Circuit Court for Baltimore County
Case No. 03-K-14006451

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 814

September Term, 2016

CHARLES WILLIAM JONES

v.

STATE OF MARYLAND

Nazarian,
Shaw Geter,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: March 7, 2018

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

Appellant was tried and convicted by a jury in the Circuit Court for Baltimore County (Bailey, J.) of first degree murder, use of a firearm in the commission of a crime of violence and possession of a regulated firearm by a person under the age of 21. Appellant was sentenced to life imprisonment, with all but 45 years suspended. Appellant filed the instant appeal in which he posits the following questions for our review.

1. Did the trial court abuse its discretion by propounding the flight instruction to the jury?
2. Did the trial court err by admitting the jail call into evidence?
3. Did the trial court err by permitting the State's improper cross examination?

FACTS AND LEGAL PROCEEDINGS

The State's first witness at Appellant's trial, which commenced on February 1, 2016 and ended on February 12, 2016, was Aaron Battle. He testified that he witnessed the shooting of his friend Jonathan Watkins, whom he had known since the sixth grade. The two would "hang out" daily. In September of 2014, Battle had been ejected from his mother's house and was staying with Watkins, at the home of Watkins' mother. On the night of September 18th, the two men slept in the stairwell of one of the apartment buildings near Marston and Sedgemoor. They spent the day of September 19th at the Dunkin' Donuts in the area, so that they could use the business's WiFi. At some point, they went to the Family Dollar store and bought some candy. At around midnight, they went to the corner of Sedgemoor and Marston, "to rob people."

They took a black duffel bag with them, which contained the clothing of Watkins

and Battle, as well as personal items such as deodorant. Also in the bag was a rifle, which had been wrapped in sheets or curtains along with a bag of bullets. They stowed the bag in the wooded area near the Salvo Auto Parts Building after Watkins took the rifle out of the bag and hid it on the steps of the building.

Their plan was to rob passersby; however, they agreed that they would not attempt to rob any women. Watkins would hold the rifle and Battle would "empty the pockets." They saw two women and an old man walk by, but did not attempt to rob them.

Battle further testified that, at approximately 1:15 a.m., three men walked down Sedgemoor toward Battle and Watkins. The man in front was wearing a blueish gray jacket and, approximately 10 to 15 feet behind him, were the other two men. One was wearing a green hoodie and the other man was wearing a light blue hoodie. As the man in the blueish gray jacket passed where Battle and Watkins stood, Battle testified that Watkins asked him if he had a cigarette. He replied that he did not, but that he did have marijuana.

The three men then continued down Sedgemoor. A maroon truck pulled out of the gas station and stopped in front of Battle and Watkins and someone inside asked if the young men needed any drugs. Watkins replied that they did not. The truck continued down the street and then pulled off on the side of Marston. The man in the blueish gray jacket went up to the passenger's side of the truck and talked to someone inside, then walked back down the intersection and asked Battle and Watkins "what we was [sic] doing around here and if we need somebody."

At that point, Watkins said that he knew the person in the back seat of the truck. The

man asked, “Who?” and Watkins replied, “you.” The truck reversed and the man hopped out and asked Watkins how he knew him. Watkins responded that “every time you see me, you always say I know you from somewhere,” and told the man that they had met before through Li’l Terry and Raquan. The man said, “Oh, all right,” and then told Battle and Watkins to be safe, as someone had just gotten robbed in the area. The man got back in the truck and the truck pulled off. The people in the truck “hollered” at the man in the blueish gray jacket and told him to come back, so he turned around and walked back up the street toward the truck. He spoke further with someone in the truck and then the truck drove off, to the left, and the three men kept walking to the left. Battle testified that neither he nor Watkins had removed the rifle from its hiding place during these events.

Later, at around 2:00 a.m., a blueish Nissan passed Battle and Watkins. Battle, who was seated on the steps, did not think anything of it, but as it passed, the man in the blueish gray jacket came up behind Watkins and shot him once in the back of the head. Battle testified that he knew it was the same person as earlier because of his walk. He described the man as six feet tall or taller. After he shot Watkins, the man ran to the blueish Nissan and got in.

Battle got up, went over to Watkins and slapped him a few times to see if he would respond. When Watkins did not respond, Battle went to the Shell station to ask if he could use their telephone to report a homicide. The station attendant would not let him use the phone, but gave him four quarters to use a pay phone nearby. Instead of searching for the pay phone, Battle walked to his mother’s house, which took approximately half an hour.

He told his mother what had happened and they went together to Watkins's mother's house to let her know what had occurred. From there, they all went to the police station.

Battle did not know Robert Holt, Dale Shepard or Appellant. He testified that he would not be able to recognize the faces of any of the three men he had seen walking down the street on September 20th. He did not identify Appellant as the person who shot Watkins. Battle was never shown a photo of Blackwell.

Donald Robinson testified that, at approximately 2:00 a.m. on September 20th, while driving his silver Mercedes, he stopped at the Shell gas station at the intersection of Sedgemoor Road and Liberty Road so that his passenger, a friend, could buy a pack of cigarettes. Robinson testified that, as he was approaching the gas station, he saw a car parked, with its lights on, in one of the driveways on Marston Road. A resident of the neighborhood, he thought this was remarkable, because the owner of that house worked the night shift and would not usually have been home at this time. Also, the parked car did not look like the car he was accustomed to seeing in that driveway, which was a green pick-up truck.

Robinson then saw someone running up the street, who was wearing a hoodie. Then, as Robinson continued down the road, he saw another person, lying on the street, with someone standing over him, at the corner of Marston and Sedgemoor.

Dale Sheppard testified that he had known Robert Holt, whom he called Robbie, for two or three years, and that he would see Holt at least once a week. As for Appellant, he testified that he has known Appellant for five years or more and would see Appellant about

once a week.

On September 19, 2014, Sheppard was working at his job at a laundry company. He left work between 11:00 p.m. and midnight and went home. Thereafter, Holt picked Sheppard up in a Nissan. As Holt drove, Appellant sat in the front passenger seat and Sheppard rode in the back seat. They proceeded to the gas station to buy snacks, which they were required to obtain through the window, as it was late. They then parked the car and got out and walked.

Sheppard testified that he did not recall talking to anyone in a red vehicle. When asked if he recalled speaking with people in the maroon truck, he responded that, "if I said hi to somebody at the gas station, then . . . it [was] probably somebody from around the neighborhood." He testified that he did not remember talking to two young men on the corner.

After they walked down the street, they returned to the car and Holt drove Sheppard home. Appellant was in the car for that trip. They did not pick up anyone else. Sheppard testified that he did not recall saying that he knew nothing about a murder. The State, in response, then played a clip of his February 18th interview with Homicide Detective Gary Childs, in which he said, "I don't know about no [sic] murder, I wasn't in no car with no murder [sic]."

Robert Holt testified that he knew Appellant and that they lived next door to one another on Digby Road for years. They would speak or hang out "probably every day, every other day."

On the night of September 19, 2014, Holt was driving his Nissan Murano. In the car with him, at about 1:15 a.m. on September 20th, were Appellant and Sheppard. Appellant was sitting in the front passenger seat and Sheppard was sitting in the back seat. They went to the Shell gas station on Liberty Road to get juice and cigarillos. After they went to the gas station, they did "what we usually do. We probably, you know, we smoked, r[o]de around, girls, stuff like that."

He parked the car in the neighborhood, at the corner of Sedgemoor and Digby, got out and walked down Sedgemoor back to the Shell gas station. He testified that, as they were walking to the gas station, Appellant walked ahead and he and Sheppard walked behind. While at the gas station, Holt saw a maroon truck, but he did not speak to anyone in the truck. However he testified that Appellant and Sheppard did.

Holt testified that, as they were walking to the gas station, he saw two people on the corner of Sedgemoor and Marston, but he did not know them. He did not speak to the people and he testified that no one else in the group did either. When they returned to the gas station, he went to the bathroom. He went alone and he did not know what Appellant and Sheppard did while he was inside. When he came out, the group walked back to the car. As they walked back, they passed the same two people at the intersection and observed the maroon truck parked along the side of the road. Holt, Appellant and Sheppard got back in the Nissan Murano. Holt testified that he dropped Sheppard off at his home in Essex.

They then picked up Elmer Blackwell, whom Holt knew as "Urk." Holt testified that they then drove back to the Shell gas station. Holt drove, Appellant sat in the front

passenger seat and Urk sat in the back seat. He testified that he did not remember why they went to the gas station. He testified that he intended to drop everyone off at home, but Appellant got out of the car at the gas station and walked off up Sedgemoor. Holt assumed that Appellant was walking to his girlfriend's apartment. When Appellant got out of the car, Holt testified that Appellant walked around to the driver's side and spoke with Urk, but he "wasn't really listening" because he was looking at his cell phone.

In his interview with Detective Childs in September of 2015, Holt said he heard "something about a bullet and . . . that was basically it." He specified that Urk said to Appellant, "don't waste your bullet" and "if you don't do it, I'm going to do it." Appellant responded, "I'ma [sic] do it." Holt testified that he did in fact participate in this conversation. He told Appellant, "don't do nothing [sic] crazy," suggesting that Appellant could "just point the gun at them and they'll run."

As Holt drove Urk home *via* Sedgemoor, he heard a loud noise, which could have been "anything," such as a gunshot or a car accident. In his interview with Detective Childs, however, which was played for the jury, Holt said that he saw Appellant shoot "that boy'" on the street. He then saw Appellant behind him, running up to the Nissan Murano and he stopped so that he could get back in. He dropped Urk and Appellant off at Urk's home, and then went home himself.

Holt testified that, on September 15, 2015, he entered into an agreement with the State's Attorney's Office. That agreement provided "that, as long as you're truthful, [the] State will not use anything you say either in pre-trial preparation or on the stand in any

type of hearing against you . . . .” Holt understood that his testimony needed to be consistent with his statements to Detective Childs on October 23rd for him to receive this immunity. If it was not, he could be charged with murder, for driving the getaway vehicle.

Appellant, testifying in his defense, explained that, in May of 2014, he returned home to Baltimore from college in Virginia. His plan was to attend community college to raise his GPA and then return to Virginia. In an effort to make money that summer, he began selling marijuana with Holt. Urk would supply them. Sheppard did not smoke or sell marijuana.

On the night of September 19th, Appellant was “hanging out” with Holt and Sheppard. He testified that he was wearing a grey Nike hoodie with blue stitching, black jeans, Nike sneakers and a True Religion brand hat.

In Holt’s car, the group drove to the Shell gas station, where Appellant bought an orange juice and cigarillos. While at the gas station, they encountered Johnson, someone with whom Appellant had played recreational football. Johnson was with a friend whom Appellant did not know. Appellant, Holt and Sheppard then got back in Holt’s car and drove to the corner of Digby and Sedgemoor, where they parked to sit and smoke. After they finished smoking, Appellant got out of the car and walked back to the gas station to speak further with Johnson. As he was walking back, he encountered two young men on the corner, Battle and Watkins, who asked him if he had a cigarette. He replied that he did not, but that he had marijuana.

As he continued walking, he saw the maroon truck, which was driven by Norris and

occupied by Kyree in the front seat and Urk in the back seat. He walked up to the truck and greeted everyone, shaking hands with Kyree and Norris, but only saying hello to Urk. He testified that, although he and Urk were generally "cool," they had gotten into a conflict the day before about whether or not Appellant had taken some clothing belonging to Urk while Urk was staying at his home.

Appellant then continued walking up the hill, with Sheppard and Holt walking behind. As he was walking, he observed Urk get out of the truck and walk up to the two young men on the corner. He saw them talking, but could not hear what they were saying. As he got closer, he heard one of the two men on the corner say, "You know me from Terry," and Urk responded, "I don't recall knowing you," and they went back and forth. Urk then said, "I don't know you or recall your face, but you all stay safe because somebody just got robbed out here." Urk then got back in the truck and Appellant, Holt and Sheppard got back into Holt's car and drove Sheppard to his home.

After driving Sheppard home, Appellant and Holt rode around the neighborhood. Then, Appellant asked Holt to take him to his girlfriend's house. When Holt refused because it was out of his way, Appellant asked him to drop him back off at the gas station, where he would go to a friend's home nearby. As they were driving down Liberty Road, they saw Urk walking toward the gas station and Holt pulled over to pick him up. When Urk got in the car, he indicated that he was indeed heading to the gas station.

Appellant got out of the car at the gas station and told Holt and Urk that he would see them later. Urk asked him where he was headed and Appellant told him he was going

to the home of his friend, Fats. Urk responded, "What if the two boys are on the corner and they try to rob [you]?" Appellant said he did not care, but Urk responded that one of them had his face covered. Urk told Appellant to "take the gun" and said, "don't waste any bullets if they try something."

Appellant testified that he did not see a gun at that time, but he had seen Urk with a gun before. Appellant got back in the car and told Urk that he was not trying to take the gun and had no intention to shoot anyone because he had no problem with anyone. Urk repeated that Appellant should take the gun in case the young men tried to rob him and Appellant responded that he had passed the pair half an hour before and he did not know if they were still on the corner. Urk again told him to take the gun, but Appellant said he would not. Urk responded, "if you won't do it, I'll do it." Appellant got out of the car and walked away.

Appellant testified that Holt did not interject during this conversation. As Appellant walked to his friend's house, he saw Holt's car drive past him up the hill. As the car approached the corner, it slowed and, as it went by the corner, Appellant heard a pop and saw one of the young men drop. The other young man then came up from the steps with his arm coming up and Appellant began to run away.

He saw a white truck that he thought was a police vehicle and he ran past. He then saw Holt's car on the side of the road and got in. Holt dropped Urk off at Bentlou James and dropped Appellant off at Essex. Appellant then went to his friend Keisha's house, where he spent the night.

As to the September 27th text messages regarding the Dillinger, Appellant testified that his brother, Ernest Williams, had his cell phone at the time. Detective Needham acknowledged that the Cellebrite[1] device cannot tell you who was using the phone.

At approximately 2:00 a.m., on September 20, 2014, officers of the Baltimore County Police Department were dispatched to the intersection of Sedgemoor Road and Marston Road, in the Lochearn/Woodmoor area, for an unresponsive subject. Patrol Officer Brett Randall was the first officer to arrive on the scene. There were no streetlights illuminating the intersection; consequently he used the spotlight on his patrol vehicle to see. He saw the body of a person, later identified as the victim, Jonathan Watkins, wearing all black clothing lying on the ground and not moving. The victim's eyes and mouth were open. Officer Randall did not observe any blood at that time. There was a bandana around the victim's neck, at chin level. Officer Randall asked his dispatcher to send more officers and paramedics to the scene.

When Patrol Officer John Dill arrived, he checked the victim's vital signs, then began chest compressions. When paramedics arrived, they continued CPR and also attempted to revive the victim with an automated external defibrillator. During these efforts, the victim began to bleed from the back of his head and a small shell casing dropped from his head. Officer Randall collected the shell casing and packaged it in a surgical glove

[1] CELLEBRITE, https://www.cellebrite.com/en/about/company/ (last visited January 25, 2018). Cellebrite is a company that offers comprehensive resources to law enforcement, the military and corporate clients regarding digital forensic evidence gathering, analysis and support.

to give over to the crime scene technicians when they arrived. No other shell casings were recovered from the scene. Based on their observation of a gunshot wound to the back of the head, the paramedics declared the victim deceased and covered his body with a sheet. Officers called for both a crime lab technician and for homicide detectives and then secured the scene.

Dr. Donna Vincenti, Assistant Medical Examiner of the Office of the Chief Medical Examiner, performed the victim's autopsy on September 20th. She determined that the cause of death was a gunshot wound to the head and that the manner of death was homicide. She observed an entrance wound to the back of the head and recovered one bullet from the left maxillary sinus, which she turned over to a police department evidence technician.

Detective Childs was assigned as the primary investigator on the case. At the behest of Detective Childs, forensic services technician Gregory Klein went to the Shell gas station at 7000 Liberty Road and downloaded the business's video surveillance footage from that night. Klein testified that the system was working properly and that he was able to download the footage from 9:00 p.m. on September 19th to 2:15 a.m. on September 20th. Some days later, Klein also went to the Salvo Auto Parts to download their surveillance footage from the night of September 19th. He was able to download the footage from midnight on September 20th to 3:00 a.m.

On the morning of September 22, 2014, Homicide Detective Jim Lambert assisted Detective Childs by driving around the neighborhood and looking for vehicles that matched the Nissan Murano in the surveillance footage. He observed a similar vehicle while driving

across Betlou James Place; accordingly, he wrote down the address and license plate number and returned to the police station. The vehicle registration came back to a Ms. Porter and Detective Childs determined that Porter was associated with Holt. That evening, Detective Lambert returned to Betlou James Place to conduct surveillance and see if anyone would get in the Nissan Murano. As he was waiting, he observed Holt driving a silver Nissan Maxima, which Holt eventually parked behind the Murano. The Maxima was also registered to Ms. Porter.

Officers kept surveilling Holt, trying to observe him with the other people in the surveillance footage. Detective Childs obtained warrants to affix GPS trackers to Holt's vehicles to obtain Holt's phone records and also to install a pole camera outside of Holt's residence.

On October 23, 2014, officers executed a search warrant at Holt's apartment on Stonecroft Road. Officers were looking for any evidence of the crime, specifically, a .32-caliber handgun, ammunition, the blue hoodie and a baseball hat. They recovered a light blue hoodie behind a sofa, along with other clothing and a baseball hat.

The officers waited for Holt to leave his apartment before executing the search warrant. When he exited the premises, police stopped him and Detective Childs asked him to come to the Homicide Office for an interview. Detective Childs showed Holt the surveillance footage from the night of September 19th and Holt identified the Murano as his. Detective Childs presented Holt with photos of Appellant, Sheppard and Urk to identify.

Holt identified the person who got out of the front passenger seat as "Little Bip," and the person in the green hoodie as "Chris." When the interview ended, Holt had given Chris's real name as Dale Sheppard. However, Bolt stated that Sheppard was not present during the shooting. Holt did not initially identify a photo of Appellant.

Holt identified Elmer Blackwell as "Urk," who was initially in the maroon truck and had a conversation with the victim, Watkins, but later entered the Nissan Murano. Holt told Detective Childs that Urk and Watkins engaged in conversation on the night of September 20th. The Detective conducted further questioning, after which, Holt signed a photo of Appellant, initialed it and wrote on it "he shot the boy and got back in my car."

On November 6, 2014, Appellant was arrested. On the same day, officers executed a search warrant at his home on Digby Road. They did not find any firearms or ammunition pursuant to that search. Appellant was brought to police headquarters for an interview, where he was questioned by police before he invoked his *Miranda*[2] rights. That portion of the police interview was published for the jury, over defense objection. In it, Appellant stated that he remembered the night of September 20th; he got into a disagreement with Holt and dropped him off, after which, he journeyed to a friend's house.

Detective Needham performed a data extraction, using a Cellebrite device, on both Holt's and Appellant's cell phones, to retrieve contacts, text messages and photos. He further extracted an outgoing text from Holt's phone to Appellant's on September 27th

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

which stated: "You really trying to sell that Dillinger?" A response from Appellant's phone to Holt's phone was also extracted, which stated: "No, unless it's that price lol."[3]

On November 30, 2014, Detective Kenneth Nacke of the Criminal Investigation Bureau was assisting the Violent Crimes Unit with the surveillance and arrest of a suspect in an unrelated case, Jatwan Boston. As soon as Boston's vehicle entered Baltimore County, the officers effected a traffic stop. Inside the vehicle, officers located a Savage .32-caliber semi-automatic handgun. Sergeant Mark Ensor of the Forensic Services Section was asked to analyze the bullet and casing recovered from the victim's head. He performed toolmark identification analysis and determined that the bullet and casing recovered from the victim had been fired from the gun recovered from Jatwan Boston's vehicle.

Detective Childs interviewed Elmer Blackwell on September 14, 2015, at the Baltimore County Detention Center. Blackwell denied getting out of the maroon truck and speaking to the victim on the street and denied ever being in Holt's Nissan Murano. He told Detective Childs that he made a purchase at the Shell station and was then driven home.

DISCUSSION

I.

Appellant's first contention is that the trial court abused its discretion by

[3] Paul Gil, *What LOL Stands for and How to Use It,* LIFEWIRE (Oct. 2, 2017), https://www.lifewire.com/what-does-lol-mean-2483393 ("'LOL' is one of a few common acronyms for laughter. It stands for 'Laughing Out Loud'.").

propounding the flight instruction to the jury. According to Appellant, "the facts of the case did not generate [the] prejudicial instruction." Specifically, Appellant alleges that he "departed" from the scene, not "fled," to avoid police apprehension and contests "that his departure reflected consciousness of guilt." Appellant further elucidates that he "ran from the scene because he feared that the person on the stairs was about to shoot a gun."

The State responds that the trial court properly exercised its discretion by giving a flight instruction. The State maintains that Appellant "disputes only the existence of evidence sufficient to support the first inference [of the four-part *Myers* test, *see below*] — that his behavior suggested flight[,]" and Appellant's own testimony "state[s] that he fled the scene of the shooting to avoid police[.]" The State also notes that "there was sufficient evidence from other sources for the jury to find that he was the shooter," specifically, testimony from Battle and Holt, described as the "getaway driver."

"We review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard." *Thompson v. State*, 393 Md. 291, 311 (2006) (citations omitted).

"At its most basic, evidence of flight is defined by two factors: first, that the defendant has moved from one location to another; second, some additional proof to suggest that this movement is not simply normal human locomotion." *Hoerauf v. State*, 178 Md. App. 292, 323 (2008) (quoting 22 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 5181 (1978 & Supp. 2007)).

Maryland has adopted the four-prong test, first articulated in *United States v. Myers*,

550 F. 2d 1036 (5th Cir.1977), as it pertains to flight instructions. *Id.*

> [C]ircumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

Id. at 312 (quoting *Myers*, 550 F.2d at 1049).

Stated another way,

> for an instruction on flight to be given properly, the following four inferences must reasonably be able to be drawn from the facts of the case as ultimately tried: that the behavior of the defendant *suggests* flight; that the flight suggests a consciousness of guilt; that the consciousness of guilt is related to the crime charged or a closely related crime; and that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime.

Id. at 312. (Emphasis suppled).

In the instant case, the State notes that Appellant only challenges the first inference. In his brief, Appellant argues that there was insufficient evidence to support the first inference "and, by extension, the other three inferences"; however, he only provides argument in support of the first inference. Accordingly, we will restrict our review of the first inference only, *i.e.*, whether Appellant's behavior suggested flight.

> The term "flight" is often misused for the word "departure." Departure from the scene after a crime has been committed, of itself, does not warrant an inference of guilt. "Flight" may be established by a broad range of circumstances. We believe the proper rule to be that for departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a *consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt.*

Hoerauf, 178 Md. App. at 324–25 (emphasis supplied) (quoting *State v. Lincoln*, 164

N.W.2d 470, 472 (1969)).

In *Hoerauf*, this Court held that

> an accused's departure from the scene of a crime, without any attendant circumstances that reasonably justify an inference that the leaving was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt, does not constitute "flight," and thus does not warrant the giving of a flight instruction.

Id. at 325–26.

In the instant case, Appellant's cross-examination illustrates that he fled the scene, in part, to avoid police apprehension.

> MR. JONES: As I walk up the hill, I notice that the two guys are on the corner and one was sitting down and one was standing, standing up and as I proceeded up the hill, Robert's car got closer to the corner and as it got closer to the corner, I, it, I would say gradually slowed down because I saw his brakes stop and at the time I thought he was stopping for me but he never made a complete stop and in the process of him going by the corner, that's when I heard a pop and when I heard the pop, I saw the guy drop and when I saw the guy drop, it shocked me at first and Robert's car kept going and as Robert's car kept going, I saw a guy coming from the, from the step area with his, with his car coming up and as his arm came up, I began to run and I saw a white truck coming down the hill that looked like the police car and as the police, well, I thought it was a police car coming down, I began to run past the police car and as I ran past the police car I got further up the hill and I saw Robert's car stopped at the, and between Digby and I believe that's Hillsman and he stopped right there and I got in the car and when I got in the car, Robert asked what's wrong and I said nothing and at the time Robert then pulled off and dropped Urk off on Bentlou James and dropped me off on Essex and I went to my, a friend of the family named Keisha['s] house.
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> ***
>
> MR. JONES: I started running no more than two seconds after I heard the pop and looked to the, out of my peripheral to my right and saw a guy coming from the steps.
>
> [DEFENSE COUNSEL]: Now, when you ran, you see the, a white car and you thought it was a police car?

MR. JONES: Yes.

[DEFENSE COUNSEL]: Do you run towards that car or away from that car?

MR. JONES: Well, I was more so in the street at the time, so when the car came down, I went—

[DEFENSE COUNSEL]: Which street does the car come down?

MR. JONES: It came the same direction Robert [Holt] was driving up, so that would be I would, right there at—

[DEFENSE COUNSEL]: Sedgemoor

MR. JONES: —Digby and Sedgemoor, yes.

[DEFENSE COUNSEL]: Okay and when you see the car, the white car, do you run past it?

MR. JONES: Yes.

[DEFENSE COUNSEL]: And how far up, when you run past it and see it's not, do you ever see it's not a police car?

MR. JONES: No, because at the time, I was nervous and high and I and I, as far as I knew, I thought it was, I knew it was the police.

[DEFENSE COUNSEL]: Okay and when you're running, when you see the person out on the peripheral like what do you see that person doing?

MR. JONES: I seen him coming from the step area and gradually raising his hand and I was nervous and I didn't know what was going on because I just saw somebody drop and I heard a pop so, at this point, I'm thinking someone got shot.

[DEFENSE COUNSEL]: Now, when you go up the hill, when you start running at that point, you see Robert's car?

MR. JONES: Yes.

[DEFENSE COUNSEL]: And when you got into Robert's car, you said that Robert

> said to you, what's wrong?
>
> MR. JONES: Yes.
>
> [DEFENSE COUNSEL]: Why did he say that, if you know?
>
> MR. JONES: I was panting because of the, me running all the way up that hill *and thinking that that was the police so I'm think, I was thinking that the, if that was the police then I'm in this area and I'm trying to get away from the area. I didn't want to be seen in the area at the time.*

(Emphasis supplied).

Clearly, Appellant's own testimony supports the inference that he was fleeing the area, in part, to avoid the police. Although Appellant testifies that he heard a "pop" sound and that he then ran, Appellant also testifies that he believed that he saw the police and that, if they were in the area, he was "trying to get away from the area" and that he "didn't want to be seen in the area at the time," the inference that he was fleeing the area to avoid the police. Therefore, we hold that there was sufficient evidence to support the first inference of the *Myers* test. Because the first inference was the only one contested, we hold that the trial court did not err in permitting the flight instruction.

We are unpersuaded by Appellant's argument that "the evidence showed that Appellant left the scene to avoid being shot[.]" Appellant only references his cross-examination testimony, *supra*, to support his argument. The jury was free to disbelieve the part of his testimony that suggested he heard the gunshots and then ran, while believing the part of his testimony that stated he saw the police and ran because he did not want to be seen in the area. *See Correll v. State*, 215 Md. App. 483, 502 (2013) (noting that a jury, as

the fact-finder "can accept all, some, or none of the testimony of a particular witness"). Accordingly, we uphold the trial court's propounding of the flight instruction to the jury.

II.

Appellant's next contention is that the trial court erred by admitting the recording of the telephone call from jail into evidence. Appellant maintains that his defense counsel objected to admitting the jail call because it was overly prejudicial but had no probative value. On appeal, Appellant adds that the call was also not relevant.

The State responds that the trial court properly admitted the jail telephone call into evidence. According to the State, "[t]he call was relevant and highly probative to show consciousness of guilt, specifically, that Jones intended to present a false veneer to the jury and that he was angry at Holt, a key State's witness, for 'ratting.'"

As a preliminary matter, we address a potential preservation issue, not asserted by either party, but noted by this Court. In Appellant's brief, he states that, when his trial counsel objected to the introduction of the jail call evidence, "the basis for the objection was that the call was overly prejudicial but had no probative value." Later, in his brief, Appellant asserts that the evidence is also not relevant.

"Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" MD. RULE 8–131(a). "[W]hen particular grounds for an objection are volunteered or requested by the court, 'that party will be *limited on appeal to a review of those grounds and will be deemed to have waived any ground not stated*.'" *State v. Jones*, 138 Md. App. 178, 218 (2001)

(emphasis supplied) (citations omitted). Furthermore, "the thrust of an unfair prejudice argument is that the prejudicial effect outweighs the *acknowledged* relevance. If the evidence were truly totally irrelevant, it would have little, if any, capacity to prejudice." *Jeffries v. State*, 113 Md. App. 322, 342 (1997) (emphasis supplied).

In the instant appeal, Appellant characterized the grounds for the objection as "overly prejudicial but had no probative value." Appellant did not include relevancy among the volunteered grounds. Accordingly, any claim now made regarding the irrelevancy of the evidence is waived and appellate review will be limited to the stated grounds made at the time of the objection, *i.e.*, overly prejudicial, but having no probative value.

"[A]ll relevant evidence is admissible." MD. RULE 5–402. "'Relevant evidence' is defined in the Maryland Rules of Procedure as 'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Decker v. State*, 408 Md. 631, 639 (2009). *See also* MD. RULE 5–401.

Md. Rule 5–403 provides that

> [a]lthough relevant, evidence may be excluded if its probative value is *substantially outweighed* by the danger of *unfair* prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(Emphasis supplied).

"In balancing probative value against prejudice, 'we keep in mind that 'the fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not

the undesirable prejudice referred to in Rule 5–403.'" *Burris v. State*, 435 Md. 370, 392 (2013) (quoting *Odum v. State*, 412 Md. 593, 615 (2010)). "Rather, evidence is considered unfairly prejudicial when 'it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged.'" *Id.* (quoting *Odum,* 415 Md. at 615). "The more probative the evidence, therefore, 'the less likely it is that the evidence will be unfairly prejudicial.'" *Id.* (quoting *Odum*, 415 Md. at 615).

"As with other forms of circumstantial evidence, however, 'the probative value of 'guilty behavior' depends upon the degree of confidence with which certain inferences may be drawn.'" *Decker,* 408 Md. at 641 (quoting *Thomas*, 372 Md. at 352). "'There must be an evidentiary basis, either direct or circumstantial,' to link the defendant's conduct to the consciousness of guilt inference." *Id.* (quoting *Thomas*, 372 Md. at 352).

"A person's post-crime behavior often is considered relevant to the question of guilt because the particular behavior provides clues to the person's state of mind." *Thomas*, 372 Md. at 352. "Applying our accepted test of relevancy, 'guilty behavio[]r should be admissible to prove guilt if we can say that the fact that the accused behaved in a particular way renders more probable the fact of their guilt.'" *Id.* (citation omitted).

In the instant case, the telephone call made from jail was placed on February 1, 2016, which coincided with the first day of trial. Although there are numerous "inaudible" notations in the transcripts, in the call, Appellant lambasts Holt, stating that he was "ratting on a n-----" and that Holt was "trying to throw a n----- under the bus." (Expletive redacted).

Appellant also discussed being in court and looking "smart as shit, like I'm a whiz or something," and that he was "acting like I'm reading this shit, taking notes, the whole time . . . straight bluffing." Furthermore, although Appellant did not expressly say that he was going to "get on the stand and fake cry" during the recorded audio, it was characterized as such during the State's closing arguments without objection from Appellant.

Although Appellant argues that the recorded jail call was unduly prejudicial, we are unpersuaded. The evidence does not rise to the level of "influenc[ing] the jury to disregard the evidence or lack of evidence regarding the particular crime with which [Appellant] is being charged." *Burris, supra.* Accordingly, we hold that the recorded jail call was not unduly prejudicial and that the trial court properly admitted it.

III.

Appellant's final contention is that the trial court erred by permitting the State's improper cross examination. Appellant maintains that whether his parents could have wanted him to report the shooting is "utterly irrelevant" regarding the identity of the shooter. Appellant also asserts that this line of questioning involved his pre-arrest silence. Appellant argues that these errors cannot be deemed harmless and, therefore, reversal is required.

The State responds that the trial court properly exercised its discretion by allowing the State to cross-examine Appellant about his failure to report the murder he claimed to have witnessed. Specifically, the State asserts that, because during direct examination, Appellant "sought to bolster his testimony that he was merely an innocent witness by

extolling his virtuous upbringing[,]" it was, therefore, appropriate for the State to cross examine him for impeachment purposes.

During direct examination, Appellant testified as follows:

> [DEFENSE COUNSEL]: So how would you describe your home life, how you grew up?
>
> MR. JONES: I would describe it as brought up pretty good, [sic] you know. I was adopted at birth and I was brought into a Christian household where we went to church every Sunday, went to bible studies on Wednesday and as I got older it was a youth ministry on Fridays and it was several Christian events, we would go to Ocean City and a place called (inaudible) where it was just Christian retreats and I stayed in sports from about seven all the way up until my first year of college, that's when I stopped playing sports and it was embraced with love, brought up with good character. My mom and dad have been together for about thirty years and you, my dad brought me up as a, to teach me to be a good young man and my older brother, you know, gave me ambitions of going to school and being successful and it was, I would, I would always think of if I would have stayed with my biological family where would I be and how my life would be, would be different and I wouldn't change the family that I've been given for anything in the world, you know, but I always had that question of did my mom love me but, you know, my mom—

During cross-examination, the following colloquy took place:

> STATE: Now, after this point, you didn't go to the police station, correct, and advise—
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Counsel, approach.
>
> (BENCH CONFERENCE)
>
> THE COURT: Basis?
>
> [DEFENSE COUNSEL]: He has no legal obligation to go to the police station.
>
> THE COURT: No, overrule.

(END OF BENCH CONFERENCE)

THE COURT: You may restate the question.

STATE: You, you testified you come from a very religious background, correct?

MR. JONES: Yes, ma'am.

STATE: And you were taught to do the right thing, correct?

MR. JONES: Yes, ma'am.

STATE: Now, you just advised us that you watched someone gunned down in the street, correct?

MR. JONES: Yes, ma'am.

STATE: However, you did not go to the police station and report this, did you?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overrule.

MR. JONES: No, ma'am.

Similarly, during re-cross examination, the following colloquy occurred:

STATE: Now, in, after that day or two, once again, let's, you did not go to the police station and report this information, correct?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overrule.

MR. JONES: No, ma'am.

STATE: Okay and we heard that your, you had a nice upbringing, correct?

MR. JONES: Yes, ma'am.

STATE: You were taught right from wrong, correct?

MR. JONES: Yes, ma'am.

STATE: And someone's child was just murdered and you knew that, correct?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overrule.

MR. JONES: Yes, ma'am.

STATE: Your parents taught you to go to the police, correct?

MR. JONES: That wouldn't come into play because me and my, I never got in trouble with the police so, no.

STATE: Okay, well, in this type of situation, you don't believe your parents would have wanted you to go to the police?

[DEFENSE COUNSEL]: Objection.

MR. JONES: Yes, but I wouldn't have that conversation with them because I didn't know what to do at the time.

STATE: Now, at some point, a couple days, at some point after this conversation, you end up getting arrested for murder, correct?

MR. JONES: Yes, ma'am.

STATE: Okay and you are here telling us that—

[DEFENSE COUNSEL]: Objection.

THE COURT: Overrule.

STATE: —you know that Urk murdered the individual that you were charged with murdering, correct?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overrule.

MR. JONES: Yes.

STATE: Yet you still did not tell the police what you witnessed, correct?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overrule.

MR. JONES: Yes.

STATE: You did not, correct?

MR. JONES: Yes, I did not.

"It is well established that '[t]he allowance or disallowance of certain questions on cross-examination normally is left to the sound discretion of the trial judge,' 'and, in the absence of an abuse of discretion, will not be interfered with on appeal.'" *Vitek v. State*, 295 Md. 35, 40 (1982) (citations omitted).

Md. Rule 5–404(a)(2)(A) provides that "[a]n accused may offer evidence of the accused's pertinent trait of character. If the evidence is admitted, the prosecution may offer evidence to rebut it." *See Braxton v. State*, 11 Md. App. 435, 439–40 (1971) (quoting 1 WHARTON'S CRIMINAL EVIDENCE, 12th Ed., s 221, pp. 458–59) ("The State cannot show the bad character of the accused until the accused has raised the issue by offering evidence of good character. Once the defendant raises the issue of his character, the prosecution may then offer evidence of the defendant's bad character.").

Importantly, "[u]nder the 'opening the door' doctrine, otherwise irrelevant evidence may be admitted when the opposing party has 'opened the door' to such evidence." *Grier*

v. State, 351 Md. 241, 260 (1998). "Generally, 'opening the door' is simply a contention that competent evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence on the same issue." *Id.* (citation omitted).

The Court of Appeals has rejected "the notion that a person's failure to come forward and tell the police his or her version of events constitutes pre-arrest silence such that it is admissible as substantive evidence of guilt." *Id.* The Court has further held that, "[s]uch evidence carries little or no probative value . . . [and] any minimal amount of probative value is substantially outweighed by the danger of unfair prejudice." *Id.* at 253–54. However, evidence of an accused's pre-arrest silence may be used to impeach his earlier testimony "when prior silence is so inconsistent with present statements that impeachment by reference to such silence is [more] probative" than prejudicial. *Id.* at 254–55 (quoting *Jenkins v. Anderson*, 447 U.S. 231, 239–40 (1980)).

In the instant case, Appellant had testified during direct examination about his good upbringing, his "good character" and his strong Christian values. The State sought to impeach this character evidence by questioning Appellant about his pre-arrest silence and his failure to report the crime to the police. The evidence was not used as "substantive evidence of guilt." *Grier, supra*. Although it would have been inadmissible had the State sought to introduce this evidence without Appellant's character testimony, the fact remains that Appellant did "open the door" to the State's line of questioning. Accordingly, we hold that the trial court properly permitted the State's cross-examination for impeachment purposes.

CONCLUSION

We hold that the trial court did not abuse its discretion by propounding the flight instruction to the jury, properly admitted the telephone call from jail into evidence and properly permitted the State's cross-examination for impeachment purposes.

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