Circuit Court for Anne Arundel County
Case No. C-02-CR-20-000887

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 995

September Term, 2021

ALONTA BORRELL JOHNSON

v.

STATE OF MARYLAND

Berger,
Leahy,
Tang,

JJ.

Opinion by Berger, J.

Filed: July 1, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following a jury trial in the Circuit Court for Anne Arundel County, Alonta Borrell Johnson ("Johnson"), appellant, was convicted of attempted second-degree murder and associated handgun offenses stemming from a shooting that occurred in the parking lot of the Maryland Live! Casino in Hanover, Maryland. Johnson was sentenced to a term of thirty years' incarceration for attempted second-degree murder with all but twenty years suspended. He received a concurrent ten-year sentence for the use of a firearm in a crime of violence, a consecutive ten-year sentence for possession of a firearm with a prior disqualifying conviction, and a one-year sentence for illegal possession of ammunition.

Johnson raises four issues on appeal, which we restate verbatim as presented in Johnson's appellate brief:

> 1. Did the trial court commit reversible error by admitting State's Exhibit 7, body-worn camera footage of Appellant's arrest, because it contained inadmissible evidence under Md. Rule 5-404(b)?
>
> 2. Did the trial court err in admitting State's Exhibit 1, a jailhouse phone call, where the call contained hearsay inadmissible under Md. Rule 5-803(a)(2), bad-acts evidence inadmissible under Md. Rule 5-404(b), and testimonial evidence inadmissible under the Confrontation Clause?
>
> 3. Did the trial court err in admitting State's Exhibit 6, license-plate-reader records, that contained statements that were inadmissible hearsay, irrelevant, and unduly prejudicial?
>
> 4. Did the trial court err in giving a flight instruction where the State's evidence supported only an inference of mere departure from the scene, not flight?

Perceiving no error, we shall affirm.

FACTS AND PROCEEDINGS

Shortly before midnight on July 18, 2020, Anthony Jeppi ("Jeppi") went to the Maryland Live! Casino adjacent to Arundel Mills Mall in Hanover, Maryland with his girlfriend, Brittany Gaydosh, his friend, Carl Robinson, and Mr. Robinson's girlfriend, Brandie Dixon. Jeppi was "already a little intoxicated" when he got to the casino. Jeppi and his friends left the casino shortly after 5:00 a.m. the next morning. Jeppi had been arguing with his girlfriend and was feeling angry. As he was walking in the parking lot, Jeppi saw "a dude staring at" him from his car. Initially, Jeppi looked away, but when he got to the bottom of a ramp, Jeppi asked the man, "yo what are you staring at?" and walked toward him. The man did not respond but continued to stare at Jeppi. Jeppi recalled that "some words [were] exchanged" and then he saw the man "pull[] a gun out." The man shot Jeppi in the abdomen, after which the man "just balled out" and "[l]eft the -- you know, the scene" in his vehicle. Jeppi recalled that the man had "brown skin and had gold in his mouth." Jeppi acknowledged that he would not be able to recognize the shooter, nor did he remember details about the shooter's car beyond the fact that it was a four-door sedan.

After the shooting, Ms. Dixon called 911 to report that her friend had been shot. Casino security personnel also responded immediately to the scene of the shooting. Jeppi was taken by ambulance to the R Adams Cowley Shock Trauma Center at the University of Maryland Medical Center, where he was treated for a gunshot wound to the abdomen.

Brittany McGee, a surveillance investigator at the casino, was working at the time of the shooting. After she was notified that a shooting had occurred in the parking lot, Ms. McGee began reviewing casino security footage to determine what had occurred leading up to the shooting. Ms. McGee explained that there were over a thousand cameras at the casino filming at any given time. Ms. McGee reviewed footage that showed Jeppi approaching a car, jumping back, and falling to the ground after being shot. Ms. McGee and her colleagues continued reviewing security footage in order to determine whether it was possible to identify the shooter. Ms. McGee identified a person of interest, who she was able to track throughout his time at the casino on various security cameras. At trial, Ms. McGee identified the person of interest as Johnson.

Ms. McGee prepared a video compilation showing Johnson's actions when he was at the casino that was compiled from the security footage from multiple cameras. The video compilation was played for the jury at trial. The video footage tracked the person who was seen entering the vehicle suspected of being involved in the shooting just minutes before Jeppi was shot. The video footage showed the shooting itself and also depicted the suspect vehicle pulling out of the parking lot and leaving the scene seconds after the shooting occurred. The video compilation showed that the individual, whom Ms. McGee identified as Johnson, had previously been seen in the casino wearing a distinctive pendant necklace. Ms. McGee described the distinctive paper ID that Johnson had used to enter the casino, which had been photographed by casino security personnel when Johnson entered the casino.

Anne Arundel County Police Officer Shawn Sheskin was patrolling at the time of the shooting and responded to the site of the shooting in the casino parking lot. He observed "a white male lying on the ground with a gunshot wound to his abdomen." Another officer was already at the scene and was providing first aid to the victim, who was later identified as Jeppi. Officer Sheskin spoke with casino security representatives and viewed the casino's security footage. When viewing the security camera footage, Officer Sheskin saw footage of Johnson entering the casino and providing a paper temporary ID card. Casino security representatives showed Officer Sheskin "a paper ID card without a photograph on it" bearing the name "Alonta Borrell Johnson," which was the same paper ID card Johnson was seen using to enter the casino in the surveillance footage.

At trial, Detective Dana Crockett, the lead investigator for the shooting, described his investigation of the case. By the time Detective Crockett arrived at the scene, Jeppi had already been transported to the hospital. Detective Crockett developed Johnson as a suspect after having identified a person of interest who "was captured on surveillance cameras at the casino, entering and also exiting [the casino, and] getting into the suspect vehicle." Johnson's "name was developed because he couldn't get in" to the casino when he initially attempted to enter. Detective Crockett explained:

> [Johnson] didn't have an ID. And he had an interim ID, which as we know in the State of Maryland, is a piece of paper with your name and your information on it. So, he presented that to the security guard. Security guard initially denied him access.
>
> He then went back out to the vehicle. If I remember correctly, he went in his truck -- in his trunk, rather. Then, he sat in the

> car for a little bit, and he attempted to come back in. At that time, he presented the interim ID.
>
> Security wrote the name down. He either wrote the name or he may have taken a picture. But either way, he had the name that was on the interim ID. And [the security guard] presented the situation to his supervisor, who in turn told him to allow the person in. And that was how the name was developed.

Detective Crockett further explained that he was able to view the vehicle involved in the shooting on surveillance footage, but initially, he was unable to make out a license plate number for the vehicle, nor was he initially able to definitively identify the make or model of vehicle from the surveillance footage alone. Detective Crockett developed a silver Infiniti as the suspect vehicle after determining that the vehicle was identified on a License Plate Reader ("LPR") machine at the Arundel Mills Mall parking lot. Detective Crockett determined that the vehicle captured by the LPR machine was the same vehicle that left the parking lot after the shooting by following the vehicle on surveillance camera footage. The license plate number for the suspect vehicle "did not come back to anybody on a registration." Detective Crockett had the vehicle "put on a hot list," which meant that "anytime that vehicle gets an LPR hit in the State of Maryland, [Detective Crockett] would get an alert." Having determined that Johnson was the suspect shooter based upon the security footage and the temporary ID that had been provided to casino security, Detective Crockett obtained an arrest warrant for Johnson on July 20, 2020.

On July 21, 2020, officers of the Baltimore City Police Department arrested Johnson in Northwest Baltimore City following a vehicle pursuit arising from an attempted traffic stop for a suspected window tint violation. Johnson, who was driving the vehicle (not the

silver Infiniti involved in the shooting), did not stop the vehicle, and instead, leaped from the vehicle while it was still in motion, resulting in a collision with a parked vehicle.[1] As he fled on foot, Johnson was seen tossing a handgun which was recovered and determined to be operable and contained live rounds. Johnson's apprehension and arrest were captured on video by Detective Drake Winkey's body-worn camera. The body-worn camera footage showed Johnson wearing a distinctive pendant necklace and depicted gold in his mouth. Officers recovered a set of car keys from Johnson at the time of his arrest. One of the keys recovered from Johnson matched the silver Infiniti, which was subsequently located in Baltimore City and processed for evidence days later. Over defense objection, certain clips of the video footage from Detective Winkey's body worn camera were played for the jury.

While in custody prior to trial, Johnson made a telephone call from jail that was recorded and ultimately played for the jury at trial, over defense objection. Additional facts shall be discussed as necessitated by our consideration of the issues raised on appeal.

DISCUSSION

I.

The first three issues raised in this appeal are premised upon evidentiary determinations by the trial court. Specifically, Johnson challenges the trial court's decision to admit (1) body-worn camera footage, (2) an audio recording of a jailhouse telephone

[1] Certain details regarding the arrest are drawn from the State's Motion to Introduce Evidence Pursuant to Maryland Rule 5-404(b) but were not established at trial. We include this information for context only.

call, and (3) LPR records. As we shall explain, we find no merit to any of Johnson's allegations of error.

A. General Standard of Review for Admissibility of Evidence

Generally, appellate courts review rulings on the admissibility of evidence under an abuse of discretion standard and we "extend the trial court great deference" in making those determinations. *Vielot v. State*, 225 Md. App. 492, 500 (2015) (citing *Hopkins v. State*, 352 Md. 146, 158 (1998)). "We apply a different standard, however, when it comes to hearsay evidence." *Id.* The Court of Appeals has explained that "[w]hether evidence is hearsay is an issue of law reviewed *de novo*." *Gordon v. State*, 431 Md. 527, 536 (2013) (internal quotation omitted). Indeed, a trial court has "no discretion to admit hearsay in the absence of a provision providing for its admissibility." *Id.* (internal quotation omitted). Accordingly, "[h]earsay . . . must be excluded at trial, unless it falls within an exception to the hearsay rule." *Id.* at 535 (internal quotation omitted). Nevertheless, if a trial court makes specific findings of fact in applying an exception to the rule against hearsay, those factual findings will not be disturbed absent clear error. *Id.* at 538.

"Trial judges generally have 'wide discretion' when weighing the relevancy of evidence." *State v. Simms*, 420 Md. 705, 724 (2011) (quoting *Young v. State*, 370 Md. 686, 720 (2002)). Nevertheless, trial judges "do not have discretion to admit irrelevant evidence." *Id.* (internal citation omitted); *see also* Md. Rule 5-402. We apply a *de novo* standard of review when reviewing the trial judge's conclusion of law that the evidence at issue "is [or is not] of consequence to the determination of the action." *Montague v. State*,

471 Md. 657, 673 (2020) (internal quotation omitted). "After determining whether the evidence in question is relevant, we consider whether the trial court abused its discretion by admitting relevant evidence which should have been excluded as unfairly prejudicial." *Id.* Accordingly, we review the trial judge's decision on admissibility under Maryland Rule 5-403 under an abuse of discretion standard. *Id.* at 673-74. We will generally not reverse a trial court under this standard "unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Id.* (internal citations omitted).

B. Body-Worn Camera Footage

Johnson first asserts that the trial court erred in admitting certain clips of body-worn camera ("BWC") footage of Johnson's arrest because they contained evidence of "other crimes, wrongs, or other acts" in violation of Md. Rule 5-404(b) and lacked special relevance. Johnson further maintains that the BWC footage was substantially more prejudicial than probative.

Pursuant to Md. Rule 5-404(b), "[e]vidence of other crimes, wrongs, or other acts . . . 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 . . . ." Prior to trial, the State moved to introduce evidence pursuant to Rule 5-404(b). Johnson opposed the State's motion, and a pretrial hearing was held on the motion on July 20, 2021, the same day on which the trial

began. The State asserted that the BWC footage was relevant to establish Johnson's identity and was not unduly prejudicial. Johnson filed an opposition, arguing that the BWC footage did not have special relevance, that the other acts evidence could not be established by clear and convincing evidence, and that the BWC footage would unfairly prejudice the Johnson.

At the hearing on the State's motion, the prosecutor explained that "[t]he reason the State initially wanted to introduce that evidence or portions of that evidence is two[]fold." The first reason was "when Mr. Johnson was arrested in Baltimore City, he was wearing a very unique necklace which is identical to the necklace that the suspect was wearing at the Anne Arundel County shooting two days prior." The prosecutor argued that "this evidence goes directly to [identification] and it is very strong because upon his arrest in Baltimore City, [Johnson provided] his name and [his] identification [was] confirmed[,] and he [was] wearing this unique piece of . . . jewelry that the person who committed the shooting was seen [wearing] in Anne Arundel County." The second reason proffered by the prosecutor was that the set of keys recovered from Johnson as shown on the BWC footage matched the vehicle suspected of being implicated in the shooting (the silver Infiniti). The prosecutor further explained that the video footage was "cut into three segments" and had been "heavily redacted" in order to avoid "any other references to other crimes."

Counsel for Johnson argued that the BWC footage included inadmissible bad act evidence because it showed Johnson "on the ground," "in cuffs," "in custody," "sweating," "huffing and puffing," and "complaining that he can't breathe" while "surrounded by three

to four Baltimore City police officers." Defense counsel asserted that this footage would be "letting the jury know that there has been some kind of activity leading to that point where Mr. Johnson is now on the ground in cuffs, sweaty, breathing heavily and surrounded by Baltimore police officers." Defense counsel further argued that "those portions of the body cam video do indicate . . . that there was some kind of confrontation" or "chase." Defense counsel asserted that an officer could testify that Johnson was arrested wearing the distinctive pendant rather than showing the allegedly prejudicial BWC footage. Defense counsel took further issue with the portion of the BWC footage showing Johnson brought into a holding cell, after which a police officer recovered the paper temporary ID from Johnson. The BWC footage also included footage of Johnson providing a phone number for "Mikey" that was connected to a later jailhouse telephone call.

The trial court allowed the State to play three clips from the BWC footage.[2] The court explained that the evidence was admissible to prove Johnson's identity because it specifically showed Johnson wearing the distinctive pendant necklace as well as the temporary paper ID that linked Johnson to the shooting. The court observed that there was no indication in the video footage of any other crimes or bad acts. The court observed that the video footage did not include anything about "what he is arrested for" and reasoned that "[t]here are other inferences which may be made with regard to why Baltimore City is

[2] The court required the State to remove a portion of the footage that showed police officers counting approximately $1,400.00 in cash that was recovered from Johnson at the time of his arrest.

involved in an Anne Arundel County case," particularly given that "[t]here was an active warrant out at the time."

When reviewing the trial court's decision to permit BWC footage to be played for the jury, we are mindful that "[o]ther crimes evidence does not have to fall neatly into one particular exception and be admitted for one purpose." *Page v. State*, 222 Md. App. 648, 663 (2015) (quotation marks omitted). The label of the exception "is not that important, just so long as the evidence of 'other crimes' possesses a special or heightened relevance and has the inculpatory potential to prove something other than that the defendant was a 'bad man.'" *Id.* (quoting *Oesby v. State*, 142 Md. App. 144, 162 (2002)).

Admission of "other acts" evidence is subject to the three-prong test set forth by the Court of Appeals in *State v. Faulkner*, 314 Md. 630, 634-35 (1989): (1) the evidence must have special relevance other than to show propensity; (2) the proponent must establish by clear and convincing evidence that the prior act occurred; and (3) the probative value of the prior act must substantially outweigh the danger of unfair prejudice. Although we review without deference the determination of whether the challenged evidence has relevance other than to show propensity, we review the ultimate balancing of probative value and unfair prejudice for abuse of discretion. *Id.* at 641.

On appeal, Johnson contends that the BWC footage contained "bad acts" evidence because it showed "Johnson face-down on the ground and seemingly out of breath as police detain him after an apparent chase, his arrest in Baltimore City, the appearance of him in shackles, and the police's placement of him in a barren cell." We disagree with Johnson

that the challenged footage contained "bad acts" evidence introduced for no other purpose than propensity. As the trial court observed, there is nothing in the BWC footage that suggests that Johnson was being arrested for any reason other than the alleged murder specifically at issue in this case. Although Johnson was, in fact, arrested after a pursuit arising from an attempted traffic stop for an alleged illegal window tint, there is no indication of such in the BWC footage. The arrest occurred only two days after the shooting, and the BWC footage showed officers recovering the Infiniti keys and the paper temporary ID card that specifically linked Johnson to the charged offense. In our view, a reasonable jury would not have inferred that Johnson was being arrested for any reason other than the specific crime for which Johnson was charged in this case. We agree with the trial court that there is no reason why jurors would conclude that the arrest of Johnson in a different jurisdiction was indicative of any other "bad acts," particularly given that a warrant for Johnson's arrest had been issued at the time.

Furthermore, even if we were to construe the BWC footage as "bad acts" evidence, the evidence satisfies the requirements of *Faulkner*. The trial court found, and we agree, that the BWC footage was relevant to prove Johnson's identity, as well as to provide a link to the phone number associated with "Mikey." All of the clips played for the jury showed what Johnson looked like two days after the shooting. The clips also showed Johnson providing his name and birthdate to the arresting officers. The distinctive pendant is visible in the BWC footage, as is the paper temporary identification that he had produced for entry to the casino on July 18. The admission of the BWC footage allowed the jury to compare

footage of Johnson's address with casino security footage and reach a conclusion as to whether the security footage depicted the same person as shown on the BWC footage.

Likewise, the trial court did not abuse its discretion when it determined that the probative value of the BWC footage substantially outweighed the danger of unfair prejudice. Johnson contends that the BWC footage was unfairly prejudicial because it showed him handcuffed and surrounded by officers while being arrested. Johnson further points to other examples of "unfairly prejudicial parts" of the BWC footage, including Johnson being "surrounded by numerous officers and numerous police cars," one officer's comment that he suspected that Johnson had provided a fake name and birth-date, Johnson's comment that he was homeless and slept in his car, and the "undeniably problematic footage of Mr. Johnson stepping out of a police car at the jail, while shackled."

We disagree that these examples, when viewed within the context of the attempted murder and associated offenses with which Johnson was charged, constitute unfair prejudice. When considering whether evidence would be unfairly prejudicial, we are mindful that "[t]he 'unfair' component of the prejudice is not the tendency of the evidence to prove the identity of the defendant as the perpetrator of the crimes. What is 'unfair' is only the incremental tendency of the evidence to prove that the defendant was a 'bad man.'" *Oesby*, *supra*, 142 Md. App. at 166. There is nothing about the BWC footage that had a tendency to prove that Johnson was a bad actor. Indeed, the BWC footage was redacted to specifically exclude evidence that might have suggested that he was a bad actor. In the first two clips, Johnson appears to be restrained, but he is compliant and does not resist in

any way. The portion of the BWC footage showing flight from police was redacted from the video that was played for the jury. Although the portion of the BWC footage showing Johnson in a jail cell did show that he was shackled, it would be unsurprising to a juror that an individual who had just been arrested for attempted murder was being restrained. Furthermore, we are not persuaded that an officer's comment that he suspected Johnson had given a fake name and birthdate would have been likely to lead the jury to conclude that Johnson was a "bad man." Nor are we persuaded that Johnson's admission that he had no fixed address and was sleeping in his car would have led the jury to infer that Johnson was a "bad man."

Accordingly, we hold that the trial court appropriately determined that the BWC footage was admissible to prove Johnson's identity because it showed what Johnson looked like shortly after the shooting and allowed the jury to compare the BWC footage to the casino security footage. We further hold that the trial court's determination that the probative value of BWC footage substantially outweighed the danger of unfair prejudice was not an abuse of discretion. Consequently, we reject Johnson's contention that the trial court erred by admitting the redacted portions of the BWC footage to prove Johnson's identity.

We briefly comment further on the State's contention that, assuming *arguendo* that the trial court erred by permitting the State to introduce any portion of the BWC footage, any error was harmless beyond a reasonable doubt. In short, we agree with the State.

A criminal defendant has the right to a fair trial, but not necessarily to a perfect trial. *State v. Babb*, 258 Md. 547, 552 (1970). The Court of Appeals enunciated the harmless error test in *Dorsey v. State*, explaining:

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of whether erroneously admitted or excluded -- may have contributed to the rendition of the guilty verdict.

276 Md. 638, 659 (1976); s*ee also Williams v. State*, 462 Md. 335, 355 (2019) (reaffirming the *Dorsey* standard and explaining that "[c]onsistent with the *Dorsey* standard, unless we determine beyond a reasonable doubt that the error in no way influenced the verdict, the error cannot be deemed harmless and a reversal is mandated.").

As we shall explain, having considered the entirety of the record in this case, we are persuaded that even if we were to assume the trial court erred by permitting the BWC footage to be played for the jury -- which we do not -- we would conclude that any error was harmless beyond a reasonable doubt in light of the overwhelming evidence of Johnson's guilt. Johnson concedes, as he must, that even if the BWC footage had been further redacted, the jury would have been made aware of the fact that only two days after the shooting, Johnson was arrested while wearing a distinctive pendant that appeared to match the pendant worn by the person suspected to be the shooter. The jury would have further been made aware that an Infiniti key that matched the car suspected of being

involved in the shooting was recovered from Johnson's person. Furthermore, the jury would have been made aware of the paper temporary ID recovered from Johnson that matched the ID used by the shooter to enter the casino. These were the portions of the BWC footage that allowed the jury to connect Johnson to the shooting.

Moreover, the casino security footage played a much more substantial role at trial than the BWC footage. The casino security footage was emphasized by the prosecutor in closing argument, when the prosecutor argued as follows:

> You watch that casino video. You watch it over and over and over again if you have to. But there is one guy getting out of that car and getting into that car and coming into the casino and exiting the casino. It is nobody else. It is the Defendant.

The security camera footage showed Johnson entering and exiting the casino and presenting a temporary paper ID to casino security staff. The security camera footage showed Johnson leaving and, as the State argued, heading toward the Infiniti from which Jeppi was shot. The security camera footage showed the Infiniti driving away immediately after the shooting. In addition to the security camera footage, LPR records placed the Infiniti at the scene of the shooting before departing immediately after the shooting. Finally, Johnson matched the (admittedly limited) description Jeppi gave of his assailant as a man with "brown skin" and "gold in his mouth." Accordingly, we are persuaded, beyond a reasonable doubt, that even if a portion of the BWC footage admitted was admitted in error, it in no way influenced the jury's verdict. *See Dorsey*, *supra*, 276 Md. at 659.

C. Jailhouse Telephone Call

While detained pending trial, on July 27, 2020, Johnson made a telephone call that was recorded pursuant to correctional facility policy. At trial, the State introduced an audio recording of the telephone call over Johnson's objection. Johnson objected to the introduction of the call on the grounds that it contained inadmissible hearsay and inadmissible "bad acts" evidence in violation of Maryland Rule 5-404(b). Johnson further objected on the ground that the admission of the telephone call violated the Confrontation Clause because defense counsel did not have the opportunity to cross-examine the person with whom Johnson was speaking on the phone. On appeal, Johnson reasserts the same allegations.

The telephone call began with a conversation between Johnson and a female speaker. After a few minutes, a speaker named "Mikey" joined the call. The portion of the telephone call between Mikey and Johnson forms the basis of Johnson's allegations of error. The relevant portion of the call was transcribed as follows:[3]

[3] There are certain time lapses between statements during the phone call that are not reflected in the transcript prepared by the stenographer. We have added notations in bracketed bold text to indicate the length of certain pauses that are relevant to our analysis of the issues raised on appeal. Triple hyphens indicate portions of the conversation that the stenographer found to be inaudible.

Although the telephone call was transcribed in the context of the defense motion challenging the admissibility of the call, when the call was played for the jury, the audio was described as "mostly inaudible" by the court reporter. Johnson moved to supplement the appellate record with a transcript of the jailhouse telephone call, and the State did not object. The State "does not dispute that the words [in the call] are what the transcript now says they are." It is from this transcript that we draw the quoted language from the telephone call at issue.

[AUTOMATED RECORDING]: This call will be recorded and monitored.

* * *

[JOHNSON]: Yeah.

[MIKEY]: Yo.

[JOHNSON]: Yo, man, I was ready to --- I just came on the street for hollering at you. As soon as I get on the corner, they shaking on --- he talking about yeah we already following you. I am like following me for what? I am like this car ain't stolen. He straight ran that shit and then realized that that shit wasn't stolen and then he was going to say oh yeah man, you know you driving with illegal tint. I am not trying to hear that shit man. Y'all just pull a n[****] and do all this shit because you y'all made a mistake.

[MIKEY]: So what they say about the --- about the --- because they got you charged with that.

[JOHNSON]: Yeah, they done --- so I don't know if they trying to figure out, trying to say that is it or what. But I am like they ain't --

[MIKEY]: You know they --- car, started --- on all that.

[JOHNSON]: What the truck?

[MIKEY]: Nah, the Infinit[i]. [**approximately three second pause**] They found that bitch. **[approximately six second pause]** Yeah they ---. Out --- for real. **[approximately four second pause]**

[AUTOMATED RECORDING]: You have 60 seconds remaining.

[JOHNSON]: --- want to come get the shit. He is the one that was leading me right there and that is where all that shit happened.

[MIKEY]: And what are they saying about the truck?

[JOHNSON] They ain't find shit about the truck, for real.

[MIKEY]: So it was just the money you had on you?

[JOHNSON]: Nah, I got that.

[MIKEY]: How much money did you have?

[JOHNSON]: I got 14 and ---

[AUTOMATED RECORDING]: You have 30 seconds remaining.

[MIKEY]: -- and yo, yo, look. Look. Lawyer coming to see me tomorrow. You got to --- keys and run that money up there. I know --- going to take care of ----

[JOHNSON]: All right. I got to figure out how they doing it because the find --- because I have been with --- but --

[MIKEY]: He is on top -- he is on top of you. I gave him --

[End of recording]

When the recording was first played in the context of Johnson's motion to exclude the telephone call, the trial court expressed frustration about the intelligibility of the call. The trial court commented that it was difficult to determine the relevance of the call in light of how challenging the conversation was to hear. It nonetheless determined that the telephone call recording was admissible and that Johnson's reaction of silence after Mikey's comment about the Infiniti constituted an adoptive admission that was admissible as an exception to the rule against hearsay. The trial court further determined that the telephone call did not include inadmissible "bad acts" evidence in violation of Maryland Rule 5-404(b). As we shall explain, we shall hold that the trial court did not err in admitting the audio recording of the July 27, 2020 telephone call.

1. Adoptive Admission

One of the "most important exceptions" to the rule against hearsay is the statement by a party opponent exception. *Bellamy v. State*, 403 Md. 308, 319 (2008). Md. Rule 5-803 provides, in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (a) Statement by party-opponent. A statement that is offered against a party and is:
>
> (1) The party's own statement, in either an individual or representative capacity;
>
> (2) A statement of which the party has manifested an adoption or belief in its truth;
>
> (3) A statement by a person authorized by the party to make a statement concerning the subject;
>
> (4) A statement by the party's agent or employee made during the agency or employment relationship concerning a matter within the scope of the agency or employment; or
>
> (5) A statement by a coconspirator of the party during the course and in furtherance of the conspiracy.

In this case, the trial court determined that Johnson's silence after Mikey's comment about the Infiniti was sufficient to constitute an adoptive admission, and therefore, was admissible pursuant to Rule 5-803(a)(2). Johnson contends that his silence was not an adoptive admission. In our view, the trial court's determination that Johnson's silence constituted an adoptive admission was not clear error.

Although a trial court's "ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on

appeal," a trial court's decision about whether a person made an adoptive admission is generally a factual one, and we will not disturb that decision absent clear error. *Gordon*, *supra*, 431 Md. at 550. When deciding whether to admit an adoptive admission of a statement, the trial court "'must make a preliminary determination as a matter of fact whether a jury could reasonably conclude that the defendant unambiguously adopted another person's incriminating statement. If the judge answers that question in the affirmative and admits the evidence, then the jury's function is to decide whether it *should* reach the conclusion which the judge has held that it *may* reach, namely that there was unambiguous assent.'" *Id.* at 547 (quoting *Blackson v. United States*, 979 A.2d 1, 7 (D.C. 2009)) (emphasis in original). Accordingly, on appeal of an allegedly erroneous admission of evidence as an adoptive admission, "the question is not whether the evidence before the judge clearly proved that the person against whom the statement was admitted unambiguously adopted the statement. Rather, the question is whether there is sufficient evidence from which a jury *could* reasonably conclude that the defendant unambiguously adopted another person's incriminating statement." *Id.* (Emphasis in original; internal quotation marks omitted).

Although the trial court addressed the admissibility of the portion of the phone call involving the discussion about the Infiniti as an adoptive admission, we first emphasize that, in our view, Mikey's statement that police had found the Infiniti was admissible as nonhearsay because it was not offered for the truth of the matter asserted. Under the Maryland Rules, hearsay is defined as "a statement, other than one made by the declarant

while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." 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. Mikey's statement about the Infiniti was not offered to prove that the police had, in fact, found the Infiniti. Rather, it was offered to provide context for Johnson's silence in response and to show the effect of Mikey's statement on the listener (Johnson).

"Statements offered, not to prove the truth of the matters asserted therein, but as circumstantial evidence that the declarant had knowledge of or believed certain facts or had a particular state of mind, when that knowledge, belief, or state of mind is relevant, are nonhearsay." *Conyers v. State*, 354 Md. 132 (1999) (internal quotations omitted). "If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay." *Fair v. State*, 198 Md. App. 1, 37 (2011) (quoting the advisory committee note to Fed. R. Evidence 801(c)). There was no question that the Infiniti at issue had, in fact, been recovered by the time of the phone call. Moreover, whether the Infiniti had been recovered was irrelevant to the significance of Johnson's arguably noteworthy silence in response to Mikey's statement. We hold, therefore, that Mikey's statement about the Infiniti was admissible as nonhearsay because it was not offered to prove the truth of the matter asserted.

Furthermore, even if the statement constituted hearsay, we hold that there was sufficient evidence for the trial court to conclude that "a jury *could* reasonably conclude that [Johnson] unambiguously adopted" Mikey's reference to the Infiniti. *Gordon*, *supra*,

431 Md. at 547. A jury could have inferred that a listener unfamiliar with "the Infiniti" Mikey mentioned would have asked Mikey to clarify what he meant by the statement. We hold, therefore, that the trial court reasonably concluded that Johnson's silence constituted an adoptive admission.

Additionally, Johnson contends that his silence in response to Mikey's statements was inadmissible because the silence occurred when Johnson was in custody and speaking on a recorded line. Johnson cites cases addressing silence during custodial interrogation in support of this argument. Johnson observes, for example, that "[e]vidence of post-arrest silence, after *Miranda* warnings are given, is inadmissible for any purpose, including impeachment." *Grier v. State*, 351 Md. 241, 258 (1998). Johnson contends that by monitoring jailhouse telephone calls, police or prosecutors are "constructively present, waiting to see if [Johnson] might say anything potentially incriminating." Johnson asserts that "[j]ust as the case law distinguishes between pre-and post-arrest silence when used as substantive evidence of a defendant's guilt, the law similarly recognizes that post-arrest silence is less likely to be sufficiently unambiguous to constitute an adoptive admission."

In support of this assertion, Johnson cites *Miller v. State*, 231 Md. 215 (1963), and *Kosh v. State*, 382 Md. 218 (2004), both of which involve the admissibility of a defendant's silence in the face of police interrogation. The cases focused upon the right against compelled self-incrimination and addressed the rules against hearsay only tangentially. We expressly decline Johnson's invitation to extend the caselaw addressing pre- and post-arrest silence during custodial police interrogations to the admissibility of alleged hearsay

contained within a recorded jailhouse telephone call between the defendant and a third party.

2. Confrontation Clause

Johnson further contends that the admission of Mikey's statement contained within the recorded jailhouse call violated his constitutional right to confront Mikey. We are not persuaded.

A criminal defendant in a Maryland court possesses a right of confrontation both under the Sixth Amendment to the United States Constitution[4] and under Article 21 of the Maryland Declaration of Rights.[5] The confrontation rights under Article 21 and the Sixth Amendment are generally analyzed "*in pari materia*, or as generally providing the same protection." *Cooper*, *supra*, 434 Md. at 232.

"[T]he right of confrontation is implicated only when two conditions are met: the challenged out-of-court statement or evidence must be presented for its truth and the challenged out-of-court statement or evidence must be 'testimonial.'" *Id.* at 233 (citing *Derr v. State*, 434 Md. 88, 106-07 (2013) (citing *Crawford v. Washington*, 541 U.S. 36,

[4] The Sixth Amendment provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . [and] to examine the witnesses against him on oath[.]" U.S. Const. amend. VI. "The Sixth Amendment right to confront witnesses is binding on Maryland through the Fourteenth Amendment." *Cooper v. State*, 434 Md. 209, 233 n. 11 (2013) (citing *Cox v. State*, 421 Md. 630, 642 (2011)).

[5] Article 21 of the Maryland Declaration of Rights provides, in relevant part, that "[i]n all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him . . . [and] to examine the witnesses for and against him on oath[.]"

59-60 n. 9 (2004))); *see also State v. Payne*, 440 Md. 680, 715 (2014) ("The Confrontation Clause analysis is triggered when hearsay, sought to be introduced, is 'testimonial' in nature.").

As we have already explained, Mikey's statement was not introduced for the truth of the matter asserted. Nor, as we shall explain, was it testimonial. A statement is testimonial when "'a reasonable person in the declarant's position would have expected his statements to be used at trial — that is, [when] the declarant would have expected or intended to "bear witness" against another in a later proceeding.'" *McClurkin v. State*, 222 Md. App. 476 (2015) (quoting *United States v. Jones*, 716 F.3d 851, 856 (4th Cir. 2013)) (alteration in *McClurkin*). A statement that is part of a "'casual conversation between private acquaintances' and . . . '[is] not made for the primary purpose of creating a substitute for trial testimony'" is not testimonial. *Payne*, *supra*, 440 Md. at 716 (quoting *Cox*, *supra*, 421 Md. at 650-51. A statement that is not testimonial does not trigger the application of the Confrontation Clause. *Cox*, *supra*, 421 Md. at 643; *Crawford*, *supra*, 541 U.S. at 68.

Johnson asserts that the circumstances involved in the relevant phone conversation in this case -- a recorded and monitored jailhouse call -- would lead an objective person to reasonably believe that the statements would be available for use at trial. The test, however, is not whether an objective person would believe that statements may be available for trial. Rather, statements are only testimonial if "a reasonable person in the declarant's situation would have made the statement with a *primary purpose of creating an out-of-court*

substitute for trial testimony." *Cox*, *supra*, 421 Md. at 650 (emphasis added; internal quotations omitted).

We addressed an analogous situation in *McClurkin*, *supra*, in the context of a jailhouse telephone call in which the defendant placed a call to an unidentified person "in an effort to induce the victim to sign a 'paper,' which stated that [the defendant and other individuals] had nothing to do with [a] shooting." 222 Md. App. at 470. We expressly rejected the appellant's assertion that the phone call contained testimonial statements, observing that "[i]f a 'casual conversation' between inmates is not testimonial, neither is the type of conversation that occurs during a telephone call between an inmate and a friend, as occurred here." *Id.* at 474. We expressly held that "the statements at issue in [*McClurkin*] — the recorded jailhouse calls by [the appellant and another individual] — were non-testimonial, because a reasonable person in the declarant's position would not have made the statement 'with a primary purpose of creating an out-of-court substitute for trial testimony.'" *Id.* at 477 (quoting *Cox*, *supra*, 421 Md. at 650 (quoting *Michigan v. Bryant*, 562 U.S. 344, 358 (2011))).

Johnson seeks to distinguish *McClurkin* because the telephone call in *McClurkin* involved an attempt to induce the victim to change his account of who was involved in the shooting, while in the present case, Mikey's statements were not self-inculpatory and did have a separate purpose other than to create evidence against Johnson. We disagree. As we explained in *McClurkin*, it would "def[y] logic" to adopt the rule advanced by Johnson that "merely because correctional institutions record outgoing telephone calls and routinely

notify the participants that their conversations are being recorded, 'that all parties to a jailhouse phone call categorically intend to bear witness against the person their statements may ultimately incriminate.'" 222 Md. App. at 478 (quoting *Jones*, *supra*, 716 F.3d at 856).

3. "Bad Acts" Evidence

Johnson further challenges the admissibility of the recorded jailhouse call on the grounds that it contains inadmissible "bad acts" testimony in violation of Maryland Rule 5-404(b). Specifically, Johnson points to the following statements as examples of inadmissible bad acts: (1) he had been pulled over for driving a vehicle with "illegal tint;" (2) he was not in a "stolen car;" (3) the keys to an unspecified truck "weren't even on his key chain;" and (4) the police "didn't find shit about the truck." Johnson asserts that these references "constituted specific evidence of other crimes, wrongs, or bad acts, capable of impugning his character in the mind of jurors."

Before the trial court, defense counsel raised this argument briefly, arguing that "there is discussion of intermingling the Baltimore City Police pursuit and arrest there, with another vehicle being referenced, thought to be stolen, et cetera." Defense counsel commented that she "c[ould]n't imagine the call could be sanitized where there is not a reference to the pursuit, and the stolen car reference in Baltimore City." Defense counsel observed that "the caller does say at the end the car was not stolen, et cetera" but argued that it "still raise[s] the issue of other bad acts and prejudice to him by referencing at least a suspicion of other bad acts in Baltimore City."

The trial court rejected the "bad acts" argument, reasoning that "[t]here is no way that [jurors] can infer that because [Johnson] may have been in possession of a car that was not stolen -- [it] has nothing to do with the charges that he is currently facing here." We agree with the trial court that Johnson's comment that he was not in a "stolen car" is not a "bad act" under Maryland Rule 5-404(b), nor were the references to keys to an unspecified truck that "weren't even on his key chain" and that police "didn't find shit about the truck." These are not references to other crimes, wrongs, or other bad acts prohibited by Maryland Rule 5-404(b). Furthermore, the reference to an alleged illegal tint was inconsequential enough that it could not have caused prejudice. In our view, a minor alleged illegal window tint violation could not have influenced the verdict in this attempted murder case. Accordingly, we reject Johnson's assertion that the telephone call should have been excluded pursuant to Maryland Rule 5-404(b).

D. License Plate Reader Records

Johnson's final evidentiary issue pertains to the trial court's admission of certain LPR records. Detective Sergeant Walter Johnson, the LPR Program Manager for the State of Maryland, explained that LPRs are "a set of camera[s] attached to a computer that are designed to capture license plates of vehicles operated on public roadways, or areas of critical infrastructure," including "bridges, tunnels, and things like that throughout the State." Detective Johnson explained that approximately "400 at a time" are deployed in the State of Maryland. The purpose of the LPRs "is simply just to gather license plate data that passes the readers" that is subsequently "stored at [the Maryland Coordinating

Analysis Center] for use in criminal investigations."[6] LPRs are located "closely in the metropolitan area, where critical structures belonging to the Maryland Transportation Authority [are located, and] agencies like Anne Arundel County Police Department deploy systems that are part of our statewide network. They have systems providing areas where they believe are critical for criminal activity or general enforcement, including areas like Arundel Mills." Police vehicles are also equipped with LPRs.

In November, 2020, the prosecutor requested certified LPR records for the month of July, 2020 for the license plate number of the Infiniti sedan suspected of being involved in the shooting. The LPR records received by the prosecutors spanned 343 pages.

When the State sought to introduce the LPR records into evidence, defense counsel objected. At a bench conference, defense counsel asked that the documents be "narrowed on the relevance grounds" to July 18-20, 2020 rather than for the entire month of July. The trial court was persuaded that the time period should be narrowed and allowed only the LPR records for July 17-21, 2020 to be admitted.

Defense counsel further "ask[ed] that th[e LPR records] be redacted, as it discusses the basis for the request; attempted burglary, shooting, et cetera, that I don't believe is

[6] Detective Johnson explained that the Maryland Coordinating Analysis Center, which is often abbreviated "MCAC" is "a fusion center, which was started after 9/11 for information gathering [and] information sharing." The "primary goal [of the MCAC is] to support law enforcement agencies, State of Maryland, local, the State level agencies, the county, and . . . Federal partners throughout the country."

relevant to what this --- to be --- records, who often responds to that --- request."[7] Defense counsel also asked that the same text be redacted on hearsay grounds.

Each LPR record includes two pages. One page includes a small photograph of the license plate and vehicle as well as notations regarding the time, date, and location, among others. There is also a section labeled "notes" which includes information about the car as well as the background of the search. The "notes" section included the following text in red print:

> WANTED PERSON - Shooting Investigation - Silver Infiniti - MD tag 9CL2047 - Alonta Borrell Johnson, B/M, DOB: 06/21/1993 - If located, contact Det Crockett, AACoPD, [email address], at [telephone number], reference case# 20-722595.

The second page of each record contains close-up photographs of the vehicle and license plate. This two-page sequence repeats for the record from each LPR that captured the vehicle's license plate number.

The trial court rejected Johnson's hearsay and relevance arguments. It explained that the documents were admissible as an "exception to the hearsay rule if it is kept in the ordinary course of business." Although defense counsel argued at trial that the LPR records were irrelevant, defense counsel did not expressly argue that the LPR records needed to be redacted because the probative value of the text quoted above was outweighed by the risk of unfair prejudice.

[7] As we explained *supra*, the triple hyphen notation indicates dialogue that the stenographer found to be inaudible.

The State asserts that Johnson has waived a claim that the probative value of the LPR records was outweighed by the risk of unfair prejudice, observing that Maryland Rule 8-131(a) provides that "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." Our review of the transcript demonstrates that, at trial, defense counsel's challenge to the LPR records at issue on appeal focused on the relevance of the text and the hearsay argument. Defense counsel did expressly refer to the text containing "information about the nature of the offense alleged and suspect information," which she argued should "not be included." Nevertheless, defense counsel did not explicitly argue that Johnson would suffer unfair prejudice as a result of the LPR records being admitted. To the extent that defense counsel hinted at a Maryland Rule 5-403 prejudice argument, defense counsel certainly could have articulated the argument with more specificity. Nonetheless, we shall exercise our discretion to undertake the prejudice analysis on appeal in light of the fact that the record at least hints at such an issue having been raised.

We, therefore, turn to Johnson's substantive challenge to the admissibility of the LPR records. Johnson asserts that the text quoted above was (1) inadmissible hearsay, (2) irrelevant, and (3) if relevant, the probative value was greatly outweighed by the danger of unfair prejudice. In our view, the trial court appropriately determined that the LPR

records were admissible as nonhearsay, and the records were further relevant to explain the course of the police investigation.

A somewhat similar situation arose in the case of *Hallowell v. State*, 235 Md. App. 484, 520-24 (2018). The challenged evidence in *Hallowell* consisted of computer aided dispatch ("CAD") report records for a 911 call in which the caller reported having heard gunshots. An officer explained that CAD report records are created after a call is received by a 911 operator and includes information about the call and the emergency response, such as the time when the call was received, encoded identities of emergency responders, and the location where the emergency occurred. CAD reports also include "one or more summaries of statements made by the 911 caller to the dispatcher, which the dispatcher then relays to responders." *Id.* at 521. The CAD report summaries at issue in *Hallowell* included information from a caller who reported that shots had been fired, a suspect was on the scene, and no sounds of fleeing vehicles had been heard. Defense counsel objected to the admission of the CAD report records, but the trial court "determined that the CAD reports were being offered for a nonhearsay purpose, namely, 'to show what the officer[s] responded to and what they perhaps would be looking for when they got to the scene.'" *Id.* The trial court also rejected appellant's assertion that the CAD reports were "not relevant, not material, and more probative than prejudicial." *Id.* at 522.

On appeal in *Hallowell*, we examined our opinions in *Frobouck v. State*, 212 Md. App. 262, 281 (2013), and *Zemo v. State*, 101 Md. App. 303, 310 (1994). In *Frobouck*, we affirmed the trial court's admission of a police officer's statement that he "was dispatched

[to the scene] for a suspected marijuana grow." 212 Md. App. at 281. We determined that the statement was "not offered to prove the truth of the matter asserted --that there was a 'marijuana grow' -- but, rather, to explain *briefly* what brought the officers to the scene in the first place." *Id.* at 283.

In contrast, in *Zemo*, we held that the trial court erred when permitting the lead detective to testify, over objection

> that he received evidence about the crime from a confidential informant, that the informant's information put him on the trail of [Zemo] and other suspects, that other parts of the informant's information were corroborated and turned out to be correct, and that, acting on the informant's information, he arrested [Zemo].

101 Md. App. at 306.

We held in *Hallowell* that the CAD report records were "more like *Frobouck*, than *Zemo*." We observed that the statements contained within the CAD report "amounted to, perhaps, somewhat more than" the "brief" explanation in *Frobouck*, "their import was similarly benign." 235 Md. at 524. We further emphasized that the statements "were cumulative to testimony of police officers that there had, in fact, been a contemporaneous report of gunshots fired on the block where Appellant lived." *Id.* We observed that there was "no reasonable possibility that they influenced the jury's verdict." *Id.*

In this case, the challenged text on the LPR records was not offered to actually prove that Johnson was a "wanted person." Rather, the LPR records were introduced to demonstrate to the jury how investigators had tracked and located the Infiniti suspected to be involved in the shooting between the time that the shooting occurred and when the

vehicle was subsequently recovered. The prosecutor presented each LPR record to Detective Johnson, who explained where on the document the GPS coordinates identified the location of the vehicle as it traveled throughout the Baltimore area.

Using the LPR records, investigators were able to trace the Infiniti in the hours and days after the shooting. Detective Johnson identified an LPR record showing that the vehicle was in an outbound lane leaving the Arundel Mills Mall at 5:15 a.m. on July 19, 2020,[8] after which the vehicle headed toward Baltimore where it was seen traveling northbound through the Baltimore Harbor Tunnel at 5:27 a.m. Additional LPR records established that the vehicle was in various areas in Baltimore City between the time of the shooting and when it was located by police on Rogers Avenue in Northwest Baltimore City on July 23, 2020.

The State acknowledges that unlike the records in *Hallowell*, which did not identify a suspect by name, the LPR records contained Johnson's name and identified the offense for which he was suspected of being involved. In our view, however, this is not dispositive. The text identifying Johnson as a suspect in a shooting investigation did not include any information of which the jury was not otherwise aware. Indeed, Officer Sheskin identified Johnson as the man he had seen in the casino's security camera footage who had provided a paper temporary ID bearing the name "Alonta Borrell Johnson." Detective Crockett also identified Johnson as the suspect he had developed after reviewing video footage as well

[8] The Maryland Live! Casino is directly adjacent to the Arundel Mills Mall and the two facilities share a parking lot.

as the paper temporary ID. The casino's surveillance investigator (Ms. McGee) similarly identified Johnson as the individual involved in the shooting based upon her review of casino video footage. As in *Hallowell*, the challenged evidence was cumulative. 235 Md. App. at 524.

Finally, in light of the overwhelming evidence presented at trial, we hold, as we did in *Hallowell*, that "there is no reasonable possibility that [the challenged text on the LPR records] influenced the jury's verdict." *Id.* Johnson asserts that the LPR records suggested to the jury that police "got their guy" before Johnson had been arrested or charged. We disagree with this characterization. In our view, the challenged text on the LPR records suggested to the jury that the police were investigating Johnson as a suspect -- information of which the jury was already well aware. Furthermore, the jury subsequently heard that Johnson was in possession of the Infiniti keys and was wearing the distinctive pendant at the time of his arrest. Accordingly, we hold that even if certain text within the LPR records was inadmissible, any error in admitting the LPR records was harmless beyond a reasonable doubt.

II.

In addition to the evidentiary issues we addressed *supra* in Part I of this Opinion, Johnson further asserts that the trial court abused its discretion by issuing a flight instruction. Johnson contends that the instruction was not generated by the facts of the case because there was no evidence demonstrating flight other than the fact that the driver

of the Infiniti left the scene after the shooting. Johnson suggests that the evidence does not indicate flight but instead shows a "mere departure."

We review a trial court's decision to provide a challenged jury instruction for abuse of discretion. *Stabb v. State*, 423 Md. 454, 465 (2011). In determining whether the trial court properly exercised its discretion, we consider whether the instruction (1) is a correct statement of law, (2) was generated by the evidence, and (3) was not fairly covered by the court's other instructions. *Dickey v. State*, 404 Md. 187, 197-98 (2008); *Fleming v. State*, 373 Md. 426, 433 (2003).

Johnson does not contend that the flight instruction provided by the trial court was not a correct statement of the law or that the substance of the flight instruction was adequately covered in other instructions. The only question before us, then, is whether the instruction was generated by the evidence. So long as the requesting party has produced "some evidence" implicating the instruction, the trial court properly exercised its discretion in propounding the instruction. *Bazzle v. State*, 426 Md. 541, 551 (2013). The threshold of demonstrating "some evidence" is very low. *Id; see also Arthur v. State*, 420 Md. 512, 526 (2011) ("Some evidence is not strictured by the test of a specific standard. It calls for no more than what it says -- 'some,' as that word is understood in common everyday usage. It need not rise to the level of 'beyond reasonable doubt' or 'clear and convincing' or 'preponderance."'). In determining whether "some evidence" exists, the trial court views the facts in the light most favorable to the party requesting the instruction, in this case the State. *McMillan v. State*, 428 Md. 333, 355 (2012).

In *Thompson v. State*, 393 Md. 291, 312 (2006), the Court of Appeals explained that the following standard applies when considering whether a flight instruction is generated:

> [F]or an instruction on flight to be given properly, the following four inferences must reasonably be able to be drawn from the facts of the case as ultimately tried: that the behavior of the defendant suggests flight; that the flight suggests a consciousness of guilt; that the consciousness of guilt is related to the crime charged or a closely related crime; and that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime.

In *Hoerauf v. State*, 178 Md. App. 292, 325-26 (2008), we distinguished between "flight" and "mere departure," explaining that "an accused's departure from the scene of a crime, without any attendant circumstances that reasonably justify an inference that the leaving was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt, does not constitute 'flight,' and thus does not warrant the giving of a flight instruction." One of the "classic" instances of flight "is where a defendant leaves the scene shortly after the crime is committed and is running, rather than walking[.]" *Id.* at 324. "At its most basic, evidence of flight is defined by two factors: first, that the defendant has moved from one location to another; second, some additional proof to suggest that this movement is not simply normal human locomotion." *Id.* at 323 (quotations and citations omitted).

Our review of the record leads us to conclude that the State presented "some evidence" at trial from which the jury could find that the Infiniti traveled away from the scene of the shooting in a manner that suggested the driver had engaged in flight "with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based

on that guilt." Casino video footage from Camera 57 shows the shooting occurred at approximately 5:13:46 a.m. Approximately four seconds later, at 5:13:50 a.m., the Infiniti was seen pulling out of a parking spot immediately adjacent to where Jeppi fell to the ground after being shot. The Infiniti is visible driving down the row of parked vehicles. At 5:13:55 a.m., the Infiniti was seen turning without stopping on to an adjacent road. In closing argument, the prosecutor characterized the video footage as showing the Infiniti "speed[ing] off" after the shooting. Similarly, Jeppi testified that after he was shot, the shooter "looked around and then he just balled out. Left the -- you know, the scene." Jeppi's friend (Ms. Dixon) reported to a 911 dispatcher that the shooter left immediately after shooting Jeppi, explaining that "[s]omebody just shot him and then drove off."

Johnson asserts that the evidence summarized above only showed a "mere departure," but, in our view, whether the circumstances in fact constituted flight was a disputed issue appropriate for the jury's consideration. The evidence summarized above was sufficient to meet the "some evidence" standard from which the jury could have reasonably inferred that the driver of the Infiniti left the scene after the shooting in a manner that indicates a consciousness of guilt.

We are not persuaded that the trial court erred or abused its discretion in giving a flight instruction in this case. The evidence clearly establishes that Johnson left the scene rapidly after the shooting occurred. The parties were entitled to argue to the jury as to what inferences should be drawn from the Infiniti's rapid departure from the scene immediately after the shooting, and "the determination as to the motivation for flight [was] properly

entrusted to the jury." *Thompson*, *supra*, 393 Md. at 305. When viewed in a light most favorable to the State, the evidence presented at trial established several "attendant circumstances" that reasonably justified an inference that Johnson's departure from the scene following the shooting was not "simply normal human locomotion." *Hoerauf, supra*, 178 Md. App. at 323. Accordingly, we hold that the trial court did not abuse its discretion by giving the pattern flight instruction.

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