Circuit Court for Frederick County
Case No. C-10-CR-20-000499

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 84

September Term, 2022

JORDAN BURRIS HOOKS

v.

STATE OF MARYLAND

Graeff,
Tang,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: July 21, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

In November 2021, a jury in the Circuit Court for Frederick County convicted Jordan Burris Hooks, appellant, of involuntary manslaughter, second-degree assault, conspiracy to commit second-degree assault, and accessory after the fact to the first-degree murder of Jaemari "Mari" Anderson, the victim, who was shot and killed in September 2020. The court sentenced appellant to ten years, all but eight and a half years suspended, on the conviction for involuntary manslaughter, ten years, consecutive, all suspended, on the conviction for conspiracy to commit second-degree assault, and ten years, consecutive, all suspended, on the conviction for accessory after the fact to first-degree murder.[1]

On appeal, appellant presents the following questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the circuit court err or abuse its discretion in instructing the jury that a homicide in the course of a second-degree assault constitutes involuntary manslaughter?

2. Did the circuit court err or abuse its discretion in admitting evidence that appellant was known to the police prior to the shooting?

3. Was the evidence legally sufficient to support appellant's convictions for involuntary manslaughter and being an accessory after the fact to murder?

4. Did the circuit court err or abuse its discretion in instructing the jury that the shooter, Daniel "K.D." Flythe, would invoke his Fifth Amendment privilege against self-incrimination and answer certain non-incriminating threshold questions, as opposed to allowing Mr. Flythe to testify and invoke his Fifth Amendment privilege in the jury's presence?

[1] The court merged the conviction for second-degree assault with the conviction for involuntary manslaughter for purposes of sentencing.

5. Did the circuit court err or abuse its discretion in excluding the testimony of a defense witness on discovery grounds?

6. Did the circuit court commit plain error in admitting evidence of appellant's pre-arrest silence?

7. Did the circuit court err or abuse its discretion in instructing the jury on flight?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On September 21, 2020, appellant was indicted in connection with the shooting of Mr. Anderson and charged with first-degree murder (count one), first-degree assault (count two), use of a firearm in the commission of a violent crime (count three), and unlawfully carrying a handgun on his person (count four). Approximately ten months later, on July 23, 2021, appellant was charged by supplemental indictment with conspiracy to commit first-degree murder (count five), conspiracy to commit first-degree assault (count six), involuntary manslaughter (count seven), second-degree assault (count eight), conspiracy to commit second-degree assault (count nine), conspiracy to use a firearm in the commission of a violent crime (count ten), and accessory after the fact to first-degree murder (count eleven).

I.

Trial

On October 25, 2021, appellant's 18-day trial began. In opening statement, the prosecutor stated that Mr. Anderson was shot in the center of his forehead with a .38 caliber bullet. The prosecutor stated that, "although there was only one single bullet, there were

several people behind that bullet, including [appellant]." In this regard, appellant "put the wheels in motion that ultimately led to [Mr. Anderson's] untimely death."

The prosecutor stated that a conflict between appellant and Mr. Anderson led to Mr. Anderson's death. Appellant "did not resolve his conflict privately." Instead, he "invited the others to his house, and to his personal developing conflict with" Mr. Anderson. The prosecutor asserted that appellant, together with Mr. Flythe, Brian "Lurk" Henry, and Tynoura Coleman, "in a coordinated effort, had common objectives that night, one of which, first and foremost, was to settle that conflict between [appellant] and Mr. Anderson."

The prosecutor stated that Mr. Flythe "was the one who probably pulled that trigger," but "[w]hether or not that gun was actually in [appellant's] hands on the night of the murder, [appellant] effectively brought that gun to his own conflict." Appellant "knew that gun was likely to be with them," and he bore "responsibility for that single fatal bullet, even though just one of them pulled that trigger." The prosecutor stated: "This case ultimately is about responsibility for a deadly act and a deadly situation that [appellant] caused. [Appellant] put that series of events into motion. And he didn't want to get caught."

Defense counsel asserted in opening statement that, by December 15, 2020, when Mr. Henry was arrested, the police knew that Mr. Flythe—not appellant—shot Mr. Anderson. Counsel stated: "My client is no saint. But he is not guilty of the violation of any crime."

A.

Testimony of Jessica Neder

Jessica Neder, a scientist at the National Institutes of Health, testified that, in September 2020, she lived in the Waterside community in Frederick, Maryland. On September 6, 2020, at approximately 8:00 p.m., she and her fiancé were walking their two dogs on the walking path behind the neighborhood. They were using their flashlights because it was "[p]itch-black." Ms. Neder saw a man on the grass lying on his back, and she "noticed blood on the grass."

Ms. Neder told her fiancé to call 911. She approached the man on the ground and "bent down to check to see if the gentleman was okay." He was unresponsive and "moaning and groaning in pain." There was blood "underneath his head and off to left of the body." "There was a lot of blood in the grass next to him, and he was pulling the grass out, as in pain." She sat next to the man and held his hand until the police and emergency medical personnel arrived at the scene.

B.

Testimony of Dr. Theodore King

Dr. Theodore King, an Assistant Medical Examiner with the Office of the Chief Medical Examiner, testified as an expert in forensic pathology. He performed an autopsy of Mr. Anderson on September 10, 2020. Dr. King testified that there was an entrance gunshot wound between Mr. Anderson's eyebrows. Around the edge of the entrance wound was gunpowder stippling, which Dr. King testified was "one of the evidences of

close range firing." He testified in this regard that "the weapon was fired close enough to the target to allow those residues to land on the target." He opined that the manner of Mr. Anderson's death was homicide.

C.

Testimony of Kayla Scott

Kayla Scott testified that appellant was her boyfriend in September 2020. Appellant lived in the basement of his mother's house, located in the Waterside community, and Ms. Scott stayed with appellant frequently. People would come and go from the house using the back door to basement, which opened into a living room. Appellant's bedroom, a laundry room, and a full bathroom were in the back of the basement.

Approximately two days before the shooting, on September 4, 2020, Ms. Scott first met Mr. Flythe, Mr. Henry, and Ms. Coleman. They came over to appellant's house that evening, on appellant's invitation, and were "hanging out" with appellant, Ms. Scott, and Mr. Anderson. They were smoking marijuana, drinking, and using "Molly" until 2:00 or 3:00 a.m. During the party, Ms. Scott was "getting a weird vibe from them." She felt that Mr. Flythe, Mr. Henry, and Ms. Coleman were "using" appellant. A few hours later, she "texted [appellant] trying to ask if [he] want[ed] [her] to fake being sick so that they would leave, and that didn't happen." Appellant did not respond to her text. She did not see any guns at appellant's house that evening.

The prosecutor played a video to the jury that depicted Ms. Scott, appellant, and Mr. Anderson, among other individuals, mere days before the shooting. Ms. Scott was lying

in bed next to appellant, and Mr. Anderson was "either dropping off or picking up money for puff bars," a type of electronic cigarette.[2] Appellant and Mr. Anderson would sell the puff bars and share the proceeds.

On the evening of the shooting, September 6, 2020, there was a gathering at appellant's residence, and Ms. Scott, appellant, Mr. Anderson, Mr. Flythe, Mr. Henry, and Ms. Coleman were there. They were "hanging out," listening to music, dancing, and drinking in the basement.

An argument ensued when Mr. Anderson "said that he was [the] realist [n*****] in the room," and "everything kind of just turned." Ms. Scott thought that the statement was a joke, but Mr. Henry took it pretty seriously and did not like it. Mr. Henry "kept saying that they needed to teach [Mr. Anderson] a lesson, meaning fighting him because he was being disrespectful by saying that he was the realist [n*****] in the room."

Mr. Anderson indicated that he was willing to go outside and fight, but he wanted to change his clothes first. When Mr. Anderson walked back to appellant's bedroom to change, Ms. Scott "followed him and told him that this was stupid, and everybody was just high and everybody was acting dumb."

Mr. Anderson changed into black clothing and went outside. Ms. Scott went outside after the others, and she saw appellant, Mr. Anderson, Mr. Flythe, and Mr. Henry near the walking path behind the Waterside community. She saw Ms. Coleman standing "more

[2] *See* Jennifer Maloney, *Puff Bar Stays Top Teen Vaping Choice, as Juul Slips*, WALL ST. J. (Oct. 6, 2022, 9:16 PM), https://www.wsj.com/articles/puff-bar-holds-top-spot-among-vaping-teens-as-juul-slips-11665073650.

towards the parking lot" up the hill and "decided to go towards her" and "stay with the only girl that was there."

She observed appellant, Mr. Flythe, and Mr. Henry in "a semi-circle just standing in a line," and Mr. Anderson "was standing in front of them." Although there was supposed to be a fight, she did not see anyone with their fists up. Instead, they "were down there talking." And then, "a gun went off."

Ms. Scott did not know who had a gun or who fired the shot. After the gun went off, "[t]hey all ran." Mr. Flythe, Mr. Henry, and Ms. Coleman all ran to the front of appellant's house, got into a car, and immediately left the scene. Mr. Flythe was driving the car. When questioned about what Mr. Anderson did after the gun went off, Ms. Scott testified: "He dropped."

Appellant also ran to the front of his house with the others, but he did not get into the car with them. Ms. Scott heard appellant "screaming [her] name." When she found appellant near the front of his house, both of them were crying and "freaked out." They went back inside and sat in appellant's basement. Ms. Scott fell asleep in appellant's bedroom, but appellant stayed up in the living room. He told her that "everything was going to be okay."

The next day, September 7, 2020, Ms. Scott spoke with the police outside appellant's house. On September 11, 2020, she gave a statement regarding the shooting to Sergeant Curtis Pierce, formerly of the Frederick County Sheriff's Office.[3]

D.

Testimony of Sergeant Curtis Pierce

Sergeant Pierce testified that, on September 6, 2020, he received a call that an assault had occurred. The victim, who had been identified as Mr. Anderson, was found lying on a walking path in the rear of Waterview Court. He had apparently "suffered from some sort of head trauma, but the details of that were . . . vague."

Sergeant Pierce arrived at the scene shortly after midnight on September 7, 2020. There was blood along the walking path and the general area." The police found a shell casing in the grass near Mr. Anderson's body.

Mr. Anderson "did not have a cell phone or many personal belongings with him," so the police requested an "exigent ping" on his cell phone. The police were able to pinpoint the cell phone being located at 8035 Waterview Court. The police prepared a search warrant for the property and executed it on the afternoon of on September 7, 2020.

When Sergeant Pierce entered the residence at 8035 Waterview Court to execute the search warrant, he encountered appellant, his mother, and Ms. Scott in the living room

[3] Sergeant Curtis Pierce left the Frederick County's Sheriff's Office on December 31, 2020. In this opinion, we shall refer to him as "Sergeant Pierce."

on the first floor. As the police searched the basement of the residence, Sergeant Pierce and Detective Jason Brady interviewed appellant and Ms. Scott, in turn.[4]

Sergeant Pierce and Detective Brady interviewed appellant in Detective Brady's police cruiser. Detective Brady read appellant his *Miranda* rights.[5]

Sergeant Pierce asked appellant "what his relationship was like with Mr. Anderson." Appellant stated that Mr. Anderson "was like a brother to him." When asked why, "if he was so close to Mr. Anderson," he did not come outside when he heard that Mr. Anderson was the victim of an assault, appellant stated that "he was busy taking phone calls and was having sex with his girl for most of the night."

Sergeant Pierce asked appellant who else was at the house that night. Appellant stated: "[N]o one." Sergeant Pierce told him that, as he approached appellant's residence during the initial execution of the search warrant, at approximately 12:45 p.m., he saw someone exit the residence. Appellant "explained that that was . . . his man Mike." When Sergeant Pierce asked appellant for the last name of "Mike," appellant stated, with no objection, that "he wasn't sure of his last name and that he was there tripping over $10 for some cocaine."

Sergeant Pierce told appellant that he believed appellant "had information about what happened," and he "pleaded for [appellant] to share what information he had."

[4] At the time of the events, Detective Brady was a detective assigned to the Criminal Investigation Section of the Frederick County Sheriff's Office. He was subsequently promoted to corporal at the time of trial.

[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Appellant "paused as if he wanted to answer," but "then he stopped and said I don't know." The interview with appellant lasted for approximately one hour.

Sergeant Pierce and Detective Brady next interviewed Ms. Scott. Sergeant Pierce asked her "what were they doing that evening" and what she knew about what had happened with Mr. Anderson. Ms. Scott was "reluctant to answer many questions at that time and said this isn't the right place and the right time to speak." Sergeant Pierce appealed to Ms. Scott for information, stating that he "believed that she was caught up in the wrong situation in the wrong place at the wrong time." She stated that "that's usually what happens to her."

As indicated, *supra*, Sergeant Pierce interviewed Ms. Scott again on September 11, 2020. During the time between Ms. Scott's initial interview on September 7, 2020, and her second interview on September 11, 2020, the police acquired both appellant's cell phone and Mr. Anderson's cell phone, which the police had found in appellant's basement while executing the search warrant. The police extracted data from the cell phones and identified Mr. Flythe, Mr. Henry, and Ms. Coleman as possible suspects. The police "made contact with these individuals and conducted interviews." Mr. Flythe, Mr. Henry, and Ms. Coleman were in Montgomery County, Maryland, "so [police in Montgomery County] assisted [Frederick County police] to locate the apartment complexes."

On September 11, 2020, the police interviewed Ms. Coleman, who helped identify the individuals who were present at appellant's residence on the night of the shooting.

Sergeant Pierce compared Ms. Coleman's statement with Ms. Scott's statement "as to the basic events of who was present and what happened," and the statements were similar.

E.

Testimony of Detective Jason Brady

Detective Brady also testified to his interview of appellant. Appellant stated that he had known Mr. Anderson for several years, and he and Mr. Anderson "were pretty close." Appellant stated that he had last seen Mr. Anderson on September 6, 2020, and he believed that Mr. Anderson left to see his girlfriend, Grace Delphin. Appellant recalled that Mr. Anderson left during the daytime.

Detective Brady asked whether any of Mr. Anderson's possessions were in appellant's residence. Appellant stated that there was a red and black backpack in his bedroom, and that there might be a black fanny pack somewhere in the residence. Mr. Anderson kept his cell phone and charger in the fanny pack. When Detective Brady asked appellant why Mr. Anderson had left without his bicycle and personal belongings, appellant stated that "he didn't know."

Detective Brady asked appellant if he knew anything about what had happened to Mr. Anderson. Appellant stated that "he wasn't aware of anything until the helicopter and the police ended up showing up in the area." Appellant did not call 911 or go outside and check on Mr. Anderson; he told Detective Brady that "he was on his phone, and he was busy all night."

During the interview, appellant "identified other subjects that may have had some knowledge" regarding Mr. Anderson's whereabouts and the circumstances surrounding the shooting, including Ms. Delphin, Mr. Anderson's nephew, and two other individuals, Leo McDonald and Laquan McDonald.

Appellant returned to his residence at the conclusion of the interview. The interview lasted approximately one hour. Detective Brady and Sergeant Pierce also interviewed Ms. Scott on September 7, 2020, but Detective Brady testified that "[n]o additional information was provided at that time." Ms. Scott returned to appellant's residence after the interview.

On September 11, 2020, the police asked appellant to come to the Frederick County Law Enforcement Center to retrieve his cell phone. When he arrived, the police arrested him based on, among other things, the information obtained from interviews of Ms. Coleman and Ms. Scott.

On December 15, 2020, the police arrested Mr. Henry. Mr. Henry then agreed to speak with the police. During the interview, Mr. Henry advised that he could direct the police to the location where the murder weapon "may have been discarded." Detective Brady and other officers drove with Mr. Henry to the area where he indicated that the police would find the weapon. The police located the gun "on the ramp from the Ballenger Creek Pike and Crestwood area to the I-270 corridor."

F.

Testimony of Brian Henry

Mr. Henry testified that, in December 2020, approximately three months after the shooting, the police came to his residence in Clarksburg, Maryland, and executed a search warrant. He gave his cell phone to the police and consented to a search of its contents and data, stating that he "didn't have anything to hide." He was arrested on December 15, 2020.

Mr. Henry testified that he had been charged with multiple crimes in connection with the shooting of Mr. Anderson. On October 14, 2021, Mr. Henry pleaded guilty to the charge of accessory after the fact to first-degree murder.[6] When questioned about his motivation for testifying at appellant's trial, Mr. Henry stated: "I'm just here to tell [the jury] what happened . . . on September 6." He also stated that, as part of his plea agreement to the charge of accessory after the fact to first-degree murder, he "had to come and testify and tell the truth."

Mr. Henry had known appellant and Mr. Flythe for a couple of years before the shooting. Mr. Henry first met Mr. Anderson on Snapchat sometime in 2019. He met him in person for the first time at the beginning of 2020. As of September 6, 2020, Mr. Henry and Ms. Coleman were in a romantic relationship. They were not together, however, at the time of trial.

[6] Mr. Henry testified that he had prior convictions for conspiracy to commit robbery, theft, and disorderly conduct. At the time of trial, he was on probation for the conviction of conspiracy to commit robbery.

On September 6, 2020, Mr. Henry went to appellant's house with Ms. Coleman and Mr. Flythe to "chill" and drink. They arrived between 1:00 and 2:00 p.m., and together with appellant, Mr. Anderson, and Ms. Scott, they were taking "Molly," smoking marijuana, and drinking.

Mr. Henry testified that he was present when Mr. Anderson was "shot. Pointblank." He stated that the shooting resulted from an argument after Mr. Anderson said that "he was better than a couple [of] people that [they] associated with." Mr. Henry testified that he did not take offense to what Mr. Anderson had said: "Not to the point where it was that serious."

When asked whether any tension existed prior to the shooting, Mr. Henry responded in the affirmative, stating that "there was tension because [Mr. Anderson] tried to set [appellant] up." Mr. Anderson "tried to go with somebody else" and "go against [appellant] like set him up."

After Mr. Anderson stated "that he was just realer than a couple [of] people," Mr. Henry advised Mr. Flythe, who had been sleeping, about what was going on. He told Mr. Flythe "[t]hat [Mr. Anderson] just said [that] he was realer than the four names," i.e., appellant and three others, and "that [appellant] and [Mr. Anderson] agreed to fight."

They went outside because appellant "didn't want to fight in his mom's house. He wanted to respect his mom's house. So [they] would do it outside." They all went outside for appellant and Mr. Anderson to fight.

Mr. Henry knew Mr. Flythe often carried a gun. On at least one occasion prior to the September 6, 2020 shooting, Mr. Flythe showed a gun to Mr. Henry. Mr. Henry stated that he did not know appellant to carry a gun.

As Mr. Henry was walking, Mr. Flythe told him to advise Ms. Coleman to go away from the area. Mr. Flythe told Mr. Henry that "he was about to take it there," which Mr. Henry interpreted to mean that "he's about to turn up," i.e., "implying that he was about to jump in or get involved personally."

Prior to the anticipated fight, Mr. Anderson was lined up facing appellant. Mr. Flythe was behind Mr. Anderson, and Mr. Henry was off to Mr. Anderson's side. Appellant and Mr. Anderson were "squared up," i.e., putting their fists up. They were about ten inches apart. Mr. Anderson then "remembered he had his glasses on. So he started to take his glasses off." Mr. Anderson turned around to Mr. Flythe and asked him to hold his glasses, "and that's when he got shot." Mr. Henry saw the shot; Mr. Flythe was the shooter. After the shot, Mr. Anderson "just dropped." Everyone else "took off running."

Mr. Henry met Mr. Flythe at appellant's house, and he saw Mr. Flythe holding a gun. Mr. Flythe tucked the gun into his waistband, and he, Ms. Coleman, and Mr. Henry left the scene in Mr. Flythe's car.

Mr. Flythe drove Mr. Henry and Ms. Coleman to the home of his acquaintance "Q-Bon," in Frederick. Q-Bon gave Mr. Flythe a shirt. Mr. Flythe then drove Mr. Henry and Ms. Coleman back to Mr. Henry's house in Clarksburg, Maryland. While they were in the

car, Mr. Flythe asked Ms. Coleman to wipe the prints off the gun with the shirt Q-Bon gave Mr. Flythe. After she did that, Mr. Henry threw the gun, which was wrapped in the shirt from Q-Bon, out the window, onto a highway off-ramp in Frederick.[7]

When Mr. Henry, Mr. Flythe, and Ms. Coleman got to Mr. Henry's house, they "all went upstairs and changed. Took off [their] clothes. Changed [their] clothes and put [them] in a black trash bag." Mr. Flythe and Ms. Coleman took the trash bag with them when they left for Ms. Coleman's house, and they "were supposed to burn it." Mr. Henry denied participating in the burning of any clothing.

Once he got to his house, Mr. Henry spoke with appellant via video chat because appellant was crying when Mr. Henry, Ms. Coleman, and Mr. Flythe left the scene, and Mr. Henry wanted "to make sure he was all right." He spoke with appellant after the shooting a "handful of times."

Mr. Henry testified that, after the shooting, the person with whom Mr. Flythe had been living "put him out" because Mr. Flythe told his roommate that he had shot Mr. Anderson. Mr. Flythe then began staying with Mr. Henry "some nights." When Mr. Henry was arrested on December 15, 2020, Mr. Flythe was still staying with him. Mr. Henry told the police that Mr. Flythe "had more than one body," and "it was difficult living with someone with multiple bodies."[8]

[7] The gun that Mr. Henry threw out the window was entered into evidence as State's Exhibit No. 108.

[8] Mr. Henry testified that, "when somebody has a body," it means that the individual has "[k]illed somebody."

G.

Testimony of Tynoura Coleman

Ms. Coleman testified in the defense case that she did not know appellant "very well." She had been to appellant's residence on only two dates: (1) the day before the shooting, September 5, 2020; and (2) the day of the shooting, September 6, 2020. She first met appellant the day before the shooting. She also met Mr. Anderson for the first time that same day.

Ms. Coleman testified that she was questioned by the police in connection with the shooting. During the interview, she stated that, when she, Mr. Flythe, and Mr. Henry arrived at appellant's residence, "the whole group was upset at [Mr. Anderson]." She was not upset, but rather, confused. Ms. Coleman indicated that Mr. Anderson "was in between a situation" involving appellant and one of her friends, Donovan "Nova" Lee, and appellant and the others were upset about Mr. Anderson's involvement in the "situation."

Appellant and Mr. Anderson then said that "they were going to solve it" between the two of them, i.e., appellant and Mr. Anderson were going to go outside and fight. Ms. Coleman saw appellant take a gun from underneath the couch and tuck the gun in his waistband.

Ms. Coleman testified that, once they were outside, she and Ms. Scott "were walking up towards the hill." Appellant, Mr. Anderson, Mr. Flythe, and Mr. Henry "walked in the opposite direction towards the bottom of the hill." As Ms. Coleman proceeded up the walking path, she heard a gunshot. Although she was not near Mr. Anderson when she

heard the gunshot, she testified that appellant "went out to that trail with a gun in his waistband."

Once she heard the gunshot, Ms. Coleman "ran in the other direction." She got in the car with Mr. Flythe and Mr. Henry, and they all left the scene.

H.

Closing Arguments

In closing argument, the prosecutor argued that Mr. Anderson "was shot and left to die" on the walking path behind appellant's home "by [appellant] and his friends as they all fled the scene." The prosecutor stated that "these conspirators . . . chose to take [Mr.] Anderson out to a path, telling him he was going out to get, have a fight, going to get beat around a little bit. That wasn't the plan." He stated in this regard: "Who takes a gun to a fistfight unless they're planning to use it?" The prosecutor argued that appellant "was extremely upset" with Mr. Anderson on the night of the shooting, and "with his accomplices by his side, [appellant] took a handgun from the couch, put it in his waistband, and walked to that crime scene. That handgun was used to shoot . . . [Mr.] Anderson."

The prosecutor argued that, after the shooting, appellant chose to tell Sergeant Pierce and Detective Brady that he did not know what happened. Appellant told the police that he "heard [Mr. Anderson] got beat down by somebody. I heard he got hit on the trail. I don't know." The prosecutor continued: "Not only does [appellant] do that, he then goes and tries to give them other people to go look into, other people that the police should investigate. . . . He knew that wasn't true. He blatantly lied to the police." Appellant did

so, the prosecutor argued, "with the intention to protect himself, [Mr.] Flythe and [Mr.] Henry; prevent their arrest; prevent their de[t]ection and their prosecution; and his doing so enabled them to stay below the radar between September 7th and September 11th when . . . other witnesses decided to come forth." Appellant told the police that Mr. Anderson had "left in the afternoon while it was still daylight . . . a bald-faced lie. He knew full well [Mr. Anderson] was out there." He noted in this regard that appellant "knew who was out there and he chose not to tell the police, or to give that false version of the events."

The prosecutor argued that "[t]his was a planned decision to go down to that trail to shoot [Mr.] Anderson," and Maryland law authorized the jury "to impose a level of responsibility [it] determine[d] appropriate up to and including first-degree murder," even if the jury did not find that appellant was the person who pulled the trigger. He asserted that "this case is not just about the pulling of the trigger. This case is about circumstances under which those individuals went out there." He argued that "they were all in it together, just like they were all in the fight inside." Appellant was "the hub of the wheel." Thus, appellant had "responsibility for the murder of [Mr.] Anderson," no matter "how much you want to say that somebody else pulled the trigger."

Defense counsel argued that the State "didn't have any physical evidence" against appellant, and there was a lack of evidence to prosecute appellant for the shooting of Mr. Anderson. Although defense counsel acknowledged that appellant "could have conducted himself better" during the interview with Sergeant Pierce and Detective Brady, being an

accessory after the fact is "not having a conversation with a police officer in which you're not forthright."

II.

Convictions and Sentencing

As indicated, the jury convicted appellant of involuntary manslaughter, second-degree assault, conspiracy to commit second-degree assault, and accessory after the fact to first-degree murder. The court imposed a total sentence of eight years and six months.

This appeal followed.

DISCUSSION

I.

Involuntary Manslaughter Instruction

Appellant contends that the circuit court erred or abused its discretion in instructing the jury that a homicide perpetrated during the commission of an assault constitutes involuntary manslaughter. He asserts that, pursuant to the merger doctrine adopted in *State v. Jones*, 451 Md. 680 (2017), "the offense of assault, being integral to a resulting death, cannot serve as a predicate offense sustaining a conviction of felony murder." He argues that, "[j]ust as felony murder cannot be supported by an underlying assault, so [too] unlawful-act involuntary manslaughter cannot be sustained by an assault integral to the homicide." He argues that the court's instruction on involuntary manslaughter "was wrong as a matter of law" and "reversal is mandated."

The State contends that appellant's contention is not preserved for review because he did not object to the instruction on the ground that the merger doctrine precluded assault from being the predicate for unlawful-act involuntary manslaughter. In any event, the State contends that the circuit court properly instructed the jury on involuntary manslaughter.

A.

Involuntary Manslaughter, Felony Murder, and the Merger Doctrine

"Involuntary manslaughter is the unintentional killing of a human being, irrespective of malice." *State v. Thomas*, 464 Md. 133, 152 (2019). It is a common-law felony in Maryland, and pursuant to Md. Code Ann., Crim. Law. Art. ("CR") § 2-207(a) (2021 Repl. Vol.), punishable by imprisonment for up to ten years. *Johnson v. State*, 223 Md. App. 128, 138, *cert. denied*, 445 Md. 6 (2015). There are three varieties of involuntary manslaughter: (1) unlawful act manslaughter; (2) gross negligence manslaughter; and (3) the negligent omission to perform a legal duty. *Thomas*, 464 Md. at 152. *Accord Beckwitt v. State*, 477 Md. 398, 430, *cert. denied*, 143 S. Ct. 216 (2022).

Unlawful act involuntary manslaughter, the type involved here, is "the killing of another unintentionally while doing some unlawful act." *Ashe v. State*, 125 Md. App. 537, 546, *cert. denied*, 354 Md. 571 (1999). *Accord Schlossman v. State*, 105 Md. App. 277, 284 (1995) (Unlawful act involuntary manslaughter, also known as "misdemeanor manslaughter," occurs when "one commits a criminal act not amounting to a felony that unintentionally causes the death of another."), *cert. dismissed as improvidently granted*, 342 Md. 403 (1996), *overruled on other grounds by Bailey v. State*, 355 Md. 287 (1999).

This type of involuntary manslaughter requires the State to prove that "the defendant either committed or attempted to commit or participated in one or more unlawful acts that killed a person." *Tolen v. State*, 242 Md. App. 288, 299 (2019). "[U]nlawful act manslaughter is the 'junior varsity manifestation' of felony murder, and, thus, 'its rationale parallels that of the felony murder doctrine in every regard.'" *Thomas*, 464 Md. at 173 n.20 (quoting Charles E. Moylan, Jr., *Criminal Homicide Law* § 11.1, at 207 (2018)).

"Felony murder is defined under Maryland common law as 'a criminal homicide committed in the perpetration of or in the attempted perpetration of a dangerous to life felony.'" *Yates v. State*, 429 Md. 112, 125 (2012) (quoting *Roary v. State*, 385 Md. 217, 232 (2005)). "Under the felony murder doctrine, the common law mens rea requirement for murder is satisfied by the actual malice of a defendant while committing the underlying felony." *McMillan v. State*, 428 Md. 333, 351–52 (2012).

In *Jones*, 451 Md. at 694, the Supreme Court of Maryland held that, under the merger doctrine, the felony murder doctrine is inapplicable "whenever the underlying felony is an integral element of the homicide."[9] "In other words, to support a charge of felony murder, the underlying felony must be independent of the homicide." *Id.*

[9] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

B.

Proceedings Below

On November 16, 2021, during a discussion on jury instructions, the State proposed a jury instruction on involuntary manslaughter that listed four offenses as possible predicates for unlawful act involuntary manslaughter: (1) first-degree assault; (2) second-degree assault; (3) conspiracy to commit first-degree assault; and (4) conspiracy to commit second-degree assault. The prosecutor stated that, "if the jury acquits on second degree assault, first degree assault, conspiracy second degree assault, and conspiracy first degree assault, then they necessarily must acquit on involuntary manslaughter as well. That's how that would play out." Defense counsel said: "[O]kay, great."

The court subsequently instructed the jury on involuntary manslaughter, as follows:

> The defendant is charged with the crime of involuntary manslaughter. In order to convict the defendant of involuntary manslaughter the State must prove, number one, that [appellant] committed first degree assault or second degree assault or conspired with [Mr.] Flythe and [Mr.] Henry, not and/or, to commit either crime, two, that another participating in the crime killed [Mr.] Anderson and, three, that the act resulting in the death of [Mr.] Anderson occurred during the commission of the first degree assault [or] a second degree assault.

On the following day, November 17, 2021, the State requested that the court clarify the involuntary manslaughter instruction and add a portion that had been omitted. The defense requested that the court remove the instruction on second-degree murder. The State argued that second-degree murder was properly included in this case because, "when you charge first-degree murder, you're also charging second-degree murder."

After hearing further argument from the defense regarding the second-degree murder issue, the court addressed the State's request to modify the involuntary manslaughter instruction, noting that "part of the language" of the instruction "was left off" the previous day. The court stated that the final portion of the instruction "should have read that the act resulting in the death of [Mr.] Anderson occurred during the commission of the first-degree assault or second-degree assault, **or the conspiracy to commit either crime with [Mr.] Flythe and [Mr.] Henry.**" (Emphasis added).

The court asked defense counsel if he had an objection to rereading the involuntary manslaughter instruction, as modified. Defense counsel did object to that instruction if the court did not remove the second-degree murder instruction, stating: "Because it seems like it should be, if they're going to make corrections, they should make all the corrections." The court overruled the objection, granted the State's request to modify the involuntary manslaughter instruction, and denied the request to remove the instruction on second-degree murder.

The court then gave a modified jury instruction on involuntary manslaughter, as follows:

> [W]e have one change from the instructions that were given yesterday, and that's only as to the involuntary manslaughter instruction. You'll get it again, your packet has been modified to include the modified instruction; but I'll read it to you anyway.
>
> So, [appellant] is charged with the crime of involuntary manslaughter. In order to convict the defendant of involuntary manslaughter, the State must prove, number one, that [appellant] committed first-degree assault or second-degree assault, or conspired with [Mr.] Flythe and [Mr.] Henry to commit either crime; two, that another participating in the crime killed [Mr.]

> Anderson; and, three, that the act resulting in the death of [Mr.] Anderson occurred during the commission of the first-degree assault or second-degree assault, or the conspiracy to commit either crime with [Mr.] Flythe and [Mr.] Henry.

The defense objected to the modified instruction on the ground that second-degree assault was not a felony, and therefore, it could not serve as a predicate for involuntary manslaughter. The court overruled the objection.

C.

Preservation

We begin by addressing the State's argument that appellant's contention regarding the involuntary manslaughter instruction is not properly before this Court. We agree.

Maryland Rule 4-325(f) provides, in part: "No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." The purpose of this requirement is "'to give the trial court an opportunity to correct its charge if it deems correction necessary.'" *Watts v. State*, 457 Md. 419, 426 (2018) (quoting *Gore v. State*, 309 Md. 203, 209 (1987)). "The general rule is that the failure to object to a jury instruction at trial results in a waiver of any defects in the instruction, and normally precludes further review of any claim of error relating to the instruction." *State v. Rose*, 345 Md. 238, 245 (1997). *Accord Watts*, 457 Md. at 426 ("the failure to object to an instructional error prevents a party on appeal from raising the issue").

Here, appellant never objected to the involuntary manslaughter instruction on the ground that, pursuant to the merger doctrine, the assault charges could not serve as a

predicate for the charge of involuntary manslaughter. Under these circumstances, appellant's contention in this regard is not preserved for this Court's review. We shall not address it.

II.

Admission of Sergeant Pierce's Testimony

Appellant contends that the circuit court erred in admitting Sergeant Pierce's testimony that he was "familiar with" appellant prior to Mr. Anderson's murder. He argues that Sergeant Pierce's prior knowledge of him was irrelevant because "identity was never an issue in this case." He further asserts that the testimony was "clearly prejudicial" because the jury knew that Sergeant Pierce had been a narcotics officer, and the jury "almost certainly" would conclude that the prior contact between the two "arose out of a criminal investigation."

The State contends that the circuit court properly permitted Sergeant Pierce to testify that he recognized appellant. It argues that, because there was no recording of appellant's interview with Sergeant Pierce and Detective Brady, and given that appellant gave false statements to the police to cover up the crime, it was relevant to establish that it was *appellant* who made false statements. The State also argues that Sergeant Pierce's testimony was not unfairly prejudicial, noting that there was no testimony that he knew appellant "from a previous police investigation or arrest, nor did any evidence link [appellant] to other crimes."

A.

Proceedings Below

As indicated, *supra*, Sergeant Pierce and Detective Brady interviewed appellant in Detective Brady's police cruiser after the shooting. Appellant's interview with Sergeant Pierce and Detective Brady was not recorded.

Detective Brady testified that, during the interview, appellant advised him that Mr. Anderson had left his residence on the day of the shooting. He did not know where Mr. Anderson went, but he believed that Mr. Anderson was going to see his girlfriend. Detective Brady asked appellant what he did after Mr. Anderson left his residence, and appellant stated that "he was just with his girlfriend in his room." Detective Brady asked appellant if he knew anything about what had happened to Mr. Anderson. Appellant stated that "he wasn't aware of anything until the helicopter and the police ended up showing up in the area." Appellant also told Detective Brady that "he was on his phone, and he was busy all night." During the interview, appellant "identified other subjects that may have had some knowledge" regarding Mr. Anderson's whereabouts and the circumstances surrounding the shooting, including Mr. Anderson's nephew, Leo McDonald, and Laquan McDonald.

Sergeant Pierce asked appellant who else was at the house that night. Appellant stated: "[N]o one." The prosecutor then questioned Sergeant Pierce, as follows:

> [THE PROSECUTOR:] And I just want to ask you, prior to conducting or beginning the interview with [appellant], did you guys confirm his identity in any way?

> [SERGEANT PIERCE:] No, I didn't. I asked for a driver's license, but I was familiar with who [appellant] was.
>
> [DEFENSE COUNSEL:] Objection.
>
> THE COURT: Overruled.
>
> [THE PROSECUTOR:] So you would be able to identify him if you saw him in the courtroom today? I don't believe that we have done that yet. Do you see [appellant] in the courtroom today?
>
> [SERGEANT PIERCE:] Yes, sir. Yes, I did. I did yesterday.
>
> [THE PROSECUTOR:] I thought so.
>
> [SERGEANT PIERCE:] That's [appellant] right there.
>
> [THE PROSECUTOR:] Thank you.

Sergeant Pierce also testified that he had been a narcotics investigator for seven years. He testified in this regard that he had "a lot of contact" with individuals who were under the influence of drugs or alcohol.

B.

Standard of Review

This Court recently explained the applicable standard of review for a circuit court's admission of evidence, as follows:

> Our review of the circuit court's decision to admit evidence involves a two-step analysis. First, without deference to a trial court's conclusion, an appellate court reviews whether the evidence is legally relevant. *Ford v. State*, 462 Md. 3, 46 (2018). Pursuant to Maryland Rule 5-402, "except as otherwise provided by constitutions, statutes, or the Maryland Rules, or by decisional law not inconsistent with the Maryland Rules, all relevant evidence is admissible. Evidence that is not relevant is not admissible." *See Sifrit v. State*, 383 Md. 116, 129 (2004); *Dorsey v. State*, 276 Md. 638, 643 (1976). Although relevant, evidence may be excluded if its probative value

> is substantially outweighed by the danger of unfair prejudice. Md. Rule 5-403.
>
> Once the evidence is deemed relevant, the circuit court's decision to admit or exclude evidence is reviewed by this Court under an abuse of discretion standard. *Merzbacher v. State*, 346 Md. 391, 404 (1997) (citing Md. Rule 5-402); *Taneja v. State*, 231 Md. App. 1, 11 (2016), *cert. denied*, 452 Md. 549 (2017). "Abuse of discretion exists where no reasonable person would take the view adopted by the circuit court, or when the court acts without reference to guiding rules or principles." *State v. Robertson*, 463 Md. 342, 364 (2019) (quoting *Alexis v. State*, 437 Md. 457, 478 (2014)). "If the trial court's ruling is reasonable . . . we will not disturb the ruling on appeal." *Taneja*, 231 Md. App. at 12 (citing *Peterson v. State*, 196 Md. App. 563, 585 (2010)).

Urbanski v. State, 256 Md. App. 414, 429 (2022) (cleaned up), *cert. denied*, 483 Md. 448 (2023). *Accord Colkley v. State*, 251 Md. App. 243, 280 ("A trial court does not have discretion to admit irrelevant evidence."), *cert. denied*, 476 Md. 268 (2021).

B.

Analysis

Here, Sergeant Pierce's testimony regarding his familiarity with appellant was relevant to his identification of appellant, the person on trial for accessory after the fact to Mr. Anderson's murder, as the person who gave false information to the police regarding the shooting. *See People v. Duty*, 74 Cal. Rptr. 606, 609 (Cal. Ct. App. 1969) ("[A]n affirmative falsehood to the public investigator, when made with the intent to shield the perpetrator of the crime, may form the aid or concealment" sufficient to sustain a conviction for accessory after the fact.). The circuit court did not err in concluding that the evidence was relevant.

Moreover, the circuit court did not abuse its discretion in determining that the probative value of Sergeant Pierce's testimony was not substantially outweighed by the risk of unfair prejudice to appellant. Sergeant Pierce did not testify that his familiarity of appellant was based on any criminal activity on appellant's part. *See Commonwealth v. Gonzalez*, 712 N.E.2d 108, 111 (Mass. App. Ct.) (police officer's response that he knew defendant and his associate from "dealing with them in the past" did not cause sufficient prejudice to warrant reversal), *review denied*, 717 N.E.2d 1014 (Mass. 1999); *State v. Reese*, 446 N.W.2d 173, 178 (Minn. Ct. App. 1989) (police detective's testimony that he knew defendant for 16 years since starting with the police department did not cause sufficient prejudice to warrant reversal, where testimony "had a purpose other than insinuating that [defendant] was a criminal"). Under the circumstances here, the circuit court did not err or abuse its discretion in admitting Sergeant Pierce's testimony.

Even if it could be said that it was error to admit Sergeant Pierce's testimony that he was familiar with appellant, it was harmless because Sergeant Pierce did not testify that his familiarity was based on criminal activity on appellant's part. Harmless error exists when "there is no reasonable possibility that the evidence complained of – whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict." *Belton v. State*, 483 Md. 523, 542 (2023) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). Here, any error in this regard was "'unimportant in relation to everything else the jury considered on the issue in question.'" *See id.* at 543 (quoting *Bellamy v. State*, 403 Md. 308, 332 (2008)).

III.

Sufficiency of the Evidence

Appellant contends that the evidence was legally insufficient to sustain his convictions for (1) involuntary manslaughter, and (2) accessory after the fact. We shall address the legal sufficiency of each conviction, in turn.

A.

Standard of Review

"The sufficiency of the evidence is viewed in the light most favorable to the prosecution." *State v. Morrison*, 470 Md. 86, 105 (2020). "The test for legal sufficiency of evidence is whether any rational fact finder could find 'the essential elements of the crime beyond a reasonable doubt.'" *Hammond v. State*, 257 Md. App. 99, 125 (2023). "We do not measure the weight of the evidence; rather, our concern is only whether the verdict was supported by sufficient evidence, direct or circumstantial, which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Taylor v. State*, 346 Md. 452, 457 (1997).

A valid conviction may be based solely on circumstantial evidence. *Morrison*, 470 Md. at 106. "We must give deference to all reasonable inferences that the fact-finder draws, regardless of whether the appellate court would have chosen a different reasonable inference." *Hammond*, 257 Md. App. at 125. *Accord Morrison*, 470 Md. at 105 ("[T]he appellate court does not 're-weigh' the credibility of witnesses or attempt to resolve any conflicts in the evidence."). "Consequently, the dispositive issue 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.'" *Manuel v. State*, 252 Md. App. 241, 252 (2021) (quoting *Fraidin v. State*, 85 Md. App. 231, 241 (1991)).

B.

Involuntary Manslaughter

Appellant contends that the evidence was legally insufficient to sustain his conviction for involuntary manslaughter because "none of the three modalities" of proving involuntary manslaughter apply in this case. He argues that unlawful act involuntary manslaughter is "eliminated" because "an assault cannot be used to bootstrap the assaultive act to the level of a criminal homicide by analogy to *Jones*." He argues that involuntary manslaughter on a theory of gross negligence "was not pressed," and in any event, his agreement with Mr. Anderson to engage in a fistfight "neither rose to the level of criminal negligence nor bore a causal connection with [Mr.] Anderson's death." He also argues that he "neither owed nor breached any legal duty to [Mr.] Anderson."

The State contends that the evidence was legally sufficient to support appellant's conviction for involuntary manslaughter. It concedes that the only variety of involuntary manslaughter at issue here is an unintentional killing arising out of an unlawful act, noting that the other modalities of proving involuntary manslaughter—i.e., gross negligence and failure to perform a legal duty—were not raised in the circuit court. With respect to appellant's argument that the evidence was insufficient to prove the unlawful act variety of involuntary manslaughter because assault cannot be the underlying unlawful act for

involuntary manslaughter, the State asserts that this argument is not preserved for this Court's review, and in any event, it is without merit.

We address first the State's preservation argument. Appellate review of the sufficiency of the evidence "is available only when the defendant moves for judgment of acquittal at the close of all the evidence and argues precisely the ways in which the evidence is lacking." *Anthony v. State*, 117 Md. App. 119, 126, *cert. denied*, 348 Md. 205 (1997). *Accord Howard v. State*, 232 Md. App. 125, 169 (claim not preserved where appellant failed to first raise it on motion for judgment of acquittal), *cert. denied*, 453 Md. 366 (2017). A criminal defendant "is not entitled to appellate review of reasons stated for the first time on appeal." *Starr v. State*, 405 Md. 293, 302 (2008).

Here, at the conclusion of the State's case, defense counsel asked the court to grant a motion for judgment of acquittal on the charge of involuntary manslaughter, arguing that there was no evidence of a "physical act at all." Counsel asserted that "the men were gathered outside for perhaps a physical confrontation . . . and not a punch was thrown." There was "not a punch, not a swing and not an indication of a prompting by [appellant] with anyone else to engage . . . in physical contact [with] [Mr. Anderson]." He also argued that involuntary manslaughter entailed "a reduced level of intent," and there was no "specific or general intent that [could] be deduced by a reasonable jury from the facts . . . put in front of them." The court denied the motion. Counsel did not renew his motion for judgment of acquittal on the charge of involuntary manslaughter at the close of all the evidence.

Appellant's motion for judgment of acquittal on the charge of involuntary manslaughter was limited to two reasons: "want of a physical act" and "want of the state of mind." Appellant did not mention the merger doctrine or the Supreme Court's decision in *Jones*, and he did not argue, as he does on appeal, that involuntary manslaughter was unavailable because an assault cannot be the unlawful act that leads to a conviction. Under these circumstances, appellant's contention on appeal is not preserved for this Court's review. We shall not address it.

C.

Accessory After the Fact

Appellant contends that the evidence was insufficient to sustain his conviction for accessory after the fact for two reasons. First, he argues that there was no evidence that he tried to help Mr. Flythe or Mr. Henry after the shooting. He asserts that his conduct in giving false statements to the police was "calculated to remove suspicion from *himself*," rather than Mr. Flythe. Second, appellant argues that, when he spoke with the police and "provided the arguably misleading information," the evidence reflected that Mr. Anderson was still alive, and therefore, "[t]here was at that point no murder to help cover up."

The State contends that the evidence was legally sufficient to support appellant's conviction for accessory after the fact. It argues that the jury could reasonably conclude that appellant, who failed to disclose the shooting to the police, actively misled police about when Mr. Anderson left his house, lied about being present at the shooting, gave the police the names of suspects who were not there, and sought "to help shield [Mr.] Flythe and the

other co-defendants from prosecution." It argues in this regard that, although the jury could also conclude that appellant acted "out of self-preservation," that is immaterial on appeal because this Court "does not elect between competing rational inferences available to the factfinder." Moreover, the State argues that, even if Mr. Anderson was not dead at the time appellant made the statements, the jury reasonably could conclude that appellant knew, as soon as Mr. Anderson "dropped to the ground" after being shot in the head at close range, that he would not survive.

"An accessory after the fact is one who, with knowledge of the other's guilt, renders assistance to a felon in the effort to hinder his detection, arrest, trial or punishment." *Morgan v. State*, 134 Md. App. 113, 131 (emphasis omitted) (quoting *State v. Sowell*, 353 Md. 713, 718 (1999)), *cert. denied*, 361 Md. 232 (2000). *Accord State v. Hawkins*, 326 Md. 270, 281 (1992). To convict a defendant as an accessory after the fact, the State must prove that: (1) a felony was committed by another prior to the accessorial act; (2) the defendant knew of the commission of the felony; and (3) the defendant did "some act personally in his effort to assist the felon to avoid the consequences of his crime." *Hawkins*, 326 Md. at 284. *Accord* Maryland Criminal Pattern Jury Instruction 6:01 (pattern jury instruction on accessory after the fact).

An accessory after the fact renders assistance—and the third element of the crime is satisfied—if the accessory "harbors and protects the felon or renders him any other assistance to elude punishment." *West v. State*, 3 Md. App. 662, 665–66 (quoting *Watson v. State*, 208 Md. 210, 218 (1955), *abrogated on other grounds by State v. Jones*, 466 Md.

142, 163–64 (2019)), *cert. denied*, 251 Md. 753 (1968). As noted, *supra*, "an affirmative falsehood to [a] public investigator, when made with the intent to shield the perpetrator of the crime, may form the aid or concealment" sufficient to sustain a conviction for accessory after the fact. *Duty*, 74 Cal. Rptr. at 609.

Here, there was evidence that, on the evening of September 6, 2020, Mr. Flythe shot Mr. Anderson behind appellant's residence, where appellant and Mr. Anderson had agreed to fight. On the following day, September 7, 2020, during the interview with Sergeant Pierce and Detective Brady, appellant made multiple false statements to the police, including that:

> • Mr. Anderson had left appellant's residence "during the daytime" the previous day, September 6, 2020, and appellant did not know where Mr. Anderson went.
>
> • After Mr. Anderson had left appellant's residence, appellant "was just with his girlfriend in his room."
>
> • Appellant "wasn't aware of anything" that had happened to Mr. Anderson until the next day, September 7, when "the helicopter and the police ended up showing up in the area."
>
> • "[N]o one" else, other than appellant and Ms. Scott, was at appellant's residence on the night of the shooting.

When asked who might "have had some knowledge" regarding Mr. Anderson's whereabouts and the circumstances surrounding the shooting, appellant did not identify Mr. Flythe, but he identified Mr. Anderson's nephew and Laquan McDonald, despite any evidence that any of those individuals were at appellant's residence on the night of September 6 or were present when the shooting occurred. Mr. Flythe was not apprehended

until approximately seven months later, in April 2021. Under these circumstances, the evidence was sufficient to sustain appellant's conviction for accessory after the fact.

IV.

Danial Flythe's Invocation of His Fifth Amendment Privilege

Appellant contends that the circuit court abused its discretion in ruling that Mr. Flythe would invoke his Fifth Amendment privilege against self-incrimination and answer "non-incriminating threshold questions" outside the presence of the jury. He argues that, where the legitimacy of the invocation was undisputed, and the defense theory of the case was that Mr. Flythe fired the shot that killed Mr. Anderson, it was important for the jury to observe Mr. Flythe invoke his privilege against self-incrimination.

The State contends that the circuit court properly exercised its discretion in instructing the jury that Mr. Flythe invoked his Fifth Amendment privilege, rather than requiring him to invoke the privilege in the jury's presence. The State asserts that Maryland case law "neither requires nor forbids a trial court from having a witness invoke their Fifth Amendment rights in front of a jury."

A.

Proceedings Below

At the start of the defense case, counsel indicated that the defense would be calling Mr. Flythe as its first witness. Mr. Flythe's attorney stated that he had advised Mr. Flythe of his right to assert his Fifth Amendment privilege, and "he's asserting his Fifth

Amendment rights." Because Mr. Flythe had an "active, pending case," they "prefer[red] he not self-incriminate himself and . . . that's what he's avoiding."

The prosecutor argued that, pursuant to *Gray v. State*, 368 Md. 529 (2002), the defense would be entitled to have Mr. Flythe invoke his Fifth Amendment privilege in the jury's presence only when the defense argument was "that someone else had committed the offense . . . . Otherwise, the defendant is . . . entitled to an instruction." Defense counsel disagreed, stating: "The proposition is ridiculous. I'll call [Mr. Flythe] as a witness in front of the jurors, and if he does not answer, he's exercising his Fifth Amendment rights."

The court stated that Mr. Flythe had "been named throughout the trial as an involved party," so his testimony was relevant. The "next question," the court stated, was "whether [Mr. Flythe's] testimony, or his invoking the privilege [was] a necessary component of the [d]efense to this case." It stated in this regard that Mr. Flythe could either (1) assert his Fifth Amendment privilege "outside of the presence of the jury with an appropriate instruction to follow at . . . the time [the court] gives the instructions," or alternatively, (2) Mr. Flythe could assert the privilege in front of the jury. The court noted that it had to analyze the relevance and "then the necessity to the [d]efense's case of having him actually do that in front of the jury."

The court asked defense counsel to explain "how this is a necessary component of [appellant's] defense?" Counsel stated that Mr. Flythe had information that had a bearing on the case, and his credibility in invoking the Fifth Amendment in front of the jury assisted appellant. The State asserted that it had no objection to the court instructing the jury that

Mr. Flythe had invoked his Fifth Amendment privilege, and from his invocation, the members of the jury could "take whatever inferences they want." Defense counsel agreed that the court could give an instruction to the jury, but he stated: "We want to run our case here."

After a recess, the prosecutor argued that, under *Gray*, Mr. Flythe's invocation of his Fifth Amendment privilege "should be done out of the presence of the jury." He noted that, in *Gray*, the assertion was that Gray did not commit the crime but the other witness did. Here, however, the State's theory was based on accomplice liability theory, where "multiple individuals can be responsible for the same offense, even in a case like this where there's one gun, one bullet, and one victim."

Defense counsel argued that, pursuant to *Gray*, it was within the court's discretion "whether or not this privilege . . . should be exercised outside the presence of the jury." Counsel asserted that questions that tended to incriminate Mr. Flythe could be "taken by the jury in favor of" appellant, and not allowing Mr. Flythe to invoke his Fifth Amendment privilege in the jury's presence would violate appellant's right to compulsory process and to call witnesses.

The court stated that it was "going in a different direction," noting that,

> if Mr. Flythe asserts his Fifth Amendment privilege, or even if Mr. Flythe were to come in here and say, I did it, I shot him, it leads to the so what question, because . . . many of these charges are conspiracy-related, many of these charges are accomplice-related.
>
> So even if there was an admission, which we're not going to have, how does that impact your client here today?

Defense counsel stated in response: "I find it astounding to hear the [c]ourt say that a man admitting that he shot someone is a so what. That's quite significant." The court disagreed, stating: "Not under the charges . . . that have been asserted . . . in this case."

In rebuttal, the prosecutor requested that the court have Mr. Flythe invoke his privilege outside the presence of the jury and then give an appropriate instruction. He argued that, under *Gray*, absent a showing that appellant, to the exclusion of a co-defendant, was the murderer, the appropriate procedure was to have the witness invoke his privilege out of the presence of the jury, with the court advising of the invocation with a jury instruction.

The court ruled that appellant was not prejudiced by Mr. Flythe invoking his Fifth Amendment privilege outside the presence of the jury. The court also stated that it would give a jury instruction that explained why Mr. Flythe was unavailable to testify. The court subsequently instructed the jury, as follows:

> A witness has the right under the Fifth Amendment to the United States Constitution and Article 22 of the Maryland Declaration of Rights not to testify when called to the witness stand i[f] doing so would potentially incriminate the witness. [Mr.] Flythe was called as a witness by the [d]efense in this case outside of your presence. He invoked his right not to testify. In doing so [Mr.] Flythe became unavailable to testify before you as a witness in this case.

B.

Analysis

"A fundamental element of due process of law is the right of a defendant to present a defense." *Purohit v. State*, 99 Md. App. 566, 576 (citing *Washington v. Texas*, 388 U.S.

14, 19 (1967)), *cert. denied*, 335 Md. 698 (1994). "It is the adversarial system of justice which requires that the defendant be given every opportunity, within procedural and evidentiary boundaries, to present a defense." *Kelly v. State*, 392 Md. 511, 533 (2006).

"Under the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights, a criminal defendant has the right to present witnesses and evidence to establish his defense." *Holmes v. State*, 236 Md. App. 636, 668, *cert. denied*, 460 Md. 15 (2018). "Although the right of a defendant in a criminal trial to present witnesses in his defense is a critical right, it is not absolute." *Taneja*, 231 Md. App. at 10. "'The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. The Compulsory Process Clause provides him with an effective weapon, but it is a weapon that cannot be used irresponsibly.'" *Kelly*, 392 Md. at 537 (quoting *Taylor v. Illinois*, 484 U.S. 400, 410 (1988)).

In *Gray*, 368 Md. at 547, 558, the Supreme Court addressed, "for guidance purposes," the appropriate procedure when a defendant wants to call a witness, "who was not an accomplice, but rather the person the defendant claims committed the crime, to testify or invoke his Fifth Amendment privilege in the presence of the jury." In that case, Gray was on trial for murdering his wife, and he requested the circuit court's permission to call a witness, Brian Gatton, to invoke his Fifth Amendment privilege in the jury's presence. *Id.* at 547–48. Gray claimed that Gatton, not he, had murdered Gray's wife, and he argued that it would be "unfair" to deny his request "because the very invocation of the

privilege contain[ed] relevant evidentiary inferences supporting the theory of the defense." *Id.* at 548. The circuit court denied the request, finding that it did not have the discretion to permit a witness to invoke his Fifth Amendment privilege in the jury's presence. *Id.* at 549.

Although the Supreme Court resolved the case on other grounds, it explained the procedure that a court should employ in this scenario. *Id.* at 562–64. It stated that the court should first determine whether sufficient evidence has been presented that links the witness to the commission of the crime that could cause "any trier of fact" to infer that the witness might have committed the crime, instead of the defendant. *Id.* at 562, 564. If such evidence exists, "then the trial court has the discretion to permit, and limit as normally may be appropriate, the defendant to question the witness, generally, about his involvement in the offense and have him invoke his Fifth Amendment right in the jury's presence." *Id.* at 564. If, however,

> the trial court fails to permit a "Gatton-type" of witness to invoke the Fifth Amendment in the presence of the jury, the trial court, upon appropriate request, should give a full instruction to the jury, that the witness, under the circumstances described above, has invoked his right against self-incrimination, and, therefore, is unavailable to the defendant. Even if a "Gatton-type" of witness is permitted to invoke a Fifth Amendment privilege, in the presence of the jury, either party, in some circumstances, might still be entitled to have an appropriate instruction given to the jury.

Id.

Here, unlike in *Gray*, the court did not refuse to exercise its discretion. Instead, it considered appellant's arguments, but it exercised its discretion to instruct the jury that Mr.

Flythe invoked his Fifth Amendment privilege, rather than have him do so in person before the jury.

Moreover, in *Gray*, the defense theory was that the witness, not Gray, committed the murder. In that situation, having the witness invoke his privilege in front of the jury might have persuaded the jury that the witness "committed the crime instead of the defendant." *Id.* at 562. Here, the State's theory was that appellant was responsible for Mr. Anderson's murder because he acted in concert with Mr. Flythe, who was, as the State recognized at trial, "the one who probably pulled that trigger." Thus, Mr. Flythe's invocation of his Fifth Amendment privilege had some tendency to also incriminate appellant. This was not the case in *Gray*, where the witness's invocation tended to exonerate Gray. Under the circumstances here, appellant has not persuaded us that the circuit court abused its discretion in instructing the jury that Mr. Flythe invoked his Fifth Amendment privilege to remain silent, rather than requiring him to invoke the privilege in the jury's presence.

V.

Exclusion of Tiffany Keener's Testimony

Appellant contends that the circuit court erred or abused its discretion in excluding the testimony of Tiffany Keener on the ground that the defense did not disclose her as an expert witness during discovery. Although he acknowledges that expert opinions must be disclosed prior to trial, he asserts that "the purposes of discovery are to further trial preparation and avoid surprise," and in this case, where Ms. Keener testified as an expert

witness in the State's case-in-chief, "[n]o additional disclosures concerning Ms. Keener could have served the purposes of allowing the State to prepare for trial and avoid facing surprise."

The State contends that the circuit court properly exercised its discretion in excluding Ms. Keener's defense testimony. Although Ms. Keener had been called as an expert in areas including DNA analysis, defense counsel then called her as a witness and sought an opinion that was beyond her previously admitted expert opinions, in additional fields, without providing advance notice of her opinions.

A.

Standard of Review

"A trial court is given wide latitude in controlling the admissibility of evidence." *Taneja*, 231 Md. App. at 11. "An appellate court typically reviews a trial court's ruling on the admission of evidence for abuse of discretion." *State v. Galicia*, 479 Md. 341, 389, *cert. denied*, 143 S. Ct. 491 (2022). "An abuse of discretion exists 'where no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles.'" *In re Richard M.*, 256 Md. App. 445, 466 (2022) (quoting *Cagle v. State*, 462 Md. 67, 75 (2018)) (cleaned up).

B.

Proceedings Below

The State called Ms. Keener, a forensic scientist with the Maryland State Police Forensic Sciences Division, to testify in its case-in-chief. The State qualified Ms. Keener

as an expert, without objection, in serology (specifically, "in processing submitted samples for the presence of blood") and short tandem repeat DNA analysis. Her analysis of more than a dozen samples submitted by the Frederick County Sheriff's Office did not lead to any conclusive findings connecting appellant to the shooting.

Subsequently, on November 15, 2021, the defense called Ms. Keener as its witness. Defense counsel established that Ms. Keener had not received any nail clippings for analysis. Counsel then asked: "What probative value or relevance would fingernail clippings perhaps have to a case where there was a shooting or a fight or a tussle?"

The prosecutor objected, arguing that defense counsel was asking Ms. Keener "her expert opinion on things regarding her expertise," but the defense did not note her as an expert or provide notice of "what the opinion would be from an expert they were calling" in the defense case. Defense counsel argued that Ms. Keener was "allowed to give . . . expert testimony within the scope of the work that she did on this case." The prosecutor disagreed, stating: "If he is asking her for opinions we were entitled to those opinions prior to this trial. We never received such a notification from the defense."

In response to questioning by the court, defense counsel acknowledged that he did not name Ms. Keener as a defense expert, but counsel listed Ms. Keener as a potential defense witness on its witness list prior to trial. The court stated: "Well, it is one thing to call her. It is another thing to call her as an expert and have her testify as to things that only an expert would be allowed to testify to." The prosecutor argued that defense

counsel's question to Ms. Keener posed "a concern" because the State was "not provided the opinions." The court sustained the objection.

C.

Analysis

"Maryland Rule 4-263 sets forth the discovery requirements of the parties in a criminal case." *Thomas v. State*, 213 Md. App. 388, 401 (2013), *cert. denied*, 437 Md. 640 (2014). Rule 4-263(e)(2)(A) provides that, for "each defense witness the defense intends to call to testify as an expert witness," and "[w]ithout the necessity of a request," the defense must provide to the State's Attorney "the expert's name and address, the subject matter on which the expert is expected to testify, the substance of the findings and the opinions to which the expert is expected to testify, and a summary of the grounds for each opinion."

Rule 4-263(n) provides that, "[i]f . . . the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule," the court may impose a remedy or sanction for the party's non-compliance, such as "prohibit the party from introducing in evidence the matter not disclosed." "When there is a violation of a discovery obligation in a criminal case, the decision as to which remedy or sanction to impose generally rests within the broad discretion of the trial court." *Correll v. State*, 215 Md. App. 483, 512 (2013) (quoting *Williams v. State*, 416 Md. 670, 698 (2010)) (cleaned up), *cert. denied*, 437 Md. 638 (2014).

Here, defense counsel's question to Ms. Keener sought to elicit an expert opinion regarding the probative value, if any, that fingernail clippings might have in the case. It is undisputed that the defense did not disclose Ms. Keener as an expert witness in accordance with the Maryland Rules, and this testimony was not encompassed by her testimony in the State's case-in-chief. Under these circumstances, the circuit court did not abuse its discretion in excluding Ms. Keener's defense testimony.

VI.

Pre-Arrest Silence

Appellant contends that the circuit court committed plain error in admitting evidence of his pre-arrest silence. He acknowledges that defense counsel did not object to the evidence, but he requests that this Court review the issue for plain error.

The State contends that this Court should decline to consider the issue. It argues that appellant "intentionally relinquished any claim of error about his silence by affirmatively asking about it."

A.

Proceedings Below

After the police interviewed Ms. Coleman and conducted Ms. Scott's second interview, Sergeant Pierce came into contact with appellant at the Frederick County Law Enforcement Center on September 11, 2020. The prosecutor questioned Sergeant Pierce in this regard, without objection, as follows:

> [THE PROSECUTOR:] Can you tell the ladies and gentlemen of the jury how that occurred?

> [SERGEANT PIERCE:] He responded to the Sheriff's Office and was brought up to an interview room. And we attempted to conduct a second round of interviews based off of what we had learned, and he refused to speak to us again and, ultimately, he was arrested.
>
> [THE PROSECUTOR:] On what was a determination made to arrest him on that day as opposed to . . . September 7?
>
> [SERGEANT PIERCE:] The information that we had received over the course of the next several days from interviews, from cell phone reviews, Ms. Scott's second interview, Ms. Coleman's interview, and then the overall evidence that we were able to obtain throughout the case.

On cross-examination, defense counsel questioned Sergeant Pierce regarding his September 11, 2020 encounter with appellant, as follows;

> [DEFENSE COUNSEL:] And the interview of [appellant] on September 11, were you there?
>
> [SERGEANT PIERCE:] He chose not to speak to us.
>
> [DEFENSE COUNSEL:] I asked you if you were there. Were you there?
>
> [SERGEANT PIERCE:] You said did I interview him, and he chose not to speak to us. There was no interview conducted.
>
> [DEFENSE COUNSEL:] I asked if you were there.
>
> THE COURT: He has answered your question.

B.

Analysis

"Ordinarily, an appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). As this Court has explained: "Unless a party properly raises an objection to the admissibility

of evidence with the trial court, any error is deemed waived and ordinarily will not be considered on appeal." *Stevenson v. State*, 222 Md. App. 118, 140 (quoting *Anderson v. Litzenberg*, 115 Md. App. 549, 568 (1997)) (cleaned up), *cert. denied*, 443 Md. 737 (2015). *Accord Young v. State*, 234 Md. App. 720, 740 (2017) ("Maryland Rule 5-103(a)(1) allows an admission of evidence to be an appealable error only if 'a timely objection or motion to strike appears of record.' A contemporaneous objection to the admission of evidence is required."), *aff'd*, 462 Md. 159 (2018). "The purpose of the preservation requirement is to preserve the integrity and the efficiency of the trial itself," and "eliminate any necessity for appellate review." *Robson v. State*, 257 Md. App. 421, 460, *cert. denied*, 483 Md. 520 (2023). The preservation requirement aims to avoid error because, if counsel alerts the court to an error, the court typically has the opportunity to remedy it. *Id.* at 460–61.

Although this Court has discretion to review unpreserved errors, "appellate courts should rarely exercise" this discretion. *Chaney v. State*, 397 Md. 460, 468 (2007). *Accord Kelly v. State*, 195 Md. App. 403, 431 (2010), *cert. denied*, 417 Md. 502, *cert. denied*, 563 U.S. 947 (2011). Plain error review should not be employed except in those instances when an unpreserved error can be characterized as "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Stone v. State*, 178 Md. App. 428, 451 (2008). *Accord Steward v. State*, 218 Md. App. 550, 566–67, *cert. denied*, 441 Md. 63 (2014).

Plain error review involves four steps:

> (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.

Beckwitt, 477 Md. at 464. "[A]ppellate invocation of the 'plain error doctrine' 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003), *cert. denied*, 380 Md. 618 (2004).

In the present case, plain error review is unwarranted. The record reflects that, on October 29 and November 1, 2021, prior to the testimony of which appellant complains on appeal, defense counsel cross-examined Sergeant Joseph McCallion regarding the police encounter with appellant on September 11, 2020, when appellant and his mother went to the Frederick County Law Enforcement Center to retrieve his cell phone. Sergeant McCallion stated that permitting appellant to retrieve his cell phone was a tactical "ruse" for another opportunity to question appellant. Defense counsel's cross-examination of Sergeant McCallion ensued, as follows:

> [DEFENSE COUNSEL:] And it's clear that he didn't come in for further questioning, isn't that right?
>
> [SERGEANT McCALLION:] There was further questioning[].
>
> * * *
>
> [DEFENSE COUNSEL:] And the attempt went nowhere really, because he refused to answer questions, right?
>
> [SERGEANT McCALLION:] That's correct.

As indicated, *supra*, Sergeant Pierce subsequently testified, without objection, regarding appellant's pre-arrest silence during his September 11, 2020 encounter with the police.

Here, appellant not only failed to object to the admission of Sergeant Pierce's testimony regarding his pre-arrest silence, he invited the error by specifically referencing—and eliciting testimony regarding—his pre-arrest silence on cross-examination of Sergeant McCallion the previous day. "'[W]here a party invites the trial court to commit error, he cannot later cry foul on appeal.'" *Hayes v. State*, 217 Md. App. 159, 172 (2014) (quoting *State v. Rich*, 415 Md. 567, 575 (2010)). *Accord In re Jeannette L.*, 71 Md. App. 70, 81 ("It is with ill grace that they now complain they should not have gotten that for which they asked."), *cert denied*, 310 Md. 491 (1987). We decline to exercise our discretion to review this claim for plain error.

VII.

Flight Instruction

Appellant contends that the circuit court erred in propounding a jury instruction on flight. He argues that the flight instruction was not generated by the evidence because "simply leaving the scene of a crime is not evidence of consciousness of guilt," and in this case, "at the sound of a gunshot," he "sensibly departed the scene and ran to his residence 200 feet away." Appellant contrasts his conduct with that of Mr. Flythe, Mr. Henry, and Ms. Coleman, "who drove from the scene with the intent to obtain the supplies and instrumentalities necessary to destroy evidence which might have adhered to the gun and their clothes."

The State contends that the circuit court properly exercised its discretion in giving a jury instruction on flight. It argues that the evidence at trial generated the flight instruction, asserting that appellant ran away from the scene of a shooting in public that police obviously would investigate, and he went inside his house, thereby keeping him away from public view. The State also argues that "[t]he fact that [appellant] did not travel a great distance did not negate his flight." It asserts in this regard: "A robber who flees from a bank and runs into a police officer around the corner can hardly be said to not have fled because he did not travel far."

We typically "review a trial court's decision to give a particular jury instruction for abuse of discretion." *Wright v. State*, 474 Md. 467, 482 (2021). A "court abuses its discretion if it commits an error of law in giving an instruction." *Id.* Pursuant to Maryland Rule 4-325(c), a judge is required to give a requested jury instruction when "'(1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given.'" *Rainey v. State*, 480 Md. 230, 255 (2022) (quoting *Ware v. State*, 348 Md. 19, 58 (1997)).

Here, appellant challenges only the second requirement of the rule. He asserts that the flight instruction was not applicable because it was not generated by the evidence.

"'A requested jury instruction is applicable if the evidence is sufficient to permit a jury to find its factual predicate.'" *Page v. State*, 222 Md. App. 648, 668 (quoting *Bazzle v. State*, 426 Md. 541, 550 (2012)), *cert. denied*, 445 Md. 6 (2015). The "determination of

whether the evidence is sufficient to generate the desired instruction is a question of law." *Hayes v. State*, 247 Md. App. 252, 288 (2020) (quoting *Bazzle*, 426 Md. at 550). *Accord Rainey*, 480 Md. at 255, 268. The threshold is low, as "[t]he requesting party must only produce 'some evidence' to support the requested instruction, and [the appellate court] views the facts in the light most favorable to the requesting party." *Rainey*, 480 Md. at 255.

In *Thomas v. State*, 372 Md. 342, 352–53 (2002), the Supreme Court adopted the four-part test set forth in *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977), *cert. denied*, 439 U.S. 847 (1978), to assess whether a flight instruction is appropriate under the facts of a particular case. An instruction on flight properly may be given only if "the following four inferences" reasonably can be drawn from the facts of the case:

1. The behavior of the defendant suggests flight.

2. The flight suggests a consciousness of guilt.

3. The consciousness of guilt is related to the crime charged or a closely related crime.

4. The consciousness of guilt of the crime charged suggests actual guilt of the crime charges or a closely related crime.

Thomas, 372 Md. at 352, 356. *Accord Thompson v. State*, 393 Md. 291, 312 (2006) ("'[A] flight instruction is improper unless the evidence is sufficient to furnish reasonable support for all four of the necessary inferences.'") (quoting *Myers*, 550 F.2d at 1050).

Here, appellant asserts that the facts did not support the first inference, i.e., that his behavior suggested flight. In *Hoerauf v. State*, 178 Md. App. 292, 323 (2008), this Court

noted: "[E]vidence of flight is defined by two factors: first, that the defendant has moved from one location to another; second, some additional proof to suggest that this movement is not simply normal human locomotion." (quoting 22 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 5181 (1978 & Supp. 2007)). "This additional proof of other than normal human movement also must reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt." *Id.* at 323–24. Appellant argues that the evidence here showed only a mere departure from the scene of the shooting, asserting that, at the sound of the gunshot, he "sensibly departed the scene and ran to his residence 200 feet away." We disagree.

To be sure, this Court has recognized that "[d]eparture from the scene after a crime has been committed, of itself, does not warrant an inference of guilt." *Id.* at 324 (quoting *State v. Lincoln*, 164 N.W.2d 470, 472 (Neb. 1969)). "[F]or departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt." *Id.* at 324–25 (quoting *Lincoln*, 164 N.W.2d at 472). "[T]he classic case of flight is where a defendant leaves the scene shortly after the crime is committed and is running, rather than walking, or is driving a speeding motor vehicle." *Id.* at 324.

This case presented a classic case of flight. Ms. Scott, Mr. Henry, and Ms. Coleman all testified that, when the gunshot went off, Mr. Anderson dropped to the ground, and

everyone—including appellant—ran in the direction of appellant's residence. Mr. Henry, Ms. Coleman, and Mr. Flythe then drove away from the Waterside community, and appellant and Ms. Scott went inside appellant's residence and remained there until the next day, when the police arrived to search the premises. Under these circumstances, there was "some evidence" from which the jury could reasonably infer that appellant left the scene of the shooting with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution. Accordingly, the flight instruction was applicable under the facts of this case, and the circuit court did not err or abuse its discretion in giving the instruction to the jury.

JUDGMENTS OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.