Circuit Court for Baltimore City
Case No. 119057013

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1298

September Term, 2022

GILBERT DELLA

v.

STATE OF MARYLAND

Nazarian,
Shaw,
Kenney, James A. III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw, J.

Filed: November 21, 2023

*This is an unreported opinion. This 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).

A jury sitting in the Circuit Court for Baltimore City found Appellant, Gilbert Della, guilty of first-degree murder; use of a firearm in the commission of a crime of violence; and wearing, carrying, or transporting a handgun. The court sentenced Appellant to life imprisonment for first-degree murder, all but fifty-five years suspended; and a consecutive five years, without parole, for use of a firearm in the commission of a crime of violence. For sentencing purposes, the handgun and firearm convictions were merged.

Appellant filed a timely appeal and presents the following questions for our review, which we have reordered and rephrased:[1]

1. Was the evidence at trial sufficient to sustain the convictions for first-degree murder and use of a firearm in the commission of a crime of violence?
2. Did the trial court err in responding to a note from the jury regarding causation?

For the following reasons, we affirm the judgments of the circuit court.

BACKGROUND

The State charged Appellant in connection with the shooting death of Ikeem Isaac on January 1, 2019. Mr. Isaac's girlfriend, Regina Shaw, was the only eyewitness to testify at trial.

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[1] Appellant's questions verbatim were:

1. Did the trial court err in its response to the jury's question asking, "[i]s Gilbert Della's potential contribution to the cause of death sufficient to meet the standard of the offense? That is to say if we don't know if Gilbert Della is the only cause of death, is it possible to convict?"

2. Is the evidence sufficient to sustain the convictions for first-degree murder and firearm use in the commission of a crime of violence?

Ms. Shaw testified that she was walking with Mr. Isaac on the 4900 block of Frederick Avenue just before the shooting. She stated that she was walking a few feet behind Mr. Isaac because they had just gotten into an argument. Mr. Isaac approached two parked cars in front of an apartment building and Ms. Shaw testified that she saw about five men standing outside the cars. One of the men reached out and shook Mr. Isaac's hand. At the same time, Mr. Isaac "swung on" another man, who was wearing a hoodie. The person in the hoodie, whom Ms. Shaw later identified in a photo array and at trial as Appellant, pulled out a gun and shot Mr. Isaac. Ms. Shaw stated that the gun "must have got jammed, because [Appellant] started smacking [Mr. Isaac] in the head with the gun." She testified that she started "running up towards the scene" but after she heard more gunshots, she ran to a neighbor's house, and the neighbor called the police. Mr. Isaac was transported to the hospital and died a short time later. On January 5, 2019, Ms. Shaw identified Appellant in a photo array as the person she saw shoot Mr. Isaac. Appellant was arrested on January 28, 2019.

Three video cameras mounted on the exterior of an apartment building captured the shooting. The camera footage was introduced into evidence and viewed by the jury. It shows two light-colored sedans parked parallel to the curb, one in front of the other. Three individuals exit the vehicles and stand around on the sidewalk and adjacent grassy area for approximately ten minutes before Mr. Isaac appears.

As Mr. Isaac walks by the cars, he lunges at a person in a gray hoodie. That person points what appears to be a gun at Mr. Isaac and at least one shot is fired. Mr. Isaac brings both arms to his chest and falls to the ground in a fetal position, on his right side, with his

back to the camera. The person in the gray hoodie takes several steps toward Mr. Isaac and delivers three blows to Mr. Isaac's head, using the object in his hands. He then walks away from Mr. Isaac but remains nearby.

Mr. Isaac rolls over, from his right side to his left, so that he is facing the camera. As the front of his body comes into view, it appears he is holding his right hand over the left side of his chest. As one of the cars is driven away from the scene, a second person walks toward Mr. Isaac, who is laying on his left side, and points a gun at him. Mr. Isaac pulls his right knee close to his chest and raises both forearms in front of his face, in an apparent attempt to protect himself. The second shooter fires more than one shot, but it is not clear how many shots are fired or how many hit Mr. Isaac. At least one of the bullets misses Mr. Isaac and hits the ground in front of him. The second shooter then gets closer to Mr. Isaac and fires a shot which is aimed at and appears to hit the right side of Mr. Isaac's torso. Appellant and the second shooter then get into the remaining car and leave the scene.

Dr. Zabuillah Ali, who performed an autopsy on Mr. Isaac, testified for the State as an expert in the field of forensic pathology. He stated that Mr. Isaac sustained five gunshot wounds: one to the left upper chest, one to the right side of the chest, two to the right arm, and one to the front of the neck. Dr. Ali stated that the cause of Mr. Isaac's death was "multiple gunshot wounds." Dr. Ali reported: "The gunshot wounds [to the chest] are considered rapidly fatal wounds due to associated significant internal trauma." The remaining gunshot wounds did not injure any vital structures, but contributed to overall

blood loss and are considered potentially fatal wounds. A "deformed" bullet was recovered from each of the chest wounds.

Physical evidence was recovered from the scene and included a bullet that was found in the grassy area. No firearms were recovered. The evidence recovered was tested for DNA and fingerprints. Swabs from a cell phone and from suspected saliva present on the street surface yielded a full single DNA profile belonging to Appellant. Appellant's fingerprints were present on the cellphone. Swabs from the interior collar and sleeve cuffs of a jacket recovered at the scene yielded a DNA profile consistent with a major male DNA profile and at least two indeterminate minor contributors. Appellant was the source of the major male DNA profile.[2] The State did not present evidence of any ballistics testing of the bullets recovered in the investigation.

Appellant moved for judgment of acquittal at the close of the State's case-in-chief and again after the conclusion of the evidentiary portion of the trial. On the charge of first-degree murder, Appellant argued the State had not established that he caused the death of Mr. Isaac because there was no evidence that the shooter identified as Appellant "fired a shot that caused a fatal wound." The court denied the motions.

As stated earlier in this opinion, Appellant was convicted of first-degree murder; use of a firearm in the commission of a crime of violence; and wearing, carrying, or transporting a handgun. Additional facts will be included in the discussion of the issues.

[2] The parties stipulated that the DNA of two other individuals was present in suspected saliva and on a juice bottle, both of which were recovered from the scene.

DISCUSSION

I. The evidence was sufficient to support the convictions.

Appellant claims that the evidence at trial was insufficient to support his convictions for first-degree murder and use of a firearm in the commission of a crime of violence. Appellant maintains that the evidence was insufficient to support a finding that he fired either of the shots to the chest that caused the "rapidly fatal" wounds. He further asserts that the State was required to show that any "potentially fatal" gunshot wound was "independently sufficient" to cause Mr. Isaac's death.

The State contends that the evidence was sufficient to support one of three inferences: (1) Appellant fired one of the "rapidly fatal" shots, (2) the wound(s) inflicted by Appellant, even if not "rapidly fatal," contributed to Mr. Isaac's death; and (3) even if Appellant did not fire any of the shots that directly caused Mr. Isaac's death, Appellant's conduct was a contributing cause.

"In assessing the sufficiency of the evidence supporting a criminal conviction, we ask '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.'" *Stanley v. State*, 248 Md. App. 539, 564 (2020) (quoting *McClurkin v. State*, 222 Md. App. 461, 486 (2015)) (in turn quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (some quotation marks omitted). "We conduct such a review, however, keeping in mind our role of reviewing not only the evidence in a light most favorable to the State, but also all reasonable inferences deducible from the evidence in a light most favorable to the state." *Smith v. State*, 415 Md. 174, 185–86 (2010). "An inference 'need

only be reasonable and possible; it need not be necessary or inescapable.'" *Neal v. State*, 191 Md. App. 297, 318 (2010) (quoting *Smith v. State*, 374 Md. 527, 539 (2003)). We do not consider exculpatory inferences because they are "not a part of that version of the evidence most favorable to the State." *Cerrato-Molina v. State*, 223 Md. App. 329, 351 (2015).

"On appellate review of evidentiary sufficiency, a court will not 'retry the case' or 're-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence.'" *Stanley*, 248 Md. App. at 564 (quoting *Smith*, 415 Md. at 185). "The relevant question is not 'whether the evidence *should have* or *probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.'" *Id.* at 564-65 (quoting *Fraidin v. State*, 85 Md. App. 231, 241 (1991)).

"To warrant a conviction for homicide it must be established that the act of the accused was a proximate cause of death." *Stewart v. State*, 65 Md. App. 372, 378 (1985). The test is "whether any rational trier of fact could have found beyond a reasonable doubt that the [accused's] felonious acts caused [the victim's] death." *Id.* at 383–84. "The evidence to support a finding of guilt of the crime of murder may be either direct or circumstantial and, where legally sufficient evidence of *corpus delicti* and criminal agency are presented, the question of whether a defendant is guilty is a question of fact to be determined by the jury." *Morgan v. State*, 134 Md. App. 113, 124 (2000) (citing *Hebron v. State*, 331 Md. 219, 237-38 (1993)). "Circumstantial evidence may support a conviction when the circumstances, taken together, do not require the trier of fact to resort to speculation or mere conjecture." *Id.*

"'To constitute the cause of the harm, it is not necessary that the defendant's act be the sole reason for the realization of harm which has been sustained by the victim. . . . The defendant does not cease to be responsible for his otherwise criminal conduct because there were other conditions that contributed to the same result.'" *Palmer v. State*, 223 Md. 341, 353 (1960) (quoting 1 Wharton, Criminal Law and Procedure (Anderson), § 68). *See also* Comment to Maryland Criminal Pattern Jury Instruction 4:17 ("The factual causation requirement is satisfied if the defendant's act or omission was a substantial factor in bringing about the death.")

Viewing the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the State, we conclude that the evidence supported a finding that Appellant caused the death of Mr. Isaac. The video of the shooting established that Mr. Isaac was shot by two people. Ms. Shaw identified Appellant in a photo array and at trial as the person who shot Mr. Isaac and then hit him in the head with a gun. The jury could have reasonably inferred, from Mr. Isaac's bodily response to that shooting, and his apparent inability to get up and run away or otherwise defend himself as Appellant then walked toward him with the gun, that Appellant inflicted one of the "rapidly fatal" wounds to Mr. Isaac's chest. Alternatively, because the undisputed cause of death was attributed to "multiple (5) gunshot wounds," the evidence was sufficient to support a finding that each of the gunshot wounds, even if not "rapidly fatal," was a substantial factor that led to the death of Mr. Isaac.[3]

[3] The State further contends that, even if the evidence was not sufficient to show that Appellant's conduct directly caused the death of Mr. Isaac, his actions rendered Mr. Isaac

Appellant claims that the State was required to show that the "potentially fatal" wounds would have been "independently sufficient" to cause the death of Mr. Isaac. Appellant relies on *Burrage v. U.S.*, in support of this contention. 571 U.S. 204 (2014). The issue in *Burrage* involved the interpretation of a federal statute that imposed a mandatory minimum sentence for unlawful distribution of a controlled dangerous substance in cases where "death or serious bodily injury *results from* the use of such substance."[4] *Id.* at 206 (emphasis added). The United States Supreme Court concluded that the mandatory minimum sentencing provision did not apply where the drugs supplied by the defendant "merely contributed" to the death of the user. *Id.* at 216. The Court acknowledged that some jurisdictions apply either a "substantial factor" or "contributing cause" test to determine actual cause. *Id.* at 214-15. The Court noted, however, that "Congress could have written § 841(b)(1)(C) to impose a mandatory minimum sentence when the underlying crime 'contributes to' death or serious bodily injury, or adopted a modified causation test tailored to cases involving concurrent causes," but "chose instead to use language that imports but-for causality." *Id.* at 216.

We decline to extend this statutory interpretation of the phrase "results from" in a sentencing provision of the federal Controlled Dangerous Substances Act to the element of

defenseless and unable to escape before the second shooter fatally wounded him. We find it unnecessary to address this contention.

[4] 21 U.S.C. § 841(b)(1)(C).

causation required to obtain a conviction for the common law crime of murder.[5] To be sure, "[f]or conduct to be the actual cause of some result, 'it is almost always sufficient that the result would not have happened in the absence of the conduct'—or 'but for' the defendant's actions." *State v. Thomas*, 464 Md. 133, 174 (2019) (quoting Wayne R. LaFave, *Criminal Law* § 6.4(b), at 439 (6th ed. 2017)). In other words, "although but-for causation explains almost all of the cases wherein it is held that the conduct in question causes the result in question, it does not explain them all." Wayne R. LaFave, *Substantive Criminal Law*, §6.4(b) at 633 (3d ed. 2018).

This case is an example of one where but-for causation does not explain the cause of death. Mr. Isaac sustained five gunshot wounds that were inflicted by Appellant and another shooter. The evidence supported a finding that Appellant inflicted one of the two fatal wounds to Mr. Isaac's chest. Because that would mean the second shooter also inflicted a fatal wound, it would be illogical to require a finding that, but for Appellant's actions, Mr. Isaac would not have died.[6] Alternatively, even assuming the evidence did

[5] *See Garcia v. State*, 480 Md. 467, 475 (2022) (murder has been statutorily separated into degrees for "the express purpose of mitigating punishment[,]" but remains a common law crime.)

[6] *See also* Wayne LaFave, Substantive Criminal Law, §6.4(b) at 633 (3d ed. 2018):

> . . . A stabs B, inflicting a fatal wound; while at the same moment X, acting independently, shoots B in the head with a gun, also inflicting such a wound; and B dies from the combined effects of the two wounds. It is held that A has caused B's death (so he is guilty of murder if his conduct included an intent to kill B, manslaughter if his conduct constituted recklessness). (X, of course, being in exactly the same position as A, has equally caused B's death.)

not support a finding that Appellant inflicted one of the "rapidly fatal" wounds to the chest, the cause of death was nonetheless attributed to the effects of all five gunshot wounds, and not to any particular wound or wounds. Accordingly, "but for" causation would still be inapplicable.

In sum, the evidence was sufficient to support the conviction for first-degree murder. Consequently, the evidence was also sufficient to support the conviction for use of a firearm in the commission of a crime of violence.

II. The court did not err in instructing the jury.

During jury deliberations, the jury sent out the following note: "Is [Appellant's] potential contribution to the cause of death sufficient to meet the standard of the offense? That is to say if we don't know if [Appellant] is the only cause of death, is it possible to convict?" The court responded to the note as follows: "If you find beyond a reasonable doubt that [Appellant] was a cause of the death of Ikeem Isaac, then you may find him guilty of [f]irst or [s]econd [d]egree [m]urder or [v]oluntary [m]anslaughter."

Appellant contends that the trial court's instruction was an incorrect statement of the law. According to Appellant, the trial court should have responded "by explicitly telling the jury" that, to convict Appellant, they must find that if he "had not shot Mr. Isaac, Mr. Isaac's death would not have occurred."

The State maintains that Appellant's claim of error was not preserved for appellate review. Alternatively, the State contends that, even if preserved, Appellant's claim fails because the court's instruction (1) was an accurate statement of law, and (2) did not relieve the jury of its obligation to find that Appellant caused Mr. Isaac's death.

We agree with the State that the issue was not preserved for appellate review. Maryland Rule 4-325(f) provides: "No party may assign as error the giving or 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." The purpose of the rule "'is to give the trial court an opportunity to correct its charge if it deems correction necessary.'" *Beckwitt v. State*, 477 Md. 398, 463 (2022) (quoting *Sequeira v. State*, 250 Md. App. 161, 196-97 (2021)). *See also Morris v. State*, 153 Md. App. 480, 510 (2003) (stating that the preservation requirement of Rule 4-325(f) "protect[s] the trial judge from being sandbagged[.]")

A challenge to a jury instruction is not preserved where the grounds for objection at trial were different than the grounds asserted on appeal. *See Nottingham v. State*, 227 Md. App. 592, 609-610 (2016). At trial, Appellant's objection to the court's supplemental instruction was based on his contention that, as he had argued in his motion for judgment of acquittal, there was no evidence as to which gunshot wound was inflicted by Appellant, and therefore no evidence that Appellant caused Mr. Isaac's death. At no time, however, did Appellant assert that the court's supplemental instruction was an incorrect statement of law. Nor did Appellant request the specific instruction on but-for causation that he now claims the court erred in failing to give. Appellant requested only that the court respond to the note by referring the jury to the instructions already given. As a result, the court was "deprived of the opportunity to consider the request and to correct the proposed instruction if required." *Beckwitt*, 477 Md. at 463. Accordingly, Appellant's claim of error by the court in responding to the jury's note is not preserved for appellate review.

In anticipation of the State's preservation argument, Appellant claims that the instructional issue was preserved because the record reflects that the trial court understood and rejected the argument he asserts on appeal. We do not agree. A party challenging a trial court's instructions to the jury, must "state clearly what the problem is and [ ] state clearly what precise instruction is being requested. A mere passing allusion to a difficult conceptual area will not suffice." *Bey v. State*, 140 Md. App. 607, 628 (2001). We do not conclude that defense counsel's objection, which relates to the sufficiency of the evidence on the element of causation, was understood by the court as an argument that the court's response to the note was an incorrect statement of law. Nor can we conclude that the court understood, from Appellant's request for the court to refer the jury to the pattern jury instructions previously given, that Appellant was actually requesting an instruction on but-for causation.

Even if preserved, Appellant's argument is without merit. "When a jury question involves an issue central to the case, 'a trial court must respond ... in a way that clarifies the confusion evidenced by the query.'" *Sweeney v. State*, 242 Md. App. 160, 173 (2019) (quoting *State v. Baby*, 404 Md. 220, 263 (2008)). "'The decision of whether to supplement the instructions, including an instruction given in response to a jury question, is within the discretion of the trial court and will not be disturbed except on a clear showing of an abuse of discretion.'" *Lindsey v. State*, 235 Md. App. 299, 314 (2018) (quoting *Appraicio v. State*, 431 Md. 42, 51 (2013)).

The jury asked the court whether it was possible to convict Appellant of the murder of Mr. Isaac if they did not know if Appellant was the "only cause" of death. In response,

the court clarified that Appellant could be convicted if the jury found beyond a reasonable doubt that Appellant's conduct was "a cause" of Mr. Isaac's death. The court's instruction was a correct statement of law. *See Palmer*, 223 Md. at 353 ("To constitute the cause of the harm, it is not necessary that the defendant's act be the sole reason for the realization of the harm which has been sustained by the victim.") (quoting 1 Wharton, Criminal Law and Procedure § 68)). Furthermore, the evidence showed that Mr. Isaac was shot by Appellant and another person, where the undisputed cause of death was multiple gunshot wounds. There was no evidence as to whether any of the "potentially fatal" wounds would or would not have been fatal on their own. We cannot conclude that the court abused its discretion to refuse to instruct the jury that, to convict, the jury must find beyond a reasonable doubt that Mr. Isaac would not have died if Appellant had not shot him.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.