Circuit Court for Baltimore City
Case No. 117186007

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2616

September Term, 2018

DERRICK RUCKER

v.

STATE OF MARYLAND

Arthur,
Wells,
Wright*
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: April 24, 2020

*Wright, J., now retired, participated in the hearing of this case while an active member of the Court; after being recalled pursuant to Maryland Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this Opinion.

Appellant Derrick Rucker was convicted by a jury sitting in the Circuit Court for Baltimore City of first-degree murder; use of a firearm in the commission of a crime of violence; possession of a firearm after having been convicted previously of a disqualifying crime; and wearing, carrying, and transporting a handgun. The court sentenced Rucker to life imprisonment for first-degree murder plus consecutive terms totaling 35 years for the other offenses. He then noted this appeal, raising the following issues:

> I. Whether the trial court abused its discretion in denying the defense's motion for mistrial;
>
> II. Whether the trial court erred in admitting surveillance video without proper authentication;
>
> III. Whether the trial court erred in admitting into evidence a recorded jail house telephone call, purportedly placed by Rucker;
>
> IV. Whether the trial court erred in admitting into evidence testimony by a State's witness explaining the meaning of the word "bitch" as used in a jail call;
>
> V. Whether the trial court erred in admitting evidence of "other crimes"; and
>
> VI. Whether the trial court abused its discretion in overruling defense objections to improper remarks made by the State in closing argument.

Because we find no reversible error, we shall affirm.

BACKGROUND

Shortly before noon on November 7, 2015, Nicholas Brunson was standing outside Bela Mart,[1] a corner grocery store in the 5400 block of Belair Road in Baltimore City, with three friends: Trevor Joyner, the murder victim, Cliff Danas, and Mark Crockett. Nearby were two other men, one of whom Brunson knew as "Trelly," the other a man he did not know. While the group stood in front of the store, another man, whom Brunson apparently did not know, approached.

Joyner and Trelly engaged in a conversation, and, meanwhile, Brunson shared a marijuana "blunt" with Danas. Brunson then heard a gunshot. Upon turning to his left, he observed Joyner, falling face first to the pavement. Brunson, Danas, and Crockett immediately fled.

A flood of 911 calls ensued. All of them were consistent in two critical respects—a young, African-American male had been shot in the back of the head and was lying face down on the ground; and no one could identify the shooter. Emergency responders arrived at the scene and transported the victim to Johns Hopkins Hospital, where he was pronounced dead.

Detective Joseph Chin, of the Homicide Unit of the Baltimore City Police Department, responded to the hospital. After speaking briefly with the victim's mother, learning the victim's name and finding that he was deceased, he traveled to the crime scene.

[1] The store's name is not spelled consistently in the record. Other spellings include "Bella Mart" and "Belair Mart."

Detective Chin, with another officer, then canvassed the crime scene. While doing so, the detective discovered that "the Belair Mart establishment had CCTV cameras on the business, both inside and outside," and he determined that those cameras were "able to capture parts of the incident."

At Detective Chin's direction, a technician from the Baltimore City Police Department traveled to the crime scene the following day and recovered surveillance video from the store. Detective Chin viewed that surveillance footage and, using still images captured from the video, created a "Be on the Lookout" ("BOLO") poster, which he distributed by email to others in the Police Department.

During the evening of November 11, 2015, four days after the murder, a Baltimore City patrol officer, having seen the BOLO, detained a suspect, subsequently identified as Rucker, in the 5200 block of Belair Road, just a few blocks from the crime scene. Rucker was wearing "a red and white jacket with white jeans," which matched the still images from the surveillance video. Rucker was taken to the Homicide Unit at Police Headquarters in downtown Baltimore.

Detective Chin was notified that Rucker had been apprehended, and he went to the Homicide Unit to conduct an interview. He spoke briefly with Rucker, who was detained in a holding cell, and then left to prepare for the interview. During that initial encounter, Detective Chin could not help but notice that Rucker was "wearing the red and white jacket, white jeans, and the -- that Gucci belt with the large Gucci emblem," which the detective had observed in the surveillance video.

While Detective Chin was in his office with his "squad" and an assistant state's attorney, "conducting a background investigation in reference to Derrick Rucker," police officers heard "a loud banging" and observed "smoke" coming from Rucker's holding cell. Upon arriving there, they first ensured that Rucker was safe, then extracted him from the cell and proceeded to investigate the cause of the apparent fire. In so doing, they observed that Rucker was wearing only a pair of boxer shorts and that his "partially burnt" clothes were still in the holding cell. It was evident that Rucker had set his clothes on fire.

After determining Rucker's address, Detective Chin obtained a search warrant for that location. On November 12, 2015, the day after Rucker had been arrested, police officers executed the search warrant. They recovered "[t]wo boxes of .38 special rounds," of the same caliber as the projectile that had caused Joyner's death, hidden between the floor joists in the basement ceiling. No murder weapon, however, was ever recovered.

An indictment was issued in the Circuit Court for Baltimore City, charging Rucker with murder in the first degree; use of a firearm in the commission of a crime of violence; possession of a regulated firearm after having been convicted previously of a disqualifying crime; and wearing, carrying, and transporting a handgun on his person. The matter proceeded to a jury trial.

In addition to the preceding narrative, which was derived from the trial record, the following facts are pertinent:

Joyner died of a single gunshot wound to the back of the head at close range. According to the Assistant Medical Examiner, Melissa Brassell, M.D., who performed the autopsy, Joyner, upon being shot, was sufficiently incapacitated that he collapsed and fell

hard to ground, without breaking his fall. Dr. Brassell recovered two primary fragments, from a single cartridge, from Joyner's head—"a separated jacket" and a "lead core," which subsequently were examined by the State's firearms examiner.

The examiner, Christopher Faber, of the Baltimore City Police Department, determined that the fragments recovered from Joyner's head came from "a .38 class bullet" with a brass alloy jacket. Faber compared the fragments to the cartridges that had been recovered during the search of Rucker's residence. Although it was impossible to say that the fatal projectile had come from the same source as the unfired cartridges found during the search, it was nonetheless true that both could be fired from the same weapon, and, moreover, both the fired and unfired rounds were constructed with a brass alloy jacket.

Nicholas Brunson was the only eyewitness called to testify at trial. Brunson did not see who had shot Joyner, nor was he able to give police officers a description of the lone man who had approached the group while they were standing in front of the store just before the shooting took place.

The jury found Rucker guilty of all charges. The court thereafter sentenced him to life imprisonment for first-degree murder; a consecutive term of twenty years, the first five without the possibility of parole, for use of a firearm in a crime of violence; and a consecutive term of fifteen years, the first five without the possibility of parole, for

possession of a regulated firearm after having been convicted previously of a disqualifying crime.[2] He then noted this timely appeal.

Additional facts appear as pertinent to the discussion of the issues.

DISCUSSION

I.

Rucker contends that the circuit court abused its discretion in denying his motion for mistrial. Before addressing this contention, we set forth some additional background.

The jury began deliberations late in the afternoon on a Monday but, after deliberating for approximately an hour or so, were dismissed without having reached a verdict. They resumed deliberations Tuesday morning, and, at 10:37 a.m., Juror 12 submitted a note, stating as follows:

> This morning 4:00 a.m. gun fire woke me up. Being 2 or 3 seconds bang then bang, bang, bang, bang. I feel someone in audience knows me possibly from neighbor. I like to be dismiss [sic] before judgement [sic].[3]

Before the court could respond to Juror 12's note, a second note was received at 10:52 a.m., stating:

> Jury has a verdict but we are waiting for a response from judge on note from juror 12.

The parties then conferred with the court as to what course of action should be followed. Rucker moved for a mistrial, contending that Juror 12 had been affected by "an

[2] The conviction for wearing, carrying, and transporting a handgun on the person was merged into that for illegal possession for sentencing purposes.

[3] We have slightly cleaned up the punctuation.

outside influence." The court denied that motion and, instead, conducted *voir dire* of each juror, beginning with Juror 12. The following ensued:

> THE COURT: You're Juror No. 12, sir?
>
> JUROR NO. 12: Yes.
>
> THE COURT: Okay. I -- you know we received your note here. We've been addressing how to handle this. I have to do this very fastidiously. So first off, I have a second note indicating that the jury has reached a verdict. At the moment, I don't want to know what that verdict is. So the first question I have, you know, about your note is that, you know, it details what you heard when you woke up this morning and indicates you feel that someone in the audience knows you. Is that correct?
>
> JUROR NO. 12: Yes.
>
> THE COURT: Is that -- just answer very -- yes or no. Is that just a feeling, or are you reason --
>
> JUROR NO. 12: I'm not certain.
>
> THE COURT: You're not certain. Okay. You said -- and then you say "possibly from neighbor" meaning from the neighborhood, or from a specific neighbor? Just --
>
> JUROR NO. 12: Specific neighbor.
>
> THE COURT: Specific neighbor. Okay. Who's -- that neighbor's not here; is that correct?
>
> JUROR NO. 12: Yes.
>
> THE COURT: Okay. Just -- let me ask you this. Have you shared this with the other jurors?
>
> JUROR NO. 12: Yes.
>
> THE COURT: All of them, or just the Foreperson, or --

JUROR NO. 12: Well, at first, just the Foreperson then discussed it with everybody else.

THE COURT: All right. I'm going to ask -- don't answer this, I want to make sure they hear this question, okay? The next question that I'm going to ask you is what you described here, do you feel that had an effect on, you know, a verdict? What you -- with your verdict. Do you feel that had an effect? Just yes or no. What you described here.

JUROR NO. 12: No.

THE COURT: Okay. So and I'm asking you out here now, you had asked to be dismissed before judgment. Are you -- apparently, there has been a verdict, so are you -- I'll phrase it this way -- I assume you're no longer asking to be dismissed before judgment; is that correct?

JUROR NO. 12: (Indiscernible).

THE COURT: As of now. I mean, I understood what you wrote about an hour ago. But as of now, you're not asking to be relieved before we take this verdict, is that correct, sir?

JUROR NO. 12: Yes.

THE COURT: Okay. Why don't you stand back, if you would, and let me just talk to Counsel.

JUROR NO. 12: Okay.

THE COURT: If you would just stay there. Thank you.

A bench conference followed. Defense counsel stated that he thought the court should "be more clear" and that it should ask whether Juror 12 gave "consideration to the happening before he left out in reaching his verdict." Moreover, defense counsel asked that the same question be posed to each juror. The court stated its intention to call each juror and ask whether "they've heard it" and whether it "had an effect on them." In

response, defense counsel protested that it was unclear whether Juror 12 "believed there was any impact on his verdict," and he urged the court to conduct a wider-ranging inquiry by asking Juror 12 "whether it had any impact on his consideration of the evidence or on his verdict."

The court, however, declined that suggestion, emphasizing the "delicate balance that has to be achieved here of not overly affecting what they're doing versus determining what effect." The court then called Juror 12 to the bench and instructed him not to discuss the matter with the other jurors. It thereafter examined each juror individually, asking whether Juror 12 had shared "any experience that he had outside of deliberations," and, if so, whether that had an effect on his or her decision in the case. Each juror answered "yes" to the first question and "no" to the second.

After the court had examined each juror, the defense moved for a mistrial because, in its view, the court was "not allowing the Defense to elicit" Juror 12's "recollection of events as he shared it to the other members of the panel," nor was it allowing "the Defense to gather the additional information about what he said, why he wrote the note the way he did, and to get any clarification." The court denied that motion, emphasizing that it wished to avoid intruding into the sanctity of juror deliberations while, simultaneously, clarifying that Juror 12's experience had not influenced the verdict.

The court then took the verdict. The jury found Rucker guilty of first-degree murder; use of a firearm in the commission of a crime of violence; possession of a firearm by a prohibited person; and wearing, carrying, and transporting a handgun on his person. The court then polled the jury, repeating the sequence of questions it had asked previously,

namely, whether Juror 12 had disclosed the experience he had the night after the first day of deliberations and, if so, whether that disclosure had affected the verdict. Once again, each juror answered affirmatively to the first question but negatively to the second. Finally, the jury was hearkened to its verdict and then discharged.

"The grant of a mistrial is considered an extraordinary remedy," and a trial court should take that action "only if necessary to serve the ends of justice," *State v. Hart*, 449 Md. 246, 276 (2016) (quoting *Klauenberg v. State*, 355 Md. 528, 555 (1999)), or, in other words, "when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice." *Nash v. State*, 439 Md. 53, 69 (2014) (quoting *Burks v. State*, 96 Md. App. 173, 187, *cert. denied*, 332 Md. 381 (1993)). "Generally, appellate courts review the denial of a motion for a mistrial under the abuse of discretion standard, because the 'trial judge is in the best position to evaluate whether or not a defendant's right to an impartial jury has been compromised.'" *Dillard v. State*, 415 Md. 445, 454 (2010) (quoting *Allen v. State*, 89 Md. App. 25, 42-43 (1991), *cert. denied*, 325 Md. 396 (1992)). A trial court abuses its discretion when its decision is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Nash*, 439 Md. at 67 (citations and quotations omitted).

In the instant case, the circuit court took great pains to delve into the reasons why Juror 12 wrote his note and whether his experience influenced the jury's verdict while, simultaneously, respecting the sanctity of deliberations. The court carefully elicited, from each juror, his or her acknowledgement that Juror 12's disclosure had no influence on the verdict. We certainly cannot say that the circuit court's actions, in conducting a careful,

limited *voir dire* and, in light of the responses to its inquiry, denying Rucker's motion for a mistrial, were "beyond the fringe of what [we] deem[] minimally acceptable." *Nash*, 439 Md. at 67. Indeed, this is not even a case where we might have taken a different action than the circuit court but, nonetheless, declined to find an abuse of discretion. We commend the circuit court in this case for carefully navigating the fine line between properly investigating the origins of the juror's note and any improper influence it may have had on the verdict while, at the same time, resisting the inclination to delve into matters that must remain strictly confidential.

The cases Rucker cites are readily distinguishable from the present case. For example, in *Dillard*, upon the conclusion of the testimony of "the State's primary law enforcement witness, two jurors patted [him] on the back and commended him for doing a 'good job,'" and, moreover, the trial court thereafter "failed to conduct a *voir dire* examination of the jurors to determine whether the jurors had reached a premature conclusion as to [the defendant's] guilt or formed fixed opinions about the evidence." *Dillard*, 415 Md. at 448-49. In contrast, here, there was no hint of juror misconduct, but even if we were to treat the experience of Juror 12 as akin to the juror contact with the State's witness in *Dillard*, the circuit court here, unlike in *Dillard*, did "conduct a meaningful inquiry" that resolved any question that might have arisen as a result of Juror 12's experience the night before. *Id.* at 459.

Likewise, in *Johnson v. State*, 423 Md. 137 (2011), a juror had inserted his own battery into a cell phone that was in evidence, turned it on, and examined its call log, in violation of the trial court's instructions, and the court thereafter was informed of that

misconduct but failed to conduct a *voir dire* of the jury. *Id.* at 144, 153-54. The instant case, where the circuit court did conduct a careful *voir dire* of the jury, could not be any more different. And, for the same reason, Rucker's reliance upon *Wardlaw v. State*, 185 Md. App. 440 (2009), is similarly unavailing. *Id.* at 452-54 (reversing convictions because trial court had failed to conduct *voir dire* of the jury after discovering that a juror had engaged in "egregious misconduct").

We conclude that the circuit court acted appropriately in the instant case upon being apprised of Juror 12's note. The court did not abuse its discretion in examining the jurors, ascertaining that Juror 12's experience did not influence their deliberations, and then taking the verdict.

II. & III.

Rucker's next two claims involve partially overlapping legal issues, and we therefore consider them together. First, he contends that the circuit court erred in admitting into evidence surveillance video of the crime scene because, he maintains, it lacked proper authentication. Second, he contends that the circuit court erred in admitting into evidence a recorded jail house telephone call that he placed to his brother, because it, too, purportedly lacked proper authentication. He further challenges the admission of that telephone call on other evidentiary grounds. These contentions have no merit.

A. Authentication

Maryland Rule 5-901 provides:

> **(a) General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is

satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:

(1) *Testimony of Witness With Knowledge.* Testimony of a witness with knowledge that the offered evidence is what it is claimed to be.

(2) *Non-Expert Opinion on Handwriting.* Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison With Authenticated Specimens.* Comparison by the court or an expert witness with specimens that have been authenticated.

(4) *Circumstantial Evidence.* Circumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be.

(5) *Voice Identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, based upon the witness having heard the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone Conversation.* A telephone conversation, by evidence that a telephone call was made to the number assigned at the time to a particular person or business, if

> (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or
>
> (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

> (7) *Public Record.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, is from the public office where items of this nature are kept.
>
> (8) *Ancient Document or Data Compilation.* Evidence that a document or data compilation:
>
> > (A) is in such condition as to create no suspicion concerning its authenticity,
> >
> > (B) was in a place where, if authentic, it would likely be, and
> >
> > (C) has been in existence twenty years or more at the time it is offered.
>
> (9) *Process or System.* Evidence describing a process or system used to produce the proffered exhibit or testimony and showing that the process or system produces an accurate result.
>
> (10) *Methods Provided by Statute or Rule.* Any method of authentication or identification provided by statute or by these rules.

A "Court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so." *Jackson v. State*, 460 Md. 107, 116 (2018) (quoting *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006)) (emphasis in original). "The threshold of admissibility is, therefore, slight." *Id.* (citation omitted). We review a circuit court's decision that evidence is properly authenticated for abuse of discretion. *Donati v. State*, 215 Md. App. 686, 709, *cert. denied*, 438 Md. 143 (2014).

1. Surveillance Video

"[F]or purposes of admissibility, a videotape is subject to the same authentication requirements as a photograph." *Jackson*, 460 Md. at 116 (citing *Washington v. State*, 406 Md. 642, 651 (2008)). "Photographs and videotapes may be authenticated through first-hand knowledge, or, as an alternative, as a mute or silent independent photographic witness because the photograph speaks with its probative effect." *Id.* (citations and quotations omitted). The latter "silent witness method" of authentication "allows for authentication by the presentation of evidence describing a process or system that produces an accurate result." *Washington*, 406 Md. at 652 (citations omitted).

"Generally, surveillance tapes are authenticated under the silent witness theory, and without an attesting witness." *Id.* at 653 (citation omitted). "Courts have admitted surveillance tapes and photographs made by surveillance equipment that operates automatically when a witness testifies to the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system." *Id.* (citations and quotation omitted).

In the instant case, the State sought to authenticate the surveillance video through the testimony of Sergeant Lewis Yamin, a retired police officer who, at the time, was a supervisor in the Cyber and Electronic Crimes Unit. Because Sergeant Yamin did not have firsthand knowledge of the events depicted on the video, we turn to consider whether the State met its "slight" burden under the "silent witness" theory.

At the request of Detective Chin, the lead detective in the case, Sergeant Yamin went to the crime scene the day after the murder to recover video surveillance footage that

might assist in the investigation of the crime. Sergeant Yamin testified that, upon arriving at the scene, he "document[ed] where the camera" was and "the type of camera system." That system, Sergeant Yamin testified, was a type H.264, "a generic DVR system commonly used in numerous businesses," with which he was "fairly familiar." He further testified that he had recovered video from systems of that type "approximately" 50 times and that he had recovered video of all types "over a thousand" times.

Sergeant Yamin verified that the date and time displayed in the video camera system was accurate by comparing it to that on his watch and photographing each time and date display. After completing the documentation, he accessed the menu of the video system, searched for the date and time period requested by Detective Chin, and retrieved the video, saving it to a flash drive, which he had previously reformatted so that it did not contain any other data. He then "viewed the video to ensure" that he had recovered "the dates, the times, and the cameras" that Detective Chin had requested. Upon returning to headquarters, he transferred the data from the flash drive to a compact disc and viewed the video once more "to ensure that it was the same video from the thumb drive." That compact disc ultimately was entered into evidence over the defense's objection.

Two decisions of the Court of Appeals, which addressed similar issues, inform our analysis: *Jackson v. State*, 460 Md. 107, and *Washington v. State*, 406 Md. 642. We shall briefly summarize their facts and holdings.

In *Jackson*, the State introduced into evidence surveillance video taken at a Bank of America branch where, the State alleged, Jackson, without authorization, had withdrawn funds from the automated teller machine ("ATM") using the victim's account information.

460 Md. at 111-12. To authenticate the video, "the State relied on the testimony of Brett Cunningham, Bank of America's Protective Services Manager[.]" *Id.* at 117.

Cunningham described the process used to obtain the video at issue, which entailed accessing a software application from which he could select the bank branch, date, time, and video cameras. *Id.* Cunningham then "exported" still images from the video "into a digital file and emailed them" to the police detective for confirmation that the images depicted the desired date, time, and video cameras. *Id.* After receiving that confirmation, Cunningham "was then required to submit a specific request with date, time, location and camera specifications to a Bank of America team located in North Carolina, who would 'download the requested video and mail it directly to the detective.'" *Id.* Further confirming the integrity of the process, Cunningham testified that the video displayed at trial was the same as that which he had initially observed, in the software application, at the time he submitted his request to the North Carolina team. *Id.* at 118-19.

The Court of Appeals held that the video had been properly authenticated. It reasoned that the State had "elicited through Mr. Cunningham's testimony the process of reproduction, the reliability of that process, and whether the reproduction was a fair and accurate representation of what the witness had viewed when he submitted a request for the video footage to the Bank of America team in North Carolina." *Id.* at 119.

In *Washington v. State*, 406 Md. 642, the State introduced into evidence "a videotape recording made by surveillance cameras inside and outside the bar" where the crimes had occurred. *Id.* at 646. The State sought to authenticate that recording through the testimony of the owner of the bar, David Kim. *Id.* Mr. Kim testified that "the camera

system was an eight-camera digital video security system, with six cameras inside and two cameras outside the bar, that recorded '24 hours a day.'" *Id.* He further testified that, upon receiving a call from a police officer requesting that he furnish any surveillance tapes, he had arranged for a technician to come out to extract the video, compile it onto a compact disc ("CD"), and transfer it to a VHS tape. *Id.* The technician, however, was not called to testify at Washington's trial.

The Court of Appeals held that the videotape had not been properly authenticated. It observed that the "videotape recording, made from eight surveillance cameras, [had been] created by some unknown person, who through some unknown process, compiled images from the various cameras to a CD, and then to a videotape." *Id.* at 655. Because "Mr. Kim, the owner of the bar, testified that he did not know how to transfer the data from the surveillance system to portable discs"; that, accordingly, he had "hired a technician to transfer the footage from the eight cameras onto one disc in a single viewable format"; and he "did not testify as to the subsequent editing process," Mr. Kim's testimony failed to provide an adequate foundation to authenticate the video. *Id.* at 655-56.

According to Rucker, the instant case is controlled by *Washington*. We disagree. Here, unlike in *Washington*, Sergeant Yamin, a technician who had supervised the Cyber and Electronic Crimes Unit for 10 years, exhibited a detailed understanding of the operation of the video surveillance system from which he, not "some unknown person," 406 Md. at 655, had obtained the video footage. Moreover, Sergeant Yamin testified that he had taken steps to ensure the integrity of the data, which included reformatting the flash drive prior to use in this case, as well as viewing the video recording twice, once to ensure

that the copy on the flash drive was the same as that on the video camera system, and a second time to ensure that the copy on the compact disc was the same as that on the flash drive.

In every important respect, the instant case is similar to *Jackson* and distinguishable from *Washington*. The only notable difference between the instant case and *Jackson* is that, in *Jackson*, the owner of the video surveillance system was a large corporation that had a centralized system for recovering and distributing video footage in response to requests from law enforcement organizations, whereas, here, the owner of the video surveillance system was a small mom-and-pop grocery store that lacked such a system. Sergeant Yamin's detailed description of the steps he took to recover the surveillance video and to ensure its integrity, however, was more than sufficient to satisfy the State's burden to show a reasonable probability that the video on the compact disc was what it purported to be. Rucker's insistence that Sergeant Yamin's testimony concerning the operability of the video surveillance system on November 8, 2015, was insufficient to establish its operability the day before, when the murder took place, is misplaced; that argument goes to the weight, not the admissibility, of the evidence. The circuit court did not err in admitting the surveillance video into evidence.

2. Jailhouse Telephone Call

On November 13, 2015, the day after Rucker was arrested and set his clothes on fire, he placed a telephone call, while incarcerated, to his brother, Andre. At trial, the State introduced a recording of that call into evidence over defense objection. Among the grounds raised was that the State did not call a representative of Global Tel Link ("GTL"),

the private contractor that operated the prison telephone system, to authenticate that call and that the testimony of the State's witness, Nicholas Weikel, an intelligence analyst for the Maryland Department of Public Safety and Correctional Services ("DPSCS"), was insufficient for authentication.

Among Weikel's duties was recording jailhouse telephone calls to CD. By means of a subpoena sent to the DPSCS, the State requested a recording of a call placed on November 13, 2015, to a phone number associated with Andre.[4] Upon receiving that subpoena, Weikel accessed an internet-based "system called B Track," which is provided by GTL. That system allowed Weikel to enter the appropriate search criteria and download a recording of the desired telephone call, which he then burned to a CD "using that system's software." During cross-examination, however, Weikel conceded that DPSCS did not maintain the recordings and that he had "no personal knowledge whatsoever of how GTL" maintains its records.

If Weikel's testimony had been the only basis upon which the State relied to authenticate the jailhouse call in question, there would be some merit to Rucker's argument concerning inadequate authentication, in light of Weikel's admission that he has no personal knowledge of how GTL maintains its records. Maryland Rule 5-901(b), however, sets forth multiple ways in which a piece of evidence may be authenticated, including: circumstantial evidence, "such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed

[4] Detective Chin had observed that Rucker's phone contact list included the number in question and that it belonged to "Dre."

to be"; "[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, based upon the witness having heard the voice at any time under circumstances connecting it with the alleged speaker"; and, regarding a telephone conversation, "by evidence that a telephone call was made to the number assigned at the time to a particular person or business, if . . . in the case of a person, circumstances, including self-identification, show the person answering to be the one called[.]" Md. Rule 5-901(b)(4)-(6). Taken together, these means were enough to satisfy the State's burden to provide "sufficient proof so that a reasonable juror could find in favor of authenticity or identification." *Sublet v. State*, 442 Md. 632, 667 (2015) (citation and quotation omitted) (cleaned up).

As to circumstantial evidence supporting authentication of the jailhouse call, we look to its contents:

> MR. ANDRE RUCKER: 'Sup, brother?
>
> MR. DERRICK RUCKER: 'Sup.
>
> MR. ANDRE RUCKER: Hey, you know, what did they lock you up for?
>
> MR. DERRICK RUCKER: Locked me up for arson.
>
> MR. ANDRE RUCKER: Yeah, they didn't lock you up for nothing else?
>
> MR. DERRICK RUCKER: No.
>
> MR. ANDRE RUCKER: All right, then. They found the box – they found the .38 shells.
>
> MR. DERRICK RUCKER: They found the .38 shells?

> MR. ANDRE [RUCKER]: Yeah, the two boxes. I don't know if they got the bitch,[5] though. Don't got that.
>
> MR. DERRICK RUCKER: They got the bitch?
>
> MR. ANDRE RUCKER: I don't know. Man, I don't know where you put it at, so I didn't check, you feel me?
>
> MR. DERRICK RUCKER: Yeah.
>
> MR. ANDRE RUCKER: You hear me?
>
> MR. DERRICK RUCKER: They came for that, searching and shit?
>
> MR. ANDRE RUCKER: Man, they flipped this bitch, man. You already know because (indiscernible).

That Rucker mentioned "arson" is strong circumstantial evidence that the jailhouse call is what it purported to be, given how unusual it is for an inmate to set his clothes on fire, a uniqueness bolstered by the fact that the "arson" took place the day before Rucker placed the telephone call. That the two brothers discussed the search of Rucker's residence, which also had been conducted the day before, is further circumstantial evidence in support of authentication.

There was additional evidence to authenticate the jailhouse call. Detective Chin testified that he had observed that Rucker's phone contact list included the number to which this call was placed and that it belonged to "Dre." Rucker's brother is named "Andre." Furthermore, Detective Chin identified the voices on the call as belonging to Rucker and his brother, based upon his "prior interaction" with the two men. Rucker disparages that

[5] We address Rucker's challenge to the characterization of the slang term, "bitch," in Part IV *infra*.

testimony as unreliable, given that Detective Chin had only a "limited interaction" with Rucker, 18 months before he reviewed the recording of the call, but that argument goes to weight, not admissibility. Moreover, Andre, the person whose number was called and who answered the call, referred to the caller as his "brother," all of which were circumstances tending to "show the person answering to be the one called[.]" Md. Rule 5-901(b)(6). We hold that the circuit court did not abuse its discretion in admitting the jailhouse telephone call into evidence.

B. Other Evidentiary Issues Regarding the Jailhouse Telephone Call

Rucker raises the following additional reasons why the jailhouse telephone call was purportedly inadmissible: first, that the circuit court erred in admitting Andre's recorded statements (that is, hearsay) as adoptive admissions of Rucker; and second, that the circuit court erred in admitting the call because it "was too ambiguous to be relevant."

1. Adoptive Admissions

"'Hearsay' is 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." Md. Rule 5-801(c). "Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802. Maryland Rule 5-803(a)(2) codifies the hearsay exception for adoptive admissions: "A statement that is offered against a party and is . . . [a] statement of which the party has manifested an adoption or belief in its truth" is not "excluded by the hearsay rule[.]"

Although, generally, evidentiary rulings are reviewed for abuse of discretion, hearsay rulings are different because a circuit court has no discretion to admit hearsay that

does not fit within an exception. *Gordon v. State*, 431 Md. 527, 534-35 (2013). Accordingly, we review a circuit court's "legal conclusions on hearsay evidence without deference[.]" *Id.* at 535. Any underlying factual determinations a circuit court must make in deciding the issue, however, "will not be disturbed absent clear error[.]" *Id.* at 538.

In the instant case, there is no dispute that Andre's statements on the jailhouse telephone call were hearsay. The only dispute between the parties is whether those statements were adoptive admissions and therefore admissible under Rule 5-803(a)(2).

As to how a party may adopt a statement "so as to manifest a belief in its truth," the "possibilities are endless." L. McLain, 6A *Maryland Evidence, State and Federal* § 801(4):3 (footnote omitted). In the instant case, Rucker manifested a belief in the truth of Andre's statements, both tacitly and in repeating those statements twice. Indeed, a party's silence may be construed as a tacit admission:

> In order for the other's out-of-court statement to be considered the party's tacit admission, the following prerequisites must be satisfied: (1) the statement was made in the presence of the party against whom it is offered (or, for example, over the telephone to that party), and that 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. As a component of the third requirement, the party must have had first-hand knowledge of the matter addressed in the statement.

Id.

According to Rucker, he had no firsthand knowledge of the matter addressed in the statement, since he was incarcerated and not home when the search warrant was executed. That belies too narrow a view of "the matter addressed." It is clear, from Andre's

statement—"Man, I don't know where you put it at, so I didn't check, you feel me?"—that Rucker was the only person who knew where he had hidden "it,"—the murder weapon—thereby demonstrating Rucker's firsthand knowledge of the matter addressed in the statement. We conclude that the circuit court did not clearly err in finding that Rucker had manifested a belief in the truth of his brother's statements, nor did it abuse its discretion in admitting those statements into evidence.

2. Relevance and Balancing of Probative Value Against Unfair Prejudice

Rucker contends that the statements in the jailhouse call were "too ambiguous to be relevant" and that their probative value was substantially outweighed by the potential for unfair prejudice under Maryland Rule 5-403. These contentions have no merit.

Merely because the parties to the jailhouse call used slang does not render their statements "ambiguous," and even an ambiguity is not fatal to admissibility. *See Fenner v. State*, 381 Md. 1, 26 (2004) (holding that the trial court did not abuse its discretion in admitting into evidence a redacted statement by the defendant, concluding that the statement "was [not] so vague or misleading as to have made the statement inadmissible at trial" and that, in any event, "any ambiguity went to the weight of the statement itself and not to its admissibility"). We think the meaning of the statements in the call was quite clear and is precisely why Rucker sought to have those statements excluded.

As for Rucker's claim that the call's probative value was substantially outweighed by the potential for unfair prejudice, we note that the call was highly probative evidence that indicated Rucker's awareness that police were searching for inculpatory evidence, including the murder weapon. Moreover, his attempt to conceal that evidence was highly

probative evidence of his consciousness of guilt. The only prejudice we perceive in admitting this evidence was of the "legitimate," not "unfair," type. *See Newman v. State*, 236 Md. App. 533, 549 (2018) (observing that what "must be balanced against 'probative value' is not 'prejudice' but . . . only 'unfair prejudice'").

IV.

Rucker contends that the circuit court erred in admitting into evidence testimony by Detective Chin, explaining that the word "bitch," as used in the jailhouse telephone call, referred to a handgun, because, he maintains, Detective Chin's testimony failed to satisfy the requirements for the admissibility of lay opinion testimony, under Maryland Rule 5-701. Although we agree that the court erred in admitting that testimony as lay opinion, we conclude that the error was harmless.

During Detective Chin's direct testimony, the State played the recorded jailhouse telephone call. As noted previously, during that call, the two men discussed the search that had been conducted (pursuant to a warrant the validity of which is not in question) at Rucker's dwelling the previous day and, while doing so, discussed whether the police had recovered "the bitch."

The State subsequently sought to lay a foundation for Detective Chin to opine about the meaning of the term, "bitch." The following exchange occurred:

> [THE STATE]: Okay. Detective, how long have you been with the Baltimore City Police Department?
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> [DETECTIVE CHIN]: Fourteen years.
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> [THE STATE]: And in those 14 years, what assignments have you held?

[DETECTIVE CHIN]: I worked in patrol in the Northeast District. I also worked in operations, the flex unit, which basically you did drug work, in plain clothes capacity. Then I was promoted to detective and I worked in the Eastern District, DDU, investigated violent crimes primarily with robberies, and then non-fatal shootings. And then I did that for about four years -- I did that for four years, and then I went to homicide, and I've been there for six.

[THE STATE]: And during that time, have you investigated crimes that involved handguns?

[DETECTIVE CHIN]: Yes.

[THE STATE]: Approximately how many?

[DETECTIVE CHIN]: A lot. I don't know a number.

[THE STATE]: Okay. Can you tell us in what capacity you investigated guns that -- or crimes that involved guns?

[DETECTIVE CHIN]: I've arrested people with guns, investigated – executed search warrants and obtained guns, car stops, obtained – where we recovered guns. Investigations with violent crimes such as robberies and shootings, as well as homicides, that investigations that involve guns as well.

[THE STATE]: What's a CI?

[DETECTIVE CHIN]: A confidential informant.

[THE STATE]: Have you ever dealt with any investigations that involved confidential informants?

[DETECTIVE CHIN]: Yes.

[THE STATE]: Specifically involving handguns?

[DETECTIVE CHIN]: Not directly, but yes.

[THE STATE]: And during that time, have you ever been familiar with slang terms used for handguns?

At that point, defense counsel objected, and, during the bench conference that ensued, the State insisted that Detective Chin did not have to be qualified as an expert to opine as to the meaning of the slang term. Ultimately, the court overruled the objection. Detective Chin then proceeded to testify that, in his previous investigations, he had encountered various slang terms that were used to refer to handguns and that he had "frequent[ly]" encountered the use of the term "bitch" for that purpose.

Maryland Rule 5-701 governs the admission of lay opinion testimony. It provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

In contrast, an expert is not so constrained as to what he or she may testify. Maryland Rule 5-702 governs the admission of expert opinion testimony and states:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

In *Ragland v. State*, 385 Md. 706 (2005), the Court of Appeals considered an issue that "lies at the intersection of" Maryland Rules 5-701 and 5-702 and is also raised in this appeal—whether a witness, who "has first-hand knowledge of the events that form the subject of his or her testimony," may offer, "as 'lay opinion testimony,' opinions formed

about those events based on specialized knowledge, skill, experience, training, or education." *Id.* at 716. The Court held that such a witness must be qualified as an expert—that is, that Maryland Rules 5-701 and 5-702 "prohibit the admission as 'lay opinion' of testimony based upon specialized knowledge, skill, experience, training or education." *Id.* at 725.

Because Detective Chin was not qualified as an expert, the question before us is whether his opinion, that the term "bitch," used in the jailhouse telephone call, referred to a handgun, may be deemed a lay opinion. Plainly, the foundation laid by the State examined Detective Chin's extensive training and experience in investigating cases involving the use of illicit handguns, which, just as plainly, was the basis for the detective's opinion as to the meaning of the slang term at issue. This is not a case where the witness's specific knowledge or experience with the defendant formed the basis for his opinion, nor is it a case, such as *In re: Ondrel M.*, 173 Md. App. 223, 244 (2007), in which a police officer could opine, as a lay witness, that he recognized the smell of marijuana, a smell that is a matter of common experience for millions of people. Consequently, the instant case is controlled by *Ragland*, and it was error for the circuit court to admit Detective Chin's de facto expert opinion under the guise of lay opinion. We therefore must consider whether that error was harmless beyond a reasonable doubt under the standard articulated in *Dorsey v. State*, 276 Md. 638, 659 (1976).

Our starting point in the harmless error analysis is the context of the disputed slang term itself. In the conversation, Rucker and his brother were discussing what the police had recovered in executing a search warrant. The plain object would have been the

suspected murder weapon. The two brothers had just discussed that the police had recovered a box of .38 cartridges, and therefore it was more than plain that the term "bitch" almost surely referred to the handgun sought by the police. It is hard to fathom it would have referred to anything else. *See Gray v. Maryland*, 523 U.S. 185, 195 (1998) (holding that there had been a *Bruton* violation where a non-testifying co-defendant's statement was admitted into evidence, and that statement contained redactions that, in the Court's view, were "obvious" references to the defendant).

Other factors strongly weigh in favor of harmlessness. First is the extraordinary coincidence that Rucker, at the time he was arrested, was wearing "exactly" the same clothes as the suspect depicted in the surveillance video taken at the time of the murder. Rucker, too, must have been painfully aware of that fact, given that he set his clothes on fire while confined in a holding cell, an act of sheer desperation that plainly was intended to destroy evidence of his guilt. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (observing that "of course, the overall strength of the prosecution's case" is a factor to be weighed in determining whether a trial error is harmless under the standard articulated in *Chapman v. California*, 386 U.S. 18, 24 (1967))[6]. And, finally, the jury deliberated, at

[6] Under federal law, only preserved errors of constitutional dimension are subject to the harmless error standard expressed in *Chapman*, 386 U.S. at 24—that is, reversal is mandated unless the State can demonstrate "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Under Maryland law, all preserved errors, whether "of constitutional significance or otherwise," are subject to the *Chapman* standard. *Dorsey v. State*, 276 Md. 638, 659 (1976). In other words, *Van Arsdall* was referring to the same stringent harmless error standard that Maryland courts apply to all preserved errors in criminal cases. *See Dionas*, 436 Md. at 114 (distinguishing the

most, for a few hours, and at no time indicated that it was deadlocked or otherwise uncertain how to resolve the case. *See Dionas v. State*, 436 Md. 97, 112 (2013) (observing that "the length of jury deliberations is a relevant factor in the harmless error analysis").

We are convinced, beyond a reasonable doubt, that the jurors would have reached the same conclusion as to the meaning of the slang term, "bitch," that Detective Chin did, with or without his testimony on that point. That belief is fortified by the strong evidence of Rucker's guilt and the absence of any evidence of uncertainty by the jurors. We conclude that the error was harmless.

V.

Rucker contends that the circuit court erred in granting the State's motion in limine to admit other acts evidence and then, at trial, admitting evidence that he had set fire to his clothing while in a holding cell, shortly after he had been arrested in this case. That evidence, he maintains, was inadmissible under Maryland Rule 5-404(b), the rule governing "other acts" evidence. Specifically, he avers that the State failed to prove by clear and convincing evidence that the burned clothing was the same as that depicted in the surveillance video taken on the night of the murder five days previously, and because the probative value of that evidence "was far more prejudicial than probative." This contention has no merit.

Dorsey harmless error standard from the federal non-constitutional standard derived from *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).

At the time of Rucker's trial,[7] Rule 5-404(b) stated:

> Evidence of other crimes, wrongs, or other acts including delinquent acts as defined by Code, Courts Article § 3-8A-01 is not admissible to prove the character of a person in order to show action in the 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, absence of mistake or accident.

Although courts frequently refer to this rule as governing the admissibility of "prior bad acts" evidence, "the acts contemplated by the rule" need be neither "prior" nor "bad." *Klauenberg v. State*, 355 Md. 528, 547 n.3 (1999). "This rule plays a role similar to the prohibition against unfairly prejudicial evidence, *i.e.*, to prevent the jury from developing a predisposition of guilt based on unrelated conduct of the defendant." *Smith v. State*, 218 Md. App. 689, 709-10 (2014) (citations and quotations omitted). In addressing whether evidence should be admitted under this rule, the trial court performs a three-part analysis: first, it determines whether the evidence "is substantially relevant to some contested issue in the case" and "not offered to prove the defendant's guilt based on propensity to commit crime or his character as a criminal," *State v. Faulkner*, 314 Md. 630, 634 (1989); second, it determines whether the defendant's involvement in committing the other acts "is established by clear and convincing evidence," *id.* at 634-35 (citations omitted); and, third, it "must carefully balance the probative value of prior bad acts evidence against its potential

[7] The Rule has since been amended, effective July 1, 2019, to conform to new Rule 5-413.

for unfair prejudice under Rule 5-403."[8] *Burris v. State*, 435 Md. 370, 386 (2013) (citations omitted).

Appellate review of the trial court's decision in the first step is without deference. *Faulkner*, 314 Md. at 634 (citations omitted). We review the trial court's decision in the second step "to determine whether the evidence was sufficient to support [its] finding." *Id.* at 635. Finally, we review the trial court's balancing of probative value versus unfair prejudice for abuse of discretion. *Id.*

We begin by noting that evidence that Rucker set his clothes on fire while in the holding cell satisfies the first step in the *Faulkner* analysis, because it has "special relevance," *Sessoms v. State*, 357 Md. 274, 284 (2000) (citation and quotation omitted), namely, it strongly suggests consciousness of guilt as well as Rucker's identity as the murderer.[9] Clearly, this evidence was "not offered to prove [Rucker's] guilt based on propensity to commit crime or his character as a criminal." *Faulkner*, 314 Md. at 634.

[8] This latter provision represents a relaxation of the rule that previously had applied, whereby the balancing test required a court to exclude other acts evidence unless its "probative force . . . substantially outweighs its potential for unfair prejudice[.]" *Harris v. State*, 324 Md. 490, 500 (1991). More recent decisions from the Court of Appeals, including *Burris* and *Gutierrez v. State*, 423 Md. 476, 490 (2011), apply Md. Rule 5-403 balancing, which merely requires exclusion if the probative value of the evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403.

[9] "The list of exceptions provided in the Rule is not 'a laundry list of finite exceptions . . . but rather a representative list of examples' of permissible uses of other crimes evidence." *Burral v. State*, 118 Md. App. 288, 297 (1997) (citing *Merzbacher v. State*, 346 Md. 391, 407 (1997)), *aff'd*, 352 Md. 707, *cert. denied*, 528 U.S. 832 (1999). Thus, consciousness of guilt would, in our view, qualify under Rule 5-404(b), as fitting

We turn next to consider whether the evidence was sufficient to support the circuit court's finding, by clear and convincing evidence, that the clothing Rucker wore and set ablaze while in custody was the same as the clothing he was wearing when he committed the murder five days previously. Detective Chin testified, at the motions hearing, that, after reviewing the surveillance video recovered from the crime scene, he "was able to determine that the suspect wore a red-and-white jacket," a "very particular" Gucci belt, and "white jeans," all of which he could "clearly see . . . in one of the cameras in the video tape." He further testified that, five days after the murder, when Rucker was arrested and transported to the Homicide Unit at Police Headquarters, he had an opportunity to observe Rucker in person and noted that he was wearing "exactly" the same clothes as the suspect depicted in the surveillance video. Then, while Detective Chin was preparing to interrogate Rucker, he was notified of an "emergency" and, shortly thereafter, discovered that there was a fire in Rucker's holding cell. After ensuring that the fire had been put out and that Rucker was safe, police detectives recovered the clothes he had been wearing, including the distinctive the Gucci belt, and all of those items were introduced into evidence at the hearing. In addition, a photograph of Rucker, taken shortly after the fire, depicting him in a state of undress, was introduced into evidence. This evidence was more than sufficient to support the circuit court's finding.

within the category of permissible exceptions. But, in any event, the contested evidence may be construed as tending to establish Rucker's identity as the murderer, and identity is expressly included in the rule. *See Faulkner*, 314 Md. at 637-38 (observing that other acts evidence "may be received under the identity exception" if it shows "that on another occasion the defendant was wearing the clothing worn by or was using certain objects used by the perpetrator of the crime at the time it was committed").

Finally, as for the balancing of probative value against the potential for unfair prejudice, we note that the evidence was highly probative of Rucker's identity and consciousness of guilt. Moreover, we perceive little or no unfair prejudice; as we have noted previously, what "must be balanced against 'probative value' is not 'prejudice' but . . . only 'unfair prejudice.'" *Newman*, 236 Md. App. at 549. In the instant case, the prejudice that ensued from admitting evidence that Rucker had set fire to his clothes fell firmly within the category of "legitimate prejudice," that is, the prejudice that ensues from evidence tending "to prove the identity of the defendant as the perpetrator of the crimes," not that he "was a 'bad man.'" *Id.* (quoting *Oesby v. State*, 142 Md. App. 144, 166, *cert. denied*, 369 Md. 181 (2002)). We certainly cannot say that the circuit court abused its discretion in determining that the probative value of this evidence was not substantially outweighed by its potential for unfair prejudice. Indeed, we would not find an abuse of discretion even under the older, more defendant-friendly standard articulated in *Harris*, that the evidence has "probative force that substantially outweighs its potential for unfair prejudice[.]" *Harris*, 324 Md. at 500.

VI.

Rucker contends that the circuit court abused its discretion in overruling his objections to improper remarks the prosecutor made during closing argument. Before addressing this claim, we set forth the background.

During closing argument, defense counsel attacked perceived inconsistencies in the State's case, asserting, at various times, that his client was "entitled to more than the State's roll of the dice"; that "the State chooses to introduce evidence the way it wishes to color

it"; that "misleading evidence" was "the nature and quality of the State's case"; and that the ending time of the surveillance video presented by the State was chosen at "random." Then, after questioning why the State "was so desperate to give" the jury its version of events and not allow the jury to "draw [its] own conclusions," defense counsel stated: "And gamesmanship is not (indiscernible). Trust us, ladies and gentlemen."

Subsequently, during rebuttal closing argument, the State made the following comment:

> The Defense talks about gamesmanship. This isn't about gamesmanship. You're right, this isn't a game. The only person playing a game here is the Defense when the defense told you –

Defense counsel objected, but the court overruled that objection, observing that the defense had "used those exact same words against" the State.

Thereafter, the State made another comment that Rucker finds objectionable:

> And you and your brother are talking about this murder on the phone like it's nothing. He knew, Andre knew about this murder, knew that he committed it –

The defense objected, claiming that there was "no evidence that Andre knew anything about it" and that the State was arguing facts not in evidence. The court overruled the objection, instructing the jury that its memory of the evidence controls, and that argument of counsel is not evidence.

The prosecutor "may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Lee v. State*, 405 Md. 148, 163 (2008) (citation and quotation omitted). "While arguments of counsel are required to be confined to the

issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel, generally speaking, liberal freedom of speech should be allowed." *Id.* (citation and quotation omitted). Moreover, not "every improper remark" a prosecutor makes during closing argument "necessarily mandates reversal," *Lawson v. State*, 389 Md. 570, 592 (2005) (citation and quotation omitted), but rather, reversal is required only where the court's error in allowing the prosecutor's improper remark is not harmless beyond a reasonable doubt. *Simpson v. State*, 442 Md. 446, 458 n.5 (2015); *Lee*, 405 Md. at 164.

The first purportedly objectionable remark, concerning gamesmanship, was, in our view, not improper under the circumstances. As the circuit court observed, the State was merely responding in kind to the defense, using the "exact same words" that previously had been directed at it. Although it is true that "a prosecutor may not impugn the ethics or professionalism of defense counsel in closing argument," *Smith v. State*, 225 Md. App. 516, 529 (2015), *cert. denied*, 447 Md. 300 (2016), we do not think that this isolated remark, using the exact same term that defense counsel had employed against the State, constituted an attack against defense counsel's ethics or professionalism. *See id.* (holding that the prosecutor's comments about "smoke and mirrors" were "clearly directed to defense counsel's argument and did not impute impropriety or unprofessional conduct to defense counsel").

The second comment also was not improper. A prosecutor "may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Lee*, 405 Md. at 163. During the recorded jailhouse telephone call, about which the

prosecutor made the allegedly objectionable comment, Andre informed Rucker that police officers had executed a search warrant at their dwelling; that, in so doing, they had recovered .38 ammunition; but that he did not know whether they had recovered the "bitch," that is, the handgun and presumed murder weapon. The State's comment, that Andre "knew" that his brother had committed the murder, is a fair inference to be drawn from that telephone call.

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