Circuit Court for Montgomery County
Case No. 131616C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 403

September Term, 2020

HAYDEN ALLEN

v.

STATE OF MARYLAND

Berger,
Wells,
Gould,

JJ.

Opinion by Berger, J.

Filed: May 12, 2021

Following a jury trial in the Circuit Court for Montgomery County, Hayden Allen ("Allen"), Appellant, was convicted of armed robbery and conspiracy to commit armed robbery. Allen presents three issues for our consideration on appeal,[1] which we have rephrased for clarity as follows:

> I. Whether the trial court erroneously admitted body-worn camera footage containing hearsay.
>
> II. Whether the trial court abused its discretion by admitting evidence of consciousness of guilt that Allen failed to report a robbery.
>
> III. Whether the trial court erred by instructing the jury regarding flight as evidence of consciousness of guilt.

The State filed a Motion to Dismiss, alleging that the trial court erred by granting Allen's motion for leave to file a belated appeal because, in its view, Allen is required to request his relief in a petition for postconviction relief. For the reasons stated herein, we deny the State's Motion to Dismiss and affirm the decision of the Circuit Court for Montgomery County.

[1] Allen's original questions presented are as follows:

> 1. Whether the trial court erroneously admitted hearsay statements contained in an officer's body-worn camera?
>
> 2. Whether the trial court erroneously admitted evidence of consciousness of guilt that Appellant failed to report a robbery?
>
> 3. Whether the trial court erroneously instructed the jury that Appellant's "flight" is evidence of his consciousness of guilt?

FACTS AND PROCEEDINGS

On March 19, 2017, 22-year-old Sara Kassem ("Kassem") used the computer application called "Offer Up" to initiate a conversation with the profile named "Marcus." Marcus was later identified as Allen. Allen does not dispute that he was the seller behind the profile labeled Marcus and that he arranged to meet with Kassem. Kassem contacted Allen to purchase an iPad that Allen had listed for sale. The application, Offer Up, allows a seller to list an item for sale and chat with potential buyers to negotiate the price and other sales terms. Kassem and Allen agreed that Kassem would pay $220 for the iPad and an iPhone 7 that was also listed for sale. On March 20, 2017, Kassem drove from Leesburg, Virginia to Germantown, Maryland to meet Allen and to purchase the items.

When Kassem arrived at the address that Allen provided, she sent him a message in the Offer Up application containing her phone number because she did not know where she was and needed directions. Kassem sent the message from her aunt's Offer Up account, identified as "Maria." Allen then called Kassem's cellphone from a blocked number. Allen also texted Kassem from the phone number 240-753-5091.[2] At approximately 1:30 p.m., Kassem saw Allen standing in the middle of the sidewalk and she stopped her vehicle in the middle of the street to speak with him.

Allen approached Kassem's passenger door, and Kassem rolled down the window to tell Allen she was there to purchase the iPad and iPhone. Allen was with a young man,

[2] This phone number was later identified and registered to William Winston's account ("Winston").

whom he told to go home and get the iPad. The young man walked away. Cars were stopped behind Kassem's vehicle as she was parked in the middle of the street. Allen then asked Kassem to pull into the parking lot of a nearby apartment complex and then walked to the driver's side of her vehicle. Kassem recalled that the location where Allen directed her to park was a spot where she would have to back out to leave the location.

Allen then placed a phone call to someone and said, "I think we're set. Bring the phone and come here." Kassem described "Marcus" as a black male, taller than her, mid-20s, with green eyes, and with a teardrop tattoo under his eye. Kassem later identified Allen as "Marcus" during the trial. After Allen made the phone call, another male, wearing sunglasses and a bandana covering part of his face, ran towards Kassem's vehicle and physically attacked Allen. Kassem stated that the attack "looked like they were play fighting."

Kassem stated that the second male had a small, black and silver handgun with him. The man pointed the gun at Kassem's head and grabbed her phone from between her legs. The man demanded that Kassem give him her wallet. Kassem then gave him one of her wallets which contained $500.00 cash. The gunman did not attempt to take Allen's cellphone or threaten him with the gun in any way. At trial, Kassem described the gunman as a light-skinned black male who was both shorter and younger than Allen. Kassem explained that she was unable identify the gunman because his face was covered by both the sunglasses and the bandana.

Once the gunman obtained Kassem's phone and wallet, he ran into the woods nearby. Allen then ran after the gunman in the same direction. Kassem drove out of the apartment complex and arrived at Lakeforest Mall. Kassem then went into the T-Mobile store to call 911 and to get a replacement cellphone. When she called 911, Kassem reported that there were two suspects and that she was robbed by a guy and "his friend."

Officer Charles Young of the Gaithersburg City Police Department interviewed Kassem about her description of the suspects. Kassem told Officer Young that one suspect had a teardrop tattoo under his left eye and was a light-skinned, black male, who was 5'11" in height. Kassem did not describe the gunman's complexion at that time. Officer Chen of the Montgomery County Police Department also spoke to Kassem at the T-Mobile store for approximately one hour. Officer Chen's body-worn camera ("BWC") recorded his entire conversation with her. A grand jury indicted Allen with one count of armed robbery and one count of conspiracy to commit armed robbery. The police later apprehended William Winston and he was charged as Allen's accomplice.

Winston and Allen were tried jointly before a jury in the Circuit Court for Montgomery County. At the trial, Winston's counsel confronted Kassem with her statement to Officer Chen, recorded on his BWC, in which she described the race, height, and age of the gunman. After the BWC footage was introduced, Kassem acknowledged that, on the day of the robbery, she did not describe the gunman to the police as light skinned. Based on her observation in the courtroom, Kassem agreed that Winston's skin complexion was lighter than Allen's. Kassem also agreed that she did not tell Officer Chen

that the gunman seemed a lot younger than Marcus like she had done in her earlier 911 phone call.

On redirect examination, Kassem testified that she considered both Winston and Allen to be light skinned black males. The State also introduced Kassem's statement that she made the day after the robbery to Detective John Marr, in which she described one of the two suspects as older than the other. Further, the State introduced Kassem's initial description to Officer Young that the gunman was of average height. The State also introduced Officer Chen's entire BWC recording of his conversation with Kassem.

During Kassem's redirect examination, the State played nearly half of the approximately one-hour long BWC recording admitted into evidence. This portion included Kassem recounting her opinion that Allen called "this other guy" and the gunman then showed up at the scene. Further, the recording included Kassem's recollection that the gunman "choked his friend" and that the gunman "let him go" and took her phone. The BWC recording also included Officer Chen's summary of Kassem's statements and an unidentified T-Mobile employee stating that "they" turned off Kassem's phone so that it could not be tracked. Finally, Officer Chen's BWC recording included his summary of Kassem's statement which he related to his Sergeant.

Detective Marr testified about his investigation of the robbery. Detective Marr obtained the account information for "Marcus" from the Offer Up application, which reflected that the email associated with the account was HadenX@yahoo.com. Detective Marr then obtained the Yahoo email account information, which included Allen's name.

Further, Detective Marr performed a reverse phone search of the phone number Allen provided to Kassem. This search showed that the phone number was an AT&T number associated with Winston. The State then introduced the call detail records for the phone number as well as the location data. Detective Scott Sube testified as an expert that the handset was within a mile-and-a-half of the crime scene around the time of the robbery. Detective Sube testified that the cell site location records provide "the best estimate by the carrier as to where that phone might have been" when an "event" occurs.

Detective Marr further testified that he reviewed nineteen recorded phone calls made by Allen to Winston at the 240-753-5091 phone number from April 13, 2017 to June 5, 2017. The State played a recording of one call from April 18, 2017 in which Allen referred to the "Offer Up" robbery. In closing, the State argued that, before describing the facts alleged in the statement of charges, Allen told Winston not to respond because "they listening." Further, the recording included Allen stating, "this case is not going to stick because I made it too sweet." Detective Marr also testified that he was unaware of any report filed by Allen of a robbery or assault prior to April 18, 2017.

Allen was convicted by a jury on December 8, 2017 and sentenced on March 28, 2018. The trial court sentenced Allen to seventeen years for the count of armed robbery with credit for one year of time served. The trial court also sentenced Allen to seventeen years for the count of conspiracy to commit armed robbery with credit for one year of time served. Both sentences were ordered to be served concurrently and no period of probation was imposed. On April 26, 2018, Allen's attorney filed a Notice for *In Banc* Review in

which he requested an *in banc* review of the sentence rendered on March 28, 2018. The trial court appointed a sentence review panel on May 2, 2018.

On February 24, 2020 Allen filed a motion for leave to file a belated notice of appeal in the Circuit Court for Montgomery County. The trial court granted this motion on June 15, 2020. Thereafter, Allen filed a notice of appeal on June 22, 2020.

MOTION TO DISMISS

The State filed a motion to dismiss Allen's appeal alleging that the trial court did not have the authority to grant Allen's motion for leave to file a belated notice of appeal. The State argues that the right to file a belated appeal must be granted in the form of post-conviction relief. The State contends that Allen never filed a petition for post-conviction relief, and, therefore, is not entitled to file a belated notice of appeal. Allen argues that the State failed to object to his motion for leave to file a belated notice of appeal in the trial court and has therefore waived the issue. Allen further contends that trial court had the authority to grant his motion to file a belated notice of appeal.

"In Maryland, appellate jurisdiction, except as constitutionally created, is statutorily granted." *Schuele v. Case Handyman & Remodeling Servs., LLC*, 412 Md. 555, 565 (2010) (citing *Gruber v. Gruber*, 369 Md. 540, 546 (2002); *Kant v. Montgomery Cnty.*, 365 Md. 269, 273 (2001)). "Appellate jurisdiction is codified in § 12-301 of the Courts and Judicial Proceedings Article [(C&JP)] of the Maryland Code." *Rosales v. State*, 463 Md. 552, 563 (2019). The statute contains no provision requiring a certain timing for the filing of a notice of appeal. *See* Md. Code (1973, 2020 Repl. Vol.), § 12-301 of C&JP.

Indeed, "no statute sets forth a time limitation for an appeal from a final judgment of a circuit court in a criminal matter such as this one." *Rosales, supra*, 463 Md. at 563. Rather, the limitation is governed by the Maryland Rules. *See* Md. Rule 8-202. Generally, except as provided by Maryland Rule 8-202, or by law, a notice of appeal must be filed "within 30 days after entry of the judgment or order from which the appeal is taken." Md. Rule 8-202(a).

Prior to the Court of Appeals' decision in *Rosales*, this Court and the Court of Appeals referred to the thirty-day limitation on appeals as "jurisdictional." *Rosales, supra*, 463 Md. at 565. Accordingly, whenever an appellant failed to comply with the thirty-day requirement set forth in Maryland Rule 8-202(a), "we would, in dismissing the appeal for that reason, frequently refer to a lack of 'jurisdiction.'" *Id.* In *Rosales*, the Court of Appeals recognized the thirty-day requirement of Maryland Rule 8-202(a) as a "claim-processing rule, and not a jurisdictional limitation on this Court." *Id.* at 568. Despite this clarification, the Court of Appeals made clear that the thirty-day limitation is still a binding rule on appellants that we must continue to enforce. *Id.* Further, the Court of Appeals explained that we can continue to dismiss an appeal for failure to comply with Maryland Rule 8-202(a), but we must characterize the dismissal as a dismissal for failure to comply with the Maryland Rules, not for lack of jurisdiction. *Id.* This characterization allows an appellate court to consider the basis for an appellant's belated appeal. *Id.*

In *Rosales*, the appellant filed a petition for postconviction relief. *Id.* at 560. Critically, instead of participating in a postconviction hearing as required under the law,

the appellant and the State entered into a consent agreement allowing the appellant to file a belated appeal. *Id.* at 569. No hearing was held on the ineffective assistance of counsel claim, nor did the postconviction court issue a statement of reasons or order. *Id.* The Court of Appeals recognized that normally it would dismiss the appeal due to appellant's failure to comply with the thirty-day requirement and failure to follow the appropriate postconviction procedures. *Id.* Nevertheless, the Court held that there was evidence that permission to file a belated appeal was an appropriate remedy and dismissing the appeal would only result in a replica of this case climbing the "appellate ladder" at a later date. *Id.* at 569–70.

Here, Allen did not file a petition for postconviction relief. Rather, Allen filed a motion for leave to file a belated notice of appeal in the trial court. In his motion, Allen argued that his postconviction counsel was ineffective in not filing a notice of appeal when Allen wanted him to do so. The State did not file an objection to this motion. The trial court granted Allen's motion and allowed him to file a belated notice of appeal.

In *Rosales*, the Court of Appeals clarified that by characterizing the thirty-day requirement of Maryland Rule 8-202(a), a reviewing court is required to "examine whether waiver or forfeiture applies to a belated challenge of an untimely appeal." *Id.* at 568. While the instant case differs from the facts in *Rosales*, the fact that the State never filed an opposition to the motion in the circuit court does not go unnoticed. Maryland Rule 8-131(a) requires that a party raise a particular issue or objection in the trial court to preserve

that issue for appeal. The State did not do so. Accordingly, the State waived any objection to Allen's motion for leave to file a belated notice of appeal.

"Given the unique history of these proceedings[,]" the State's failure to file any objection to Allen's motion, and the trial court granting the relief to file a belated notice of appeal, "this case presents a narrow circumstance in which we will consider the merits without the filing of a timely appeal or without" the filing of a petition for postconviction relief. *Id.* at 570. If we dismiss this appeal, it would "inevitably result in [a] postconviction court making the appropriate findings under the Postconviction Act to permit [Allen] to file a belated appeal, this appeal working its way up the appellate ladder, and this Court addressing the exact issue[s] that w[ere] already briefed and argued before this Court." *Id.* Accordingly, under the circumstances, we will consider the merits of Allen's contentions. Because these issues have been fully briefed and the Court of Appeals has recharacterized the thirty-day requirement in Maryland Rule 8-202(a), there is no jurisdictional impediment prohibiting us from considering the merits of this case. *Id.*[3]

STANDARD OF REVIEW

Generally, we review rulings on the admissibility of evidence under an abuse of discretion standard and we "extend the trial court great deference" in making those determinations. *Vielot v. State*, 225 Md. App. 492, 500 (2015) (citing *Hopkins v. State*,

[3] As noted in *Rosales*, this case presents an exceptional circumstance for us to consider the merits of Allen's claims. Nevertheless, nothing in this opinion should be construed that appellants in other cases are not required to follow the requirements of the Postconviction Act and the thirty-day requirement of Maryland Rule 8-202(a). *Rosales*, *supra*, 463 Md. at 570.

352 Md. 146, 158 (1998)). "We apply a different standard, however, when it comes to hearsay evidence." *Id.* The Court of Appeals has held that "[w]hether evidence is hearsay is an issue of law reviewed *de novo*." *Gordon v. State*, 431 Md. 527, 536 (2013) (internal quotation omitted). Indeed, a trial court has "no discretion to admit hearsay in the absence of a provision providing for its admissibility." *Id.* (internal quotation omitted). Accordingly, "[h]earsay . . . must be excluded at trial, unless it falls within an exception to the hearsay rule." *Id.* at 535 (internal quotation omitted). Nevertheless, if a trial court makes specific findings of fact in applying an exception to the rule against hearsay, those factual findings will not be disturbed absent clear error. *Id.* at 538.

"Trial judges generally have 'wide discretion' when weighing the relevancy of evidence." *State v. Simms*, 420 Md. 705, 724 (2011) (quoting *Young v. State*, 370 Md. 686, 720 (2002)). Nevertheless, trial judges "do not have discretion to admit irrelevant evidence." *Id.* (internal citation omitted); *see also* Md. Rule 5-402. We apply a *de novo* standard of review when reviewing the trial judge's conclusion of law that the evidence at issue "is [or is not] of consequence to the determination of the action." *Montague v. State*, 471 Md. 657, 673 (2020) (internal quotation omitted). "After determining whether the evidence in question is relevant, we consider whether the trial court abused its discretion by admitting relevant evidence which should have been excluded as unfairly prejudicial." *Id.* Accordingly, we review the trial judge's decision on admissibility under Maryland Rule 5-403 under an abuse of discretion standard. *Id.* at 673–74. We will generally not reverse a trial court under this standard "unless the evidence is plainly inadmissible under

a specific rule or principle law or there is a clear showing of an abuse of discretion." *Id.* (internal citations omitted).

Maryland Rule 4-325(c) provides that a trial court "may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." "The Rule requires the trial court to give a requested instruction when '(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given.'" *Wright v. State*, 247 Md. App. 216, 229 (2020) (quoting *Dickey v. State*, 404 Md. 187, 197–98 (2008)). We review a trial court's decision to give a particular jury instruction under an abuse of discretion standard. *Id.* Therefore, we will not reverse the trial court's decision "unless we determine that the instruction was 'ambiguous, misleading[,] or confusing[,]' or otherwise [did] not 'fairly cover[ ]' the applicable law." *Id.* (quoting *Smith v. State*, 403 Md. 659, 663 (2008)).

I. Although the trial court erred in admitting hearsay statements from an officer's body-worn camera, the statements were cumulative of other evidence entered at trial.

At trial, Kassem testified that she remembered the gunman was a "light-skinned" male. Winston's counsel requested the opportunity to confront Kassem with her recorded statement from Officer Chen's BWC footage describing the two suspects. The State objected to the admission of the BWC footage unless Winston's counsel introduced the entirety of the BWC footage, and not just one specific portion. The trial judge ruled that Winston's counsel could "play the whole thing or nothing." Winston's counsel explained

that he only wished to introduce the portion of the BWC footage in which Kassem made a statement as to the gunman's description. The State objected. The trial judge overruled the State's objection and allowed Winston's counsel to play a portion of the BWC footage at that time. During redirect of Kassem, the State offered the entirety of the BWC footage into evidence. Both counsel for Winston and for Allen objected. The trial judge overruled the objections and the entire hour-long BWC recording was played for the jury.

A. Allen properly preserved the admissibility of the BWC footage for our review, and the statements included in the recording were inadmissible hearsay.

To preserve an objection for appellate review, an objection must be made "at the time the evidence is offered or as soon thereafter as the grounds for the objection become apparent. Otherwise, the objection is waived." Md. Rule 4-323(a). Notably, "[t]he grounds for the objection need not be stated unless the court . . . so directs." *Id.* Accordingly, if a court overrules a general objection, "all grounds for objection may be raised on appeal." *Anderson v. Litzenberg*, 115 Md. App. 549, 569 (1997). Here, Allen made a general objection immediately after the State offered Officer Chen's BWC footage into evidence. The trial court overruled the general objection. Accordingly, this issue is properly preserved for our review.

Maryland Rule 8-501(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." When a party objects to hearsay, the court must determine (1) whether the declaration is a "statement," and (2) whether the proponent offers it for the

truth of the matter asserted. Md. Rule 8-501. Maryland Rule 8-501(a) provides that a "statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."

Officer Chen's BWC footage captured a recording of his initial interview with Kassem. It also included declarations from Officer Chen to his supervisor and comments from T-Mobile employees. Kassem also described the two suspects and gave her opinion as to their relationship to one another. The T-Mobile employee claimed that "they," referring to the two suspects, turned off Kassem's phone so that it could not be tracked. Officer Chen recited all of the statements from Kassem to his supervisor. All of the comments throughout the recording were clearly "assertions" under Maryland Rule 8-501(a) and further related to the alleged crimes.[4]

At trial, the State offered the entirety of the BWC recording into evidence. The State did not purport to offer the recording for the limited, non-hearsay purpose of rehabilitating Kassem by using the recorded statements. Indeed, the trial judge instructed the jury that they could consider Kassem's statements made out of the courtroom "as if they were made at this trial and rely on them as much or as little as you think proper."

[4] We do not agree with the State's contention that Allen "hindered the State's ability to meaningfully respond to his hearsay contention." Allen did not need to identify specific statements within his brief that he challenges as hearsay. The trial court instructed the jury that *all* of Kassem's statements made out of court were admitted as substantive evidence for the jury to consider. Accordingly, it is feasible that Allen is challenging all of the statements contained in the BWC recording.

Hearsay is not admissible unless otherwise provided by the Maryland Rules. Md. Rule 5-802. Therefore, to be admissible, the statements contained on Officer Chen's BWC footage must fall within an exception to the rule against hearsay. There is no indication that the statements fall within any exception. First, the hearsay was not admissible as a public record. Pursuant to Maryland Rule 5-803(b)(8), hearsay statements made by a public agency setting forth certain assertions are not hearsay. Nevertheless, "a record of matter observed by a law enforcement person is not admissible . . . when offered against an accused in a criminal action." Md. Rule 5-803(b)(8)(C). BWC recordings by a law enforcement officer fall within an exception under Maryland Rule 5-803(b)(8)(D), but they are nevertheless subject to the requirements of Maryland Rule 5-805. Pursuant to this Rule, "[i]f one or more hearsay statements are contained within another hearsay statement, each must fall within an exception to the hearsay rule in order to not be excluded by that rule." Md. Rule 5-805. Here, the statements recorded on the BWC do not fall within an independent hearsay exception and, therefore, are not admissible as a public record. *See id.* Accordingly, the statements on Officer Chen's BWC were hearsay but that determination does not end our analysis.

B. Although the trial court erred in admitting the body-worn camera footage, the error was harmless because the content of the recording was cumulative of other evidence received or otherwise undisputed and conceded by both parties.

An error is harmless when "a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *Dorsey v. State*, 276 Md. 639, 659 (1979). We must be "satisfied

that there is no reasonable possibility that the evidence complained of – whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict." *Id.* The burden is on the State to show that the error was harmless beyond a reasonable doubt. *Dove v. State*, 415 Md. 727, 743 (2010).

Many of the statements made by the declarants in the BWC footage were surrounding facts that were undisputed and conceded by both parties. Allen did not dispute that he used the Offer Up profile "Marcus" to arrange a meeting with Kassem on March 20, 2017. Allen also did not dispute that a robbery took place during that time and at the location where he and Kassem arranged to meet. Critically, the theory of Allen's defense presented at trial was that a robbery did take place, and that he and Kassem were *both* robbed by the gunman. Accordingly, there is no reasonable possibility that Kassem's statements to Officer Chen describing the details of the arrangement of the meeting, where the meeting took place, or the basic circumstances of the robbery prejudiced Allen or affected the outcome of the verdict. *See id.* at 744, 747.

"In considering whether an error was harmless, we also consider whether the evidence presented in error was cumulative evidence." *Id.* at 743. "Evidence is cumulative, when, beyond a reasonable doubt, we are convinced that 'there was sufficient evidence, independent of the [evidence] complained of, to support [Allen's] conviction.'" *Id.* at 743–44 (quoting *Richardson v. State*, 7 Md. App. 334, 343 (1969)). Put simply, "cumulative evidence tends to prove the same point as other evidence presented during the trial or sentencing hearing." *Id.* at 744. We use this test to determine "whether the

cumulative effect of the properly admitted evidence so outweighs the prejudicial nature of the evidence erroneously admitted that there is no reasonable possibility" that the outcome would have been different. *Id.* (citing *Ross v. State*, 276 Md. 664, 674 (1976)).

Further, "[w]here competent evidence of a matter is received, no prejudice is sustained where other objected to evidence of the same matter is also received." *Yates v. State*, 429 Md. 112, 120–21 (2012) (internal quotations omitted). We will not reverse "when objectionable testimony is admitted if the essential contents" of that testimony "ha[s] already been established and presented to the jury *without objection* through [ ] prior testimony." *Id.* at 120 (emphasis in original).

Allen contends that Kassem's statements on the BWC recording regarding her belief that Allen and the gunman were acting together were prejudicial. Allen further maintains that Officer Chen's recitation of those statements also constitutes hearsay. He argues that Kassem's assertions that the gunman's attack on Allen looked "fake" and that the two men were "play fighting" was prejudicial and affected the verdict. Critically, other evidence on this same point was received without any objection from Allen's counsel. Indeed, the recording of Kassem's phone call to 911 was admitted into evidence. This phone call contained statements of Kassem explaining that there were two people involved in the robbery, the gunman and the "the guy that was trying to give [her] the iPad." Further, on the recording, Kassem referred to Allen and the gunman as "friend[s]."

Moreover, recorded phone calls between Allen and Winston were offered into evidence. In one recording, Allen informs Winston that Kassem "thinks [he] set it up."

We find it troubling that the trial court admitted the entire BWC footage. Nevertheless, under the unique circumstances of this case, the footage was cumulative to previously admitted testimony and we hold that the trial court error in admitting such evidence was harmless. Accordingly, any statements in the BWC recording relating to Kassem's perception that the attack was staged were cumulative and, therefore, do not entitle Allen to a new trial. *See id.* at 120–21, 124; *see also DeLeon v. State*, 407 Md. 16, 30–31 (2008) (holding that any objection to evidence related to the defendant's purported gang affiliation was waived when evidence on the same point was admitted without objection elsewhere at trial).[5]

II. Allen failed to preserve his contention that his failure to file a police report was not relevant, and, even if he had preserved this argument, the trial court did not erroneously admit such evidence.

At trial, during the State's direct examination of Detective Marr, the State asked Detective Marr if he was aware of whether Allen had ever contacted the police to report a robbery. Detective Marr replied that he was not aware of such a report. Allen's counsel did not object to this line of questioning. On cross-examination, Winston's defense counsel elicited testimony from Detective Marr that Allen and Winston spoke on the phone many times, and only a few of those phone calls referenced any criminal activity. On redirect, the State elicited that the recorded call on April 18, 2017 between Allen and Winston was

[5] There is no merit to the argument that it is not only the content, but also the manner in which the content is delivered, that matters as to whether evidence is cumulative. The Court of Appeals has held that the same statement, offered through two different witnesses, is cumulative. *Yates*, *supra*, 429 Md. at 123–24.

the only recorded call reviewed by Detective Marr which mentioned Offer Up and was the only call in which Allen even mentioned that he was robbed. Further, the State revisited the point of whether he was aware of Allen reporting that he was robbed at any point prior to the phone call on April 18, 2017. Allen's counsel generally objected. The trial judge overruled the objection and Detective Marr answered "no."

On appeal, Allen argues that the trial court erred by admitting this evidence that Allen failed to report that he was robbed to the police. Specifically, Allen contends that Detective Marr's testimony was hearsay and irrelevant. Alternatively, Allen argues that the evidence should have been excluded because any probative value was substantially outweighed by the danger for unfair prejudice.

A. Because Allen failed to initially object to evidence of his failure to report a robbery, his later objection did not preserve this argument for our review.

Maryland Rule 4-323(a) requires that "[a]n objection to the admission of evidence be made at the time the evidence is offered or as soon thereafter as the grounds for the objection become apparent. Otherwise, the objection is waived." "When evidence is received without objection, a defendant may not complain about the same evidence coming in on another occasion even over a then timely objection." *Williams v. State*, 131 Md. App. 1, 26 (2000). Accordingly, "[o]bjections are waived if, at another point during the trial, evidence on the same point is admitted without objection." *DeLeon, supra*, 407 Md. at 31.

Here, the same evidence that formed the basis of counsel for Allen's objection was previously admitted without objection. On direct examination, the State asked Detective

Marr if he was aware if Allen or anyone else had contacted the police to report the robbery of Allen, to which Detective Marr replied "no." The State confirmed with Detective Marr that the only report filed regarding the robbery on March 20, 2017 was filed by Kassem. Later, on redirect, the State asked Detective Marr "at any point prior to April 18, did you receive any report of Allen reporting to the police that he was licked?"[6] Detective Marr replied, over objection, "No. Nothing." This later question, which Allen's counsel generally objected to, addressed the same point as the prior question, namely, whether Allen or anyone else reported Allen being robbed on March 20, 2017? Both times he was asked, Detective Marr replied "no" and that, to his knowledge, "nothing" was filed. Because testimony on the same point was received without any objection, this issue is not preserved for our review.

B. Assuming *arguendo* that Allen preserved this issue for our review, the trial court did not err in admitting the evidence that Allen did not report a robbery because it was relevant to show consciousness of guilt.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Generally, "all relevant evidence is admissible" and "[e]vidence that is not relevant is not admissible." Md. Rule 5-402. This standard is "a very low bar to meet." *Montague*, *supra*, 471 Md. at 674 (internal citation omitted).

[6] The term "licked" is slang for "robbed" or "assaulted."

Relevant evidence may be excluded if the trial court finds that "its probative value is substantially outweighed by the danger of unfair prejudice or other countervailing concerns." *Id.* (citing Md. Rule 5-403). "Probative value is substantially outweighed by unfair prejudice when the evidence 'tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission.'" *Id.* at 674–75 (quoting *State v. Heath*, 464 Md. 445, 464 (2019)). We entrust this balancing task to the trial court, first and foremost. *Id.*

Detective Marr's testimony regarding Allen's failure to report a robbery on March 20, 2017 was relevant because it tended to make a fact of consequence "more probable or less probable than it would be without the evidence." Md. Rule 5-401. Allen's trial counsel presented a defense theory that he was not one of the perpetrators in the robbery, but rather that he was an additional victim of the robbery, along with Kassem. Evidence that Allen had not reported a robbery made it more likely that he was not actually robbed and was instead involved in a scheme to rob Kassem with Winston. *See id.*

"If relevant, circumstantial evidence regarding a defendant's conduct may be admissible under [Maryland] Rule 5-403, not as conclusive evidence of guilt, but as a circumstance tending to show consciousness of guilt." *Snyder v. State*, 361 Md. 580, 593 (2000) (internal citations omitted). The Court of Appeals has held that "evidence of a defendant's behavior after the commission of a crime may be admissible." *Id.* We consider a person's post-crime behavior as relevant to the question of guilt because "the particular behavior provides clues to the person's state of mind." *Thomas v. State*, 372 Md. 342, 352

(2002). "Consciousness of guilt can be inferred from some" post-crime actions. *Snyder*, *supra*, 361 Md. at 594. For example, the "failure to inquire" can lead to an inference of consciousness of guilt. *Id.* (citing *State v. Marshall*, 586 A.2d 85, 143–46 (N.J. 1991)).

The Court of Appeals adopted a test from the Fifth Circuit to determine the probative value of evidence relating to consciousness of guilt. *Thomas*, *supra*, 372 Md. at 352. To be admissible, the evidence must support four inferences, namely,

> the probative value of the evidence "depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to [the failure to report being robbed]; (2) from the [failure to report being robbed] to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt of the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged."

Id. (quoting *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977)). Here, Detective Marr's testimony regarding Allen's failure to report a robbery satisfies the four-part test. Allen's failure to report that he was robbed directly detracted from his defense theory that he was also robbed by the same person who robbed Kassem. This evidence had the tendency to make it more likely that the robbery was staged, and that Allen was never robbed. The trial court was within its discretion to admit the evidence as Allen's failure to report the robbery was indicative of his consciousness of guilt.

Alternatively, Allen contends that, even if relevant, the probative value of Detective Marr's testimony was substantially outweighed by the danger of unfair prejudice that it created. Allen also argues that the evidence is too ambiguous and invites the jury to speculate. *Snyder*, *supra*, 361 Md. at 595–96. We trust this balancing test to the trial court.

Newman v. State, 236 Md. App. 533, 556 (2018). While there may be multiple reasons for a person not to report a robbery, Allen's counsel was welcome to, and did, present these reasons to the jury. *See Thompson v. State*, 393 Md. 291, 315 (2006). Specifically, Allen's counsel offered another reason that Allen may not have reported the robbery during his closing argument.[7] Accordingly, assuming *arguendo* that Allen properly preserved this evidentiary issue for our review, the evidence was relevant and properly admitted as evidence indicative of Allen's consciousness of guilt.[8]

III. Allen failed to preserve his objection to the jury instruction regarding flight. Nevertheless, we decline to engage in plain error review.

At trial, the trial judge discussed the inclusion of certain jury instructions with Allen, Winston, and their respective counsel, along with the State. Winston's counsel objected to the trial court giving an instruction regarding the defendant's flight as to Winston because Winston was disputing identity. Winston's counsel requested that if the trial court were to give the flight instruction, it should differentiate between the two defendants. The State

[7] During closing arguments, Allen's counsel stated: "Why wouldn't he call the police? Well, ladies and gentlemen, there are a lot of people [ ], especially a young African-American man, [who] might not want to call the police. I'm sorry I have to say that."

[8] We reject Allen's argument that Detective Marr's testimony regarding Allen's failure to report a robbery was inadmissible hearsay. Detective Marr's testimony did not reference a statement or offer a statement for the truth of the matter asserted. *See* Md. Rule 5-801; *Stoddard v. State*, 389 Md. 681, 688–89 (2005). Further, Allen contends that Detective Marr did not have personal knowledge of Allen's failure to report the robbery. There is no evidence to suggest that this is true based on the fact that Detective Marr would be likely to know whether or not he received, or was aware of, any report filed by Allen. Regardless, personal knowledge is not the test to determine what evidence constitutes hearsay. *Id.*

argued that the flight instruction applied to both Allen and Winston because they were each charged with conspiracy to commit armed robbery. The trial judge concluded that he would give the instruction and that he would not differentiate between the two defendants. Allen's counsel never objected to the trial court giving the flight instruction to the jury prior to delivering the instruction.

Thereafter, the trial court delivered the following instruction to the jury regarding flight:

> A person's flight immediately after the commission of a crime or after being accused of committing a crime is not enough by itself to establish guilt. But 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 consciousness of guilt.[9]

Thereafter, the trial court asked if there were any exceptions to the proposed jury instructions. Winston's counsel renewed his prior objection to the flight instruction "on behalf of Mr. Winston." Allen's counsel made no objection to the flight instruction with respect to Allen.

A. Allen's counsel did not object to the trial court giving the jury a flight instruction. Although Winston's counsel objected, this objection as to Winton is insufficient to preserve this issue for our review.

Maryland Rule 4-325(e) provides that: "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the

[9] The instruction given by the trial court tracks the language of the Maryland Pattern Jury Instruction on flight. *See* MPJI-Cr § 3:24.

court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objections." Allen never objected to the jury instruction regarding flight, and, therefore, based on the plain language of the Rule, Allen would now be barred from assigning error to the trial court's decision to give the flight instruction. *See* Md. Rule 4-325(e).

Nevertheless, it is possible for a party to demonstrate "substantial compliance" with Maryland Rule 4-325(e) and preserve the issue for appellate review. *See Bowman v. State*, 337 Md. 65, 69 (1994). To substantially comply:

> There must be an objection to the instruction; the objection must appear on the record; the objection must be accompanied by a definite statement of the ground for objection unless the ground for the objection is apparent from the record and the circumstances must be such that a renewal of the objection after the court instructions the jury would be futile or useless.

Id. (citing *Gore v. State*, 309 Md. 203, 309 (1987)). Critically, situations where substantial compliance exists are "rare exceptions" and "the requirements of the Rule should be followed closely." *Sims v. State*, 319 Md. 540, 549 (1990). Allen cannot demonstrate substantial compliance with Maryland Rule 4-325(e). Indeed, Allen did not make an objection to the instruction, nor did he offer a definite statement as to the grounds of his objection. Similarly, the reasons for his dissatisfaction are not apparent from the record. Accordingly, it cannot be said that further objection would have been "futile or useless." *Bowman, supra,* 337 Md. at 69.

Allen further contends that the trial court's instruction on flight is preserved for review because Winston's counsel objected. We disagree. "[I]n cases involving multiple

defendants, 'each defendant must lodge his own objection in order to preserve it for appellate review and may not rely, for preservation purposes, on the mere fact that a co-defendant objected.'" *Hayes v. State*, 247 Md. App. 252, 276 (2020) (quoting *Williams v. State*, 216 Md. App. 235, 254 (2014)). Indeed, a defendant may join in a co-defendant's objection, but he must do so expressly. *Id.* Allen made no objection to the jury instruction, nor did he expressly join in his co-defendant's objection.

Further, Winston's basis for his objection to the jury instruction on flight was inapplicable to Allen's case. Winston's counsel objected because the flight instruction presumes that the jury knows the identity of the perpetrator and Winston was disputing the issue of identity. Allen argues that the jury instruction on flight was improper as to his case because it failed to distinguish between the various explanations for fleeing the scene. Accordingly, it would be improper for this Court to allow Winston's objection to serve as preservation for Allen's argument on a completely different basis. *Id.*

B. The trial court's decision to instruct the jury on flight is not a situation appropriate for plain error review.

"[I]n order for an appellate court to exercise plain error review, there must be an 'error,' it must be 'plain,' and it must be 'material to the rights of the defendant.'" *State v. Brady*, 393 Md. 502, 507 (2006) (quoting Md. Rule 4-325(e)). We reserve this review for issues which are "compelling, extraordinary, exceptional[,] or fundamental to assure the defendant a fair trial." *Yates, supra*, 429 Md. at 131 (internal quotations omitted). While "we have discretion under [Maryland] Rule 4-325(e) to address an unpreserved issue," this discretion should only be exercised rarely. *Wiredu v. State*, 222 Md. App. 212, 223–24

(2015) (internal quotations omitted). Indeed, "appellate review under the plain error doctrine 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Kelly v. State*, 195 Md. App. 403, 432 (2010).

As a threshold requirement for this Court to engage in plain error review, a party must show that an error has not been affirmatively waived or abandoned. *See Newton v. State*, 455 Md. 341, 364 (2017). After the trial court gave the flight instruction to the jury, the trial judge asked if there were any exceptions. Winston's counsel renewed his objection to the flight jury instruction as to his client, Winston. While Allen's attorney did not object to the flight jury instruction, he did object as to the instruction on circumstantial evidence. Accordingly, there is no evidence that Allen did not affirmatively waive or abandon this issue. Even if there is plain error related to a jury instruction given by the trial court, "its consideration on appeal is not a matter of right; the rule is couched in permissive terms and necessarily leaves its exercise to the discretion of the appellate court." *Morris v. State*, 153 Md. App. 480, 512 (2003). In short, we decline to engage in plain error review of the trial court's decision to instruct the jury on flight.

APPELLEE'S MOTION TO DISMISS DENIED. JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.