Circuit Court for Baltimore County
Case No. 03-K-12-004851

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 640

September Term, 2018

DERIUS DUNCAN

v.

STATE OF MARYLAND

Meredith,
Graeff,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: May 14, 2020

Prior to the events that are the focus of this case, Derius Duncan, appellant, had been convicted of another offense for which he received a suspended sentence subject to a period of probation. Consequently, as of March 2011, Duncan was subject to reimposition of nearly twenty years of incarceration for a violation of the conditions of his probation. On March 22, 2011, Duncan was arrested and charged with prohibited possession of a firearm that was found in the glove compartment of an unlicensed taxi cab in which Duncan was a passenger. The "hack" was being driven by Ronald Givens. Duncan was held without bail pending a hearing on charges that he had violated his probation. Givens was also initially arrested and charged with possession, but the State later dropped all charges against Givens and subpoenaed him to testify against Duncan at Duncan's probation hearing. After Givens was found dead in front of his house a few weeks before the scheduled probation hearing, Duncan was charged with several offenses related to Givens's death. The first trial ended in convictions which we reversed in *Butler & Duncan v. State*, 231 Md. App. 533 (2017).

Upon remand, Duncan was acquitted of first degree murder, but convicted of second degree murder, conspiracy to commit murder, intimidating a witness, and use of a firearm in the commission of a crime of violence. Duncan noted this appeal.

QUESTIONS PRESENTED

Duncan presents two questions for our review:

1. Whether the evidence is insufficient to support Mr. Duncan's conviction for second degree murder?

2. Whether the trial court erroneously instructed the jury that Mr. Duncan was charged with conspiracy to commit witness intimidation when, in fact, he was not charged with that offense?

For the reasons set forth herein, we shall affirm the judgments of the Circuit Court for Baltimore County.

FACTUAL AND PROCEDURAL BACKGROUND

On March 22, 2011, Ronald Givens and Derius Duncan were each placed under arrest and charged with possession of marijuana and possession of a handgun that was found in the glove compartment of Givens's car. Because Duncan was on probation at the time of his arrest, the circuit court held him without bail pending a violation of probation hearing, which was scheduled to take place on October 26, 2011. If Duncan was found guilty of violating the conditions of his probation, Duncan faced a potential period of incarceration of 19 years and 364 days. The State dropped the charges against Givens and served him with a subpoena to testify for the State at Duncan's violation of probation hearing on October 26, 2011.

The Death of Ronald Givens

On the morning of October 4, 2011, Givens's next-door neighbor—Annette Isaac—saw Givens lying on the front lawn of his home, and she called out to him. He was unresponsive. She searched for a pulse, and feeling none, asked her daughters to call 9-1-1.

Patrol officers from the Woodlawn Precinct of the Baltimore County Police Department were the first to arrive on the scene. They contacted the Baltimore County

Police Department's Homicide Division. Detective Brian Wolf was dispatched to the scene and assigned to be the lead detective in the investigation of Givens's death.

Detective Wolf's Investigation

While at the scene, Detective Wolf observed a bullet wound behind Givens's left ear and a bullet wound below Givens's belly button. Detective Wolf and Baltimore County Crime Scene Technician Jenny Earnest attempted to locate physical evidence that Givens had been shot, but no handgun, bullets, shell casings, or any other ballistics-related materials were recovered from the scene. Detective Wolf, however, recovered several small baggies, which he believed contained controlled dangerous substances, near Givens's body.

From inside Givens's home, Detective Wolf recovered additional evidence of drug use, such as paraphernalia used for smoking controlled dangerous substances. Detective Wolf later testified at Duncan's trial that he did not seek to have the items forensically examined because he believed that the drugs played no part in Givens's death.

While he was at the scene of the crime, Detective Wolf also conducted an interview of Givens's mother, and she provided him the subpoena commanding Givens to appear as a witness in the Circuit Court for Baltimore City at Duncan's violation of probation hearing on October 26, 2011. A stipulation was later received into evidence at Duncan's trial that, at the time of Givens's death, "Duncan was on probation for a felony offense, and if convicted of a violation of probation, was subject to a potential period of incarceration of up to 19 years and 364 days."

Detective Wolf learned that Duncan was being held without bail at a detention center, awaiting the violation of probation hearing. A search of Duncan's cell produced documents containing several names, addresses, and telephone numbers. Detective Wolf also subpoenaed the records of Duncan's telephone calls while incarcerated, and the detective obtained a certified call log containing information about the person who made each call, the number that was called, and the date that the call was made.

Detective Wolf listened to over 30 hours of Duncan's jail calls. Detective Wolf testified at Duncan's trial that he was able to discern the voices of Clifford Butler, Jr., and Keyon Beads on the jail calls based upon lengthy interviews that the detective had conducted of those suspected accomplices during his investigation. Detective Wolf's investigation led him to believe that Duncan, Butler, and Beads were his prime suspects in the shooting death of Givens.

The State's Case-in-Chief on Remand

At Duncan's trial after remand, the State's case-in-chief relied on circumstantial evidence to support its theory that Duncan induced accomplices to kill Givens to prevent him from testifying at the probation hearing scheduled for October 26, 2011. In its opening statement, the State asserted that Duncan conspired with Beads and Butler, via jail calls and correspondence, to kill Givens. According to the prosecutor, in the recordings of Duncan's jail calls, the jury would hear "slang" used by the parties that was a "thinly-veiled code" about Duncan's plan to kill Givens.

The State called five witnesses at trial: Baltimore County Police Department Officer John Potter; Ronald Givens's neighbor Annette Patricia Isaac; Baltimore County Police Department Crime Scene Technician Jenny Earnest; Baltimore County Police Department Detective Brian Wolf; and Keyon Beads. No expert witness was called to testify about the cause of Givens's death, and the report of Givens's autopsy was not offered into evidence.

Ms. Isaac, who was the neighbor who found Givens's body on the morning of October 4, 2011, testified that, during the preceding evening, she heard a series of five alarming and very loud sounds that, she said, sounded like firecrackers.

Ms. Earnest attended Givens's autopsy. She testified that the medical examiner who performed the autopsy handed her four individual packages that each contained a bullet that had been removed from Givens's body during the autopsy. The four bullets were admitted into evidence without objection.

Detective Wolf testified that, as a homicide detective, he was familiar with the appearance of bullet injuries, and that he observed two bullet injuries to Givens's body on October 4, 2011: a bullet wound behind the left ear, and a bullet wound below the belly button. He also testified that he, too, attended Givens's autopsy and observed a total of four bullet wounds at that time, located in the areas of Givens's head, torso, and shoulder.

The State played for the jury recordings of 19 of Duncan's jail calls that Detective Wolf believed were pertinent to the death of Givens. A disc containing recordings of the 19 jail calls that were played for the jury was admitted into evidence.

The Defense's Motion for Judgment of Acquittal

At the close of the State's case-in-chief, counsel for Duncan moved for judgment of acquittal, arguing that the State had not established the cause of death:

> [COUNSEL FOR DUNCAN]: Your Honor, on behalf of Mr. Duncan, I would make a Motion for Judgment of Acquittal, Your Honor, to each and every count. Starting with Count 1, Your Honor, murder in the first degree, we've heard absolutely no testimony. I understand the light the Court will view this in, but I'm gonna make this abundantly clear. **We've heard no testimony from any medical examiner as to the cause of death. We haven't had it firmly established that Mr. Givens died as a result of murder versus any other number of ways he could have passed, Your Honor.**
>
> THE COURT: **You mean, like, suicide?**
>
> [COUNSEL FOR DUNCAN]: **Suicide. A drug overdose. We have no indication that he was actually shot while he was still alive. It's possible.**
>
> THE COURT: Okay.
>
> [COUNSEL FOR DUNCAN]: **Your Honor, and the same second degree assault would have required that - -**
>
> THE COURT: **Second degree murder?**
>
> [COUNSEL FOR DUNCAN]: **Yes. Excuse me. . . .**

(Emphasis added.)

Duncan's counsel also moved for judgment of acquittal of the counts charging Duncan with intimidating a witness, use of a firearm in the commission of a crime of violence, and conspiracy to commit murder. The trial court denied the motion for judgment of acquittal on all counts.

Duncan did not call any witnesses, and elected not to testify. After resting Duncan's case, Duncan's counsel renewed his motion for judgment of acquittal at a bench conference, stating only: "Your Honor, I would adopt all of my earlier arguments and submit without further argument." The trial court denied the renewed motion for judgment of acquittal.

The Trial Court's Jury Instructions

Pertinent to this appeal, the trial court erroneously instructed the jury that Duncan was charged with conspiracy to commit the crime of "intimidating a witness" even though the conspiracy charge was for conspiracy to commit murder. The trial court's oral instruction stated:

> THE COURT**: The Defendant is charged with a crime of conspiracy to commit the crimes of murder and intimidating a witness.** Conspiracy is an agreement between two or more persons to commit a crime. In order to convict the Defendant of conspiracy, **the State must prove that the Defendant agreed with at least one other person to commit the crimes of murder, and/or intimidating a witness** and, that the **Defendant entered into the agreement with the intent that the crimes of murder and/or intimidating a witness** be committed.

(Emphasis added.)

After the trial court finished instructing the jury, Duncan's trial counsel objected to the trial court's erroneous instruction on the conspiracy count, stating:

> [COUNSEL FOR DUNCAN]: - - Your Honor. You mentioned that he was charged with **conspiracy to intimidate a witness** at some point. He is not charged with such crime.

The trial court said simply that all of the defendant's objections were noted but denied.

The trial court also provided the jury with a printed copy of its instructions, and that set of instructions included a similarly erroneous description of the conspiracy charge, stating:

Conspiracy

> **The defendant is charged with the crime of conspiracy to commit the crimes of Murder and Intimidating a Witness.** Conspiracy is an agreement between two or more persons to commit a crime. In order to convict the defendant of conspiracy, the State must prove:
>
> (1) that the defendant agreed with at least one other person to commit the crimes of Murder and/or Intimidating a Witness; and
>
> (2) that the defendant entered into the agreement with the intent that the crimes of Murder and/or Intimidating a Witness be committed.

(Emphasis added.)

The verdict sheet, however, correctly identified the conspiracy charge as simply "CONSPIRACY TO COMMIT MURDER."

And the trial court correctly instructed the jury on the pending charge of "intimidating a witness." The court's oral instruction on intimidating a witness stated:

> THE COURT: Defendant is charged with a crime of intimidating a witness. In order to convict the Defendant of intimidating the witness - - a witness, - - excuse me - - the State must prove that the Defendant, or an accomplice of the Defendant, used threats or force in an effort to influence, frighten, or impede any witness in the conduct of his or her duties or, to obstruct or impede the due administration of justice.

The court's written instruction on the charge of "intimidating a witness" correctly stated:

Intimidating a Witness

The Defendant is charged with the crime of Intimidating a Witness. In order to convict the Defendant, of Intimidating a Witness, the State must prove that the Defendant or an accomplice of the Defendant used, threats or force in an effort:

1. To influence, frighten, or impede any witness in the conduct of his or her duties; or

2. To obstruct or impede the due administration of justice.

The State's Closing Argument

In closing argument, the State replayed portions of some of the 19 jail calls, and argued that the conversations heard on those jail calls supported its claim that Duncan had conspired with Butler and Beads to eliminate the possibility that Givens could testify at Duncan's probation hearing on October 26, 2011. The conversation recorded on April 20, 2011, indicated that Duncan initially urged Beads to bribe Givens with "candy," *i.e.*, drugs, to dissuade him from saying anything at Duncan's pending violation of probation hearing:

> MR. BEADS: He said- - he said was, he said, he say- - I told him he (inaudible)- - he told me he said he wasn't gonna say, say nothing, but he heard the glove box. I told him not even say nothing. I'm like, yo, you ain't see nothing. Yo, just say you ain't see or hear nothing, yo.
>
> * * *
>
> MR. DUNCAN: I said, that's real facts. He gonna fuck me over (inaudible) saying some shit like that, for real.
>
> MR. BEADS: Yeah. That's why I'm like, I'm like, (inaudible) that n***** again today. But like I said, he be saying- - he like, yo, I ain't gonna- - he, he say, he say, he ain't gonna say nothing about- - he like, I didn't see nothing, Key. He like, all I know, he told me- - about how that

> shit happened. He like, well, all I know is, you know what I mean? I heard the (inaudible). I'm like, yo. That right there, though. Don't even say that, yo. I'm like, just say you didn't see nothing, yo. I'm like, just say you didn't see nothing, yo. You know what I mean? So, what you want me- - what else you want me to tell him, yo?
>
> MR. DUNCAN: (Inaudible). I don't know, man. Like you said, I don't- - (inaudible) motherfucking. And I'm (inaudible) or something, for real. (Inaudible) candy that he like, for real. Something, man. Sure enough.
>
> MR. BEADS: Right. (JAIL CALL STOPS BEING PLAYED)- - -

But the State argued that the following call recorded on September 12, 2011, established that, by mid-September 2011, Duncan was urging his associates outside the jail to employ more violent means to preclude Givens from testifying:

> MR. DUNCAN: (Inaudible), yo, I'm, I'm to the point, yo, I'm to the point, I'm trying to holler at - - yo, I'm trying to holler at, at Eric. I'm to the point where I was, I was getting ready to write you some shit like, yo, and direct you to the people, for real. Like, man, this shit crazy, yo.
>
> MR. BEADS: (Inaudible) - -
>
> MR. DUNCAN: I don't- - then, I don't- - then, the whole thing- - I don't know if he- - like, he telling you like, yeah, they wanted me to come to Court for it, but I'm not trying to come to Court for that. I don't know if this n***** getting ready to come to Court, or he trying to come to Court on me or what. (Inaudible) right there. I don't know if this n***** about to- - you, you (inaudible)?
>
> * * *
>
> MR. DUNCAN: Like, like, you feel me? I still got- - and Key, I still got (inaudible) probation (inaudible) 15 to back up, shorty, plus, whatever they gonna try to hit me in the head with.
>
> MR. BEADS: (Inaudible).
>
> MR. DUNCAN: You feel me, shorty? (Laughs)- - - I'm only 21. (Inaudible). That's, that's more than what the fuck (inaudible)- -

(LAUGHTER) - - - that's more than what the fucking n***** (inaudible) and shit. Goddamn. I'm like, this - -

MR. BEADS: Right.

MR. DUNCAN: - - fucking shit- - (JAIL CALL STOPS BEING PLAYED)- - -

The State replayed the following jail call, made on September 13, 2011, and argued that, when Duncan realized that Beads "can't get it done[,]" Duncan turned to Butler to oversee Givens's murder:

MR. BUTLER, JR.: What it do, D?

MR. DUNCAN: Ain't shit, man. (Inaudible) shit. Look, Cliff, I gotta write you, though. Man, holler at that n*****, Key, yo. I've been- - I told your father, man, I was trying to holler at Dave, man. That motherfucker. So, you know, the n*****s ain't like us, yo. If you know, if you know- - if you was in that situation, I'd be in a n*****'s bushes, though, yo.

MR. BUTLER, JR.: What? I ain't hear you. I ain't hear you, yo.

MR. DUNCAN: I said n*****s ain't like us, yo. If you know, if you know, if me or you was in that situation, for real, and we was (inaudible) or something, (inaudible), n*****s would be in a n***** bushes looking for a n*****, for real, knowing that a n***** might be (inaudible) for a (inaudible)- -

MR. BUTLER, JR.: (Inaudible)- -

MR. DUNCAN: - - you feel me?

MR. BUTLER, JR.: You already know the score.

The State replayed the following jail call, made on September 25, 2011, and argued that the conversation contained clues for figuring out the what the reference to "air holes" meant:

> MR. BUTLER, JR.: Hey, yo. Dave wanted me to ask you where, where as, where was air - - where was the air, the air - - the air hole was at, for real.
>
> MR. DUNCAN: It's in the, it's in the, it's in the - - it's, it's still in the, it's still in the house, put up. Tell him, - -
>
> * * *
>
> MR. DUNCAN: Well, um, my mother - - because, because grandma ain't in there right now. My mother probably can meet him and, and I probably can tell her where he's at or something, for real, and he probably (inaudible), he probably get - - I mean, you know, she ain't gonna touch that motherfucker.

The State replayed the following jail call, made on October 1, 2011 (three days before Givens was found dead), and argued that the conversation indicated that Duncan's accomplice or accomplices were attempting on a more frequent basis to kill Givens:

> MR. DUNCAN: Yo.
>
> MR. BUTLER, JR.: What it do? Man, n*****s was on, n*****s was on it last night, for real. N*****s say, n*****s say he just missed his ass, for real.
>
> MR. DUNCAN: Yeah.
>
> MR. BUTLER, JR.: So, the shit might be ready tonight, for real.

The State also replayed the following jail call recorded on October 5, 2011 (the day after Givens's body was found), in which Butler reported to Duncan that "he got her, for real," and told Duncan to "just ease back":

> MR. DUNCAN: Yo ain't, yo ain't never see that girl, though? (PAUSE)- -
>
> MR. BUTLER, JR.: (Inaudible) I don't know, yo.
>
> MR. DUNCAN: All right. (Inaudible) for real, for real.

MR. BUTLER, JR.: All right. All right. You already know. Yeah. N*****s, n*****s I think (inaudible) gonna say fuck it, for real.

MR. DUNCAN: I don't know what the fuck it is, though, yo.

MR. BUTLER, JR.: Don't even trip off that shit. Just ease back.

* * *

MR. DUNCAN: You sent Little Dave to holler at shorty to get her number, though?

MR. BUTLER, JR.: I know he - - I think he did holler at her, for real, though.

MR. DUNCAN: All right.

MR. BUTLER, JR.: He definitely hollered at her for real. I think he did holler at her. Yo, he definitely told me he got her, for real.

MR. DUNCAN: All right.

MR. BUTLER, JR.: He definitely hit me up and told me he got her. I just wrote you, too. They probably grabbed that motherfucker. They probably won't even let you get that.

MR. DUNCAN: All right. Ain't nothing crazy in that shit, is it?

MR. BUTLER, JR.: Uhn-uhn.

MR. DUNCAN: All right.

After closing arguments, the jury deliberated and returned its verdict. As noted above, the jury found Duncan not guilty of first degree murder, but found him guilty of second degree murder, conspiracy to commit murder, intimidating a witness, and use of a firearm in the commission of a crime of violence.

At the sentencing hearing, the court did not impose a sentence for "conspiracy to intimidate a witness." The court sentenced Duncan for his convictions of intimidating a witness and conspiracy to commit murder (in addition to his convictions for second degree murder and use of a firearm in the commission of a crime of violence), stating:

> THE COURT: . . . [B]ased on the evidence that this Court heard, the Defendant basically killed the victim in this case so he couldn't testify. And that's, that's egregious. That is, that is an affront to the criminal justice system and that kind of crime must be punished. . . . [T]he various factors that the Court has to consider in sentencing, and one of those factors is sending a message to those people who are involved in the criminal justice as, as, as criminals. **And to intimidate a witness is just the top - - among the top of the list.** So, with regard to Count 1, which is second degree murder, Court imposes a sentence of 30 years to the Division of Corrections. **With regard to Count 4, which is intimidating a witness, the Court imposes 20 years to Division of Corrections.** That is to be served consecutive to Count 1, which totals, at this point, 50 years. And as to Count 6, firearm - - use of a firearm in the commission of a crime of violence, the Court imposes a sentence of 20 years. That sentence is consecutive to Count 3, for a total of 70 years - - excuse me. That, that sentence is consecutive to the intimidating a witness, which is Count 4. **And with regard to conspiracy to commit murder, Count 3, the Court imposes a sentence of 20 years, concurrent to the sentences I've imposed in Counts 1, 4, and 6.** He's getting credit for the time he served in this case.

(Emphasis added.)

After sentencing, this direct appeal followed.

DISCUSSION

I. Sufficiency of the evidence of murder.

In Duncan's brief, he contends that "no reasonable juror could have reached the conclusion that Ronald Givens'[s] death was a homicide, much less murder, without critical evidence of the manner and cause of death, which the State failed to produce."

He emphasizes the absence of any testimony by a medical examiner expressing an opinion that the cause of death was homicide, and asserts that the prosecution did not rule out the possibility that Givens's death could have been caused by a self-inflicted drug overdose, or the ingestion of fatal drugs such as fentanyl or carfentanyl. He asserts: "Without the crucial causation evidence, which could have only been established through the medical examiner, no reasonable juror could have determined beyond a reasonable doubt that Givens['s] death was homicide versus suicide or accident, and that Mr. Duncan was guilty of murder."

The State replies that the circumstantial evidence introduced in the case was sufficient for a jury to rationally conclude that Ronald Givens was murdered by an accomplice of Duncan to prevent Givens from testifying at Duncan's probation hearing. The State asserts there was sufficient evidence of death by homicide, including "evidence that: 1) Givens's neighbor heard gunshots the night before Givens's body was found; 2) Givens was found dead on his front lawn with four gunshot wounds in his head and chest; and 3) Givens was to be a witness in Duncan's gun case where Duncan was facing up to 20 years in prison[.]" The State also points out that a medical examiner's testimony on cause of death is not always necessary, observing that, in certain cases, "the State can successfully prosecute a defendant for murder even if the body of the victim was never found." (Citing *Hurley v. State*, 60 Md. App. 539, 550 (1984); and *Lemons v. State*, 49 Md. App. 467, 468 (1981).)

Standard of Review

"In determining whether the evidence is legally sufficient, we examine the record solely to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Tarray v. State*, 410 Md. 594, 607–08 (2009) (citing, *inter alia*, *Jackson v. Virginia*, 443 U.S. 307, 315–16 (1979)). "In examining the record, we view the State's evidence, including all reasonable inferences to be drawn therefrom, in the light most favorable to the State." *Tarray*, 410 Md. at 607-08. *See Correll v. State*, 215 Md. App. 483, 502 (2013) ("It is not a proper sufficiency argument to maintain that the jurors should have placed less weight on the testimony of certain witnesses or should have disbelieved certain witnesses.").

"[A] guilty verdict may be set aside only if there is no legally sufficient evidence or inferences drawable therefrom on which the jury could find the accused guilty beyond a reasonable doubt." *Morgan v. State*, 134 Md. App. 113, 121 (2000). "['<u>To prove guilt beyond a reasonable doubt it is not necessary that every conceivable miraculous coincidence consistent with innocence be negatived</u>.']" *Ross v. State*, 232 Md. App. 72, 95 (2017) (quoting *Nichols v. State*, 5 Md. App. 340, 350 (1968) (emphasis added in *Ross*)). This standard of review "applies to all criminal cases, including those resting upon circumstantial evidence[.]" *Neal v. State*, 191 Md. App. 297, 314-15 (2010).

In *Ross*, Judge Charles E. Moylan, Jr., summarized how we are to assess the legal sufficiency of the evidence in a criminal case relying upon circumstantial evidence:

> The State is **NOT** required to negate the inference of innocence. It is enough that the jury must be persuaded to draw the inference of guilt. As

> the Court of Appeals stated, [in *Smith v. State*,] 415 Md. at 183, 999 A.2d 986, "the finder of fact has the 'ability' to choose among differing inferences that might possibly be made from a factual situation.' That is fundamentally the fact-finder's role, not that of an appellate court." Judge Harrell's opinion [in *Smith*] went on, 415 Md. at 183–84, 999 A.2d 986:
>
> > "We do not second-guess the jury's determination where there are competing rational inferences available. We give deference 'in that regard to the inferences that a fact-finder may draw.' . . . We need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence."
>
> (Citations omitted [in *Ross*]).

232 Md. App. at 98 (emphasis in original).

Analysis

In this case, the jury was instructed on the essential elements of second degree murder as follows:

> 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:
>
> (1) that the defendant, or an accomplice of the Defendant, caused the death of Ronald Givens and
>
> (2) that the defendant, or an accomplice of 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.

We are persuaded that the recordings of the jail calls, considered with the testimony and other circumstantial evidence in this case, when viewed in the light most favorable to the State, provided sufficient evidence for a rational trier of fact to find

beyond a reasonable doubt that Duncan, through an accomplice (or accomplices), caused the death of Ronald Givens, and that an accomplice of Duncan engaged in deadly conduct (which included a gunshot to Givens's head) with the intent to kill Givens. *See Spencer v. State*, 450 Md. 610, 632 (2016) ("The required *mens rea* of intent to kill may be proved by circumstantial evidence. The trier of fact may infer the existence of the required intent from surrounding circumstances such as the accused's acts, conduct and words.").

A copy of the summons for Mr. Givens to appear as a witness for the State at Duncan's violation of probation hearing on October 26, 2011, was received into evidence. A stipulation was also received into evidence that, "on March 22, 2011, Duncan was on probation for a felony offense, and if convicted of a violation of probation, was subject to a potential period of incarceration of up to 19 years and 364 days."

The evidence included the following jail call, made on September 12, 2011, which the State argued demonstrated Duncan's concern about the suspended sentence:

> MR. DUNCAN: Yeah. Like, I don't know if this n***** still trying to come to Court or what. (Inaudible) like, what the fuck is going on? So, I'm trying to motherfucking like, - - like, look yo, - - and, and before it really get started and where I really want it to go, for real, but I'm trying to like, look, yo. Here, you take this, yo and don't, don't, don't come, you feel me, that day or whatever, for real. Like, like, - - (inaudible) because - - you feel me? It's like, his, his shit ain't nothing, you feel me? Then, he talking about his shit already over with, for real. So, I know it's some shaky shit going on, for real, you feel me, motherfucker?
>
> MR. BEADS: Right.

MR. DUNCAN: Like, like, you feel me? I still got - - and Key, I still got (inaudible) probation (inaudible) 15 to back up, shorty, plus whatever they gonna try to hit me in the head with.

MR. BEADS: (Inaudible).

MR. DUNCAN: You feel me, shorty? (Laughs) - - - I'm only 21. (Inaudible). That's, that's more than what the fuck (inaudible) - - (LAUGHTER) - - - that's more than what the fucking n***** (inaudible) big (inaudible) and shit. Goddamn. I'm like this - -

* * *

MR. DUNCAN: - - thing that's holding me up, yo. That's the only thing. Yo, I would - -

MR. BEADS: Right.

MR. DUNCAN: (Inaudible) - - I'm about to beat this, for real. Like, if - - like, I don't even trip off even if I, even if I, even if I get the petty-ass possession charges for the little bit of grass or something, for real. I'm not even tripping about that. I take that shit. This is the whole point, yo, this this gun shit, for real, and another felony and all this dumb ass shit, for real. Man, they gonna, they gonna throw my little ass to the wolves, for real.

MR. BEADS: Man, I'm gonna call - - I'm gonna press up on this (inaudible), yo.

The jury also heard the following jail call made on September 13, 2011, which the State argued demonstrated that Duncan encouraged Butler to take care of Givens's murder:

Mr. BUTLER, JR.: What it do, D?

MR. DUNCAN: Ain't shit, man. (Inaudible) shit. Look, Cliff, I gotta write you, though. Man, holler at that n*****, Key, yo. I've been- - I told your father, man, I was trying to holler at Dave, man. That motherfucker. So, you know, the n*****s ain't like us, yo. If you know, if you know- - if you was in that situation, I'd be in a n*****'s bushes, though, yo.

MR. BUTLER, JR.: What? I ain't hear you. I ain't hear you, yo.

MR. DUNCAN: I said n*****s ain't like us, yo. If you know, if you know, if me or you was in that situation, for real, and we was (inaudible) or something, (inaudible), n*****s would be in a n***** bushes looking for a n*****, for real, knowing that a n***** might be (inaudible) for a (inaudible)- -

MR. BUTLER, JR.: (Inaudible)- -

MR. DUNCAN: - - you feel me?

MR. BUTLER, JR.: You already know the score.

The State argued at trial that the following jail call, recorded on October 1, 2011, demonstrated that, approximately one month prior to Duncan's probation hearing, and just three days before Givens's death, Duncan's accomplice Butler was reporting failed attempts to murder Given:

MR. DUNCAN: Yo.

MR. BUTLER, JR.: What it do? Man, n*****s was on, n*****s was on it last night, for real. N*****s say, n*****s say he just missed his ass, for real.

MR. DUNCAN: Yeah.

MR. BUTLER, JR.: So, the shit might be ready tonight, for real.

And, after Givens was found dead on the morning of October 4, 2011, a phone conversation between Butler and Duncan was recorded on October 5, 2011, celebrating the death of Givens:

MR. DUNCAN: Yo ain't, yo ain't never see that girl, though? (PAUSE)- -

MR. BUTLER, JR.: (Inaudible) I don't know, yo.

MR. DUNCAN: All right. (Inaudible) for real, for real.

MR. BUTLER, JR.: All right. All right. You already know. Yeah. N*****s, n*****s I think (inaudible) gonna say fuck it, for real.

MR. DUNCAN: I don't know what the fuck it is, though, yo.

MR. BUTLER, JR.: Don't even trip off that shit. Just ease back.

* * *

MR. DUNCAN: You sent Little Dave to holler at shorty to get her number, though?

MR. BUTLER, JR.: I know he - - I think he did holler at her, for real, though.

MR. DUNCAN: All right.

MR. BUTLER, JR.: He definitely hollered at her for real. I think he did holler at her. Yo, he definitely told me he got her, for real.

MR. DUNCAN: All right.

MR. BUTLER, JR.: He definitely hit me up and told me he got her. I just wrote you, too. They probably grabbed that motherfucker. They probably won't even let you get that.

MR. DUNCAN: All right. Ain't nothing crazy in that shit, is it?

MR. BUTLER, JR.: Uhn-uhn.

MR. DUNCAN: All right.

There was sufficient evidence that Givens died of gunshot wounds to his head and torso. Givens's next-door neighbor, Ms. Isaac, testified that, on the night before she found Givens lying lifeless on his front lawn, she heard a series of loud sounds that sounded like firecrackers. She also testified that, on the morning she found him, she saw

something "oozing" from the back of his neck. Ms. Earnest testified that she attended the autopsy and collected from the medical examiner four bullets that were extracted from Givens's body, and those bullets were introduced as evidence at trial without objection. Detective Wolf testified that, as a result of his years of experience as a homicide detective, he was familiar with the appearance of bullet injuries. He also testified that, when he attended Givens's autopsy, he observed four bullet wounds to Givens's body, which he testified were in his head, upper torso, and shoulder areas.

It was up to the jury to draw rational inferences from the evidence, resolve any conflicts in evidence, and weigh the jail calls, the testimony, and the other evidence received in this case. *See Neal*, 191 Md. App. at 314-15. Indeed, "the choice of which inferences to draw is exclusively that of the fact-finding jury and not that of a court assessing the legal sufficiency of the evidence." *Ross*, 232 Md. App. at 98. "'We give deference "in that regard to the inferences that a fact-finder may draw." . . . **We need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence**.'" *Id.* (emphasis added) (quoting *Smith*, 415 Md. at 183–84). We are satisfied that the evidence presented at trial, viewed in the light most favorable to the State, was legally sufficient to support a finding of each element of second degree murder beyond a reasonable doubt.

II. Instruction regarding conspiracy to commit witness intimidation.

Duncan contends the trial court committed reversible error because it "instructed the jury that Mr. Duncan was charged with conspiracy to commit witness intimidation, when, in fact, he was not charged with that offense." As a remedy, Duncan asks us to vacate his conviction for intimidating a witness—an offense of which he *was* clearly charged—because he theorizes that the erroneous instruction may have confused the jury. He argues that the trial court's conspiracy instruction was not only "inapplicable," but was also "misleading" to the jury because of a "strong possibility that the jury reconciled the discrepancy . . . to mean it could find that Mr. Duncan committed the substantive crime of witness intimidation simply by entering an agreement to do so." Duncan asserts: "The problem is that the jury could have taken the erroneous conspiracy to commit witness intimidation [instruction], even when read with the correct instruction on the substantive offense, to mean that it only needed to find the agreement to commit the crime." Therefore, he contends, his "conviction for witness intimidation must be vacated."

The State concedes that the trial court "mistakenly told the jury that he was charged with conspiracy to commit witness intimidation," but asserts that that error was harmless because it did not affect the jury's verdict, noting that the verdict sheet listed the charges correctly, and the jury returned no verdict purporting to find Duncan guilty of a conspiracy to commit the crime of intimidating a witness.

Standard of Review

In *Fleming v. State*, 373 Md. 426, 433 (2003), the Court of Appeals discussed appellate review of jury instructions, stating:

> On appeal, instructions are reviewed in their entirety to determine if reversal is required. The jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate. Reversal is not required where the jury instructions, taken as a whole, sufficiently protect the defendant's rights and adequately covered the theory of the defense.

Jury instructions are meant to "direct the jury's attention to the legal principles that apply to the facts of the case." *General v. State*, 367 Md. 475, 485 (2002). "Accurate jury instructions are also essential for safeguarding a defendant's right to a fair trial. The court's instructions should fairly and adequately protect an accused's rights by covering the controlling issues of the case." *Robertson v. State*, 112 Md. App. 366, 385 (1996).

In *Porter v. State*, 455 Md. 220, 234 (2017), the Court of Appeals described the standard of appellate review for considering whether an error committed by the trial court requires reversal of a judgment of conviction:

> Harmless error review is the standard of review most favorable to the defendant short of an automatic reversal. When we have determined that the trial court erred in a criminal case, reversal is required unless the error did not influence the verdict. To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record. In other words, reversal is required unless we find that the error was harmless. We have explained that an error is harmless only if it did not play **any role** in the jury's verdict.

(Emphasis in original; internal quotation marks and citations omitted.)

Similarly, the Court of Appeals addressed application of the harmless error standard in *DeVincentz v. State*, 460 Md. 518, 560–61 (2018):

> [W]hen 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.

[Quoting *Dorsey v. State*, 276 Md. 638, 659 (1976).]

> "[O]nce error is established, the burden falls upon the State . . . to exclude this possibility beyond a reasonable doubt." *Dionas v. State*, 436 Md. 97, 108, 80 A.3d 1058 (2013).

* * *

> The proper inquiry in applying the harmless error test is . . . "whether the trial court's error was unimportant in relation to everything else the jury considered in reaching its verdict." *Dionas*, 436 Md. at 118, 80 A.3d 1058.

In applying the harmless error standard, it is not appropriate to simply focus on the strength of other evidence in the State's case. *Dionas v. State*, 436 Md. 97, 116–17 (2013).

Analysis

Here, there is no dispute that the trial judge committed an error by instructing the jury—both orally and in writing—that Duncan was charged with "conspiracy to intimidate a witness," despite a timely objection from Duncan's counsel advising the judge that "[h]e is not charged with such crime." The question Duncan places before us

is whether that instructional error could have influenced the jury's verdict on the count of intimidating a witness. We see no possibility that the court's error in adding witness intimidation to the conspiracy instruction influenced the jury's verdict of guilty on the substantive count of intimidating a witness.

In addition to the trial court's erroneous instruction regarding the conspiracy count, the trial court correctly instructed the jury on the elements of the charge of intimidating a witness. As noted above, the oral instruction stated:

> [THE COURT:] Defendant is charged with a crime of intimidating a witness. In order to convict the Defendant of intimidating the witness - - a witness, - - excuse me - - the State must prove that the Defendant, or an accomplice of the Defendant, used threats or force in an effort to influence, frighten, or impede any witness in the conduct of his or her duties or, to obstruct or impede the due administration of justice.

(Emphasis added.)

And the trial court also provided the jury a correct written instruction on intimidating a witness, telling the jury:

> *Intimidating a Witness*
>
> The Defendant is charged with the crime of Intimidating a Witness. In order to convict the Defendant, of Intimidating a Witness, the State must prove that the Defendant or an accomplice of the Defendant used, threats or force in an effort:
>
> 1. To influence, frighten, or impede any witness in the conduct of his or her duties; or
> 2. To obstruct or impede the due administration of justice.

The verdict sheet that was given to the jury correctly listed only the five counts with which Duncan was charged; the verdict sheet correctly described the conspiracy

charge as "CONSPIRACY TO COMMIT MURDER," and correctly described the witness intimidation charge as "INTIMIDATING A WITNESS." The record does not reflect that the jury sent any notes asking the trial court for clarification of the discrepancy between the instruction on conspiracy and the verdict sheet's listing of the crimes charged. *Cf. Dionas*, 436 Md. at 110–11 (explaining that jury notes are relevant to a harmless error analysis because they can reveal "the jury's perspective as the arbiters of fact").

When the jury returned its verdict, the clerk asked the forelady: "How do you find as to conspiracy to commit murder?" and "How do you find as to intimidating a witness?" After the forelady announced that the jury's verdict was "Guilty" as to those two counts (as well as second degree murder and use of a firearm in the commission of a crime of violence), the jury was polled, and then hearkened. Throughout this process, the jury expressed no confusion relative to the trial judge's error in the conspiracy instruction.

We agree with the State's assertion that, "[g]iven the clarity of the verdict sheet, the announcement of the verdict, and the polling and hearkening of the jury," as well as the fact that the jury was correctly instructed on the elements of the crime of intimidating a witness, "[t]here is no reason to think that the jury did anything other than ignore the irrelevant instruction" referring to conspiracy to intimidate a witness. We are satisfied that the error in no way influenced the jury's verdict, and find that the error was harmless beyond a reasonable doubt.

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