Circuit Court for Baltimore City
Case Nos. 119120006 & 119120007

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 522 & 745

September Term, 2021

JOSE SANTIAGO MIGUEL & EFRAIN TORRES-EUSEBIO

v.

STATE OF MARYLAND

Beachley,
Ripken,
Salmon, James. P.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Salmon, J.

Filed: August 18, 2022

At 9:56 p.m., on February 16, 2019, Ricardo Chicas Serrano (Santos Medrano's roommate) received a phone call from Efrain Torres-Eusebio ("Mr. Torres") asking him to tell Mr. Medrano to come outside. The roommate conveyed the message and Mr. Medrano did as requested. The roommate never saw Mr. Medrano again.

Less than 25 minutes after that phone call, Mr. Medrano was found in an alley fatally wounded as a result of a single bullet, which was fired at close range, to the left side of his face. A passing motorist saw two men in the alley near the body. One of those men was standing over the body with something in his hand that "looked like a pipe." The two men then ran towards a car that was waiting with its motor running. The men got into the car and a woman drove them away. The car that was seen leaving the scene of the murder was registered to Mr. Torres.

About one-and-one-half hours after the two men fled the scene of the murder, a Maryland State police officer, in Frederick County, Maryland, made a traffic stop of Mr. Torres' car. When the stop was made, Mr. Torres was driving and Jose Santiago Miguel ("Mr. Miguel") was the front seat passenger. The vehicle was searched and the police found, among other things: (1) the murder victim's cell phone; (2) cell phones belonging to Mr. Torres and Mr. Miguel; and (3) $14,400 in cash. Mr. Miguel was taken to a police barracks where he was searched more thoroughly. The police found two handguns on Mr. Miguel's person; one of the handguns was a .22 revolver with five cartridges in a cylinder that accommodated six; the second gun found was an unloaded 9mm semi-

automatic handgun. The weapons were secured to Mr. Miguel's leg by "compression pants" that were under his sweat pants.[1]

Mr. Torres and Mr. Miguel were indicted for the first-degree murder of Mr. Medrano along with a host of related charges.

In December 2019, Mr. Miguel and Mr. Torres were tried jointly before a jury in the Circuit Court for Baltimore City. The trial lasted four days. Mr. Torres was convicted on five charges but acquitted of first-degree murder. A motion for new trial was not filed. On July 26, 2021, Mr. Torres received the following sentences:

- Second-degree murder – 40 years;
- Robbery with a deadly weapon – 20 years consecutive;
- Use of a firearm in a crime of violence – 20 years consecutive;
- Conspiracy to commit murder – 20 years consecutive;
- Conspiracy to rob with a deadly weapon – 20 years concurrent; and
- Conspiracy to use a firearm – 20 years concurrent.

Mr. Miguel was acquitted of both first and second-degree murder but was convicted of five other crimes. Like Mr. Torres, he did not ask for a new trial. He received the following disposition:

- Conspiracy to commit murder – 40 years;
- Robbery with a dangerous weapon – 20 years consecutive;
- Use of a firearm during the commission of a crime of violence – 20 years consecutive;
- Conspiracy to commit robbery with a dangerous weapon – 20 years concurrent to the conviction for conspiracy to commit murder; and

[1] Immediately after their arrest, custody of Mr. Miguel and Mr. Torres was turned over to agents of the U.S. Department of Homeland Security because: (1) Mr. Miguel possessed two handguns; (2) a large amount of cash and drugs were found; and (3) both arrestees were in the United States illegally.

- Conspiracy to use a firearm in the commission of a crime of violence – conviction merged for sentencing purposes.

After sentencing, both Mr. Torres and Mr. Miguel filed timely appeals, which were consolidated.

I.

QUESTIONS PRESENTED

In this consolidated appeal, both appellants raised questions which we have rephrased and combined for clarity:

I. Did the trial court err in permitting the prosecutor to make an improper rebuttal closing argument?

II. Did the trial court err, or abuse its discretion, when it allowed the State to admit various items of evidence that were seized after the appellants' arrest?

III. Should this Court vacate all but one of the appellants' conspiracy convictions and sentences?

Mr. Miguel raises one additional question that he phrases as follows: "Did the State's belated disclosure of call detail records used to create cell site mapping reports violate Maryland Rule 4-263?"

Mr. Torres alone asks: "Did the trial court commit plain error in its response to a question presented by the jury during its deliberations?"

II.

EVIDENCE PRODUCED AT TRIAL[2]

A. Testimony of Ricardo Chicas Serrano

In February 2019, the murder victim, Mr. Medrano, had been staying with Ricardo Chicas Serrano at 411 North Hornel Street in Baltimore City. On the afternoon of February 16, 2019, Mr. Serrano and the murder victim drank beer and consumed cocaine. During that afternoon and evening, the murder victim received on his cell phone several phone calls from Mr. Torres, but the victim did not answer or return those calls. At 9:56 p.m., Mr. Serrano received a call on his cell phone from Mr. Torres. Mr. Serrano answered and Mr. Torres asked Mr. Serrano to tell Mr. Medrano to come outside; he did so and Mr. Medrano left the apartment shortly thereafter, taking his cell phone with him.

B. Testimony of Keith Green

On February 16, 2019, Mr. Green was driving his vehicle on Bank Street in Baltimore City. When he approached an alley located behind Imla Street, he saw a car parked on the left side of the street with its motor running and the left passenger side door ajar. The car he saw was facing in the same direction he was and had stopped before it reached the mouth of the aforementioned alley. The alley was to Mr. Green's left. Mr.

[2] At trial, the appellants called no witnesses but did introduce certain pictures as exhibits. Because the appellants do not contend that the evidence was insufficient to convict them, it is unnecessary to relate, in detail, all the facts that the jury considered. Therefore, in part II of this opinion, we have endeavored to summarize those facts that are directly related to the issues presented, along with facts that are necessary to put the issues in context.

Green drove around the stationary car and saw one man "going back into the alley" and another was "standing . . . over top of somebody . . . [with] something in his hand." That "something" looked to Mr. Green like a pipe. And, in Mr. Green's words, "[t]hey were searching" the victim. Because it was hard to see around a trashcan that interfered with his view of the alley, Mr. Green "put [his] reverse light on so [he] could . . . see better." When he did so, he saw that the two men had "ran back to the car" that had stopped, got in, and were driven away by a "lady."

After the car left, Mr. Green drove his vehicle into the alley and called a 911 operator at 10:23 p.m. He reported that a man was face down in the alley and that the man, later identified as Mr. Medrano, was bleeding from the face. He reported that he had seen individuals driving off in a silver Honda Civic with Maryland tag number 4DR9010. He also told the operator that the men were "Spanish," and that one of them wore a red shirt "with a mask on"; one of the men was "tall and skinny" and the other was "short and skinny."

C. Testimony of Trooper First Class Sam Morris

About an hour and one-half after Mr. Medrano was murdered, Trooper Morris was on Route 70 going west when he noticed a grey Toyota Corolla proceeding westbound with one tag light out. He stopped the vehicle for that infraction. The Maryland tag

number of the vehicle he stopped was 3DR9010.[3] Mr. Torres was driving the vehicle and Mr. Miguel was his front seat passenger. When Mr. Torres rolled down his window, Trooper Morris noted an odor of "raw marijuana" emanating from the vehicle. The trooper asked Mr. Torres when he had last smoked marijuana and Mr. Torres provided a "time estimate." The trooper also smelled alcohol on Mr. Torres' breath.

As mentioned earlier, a 9mm handgun was found on Mr. Miguel's person.[4] When Mr. Torres' cell phone was examined, the police found a picture of a 9mm handgun on his phone. The serial numbers shown in the picture were the same as the one on the gun that was in Mr. Miguel's possession when he was arrested.

[3] Mr. Green told the 911 operator that the car he saw was a silver Honda Civic, whereas Mr. Torres' car was a gray Toyota Corolla. Nevertheless, there can be little doubt that the car Mr. Green saw at the scene of the murder was the same car that Mr. Torres was driving one-and-one-half hours later in Frederick, Maryland. Not only was the license tag number almost exactly the same as the one recorded by Mr. Green, but inside that automobile was the victim's cell phone which was the same phone that the victim had in his possession when he left Mr. Serrano's house about 25 minutes before his body was discovered.

[4] Firearms Examiner Daniel Lamont testified that the guns recovered from Mr. Miguel's person and the bullet fragments recovered from the decedent's body were examined. Both handguns were operable. But, as a result of the bullet's mutilation, the expert was unable to form an opinion as to whether either gun found on Mr. Miguel's person was the murder weapon.

The cell phone belonging to the victim was found in the center console of Mr. Torres' vehicle. Also in the console was a magazine for a 9mm handgun.[5] During Trooper Morris' testimony, pictures from the dashboard camera of one of the police vehicles that was at the scene of the appellants' arrest were introduced as State's Exhibit 19B, 19D and 19E. Those photographs show that at the time Mr. Torres' car was stopped, Mr. Miguel was wearing a red "camo shirt." Trooper Morris found $14,400 in cash in the glove compartment of Mr. Torres' car.

D. State's Exhibit 10

The State introduced five Facebook messages downloaded from Mr. Torres' phone. The messages were all sent within fourteen hours of the murder. The Facebook messages began with the following communication from one Concho Barriodostres to Mr. Torres. It was sent on February 15, 2019 at 8:49.58 and read:[6]

> Right on well no it's slow bro… I moved some here too, but only a little. And because of the problem that happened to me well shit… But just now I was thinking of other plans to make some money… So let's get some toys and let me talk to osmar… And we can pull a job… Just send us pictures… I'm thinking of starting a cell sort of like hitmen… I mean like start a business to kill…for money… But I'm not sure let me check and we'll see… you let me know[.]

Mr. Torres responded in two communications to Mr. Barriodostres:

[5] Trooper Morris also found a second magazine for the 9mm handgun in the car but could not recall exactly where he found it. According to a police report admitted into evidence, the magazine had a 16 cartridge capacity.

[6] The messages on the phone were in Spanish but were translated into English by a court interpreter.

a) [2/15/19 at 9:11.20] "Look crazy man only ounces," and

b) [2/15/19 at 9:20.53] "That's the idea and also for other continents[.]"

At 10:07.56, another message was sent to Mr. Torres from Concho Barriodostres that read: "Yeah we're going to create something cool that gives us a lot of money… We'll become what others want to be but can't[.]"

About five minutes later, at 10:12.28, Mr. Torres replied "Hell yeah, let's move forward buddy you know that you have my support, let's build it man, this is an organization[.]"

E. Testimony of FBI Agent Matthew Wilde

FBI Agent Matthew Wilde testified as an expert in historical cell site analysis and location data. Both appellants accepted Agent Wilde as an expert in that field.

Agent Wilde examined what he termed "call detail records," which are the raw data that are a part of the phone records of each of the cellphones found in Mr. Torres' vehicle. The records were provided by the relevant cell service providers. He then mapped the location of the towers that handled the signals from the recovered phones. Based on this information, he plotted the course taken by the phones starting at 9:00 p.m. on the date of the murder until about two hours after the State police confiscated the phones. The purpose of reviewing the call detail records was to see if the phone activity was consistent or inconsistent with the phones being in the area where Mr. Medrano's body was found and the place where Mr. Torres' car was stopped on I-70 West. He testified, without objection, that the three phones "were basically in the same general area

[as the murder scene] on the east side" of Baltimore City around 10:00 p.m. on the evening of February 16, and "eventually made their way into Frederick." A report, prepared by Agent Wilde setting forth his opinions, was also introduced into evidence.

III.

THE CLOSING ARGUMENTS OF DEFENSE COUNSEL

Counsel for both appellants stressed that the State had presented no eye-witness testimony or forensic evidence (such as DNA evidence) connecting them to the murder. They emphasized that Mr. Green's description of Mr. Torres' car was inaccurate. They also pointed out, based on photographs from the police video of their arrest, that neither of them could accurately be described as "short and skinny" or "tall and skinny."[7] Their counsel claimed that the police investigation was far from thorough and that the Baltimore homicide detective who testified did not seem to know much about the case. According to defense counsel, FBI Agent Wilde's opinion testimony was undermined by his admission that his assumption that cell phone calls go to the nearest tower is not always true because, when the nearest tower has too much traffic, the calls are re-routed to the next nearest available cell phone tower. From this, they argued it was possible that Agent Wilde's maps may have been inaccurate.

[7] The photograph showed that both appellants were relatively short but were of at least average weight.

Counsel for Mr. Miguel argued that because the guns were not found by the police when he was arrested (despite a roadside search), the State police may not have actually found the guns on Mr. Miguel as the State claimed.

In summary, both appellants claimed that the State had failed to prove them guilty, beyond a reasonable doubt, as to any charge.

IV.

Rebuttal Closing Argument

The trial judge began his instructions by saying:

> [Y]ou are instructed by the [c]ourt that you are not to consider the reasons for the defendants' arrest. The [c]ourt instructs you that the defendants' arrest by the Maryland [S]tate police was lawful.

Despite that instruction, the following occurred when the prosecution made her rebuttal closing argument:

> [PROSECUTOR]: So when [Mr. Torres] gets pulled over, he's probably thinking, if we remain calm, they're not going to find anything on us. We're out in Frederick. We're not three blocks away in southeast Baltimore. We're in Frederick, Maryland. This is the State trooper that just pulls people over for speeding. We'll be fine. Stay calm. Didn't work out that way for them. *Troopers found the drugs—the marijuana that led to the probable cause for the stop—*
>
> [COUNSEL FOR MR. MIGUEL]: Objection.
>
> [PROSECUTOR]: Of the search of the car.
>
> THE COURT: Objection is noted. *It was corrected*.
>
> [PROSECUTOR]: The troopers found the money in the car, $14,000.

(Emphasis added.)

Mr. Torres claims that the prosecutor's reference to "marijuana" in her rebuttal closing argument, and the way the judge handled the objection constituted "prejudicial error." He argues:

> In the present case, the judge took no curative action. He *overruled* the objection, stating cryptically: "It was corrected." The jurors could only have gleaned from this that there was no impropriety in the reference to marijuana. *See Georges* [*v. State*], [252] Md. App. [523, 538 (2021)], citing authority for the proposition that prejudice may be enhanced if the judge fails to take curative measures.
>
> In the present case, the propriety of the police investigative stop was none of the jury's business, and the distinction between a stop and a search irrelevant. The only part of the argument that the jurors could make sense of was the link between the defendants on trial and marijuana. The overruling of this objection under the circumstances was prejudicial error.

(Emphasis added.)

Even though the court never overruled the objection, it is probably true, as Mr. Torres contends, that the jury could only have inferred that there was "no impropriety" in the reference to marijuana. Technically, it was improper to refer to marijuana being found in Mr. Torres' car because no evidence showed that to be true. It appears, however, that the judge felt the remarks caused no harm. That was understandable because it is hard to conceive of a single isolated remark, such as the one here at issue, that would have been less prejudicial to appellants. After all, Trooper Morris testified, without objection, that when Mr. Torres rolled down the window of his car, he noted the smell of raw marijuana and Mr. Torres made no secret of his marijuana use when, without objection, Trooper Morris testified that Mr. Torres told him when he last smoked

that drug. We reject Mr. Torres' argument that he was prejudiced by the prosecutor's statement that the police had found marijuana in the car.[8]

In regard to the prosecutor's rebuttal closing argument, Mr. Miguel's contentions are much more robust and somewhat different than those advanced by Mr. Torres. He asserts (accurately), that arguing facts not in evidence can be "highly improper," citing *Fuentes v. State*, 454 Md. 296, 319 (2017). Admittedly, he makes the valid point that it was no concern of the jury as to whether the police had probable cause to search the vehicle in which he was a passenger. He also argues:

> Here, the prosecutor's reference to the discovery of drugs or marijuana which authorized the search of the vehicle plainly portrayed Mr. Miguel as a drug dealer. Where there were no drug charges before the jury, the remark was unfairly prejudicial. Drug dealing is strongly associated with violence. *See, e.g.*, *State v. Heath*, 464 Md. 445, 464 (2019) ("An association with drugs is extremely prejudicial given the fact that [the defendant] was not charged with a drug related offense."). *Cf. Norman v. State*, 452 Md. 373, 397 (2017) ("[T]here can be no serious dispute that there is an intimate relationship between violence and drugs.").
>
> * * *
>
> [T]he prosecutor's remarks [at issue] left the jury with the prejudicially erroneous belief that Mr. Miguel was a violent drug dealer. The overruling of this objection under the circumstances was prejudicial error. As such, reversal is required.

[8] In any event, Mr. Torres failed to preserve for purpose of appeal his claim that he was prejudiced by the "found marijuana" remark because at trial his counsel failed to object to any part of the prosecutor's rebuttal closing argument. *See Evans v. State*, 174 Md. App. 549, 566 (2007) ("[A] defendant may not rely on an objection made by a co-defendant for the purpose of raising an appeal as to that issue.").

Marijuana is a drug. But it is only in that sense true that the prosecutor conveyed to the jury the message that the police had found "drugs or marijuana" in the car. As Mr. Torres admitted, after the prosecutor corrected herself, the jury was left with the impression that the police had found marijuana in the car. But the statement at issue plainly did not portray Mr. Miguel as a drug dealer—violent or otherwise. Obviously, being a passenger in a vehicle that has an unspecified amount of marijuana in it, does not suggest that anyone in the vehicle is a drug dealer. Moreover, it is not true that there is an "intimate relationship between violence" and marijuana possession.

Though not determinative, even Mr. Miguel's trial counsel apparently did not believe that his client had been seriously prejudiced by the prosecutor's remark. This can be inferred, legitimately, from the fact that his counsel did not ask the court to rule on the objection or to tell the jury to disregard the remark or to declare a mistrial; nor did Mr. Miguel's counsel later file a motion for new trial based on what he now claims to be a highly prejudicial remark.

Mr. Miguel points out that frequently, in deciding whether a prosecutor's remark was prejudicial, a reviewing court will look at the strength of the State's case. And, according to Mr. Miguel, the State's case against him was "not strong" as "demonstrated by the jury's struggle to reach a verdict." His argument continues:

> The case did not involve complicated evidentiary issues, yet the jury deliberated for eight hours in the course of two days. *Cf. Dionas v. State*, 436 M[d]. 97, 112 (2013) (recognizing that "the length of jury deliberations is a relevant factor in the harmless error analysis").

* * *

> To be sure, no physical evidence tied Mr. Miguel to a conspiracy to murder [Mr.] Medrano.

(References to record and footnote omitted.)

The State's evidence against the appellants was mostly circumstantial but whether or not it was "strong" is debatable. It was undisputed that shortly before the murder, the victim went outside to meet with Mr. Torres and there can be little doubt that it was Mr. Torres' vehicle that sped away from the murder scene because: (1) the car Mr. Torres was driving about an hour and one-half after the murder had the same tag number (except for the first number) as the tag number reported to the 911 operator; and (2) more importantly, the phone stolen from the victim was found in the front console of that vehicle. When the car was stopped, Mr. Miguel was in that car and had on a red shirt which was the same color as the shirt that Mr. Green said that one man he saw fleeing the scene was wearing. Phone records indicated that the victim's phone, as well as the cell phones of both appellants, were in the vicinity of the murder when it occurred and were transported from the scene of the murder to Frederick. Only a day before the murder, Mr. Torres agreed to kill people for money and over $14,000 cash was found in Mr. Torres' vehicle. Thus, the State's evidence against Mr. Miguel, if not "strong," was at least substantial.

The fact that the jury deliberated for eight hours after a three day trial involving two defendants and multiple charges does not support the implied contention that the State's evidence "was weak."

The remark at issue was not repeated by the prosecutor and, for the same reasons as those set forth concerning Mr. Torres' claim of serious prejudice, we hold that the trial court's failure to sustain Mr. Miguel's objection was harmless beyond a reasonable doubt. *See Taylor v. State*, 407 Md. 137, 165 (2009) (an error is harmless if a reviewing court concludes, beyond a reasonable doubt, that the error did not influence the verdict.).

V.

INTRODUCTION INTO EVIDENCE OF VARIOUS ITEMS OF EVIDENCE SEIZED BY THE STATE POLICE WHEN MR. TORRES' CAR WAS STOPPED

On the morning that the jury was selected, a motion *in limine* that had been filed by counsel for Mr. Miguel about ten days earlier, was heard by the trial judge. In that motion, which counsel for Mr. Torres joined at the time of the hearing, the appellants sought to keep out of evidence almost everything the State police had seized at the time of their arrest. Appellants contend that the trial judge erred in denying the motion. They also contend the trial court erred when it allowed the State, over objection, to introduce the evidence that was the subject of the *in limine* motion. Several items of evidence are at issue and we will discuss each item separately.

A. Admissibility of State's Exhibit 10

Mr. Miguel claims that Exhibit 10 should not have been admitted because what Mr. Barriodostres said in the Facebook messages and what Mr. Torres said in reply about forming an organization to kill people for money, was hearsay. According to Mr. Miguel, the Facebook message comes within no exception to the rule that precludes the admission into evidence of hearsay. Mr. Torres, although he argues that Exhibit 10

should have been excluded on other grounds, does not argue that what was said in the Facebook exchanges was hearsay.

Mr. Miguel argues:

> Hearsay is defined 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." Md. Rule 5-801(c). "[W]hether an out-of-court statement is hearsay depends on the purpose for which it is offered at trial." *Wallace-Bey v. State*, 234 Md. App. 501, 537 (2017) (quoting *Dyson v. State*, 163 Md. App. 363, 373 (2005)). "Evidence of a statement is not hearsay unless it is 'offered in evidence to prove the truth of the matter asserted.'" *Id*. (quoting Md. Rule 5-801(c)).
>
> * * *
>
> A trial court's determination of whether particular evidence is hearsay is reviewed *de novo*. *Gordon v. State*, 431 Md. 527, 538 (2013). As to factual findings that are necessary to make a hearsay determination, however, the appellate court defers to the trial court so long as its findings are not clearly erroneous. *Id*.
>
> Here, the trial court's ruling regarding the admissibility of these hearsay statements was in error. These statements were unquestionably admitted for the truth of the matter asserted. In closing argument, the prosecutor used the messages to argue that "the defendants talked about becoming hitmen a day before this murder happened," and that "according to Mr. Torres's Facebook messages this was a hit." Despite defense counsel's hearsay objection, however, the trial court failed to articulate an exception for admitting this hearsay evidence.[9]

(References to record omitted.)

[9] At the motion *in limine* hearing, numerous reasons were raised by appellants' counsel as to why various items of evidence should be excluded. One of the reasons to exclude Exhibit 10 was because, purportedly, it contained hearsay. By denying the motion, the trial judge impliedly rejected that argument. The trial judge was not required to give a reason.

We will first address Mr. Miguel's contention that Exhibit 10 contained a "hearsay statement." Maryland Rule 5-801(a) defines the word "statement" as: (1) an oral or written assertion; or (2) non-verbal conduct of a person, if it is intended by the person as an assertion. The State contends that the portion of the Facebook messages concerning the forming of an organization to kill for hire, did not contain "assertions" within the meaning of the hearsay rule; instead, the words contained in the exchange were verbal acts, which do not come within the rule excluding hearsay.

In *Cassidy v. State*, 74 Md. App. 1, 12 (1988), Judge Moylan, speaking for this Court, said that the term "Verbal Acts" refers to "utterances – verbal conduct – to which the law attaches duties and liabilities. Examples are such things as the offer and acceptance of an oral contract, the uttering of a slander, and the making of a false or deceptive representation." The phrase "Verbal Parts of Acts" was defined as referring to:

> utterances accompanying a legally significant act, sometimes explaining or giving character to a transaction that might otherwise be ambiguous. Examples would include words explaining whether a transfer of money was a gift, a loan, a repayment of a debt, a bribe, etc.; the words "Your money or your life," in an armed robbery context, or the words "Don't scream or I'll kill you," in a kidnapping context.

Id. at 13.

The two Facebook messages from Mr. Barriodostres, one at 8:49 p.m. on February 15, and the second at 10:07 p.m. on the same date, together with Mr. Torres' reply at 10:12 p.m., were verbal acts—not assertions of fact. In essence, Mr. Barriodostres asked Mr. Torres if he wanted to join an organization where the participants would "kill . . . for money," which would "give[ ] us a lot of money" and would allow them to "become

what others want to be but can't[.]" Mr. Torres agreed to join the organization by saying "[h]ell yeah, let's move forward buddy you know that you have my support, let's build it man, this is an organization[.]" That exchange constituted a classic example of a verbal act [offer and acceptance]. Admission of that exchange did not violate the rule against the admission of hearsay.[10]

B. Relevancy of Exhibit 10

Both Mr. Miguel and Mr. Torres argue that the contents of State's Exhibit 10 were irrelevant under Maryland Rule 5-401 and, even if relevant, any probative value was substantially outweighed by its prejudicial effect under Maryland Rule 5-403.

According to Mr. Miguel, the Facebook messages "bore no tangible connection to the crime on trial" inasmuch as the messages "were not at all tied to Mr. Miguel" or to the murder in question, yet were extremely offensive. Furthermore, according to Mr. Miguel, the messages "communicated no intention to harm" the victim.

Mr. Torres argues that Exhibit 10 should not have been admitted because:

[10] In its brief, in regard to the hearsay issue, the State addressed the question as to whether the words in the Facebook messages from Mr. Barriodostres were verbal acts but does not discuss whether the words used by Mr. Torres were also verbal acts. We do not agree with that approach. To determine whether the verbal act exception to the hearsay rule applies, one must look at what was said by both the offeror and the offeree.

The State argues, in the alternative, that the statements were admissible as a statement of a co-conspirator under Maryland Rule 5-803(a)(5) (providing an exception to the hearsay rule for "[a] statement by a co[-]conspirator of a party during the course and in furtherance of the conspiracy"). We need not decide that issue.

> This exchange could be read to mean that both [he] and [Mr. Barriodostres] are persons of bad character, with a propensity to offend. But it is pure speculation that their communication had anything to do with a murder committed 24 hours later. Rome wasn't built in a day, and neither are criminal organizations. The likelihood that this conversation had anything to do with the offense on trial is exceedingly remote.

In *Cook v. State*, 118 Md. App. 404 (1997), we said: "[T]he question of whether a given fact is 'material' and thus relevant, depends on the underlying facts of the case. Evidence is material if it tends to establish a proposition that has legal significance to the litigation." *Id*. at 416 (quotation marks and citation omitted).

In the case *sub judice*, the trial judge found the evidence seized was both probative and relevant and that its probative value outweighed its prejudice. He ruled:

> Probably - - I don't have the time exact. But I'm going to say within 36 hours.
>
> That is money, guns and the Facebook messages within this limited timeframe is more probative than prejudicial to the defendants as presented to the Court during yesterday's [motion *in limine*] hearing. It is relevant to these proceedings. It appears neither misleading as of right now nor cumulative. And there is a temporal proximity surrounding this shooting. That is from the time the Facebook message was had until the time the defendants were stopped in Frederick County in the vehicle with the tag number less than a day and a half later.

The State argues, and we agree with the argument, that Exhibit 10 was relevant to show motive and intent of both appellants. Mr. Torres, one day before Mr. Medrano was shot in the face at close range, agreed to be a part of an organization that would kill people for money. The jury could infer, legitimately, that the motive for killing Mr. Medrano was money. That inference was supported by what Mr. Torres said in the

Facebook message and by the fact that over $14,000 in cash was found in Mr. Torres' car shortly after the murder.

We disagree with Mr. Torres' argument that the temporal proximity between the Facebook exchange and the murder makes it less likely that the events were connected. His willingness to kill for money was not ancient history. Because the temporal relationship was so close, it made it more likely, not less likely, that the appellants killed the victim for money. While it is true as Mr. Torres notes, that a large city, such as Rome, cannot be built in a day, the same is not true as to the time it takes to enter into a conspiracy to kill others for money or to form an organization whose purpose is to kill for profit. Such illegal conspiracies or organizations can be formed quickly if two or more people agree to participate in such an evil enterprise.

Both Mr. Miguel and Mr. Torres argue, in the alternative, that even if Exhibit 10 was relevant, its relevancy was outweighed by its prejudicial effect because a portion of the Facebook exchange made them look like drug dealers, yet they were not charged with any drug offenses.

The exchange did suggest that Mr. Barriodostres was a drug dealer but did not, directly at least, suggest that Mr. Torres was one. Mr. Torres did say, in his Facebook message at 9:11 p.m. on February 15, 2019, "look crazy man only ounces." But it is impossible to determine exactly what that meant. And, in the Facebook exchange, Mr. Barriodostres did not offer to sell, donate, or otherwise distribute drugs to Mr. Torres. Admittedly, the jury might have interpreted Mr. Torres' "only ounces" remark as

meaning he wanted to buy "only ounces" of drugs, but that interpretation could only be based on speculation. But even if the jury might have so speculated, the trial judge was not clearly erroneous in finding that the probative value of the message as a whole (showing that Mr. Torres had agreed to be part of an organization that would kill people for money) outweighed any possible prejudice.[11]

In regard to Exhibit 10, and other evidence seized by the State police, Mr. Torres also argues that "the trial court here abdicated its gatekeeper role of assessing relevance and unfair prejudice to the jury. A proper assessment would have resulted in the conclusion that very minimal probative value was greatly outweighed by the potential for unfair prejudice." Mr. Torres' "abdication argument" is based on something that the trial judge said during the course of the motion *in limine* hearing. The relevant exchange was as follows:

> [PROSECUTOR]: So the guns are relevant. The money is relevant, and the fact that there is no DNA on the guns is evidence of nothing.
>
> THE COURT: Well, the jury will make a determination if it should get that far with regard to that.

In other words, the trial judge held the view that the jury would determine whether or not it was significant that no DNA evidence was found on the guns. This comment

[11] In most circumstances, persons standing trial, such as the appellants, would not want the jury to believe that they were drug dealers. But, in the peculiar circumstances of this case, the appellants would likely benefit if the jurors held such a belief because: (1) they were not charged with any drug offense; and (2) being a drug dealer might present an alternate reason (some reason other than murder for hire) for possessing guns and a large amount of cash.

does not support Mr. Torres's argument that the trial judge abdicated his responsibility to weigh the probative value of the evidence confiscated against its probative value.

C. The Two Guns

Both appellants claim that the trial judge erred in allowing the State to introduce into evidence the two guns that were found on Mr. Miguel when he was searched at the State Police barracks. Both appellants stress the fact that the State was unable to produce forensic evidence proving that either one of the guns was used in the killing of Mr. Medrano. The State concedes that fact but stresses that its expert also testified that he was unable to exclude either of the weapons as the instrument of murder. He simply could not give an opinion in that regard because only fragments of the bullets survived the shooting.

Both the appellants cite *Smith v. State*, 218 Md. App. 689 (2014), in support of their contention that admission into evidence of the fact that two guns had been seized at the time of Mr. Miguel's arrest was prejudicial error. The *Smith* case is inapposite.

Gary Smith, in September of 2006, shared an apartment with one Michael McQueen. *Id*. at 696. In the early morning hours of September 26, 2006, police responding to Mr. Smith's 911 call, found Mr. McQueen in the living room of his apartment dead from a gunshot wound to the right side of his head. *Id*. Police did not find the gun that inflicted the wound anywhere in the apartment. *Id*. Mr. Smith's defense was that his roommate had shot himself while he [Mr. Smith] was out of the apartment

and that when he discovered the body, he threw the gun used by McQueen into a nearby lake. *Id*. at 697.

At trial, the judge allowed the State to admit evidence of the fact that Mr. Smith owned eight guns and had ammunition in the apartment he shared with the victim. *Id*. at 703. In *Smith*, Judge Nazarian, speaking for this Court said:

> Although there was nothing illegal about Mr. Smith owning guns and ammunition,[12] the evidence the court admitted regarding Mr. Smith's ownership of unrelated firearms and ammunition was minimally relevant, at best, and highly prejudicial, and should have been excluded from the trial of these charges. Neither the State nor the trial judge articulated how this evidence was relevant to whether Mr. Smith committed the alleged crimes. The fact that Mr. Smith legally possessed guns and ammunition does not make the weapons relevant to the victim's death, and we cannot see from this record how the inclusion of this evidence would help prove the offense charged. Without a more direct or tangible connection to the events surrounding *this shooting*, the evidence of the other weapons and ammunition owned by Mr. Smith failed the probativity/prejudice balancing test, and the trial court erred by admitting it.

Id. at 705-06.

Judge Nazarian also said:

> Our review of the trial court's decision to admit the evidence involves two steps of analysis. "'First, we consider whether the evidence is legally relevant, a conclusion of law which we review *de novo*.'" *Brethren Mut. Ins. Co. v. Suchoza*, 212 Md. App. 43, 52 (2013) (quoting *Wash. Metro. Area Transit Auth. v. Washington*, 210 Md. App. 439, 451 (2013)). To qualify as relevant, evidence must tend "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.

[12] The same is not true as to Mr. Miguel who, at the time of his arrest, was an immigrant from Mexico illegally in the United States and therefore not allowed to possess a handgun.

> Evidence that is relevant is admissible, but the trial court does have not discretion to admit evidence that is not relevant. Md. Rule 5-402; *State v. Simms*, 420 Md. 705, 724 (2011). After determining whether the evidence in question is relevant, we look to whether the court "'abused its discretion by admitting relevant evidence which should have been excluded'" as unfairly prejudicial. *Brethren Mut. Ins. Co.*, 212 Md. App. at 52 (quoting *Wash. Metro. Area Transit Auth.*, 210 Md. App. at 451).

Id. at 704.

In contrast to the situation in *Smith*, both the trial judge and the State did articulate a reason as to why the evidence was relevant to the issue of whether the defendants committed murder. The State, as well as the trial court, stressed the temporal relationship between Mr. Miguel's possession of the guns and the murder. He had both those guns in his possession approximately one-and-one-half hours after the shooting and the State's cell phone evidence showed that Mr. Miguel had traveled directly from the scene of the murder to the place where the State police stopped the vehicle. In this case, had the guns not been admitted, the jury might well have believed that even though there existed highly incriminating evidence against the appellants (for instance, possession of the murder victim's phone), the State had failed to explain how unarmed men could have shot the victim.

Evidence that Mr. Miguel had two guns on his person, one of them loaded, was prejudicial to the appellant in the sense that all relevant evidence can be prejudicial to a criminal defendant. But it was not unfairly prejudicial to either appellant. The trial judge did not err in deciding that the prejudicial value of the gun evidence was outweighed by its relevance under the circumstances of this case.

D. $14,400 in Cash

Both appellants argue that the admission into evidence of the cash found in Mr. Torres' car was irrelevant because the State failed to link the cash to the crime and, even if marginally relevant, the relevance was out-weighed by its prejudice because possession of the cash made them look like drug dealers. The "no relevance" argument overlooks an inconvenient fact, i.e., that less than fifteen hours before the cash was discovered, Mr. Torres agreed to be part of an organization that would kill people for money. Admission into evidence of the money, coupled with what Mr. Torres said in the Facebook exchanges, helped the State prove Mr. Torres' probable motive for luring the victim outside and then killing him.

The argument that admission of the money made the appellants look like drug dealers is undermined by the fact that the State: (1) elected not to introduce evidence that drugs were found in the car; and (2) throughout the trial, the State took the position that the money represented payment for a murder, not payment for anything else. *See also* n.11, *supra*, at page 21.

E. Mention of Alcohol on Mr. Torres' Breath

Trooper Morris testified that when he stopped Mr. Torres' vehicle, he "detected the odor of alcohol" emanating from Mr. Torres. Counsel for Mr. Miguel objected to this testimony, but the objection was overruled. Counsel for Mr. Torres did not join in the objection.

In his brief, in regard to the smell of alcohol testimony, counsel for Mr. Torres devotes one sentence to the alcohol issue, *viz*: "[T]he evidence of an odor of alcohol emanating from the driver gave rise to an inference that [Mr. Torres] was driving while intoxicated[.]" The suggested inference is, to say the least, dubious. But, even if it were not, any error by the court in overruling the objection was waived, so far as Mr. Torres is concerned, because at trial his counsel failed to object. *See* n.8, *supra*, at page 11.

VI.

THE CONSPIRACY CONVICTIONS

The State asserts:

> Here, [Mr.] Miguel's conviction and sentence for conspiracy to commit robbery with a dangerous weapon, along with his conviction for conspiracy to use a firearm in the commission of a crime of violence, must be vacated, leaving intact his conviction and 40-year sentence for conspiracy to commit murder. Likewise, [Mr.] Torres['] convictions and sentences for conspiracy to commit robbery with a dangerous weapon and conspiracy to use a firearm in the commission of a crime of violence must be vacated, also leaving intact his conviction and 20-year sentence for conspiracy to commit murder.

Both appellants agree with the State's position. The State's proof, if credited, showed that there was only a single common law conspiracy, regardless of the number of criminal acts the conspirators agreed to commit. In other words, in this case, there was no evidence of multiple agreements to rob the victim, kill him, or use a firearm in the perpetration of such crimes. Under such circumstances, there can be but one sentence and conviction for conspiracy. *See Savage v. State*, 212 Md. App. 1, 13 (2013). The proper remedy as to each appellant, is to vacate all but one of the conspiracy convictions;

the conviction and sentence to be preserved is the one "with the greatest maximum penalty[.]" *McClurkin v. State*, 222 Md. App. 461, 491 (2015). That remedy will be reflected in our mandate.

VII.

MR. MIGUEL'S CONTENTION THAT "THE STATE'S BELATED DISCLOSURE OF CALL DETAIL RECORDS USED TO CREATE CELL SITE MAPPING REPORTS [BY FBI AGENT WILDE] VIOLATED MD RULE 4-263"

A. Background

Counsel for Mr. Miguel entered her appearance and filed pre-trial motions on May 28, 2019. On June 19, 2019, the State provided initial discovery, which included a "draft" cell site survey report dated May 28, 2019 that was authored by FBI Agent Wilde with the help of a cellular analysis survey team. The draft report had stamped on its first page: "DRAFT – NOT A FINISHED PRODUCT." As mentioned earlier, the purpose of the report was to track, by use of data supplied by the cell phone companies, the three phones that were seized by the State police shortly after the murder of Mr. Medrano. The underlying data supplied by the phone companies covered hundreds of pages and was not included in the State's initial discovery response.

The prosecutor, on December 6, 2019, emailed counsel for Mr. Miguel a final report from the FBI Cellular Analyst Survey team. As discussed, *infra*, the final report was almost the same as the initial one, although there were a few changes. Defense counsel immediately notified the State that she had never received any of the call detail records used by the experts to create the final report. Three days later, on December 9,

2019, the State provided defense counsel with call detail records that the FBI had received from T-Mobile and Sprint, who were the providers for the cell phones in question.

The next day, December 10, 2019, Mr. Miguel's counsel filed a motion *in limine* to exclude the report and testimony of FBI Agent Wilde concerning the cell site analysis survey. Mr. Miguel alleged that "due to the late disclosure of voluminous material relied upon by the State's expert that had been in the possession of the State for months, [he] has been denied adequate time to consult with his own expert, mount a challenge [to] the findings, and prepare for an effective cross[-]examination."

The motion *in limine* was heard on the morning that trial was set to commence. Mr. Miguel's counsel's first objection at the hearing was that the final report contained information that differed from that contained in the draft report. The difference was that on page 20 of the draft report, "the bottom heading . . . says that the time is from 10:34 to 10:38 [on February 16, 2019, but o]n the final [report,] it says that the times included are 10:34 to 10:42." Nevertheless, the actual data points contained within the maps were the same and the maps included in the final report were identical to those in the draft report. There were, however, a few phone calls noted in the final report that were not mentioned in the draft report.

The trial judge ruled that the State could only rely on the initial draft and could not introduce into evidence, or otherwise rely, on the final draft. The prosecutor told the judge that was "fine" with her. But counsel for Mr. Miguel told the judge that "I really

like the new page ten" on the final draft. She then said, "I don't want [either of the reports introduced]. But if I had to pick one, I would pick the final [report]."

Counsel for Mr. Miguel then brought up a completely separate argument. She said that she was objecting to either report on the grounds that she "didn't get the data that was used to generate" the reports until December 11, 2019.

The State and Mr. Miguel now agree that the issue to be resolved is whether the State was obligated to supply the raw data used to create Agent Wilde's final report. They also agree that the issue is governed by Rule 4-263(d)(8), which requires pre-trial disclosure of expert witnesses and the substance of their findings and opinions. The rule reads, in pertinent part:

> (8) Reports or Statements of Experts. As to each expert consulted by the State's Attorney in connection with the action:
>
> (A) the expert's name and address, the subject matter of the consultation, *the substance of the expert's findings and opinions,* and a summary of the grounds for each opinion;
>
> (B) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and
>
> (C) the substance of any oral report and conclusion by the expert[.]

If a disclosure is required, the State must make it "within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant[.]" Maryland Rule 4-263(h)(1). Mr. Miguel argues:

> In this case, the State failed to meet its discovery obligations when the call detail records used to generate the cell site mapping analysis were

> not provided within 30 days of the appearance of counsel, as required by Rule 4-263(h)(1), but were instead provided nine days before trial. As noted, the trial court failed to address counsel's argument regarding the late disclosure of the call detail records and focused only on the State's disclosure of the draft and final cell site mapping reports.[13]

At the *in limine* hearing, Mr. Miguel's counsel never cited any case, or provision of Md. Rule 4-263 or any other rule, that required the State to provide the underlying data at issue. Counsel for Mr. Miguel simply argued that the data should have been provided, but cited no authority to support his position.

In his brief filed with this Court, Mr. Miguel's counsel once again fails to point to any case law, or portion of Md. Rule 4-263, that required the State to provide the defense with the data used to create the cell site mapping report. A plain reading of Md. Rule 4-263 shows that the rule does not require the State to supply the data used to support an expert's opinion. For that reason, we agree with the following argument made by the State:

> Although the basis of [Mr.] Miguel's counsel's object[ion] shifted in the course of the discussion with the trial court, the answer to this particular claim on appeal is simple. Rule 4-263 required that the State disclose any

[13] It does not appear to be true that the motions judge "failed to address counsel's argument regarding the late disclosure of the call detail records . . . ." This is shown by the following colloquy:

> [COUNSEL FOR MR. MIGUEL]: I am objecting to the whole thing [i.e., the experts report] in general, but on different grounds . . . [because] I didn't get the data that was used to generate these [reports].
>
> THE COURT: That objection is noted. It is overruled. . . .

> expert report ahead of time, and any summary of the grounds for his opinion, but absent inquiry from the defense, the rule [does] not require that the prosecutor disclose ahead of time the information on which that expert *relied*. That was the case regardless of the peripheral issue that the defense raised at trial about when the prosecutor disclosed different versions of the expert report itself.

We hold that the court did not commit reversible error in failing to find a discovery violation.[14]

VIII.

MR. TORRES' CONTENTION THAT THE TRIAL JUDGE COMMITTED PLAIN ERROR WHEN HE RESPONDED TO A JURY NOTE

A. Background

In his jury instructions, the trial judge, in accordance with the Maryland pattern jury instructions [MPJI-Cr 4:17], instructed the jury as to first and second-degree murder as follows:

> The defendants are charged with the crime of murder. This charge includes first-degree murder and second-degree murder.
>
> First-degree murder is the intentional killing of another person with willfulness, deliberation, and premeditation. In order to convict the defendants of first-degree murder, the State must prove that the defendants caused the death of Mr. Medrano, and that the killing was willful, deliberate, and premeditated.
>
> Willful means that the defendant actually intended to kill Mr. Medrano. Deliberate means that the defendant was conscious of the intent

[14] At trial, the State introduced into evidence Agent Wilde's final report. That report came in without objection. Moreover, at trial, neither defense attorney objected to Agent Wilde's expert opinions.

> to kill. Premeditated means that the defendant thought about the killing, and that there was enough time before the killing, though it may only have been brief, for the defendant to consider the decision whether or not to kill and enough time to weigh the reasons for and against the choice. The premeditated intent to kill must be formed before the killing.
>
> Second-degree murder is the killing of another person with either the intent to kill or the intent to inflict such serious bodily harm that death would be the likely result. Second-degree murder does not require premeditation or deliberation.
>
> In order to convict the defendant of second-degree murder, the State must prove that the defendant caused the death of Mr. Medrano and that the defendant engaged in the deadly conduct either with the intent to kill or with the intent to inflict such serious bodily harm that death would be the likely result.

During the court's instruction, at a bench conference, the prosecutor asked the court to give the pattern jury instruction for accomplice liability [MPJI-Cr 6:00]. The prosecutor explained that she had forgotten to ask for the instruction earlier. Counsel for Mr. Miguel objected that the request came too late inasmuch as the prosecutor "had plenty of time to discuss [the instructions]." The trial judge ruled that although the instruction "may be appropriate," he was not going to give it because the prosecutor's late request did not give defense counsel "an opportunity to consult with their clients as to the request." When the court asked Mr. Torres' counsel if rejecting the instruction was "okay," counsel for Mr. Torres indicated that it was okay by simply responding, "Thank you, Your Honor."

During deliberation, the jury sent out a note that read: "Does planning a murder, even if you don't commit it, count as first-degree murder or second-degree murder?" After consulting with counsel, the court responded to the note, in writing, as follows:

"You have previously [been instructed] on the law in this case and you must apply the law to the facts."[15] The prosecutor and counsel for both defendants expressed their agreement that the judge's response was appropriate.

Mr. Torres now argues:

> In light of the clear demarcation between the crimes of murder and conspiracy to murder, and the Maryland rule that the gravamen of conspiracy is the agreement, with no overt act required, *Townes v. State*, 314 Md. 71, 548 A.2d 832 (1988), the correct answer to the jury's question should have been clear. Planning a murder with another person in and of itself is likely to qualify as a criminal conspiracy, but in the jury's words, "if you don't commit it," the perpetrator is clearly not guilty of *either* first-degree murder *or* second-degree murder. A correct answer to the question would necessarily have included an explanation of the distinction between an inchoate crime and a completed one, and clear advice that in the absence of conduct in furtherance of the "planning," there can be no substantive crime. Instead, the jury was told: "You have been instructed on the law as to first and second-degree murder." Counsel for neither defendant objected. Nevertheless, review is appropriate under the plain error doctrine.

(Reference to record omitted.)

Mr. Torres claims that the judge's answer to the question harmed him. He argues:

> The jurors could rationally have concluded that one of the defendants was guilty of the substantive crime of murder, while the other ended his involvement at the conspiracy stage. By answering the question by reference to the substantive murder instructions, the court clearly implied that the defendants should be convicted of murder and the remaining substantive crimes, even if, as the jurors put it, one of them was involved in "planning a murder" but "didn't commit it."

[15] Mr. Torres is incorrect when he states in his brief that the judge answered the jury note by writing: "You have been instructed on the law as to first and second-degree murder."

Before discussing the plain error doctrine, in detail, it is useful to start out with language used by the Court of Appeals in *Ware v. State*, 360 Md. 650, 694-95 (2000), *Robinson v. State*, 410 Md. 91, 105 (2009) and by this Court in *Sweeney v. State*, 242 Md. App. 160, 173 (2019).

In *Ware*, the Court said:

> A court's obligation to give any particular instruction in a criminal case is governed by Maryland Rule 4-325. Rule 4-325(c) provides:
>
> > The 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 court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.
>
> Rule 4-325(e) deals with objection and the right to assign error in connection with jury instructions:
>
> > No party may assign as error the giving or failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.
>
> We have long interpreted these rules and their predecessors to mean that a court does not err when it omits an instruction or, in this case, further amplification, that was never requested.

Ware, 360 Md. at 694-95 (emphasis added).

In *Robinson*, after discussing other considerations relevant to the recognition of plain error review, the Court observed:

> Appellant makes no attempt to argue that the lack of defense objection was mere oversight, rather than the deliberate decision of defense counsel not to object. To be sure, no one can know from this record why defense counsel stood silent as the events unfolded. We can be virtually certain, however, given the lengthy discussion that preceded the court's issuance of its order, that defense counsel had ample opportunity to object. And, though we may not at this juncture attempt to assign a reason for the lack of defense objection, we cannot ignore the possibility that defense counsel did not object because he believed it better for his client to have his family members and others out of the courtroom during trial. Under these circumstances, it would be unfair to the court and prejudicial to the State to review Appellant's unpreserved claim of error. *See Jones* [*v. State*], 379 Md. [704] at 714 [(2004)].

Robinson, 410 Md. at 105 (emphasis added, footnote omitted).

As we said in *Sweeney v. State*, 242 Md. App. at 173, "[N]ot all jury questions require an answer—it may also be appropriate for the trial judge simply to tell the jury to rely on the instructions given prior to closing arguments." It is only "[w]hen a jury question involves an issue central to the case, 'a trial court must respond . . . in a way that clarifies the confusion evidenced by the query.'" *Id*. (quoting *State v. Baby*, 404 Md. 220, 263 (2008)).

Mr. Torres argues that we should overlook the failure of trial counsel to object based on what he claims to be a "clear" principle of Maryland law, which, in his words, provides: "[W]hen a deliberating jury communicates a legal question, the judge must provide an answer that is correct, responsive, and sufficiently specific to provide guidance." As will be seen, the principle as Mr. Torres phrases it, is too broad. Mr. Torres claims this "principle of law," is based on four cases: *Cruz v. State*, 407 Md. 202 (2009); *State v. Baby*, *supra*; *Brogden v. State*, 384 Md. 631 (2005); and *Manuel v. State*,

252 Md. App. 241 (2021). None of the cases cited were ones that the Court was called upon to consider the plain error doctrine.

In *Cruz*, the Court of Appeals was asked to decide "whether a supplemental jury instruction on a new theory of culpability that is supported by the evidence given during jury deliberations can result in prejudice to a defendant that merits a new trial." 407 Md. at 204. The Court concluded that even though the trial judge's supplemental instruction was generated by the evidence, it was inappropriate under Maryland Rule 4-325 because defense counsel's reliance on the court's pre-closing argument instruction resulted in prejudice to Cruz. *Id*. In the course of that opinion, the *Cruz* Court quoted *Baby* (404 Md. at 263), for the proposition that trial courts "'must respond to a question from a deliberating jury in a way that clarifies the confusion evidenced by the query when the question involves an issue central to the case.'" *Id*. at 210 (emphasis added).

In *Baby*, the issue was whether "it was error for a trial court, during a rape trial, to respond to jury questions concerning the effect of post-penetration withdrawal of consent by referring the jury to previously provided instructions on the elements of first-degree rape, without further clarification." 404 Md. at 222-23. The trial judge had initially instructed the jury that "[r]ape is unlawful vaginal intercourse with a female by force or threat of force and without her consent." *Id.* at 233 n.6. At trial, there was testimony, if credited, that the victim, prior to vaginal intercourse, had consented but during intercourse had withdrawn her consent. During deliberations, the jury sent out a note asking, "If a female consents to sex initially and, during the course of the sex act to which

she consented, for whatever reason, she changes her mind and the man continues until climax, does the result constitute rape?" *Id*. at 233-34. Defense counsel asked that the question be answered in the negative. *Id*. at 234. The trial judge answered the note as follows: "I am unable to answer this question as posed. Please reread the instructions as to each element and apply the law to the facts as you find them[.]" *Id*. at 235. Later, the jury submitted a somewhat similar question which read, "If at any time the woman says stop is that rape?" *Id*. The court answered that question as follows: "This is a question that you as a jury must decide. I have given the legal definition of rape which includes the definition of consent." *Id*. In *Baby*, the Court of Appeals noted that the question before it was "[W]hether the jury's questions made explicit its difficulty with an issue central to the case such that the trial court was required to respond to the questions in a manner that directly addressed the difficulty." *Id*. at 263. The Court of Appeals answered that question in the affirmative stating that it agreed "with the Court of Special Appeals that, in responding to the jury's questions, the trial court should have directly addressed the jurors' confusion on the effect of withdrawal of consent during intercourse, rather than simply referring the jurors to previously provided instructions on the elements of rape." *Id*. at 260.

In *Brogden v. State*, the petitioner was charged, among other things, with carrying a handgun. 384 Md. at 633. During jury deliberations, the jury sent a note asking, "whether it was a crime to have a handgun, and secondly, whether the State had the burden of proving that petitioner did not have a license to carry a handgun." *Id*. at 635.

Over objection by defense counsel, the trial judge gave a supplemental jury instruction that said, insofar as here pertinent, "It's the burden of the Defendant to prove the existence of the license, if one exists, not the State." *Id*. at 639. In *Brogden*, the Court of Appeals reversed the defendant's conviction for wearing, carrying, or transporting a handgun. The *Brogden* Court held:

> The supplemental jury instructions at issue here were simply not "appropriate" under Md. Rule 4-325 in that they did not state the "applicable law" as to the issues relating to the handgun charge then properly before the jury for deliberation. At the point the supplemental instruction was given, the entire burden of proving the commission of that particular crime rested with the State. Petitioner had presented no defense. The jury had already been correctly instructed. To then inform the jury that petitioner had the burden of establishing the existence of a license in order to prevail on a defense that petitioner had never raised, was to impose a burden on petitioner that he never had. Under these circumstances it could not have been harmless.
>
> While it may be commonplace for a jury to pose questions during deliberations to a trial court for clarification and often these questions are reasonable, this does not mean that a trial court judge is obliged to provide answers via supplemental instructions to every question that a jury presents to the court, especially when those questions deal with aspects of the law that have absolutely nothing to do with the case *as presented to that jury* and create burdens of proof on a defendant, that the defendant, under the circumstances of the particular case, does not have. The jury should be limited in its deliberations to the issues and evidence as presented to it and should not be given answers to inquiries which reach outside of the case as presented at trial.

Id. at 644-45 (emphasis added).

In *Manuel v. State*, the defendant was charged with two counts of distribution of heroin and two counts of distribution of fentanyl. 252 Md. App. at 246. In accordance with the pattern jury instructions, the trial judge instructed the jury concerning the four

distribution counts. There was no objection to the instructions. *Id*. at 249-50. During the deliberations, the jury sent out a note asking: "Does it matter that the Defendant was aware of what drugs were in the bag, a/k/a does intent matter?" *Id*. at 251. Defense counsel took the position that the judge should answer that question in the affirmative and tell the jury that intent does matter. *Id*. The trial judge, over objection, simply told the jury that "the elements of the charged offenses are outlined in the jury instructions[.]" *Id*. In *Manuel*, we held:

> "A requested jury instruction, general or supplemental, must be given when the following three requirements are satisfied: *first*, it must be a correct statement of the law; *second*, the instruction must apply to the facts of the case; and *third*, it must not be 'fairly covered elsewhere' in the jury instructions[.]" *Sweeney v. State*, 242 Md. App. at 173-74 (emphasis in original) (citing *Dickey v. State*, 404 Md. 187, 197-98 (2008)). Applying that three-part test, we conclude that the trial court erred in not giving the jury a supplemental instruction to the effect that the State must prove that Manuel knew of the general character or illicit nature of the substance before Manuel could be found guilty of distribution of a controlled dangerous substance.

Id. at 258 (emphasis added).

None of the cases relied upon by Mr. Torres, which we have just summarized, support his position that the trial judge committed plain error by failing to give an instruction that was never requested. We say this because the question asked by the jury in this case, did not involve "an issue central to the case." *Cruz*, 407 Md. at 210, quoting *Baby*, 404 Md. at 263. The question posed may have made a good question for a bar examination, but it was a question having nothing to do with any of the defenses or arguments raised by appellants. The jury had previously been told that it must base its

verdict on the evidence presented. No evidence was presented that showed directly, or supported a legitimate inference, that Mr. Torres planned the murder but did not commit it.

We hold that a trial judge, in a situation like the one here presented, is not required to give a supplemental instruction as to an issue not central to the case.

Mr. Torres asked us to apply the plain error doctrine as enunciated in *Puckett v. United States*, 556 U.S. 129, 135 (2009):

> [P]lain-error review—involves four steps, or prongs. First, there must be an error or defect—some sort of [d]eviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings. Fourth and finally, if the above three prongs are satisfied, the court of appeals has the *discretion* to remedy the error—discretion which ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings. Meeting all four prongs is difficult, as it should be.

(Quotation marks and citations omitted.)

The *Puckett* formulation was expressly adopted by the Maryland Court of Appeals in *State v. Rich*, 415 Md. 567, 578-79 (2010).

In this case, Mr. Torres has not met <u>any</u> of the first three prongs that make up the *Puckett* test. He did not show that the trial judge deviated from any legal rule, when he answered the jury note by referring the jury back to the original instructions. As previously explained, the jury note did not concern an issue central to the case. Even if it could somehow be argued that the question did involve an issue central to the case, Mr.

Torres' counsel affirmatively waived reliance on the "error" because his counsel agreed with the trial judge as to the answer that should be given. The second prong likewise was not met because it most assuredly cannot be said that "the legal error [was] clear or obvious[.]" Lastly, Mr. Torres has not demonstrated that the "error," in any way, "affected the outcome" of the trial.[16]

For the reasons set forth above, we hold that the plain error doctrine is inapplicable.

JOSE SANTIAGO MIGUEL'S CONVICTION AND SENTENCE FOR CONSPIRACY TO COMMIT ROBBERY WITH A DANGEROUS WEAPON AND HIS CONVICTION FOR CONSPIRACY TO USE A FIREARM IN THE COMMISSION OF A CRIME OF VIOLENCE ARE VACATED. EFRAIN TORRES-EUSEBIO'S CONVICTIONS AND SENTENCES FOR CONSPIRACY TO COMMIT ROBBERY WITH A DANGEROUS WEAPON AND FOR CONSPIRACY TO USE A FIREARM IN THE COMMISSION OF A CRIME OF VIOLENCE, ARE VACATED; ALL OTHER JUDGMENTS AND SENTENCES OF THE CIRCUIT COURT FOR BALTIMORE CITY ARE OTHERWISE AFFIRMED; COSTS TO BE PAID 25% BY THE STATE OF MARYLAND AND 75% BY THE APPELLANTS.

[16] Mr. Torres' prejudice argument [prong 3], which is quoted at page 33, *supra*, is based on the assertion that when the trial judge answered the note "by reference to the substantive murder instructions," the court "clearly implied" that both defendants "should be convicted of murder and the remaining substantive crimes, even if . . . one of them was involved in 'planning a murder' but 'didn't commit it.'" Nothing in the instructions actually given implied any such thing. Moreover, the jury plainly did not draw any such inference because it acquitted Mr. Miguel of all murder charges.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0522s21cn.pdf