Circuit Court for Montgomery County
Case No. 132703C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 373

September Term, 2019

LLOYD PATRICK WALTERS

v.

STATE OF MARYLAND

Kehoe,
Arthur,
Moylan, Charles E., Jr.,
(Senior Judge, Specially Assigned)
JJ.

Opinion by Kehoe, J.

Filed: December 7, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. *See* Md. Rule 1-104.

After a jury trial in the Circuit Court for Montgomery County, Lloyd Patrick Walters was convicted of first-degree felony murder and the use of a handgun in a crime of violence. He raises six issues on appeal, which we have broken down into seven and reworded:

1. Did the court err in admitting call and location records for appellant's cell phone?

2. Was the evidence sufficient to sustain the convictions?

3. Is a new trial required because it is unclear whether the jury unanimously agreed as to the verdicts on the predicate felonies to support the felony murder conviction?

4. Did the trial court err by giving the flight instruction to the jury?

5. Did the trial court err by admitting evidence of appellant's pre-arrest statements to the police?

6. Did the trial court err in giving the unmodified Maryland Criminal Pattern Jury Instruction on intent?

7. Did the court err in permitting the State in closing argument to tell the jury that it could draw an inference of guilt from appellant's pre-arrest statements?[1]

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[1] Appellant sets out the issues as:

1. Did the court err in admitting the call records from a phone attributed to Appellant?

2. Was the evidence sufficient to sustain Appellant's convictions?

3. Assuming *arguendo* that the evidence was sufficient for finding Appellant guilty of felony murder on one or more but not all predicate felonies, is a new trial is required?

4. Did the court err in its instructions to the jury?

(Footnote continued . . . .)

Background

The prosecution's theory at trial was that appellant (armed with a nine-millimeter pistol) exchanged gunshots with his intended victim, Todd Pruitt (armed with a .357 magnum revolver), in the course of an unsuccessful armed robbery. Pruitt was killed and appellant seriously wounded. What follows is a summary of the evidence presented at trial that is relevant to the parties' appellate contentions.

A. The forensic and testimonial evidence

At approximately 9:30 pm on September 7, 2017, appellant drove himself to the Montgomery County Police Department's Third District Station on Route 29 in White Oak, Maryland. Appellant had been shot in the abdomen and was in great pain when he entered the station. Police officers came to appellant's aid assistance and called for an ambulance. Before the EMTs arrived, appellant told Officer Marcus Hendriks that he had been shot about thirty minutes before. He also stated, "That was me . . . [t]hat shot the man." Appellant gave the police directions to where the shooting had taken place. Appellant was then taken by ambulance to the Washington Hospital Center. He remained hospitalized until September 30, 2017.

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5. Did the court err in permitting the State to argue to the jury that it may draw an inference of guilt from Appellant's pre-arrest silence?

6. Was evidence of Appellant's pre-arrest silence erroneously admitted?

Police officers went to the location described by appellant and found a recreational vehicle parked on a lot on Old Columbia Pike across from Paint Branch High School. The door to the RV was ajar. In the RV, police discovered the body of Todd Pruitt, who was dead from gunshot wounds. Police forensic investigators found bloodstains, bullet fragments, and shell casings in the RV. Additionally, police recovered a nine-millimeter cartridge on the steps to the door of the RV. Police found $520 in one of the pockets of the jeans Pruitt was wearing when he was killed. The RV also contained a safe. There was a large pool of blood on the carpet in front of the safe. When the police were able to open it, they found $12,000 in U.S. currency. Although the police discovered hundreds of rounds of .357 magnum ammunition within the RV, they recovered no handguns or other firearms at the site. A neighbor and acquaintance of Pruitt told the police that Pruitt had a .357 magnum pistol. Another neighbor informed the police that at around 9:30 pm on that same night, he had heard gunshots—"two quickly, a brief pause, and then three quickly."

The police obtained copies of appellant's cell phone records and those records led them to Alan Bird, a mutual acquaintance of appellant and Pruitt. He testified that Pruitt had inherited about $170,000 from his mother and kept between $20,000 and $30,000 in cash in a safe in his RV. Bird testified that Pruitt was planning to move to Florida. The logistics of Pruitt's planned relocation were complicated by the fact that he owned several vehicles. Bird told appellant that Pruitt had "come into money" and that Pruitt was looking for someone to help him move the vehicles to Florida. Bird also testified that

he told appellant that Pruitt had a gun and "might have told" appellant that he knew the combination to Pruitt's safe.

Once, when he and appellant were driving together, Bird pointed out the location of Pruitt's RV. This was about two months before Pruitt was murdered. According to Bird, appellant was "excited" about the possibility of being hired by Pruitt and wanted to be introduced to him for that purpose. Bird testified that he never introduced appellant and Pruitt to one another, never gave appellant Pruitt's telephone number, and never told Pruitt about appellant. However, Bird acknowledged that he did not know if appellant had introduced himself to Pruitt. According to Bird, appellant did not tell him that he planned to go to Pruitt's RV on the fatal night, nor did Bird see appellant at any time after 8:00 pm on that day. Bird also denied receiving anything from appellant.

Montgomery County Police Department forensic technicians examined the truck that appellant had driven to the police station on the night of the shooting. They found no weapons in it but they did find blood stains in the passenger compartment. A technician wiped the truck's steering wheel for purposes of conducting a gunshot residue analysis. The sample from the left side of the steering-wheel tested positive for gunshot residue. One of the forensic technicians, Tara Helsel, testified that the presence of gunshot residue indicated that a weapon had been discharged in the truck or that the residue had been transferred onto the steering-wheel.

Julia Shields, M.D., an Assistant Medical Examiner, performed Pruitt's autopsy. She testified that she found three separate gunshot wounds on Pruitt. The first was to the left upper chest near the armpit; there was soot and stippling at the wound entrance, indicating that the bullet had been fired from close-range, i.e., "inches away." This wound would have been "rapidly fatal." The second wound was to the lower abdomen; there was soot, and only soot, at the entrance of the wound, which indicated that the shot inflicting this wound had been fired at a closer in range than the first. A part of a bullet was recovered at the exit site of this wound. This wound would have contributed to the blood loss from the first wound. The third wound was to Pruitt's right thigh; this wound was marked by a "muzzle abrasion and it indicates that the end of the gun was in contact with the, the leg through . . . the jeans which were being worn when the injury occurred" The cause of death was "multiple gunshot wounds" and the manner of death was homicide.

Detective Grant Lee was accepted by the court as an expert in firearm and tool mark examination. He testified that the shell casings found in Pruitt's RV came from a nine-millimeter Luger pistol. Lee also stated that three bullets had been recovered as well. Two of these had been fired from the same Luger but the third bullet had been fired from a different weapon. Other bullet fragments recovered from the scene lacked discernible markings for comparison value.

Detective Jesse Stryker was accepted as an expert in "cell phone plotting." Stryker obtained phone records for appellant's cell phone number from his carrier, T-Mobile. Based on these records, Stryker concluded that appellant's cell phone was in the vicinity of the Pruitt's RV at 9:30 pm on the night of the murder. However, the cell phone records did not reveal any communication between appellant's cell phone and the number associated with Pruitt.

Elmer Haapala, an expert witness in forensic biology, conducted an analysis of the DNA evidence. Most of Haapala's findings did not tie appellant to Pruitt or the crime scene with one very significant exception—there was a bloodstain on the jeans that appellant had been wearing on the night of the murder and Pruitt was "the major contributor" of the DNA recovered from the sample, appellant was the minor contributor, and there was no DNA from any other source. Haapala also concluded that none of the other DNA recovered from the interior of the RV indicated the presence of anyone other than Pruitt.

B. Evidence of appellant's pre-arrest statements

The prosecution introduced recordings of four verbal exchanges between conversations between the police and appellant prior to his arrest.

The first took place between appellant and officers at the police station on the night of the shooting. The evidence of this dialogue was presented through the audio portion of Officer Marcus Hendricks' body camera:

Officer Hendricks: Sir, can you tell me your name?

Mr. Walters: Lloyd Walters.

* * *

Mr. Walters: You know who I am up there.

Officer Hendricks: Yeah, I know who you are . . . .

* * *

Officer Hendricks: All right, where did this happen, Lloyd?

Mr. Walters: Right near Paint Branch.

* * *

Officer Hendricks: About how long ago? About how long ago did this happen?

Mr. Walters: That was me. That was me.

* * *

Officer Hendricks: That was you? About how long ago were you shot?

Unidentified Male: About 30 minutes ago you say.

Officer Hendricks: What can you tell me about the man who did it?

Mr. Walters: That was me.

Officer Hendricks: It was you?

Mr. Walters: That shot the man.

Officer Hendricks: Okay

Mr. Walters: In the trailer.

Officer Hendricks: In the trailer?

Mr. Walters: Uh-huh.

Officer Hendricks: Okay, all right. What trailer are you speaking about?

Mr. Walters: Briggs Chaney and Paint Branch.

Officer Hendricks: Briggs Chaney and Paint Branch.

Mr. Walters: Uh-huh.

Unidentified Male: He say he shot himself?

> Officer Hendricks: He said that was me who shot the man in the truck at Briggs Chaney and Paint Branch. Okay. What kind of truck was it? What else can you tell me about it? We've got an ambulance coming for you, all right. Is it behind the school?
>
> Mr. Walters: Beside the school.
>
> Officer Hendricks: Beside the school. What kind of truck was it?
>
> Mr. Walters: It's a trailer camp.
>
> Officer Hendricks: A trailer?
>
> Mr. Walters: He lives there.

This evidence was introduced without an objection from defense counsel.

The second exchange occurred on September 8, 2017, while appellant was in the hospital. Appellant's interlocutors were Montgomery County police detectives Randy Kucsan and Deana Mackie.[2] A recording of this exchange was entered into evidence without objection from defense counsel. In pertinent part, the jury heard:[3]

> Detective Mackie : . . . [M]y name is [Deana] Mackie, and the reason why I'm here is just to kind of figure out what happened to you, because we know you were pretty injured.
>
> Like I said, I'm just, we just wanted to see if you remembered what happened to you, or figure out what happened to you, because we know you had gotten shot and we're just trying to piece that all together. Because

[2] The transcript refers to Mackie as "Gina Mackey." We have corrected the spelling of Mackie's surname.

[3] There was a problem with the accuracy of the court reporter's transcription of parts of these recordings as they were played at trial. Passages in the trial transcript are indicated as "unintelligible." Appellant filed an unopposed motion to file corrected transcripts of the recordings of the September 8 and September 27 interviews. We have set out the dialogue from the corrected transcripts.

we don't what happened from, you know, what happened to you. Only you can tell us that. We're trying to figure it out.

Mr. Walters: Well, why would I want to tell you what happened to me?

Unidentified Detective:[4] We work at the police station where you walked into. So, I mean if you walk in with a gunshot wound, we're sort of obligated to find the guy who did it, and arrest him.

Mr. Walters Where I come from – –

Unidentified Detective: What's that?

Detective Mackie: Huh?

Mr. Walters: Where we come from, we don't tell.

Unidentified Detective: What did you say?

Detective Mackie: Where – –

Mr. Walters: Where I come from, we don't tell.

Unidentified Detective: Oh, well, I don't know. I mean I don't think I've ever experienced that.

Mr. Walters: You're experiencing it now.

Detective Mackie: Okay.

Unidentified Detective: Is there a reason you wouldn't want to like get the guy who did it or —

Mr. Walters: Why should I need that kind of help? You can't help me man. Why should I want to help you help me?

Detective Mackie: Because that's what we do, we help people. You know?

Unidentified Detective: I mean the officers helped you the other night, clearly.

Mr. Walters: That's their job.

* * *

Detective Mackie: And that's our job too.

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[4] From Detective Kucsan's trial testimony, we believe that he was the "Unidentified Detective."

Unidentified Detective: So we're following up on the shooting, simple.

Mr. Walters: I don't have answers for you.

Detective Mackie: Okay.

Mr. Walters: I have no answers for you.

* * *

Detective Mackie: So you haven't talked to your mom or your sister?

Mr. Walters: (Inaudble response.)

Detective Mackie: No.

Mr. Walters: I didn't see nobody, yet.

Detective Mackie: Yeah, well they were pretty worried about you. I've been here both days and you're trying to– – do you know who did it?.

Mr. Walters: Why, why, why should you help?

Detective Mackie: So we can ensure that it doesn't happen to somebody else, because that's our job to try to keep people safe.

Mr. Walters: Apparently, you didn't.

Detective Mackie: Well, that's what we're trying to figure out so we can — I mean —

Mr. Walters: I can solve my own problem.

Detective Mackie: Well, I understand that but —

Mr. Walters: So what I need you for?

Detective Mackie: Because that's our job, that's what he do.

Mr. Walters: If I can solve my own problem, what I need you for?

Detective Mackie: Well, why would you want to put yourself in that situation?

Mr. Walters: Why wouldn't I?

* * *

Unidentified Detective: The simple answer is I think the community expects us to arrest the guy that shot you. That's the way it works. Most normal people would be —

Mr. Walters: So you're saying I'm not normal people?

Unidentified Detective: Yeah, I can tell.

Detective Mackie: But we just — we just really want to help you.

Mr. Walters: You can't (indiscernible).

Detective Mackie: Okay.

Mr. Walters: I been damaged already.

Detective Mackie: Huh?

Mr. Walters: I been damaged already.

* * *

Detective Mackie: I mean, we want to help try to keep you safe for your family, for your son, for your girlfriend. I talked to all of them. I was with them yesterday and then I came here to see you. And your family and your son,, we want to make sure you're safe.

Mr. Walters: I'm all right now.

Detective Mackie: Well, what's going to stop this from happening again? . . . .

Mr. Walters: I have no answers for you.

Detective Mackie: Okay.

Mr. Walters: None.

* * *

Detective Mackie: Well, [your family] care[s] about you. They love you. (indiscernible) you don't care that they worry about you?

Mr. Walters: I'm all right.

Detective Mackie: . . . don't care if your mom worries?

Mr. Walters: That's my mom.

Detective Mackie: Well, yeah but you're her son.

Mr. Walters: And.

* * *

Detective Mackie: . . . You don't want them to visit?

Mr. Walters: For what?

* * *

> Detective Mackie: . . . . I know that you've been through a lot. I hope you feel better soon.
>
> Mr. Walters; I hope so too.

The third exchange occurred on September 27, 2017, when Montgomery County and District of Columbia detectives, including Montgomery County Police Detective Mike Kwarciany, served a search warrant on appellant to obtain a DNA sample by means of a buccal swab. An audio recording of the exchange was admitted into evidence without objection. The relevant part of the transcript of the encounter states:

> Unidentified Detective No. 1:[5] Do you recall how you got here? Do you know why you're here?
>
> Mr. Walters: I know why I'm here.
>
> Unidentified Detective No. 1: Why are you in the hospital?
>
> Mr. Walters: Because I was shot.
>
> Unidentified Detective No. 1: Okay. This is what that pertains to. If you have some more questions, I'd be more than happy to answer them for you.
>
> Mr. Walters: No, I'm cool yo.
>
> Unidentified Detective No. 1: Okay.
>
> Unidentified Detective No. 2: Who shot you:
>
> Mr. Walters: I don't know.
>
> Unidentified Detective No. 2: Can you describe him? Race, sex, age. (Indiscernible) you were shot.
>
> Mr. Walters: I ain't even supposed to be talking to y'all without a lawyer.
>
> Unidentified Detective No. 2: Okay, normally not a response we get from the victim of a shooting, but if that's what you prefer, that's fine. Why don't I leave

[5] Trial testimony indicates that Detective Kwarciany was "Unidentified Detective No. 1."

> my card; if you get a hold of your lawyer and change your mind you give me a call, all right?
>
> Unidentified Detective No. 1: How tall are you?
>
> Mr. Walters: How tall am I?
>
> Unidentified Detective No. 1: Yeah.
>
> Mr. Walters: 5’9”.
>
> Unidentified Detective No. 1: Okay.
>
> Mr. Walters: That’s all we need to be.
>
> Unidentified Detective No. 1: Huh?
>
> Mr. Walters: That’s all that we need to be.
>
> Unidentified Detective No. 1: I was just wondering how tall you were, that’s all.

* * *

The last of appellant’s pretrial statements introduced at trial was part of a telephone conversation that he had with Officer Marcus Hendricks—one of the officers who had assisted appellant with first aid at the police station on the night of the shooting. The recording of the conversation was 19 minutes long, but the State wished to introduce a brief passage of about 30 seconds. Defense counsel objected, asserting that the entire recording should be played to the jury. The trial court overruled the objection. The court stated that an excerpt was admissible as long as it did not mischaracterize the substance of the exchange. The court also ruled that appellant could play other parts of the recording to the jury. In the extract played to the jury, it heard in relevant part:

> Officer Hendricks: Are there any weapons that we should be mindful of that may have been involved in the incident since it happened near the school, just so if there are any neighborhood school kids that are putting themselves in danger?
>
> Mr. Walters: No, no, no, no, no, no.
>
> Officer Hendricks: Okay.
>
> Mr. Walters: (Unintelligible) that I got, or where?
>
> Officer Hendricks: That might be in the area of the school where the shooting happened.
>
> Mr. Walters: No, no, no, no, no, no.
>
> Officer Hendricks: That would be cool. . . . That is definitely something I was worried about because I wanted to make sure that nothing was in the area where any school kids could pick it up and bring it to school.
>
> Mr. Walters: Well, you know what I mean, its been (unintelligible) mean, so. No, no, no, no, there's no, none over there.

Based on this evidence, the jury acquitted appellant of murder in the first degree but convicted him of first-degree felony murder and the use of a handgun in a crime of violence. Additional facts are included in our analysis.

Analysis

1. Appellant's cell phone records

As we have related, the prosecution presented evidence of appellant's cell phone usage at trial. According to the prosecution's theory of the case, appellant's cell phone provider was T-Mobile and that company's records for the mobile phone indicated that appellant had not had any telephone conversations with Pruitt prior to Pruitt's death. The prosecution also used the phone's location records to show that the device (which presumably was in appellant's possession) was near the scene of the murder at about the

time that Pruitt was shot to death. This information was presented to the jury through the testimony of Detective Jesse Stryker, who was designated by the court as an expert witness subject to an objection by appellant that we will discuss presently. Stryker based his conclusions on data provided to the police by T-Mobile in response to a subpoena issued by the police for information regarding appellant's mobile phone. This material was introduced as a State's exhibit.

On appeal, appellant does not challenge Stryker's qualifications or the validity of his conclusions. Appellant's argument is that the T-Mobile records were not properly before the court in the first place because the prosecution did not notify appellant at least ten days prior to the beginning of the trial that it would seek introduction of the T-Mobile data as a business record pursuant to Md. Rule 5-902(b).[6]

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[6] Rule 5-902 states in relevant part:

> (b) Certified records of regularly conducted business activity.
> (1) Procedure. Testimony of authenticity as a condition precedent to admissibility is not required as to the original or a duplicate of a record of regularly conducted business activity, within the scope of Rule 5-803(b)(6) that has been certified pursuant to subsection (b)(2) of this Rule, provided that at least ten days prior to the commencement of the proceeding in which the record will be offered into evidence, (A) the proponent (i) notifies the adverse party of the proponent's intention to authenticate the record under this subsection and (ii) makes a copy of the certificate and record available to the adverse party and (B) the adverse party has not filed within five days after service of the proponent's notice written objection o

(Footnote continued . . . .)

This timeline is based on representations made to the trial court by counsel:

- September 12, 2017: Police electronically served a subpoena on T-Mobile for appellant's phone records.
- "[L]ate 2017": T-Mobile provided the records in the form of a spreadsheet in a .pdf format.
- November 20, 2017: Prosecutors forwarded the spreadsheet to defense counsel.
- February 2018: T-Mobile provided the same data to the police in an electronic format accompanied by an email stating that the material was provided in response to a subpoena. However, the email did not comply with the requirements of Md. Rule 5-902(b)(2).
- February 22, 2018: Prosecutors forwarded the data and the email to defense counsel.

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the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.
(2) (2) Form of Certificate. For purposes of subsection (b)(1) of this Rule, the original or duplicate of the business record shall be certified in substantially the following form:
Certification of Custodian of Records or Other Qualified Individual
I, __________, do hereby certify that:
(1) I am the Custodian of Records of or am otherwise qualified to administer the records for: ____________________ (identify the organization that maintains the records), and
(2) The attached records
(a) are true and correct copies of records that were made at or near the time of the occurrence of the matters set forth by, or from the information transmitted by, a person with knowledge of these matters; and
(b) were kept in the course of regularly conducted activity; and
(c) were made and kept by the regularly conducted business activity as a regular practice.
I declare under penalty of perjury that the foregoing is true and correct.
Signature and Title: ______________________
Date: ______________________.

- February 1, 2019: T-Mobile sent a Rule 5-902(b) compliant certificate to the State. The prosecutors forwarded the certificate to defense counsel on the same day.
- February 4, 2019: Trial began.

Appellant filed a motion in limine seeking to prohibit introduction of the T-Mobile records. During the course of the hearing, defense counsel conceded that (1) they had received the records in both documentary and electronic formats on the dates reflected in our timeline, (2) defense counsel had known for months prior to trial that the prosecution intended to use the records at trial, and (3) but for the failure to provide timely notice, counsel had no basis to challenge the certification or to assert that the T-Mobile data did not qualify as a business record. The trial court denied the motion. It reasoned that the purpose of the ten-day deadline in Rule 5-902(b) was to give opposing counsel an opportunity to assert that the documents in question were not admissible as business records but defense counsel conceded that they had no basis to make such an argument in the present case.

In his brief, appellant argues that the trial court erred. Appellant points out that the Maryland Rules are not guidelines but "precise rubrics established to promote the orderly and efficient administration of justice and [they are] to be read and followed." (quoting *Parren v. State*, 309 Md. 260, 280 (1987)). Moreover, says appellant, Rule 5-902 "does not provide for a prejudice analysis as a means for excusing non-compliance" with the ten-day notice requirement.

For its part, the State presents several contentions. It argues that the trial court correctly identified the reason for the ten-day notice requirement embedded in Rule 5-902(b). Because appellant had no intention of otherwise challenging the introduction of the T-Mobile records, strict application of the rule in the manner suggested by appellant "would exalt form over substance." Second, the State asserts that, even though Rule 5-902 contains no provision by which a court can excuse non-compliance with the ten-day notice deadline, the authority to do so is implicit in a trial court's general discretion to regulate the admission of evidence. Third, the State suggests that the appropriate remedy for a violation of the ten-day requirement is not preclusion of the evidence but rather a continuance. Whatever merits these contentions might otherwise have, we will rely on the State's fourth argument, namely that any suppositional error on the court's part was harmless because the evidence was authenticated through other means at trial.

The threshold for authentication of evidence is "slight." *Johnson v. State*, 228 Md. App. 27, 59 (2016). The threshold is crossed when the proponent presents "evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id.* at 60 (quoting Md. Rule 5-901(a)). Such evidence can be either direct or circumstantial.

In the present case there was testimonial evidence (Detective Stryker's description to the jury of the police department's communications with T-Mobile) and documentary evidence (the email from T-Mobile stating that the data transmitted to the department was

in response to a subpoena). From this, the jury could infer that the department had obtained a subpoena requiring T-Mobile to provide copies of its business records relating to appellant, that T-Mobile did so, and that the business records produced by T-Mobile in response to the subpoena were the records that the prosecution sought to have admitted at trial. Thus, even without the assistance of Rule 5-902(b), the prosecutors sufficient presented sufficient evidence for the jury to conclude that the records introduced through Stryker were, in fact, what they purported to be. Appellant did not argue to the contrary at trial nor does he do so on appeal.

2. Sufficiency of the evidence

Appellant asserts that the evidence was not sufficient to support his convictions of first-degree felony murder and use of a handgun in a felony or crime of violence. He states (citations omitted):

> There is no evidence that Appellant took and carried away any property of Pruitt's, other than his handgun. As for the handgun, there is no evidence that an intent to take the handgun was formed prior to or concurrent with the conduct resulting in death[.]
>
> Nor is the evidence sufficient for purposes of proving an attempted robbery. The court gave an unwarranted amount of weight to the evidence of motive. Bird testified that Appellant knew that Pruitt had money. There is a difference between cash and money, which could be in a bank, not a home, as the prosecutor's direct examination tacitly recognized. While Bird indicated that he might have told Appellant that he, Bird, knew the combination to Pruitt's safe, Bird did not tell Appellant how much money Pruitt kept.
>
> Second, the evidence of motive is equivocal, at best. It is not at all unusual, let alone incriminating, that Appellant might have been looking for money, many law-abiding people are constantly in need of money. And Pruitt [that

> is Bird] was quite clear about the way in which Appellant might have been motivated vis-à-vis Pruitt's money—to get himself hired by Pruitt for the job of transporting cars down to Florida. . . .

Evidence is legally sufficient to support a conviction if "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." *Jackson v. Virginia*, 443 US. 307, 319 (1979) (emphasis in original); *see also Ross v. State*, 232 Md. App. 72, 81–82, (2017) ("*Jackson* . . . is the universally followed pole star" for sufficiency analyses.). Additionally, in a sufficiency of the evidence review, appellate courts "draw all rational inferences that arise from the evidence in favor of the prevailing party." *Abbott v. State*, 190 Md. App. 595, 616 (2010).

In light of the evidence, and in order to convict appellant of felony murder in the first degree, the State needed to prove that appellant killed Pruitt in the commission of, or in the attempt to commit, first-, second-, or third-degree burglary or robbery. *See* Crim. Law § 2-201(a)(4)(iii). The State's primary theory, both at trial and on appeal, was that the predicate felony was attempted robbery.

Robbery is "the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence, or by putting him in fear." *Smith v. State*, 412 Md. 150, 156 n.1 (2009) (cleaned up). As the State points out in its brief, the jury could have reached the following conclusions from the evidence:

> (1) Appellant was aware from his conversations with Bird that Pruitt had come into money after his mother's death, that Bird had told appellant that he knew the combination of the safe in Pruitt's RV and that Pruitt had a gun.
>
> (2) Even though there had been no telephone contract between appellant and Pruitt before the night of the latter's death, appellant visited Pruitt's RV on the night of Pruitt's death.
>
> (3) Appellant went to the RV with a gun and shot Pruitt three times.
>
> (4) Appellant pressed the barrel of his handgun against Pruitt's thigh while Pruitt was standing in front of his safe and shot him.
>
> (5) Because the main concentration of blood found in the RV was in the area of Pruitt's safe, the safe was the focus of appellant's and Pruitt's interactions on the fatal night.
>
> (6) At some point during their encounter, Pruitt shot appellant but no handguns were found in the RV.

The State asserts that "[t]his evidence, viewed in the light most favorable to the State, provided a sufficient basis for a reasonable factfinder to conclude that Walters's intent was to take Pruitt's money by force and/or threat of force." We agree. A reasonable factfinder could also infer that the purpose of the gunshot wound to the thigh was to induce Pruitt to open his safe. The State also asserts that the jury could conclude that "Walters took both guns from the scene and hid them, along with his cell phone, before seeking medical treatment for a life-threatening gunshot wound," and that evidence demonstrates appellant's consciousness of guilt. We also agree. To be sure, appellant presents exculpatory interpretations of the evidence but that is neither here nor there. But to satisfy the *Jackson v. Virginia* standard, the State need not rebut every possible contrary interpretation advanced by a defendant. We hold that the evidence was legally

sufficient to support the convictions for felony murder and use of a handgun in the commission of a crime of violence.[7]

3. Inconsistent verdicts

Appellant argues that his convictions must be reversed because there was evidence presented to the jury that there were two possible underlying felonies: robbery or attempted robbery and burglary, and the jury's verdict was silent as to which offense formed the basis of the jury's felony murder verdict. The State points out that this argument is not preserved for appellate review because it was not raised to the trial court. Md. Rule 8-131(a). Appellant does not contest the preservation issue.[8]

4. The flight instruction

Among its instructions at the close of trial, and over appellant's objection, the court told the jury:

> Flight of the defendant. A person's flight immediately after the commission of a crime, or after being accused of committing a crime, is not enough, by

[7] The State presents an alternative theory for a predicate offense to support the felony murder conviction, namely, that the single nine-millimeter shell found on the step of the RV supports a reasonable inference that appellant constructively broke into and entered the RV by threat of force. We need not address this contention.

[8] Appellant's contention was not only not preserved, it was waived. Appellant is correct that the verdict sheet did not require the jury to identify which predicate felony supported the felony murder conviction. But appellant expressly approved the verdict sheet before it was submitted to the jury. *See, e.g., Carroll v. State*, 202 Md. App. 487, 509 (2011) *aff'd*, 428 Md. 679 (2012) (noting the distinction between "forfeiture, which is the failure to make a timely assertion of a right, and waiver, which is the intentional relinquishment or abandonment of a known right.") (Cleaned up.)).

> itself, to establish guilt. But it is a fact that may be considered by you as evidence of guilt.
>
> Flight under these circumstances may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether there is evidence of flight. If you decide there is evidence of flight, then you must decide whether this flight shows a consciousness of guilt.[9]

Appellate courts review a trial court's decision to grant or deny a request for a jury instruction for abuse of discretion. *Bazzle v. State*, 426 Md. 541, 548 (2012). There are three relevant considerations: "(1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given." *Id.* at 549.

Appellant does not take issue with the first or the third of these requirements but argues that the flight instruction was not appropriate in light of the evidence. He states:

> The evidence is that [a]ppellant left the scene of the shooting, severely wounded. Had he stayed at the scene, he likely would have died; he was in "flight" to live. Moreover, he went to a police station. The whole point of the flight instruction is that efforts to elude an encounter with the police might show a consciousness of guilt. But where the purported "flight" is not undertaken to elude an encounter with police but to initiate one, any inference of consciousness of guilt is completely negated. Accordingly, there was not "some evidence" that could support an inference of consciousness of guilt from evidence that [a]ppellant left the scene of the shooting.

[9] The instruction tracks Maryland Criminal Pattern Jury Instruction MPJI-Cr 3:24 Flight or Concealment of Defendant, except that the court omitted references to "concealment."

We do not agree. As the *Bazzle* Court noted, the evidentiary threshold for a jury instruction "is low, as [the proponent of an instruction] needs only to produce some evidence that supports the requested instruction." 426 Md. at 551 (quoting *Dykes v. State*, 319 Md. 206, 216–17 (1990)). And in this context "'some . . . . calls for no more than what it says—'some,' as that word is understood in common, everyday usage. . . . If there is any evidence relied on by the [proponent] which, if believed, would support his claim . . . [the proponent] has met [its] burden." *Id.*

There was some evidence before the jury that: (1) two guns were discharged within the RV, (2) appellant shot Pruitt, (3) appellant had a working cell phone with him when he went to Pruitt's RV, (4) appellant did not call 911 for medical assistance after the shooting nor did he go to a hospital or the police station go immediately after the shooting but arrived at the station about thirty minutes after the shooting, (5) there were no handguns in the RV or in appellant's truck, (6) appellant did not have a handgun or his mobile phone with him when he arrived at the police station, and (7) the reason why the handguns and the cell phone had disappeared was because appellant taken the time to hide them before he sought medical attention. This evidence is more than enough to meet the "some evidence" requirement.

5, 6, and 7. Appellant's pre-arrest statements

Appellant's remaining arguments are centered around his pre-arrest statements made to the police on three occasions: first, when he came to the police station on the night of

the murder and spoke to several officers, including Officer Hendricks; second, when he was interviewed by Detectives Kucsan and Mackie at the hospital a few days after the shooting; and third, when Detective Kwarciany visited him in the hospital to obtain a buccal swab for DNA evidence purposes.

The appellant's arguments are based on two premises: The first is that on the night of the shooting he was in "agony" and severe medical distress and the questions by the police were "obviously" put to him "for the purpose of rendering medical aid. The second is that he invoked his Fifth Amendment right to remain silent in the second and third interviews. Based on these suppositions, appellant argues that the trial court erred in permitting the introduction of audio recordings of these exchanges. This error was compounded, says he, when the court gave an impermissibly broad instruction to the jury regarding evidence that could be considered to show criminal intent. Appellant also contends that the prejudicial effects of these asserted errors were further magnified by parts of the prosecutor's closing argument. Appellant concludes by arguing that, whether considered separately or together, these errors require reversal of his convictions.

These contentions are completely unconvincing. In addition to some serious preservation and waiver problems, appellant's arguments are legally and factually wrong. Before unpacking the parties' assertions and counter-assertions, we will set out the legal landscape.

The leading case in Maryland's jurisprudence on the admissibility of pre-arrest *silence* is *Weitzel v. State*, 384 Md. 451, 456 (2004). Weitzel was charged with assault for pushing a woman down a flight of stairs after a vodka and cocaine binge. When the police arrived, an eyewitness pointed to Weitzel and stated that he had been the assailant. Weitzel did not respond. At trial, one of the police officers testified that Weitzel "made no comment or response" to the accusation. *Id.* at 453–54. The trial court ruled that this evidence of Weitzel's silence in the face of an accusation was admissible as a tacit admission of guilt. *Id.* at 454. The Court of Appeals reversed, holding that the evidence of pre-arrest silence "is too ambiguous to be probative when the 'pre-arrest silence' is in the presence of a police officer." *Id.* 456.

The *Weitzel* Court made it clear that its holding was based upon common law principles of relevance and the Court expressly declined to address "whether admission of a defendant's pre-arrest silence as substantive proof of guilt violates the Fifth Amendment['s] privilege against self-incrimination." 384 Md. at 456 n.2; *see also* A. Jeszic *et al*. Maryland Law of Confessions at 965 (2019–2020 ed.) ("Notably, the Court in *Weitzel* did not discuss whether the use of pre-arrest silence as a tacit admission burdened a

defendant's Fifth Amendment right against compelled self-incrimination.").[10]

Weitzel involved actual, literal silence in the face of an explicit accusation of criminal wrongdoing. As the transcripts of the recordings of appellant's pre-arrest interactions with the police make clear, the police never accused appellant of any wrong-doing and appellant was anything but silent in them. To bridge this gap, appellant attempts to re-define "pre-arrest silence" to encompass "both . . . literal silence . . . and the silence effected by [his] statements indicating that he was refusing to answer questions put to him by police." This is not a convincing proposition because it is inconsistent with long-settled caselaw on the privilege against self-incrimination guaranteed by the Fifth Amendment.

The privilege against self-incrimination "is an exception to the general principle that the Government has the right to everyone's testimony." *Salinas v. Texas*, 570 U.S. 178,

[10] Appellant also relies on *Younie v. State*, 272 Md. 233, 244–45 (1974). Younie was arrested for robbery and murder and when interviewed by police, told them that he was willing to answer "some" of their questions. *Id.* at 244. The trial court permitted the prosecutors to read the entire transcript of the interview to the jury and to refer to it in closing argument. *Id.* at 236. The Court held that Younie's "failure to answer was an invocation of his fifth amendment privilege." *Id.* at 245. But it is now clear that the right to remain silent does not give a suspect the right to answer questions that he wants to answer and to invoke his right to remain silent as to others. *See Roberts v. United States*, 445 U.S. 552, 560, n.7 (1980) ("A witness may not employ the privilege to avoid giving testimony that he simply would prefer not to give.). Moreover, it is now equally clear that, even in the context of a custodial interrogation, silence alone does not equate to an invocation of the right to remain silent. *See Berghuis v. Thomson*, 560 U.S 370, 381–82 (2010).

183 (2013)[11] (quoting *Garner v. United States*, 424 U.S. 648, 658, n.11 (1976)). For this reason, and subject to two exceptions,[12] an individual who "desires the protection of the privilege, must claim it" at the time he relies on it. *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984) (quoting *United States v. Monia*, 317 U.S. 424, 427 (1943)). Moreover, an individual's invocation of the right to remain silent must be "express." *Murphy*, 465 U.S. at 427; *United States v. Riley*, 920 F.3d 200, 204 (4th Cir.), *cert. denied*, ___ U.S. ___, 140 S. Ct. 391 (2019) ("The Clause speaks in terms of compelled testimony, and thus the protections it grants generally are not self-executing. That is, a person seeking to invoke the Fifth Amendment privilege against self-incrimination generally must assert the privilege rather than answer." (cleaned up)). Among the reasons for the express invocation requirement is that it "gives courts tasked with evaluating a Fifth Amendment claim a contemporaneous record establishing the witness' reasons for refusing to

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[11] *Salinas* was a plurality decision. Justice Alito wrote the opinion for the Court and was joined by Chief Justice Roberts and Justice Kennedy. Justices Thomas and Scalia concurred on the basis that the Fifth Amendment did not prohibit "a prosecutor from using a defendant's pre-custodial silence as evidence of his guilt." 570 U.S. at 191. Justices Breyer, Ginsburg, Kagan and Sotomayor dissented.

[12] First, "a criminal defendant need not take the stand and assert the privilege at his own trial." *Salinas*, 570 U.S. at 184 (citing, among other decisions, *Griffin v. California*, 380 U.S. 609, 613–615 (1965)). Second, "a witness' failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary." *Salinas*, at 184. The paradigmatic example of a situation in which such coercion exists is a custodial interrogation. *See Miranda v. Arizona,* 384 U.S. 436, 467–68 and n. 37 (1966); *Murphy*, 465 U.S. at 429–30. Appellant does not assert that any of these exceptions apply to his case.

answer." *Salinas*, 570 U.S. at 183–84 (citing *Roberts v. United States*, 445 U.S. 552, 560, n.7 (1980)). Finally, an invocation of the privilege must be consistent. *Roberts*, 445 U.S. at 560 n.7 ("A witness may not employ the privilege to avoid giving testimony that he simply would prefer not to give[.]"); *see also United States v. Vargas*, 580 F.3d 274, 278 n.1 (5th Cir. 2009) ("But Vargas was not silent. He answered several questions after the *Miranda* warnings had been given, making fair game both his answers and omissions[.]"); *United States v. Fambro*, 526 F.3d 836, 842 (5th Cir. 2008)) ("A defendant cannot have it both ways. If he talks, what he says or omits is to be judged on its merits or demerits." (cleaned up)).

Against this backdrop, it is clear that appellant did not effectively invoke his right to remain silent in any of his pre-arrest interviews by the police. There is absolutely nothing in his first interview (the body camera recording of what occurred after appellant arrived at the police station seeking assistance on the night of the murder) that remotely suggests

any attempt on his part either to invoke his right to remain silent.[13] The same is equally true of the last interview (Officer Hendricks's telephone call to him about the whereabouts of the handguns). Appellant bases his contention that he invoked his right to remain silent in responses to some of the questions asked of him in the second[14] and third interviews.[15] But none of his statements constitute an express invocation of the right

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[13] Appellant contends that what occurred on the night of the shooting should not have been admitted because he was in "agony" and severe medical distress and the questions by the police were "obviously" put to him "for the purpose of rendering medical aid." He is partially correct. *Some* of the questions put to him by Officer Hendricks and other officers clearly pertained to his medical condition. But others, for instance, questions as to who shot him and where the shooting occurred, equally clearly did not. Moreover, appellant cites no legal authority to support his argument that his night-of-the-shooting statements were inadmissible. His failure to do so constitutes a waiver of argument. *See* Md. Rule 8–504(a)(6); *HNS Development, LLC v. People's Counsel for Baltimore County*, 425 Md. 436, 459 (2012) (The rule requires that briefs contain "argument in support of the party's position on each issue." "[W]here a party fail[s] to cite any relevant law on an issue in its brief, [appellate courts] will not "rummage in a dark cellar for coal that [may or may not] be there." (quoting *Konover Prop. Trust v. WHE Assocs*., 142 Md. App. 476, 494 (2002) (cleaned up)).

[14] Appellant's responses of "where we come from we don't tell" and "I don't have answers for you" to specific questions from Detective Mackie.

[15] The relevant potion of the third interview is (emphasis added):

> Unidentified Detective No. 1: Why are you in the hospital?
>
> Walters: Because I got shot.
>
> Unidentified Detective No. 1: Okay. This is what that pertains to. If you have some more questions, I'd be more than happy to answer them for you.
>
> Walters: No, I'm cool yo.
>
> Unidentified Detective No. 1: Who shot you:

(Footnote continued . . . .)

to remain silent. Nor was he silent. Both before and after appellant gave his "where we come from we don't tell" and "I don't have answers for you" responses in the second interview, he answered other questions from the police. Invocation of the right to remain silent is not a mechanism to avoid answering some questions while answering others. *See Roberts*, 445 U.S. 552, 560, n. 7 (1980). Finally, appellant's observation that he wasn't "supposed to be talking to y'all without a lawyer" was not an express invocation of his right to remain silent.[16]*See Roberts*, 445 U.S. at 560–61 ("[P]etitioner did not assert his privilege or in any manner suggest that he withheld his testimony because there was any ground for fear of self-incrimination. His assertion of it here is evidently an afterthought.") (cleaned up); *Salinas,* 570 U.S. at 184 (citing *Hutcheson v. United States*, 369 U.S. 599, 605–06 (1962) for the proposition that an invocation of the right to due process is not an invocation of the right to remain silent.)

We now turn to appellant's specific contentions.

> Walters: I don't know.
>
> Unidentified Detective No. 1: Can you describe him?
>
> Walters: *I ain't even supposed to be talking to y'all without a lawyer.*
>
> Unidentified Detective No. 2: Okay, normally not a response we get from the victim of a shooting, but if that's what you prefer, that's fine.

[16] That appellant's statement might have served as an invocation of his right to an attorney in a custodial interview is neither here nor there. He had no right to a lawyer in a pre-arrest interview and appellant does not assert to the contrary.

A. The admission of the pre-arrest statements into evidence

Appellant's contention that the trial court erred in admitting recordings of those parts of his pre-arrest interviews in which he purportedly invoked his right to remain silent fails because, as the State points out in its brief, all four of appellant's pre-arrest statements were admitted into evidence without objection. Appellant concedes this was the case but argues that the issue is nonetheless preserved because he did object to the court's intent instruction, "[n]ecessarily . . . the trial court's rulings regarding the instructions and closing argument entailed the ruling that the evidence was admissible as substantive evidence of guilt. Accordingly, the issue of the admissibility of the evidence on this basis is preserved. Maryland Rule 8-13l(a)."

We do not agree. An objection to evidence must be timely. *See* Md. Rule 4-323 ("An 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.") (emphasis added). The basis for the hypothetical objections, namely that appellant had invoked his right to remain silent during two of the four interviews, was as clear when the evidence was introduced as it was at any other time in the trial. And, assuming for the purposes of analysis that appellant's contention was preserved, his argument fails for the reasons that we have previously explained.

Appellant also asks us to exercise our discretion under the plain error doctrine to reach the issue of the admissibility of his pre-arrest statements which, in his words, had

the effect of "indicating that he was refusing to answer questions put to him by police." We decline to do so. Appellate courts have the discretion to consider unpreserved trial error but that discretion can only be exercised if four criteria have been met: (1) the alleged error "must be clear or obvious, rather than subject to reasonable dispute," (2) the error was not affirmatively waived at trial, (3) ordinarily, the error affected the outcome of the trial, and (4) the error is of a nature that must that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *State v. Rich*, 415 Md. 567, 578–79 (2010) (citing *Puckett v. United States*, 556 U.S. 129, 135 (2009); *see also Kelly v. State*, 195 Md. App. 403, 432 (2010).

There are at least two reasons why appellant's invocation of the plain error review doctrine is unavailing. First, he has not convinced us there was any error in the first place. *See Morris v. State*, 153 Md. App. 480, 507 n.1 (2003) ("[T]here are some limitations on the affirmative act of noticing plain error. 1) There must be error. 2) It must be plain."). Second, in light of the overwhelming evidence that appellant killed Pruitt, it is difficult for us to conceive how the introduction of appellant's statements that "where we come from we don't tell," or that he had "no answers" to specific questions posed by the police, or that he answered a question after observing that he wasn't "even supposed to be talking to y'all without a lawyer," affected the outcome of trial.

B. The jury instruction on intent

Appellant's next argument is that the trial court erred when it gave the following instruction to the jury (emphasis added):

> Proof of Intent. An intent is a state of mind and ordinarily cannot be proven directly, because there is no way of looking into a person's mind. Therefore, a defendant's intent may be shown by surrounding circumstances.
>
> In determining the defendant's intent, you may consider the defendant's acts and statements, as well as the surrounding circumstances. Further, you may, but are not required to, infer that a person ordinarily intends the natural and probable consequences of his acts *and/or omissions*.[17]

At trial, defense counsel argued that including "omissions" in the instruction was improper because appellant's "decision not to talk to the police cannot be used against him" The prosecutor responded that:

> Well, it's his decision to talk to the police. He presented himself to the police station. I think that what the Defense is going to try and argue is in direct contradiction to what he said, and we're going to argue that that . . . they're very important things that he didn't say when he was there[.]

Defense counsel responded that inclusion of "omissions" in the instruction would amount to "burden shifting . . . because [appellant] does not have the responsibility to tell the police anything [and his] not saying something, should not now be used as some form of evidence against him." The court decided to include "omissions" in the instruction

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[17] The instruction tracked Maryland Criminal Pattern Jury Instruction MPJI-Cr 3:31 Proof of Intent.

because appellant "can't use the Fifth Amendment as his shield as to what he doesn't say when he does say stuff." The court also granted appellant a continuing objection to the State's closing based on these grounds.

On appeal, appellant argues that "the court's giving of the intent instruction, without modification, permitted the jury to use [his] pre-arrest silence in police presence as substantive evidence of guilt." He asserts that, in light of the evidence before the jury, the instruction was inconsistent with Maryland evidentiary law and as a matter of constitutional law. Finally, appellant contends that as a consequence of this instruction, "the State was permitted to argue to the jury [his] guilt from his pre-arrest silence." Again, by "pre-arrest silence," appellant means "both . . . literal silence . . . and the silence effected by [his] statements indicating that he was refusing to answer questions put to him by police."

These contentions are misdirected. Appellant never invoked his right to remain silent. Instead, he answered the questions that he wanted to answer and evaded answering the questions that he didn't. Nor does Maryland's non-constitutional law of evidence, exemplified by *Weitzel*, provide him any assistance.

As we have explained, there are three criteria for the use of a jury instruction: it must be a correct statement of the law, it is applicable to the facts before the jury, and it must not be redundant in light of the other instructions. *Bazzle*, 426 Md. at 549. Appellant does not assert that the intent instruction was incorrect as a matter of law, nor do we

understand him to argue that there was wasn't a sufficient evidentiary basis for inclusion of "omissions" in the instruction.[18]

C. Closing argument

In the State's closing argument, prosecutors played portions of the recordings of each of appellant's pre-arrest interviews, including Detective Mackie's questions as to the name of the person who shot him. Referring the appellant's responses to those questions— "Where we come from, we don't tell"—the prosecutor told the jury that "those are the statements of a guilty man, someone who knows what he did was wrong, that . . . he went to rob someone, he got shot in the process, and now he has no interest in helping the police."

The prosecutor also played an excerpt from Detective Kwarciary's interview of appellant when police were obtaining a DNA sample:

> Unidentified Detective No. 2: Who shot you:
>
> Walters: I don't know.
>
> Unidentified Detective No. 2: Can you describe him? Race, sex, age. (Indiscernible) you were shot.
>
> Walters: I ain't even supposed to be talking to y'all without a lawyer.

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[18] In any event, based on the evidence, the State was entitled to argue to the jury that appellant's failure to contact the police or emergency medical services during the 30 minutes after he left Pruitt's RV and before he arrived at the police station was indicative of appellant's criminal intent in going to Pruitt's RV and shooting him. And the prosecutors made precisely that argument in closing.

The prosecutor then said:

> [Appellant's] in the hospital at this point. Remember, the police have made multiple attempts in a perfectly sort of informal way, both when they're trying to help him medically and then when they're at the hospital, to try to get . . . some information from him. And he doesn't have to talk to them. He doesn't have to make any statements at all. But listen to what he says and what he doesn't say. He won't identify the person who shot him. He won't say anything about the person who shot him. [He] withholds information from the police. And again, like I say, he doesn't have to say anything, but listen to what he's saying and what he's not telling them.
>
> Where I come from, we don't tell. . . .
>
> Why wouldn't you tell [the] police if a perfect stranger shot you? Because you know you're the guilty person. You know that you went to rob that person, and you don't want to help the police.

The State made similar arguments in its rebuttal.

On appeal, appellant presents two arguments as to why these parts of the State's closing argument were improper. First, he asserts that: "the prosecutor urged the jury to draw an inference of guilt from Appellant's pre-arrest silence. But as inherently ambiguous evidence, pre-arrest silence cannot serve as a basis from which to reasonably infer guilt."

Second, appellant argues (emphasis in original):

> The prosecutor's remarks were also improper because they ran afoul of Appellant's privilege against self-incrimination under the Fifth

> Amendment, Article 22, and Md. Code Ann, Cts. & Jud. Proc. § 9-107.[19]
>
> The test is as follows:
>
> > [I]s the remark "*susceptible of the inference* by the jury that they were to consider the silence of the traverser in the face of the accusation of the prosecuting witness as an indication of his guilt." *Smith v. State*, 169 Md. 474, 476, 182 A. 287, 288 (1936) (emphasis added).
>
> *Smith v. State*, 367 Md. 348, 354 (2001).
>
> In accordance with Appellant's argument that his privilege against self-incrimination extended to his pre-arrest silence, all the prosecutor's remarks on Appellant's silence were susceptible of an impermissible inference on his privilege. For this reason, the court abused its discretion in permitting the prosecutor to argue from Appellant's pre-arrest silence.

These contentions falter for the same reasons that his arguments on his related assertions fail: Appellant never invoked his right to remain silent. Providing direct answers to some questions and refusing to answer others is not invoking the right to silence because the Fifth Amendment does not give an individual the right to pick and choose. *Roberts*, 445 U.S. at 560 n.7; *Vargas*, 580 F.3d at 278 n.1; *Fambro*, 526 F.3d at 842. As the *Fambro* court observed: "A defendant cannot have it both ways. If he talks, what he says or omits is to be judged on its merits or demerits." *Id.*

The legal authority marshalled by appellant to support his contention is inapposite. By its plain language, Courts & Jud. Proc. § 9-107 applies to an accused's election not to

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[19] Courts & Jud. Proc. § 9-107 states:

> A person may not be compelled to testify in violation of his privilege against self-incrimination. The failure of a defendant to testify in a criminal proceeding on this basis does not create any presumption against him.

testify in court. The issue in *Smith v. State*, 367 Md. 348, 356–59 (2001), was whether a prosecutor can suggest in closing argument that the jury could infer guilt from the fact that the defendant had not testified at trial. The issue in the other case upon which primarily appellant relies, *Simpson v. State*, 442 Md. 446, 459–60 (2015) was whether a prosecutor can make a similar suggestion to the jury in her opening statement. And the answer in both Smith *and Simpson* was the same: a prosecutor cannot. Neither case addressed, either directly or by inference, whether a prosecutor could suggest to the jury that what the defendant said and didn't say in his pre-arrest statements could be the basis for an inference of guilt.[20]

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[20] Appellant also suggests that the prosecutors' closing argument could have been interpreted by the jury as "susceptible of the impermissible inference that Appellant's failure to testify should be viewed as evidence of guilt." There are two problems with this.

The first is that the prosecutors explicitly referred to appellant's statements to the police and only to those statements. The test is whether the prosecutorial statement was "reasonably susceptible" to being interpreted as inviting the jury to draw an adverse inference from a defendant's failure to testify. *Simpson*, 442 Md. at 460. We do not believe that a reasonable juror would think that the prosecutors were referring to the fact that appellant did not testify at trial.

The second is that appellant's argument is unpreserved. The continuing objection that defense counsel sought and obtained from the trial court was that the prosecution's closing argument constituted improper "burden shifting . . . because [appellant] does not have the responsibility *to tell the police anything* [and his] not saying something, should not now be used as some form of evidence against him." (Emphasis added.)

(Footnote continued . . . .)

For these reasons, we will affirm appellant's convictions for felony murder in the first degree and the use of a handgun in the commission of a crime of violence.

THE JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY ARE AFFIRMED. APPELLANT TO PAY COSTS.

This continuing objection did not extend to the State's suggesting to the jury that it could hold appellant's failure to *testify at trial* against him. No other objection was made to the prosecution's closing arguments. (And, as we have indicated, the State never suggested to the jury that it could hold appellant's failure to testify against him.)

Finally, the State suggests that there is yet another obstacle in appellant's path: All four of appellant's pre-arrest statements to the police were admitted into evidence without objection. Because they were admitted without objection, the State asserts that the prosecutors were entitled "to argue reasonable inferences from [that] evidence." *Daniel v. State*, 132 Md. App. 576, 596–97 (2000). The evidence in question in *Daniel* was the defendant's pre-arrest silence, *id.* at 596, and appellant suggests that the holdings in *Smith* and *Simpson* undercut our logic in *Daniel.* Because it is not necessary for us to answer this interesting question to resolve the issues in this appeal, we will not address it.