UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1539

September Term, 2015

TIESHA WILLIAMS

v.

STATE OF MARYLAND

Nazarian,
Leahy,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: August 1, 2016

*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.

During the early morning hours of November 12, 2014, Tiesha Williams, appellant, got into a fight with Malita Savage. During the fight, Ms. Williams stabbed Ms. Savage five times with a knife. As a result of the stabbing Ms. Savage suffered a punctured lung and two arteries in her head were severed. She was hospitalized for three days.

Due to the stabbings, Ms. Williams, was charged by information in the Circuit Court for Baltimore City with: 1) attempted first-degree murder; 2) attempted second-degree murder; 3) first-degree assault; 4) second-degree assault; and 5) wearing or carrying a deadly weapon with intent to injure.

A jury trial was held in June 2015. Even though she never testified at trial, appellant's attorney claimed that his client stabbed Ms. Savage in self-defense. The jury found Ms. Williams guilty of first-degree assault and guilty of openly carrying a deadly weapon with intent to injure, but acquitted her of attempted first and second-degree murder.

After sentencing, Ms. Williams filed a timely appeal in which she raises two questions, worded as follows:

> 1) Did the trial court abuse its discretion by admitting the redacted versions of Ms. Williams' jail phone calls rather than [admitting] the full version of the calls?
>
> 2) Did the court commit plain error when it allowed the prosecutor to make improper and highly prejudicial remarks during closing argument?

I.
BACKGROUND FACTS

In Part I of this opinion, we shall make no attempt to summarize all of the testimony that was produced at trial because appellant does not contend that the evidence was insufficient to convict her. Instead, we shall summarize only the facts relevant to the first question presented along with matters that put those facts in context.

A. The State's Evidence

In the early morning hours of November 12, 2014, Ms. Williams went to Kitty's Lounge located on Greenmount Avenue in Baltimore City. Accompanying her that evening was her friend, Ashley Tucker, and another woman whose nickname was "Eye." Also with her were two men whose nicknames were "Reck" and "Little Man."

That same evening, Malita Savage and her friend, Byron Martino, were about to leave the parking lot of Kitty's Lounge in Ms. Savage's SUV when they encountered Ms. Williams and the people who were with her. The encounter had its origin when Reck got out of the vehicle occupied by appellant, then tripped and fell and landed on Ms. Savage's SUV. Byron Martino got out of the SUV and, shortly thereafter Martino and Reck got into a fight. During the fight, Ms. Williams and the two females who accompanied her that evening got out of their vehicle and Ms. Savage got out of hers. Before long, Ms. Savage and Ms. Williams got into a fight with each other in which Ms. Williams's friend, Ashley Tucker, also participated.

According to Ms. Savage's testimony, her initial fight with Ms. Williams ended without substantial injury. But not long thereafter, a second fight commenced when Ms. Williams charged at Ms. Savage and stabbed her repeatedly with a knife. Thereafter, again according to Ms. Savage's testimony, Ms. Savage managed to push Ms. Williams' arm behind her back and take the knife from her. Ms. Savage then began swinging the knife while at the same time telling Mr. Martino that she needed to go to the hospital.[1] Martino immediately took Ms. Williams to Union Memorial Hospital.

Baltimore City Detective Joel Hawk responded to Union Memorial Hospital to investigate the stabbing. Soon after his arrival, Detective Hawk was notified that another female stabbing victim had been located at 449 East Lorraine Avenue, which was about five blocks from Kitty's Lounge.

That second stabbing victim was Ms. Williams. Detective Hawk sent a colleague to meet with Ms. Williams at the East Lorraine address, which turned out to be where Ms. Williams lived. Later, Detective Hawk went to the same address; he was accompanied by Mr. Martino. Detective Hawk found Ms. Williams and Ashley Tucker at that address and saw that blood was pouring from Ms. Williams' face. Mr. Martino then identified Ms.

[1] Ms. Savage's version as to what occurred during the fight differed in some respects from what Mr. Martino recalled. Those discrepancies, however, do not concern any issues material to appeal.

Williams and her friend, Ashley Tucker, as the women involved in the fight with Ms. Savage.[2]

When she was questioned at her home, Ms. Williams told a police officer that she had been in a fight that evening at a club in downtown Baltimore, but she denied having ever been to Kitty's Lounge on Greenmount Avenue. According to Ms. Williams' statement to the police, the fight originated when she saw her "baby's father . . . with another girl." She also told the officers that when the other girl and that girl's friend jumped her, she (Ms. Williams) hit her head. Ms. Williams refused medical attention even after emergency medical personal were called to assist her.

During the State's case, a videotape (from a city surveillance camera) of a part of the fight in which appellant participated was played for the jury. The videotape captured intermittent snippets of the fight but did not show how that fight started or ended, nor did it show anyone holding a knife. The tape, however, did show that Ms. Williams was, in fact, at the scene of the fight in which Ms. Savage was stabbed.

Also, as an important part of its case, the State introduced excerpts from three taped recordings of phone conversations that Ms. Williams participated in on November 13, 2014, while in jail. Two of those phone conversations were between appellant and her mother, Andrietta Allen. The third phone conversation was between Ms. Williams and a woman

[2] Ms. Tucker, was charged with first and second-degree assault for her part in the fight. Later, she entered an Alford Plea concerning one of the assault charges.

called "Shay." Also, participating in this third call was Ms. Williams's six-year-old daughter. In the first telephone conversation Ms. Williams admitted to her mother that the victim, Ms. Savage, was unarmed. In the second recorded conversation with her mother, Ms. Williams repeatedly asked her mother to contact Ms. Savage and offer her money in exchange for Ms. Savage's agreement to "not press charges." At one point in that recorded conversation, Ms. Williams said: "Ma, only thing I can tell y'all to do is pull the girl's (Ms. Savage's) name up and try to get a contact for her and see if y'all could pay her to not press charges." Appellant went on to say in the recorded conversation that if Ms. Savage pressed charges, she (Ms. Williams) would "do time." In the phone conversations, Ms. Williams' mother did not agree to attempt to bribe Ms. Savage and told her daughter that "you shouldn't be discussing that on the phone. That's bribery." In the third conversation, when Ms. Williams talked to Shay, Ms. Williams asked Shay if she would get in contact with Ms. Savage, to see if she could bribe her so that the victim would not press charges. Also during the conversation, after Ms. Williams mentioned the fact that the police had the fight "on camera," Shay asked Ms. Williams whether the fact that the fight was on camera was a "good thing or a bad thing?" Ms. Williams replied, "It's a bad thing. That's why I need her to, you know, do what I said. You get what I'm saying? That's the only thing that's helping me."

B. The Defense's Case

Ashley Tucker, a friend of appellant's, was the main witness for the defense. She testified that she, Ms. Williams and their friends went to Kitty's Lounge in Baltimore City at approximately12:30 a.m. on November 12, 2014. After Reck parked his car behind a grey Hyundai, he got out of the vehicle, and fell onto the driver's rear side door of the grey Hyundai. A man, later identified as Mr. Martino, got out of the Hyundai and "was being real forceful" and "aggressive" toward Reck. Mr. Martino then started to fight with Reck.

Ms. Williams and her friends were still inside the car when the fight began. Ms. Tucker exited the car to try to stop the fight but found herself trapped between the two combatants, who were both large men. Ms. Williams then got out and attempted to pull Ms. Tucker out of harms way. As Ms. Williams was trying to help Ms. Tucker, Ms. Savage "jumped out of the car and started to swing on [Ms. Williams]." At some point, Mr. Martino took Ms. Savage back to her SUV. When Ms. Savage tried to get out again, Ms. Tucker tried to stop her. Next, Ms. Tucker saw Ms. Savage crawl back out of the driver's side door of Ms. Savage's SUV, come around the vehicle, and assault Ms. Williams for a second time. This caused Ms. Savage and Ms. Williams to re-engage in a fight once more. Ms. Tucker testified that when she saw Ms. Williams and Ms. Savage wrestling on the ground she suspected a weapon was being used in the fight. That suspicion was caused by her observation of blood coming from Ms. Williams' head. Ms. Tucker then saw Ms. Savage

stand up with a knife in her hand. Ms. Williams, at this point, had blood gushing from her head. After Ms. Tucker pleaded with Ms. Savage to calm down, the latter backed away still holding the knife. Next, Mr. Martino grabbed Ms. Savage and placed her in the Hyundai. Ms. Tucker then wrapped her jacket around Ms. Williams' bleeding head and helped Ms. Williams to return to the latter's home. By the time they arrived at Ms. Williams' house, Ms. Tucker's jacket and Ms. Williams' clothing were so drenched in blood that the clothes were thrown away.

Ms. Tucker described Ms. Williams as a "peaceful person" who had never been in a fight before. She testified that she knew for a fact that none of the people she was with on the night of the fight was carrying a knife or any other weapon. Ms. Tucker also told the jury that she was with Ms. Williams "for about four or five hours" prior to the fight and knew that Ms. Williams didn't have a knife on her. In fact, Ms. Tucker, in her lifetime, had never seen Ms. Williams with a knife.

Andrietta Allen, appellant's mother, testified that appellant was 24 years old and was the mother of a six-year-old girl. On the date of appellant's arrest, appellant's daughter, appellant's father, appellant and the witness all lived together. At that time, appellant was in a "relationship" with a girl named "Shay."

Ms. Allen further testified that appellant had suffered from chronic asthma along with other breathing and bronchial problems all her life. Nevertheless, at the time of her arrest,

appellant was working as a "[p]rivate day nursing assistant" and had the prime responsibility for taking care of her (appellant's) father, who had serious health problems. Ms. Allen also swore that appellant had no "history of violence"; that when appellant returned home on the evening in question, she was bleeding from a gash on her forehead; and that appellant said that she had been stabbed in the head. Both Ms. Williams and her husband wanted to call for medical help but appellant refused such help because "she was afraid."

During her testimony, the prosecutor played portions of the November 13, 2014 phone calls between appellant and her mother. Ms. Allen admitted that the story that her daughter related prior to her arrest differed from the story that the witness heard from appellant in the phone conversations from jail. Appellant's mother also admitted that during one of the phone calls, appellant asked her to "pay Malita Savage to not press charges." According to appellant's mother, appellant did this "out of fear."[3]

II.
MOTION TO SUPPRESS THE JAIL TAPES

The issue regarding the recorded jail calls first came up at a hearing concerning appellant's motion to suppress the tapes. That motion was heard on the day before appellant's trial commenced. In support of the motion to suppress, counsel for Ms. Williams

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[3] In her brief, appellant says that her mother testified that she (appellant) "asked her (Ms. Allen) to research the possibility of paying witnesses not to press charges because she was scared." To say the least, this is a very generous reading of what Ms. Allen actually told the jury.

pointed out that on the date the jail calls were recorded, he had already been appointed as Ms. Williams' lawyer. Counsel worded his argument as to why the tapes should be suppressed as follows:

> I'm just looking at . . . the Constitution, and once an attorney is involved in a case . . . [thereafter] no statements or investigations are to be made against a defendant, I would suggest that they're not admissible.
>
> I mean this was obviously when she was in custody, after she had her first appearance in front of an administrative officer . . . an attorney was appointed, represented her, and no other information was to be taken . . . from the defendant.

The prosecutor replied, citing, *inter alia*, *Thomas v. State*, 372 Md. 342 (2002), that the statements Ms. Williams made in the jail calls were admissible to show a consciousness of guilt.[4] The prosecutor stressed that the three calls were made "right after the commission of the crime" with the purpose of influencing a witness by bribing her.

After hearing argument, the trial judge announced that she was not going to suppress the jail house calls. Immediately after making that announcement, the trial judge asked defense counsel if she (the trial judge) was correct in her understanding that in view of her ruling, defense counsel wanted all the jail tapes admitted into evidence. Defense counsel

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[4] The *Thomas* case provides a detailed analysis of situations when a defendant's behavior, after the crime has been committed, may be used to prove a defendant's consciousness of guilt. 372 Md. at 354. An attempt by the accused to bribe a witness is one example. *Id*.

said that that was what he wanted. The prosecutor then said that he opposed the admission of all portions of the tapes for "a couple of reasons." The prosecutor continued:

> First of all, as I said before, there are several discussions [in the jail calls] about the necessity of a lawyer, and how important it would be to the case. And I think even under the Rule of Completeness, that would still be extracted out, because she's entitled constitutionally to a lawyer so those comments shouldn't be used against her.

(Emphasis added.)

The trial judge said that she was not sure that she understood the State's position. The prosecutor responded:

> Some of the contents that's been pulled out, how she has to get in touch with her lawyer and talk to her lawyer. I'm paraphrasing and I can play the calls for the court. I think that would be helpful for my other points.
>
> But anything about the necessity post[-]arrest of speaking with the lawyer about the case, the State's position is that it should not be admissible.

The trial judge initially voiced her disagreement with the prosecutor's position and said that it was up to Ms. Williams as to whether she wanted to assert her "privilege" concerning conversations about hiring another lawyer. The court then preliminarily overruled the prosecutor's objection to the admission of that portion of the tapes.

The prosecutor next segued into a discussion of another portion on the tapes that he contended should be redacted. He pointed out, accurately, that in some of the calls there is a discussion about Ms. Williams' daughter, in which Ms. Williams became "very emotional about how she's gonna lose her daughter. There's a lot of crying." The State argued that

this portion of the conversations would be “unduly prejudic[ial]” to the State because it would draw “sympathy towards the defendant . . . .” The prosecutor also pointed out that in the tapes there were discussions about Ms. Williams’ mental health. Parenthetically, we note that counsel was referring to a portion of one of the tapes where Ms. Williams said that she was going to plead insanity. The prosecutor argued that the “mental health issues have not been raised in this case”; was not a defense in this case; and admission would “unduly prejudice” the State’s case by bringing that defense to the jury’s attention. The prosecutor added:

> [a]nd we’re not in a position to address, rebut, offer evidence about her mental health status. So again, that would not, in our position, be relevant to the case. <u>They’re not necessary under the Rule of Completeness</u> to understand the context of the calls.

(Emphasis added.)

When the trial judge asked defense counsel what his position was in regards to the argument “that the issue of Ms. Williams’ daughter and mental health” would “curry undo favor or sympathy” for the defense in a way that would make them inadmissible, defense counsel said, “I don’t believe these phone calls would be the only evidence. Her mother plans on testifying. The fact that she has a daughter[,] I think would come out.” When the trial judge asked defense counsel why he believed that it would come out in testimony that Ms. Williams had a daughter, counsel said “I think it comes out when a person with no record is charged with such a horrible offense and the testimony against this person without

a record, without a history of violence, a person that takes care of an adult parent as well as other people in a medical setting . . . ." After the court was advised that Ms. Williams planned to argue self-defense, the court voiced uncertainty as to how the issue of Ms. Williams' "mental health history and the fact that she has a daughter," would be admissible. To this, defense counsel merely said that Ms. Williams was "not the aggressor, . . . [while] on the other hand, the victim and State's witnesses are convicted armed robbers." The trial judge then inquired as to why "does the fact that she has a daughter come into the picture at all, on a relevance standpoint" to which defense counsel said "because she spends time taking care of her daughter. She's not going out committing crimes assaulting people. . . . She's not a person that would carry around a knife, which is the alleged implement in this offense."

The trial judge announced that she was going to reserve on the issue as to whether the statement in regard to mental health and the portion of the tapes regarding appellant's daughter would come into evidence. She added, however, that at this point she was "not really seeing the relevance of that."

On the morning of trial, the following colloquy occurred:

> THE COURT: There were other issues yesterday with regard to the statements that are recorded that the State intends to use. And it's the ruling of the Court, I think, that in view of the fact that I'm not really seeing the relevance of Ms. Williams' motherhood or mental health at issue, that those would remain redacted from the statements.

> But likewise, I think that statements made with respect to her wishes to obtain an attorney, I don't really see how that is relevant to the State's case or the defense at this point. So I think that the redacted statements should stay as they are. And that's the ruling of the court.
>
> Is there anything else preliminarily?
>
> [DEFENSE COUNSEL]: Your Honor, not to unnecessarily delay things, but I have not heard the redacted statements.
>
> THE COURT: Oh.
>
> [PROSECUTOR]: I have them here, Your Honor, if you'd like me to play them.
>
> [DEFENSE COUNSEL]: <u>I heard the full statements. That's why I'd ask that the full statements be admitted</u>.
>
> THE COURT: All right. Well, let's - - let's - - let's get the jury picked and then we can make sure that you have an opportunity to hear them before that . . . .

(Emphasis added.)

At trial, when the prosecutor was about to introduce the redacted jail calls, the following occurred:

> [PROSECUTOR]: Okay, I'll make a record of the calls themselves. And then I'll put them on a dis[c] for the [c]ourt's file. But right now, they're just (Inaudible.)
>
> THE COURT: I certainly (Inaudible.)
>
> [DEFENSE COUNSEL]: And I'll have a continuing objection, without raising my voice.
>
> THE COURT: You mean as far as the redaction issue?

> [DEFENSE COUNSEL]: The redaction and the admissibility.
>
> THE COURT: Right. To the extent the Court of Appeals acknowledges them, you have a continuing objection.

III.
DISCUSSION

A. Issue 1

Attached hereto as Exhibit A, is a summary of the many parts of the tapes that were deleted.

Appellant contends that the trial judge abused her discretion by not admitting into evidence the redacted portions of the jail phone calls. According to appellant, everything on the tapes should have been admitted under "the Rule of Completeness," which is set forth in Md. Rule 5-106, viz.:

> When part or all of a . . . recorded statement is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

According to appellant, the parts of the tapes (summarized in Exhibit A) should have been admitted because those portions showed that appellant wished to get out of jail immediately and that wish (or hope) gave an alternative and innocent reason as to why she wanted to bribe the State's main witness. She words her argument as follows:

> In the first unredacted call, for example, Ms. Williams appeared desperate to make bail. She pleaded with her mother to come up with cash,

> suggesting that she ask her cousin to put up her house and that she pawn their televisions. She became even more desperate in the subsequent unredacted calls after she was denied bail. She twice told her mother, "Ma, I don't think I could sit for 30 days," and also told her girlfriend "Babe, I don't know if I'm going to be able to hold it together." She talked about her daughter and how she had never been away from her that long, about how it was "killing" her, and about how she did not want her daughter to know she was in jail. She then spoke [during the third taped call] with her daughter and told her she was working. Immediately thereafter, Ms. Williams cried and asked Shay to speak with Ms. Savage so she could get home to her daughter before her preliminary hearing. She also talked about losing her job and asked her mother to tell her employer that she was in the hospital.
>
> These statements revealed that Ms. Williams was upset over being denied bail, desperately needed to get back to her daughter and her job, and was distraught about the idea of staying even 30 days in jail. The full calls offered <u>another–innocent–explanation for why Ms. Williams wanted to pay Ms. Savage to drop charges</u>.[5] But, because of the prosecutor's redactions, the jury heard none of this. The redactions ensured that the jury heard only the narrowest and most damaging portions of the phone calls–the parts that most strongly suggested consciousness of guilt.

(References to Appendix omitted.) (Emphasis added.)

The State argues that the issue of whether the trial judge erred in not allowing appellant to introduce the portion of the tapes summarized in Exhibit A is not preserved. We agree with the State.

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[5] Ms. Williams' efforts to bribe the State's main witness provides a classic example of how a defendant's post-arrest conduct demonstrates a conscious of guilt. In Ms. Williams' own words; if she (Ms. Savage) testifies "I'll do time." That showing of a consciousness of guilt is entirely consistent with a desire to get out of jail as soon as possible. In view of appellant's explicit admission that she needed to bribe a witness to avoid conviction, it is far from clear that proof that appellant desperately wanted to get out of jail provided "an innocent explanation" as to why Ms. Williams wanted to engage in bribery.

The first thing to keep in mind when considering the preservation issue is that, according to appellant, the trial judge erred in failing to admit evidence. On appeal she does not contend that the court erred in admitting the three redacted tapes, even though at trial her counsel did object. When an appellant complains about the trial judge's failure to admit evidence, the rule is as follows:

> [T]o preserve an objection to the trial court's exclusion of evidence, the party must show . . . that "the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered." Maryland Rule 5-103(a)(2).

Peterson v. State, 444 Md. 105, 125 (2015).

There is no indication in the record that the trial judge was asked by appellant's counsel to listen to the portion of the tapes that were excluded and no indication that the trial judge did so *sua sponte*. Moreover, no typed transcript of the redacted portion of the tapes was in existence prior to an appeal being filed in this case. In regards to the redactions, all that was made known to the trial judge was what the lawyers said at the motion to suppress hearing. And, with three exceptions (discussed *infra*), the substance of the evidence appellant's trial counsel wanted admitted was never made known to the trial judge. Thus, save for those three exceptions, the principles of law set forth in *Peterson*, *supra*, prevents appellant from arguing in this appeal that the court erred in not allowing her to introduce additional parts of the tapes.

We turn now to the three exceptions. As to those, the substance of the part of the tapes that counsel wanted included was made known to the court by what the prosecutor said at the hearing on the motion to suppress. As mentioned earlier, when the issue of whether the tapes should be redacted was discussed with the trial judge, the prosecution argued that material related to three subjects should be excluded viz.: 1) discussions between appellant and her callers about retaining new counsel; 2) discussion concerning appellant's daughter in which appellant became emotional; and 3) discussion about appellant's mental health. As to those three subjects, defense counsel, when the trial judge inquired, never suggested that the conversations should be admissible under the Rule of Completeness. In fact, as already shown, as to two of the subjects, defense counsel gave reasons as to admissibility that are completely different than the reasons appellant now advanced. As to the third subject (discussions about the advantages of hiring new counsel), appellant's trial counsel gave no reason why those conversations would be relevant.

The foregoing circumstances brings Maryland Rule 8-131(a) into play. That rule provides that, except for certain jurisdictional issues, an appellate court ordinarily will not decide any other issue "unless it plainly appears by the record to have been raised in or decided by the trial court. . . ." In the trial court, appellant's counsel never contended that the "Rule of Completeness" required admission of any part of the tapes that were deleted.

Thus, appellant's present argument that the Rule of Completeness required the admission of the parts of the tapes that were redacted is not preserved for appellate review.

In regards to the preservation issue, appellant asserts in her reply brief:

> The State is correct that defense counsel never used the words "rule of completeness" [when discussing the admission into evidence of all parts of the three tapes that were redacted]. But it fails to mention that the prosecutor specifically raised the rule of completeness during the pretrial motion hearing. An issue is preserved for appeal if "it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131 (2016). The trial court initially reserved ruling on this matter but later, without explanation on the record, allowed the State to admit the redacted calls. To reach this conclusion, the court must have agreed with the prosecutor that the rule of completeness did not require admission of the full calls. Thus, the completeness issue was raised and, at least implicitly, decided at trial.

(References to record omitted).

The above argument is misleading. Insofar as the Rule of Completeness is concerned, the issues that were "raised in or decided by the trial court" were: 1) whether the Rule of Completeness required the admission of the portion of the jail tapes in which discussions took place about the necessity of a lawyer and how important it would be to have a lawyer in the subject case, and 2) the portion of the tapes in which appellant discussed her mental health and her plan to plead not guilty by reason of insanity. The trial judge, impliedly at least, agreed with the prosecution that as to those two subjects, the Rule of Completeness did not compel those portions to be admitted. But on appeal, appellant does not argue that the trial judge's (implied) ruling as to those two subjects was erroneous.

Importantly, no one argued below and as a consequence the trial judge did not decide whether the Rule of Completeness required the admission of any of the parts of the tapes that appellant now says were improperly excluded, i.e., the parts where appellant discusses how to raise bail money, laments being in jail, explains to the persons she called why she desperately wanted to get out of jail as soon as possible, and the parts where appellant talks to her daughter and tells others how much she misses her daughter.

For the reason set forth above, we hold that appellant did not preserve for appellate review the first issue presented. That being said, however, we hasten to point out that nothing in this opinion should be construed as meaning that if the issue had been preserved that we would have held that the trial judge abused her discretion by not admitting everything on the three tapes.[6] We say this because, as shown by Exhibit A, much of what is contained in the portion of the tapes that was redacted would be irrelevant even under appellant's theory, advanced for the first time on appeal, that her willingness to bribe the State's main witness did not show a consciousness of guilt but instead was explained by her desperate desire to be released from jail. The following paragraphs of Exhibit A

[6] If appellant had argued in this appeal that the Rule of Completeness required the circuit court to admit that part of the tape concerning conversations about hiring a new lawyer or the part dealing with appellant's mental health or her intent to plead not guilty by reason of insanity, those arguments would have been preserved for appeal under Md. Rule 8-131(a), assuming that appellant made the same argument on appeal as she did below. But because those parts of the tape are so obviously irrelevant it is understandable why appellant's counsel in this appeal made no specific contention of error as to those exclusions.

demonstrated this point: 1A, 1C, 2A, 2B, 2C, 2D, 2E, 2G, 2H, 2I, 2J, 2L, 2M, 2N, 3A, 3C, 3D, 3E, 3F, 3L, 3M, 3N, 3O.

B. Plain Error

Appellant claims that the trial judge committed plain error when she failed to intervene when the prosecutor made various statements in his closing arguments and, in one instance, in his opening statement. This argument is made despite the fact that appellant's trial counsel did not object to anything the prosecutor said in his opening statement or closing arguments.

Listed below are the statements at issue along with the words of the prosecutor that puts the statements in context. The portions of the statement emphasized are the parts to which appellant now says were objectionable.

> **Statement 1**. In describing Ms. Williams' stabbing of the victim, the prosecution said, in his opening statement, that this is "another [act] of just senseless violence."
>
> **Statement 2**. Ms. Williams' actions occurred on "just a regular old street in the [C]ity of Baltimore."
>
> **Statement 3**. At the end of his first closing argument, the prosecution said:
>
>> And remember you represent this city. You're the ones who get to say whether we're going to tolerate this. It is what it is a crime. That's what it is. And it's an attempted first degree murder. It's not a second degree, it's not a first degree assault or a second degree assault. She tried to kill another person.

Statement 4. In arguing that appellant should be convicted of attempted first-degree murder, the prosecutor said:

> It was wilful. She was actually trying to kill her. She's stabbing her in the head. She's stabbing her in the chest. And she's doing it over, and over, and over, and over again.
>
> Any one of those times, that first, second, third, fourth strike, she could have stopped. She didn't. Even the fifth, she could have stopped. She didn't. Ms. Savage, I don't know how, was able to get this [knife] away. If she didn't she'd be dead.
>
> <u>It sounds crazy until you're actually in the moment, until you're barely breathing, until the blood is dripping down your face and you do whatever you can to survive</u>.
>
> She got this [the knife] away. She's alive, no thanks to that woman who would have kept doing it until she was dead.

Statement 5.

> We also know that within a minute, at 12:37 and 34 seconds, that ten seconds that the camera panned by the guy named "Reck" with a white shirt is swinging at Byron Martino at least two times. We saw that. It's in the video. Ashley Tucker watched the victim and admitted it. No doubt about that happening.
>
> It's important because Malita Savage isn't even involved in it. Tiesha Williams isn't even involved in it.
>
> We know that by 12:30 and 28 seconds, the fight had stopped. There's no fighting, it's just people standing on the street. They are outside the bar. You can see all the women at this point. You can see the two guys, but there's no fighting going on.

And that's exactly what Byron Martino said. And that's exactly what Malita Savage said. It stopped. It was back and forth and back and forth. And what does that tell us? Why is that so important.

You heard the judge say that you don't get to claim self defense if you didn't walk away. Everybody should walk away. They didn't.

Tiesha Williams could have walked away. She didn't. I don't get it. To start a fight, stop a fight and then start it again and claim (inaudible).

We also know that within two minutes, 12:41, the woman (inaudible). You saw Tiesha Williams and Ashley Tucker locked hands on head pulling each other back and forward to the point whey they separated - - they separated.

Statement 6.

This is the end of the case. The State of Maryland versus Tiesha Williams. At the beginning of this case, when I did my opening statement, I told you there were going to be two questions, two questions that we needed to ask, what happened, and who did it.

Now that you've heard testimony, having seen video, photographs, the phone call, I'm going to change that first question just a little bit. Put why it happened is question number one.

And the reason why I say that is you have to remember why that we're here. We're not here because somebody taped a call. We're not here because somebody had words on the sidewalk. We're not even here because there was a fight between Byron Martino and a guy named "Reck."

> We're not even here because there was a fight between Malita Savage and Ashley Tucker, and the defendant, and a girl name "Eye." Those aren't the crimes that you need to decide.
>
> The crime in this case, Ladies and Gentlemen, is that Malita Savage was repeatedly stabbed. <u>That's the only question that you have to ask yourself as it pertains to the crime, as it pertains to what happened. Are you satisfied beyond a reasonable doubt that Malita Savage was repeatedly stabbed</u>.
>
> Is there a reason to suggest that that somehow didn't happen. Remember none of you were there. You rely on the evidence to prove that this stabbing actually took place.

Statement 7.

> <u>Malita Savage was stabbed, we've proven the person who did it was Tiesha Williams the defendant</u>,[7] <u>then really the only thing left to talk about is how do we know what her intent here was</u>.
>
> It does seem to tell you on the verdict sheet for all those counts, attempted first degree murder, second degree murder, first degree assault, second degree assault, you're going to notice on this verdict sheet if you find the defendant guilty of the first count, skip the rest. Why?
>
> Because they are all lesser included. If I did the first one, that means I had to do the rest. (Inaudible.) So the decision between Counts 1 and 4 is really just what was her state of mind when she stabbed (inaudible).

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[7] In her brief, appellant states that at pages 36 and 42 (of the transcript of closing argument) that the prosecutor said "the only question that you have to ask yourself is 'Are you satisfied beyond a reasonable doubt Malita Savage was repeatedly stabbed.'" A review of transcript pages 36 and 42 shows that the prosecutor did not make such statements on those pages although he did say this in the excerpt we have listed as Statement 6.

> Was she trying to kill her and she thought about it before she did it? Was she trying to seriously injure or kill her regardless of whether she thought about it or did it. Was she just trying to cause serious injury. Or was she just trying to be offensive? That's kind of the scale that we're talking about here.
>
> And that's why the conduct itself is so important. Because I can't get in her head. I can't tell you what she's thinking now when actions speak louder that words.

Statement 8.

> It's corroborated by Tiesha Williams. And I told you at the beginning that that was going to be the most devastating evidence and here we are at the end, and I think you'll agree she couldn't have said it any better when she's talking to her mom, she's talking the day after this happened.
>
> And that, Ladies and Gentlemen, is the most honest that Tiesha Williams has ever been of herself in this case. I could have prevented what I did. It wasn't self defense because the other girl didn't have a weapon.
>
> And that's as about as close as you're going to get to Tiesha Williams saying, "I did it. I did it. I repeatedly stabbed Malita Savage."
>
> But there's more. And this is from the video. Again you heard that story, "I wasn't there. I was at the Inner Harbor." Over and over again we see the photos. Her own mother, she says it blurry, you can't see it.
>
> It's curious Ashley Tucker was able to spot on start to picking everybody off. Ashley Tucker is just a friend. Her own mother was hesitant to even admit who that is. This is all before a weapon gets involved.

Statement 9.

When her mother asks her did they swing on you first, she gives that response, yeah, which is interesting because she does that on another call, too. When her mother is trying to convince her that this was self defense, her mother wasn't there, her mother loves her daughter very much, was trying to get in her daughter's head that this was self defense so that for the next seven months she can get it into her head that this was self defense, she also asked her the girl was bigger than you, wasn't she.

Yeah.

Five one, 198 pounds. (Inaudible.) So we can try and change reality. We can try and tell ourselves the same story over, and over, and over again for days and weeks and months. But the facts are the facts.

And just as much as Melita Savage is not way bigger than Tiesha Williams, this was not self defense. And the defendant doesn't believe it was self defense. And that's step one to the question of self defense. Did you actually believe you needed to defend yourself. She says no.

So it doesn't matter what the lawyers say. It doesn't matter what her parents says. It doesn't matter what friends say. She said no. She knew that she did. She knew what she did when she did it.

Statement 10.

Who better to know what happened to Malita Savage than Malita Savage. She's here. She testified. She subjected herself to the cross-examination of the defense attorney. Asked very pointed questions.

* * *

> Eyewitness testimony. Byron Martino. He's the eyewitness. At this point in his life, he has nothing to do with this case. He's a friend of Malita Savage, not in a relationship, not intimate. He could have told us, "Forget this. I'm out of here. I got nothing to do with this. I ain't coming to court. I ain't talking." Did he do that? You know it's possible. Reck's not here. Eye's not here. Little Man's not here. So we know that there are people that were involved in this case who (inaudible) forget it. I don['t] want anything to do with it. But Byron Martino came to court. Byron Martino testified. And according to Byron Martino, this woman was repeatedly stabbed.

Before discussing the various ways appellant contends that the prosecutor's arguments denied her the right to a fair trial, it is important to note that the trial judge accurately instructed the jury as to the law both orally and in written instruction. Importantly, those written instructions were sent back to the jury room when they deliberated.

The judge told the jurors that the instruction as to the law was binding on them, that their verdict must be based on the evidence, and that what the lawyers said in opening or closing argument was not evidence.

It is also important to keep in mind that we will recognize "plain error" only in instances [that] are "compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *See Lawson v. State*, 160 Md. App. 602, 629-30 (2005) (quoting *Stanley v. State*, 157 Md. App. 363, 370 (2004). In *Lawson*, 160 Md. App. at 631-32, we said:

> The fact that an error may have been prejudicial to the accused does not, of course, *ipso facto* guarantee that it will be noticed." *Morris* [*v. State*], 153 Md. App. [480] at 512, 837 A.2d 248 [(2003)]. This is because "[i]f every material (prejudicial) error were *ipso facto* entitled to notice under the 'plain error doctrine,' the preservation requirement would be utterly meaningless." *Id*. at 511, 837 A.2d 248.
>
> Indeed, courts are reluctant to find plain error in closing arguments. *See Clermont v. State*, 348 Md. 419, 704 A.2d 880 (1998); *Rubin v. State*, 325 Md. 552, 602 A.2d 677 (1992); *Perry v. State*, 150 Md. App. 403, 822 A.2d 434 (2002); *Beard v. State*, 42 Md. App. 276, 399 A.2d 1383 (1979). This principle holds true even when the prosecutor impermissibly argues that the jury should convict a defendant in order to prevent him from committing future crimes. *See State v. Williams*, 145 S.W.3d 874 (2004); *State v. Dixon*, 70 S.W.3d 540 (Mo.App.2002); *State v. Brown*, 131 Idaho 61, 951 P.2d 1288 (1998).

(Emphasis added.)

Plain error review is a rarely used and tightly circumscribed method by which appellate courts can, at their discretion, address unpreserved errors by a trial court, which "vitally affect[ ] a defendant's right to a fair and impartial trial." *Malaska v. State*, 216 Md. App. 492, 524, *cert denied*, 439 Md. 696 (2014) (quoting *Diggs v. State*, 409 Md. 260, 286 (2009) (some quotation marks and citations omitted)). This discretion should be rarely exercised because considerations of fairness and judiciary efficiency call for assertions of error to be raised at trial so that "a proper record can be made with respect to the challenge, and . . . 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). We should engage in plain error review only when we are confronted with an outcome-affecting error of such

magnitude that it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *State v. Rich*, 415 Md. 567, 578 (2010) (some quotation marks and citations omitted).

Here, the error claimed by appellant to be "plain" is that when improper remarks were made, the trial judge should have, *sua sponte*, interrupted the prosecutor, and told the jury to disregard the offending remarks and, as to some of the remarks, ordered a mistrial.

According to appellant, the emphasized words in Statements 1, 2, and 3 violated the prohibition against making "golden rule" arguments because the prosecutor asked "jurors to convict a defendant in order to preserve the safety or quality of their communities" (quoting *Hill v. State*, 355 Md. 206, 225 (1999)). This contention needs no extended discussion. The prosecutor did not ask the jury to convict Ms. Williams to protect their community. The prosecutor asked the jury to convict Ms. Williams because the State proved, by the jailhouse tapes and the testimony of Ms. Savage, that the victim was unarmed and that after a brief fight between Ms. Savage and appellant, the latter armed herself with a knife and proceeded to repeatedly stab Ms. Savage. When read in context, Statements 1, 2, and 3 did not violate the prohibition against making "golden rule" arguments.

Appellant claims that in Statement 4, the prosecutor also violated the golden rule prohibition by asking the jury to "place themselves in the victim's shoes." The short answer to that argument is that in Statement 4, the prosecutor was simply explaining how Ms.

Savage managed to take the knife away from appellant. In giving that explanation, the prosecutor never asked the jurors to put themselves in the victim's place.

In regard to Statement 5, appellant argues:

> The prosecutor prejudicially distorted [the court's self-defense] instruction when [he] told the jury, "You heard the judge say that you don't get to claim self defense if you didn't walk way." He then told the jury that Ms. Williams should have walked away when "there was separation" in the fighting before the [final] fight between Ms. Savage and Ms. Williams even began.

The trial judge told the jury in her instructions that the elements of self-defense were:

> One, the defendant was not the aggressor; or, although the defendant was the initial aggressor, she did not raise the fight to the deadly force level; two, the defendant actually believed that she was in immediate and imminent danger of bodily harm; three, the defendant's belief was reasonable; and, four, the defendant used no more force than was reasonably necessary to defend herself in light of the threatened or actual harm.
>
> Deadly force is that amount of force reasonably calculated to cause death or serious bodily harm. If you find that the defendant used deadly force, you must decide whether the use of deadly force was reasonable.
>
> Deadly force is reasonable if the defendant actually had a reasonable belief that the aggressor's force posed an immediate and imminent threat of death or serious bodily harm.
>
> <u>In addition, before using deadly force, the defendant is required to make a reasonable effort to retreat</u>. The defendant does not have to retreat if retreat was unsafe, the avenue of retreat was unknown to the defendant. If you find that the defendant did not use deadly force, then the defendant had no duty to retreat. The defendant does not have to retreat if retreat was unsafe, the avenue of retreat was unknown to the defendant. If you find that the defendant did not use deadly force, then the defendant had no duty to retreat.

(Emphasis added.)

It is true that the judge didn't literally say: "You don't get to claim self-defense if you didn't walk away" but the point that the prosecutor was evidently attempting to make in Statement 5 was valid, i.e., under the circumstances of this case appellant did have the duty to retreat (i.e., walk away) and that if she failed to retreat, she couldn't claim self-defense. The prosecutor had a solid factual basis for making that argument because: 1) Ms. Savage said that after a break in the fighting, appellant renewed the fight by charging at her armed with a knife, and 2) the fact that Ms. Savage was unarmed was corroborated by words spoken by appellant on the jail tapes. If the jurors credited the State's evidence, appellant could not validly claim self-defense because, armed with a knife, she attacked Ms. Savage when she could have elected to stay put or retreat. Read in context, Statement 5 was extremely unlikely to have mislead the jury especially in view of the fact that during deliberations (which lasted three days), the jury had in its possession the court's written instructions, which accurately set forth the law governing self-defense.

In Statements 6 and 7, appellant complains that the prosecutor "distorted" the instructions and "misstated the law" when he "specifically stated" that the only question that you have to ask yourself is "Are you satisfied beyond a reasonable doubt that Malita Savage was repeatedly stabbed?" These criticisms might have some plausibility were it not for the fact that the prosecutor earlier discussed in detail, appellant's claim of self-defense and later

told the jury that it must consider the defendant's intent. We fail to see how the prosecutor mislead the jury or prejudiced appellant by Statement 6 or 7.

In regards to Statement No. 8 and 9, appellant claims that the prosecutor "argued facts not in evidence," when he commented about what appellant said in the jail tapes. Although his recollection did not provide the jury with verbatim quotes, the prosecutor's comments did not materially distort appellant's words. After all, appellant did tell her mother, in effect, that she did not act in self-defense because the victim was unarmed. In other words, it was appellant's decision to turn a simple scuffle between two women into a knife fight in which appellant used potentially deadly force. Additionally, appellant told her mother, that she (appellant) could have "prevented what I did."[8]

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[8] In a phone conversation with her mother, the following was said:

[MOTHER]: Well, it doesn't matter because you were defending yourself. This is what I'm trying to tell you also. If you're defending yourself, you're running from nothing. But if this was something else, it is what it is.

MS. WILLIAMS: No, it wasn't something else. She did swing on us first, but they said they got it on camera, so I'm - - if I sit 'til my court date, I'm going to be doing time and what if that happens, ma? What am I going to do?

[MOTHER]: How when you were protecting yourself?

MS. WILLIAMS: It doesn't matter. She didn't have a weapon.

In another call, the following exchange occurred:

MS. WILLIAMS: They have footage on the city cameras.

(continued...)

Appellant claims that in Statement 10, the prosecutor made an "oblique" reference to appellant's failure to testify. We fail to see how the prosecutor's comments, when read in context, commented on appellant's failure to testify. Moreover, even in the unlikely event that the jury considered the remarks as constituting an "oblique" reference to appellant's failure to testify, it is extremely unlikely that appellant was prejudiced. We say this because the trial judge instructed the jury that appellant's failure to testify could not be used against her or considered in any way. This is important because jurors are presumed to have understood and to have followed the judge's instructions. *State v. Gray*, 344 Md. 417, 423 (1997). Here, that presumption was not rebutted.

The appellant also claims that in Statement 10, the prosecutor "deceptively used Little Man's absence from trial to imply that the defense had failed to produce an important witness, when the prosecutor knew that was not the truth." According to appellant, the State knew that Little Man was unavailable because a bench warrant for his arrest had been issued. Appellant argues therefore, that the statement misled the jury into thinking that Little Man would have testified unfavorably to the defense while it "bolstered Mr. Martino's

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[8](...continued)
[MOTHER]: Okay. Sapphire, but you still was defending yourself. You keep saying it like you created this situation. If you didn't create the situation, it's not your fault. You have to have some type of defense.

MS. WILLIAMS: But I could have prevented what I did.

credibility because the prosecution suggested that he was the only witness that voluntarily testified."

We reject that argument. The point the prosecutor made was a valid one, viz.: unlike "Reck," "Little Man" or "Eye," Mr. Martino voluntarily appeared at trial and subjected himself to intense cross-examination. The prosecutor did not comment on whether the defense could have procured Little Man's testimony. He simply said, accurately, that Little Man and others did not voluntarily testify. Thus, the prosecutor's remarks were not likely to have deceived anyone.

For the reasons set forth above, it is very doubtful that the trial judge committed any error by failing to act, *sua sponte*, when the prosecutor made his opening statement or his closing argument. But even assuming that "error" occurred, it is only "the extraordinary error and not the routine error that will cause us to exercise the extraordinary prerogative [of reviewing plain error]." *Martin v. State*, 165 Md. App. 189, 195 (2005) (quoting *Williams v. State*, 34 Md. App. 206, 212 (1976)). Here it is crystal clear that the trial judge never committed "extraordinary error" that vitally affected appellant's rights to a fair trial.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

EXHIBIT A
THE PORTIONS OF THE TAPES THAT WERE REDACTED
1. First Conversation With Appellant's Mother

A. Preliminary Conversation between appellant's mother and the phone operator setting up the call.

B. Lengthy conversation between appellant and her mother (and at one point, an unidentified male) about the fact that the Commissioner had set bond at $250,000 and how the money might be raised to pay a bail bondsman or put up someone's house as security for a bond.

.

C. Conversation about the necessity of appellant's mother purchasing for appellant a "global tele[phone]" so that appellant could communicate with her mother "at all times."

2. Second Call With Appellant's Mother

A. One full-page of transcript of conversation between an operator and appellant's mother setting up the call.

B. Discussion between appellant and her mother in which mother advises that she is busy and that appellant should call her back.

C. Conversation about the fact that the school had called appellant's mother concerning appellant's daughter's school attendance.

D. Complaint by appellant's mother that she gets no sleep because every time she falls asleep, she receives a phone call from appellant.

E. Conversation about the fact that appellant's friend, Shay, is presently trying to pawn a TV to help raise money.

F. Discussion about replacing the public defender who had been appointed to represent appellant by hiring a "good lawyer," coupled with a conversation about an offer by a private attorney to give mother a "free consultation" concerning appellant's case.

G. Request by appellant that her mother call Shay while appellant was on the phone in order to get Shay "to do what I ask (sic) her to do ("presumably to attempt to bribe Ms. Savage").

H. Statement from appellant's mother that she was calling Shay now.

I. Request that mother contact "GTL" to obtain a phone calling card for appellant and to:

> Set up an account with the phone company and to put money in the account so that appellant could make phone calls from jail.

J. Discussion about the fact that it costs $9 per call for appellant to make a phone call from jail.

K. Discussion as to where appellant's daughter was presently staying, coupled with a lament that appellant would not be able to be with her daughter "for a month," which was longer than appellant and her daughter had ever been separated.

L. Request that appellant's mother contact appellant's employer to tell the latter that appellant "was in the hospital and not doing good."

M. Discussion about appellant's plan to just take her medication and just sleep through the days.

N. Lengthy conversation about the need for appellant to "remain strong" and not let "them bitches" (presumably other female inmates or perhaps, guards) see appellant cry.

3. Redacted Portion of Phone Call Between Shay, Appellant and Appellant's Daughter

A. Discussion between Shay and operator concerning the mechanics of setting up the call.

B. Statement by Ms. Williams that she has "no bail" and as a consequence she was going to be "sitting [here] until December 11, 2014."

C. Inquiry about what could be done for appellant's situation including an inquiry from appellant as to whether Shay was "taking that money to the lawyer tomorrow."

D. Discussion with Shay concerning how much the latter received by selling a television set coupled with Shay's statement that the pawn shop gave her $200 for some unspecified item but she did not pawn the television set because the pawn shop only offered her $5 for it.

E. Statement from Shay that a person named "Rick" was going to give her (Shay) an unspecified amount of money every week "when he get paid."

F. Discussion between Shay and appellant about a conversation with a lawyer, and the fact that an unnamed person was going to give Shay money so that a defense lawyer could be paid by the end of the month.

G. Request by appellant that she speak to her daughter, Kamaria, along with a discussion about the fact that Kamaria thought that her mother was at work and that was the reason that appellant had not been home the previous day.

H. Shay turns the phone over to Kamaria whereupon appellant had a lengthy conversation in which appellant tells her daughter that the reason she hasn't come home is that she is at work and that she (appellant) needs to work to "pay the bills." Appellant adds that, because of her job, she needs to sleep at her place of employment. Kamaria asked why that was so and appellant replied that she did not know but that she would be home "in a couple of weeks." The conversation with appellant's daughter concluded with a request by appellant that Kamaria "be good" while her grandparents are taking care of her followed by several reassurances by both appellant and her daughter that they love each other.

I. Statement by appellant to Shay that she couldn't stand to be on the phone any longer with Kamaria because it does nothing but "make her more emotional" in that Kamaria is "so precious and so calm."

J. Statement by appellant that if she had to "plead insane," then she would do so but then they would send her to a "crazy home" where she would have to stay for "six months to a year," but this was better than spending time in jail.

She then told Shay that this was why "I need you to do exactly what I ask you to do regardless if you want to do [it] or not. Understand?" To that question, Shay said that she did understand.

K. Appellant next told Shay that she needed her to "get that lawyer no matter what" so that the lawyer could "pull everything right now" and begin working on the case immediately.

L. Lengthy conversation concerning ways appellant could get a "GTL phone and how the phone would be delivered by Shay to appellant while appellant was in jail.

M. Lengthy conversation about how money could be put on appellant's jail account so that she could use it in the commissary to get extra food due to the fact that appellant was not eating the jail food. Ms. Williams asked that Shay put $30 on her account "for now." Appellant also instructed Shay that when she sees "the lawyer" to ask the lawyer if he could get her on a payment plan and to try and find out how much the lawyer needed to be paid up front.

N. Statement by appellant to Shay that the latter should "stay calm and easy, do things to have fun" and even "stay out overnight" but to make sure that appellant's daughter is taken care of in the event that Shay is not there at night.

O. The final discussion between Shay and appellant concerned how the two could communicate by phone the next day and to make sure that arrangements were made so that appellant could make calls to Shay as often as appellant needed to do so.