Circuit Court for Prince George's County
Case No. CT171231X

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0355

September Term, 2022

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MARTINEZ D. FERRELL

v.

STATE OF MARYLAND

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Wells, C.J.,
Leahy,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Leahy, J.

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Filed: July 22, 2024

* This is an unreported opinion. The opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Officers responded to a call on the morning of July 29, 2017, from someone claiming that a man was "in the bushes and looked like he needed help." Upon arriving at the scene, a wooded area near Capital Heights in Prince George's County, the officers found Mr. Kevin Bartimus Hawkins ("Mr. Hawkins") "on the side of the road" with "severe head trauma[.]" Mr. Hawkins was rushed to Prince George's Hospital, where he was pronounced dead five days later, having suffered two gunshots to his left eye.

Mr. Martinez Diaz Ferrell ("Appellant") was tried before a jury in the Circuit Court for Prince George's County and convicted of second-degree murder and conspiracy to commit murder. Appellant was sentenced to life for the conspiracy conviction and twenty-five years for the second-degree murder conviction to be served concurrently. He timely filed this appeal and presents four questions for our review, which we have reordered, as follows:

I. "Did the Circuit Court err when it denied the [Appellant's] Motion for Judgment of Acquittal on the charge of second[-]degree murder?"

II. "Did the Circuit Court err when it denied the [Appellant's] Motion for Judgment of Acquittal on the charge of conspiracy to commit murder?"

III. "Did the Circuit Court plainly error [sic] by failing to instruct the jury that if they found the [Appellant] NOT Guilty of First[-]Degree Murder then they must acquit the [Appellant] of Conspiracy to Commit Murder?"

IV. "Did the Circuit Court impose an illegal sentence on the [Appellant] when it sentenced him to life imprisonment for conspiracy to commit murder after he was found NOT Guilty of First[-]Degree Murder?"

For the following reasons, we hold that the evidence was legally sufficient to sustain the jury's verdict convicting Appellant of second-degree murder and conspiracy to commit

murder. Next, we determine we determine that Appellant's jury instruction issue does not qualify for plain error review, and that the trial court did not impose an illegal sentence. Accordingly, we affirm.

## BACKGROUND

On August 31, 2017, a grand jury in Prince George's County indicted Appellant on the following counts: murder in the first degree (Count I); use of a handgun in a crime of violence (Count II); use of a handgun in the commission of a felony (Count III); and, conspiracy to commit murder in the first degree (Count IV).

The following factual account is drawn from the evidence presented at Appellant's jury trial which took place over five days, beginning on November 30, 2021, and culminating with the jury's verdict on December 8, 2021. The State called fourteen witnesses. The defense did not call any witnesses and did not offer any evidence. We present the evidence in the light most favorable to the State. *Hayes v. State*, 247 Md. App. 252, 306 (2020) ("In examining the record, we view the State's evidence, including all reasonable inferences to be drawn therefrom, in the light most favorable to the State."). We later supplement these facts in our discussion of the issues.

### The Victim's Mother

Ms. Sabrena Johnson testified that after finishing dinner on July 28, 2017, her son, Mr. Hawkins, went outside in the pouring rain because "D.J. was having a house party[.]"[1]

[1] In the record, Appellant is sometimes referred to as "D.J," which is a reference to Appellant's work as a disc jockey.

She noted that Appellant lived across the street from her family "at a[n] angle." At around 11:45 p.m., Ms. Johnson was sitting in her car preparing to go pick up her daughter from work when Mr. Hawkins approached and asked, "Ma, are you good[?]" She told him that she was leaving to go pick up his sister, and then she watched Mr. Hawkins "danc[e] back to" Appellant's house. Ms. Johnson mentioned that although "[i]t was dark[,]" she "saw people out[side]" Appellant's house, with "[t]he door . . . opened and music . . . playing."

After picking up her daughter, Ms. Johnson drove home and saw Mr. Hawkins outside of Appellant's house "just dancing in the rain[.]" She called out to him and asked why he was "dancing in the rain, looking crazy[,]" and he responded, "Ma, I'm living life. Let me live now." Around 1:40 a.m., Ms. Johnson left to pick-up her husband from work. Mr. Hawkins offered to go instead, but Ms. Johnson declined, and he returned to the party. When she returned a little after 2 a.m., her son was nowhere to be seen. The music had stopped, there were no people outside, and Appellant's house appeared as though "nothing had ever even happened."

Later that morning around 6:30 a.m., Ms. Johnson noticed that her son was not sleeping in his bedroom nor was he asleep on the couch in the living room. She instinctively checked her phone in case he messaged her, as her children would always text if "they were staying out[,]" but there were no text messages or calls from Mr. Hawkins. Concerned, she searched outside, half-expecting to find him "locked . . . out" and sleeping in his car. He was nowhere to be found. Immediately, Ms. Johnson began calling and texting him but received no response. She attempted to locate him using the "Find My

Phone" application to GPS-track Mr. Hawkins's location; however, the efforts were unsuccessful because the signal was "pinging . . . like it was moving[,]" but it "would show[] different spots[.]"

Around 9 a.m., Ms. Johnson walked across the street to Appellant's house, the last place she had seen Mr. Hawkins. Ms. Johnson spoke to Appellant, whom she identified in court, and Appellant informed Ms. Johnson that her son had "got[ten] in a . . . silver car or gray car with tinted windows, with a female." Ms. Johnson returned to her house "with a real bad feeling in [her] gut." She continued to call, text, and "even email" her son. A few hours later, Ms. Johnson returned to Appellant's house to inquire further about Mr. Hawkins, but she received the same response.

Later that evening, Ms. Johnson was "getting ready to leave" with her daughter and her husband to drive along the road to try to find her son. When she opened the door to go outside, the police were there bearing devastating news. Upon learning of the situation, Ms. Johnson rushed to Prince George's Hospital where her son had been admitted. Mr. Hawkins remained at the hospital for five days without regaining consciousness. On August 3, Mr. Hawkins was pronounced dead at 4:02 p.m.

**The Investigation**

Around 11:30 a.m. on July 29, Mr. Charlie Starling arrived at the Pine Grove area in Capitol Heights, Maryland, intending to "help[] neighbors" by clearing trees and grading the backyard. While approaching his tractor, he noticed Mr. Hawkins near a "rotted log" in the bushes. Mr. Starling stated that Mr. Hawkins's clothing was "pulled down to his

kneecap[,]" and it seemed as though Mr. Hawkins had "scrambled and propped [himself] upside" on the rotting log. Mr. Starling immediately called the police.[2]

The Prince George's County Police Department received an emergency call reporting a "man in the bushes [who] looked like he needed some help." Officer Daniel Hamilton was the first to respond, arriving at 1408 Pine Grove in Prince George's County. Upon arrival, Officer Hamilton observed that Mr. Hawkins had "pretty severe head trauma[,]" "road rash[,]" and was "missing one of his eyes." Despite his critical condition, Mr. Hawkins was alive at the time and had "agonal breathing, which is very shallow breath." Officer Hamilton immediately began "administering life saving measures" and called the fire department for additional assistance. Emergency medical personnel transported Mr. Hawkins to the hospital for further treatment.

Sergeant Michael McAveety went to 1408 Pine Grove Road to "conduct canvasses, help with pulling video, [and] conduct[] interviews." He recovered video recordings from two different houses situated alongside Pine Grove Road. During trial, Sgt. McAveety paused the first video at 2:31:46 and described an "SUV with its lights shut[] off" coming from the Pine Grove area, where Mr. Hawkins was discovered. The vehicle then made "a three-point turn in the middle of the road" before returning "back up Pine Grove." The second video also depicted an SUV turning off its headlights and "continuing down Pine Grove Road, toward 1400."

[2] The 9-1-1 call was entered into evidence and played before the jury.

Based on information gathered from Mr. Hawkins's family, Sgt. McAveety proceeded to "1020 Atlee Drive" and spoke with Appellant. Appellant stated that Mr. Hawkins "had come by for a party," but he had left "in a silver sedan[.]" Upon further examination, Sgt. McAveety searched motor vehicle records and discovered that Appellant's wife owned "a black Chevy Trail Blazer." He obtained search warrants for Appellant's house and for the vehicle.

Sergeant Michael Genung testified that he was the lead detective assigned to the case. He executed the warrant for the vehicle on August 9, 2017, after locating the vehicle about "a mile" away from 1020 Atlee. Sgt. Genung conducted a "quick visual observation" and noticed that the vehicle "looked like it was freshly cleaned." While examining the exterior, he did not "notice anything out of the ordinary."

Sgt. Genung explained that he interviewed Appellant on August 10. He advised Appellant of his rights "[i]n front of his house on Atlee drive" and then "transported [him] to the homicide office for an interview that could be recorded." The interview with Appellant took place around 1:40 a.m., and the recording of the interview was presented to the jury and admitted into evidence.

During the interview, Sgt. Genung asked Appellant "what kind of black SUV do you drive?" and Appellant responded that "I ain't got no black SUV." Sgt. Genung then asked "What about your wife, are there any other trucks in her name?" To this, Appellant stated that, among other vehicles, his wife owned a "black Chevy." Appellant further claimed that while he "drove all of [his wife's] cars[,]" the black Chevy "went

out . . . probably about six months or so" ago. More specifically, Appellant claimed that "the axle" of the vehicle had "broke" while "driving on the highway." Appellant stated that his wife initially attempted to have the vehicle repaired, but that ultimately the vehicle was "scrapped [] for parts" in "Alabama" "about a month ago." Throughout the remainder of the interview, Appellant maintained his belief that the vehicle had been scrapped in Alabama, and he denied having driven the vehicle the previous week. Additionally, he claimed he had only "switched it up about the cars" because he was concerned he could get in trouble for an issue involving his license.

**State Expert Witnesses**

Dr. Jack Titus conducted Mr. Hawkins's autopsy on August 4, 2017, in his official role as an assistant medical examiner. Dr. Titus observed extensive therapeutic intervention aimed at "try[ing] to keep [Mr. Hawkins] alive." During the internal examination, Dr. Titus identified two gunshot wounds in Mr. Hawkins's left eye. Although the bullet trajectories differed, the entry points "were in close proximity to each other[.]" One bullet entered the left eye and "went downwards through the back of the throat[,]" lodging itself in Mr. Hawkins's neck, while the other bullet also entered the left eye and penetrated "the right side of the skull."

Dr. Titus testified that there was an absence of "stippling" (small abrasions) around the wound and no soot on the body. He concluded that the gun was likely fired from a distance greater than 18 to 24 inches, and that the shots were fired "around the same time[,]" although he could not ascertain when the wounds were inflicted. Dr. Titus, within

a reasonable degree of medical certainty, determined that the cause of Mr. Hawkins's death was the "gunshot wounds [to his] head" and classified the manner of death as homicide.

Dr. Titus prepared a "blood card[,]" also known as a DNA card, using Mr. Hawkins's blood retrieved from his heart during the autopsy. Subsequently, the blood sample was "turned over to the evidence technician" from the Prince George's County Police Department.

Mr. Jaimie Smith, who worked as a Firearms Examiner in the Firearms Examination Unit within the Forensic Science Division at the Prince George's County Police Department, testified that he examined State's Exhibits Number 17 and 18, which were manilla envelopes with a fired bullet in each. He determined that both bullets belonged to the .38 caliber class and both bullets had "eight lands and grooves[.]" Upon closer scrutiny using a comparison microscope, Mr. Smith testified that the small striations in the land impressions were sufficient to ascertain whether the bullets were fired from the same gun. Based upon his expert opinion within a reasonable degree of scientific certainty, Mr. Smith concluded that the two bullets were fired from the same unknown firearm. As no weapon was recovered at the scene, Mr. Smith was unable to determine the specific type of gun from which the bullets were discharged.

Lieutenant-Colonel David Vastag from the Prince George's County Crime Scene Investigation Division processed a "2005 Chevy Trail Blazer" on August 10 and "took photographs, fingerprints, and did serology swabs[.]" Lt. Col. Vastag testified that the crime scene investigators "observed some staining on the seats of the vehicle," which

appeared to have "been cleaned up." Lt. Col. Vastag "cut the seat material" from the rear seat of the vehicle and "submit[ted] the entire foam as a single unit to the serology lab."

Mr. Joseph Rose, a forensic chemist with the Prince George's County Police Department, was qualified as an "expert in the field of forensic serology and DNA analysis." Mr. Rose conducted both serology and DNA analyses on the forensic evidence recovered from the vehicle. Upon completing the initial serology screening, Mr. Rose proceeded with DNA forensic analysis on a section of the seat cushion "that tested presumptively positive for blood" matched against analysis of fingernail clippings from Mr. Hawkins's right and left fingers. The DNA profiles revealed multiple contributors, and Mr. Rose, with a reasonable degree of certainty, concluded that the major component of the DNA on the seat cushion matched Mr. Hawkins's DNA and did not match that of Appellant or the three other individuals from the reference samples. He noted that the likelihood of randomly selecting an unrelated person in the community with the same DNA profile was "approximately one in 13.2 billion[.]" However, Mr. Rose could not definitively determine the source of Mr. Hawkins's DNA or affirmatively state whether it originated from blood. When asked by the State's counsel whether power washing could degrade DNA, Mr. Rose testified that "prolonged moisture . . . can promote bacterial or mold growth, and that would degrade the DNA[.]"

**The Car Detailing**

Mr. James Deal testified that he owned a car detailing business, which involves "shampooing carpets [and] buffing cars[.]" On July 20, Appellant's wife reached out to

Mr. Deal and asked him to detail their vehicle, which he identified during trial. This was the first time Mr. Deal had detailed a car for them. Mr. Deal began detailing the black Chevy Trail Blazer on August 1, 2017, and completed the car detailing job on August 3, 2017. He described the vehicle as being in poor condition, stating it was "tore up[,]" "trashed[,]" and "filthy." Mr. Deal documented the transformation with before-and-after pictures and videos of the SUV "for [his] portfolio[,]" which were entered into evidence and showed to the jury.

Mr. Deal testified that he used an "all-purpose chemical" while power washing the interior of Appellant's car, along with "all-purpose cleaning carpet enzymes for carpeting and seats[.]" He mentioned that he posted the Trail Blazer on his Instagram page at the request of Appellant and his wife, as they were hoping to find "somebody [to] buy the vehicle." Mr. Deal acknowledged that this was not his typical practice but agreed to do so as a favor, given that he once dated Appellant's wife's best friend.

**David Moore Testimony**

The State's lead witness, Mr. David Moore, recounted that as he returned home late from work on the evening of Friday, July 28, he spotted Appellant and Mr. Hawkins engaged in a friendly conversation outside. Mr. Moore waved to them and talked to them for about "five minutes" before he went back inside his house and "started watching TV."

Around 12:30 or 1:00 a.m., Mr. Moore recalled hearing a loud noise, which he described to the police as a gunshot. Mr. Moore looked outside his window but was unable

to see anything because it was "really raining hard."[3] He assumed the sound came from a firecracker, so he "went back inside."

Mr. Moore looked outside again and observed Appellant and an unidentified second individual placing an object in the "back, left driver's side" of Appellant's car. Mr. Moore testified that he was unable to discern the nature of the object clearly because it was raining heavily. However, he informed the police that the object appeared to be a "black box[,]" but he "couldn't really see" due to the downpour. While Mr. Moore could not provide specifics regarding the object's shape or other characteristics, he noted that the object "had a little weight to it[,]" making it too heavy for one person to lift alone.[4]

Mr. Moore recounted that he saw Appellant and an unidentified second person enter the SUV after placing the object in the back, then driving away at a "normal speed[,]" with Appellant seated in the passenger seat. According to Mr. Moore, Appellant and the unknown individual returned around 2 or 2:30 am and began "spraying the car down" with a water hose, despite the heavy rain. Mr. Moore noted that he had previously observed the SUV regularly "[p]arked in front of [Appellant's] house[,]" but after that incident, he never saw the vehicle again.

[3] Mr. Moore said it was raining heavily, comparing it to a "tropical storm" and stated that on his way home from work he could "barely see the road."

[4] In Mr. Moore's police interview, Mr. Moore told police officers that he thought that Appellant and the second party were putting equipment in the backseat because Appellant was a DJ and often had gigs. Mr. Moore said he was unable to see what the object was because it was raining so hard, but it seemed as if the object was heavy based on how the two men were walking while carrying it.

**Motions for Judgment of Acquittal**

After the State rested its case, defense counsel motioned for a judgment of acquittal. Defense counsel argued that although the court "heard a lot of testimony[,]" there was nothing that directly "implicat[ed] [Appellant]." As counsel argued:

> The best the State has is that some two hours before the deceased was shot the neighbor saw and spoke with [Appellant] and Mr. Hawkins right in front of the home, nothing after that. Nothing – there was no indication, there is no ballistics, there is no forensic evidence, nothing that implicates [Appellant] in this case.
>
> * * *
>
> Mr. Moore's testimony was that he saw, looking at this in the best light for the State, Mr. Moore's testimony was that he saw a box being loaded into the car. A box. One would think – and counsel asked the Court to use, you know, common sense and stuff – one would think that one would recognize if a body is being loaded as opposed to a box. He saw a box being loaded into the SUV.
>
> In addition to that, where the body was found, there was no box. There was no box there attendant to the body or anything like that.
>
> * * *
>
> So then you have evidence of a black SUV. Doesn't even – as a matter of fact, it doesn't even identify the type, much less identify the specific SUV, just a black SUV. And so in a box being loaded, that's the State's best case, that they saw a box being loaded, and that there was a black SUV seen somewhere where, supposedly, in some proximation to where the body was dumped.

The State responded, asserting that while this case "may not have a lot of direct evidence, it is full of circumstantial evidence." As the State contended:

> There is strong circumstantial evidence by way of witness testimony through both Ms. Johnson, the decedent's mother, and Mr. Moore, the neighbor,

> about the interaction and about the fact that Mr. Hawkins was last seen alive shortly before Mr. Moore heard a gunshot at the defendant's house.
>
> There was then testimony that Mr. Moore observed the defendant and another individual carrying something that appeared to be heavy out into his truck, that he got into his truck and drove away.
>
> Then, there was video evidence recovered from the scene of where Mr. Hawkins' body was dumped. And it shows that about 2:20 [a.m.] a black SUV is traveling on the road where Mr. Hawkins' body is dumped. It then does a three-point turn, turns its lights down and goes back by the area where Mr. Hawkins was dumped.
>
> * * *
>
> Mr. Moore then testifies that sometime between 2:45 and 3:00 the truck that he saw the defendant drive off [in] is now back in front of the defendant's house and the defendant is hosing it down in the rain. Further, Mr. Moore testified that after that Saturday he did not see the truck around anymore and that was unusual to him because it was a car he knew the defendant to drive and knew to be parked in front [of] the defendant's home regularly.

The State further emphasized that Mr. Hawkins's DNA was found in the back seat of the vehicle, and Mr. Deal testified that he "was contacted by the defendant's wife" to detail the car and post it online, at Appellant's behest, as they were "attempting to sell the vehicle." Additionally, the State pointed out that during his police interview, Appellant told the police "over and over again" that he had not driven the vehicle "in quite some time" because the axle was broken, and "it had been scrapped and was in Alabama."

Considering the entirety of the evidence presented, the State argued that "there is certainly substantial evidence for the charges to go forward." The Court agreed, noting the "abundance of circumstantial evidence[,]" and denied the motion for judgment of acquittal.

At the close of all evidence, the defense renewed its argument for a directed verdict. The defense counsel reiterated his previous argument but also contended that the conspiracy charge should be dismissed because "there was no testimony whatsoever that can go back to the jury with respect to any conspiracy in this matter." The State incorporated its previous arguments and responded:

> Mr. Moore's testimony . . . indicated that the defendant and one other person were loading what the State is arguing is Mr. Hawkins' body into the back of the defendant's truck and that when he saw the truck return, he saw the defendant, and at this point two people [were] washing the truck.
>
> Again, given the State's theory of the case that this was a continuing act from 1020 Atlee to Pine Grove and that multiple, albeit unknown people were involved, I do believe that there is sufficient and substantial evidence for the conspiracy charge to move forward.

The Court again denied the defense's motion, acknowledging that there was "no direct" evidence but nevertheless deemed "that there [was] sufficient evidence[.]"

**The Verdict**

On December 8, 2021, the jury rendered its verdict, finding Appellant guilty of second-degree murder and guilty of conspiracy to commit murder. The jury acquitted Appellant of first-degree murder and use of a firearm in a crime of violence.

**Sentencing Hearing**

At the sentencing hearing, the State asked for a maximum sentence of life imprisonment, contending that the sentencing for conspiracy should align with that of first-degree murder. The defense disagreed that the second convicted offense, the conspiracy charge, should align with sentencing for first-degree murder. More specifically, defense

counsel argued, "The second convicted offense I don't believe would carry anything more than what the actual – I don't think the conspiracy would follow the first degree. It should follow the second degree. As such, the total, it should go from 18 to 25 total."

The Court provided Appellant with an opportunity to address the Court before sentencing, but Appellant declined to say anything. The Court then imposed a life sentence. The Court also imposed a twenty-five-year sentence for the conviction of second-degree murder, to be served concurrently.

Mr. Ferrell timely appealed on April 27, 2022.

## DISCUSSION

## I.

## Second Degree Murder

### *A. Parties' Contentions*

Appellant argues that there was insufficient evidence for a second-degree murder conviction and asserts that the Circuit Court erred in denying his Motion for Judgment of Acquittal on the charge of second-degree murder.

First, Appellant contends that since the jury found Appellant not guilty of first-degree murder and not guilty of using of a handgun in a crime of violence, the only theory upon which the jury could have based its verdict for second-degree murder was depraved heart murder.[5] Quoting *Beckwitt v. State*, 477 Md. 398, 467, *cert. denied*, 143 S. Ct. 216

[5] Appellant did not request an involuntary manslaughter instruction:

(Continued)

(2022). Appellant defines depraved-heart murder as "the willful doing of a dangerous and reckless act with wanton indifference to the consequences and perils involved[.]" According to Appellant, the State failed to introduce any evidence indicating that Appellant knew Mr. Hawkins was alive when he transported him to the secondary location. Appellant posits that, without demonstrating that he had knowledge of Mr. Hawkins's survival, the State could not meet the elements of depraved-heart murder because there could be no willful and wanton indifference to the consequences. Additionally, Appellant asserts that the State did not produce evidence suggesting that Mr. Hawkins exhibited signs of life when transported by Appellant to the secluded area. Appellant alleges that the person who found Mr. Hawkins "perceived him to be a dead body," and the medical examiner did not

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> PROSECUTION: Is the defense requesting involuntary manslaughter?
> DEFENSE: No, we're not asking for involuntary manslaughter.

The State requested to break the second-degree murder charge into individual theories.

> PROSECUTION: So, if I may, just go back to the second[-]degree depraved heart murder, because I also requested that theory.
> …
> THE COURT: So, I don't know, it just seems like the depraved heart, you know, again seems duplicative in a sense.
> …
> PROSECUTION: So I don't believe that it's – that it's cumulative. I think there is a reason why that the individuals on the jury instruction committee made two different ones instead of a single second degree murder. That's –
> THE COURT: …I am not going to permit you to break it down by theory in terms of the verdict sheets.
> PROSECUTION: Okay.
> THE COURT: So that's not going to happen.
> PROSECUTION: Okay.
> THE COURT: So you're going to have to change that to first degree, second degree, whatever.

attribute the "movement of Hawkins or the delay in medical treatment" as the cause of Mr. Hawkins's death. (Emphasis supplied by Appellant's brief). Therefore, Appellant urges, the evidence did not support a rational inference that Appellant willfully moved Mr. Hawkins while he was still alive to the secluded area or that transporting Mr. Hawkins caused his death.

The State counters by arguing, initially, that Appellant's legal sufficiency challenges, particularly regarding whether Appellant knew Mr. Hawkins was alive when he left him in the rural area and whether Appellant's actions caused Mr. Hawkins's death, are inappropriate for consideration by this Court because they were not preserved. According to the State, these issues were not "raised with particularity" by defense counsel in his motion for judgment of acquittal as mandated by Maryland Rule 4-324(a).

The State contends that even if these issues were preserved, "they are meritless." The State argues that a reasonable juror could rationally infer that Appellant knew Mr. Hawkins was still alive when he transported him and left him in the secluded area. "The simple fact that Hawkins *was* alive when he was discovered at 11:30 a.m.[,]" the State says, supports this inference. Additionally, Mr. Starling, who discovered Mr. Hawkins, testified that it appeared that Mr. Hawkins had "scrambled and propped" himself up against a log; and Officer Hamilton, the first to arrive on the scene, noted that Mr. Hawkins had "agonal breathing."

According to the State, a rational juror could find Appellant guilty of second-degree murder on any three of the culpable mental states – either of the "specific intent" modalities

or the "depraved heart" modality. The State rejects Appellant's contention that a jury could only convict him of second-degree murder based on a depraved heart due to the jury's verdict of not guilty on the charge of using a firearm in a crime of violence. The State asserts, quoting *Purnell v. State*, 250 Md. App. 703, 711 (2021), that the Appellate Court is "not concerned with what a factfinder . . . d[id] with the evidence [but rather] with what a factfinder '*could have done* with the evidence.'" *Id.* (emphasis supplied by Appellant's brief).

The State outlines several pieces of circumstantial evidence that support the jury's second-degree murder conviction, including: 1) Mr. Hawkins attended a party at Appellant's house; 2) Mr. Moore saw Mr. Hawkins speaking with Appellant shortly before hearing a gunshot; 3) Appellant and another person were seen loading Mr. Hawkins into Appellant's vehicle and driving away; 4) Mr. Moore observed Appellant washing his vehicle in the rain upon return; 5) Appellant paid to have his vehicle detailed; and 6) Appellant initially lied about owning the vehicle during his police interview. This, the State contends, is sufficient evidence for a rational juror to infer a causal connection between Appellant's actions and the death of Mr. Hawkins.

Finally, the State rebuts Appellant's argument that expert testimony was required to demonstrate that transporting Mr. Hawkins and leaving him in a secluded area was a cause of Mr. Hawkins's death. Expert testimony was not necessary, the State argues, "because due to [Appellant's] conduct, [Mr. Hawkins] went without medical aid for over eight hours after being shot in the head." Consequently, the State asserts that Appellant caused Mr.

Hawkins's death by manifesting an "extreme indifference to the value of human life." (*Citing Beckwitt v. State*, 249 Md. App. 333, 352 (2021), *aff'd*, 477 Md. 398 (2022)).

### *B. Legal Framework and Standard of Review*

As mentioned above, the standard of review for sufficiency of the evidence 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." *Smith v. State*, 415 Md. 174, 184 (2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Appellant was convicted of second-degree murder under section 2-204 of the Maryland Criminal Law Article. Maryland Code (2002, 2021 Repl. Vol.), Criminal Law Article ("CR"), § 2-204. In Maryland, murder is a single common law offense but is categorized into two degrees for sentencing purposes. Second-degree murder encompasses homicides "not in the first degree[.]" CR § 2-204(a). A murder is aggravated to the first-degree if the jury concludes it was "a deliberate, premediated, and willful killing." CR § 2-201(a)(1). Maryland law recognizes second-degree murder in several forms: 1) the unlawful killing of a human being without premeditation; 2) the intent to inflict grievous bodily harm where death is likely; 3) felony murder;[6] and 4) depraved heart murder. *See, e.g.*, *Alston v. State*, 414 Md. 92, 109 n.5 (2010). Unlike first-degree murder under CR § 2-201(a)(1), which necessitates premeditation, second-degree murder does not require

[6] The Appellant was not charged and the jury was not instructed on felony murder in this case.

premeditation. As Judge Moylan recently explained, in discussing “[s]imple [i]ntent-to-[k]ill [m]urder in the second degree[,]”:

> It is tempting to call second-degree murder of this type “unpremeditated murder,” but that would not be literally correct. Non-premeditation is not an affirmative element of the second-degree crime. What is involved in proving the lesser-degree of murder is not proof of non-premeditation but only the non-proof of premeditation. There is a big difference between the two.

*Pitts v. State*, 250 Md. App. 496, 501 n.1 (2021).

“Malice is the indispensable ingredient of murder[.]” *Lindsay v. Stat*e, 8 Md. App. 100, 104 (1969). Second-degree murder occurs when the defendant intends to inflict such grievous bodily harm that death is the likely outcome. *Thornton v. State*, 397 Md. 704, 713 (2007). The intent element of second-degree murder turns on whether a reasonable person, under the circumstances, would have anticipated that death would likely occur. *Id.* The key distinction between second-degree murder and involuntary manslaughter lies in the “presence or absence” of the element of malice. *Thornton*, 397 Md. 713 (citing *Selby v. State*, 361 Md. 319, 332 (2000)) (citations omitted). Malice can manifest as expressed or implied, and a specific intent to kill is not necessary. *Gladden v. State*, 273 Md. 383, 388 (1974). Thus, murder can occur without an explicit intent to kill, and malice can be inferred from the surrounding circumstances. *Id.* Judge Orth expounded on the necessary *mens rea* for second-degree murder in *Lindsay v. State*:

> If a man voluntarily and willfully does an act, the natural and probable consequences of which is to cause another’s death, an intent to kill may be inferred from the doing of the act. So, it has been consistently held, that in the absence of excuse, justification, or a mitigating circumstance*,* malice is inferred from the use of a deadly weapon directed at a vital part of the body.

8 Md. App. 100, 105 (1969).

The *mens rea* for malice entails both affirmative and a negative components. On the affirmative side, there must be an intent to cause serious bodily injury such that death is the likely outcome, or to act so recklessly and wantonly that death is the natural result. The negative component involves a lack of justification (*e.g.*, self-defense) or mitigation (*e.g.*, provocation) that would categorize the crime as manslaughter rather than murder. As Judge Moylan warned, the careless usage of the umbrella term malice can be a "linguistic snare." *Glenn v. State*, 68 Md. App. 379, 404 (1986). Both murder and manslaughter share the requisite intent and the absence of justification, with the distinction lying in the absence of mitigation, which separates murder from manslaughter. *Id.* at 405.

A depraved heart murder is a wanton and willful killing, where the defendant is aware that his actions create a likelihood of death. Central to depraved heart murder is an "extreme indifference to the value of human life." *Alston v. State*, 101 Md. App. 47, 56 (1994), *aff'd*, 339 Md. 306 (1995). This form of murder embodies a sense of "viciousness or a contemptuous disregard for the value of human life." *Beckwitt*, 477 Md. at 471 (quoting *Simpkins v. State*, 88 Md. 607, 619-20 (1991), *superseded by rule on other grounds as stated in*, *State v. Brown*, 464 Md. 237, 252 (2019)).

As instructed in *Robinson v. State*, 307 Md. 738, 745 (1986):

> A depraved heart murder is often described as a wanton and wilful killing. The term 'depraved heart' means something more than conduct amounting to a high or unreasonable risk to human life. The perpetrator must or reasonably should realize the risk his behavior has created to the extent that his conduct may be termed wilful. Moreover, the conduct must contain an

> element of viciousness or contemptuous disregard for the value of human life which conduct characterizes that behavior as wanton.

*Robinson v. State*, 307 Md. at 745 (quoting from R. Gilbert & C. Moylan, Maryland Criminal Law: Practice and Procedure § 1.6–3 (1983)).

Depraved heart murder can arise from acts of omission or failure to act. For example, in *In re Eric F.*, this Court determined that the juvenile defendant was guilty of depraved heart murder of the victim who died of hypothermia after he dragged her into the woods while she was unconscious from alcohol intoxication and left her there. 116 Md. App. 509, 520, 522 (1997). We found that the defendant's conduct exhibited extreme indifference to the value of human life when he abandoned the unconscious victim in the November cold without seeking assistance.[7] *Id*. at 521-22. We clarified that, to qualify as depraved heard murder, the act in question "may be perpetrated without the slightest trace of personal ill-will." *Id.* at 520 (quoting *Glenn v. State*, 68 Md. App. 379, 399 (1986)). Instead, it is the "willful doing of a dangerous and reckless act with wanton indifference to the consequences and perils involved[.]" *Id.*

### *C. Analysis*

In the instant case, the State presented sufficient "successive links of circumstantial evidence," *Covel v. State*, 258 Md. App. 308, 322, *cert. denied*, 486 Md. 157 (2023), to

[7] Eventually, one of the defendant's friends made a call to the local sheriff, but the friend "gave an incorrect address that [the defendant] had given him because [the defendant] did not want the police coming to his house." *In re Eric F.*, 116 Md. App. at 512.

support Appellant's conviction for second-degree murder. During the trial, witnesses testified that Appellant was seen with the victim shortly before a gunshot was heard. A neighbor, Mr. Moore, described seeing Appellant with the victim in front of Appellant's house as Mr. Moore arrived home from work on July 28th. Then, in the early hours of the next morning, he heard what sounded like a gunshot, and thereafter observed Appellant and another person loading a heavy object into a black SUV in the pouring rain before driving away. Mr. Moore then observed Appellant return with his accomplice later "around o'clock, 2:30" in the morning, and then hose down the vehicle in the pouring rain. Another witness testified that it appeared Mr. Hawkins had "scrambled and propped" himself against a log on the side of the road, indicating he was at least somewhat mobile; paired with the simple fact that Mr. Hawkins was breathing and survived for several additional days, these facts gave rise to a permissible inference that Appellant *knew* he was still alive.

Although the forensic evidence could not definitively determine if the stains on the backseat of the Appellant's vehicle were blood, the stains confirmed the presence of the victim's DNA. Coinciding with the timeframes provided by Mr. Moore, surveillance footage captured a black SUV, resembling Appellant's vehicle, driving with its lights off in the vicinity where Mr. Hawkins was abandoned.

Viewed in the light most favorable to the State, this evidence was sufficient for the jury to conclude that Appellant was guilty of second-degree depraved heart murder. *See In re Eric F.*, 116 Md. App. at 522 (concluding the evidence presented was sufficient for the factfinder "to find that appellant knew . . . his actions would lead to [the victim's] death,

and that he manifested extreme indifference to the value of her life by leaving her in the cold, and failing to seek appropriate help"). The evidence was also sufficient for the jury to determine that, by abandoning Mr. Hawkins, Appellant *intended* to cause his death. *See, e.g.*, *Lindsay*, 8 Md. App. at 105 ("If a man voluntarily and wilfully does an act, the natural and probable consequence of which is to cause another's death, an intent to kill may be inferred from the doing of the act." (footnote omitted)). Here, regardless of who actually shot Mr. Hawkins, the natural and probable consequence of transporting Mr. Hawkins—who was alive but had been shot in the head—to a secluded section of the road and abandoning him there was to ensure he succumbed to his wounds. A rational factfinder could conclude that Appellant intended to inflict grievous bodily harm upon Mr. Hawkins when he abandoned him by the roadside without calling for aid, and that death was the likely result.

A person's behavior "after the commission of a crime" can also serve as "circumstantial evidence from which guilt may be inferred." *Thomas v. State*, 372 Md. 342, 351 (2002). Post-crime behavior, including the "destruction or concealment of evidence[,]" can shed light on an individual's state of mind. *Id.* (citations omitted). In this case, Appellant's conduct suggests a guilty conscious. A witness observed Appellant washing his vehicle, despite stormy weather, and then he falsely told the police "over and over again" that he had not driven the vehicle "in quite some time" because the axle was broken, and "it had been scrapped and was in Alabama." Meanwhile, Appellant had arranged for the vehicle to undergo deep cleaning and detailing shortly after the shooting.

While post-crime behavior alone does not establish guilt, it contributes to the overall context from which a reasonable trier of fact may infer Appellant's culpability.

In summary, although there was no direct evidence presented at trial linking Appellant to the actual shooting, it is clear that Mr. Hawkins was still alive when Appellant abandoned him in a secluded, wooded area, knowing that he had been shot in the head. And even if the jury found no specific intent to kill, it was reasonable for the jury to infer that Appellant intended to inflict serious bodily harm, with death as a probable outcome. A reasonable jury could have also found that Appellant was guilty of depraved-heart murder for abandoning Mr. Hawkins in a secluded area while he suffered from life-threatening injuries because that act reflected a wanton disregard to the value of life. *See, e.g.*, *In re Eric F.*, 116 Md. App. at 519-22.

## II.

## Conspiracy to Commit Murder

### *A. Parties' Contentions*

Appellant contends, *first*, that the circuit court erred when it denied his motion for judgment of acquittal on the charge of conspiracy to commit murder because there was insufficient evidence that he entered into a conspiracy to kill Hawkins before the shooting:

> The State's case . . . did not include any *pre*-shooting evidence of planning or preparation by [Appellant] to shoot or kill Hawkins or *pre*-shooting evidence of communication between [Appellant] and anyone connected to the shooting. There was no evidence that [Appellant] was present at the scene of the shooting . . . . The State's case relied exclusively on an inference that [Appellant's] *post*-shooting disposal of Hawkins is not consistent with the conduct of an innocent man.

(Emphasis supplied by Appellant's brief).

Appellant also emphasizes that, while a neighbor saw Appellant and another individual loading Mr. Hawkins into the back of Appellant's vehicle, there was no evidence of "communication[] between the men, such as pointing, head-nods, head-shakes, smiling, waving, using the 'OK' sign, patting on the shoulder, or other non-verbal gesture commonly used to coordinate activity or to acknowledge solidarity between two people." Accordingly, Appellant asserts that the State failed to prove Appellant and any other person "entered into an agreement . . . *before* Hawkins was shot." (Emphasis supplied by Appellant's brief). In Appellant's view, "[a] *rational* inference that [Appellant] conspired to shoot or kill Hawkins can only be drawn from . . . *post*-shooting conduct if it is combined with either (1) [Appellant's] presence at the actual shooting; (2) evidence [Appellant] had a matching firearm or ammunition; (3) an incriminatory admission by [Appellant]; (4) accomplice testimony; or (5) evidence of motive to harm Hawkins on the part of [Appellant] or his co-conspirator." (Emphasis supplied by Appellant's brief). Appellant further emphasizes his perceived need for the State to prove the existence of an agreement *before* the shooting, stating that Appellant's "[*p*]*ost*-crime conduct is evidence of a guilty conscience but . . . does not relieve the State from establishing a *prima facie* case that [Appellant] shot Hawkins . . . or conspired with someone to shoot Hawkins before the shooting actually occurred." (Emphasis supplied by Appellant's brief).

*Second*, Appellant contends that "because there is no crime of conspiracy to commit Second Degree Murder based on specific intent to kill, or specific intent to inflict grievous

bodily injury, the court should have entered judgment of acquittal to the extent that the State sought a conspiracy verdict on those grounds." (Citations omitted). Continuing, Appellant states that "[s]imilarly, . . . because wanton conduct will not support the specific intent required for the crime of conspiracy" "the court should have entered a judgment of acquittal to the extent that the State sought a conspiracy verdict on the . . . depraved-heart theory of second degree murder[.]" (Citations omitted).

The State counters that the circumstantial evidence presented, viewed in the light most favorable to the State, was sufficient for the jury to conclude that Appellant and the unidentified third-party conspired to kill Mr. Hawkins. The State concedes the fact that "[p]ersons cannot be guilty of conspiracy to commit a crime which has already been committed[,]" quoting *Jones v. State*, 8 Md. App. 370, 379 (1969) (quotation omitted), but stresses that "[t]he crime of murder is not committed unless, and until, the victim dies." Therefore, it was not necessary for the conspiracy to form *before* the shooting, the State urges, because:

> [A] reasonable juror could rationally infer [from the circumstantial evidence presented] that Appellant and another person reached an unlawful agreement to kill Hawkins **by carrying him to [Appellant's] vehicle, transporting him to a secluded wooded area, and abandoning him on the side of the road with the intent that Hawkins, alone and unable to seek help, would soon die from his severe injuries.**

(Emphasis added).

### *B. Legal Framework and Standard of Review*

As before, the standard of review for sufficiency of the evidence 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." *Smith v. State*, 415 Md. 174, 184 (2010) (quotation omitted).

As stated by the Supreme Court of Maryland in *Mitchell v. State*:

> Where, as in the instant case, the object of a conspiracy is to kill, the appropriate charge may be conspiracy to commit first degree murder. *See Bell v. State*, 48 Md. App. 669, 680 (1981) (["]If one conspires to murder … the conspiracy itself is the premeditating factor raising the underlying crime from a second to a first degree offense["])[, *abrogated on other grounds by Savage v. State*, 48 Md. App. 669 (1981)].

363 Md. 130, 144 (2001) (quoting *Gary v. State*, 341 Md. 513, 517 n.2 (1996)). In *Kohler v. State*, we explained:

> The crime of conspiracy is defined in Maryland as:
>
>> [T]he combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. The essence of a criminal conspiracy is an unlawful agreement. The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design. [Furthermore], the crime is complete when the unlawful agreement is reached, and no overt act in furtherance of the agreement need be shown.
>
> *Campbell v. State*, 325 Md. 448, 495-96 (1992) (internal quotation marks and citations omitted).

203 Md. App. 110, 130-31 (2012) (alterations in original). *See also Mitchell*, 363 Md. at 146 ("When the object of the conspiracy is the commission of another crime, as in conspiracy to commit murder, the specific intent required for the conspiracy is not only the intent required for the agreement but also, pursuant to the agreement, the intent to assist in some way in causing that crime to be committed."). As further explained by the *Mitchell* Court:

> [W]here the charge is made and the evidence shows that the defendant conspired to kill another person unlawfully and with malice aforethought, the conspiracy is necessarily one to commit murder in the first degree (even if a murder pursuant to the conspiracy never occurs or, for whatever reason, amounts to a second degree murder), as the agreement itself, for purposes of the conspiracy, would supply the necessary deliberation and premeditation.

*Id.* at 149. *See also Alston*, 177 Md. App. at 39-40 ("Just as the crime of attempted murder requires proof that the defendant had the specific intent to murder, the crime of conspiracy to murder also requires proof that the defendant had the specific intent to kill."), *aff'd*, 414 Md. 92 (2010).

Importantly, a criminal conspiracy "may be shown by circumstantial evidence from which an inference of common design may be drawn." *McClurkin v. State*, 222 Md. App. 461, 486 (2015) (quoting *Armstead v. State*, 195 Md. App. 599, 646 (2010)). That is to say, "the State [is] only required to present facts that would allow the jury to infer that the parties entered into an unlawful agreement." *Armstead*, 195 Md. App. at 646 (quoting *Acquah v. State*, 113 Md. App. 29, 50 (1996)). While such an inference cannot be based on pure conjecture or mere speculation, *Bible v. State*, 411 Md. 138, 157 (2009), it is sufficient that the circumstantial evidence, when viewed in the light most favorable to the prosecution, could enable "*any* rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt." *Smith*, 415 Md. at 184 (quotation omitted).

In Maryland, a jury may convict a defendant of both conspiracy to murder a victim in the first degree *and* of second-degree murder of that same victim *even though* the jury concurrently acquits the defendant of first-degree premeditated murder of that victim. *Savage*, 226 Md. App. at 175 ("The guilty verdicts for conspiracy to commit murder and

second degree murder . . . are not legally inconsistent.”). While these verdicts may, depending on the circumstances, appear to be *factually* inconsistent with one another, they are not *legally* inconsistent, and therefore such verdicts are permissible in a jury trial. The Supreme Court explained these concepts in the recent case, *Williams v. State*:

> In a criminal case, verdicts are factually inconsistent where proof of the charged offenses involves establishing the same facts and the offenses have different legal elements, and a trier of fact acquits the defendant of one offense but convicts of the other. *See* [*McNeal v. State*, 426 Md. 455, 458 (2012)]. For instance, a guilty verdict as to possession of a regulated firearm by a disqualified person might be factually inconsistent with a not-guilty verdict as to wearing, carrying, or transporting a handgun, if there were a single set of facts in which the defendant possessed or carried a handgun after being convicted of a disqualifying crime. *See id.* at 472-73. **Factually inconsistent verdicts are impermissible in criminal bench trials, but they are permitted in criminal jury trials**. *See id.* at 462, 470. This is because, in a criminal jury trial, factually inconsistent verdicts “may be the product of lenity, mistake, or a compromise to reach unanimity, and [ ] continual correction of such matters would undermine the historic role of the jury as the arbiter of questions put to it.” *Id.* at 470 (cleaned up).

478 Md. 99, 105-06 (2022) (bold emphasis added). The *McNeal* Court elaborated on why factually inconsistent verdicts are permissible in a jury trial:

> A reviewing court, distanced from a jury, is equipped to evaluate independently the legal elements of charged crimes and make a determination as to whether the verdicts are compatible with these elements. It can not divine independently, however, the basis for a factually inconsistent verdict. Thus, we must assume that the guilty verdict here is “curious” or factually inconsistent (compared to the acquittal on the other charge), and that what occurs within the minds of the jurors is outside the reach of our appellate grasp.

*McNeal*, 426 Md. at 473 (citations omitted).

### *C. Analysis*

As an initial matter, under *Williams* and *McNeal* it is clear that Appellant *can* be convicted of first-degree conspiracy to commit murder *even though* he was convicted of second-degree murder, and not first-degree murder. *See also Savage*, 226 Md. App. at 175. Clearly, the fact that an individual has conspired with another to kill a specific victim would tend to support a finding that the later killing of that victim was premeditated, and thus aggravate the killing from second-degree to first-degree murder under CR § 2-201(a)(1), which states that "[a] murder is in the first degree if it is[] . . . a deliberate, premeditated, and willful killing[.]" That said, the cognitive dissonance that is apparently reflected within the jury's verdicts in this case represents mere factual, and not legal, inconsistencies, which we will not disturb. *McNeal*, 426 Md. at 472-73; *Williams*, 478 Md. at 105-06.

Moving on, we hold that sufficient circumstantial evidence was presented for the jury in this case to find, beyond a reasonable doubt, that Appellant and the unidentified individual (who helped load Mr. Hawkins' body into the vehicle) entered an agreement to kill Mr. Hawkins. It was not necessary for the State to prove that this agreement came into existence *before* the shooting because Mr. Hawkins was still alive. Moreover, as the State correctly points out in its brief, on appeal we will "not second-guess the [jury's] determination where there are competing rational inferences available" but, instead, we will defer to the "jury's ability to choose among differing inferences that might possibly be made from the factual situation[.]" *State v. Manion*, 442 Md. 419, 431 (2015) (cleaned up).

Turning to the pertinent evidence, a neighbor testified that he heard a loud noise—a gunshot or firecracker—after observing Appellant speaking with Mr. Hawkins outside the house party. Next, that same neighbor saw Appellant and another individual load Mr. Hawkins' body into the back of Appellant's vehicle and drive away, with Appellant in the passenger seat.[8] Surveillance footage showed a black SUV resembling Appellant's vehicle with its lights off in the vicinity of where Mr. Hawkins was abandoned on the side of the road in a wooded area. Viewing the evidence in the light most favorable to the State, it is clear that the jury could reasonably infer that Appellant and his accomplice *knew* Mr. Hawkins was still alive when transporting him because the individual who later found Mr. Hawkins testified he had "scrambled and propped [himself] upside" on the rotting log, meaning Mr. Hawkins retained at least a limited ability to move. Appellant and his accomplice also plainly had the opportunity to observe that Mr. Hawkins was still breathing, even if only shallowly. Upon their return, the neighbor saw Appellant and the accomplice first enter Appellant's home, and then return outside to clean the vehicle, with Appellant spraying the vehicle with a hose, in the middle of the night even though it was raining outside.[9]

[8] Appellant concedes, in his brief, that viewing the evidence in the light most favorable to the State, the jury could reasonably conclude that the object being loaded into Appellant's vehicle was, indeed, Mr. Hawkins.

[9] Appellant implicitly concedes that the neighbor's testimony supports the fact that he saw "the two men[,]" meaning Appellant and the unidentified second individual, "cleaning the Defendant's vehicle"; however, Appellant contends it may have only been Appellant who handled the hose. This distinction is irrelevant to our analysis, and the jury could reasonably conclude that both men took part in cleaning the vehicle.

Regardless of whether Appellant and the other individual in-fact agreed to kill Mr. Hawkins before the shooting, or after the shooting (but before dumping him on the side of the road), there was sufficient evidence for the jury to conclude, beyond a reasonable doubt, that the two men *had* reached an agreement, the object of which was to kill him. The agreement is evidenced by the actions the two men took in concert—loading a grievously injured Mr. Hawkins into the vehicle, driving to a secluded location, dumping him on the roadside, returning and entering Appellant's home, then exiting to clean the vehicle—all while knowing that Mr. Hawkins was still alive and without calling for aid. The State's heavy reliance on this circumstantial evidence—namely the coordinated actions of the two men—is reminiscent of *Jones v. State*, 132 Md. App. 657 (2000), where we explained:

> The appellant's first contention is that the evidence was not legally sufficient to support the conspiracy conviction. In conspiracy trials, there is frequently no direct testimony, from either a co-conspirator or other witness, as to an express oral contract or an express agreement to carry out a crime. It is a commonplace that we may infer the existence of a conspiracy from circumstantial evidence. If two or more persons act in what appears to be a concerted way to perpetrate a crime, we may, but need not, infer a prior agreement by them to act in such a way. From the concerted nature of the action itself, we may reasonably infer that such a concert of action was jointly intended. Coordinated action is seldom a random occurrence.
>
> A thin line may sometimes separate 1) joint participation as a second-degree principal aiding and abetting the first-degree principal in the perpetration of a crime and 2) an antecedent agreement to cooperate in that fashion. Theoretically, one might decide on the spur of the moment to aid and abet another in a crime without ever having been solicited to do so and without any even implicit understanding between the parties. In such a case, there would be joint participation but no antecedent conspiracy. More frequently, however, joint participation by two or more codefendants and a conspiracy, to wit, a mutual understanding, jointly to participate overlap. **The former gives rise at least to a permitted inference of the latter. In this case, it is the evidentiary fact of the appellant's joint participation with another in a murder that is the predicate for the permitted**

> **inference of an antecedent agreement between the two so to coordinate their efforts.**

*Jones*, 132 Md. App. at 660-61 (emphasis added).

Appellant's subsequent conduct—lying to the police about the location and condition of the vehicle; lying to Mr. Hawkins's mother about his whereabouts; and, his continued efforts to clean and, subsequently attempt to sell the vehicle, all without taking action (even anonymously) to direct aid toward Mr. Hawkins—further supports the permissible inference that Appellant and his unidentified accomplice intended to kill Mr. Hawkins, and had agreed to do so by dumping him, alive, in the bushes on the side of the road.

Taken together, we hold that the evidence was legally sufficient to permit the jury to reasonably find that Appellant and his accomplice acted in concert "with the conspiratorial purpose of killing their intended victim" and "therefore, [the evidence] was sufficient to support the verdict[.]" *Id.* at 664.

## III.

## Jury Instruction

### *A. Parties' Contentions*

Appellant contends the circuit court erred by providing instructions to the jury, as pertained to the conspiracy charge, that "allowed the jury to render a guilty verdict for a crime that does not exist – conspiracy to commit Second Degree Murder." Appellant's argument relies on the mistaken theory that it is impermissible, in a jury trial, for the jury's verdicts to reflect a factual (as opposed to legal) inconsistency. Put simply, in Appellant's

view, if a jury convicts a criminal defendant of second-degree murder (while acquitting on the charge of first-degree murder) then the jury cannot be permitted to concurrently convict the defendant of conspiracy to commit murder in the first-degree, and the court must provide the jury with instructions to this effect.

Appellant implicitly concedes that he failed to preserve any objection to the conspiracy instruction[10] by failing to timely object "on the record promptly after the court instructs the jury[.]"[11] Md. Rule 4-325(f). He also acknowledges that he did not object to the jury's verdicts. However, Appellant contends it was "plain error [for the circuit court] to submit the Conspiracy charge to the jury without informing the jury that it must acquit [Appellant] of conspiracy if [the jury] found [Appellant] not guilty of premeditated [first-degree] murder." Accordingly, Appellant asserts we may properly consider these issues.

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[10] The circuit court instructed the jury:

> Conspiracy. The defendant is charged with the crime of conspiracy to commit the crime of murder. Conspiracy is an agreement between two or more persons to commit a crime. In order to convict the defendant of conspiracy, the State must prove that the defendant agreed with at least one other person to commit the crime of murder, and that the defendant entered into the agreement with the intent that the crime of murder be committed.

This instruction is consistent with Maryland Criminal Pattern Jury Instruction 4:08.

[11] Appellant does not argue he substantially complied with the requirements of Maryland Rule 4-325(f). *See generally Bowman v. State*, 337 Md. 65, 69 (1994) ("We have recognized that, on occasion and objection in substantial compliance with the Rule will be considered adequately preserved.").

The State asserts we should not exercise our discretion to conduct plain error review. In support, the State cites *Yates v. State*, where we explained that "[a]ppellate courts in Maryland strongly favor the use of pattern jury instructions" and that while "use of a pattern jury instruction does not insulate a conviction against review," the appellant in that case had failed to "cite[] any case in which a Maryland appellate court . . . held that a trial court committed plain error in . . . giving, without objection, a pattern jury instruction." 202 Md. App. 700, 723 (2011) (quotation omitted). As in *Yates*, here, Appellant cites no opinion in which a Maryland appellate court found plain error in the giving of a model pattern instruction. The State also points out that Appellant's gripe is not with the actual language of the model pattern instruction on conspiracy but, rather, the circuit court's decision not to include *additional* language that is *not* found in the model instruction, based on Appellant's theory that the jury *must* acquit on the conspiracy charge upon an acquittal on the first-degree murder charge. Accordingly, the State contends the court did not commit plain error in giving the conspiracy instruction.

Separately, citing *Givens v. State*, 449 Md. 433 (2016), the State asserts Appellant failed to preserve any objection to the jury's factually inconsistent verdicts by failing to object "before the verdicts are final and the trial court discharges the jury." (Quoting *Givens*, 449 Md. at 486). In any case, citing *McNeal v. State*, 426 Md. 455 (2012), and *Williams v. State*, 478 Md. 99 (2022), the State correctly notes that factually inconsistent verdicts are permitted in Maryland jury trials.

### *B. Standard of Review and Legal Framework*

As we stated in *Adkins v. State*:

> Maryland Rule 4-325(c) provides: "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." "[T]he decision whether to give a jury instruction 'is addressed to the sound discretion of the trial judge,' unless the refusal amounts to a clear error of law." *Preston v. State*, 444 Md. 67, 82 (2015) (citation omitted). In determining whether a trial court has abused its discretion we consider whether "(1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction[.]" *Ware v. State*, 348 Md. 19, 58 (1997).

*Adkins v. State*, 258 Md. App. 18, 27 (2023).

In this case, in regard to the conspiracy charge, Appellant did not request any amended or additional instructions and did not object to the instructions given; therefore, he asks us to review the instructions for plain error. Under Maryland Rule 4-325(f):

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

Md. Rule 4-325(f) (emphasis added). As the Supreme Court of Maryland recently explained in *Beckwitt v. State*:

> Before an appellate court can exercise its discretion to find plain error, the following four conditions must be satisfied:
>
>> (1) there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant; (2) the legal error must be

> clear or obvious, rather than subject to reasonable dispute; (3) the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [ ] proceedings; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.

477 Md. 398, 464 (2022) (quoting *Newton v. State*, 455 Md. 341, 364 (2017)). Our Supreme Court has made clear that it is exceedingly rare for an appellate court to exercise plain error review, as we acknowledged in *Wiredu v. State*:

> [A]s the [Supreme Court of Maryland] has explained, this discretion should rarely be exercised:
>
> > It is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.
>
> *Chaney v. State*, 397 Md. 460, 468 (2007); *see also Kelly v. State*, 195 Md. App. 403, 432 (2010) ("[A]ppellate review under the plain error doctrine 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." (citations omitted)).

222 Md. App. 212, 224 (2015) (third alteration in original).

"As [the Supreme Court of Maryland] held in *McNeal*, factually inconsistent verdicts are permissible in criminal jury trials" and therefore a Maryland appellate court "will not intrude upon the province of the jury in an attempt to reconcile factual inconsistencies" in the jury's verdicts. *Williams*, 478 Md. at 123 (construing *McNeal*, 426 Md. at 461-62). The *Williams* Court explained:

> In a criminal case, verdicts are legally inconsistent where a defendant is convicted of an offense but acquitted of another offense that has the same

> elements as the offense of which the defendant was convicted. *See McNeal v. State*, 426 Md. 455, 458 (2012). In other words, verdicts are legally inconsistent "where a defendant is acquitted of a 'lesser included' crime embraced within a conviction for a greater offense." *Id.* at 458 n.1. Legally inconsistent verdicts are impermissible in criminal trials. *See id.* at 458, 470. In a criminal jury trial, where a trial court has properly instructed a jury as to the offenses at issue and the jury nonetheless reaches legally inconsistent verdicts, the jury has, presumptively, failed to follow the jury instructions given by the court. *See id.* at 458.
>
> In a criminal case, verdicts are factually inconsistent where proof of the charged offenses involves establishing the same facts and the offenses have different legal elements, and a trier of fact acquits the defendant of one offense but convicts of the other. *See id.* at 458. For instance, a guilty verdict as to possession of a regulated firearm by a disqualified person might be factually inconsistent with a not-guilty verdict as to wearing, carrying, or transporting a handgun, if there were a single set of facts in which the defendant possessed or carried a handgun after being convicted of a disqualifying crime. *See id.* at 472-73. Factually inconsistent verdicts are impermissible in criminal bench trials, but they are permitted in criminal jury trials. *See id.* at 462, 470. This is because, in a criminal jury trial, factually inconsistent verdicts "may be the product of lenity, mistake, or a compromise to reach unanimity, and [ ] continual correction of such matters would undermine the historic role of the jury as the arbiter of questions put to it." *Id.* at 470 (cleaned up).

478 Md. at 105-06 (alteration in original). As held by the Supreme Court of Maryland in *Givens*, "to preserve for review any issue as to allegedly inconsistent verdicts, a defendant in a criminal trial by jury must object to the allegedly inconsistent verdicts before the verdicts are final and the trial court discharges the jury." *Givens*, 449 Md. at 486.

***Analysis***

It is uncontested that Appellant failed to preserve any objection to the model panel instruction on conspiracy that the circuit court provided the jury, and Appellant does not assert that he substantially complied with the requirements of Maryland Rule 4-325(f). The

issue is thus whether the purported error that Appellant complains of—failing to instruct the jury that they may not convict Appellant of conspiracy to commit murder in the first degree if they do not also convict him of first-degree murder—qualifies for plain error review. It does not.

Premeditated murder in the first degree is not a lesser-included offense of conspiracy to commit murder in the first degree and therefore it is not *legally* inconsistent for a jury to acquit a defendant of the former, while convicting him or her of the latter. *Williams*, 478 Md. at 105. This is because, under the elements test (often termed the "*Blockburger*[12] test," "required evidence test," or "same evidence test"), each crime requires at least one element that the other does not. Under this test, "Crime A is a lesser-included offense of Crime B where all of the elements of Crime A are included in Crime B, so that only Crime B contains a distinct element." *Id.* at 126-27 (quoting *State v. Wilson*, 471 Md. 136, 178 (2020)). Here, only the conspiracy charge requires that there be an agreement amongst two or more persons, and only the premeditated murder charge requires that a killing must have actually occurred. Accordingly, neither charge is a lesser-included offense of the other.

The fact that it may have been *factually* inconsistent for the jury in this case to acquit Appellant of premeditated first-degree murder while convicting him of conspiracy to commit murder in the first degree is irrelevant because "factually inconsistent verdicts are

[12] *Blockburger v. United States*, 284 U.S. 299 (1932).

permissible in criminal jury trials" and we "will not intrude upon the province of the jury in an attempt to reconcile factual inconsistencies" in the jury's verdicts. *Id.* at 123 (construing *McNeal*, 426 Md. at 461-62). Therefore, the circuit court did *not* commit a "clear or obvious" error by failing to *sua sponte* instruct the jury that if it acquitted Appellant of the first-degree murder charge it must also acquit him of the conspiracy charge. Indeed, such an instruction would constitute a gross misrepresentation of the law. Accordingly, we hold that the issue presented by Appellant does not qualify for plain error review. *Beckwitt*, 477 Md. at 464 ("[T]he legal error must be clear or obvious, rather than subject to reasonable dispute[.]").

Moving on, although not expressly raised or argued in Appellant's brief, we note that Appellant failed to object to the verdicts "before the verdicts are final and the trial court discharges the jury[,]" and therefore Appellant has failed to "preserve for review any issue as to allegedly inconsistent verdicts[.]" *Givens*, 449 Md. at 486.

## IV.

## Conspiracy to Commit First Degree Murder: Illegal Sentence

### *A. Parties' Contentions*

Appellant contends, in a single sentence, that: "The Life sentence imposed on [Appellant] was illegal because it was based on a crime that does not exist in Maryland or exceeded the statutory limitation imposed by [CR] § 1-202 for the only murder crime for which there was any evidence before the jury." Under CR § 1-202:

**Conspiracy—Limitation on punishment**

> The punishment of a person who is convicted of conspiracy may not exceed the maximum punishment for the crime that the person conspired to commit.

CR § 1-202. In a nutshell, Appellant contends that the life sentence imposed for his conspiracy conviction is an illegal sentence because he was convicted of second-degree murder, but not first-degree murder, and a life sentence is permissible only for the latter. *Compare* CR § 2-201(b)(1) ("A person who commits a murder in the first degree . . . shall be sentenced to: (i) imprisonment for life without the possibility of parole; or (ii) imprisonment for life."); *with* CR § 2-204(b) ("A person who commits a murder in the second degree is guilty of a felony and on conviction is subject to imprisonment not exceeding 40 years."). This argument necessarily hinges on Appellant's belief that his convictions for conspiracy and second-degree murder cannot co-exist because they are factually inconsistent.

The State responds that Appellant's sentence of life imprisonment for the conviction of conspiracy to commit murder is not illegal because "[t]he maximum sentence for first-degree murder is life imprisonment." (Citing CR § 2-201(b)).

***B. Standard of Review and Legal Framework***

Under Maryland Rule 4-345(a), a court "may correct an illegal sentence at any time." Thus, "the preservation requirements" that ordinarily will apply to our consideration of an issue on appeal "do not apply to challenges to illegal sentences; that is, the court's authority to correct an illegal sentence exists even if the defendant failed to object in the trial court at the sentencing hearing or raise the issue in a direct appeal." *State v. Bustillo*,

480 Md. 650, 664 (2022). Only an "'inherently illegal' sentence[], not [a] sentence[] resulting from [a] 'procedural error[,]'" qualifies for review under Rule 4-345(a). *Id.* at 665. More specifically:

> We have consistently defined this category of "illegal sentence" as limited to those situations in which the illegality [of the sentence] inheres in the sentence itself; *i.e.*, there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful.

*Id.* (alteration in original) (emphasis removed) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). "[W]hether a sentence is illegal for purposes of Rule 4-345(a) is a question of law that we review without deference to . . . the trial . . . courts." *Id.* (citing *Bailey v. State*, 464 Md. 685, 696 (2019)).

***C. Analysis***

As already explained above, the fact that Appellant was convicted by a jury of conspiracy to commit murder but *not* premeditated first-degree murder *may* be factually inconsistent, but "factually inconsistent verdicts are permissible in criminal jury trials" and we "will not intrude upon the province of the jury in an attempt to reconcile factual inconsistencies." *Williams*, 478 Md. at 123 (citing *McNeal*, 426 Md. at 461-62); *see also Savage*, 226 Md. App. at 175 ("The guilty verdicts for conspiracy to commit murder and second degree murder . . . are not legally inconsistent."). First-degree premeditated murder is not a lesser-included offense of conspiracy to commit murder, and therefore in a jury trial an acquittal on the former charge does not necessitate an acquittal on the latter. *Williams*, 478 Md. at 105. Further, we have already held that there was sufficient evidence

for the jury to convict Appellant of conspiracy to commit murder, and under CR § 1-202 a conviction for conspiracy to commit murder is sentenced in-line with first-degree murder. *See, e.g.*, *Alston*, 414 Md. at 117 ("[A] conspiracy to murder means a malicious intent to kill with deliberation and premeditation, *i.e.*, first degree murder, as the conspiracy necessarily supplies the elements of deliberation and premeditation." (citation omitted)). Accordingly, Appellant's life sentence is not an illegal sentence.

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