did not err in admitting the recorded phone calls into evidence.

Because Johnson's statements were admissible as appellant's tacit admissions and appellant's statements were admissible as statements of a party opponent, we need not address whether the statements were also admissible under an exception to the other crimes evidence rule for the purpose of establishing appellant's consciousness of guilt.

3. Jury instructions

Next, appellant argues that the court erred by instructing the jury on flight, concealment of evidence, and witness intimidation. The State responds generally that the evidence was sufficient to support the instructions and that appellant "failed to preserve some of his complaints on appeal."

We review a trial court's decision to give a particular jury instruction under an abuse of discretion standard. *Appraicio v. State*, 431 Md. 42, 51 (2013). Maryland Rule 4-325 governs jury instructions and provides, in pertinent part:

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

The Court of Appeals "has interpreted Rule 4-325 as containing three components that must be met in order to include a proposed jury instruction in the ultimate charge to the jury: '(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.'" *Wood v. State*, 436 Md. 276, 293 (2013) (quoting *Dickey v. State*, 404 Md. 187, 197-98 (2008)). "When a [party] requests a particular jury instruction, [the Court of Appeals] has held that a party need only produce 'some evidence' to support such an instruction." *Id*. (quoting *Bazzle v. State*, 426 Md. 541, 551 (2012)). Some evidence "calls for no more than what it says - 'some,' as that word is understood in common, everyday usage. It need not rise to the level of 'beyond reasonable doubt' or 'clear and convincing' or 'preponderance.'" *Id*. (quoting *Dykes v. State*, 319 Md. 206, 216-17 (1990)).

We shall discuss each of the challenged instructions, in order.

A. Flight

The court instructed the jury:

> . . . A person's flight immediately after the commission of a crime or after being accused of committing a crime is not enough by itself to establish guilt.
>
> But it is a fact that may be considered by you as evidence of guilt. Flight under these circumstances may be motivated by a variety of factors. Some of which are fully consistent with innocence. You must first decide whether there is evidence of flight in this case. If you decide that there is evidence of flight, you then must decide whether this flight shows a consciousness of guilt.

Appellant argues that the flight instruction was not generated by the facts, because the testimony demonstrated only that he left the scene of a shooting and did not demonstrate that he fled the scene. The State responds that "the trial court did not abuse its discretion in determining that there was reasonable evidentiary support for the inference that [appellant] fled rather than [merely] departed."

Our review is limited to the second prong of the analysis: whether the flight instruction given was properly generated by the facts. In order for a flight instruction to be generated by the facts,

> the following four inferences must reasonably be able to be drawn from the facts of the case as ultimately tried: that the behavior of the defendant suggests flight; that the flight suggests a consciousness of guilt; that the consciousness of guilt is related to the crime charged or a closely related crime; 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).

In arguing that his conduct did not suggest flight, appellant challenges only the first inference. Based on the record before this Court, however, there was at least "some evidence" that appellant's conduct suggested flight, rather than a mere departure from the scene, as he argues. Several witnesses testified that after the second gunshot was fired, they saw two individuals run from the playground to the parking lot.

Chase testified that, after he shot Durley the second time, he met up with appellant, they both ran to appellant's car, got in, and drove away. Sledge testified that shortly after she

heard the gunshots, she saw appellant and Chase run toward the other side of the playground. Finally, Jones testified that after she heard the second gun shot, she saw the man who stood outside watching, presumably appellant, run off to the left.

In our view, the testimony that appellant ran away shortly after the shooting, and then drove away from the scene, constituted "some evidence" to support giving the instruction on flight.

The court did not abuse its discretion in giving the instruction.

B. Concealment of Evidence

The court instructed the jury:

> . . . You have heard evidence in this case that the defendant concealed evidence. Concealment of evidence is not enough by itself to establish guilt, but may be considered as evidence of guilt.
>
> Concealment of evidence may be motivated by a variety of factors and some of which are fully consistent with innocence. You must first decide whether the defendant concealed evidence in this case. If you find that the defendant concealed evidence in this case, then you must decide whether that conduct shows a consciousness of guilt.

Appellant argues that there were no facts to establish that he concealed evidence. The State responds that "there was sufficient evidence to support the inference that [appellant] participated in the concealment of the handgun used to kill Durley[.]"

We reiterate that only "some evidence" is required to support a jury instruction. In arguing a lack of evidence, appellant overlooks Chase's testimony that appellant told him that

they had to get rid of the weapon, that Chase pointed out a sewer to appellant, that appellant pulled the car over, and that Chase threw the gun into the sewer. This testimony alone produced some evidence that appellant participated in concealment of evidence.

Accordingly, the court did not abuse its discretion in giving the concealment instruction.

C. Witness Intimidation

The court gave a modified pattern jury instruction. Appellant argues first, that the "instruction was an ambiguous, misleading, and confusing modification of the Maryland Pattern Jury Instruction[.]" Second, appellant argues that the witness intimidation instruction was not supported by the evidence.

The State responds that "defense counsel affirmatively waived the complaint raised on appeal that the modified jury instruction was 'misleading' or an incorrect statement of the law." The State further argues that "[e]ven if the issue were not waived, the complaint is without merit as the modifications obviously were intended to and did benefit [appellant]." Finally, the State contends that there was sufficient evidence to generate the instruction given that "[a]ny attempt to interfere with a witness's truthful testimony, whether by threats, bribes, or a polite request, is properly considered as consciousness of guilt."

1. Correct Statement of Law

We first consider whether the instruction was a correct statement of the law. The State requested that the trial court give Maryland Pattern Jury Instruction 3:28, Bribery or

Witness Intimidation as Consciousness of Guilt. Defense counsel objected and argued, "it is the defense position that [appellant] did not bribe or intimidate Ms. Sledge based on the phone calls[.]"

The trial court proposed a modification of the pattern instruction and the following colloquy ensued:

> COURT: . . . I am wondering if there is a different language that we could use other than that the defendant attempted to bribe or intimidate Ms. Sledge.
>
> Literally that while on the phone *sort of catering to the facts of your transcript* which is while the defendant was on the phone, with Mr. Johnson and Ms. Sledge, the following was said. That in and of itself was not enough to establish guilt but maybe [sic] considered as evidence of guilt.
>
> [DEFENSE COUNSEL]: But just put that – again I object to this instruction, but –
>
> COURT: If we are going to give one –
>
> [DEFENSE COUNSEL]: – *but if we are going to use one, you heard that the defendant with another person spoke to or caused to have someone speak to Ms. Sledge, a State's witness in this case* –
>
> COURT: We can just say that in and of itself is not evidence – does not establish guilt but maybe [sic] considered as evidence of guilt. And then, I almost feel like if whether I give this instruction or not, I would not preclude the State from arguing that this phone call was made. I think the instruction may be a little helpful to the defendant the way it is written as well. . . .
>
> [STATE]: Would you like to reserve on that, Your Honor?
>
> COURT: No, I am trying to let you get this resolved. *I am going to give some type of instruction about this so I would rather it be a little more consistent with the words that were actually used than calling it a bribe or intimidation. If that makes sense. Which is I think something that is more consistent with*

what [defense counsel] wants if we are going to give this type of instruction. Did I get that right?

[DEFENSE COUNSEL]: *Yes, Your Honor.*

[STATE]: Is there another word that the Court would be more comfortable with instead of intimidation but that has some flavor of what Ms. Sledge testified to that about her perception of this phone call? I mean, I would submit to the Court that she was already fearful of him and when he made this call to her that day, she did feel intimidated.

COURT: Okay. What was it that you indicated?

[DEFENSE COUNSEL]: *I had said something to the effect of interfere with – I just kept thinking of the word interfere.*

COURT: I don't know if interfere is fair.

DEFENSE COUNSEL: But I had used the words, "*You had heard that the defendant along with or in conjunction with a second party contacted Ms. Sledge, a State's witness in this case or had a conversation with Ms. Sledge about her testimony or her cooperation*" –

COURT: *Okay, why don't we just keep it as vanilla as just what [Defense Counsel] said.* "You have heard that the defendant along with another person was involved in a conversation or communication with Shequita Sledge, a witness in this case." That in and of itself is not enough to establish guilt but may be considered as evidence of guilt. I mean, that is why you are offering it is sort of consciousness of guilt.

(Emphasis added).

Thereafter, the court gave the following jury instruction, which was modified from the pattern instruction to fit the facts of the case:[9]

[9] The pattern jury instruction provides:

(continued...)

> You have heard that the defendant along with another person communicated with Shequita Sledge, a witness in this case. That in and of itself is not enough to establish guilt but may be considered as evidence of guilt. You must first decide whether the defendant participated in that communication and the level of his participation if he did in fact participate.
>
> If you find that the defendant participated in that communication and depending on the level of his participation then you must decide whether that conduct shows a consciousness of guilt.

Defense counsel suggested the language to the court that appellant now complains of on appeal. Defense counsel did not object to the language in the modified instruction and in fact, seemingly agreed with the modifications to the instruction, even though she still objected to the instruction being given in the first place. Counsel's acquiescence in the modified language as crafted by the court overrides the earlier general objection to a witness intimidation instruction in any form. Accordingly, appellant waived his argument that the modified jury instruction was misleading, confusing, and/or an incorrect statement of law. *See Olson v. State*, 208 Md. App. 309, 365 (2012) ("Forfeiture is the failure to make a timely assertion of a right, whereas waiver is the intentional relinquishment or abandonment of a known right.") (internal quotation marks and citations omitted). Because appellant

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[9](...continued)

> You have heard that the defendant in this case attempted to intimidate. Witness intimidation is not enough by itself to establish guilt, but may be considered as evidence of guilt.
>
> You must first decide whether the defendant intimidated in this case. If you find that the defendant intimidated this case, then you must decide whether that conduct shows a consciousness of guilt.

affirmatively waived any complaint to the language of the modified pattern instruction we do not address this issue on appeal. *See Olson*, 208 Md. App. at 365 (quoting *State v. Rich*, 415 Md. 567, 580 (2010)) ("'Forfeited rights are reviewable for plain error, while waived rights are not.'").

2. Generated by Facts

Appellant also argues that the witness intimidation instruction was not generated by the facts of this case.

As we have discussed, only "some" evidence is required to support an instruction. The instruction given to the jury did not mention intimidation, rather it stated that appellant's communication with Sledge, asking her if she was going to court and if she was going to his lawyer's office, could be considered as evidence of guilt. The court instructed the jury to first determine if appellant participated in the conversation, then to determine appellant's level of participation, and finally to decide whether appellant's conduct showed a consciousness of guilt. Clearly, there was some evidence that appellant was involved in both of the phone calls made to Sledge on July 31, 2013.

At trial, the State played the recordings of both phone calls and Sledge identified appellant's and Johnson's voices. Sledge testified that in both phone calls Johnson and appellant kept asking her if she was going to go see appellant's lawyer. Sledge interpreted the requests for her to go see appellant's lawyer as asking her to lie, change her story, and say that she did not see anything. Accordingly, there was some evidence to support the

inference that Johnson, at appellant's request and/or with appellant's approval, encouraged Sledge to change her testimony, which could be considered as evidence of guilt.

3. Sufficiency of the evidence

Lastly, we consider appellant's argument that the evidence was insufficient to support his convictions because Chase's accomplice testimony was not corroborated. While appellant concedes that portions of Chases's testimony were corroborated, he argues that reversal is required because the testimony that appellant ordered Chase to shoot Durley was not corroborated. The State responds that the law requires only slight corroboration and that the evidence was sufficient to meet this legal standard.

"In reviewing a question regarding the sufficiency of the evidence presented at trial, the primary question we ask 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.'" *Haile v. State*, 431 Md. 448, 465 (2013) (quoting *State v. Smith*, 374 Md. 527, 533 (2003)). As an appellate Court, "'[w]e do not re-weigh the evidence,' but, instead, seek to determine 'whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.'" *Id*. at 466 (quoting *Smith*, 374 Md. at 534).

"In order to sustain a conviction of an adult based upon the testimony of an accomplice, that testimony must be corroborated by some independent evidence." *In re*

Anthony W., 388 Md. 251, 263-64 (2005). "Not much in the way of evidence is required to corroborate the testimony of an accomplice." *Id*. at 265. The Court of Appeals has, however, "'consistently held the view that while the corroborative evidence need not be sufficient in itself to convict, it must relate to material facts tending either (1) to identify the accused with the perpetrators of the crime or (2) to show the participation of the accused in the crime itself.'" *Grandison v. State*, 341 Md. 175, 248 (1995) (quoting *Brown v. State*, 281 Md. 241, 244 (1977)). "'If with some degree of cogency the corroborative evidence tends to establish either of these matters, the trier of fact may credit the accomplice's testimony even with respect to matters as to which no corroboration was adduced.'" *Id*. (quoting *Brown*, 281 Md. at 244).

Chase testified that he shot Durley at appellant's direction, which made Chase appellant's accomplice in the commission of the crime. Thus, Chase's testimony about the events that occurred on the night of January 23, 2013, required corroboration by an independent witness in order for the testimony to be admitted against appellant. That requirement was met when Chase's testimony was corroborated by Sledge, who testified that she saw appellant, Chase, and Durley together at the playground. Sledge further testified that she saw either Chase or appellant shoot Durley, but explained that she could not tell who pulled the trigger because they were standing close together. Sledge's independent testimony identified appellant with Chase, the admitted perpetrator of the crime, at the time when Durley was shot.

After the State established that appellant was with Chase at the time of the murder, the jury was permitted to consider Chase's testimony "even with respect to matters as to which no corroboration was adduced." *Grandison*, 341 Md. at 248 (quoting *Brown*, 281 Md. at 244). It was for the jury to determine whether to credit all, some, or none of Chase's testimony. *See Riggins v. State*, 155 Md. App. 181, 235 (2004) ("The ultimate determination of criminal agency and credibility are always issues for the trier of fact."). If, however, the jury believed Chase's testimony, there was more than sufficient evidence to support appellant's convictions under the accomplice liability theory.

In sum, we find neither error nor abuse of discretion, and shall affirm the judgments of the circuit court.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.