Circuit Court for Cecil County
Case No. 07-K-15-001606

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0281

September Term, 2017

NIKEL HICKS

v.

STATE OF MARYLAND

Wright,
Kehoe,
Krauser, Peter B.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Wright, J.

Filed: July 9, 2018

On October 24, 2016, Nikel Hicks, appellant, was tried by a jury in Cecil County, Maryland. Hicks was convicted of first-degree murder and wearing, carrying, and transporting a handgun. On April 10, 2017, the Circuit Court for Cecil County sentenced Hicks to: life imprisonment, suspending all but eighty (80) years for first-degree murder, plus ten years imprisonment, consecutive, for the handgun count. Hicks timely appealed and presents the following questions for our review:

1. Did the trial court err in admitting hearsay evidence?

2. Did the trial court err in admitting other crimes evidence?

3. Did the trial court err in instructing the jury as to causation?

4. Was the evidence insufficient to sustain the convictions?

5. Does the cumulative effect of the errors warrant reversal of Hicks's convictions?

For the reasons to follow, we shall affirm the judgments of the circuit court.

BACKGROUND

The Wiretap

On October 11, 2015, the Cecil County Drug Task Force started a wiretap investigation involving Hicks. This wiretap captured calls made and received from Hicks's phone as well as "off-hook conversations.[1]" The State used these phone calls and recordings as evidence against Hicks.

[1] Off-hook conversations are recordings captured when a caller presses "send" from his cell phone but the receiver has not yet answered.

The Alleged Murder

In the early morning hours of October 12, 2015, Officer Jeremy Fuller responded to a report of shots fired at Gooseneck Court, in Elkton, Maryland. Upon his arrival, Off. Fuller discovered the body of Gregory Sammons-Burris, lying in a fetal position between two townhomes. After rolling Burris onto his back, Off. Fuller noticed gunshot wounds. It was later determined that Mr. Burris died from "multiple gunshot wounds."

Detective Lindsey Ziegenfuss arrived on the scene at 2:45 a.m. to investigate and seek out potential witnesses to the shooting. At that time, Det. Ziegenfuss observed Hicks standing across the street from the crime scene where a crowd of people had gathered. There were no witnesses to the shooting. Det. Ziegenfuss marked and collected three shell casings that were found within ten feet of Burris's body. She also recovered two live rounds of .380 caliber Federal ammunition directly next to Burris's body. However, no firearm was found in the vicinity of the crime. After processing the scene, officers responded to several locations within driving distance of the crime scene to check for sales of ammunition to match the ammunition recovered at the scene.

At the North East Walmart store in North East, Maryland, officers discovered that there had been a cash transaction dated October 11, 2015, at approximately 11:30 p.m.[2] Upon checking the stores cameras, officers observed a white male, Daniel Gerres, making a purchase. Officers tracked Gerres through video surveillance throughout the

[2] Officers were directed to that WalMart location by Sergeant Kenneth Russell, who would later testify to the contents of the wiretapped phone calls and text messages at trial.

store, which revealed that he had arrived in a gold Chevrolet Impala with a black male passenger, later identified as Hicks. Gerres purchased ammunition later identified as Federal brand .380 automatic. A search of multiple databases revealed Gerres's home address.

Officers responded to his address and located Gerres.[3] Gerres informed officers that he had purchased the ammunition for an individual named "Nike," which was Hicks's street name. Gerres told the officers that he picked Hicks up in the area of Goose Neck Court, purchased the ammunition for Hicks, and then dropped Hicks back at Goose Neck Court. According to charging documents, this would have been within approximately two hours of the shooting of Burris.

Later that day, at approximately 7:22 p.m., Detective Sean Murphy conducted a search of the home of Finesse Mason, Hicks's girlfriend. Sgt. Russell directed Det. Murphy to the ceiling joists in the laundry room, where Det. Murphy located a white plastic bag containing a silver .380 Automatic caliber handgun. Upon inspecting the handgun, Det. Murphy found that it contained several bullets in the magazine and in the chamber. These bullets were the same brand and caliber of the Federal Brand .380 automatic ammunition that had been located at the crime scene. Officers also located a handwritten note from "Jamal," who was currently incarcerated, that alluded to "Shorty"

[3] Officers again followed the instruction of Sgt. Russell and went to the home of Gerres out of fear for his safety as a potential witness to the crime, given conversations that Sgt. Russell had heard on the wiretap.

Lo, Burris, needing to give money to "Jamal." The letter stated that "Jamal" wished for "Nike," to tell "Shorty Lo" to provide the money to "Chew."

While the police executed the search and seizure warrant, Hicks was observed in the neighborhood. During that time, officers received confidential information that Hicks had fled the area, although the sources did not know his destination. During the course of the investigation, a confidential source informed officers that he had heard Hicks say that he was present at the time of the murder. An additional source informed officers that he had personal knowledge that Hicks was involved in the murder of Burris.

Trial

Hicks's trial commenced on October 24, 2016, and lasted four days. The jury first heard testimony from Det. Ziegenfuss, a detective with the Elkton Police Department, Criminal Investigations Division. She testified that she spoke with two women, Azia Ray and Crystal Ray, whom were not considered witnesses. Det. Ziegenfuss also testified that she observed Hicks near the crime scene.

Perhaps the most important testimony came from Sgt. Russell, Supervisor of the Cecil County Drug Taskforce. Sgt. Russell testified as to the contents of recorded phone calls and text messages from a wiretap that had been placed on Hicks's phone the day before the murder of Burris. At trial, the jury heard a number of phone calls that occurred between Hicks and various third parties, whose identities were known and unknown to the police, and Sgt. Russell testified as to the substance of those calls:[4]

[4] Hicks's counsel consistently objected to Sgt. Russell's testimony which were overruled.

- **Session D-4604** (October 11, 2015 at 8:12PM): An unknown male asks Hicks if he has any "johns for a [.]380." Hicks then informed the unidentified male that he "can probably get some" and "we [are] all gonna need [them]."

- **Session D-472** (October 11, 2015 at 9:15PM): Sgt. Russell testified that this call was a negotiation between Hicks and an unknown male for the sale of a handgun. Hicks states he "need[s] them johns with it[,]" meaning he wanted the bullets to go with the handgun. The unknown male responds he will "take the three," which Sgt. Russell testified means $300.

- **Session D-474** (October 11, 2015 at 9:28PM): Hicks calls an individual identified as Chavez James and states, "we need to go get that joint ASAP. . . [t]hat joint you showed me today." Sgt. Russell testified this is referring to a handgun. Hicks reiterated the urgency of obtaining the weapon and that price is not important. Hicks asks what else James has available. James responds he has a "[c]ouple shotties," meaning shotguns. At the conclusion of the call, Hicks indicated he is on Gooseneck Court and James requested that Hicks come see him.

- **Session D-475** (October 11, 2015 at 9:34PM): Hicks called an individual identified as Dajon Hall. During the course of the phone call, an individual identified as Daniel Gerres spoke with Hicks. Hicks told Gerres that he "need[s] to go to Walmart and buy. . . some of [those] things again." Det. Ziegenfuss' investigation revealed that the Walmart in North East, Maryland sold Federal [.]380 ammunition. Det. Ziegenfuss obtained the security camera footage provided by the Walmart Asset Protection Associate. The video showed Hicks with Daniel Gerres enter the store, retrieve ammunition from its locked casing, and leave the store. Det. Ziegenfuss obtained a receipt, which showed the purchase of Federal [.]380 ammunition on October 11, 2015 at 11:36PM.

- **Session D-476** (October 11, 2015 at 9:37PM): Hicks received a text message stating "[w]e strapped now[.]" Sgt. Russell testified "strapped" commonly means that an individual is armed.

- **Session D-512** (October 12, 2015 at 4:13AM): An unknown female told Hicks that "people . . . tryin[g] to say [Hicks] had somethin[g] to do with it." Sgt. Russell testified this was based on Hicks's car being in the area.

- **Session D-513** (October 12, 2015 at 7:22AM): Hicks called Dajon Hall and informed him that Sammons-Burris was dead. Hicks stated that people around the crime scene said "they put one in his head [and] a couple in his back." Hicks also told Hall that Sammons-Burris was in a fetal position at the scene. Hicks told Hall, "[w]hoever did it was not playing . . . they wanted to send [him] to the graveyard . . . [and] had no intentions [of] sending him to the hospital."

- **Session D-607** (October 12, 2015 at 7:26PM): Hall called Hicks. Hall asked Hicks to get "the joint" out of the laundry room of Vanessa Mason's home. Sgt. Russell testified that a "joint" means a handgun.

Hicks's counsel made continuing objections to Sgt. Russell's testimony regarding the wiretapping. Additional facts will be provided as they become relevant to our analysis.

DISCUSSION

I.

Hicks's first claim of error is that the trial court admitted inadmissible hearsay evidence, specifically the wiretap evidence. The State responds that Hicks's claim is waived and unpreserved because the defense counsel's objection only applied to relevance, unfairness, prejudice, and prior bad acts evidence and was, therefore, limited in scope. We agree with the State's argument that Hicks did not properly preserve this issue.

Maryland Rule 8-131(a) governs our scope of review in considering issues on appeal. "Ordinarily, the 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, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." Md. Rule 8-131(a). Although this Court may "address the merits of an unpreserved issue," that discretion "is to be rarely exercised and only when doing so furthers, rather than undermines, the purposes of the rule." *Robinson v. State*, 410 Md. 91, 104 (2009); *Conyers v. State*, 354 Md. 132, 150 (1999). The

purposes of Md. Rule 8-131(a) are furthered in "cases where prejudicial error was found and the failure to preserve the issue was not a matter of trial tactics." *Grandison v. State*, 425 Md. 34, 69-70 (2012) (quoting *Abeokuto v. State*, 391 Md. 289, 327 (2006)). In other words, if a party fails to raise a particular issue in the trial court, or fails to make a contemporaneous objection, Md. Rule 8-131(a) dictates that issue is waived.

Maryland Rule 4-323(a) provides that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs."

In addition, "[i]t is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal." *Klauenberg v. State*, 355 Md. 528, 541 (1999) (citations omitted); *see also Gutierrez v. State*, 423 Md. 476, 488 (2011) (reiterating that "when an objector sets forth the specific grounds for his objection . . . the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified") (citation omitted); *Robinson v. State*, 209 Md. App. 174, 202 (2012) ("Because [Hicks's] arguments were not raised below, they are not preserved for appellate review").

A contemporaneous general objection to the admission of evidence ordinarily preserves all grounds which may exist for the inadmissibility of the evidence for appellate review. The only exception is the ground to be stated, where the trial court

requests that the ground be stated, and where the objector, although not requested by the court, voluntarily offers specific reasons for objecting to certain evidence. *Bazzle v. State*, 426 Md. 541, 561 (2012) (quoting *Boyd v. State*, 399 Md. 457, 476 (2007)).

The Court of Appeals addressed the issue raised here in *Kang v. State*, 393 Md. 97 (2006), as follows:

> We recognized in some older cases that [t]o preserve an issue on appeal in regard to the admissibility of evidence, generally speaking there must be an objection made to the question eliciting the allegedly objectionable answer. Moreover, [g]enerally speaking, specific objection should be made to each question propounded, if the answer thereto is claimed to be inadmissible. Yet, as the Court of Special Appeals noted in its opinion here, *Kang v. State*, 163 Md. App. 22, 44 (2005), "trial advocates were oftentimes obligated to lodge repetitive and disruptive objections, over and over again, even though everyone in the courtroom knew that the objections were going to be overruled."
>
> Consequently, Md. Rule 4-323(b), adopted in 1984, was created to provide a trial judge with the discretion to grant a continuing objection and thus obviates the need to object persistently to similar lines of questions that fall within the scope of the granted objection: At the request of a party or on its own initiative, the court *may grant* a continuing objection to a line of questions by an opposing party. For purposes of review by the trial court or on appeal, the continuing objection is effective only as to questions clearly within its scope. As indicated by the test of the rule, this reprieve from the contemporaneous objection rule is obtained only through a discretionary grant by the trial judge.

Id. at 119-120. (Emphasis in original) (citations omitted) (internal quotation marks omitted).

Hicks contends that he made a general objection which was "sufficient to preserve all grounds of objection which may exist." *State v. Jones*, 138 Md. App. 178, 218 (2001) (quoting *Grier v. State*, 351 Md. 241, 250 (1998)). The State responds that defense counsel only made one continuing objection, which was limited in scope and did not

reach the issue of hearsay. The State also contends that when Sgt. Russell's testimony continued to discuss the recorded wiretap calls, the continuing objection was severed by his testimony, relying on our decision in *Choate v. State*, 214 Md. App. 118, 151 (2013).[5]

At trial, Hicks's counsel objected to the wiretap evidence in the following colloquy:

> [THE STATE]: Sergeant Russell, did you get a wiretap on a phone in this case belonging to Nikel Hicks?
>
> A: Yes, ma'am.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Pardon me? Overruled.
>
> A: Yes, ma'am, we did.
>
> [THE STATE]: And you an applied to the court for that wiretap?
>
> A: Yes, ma'am, we did.
>
> [DEFENSE COUNSEL]: Objection.

[5] [A]s Professor McLain points out in *Choate, if the improper line of questioning is interrupted by other testimony or evidence and is thereafter resumed, counsel must state for the record that he or she renews the continuing objection*. McLain, Maryland Evidence, § 103.12. Otherwise, it would be impossible for an appellate court to determine whether the trial judge regarded the continuing objection as remaining in effect. An appellate court will reverse or vacate a judgment only for judicial errors. Unless it appears that the trial judge is or should be aware, when a question is asked and no objection is voiced, that counsel is relying on the continuing objection, the appellate court cannot conclude that the judge erred in not sustaining the "continuing" objection. *Id*. at 151. (Emphasis in original). In this case, there was no second objection and, therefore, the *Choate* analysis is not applicable.

[DEFENSE COUNSEL]: As to relevancy and the basis I put on the record[6] at the beach,[7] Your Honor.

THE COURT: Well, overruled.

[THE STATE]: Is there court supervision of a wiretap that you get?

A: Yes, ma'am. We report the status of the wire to the presiding judge during the course of the investigation.

[THE STATE]: And how does a wiretap work? Say you can get this court order, what do you do?

[DEFENSE COUNSEL]: Your Honor, may I have a continuing objection?

THE COURT: Sure. Overruled.

Here, the trial court granted defense counsel a continuing objection, which was then overruled. This continuing objection was limited in scope to relevancy, prior bad acts, and prejudice. Defense counsel's objection made prior to requesting a continuing objection was solely on those issues. Thus, the continuing objection the judge granted applied *only* to those three issues. Accordingly, we decline to reach the issue of hearsay. Hicks asks us to overlook his non-preservation and to take notice of plain error. In exercise of our discretion, we decline to do so. *Wallace v. State*, No. 53 (2017), ___ Md. App. ___, slip opinion, page 22.

I.

[6] The parties agree that this word should read "bench." The issues discussed at the bench were prior bad acts that were not relevant and highly prejudicial.

[7] We note that there was an error in the transcript.

Hicks's second claim of error is that the trial court erred in admitting "great amounts of irrelevant evidence and inadmissible other crimes evidence" related to his alleged participation in a drug trafficking organization. He contends that the State never alleged a connection between the drug case and the homicide, and that the jury did not have to make any determination as to the background for the wiretap. Despite this, Hicks believes that the trial court erred in permitting the introduction of Sgt. Russell's testimony that indirectly implicated him in the crime of drug trafficking. Ultimately, Hicks avers that this testimony painted him in a prejudicial light.

The State responds that the testimony was offered for the proper purpose of providing context of the wiretap's foundation and was not intended to prove Hicks's criminal propensity.

When the State sought to submit Sgt. Russell as an expert in the field of wiretapping, Hicks's defense counsel objected in the following colloquy:

> [THE STATE]: Just briefly when I say wiretap case, what does that mean?
>
> SERGEANT RUSSELL: A wiretap investigation, it's pretty extensive. There's a lot. You start investigating what you believe is a drug trafficking organization. And in order for it to get to the step where it's a wiretap investigation you have to be able to show a judge that you've tried different things --
>
> [DEFENSE COUNSEL]: Objection.
>
> SERGEANT RUSSELL: (Continuing) -- to try and --
>
> THE COURT: Basis?
>
> [DEFENSE COUNSEL]: As to relevance.
>
> * * *

[THE STATE]: Did you do all these things in the wiretap involving Nikel Hicks?

SERGEANT RUSSELL: Yes, ma'am, we did.

* * *

[DEFENSE COUNSEL]: Your Honor, I was looking for the specific notification that the State gave me as far as what his expertise went to, and I think what is being offered is beyond what I was advised. I mean, I thought he was just going to talk about this particular wiretap. So I would be objecting as him being offered as an expert in the wide field that I think the State is trying to get him to be offered as.

[THE STATE]: I'm trying to qualify him for this case. I can show you what I read is what we listed in our discovery as what he would testify to. He's going to talk about how this wire was obtained and what he did on this wire. He's not going to talk about other wires from other cases, if that's your concern . . . . Specifically, he's going to interpret the calls that he obtained from the wire, but he's also going to explain how the wire was obtained, how it works, how GPS monitoring works, which was part of this wire as well; and how those phone calls are received, that he is interpreting phone calls is his primary, and that is clearly listed in discovery.

* * *

[DEFENSE COUNSEL]: But listed as his being an expert in all of these – that, and how is it relevant. This isn't a drug case, so, I mean, certainly the wire information can come in, but it's up to the jury to decide what this means.

* * *

[THE STATE]: No, it is up to him to say what he knew from the – who the voices were from the prior wire that he had involving this defendant in a drug case, that turned into – this wire into a homicide – into a homicide case.

[DEFENSE COUNSEL]: Well, and I – but that's my concern about how much they're going to open up being prior bad acts.

THE COURT: We will have to deal with that at the time and make the appropriate objection, I guess. But, I mean, I don't know – I'm not familiar with what the testimony is going to be at this point.

[THE STATE]: Well, the motion in *limine* was the time to discuss that, and you mentioned it and you never brought it up against so I thought we were fine.

* * *

[DEFENSE COUNSEL]: Right. But the fact that – I mean, I am willing to say there was a wire. It doesn't matter if Nikel Hicks was the focus or not the focus. There was a wire. These are the conversations, period. Anything else to me beyond that, your Honor, goes into prior bad acts that are not relevant and highly prejudicial. It's – this is not a drug case, or it's not about drug dealing. It's about these conversations that occurred in this finite period of time relevant to what may have happened in the evening of October 11th and going into the morning of October 12th, period.

[THE STATE]: The concern I have is that it's a drug case when it's favorable to her. When it's not favorable to her it's not a drug case. She asked certain people about drug things, she doesn't object to those. Now all of a sudden we're not talking about them anymore.

THE COURT: Well, I am going to overrule. Let's just – we'll proceed, and if there is an objection we'll deal with it at that time.

[DEFENSE COUNSEL]: Thank you, your Honor. (Discussion at the bench concluded).

The trial court then accepted Sgt. Russell as an expert in the areas of controlled dangerous substance ("CDS"), drug investigations, the use of wiretaps in these investigations, drug trafficking, distribution, language, terminology, lingo that is used by individuals in the drug trafficking, methods of operation, and some GPS tracking.

At trial, the following colloquy occurred as the State introduced the wiretap:

[PROSECUTOR]: Just briefly, when I say wiretap case, what does that mean?

[WITNESS]: A wiretap investigation, it's pretty extensive. There's a lot. You start investigating what you believe is a drug trafficking organization. And in order for it to get to the step where it's a wiretap investigation you have to be able to show a judge that you've tried different things –

[DEFENSE COUNSEL]: Objection.

[WITNESS]: (Continuing) – to try and –

[COURT]: Basis.

[DEFENSE COUNSEL]: As to relevance.

[COURT]: Well, overruled.

[WITNESS]: You have to be able to show a judge that you've tried different ways to take down this organization, and the only way you're going to be able to try and get all the targets is through wiretaps of their phones.

[PROSECUTOR]: And how do you go about getting wiretaps on someone's phone?

[WITNESS]: It normally takes a pretty extensive affidavit where you are laying out all the facts of the investigation, and how you tried this, tried that, and the goals of the investigation are not being met yet, so you bring the affidavit to a judge, and they'll give you permission to do the wiretap if they believe it's there.

Hicks asserts in his brief that this testimony amounted to evidence of other crimes or bad acts in violation of Md. Rule 5-404(b), and was inherently prejudicial and irrelevant. Md. Rule 5-404(b) provides that: "Evidence of other crimes, wrongs, or acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident."

Pursuant to this Rule, "[p]ropensity evidence, or evidence suggesting that because the defendant is a person of criminal character it is more probable that he committed the crime for which he is on trial, is not admissible into evidence." *Wagner v. State*, 213 Md. App. 419, 458 (2013) (quoting *Hurst v. State*, 400 Md. 397, 407 (2007)). Evidence of other crimes may be admissible, however, if the evidence has "'special relevance, *i.e.*, is substantially relevant to some contested issue in the case and is not offered simply to prove criminal character.'" *Id.* (quoting *Hurst*, 400 Md. at 408). Hicks argues that Md. Rule 5-404(b) protects him from the inference that he murdered Burris because of his alleged criminal propensity.

It is well-settled that subject to several exceptions, evidence of other crimes is not admissible in Maryland. *Hurst v. State*, 400 Md. at 406. It may be admissible, however, if the "evidence is substantially relevant to some contested issue in the case and is not offered to prove guilt based on propensity to commit crimes." *Id.* (citation omitted).

To determine the admissibility of other crimes evidence, the trial court conducts a three-step analysis. *State v. Westpoint*, 404 Md. 455, 489 (2008). When presented with other crimes evidence, the court follows the three-step analysis from *State v. Faulkner*, 314 Md. 630 (1989). First, the court determines whether the evidence falls into one of the recognized exceptions, such as motive, opportunity, intent, or preparation. This is not a matter of discretion, and we review that categorization *de novo*. Second, if the evidence falls into a category of exceptions, the court decides by clear and convincing evidence whether the defendant was involved in the prior crime or bad act, and we review that finding for sufficiency of the evidence. Third, the court balances the probative value of

the evidence against the danger of unfair prejudice, which we review for abuse of discretion. *Id.* at 634.

The admission of prior crimes evidence under Md. Rule 5-505(b) is a matter for the trial court's discretion. *Snyder v. State*, 210 Md. App. 370 (2013). In *Snyder*, we explained:

> Like Maryland, Federal courts have held that a trial court must explain how the probative value of the evidence outweighs its prejudicial effect. Significantly, if the trial court fails to provide such an explanation, the appeals court will do the balancing itself.

Id. (citations omitted).

There are two reasons for this general rule of exclusion: "First, if a jury considers a defendant's prior criminal activity, it may decide to convict and punish him for having a criminal disposition. Second, a jury might infer that because the defendant has committed crimes in the past, he is more likely to have committed the crime for which he is being tried." *Ayers v. State*, 335 Md. 602, 630 (1994) (quoting *Straughn v. State*, 297 Md. 329, 333 (1983)); *see also Terry v. State*, 332 Md. 329, 334 (1993) (other crimes evidence "is excluded because it may tend to confuse the jurors, predispose them to a belief in the defendant's guilt, or prejudice their minds against the defendant").

We elaborated on this point in *Dixon v. State*, 133 Md. App. 325, 330-31 (2000), *rev'd on other grounds*, 364 Md. 209 (2001). The court explained why evidence of uncharged criminal activity that takes place at the crime scene "does not necessarily engage the gears of 'other crimes' evidence law:"

> The ultimate end to be served by the ban on "other crimes" evidence is that the State should not be permitted to bring in "out of left field" the fact that

> on some other occasion the defendant committed a crime. The danger being guarded against is that such past behavior will be offered o show and will be used by a jury to conclude that the defendant has a propensity to commit crime. The fear is that the jury may convict him in the case on trial because of something other than what he did in that case, to wit, because of his criminal propensity.

The above authorities reflect the common law principle that the strictures of "other crimes" evidence law, now embodied in Md. Rule 5-404(b), do not apply to evidence of crimes (or other bad acts or wrongs) that arise during the same transaction and are intrinsic to the charged crime or crimes. We define "intrinsic" as including, at a minimum, other crimes that are so connected or blended in point of time or circumstances with the crime or crimes charged that they form a single transaction, and the crime or crimes charged cannot be fully shown or explained without evidence of the other crimes.

Our conclusion is in accord with the interpretation that various federal courts of appeal have given to Federal Rule of Evidence 404(b), from which Md. Rule 404(b) is derived. *See, e.g., United States v. Chin*, 83 F.3d 83, 87-88 (4th Cir. 1996) (collecting cases from other federal courts of appeal and stating: "We agree with the other circuits that where testimony is admitted as to acts intrinsic to the crime charged, and is not admitted solely to demonstrate bad character, it is admissible;" and defining as "intrinsic," other criminal acts that are "inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged.").

The probative value of Sgt. Russell's testimony is clear. Sgt. Russell's testimony explained to the jury how the recorded phone calls came about. We agree with the State

that the drug activity was so intertwined with this case, that it would have been unrealistic for the State to separate any mention of drugs from the presentation of the wiretap. The introduction of the wiretap furnished "part of the context of the crime." *United States v. Powers*, 58 F.3d 1460, 1466 (4th Cir. 1995). The conversations included admonitions to "bring some stuff with you 'ight [sic]," and he "blew up for that half a stick" [drug sales] spliced with talk of "[.]380 ammunition" and "put[ting] one in his head" [murder].

The Court of Appeals has acknowledged that "[g]uns often accompany drugs, and many courts have found an 'indisputable nexus between drugs and guns.'" *Bost v. State*, 406 Md. 341, 360 (2008) (quoting *United States v. Sakyt*, 160 F.3d 164, 169 (4th Cir. 1998); *see also Dahiell v. State*, 143 Md. App. 134, 153 (2001) (noting that "[p]ersons associated with the drug business are prone to carrying weapons"). The court did not abuse its discretion in admitting the recorded phone calls.

III.

Hicks's third claim of error is that the trial court erred in giving a confusing instruction regarding intervening and superseding causes, which Hicks claims is not at issue in the case. Instead, Hicks argues that the court should have answered "yes" when presented with the jury's question.

Trial courts are required to give a requested jury instruction when: 1) the instruction correctly states the law, 2) the instruction applies to the facts of the case and has been generated by some evidence, and 3) the content of the jury instruction is not covered by another given instruction. *Derr v. State*, 434 Md. 88, 133 (2013). "We

review a trial court's decision whether to grant a jury instruction under an abuse of discretion standard." *Id.* (quoting *Cost v. State*, 417 Md. 360, 368-69 (2010)).

Also within a trial court's discretion is whether to provide a particular supplemental instruction in response to a question from the jury after its deliberations have commenced. *See Appracio v. State*, 431 Md. 42, 57 (2013); *see also Holmes v. State*, 209 Md. App. 427, 449 (2013) (quoting *Lovell v. State*, 347 Md. 623, 657 (1997)) ("Whether to give a jury supplemental instructions in a criminal case is within the discretion of the trial judge."). We will not disturb a trial court's discretionary decision "except on a clear showing of . . . discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Jarrett v. State*, 220 Md. App. 571, 584 (2014) (quoting *Bazzle v. State*, 426 Md. 541, 549 (2012)).

The court instructed the jury as to first and second-degree murder, use of a handgun in a crime of violence, and wearing, carrying, or transporting a handgun. After retiring for deliberation, the jury sent the following note to the court:

> THE COURT: All right. It's now about 2:59, and as we were handing in the answer to the first question, we were handed a second question, which is timed at 2:57: Does, and then in quotations the word cause, end of quotations, mean that the defendant actually pulled the trigger?

Defense counsel then requested that the jury be instructed "yes" in response to the question:

> [DEFENSE COUNSEL]: Your Honor, the defense proposes that the answer to that question is, Yes. He is not charged with conspiracy. There are no undicted -- no mention of unindicted co-conspirators who would have participated.

The trial court gave the following instruction, over appellant's objection:

> THE COURT: What I have written here is, the factual causation requirement is satisfied if the defendant's act or omission was a substantial factor in bringing about the death. Legal or proximate causation means that there must not have been a subsequent factual causation that intervened in such a manner as to supersede or replace the original factual causation.

After the court's instruction, defense counsel again maintained that the answer should be "yes." At oral argument, defense counsel stated that the instruction to the jury was "confusing," and that it would have confused lawyers and law students alike. The State countered that the trial court was within its discretion in relying upon the Maryland Criminal Pattern Jury Instructions ("MCPJI"). We agree.

We have voiced several times that we favor trial judges using the pattern jury instructions. *See Minger v. State*, 157 Md. App. 157, 161 n.1, (2004) ("Appellate courts in Maryland strongly favor the use of pattern jury instructions"); *Green v. State*, 127 Md. App. 758, 771 (1999) (recommending that trial judges give pattern jury instructions). As we have explained, a "trial judge is in the best position to determine whether, and which, additional instructions should be given and, therefore . . . [the trial judge's] judgment is entitled to great weight." *Howard v. State*, 66 Md. App. 273, 284-85 (1986) (citing *Kelly v. State*, 270 Md. 139, 143 (1973)). A trial court may respond to a question asked by the jury after it has begun its deliberations by giving a supplemental instruction. *See id.*; *see also* Md. Rule 4-325(a) ("The court shall give instructions to the jury . . . and may supplement them at a later time when appropriate."). In *Appraicio*, 431 Md. at 51, the Court of Appeals explained:

> When the jury asks such a question, "courts must respond with a clarifying instruction when presented with a question involving an issue central to the case." *Cruz v. State*, 407 Md. 202, 211(2009). Trial courts must avoid giving answers that are "ambiguous, misleading, or confusing." *Battle v. State,* 287 Md. 675, 685 (1980) (quoting *Midgett v. State,* 216 Md. 26, 41 (1958)).

In addition, the trial court's supplemental instruction must be responsive to "the confusion evidenced by the query." *See State v. Baby*, 404 Md. 220, 263 (2008). The trial court's decision to provide supplemental instructions, however, "and the extent of supplementation are matters left to the sound discretion of the trial judge, whose decision will not be disturbed on appeal in the absence of a clear abuse of discretion." *Howard v. State*, 66 Md. App. 273, 284 (1986) (citations omitted).

Here, the trial court provided a thorough explanation in response to the jury's question. First, the court recited, almost verbatim, the MCPJI for causation. "[W]e say for the benefit of trial judges generally that the wise course of action is to give instructions in the form, where applicable, of our [MCPJI]." *Johnson v. State*, 223 Md. App. 128, 152, *cert. denied*, 445 Md. 6 (2015) (quoting *Green v. State,* 127 Md. App. 758, 771 (1999)); *see also Minger v. State*, 157 Md. App. 157, 161 n1 (2004) (citation omitted) ("Appellate courts in Maryland strongly favor the use of pattern jury instructions."). Second, the trial court's initial and supplemental instruction covered the

essential statutory elements of first-degree murder[8] and second-degree murder,[9] and the definition provided by the MCPJI. When the court gave the jury its initial instruction,

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[8] Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL"), § 2.201 states:

(a) A murder is in the first-degree if it is:

(1) a deliberate, premeditated, and willful killing;

(2) committed by lying in wait;

(3) committed by poison; or

(4) committed in the perpetration of or an attempt to perpetrate:

(i) arson in the first degree;

(ii) burning a barn, stable, tobacco house, warehouse, or other outbuilding that:

1. is not parcel to a dwelling; and

2. contains cattle, goods, wares, merchandise, horses, grain, hay, or tobacco;

(iii) burglary in the first, second, or third degree;

(iv) carjacking or armed carjacking;

(v) escape in the first degree from a State correctional facility or a local correctional facility;

(vi) kidnapping under § 3-502 or § 3-503(a)(2) of this article;

(vii) mayhem;

(viii) rape;

(ix) robbery under § 3-402 or § 3-403 of this article;

defense counsel stated that it had no exceptions. While the defense finds the supplementary instruction unsatisfactory, the court was well within its discretion to give it.

IV.

Hicks's fourth claim of error is that the trial court erred in denying the motion for judgment of acquittal on all counts, and the evidence was insufficient to sustain those convictions. The State responds that Hicks has waived a challenge to the sufficiency of evidence because he failed to raise the issue below. Further, the State contends that although the jury's verdict was mixed, the evidence was sufficient to sustain Hicks's conviction. Before determining the sufficiency of the evidence, we will address the State's preservation argument.

At trial, defense counsel made a motion for judgment of acquittal, citing that the State had failed to establish that Hicks was the one who was "lying in wait with premeditation and forethought and sought to kill Burris." The State responded that it had met its burden as to first-degree murder because the calls and the information on the

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(x) sexual offense in the first or second degree;

(xi) sodomy; or

(xii) a violation of § 4-503 of this article concerning destructive devices.

[9] CL § 2-204 states:

(a) A murder that is not in the first-degree under § 2-201 of this subtitle is in the second-degree.

wiretap and the circumstantial evidence would allow a jury to make an inference that Hicks was guilty of first-degree murder.

This Court has consistently emphasized the requirement that alleged deficiencies in the evidence must be pointed out "with particularity" during trial in order to preserve a challenge to the sufficiency of the evidence for appellate review. "[A] motion which merely asserts that evidence is insufficient to support a conviction, without specifying the deficiency, does not comply with [Md.] Rule 4-324 and thus does not preserve the issue of sufficiency for appellate review." *Johnson v. State*, 90 Md. App. 638, 649 (1992) (citing *Brooks v. State*, 68 Md. App. 604 (1986)). Further, a motion for judgment of acquittal must argue "precisely the ways in which the evidence is lacking." *Anthony v. State*, 117 Md. App. 119, 126 (year), *cert denied*, 348 Md. 205 (1997) (citations omitted).

On appeal, Hicks's argument focuses on the fact that "there was no evidence showing that Mr. Hicks planned a murder." Hicks now contends the following: (1) that the faulty causation instruction confused the jury; (2) that the State failed to produce sufficient evidence to support the conviction; and (3) that the jury's acquittal of Hicks's use of a handgun in the commission of a crime of violence is indicative of insufficient evidence. Because the issue of whether Hicks was "lying in wait" for Burris to murder him was raised in the motion for acquittal, and then again on appeal, we find that issue was preserved and limit our review to that issue.

Jackson v. Virginia, 443 U.S. 307 (1979), is the universally followed pole star, and tells us that the standard of review of the sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of

fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 318-19 (emphasis in original). *See also Allen v. State*, 402 Md. 59, 76-77 (2007) ("[W]e review a challenge to the sufficiency of the evidence in a jury trial by determining whether the evidence, viewed in a light most favorable to the prosecution, supported the conviction . . . such that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."); *State v. Smith*, 374 Md. 527, 533 (2003) ("The standard for appellate review of evidentiary sufficiency, is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."); *Moye v. State*, 369 Md. 2, 12 (2002) ("The standard for appellate review of evidentiary sufficiency is whether any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt."); *State v. Albrecht*, 336 Md. 475, 478 (1994) (citations omitted) ("[W]e review the evidence in the light most favorable to the State, giving due regard to the trial court's finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.").

It is not within our purview to retry the evidence or the case that the jury heard. *Allen*, 402 Md. at 77. The jury, as factfinder, possesses a unique opportunity to view and weigh the evidence -- an opportunity that we do not have as an appellate court. Thus, we will not re-weigh the credibility of witnesses or resolve any conflicts in the evidence. *Tarray v. State*, 410 Md. 594, 608 (2009). We will defer to the jury's inferences and determine whether the evidence supports those inferences. *Id*. at 557. This is a standard

that applies to all criminal cases. *Smith*, 374 Md. at 534. As we assess the legal sufficiency of the evidence, our focus, of course, is not on what the jury *should* have believed, but is on what the jury *could* have believed.

The jury could have believed that the recorded phone calls and text messages from the wiretap exhibited planning, on Hicks's part, to purchase guns and bullets from a WalMart to murder Burris because of a potential drug transaction gone awry. Further, the jury could have believed that Hicks's phone calls to his girlfriend to find the gun stashed away in the laundry room, demonstrated an intent to hide the murder weapon, which the jury could conclude was evidence of Hicks's guilt. Again, we are not the factfinders in this case and do not re-weigh the evidence that the jury found. We hold that the evidence was sufficient to convict Hicks for the charge of first-degree murder.

V.

On appeal, Hicks argues that the record reflects a multitude of errors that were not harmless beyond a reasonable doubt. Hicks argues that his first-degree murder conviction was "based solely on evidence of the concealment of the weapon used in the shooting, an erroneous and confusing jury instruction, as well as a massive amount of inadmissible, irrelevant, and highly prejudicial other crimes evidence." Hicks points to a lack of DNA evidence, Hicks's fingerprints on the gun, and the jury's acquittal of Hicks using a gun.

The State responds that all of Hicks's claims of error are meritless, and that we can declare, beyond a reasonable doubt, that any error by the trial court in no way influenced the jury's verdict.

Both parties direct us to *Muhammad v. State*, 177 Md. App. 188 (2007), and we begin our analysis there. In order to conduct a cumulative error analysis, we must make "multiple findings" of harmless error. *Muhammad*, 177 Md. App. at 325. What creates a prejudicial effect is "two or more actual findings of error," not necessarily claims of error. *Id*. In *Muhammad*, the Court found that "[t]he guilt of the appellant was so massively and overwhelmingly established, in a dozen different ways, by the tidal wave of inculpatory evidence that it is inconceivable to us that the elimination of any hypothesized error, or series of hypothesized errors, could have made any difference whatsoever to the jury verdicts in this case." *Id*. at 224. Further, the *Muhammad* court found:

> The contention [of cumulative error] is one that is increasingly voguish, and it deserves some analysis. Cumulative error is a phenomenon that exists only in the context of harmless error analysis. More precisely, it exists only in the context of multiple findings of harmless error. In the case of two or more findings of error, the cumulative prejudicial impact of the errors may be harmful even if each error, assessed in a vacuum, would have been deemed harmless. Where the prejudice from each of two or more errors is fractional, the fractions may add up. Each fraction of prejudice, however, is contingent on an undergirding finding of error. It is in this regard that many promiscuous claims of cumulative error go awry.
>
> In a case involving two or more errors, the thing that may cumulate is the prejudicial effect of two or more actual findings of error, not the effect of two or more mere allegations of error. There must first be error before there is any prejudicial effect of that error to be measured. With respect to each of the appellant's contentions of individual error, we have held that there was no error. Self-evidently, there was no prejudicial impact to cumulate.

Id. at 325 (quotations omitted).

Finding no error, we accordingly affirm Hicks's convictions and the judgments of the circuit court.

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