Circuit Court for Baltimore City
Case No. 123045003

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 866

September Term, 2024

---

DARIAN MCFARLAND

v.

STATE OF MARYLAND

---

Berger,
Shaw,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

---

Opinion by Berger, J.

---

Filed: November 24, 2025

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

On December 23, 2022, Darian McFarland ("McFarland") and Michael Morrison ("Mr. Morrison") engaged in a verbal altercation in an apartment on East Eager Street in Baltimore City. The altercation quickly turned physical and ended with McFarland shooting and killing Mr. Morrison. McFarland fled the scene and went into hiding after dropping off those that had been in the apartment at a family member's house. McFarland remained in hiding in a house on Arunah Avenue until he was arrested there on January 18, 2023. After searching the Arunah Avenue house where McFarland had been in hiding, police uncovered various items including two cell phones, firearms, ammunition, and bulletproof body armor.

McFarland was charged with first degree murder, committing a crime of violence in the presence of a minor, and various firearm charges associated with his conduct on December 23, 2022. The State also charged McFarland with three counts related to his possession of firearms and body armor uncovered at the Arunah Avenue house on January 18, 2023. The trial court severed the charges associated with McFarland's arrest on January 18, 2023, while the charges associated with the murder of Mr. Morrison proceeded to trial.

At trial, the issue concerning whether McFarland killed Mr. Morrison was not contested -- McFarland admitted to that. Rather, what was at issue was whether McFarland had killed Mr. Morrison in self-defense. The jury heard testimony from McFarland and two witnesses. McFarland testified that during the altercation Mr. Morrison reached for his holstered handgun, prompting McFarland to shoot him in self-defense. Two of the State's witnesses', Jazzmen Muse ("Ms. Muse") and Jamearrah Spriggs ("Ms. Spriggs"),

testified that they did not see Mr. Morrison reach for his handgun during the altercation. Notably, neither witness saw nor remembered the entire incident. Through the course of the trial the court admitted, over objection, evidence that McFarland was seeking a lawyer on the day of the homicide, firearm and other evidence recovered on the day of McFarland's arrest, and evidence of McFarland's prior firearm convictions. The jury returned a verdict acquitting McFarland of first-degree murder but convicting him of second-degree murder and all other charges for which he was on trial.

On appeal, McFarland presents four questions[1] for our review, which we have rephrased as follows:[2]

[1] As the State points out, McFarland poses three questions in his opening brief but outlines four issues in his argument section. The fourth issue -- whether the firearm laws which McFarland was convicted for violating are constitutional under *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022) and other Supreme Court precedent -- was raised to ensure preservation of the argument while *Fooks v. State* was pending decision from the Supreme Court of Maryland. Though the Court has since rendered its decision in *Fooks v. State*, 490 Md. 458 (2025), as we shall explain below, we do not reach the merits of McFarland's Second Amendment challenge.

[2] Appellant phrased the questions as follows:

> 1. Whether the State's use of evidence that Appellant wanted and was looking for a lawyer, under a theory that it showed consciousness of guilt, (a) deprived Appellant of his due process right to a fair trial under the Fourteenth Amendment of the U.S. Constitution and Article 24 of the Maryland Declaration of Rights; (b) was irrelevant; and (c) was unduly prejudicial.
>
> 2. Whether the trial court erred in admitting, under Maryland Rule 5-404(b), evidence of guns, magazines, ammunition, a cartridge casing, a gun cleaning kit, and body armor unrelated to the crimes for which Appellant

I. Whether the trial court erred in admitting evidence that McFarland wanted and was looking for a lawyer to show both consciousness of guilt and ownership of the cell phone that the text message was sent from because (a) it violated McFarland's due process right to a fair trial under the Fourteenth Amendment of the U.S. Constitution and Article 24 of the Maryland Declaration of Rights; (b) it was irrelevant; and (c) its probative value was substantially outweighed by the danger of unfair prejudice.

II. Whether the trial court erred in admitting firearm and other evidence unrelated to the crimes for which McFarland was on trial under Maryland Rule 5-404(b) under a theory that the evidence showed consciousness of guilt.

III. Whether the trial court erred in allowing the State to use McFarland's prior convictions for unlawful possession of a firearm as impeachment evidence under Maryland Rule 5-609 or under the open door doctrine.

IV. Whether Maryland Public Safety Code § 5-133(c) and Maryland Criminal Code § 4-203 are unconstitutional under the Second Amendment of the U.S. Constitution.

For the following reasons, we shall vacate the judgments of convictions and remand for proceedings consistent with this opinion.

---

was on trial, under a theory that the evidence showed consciousness of guilt.

3. Whether the trial court erred, under Maryland Rule 5-609, by allowing the State to use Appellant's prior convictions for unlawful possession of a firearm as impeachment evidence.

## BACKGROUND

### *The Homicide*

On December 23, 2022, McFarland went to visit his twin daughters at an apartment on East Eager Street in Baltimore City belonging to the twins' mother, Ms. Muse. When he arrived, McFarland knocked on the door, but no one answered. McFarland let himself in through the unlocked front door and found one of his daughters in a playpen while the other was asleep in the bedroom with Ms. Muse's cousin, Ms. Spriggs. Shortly after McFarland arrived at the apartment, Ms. Muse came home with Mr. Morrison's daughter and promptly woke up Ms. Spriggs.

Shortly thereafter, Mr. Morrison -- Ms. Muse's partner who was expecting a baby with her -- arrived at the apartment. Mr. Morrison was carrying a holstered handgun on his hip as he regularly did because of his work as an armed security guard. McFarland and Mr. Morrison had met before without any sort of altercation. During the visit, McFarland sat on the couch with one of his daughters while Mr. Morrison stood nearby. At the same time, Ms. Muse and Ms. Spriggs talked in the adjoining room when -- hearing something he did not agree with -- McFarland interjected using a curse word. In response, Mr. Morrison told McFarland to watch his mouth when speaking in front of the children.

What happened next was subject to conflicting testimony at trial. Ms. Muse and Ms. Spriggs testified that Mr. Morrison and McFarland had a small argument, but neither recalled precisely what was said. McFarland testified that he told Mr. Morrison to "get . . . out [of his] face" and that they "kept going back and forth" verbally about McFarland's cursing in front of the children. Shortly thereafter, the altercation became physical. Ms.

Muse testified that things happened quickly, and that McFarland and Mr. Morrison were in close contact, wrestling with each other. Ms. Muse did not, however, see anything head on; rather, anything she saw was in her peripheral vision. At first, Ms. Spriggs testified that there was no physical altercation between McFarland and Mr. Morrison prior to things turning lethal. She did, however, subsequently testify that the altercation was also physical.

McFarland testified that during the verbal altercation, Mr. Morrison -- a larger man -- grew increasingly agitated. According to McFarland, Mr. Morrison reached for his holstered handgun while McFarland was still sitting on the couch with one of his daughters. As Mr. Morrison pulled the handgun from his holster, McFarland set his daughter down and "rushed" Mr. Morrison, grabbing at his wrist and the handgun. McFarland further testified that, as he and Mr. Morrison "exchang[ed] blows," McFarland reached for his own handgun, which he was carrying at his waist. Mr. Morrison reacted by grabbing McFarland's arm. The first shot went off, hitting no one. McFarland testified that he was scared for not only his life, but the life of his daughter, and that as he and Mr. Morrison continued to tussle, he shot Mr. Morrison in the head twice from close proximity.

Ms. Muse testified that she did not see Mr. Morrison pull his holstered handgun, but she also stated that she was not "really paying too much attention" at the time. Ms. Spriggs -- who was a few feet away from the altercation -- did not recall many details of the altercation but testified that she did not see Mr. Morrison reach for his gun.

After the shooting, McFarland told everyone to leave the apartment and drove them to Ms. Muse's and Ms. Spriggs' grandmother's house.

***The Arrest***

On January 18, 2023, McFarland was arrested for the murder of Mr. Morrison at a house on Arunah Avenue pursuant to an arrest warrant. When the officers arrived, they knocked but received no response. After seeing McFarland inside the house and a vehicle in an alley behind the house matching the description of the vehicle homicide detectives said McFarland drove, officers continued to knock and announce themselves. Still receiving no response, the officers decided to retreat from the house and called a SWAT team. The SWAT team arrived approximately one hour after the officers initially arrived at the Arunah Avenue house. Roughly 30 to 45 minutes later, McFarland exited the house and surrendered peacefully.

After McFarland surrendered, officers conducted a search of the house and surrounding area and uncovered, among other things, two cell phones, multiple firearms, ammunition, and bulletproof body armor. The cell phones, firearms, ammunition, and body armor were unrelated to the homicide.

***The Trial and Resulting Verdict***

McFarland was charged with twelve counts including first degree murder. Nine of the counts related to the murder of Mr. Morrison and associated conduct on December 23, 2022, and three related to possession of various items recovered from the Arunah Avenue house where McFarland was arrested on January 18, 2023. The State initially sought to try all twelve counts of the indictment in a single trial. McFarland, however, filed a motion to sever the three counts related to the evidence found on January 18, 2023, which the trial court granted. The trial proceeded on the nine counts stemming from the events that

unfolded on December 23, 2022: first degree murder, use of a firearm in the commission of a crime of violence, commission of a crime of violence in the presence of a minor, and six charges related to McFarland's possession, carrying, and transportation of firearms.

At trial, three distinct evidentiary issues arose that are relevant to this appeal. First, the trial court admitted, over objection, evidence that McFarland was looking for a lawyer on the day of the homicide. Second, the trial court admitted, over objection, evidence of items -- a rifle, a handgun, magazines and ammunition, a cartridge casing, a gun cleaning kit, and bulletproof body armor -- recovered from the Arunah Avenue house on the day McFarland was arrested ("January 18 evidence"). Third, and finally, the trial court admitted over objection evidence of McFarland's prior convictions for the illegal possession of firearms. We shall include additional details about each in the forthcoming analysis.

At the close of the State's case-in-chief, McFarland moved for judgment of acquittal on all counts, arguing there was insufficient evidence for each charge. The trial court denied the motion. At the close of his case, McFarland renewed the motion for judgment of acquittal on the same grounds and the trial court, once again, denied the motion.

The jury returned a verdict convicting McFarland of second-degree murder and the other eight charges. Subsequently, McFarland moved for a new trial. Among other things, McFarland argued that the admission of the January 18 evidence warranted a new trial and that the firearm laws which he was convicted for violating are unconstitutional under the Second Amendment of the U.S. Constitution. The trial court denied the motion, reasoning that the January 18 evidence's probative value outweighed any danger of unfair prejudice

because it was "inconsistent with" McFarland's claim of self-defense. Further, the trial court questioned whether McFarland had preserved his Second Amendment claim, but nonetheless denied the motion noting that, to the extent preserved, the claim was better addressed on appeal. We shall provide additional detail as necessary in the following analysis.

## DISCUSSION

### I. The trial court erred in admitting the December 23 text containing McFarland's lawyer's contact information because such evidence violated McFarland's due process rights, was irrelevant, and was unduly prejudicial.

The first evidentiary issue that we analyze arose when McFarland made a motion in limine to exclude from evidence a picture that the State alleged McFarland had sent via text message to "a friend or an acquaintance" in the afternoon of December 23, 2022 -- the day of the homicide ("December 23 text"). The picture was a screenshot of an iPhone lock screen displaying the cell and office phone numbers for James Gitomer ("Mr. Gitomer"), McFarland's defense counsel at trial who had also represented him previously. The State contended that the text message was relevant because it tended to show two things: identity of the owner of the phone from which the text message was sent as well as consciousness of guilt. McFarland countered that the December 23 text was irrelevant, that the State had other ways to prove ownership of the phone, and that using McFarland's relationship with his attorney to prove consciousness of guilt was "dangerous."

The trial court concluded that the December 23 text was relevant to prove ownership of the phone:

> [U]nless there's a stipulation that establishes Mr. McFarland's possession or use of that second phone, that is, if the State is put to its proof to prove of the foundational connection of the phone to Mr. McFarland, it is relevant evidence of relating to that foundation. In fact, it may be essential evidence relating to the foundations. Not conclusive, but it is evidence of that.

The trial court went on to conclude that the text was also relevant because it tended to show consciousness of guilt:

> I think it also given the timing is relevant to consciousness of guilt after the offense is committed. Now it's also consistent with, you know, Mr. McFarland thought he was in trouble and -- and wanted the assistant [sic] of counsel or could have been referring counsel to someone else. So there are innocent explanations as well, but it -- it certainly could support the State's position.

Finally, the trial court concluded that the text message was not unduly prejudicial, nor did the danger of unfair prejudice substantially outweigh its probative value. Accordingly, the trial court denied the motion in limine.

Later at trial, the court admitted the December 23 text into evidence over McFarland's objection. At the end of the State's cross-examination of McFarland, the following exchange occurred:

> [THE STATE]: Now we have a text message from December 23rd with the contact information for a James Gitomer; correct?
>
> [MCFARLAND]: Correct.
>
> [THE STATE]: And you had sent that to somebody on the day that Mr. Morrison was killed?
>
> [DEFENSE COUNSEL]: I'm going to object to this line of questioning.
>
> THE COURT: Overruled.

> [MCFARLAND]: Can you repeat the question?
>
> [THE STATE]: You know that you had sent a text message on December 23rd, 2022 after Mr. Morrison was killed you sent Mr. Gitomer's contact information to another person; correct?
>
> [MCFARLAND]: I believe so, yes.
>
> [THE STATE]: And who did you send that to?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [MCFARLAND]: I believe I sent it to two people.
>
> [THE STATE]: Okay. Who are those people?
>
> [MCFARLAND]: I believe one was a family member and one was a friend.
>
> [THE STATE]: So you had the idea of getting an attorney on December 23rd, 2022; correct?
>
> [MCFARLAND]: Correct.

After two questions regarding McFarland's contact with Mr. Gitomer between the date of the homicide and the date of his arrest, the State concluded its cross-examination.

Thereafter, the State began its closing argument by going through numerous text messages to and from McFarland that it had introduced into evidence. When the State got to the December 23 text, it stated that the screenshot was "the contact information of James Gitomer." At the end of its recitation of the text messages, the State summarized: "So now you've heard all the text messages. That's what we were spending hours on admitting into

evidence because it is quite a lot. Those text messages show the state of mind of . . . McFarland."

### A. McFarland properly preserved his challenge to the admission of the December 23 text.

As a threshold matter, we first analyze whether McFarland's challenge to the admission of the December 23 text was properly preserved. The State urges us to answer this question in the negative, arguing that McFarland failed to either object to each question posed concerning the December 23 text during the State's cross-examination or obtain a continuing objection to the line of questioning. McFarland counters that the only questions from which he did not object did not, in fact, require an objection. As a result, his claim is preserved. We agree with McFarland and conclude that his challenge to the admission of the December 23 text is properly before us.

Maryland Rule 4-323 provides, in pertinent part:

> (a) **Objections to Evidence**. An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. . . .
>
> (b) **Continuing Objections to Evidence.** At the request of a party or on its own initiative, the court may grant a continuing objection to a line of questions by an opposing party. For purposes of review by the trial court or on appeal, the continuing objection is effective only as to questions clearly within its scope.

The requirement that a party must object at the time evidence is offered to preserve their claim applies in equal force to situations where -- as here -- a motion in limine has been denied. *Jones v. State*, 9 Md. App. 455, 457 (1970). Indeed, the denial of a motion in

limine does not preserve objection to the evidence for appeal. *Id.* Rather, "[f]urther objection must be made to the introduction of the evidence at the trial." *Id.* This requirement makes sense because "a motion in limine is not a ruling on the evidence but is merely a procedural step prior to the offer of evidence, which serves the purpose of pointing out before trial certain evidentiary rulings that the court may be called upon to make." *Brown v. State*, 90 Md. App. 220, 224 (1992) (citation omitted).

Relatedly, "[a]n attorney's 'offer' of a continuing objection is without any effect unless the proposed continuing objection is expressly granted by the trial judge, and even then the objection is effective to preserve an issue for appeal 'only as to questions clearly within its scope.'" *Kang v. State*, 163 Md. App. 22, 44 (2005) (citation omitted).

There are, however, exceptions to the principles discussed above that relieve a party of the requirement to continually reassert an objection, two of which are relevant here. First, a party need not object to a question that is merely "a clarification" of evidence. *See State v. Robertson*, 463 Md. 342, 365 (2019) (noting that no objection was warranted where the State's question "was a clarification about what [the defendant] had already testified to on direct examination"). Second, no subsequent objection is necessary when a party clearly objects not only to what was just said, "but also to what [is] obviously to come" and "[i]t [is] apparent that [the judge's] ruling on further objection would be unfavorable to the [party]." *Johnson v. State*, 325 Md. 511, 514–15 (1992). The rationale is that in such a situation, "[p]ersistent objections would only spotlight to the jury the remarks of the [other party]." *Id.* at 515.

Here, McFarland failed to make a valid continuing objection. Although defense counsel did object to the line of questioning about the December 23 text, the trial court did not expressly grant a continuing objection. The State is correct that McFarland also failed to object to every question about the December 23 text. We nevertheless conclude, however, that McFarland adequately preserved his claim for review. Indeed, the first of the State's questions on this subject -- "Now we have a text message from December 23 with the contact information for a James Gitomer; correct?" -- required no objection. This question was merely "a clarification" of evidence which the State had already proffered, therefore McFarland's failure to object to this question does not constitute waiver. *See Robertson*, 463 Md. at 365.

We further conclude that McFarland's failure to object to the State's final two questions about the December 23 text does not constitute waiver. After the State posed its second question on the subject, McFarland lodged a broader objection to the entire line of questioning. This objection was clearly not only to that specific question, but also to what was obviously to come. By overruling the objection, the trial court signaled that any further objections on the issue would be unfavorable to McFarland. Accordingly, no further objection was required and the issue of whether the trial court erred in admitting the December 23 text is properly before us.

### B. Admitting the December 23 text violated McFarland's due process right to a fair trial.

We next analyze whether the trial court violated McFarland's due process right to a fair trial by admitting evidence that he was looking for a lawyer on the day of the homicide.

McFarland urges us to answer in the affirmative, arguing that the trial court's admission of the December 23 text, which contained a photo of McFarland's lawyer's name and contact information, to show consciousness of guilt violated his due process right to a fair trial under both the Fourteenth Amendment of the U.S. Constitution and Article 24 of the Maryland Declaration of Rights. The State makes no counter argument to McFarland's due process claim in its brief.

Over thirty years ago, we stated that "the rule seems well-established that it is impermissible for the State to offer evidence of, or comment upon, a criminal defendant's obtention of counsel or his attempt, request, or desire to obtain counsel in order to show consciousness of guilt." *Hunter v. State*, 82 Md. App. 679, 686 (1990). We reasoned that this rule is based on two premises, one of which is relevant to the present inquiry. *Id.* Specifically, we explained that even when the Sixth Amendment right to counsel has not yet attached "[a] person has an independent right, protected . . . by the general due process clause of the Fourteenth Amendment and its State counterpart (Maryland Declaration of Rights, art. 24), to seek legal advice or representation at any time, on any matter, and for any reason." *Id.* at 690–91. "This is especially so when the person perceives that . . . criminal litigation against him may be" forthcoming. *Id.* at 691.

Here, McFarland texted a friend and family member a screen shot of his lawyer's name and phone number on the same day that he killed Mr. Morrison. The State reasoned that this was relevant to show consciousness of guilt because it showed McFarland was seeking counsel just after killing Mr. Morrison. McFarland's Sixth Amendment right to counsel had not yet attached because he had not yet been formally charged when he sent

the text message at issue. Even so, as we stated in *Hunter*, McFarland had an independent right to seek legal representation that was protected by the due process clauses of the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights. Moreover, it is apparent that McFarland anticipated criminal litigation. Indeed, McFarland did not dispute that he killed Mr. Morrison; rather, he claimed he was acting in self-defense. A person in such circumstances would reasonably anticipate the commencement of criminal proceedings against them. If the right to seek legal advice or representation is to mean anything, evidence that a criminal defendant exercised that right must be inadmissible to show consciousness of guilt. We, therefore, conclude that admitting the December 23 text to show consciousness of guilt violated McFarland's due process right to a fair trial under both the Fourteenth Amendment of the U.S. Constitution and Article 24 of the Maryland Declaration of Rights.

### C. The December 23 text was irrelevant and was therefore inadmissible.

#### 1. *The December 23 text was not relevant to show McFarland's consciousness of guilt.*

We now turn to the relevance of the December 23 text. When reviewing a trial court's decision to admit evidence, we follow a two-step analysis. *Akers v. State*, 490 Md. 1, 24 (2025). "First, we determine whether the evidence was relevant, which is a conclusion of law that we review de novo." *Id.* (citing *Montague v. State*, 471 Md. 657, 673 (2020)). "If we determine that the evidence in question is relevant, we proceed to the second step—whether the evidence is inadmissible because its probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined

by Maryland Rule 5-403." *Id.* at 25. This second inquiry is subject to the abuse of discretion standard. *Id.* (citing *Montague*, 471 Md. at 673–74).

McFarland contends that the December 23 text was irrelevant to his consciousness of guilt because the only inference to be drawn from his seeking legal advice is that he was in a state of uncertainty with respect to the law -- not that he was guilty. The State counters that the trial court properly admitted the December 23 text because it did so on two bases, namely to show consciousness of guilt and to prove ownership of the phone that the text message was sent from. As we explain below, we agree with McFarland that the trial court erred by admitting the December 23 text.

"A central evidentiary principle in our legal system is that only relevant evidence is admissible." *Akers*, 490 Md. at 25 (citing Md. Rule 5-402). Accordingly, irrelevant evidence is inadmissible. *Id.* Relevant evidence is evidence which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. The key components of relevant evidence are therefore materiality and probative value. *State v. Joynes*, 314 Md. 113, 119 (1988). "Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case." *Id.* Probative value, on the other hand, "is the tendency of evidence to establish the proposition that it is offered to prove." *Id.* (citation omitted).

"Evidence [] lacks probative value when its relevancy depends on attributing meaning to actions too 'ambiguous and equivocal' to support the proposition for which it is offered." *Akers*, 490 Md. at 27 (quoting *Snyder v. State*, 361 Md. 580, 596 (2000))

(citing *Hunter v. State*, 82 Md. App. 679, 691 (1990) as an example of this proposition). This was precisely the case in *Hunter v. State*.

In *Hunter*, we stated the general rule that the State may not "offer evidence of . . . a criminal defendant's obtention of counsel or his attempt, request, or desire to obtain counsel in order to show consciousness of guilt." *Hunter*, 82 Md. App. at 686. We reasoned that, in addition to such evidence being protected by the right to seek counsel discussed *supra*, evidence that a criminal defendant sought counsel is also inadmissible because it is irrelevant to show consciousness of guilt. *Id.* at 691. Such evidence is irrelevant, we explained, because the act of seeking legal advice is ambiguous and does not unequivocally support the inference that a criminal defendant has a guilty conscious. *Id.* Indeed, a person seeking legal counsel "may well believe [themself] culpable of some . . . criminal conduct," or they may "believe [themself] entirely innocent or only partly culpable," or they may simply want to "know whether [their] acts or omissions are in violation of law." *Id.* There simply is no unambiguous inference to be drawn from a criminal defendant's exercise of their right to seek or consult with counsel. Rather, "the fact to be inferred -- the consciousness of guilt -- is not made more probable (or less probable) from the mere seeking of legal advice or representation, and so evidence of the predicate fact is simply irrelevant." *Id.*

This is so even in situations where the State does not directly suggest that a defendant's intent to obtain or consult with a lawyer is evidence of a guilty mind. *Waddell v. State*, 85 Md. App. 54, 65 (1990). In *Waddell*, over objection, the trial court permitted a witness to testify about the criminal defendant's statement indicating he

intended to obtain counsel in response to a general question -- "[a]nd what did [the defendant] say to that?" *Id.* at 61. The defendant appealed, arguing that admission of the evidence that he intended to call a lawyer was reversible error under *Hunter*. *Id.* at 60–61. The State countered that, because the witness volunteered the information and the State did not attempt to use it to show the defendant's consciousness of guilt, the State did not "offer" the evidence to show consciousness of guilt. *Id.* at 64. We disagreed with the State, concluding that "[a] juror, even without the prosecutor's suggestive comments, easily might infer from the witness's testimony that [the defendant] planned to obtain counsel because he had done something for which he needed a lawyer to defend him." *Id.* at 65. Accordingly, we determined that the trial court erred in admitting the witness's testimony about the defendant's intent to call a lawyer. *Id.*

Here, one of the purposes for which the State offered, and the trial court admitted, the December 23 text was to show consciousness of guilt. At trial, the State used the text message to show McFarland's consciousness of guilt. Indeed, as the State concluded its cross-examination of McFarland, it asked multiple questions about the text message and elicited testimony that McFarland "had the idea of getting an attorney" on the day of the homicide. Because McFarland admitted to killing Morrison, the only question at trial was whether he had acted in self-defense. In such circumstances, the mere fact that McFarland sought legal counsel on the day of the homicide is even less probative of his consciousness of guilt. Indeed, the most logical inference to be drawn from evidence that McFarland was seeking a lawyer is that he wanted to assess what his criminal exposure may be. *See Hunter*, 82 Md. App. at 691.

Further, during its closing argument, the State again highlighted the December 23 text noting that the jury could infer McFarland's state of mind from it. The State argues that the statement during closing argument "regarding McFarland's state of mind was made much more broadly, in reference to a whole litany of text messages read by the prosecutor to the jury." Accordingly, the State contends that particular attention was not drawn to the December 23 text. Even if the State is correct in its characterization, the result is the same. Indeed, in *Waddell*, we concluded that "*even without* the prosecutor's suggestive comments," evidence that a defendant sought legal counsel is irrelevant and therefore inadmissible. *Waddell*, 85 Md. App. at 65 (emphasis added).

The State urges us to reach a different result, arguing that "McFarland's desire to consult with his attorney after the murder was not a standalone event, but rather was interconnected with a series of events in which he fled, hid, and then ultimately surrendered after consultation with his attorney." We are not persuaded. The right to seek and consult with counsel discussed *supra* does not hinge on what the defendant does after they first exercise that right, nor does the relevance of exercising that right. We, therefore, conclude that the December 23 text was irrelevant and inadmissible to show consciousness of guilt.

**2. *To the extent that the December 23 text was relevant to show McFarland's ownership of the phone, its probative value was substantially outweighed by the danger of unfair prejudice.***

We review the trial court's balancing of the probative value of the evidence at issue with the danger of unfair prejudice to the defendant under Maryland Rule 5-403 using the abuse of discretion standard. *Akers*, 490 Md. at 25 (citing *Montague*, 471 Md. at 673–74). "An abuse of discretion occurs where no reasonable person would take the view adopted

by the [trial] court." *Montague* at 674 (quoting *Williams v. State*, 457 Md. 551, 563 (2018)). Generally, appellate courts only reverse trial courts under this standard when "the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Id.*

McFarland argues that, to the extent that the text message was admitted to establish his ownership of the phone, the trial court's admission of the text message for that purpose was an abuse of discretion because the State had alternative ways to prove ownership and the evidence was unduly prejudicial. The State counters that the December 23 text was not overly prejudicial, therefore, the trial court was within its discretion to admit the December 23 text to show ownership of the phone. While we do not fault the trial court for concluding that the December 23 text was relevant to prove ownership of the phone, as it may well have been, we nevertheless conclude that it was unduly prejudicial and therefore should have been excluded.

Under Maryland Rule 5-403, trial courts have discretion to exclude relevant evidence in several situations, including when the evidence's "probative value is substantially outweighed by the danger of unfair prejudice." The Supreme Court of Maryland has explained the highly prejudicial nature of evidence that a defendant sought or consulted with an attorney:

> Evidence of a criminal defendant's consultation with an attorney is highly prejudicial, as it is likely to give rise to the improper inference that a defendant in a criminal case is, or at least believes himself to be, guilty. . . . Moreover, the State's deliberate use of such evidence to support its consciousness of guilt theory renders the evidence particularly prejudicial.

*Martin v. State*, 364 Md. 692, 708 (2001) (internal citations omitted).

Here, the State deliberately used the December 23 text to support its consciousness of guilt theory, rendering the evidence prejudicial. Further, the probative value was minimal. Although the trial court stated that the December 23 text "may be essential evidence" to connect the phone to McFarland when ruling on the motion in limine, it went on to conclude that it was "[n]ot conclusive." At best, therefore, the December 23 text was circumstantial evidence tending to show McFarland's ownership of the phone. Indeed, the December 23 text did not contain a message indicating it was sent from McFarland, rather it was merely a screenshot of Mr. Gitomer's name and phone number. The State's theory of admissibility relied on the timing of the text message, the location where the phone was found at the Arunah Avenue house, and the fact that Mr. Gitomer had represented McFarland in prior criminal cases. Given this tenuous connection, we conclude that the probative value of the December 23 text to prove McFarland's ownership of the phone was substantially outweighed by the danger of unfair prejudice. As a result, the trial court abused its discretion in admitting it.[3]

[3] McFarland points out that the State had -- and used -- other evidence to establish McFarland's ownership of the phone. The State is correct in noting that such alternative evidence was not admitted until after the trial court ruled on the motion in limine. In our view, the timing is immaterial. Indeed, as noted *supra*, "a motion in limine is not a ruling on the evidence but is merely a procedural step prior to the offer of evidence, which serves the purpose of pointing out before trial certain evidentiary rulings that the court may be called upon to make." *Brown*, 90 Md. App. at 224 (citation omitted). McFarland duly noted his objection again at the time the December 23 text was admitted into evidence at trial, giving the trial court the opportunity to reconsider its prior determination. Moreover, a conclusion that the order in which the evidence was offered has bearing on its admissibility would have the effect of giving the State carte blanche to proffer inadmissible evidence by manipulating the order in which it offers the evidence.

### D. The trial court's admission of the December 23 text was not harmless error.

Having concluded that the trial court erred in admitting the December 23 text, we now turn to the issue of whether such error was harmless. The State argues that any error in admitting the December 23 text was harmless because this was a strong case and there is no reasonable probability that such evidence affected the jury's verdict. In support of this contention, the State points to fact that, because McFarland admitted to killing Mr. Morrison, evidence that McFarland sought a lawyer would have been unlikely to prejudice the jury. Further, the State argues that there was abundant additional evidence from which the jury could infer consciousness of guilt, including McFarland's admission that he was on the run after the homicide, ballistics evidence indicating that McFarland shot Mr. Morrison in the back of his head within close proximity, and the January 18 evidence. McFarland counters that, because witness credibility was a central issue at trial, this was a very close case and it cannot be said that improperly admitted evidence is harmless beyond a reasonable doubt. Under the circumstances of this case, we agree with McFarland.

"When we have determined that the trial court erred in a criminal case, 'reversal is required unless the error did not influence the verdict.'" *Porter v. State*, 455 Md. 220, 234 (2017) (quoting *Bellamy v. State*, 403 Md. 308, 332 (2008)). The Supreme Court of Maryland has explained that "[t]o say that an error did not contribute 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." *Id.* (quoting *Bellamy*, 403 Md. at 332). That is, we may only leave the underlying verdict undisturbed if "we find that the error was harmless."

*Id.* (quoting *Bellamy*, 403 Md. at 332). An "error is harmless only if it did not play *any role* in the jury's verdict." *Id.* (quoting *Bellamy*, 403 Md. at 332). It is the State's burden of proving beyond a reasonable doubt that the error at issue was indeed harmless. *Id.* (citing *Dionas v. State*, 436 Md. 97, 108 (2013)).

We have repeatedly held that the admission of evidence that a criminal defendant was seeking a lawyer to show consciousness of guilt -- even when there is ample other evidence to support the defendant's convictions -- is not harmless error. *Hunter*, 82 Md. App. at 91 ("Although the other evidence adduced against appellant was surely sufficient to justify his convictions, we cannot say . . . that this error was harmless."); *Waddell*, 85 Md. App. at 65 ("We believe that the other evidence against appellant . . . was enough to justify his convictions. We cannot say, however, that the admission of the supervisor's testimony [that appellant intended to call a lawyer] into evidence was harmless.").

Further, "Maryland courts have recognized that 'where credibility is an issue and, thus, the jury's assessment of who is telling the truth is critical, an error affecting the jury's ability to assess a witness'[s] credibility is not harmless error." *Devincentz v. State*, 460 Md. 518, 561 (2018) (quoting *Dionas*, 436 Md. at 110) (alteration in original); *see also Howard v. State*, 324 Md. 505, 517 (1991) ("In a case that largely turned on whom the jury was going to believe, the improperly admitted evidence of the defendant's prior conviction may have been the weight which caused the jurors to accept one version rather than the other."). In such cases, improperly admitted evidence may well have been what tipped the scales for the jury to believe a witness's account over the defendant's. *Howard*, 342 Md. at 517.

Here, the State has failed to meet its burden of proving, beyond a reasonable doubt, that the improperly admitted evidence that McFarland was seeking a lawyer constitutes harmless error. The State argues that, because McFarland conceded to killing Mr. Morrison, "there is no reasonable possibility" that the improperly admitted evidence of McFarland seeking a lawyer affected the jury's verdict. The State reasons that, "[i]n th[is] factual context, conferring with an attorney made sense and would have been unlikely to prejudice the jury." Yet, one of the State's arguments in support of the admissibility of the December 23 text, and one of the grounds upon which the trial court admitted the evidence, was that it tended to show consciousness of guilt. The State cannot have it both ways. In a case that came down to whether the jury believed McFarland's version of events -- that he acted in self-defense -- or the State's witness' version -- that they did not see Mr. Morrison pull his gun -- we cannot say that the improperly admitted evidence that McFarland was seeking a lawyer was not what caused the jurors to accept the State's version of events over McFarland's. This is especially so where, as here, the State wanted the jury to use the evidence in question to infer consciousness of guilt and find McFarland guilty. Accordingly, we conclude that the improper admission of the December 23 text was not harmless error and, therefore, we must vacate.

## II. The trial court erred in admitting the January 18 evidence because it lacked special relevance to the charges for which McFarland was on trial.

We now address whether the trial court erred in admitting the January 18 evidence to provide guidance to the court on remand.

McFarland moved in limine to exclude firearms and other items recovered from the Arunah Avenue house on January 18, 2023, arguing they constitute inadmissible "other bad acts" evidence under Maryland Rule 5-404(b) ("Rule 5-404(b)") in light of the trial court severing the charges associated with the day of McFarland's arrest. During the hearing on the motion, the State conceded that none of the firearms recovered on January 18 were "connected to the actual murder incident itself" but contended that the evidence nonetheless demonstrated McFarland's consciousness of guilt. The State reasoned that the evidence tended to show McFarland "was ready to prevent himself from being apprehended for th[e] murder" -- he fled the scene of the homicide, "stockpiled an arsenal because he was ready to go down with a fight," and had ample time between the police arriving on January 18, 2023, and finally being apprehended to conceal the evidence around the Arunah Avenue house. To support this theory, the State pointed to two pieces of evidence. First, the State pointed to evidence that two bullets recovered from the Arunah Avenue house were the same caliber and had the same production markings as bullet casings retrieved from the site of the homicide. The State, however, conceded that it had no ballistics evidence to connect the bullets retrieved from the Arunah Avenue house to the gun used in the homicide. Second, the State pointed to a text message that McFarland sent on December 25, 2022, stating "I got to rumble for my life if they do catch me."

In rebuttal, McFarland conceded that evidence related to the cell phones and vehicle recovered on January 18 was admissible, but urged that everything else -- a rifle, a handgun, magazines and ammunition, a cartridge casing, a gun cleaning kit, and bulletproof body armor -- should be excluded because he admitted in his opening statement that he killed

Mr. Morrison. Therefore, the evidence lacked any probative value and could only be used to cast him as a bad person. The trial court denied McFarland's motion in limine, finding that the State had proffered clear and convincing evidence to establish McFarland's connection and involvement with both the items and the Arunah Avenue house where they were found. Further, the trial court reasoned that -- because McFarland was claiming self-defense -- the evidence had special relevance to show McFarland's mental state and consciousness of guilt as well as to establish his access to firearms. Finally, the trial court concluded that the probative value of the January 18 evidence was "strong enough" that it was not substantially outweighed by the danger of unfair prejudice to McFarland.

At trial, the court granted McFarland a continuing objection to the admission of the evidence recovered from the Arunah Avenue house on January 18, 2023. The State first went through evidence tying McFarland to the Arunah Avenue house and then began the process of offering the objected to items into evidence. Then, over McFarland's continuing objection, the State spent about two hours admitting and presenting the January 18 evidence to the jury. The State proffered photographs of the January 18 evidence. In addition to the photographic evidence, the State also showed many of the items as physical exhibits and had its crime lab technician, who was a witness at trial, walk the handgun and rifle in front of the jury.

### A. Admission of the January 18 evidence was improper under Maryland Rule 5-404(b).

Pursuant to Rule 5-404(b), "[e]vidence of other crimes, wrongs, or acts" -- so-called "other bad acts" evidence -- is generally inadmissible "when it is offered 'to suggest that

because the defendant is a person of criminal character, it is more probable that [the defendant] committed the crime for which [the defendant] is on trial." *Browne v. State*, 486 Md. 169, 187 (2023) (quoting *Streater v. State*, 352 Md. 800, 806 (1999)) (alteration in original). This exclusionary rule is intended to prevent the jury from using "evidence of crimes that are not the subject of the trial 'to conclude that the defendant is a "bad person" and, therefore, should be convicted of the charges for which [the defendant] is on trial' for that reason, rather than based on evidence specific to those charges." *Id.* at 187–88 (quoting *Wynn v. State*, 351 Md. 307, 317 (1998)).

Other bad acts evidence is, however, admissible under Rule 5-404(b) "if it is substantially relevant to some contested issue in the case and if it is not offered to prove the defendant's guilt based on propensity to commit crime or [their] character as a criminal." *State v. Faulkner*, 314 Md. 630, 634 (1989) (citing *Ross v. State*, 276 Md. 664, 669 (1976)). When other bad acts evidence meets this initial hurdle, it is said to have "special relevance." *Browne*, 486 Md. at 190 (citing *Harris v. State*, 324 Md. 490, 500 (1991)). "Special relevance requires more than being 'technically or minimally relevant'; in addition to pertaining to an issue other than propensity, the issue must be genuinely contested and the evidence must be substantially relevant to it." *Id.* at 192 (quoting *Emory v. State*, 101 Md. App. 585, 602 (1994)). Said another way, "to have special relevance, other bad acts evidence 'must be strongly probative of an issue other than character that is a significant issue in the case.'" *Id.* at 190 (quoting 5 Lynn McLain, *Maryland Evidence: State and Federal*, § 404:5, at 760 (3d ed. 2013)).

A non-exhaustive list of purposes for which other bad acts evidence may be admissible is chronicled in Rule 5-404(b) and includes "motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, [or] absence of mistake or accident." Another non-propensity purpose "that will overcome the presumption of exclusion" attached to other bad acts evidence is consciousness of guilt. *Conyers v. State*, 345 Md. 525, 554 (1997) (citing *State v. Edison*, 318 Md. 541, 548 (1990)). Evidence of flight after a crime and "[o]ther attempts to conceal involvement in criminal activity" are common other bad acts evidence that Maryland courts have held are admissible to show a defendant's consciousness of guilt.[4] *Id.* at 554–55 (citing *Hunt v. State*, 312 Md. 494, 508 (1988)). Even where a permissible purpose for other bad acts evidence has been identified, "a court may not admit [such] evidence if the primary inference to be drawn from it depends on propensity reasoning." *Browne*, 486 Md. at 191.

On appeal, McFarland contends that the trial court erred in admitting the January 18 evidence under Maryland Rule 5-404(b) for two reasons. First, McFarland argues that the evidence was not substantially relevant to the crimes for which he was on trial -- the murder

[4] McFarland asserts that there is an additional layer to the special relevance determination where, as here, post-crime conduct is offered by the State as evidence of consciousness of guilt. Specifically, McFarland argues that, before consciousness of guilt evidence may be admitted under Rule 5-404(b), courts must be sure that the evidence supports the ultimate inference that the defendant's conduct tends to show that he is guilty of the crime charged. McFarland urges us to employ four inferences -- which he admits have not been used in the Rule 5-404(b) context -- to assess whether the State has satisfied its evidentiary burden in showing the relevance of evidence of post-crime conduct offered to show consciousness of guilt. *See, e.g.*, *Thomas v. State*, 372 Md. 342, 350–56 (2002); *Thomas v. State*, 397 Md. 557, 575–76 (2007). Because we conclude that the January 18 evidence lacked special relevance, we need not address whether these inferences are applicable in the Rule 5-404(b) context.

of Mr. Morrison and other crimes stemming therefrom. In support of this contention, McFarland emphasizes that even the State conceded that the January 18 evidence was "not connected to the actual murder incident itself." Second, McFarland contends that admitting the unrelated firearms evidence posed a danger of unfair prejudice to him that substantially outweighed any probative value the State claimed the evidence had. The State counters that the trial court properly admitted the January 18 evidence after finding it had special relevance on two independent bases.[5] First, the State argues that the evidence had special relevance to McFarland's intent or state of mind -- which tended to rebut his claim of self-defense -- because the evidence was inconsistent with the actions of someone claiming self-defense. Second, the State contends that the evidence was substantially relevant to consciousness of guilt because McFarland fled the homicide scene, went into hiding, and sent a text message to a friend on December 25, 2022, stating he would have to be ready to "rumble for [his] life if they do catch [him]." Further, the State argues that any danger of unfair prejudice to McFarland that the evidence posed did not substantially outweigh the evidence's probative value. We agree with McFarland that the January 18 evidence lacked special relevance. As a result, the trial court erred in admitting the evidence.

Before admitting other bad acts evidence under Rule 5-404(b), the trial court must be satisfied that three requirements are met. *Browne*, 486 Md. at 185 (citing *Faulkner*, 314 Md. at 634–35). We review the trial court's determination with respect to each requirement

[5] The State appears to also argue that McFarland's claim is unpreserved. We find no merit in this argument because the trial court explicitly granted McFarland a continuing objection at trial which properly preserved his claim. *See* Maryland Rule 4-323(b).

under a different standard of review. *Id.* at 193. First, the evidence must be substantially "relevant to some contested issue in the case other than the defendant's propensity to commit crime." *Id.* at 185–86 (citing *Faulkner*, 314 Md. at 634). We review the trial court's determination of whether the evidence has special relevance de novo. *Id.* at 193–94 (citing *Faulkner*, 314 Md. at 634). Second, the defendant's involvement in the other bad act must be "proven by clear and convincing evidence." *Id.* at 186 (citing *Faulkner*, 314 Md. at 634–35). We review the trial court's finding that this requirement is met for sufficiency of the evidence. *Id.* at 194 (citing *Faulkner*, 314 Md. at 635). Third, and finally, the probative value of the evidence must not be outweighed by the danger of unfair prejudice to the defendant. *Id.* at 186 (citing *Faulkner*, 314 Md. at 634–35). We review the trial court's "balancing of probative value against the danger of unfair prejudice for an abuse of discretion." *Id.* at 194 (citing *Faulkner*, 314 Md. at 635).

Here, the trial court erred in determining that the January 18 evidence had special relevance to a contested issue in the case. The State argues that the trial court properly concluded that the January 18 evidence had special relevance on two related grounds. First, the State contends that the evidence was especially relevant to McFarland's intent or state of mind because it was inconsistent with his claim of self-defense. At trial, the State reasoned that from the January 18 evidence, the jury could infer that after shooting Mr. Morrison, McFarland stockpiled weapons and was ready to resist arrest using those weapons. This inference, the State contends, was supported by the similarities between two bullets retrieved from the Arunah Avenue house and casings found at the site of the homicide as well as McFarland's December 25, 2022, text to a friend -- "I got to rumble

for my life if they do catch me." Second, the State asserts that, because the January 18 evidence showed that McFarland fled the homicide scene and was in hiding, it had special relevance to his consciousness of guilt.

To be properly admitted under Rule 5-404(b), the January 18 evidence had to be "substantially relevant to some contested issue in the case" other than McFarland's "propensity to commit crime." *Id.* at 190 (quoting *Faulkner*, 314 Md. at 634). At trial, McFarland conceded that he killed Mr. Morrison but argued that he did so in self-defense. The trial court, therefore, was correct in concluding that McFarland's state of mind and consciousness of guilt were genuinely contested issues at trial to the extent that they rebutted McFarland's self-defense claim. We disagree, however, with the trial court's conclusion that the January 18 evidence was substantially relevant to McFarland's state of mind and consciousness of guilt *with respect to the crimes for which he was on trial*.

Because the trial court severed the charges associated with McFarland's January 18 arrest, the only crimes for which McFarland was on trial were those stemming from the homicide on December 23, 2022. The January 18 evidence -- a rifle, a handgun, magazines and ammunition, a cartridge casing, a gun cleaning kit, and bulletproof body armor -- lacked any direct relevance, let alone special relevance, to McFarland's state of mind or consciousness of guilt with respect to the homicide. Indeed, the only evidence that the State offered to support the inference it contended the jury could draw from the January 18 evidence, namely that the evidence tended to show that McFarland did not act in self-defense, was that McFarland was illegally in possession of the contested evidence when he was in hiding and that he had texted a friend two days after the homicide that "[he] got to

rumble for [his] life if they do catch [him]." Moreover, it was McFarland's state of mind *at the time of the homicide* that was relevant, not his state of mind *after* the homicide. None of the January 18 evidence was relevant to McFarland's state of mind at the time of the homicide. Rather, as even the State conceded, the January 18 evidence was not connected to the homicide itself.

Further, to the extent that the two bullets retrieved from the Arunah Avenue house were relevant because they were of the same caliber and had the same markings as casings retrieved from the site of the homicide, they were only minimally relevant to show a connection between McFarland and the Arunah Avenue house. We cannot say that such evidence supports the inference that, because of similarities between the bullets and casings, McFarland stockpiled weapons and the other January 18 evidence and was ready to resist arrest for the crimes for which he was on trial.

Put simply, the January 18 evidence was not *substantially* relevant to McFarland's state of mind or consciousness of guilt with respect to the crimes for which McFarland was on trial. Indeed, the evidence at issue did not tend to make McFarland's self-defense claim any more or less likely. We, therefore, conclude that the January 18 evidence was not specially relevant to McFarland's intent, state of mind, or consciousness of guilt with respect to the homicide and related charges. Rather, the January 18 evidence was merely evidence of McFarland's post-crime conduct that reflected negatively on his character and invited the jury to infer that McFarland had the propensity to commit crime. Accordingly, the January 18 evidence was inadmissible other bad acts evidence, and the trial court erred in admitting it. In light of this conclusion, we need not address whether the trial court

abused its discretion in balancing the probative value of the evidence with the danger of unfair prejudice to McFarland.

**B. Admission of the January 18 evidence was not harmless error.**

Having concluded that the trial court erred in admitting the January 18 evidence, we turn briefly to the question of whether such error was harmless. The State argues that any error in admitting the January 18 evidence was harmless because there was ample other evidence of McFarland's consciousness of guilt, such as the fact that McFarland fled the scene and was in hiding. Further, the State contends that the manner of Mr. Morrison's death -- two shots to the head from close range -- severely undercut McFarland's self-defense claim, therefore the January 18 evidence could not have affected the jury's verdict. McFarland counters that, because the issue of whether McFarland acted in self-defense hinged on who's version of events the jury believed, the improper admission of the January 18 evidence was not harmless beyond a reasonable doubt. We agree with McFarland that the admission of the January 18 evidence was not harmless.

As explained *supra*, the State has the burden of proving beyond a reasonable doubt that the error in question was harmless; that is, that it played no role in the jury's verdict. *Porter*, 455 Md. at 234 (citation omitted). Here, we cannot say that the erroneous admission of the January 18 evidence was harmless. As discussed *supra*, this case turns on witness credibility. Moreover, the error in question was not an isolated incident. Indeed, significant time -- around two hours -- was spent at trial admitting the January 18 evidence and the trial court permitted the State's crime lab technician to walk the two admitted firearms in front of the jury as physical exhibits. In such circumstances, the

January 18 evidence may well have played a role in the jury's verdict. We, therefore, conclude that the admission of the January 18 evidence was not harmless beyond a reasonable doubt.

## III. The trial court erred in admitting evidence of McFarland's prior convictions for illegal possession of a firearm because the convictions were not for infamous crimes and McFarland did not open the door to such rebuttal evidence.

We now address the third evidentiary issue -- whether the trial court erred in admitting evidence of McFarland's prior convictions -- to provide further guidance to the trial court on remand.

While discussing McFarland's background on direct examination, defense counsel asked McFarland if he started carrying a gun as an adult. McFarland answered in the affirmative and explained in subsequent answers that he had started carrying a gun around 2008 or 2009 for safety because he lived in a dangerous neighborhood and had been in fights with gang members in the neighborhood. On cross-examination, the State asked whether McFarland "recalled when [he was] ever caught by police with a firearm." After McFarland objected on the basis that there were no impeachable offenses, the State countered that McFarland had opened the door by testifying about previously carrying firearms. Over McFarland's objection, the trial court allowed the State to proceed with questioning McFarland on two prior convictions for illegal possession of firearms, one from 2009 and the other from 2017. We shall include additional detail as it is relevant to our analysis.

On appeal, McFarland contends that the trial court erred in allowing the State to elicit testimony from McFarland on cross-examination concerning two prior convictions

for unlawful possession of a firearm as impeachment evidence under Maryland Rule 5-609 ("Rule 5-609"). McFarland reasons that the convictions at issue were not infamous crimes, nor did they have any bearing on his credibility. Therefore, the convictions were inadmissible. The State counters that the trial court did not admit the evidence of McFarland's prior convictions under Rule 5-609, but instead admitted them under the open door doctrine because McFarland testified on direct examination about when and why he began carrying firearms. As we explain below, though we agree with the State regarding the theory under which the prior convictions were admitted, we conclude that the trial court erred because McFarland did not open the door to evidence of his prior firearms convictions.

### A. McFarland's prior convictions for illegal possession of firearms were not admissible under Maryland Rule 5-609.

We review the trial court's decision to admit impeachment evidence under Rule 5-609 for abuse of discretion. *King v. State*, 407 Md. 682, 696–97 (2009). Abuse of discretion is a highly deferential standard of review which only allows us to disturb the trial court's decision when we conclude that "no reasonable person would take the view adopted by the [trial] court." *Id.* at 697 (quoting *North v. North*, 102 Md. App. 1, 13 (1994)).

The circumstances under which a party may use a prior conviction to impeach a witness are governed by Rule 5-609.[6] In assessing whether a prior conviction may be

[6] In the pertinent part, Rule 5-609 provides:

admissible under Rule 5-609 to impeach a witness, courts use a three-part test. *Anderson v. State*, 227 Md. App. 329, 339 (2016) (citation omitted). First, the court must determine "whether the conviction sought to be used to impeach a witness's credibility falls within the 'eligible universe' of crimes, which consists of two categories 'infamous crimes' and 'other crimes relevant to the witness's credibility.'" *Id.* (quoting *King*, 407 Md. at 698–99). The former category includes treason, common law felonies, and other crimes that consist of some element that bears on the witness's character for truthfulness. *Id.* at 339 & n.8 (citing *King*, 407 Md. at 699). To fall into the latter category, the elements of the crime must tend to show that the witness "is unworthy of belief." *Id.* at 339 (2016) (quoting *Washington v. State*, 191 Md. App. 48, 82 (2010)). "If the prior crime is not within either of the two categories, 'it is inadmissible, and the analysis ends.'" *Id.* at 339–40 (quoting *State v. Westpoint*, 404 Md. 455, 477 (2008)). Second, if the prior conviction falls into one of the aforementioned categories, the trial court must determine that it is "not more than 15

> (a) **Generally.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but *only if* (1) the crime was *an infamous crime or other crime relevant to the witness's credibility* and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.
>
> (b) **Time limit.** Evidence of a conviction is not admissible under this Rule if a period of more than 15 years has elapsed since the date of conviction, except as to a conviction for perjury for which no time limit applies.

years old." *Id.* at 340 (quoting *Westpoint*, 404 Md. at 477–78). Third, and finally, the court "must determine that the probative value of the prior conviction outweighs the danger of unfair prejudice to the witness or objecting party." *Id.* (citing *Westpoint*, 404 Md. at 478).

Here, evidence of McFarland's two prior convictions for illegal possession of a firearm were plainly inadmissible under Rule 5-609. To be sure, illegal possession of a firearm "is neither an infamous crime nor a crime relevant to [McFarland's] credibility." *Id.* at 341 (holding that "the crime of carrying a concealed weapon is [not] an infamous crime"). Accordingly, the prior convictions in question were inadmissible to impeach McFarland.

**B. McFarland's prior convictions for illegal possession of a firearm were not admissible under the open door doctrine.**

We now turn to whether McFarland's prior convictions were properly admitted by the trial court under the open door doctrine. We review "whether a party opened the door to introduce rebuttal evidence de novo." *State v. Robertson*, 463 Md. 342, 353 (2019). "The open door doctrine is based on principles of fairness and serves to 'balance any unfair prejudice one party may have suffered.'" *Id.* at 351–52 (quoting *Little v. Schneider*, 343 Md. 150, 163 n.6 (2013)). To accomplish its purpose, the open door doctrine "authorizes parties to 'meet fire with fire, as they introduce otherwise inadmissible evidence . . . in response to evidence put forth by the opposing side.'" *Id.* at 352 (quoting *Little*, 434 Md. at 157). Evidence admitted under the open door doctrine is often termed "rebuttal evidence." *See, e.g.*, *Id.* at 352; *State v. Heath*, 464 Md. 445, 461 (2019). At bottom, the open door doctrine is a "rule of expanded relevancy," which "authorizes admitting

evidence which otherwise would have been irrelevant in order to respond to . . . admissible evidence which generates an issue." *Robertson*, 463 Md. at 352 (citation omitted).

The State contends that the trial court properly admitted evidence of McFarland's two prior convictions as rebuttal evidence after McFarland opened the door by testifying about when and why he began carrying a firearm. McFarland counters that he did not open the door because his testimony did not generate an issue which would allow the State to respond on the basis of fairness. We agree with McFarland that he did not open the door. Therefore, the trial court erred in admitting evidence of his prior convictions.

**1. *The trial court admitted evidence of McFarland's prior convictions under the theory that McFarland had opened the door.***

We first analyze whether, as the State asserts, the trial court admitted evidence of McFarland's two prior illegal possession of a firearm convictions under the theory that McFarland had opened the door. Based on our review of the record, we conclude that the trial court admitted McFarland's prior convictions not as impeachment evidence, but instead under the theory that McFarland had opened the door. Indeed, after defense counsel objected to the State's questions concerning McFarland's prior convictions on cross-examination, the following colloquy ensued:

> [DEFENSE COUNSEL]: There are no impeachable offenses that -- we have agreed to that [the State] and I. [The State] is now getting to the point where [its] going to ask about possible convictions, about arrests and I don't think that's appropriate. If [the State] can't use it for impeachment it should not come in and that's one of the reasons we stipulated.
>
> THE COURT: I think -- well, I'll hear the State on relevance.

> [THE STATE]: He opened the door as soon as he started talking about carrying firearms in 2008.
>
> THE COURT: We've got him carrying firearms saying he was in fights, saying that he felt he was threatened. As long as it's after the dates that he said why isn't -- *why isn't the door now wide open* to any occurrence that happened during those -- that period?
>
> [DEFENSE COUNSEL]: I think that the stipulation takes care of that. I think that unless there's an impeachable offense he can't ask about it. He can say did you carry, yes, but when you get into convictions, no.
>
> THE COURT: *It's now relevant based on what the defendant has introduced* and it's relevant for its truth, not -- not for impeachment, but for it's truth. I mean it is impeachment, but it's now impeachment on the occurrence of certain events *that the witness himself placed* in 2008 or 2009. So as long as the arrest or the convictions occurred after those dates, they're events that -- that *the defendant himself* has not [sic] put at issue. Overruled.

(Emphasis added). The crux, therefore, of the trial court's determination that McFarland's prior convictions were admissible was that McFarland opened the door by placing the fact that he carried firearms staring in 2008 or 2009 for safety at issue. We, therefore, conclude that the trial court allowed the evidence of McFarland's prior convictions under the open door doctrine.

**2. *McFarland did not open the door to evidence of his prior convictions.***

We now turn to the issue of whether McFarland opened the door to the State's questioning about his prior convictions for illegal possession of firearms. Because the overarching purpose of the open door doctrine is to prevent prejudice, "what [evidence] comes through the door" must be to rebut or clarify the evidence the opposing party

introduced in the first instance.[7] *Savoy v. State*, 64 Md. App. 241, 253–54 (quoting *United States v. Winston*, 447 F.2d 1236, 1240 (D.C. Cir. 1971)).

For example, in *Robertson*, during direct examination, defense counsel asked the defendant whether he had ever gotten "into *any trouble*" as a juvenile or adult. *Robertson*, 463 Md. at 358–59 (emphasis added). The defendant responded in the negative. *Id.* On cross-examination, and over defense counsel's objection, the trial court allowed the State to introduce evidence of a previous incident that resulted in the defendant's suspension from college under the theory that the defendant had opened the door. *Id.* at 349 n.1. On appeal, the Supreme Court of Maryland concluded that the "general nature of defense counsel's questioning generated an issue as to [the defendant's] good character," which the State could rebut with evidence of the defendant's previous incident. *Id.* at 361.

Similarly, in *Little*, the defendant extensively discussed an expert witness's "accomplishments, credentials, and qualifications" during both opening arguments and in

[7] McFarland also relies on *Cason v. State*, 66 Md. App. 757 (1986) for this proposition. In *Cason*, the trial court admitted evidence of the defendant's prior convictions for selling heroin under the theory that the defendant had opened the door by testifying that he had never used heroin and that he did not know how it was normally packaged for resale. *Id.* at 763–65, 775. This Court concluded that the defendant did not, in fact, open the door noting that "[t]he fact that [the defendant] *sold* heroin prior to his arrest in 1983 does not contradict or in any way negate his testimony that he never *used* heroin." *Id.* at 776 n.4 (emphasis added). While McFarland is correct that the scenario in *Cason* is largely analogous to the instant case, there is one critical difference. In *Cason*, this Court's decision on the inadmissibility of the defendant's prior convictions was principally based on the fact that it was the State, not the defendant, who had generated the issue as to the defendant's use of heroin. *Id.* at 776. Because it was the State that had elicited the testimony while cross-examining the defendant that it subsequently sought to rebut, the open door doctrine was inapplicable. *Id.*

its examination of the expert. *Little*, 434 Md. at 158–59. Subsequently, while examining the expert witness, the plaintiff inquired into the expert's lack of board certification. *Id.* at 160–61. The Supreme Court of Maryland concluded that, by "paint[ing] a picture of [the expert witness] as a model of excellence in [his] field . . . and a great humanitarian," the defendant exceeded the scope of appropriate accreditation of a fact witness and opened the door to rebuttal inquiry." *Id.* at 163.

In both *Richardson* and *Little*, counsel who opened the door clearly put the witness's character at issue by painting them in a favorable light. Further, the rebuttal evidence offered in *Richardson* and *Little* directly contradicted what the opposing party had put at issue. The instant case stands in stark contrast to *Richardson* and *Little* and, therefore, warrants a different result.

During defense counsel's direct examination of McFarland, the following background was elicited:

> [DEFENSE COUNSEL]: Now as an adult did there come a time when you start [sic] to carry a gun?
>
> [MCFARLAND]: Yes.
>
> [DEFENSE COUNSEL]: And -- and when was that and why was that?
>
> [MCFARLAND]: I believe I started carrying back in 2008, 2009 and the reason behind that was I got into a fight.

The trial court overruled the State's objection on relevancy grounds and defense counsel continued questioning McFarland:

> [DEFENSE COUNSEL]: As I was saying now, Mr. McFarland, why did you begin carrying a gun?

> [MCFARLAND]: I started carrying a gun due to me being in fights with gang members and things of that nature in my neighborhood.
>
> [DEFENSE COUNSEL]: I see. When you say gang members, were there gang members in your neighborhood?
>
> [MCFARLAND]: Yes, sir.
>
> [DEFENSE COUNSEL]: Did that continue carrying that -- a weapon up until the time you were arrested?
>
> [MCFARLAND]: Yes, sir.
>
> [DEFENSE COUNSEL]: And why did you continue to carry a weapon during that period of time?
>
> [MCFARLAND]: Because due to my being in physical altercations with known gang members, I have been shot at, I had a guys [sic] try to stab me, so I always had a constant fear for my life and my well-being since nobody want to be a man and take a regular few bumps and bruises and keep on living, so.

McFarland's testimony here did not paint him as an upstanding citizen similar to the testimony involved in *Robertson* and *Little*. Rather, it painted him as someone who had carried a firearm for years to protect himself when he got into fights with people from his neighborhood. Further, McFarland's testimony about carrying a gun because he lived in a dangerous neighborhood did nothing to put his credibility or character at issue.

After the trial court overruled McFarland's objection to evidence concerning his prior convictions for illegal possession of a firearm, the State elicited the following from McFarland on cross-examination:

[THE STATE]: All right. Mr. McFarland, isn't it true that you've been arrested and convicted of illegally possessing regulated firearms since 2008?

[DEFENSE COUNSEL]: I object again, Your Honor.

THE COURT: Objection is overruled.

[MCFARLAND]: Yes.

[THE STATE]: And one such year was in 2009?

[MCFARLAND]: Yes.

[THE STATE]: And another year was 2017?

[MCFARLAND]: Yes.

[DEFENSE COUNSEL]: I object to both, Your Honor.

THE COURT: Thank you. The objection is overruled.

. . .

[THE STATE]: Since 2009 there have been at least two occasions where you've been convicted of illegally carrying a firearm; correct?

[DEFENSE COUNSEL]: Objection, asked and answered.

THE COURT: Overruled. You can answer.

[MCFARLAND]: Yes.

[THE STATE]: And that would be over the span of approximately 15 years?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled, approximately.

[MCFARLAND]: Yes.

As discussed *supra*, the State contended, and the trial court agreed, that McFarland's testimony put at issue the fact that he carried a gun in 2008 or 2009 because he lived in a dangerous neighborhood. According to the State and the trial court, therefore, the State was entitled to introduce rebuttal evidence. The two prior convictions introduced, however, did nothing to rebut or clarify what McFarland supposedly put at issue -- that he started carrying a gun around 2008 or 2009 for safety and continued to do so until he was arrested for the murder of Mr. Morrison. If anything, the testimony concerning the convictions that the State elicited *supported* McFarland's testimony on direct examination. We, therefore, conclude that the trial court erred in determining that McFarland opened the door to the State's questioning about his prior convictions for illegal possession of a firearm. Because we are merely addressing this issue to provide guidance to the trial court on remand, we need not address whether such error was harmless.

## IV. McFarland waived his Second Amendment challenge because he failed to raise the issue prior to filing his Motion for New Trial.

McFarland contends that two statutes that he was convicted of violating deprive him of his Second Amendment rights under the U.S. Constitution under Supreme Court precedent such as *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022) and *United States v. Rahimi*, 602 U.S. 680 (2024). The State counters that, because McFarland raised this claim for the first time in his Motion for New Trial, he did not preserve his Second Amendment challenge for review on appeal. We agree with the State that McFarland failed to preserve his Second Amendment challenge for review.

Before raising an issue on appeal, a party must preserve the challenge at trial by making a timely objection. *See Torres v. State*, 95 Md. App. 126, 134 (1993). Raising an issue "for the first time in a motion for a new trial is not a substitute for preservation." *Washington*, 191 Md. App. at 121 n.22; *see also Torres*, 95 Md. App. at 134 ("A post-trial motion cannot be permitted to serve as a device by which a defendant may avoid the sanction for nonpreservation."). This is especially so when it comes to constitutional challenges as it is our Court's "well-established policy to decide constitutional issues only when necessary." *Robinson v. State*, 404 Md. 208, 217 (2008) (citing *Burch v. United Cable*, 391 Md. 694–96 (2006)).

Here, McFarland did not preserve his Second Amendment challenge because he failed to raise it prior to his Motion for New Trial. At the close of the State's case-in-chief, McFarland moved for Judgment of Acquittal on all counts. The pertinent exchange is as follows:

> [DEFENSE COUNSEL]: As to the crimes of violence I will submit on four, five, six, seven. There -- number eight --
>
> THE COURT: Well, six is possession of a firearm used in the shooting by a prohibited person.
>
> [DEFENSE COUNSEL]: I will not make argument on that at this point. Eight is there's been on proof that there was a gun in the car. Nine, there's been no proof that the gun, if there was one that was removed from Mr. Morrison was a firearm that is legally characterized as a firearm in Maryland. Same as ten. No -- again, nothing in the -- in the evidence that would indicate on 11 that there was a gun in the vehicle. So I would submit on those. Thank you, Your Honor.

The other arguments that McFarland made in his Motion for Judgment of Acquittal revolve around sufficiency of the evidence. The trial court denied McFarland's Motion for Judgment of Acquittal. After presenting his case, McFarland renewed his Motion for Judgment of Acquittal on the same grounds and the trial court denied the motion.

After the jury returned a verdict convicting McFarland, McFarland moved for a new trial. It was only then, in his Motion for New Trial, that McFarland raised any Second Amendment challenge. During the hearing on the Motion for New Trial, the trial court questioned whether the Second Amendment challenge was preserved for either the Motion for New Trial or for appellate review because the issue had not been raised during trial. In denying the Motion for New Trial, the trial court again questioned the preservation of McFarland's Second Amendment challenge and declined to opine on the merits, instead stating that -- to the extent preserved -- the challenge was better addressed on appeal.

The trial court was correct in questioning whether McFarland preserved his Second Amendment challenge. As noted, raising an issue for the first time in a Motion for New Trial -- as McFarland did here -- is not a substitute for preservation. We, therefore, conclude that McFarland waived his Second Amendment challenge and, accordingly, we do not reach the merits.

## CONCLUSION

For the foregoing reasons, we hold that admitting evidence that McFarland was seeking an attorney on the day of the homicide violated McFarland's due process right to a fair trial under both the Fourteenth Amendment of the U.S. Constitution and Article 24 of the Maryland Declaration of Rights. We further hold that evidence that McFarland was

seeking an attorney was irrelevant to his consciousness of guilt and, to any extent that it was relevant to prove ownership of the phone from which the text message was sent, its probative value was substantially outweighed by the danger of unfair prejudice to McFarland. We, therefore, vacate the judgment of the trial court and remand for further proceedings consistent with this opinion.

**JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR A NEW TRIAL. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.**