

Circuit Court for Montgomery County
Case No. C-15-CR-23-000775

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1449

September Term, 2024

KALEAB ABEBE BERHANU

v.

STATE OF MARYLAND

Berger,
Ripken,
Lazerow, Alan C.
(Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: June 12, 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).

This case arises following the conviction of appellant, Kaleab Abebe Berhanu (“Berhanu”) in the Circuit Court for Montgomery County. Berhanu was convicted of first-degree murder, conspiracy to commit first-degree murder, home invasion, conspiracy to commit home invasion, and use of a firearm during commission of a crime of violence in connection with the April 9, 2023 shooting death of Carlos Carter (“Carter”) in his home. Berhanu was sentenced to life imprisonment for first-degree murder, a consecutive life term for conspiracy to commit murder, and a consecutive 20-year term for use of a firearm during commission of a crime of violence. This appeal followed.

QUESTIONS PRESENTED

Berhanu presents six questions for our review, which we have recast and rephrased as follows:¹

¹ Berhanu phrased the questions as follows:

1. Did the trial court err in admitting testimony by firearms examiner Stephanie Luehr that her testing of the evidence in this case was verified by another firearms examiner who did not testify?
2. Did the trial court err by not requiring jury unanimity as to the modality of first-degree murder?
3. Is the conviction and sentence for first-degree murder illegal?
4. Is the conviction and sentence for conspiracy to commit murder illegal?
5. Did the trial court err in allowing the admission of images of firearms that were not connected to the charges?
6. Did the court err in allowing the admission of rap lyrics?

- I. Whether the circuit court erred in permitting the firearms expert to testify that a second firearms examiner who did not testify verified the results of her firearm analysis.
- II. Whether the circuit court erred in declining to instruct the jury that they must be unanimous as to the modality of first-degree murder.
- III. Whether the conviction and sentence for first-degree murder was illegal.
- IV. Whether the conviction and sentence for conspiracy to commit murder was illegal.
- V. Whether the circuit court erred in admitting photographs of a shotgun and a handgun that were recovered from Berhanu’s electronic accounts.
- VI. Whether the circuit court erred in admitting the lyrics to a rap song that Berhanu had posted on his Instagram after Carter’s death.

For the following reasons, we affirm.

BACKGROUND

The Incident Leading to Berhanu’s Arrest

In the early morning hours of April 9, 2023, police responded to the home of Carlos Carter in Silver Spring, Maryland.² Carter’s mother found Carter in the staircase leading up from the basement apartment, suffering from multiple gunshot wounds to his face and back. Carter’s mother called 911, and Carter was pronounced deceased upon his arrival to the hospital. Police identified signs of forced entry in the rear of the home into the

² Carter lived in the basement apartment of his mother’s residence.

basement apartment. Multiple bullets, casings, and shotgun pellets were recovered from the crime scene and Carter’s autopsy.

In March and April 2023, Berhanu was residing in an apartment belonging to his friend, Nina O’Brien, in an apartment building on Park Avenue in Baltimore City (the “Park Avenue Apartment”). Berhanu sometimes had friends visit him at the Park Avenue Apartment, and on the night of April 8, 2023, he had several friends over, including an individual named “Mika.” O’Brien occasionally let Berhanu borrow her vehicle and the key fob for her apartment building. O’Brien later told police that on the night of April 8, 2023, she got into an argument with Berhanu after he told O’Brien that he wanted to use her vehicle because “he wanted to go rob somebody” named “Jedi.”³ O’Brien additionally told police that the morning of April 9, 2023, she overheard Berhanu and Mika talking about “bagging Los.”

Sometime after the shooting, the police began investigating “K.B.” as a suspect and determined that K.B. was Kaleab Berhanu. Police learned that Berhanu was staying with O’Brien and executed a search warrant of the Park Avenue Apartment on May 4, 2023. During the search, the police seized: 1) a loaded Springfield Armory handgun; 2) a shotgun; 3) a magazine taken from the shotgun, containing five 12-gauge live rounds; and 4) a box of buckshot pellets and a box of .45 auto live rounds. Berhanu was in the apartment at the time of the search. The police interviewed Berhanu, and he acknowledged that he and Carter had been friends but had a falling out in 2021. Berhanu also informed the police

³ The identity of the individual “Jedi” is unknown.

that he had recently purchased the shotgun. Berhanu was ultimately charged with murder, conspiracy to commit murder, home invasion, conspiracy to commit home invasion, and use of a firearm in the commission of a crime of violence.

Firearms Testimony

The State presented two firearms experts to testify at trial: Laura Lightstone and Stephanie Luehr. Lightstone testified regarding the markings made on a bullet and casing when it is expelled from a firearm. Lightstone testified that she compared two groupings of cartridge cases that were submitted under two numbers: State’s exhibit 121, which was “one fired .45 auto-caliber cartridge case,” which was recovered from the crime scene, and State’s exhibit 120, which included “three fired .45 auto-caliber cartridge cases,” which were recovered from the Park Avenue apartment building.⁴ Lightstone testified that she

⁴ The cartridge cases were recovered from the “observation deck” of the Park Avenue apartment building. Michael Ross, a facilities manager at the Park Avenue apartment building, testified about the layout of the building:

[THE STATE]: And can you describe the very top floor for us?

[ROSS]: Okay. Penthouse level is not for use. Like, it’s condemned right now. It was a storage spot. It does not pass fire inspection. Once you get off the elevators, it’s two sides. To the left is the inside. It still [has] offices. Throughout is basically an observation deck and more machines, the tower, the exhaust fans.

* * *

[THE STATE]: Okay. And then, is there like a railed area that you can look out at?

[ROSS]: Yes, that’s the observation deck.

compared the individual characteristics of each of the four cartridges and concluded that the “markings on all four were consistent with each other.” Lightstone did not examine any firearms.

The State then called the second firearms examiner, Stephanie Luehr. On direct examination, Luehr testified that she “was submitted various envelopes containing one fired cartridge case, one fired bullet, quite a few fired shot or pellets, additionally some wad fragments, and boxes of ammunition” to examine. The boxes of ammunition were “a box of buckshot pellets and a box of .45 auto live rounds.” She also examined State’s exhibit 123, a “semiautomatic Springfield Armory .45 auto-caliber pistol,” and State’s exhibit 122, a “Tokarev 12-gauge semiautomatic shotgun.” Both firearms were recovered from O’Brien’s Park Avenue Apartment.

Luehr testified that she performed two test-fires of the pistol and examined the test-fired casings for individual characteristics. Luehr testified that she compared the individual characteristics of the test-fired casings with State’s exhibit 121, the cartridge case recovered from the crime scene and determined that the casing recovered from the crime scene was consistent with being fired from the pistol. Luehr also compared State’s exhibit 119, “one fired bullet . . . a 45 Auto of 45 GAP caliber total metal covered jacketed bullet,”

Ross testified that he “walks the property” daily to check for any issues. Ross testified that on March 17, 2023, when he walked onto the observation deck, he noticed several shell casings and called the Baltimore City Police. Ross further testified that the observation deck is accessible by elevator, and anybody with a key fob to the building was able to access the elevator and penthouse floor, as the door to the penthouse floor was left unlocked.

recovered from the crime scene with the test-fired bullets. Luehr determined that the bullet was consistent with being fired from the pistol.

Luehr additionally testified that she test-fired the shotgun recovered from the apartment. Luehr testified that an unfired shot shell -- shotgun ammunition -- has various components including “wadding,” which protects the gunpowder and pellets in the shot shell, and may be plastic, cardboard, felt, or another material. Luehr learned from the results of Carter’s autopsy that “wadding was present.” Luehr testified that when examining a shotgun, “wadding can sometimes be identified back to that shotgun” because when fired, the shotgun “can sometimes leave the individual markings onto wadding.” Luehr testified that the wadding recovered from Carter’s autopsy was consistent with being a “12-gauge wad.” Luehr also testified that she examined several fired pellets, which were “consistent with being double aught buckshot.”

During cross-examination of Luehr, Berhanu questioned her about the “Ames Studies,”⁵ and the following transpired:

⁵ The “Ames Studies” are two studies conducted by the United States Department of Energy’s Ames Laboratory. The “Ames I Study” was a 2014 study “designed to measure error rates in the comparison of ‘known’ and ‘unknown’ cartridge cases.” *Abruquah v. State*, 483 Md. 637, 668 (2023) (citations omitted). In the Ames I Study, “15 sets of four cartridge cases fired from 25 new, same-model handguns using the same type of ammunition were sent to 218 examiners. Each set included one unknown sample and three known samples fired from the same known gun, which might or might not have been the source of the unknown sample.” *Id.*

The Ames II Study, completed in 2020, sought to test the accuracy, repeatability, and reproducibility of the firearms identification through three phases. *Id.* at 668-69.

The first phase of testing was designed to assess accuracy of identification, “defined as the ability of an

[DEFENSE COUNSEL]: Well, in the Ames, I think it was the Ames 2 study, but I might have the study numbers wrong, the examiners in one instance were given, for example, projectiles to make a comparative analysis with. And then they were told they were given a second set to make another analysis of. But they weren't told it was the same items.

[LUEHR]: That is correct.

[DEFENSE COUNSEL]: And the results of that roughly speaking were that they did not reach the same conclusion about 20 to 25 percent of the time. Is that correct?

[LUEHR]: The results showed that there were a higher number of inconclusive conclusions that previously before.

* * *

[DEFENSE COUNSEL]: Okay. The second part of that testing was to take the -- to give one set of examiners items to examine and then give them another set, I am sorry, giving the same items to another set of examiners. So in this case, there is two set of examiners. And again, when they concluded, when they did that, there was a significant difference in the conclusions that were reached between the two sets of examiners, correct?

examiner to correctly identify a known match or eliminate a known nonmatch.” In the second phase, each examiner was given the same test set examined in phase one, without being told it was the same, to test repeatability, “defined as the ability of an examiner, when confronted with the exact same comparison once again, to reach the same conclusion as when first examined.” In the third phase, each examiner was given a test set that had previously been examined by one of the other examiners, to test reproducibility, “defined as the ability of a second examiner to evaluate a comparison set previously viewed by a different examiner and reach the same conclusion.”

Id. at 669 (citations omitted). The Ames Studies have been criticized for the “high rates of inconclusive responses in both studies and the low rates of repeatability and reproducibility in the Ames II Study.” *Id.* at 673.

[LUEHR]: I can't quantify as significant. But there was a difference. These studies were not like a practical examination. So I must point that out that the Ames studies, there is no verification of an examiner's conclusion in the case work that is performed at Montgomery County Police Department.

* * *

[DEFENSE COUNSEL]: . . . The Ames report shows that when you are dealing with subjective evaluations, in that series of tests it showed that there were differences in the conclusions reached by different examiners examining the same items and the same examiner examining the same items at different times, correct?

[LUEHR]: That is correct.

On redirect examination, the State sought to explore Luehr's testimony about the Ames Studies and explain an inconclusive determination, and the following ensued:

[THE STATE]: I want to stick with the Ames report because you haven't heard enough about this field. In the Ames report, what [defense counsel] is alluding to about the 20 percent, 30 percent, he is giving a number, but the change. Was that including determinations by examiners that what they were looking at they came up with an inconclusive determination?

[LUEHR]: That is correct.

[THE STATE]: Can you explain for the jury what the difference is between a conclusive determination and an inconclusive determination?

[LUEHR]: Sure. So there are three main conclusions that I find this examiner could come to when making a conclusion about an examination. So the first conclusion is an identification. Okay. The second conclusion is an elimination. So these items were or were not fired from a specific firearm. Your third conclusion is inconclusive. Okay. And so this will basically say that you can determine that items are of the same class. So they share the same class characteristics. But maybe due to

damage or lack of reproducibility of the markings or the quality of the material, the -- you cannot determine if they were or were not fired. So you don't have enough individual microscopic information to be able to make an identification or to make an elimination. So an examiner will use the conclusion of inconclusive.

[THE STATE]: And were you aware of what the difference is in that percentage change that Ames was tracking if you took out the inconclusive determinations?

[LUEHR]: Yes.

[THE STATE]: And what was that?

[LUEHR]: It was much lower.

[THE STATE]: Was it within a percentage that your field felt comfortable with?

[LUEHR]: Yes.

[DEFENSE COUNSEL]: Objection to that.

THE COURT: Overruled.

[THE STATE]: And just to make clear, if you just as an examiner came up with an inconclusive determination, would there be evidence that you could state and testify to in trial that could basically say that something was conclusive?

[LUEHR]: No.

[THE STATE]: So the best -- what would be the best thing you can say if you determine something was inconclusive?

[LUEHR]: I could say that all discernible class characteristics, so the remaining class characteristics present on the evidence I am looking at are similar.

[THE STATE]: And you had discussed on cross about that there was no verification process based on that Ames study. Could you elaborate on that?

[LUEHR]: That is correct.

[LUEHR]: So the Ames study did not take into account because it was a research study that the verification process of the firearms examiner doing an examination in a laboratory. And so specifically the Montgomery County Police Department requires a hundred percent verification of all conclusions, so whether we reach an identification, elimination, or an inconclusive, every single conclusion is then verified physically by another firearms, a competent proficient firearms examiner. So in the Ames study, this is not performed. So it is just one examiner's opinion.

[THE STATE]: And in your testing today in the evidence that we went through today, was that --

[DEFENSE COUNSEL]: Objection.

[THE STATE]: -- did that go through a verification --

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[THE STATE]: Did that go through a verification process?

[LUEHR]: Yes, it did.

[THE STATE]: And was it verified?

[LUEHR]: Yes.

[DEFENSE COUNSEL]: Objection.

[THE STATE]: No further questions.

Immediately, Berhanu's defense counsel elaborated on this objection:

[DEFENSE COUNSEL]: I just want the record to be clear that my objections were based on what I mentioned before about what I think is inadmissible testimony for the State to have a

verification testify to by this witness.^[6] It was not done by this witness without me having the opportunity to cross-examine whoever that person was. It's a violation of the defendant's rights of confrontation, and that witness should've been present in order for me to be able to cross-examine them. So I would ask that the Court sustain my objection and strike the answers that relate to the verification process.

[THE STATE]: Your Honor, the door was open. I was merely -- it was covered in cross, it was a part of cross, and I think was -- it wasn't elaborated on. There was two questions to it.

THE COURT: All right. Well, I felt like your cross-examination was beyond (unintelligible 2:10:03) the last time. (Unintelligible 2:10:05) paying closer attention because of the last time. And I do feel like the door was open with respect to this issue. So --

[DEFENSE COUNSEL]: I'm sorry.

THE COURT: But --

[DEFENSE COUNSEL]: The door might have been opened to them showing that this process was verified through the testimony of another witness, but not through the hearsay testimony that's not firsthand testimony of this witness incorporating what is presented to the testimony and inclusions of the person who is not subject to a cross-examination.

THE COURT: Okay. Overruled.

[DEFENSE COUNSEL]: Thank you, Your Honor.

⁶ In his brief, Berhanu notes that “[t]he State had attempted similar questioning of firearms examiner [Lightstone], which the court did not permit.” For context, defense counsel questioned Lightstone about the Ames Studies on cross-examination. On redirect, Lightstone testified that following her analysis, she issued a report. The State asked: “Has anybody else signed the report?” The circuit court sustained defense counsel’s objection, noting that it would permit the testimony if “if the person who did her review testifies. But you can’t have under the confrontation clause and all those other cases that talk about the right to examine experts, you can’t have her testify to what somebody else reported. That person has to be present.”

Additional Evidence and Jury Instructions

After Carter’s death, Carter’s sister informed police that she viewed a post on Berhanu’s Instagram account, in which a male voice is heard singing rap lyrics.⁷ Carter’s sister recorded the post and identified the male voice singing the rap lyrics as Berhanu’s. The State sought to play the approximately 10-second video clip for the jury. The lyrics heard in the video were: “A \$@#% bag left his mama crying on the knees; \$@#% magic; We stretch him out and leave him in his blood that \$@#%.” The State argued “specifically the ‘bagging,’ and ‘leaving him in his blood,’ and the ‘making his mother cry,’ we think that that is sufficient in terms of its admissibility as it relates to the fact specifics of this case.” Berhanu objected, arguing that it was not clear that Berhanu had authored the lyrics himself. The circuit court admitted the video clip of the rap lyrics, finding “that there is a strong nexus between the specific details of the artistic composition and the circumstances of the crime for which the evidence is being adduced.” The court additionally found that any question regarding whether Berhanu authored the lyrics himself would go towards the weight of the evidence rather than the admissibility.

The State additionally introduced into evidence photographs retrieved from Berhanu’s Instagram and iCloud accounts. The photographs included various images of firearms or Berhanu with firearms. The circuit court admitted four of the photographs: 1) a March 23, 2023 photograph showing a partial image of what is either a rifle or a shotgun,

⁷ The State notes in its brief that “[t]he lyrics are unintelligible in the transcript. The State relies upon the prosecutor’s representation of those lyrics as conveyed in the transcript.” Berhanu appeared to rely on similar lyrics.

and a partial image of an extended magazine for a handgun; 2) a November 27, 2022 photograph of Berhanu holding a shotgun; 3) a September 30, 2022 photograph of a shotgun and a handgun between the feet of an unidentified seated individual; and 4) a September 24, 2022 photograph of an individual in the driver's seat of a vehicle with a shotgun and a handgun on his lap. There were several additional photographs that the court declined to admit into evidence.

Following the close of evidence, the parties discussed certain jury instructions and the verdict sheet. The State noted that there might be confusion due to the different types of first-degree murder and suggested that the court inform the jury of the two different theories of first-degree murder -- premeditated murder and felony murder. Berhanu suggested that the verdict sheet provide “first-degree murder on the theory of” and provide the two choices, with the jury permitted to choose either premeditated murder, felony murder, or both. Berhanu requested that the jury also be given a “unanimity instruction that they must all agree as to whatever the theory is.” The State disagreed that the jury was required to be unanimous as to the modality of first-degree murder. The circuit court declined to provide a jury instruction specifically on unanimity of the modality of first-degree murder, and instructed the jury on first-degree premeditated murder and first-degree felony murder as follows:

The defendant is charged with the crime of murder. This charge includes first-degree murder and second-degree murder. First-degree murder is the killing of another person with willfulness, deliberation, and premeditation. In order to convict the defendant of first-degree murder, the State must prove, one, that the defendant caused the death of Carlos Carter; and two, that the killing was willful, deliberate, and

premeditated. Willful means that the defendant actually intended to kill Carlos Carter. Deliberate means that the defendant was conscious of the intent to kill. Premeditated means that the defendant thought about the killing and that there was enough time before the killing, though it may only have been brief, for the defendant to consider the decision whether or not to kill and enough time to weigh the reasons for and against the choice. The premeditated intent to kill must be formed before the killing.

The defendant is also charged with the crime of first-degree felony murder. In order to convict the defendant of first-degree felony murder, the State must prove, one, that the defendant or another participating in the crime with the defendant committed the felony of home invasion; two, that the defendant or another participating in the crime killed Carlos Carter; and three, that the act resulting in the death of Carlos Carter occurred during the commission of the felony. Felony murder does not require the State to prove that the defendant intended to kill Carlos Carter.

The circuit court also instructed the jury on the crime of home invasion as follows:

The defendant is charged with home invasion. Home invasion is the breaking and entering of someone else's dwelling with the intent to commit murder. In order to convict the defendant of home invasion, the State must prove, one, that there was a breaking; two, that there was an entry; three, that the breaking and entry were into someone else's dwelling; four, that the breaking and entry were done with the intent to commit murder inside the dwelling; and five, that the defendant was the person who broke and entered.

Breaking means the creation or enlargement of an opening, such as breaking or opening a window or pushing open a door. Entry means that any part of the defendant's body was inside the house. A dwelling is a structure where someone regularly sleeps.

The verdict sheet included: Count 1A, first-degree murder; Count 1B, second-degree murder, if the jury found Berhanu not guilty for first-degree murder; Count 2,

conspiracy to commit first-degree murder; Count 3, home invasion; Count 4, conspiracy to commit home invasion; and Count 5, firearm use in the commission of a crime of violence.

After the jury began deliberations, it sent a note, which asked:

In the jury instructions, it says the defendant is charged with 1st degree felony murder as well, but we don't see that charge in the verdict sheet. Can you please clarify?

Berhanu renewed his request that the court instruct the jury that it need to be unanimous as to either one or both of the theories. The circuit court again declined to instruct on unanimity, and provided the following response to the jury:

A conviction of first degree murder may be proved either by showing deliberation, wilfulness [sic] and premeditation (premediated murder), or by showing a homicide committed in the perpetration, or attempted perpetration, of one of the enumerated felonies (felony murder). There is but one offense -- murder in the first degree -- but that offense may be committed in more than one way.

The jury convicted Berhanu of first-degree murder, conspiracy to commit first-degree murder, home invasion, conspiracy to commit home invasion, and use of a firearm in the commission of a crime of violence. The court sentenced Berhanu to life for first-degree murder, a consecutive life term for conspiracy to commit murder, and a consecutive term of 20 years for use of a firearm in the commission of a crime of violence. This appeal followed.

DISCUSSION

I. The circuit court did not err in permitting Luehr to testify that her firearm examination findings were verified by a firearms examiner who did not testify.

Berhanu first contends that the circuit court erred in admitting Luehr's testimony on redirect examination that her testing of the firearms evidence was verified by another, unnamed firearms examiner who did not testify at the trial. Berhanu argues that this was impermissible hearsay testimony that violated his right of confrontation under both Article 21 of the Maryland Declarations of Rights and the 6th Amendment to the United States Constitution, because he was unable to cross-examine the second firearms expert that allegedly verified Luehr's results. Berhanu additionally argues that the circuit court erred in finding that Berhanu opened the door to Luehr's testimony because he was the one who brought up the Ames studies and the concept of verification.

The State contends that the circuit court did not err in overruling Berhanu's objection following Luehr's testimony, because Luehr was the original author of the report and was simply explaining the laboratory verification procedures. As a result, the State maintains that Berhanu's confrontational rights were not implicated. The State continues, arguing that even if Luehr's testimony constituted inadmissible hearsay, Berhanu opened the door to the testimony during Luehr's cross-examination. Finally, the State contends that even if the verification process testimony was impermissible, its introduction was harmless error.

A. Standard of review

Whether a defendant’s “rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution” have been violated “is a question of law, which we review under a non-deferential standard of review.” *Langley v. State*, 421 Md. 560, 567 (2011).

B. Analysis

“[A] criminal defendant in a Maryland court has the right to confront and cross-examine adverse witnesses under both the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights.” *Leidig v. State*, 475 Md. 181, 197 (2021). The Confrontation Clause of the Sixth Amendment provides: “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend VI. Likewise, Article 21 of the Maryland Declaration of Rights provides: “[i]n all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him . . . [and] to examine the witnesses for and against him on oath.” Md. Decl. of Rts. art. 21. “[W]e have read the two rights *in pari materia*, or as generally providing the same protection to defendants.” *Derr v. State*, 434 Md. 88, 103 (2013).

The Confrontation Clause protects against the admission of testimonial hearsay statements against a defendant in a criminal trial. *Crawford v. Washington*, 541 U.S. 36, 53 (2004). “[T]he Confrontation Clause’s requirements apply only when the prosecution uses out-of-court statements for ‘the truth of the matter asserted.’” *Smith v. Arizona*, 602 U.S. 779, 783 (2024) (quoting *Crawford*, 541 U.S. at 60, n. 9).

The United States Supreme Court has held that the Confrontation Clause applies to forensic reports that are offered for the truth of their substantive contents. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308, 311 (2009) (holding that “certificates of analysis” certifying that lab tests identified a substance possessed by the defendant as cocaine were testimonial hearsay and inadmissible); *see also Bullcoming v. New Mexico*, 564 U.S. 647, 651-652, 662 (2011) (holding that a “testimonial certification” prepared by one lab analyst as to the defendant’s blood-alcohol level could not be introduced through the testimony of a different analyst who did not perform the lab tests that determined the defendant’s blood-alcohol level), and *Smith*, 602 U.S. at 802-03 (holding that a second analyst who reviewed a report prepared by a first analyst documenting the testing done on drugs seized from the defendant could not testify as to the contents of a report).

“When a statement is admitted for a reason unrelated to its truth, we have held, the Clause’s ‘role in protecting the right of cross-examination’ is not implicated.” *Smith*, 602 U.S. at 785 (quoting *Tennessee v. Street*, 471 U.S. 409, 414 (1985)). Thus, “the Clause ‘does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.’” *Id.* at 793 (quoting *Crawford*, 541 U.S. at 60, n. 9). Accordingly, when considering forensic reports, a confrontation claim may only succeed when “the absent analyst’s statements were introduced for their truth.” *Smith*, 602 U.S. at 792-93. Notably, *Melendez-Diaz*, *Bullcoming*, and *Smith* all considered instances where substantive reports had been created by one laboratory examiner, and either a different individual, or no witness at all, testified as to the contents of the reports. The Supreme Court of Maryland has noted, however, that “the State is not required to call every technician who performed

some part of the testing that led the authoring analyst(s) to state the results and conclusions contained in the report.” *Leidig*, 475 Md. at 181.

The State directs us to *State v. Miller*, in which the Supreme Court of Maryland was presented with what the State argues is the inverse of this case. 475 Md. 263 (2021). In *Miller*, an unidentified assailant sexually assaulted a woman in 2008. *Id.* at 270. Investigators recovered several DNA samples and generated a DNA profile for an “unknown male #1.” *Id.* at 270-71. A forensic analyst, Hebert, prepared a detailed report describing the DNA analysis. *Id.* In 2017, Miller’s DNA was recovered in connection with an unrelated sexual assault. *Id.* at 271. Miller was produced as a match for “unknown male #1” and was subsequently charged for the sexual offenses relating to the 2008 assault. *Id.* at 272-73. Hebert also authored the report which named Miller as “unknown male #1” (the “2017 Report”). *Id.* at 272. By the time of Miller’s trial, Hebert had moved away. *Id.* at 273. The circuit court permitted the “technical reviewer” of each report to testify instead. *Id.* The technical reviewer of the 2017 Report, Morrow, testified that technical reviewers “actually look at all of the data and we do review all of the statistics and all of the interpretation,” and testified as to the contents of the 2017 Report. *Id.* at 277-78. On appeal, Miller contested the court’s admission of Morrow’s testimony. *Id.* at 279.

The Supreme Court of Maryland concluded that there was no violation of Miller’s rights under either the Confrontation Clause or Article 21. *Id.* at 290. The Supreme Court held that the technical reviewer was effectively the “functional equivalent of a second author of the report.” *Id.* at 293. Accordingly, the court concluded that a technical reviewer is permitted to testify as to the contents of a report if the reviewer 1) thoroughly reviews

all the data that initial author used; 2) independently determines whether or not the initial author's results and conclusions were correct; and 3) if the results and conclusions were correct, sign off on the report's issuance. *Id.* As essentially a second author, Morrow's testimony regarding the contents of the 2017 Report that was prepared by Hebert was not a violation of Miller's confrontational right. *Id.* at 303.

The present case, however, does not concern the contents of Luehr's own forensic report. Rather, we must consider whether, in answering affirmatively when asked if her firearms test results were verified, Luehr effectively testified as to the contents of a "report" prepared by a second firearms expert and conclusions drawn. Luehr was questioned about the Ames Studies during cross-examination, and her testimony during redirect examination was as follows:

[THE STATE]: And you had discussed on cross about that there was no verification process based on that Ames study. Could you elaborate on that?

[LUEHR]: That is correct.

[LUEHR]: So the Ames study did not take into account because it was a research study that the verification process of the firearms examiner doing an examination in a laboratory. And so specifically the Montgomery County Police Department requires a hundred percent verification of all conclusions, so whether we reach an identification, elimination, or an inconclusive, every single conclusion is then verified physically by another firearms, a competent proficient firearms examiner. So in the Ames study, this is not performed. So it is just one examiner's opinion.

[THE STATE]: And in your testing today in the evidence that we went through today, was that --

[DEFENSE COUNSEL]: Objection.

* * *

[THE STATE]: -- did that go through a verification --

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

* * *

[THE STATE]: Did that go through a verification process?

[LUEHR]: Yes, it did.

[THE STATE]: And was it verified?

[LUEHR]: Yes.

[THE STATE]: No further questions.

Of course, Luehr was present to testify and be subject to cross-examination. Luehr's statements are no doubt testimonial since the testing of the firearms by Luehr was done in preparation for trial, as is any report prepared by another examiner. The only question here is whether Luehr's brief statement -- that her firearm testing was verified by another examiner -- implicated Berhanu's confrontational right since the second firearms examiner who allegedly verified Luehr's results was not present at trial for cross-examination. Specifically, we must determine whether Luehr's statement was offered for the truth of the matter, or whether Luehr was simply clarifying the laboratory's testing procedures.

To distinguish the present case from the Ames Studies, the State asked, without objection, whether the Ames Studies included a verification process. Luehr answered, without objection, that "the Montgomery County Police Department requires a hundred

percent verification of all conclusions, so whether we reach an identification, elimination, or an inconclusive, every single conclusion is then verified physically by another firearms, a competent proficient firearms examiner.” Luehr was explaining laboratory quality control procedures. The State then questioned whether Luehr’s results were verified, and she answered in the affirmative. Luehr, again, was explaining that her analysis of the firearms evidence in this case was subject to the regular laboratory procedures.

Berhanu’s argument effectively treats this statement as akin to admitting testimony by a second firearms examiner that followed the same procedures and reached the same results as Luehr, all while evading cross-examination and violating Berhanu’s confrontational right. We disagree. Luehr did not offer the specific results reached by a second examiner; rather, she emphasized that her processes and results, which she had already testified to, were distinguishable from the Ames Studies. Luehr was present and subject to cross-examination; this is what was required to satisfy the Confrontation Clause and *Crawford*. The circuit court, therefore, did not err when it overruled Berhanu’s objection to Luehr’s testimony that her firearms analysis and conclusions were verified.⁸

Furthermore, even if the court committed error in overruling Berhanu’s objection, any error was harmless. “Like any violation of the Confrontation Clause, a *Crawford* violation is subject to harmless error review.” *Morris v. State*, 418 Md. 194, 221 (2011) (citations omitted). To hold that error was harmless, we must “be satisfied that there is no

⁸ Even if we concluded that Berhanu’s confrontational right was implicated by Luehr’s testimony regarding verification, we would affirm on the grounds that the State was simply eliciting testimony to rebut Berhanu’s injection of doubt due to the Ames Studies that resulted from his own questioning of Luehr.

reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.” *Dorsey v. State*, 276 Md. 638, 659 (1976).

Luehr did not testify regarding the verification process during direct examination by the State. Rather, during the State’s redirect examination of Luehr, the State noted that during cross-examination, Luehr had stated that there was no verification process in the Ames Studies. The State asked Luehr to elaborate on that testimony. Luehr testified, without objection, that “the Montgomery County Police Department requires a hundred percent verification of all conclusions, so whether we reach an identification, elimination, or an inconclusive, every single conclusion is then verified physically by another . . . competent proficient firearms examiner.”

This statement implicated that for Luehr’s analysis and results to be used as evidence at trial, and for Luehr to testify regarding her analysis, Luehr’s conclusions must have received “a hundred percent verification.” From that statement alone, the jury would have been able to conclude that Luehr’s results were verified by another firearms examiner. Luehr’s testimony, that her analysis went through the required verification process, did not include any new factual evidence; it simply reiterated the testimony that was already introduced that all results must be verified. We are therefore persuaded beyond a reasonable doubt that Luehr’s brief statement that her results were verified did not contribute to the jury’s rendition of the guilty verdict. *Dorsey*, 276 Md. at 659. Accordingly, we affirm.

II. The circuit court did not err in declining to instruct the jury that it had to be unanimous regarding whether Berhanu was guilty of premeditated first-degree murder or first-degree felony murder.

Berhanu next contends that the circuit court erred because it did not instruct the jury that unanimity was required as to the modality of first-degree murder -- whether Berhanu committed premeditated or felony first-degree murder. Berhanu had requested that the jury verdict sheet contain both options and requested that the court instruct the jury that it must be unanimous in choosing either premeditated murder, felony murder, or both on the verdict sheet. The circuit court declined to instruct the jury that it must be unanimous as to the modality of first-degree murder. Berhanu argues that the requirement that a jury be unanimous extended to the modality of first-degree murder, and the circuit court erred by denying Berhanu’s requested jury instruction regarding unanimity of first-degree murder. The State argues that although a jury must be unanimous as to the verdict it is not required to be unanimous as to the specific theory of first-degree murder.

A. Standard of review

“We review ‘a trial court’s refusal or giving of a jury instruction under the abuse of discretion standard.’” *Bazzle v. State*, 426 Md. 541, 548 (2012) (quoting *Stabb v. State*, 423 Md. 454, 465 (2011)). “The discretion afforded to a trial court, ‘is not unlimited; when the issue is whether a constitutional right has been infringed, we make our own independent constitutional appraisal.’” *Johnson v. State*, 477 Md. 673, 683 (2022) (quoting *Crosby v. State*, 366 Md. 518, 526 (2001)).

B. Analysis

It is axiomatic that a jury must deliver a unanimous verdict to sustain a criminal conviction. Article 21 of the Maryland Declaration of Rights provides: “in all criminal prosecutions, every man hath a right . . . to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.” Md. Decl. of Rts. art. 21. Likewise, Maryland Rule 4-327 provides that, in a criminal trial, “[t]he verdict of a jury shall be unanimous and shall be returned in open court.” Md. Rule 4-327(a). Berhanu and the State agree, of course, that a jury must of course deliver a unanimous verdict. The parties disagree, however, with what precisely must be unanimous.

An individual may be convicted of first-degree murder based on evidence showing “a deliberate, premeditated, and willful killing.” Md. Code (2002, 2021 Repl. Vol.) § 2-201(a)(1) of the Criminal Law Article (“CR”). An individual may also be convicted of first-degree felony murder under CR § 2-201(a)(4) if the murder was “committed in the perpetration of or an attempt to perpetrate” an enumerated felony. One such felony is “burglary in the first, second, or third degree.” CR § 2-201(a)(4)(iii).

Maryland Courts have long held that first-degree murder is one crime that may be committed in multiple ways. Our Courts have never held, however, that the fact that first-degree murder may be committed in different ways creates distinct and discrete crimes of first-degree murder. In *Ross v. State*, 308 Md. 337 (1987), the Supreme Court held:

Where murder is established, and where it is further shown that the murder was deliberate, wilful [sic] and premeditated, this murder is of the first degree. Additionally, the commission of a homicide in the perpetration or attempted perpetration of any of the felonies enumerated in [the felony murder statute]

constitutes murder in the first degree, but in such cases it is not necessary to prove a specific intent to kill or to do grievous bodily harm.

Accordingly, a conviction of first degree murder may be proved *either* by showing deliberation, wilfulness [sic] and premeditation (premeditated murder), or by showing a homicide committed in the perpetration, or attempted perpetration, of one of the enumerated felonies (felony murder). There is but one offense—murder in the first degree—but that offense may be committed in more than one way.

308 Md. 337, 341-42 (1987) (internal citations omitted) (emphasis in original).

The Supreme Court has declined to require similar unanimity instructions in other cases, which we find instructive. In *Rice v. State*, the Supreme Court considered jury unanimity in a theft case. 311 Md. 116 (1987). The defendant argued that the circuit court erred because it failed to instruct the jury “that it could convict the defendant of theft only if all twelve jurors agreed unanimously that the defendant had committed all the elements of larceny . . . or all the elements of possession of stolen property.” *Id.* at 122. The Supreme Court disagreed and held that unanimity as to the modality of theft was not required because the two crimes, theft by either larceny or possession of stolen goods, were “not autonomous offenses but rather one crime defined in two ways.” *Id.* at 136. Accordingly, the Court held that whether each jury person convicted the defendant of theft by larceny or possession of stolen goods, “it is clear that violation of either leads to the same result. In either case the defendant has appropriated the property of another person without that person’s consent. It is this that imparts to [larceny or possession of stolen goods] their

wrongful character, and, we think, imparts to them the same wrongful character.” *Id.* As such, unanimity as to the theory of the crime of theft was not required. *Id.*

The Supreme Court and this Court have reached similar conclusions regarding child abuse, *Twigg v. State*, 447 Md. 1, 18 (2016) (holding that “[s]o long as the jurors were unanimous that [the defendant] committed child sexual abuse . . . it is of no consequence that they may not have agreed on which of the underlying sexual offenses supplied the ‘element’ of sexual molestation or exploitation that supported the child abuse conviction.”); and second-degree murder, *Kouadio v. State*, 235 Md. App. 621, 632–33 (2018) (holding that “[s]o long as all jurors find all of the elements of any one of [three alternative mental states] have been proved beyond a reasonable doubt, a guilty verdict of second-degree murder will stand, notwithstanding that some jurors may have found an intent to kill while others found an intent to commit grievous bodily harm or the elements of depraved heart murder.”).

In the present case, Berhanu was charged with first-degree murder. The jury was instructed that it could convict Berhanu of first-degree premeditated murder or first-degree felony murder. That some jurors may have convicted Berhanu under the theory of premeditated murder while others found him guilty under a theory of felony murder is of no consequence. In the end, all twelve jurors convicted Berhanu of first-degree murder, which is all that was required. Therefore, the circuit court did not err when it declined to instruct the jury that it was required to be unanimous as to the modality of first-degree murder.

III. The conviction and sentence for first-degree murder is not illegal.

Berhanu argues that his conviction for first-degree murder is illegal because “home invasion” is not listed as a predicate offense for felony murder under CR § 2-201(a)(4). Because the jury could have convicted Berhanu of first-degree murder under a theory of felony murder, with the home invasion being the underlying felony, Berhanu argues, the failure to specifically list “home invasion” as a predicate felony under CR § 2-201(a)(4) renders the conviction and subsequent sentence illegal. Berhanu additionally argues that an individual may not be convicted of felony murder when the underlying felony is an integral element of the homicide, and that “felony murder may not be predicated on home invasion with intent to commit murder, because the underlying felony and the homicide share the same conduct.” Finally, Berhanu contends that the circuit court erred when instructing the jury.

The State first argues that Berhanu’s claim is not preserved because he failed to object when the circuit court gave its instructions on first-degree murder. The State then contends that the failure to list “home invasion” as a predicate crime for felony murder under CR § 2-201(a)(4) does not render the conviction illegal because home invasion is composed of the same elements as first-degree burglary which is a basis for felony murder. The State additionally argues that in convicting Berhanu of home invasion, the jury “necessarily found that the elements of third-degree burglary were met,” which is also a predicate crime for felony murder. Without deciding whether the issue is preserved, we affirm.

A. Standard of review

“[A]n appellate court has the authority to review an allegedly illegal conviction regardless of whether or not an objection is made at trial.” *Montgomery v. State*, 206 Md. App. 357, 402 (2012). Likewise, “[a] substantively illegal sentence is subject to correction at any time.” *State v. Crawley*, 455 Md. 52, 66 (2017) (citing Md. Rule 4-345(a)). An illegal sentence is “one in which the illegality ‘inheres in the sentence itself; *i.e.*, there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful.” *Colvin v. State*, 450 Md. 718, 725 (2016) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). “Whether a sentence is an illegal sentence under Maryland Rule 4-345(a) is a question of law that is subject to de novo review.” *Crawley*, 455 Md. at 66.

B. Analysis

As we have previously set forth, an individual may be convicted of first-degree murder based on evidence showing “a deliberate, premeditated, and willful killing.” Md. Code (2002, 2021 Repl. Vol.) § 2-201(a)(1) of the Criminal Law Article (“CR”). An individual may also be convicted of first-degree felony murder under CR § 2-201(a)(4) if the murder was “committed in the perpetration of or an attempt to perpetrate” an enumerated felony. One such felony is “burglary in the first, second, or third degree.” CR § 2-201(a)(4)(iii).⁹

⁹ CR § 6-204 describes the crime of burglary in the third degree, providing:

From October 1, 2002 until September 30, 2014, CR § 6-202 described the crime of burglary in the first degree, providing:

- (a) A person may not break and enter the dwelling of another with the intent to commit theft or a crime of violence.
- (b) A person who violates this section is guilty of the felony of burglary in the first degree and on conviction is subject to imprisonment not exceeding 20 years.

CR § 6-202 (effective to Sept. 30, 2014).

In April 2014, the Legislature passed an Act with the stated “purpose of increasing the maximum penalty of imprisonment for breaking and entering the dwelling of another with the intent to commit a crime of violence; designating a certain offense to be the felony of home invasion; and generally relating to home invasion.” 2014 Maryland Laws Ch. 238 (H.B. 807). Thus, CR § 6-202 was updated to describe the crime of burglary in the first-degree or home invasion, providing:

- (a) A person may not break and enter the dwelling of another with the intent to commit theft.
- (b) A person may not break and enter the dwelling of another with the intent to commit a crime of violence.
- (c) A person who violates subsection (a) of this section is guilty of the felony of burglary in the first degree and on

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- (a) A person may not break and enter the dwelling of another with the intent to commit a crime.
 - (b) A person who violates this section is guilty of the felony of burglary in the third degree and on conviction is subject to imprisonment not exceeding 10 years.

CR § 6-204 (effective since October 1, 2002). Third-degree burglary does not require a crime of violence.

conviction is subject to imprisonment not exceeding 20 years.

- (d) A person who violates subsection (b) of this section is guilty of the felony of home invasion and on conviction is subject to imprisonment not exceeding 25 years.

CR § 6-202 (effective since October 1, 2014). The change effectively created two crimes: first-degree burglary, the breaking and entering of the dwelling of another with the intent to commit theft, punishable by up to 20 years; and home invasion, the breaking and entering of the dwelling of another with the intent to commit a crime of violence, punishable by up to 25 years. *Id.* CR § 14-101 provides a list of “crimes of violence,” which includes murder and “home invasion under § 6-202(b) of this article [the Criminal Law Article].” CR § 14-101(a)(7), (17).

Berhanu argues that because home invasion is not specifically listed as a predicate felony under CR § 2-201(a)(4) that necessarily means that the Legislature intended to exclude home invasion as a predicate felony for felony murder. We disagree. As the State points out in its brief, third-degree burglary, the breaking and entering of a dwelling with the intent to commit a crime, remains a predicate felony for felony murder under CR § 2-201(a)(4). There is no reason why home invasion, the breaking and entering of a dwelling the with intent to commit, specifically, a violent crime, would be excluded from the list of felonies. A statute’s “plain language must be viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute.” *Lockshin v. Semsker*, 412 Md. 257, 276 (2010). Although home invasion is not explicitly included in the list of felonies that constitute felony murder, it

would be illogical to exclude home invasion, a violent form of burglary, from serving as a predicate for felony murder.

Berhanu also argues that the felony “merger doctrine” separately renders his conviction illegal, because felony murder is not a permissible conviction “whenever the underlying felony is an integral element of the homicide.” *State v. Jones*, 451 Md. 680, 694 (2017). *Jones*, however, considered a first-degree assault that resulted in the victim’s death. *Id.* at 686. The Supreme Court held that “[w]here the only felony committed (apart from the murder itself) was the assault upon the victim that resulted in the death of the victim, the assault merges with the killing and cannot be the predicate for felony murder nor relied upon by the State as an ingredient of a felony murder.” *Id.* at 708.

In the present case, the underlying felony to support felony murder was not first-degree assault, but was instead home invasion, an entirely separate crime with different elements. This Court has held that “[a] felony murder conviction can be based upon proof that a burglary occurred, and that a death occurred during the commission of the burglary.” *Wagner v. State*, 160 Md. App. 531, 560 (2005). Home invasion is a subset of burglary, with the intent to specifically commit a crime of violence.¹⁰ The crime of violence may be murder, but it also may be another violent crime. Here, a completely distinct felony, home invasion, was committed apart from Carter’s murder. The elements of home invasion are

¹⁰ Although the circuit court in this instance instructed the jury that “[h]ome invasion is the breaking and entering of someone else’s dwelling with the intent to commit murder,” the statute actually provides that home invasion is “break[ing] and enter[ing] the dwelling of another with the intent to commit a crime of violence.” CR § 6-202(b). Of course, murder is a crime of violence; however, other crimes of violence would similarly satisfy the requirements for a conviction of home invasion.

not integral to the elements of homicide. Home invasion, therefore, may serve as a predicate felony for felony murder. Furthermore, Berhanu’s conviction under a theory of felony murder was not barred by the “merger doctrine.”

IV. The conviction and sentence for conspiracy to commit murder is not illegal.

Berhanu similarly contends that his conviction for conspiracy to commit murder is an illegal sentence because the jury could have convicted him of murder based on the theory of felony murder, and one cannot conspire to commit felony murder. The State again argues that this claim is not preserved as Berhanu failed to object during the jury instructions. The State further contends that the circuit court’s instructions on conspiracy and felony murder sufficiently conveyed to the jury that it could not convict Berhanu of conspiracy to commit murder under a felony murder theory. We assume without deciding that Berhanu’s claim is preserved and affirm.

A. Standard of review

As noted above, we review *de novo* whether a sentence, and its underlying conviction, are illegal. *Colvin*, 450 Md. at 725; *Crawley*, 455 Md. at 66.

B. Analysis

A “significant characteristic of conspiracy to commit a crime is that the defendant, to be found guilty of conspiracy, must have a specific intent to commit the offense which is the object of the conspiracy.” *Alston v. State*, 414 Md. 92, 114-15 (2010). “An intent to murder . . . means an intent to kill with malice.” *Id.* at 118 (excluding second degree murder based upon an intent to inflict grievous bodily harm from a charge of conspiracy to commit murder). Accordingly, “a conspiracy to murder means a malicious intent to kill with

deliberation and premeditation, *i.e.*, first degree murder, as the conspiracy necessarily supplies the elements of deliberation and premeditation.” *Id.*

In the present instance, the circuit court provided the following instruction to the jury on conspiracy:

The defendant is charged with the crime of conspiracy to commit the crimes of murder and home invasion. Conspiracy is an agreement between two or more persons to commit a crime. In order to convict the defendant of conspiracy, the State must prove, one, that the defendant agreed with at least one other person to commit the crimes of murder and/or home invasion; and two, that the defendant entered into the agreement with the intent that the crimes of murder and/or home invasion be committed. In order for an agreement to exist, the parties to a conspiracy must come to an understanding to commit a crime.

The circuit court’s instruction, that to convict of conspiracy to commit murder, the jury needed to find that “the defendant agreed with at least one other person to commit the crime[] of murder,” makes no mention of felony murder. Rather, the instruction on conspiracy to commit murder explicitly required the jury to find that Berhanu had agreed with another individual to commit murder, and Berhanu had the intent to commit murder when the agreement was formed.

“To be sure, our case law provides that ‘[j]urors are presumed to follow the [jury] instructions.’ That presumption, however, is itself based on another presumption—namely, that the jurors are willing and able to follow jury instructions.” *Kazadi v. State*, 467 Md. 1, 36 (2020) (internal citation omitted). Absent any specific indication that the jury declined to follow the circuit court’s instructions, we cannot conclude that the jury convicted Berhanu of conspiracy to commit murder under a theory of felony murder,

rendering the conviction invalid. Accordingly, Berhanu’s conviction of and sentence for conspiracy to commit murder is not illegal.

V. The circuit court did not err in admitting the four images of firearms.

Berhanu next contends that the circuit court erred in admitting four photographs that were recovered from Berhanu’s electronic accounts each of which depicted one or more firearms. Berhanu argues that the images were not relevant because none of the firearms in the images were identified as being the guns used in Carter’s murder.¹¹ Berhanu contends that the State’s argument at trial, that the images showed that Berhanu had “access” to firearms, was not enough to make the images relevant. Berhanu argues that the images were unfairly prejudicial, as they implicated a criminal propensity, and that any probative value was negligible. The State contends that the circuit court properly determined that the images were relevant and that any prejudice to Berhanu was outweighed by the probative value of the evidence.

A. Standard of review

“We determine whether evidence is relevant as a matter of law, for which the standard of review is de novo.” *Williams v. State*, 251 Md. App. 523, 566 (2021). If we determine that the evidence was relevant, “we proceed to the second step, which is whether the court abused its discretion in admitting the evidence.” *Vangorder v. State*, 266 Md.

¹¹ As previously noted, the four admitted photographs were: 1) a partial image of what is either a rifle or a shotgun, and a partial image of an extended magazine for a handgun; 2) Berhanu holding a shotgun; 3) a shotgun and a handgun between the feet of an unidentified seated individual; and 4) an individual in the driver’s seat of a vehicle with a shotgun and a handgun on his lap.

App. 1, 19 (2025). “An abuse of discretion occurs where no reasonable person would take the view adopted by the circuit court.” *Id.*

B. Analysis

“‘Relevant evidence’ means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Md. Rule 5-401. “Having ‘any tendency’ to make ‘any fact’ more or less probable is a very low bar to meet.” *Williams v. State*, 457 Md. 551, 564 (2018). Relevant evidence is generally admissible, but “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Md. Rule 5-402, 403.

“Probative value is substantially outweighed by unfair prejudice when the evidence tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission.” *Vangorder*, 266 Md. App. at 18 (internal quotations omitted). “Evidence is never excluded merely because it is prejudicial. If prejudice were the test, no evidence would ever be admitted.” *White v. State*, 250 Md. App. 604, 645 (2021) (internal quotations omitted) (quoting *Moore v. State*, 84 Md. App. 165, 172 (1990)). The prejudice must be unfair, which involves more than damage to a party’s case. *Weiner v. State*, 55 Md. App. 548, 555 (1983). Rather, to be unfairly prejudicial, the evidence must have “an undue tendency to persuade the jury to decide the case on an improper basis, usually an emotional one.” *Id.*

As noted, Berhanu contends that the State failed to meet its burden that the images were relevant because the State could not establish that the firearms shown in the photographs, a shotgun and a handgun, were the firearms used in the commission of Carter’s murder. The State, however, was not required to demonstrate that the firearms were the same; rather, the State was establishing that Berhanu had access to the same types of firearms that were used in Carter’s murder. That Berhanu had access to a shotgun and a handgun on other occasions, as demonstrated by the images, had a tendency to make it more probable that Berhanu had access to a shotgun and handgun to commit Carter’s murder. The circuit court properly found that the four images were relevant.

Berhanu points us to *Smith v. State* to argue that the circuit court abused its discretion in admitting the images because they were unfairly prejudicial. *Smith v. State*, 218 Md. App. 689 (2014). In *Smith*, Smith was convicted second-degree depraved heart murder for the shooting death of his roommate. *Id.* at 696. At trial, the State introduced evidence that Smith owned eight firearms and that police recovered ammunition from Smith’s apartment. *Id.* at 703. Smith objected, as the firearms and ammunition were not related to the shooting of his roommate. *Id.* This Court reversed, holding that “the evidence the court admitted regarding Mr. Smith’s ownership of unrelated firearms and ammunition was minimally relevant, at best, and highly prejudicial, and should have been excluded from the trial of these charges.” *Id.* at 705. The Court specifically noted that “[t]he fact that Mr. Smith legally possessed guns and ammunition does not make the weapons relevant to the victim’s death.” *Id.* at 705-06. Accordingly, “[w]ithout a more direct or tangible connection to the events surrounding *this shooting*, the evidence of the

other weapons and ammunition owned by Mr. Smith failed the probativity/prejudice balancing test, and the trial court erred by admitting it.” *Id.* at 706.

We do find *Smith* instructive. Of particular importance in *Smith* is that the firearms and ammunition that the State attempted to introduce were clearly not the .38 caliber handgun that the victim had been shot with. *Id.* at 703. Without a “direct or tangible connection to the events surrounding *this shooting*,” the evidence of additional firearms should not have been introduced. *Id.* at 706. To the contrary, the images that the State introduced in the present case were of a shotgun and a handgun, the types of firearms that were used in Carter’s murder. Furthermore, the circuit court specifically excluded other photographs of firearms.¹² The circuit court clearly demonstrated that it was considering the relevance, probative value, and unfair prejudicial effect of each individual photograph. The circuit court properly exercised its discretion in admitting each of the four firearms issues. Accordingly, we affirm.

VI. The circuit court did not err in admitting the rap lyrics evidence.

Finally, Berhanu contends that the circuit court erred by admitting into evidence the video clip of rap lyrics that were posted on Berhanu’s Instagram account. Berhanu argues that the evidence was not relevant as there was an insufficient nexus between the lyrics and the crime, and that the State never alleged that Berhanu was the author of the lyrics.

¹² For example, the State attempted to introduce a photograph of Berhanu holding and pointing a handgun. The handgun in the photograph was different in appearance from the semiautomatic Springfield Armory .45 auto-caliber pistol that had been recovered from the Park Avenue Apartment, which the State had argued was the handgun used in Carter’s murder. The circuit court declined to admit this photograph.

Accordingly, Berhanu contends that the prejudicial effect of the introduction of the rap lyrics far outweighed any probative value, and the evidence should not have been admitted. The State argues that the circuit court properly determined that the rap lyrics were relevant as they bore a sufficient nexus to the crime and were additionally admitted to explain the meaning of the slang term “bag” or “bagging.” The State additionally contends that the circuit court properly conducted the admissibility balancing test and found that the probative value of the rap lyrics outweighed any prejudice to Berhanu.¹³

¹³ At the time of Berhanu’s trial, the Supreme Court’s opinion in *Montague v. State* was the controlling authority concerning the admissibility of rap lyrics as evidence in criminal trials. Accordingly, the circuit court was, and on appeal, this Court is, bound by that precedent. We acknowledge, however, the Legislature’s recent action in passing the Criminal Procedure - Evidence - Protecting Artists’ Creative Expression (PACE Act) on April 8, 2026. The PACE Act Summary provides:

In any criminal or juvenile proceeding, the creative expression of a defendant or respondent is not admissible against the defendant or respondent unless the court finds, by a preponderance of the evidence, that:

- the defendant or respondent intended the creative expression to be literal, rather than figurative or fictional or if the creative expression is derivative, the defendant intended to adopt the literal meaning of the creative expression as their own;
- there is a close temporal and factual nexus between the creative expression and the alleged offense;
- the creative expression is relevant to a disputed issue of fact; and
- the probative value of the creative expression outweighs its prejudicial effect

Maryland General Assembly, Fiscal and Policy Note, Senate Bill 475, Criminal Procedure - Evidence - Protecting Artists’ Creative Expression (PACE Act), https://mgaleg.maryland.gov/2026RS/fnotes/bil_0005/sb0475.pdf.

A. Standard of review

In *Montague v. State*, 471 Md. 657 (2020), the Supreme Court of Maryland articulated the applicable appellate standard of review regarding a circuit court’s decision to admit rap lyrics into evidence as follows:

Our review of the trial court’s decision to admit the rap lyrics as evidence involves a two-step process of analysis. First, we consider whether the evidence is legally relevant which is a conclusion of law that we review *de novo*. *Portillo Funes v. State*, 469 Md. 438, 478 (2020) (citing *Ford v. State*, 462 Md. 3, 46 1090 (2018)) (“An appellate court reviews *de novo* a trial court’s determination as to whether evidence is relevant.”). After determining whether the evidence in question is relevant, we consider whether the trial court abused its discretion by admitting relevant evidence which should have been excluded as unfairly prejudicial. Thus, the trial judge’s ruling on the admissibility of evidence under Rule 5-403 is reviewed for abuse of discretion. *Id.* The standard of review for “[a]n abuse of discretion occurs where no reasonable person would take the view adopted by the circuit court.” *Williams v. State*, 457 Md. 551, 563 (2018) (citing *Fuentes v. State*, 454 Md. 296, 325 (2017)). Appellate “courts ‘are generally loath to reverse a trial court unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion.’” *Portillo Funes*, 469 Md. at 479 (quoting *Merzbacher v. State*, 346 Md. 391, 404-05 (1997)).

Montague, 471 Md. at 673-74. Accordingly, we first consider *de novo* whether the evidence of rap lyrics from Berhanu’s Instagram account was legally relevant, and we then consider whether the circuit court abused its discretion in determining that the danger of

The PACE Act codifies *Montague*, and it adds the element that a defendant must have “intended the creative expression to be literal, rather than figurative or fictional” or “intended to adopt the literal meaning of the creative expression as their own.” As of the date of the filing of this opinion, the PACE Act has not yet been signed into law.

unfair prejudice to Berhanu was outweighed by the probative value of the rap lyrics evidence.

B. Analysis

The Supreme Court of Maryland addressed the admissibility of rap lyrics at length in *Montague*. In *Montague*, the defendant, Lawrence Montague, allegedly shot and killed the victim following a drug deal and was later identified by a witness who was with the victim at the time. 471 Md. at 666-67. While incarcerated awaiting trial, Montague made a telephone call to an unidentified individual and requested that the individual record his rap. *Id.* at 667. The lyrics of the rap included details that matched the victim’s murder and made references to “shooting snitches.” *Id.* The State introduced the rap lyrics as substantive evidence to prove Montague’s guilt, and the Supreme Court upheld the circuit court’s admission of the lyrics. *Id.*

In doing so, the Court held that although rap lyrics evidence “carries inherent prejudicial effect,” the evidence nevertheless may be admissible in certain circumstances. *Id.* at 692. The Court emphasized that the inquiry is fact-dependent, and therefore the analysis must be conducted on a case-by-case basis. *Id.* at 691-92. The Supreme Court articulated the appropriate test for defendant-authored rap lyrics as follows:

If defendant-authored rap lyrics bear a close nexus to the details of an alleged crime such that the lyrics constitute “direct proof” of the defendant’s involvement, they meet the low relevance threshold of Maryland Rule 5-401 and are admissible under Maryland Rule 5-402. Then, the relevance inquiry shifts to a balancing of probative value against unfair prejudice under Maryland Rule 5-403. Similarly, when such a nexus exists, the probative value of defendant-authored rap lyrics is not substantially outweighed by unfair prejudice

because the usefulness of the lyrics to the jury is not substantially overcome by their inflammatory character as propensity evidence.

In sum, when a defendant’s rap lyrics are offered as substantive evidence of their guilt, those lyrics should be analyzed on a case-by-case basis using the evidentiary rules that courts routinely use in determining the threshold admissibility of evidence. Although rap lyric evidence carries inherent prejudicial effect, the probative value of a defendant’s rap lyrics shares an inverse relationship with unfair prejudice. The closer the nexus between a defendant’s rap lyrics and the details of an alleged crime, the lower the danger of admitting the lyrics as unfairly prejudicial propensity evidence of the defendant’s bad character.

Id. at 691-92.

Notably, *Montague* considered defendant-authored rap lyrics. We, however, see no reason not to apply the same test in the present instance. Berhanu argues that the State “made no attempt to establish that Mr. Berhanu authored the lyrics; it argued only, ‘he was singing the lyrics.’” The State counters that this is not necessary, as the lyrics were introduced in part to demonstrate the meaning of the terms “bag” or “bagging,” and whether Berhanu was actually the author of the rap lyrics should instead go to the weight that the jury ascribed to the evidence. We agree. We do not read *Montague* as constraining itself to only defendant-authored lyrics. Accordingly, we proceed with the *Montague* admissibility test.

We first consider whether the evidence is legally relevant. “Evidence is relevant if it 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.’” *Montague*, 471 Md. at 674 (quoting Maryland Rule 5-401). Again, this is a

“very low bar to meet.” *Williams*, 457 Md. at 564. As noted, lyrics may be relevant when “they bear a close factual and temporal nexus to the details of [the crime].” *Montague*, 471 Md. at 692.

In the present case, the State played for the jury a 10-second clip from an Instagram post, in which a male voice is heard singing rap lyrics. Carter’s sister had viewed the post on Instagram and sent it to the police after Carter’s death. Carter’s sister identified the voice singing the rap lyrics as Berhanu. In his brief, Berhanu notes that the “[t]he language the prosecutor argued showed a nexus to the crime was: ‘A \$@#% bag left his mama crying on the knees; \$@#% magic; We stretch him out and leave him in his blood that \$@#%.’” Berhanu argues that the lyrics are too “vague” and “generic” to be relevant to Carter’s murder, and points to several cases where the rap lyrics admitted included extremely specific details of the crime. The State argues that they lyrics were relevant because they helped illustrate the meaning of the word “bag” as referring to a violent act¹⁴ and that the references “leaving him in his blood” and “left his mama crying” bore a close resemblance to the crime.

We agree with the circuit court that the lyrics were relevant because they bore a sufficient nexus to the crime. The rap lyrics were posted after Carter’s death; used the term “bag,” a reference to a violent act, which was a term O’Brien had heard Berhanu use in reference to Carter; and described leaving Carter to bleed to death to be found by his

¹⁴ As noted previously, O’Brien acknowledged during her testimony that on May 4, 2023, she told a detective that she overheard Berhanu and another individual say that they would “bag Los.”

mother. Based on the close nexus between Berhanu’s posted rap lyrics and the details of Carter’s murder, the lyrics make it more probable that he shot and killed Carter. The rap lyrics therefore exceed the low relevance threshold set out in Rule 5-401 and are admissible under Rule 5-402. Accordingly, the circuit court did not err in determining that the lyrics were relevant.

As discussed previously, once evidence has been deemed relevant, it “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Md. Rule 5-403. Of course, evidence is not prejudicial simply because it hurts one party’s case. *Montague*, 471 at 674 (citing *Burris v. State*, 435 Md. 370, 392 (2013)). Rather, “probative value is substantially outweighed by unfair prejudice when the evidence ‘tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission.’” *Id.* (quoting *State v. Heath*, 464 Md. 445, 464 (2019)).

Berhanu notes that rap lyrics are inherently prejudicial, and that this prejudice outweighed any potential probative value. Although we agree that rap lyrics are inherently prejudicial, the circuit court in the present instance reviewed the 10-second clip and reviewed applicable case law, conducting the case-specific analysis required by *Montague*. 471 Md. at 692. The circuit court did not abuse its discretion when it determined that the probative value of the lyrics -- that the lyrics described what occurred during Carter’s murder -- was not outweighed by the danger of unfair prejudice to Berhanu. Accordingly, we affirm.

CONCLUSION

We hold that 1) the circuit court did not err in permitting Luehr to answer affirmatively when asked if her firearm analysis results were verified; 2) the circuit court did not err in declining to instruct the jury that it must be unanimous as to the theory of first-degree murder; 3) Berhanu's conviction and sentence for felony murder was not illegal; 4) Berhanu's conviction and sentence for conspiracy to commit murder was not illegal; 5) the circuit court did not err in admitting the four photographs of firearms recovered from Berhanu's electronic accounts; and 6) the circuit court did not err in admitting the rap lyrics evidence. Accordingly, we affirm the judgment of the circuit court.

**JUDGMENT OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**