Circuit Court for Baltimore County
Case No.: C-03-CR-23-002072

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1122

September Term, 2024

KENNETH LEON DAVIS, JR.

v.

STATE OF MARYLAND

Wells, C.J.,
Reed,
Battaglia, Lynn A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, C.J.

Filed: June 10, 2026

*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).

Appellant, Kenneth Leon Davis, Jr., was indicted in the Circuit Court for Baltimore County and charged with first-degree murder and related counts. The State's theory of the case was that Davis murdered the victim because she was an eyewitness to a double homicide. Davis was tried by a jury and convicted of first-degree murder, various firearm offenses, and witness intimidation. After he was sentenced to life imprisonment without the possibility of parole for the murder, as well as a consecutive sentence of 55 years for the remaining offenses, Davis filed this timely appeal and presents one question for our review:

> I. Where the State creates a zone of privacy in a jail cell, and then violates that zone by guile, all while the defendant is represented by counsel, does Article 24 of the Maryland Declaration of Rights require suppression of the fruits of that violation?

For the following reasons, we shall affirm.

BACKGROUND

On September 6, 2018, Tracey Carrington was shot twelve times at close range as she was entering the passenger side of her friend's car following a music event at S&S Lounge near Overlea Road in Baltimore County. Carrington sustained gunshot wounds to her neck, chest, side, back, arms, and legs; the projectiles pierced vital organs, and she died as a result of the attack. During the course of the investigation, the police learned Carrington was a witness to a double homicide that transpired at an apartment complex near the Towson Town Center on April 8 and 9, 2018. Two brothers, Nyghee Johnson and Norwood Johnson, were charged and ultimately convicted in early 2020 of felony murder in connection with the killings of Stanley Brunson and Shameek Joyner. They each

received a forty-year sentence. Davis, the appellant here, was close friends with the Johnson brothers and attended most of their trial in early 2020.[1]

Carrington's murder remained unsolved until May 2022, when an individual named Darrell Mason was arrested in Georgia on outstanding Baltimore City charges. Upon his arrest, Mason informed Georgia law enforcement that he had information about the Carrington murder. Mason was extradited to Baltimore, advised of his *Miranda* rights, and interviewed. He also testified at Davis' trial as a State's witness.

Mason testified that he was Davis' childhood friend. The two had been close since childhood, lived together at one point in 2017, and referred to each other as brothers. Mason also knew Davis was friends with the Johnson brothers.

According to Mason, on the night of Carrington's murder in September 2018, Davis appeared at Mason's home on Burgess Avenue late at night, carrying a bag containing two guns. Mason and Davis went into the backyard, where Davis dug a hole and buried the guns, then burned clothing in a backyard grill before leaving. Davis left his vehicle in front of Mason's home and was driven away in another vehicle. At that time, Mason did not ask Davis any questions about why they were burying guns and burning clothes.

The next day, Davis called Mason and told him to "Take them joints to Geezy." Mason testified that a "joint" was slang for a gun and that he did not know "Geezy's" real

[1] This Court affirmed the convictions in an unreported opinion. *Nyghee N. Johnson & Norwood T. Johnson v. State of Maryland*, Nos. 89 & 124, Sept. Term, 2020 (filed July 13, 2021).

name. Soon thereafter, an individual named Akeem Belvin arrived at Mason's home, dug up the two guns as well as extended ammunition clips from the backyard, and took them with him. Mason testified that he learned about the Carrington murder the next day.

Approximately one week later, when Mason went to Davis' apartment to buy marijuana, Mason overheard Davis speaking about Carrington's murder and what Davis had done. Specifically, Mason overheard Davis state, "I got that bitch. They ain't got to worry about it." According to Mason, Davis also stated, "Oh, yeah, you know, waited for her to come out the club. Then I just ran down on her." Mason also testified that, prior to Carrington's murder, he overheard Davis offer Belvin $5,000 "to take the hit," asking Belvin, "Are you going to do that?" Mason acknowledged he had not come forward with this information until his arrest in Georgia in May 2022.

After Mason was extradited to Maryland in June 2022, he agreed to participate in a recorded conversation with Davis in exchange for consideration on a pending Baltimore County gun charge—with no benefit extended to his Baltimore City cases. On June 14, 2022, Mason and Davis were placed together in a holding cell on the third floor of the courthouse. Although there was already a video camera in the cell, detectives from the Intel Unit added an audio recording device in the cell.

Davis and Mason then engaged in a conversation that lasted approximately one hour and twenty minutes, which was recorded in its entirety. Among other things, and as explained by Mason during his trial testimony, Mason asked Davis about the night Carrington was killed, asking him "[y]ou were trying to get people to do it," with Davis

responding, "I did that shit myself." In addition, after Davis brought up the Johnson brothers, Mason asked whether Davis was "caught for that," and Davis replied he was not, but continued that "[y]ou never know when your time will come up -- cold cases." The recording further captured Davis using the phrase "immediate death penalty" in the context of the conversation about the guns and the night of the murder.

In addition, Mason and Davis talked about the location of the murder weapons after Carrington's murder. The recording captured Davis asking Mason what happened to the "joints," and Mason clarified that "joints" meant guns. Mason explained he was mad at Davis because Mason "was supposed to have took and sold the guns and got rid of them." Mason told Davis that Belvin dug up and took the guns from Mason's yard.

Davis testified on his own behalf at trial. He acknowledged knowing Mason, describing him as a familiar face from the neighborhood whom he had known since age thirteen. He also acknowledged he sold marijuana and that, as a result, he kept firearms. Davis further discussed knowing the Johnson brothers and confirmed he was close to them, having attended portions of their trial and allowed them to work at his mechanic shop while they were on home detention pending that proceeding. He also stated that he knew the murder victims, Stanley Brunson and Shameek Joyner.

Davis denied killing Tracey Carrington. He acknowledged knowing Carrington from the neighborhood around Morgan State University. He further acknowledged that he was aware Carrington had been present at the apartment where the Towson homicides occurred and that she was a potential witness in the Johnson brothers' case. He denied ever

discussing her murder with Mason or burying guns or burning his clothes in Mason's backyard. He explained that when he and Mason discussed "joints" in the jail cell recording, they were referring to guns Mason stole from him in 2017—the primary source of Davis' and Mason's falling out—and not to any weapons connected to Carrington's murder.

We shall include additional detail in the following discussion.

DISCUSSION

Davis contends the circuit court erred in denying his Supplemental Motion to Suppress the recording of his jail cell conversation with Mason on the grounds that the State's orchestration of the encounter violated a right to privacy guaranteed by Article 24 of the Maryland Declaration of Rights.[2] Specifically, Davis argues that "state action created an Article 24 zone of privacy in the Circuit Court's holding cell into which the informant Mason and [Davis] were deliberately placed together for an extended period on June 14, 2022. This Court should find that the right to privacy conferred by Article 24 extends to the holding cell under the circumstances created by the State on June 14, 2022."

The State contends Davis' argument is not preserved because the Article 24 claim—the only claim raised on appeal—was never raised in the circuit court. The State explains

[2] Article 24 provides: "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Md. Constitution, Declaration of Rights, Art. 24. *See also Doe v. Dep't of Pub. Safety*, 185 Md. App. 625, 643 (2009) (recognizing that the right of privacy under the Maryland Constitution is *in pari materia—i.e.*, deals with the same subject matter—with the federal Constitution's Due Process Clause).

Davis' Supplemental Motion to Suppress and his argument before the court were based solely on two grounds: (1) he was subject to custodial interrogation without being advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966); and (2) the State created an expectation of privacy that violated his Fourth Amendment rights under *Katz v. United States*, 389 U.S. 347 (1967). The State also responds on the merits and argues Article 24 does not encompass a privacy right in a jail cell in any event, and that any error in admitting the recording was harmless beyond a reasonable doubt where Mason's testimony at trial was cumulative of the contents of the jail cell recording.

As will be explained, Davis' argument on appeal is not preserved and is harmless error in any event. As such, we decline to address the merits of Davis' claim. The pertinent pleadings, hearings, and arguments follow.

Davis' Supplemental Motion to Suppress

The following facts were set forth in the motion:

> [Davis] is charged with 1st Degree Murder and is scheduled for trial on April 8th, 2024, in front of the Honorable Robert E. Cahill, Jr. Mr. Davis is charged with the murder of Tracy Carrington which occurred on September 6, 2018, near the S & S Lounge in Baltimore County. Ms. Carrington was a witness in a murder case in Baltimore County and was scheduled to testify for the State.
>
> On or about May 17th, 2022, Darrell Mason was extradited to Baltimore City for a pending case in which he failed to appear. At the time of his extradition, he had a pending Baltimore County case in which he was charged with among other crimes, Illegal Possession of a Regulated Firearm. While in custody, Mr. Mason told Baltimore City detectives he knew information about an unsolved murder in Baltimore County. Baltimore County detectives were notified and were brought in to speak with Mr. Mason. After several interviews, an agreement was made between Mr. Mason, Baltimore County Police Department and the Baltimore County

> State's Attorney's Office in which Mr. Mason would plead guilty in his pending case to Illegal Possession of a Handgun, receive a suspended sentence and State would not oppose a disposition of Probation Before Judgment (he was also given housing and monetary aid). In exchange, Mr. Mason would meet with [Davis], whom he had known for many years, and entice him to speak about the murder. The meeting would occur in a Baltimore County Circuit Court jail cell which the Baltimore County Police had wired.
>
> On June 14, 2022, [Davis], represented by Ms. Andrea Jaskulsky, appeared in front of the Honorable Robert E. Cahill, Jr. and pled guilty to 1st degree Assault and Illegal Possession of a Firearm. While he was waiting to appear in front of Judge Cahill, he was placed in the wired cell. Mr. Mason was brought into the cell. The jail cell was wired for audio by the Baltimore County Police with assistance from court personnel (video is already in the cells). Two detectives posed as inmates wearing the Harford County black and white inmate attire. [Davis] was brought in the cell when the two inmates (the detectives) left and Mr. Mason arrived. Mr. Mason and [Davis] were left alone in the cell. The two men began speaking to each other. During the conversation, the State alleges [Davis] confessed to the murder.

Davis argued two grounds for suppression in the motion: (1) that "[t]he circumstances created by the State violated [Davis'] privilege against self-incrimination"; and (2) that "[Davis] had a reasonable expectation of privacy in the jail cell which was violated when a state agent engaged in a conversation with him." With respect to the first argument, Davis contended he was in custody in the circuit court jail cell, that Mason was a state agent, and that he was subject to the functional equivalent of interrogation without having been advised of his *Miranda* rights. Davis continued, "[t]he sole purpose of Mr. Mason having a conversation with [Davis] was to elicit information about the murder of Tracy Carrington and [Davis'] involvement in the murder. As such his statement(s) during the conversation should be suppressed."

With respect to the second argument, and solely relying on the Fourth Amendment rights espoused by the United States Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967), Davis specifically argued "the State created a private environment in which [Davis] had a reasonable expectation of privacy," that "[t]he privacy created established [Davis'] reasonable expectation of privacy in the conversation he was having with Mr. Mason," and "[Davis'] reasonable expectation privacy was violated by the State and his statement should be suppressed."

State's Answer to Davis' Supplemental Motion to Suppress

In its written response, the State agreed with parts of Davis' statement of facts with the following modifications. The State spelled the victim's first name "Tracey" rather than "Tracy" and added that her murder went unsolved for several years. The State described Mason as having identified Davis as responsible for the murder and as believing he could get Davis—who had not yet been charged—to discuss the murder. The State noted Mason was represented by counsel when the agreement was reached and described its terms more narrowly, omitting any reference to housing or monetary aid and characterizing the suspended sentence and non-opposition to Probation Before Judgment as the ultimate outcome rather than agreed-upon terms. The State attributed wiring assistance to the Baltimore County Sheriff's Department rather than court personnel, added that the detectives were placed in the cell before Mason and Davis, and characterized Davis' statements not as a confession but as self-incriminating remarks made during a lengthy conversation on a variety of topics.

With respect to Davis' first argument, the State responded that pursuant to *Hamilton v. State*, 62 Md. App. 603 (1985), *cert. denied*, 303 Md. 682 (1985), Davis was not in custody because the Fifth Amendment and *Miranda* do not apply to a person already in prison confinement. *See Hamilton*, 62 Md. App. at 611–17 (concluding Hamilton was not subject to custodial interrogation where there was "nothing coercive whatsoever in the casual questioning by the [informer] who ostensibly was not a police interrogator, that would functionally or effectively subjugate appellant to [the informer's] will"). The State argued, "[d]espite being in detention center custody and in a courthouse lockup cell, there is nothing coercive about the situation or atmosphere as it relates to the conversation between the [Davis] and Mr. Mason. While under the case law of Maryland Mr. Mason may be considered a state actor in this situation, [Davis] was not in custody for purposes of the 5th Amendment and therefore there is no requirement that Miranda warning be given."

With respect to Davis' second argument, the State responded that Davis "had absolutely no idea that any of these things—the choosing of a cell, wiring it, putting specific people in and out—were happening. An 'expectation' has to be founded on some knowledge or belief." Whereas Davis had no knowledge of these events, he could not "have any expectation of privacy based on things that he wasn't even aware of." Further, the State noted that Davis and Mason were in a cell inside the crowded courthouse, which was not "private." Davis "chose to engage in conversation with a person he'd known for many years about a variety of topics. And he chose to do so in a courthouse lockup cell, where

anyone, including other inmates and/or the sheriff deputies, could potentially be listening." Thus, the State claimed there was no expectation of privacy.

Oral Argument on the Supplemental Motion[3]

A. Miranda *Custody*

Davis' principal contention was that the recorded conversation must be suppressed because he was subjected to custodial interrogation without *Miranda* warnings or a valid *Miranda* waiver. At the hearing, and relying on *Hamilton, supra*, the State disagreed that Davis was in custody. In *Hamilton*, the defendant made several statements to an acquaintance, who was wearing a body wire, while Hamilton was incarcerated in connection with an unrelated murder. *Hamilton*, 62 Md. App. at 607. This Court agreed Hamilton was interrogated but disagreed that he was subject to custodial interrogation. *Id*. at 611 ("Only if the accused is in a situation where there are inherently compelling pressures to respond to the interrogation are *Miranda* warnings required."). We explained:

[3] After jury selection, the court heard argument on the supplemental motion. As the parties both recognize, the court did not take any evidence prior to argument, nor did it state that it was relying on the proffers set forth in the written motion and response. Although, as will be explained, we decline to consider the issues raised on the merits, our standard of review of a suppression motion is well established. *See generally*, *State v. McDonnell*, 484 Md. 56, 78 (2023) (setting forth the applicable standard of review). The parties direct our attention to *Portillo Funes v. State*, 469 Md. 438 (2020), where, although the circuit court declined to hear evidence on a suppression motion, styled there as a motion *in limine*, our Supreme Court reviewed the issue in any event because the record was sufficiently developed. *Id*. at 461–62. Were we to reach the merits here, we are persuaded the same standard would apply. *See also Matoumba v. State*, 390 Md. 544, 552 (2006) (recognizing a suppression court has broad discretion "to decline to strictly apply the Rules of Evidence").

"While appellant may have been incarcerated, there is nothing in the record which would indicate to a reasonable person that appellant was not free to discontinue the conversations[.]" *Id.* at 615; *see also Illinois v. Perkins*, 496 U.S. 292, 296–297 (1990) (prisoner who speaks with an undercover officer in his prison cell, believing him to be a fellow prisoner, is not in *Miranda* custody, stating "*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner"). Here, the State argued *Hamilton* was no different and that there was no coercion because Davis could have "just cut off communication if he wanted to," and that he was not forced to talk to Mason.

Davis responded to this argument by first noting there was no dispute that Mason was acting as a state agent. Then, attempting to distinguish *Hamilton*, Davis argued the holding cell in the courthouse was not part of Davis' regular place of incarceration and this was an "artificial custodian situation created by the State[.]"

B. Expectation of Privacy under the Fourth Amendment

As for Davis' argument that the taped conversation with Mason violated his expectation of privacy, the State first argued that courts have "repeatedly found that inmates don't have an expectation of privacy in their cells." The State argued Davis specifically had no expectation of privacy because, from his own perspective, nothing about the encounter was out of the ordinary. As the State put it, "from [Davis'] perspective, he is brought over for a hearing. He's taken to a lockup cell. There's someone that he knows in the cell, and they talk." The State emphasized the setting: deputy sheriffs were moving

in and out of the cell, and Davis found himself "in the middle of a courthouse in the middle of the afternoon," which, the State argued, "is not a sort of hidden corner of a detention center somewhere where [Davis] would believe that he has some expectation that nobody can hear what he's saying." The State further explained that any expectation of privacy must be grounded in the Davis' own knowledge, and that because Davis "had absolutely no idea that the State had done anything" to arrange the encounter, "he couldn't possibly have had any expectation of privacy." The State concluded that "there is nothing private about the cell he was in, other than he's in there with someone that he knows," and that courts have repeatedly held that inmates have no expectation of privacy in their jail cells.

Davis conceded "[he] does not have an expectation of privacy in a jail cell," but that "this isn't just a jail cell." Davis was represented by counsel and was in the courthouse for a hearing when the State "created . . . an expectation of privacy" because it picked the date and location for this encounter. Davis continued that "everything was artificially created in order to get [Davis] in that cell on that day to talk to [the State's] agent. And normally, we don't have jail cells that are wired." Further, "everything was created by the State to sort of lure him into believing that it was a private conversation."[4]

[4] Argument concluded with the parties disagreeing whether one of the undercover detectives was still in the room when Davis and Mason began talking about the Carrington murder. Here, the parties seemed to agree that the video and audio were recorded separately, making it difficult to determine when the undercover officers left the room. We have also reviewed the audio recording, which was admitted at trial over objection as State's Exhibit 50, and agree with Davis' assessment that the recording was "nearly impossible" to understand.

C. *Court's Findings and Ruling*

The court found as follows:

> THE COURT: All right. So, thank y'all very much. This was nicely briefed. I do find consistent with the State's position that [Davis] was not in Miranda custody for the purpose of analyzing whether or not he was entitled to warnings under the circumstances presented here.
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> It was a -- there was a subterfuge to be sure. But I don't think that that causes this to be properly characterized as a custodial interrogation as opposed to whatever the devil it was. So, on that grounds, the Motion is denied.
>
> Likewise, I don't determine that there's any expectation of privacy in a jail cell, whether that jail cell be in the Circuit Court building or over at the detention center or down at the DOC. Under the circumstances presented -- and I don't think the fact that -- it's an interesting argument that the -- that these other guys, the undercover detectives were brought into the cell wearing Harford County Detention Center garb.
>
> I still don't think that vitiates the idea that there's just no reasonable expectation of privacy in a jail cell, be it in here in the courthouse or over at the detention center. So, respectfully, the Motion is denied on both of those grounds.[5]

Davis' Argument in This Court is Not Preserved.

On appeal, Davis concedes his argument under the Fourth Amendment is without merit. *See generally*, *Hudson v. Palmer*, 468 U.S. 517, 525–26 (1984) ("[W]e hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that

[5] During the trial when the recording was admitted, Davis objected "subject to our previous Motion," and also made clear that the objection was not foundational but was on the grounds of a "reasonable expectation . . . of privacy with both the audio and the video." We further note that during the motions hearing, defense counsel suggested that it might object to Mason's interpretation of Davis' recorded statements during the audio conversation on the grounds that it would constitute inadmissible lay opinion. The latter argument is not being raised on appeal.

a prisoner might have in his prison cell"); *State v. Raines*, 383 Md. 1, 25 (2004) ("[I]ncarcerated persons have a severely diminished expectation of privacy"). He also concedes he has no valid claim under *Miranda*. *See Perkins*, 496 U.S. at 300 (holding that a prisoner who speaks with an undercover officer in his prison cell, believing him to be a fellow prisoner, is not in custody for *Miranda* purposes and is not entitled to its protections); *Hamilton*, 62 Md. App. at 616 ("We must not forget that '*Miranda* . . . was aimed not at self-incrimination generally . . . but at *compelled* self-incrimination—the inherent coercion of the custodial, incommunicado, third-degree questioning process.'") (citation omitted). Although the only arguments Davis raised in the circuit court are unfavorable and waived, Davis now asks us to address his case on due process and fundamental fairness grounds.

Maryland's appellate courts ordinarily will not consider "any issue 'unless it plainly appears by the record to have been raised in or decided by the trial court[.]'" *King v. State*, 434 Md. 472, 479 (2013) (quoting Md. Rule 8-131(a)). Our Supreme Court "has stated often that the primary purpose of Rule 8-131(a) is 'to ensure fairness for all parties in a case and to promote the orderly administration of law.'" *State v. Bell*, 334 Md. 178, 189 (1994) (citation omitted). In addition, "[i]t is well established that, absent good cause, Rule 4-252 prohibits a criminal defendant from raising a theory of suppression on appeal that was not argued in the circuit court." *Savoy v. State*, 218 Md. App. 130, 141 (2014).

Moreover, it is the established policy of our Supreme Court to decide a constitutional issue only when necessary. *Robinson v. State*, 404 Md. 208, 217 (2008).

Further, "[i]n determining whether to consider the merits of this issue, our precedents recognize that constitutional issues raised for the first time on appeal, and not raised in the trial court, are not automatically entitled to consideration on the merits under Maryland Rule 8-131(a)." *Hartman v. State*, 452 Md. 279, 300 (2017) (nevertheless, deciding to exercise discretion to review a due process claim for prosecutorial vindictiveness under the circumstances presented).

Here, Davis never raised his due process claim and argument under Article 24 in the circuit court; thus, this issue is clearly unpreserved. Davis responds that his privacy claim is merely an extension of the arguments that were raised and not a new issue. *See State v. Greenstreet*, 162 Md. App. 418, 426 (2005) ("The [Supreme Court of Maryland] has recognized the distinction between a new issue, as the term is used in Rule 8-131(a), and a new argument, and the Court has held that Rule 8-131(a) does not preclude the latter.") (citation omitted), *rev'd on other grounds*, 392 Md. 652 (2006). While that proposition is true, it is also established that our courts have refused "to require trial courts to imagine all reasonable offshoots of the argument actually presented to them[.]'" *Starr v. State*, 405 Md. 293, 304 (2008) (citation omitted). *Accord Arthur v. State*, 420 Md. 512, 522–23 (2011).

Indeed, as the State points out, the Maryland Supreme Court ruled that a similar argument was unpreserved in *King*, *supra*. There, on remand from the United States Supreme Court reversing the Maryland Supreme Court's holding in *King v. State*, 425 Md. 550 (2012), *rev'd*, 569 U.S. 435 (2013), that the collection of King's DNA violated his

Fourth Amendment rights, King argued the collection of his DNA violated his rights under Article 26 of the Maryland Declaration of Rights. *King*, 434 Md. at 478–79.[6] Our Supreme Court concluded this was a new argument raised for the first time in the Appellate Court and was therefore not preserved. *Id.* at 479–80. We conclude the same outcome here—Davis' argument raised a new issue, and not merely an argument, under Article 24.

Although not discussed by either party herein, we note the Court in *King* nevertheless addressed the merits of the issue. The *King* Court recognized Rule 8-131(a) "vests this Court with the discretionary power 'to decide such an [unpreserved] issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.'" *Id.* at 480. The Court observed that neither party would be subject to unfair prejudice as the issue was raised by King, resolution of the issue would promote "the orderly administration of justice," and, given the Court concluded the collection of King's DNA did not violate Article 26, neither the State nor the lower court would be prejudiced by the Court's exercise of discretion to review the unpreserved issue. *Id.* at 481. *See also Hartman*, 452 Md. at 301 ("Since both parties briefed the issue before this Court and the trial record below is sufficient for us to consider the merits, we may consider Petitioner's

[6] Article 26 provides "That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted." Md. Decl. of Rights art. 26.

prosecutorial vindictiveness due process claim, pursuant to Maryland Rule 8–131(a).").

However, the *King* Court also stated:

> We caution strongly, however, that "[o]ur decision to review unpreserved issues in this particular case should not be viewed as an indication that we will review unpreserved issues in future cases." *Conyers v. State*, 354 Md. 132, 151, 729 A.2d 910, 920 (1999). "**While an appellate court has some discretion to address and decide unpreserved issues, ordinarily this discretion will not be exercised**." *Id*., 354 Md. at 150, 729 A.2d at 919. *See also Chaney v. State*, 397 Md. 460, 468, 918 A.2d 506, 511 (2007) ("It is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court ...").

434 Md. at 481 (emphasis supplied).

Although the issue has been briefed by both parties, we choose to follow the *King* Court's admonition in this case not to exercise our discretion to excuse the lack of preservation. Accordingly, we decline to address Davis' argument on the merits. *See, e.g.*, *Morris v. State*, 153 Md. App. 480, 506–07 (2003) (noting the five words, "[w]e decline to do so[,]" are "all that need be said, for the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation") (emphasis omitted), *cert. denied*, 380 Md. 618 (2004). Our decision not to address the merits is bolstered by Davis' own concessions under the Fourth and Fifth Amendment case law, as well as our conclusion, discussed next, that any error was entirely harmless beyond a reasonable doubt.

Any error was harmless beyond a reasonable doubt

An error is deemed harmless when the reviewing court, upon "its own independent review of the record," is "satisfied beyond a reasonable doubt" that there is no reasonable

possibility that the error "influenc[ed] the outcome of the case." *Gonzalez v. State*, 487 Md. 136, 184 (2024) (citations omitted). *Accord Dorsey v. State*, 276 Md. 638, 659 (1976). Even constitutional violations can constitute harmless error. *See Chapman v. California*, 386 U.S. 18, 23 (1967) (concluding that although there are some rights so basic to a fair trial that their infraction can never be harmless, all trial errors implicating the Constitution do not automatically call for reversal).

In determining whether an error is harmless, we may consider whether the error was in admitting cumulative evidence. As explained by our Supreme Court:

> Evidence is cumulative when, beyond a reasonable doubt, we are convinced that "there was sufficient evidence, independent of the [evidence] complained of, to support the appellant's conviction." In other words, cumulative evidence tends to prove the same point as other evidence presented during the trial or sentencing hearing. For example, witness testimony is cumulative when it repeats the testimony of other witnesses introduced during the State's case-in-chief. "The essence of this test is the determination whether the cumulative effect of the properly admitted evidence so outweighs the prejudicial nature of the evidence erroneously admitted that there is no reasonable possibility that the decision of the finder of fact would have been different had the tainted evidence been excluded."

Dove v. State, 415 Md. 727, 743–44 (2010) (cleaned up).

Here, the recording was, by Davis' own description, "nearly impossible to understand." Its admission added nothing of substance to what the jury heard through Mason's live testimony, which was independently admissible as a statement by a party-opponent and which Appellant does not challenge. *See* Md. Rule 5-803(a)(1). Mason testified from his own firsthand knowledge that on the night of the murder, Davis appeared at his home carrying two guns, buried them in the backyard, and burned clothing before

departing. Mason further testified that the following week, at Davis' apartment, he overheard Davis state with respect to Carrington, "I got that bitch. They ain't got to worry about it," and, "you know, waited for her to come out the club. Then I just ran down on her." Mason also testified he had previously overheard Appellant offer Belvin $5,000 "to take the hit." The recording, to the extent the jury could understand it at all, was cumulative of Mason's testimony. Thus, any error in its admission was harmless, and we affirm the ruling of the circuit court.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY IS AFFIRMED. APPELLANT TO PAY THE COSTS.