Circuit Court for Baltimore County
Case No. C-03-CR-21-000273

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 2291

September Term, 2022

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LYDELL DARIEN

v.

STATE OF MARYLAND

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Reed,
Shaw,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Shaw, J.

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Filed: March 18, 2024

*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 in the Circuit Court for Baltimore County convicted Appellant, Lydell Darien, of second-degree murder and use of a firearm in the commission of a crime of violence. The court sentenced him to a total term of 40 years' imprisonment.

In this appeal, Appellant presents four questions, which we have rephrased for clarity:

1. Did the trial court err in excluding testimony from Darien regarding how he "felt" after being placed in protective custody while in jail prior to trial?

2. Did the trial court err in refusing to permit Darien to cross-examine a police officer as to whether the officer had investigated alleged threats made against an individual who was with the victim around the time of the shooting?

3. Did the trial court commit plain error in permitting a police officer to testify, as a lay witness, that Darien's cell phone had, at the time of the shooting, connected to a cell tower that was "in close relationship to the crime scene?"

4. Was Darien denied his right to effective assistance of counsel when trial counsel failed to object to the officer's testimony regarding the connection between Darien's cell phone and a cell tower located near the scene of the crime?

For reasons to follow, we hold that the trial court did not err in limiting Darien's testimony or in limiting his cross-examination of the police witness. As to the admission of the cell tower testimony, we decline Darien's request that we review that issue for plain error or ineffective assistance of counsel. Accordingly, we affirm the judgments of the circuit court.

## BACKGROUND

At approximately 10:30 p.m. on December 3, 2020, Tyrelle Wyche was shot and killed outside the home of a friend. Appellant was later arrested and charged as the shooter.

At trial, the victim's girlfriend, Shantel Hickson, testified that, on the day of the shooting, there had been an altercation involving the victim and Appellant. According to Shantel,[1] at approximately 8:00 p.m. that evening, her sister, Bria Hickson, who was living with Appellant at the time, wanted to retrieve a housekey from Darien, and Shantel and the victim agreed to accompany her. The three eventually met up with Darien, who was sitting in a parked vehicle. An argument ensued, and, during the argument, the victim reached into the vehicle and took the housekey from Darien. Shantel and the victim then left the scene. Sometime later, Shantel and the victim were driving to the casino when Shantel received a call from Bria, who asked to speak with the victim. After a brief conversation, the victim, who was driving, changed course and drove to Bria's home. According to Shantel, the victim drove to Bria's house so that the victim and Darien could "talk" because Darien "felt disrespected." Upon arriving at Bria's home, the victim exited his vehicle, walked up to Bria's house, and engaged in a conversation with Bria. The victim then told Shantel to "go in the house" because Appellant "wanted to talk." Shantel then exited the vehicle and walked into Bria's house. As soon as she entered the house, Shantel heard three gunshots. Bria then dragged Shantel further inside the house and called 911.

[1] Shantel Hickson's sister, Bria Hickson, also testified. Because they share the same last name, they will be referred to by their first names.

On cross-examination, Shantel testified that, when Bria called 911, she told the operator that there was a "black vehicle" parked in front of the home. Shantel testified that she believed that the black vehicle was "possibly connected" to the shooting. Shantel also testified that, following the shooting, she began to receive "threats" from people who may have been family or friends of the victim. Shantel believed that those individuals had made those threats because they thought that Shantel was somehow involved in the shooting.

Bria Hickson testified that, at the time of the shooting, she was living with Appellant at 165 Pittston Circle in Owings Mills. According to Bria, on the day of the shooting, she learned that Darien was in contact with a woman, later identified as Teardra Shannon. Bria became upset and decided to confront Darien and demand that he return the key to the home they shared. Before confronting Darien, Bria told Shantel about her plans, and Shantel ultimately enlisted the victim to accompany her and Bria to where Bria intended to confront Darien. Sometime that evening, Bria, Shantel, and the victim went to Shannon's home, where they found Darien and Shannon sitting in Darien's gold Lexus, which was parked outside. During the ensuing confrontation, the victim took a key from Darien, gave it to Bria, and left the scene with Shantel. Bria left shortly thereafter and went back to her home at 165 Pittston Circle. Later that evening, Bria received a call from Darien, who stated that he wanted to come by the house to get his things. Shortly thereafter, Darien arrived at the home and, upon entering the home, informed Bria that he wanted to "talk" to the victim because the victim had "disrespected him." Bria then called Shantel, who was in the car with the victim, and Darien and the victim spoke. During that

conversation, the victim agreed to come to Bria's house to talk with Darien. Darien then left the house, and, sometime later, the victim knocked on the door. Upon answering the door, Bria informed the victim that Darien had left, and the victim walked away. Not long after, Shantel came to the door, at which point Bria heard a gunshot. Bria then looked outside and saw the victim standing near the driver's side of Darien's gold Lexus. Bria then heard two more shots, saw the victim fall to the ground, and observed Darien's gold Lexus drive away.

In addition to the above testimony, the State presented evidence of Darien's post-crime conduct, which the State argued was indicative of a consciousness of guilt. That evidence included the testimony of Monique Barnwell, a friend of Darien, who testified that, the day after the shooting, Darien gave her his cell phone to keep. Barnwell also testified that, a few days later, she and Darien went to a local junk yard, where Darien sold his gold Lexus for a few hundred dollars. The State also played for the jury a recording of a phone call that Darien made to Teardra Shannon from jail prior to trial. During that conversation, Darien told Shannon to contact Barnwell and make sure they "are both on the same page."

Darien testified in his own defense. In so doing, Darien admitted that he was with Shannon on the day of the shooting and that Bria, Shantel, and the victim had confronted him and demanded that he return his housekey. Darien stated that he later went to 165 Pittston Circle and that, during that visit, Bria told him that he needed to apologize to Shantel and the victim. According to Darien, Bria then called Shantel and arranged for her

and the victim to come by the house. Darien testified that he left the house before Shantel and the victim arrived. Darien testified that he then got in his car and drove around the area for a brief period before exiting the development in which 165 Pittston Circle was located. Darien denied shooting the victim.

The jury ultimately convicted Darien of second-degree murder and use of a firearm in the commission of a crime of violence. This timely appeal followed.

**DISCUSSION**

**I.**

Darien's first claim of error concerns the trial court's decision to sustain an objection lodged by the State during Darien's direct testimony. That objection came during an exchange in which defense counsel asked Darien about the circumstances of his pretrial detention:

> [DEFENSE]: And when you get to Towson Detention Center, what happens when you get there?
>
> [WITNESS]: Just talking to somebody that knows Tyrelle and I started, you know, getting into altercations. People trying to extort me. A lot was going on. I was getting into several fights with multiple people, not just one person.
>
> [DEFENSE]: Were these fights you believe connected to this belief that you had something to do with Tyrelle's death?
>
> [WITNESS]: Yes.
>
> * * *
>
> [DEFENSE]: How did that make you feel?

[WITNESS]: Scared for my life, you know. I mean, I'm – I have never been locked up before, so this is all new to me. Back against a wall. I didn't know what to do.

[DEFENSE]: And in response to that, did you take any – make any request of the Detention Center?

[WITNESS]: Yes. I asked to be beyond PC, which is protective custody.

* * *

[DEFENSE]: And how did you feel being on protective custody?

[STATE]: Objection. Your Honor, may we approach?

THE COURT: You may.

(Whereupon, counsel approached the bench.)

THE COURT: Yes.

[STATE]: I don't think any information about what the Defendant's pretrial status or how it makes him feel are relevant to the issues currently before the Court.

[DEFENSE]: The State played the jail call. The statement that was made at the time that jail call was made is important to this jury.

THE COURT: In protective custody? If he was in protective custody, I don't know whether it is related to this case or – he has been in jail since what, December?

[DEFENSE]: Yes.

THE COURT: Of 2020. I don't know whether he has had altercations with other inmates, whether it is related to this case or not. I don't see the relevance. I certainly don't see it is relevant as it relates to the jail call that was played earlier.

> [DEFENSE]: I think it is relevant, Judge, to the state of mind. (Inaudible) I'm doing everything I can to make sure – (Inaudible) that is what he said on the jail call.
>
> THE COURT: [Defense counsel], I don't think there is any connection there. You can make your argument in closing but not. So I'm going to sustain the objection.
>
> [DEFENSE]: Note my objection.
>
> THE COURT: All right.

***Parties' Contentions***

Appellant argues that the trial court erred in sustaining the State's objection. He contends that the objected-to testimony was relevant to refute the State's position that the jail call he made to Teardra Shannon was an effort to tamper with a witness and evinced consciousness of guilt. He argues that his testimony, which concerned "the conditions and his safety in jail," should have been allowed because it "suggested that the call was not an inference of guilt, but a result of him being scared for his life."

The State contends that Darien's argument is unpreserved because he did not make a sufficient proffer at trial as to the content and relevancy of the disputed testimony. The State argues further that, even if Darien's claim was preserved, the trial court did not abuse its discretion in excluding the testimony. Finally, the State contends that any error the court may have made was harmless because the disputed testimony was cumulative of other evidence properly admitted.

***Analysis***

We agree with the State that Darien's claim is unpreserved due to his failure to make a sufficient proffer at trial. Maryland Rule 5-103 provides, in pertinent part, that a party may not predicate error upon a ruling that excludes evidence unless the party is prejudiced by the ruling and "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." Md. Rule 5-103(a)(2). "'Ordinarily, a formal proffer of the contents and relevancy of the excluded evidence must be made in order to preserve for review the propriety of the trial court's decision to exclude the subject evidence.'" *Ndunguru v. State*, 233 Md. App. 630, 637 (2017) (quoting *Merzbacher v. State*, 346 Md. 391, 416 (1997)).

Here, after Darien testified that he had been placed in protective custody, defense counsel asked Darien how he "felt" about being in protective custody. After the State objected on relevancy grounds, defense counsel noted that the State had "played the jail call" that included a "statement" that was "important to this jury." When the court asked defense counsel how Darien being in protective custody was relevant to the jail call, defense counsel merely stated that the testimony went to "the state of mind." At no point did Darien argue, as he does now, that the testimony concerned "the conditions and his safety in jail" or that the testimony was being offered to refute the State's arguments regarding the jail call or to suggest that Darien made the call because he was "scared for his life." Darien's failure to make that proffer and present those arguments to the trial court precludes appellate review.

Assuming, *arguendo*, that the issue was preserved, we hold that the trial court did not err in finding that Darien's testimony regarding his "feelings" about being in protective custody was irrelevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probably than it would be without the evidence." Md. Rule 5-401. "'Evidence which is thus not probative of the proposition at which it is directed is deemed irrelevant.'" *Urbanski v. State*, 256 Md. App. 414, 432 (2022) (quoting *Sifrit v. State*, 383 Md. 116, 129 (2004)). Relevancy is "a relational concept," and "an item of evidence can be relevant only when, through proper analysis and reasoning, it is related logically to a matter at issue in the case[.]" *Snyder v. State*, 361 Md. 580, 591 (2000). Whether evidence is legally relevant is a question we review *de novo*. *Calloway v. State*, 258 Md. App. 198, 216 (2023).

As noted, Darien contends that the objected-to testimony, which concerned his safety in jail, was relevant in establishing that his jail call to Shannon was made because he was scared for his life. In making that argument, however, Darien fails to establish any connection between his feelings about being in protective custody and the phone call he made to Shannon. At no point during the call does Darien mention protective custody, disclose that he had concerns about his safety, or otherwise indicate that he was "scared for his life." As such, the trial court did not err in finding that the testimony was irrelevant.

**II.**

Darien's next claim of error concerns an issue that arose during his cross-examination of Baltimore County Police Detective Lindsay Buckingham, who testified on

direct that she had been part of the investigation into the shooting death of Tyrelle Wyche. On cross-examination, defense counsel asked Detective Buckingham about whether she had investigated "threats" that had allegedly been made against Shantel Hickson:

> [DEFENSE]: So you listened to the 911 call as part of the investigation of this case, correct?
>
> [WITNESS]: Correct.
>
> [DEFENSE]: And you listened to what was said in that 911 call by people on that 911 call, correct?
>
> [WITNESS]: Yes.
>
> [DEFENSE]: And was there any follow-up to any threats being made to Shantel Hickson?
>
> [STATE]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENSE]: Did you investigate any threats being made to Shantel Hickson?
>
> [STATE]: Objection.
>
> THE COURT: Sustained.

***Parties' Contentions***

Darien contends that the trial court erred in sustaining the State's objections. Darien argues that the court's decision prevented him "from propounding evidence regarding another viable suspect and showing that the police failed to conduct a full and proper investigation." Darien insists that the "threats" alluded to during his cross-examination of Detective Buckingham were related to the "black car" that had purportedly been seen

driving away from the scene of the shooting. Darien contends that the presence of the "black car" supported the defense's theory that someone else had committed the crime. Darien argues that the court's refusal to permit him to question Detective Buckingham about the "threats" infringed upon his constitutional right to confront witnesses and present a defense.

The State contends that Darien's argument is unpreserved because he did not make a sufficient proffer at trial as to the content and relevancy of the disputed testimony. The State contends further that, regardless, the court properly excluded the testimony.

***Analysis***

We agree with the State that Darien's argument is unpreserved. When the trial court sustained the State's objections to defense counsel's questions regarding certain "threats," Darien provided no explanation as to what the threats were or how they were relevant to any contested issue in the case. As such, Darien's appellate claim is not properly before this Court. Md. Rule 5-103(a)(2).

Even if preserved, Darien's claim is without merit. "A criminal defendant's right to cross-examine a prosecution witness is guaranteed by the Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights." *Holmes v. State*, 236 Md. App. 636, 671 (2018). "To comply with the Confrontation Clause, a trial court must allow a defendant a 'threshold level of inquiry' that 'exposes to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the

reliability of the witnesses.'" *Peterson v. State*, 444 Md. 105, 122 (2015) (quoting *Martinez v. State*, 416 Md. 418, 428 (2010)). "An undue restriction of the fundamental right of cross-examination may violate a defendant's right to confrontation." *Pantazes v. State*, 376 Md. 661, 681 (2003). "Nevertheless, a defendant's constitutional right to cross-examine witnesses is not boundless," and "[t]he Confrontation Clause does not prevent a trial judge from imposing limits on cross-examination." *Id.* at 680. "[T]rial judges are entitled to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues or interrogation that is only marginally relevant." *Parker v. State*, 185 Md. App. 399, 426 (2009) (cleaned up); *See also* Md. Rule 5-611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.").

In *Manchame-Guerra v. State*, 457 Md. 300 (2018), the Supreme Court of Maryland outlined the standard by which an appellate court should assess the propriety of a trial judge's restriction on a defendant's cross-examination of a witness when the defendant claims that the restriction violated the Confrontation Clause:

> In controlling the course of examination of a witness, a trial court may make a variety of judgment calls under Maryland Rule 5-611 as to whether particular questions are repetitive, probative, harassing, confusing, or the like. The trial court may also restrict cross-examination based on its understanding of the legal rules that may limit particular questions or areas of inquiry. Given that the trial court has its finger on the pulse of the trial

> while an appellate court does not, decisions of the first type should be reviewed for abuse of discretion. Decisions based on a legal determination should be reviewed under a less deferential standard. Finally, when an appellant alleges a violation of the Confrontation Clause, an appellate court must consider whether the cumulative result of those decisions, some of which are judgment calls and some of which are legal decisions, denied the appellant the opportunity to reach the 'threshold level of inquiry' required by the Confrontation Clause.

*Id.* at 311 (quoting *Peterson*, 444 Md. at 124)).

Against that backdrop, we hold the trial court did not err in limiting Darien's cross-examination of Detective Buckingham. Although Darien claims that Detective Buckingham's testimony about the "threats" that were supposedly alluded to during the 911 call would have supported the defense's theory of the case regarding the alternate suspect in the "black car," Darien provides no explanation as to the nature of those threats, when they were made, or how they may have been related to the shooting. Moreover, the record shows that the court did permit Darien to question Detective Buckingham about her investigation into other alleged threats, namely, those allegedly made by the victim's friends and family against Bria Hickson. The record also shows that the court permitted Darien to question Detective Buckingham about her investigation into the "black car" and the court did not limit Darien's ability to argue his theory about an alternate suspect to the jury. We hold the court did not deny Darien the "threshold level of inquiry" required by the Confrontation Clause or otherwise infringed upon his right to present a defense.

**III. and IV.**

Darien's final two claims of error concern the following testimony, which occurred during the State's direct examination of Detective Buckingham:

[STATE]: Now, as a homicide investigator, Detective Buckingham, do you often formulate time lines of events?

[WITNESS]: Yes.

[STATE]: Okay. And through all of your investigation in this case, were you able to come up with a time line?

[WITNESS]: Yes, ma'am.

[STATE]: And can you tell approximately through your investigation when the events of December 3rd, 2020, involving Bria Hickson and Shantel Hickson and Tyrelle Wyche and Lydell Darient started?

[WITNESS]: Yes, ma'am. I believe it was in the late afternoon hours is when the initial confrontation happened between everyone involved in this case in reference to retrieving Bria Hickson's residence key from the Defendant. Later on in the night, it was in the 10 o'clock hour when Bria Hickson was back at her residence at 165 Pittston Circle when she received what I recall was a FaceTime phone call from the Defendant asking if he could come over to her residence. She advised that he could in fact come over to the residence. Once the Defendant was at the residence, it was learned that the Defendant had inquired to speaking to the victim and having the victim respond to the location at 165 Pittston Circle. We then see through the phone records that the Defendant had contact with the victim at approximately 9:22 [sic] and 10:23 p.m. on December 3rd. The 911 call came in at 10:28 p.m. and during the phone call – let me back up. The phone call at 10:22 and 10:23 p.m. we were able to locate that the Defendant's cellular phone handset was connecting to a tower in close relationship to the crime scene. The next movement on the Defendant's cell phone comes at the time the phone call is initiated with Teardra Shannon at 10:37 p.m. At that time the Defendant's handset is connecting to a tower in close location to Owings Mills Boulevard and Associated Way.

***Parties' contentions***

Darien argues that the trial court erred in permitting Detective Buckingham to testify that Darien's phone had connected to certain cell towers on the night of the shooting. Darien contends that the admission of such evidence requires the testimony of an expert

witness, which Detective Buckingham was not. Recognizing that he failed to lodge an objection to the dispute testimony, Darien asks that we review the issue for plain error. Darien also asks that we review his claim for ineffective assistance of counsel, given defense counsel's failure to object.

The State contends that this Court should decline Darien's request for plain error review because Detective Buckingham's testimony was not misleading and was relatively inconsequential. The State contends that we should also decline to review Darien's ineffective assistance claim, as such claims are best left to post-conviction review. The State contends further that, if reviewed, Darien's ineffective assistance claim is without merit because he failed to establish deficient performance and prejudice.

***Analysis***

Generally, "[w]e reserve our exercise of plain error review for instances when the 'unobjected to error [is] compelling, extraordinary, exceptional, or fundamental to assure the defendant a fair trial.'" *Harris v. State*, 251 Md. App. 612, 660 (2021) (quoting *State v. Brady*, 393 Md. 502, 507 (2006)), *aff'd* 479 Md. 84. On the other hand, plain error review is inappropriate "as a matter of course" or when the error is "purely technical, the product of conscious design or trial tactics or the result of bald inattention." *Brady*, 393 Md. at 507 (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)). Moreover, plain error review "is a discretion that appellate court's should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party

desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court[.]" *Chaney v. State*, 397 Md. 460, 468 (2007).

In *Beckwitt v. State*, 477 Md. 398 (2022), the Supreme Court of Maryland set forth the following four-prong test regarding plain error review:

> Before an appellate court can exercise its discretion to find plain error, the following four conditions must be satisfied: 1) there must be an error or defect – some sort of deviation from a legal rule – that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant; 2) the legal error must be clear or obvious, rather than subject to reasonable dispute; 3) the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [] proceedings; and 4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.

*Id.* at 464 (quoting *Newton v. State*, 455 Md. 341, 364 (2017)).

We see no reason to exercise plain error review here. To be sure, Detective Buckingham did testify as a lay witness that Darien's cell phone had connected to two different cell towers on the night of the shooting, and our courts have previously held that certain "cell phone cite location evidence" requires expert testimony. *See e.g. State v. Payne*, 440 Md. 680 (2014); *Wilder v. State*, 191 Md. App. 319 (2010). Nevertheless, we are not convinced that the admission of Detective Buckingham's testimony constituted plain error. First, the testimony was offered as part of a general synopsis of the police's investigation into the shooting, and the State did not ask Detective Buckingham any follow-up questions about the location of Darien's cell phone. Thus, it is entirely possible that defense counsel chose not to object so as not to draw the jury's attention to the matter. In any event, Detective Buckingham's testimony merely established that Darien's cell phone

was in the area prior to the shooting and that his cell phone had left the area after the shooting. But those facts were hardly disputed, as Darien himself testified that he was at Bria Hickson's home prior to the shooting and that he got in his car and drove away from the area sometime later. Given those circumstances, any error the court may have made in permitting Detective Buckingham's testimony could hardly be considered compelling, extraordinary, exceptional, or fundamental.

For the same reasons, we decline to review Darien's ineffective assistance claim. "Generally, absent any 'objective, uncontroverted, or conceded error,' the issue of defense counsel's effectiveness is raised most appropriately in a post-conviction proceeding." *Steward v. State*, 218 Md. App. 550, 570 (2014) (citing *Haile v. State*, 431 Md. 448, 473 (2013)). Moreover, "[a]n appellant asserting ineffective assistance of counsel must show (1) 'that counsel's performance was deficient,' and, (2) 'that the deficient performance prejudiced the defense.'" *Steward*, 218 Md. App. at 570 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

Based on the record before us, we are not persuaded that defense counsel's performance was deficient or that Darien was prejudiced. As noted, a reasonable argument could be made that defense counsel chose not to object so as not to draw the jury's attention to the testimony. *Newton v. State*, 455 Md. 341, 355 (2017) (To establish deficient performance, "the defendant must show that his counsel's representation fell below an objective standard of reasonableness, and that such action was not pursued as a form of trial strategy.") (citations and quotations omitted). Moreover, to the extent that the

testimony was objectionable, it merely established Darien's presence at the scene around the time of the shooting, and that fact was, for the most part, not seriously disputed. *See In re Parris W.*, 363 Md. 717, 727-28 (2001) (To establish prejudice, a defendant must show "that there is a substantial possibility that, but for counsel's error, the result of his proceeding would have been different.").

**JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.**