Circuit Court for Queen Anne's County
Case No. C-17-CR-20-000277

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0435

September Term, 2021

MARTAVEOUS MELVIN ADKINS

v.

STATE OF MARYLAND

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

Opinion by Reed, J.

Filed: December 22, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Md. Rule 1-104 (a)(2)(B).

The Appellant, Martaveous Adkins ("Appellant") was charged in the circuit court with (1) possession with intent to distribute cocaine; (2) possession with the intent to distribute fentanyl; (3) possession of cocaine; (4) possession of fentanyl; (5) possession of cocaine paraphernalia; (6) possession of fentanyl paraphernalia; (7) conspiracy with Dontae Dennis ("Mr. Dennis") to possess with the intent to distribute cocaine; and (8) conspiracy with Dontae Dennis to possess with the intent to distribute fentanyl. Following a bench trial, the circuit court convicted Appellant of the first six charges and acquitted him of the two conspiracy charges. The circuit court sentenced him to 20 years of imprisonment for count one, possession with intent to distribute fentanyl, with all but eight years suspended, and suspended all remaining counts. After sentencing, Appellant timely filed his appeal.

In bringing his appeal, Appellant presents three questions for our review:

1. Did the trial court err in accepting Mr. Adkins' jury trial waiver without informing him of the possibility of a hung jury and without ensuring that his waiver was made voluntarily?

2. Did the trial court err when it admitted evidence of a text message that appeared on a cell phone that was not tied to Mr. Adkins?

3. Did the trial court err in admitting evidence of a jail call?

For the following reasons, we affirm the trial court's decision on all three questions. We hold that the trial court should not have admitted Appellant's jail call into evidence. After reviewing the totality of the circumstances and applying the harmless error test, we find this error was harmless as its addition or exclusion would not have influenced the trial court's decision.

FACTUAL & PROCEDURAL BACKGROUND

On July 15, 2020, police officers executed a search warrant on a residential trailer, which was based on an investigation that began in May 2020. Deputy First Class Dillon Bennet ("Deputy Bennet") and Deputy First Class Justin Custis ("Deputy Custis") were present during the search warrant's execution. According to Deputy Bennett's testimony, six people were present at the residential trailer when they arrived. These people included Martaveous Adkins, Victoria Clough ("Ms. Clough"), Mr. Dennis, Clinton Adkins ("Appellant's Father"), Darlene Tracey Burgess ("Ms. Burgess"), and Victoria Fluharty ("Ms. Fluharty"). According to Deputy Bennett's testimony, additional law enforcement including Queen Anne's County's SWAT team, the Kent County Narcotics Task Force and the Queen Anne's Drug Task Force also arrived at the scene because surveillance showed that there could be a large number of people present, and they wanted to be prepared in case of any unlawful resistance. The officers entered the trailer on the left-hand side, which led to a living room area. Deputy Bennett turned left through the living room area and heard a few women in the hallway and ushered them into the living room.

Upon the officers' arrival, Adkins attempted to flee by proceeding to the rear of the trailer and into the kitchen, while the officers gathered everyone else in the main room. Specifically, Deputy Bennett heard glass breaking and a SWAT team shield operator giving commands and indicating that Appellant tried to jump out of the window. Later, Deputy Bennett stated that he saw Appellant come out of the hallway. The Deputy gathered everyone into the living room. The officers placed all persons on the couch or chairs in the living room to search them and ultimately handcuffed and apprehended all

parties. The Appellant was charged, arraigned and set for trial.

The day before his jury trial was to begin the following colloquy occurred, after a brief exchange on the record, Appellant's counsel stated that Appellant wanted to waive his right to a jury trial. Specifically, Appellant stated the following:

> DEFENSE COUNSEL: Mr. Adkins, what's your full name?
>
> THE DEFENDANT: Martaveous Melvin Adkins.
>
> DEFENSE COUNSEL: How old are you?
>
> THE DEFENDANT: Forty.
>
> DEFENSE COUNSEL: How far did you go in school?
>
> THE DEFENDANT: Graduated.
>
> DEFENSE COUNSEL: Can you read and write?
>
> THE DEFENDANT: Yeah.
>
> DEFENSE COUNSEL: Have you had any drugs or alcohol or medication today?
>
> THE DEFENDANT: No.
>
> DEFENSE COUNSEL: We've indicated to the Court that we're not going to proceed by a jury trial. We're going to proceed by a court trial. And you understand that you have a right to have a jury trial in this matter. If you elected to have a jury trial, we'd come into court, there'd be a large group or Queen Anne's County citizens called in random. You and I and the prosecutor would participate in selecting 12 of them to hear your case. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> DEFENSE COUNSEL: In order to find you guilty of any offense, all 12 would have to say you're [guilty] of that offense. It has to be a unanimous verdict. It also has to be a unanimous verdict the other way. In order to find you not guilty, all 12 would have to say you're

> not guilty to the offense. Okay. We've indicated to the Court that we want to proceed not with a jury trial, but with a court trial. We'd still have all the rights associated with a trial that are granted to you under the constitution. We'd be able to cross-examine any witness or confront our accusers and make the State prove the case beyond a reasonable doubt. They carry the burden throughout the trial. It's just that the judge would be the fact finder in determining whether somebody is guilty or not. Is that your understanding?
>
> THE DEFENDANT: Yes.
>
> DEFENSE COUNSEL: Knowing all that and after discussing with me, do you wish to waive your right to a jury trial and proceed with a court trial?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Court finds that Mr. Adkins has been advised; that he knowingly, voluntarily, and intelligently is waiving his right to a jury trial. He's proceeding tomorrow by a court trial. He does understand the consequences and nature thereof. He has been questioned on the record. So we will – how many witnesses are we looking for each side?

As such, the trial proceeded as a bench trial as opposed to a trial by jury. On the next day, May 24, 2021, Appellant's court trial began in the Circuit Court for Queen Anne's County.

During the trial, Deputy Bennett testified about the evidence the officers recovered from the scene and on the persons of those at the scene. Within the bedrooms, officers discovered 42 vials, 13 capsules, two digital scales, a bag of white powder, a cell phone with white powder on the screen, clothes, mail, an X-Box game system, and shoes. After testing the recovered evidence, the officers learned that the 42 vials contained cocaine and the 13 capsules contained fentanyl. Through testing, the officers also discovered that the bag of white powder contained cocaine. Within other bedrooms, the officers discovered $518 in cash and pill bottles. Officers also discovered fentanyl, marijuana, 4-ANNP, and

etizolam, and paraphernalia on various persons, including family who were present during the execution of the warrant.

While searching the kitchen, Deputy Bennett testified that he saw two cell phones on the kitchen counter. One of the cell phones on the kitchen counter had a text message pop up on the screen, which stated, "I got 40." During direct examination, Deputy Bennett testified about how he came to see the cell phone and its message. Specifically, Deputy Bennett stated the following during direct examination:

> STATE: While you were in that kitchen area, did you notice anything like cell phones in that area?
>
> DEPUTY BENNETT: Yes, two cell phones on the counter.
>
> STATE: And were they powered on or off?
>
> DEPUTY BENNETT: I believe one was off and one was charging.
>
> STATE: Did you make any observations of the cellular telephones in the kitchen area while you were executing the search and seizure warrant?
>
> DEPUTY BENNETT: Yes, while I was over by the phones, a message popped on the home screen.
>
> DEFENSE COUNSEL: Objection, Your Honor, hearsay.
>
> THE COURT: Madam State.
>
> STATE: I think he's allowed to testify as to what he saw and I don't think it's being moved in for the truth of the matter asserted. It's just what he saw and the effect on him.
>
> THE COURT: Right, I overrule it.
>
> DEFENSE COUNSEL: If it's not being introduced for the drug lingo that I assume he's going to be testifying to, that he's interpreting it to mean, I don't see any relevance for why the statement is coming in?

STATE: Circumstantial evidence regarding what's popping up.

DEFENSE COUNSEL: So, then, therefore, it is – they're claiming it is evidence of the statement and the truth of the matter asserted now.

THE COURT: Madam State.

STATE: I think it falls under the catchall exception. It's present. It's popping up. It's a text message. It's not related to any—it would be—it would go to probably cause. Certainly, the effect on the intended hearer or seer of that text message.

THE COURT: Where was the cell phone located?

DEPUTY BENNETT: In the kitchen on the counter.

THE COURT: There were two of them together?

DEPUTY BENNETT: Yes.

THE COURT: It was face up?

DEPUTY BENNETT: Yes.

THE COURT: And this message popped up while you're standing near it?

DEPUTY BENNETT: Yes, ma'am.

THE COURT: I'll overrule. You can answer.

DEFENSE COUNSEL: If I may be heard, just additionally, Your Honor.

THE COURT: To create the record, go ahead, Mr. Fricker.

DEFENSE COUNSEL: Several arguments that I've heard is catchall exception; that's for the extreme cases and I don't believe that this would fall under that. If it's for the effect of the hearer, we don't need to hear – we don't even know that the message said, just the effect that it had on him. I think it would be enough to get that testimony in, if that's what they're looking for. Probable cause, we're dealing with items found in a bedroom, we're not dealing with cell phones, as far as the probable cause to charge or to arrest anybody. I don't—based on a cell phone, that's not an issue here. It's not a

> probable cause hearing. It's not a motions hearing about illegality of arrest or search and seizure. So I still don't see relevance for this, aside from the substance of the statement and his opinion about what it says.
>
> STATE: I'm not asking for Detective Bennett's opinion of it, just what he saw. Again, he was not—that's not his cell phone so it's not the effect on him, as the hearer, but the effect on the receiver of that message and I think for that purpose it is admissible.
>
> THE COURT: I'll overrule. Go ahead. Ask your next question.
>
> STATE: Thank you, ma'am.
>
> STATE: What did you see?
>
> DEPUTY BENNETT: I saw a message pop up on the cell phone.
>
> STATE: What did you see?
>
> DEPUTY BENNETT: The message read: I got 40.
>
> STATE: I got 40?
>
> DEPUTY BENNETT: Yes.

Appellant made no further objections. Additionally, Sergeant Tyson Brice ("Sergeant Brice"), Deputy Bennett's supervisor in the drug task force, also served as a witness and testified during trial. During direct examination, Sergeant Brice also discussed the text message. Specifically, the exchange went as follows:

> STATE: And how about the—based on your training, knowledge, and experience, what do you believe the text message of a cellular phone observed by Detective Bennett meant?
>
> SERGEANT BRICE: It was someone with $40 looking to purchase.

There was no objection to this testimony. The State continued to question Sergeant Brice until Appellant objected to the following exchange:

> STATE: Based on your training, knowledge, and experience, do you find anything remarkable about Detective Bennett's testimony regarding some of the things that he heard Mr. Adkins say on the telephone – the recorded calls regarding a concern that law enforcement would attempt to break into his phone?
>
> DEFENDANT'S COUNSEL: Objection, I don't think he has a basis to form an opinion on that, what was meant by the defendant, by asking if law enforcement can get into his phone.
>
> STATE: I can withdraw it. Actually, no further questions for this witness.

Additionally, Deputy Bennett testified during trial about certain recorded phone calls where he heard Appellant speaking in jail about selling pills on August 15, 2020. Specifically, during direct examination, Deputy Bennett testified to the following:

> STATE: Now, directing your attention to August 15th of 2020, at approximately 1258 hours, did the defendant make any phone calls?
>
> DEPUTY BENNETT: Yes.
>
> STATE: And directing your attention to approximately 1538 into that call, what, if anything, of relevance does he say?
>
> DEFENSE COUNSEL: Objection, for the record.
>
> STATE: This is the Motion in Limine call.
>
> THE COURT: Okay. I will overrule it. Go ahead.
>
> STATE: Thank you, Your Honor.
>
> STATE: What, if anything, did he say?
>
> DEPUTY BENNETT: She has money, she can buy her own pills. She got her own money. She doesn't need to do that. She got a lot of money. She buy pills from me all the time. Then he said, what the fuck you got me talking on this fucking phone.

Additional facts will be supplemented in the discussion section when necessary.

DISCUSSION

I. Jury Trial Waiver

A. Parties' Contentions

Appellant contends that the trial court erred in accepting Appellant's jury trial waiver because the trial court failed to inform him of the possibility of a hung jury. Specifically, the Appellant argued that "the trial court erred because the information it elected to provide regarding the consequences of a jury trial was incomplete in a significant way and it was therefore incorrect and misleading." The Appellant went on to argue that the trial court "is not permitted to provide incorrect information telling a defendant that there are only two potential outcomes of a jury trial a guilty verdict or a not guilty verdict without informing him of the third potential outcome of a hung jury. This is a material omission because knowing all the possible outcomes would significantly affect a person's decision making. Because of this material omission, the information provided to Mr. Adkins was incorrect and misleading." Appellant also contends that the trial court failed to ensure that Appellant voluntarily waived his jury trial because the trial court did not ensure that Appellant's waiver "was not the product of any inducement, threat, or coercion."

The State contends that Appellant validly and knowingly made his jury trial waiver because the trial court provided Appellant with "some knowledge about a jury trial" before he waived the jury trial. Such knowledge includes informing Appellant about the fundamental aspects of a jury trial including the number of jurors, the jury selection process, and a possible acquittal. As such, the State contends that Appellant was provided with enough information for him to knowingly waive a jury trial.

The State also discusses that as Appellant's waiver contention is partially based on the assertion that the trial court violated Maryland Rule 4-246(b), wherein a contemporaneous objection is required, Appellant failed to so object and thus did not inform the trial court of the alleged insufficient information which prevented him from making a knowing waiver. As such, the State argues Appellant failed to preserve his jury trial waiver claim for appellate review, which is required under Maryland Rule 4-246. Additionally, the State contends that Appellant's jury waiver was voluntary because Appellant did not present any factual triggers on the record to warrant an inquiry in the voluntariness of the plea. Appellant argues that such a trigger is not necessary under the circumstances presented in this case. Specifically, the Appellant argues that "import[ing] this requirement into the constitutional determination that a waiver is voluntary would be to eviscerate the longstanding precedent against presuming that fundamental rights are waived".

We hold below that the advisement was not incomplete in a significant way, or incorrect or misleading because a hung jury was not mentioned. Unlike in the death penalty cases cited by the Appellant, this case would have started over with a new trial, a trial that had been explained to the Appellant and for which he had been given some knowledge.

B. Analysis

Knowing Waiver

Appellant contends that the court violated his constitutional rights to a jury trial

because the court failed to ensure that his waiver of a jury trial was knowing. The Sixth Amendment of the United States, as well as Md. Const. Decl. of Rights, Art. 5 and 21 ensures a criminal defendant a right to a jury trial.[1] *Abeokuto v. State*, 391 Md. 289, 316 (2006). A defendant may elect to waive their right to a jury trial and instead be tried by the court. *Id*. at 316. According to the Supreme Court of the United States, a waiver constitutes "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). However, a defendant may only properly waive their right to a jury trial if they waive this right knowingly and voluntarily. *Abeokuto*, 391 Md. at 316; *Smith v. State*, 375 Md. 365, 377-80 (2003). Courts have defined knowingly as synonymous with "intelligently" and "having or showing awareness or understanding." *Nalls v. State*, 437 Md. 674, 689 (2014) (citing *State v. Zimmerman*, 261 Md. 11, 13 (1971)). Although the defendant must have knowledge of the jury trial before waiving this right, full knowledge is not required. *State v. Bell*, 351 Md. 709, 720 (1998). As such, the court need not recite "any fixed incantation" to ensure that the defendant knowingly waives their jury trial right. *Martinez v. State*, 309 Md. 124, 134 (1987).

Furthermore, the court need not require explicit inquiry into voluntariness of the waiver, absent any triggering facts. *Aguilera v. State*, 193 Md. App. 426, 442 (2010). Nonetheless, the court must ensure that the defendant's waiver is intentional and is not a product of duress or coercion. *State v. Hall*, 321 Md. 178, 182-83 (1990). Finally, the court

[1] Maryland Declaration of Rights Articles 21 and 24 also guarantee a party's right to a jury trial in Maryland. Md. Decl. of Rights Art. 21, 24. *See also Kang v. State*, 393 Md. 97 (2006); *Abeokuto v. State*, 391 Md. 289 (2006).

looks to the totality of the circumstances to ensure that a defendant knowledgably and voluntarily waives their right to a jury trial. *Abeokuto*, 391 Md. at 320.

Maryland Rule 4-246 addresses jury waivers. The rule establishes the jury trial waiver procedure as follows:

> **(a) Generally.** In the circuit court a defendant having a right to a trial by jury shall be tried by a jury unless the right is waived pursuant to section (b) of this Rule. If the waiver is accepted by the court, the State may not elect a trial by jury.
>
> **(b) Procedure for Acceptance of Waiver.** A defendant may waive the right to a trial by jury at any time before the commencement of a trial. The court may not accept the waiver until, after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record the waiver is made knowingly and voluntarily.
>
> **Committee note**: Although the law does not require the court to use a specific form of inquiry in determining whether a defendant's waiver of a jury trial is knowing and voluntary, the record must demonstrate an intentional relinquishment of a known right. What questions must be asked will depend upon the facts and circumstances of the particular case.
>
> In determining whether a waiver is *knowing*, the court should seek to ensure that the defendant understands that: (1) the defendant has the right to a trial by jury; (2) unless the defendant waives a trial by jury, the case will be tried by a jury; (3) a jury consists of 12 individuals who reside in the county where the court is sitting, selected at random from a list that includes registered voters, licensed drivers, and holders of identification cards issued by the Motor Vehicle Administration, seated as jurors at the conclusion of a selection process in which the defendant, the defendant's attorney, and the State participate; (4) all 12 jurors must agree on whether the defendant is guilty or not guilty and may only convict upon proof beyond a reasonable doubt; (5) if the jury is unable to reach a unanimous decision, a mistrial will be declared and the State will then have the option of retrying the defendant; and (6) if the defendant waives a jury trial, the court will not permit the defendant to change the election unless the court finds good cause to permit the change.
>
> In determining whether a waiver is *voluntary*, the court should consider the defendant's responses to questions such as: (1) Are you making this decision of

> your own free will? (2) Has anyone offered or promised you anything in exchange for giving up your right to a jury trial? (3) Has anyone threatened or coerced you in any way regarding your decision? and (4) Are you presently under the influence of any medications, drugs, or alcohol?
>
> **(c) Withdrawal of a Waiver.** After accepting a waiver of jury trial, the court may permit the defendant to withdraw the waiver only on motion made before trial and for good cause shown. In determining whether to allow a withdrawal of the waiver, the court may consider the extent, if any, to which trial would be delayed by the withdrawal.

Md. Rule 4-246 (emphasis in original). Appellant argues that he was unable to knowingly waive his right to a jury trial because the trial court did not inform him of the possibility of a hung jury, one of the three possible outcomes of a jury trial. A hung jury pertains to a jury deadlock or when the jury is unable to agree on a matter, which ultimately necessitates the grant of a new trial. 17 M.L.E. *New Trial* § 7 (2023). Appellant argues that the court should have informed him of a hung jury option and the resulting possibility of being retried. Appellant cites to *Harris v. State*, 295 Md. 329 (1983) and *Trimble v. State*, 321 Md. 248 (1990) to support his argument, which we find to be inapplicable to the factual scenario in the instant case.

In *Harris*, the defendant contended that the Court should reverse his conviction because the trial court judge did not fully explain the jury's functions and his trial options. *Harris*, 295 Md. at 331. Specifically, the defendant argued that the trial court did not inform him of the possibility of a jury waiver, where in his death penalty case, if even one juror voted against the death sentence, he could possibility be granted a life imprisonment sentence instead. *Id.* at 339-40. As such, the defendant argued that since he lacked this additional information, his sentence should be reversed because the trial court did not fully inform him of "what he was

relinquishing" *Id.* at 339. Ultimately, the Court agreed with the defendant, stating, "[I]t is one thing to be told that the jury would have to be unanimous before imposing death or life imprisonment, but quite another to not be made aware that if, after a reasonable time, the jury is unable to agree, the court shall dismiss the jury and impose a life sentence. It is not difficult to see how this additional information may very well be significant to one convicted of first degree murder and facing a possible sentence of death." *Id.* at 339-40. The Supreme Court vacated the defendant's sentence and remanded the case for a new sentencing hearing. *Id.* at 340.

Although *Harris* demonstrates the importance of informing a party of valuable information to make an informed decision, the two cases are not fully comparable. In *Harris*, the defendant was potentially facing a death penalty sentence, which as the *Harris* court alludes to, carries a different type of weight than the current crimes with which Appellant has been charged. Here, Appellant is charged with various drug charges, which differs from a potential death penalty sentence in *Harris*. The failure to inform a defendant of the possibility of avoiding a death sentence is distinguishable from the instant case.

Similarly in *Trimble*, the Supreme Court vacated the defendant's death sentence after the trial court did not properly instruct him as to his right to a jury sentencing. *Trimble*, 321 Md. at 260-61. The defendant argued that his waiver of a jury sentencing without all of the relevant facts could not be knowing and intelligent. *Id.* at 261. the Supreme Court of Maryland held that the *Harris* case was controlling and ultimately agreed with the defendant *Id.* at 262. The Court held that his decision to waive sentencing

by the jury was not a knowing waiver and vacated his sentence of death. *Id.* at 264.

In its brief, the State contends that Appellant knowingly waived his right to a jury trial because under the totality of the circumstances, he demonstrated "some knowledge" of his right to a jury trial before waiver. The State cites to *State v. Hall*, 321 Md. 178 (1990) and *Abeokuto v. State*, 391. Md. 289 (2006) for the principle that the court does not need to provide detailed information regarding a jury to satisfy the knowledge requirement. Neither does the court have to provide a "fixed litany or boilerplate colloquy" to the defendant to ensure that the defendant knowingly waives their jury trial right. *Abeokuto*, 391 Md. at 320. The Appellant concedes this point. If the defendant has some knowledge about the jury waiver requirement, the defendant's jury waiver is deemed sufficient but full knowledge is not required. *Id*. at 317. Whether a waiver is valid depends on the facts and the totality of the circumstances. *Id.* at 318 (citing to *State v. Hall*, 321 Md. 178, 182 (1990)).

In the instant case, the trial court provided the defendant with sufficient information for the Appellant to waive his right to a jury trial. As the record demonstrates, Defense counsel's colloquy provided Appellant with the fundamental aspects of a jury trial, the number of jurors, the jury selection process, and a possible acquittal. According to the caselaw cited above, the trial court ensured that defendant had sufficient information to waive or retain his jury trial rights.

Furthermore, Appellant contends that the trial court's "failure" to mention a hung jury option equates to the trial court mistakenly advising the defendant, as seen in *Winters*

v. State, 434 Md. 527 (2013) or the trial court misleading the defendant, as seen in *Morales v. State*, 325 Md. 330 (1992). However, these cases are not analogous with Appellant's case.

In *Winters v. State*, the trial court provided the defendant with erroneous advice regarding the standard of review of the case, stating that the defendant would need to "unanimously convince jurors beyond a reasonable doubt that he was not criminally responsible" as opposed to the proper preponderance of the evidence standard. *Winters*, 434 at 538-39. The Court held that although the trial judge did not need to include the standard of review within his colloquy, the trial judge "may have misled Petitioner" due to providing the defendant with erroneous information, which thus influenced the defendant's decision to waive his right to a jury trial. *Id.* at 539. Due to these circumstances, the Supreme Court held that the trial court failed to ensure that the defendant's waiver of a jury trial was knowing and reversed his conviction. *Id.*

In *Morales v. State*, a defendant decided to represent himself at trial. *Morales,* 325 Md. at 332-33. At trial, the defendant contemplated whether to take the trial during his case in chief. *Id.* The trial court informed the defendant that if he took the witness stand, he could be impeached by his prior convictions. *Id.* at 335. The Supreme Court of Maryland reasoned that while the trial judge was not obligated to inform the defendant of this information, since doing so, the judge should have also informed the defendant of his constitutional right to remain silent. *Id.* As such, the trial judge may have misled the defendant, which in turn resulted in the defendant not knowingly and intelligently waiving his right to testify. *Id.* at 339. Based on these facts, the Supreme Court vacated

the defendant's convictions and remanded the case back to the trial court. *Id.* at 340.

Here, Appellant's case differs greatly from both *Winters* and *Morales*. In no instance did the trial court provide Appellant with unreservedly incorrect information during the colloquy, as seen in *Winters*. Appellant contends that the trial court failing to include the option of a hung jury constitutes a mistake. However, this is not analogous to the mistakes made in the other cases. A hung jury is not a material circumstance that would lead to a definitive result such that the defendant had to be informed. It is not akin to the advisement of an incorrect standard of review or failing to inform of the right to remain silent. Furthermore, unlike in *Morales,* the trial court did not include additional erroneous information within their litany about Appellant's rights. A trial court's decision to not provide "a fixed litany" or "boilerplate colloquy" that includes hung jury language does not automatically equate to mistakenly advising a defendant or providing them with misleading information. *Abeokuto*, 391 Md. at 320. So long as the information provides sufficient information for a defendant to make a knowledgeable decision about their rights, a trial court's decision to not include additional information above that sufficient threshold should not be held to be misleading or ill-advised. Accordingly, this Court affirms that the information provided was sufficient to allow Appellant to knowingly make a decision regarding his right to a jury trial.

Voluntariness

Furthermore, Appellant contends that he did not voluntarily waive his right to a jury trial because the trial court did not inquire whether Appellant was acting out of coercion, duress, or inducement. Particularly, Appellant argues that the trial court asking Appellant

whether "he had any drugs or alcohol or medication today?" should not equate to whether Appellant voluntarily waived his jury trial right because sobriety is not tantamount to voluntariness. The State responds that because the record does not contain any factual triggers, the trial court was not required to conduct an "express inquiry into the voluntariness of a jury trial waiver."

For a court to consider a jury waiver voluntary, the defendant must make the waiver under their own free will, uncoerced, and uninfluenced by drugs or alcohol. *Nalls v. State*, 437 Md. 674, 689 (2014). Nonetheless, absent any facts in a particular case that suggest an involuntary or unknowing waiver, the trial court is not required to ask the defendant whether the trial court's election is a result of physical or mental duress or coercion. *Hall*, 321 Md. at 183; *see also Abeokuto*, 391 Md. at 318. Absent any factual trigger, the trial court is permitted to determine the defendant's voluntariness based on the defendant's demeanor. *Aguilera*, 193 Md. App. at 442; *see also Kang v. State*, 393 Md. 97, 110 (2006).

In *Dortch v. State*, the Supreme Court of Maryland held that the trial court did not commit an error when ruling that the defendant voluntarily waived their jury waiver when the trial court failed to ask the defendant specifically whether they were "induced by promises or by physical or mental coercion." *Dortch v. State*, 290 Md. 229, 235 (1981); *see also Abeokuto*, 391 Md. at 319. However, the Court noted that the "preferable practice" for trial courts is to inquire that the waiver decision is voluntary. *Dortch*, 290 Md. at 236.

In contrast, in *Martinez*, the Supreme Court of Maryland held that the trial court wrongly determined that the defendant voluntarily waived their right to a jury trial because

they ignored a relevant, triggering fact which questioned his voluntariness. *Martinez*, 309 Md. at 134-35. Particularly, the Court reasoned that when the defendant answered "Yes" to, "Has any person, either inside or outside of this courthouse, made you any promise, or has anyone threatened you in any way in order to have you give up your right to a jury trial?", that this was "particularly relevant" information which did not show that the defendant voluntarily waived his jury trial right and was potentially coerced. *Id.* at 135-36.

Accordingly, the trial court's inquiry as to whether Appellant has ". . . had any drugs or alcohol or medication today?" is sufficient, in the context here, to satisfy the voluntary inquiry. As seen in *Dortch*, the trial court is not required to ask a defendant specific questions about voluntariness absent any triggering facts. Unlike the *Martinez* case, there were not any triggering facts in this case regarding Appellant's voluntariness. Nonetheless, the trial court still inquired regarding Appellant's voluntariness when asking Appellant, "Have you had any drugs or alcohol or medication today?" The trial court ensured that Appellant was uninfluenced by drugs or alcohol when making his decision, and no facts required the trial court to conduct any further inquiry. As such, the trial court ensured that Appellant voluntarily made his decision to waive his right to a jury trial.

Compliance with Md. Rule 4-246(b) and the Preservation Rule

The State contends that since Appellant's claim is partially based on Md. Rule 4-246(b), which requires a contemporaneous objection for a party to challenge a jury waiver issue on appeal, Appellant does not have a claim because Appellant did not alert the trial

court of his jury waiver concerns before this appeal. Alternatively, the State asks this Court to merely conduct an appellate review of Appellant's constitutional argument because a party's contemporaneous object is not required for a constitutional jury trial claim.

While the Supreme Court of Maryland has held in *Nalls v. State*, 437 Md. 674, 692 (2014) that a complaining party must have also raised the jury trial issue in trial court under Md. Rule 4-246(b), because Appellant states that this is merely a constitutional claim, we will not address or conduct any analysis under Md. Rule 4-246.

II. Text Message Evidence

A. Parties' Contentions

Appellant contends that the trial court erred in admitting evidence of the text message that appeared on the cell phone that was discovered in the kitchen when executing the search and arrest warrants. Particularly, Appellant contends that the cell phone is not connected to his person, and as such, messages from the phone should not be tied to his case. Additionally, Appellant emphasizes that the text message should not be included in his case and argues that this is evident since the State previously attributed the phone to another party, Mr. Dennis, in the opening argument, and stated that the phone was "unclaimed" in the closing argument. As such, Appellant states that the cell phone's text message is irrelevant because the State failed to connect the cell phone to Appellant, and thus the trial court should not have admitted it.

The State contends that the trial court rightfully admitted the text message stating, "I got 40" because the message is relevant to Appellant's drug distribution and conspiracy charges. The State argues that because the bar for relevancy is low, as outlined in *Otto v.*

State, 459 Md. 423, 452 (2018), and the text message refers to Appellant's charges, the trial court properly admitted the text message into evidence, irrespective of who owns the phone. The State argues that the Appellant's case is similar to *Garner v. State*, 414 Md. 372 (2010), and as such, argues that the text message should be admitted because the phone was used as an instrumentality of Appellant's crimes and is thus relevant. Further, the State argues that the trial court admitting this evidence was harmless because the trial court's verdict indicates that the text message sent to the phone was not necessary to show that Appellant "intended to distribute the drugs discovered in the trailer."

B. Standard of Review

Generally, for evidence to be admissible, it must be relevant. *Thomas v. State*, 429 Md. 85, 95 (2012). Relevant evidence is evidence that 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. Relevant evidence is presumptively admissible and evidence that is not relevant to the material issue is inadmissible. Md. Rule 5-402. However, "even if relevant, [evidence] may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Smith v. State*, 371 Md. 496, 504 (2002). Ultimately, a trial judge must use considerable and sound discretion to determine what evidence should be admitted or not, upon consulting Md. Rules 5-401 through 5-403. *Thomas*, 429 Md. at 96; *Merzbacher v. State*, 346 Md. 391, 404 (1997).

Our review of the trial court's decision to admit the evidence is comprised of two steps. *Smith v. State*, 218 Md. App. 689, 704 (2014). "First, we consider whether the

evidence is legally relevant, a conclusion of law which we review *de novo*." *Id.* (quoting *Brethren Mut. Ins. Co. v. Suchoza*, 212 Md. App. 43, 52 (2013)). Next, we determine whether the court "abused its discretion by admitting relevant evidence which should have been excluded" as unfairly prejudicial. *Id.*

C. Analysis

Appellant contends that the trial court committed a reversible error by admitting the text message saying "I got 40" into evidence because it was irrelevant. As such, Appellant argues that the trial court's error was harmful to his case. The State contends that the trial court rightfully admitted the evidence because the text message was relevant to Appellant's drug distribution and conspiracy charges.

Courts have held that when a telephone is used to receive illegal wagers or to receive orders called in by persons who wish to purchase a controlled dangerous substance, the telephone becomes an instrumentality of the crime. *Garner v. State*, 414 Md. 372, 382 (2010); *see also Little v. State*, 204 Md. 518, 522-23 (1954) (reasoning that "[t]he making of a wager or the purchase of a drug, legally or illegally, is a form of contract"). In *Garner*, an unknown declarant called the Petitioner's cell phone stating, "Can I get 40?" and the Supreme Court of Maryland held that the district court properly admitted such evidence. *Garner*, 414 Md at. 376, 388. The Court referenced Professors Mueller and Kirkpatrick's treatise on Evidence to emphasize that courts often admit evidence where a "caller makes a commitment or just tries to make a bet or buy drugs" because "the performative quality of such behavior" justifies admitting such evidence "when it is proved as a means of showing that bets are taken or drugs are sold where the call is received." *Garner,* 414 Md.

at 385; Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence,* § 8.22 at 773 (4th ed. 2009). Ultimately, the Court held the call to be admissible because it "established a consequential fact: Petitioner was in possession of a telephone called by a person who requested to purchase cocaine." *Garner*, 414 Md. at 388.

In the present case, Appellant received a text stating "I got 40," and the trial court allowed the testimony of expert witness Sergeant Brice to establish what this meant. Sergeant Brice was an expert in the field of identification, detection, packaging, and distribution of controlled dangerous substances, including specialized terminology related to the drug trade. During direct examination, Sergeant Brice stated that he has been assigned to the Queen Anne's County Drug Task Force since 2005 and has been a law enforcement officer since 1997. Sergeant Brice focused on all aspects of the task force, including "search warrants, reports, controlled buys, informant handling, and etcetera" and stated from his testimony, has become very familiar with drug dealer and user language. During his testimony, he established that pertaining to heroin or fentanyl, "the green caps are approximately $40 a piece." During direct examination, Sergeant Brice also discussed the text message. Specifically, the exchange between the State and the Sergeant included:

> STATE: And how about the – based on your training, knowledge, and experience, what do you believe the text message of a cellular phone observed by Detective Bennett meant?
>
> SERGEANT BRICE: It was someone with $40 looking to purchase.

Based on the Sergeant Brice's statement, the text message described a party looking to purchase $40 worth of drugs. This statement is almost identical to the call the defendant

received in *Garner*, which the Court described as a "consequential fact," and ultimately included the call as relevant evidence. *Garner*, 414 Md. at 388. Similarly, here, the trial court properly admitted the text message into evidence because as the State outlines, "[a] text message stating, "I got $40," to a phone located in the common area of a "trap house" containing a multitude of cocaine, fentanyl capsules, and cash indicates that in looking at the totality of the circumstances, is relevant to Appellant's case."

Furthermore, the State cites to *State v. Gutierrez*, 446 Md. 221 (2016) to support their argument that the telephone found in the kitchen with the text message should be used as evidence, despite the uncertainty of which party owned the telephone, because officers found the phone in a shared area of residential trailer, and because the text message is relevant to Appellant's drug distribution and conspiracy charges.

In *Gutierrez*, the trial court convicted defendants Gutierrez and Perez-Lazaro of possession of cocaine hydrochloride with an intent to distribute and possession of a firearm connected to drug trafficking. *Gutierrez*, 446 Md. at 233. The State contended that they provided sufficient evidence to establish that the defendants had possession of the drugs and gun because "a jury could conclude that Gutierrez and Perez-Lazaro had possessory interest in the apartment, that the drug paraphernalia was in plain view, and that Gutierrez and Perez- Lazaro were engaged in the mutual use of the cocaine as drug distribution activity was occurring in the apartment." *Id.* at 232. In contrast, the defendants argued that the State's evidence was "legally insufficient to establish their possession of the gun and cocaine" because the State failed to show that the parties had a "possessory interest in the apartment" and apartment ownership. *Id.* at 232-33. They further argued that because the

drugs and gun were not in plain view and required a search to discover, that the State cannot prove the parties had constructive possession of the gun and drugs. *Id.* at 232. The Supreme Court of Maryland ultimately reasoned that the defendants had possessory interest in the apartment evidenced by their personal items in the apartment. *Id.* at 237. Additionally, the Court reasoned that because the gun and the cocaine were found in the kitchen and bathroom, the apartment's common areas that both residents would frequent, that both parties had mutual possession or use and enjoyment of the items. *Id.*

Similarly, here, Appellant is a resident in the trailer in which the officers conducted the search. Although Appellant referred to the trailer as a "trap house," he also established the trailer as his residence. During the trial proceeding, the State conducted a direct examination of Agent Allison Broughton ("Agent Broughton"), a Centreville Parole and Probation Officer. At trial, Ms. Broughton testified that the trailer where the officers found the cell phone and other items was Appellant's home. Specifically, Agent Broughton testified:

> STATE: During the course of you[r] employment, did Mr. Adkins provide you with his address?
>
> AGENT BROUGHTON: Yes, he did.
>
> STATE: What was his address?
>
> AGENT BROUGHTON: He provided an intake form on January 23, 2020 of 316 Brownsville Road, Centreville, Maryland, Queen Anne's County.
>
> STATE: How did you learn this address?
>
> AGENT BROUGHTON: He wrote it on the intake form.

Later, Ms. Broughton reaffirms that the address officers conducted their search

warrant was Appellant's home. She also states the following during her testimony:

> STATE: Did he, at any time, update an address with you?
>
> AGENT BROUGHTON: Update an address with me?
>
> STATE: Did he give you any other addresses that were his home?
>
> AGENT BROUGHTON: No. He had always indicated the 316 Brownsville
>
> STATE: Now, to your knowledge, was Mr. Adkins residing at 316 Brownsville, Centreville, Maryland, on July 15th of 2020?
>
> AGENT BROUGHTON: He reported to my office on July 8th and he reported the same home address with the father. The last other office visit was June 24th and he reported the address of 316 Brownsville Road.

Accordingly, Appellant resided in the trailer where the officers found the cell phone placed on the kitchen counter, evidenced by the address Appellant provided to the probation officer. Appellant argues that because the State mentions in their closing argument that the phone in the kitchen may belong to Mr. Dennis that the State fails to provide a proper nexus between the phone and the Appellant to admit the evidence on the phone. Although the State does mention Mr. Dennis in their closing argument, shortly afterwards, we see in the record that the State does create a nexus between the phone and the Appellant, and in a manner similar to what we see in *Gutierrez.* Specifically, the State creates such a nexus stating that Appellant and his father have possessory interest in the entire trailer as residents, and as such "there can be joint possessory interest in the items in that trailer." Therefore, similar to the *Gutierrez* Court, this Court agrees that the cellphone in the kitchen does constitute relevant evidence because as a phone found in the common area of a place Appellant proclaims as his residence, it demonstrates that Appellant possessed and intended to

distribute the drugs officers recovered in the trailer. Thus, the trial court did not err by admitting such evidence in the case.

III. Jail Call as Evidence of Prior Bad Acts

A. Parties' Contentions

Appellant contends that his phone call while in custody where he states, "she has money, she can buy her own pills, she got her own money, she doesn't need to do that. She got a lot of money. She buy pills from me all the time, what the fuck, you got me talking on this fucking phone," should not have been introduced into evidence because that "statement is a statement by a party opponent about his intention in the past of distributing pills." Specifically, Appellant argues that his jail phone call constitutes evidence of a prior bad act under Maryland Rule 5-404(b), which prohibits evidence of prior bad acts unless an exception applies. According to Appellant, the State failed to show that the phone call had special relevance to show intent and common scheme.

Citing to *Howard v. State*, 324 Md. 505 (1991) and *Ross v. State*, 276 Md. 664 (1976), Appellant contends that because the State does not establish when Appellant conducted these alleged prior sales and how it directly connects to the case at bar, the trial court should not have admitted the call into evidence. Additionally, Appellant cites *Emory v. State*, 101 Md. App. 585 (1994) to show that the common scheme exception does not apply to Appellant's jail phone call because the exception applies solely when there is "evidence that the crimes involved were conceived of by the defendant as part of one grand plan" and that "the commission of each is merely a step toward the realization of that

goal," which Appellant argues the call does not demonstrate. Further Appellant contends that the jail call "was not harmless" due to the State's "heavy reliance on the jail call" during their opening and closing arguments.

The State contends that the trial court rightfully admitted Appellant's call while in custody into evidence because it was "specially relevant" to demonstrate Appellant's intent to distribute drugs. The State emphasizes that Appellant's use of present tense during the phone call when discussing selling drugs as opposed to using past tense language supports the inference that Appellant was referring to a "more recent drug transaction". As such, the State argues that in looking at the phone call in light of the multitude of drugs and drug paraphernalia officers found in what Appellant refers to as a "trap house," the trial court properly admitted the call into evidence under the necessary Maryland Rule 5-404(b) intent and common scheme exceptions.

B. Standard of Review

Maryland law establishes that evidence of prior criminal acts may not be introduced to prove guilt for which the defendant is on trial. *Terry v. State*, 332 Md. 329, 334 (1994) (citing *Cross v. State*, 282 Md. 468, 473-74 (1978)). Further, Maryland law emphasizes that, "evidence which in any manner shows or tends to show that the accused has committed another crime wholly independent of that for which he is on trial, even though it be a crime of the same type, is irrelevant and inadmissible." *Ross v. State*, 276 Md. 664, 669 (1976). However, as highlighted in Maryland Rule 5-404(b), "[e]vidence of other crimes may be admitted [] if it is substantially relevant to some contested issue in the case and if it is not offered to prove the defendant's guilt based on propensity to

commit crime or his character as a criminal." *Page v. State*, 222 Md. App. 648, 660 (2015) (quoting *State v. Faulkner*, 314 Md. 630, 634 (1989)). Md. Rule 5-404(b) states that:

> **(b) Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or other acts including delinquent acts as defined by Code, Courts Article § 3-8A-01 is not admissible to prove the character of a person in order to show action in the conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident, or in conformity with Rule 5- 413.

Md. Rule 5-404(b). Before the trial court may admit such into evidence, the trial court must satisfy three requirements. *Page*, 222 Md. at 661. First, the court must find the evidence to be "relevant to the offense charged on some basis other than mere propensity to commit crime." *Id.* Secondly, the court must "decide whether the accused's involvement in the other crimes is established by clear and convincing evidence[,]" and we "review this decision to determine whether the evidence was sufficient to support the trial judge's finding." *Id.* (quoting *State v. Faulkner*, 314 Md. 630, 634-35 (1989)). Thirdly, "[t]he necessity for and probative value of the 'other crimes' evidence is to be carefully weighed against any prejudice likely to result from its admission[,]" and this is something we review under the abuse of discretion standard. *Page*, 222 Md. at 661; *see also Smith v. State*, 218 Md. App. 689, 710 (2014).

C. Analysis

Courts have held that there must be a causal relation or logical or natural connection among the various prior acts or the acts must form part of a continuing transaction to fall

within the common scheme exception. *State v. Jones*, 284 Md. 232, 23-44 (1979) (citing *Cross v. State*, 282 Md. 468, 475-76 (1978) (holding that "evidence of other crimes can be introduced under the common scheme exception only when the relationship between the time, place, circumstances or parties involved in the crimes is such that the uncharged crime or crimes 'support the inference that there exists a single inseparable plan…' ")). According to the Supreme Court of Maryland, evidence that possesses no special relevance or link to the charged crime and merely shows evidence of criminal character cannot be admitted into evidence. *Howard v. State*, 324 Md. 505, 513 (1991); *Harris v. State*, 324 Md. 490, 597 (1991). Particularly, in *Howard*, the defendant's intent to distribute PCP was an issue in the case. *Id.* at 514. However, the Court reasoned that the defendant selling PCP two days before the possession charged had special relevance and a clear connection to her intent in the case in question, as opposed to the evidence of the Appellant's other alleged PCP sales at unspecified times within the previous year. *Id.* at 515-16. As such, the Court held that the evidence of defendant's acts during unspecified times should not have been admitted into evidence under the intent exception. *Id.* at 516.

Similarly, here, Appellant's intent to distribute drugs is a contested issue. However, unlike in *Howard* and cases like *Ross*, the State fails to show how Appellant's phone call contains the specificity and closeness in time necessary to be admitted under the intent exception under Maryland Rule 5-404(b). Although Appellant discusses selling drugs in the present tense, evidenced by his statement "She buy pills from me all the time," this statement does not provide enough specificity to constitute a clear connection to the instant case. The court trial should not have admitted the jail call under the common scheme exception

because Appellant's phone call does not establish "a relationship between the time, place, circumstances or parties involved in the crimes such that the uncharged crime or crimes support the inference that there exists a single inseparable plan". Therefore, the trial court did err in admitting Appellant's jail call as evidence in the case.

Although the phone call was improperly admitted, on review, we apply the longstanding principle that improperly admitted evidence must be prejudicial to constitute reversible error. *See* Maryland Rule 5-103(a) ("Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling"). Accordingly, we review prejudice applying the harmless error test. *Dorsey v. State*, 276 Md. 638, 659 (1976); *Gutierrez*, 423 Md. 476 at 499-500. As such, we are aware that:

> When an appellant, in a criminal case, establishes error, unless 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, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus 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.

Dorsey, 276 Md. at 659. In looking to the evidence on the record, we conclude that the trial court's admission or exclusion of Appellant's jail phone call did not influence the trial court rendering of a guilty verdict when it did so in light of the many additional facts favorable to the State's argument. Other properly admissible evidence, such as the 42 vials of cocaine, 13 fentanyl capsules, and scales in a place that Appellant listed as his home to probation officers, as well as his description of a "trap house," incriminates Appellant for the charged crimes. Additionally, Appellant attempted to flee the scene upon the officers' arrival. Despite the trial court's error, after applying the harmless error test and considering

the totality of the circumstances, we find that the trial court's admission of Appellant's phone call constituted a harmless error beyond a reasonable doubt.

CONCLUSION

For the reasons previously stated, we affirm the trial court's decision. Accordingly, the trial court did not commit error as to Appellant's knowing and voluntary waiver of his right to a jury trial. Secondly, we hold that the trial court did not commit error when it admitted the text message into evidence because the phone was placed in the common area of a place that the Appellant calls home. Lastly, we acknowledge that the State did not provide enough evidence to show how Appellant's jail phone call satisfies the necessary requirements for the intent and common scheme exceptions under Maryland Rule 5-404(b) and thus the evidence was not properly admitted. However, after applying the harmless error test, we conclude the admission of this information into evidence did not impact the trial court's decision on the matter at hand. Therefore, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.