Circuit Court for Anne Arundel County
Case No. C-02-CR-19-001118

UNREPORTED*

IN THE APPELLATE COURT

OF

MARYLAND

No. 1549

September Term, 2021

EDWIN JAVIER HURTADO-VALDEZ

v.

STATE OF MARYLAND

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

Opinion by Albright, J.

Filed: September 11, 2023

*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).

Following the deaths of Antwan Briggs and Antwon Queen, a jury in the Circuit Court for Anne Arundel County found Edwin Hurtado-Valdez, appellant, guilty of two counts of second-degree felony murder, two counts of manslaughter, and related other crimes. For both murder convictions, the predicate felony was possession of marijuana with intent to distribute. Mr. Hurtado-Valdez was not separately charged (or convicted) of this felony, though. Mr. Hurtado-Valdez was sentenced to a total term of 46 years in prison.[1]

On filing his initial brief, Mr. Hurtado-Valdez presented two questions for our review:

1. Did the trial court abuse its discretion in admitting photographic and video evidence that had been posted to Mr. Hurtado-Valdez's social media account depicting him in possession of various firearms?
2. Did the trial court err in instructing the jury that self-defense did not apply to the charge of felony murder in the second degree?

After Mr. Hurtado-Valdez was sentenced, and during the pendency of his appeal, the law on possession of marijuana with intent to distribute changed. Specifically,

[1] In addition to the above crimes, Mr. Hurtado-Valdez was also convicted of two counts of use of handgun in the commission of a crime of violence and one count of destruction of evidence. He was sentenced to: 18 years for each count of felony-murder (Counts 1 & 6); 5 years for each count of use of handgun in commission of a crime of violence, with 5 years of parole ineligibility (Counts 5 & 7); and 1 year for one count of destruction of physical evidence (Count 8). All sentences are consecutive except the sentence for destruction of physical evidence, which was concurrent to the sentence for Count 5. The trial court did not impose a sentence for either manslaughter, the State having suggested that these counts merged with felony-murder for the purpose of sentencing.

Maryland's General Assembly passed, and voters later approved, the Maryland Cannabis Reform Act ("MCRA"), one feature of which was to reclassify possession of marijuana with intent to distribute from a felony to a misdemeanor. The mechanism for this change was to repeal and reenact the penalty provision for possession with intent to distribute marijuana, Md. Code Ann., Criminal Law ("CR") § 5-607(a)(2). This statutory change took effect January 1, 2023.

After (and in light of) the reclassification of the predicate for his murder convictions, Mr. Hurtado-Valdez moved to supplement his brief. The State opposed this request. We granted Mr. Hurtado-Valdez's motion, asking the parties to file supplemental briefs on the effect of the reclassification and how Maryland's general savings clause, Md. Code Ann., Gen. Provis. § 1-205, might apply. Specifically, we ordered briefing on the following issue, which, for organizational purposes, we number as "3." in keeping with the numbering of the above questions presented:

> 3. The effects of Md. Code Ann., Crim. Law § 5-607(a)(2) and Md. Code Ann., Gen. Provis. § 1-205 on this appeal.

For reasons to follow, we affirm Mr. Hurtado-Valdez's convictions. As to the photographic and videographic gun evidence, while we agree that it should not have been admitted, the error was harmless. Because self-defense is not a defense to second-degree felony murder, we see no error in how the jury was instructed on this point. Finally, the reclassification of possession with intent to distribute marijuana from a felony to a misdemeanor, coming as it did after Mr. Hurtado-Valdez was found guilty and sentenced, does not affect his convictions.

FACTUAL AND PROCEDURAL BACKGROUND

In 2019, Mr. Briggs and Mr. Queen were shot in the laundry room of an apartment complex. Mr. Briggs died instantly. Mr. Queen made it outside before dying in the parking lot. Before the murders, a building resident confirmed seeing Mr. Briggs and Mr. Queen sitting on a bench outside the building. After a time, that resident heard gunshots in the laundry room.

Another resident was walking to her car when she encountered a man, later identified as Mr. Queen, staggering and then collapsing near her car. According to this resident, another man drove up, got out of his car, flipped Mr. Queen over onto his back, "[went] through his pockets and patt[ed] his pockets down[,]" and then [left] in the car without concern for Mr. Queen.

When police arrived, they found no guns, cell phones, or marijuana on Mr. Briggs, Mr. Queen, or at the crime scene. Near the entrance to the laundry room, the police recovered a cartridge case for a bullet on the floor next to Mr. Briggs' body, as well as a bullet recovered from under him. In all, "[s]even [9 mm caliber] cartridge casings, two bullets[,] and two fragments were recovered."

Police investigation soon focused on Mr. Hurtado-Valdez, a high school acquaintance of Mr. Queen's who sold drugs. After speaking with Mr. Queen's family, police secured records (including electronic messages and images) from Mr. Hurtado-Valdez's and Mr. Queen's social media accounts. Some six months before the murders, Mr. Queen had messaged Mr. Hurtado-Valdez, asking whether he had any cocaine

available. When Mr. Hurtado-Valdez was unable to acquire it at the price Mr. Queen was willing to pay, the deal fell through. Three months later, Mr. Hurtado-Valdez messaged Mr. Queen about the availability of a different drug for sale, a high-grade variety of marijuana. And on the day of the murders, Mr. Queen messaged Mr. Hurtado-Valdez, telling him that he needed marijuana.

> [MR. QUEEN, 12:45 p.m.]: U kan meet me out BG
>
> * * *
>
> [MR. QUEEN, 12:53 p.m.]: By hospital dr
>
> [MR. HURTADO-VALDEZ, 12:53 p.m.]: Yuh had said BG llab
>
> [MR. QUEEN, 1:16 p.m.]: Yea but I gahh hit a kouple more play give me like a 1hr
>
> [MR. QUEEN, 2:21 p.m.]: Broo
>
> [MR. HURTADO-VALDEZ 2:24 p.m.]: Wudup bro?
>
> [MR. QUEEN, 2:24 p.m.]: I need dat.
>
> [MR. HURTADO-VALDEZ, 2:26 p.m.]: Ardd ima hit this play than be omw
>
> [MR. QUEEN, 2:49 p.m.]: Bet
>
> * * *
>
> [MR. HURTADO-VALDEZ, 3:01 p.m.]: Addy?
>
> [MR. QUEEN, 3:10 p.m.]: 344 [street name redacted]
>
> [MR. QUEEN, 4:01 p.m.]: How far away?
>
> [MR. HURTADO-VALDEZ, 4:30 p.m.]: Bro can you pick me up[2]

[2] Other evidence showed that Mr. Hurtado-Valdez later drove himself to the apartment complex.

In addition to the electronic messages, police found three still images of handguns that Mr. Hurtado-Valdez had posted on his social media account within a month of the murders. Two stills were of revolvers, and one still was of a 9 millimeter (mm) Luger. On Mr. Hurtado-Valdez's social media account, police also found a video showing him in possession of a firearm. This video had been posted to the account about a month prior to the murders.

After the murders, police found marijuana in Mr. Hurtado-Valdez's home and a blood stain on the car he was believed to have driven away from the apartment complex. Specifically, in the kitchen cabinets, in a potato chip bag, police found "a bag of marijuana," holding approximately 62 grams of marijuana. The marijuana was packaged in a sealed plastic bag that itself contained two sandwich bags that themselves contained 36 smaller bags or "bag corners." Inside the potato chip bag was also a variety of other chip bags, including a Cheetos bag. The blood stain was on the driver's side door.

When police searched Mr. Hurtado-Valdez's home, he had already fled the area and crossed the border into Mexico near Laredo, Texas. Later, Mr. Hurtado-Valdez was returned to Texas, and then to Maryland. Once in Maryland, Mr. Hurtado-Valdez met with Anne Arundel County Police Detectives Adrian Lewis and Vincent Carbonero and provided a long, recorded interview.

During the interview, Mr. Hurtado-Valdez did not deny shooting Mr. Briggs and Mr. Queen but said he did so in self-defense. Mr. Hurtado-Valdez told the detectives that he met Mr. Queen at the apartment complex to smoke marijuana together. When he

arrived, Mr. Queen showed Mr. Hurtado-Valdez some marijuana that he had in a small Cheetos bag.[3] Mr. Queen then gave Mr. Hurtado-Valdez the bag; he smelled it and returned it to Mr. Queen before following him into the apartment building, down the hall, and toward the laundry room.

As Mr. Hurtado-Valdez told the police, Mr. Briggs must have been in a dark corner of the laundry room waiting out of sight because when he walked into the room ahead of Mr. Queen, he heard the door shut behind him, and before he turned toward the door, Mr. Briggs hit him, knocking him to the ground. Mr. Hurtado-Valdez claimed that Mr. Briggs pointed a gun at him and demanded that he turn over his stuff. After taking a wallet from Mr. Hurtado-Valdez, Mr. Queen turned to give it to Mr. Briggs, and that is when Mr. Hurtado-Valdez claimed Mr. Briggs said, "[I]f he don't got nothing, we gonna smoke him."

Taking Mr. Briggs' statement to mean they were going to kill him, Mr. Hurtado-Valdez acted out of fear for his life.

> [MR. HURTADO-VALDEZ]: Yeah, like . . . that is when I took the gun. I can't really explain how I took the gun. I just know I took it. I twisted it. And then – it was kind of falling to the ground but I still had, I was holding the [gun] where you insert the clip . . . . My finger wasn't even on the trigger. [Mr. Briggs] grabbed like the barrel and we were still like I guess you could say fighting over a gun . . . . I'm on the ground at this point. I had the gun and [Mr. Briggs] was on me at this point . . . [b]ut he was pressing down on me. I pointed the gun toward him and I shot, and I shot him . . . . I'm pretty sure it was his chest because he was like above me . . . but I just pointed the gun and it went off[.]

[3] There was apparently no connection between the Cheetos bag Mr. Hurtado-Valdez said Mr. Queen showed him and the one found in Mr. Hurtado-Valdez's kitchen during the police search of it.

After taking the gun from Mr. Briggs and shooting him, Mr. Hurtado-Valdez shot Mr. Queen. According to Mr. Hurtado-Valdez, Mr. Queen was some distance away when he fired the gun at him. The first time he shot him "in the front," and the second time was when Mr. Queen turned and picked up his phone that had fallen out of his pocket before struggling to open the door and running out of the room. Mr. Hurtado-Valdez—still lying on the ground—panicked, got up, grabbed his wallet from atop the nearby washing machine, and left.

When Mr. Hurtado-Valdez finished explaining what happened, the detectives inquired about the gun, but the inquiry yielded little useful information.

> [DET. LEWIS]: Can you tell us what kind of gun it was? I mean, how much do you know about guns?
>
> [MR. HURTADO-VALDEZ]: No, not much.
>
> * * *
>
> [DET. LEWIS]: And do you know what kind of – what make and model that gun was?
>
> [MR. HURTADO-VALDEZ]: It had a nine and it had two Ms.

Mr. Hurtado-Valdez also told the detectives that after leaving the apartment complex, he used a tool to break the gun into pieces before taking it to an area in Brooklyn, Maryland, where he threw it in the storm drains.

The State's Motion in Limine

Before the trial, the State moved *in limine* to admit the photographic images (stills and video) of guns that Mr. Hurtado-Valdez had posted on his social media account. Again, this evidence included a photograph of a 9 mm Luger, a photograph of a revolver,

another photograph of a revolver, and a video of Mr. Hurtado-Valdez with a gun tucked into the waistband of his pants. This gun appeared similar to the 9 mm Luger depicted in the still photograph. Here, we will refer to these three still images and the video collectively as the "photographic gun evidence" or the "images."[4]

The State argued that the photographic gun evidence was relevant for two specific purposes. First, based on the forensic evidence recovered from the scene that suggested the murder weapon was consistent with a 9 mm Luger, the photographic gun evidence was relevant to show that even though the State could not connect any of the guns depicted in the images to the murders, it was more likely than not that Mr. Hurtado-Valdez brought the murder weapon with him that day. Second, the photographic gun evidence was relevant to his credibility because it contradicted his statements that he did not know much about guns or what kind was used to shoot the victims. Mr. Hurtado-Valdez countered that the photographic gun evidence should be excluded as irrelevant and prejudicial since the State could not connect the depicted guns to the crime.

The motions court ruled that the photographic gun evidence would be admitted for the limited purpose of showing Mr. Hurtado-Valdez's familiarity with guns and whether he had possessed a firearm before the shootings.[5] After considering whether the evidence

[4] The State's motion addressed other evidence that the motions court ultimately decided not to admit.

[5] As to how it was to consider the photographic gun evidence, the trial court provided the following limiting instruction to the jury:

was substantially relevant, whether Mr. Hurtado-Valdez's relationship to the evidence had been proven by clear and convincing evidence, and whether the evidence's probative value was outweighed by undue prejudice, the court ruled that the image of the revolver was "absolutely going to be able to come in[,]"and the image of the 9 mm Luger could come in without redacting the caliber because "it is relevant about [Mr. Hurtado-Valdez's] familiarity with guns." Regarding the video of Mr. Hurtado-Valdez with a gun in his waistband, the court ruled it relevant to show that "he has carried a gun at some point[,]" but the State "[could not] say that the 9mm that was posted two[6] months ago is the 9mm that was in his waistband three weeks and obviously is the murder weapon[.]" The court also ruled that the video was admissible to show that "not only is [Mr. Hurtado-Valdez] familiar with guns but in fact had a gun in his waistband area three weeks before the incident."

The Trial

The State called eleven witnesses to testify at trial. These included Mr. Queen's sister and other civilian fact witnesses, crime scene technicians, a forensic chemist, an expert in tool mark examination, Detective Lewis, medical examiner Dr. Patricia

> [THE COURT]: You have heard evidence that the Defendant previously posted pictures of guns on social media and posted a video of him in possession of a firearm. The State contends that in the Defendant's interview with police he denied knowing about guns. This evidence should only be considered regarding the Defendant's familiarity of [sic] firearms and whether he has previously possessed a firearm.

[6] This appears to be a misstatement, as all photographic gun evidence was dated approximately a month, rather than two months, before the date of the murder.

Aronica, and Detective Matthew Wires, a DEA task force officer who was qualified as an expert witness in controlled dangerous substances, drug terminology, and "generally, the drug trade." In addition, the State introduced clips of Mr. Hurtado-Valdez's police interview, the photographic gun evidence that had been the subject of its motion *in limine*, and the messages that Mr. Hurtado-Valdez and Mr. Queen had exchanged. Mr. Hurtado-Valdez did not testify or call other witnesses.

After explaining how he acquired records from Mr. Hurtado-Valdez's and Mr. Queen's social media accounts, Detective Lewis testified that on the day of the murders, Mr. Queen and Mr. Hurtado-Valdez were communicating with each other. He added that while Mr. Queen's accounts showed the communications, Mr. Hurtado-Valdez's did not. Detective Lewis then continued explaining the investigation, including the searches of Mr. Hurtado-Valdez's home and car, and his interview with Mr. Hurtado-Valdez at the police station.

The interview with Mr. Hurtado-Valdez was recorded by video and broken into multiple clips. After Detective Lewis identified a clip, the State played it for the jury and interspersed additional questions for Detective Lewis between clips. The State introduced the photographic gun evidence that Mr. Hurtado-Valdez had posted on his social media account before airing the video segment in which he claimed to know little about firearms. Additionally, the jury heard Mr. Hurtado-Valdez explain in his own words what happened in the moments leading up to the shootings of Mr. Briggs and Mr. Queen.

Dr. Patricia Aronica testified that Mr. Briggs and Mr. Queen both died from their

bullet wounds. Mr. Briggs was shot in his head, upper extremity, and left hand. Mr. Brigg's head wound was instantly fatal and resulted from a bullet fired from approximately 8 to 24 inches away. Mr. Queen suffered several gunshot wounds as well. The first, with the bullet entering Mr. Queen's right upper back, going through the lung, and exiting the chest, was likely fatal. The second bullet's trajectory was very slightly upward, entering Mr. Queen's left ribcage and traveling through his left lung, his heart, and his right lung, before exiting his right ribcage.

Detective Wires explained that on the day of the murders, Mr. Hurtado-Valdez and Mr. Queen had been arranging a drug deal and had communicated with each other before that day. In their initial messages from the day of the murders, there was some confusion between Mr. Queen and Mr. Hurtado-Valdez about where they were going to meet. Mr. Hurtado-Valdez responded that he would meet up with Mr. Queen in about an hour after he completed a few more drug deals. Just over an hour later, Mr. Queen messaged Mr. Hurtado-Valdez, saying that he "'needs dat,' indicating that he need[s] [the] marijuana" he asked about earlier that day. Mr. Hurtado-Valdez told Mr. Queen that he is on his way to another drug deal and will be on his way after that. Approximately 35 minutes later, Mr. Hurtado-Valdez messaged Mr. Queen for the address, Mr. Queen responded with it, and asked Mr. Hurtado-Valdez about how far away he was from their meeting place. An hour later, around the time of the murders, Mr. Hurtado-Valdez messaged Mr. Queen for the last time.

Detective Wires also testified regarding several aspects of drug dealing. He

explained that, as a cash business, drug dealing is inherently dangerous because sellers will stockpile cash since it is difficult to move cash into a bank account, while cashless or disappointed buyers may also rely on guns to get what they want. The presence of significant amounts of cash and illegal activity generally leaves drug dealers and buyers without anyone to call for help. Hence, firearms are often the chosen means of enforcement and protection. This interconnectivity increases the likelihood that where drug deals take place, firearm-related crimes will occur.

Second-Degree Felony Murder and Self-Defense Instructions

On the second day of the trial, the State filed a memorandum requesting the trial court instruct the jury on second-degree felony murder, with the predicate felony being possession with the intent to distribute marijuana. In the memorandum, the State also requested that the court instruct the jury that self-defense is not a defense to felony murder.

On the third day, the court discussed the State's requested jury instructions with the parties. The State argued that, according to *Nicholson v. State*, 239 Md. App. 228 (2018), self-defense did not apply to the felony murder charges, so Mr. Hurtado-Valdez's requested instruction on perfect and imperfect self-defense should be limited to the first- and second-degree (intentional) murder charges. Mr. Hurtado-Valdez countered, arguing that he should be entitled to a self-defense instruction on the felony murder charges because *Nicholson* was "wrongly decided." The court found that *Nicholson* clearly held that self-defense was not a defense to felony murder, saying, as to *Nicholson*, "[so], we

are stuck with it, you know – [.]"

The following day, Mr. Hurtado-Valdez did not repeat his objection to the court's decision not to include self-defense among the possible defenses to first- or second-degree felony murder. Before instructions, Mr. Hurtado-Valdez lodged no such objection. After instructions, the court asked the parties if there were any objections, and the following colloquy ensued:

> [THE STATE]: None from the State.
>
> [THE COURT]: Okay. Defense?
>
> [COUNSEL FOR MR. HURTADO-VALDEZ]: I just want to preserve the objection to the –
>
> [THE COURT]: The secondary [sic] felony murder going back at all?
>
> [COUNSEL FOR MR. HURTADO-VALDEZ]: Well, that and so I want to preserve my objection to the second-degree felony murder, I want to preserve my objection to the social media posts of the gun that would intend to show anything other than familiarity or possession.
>
> [THE COURT]: Okay. Yep, that is noted.
>
> [COUNSEL FOR MR. HURTADO-VALDEZ]: I think that is, that is it.

Verdict

The jury returned guilty verdicts on two counts each of second-degree felony murder and manslaughter, and three related charges. The jury acquitted Mr. Hurtado-Valdez of premeditated murder, intentional second-degree murder, and first-degree felony murder, among others.

Additional facts are provided below as needed.

DISCUSSION

Admission of the Photographic Gun Evidence

Mr. Hurtado-Valdez first claims that the trial court erred in admitting the photographic gun evidence.[7] Mr. Hurtado-Valdez contends that this evidence was irrelevant because the State "admittedly was unable to link the guns to the crime" and because the State's purported purpose for admitting the evidence – to show his familiarity with guns – was not probative of any fact in issue. He argues further that, even if the evidence had some probative value, any such value was substantially outweighed by the danger of unfair prejudice and misleading the jury. He asserts that the evidence was inflammatory and likely caused the jurors to view him as a person of general criminal character.

The State contends that the photographic gun evidence was relevant to show Mr. Hurtado-Valdez's familiarity with guns and to support the State's theory of the case, which was that Mr. Hurtado-Valdez brought a gun to the meeting with Mr. Queen and proceeded to rob and kill the victims. The State contends that the photographic gun evidence was also relevant to refute Mr. Hurtado-Valdez's claims that he shot the victims in self-defense and that he was unfamiliar with firearms, including the type of firearm linked to the shooting. The State argues that the risk of prejudice was low given the trial

[7] In this appeal, Mr. Hurtado-Valdez challenges the admissibility of a video that shows him with a gun in his waistband. Nonetheless, the trial record suggests that there may have been a second video admitted from Mr. Hurtado-Valdez's social media account. Because Mr. Hurtado-Valdez does not challenge the admission of a second video, we do not discuss it.

court's limiting instruction to the jury. Finally, the State argues that, to the extent that the court erred in admitting the photographic gun evidence, any error was harmless because the jury acquitted Mr. Hurtado-Valdez of the offenses for which the photographic gun evidence may have influenced the jury.

We hold that it was an abuse of discretion to admit the photographic gun evidence. As we explain below, these images were not admissible to prove that Mr. Hurtado-Valdez owned the murder weapon. Thus, even if these images tended to undercut the credibility of Mr. Hurtado-Valdez's assertion to police that he did not know much about guns, admitting these images was an error.

As to whether Mr. Hurtado-Valdez owned the weapon used to kill Mr. Briggs and Mr. Queen, the photographic gun evidence was not admissible in the absence of a connection between a depicted weapon and the murder weapon. Without this connection, the images established only that some weeks before the murders, Mr. Hurtado-Valdez possessed other firearms. But, possessing other firearms some weeks before the murders was only minimally relevant to proving what happened on the day of the murders. As such, admission of the images would have failed the probative/prejudice balancing test of Md. Rule 5-403. *Smith v. State*, 218 Md. App. 689, 705-06 (2014) ("The fact that Mr. Smith legally possessed guns and ammunition does not make the weapons relevant to the victim's death, and we cannot see from this record how the inclusion of this evidence would help prove the offense charged. Without 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.").

The images did not become admissible because Mr. Hurtado-Valdez denied knowing much about weapons. On this point, *Anderson v. State*, 220 Md. App. 509 (2014) is instructive. Mr. Anderson was charged with two counts of first-degree rape after he and another man raped a woman at gunpoint. During cross-examination, Mr. Anderson was asked whether, and denied that, he had purchased a handgun. During rebuttal, the State introduced evidence (in the form of testimony from a police detective) that during an unrelated search of Mr. Anderson's Washington, D.C. apartment two weeks after the rapes, police found a handgun. But the State did not theorize, and could not prove, that that handgun was the one used during the rapes.

On appeal, we held that the fact of a handgun having been found in Mr. Anderson's apartment, even as this fact contradicted Mr. Anderson's testimony, was nonetheless irrelevant without evidence connecting the handgun to the rape. *Anderson*, 220 Md. App. at 523. Because Mr. Anderson denied having purchased the handgun, we started with Maryland Rule 5-616(b)(2) regarding the use of extrinsic evidence to contradict a witness's testimony. *Id.* at 516. We explained that extrinsic evidence must itself be relevant in order to meet Rule 5-616(b)(2)'s requirement that extrinsic evidence go to "non-collateral matters."[8] *Id.* at 520. Although the State argued that Mr. Anderson's

[8] Whether a matter or an issue is "collateral" depends on the relevancy of related evidence. *See Love v. Curry*, 104 Md. App. 684, 701-02 (1995); *Smith*, 273 Md. at 157.

credibility "was a material, not a collateral, issue[,]" *Anderson*, 220 Md. App. at 522 (omitting footnote), we pointed out, as did Mr. Anderson, that "the question is not whether the appellant's *credibility* was a collateral issue; it is whether *the fact or matter that was being used to impeach his credibility* was a collateral issue." *Id.* (emphasis in original). Concluding that the handgun in Mr. Anderson's apartment " . . . was not relevant to any substantive issue in the case[,]" we added " . . . an irrelevant fact that comes into evidence does not become relevant merely because there is extrinsic evidence to contradict it." *Id*. at 524 (analogizing to *Smith v. State*, 273 Md. 152 (1974)). Ultimately, we held that whatever negligible probative value the handgun may have had, it was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury." *Id.* at 525.

As applied to this case, the message of *Anderson* is clear. Even if the images on Mr. Hurtado-Valdez's social media account tended to undermine the credibility of his statement to police that he did not know much about guns, that tendency alone was not enough to render the images admissible. Instead, in order to be admissible, the images had to be relevant to a substantive issue in the case. Here, the State could not establish that the gun used to kill Mr. Briggs and Mr. Queen was among those depicted on Mr. Hurtado-Valdez's social media account. Indeed, the State conceded that its theory in

When evidence, if admitted, tends to establish or undermine a fact relevant to the underlying dispute, that fact is "non-collateral" within the meaning of Rule 5-616(b)(2). *See Love*, 104 Md. App. at 701-02 (*quoting* 1 John W. Strong, *et al.*, McCormick on Evidence, Ch. 5, § 49, p. 183 (4th ed. 1992)).

offering the images was for what amounted to a non-substantive purpose, i.e., to show that Mr. Hurtado-Valdez was familiar with weapons when he claimed not to have known much about them. But the fact of Mr. Hurtado-Valdez's asserted unfamiliarity with guns did not become relevant simply because the State had "extrinsic evidence to contradict it." *Anderson*, 220 Md. App. at 524.

That the State offered the images during its case-in-chief, rather than in rebuttal to impeach something Mr. Hurtado-Valdez said in direct testimony (as had Mr. Anderson), does not help the State's cause here. "Strawman rebuttal" or "anticipatory rehabilitation" is the practice by which the State, in anticipation of something the defendant may introduce during his case, introduces rebutting evidence during its case-in-chief. *See, e.g.*, *Johnson v. State*, 408 Md. 204, 226-229 (2009) (citing cases). Of course, "[t]he prohibition against 'anticipatory rehabilitation' and/or 'strawman rebuttal' evidence is well established." *Id*. at 227, and certainly so when used as a means of "bootstrapping" the admission of "other crimes" evidence into the State's case-in-chief. *Id*. at 228 (citing *State v. Werner*, 302 Md. 550, 565 (1985).[9] Here, the State elected to introduce Mr. Hurtado-Valdez's statement that he had little familiarity with guns. Having done so, the

[9] To this general prohibition against "strawman rebuttal" or "anticipatory rehabilitation" an exception exists whereby the defendant's opening statement "opens the door" to such evidence. *Johnson*, 408 Md. at 226. Here, the State identifies nothing in Mr. Hurtado-Valdez's opening statement that "opened the door" to admission of the photographic gun evidence.

State was not entitled to undermine it, during its case-in-chief, with evidence having minimal, if any, relevance to the case.

Having concluded that the trial court abused its discretion by admitting the photographic gun evidence, we nonetheless conclude that this error was harmless to Mr. Hurtado-Valdez. Given the overall strength of the State's case, including the marijuana and packaging found in Mr. Hurtado-Valdez's home, the messages showing his involvement in marijuana sales, Mr. Hurtado-Valdez's admission that he killed Mr. Briggs and Mr. Queen, and Detective Wire's testimony about the role that guns play in the drug trade, as well as the jury's acquittal of Mr. Hurtado-Valdez for intentional murder, we are satisfied that admitting the photographic gun evidence "in no way influenced the verdict." *Dorsey v. State*, 276 Md. 638, 659 (1976). We explain.

The standard for assessing harmlessness of an error in admitting (or excluding) evidence is a familiar one:

> [U]nless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

Dorsey, 276 Md. at 659. Once a criminal defendant establishes error, it is the State's burden to show that the error is harmless. *State v. Dionas*, 436 Md. 97, 108 (2013)).

In determining whether erroneously-admitted evidence is harmless or harmful to the criminal defendant, our focus is not on the sufficiency of the evidence. Instead, we

consider "what evidence the jury, in fact, used to reach its verdict." *Id.* at 109 (citing cases); *see also Soares v. State*, 248 Md. App. 395, 420 (2020) (in assessing harmfulness or harmlessness, "[w]e measure not what **SHOULD** influence or have an impact on a jury but what **MAY** influence or have an impact on a jury.") (emphasis in original). Among the factors we have considered are the overall strength of the State's case from the jury's perspective, *see Paydar v. State*, 243 Md. App. 441, 458 (2019); whether the erroneously-admitted evidence "provided the jury with a direct link between [the defendant] and [the crime]." *Dulyx v. State*, 425 Md. 273, 291-92 (2012); whether the erroneously-admitted evidence was cumulative of other properly-admitted evidence, *see Gross v. State*, 481 Md. 233, 270-71 (2022); and how the jury behaved during deliberations, *see Dionas v. State*, 436 Md. 97, 109-10 (2013) (citing cases).

Here, the State's case of second-degree felony murder predicated on possession of marijuana with intent to distribute was strong, and the photographic gun evidence provided no missing link that was not shown by other evidence. Mr. Hurtado-Valdez admitted to police that he shot and killed Mr. Briggs and Mr. Queen in the laundry room. Forensic testimony from Dr. Aronica confirmed that both victims suffered multiple gunshot wounds and died. Mr. Briggs died instantly. Mr. Queen died shortly afterward in the parking lot.

Messages between Mr. Hurtado-Valdez and Mr. Queen showed that at or about the time of the murders, Mr. Hurtado-Valdez was intent on selling marijuana. Specifically,

Mr. Hurtado-Valdez was offering "gas," a high-grade variety of marijuana.[10] Other messages showed that Mr. Hurtado-Valdez had sold marijuana for some time before encountering Mr. Briggs and Mr. Queen. And, shortly after the murders, police found a substantial amount of marijuana, individually packaged, in the home occupied by Mr. Hurtado-Valdez and his wife.

With regard to the inherent dangerousness of marijuana dealing, the predicate felony, Detective Wire explained the prevalence of firearms in illegal drug sales. Specifically, Detective Wire testified that because drug dealing is a cash business, "firearms are used as a means of protection during these illegal drug transactions." He explained that those involved in drug sales, either as buyer or seller, cannot call police when the deal is not what was expected. Instead, "they take the enforcement means or their protection in their own hands, and typically, that'll be with firearms."

Viewed in light of Detective Wire's testimony about the role of firearms in illegal drug sales, the photographic gun evidence was cumulative. In the context of harmless error, evidence is cumulative if it "tends to prove the same point as other evidence presented during the trial or sentencing hearing." *Dove v. State*, 415 Md. 727, 744 (2010). In determining whether erroneously-admitted evidence is cumulative of properly-

[10]Mr. Hurtado-Valdez told police that his purpose in seeing Mr. Queen centered around marijuana, albeit to smoke it, not necessarily sell it. In that it found Mr. Hurtado-Valdez guilty of crimes predicated on intent to distribute marijuana, the jury did not credit Mr. Hurtado-Valdez's assertion as to why he was seeing Mr. Queen.

admitted evidence, we focus on the substance of the erroneously-admitted evidence, not the manner in which it is delivered. *Gross v. State*, 481 Md. at 268.

To the extent that the photographic gun evidence depicted Mr. Hurtado-Valdez in possession of firearms, that point—that Mr. Hurtado-Valdez was someone who possessed guns—was something the jury could reasonably have inferred from Detective Wire's testimony and Mr. Hurtado-Valdez's messages. Detective Wire testified that firearms are used as a means of protection during illegal drug transactions. Mr. Hurtado-Valdez's messages showed he was involved in illegal drug transactions. Putting two and two together, the jury could have reasonably inferred that Mr. Hurtado-Valdez, as one involved in illegal drug transactions, possessed a gun.

With regard to how the photographic gun evidence may have impacted the jury's deliberations, particularly Mr. Hurtado-Valdez's claims of perfect and imperfect self-defense, we see nothing to suggest that the jury took the photographic gun evidence for more than what it was or ignored the trial court's limiting instruction. Whether perfect or imperfect, both forms of self-defense require that the defendant actually believe he was in danger and not provoke or be the first aggressor in the conflict. *Porter v. State*, 455 Md. 220, 234-35 (2017). For their remaining elements, these defenses differ only in the reasonableness of defendant's beliefs. If the defendant's belief in the need for self-defense is reasonable, and the amount of force used is reasonable, he acts in perfect or complete self-defense. Unreasonable (though actual) beliefs mean imperfect self-defense. *Id.* at 235.

Having acquitted Mr. Hurtado-Valdez of premeditated and intentional murder, the jury must have found that Mr. Hurtado-Valdez was not the first aggressor (or the provoker of the conflict) or at least been unpersuaded that Mr. Hurtado-Valdez was. In other words, the jury did not look at the photographic gun evidence and infer from the images that because Mr. Hurtado-Valdez possessed guns at some point, he was the one that brought a gun to the laundry room and, as the first aggressor or provoker, used a gun to premediate or intend the murder of Mr. Briggs and Mr. Queen.

As to the manslaughter convictions, both of which must have resulted from the conclusion that Mr. Hurtado-Valdez did not act perfect self-defense, we see no connection between these verdicts and the photographic gun evidence. Mr. Hurtado-Valdez posits that these images suggested to the jury that Mr. Hurtado-Valdez had a propensity for guns, but even if the jury saw it this way, we see no way that such an inference led the jury to conclude that Mr. Hurtado-Valdez's beliefs in the imminence or immediacy of the danger he faced, or that the amount of force he used, were unreasonable.

As to the second-degree felony murder convictions, Mr. Hurtado-Valdez admitted that he killed Mr. Briggs and Mr. Queen by shooting them with a gun. There was substantial evidence that these murders were the result of Mr. Hurtado-Valdez's participation in illicit drug sales and that such sales can involve firearms. Images of Mr. Hurtado-Valdez in possession of guns at some point other than the day of the murders added little, if anything, to this picture.

Jury instruction on Felony Murder and Self-Defense

Mr. Hurtado-Valdez contends that the trial court erred in instructing the jury that self-defense was not applicable to second-degree felony murder. Specifically, Mr. Hurtado-Valdez asserts that *Nicholson v. State*, 239 Md. App. 228 (2018), should not control the trial outcome because the facts do not support an inference that he engaged in inherently dangerous conduct necessary to support the convictions for felony murder and, therefore, he was entitled to a self-defense instruction regardless of Maryland's rule that "self-defense is not a defense to felony murder." *Nicholson*, 239 Md. App. at 245 (quoting *Sutton v. State*, 139 Md. App. 412, 454 (2001)). The State counters that because self-defense is not available as a defense to second-degree felony murder, the trial court's instructions in this regard were not an abuse of discretion.

Preliminarily, we disagree with the State that Mr. Hurtado-Valdez's challenge here is not preserved per Maryland Rule 4-325(e). *See* Md. Rule 4-325(e) ("[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury"). Here, before the jury was instructed, Mr. Hurtado-Valdez asked for a self-defense instruction, arguing that the case on which the State relied for not giving the instruction, *Nicholson v. State*, 239 Md. App. 228 (2018), was wrongly decided. Given that the trial court then replied, "we are stuck with it . . . [t]hat is the law[,]" referring to *Nicholson*, we conclude that renewing the objection after the trial court's jury instructions would have been futile or useless. Accordingly, we conclude that because Mr. Hurtado-Valdez substantially complied with Maryland Rule 4-325(e), his jury instruction challenge is preserved. *See Sequeira v.*

State, 250 Md. App. 161, 197 (2021) (discussing substantial compliance standard of *Gore v. State*, 309 Md. 203, 208 (1987)).

Maryland Rule 4-325 states, in relevant part, that a "court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." Md. Rule 4-325(c). That Rule "has been interpreted consistently as requiring the giving of a requested instruction when the following three-part test has been met: (1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given." *Dickey v. State*, 404 Md. 187, 197-98 (2008). "Generally, 'we review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard.'" *Page v. State*, 222 Md. App. 648, 668 (2015) (citing *Thompson v. State*, 393 Md. 291, 311 (2006)).

That self-defense is inapplicable to a charge of second-degree felony murder was decided in *Nicholson v. State*, *supra*. There, Mr. Nicholson, was charged with, among other things, first-degree murder, second-degree murder, and possession with intent to distribute marijuana after he shot someone during a drug deal. *Nicholson*, 239 Md. App. at 234-36. At trial, Mr. Nicholson asked the court to instruct the jury on self-defense, but the court refused on the grounds that such a defense had not been generated by the evidence. *Id.* at 238. Mr. Nicholson was ultimately acquitted of the intentional murder counts but convicted of second-degree felony murder, with the felony being possession with intent to distribute marijuana. *Id.* On appeal, Mr. Nicholson argued that the court

had erred in refusing to give a self-defense instruction, and we agreed. *Id.* at 239-44. We ultimately held, however, that the court's error was harmless. *Id.* at 244-45.[11] Citing *Sutton v. State*, 139 Md. App. 412, 454 (2001), we noted that "self-defense is not a defense to felony murder." *Nicholson*, 239 Md. App. at 244-45 (quotations omitted). We reasoned that, "[b]ecause the jury was not permitted to acquit [Mr.] Nicholson of second-degree felony murder on the basis of self-defense, the circuit court's refusal to give an instruction on that issue could have no prejudicial effect." *Id.* at 245.

Mr. Nicholson argued that the general rule regarding self-defense being inapplicable to felony murder should not apply in his case. *Id.* He maintained that that rule only applied "to cases of felony murder where the underlying felony involves force or threat of force." *Id.* Mr. Nicholson claimed that the inapplicability of self-defense to felony murder arose "from 'the fundamental concept that the accused claiming the right of self-defense must not have been the aggressor or provoked the conflict.'" *Id.* (citing *Sutton*, 139 Md. App. at 454-55). He insisted, therefore, that the general rule regarding self-defense would not apply in cases where the defendant was not the aggressor. *Nicholson*, 239 Md. App. at 245-46.

We rejected Mr. Nicholson's arguments and concluded that he was reading the case law too narrowly. *Id.* at 246. We explained that our holding in *Sutton* was a blanket rule that did not depend on whether the defendant was the aggressor:

[11] The trial court's error was harmless as to the intentional murder counts because Mr. Nicholson was acquitted of them. *Nicholson*, 239 Md. App. at 244.

> In holding [in *Sutton*] that the trial court had not erred in propounding the instruction, we affirmed categorically that "self-defense is not a defense to felony murder." [*Sutton*, 139 Md. App. at 454.] Had we intended to limit this rule to cases where the underlying felony involves force or the threat of force, we could easily have included language to that effect. Instead, we stated the rule broadly and without qualification. Indeed, we noted that when the Court of Appeals enumerated the elements of self-defense in *State v. Faulkner*, 301 Md. 482, 483 A.2d 759 (1984), it referred to them as "the elements required to justify a homicide, *other than felony murder*[.]" *Id.* (emphasis in original). The Court's blanket exclusion of felony murder from its discussion of self-defense undermines [Mr.] Nicholson's assertion that self-defense is applicable to felony murder in some cases.

Nicholson, 239 Md. App. at 246.

We explained further that Mr. Nicholson's argument was "contrary to the purpose of Maryland's felony murder law" because "felony murder is defined by the dangerousness of the underlying conduct, rather than the intent to kill[.]" *Id.* at 247. We reasoned that, "[i]n convicting Nicholson of second-degree felony murder, the jury necessarily found that Nicholson's felonious conduct was inherently dangerous, and Nicholson does not challenge that finding on appeal." *Id.* at 248. We concluded:

> It was [Mr.] Nicholson's decision to engage in an inherently dangerous felony that resulted in the killing of [the victim]; to the extent that [Mr.] Nicholson was confronted with a dangerous situation, he was responsible for creating that situation. We, therefore, decline to depart from the general rule, clearly stated in *Sutton*, that self-defense is not a defense to felony murder.

Id.

Turning back to the instant case, we hold that *Nicholson* is dispositive of Mr. Hurtado-Valdez's claim. *Nicholson* makes clear that self-defense is not available to a charge of second-degree felony murder. Thus, the trial court did not err in refusing to instruct the jury otherwise.

In an attempt to overcome this conclusion, Mr. Hurtado-Valdez argues that *Nicholson* is distinguishable because his conduct, unlike that in *Nicholson*, was not inherently dangerous. But here, the jury found that Mr. Hurtado-Valdez's conduct was inherently dangerous. Had the jury found that Mr. Hurtado-Valdez's conduct was not inherently dangerous, as he suggests, then it would have found him not guilty of those charges. Instead, the jury found him guilty, and he makes no sufficiency challenge to those verdicts here.

Finally, Mr. Hurtado-Valdez contends that *Nicholson* was "wrongly decided." That contention is based on the premise that "[o]nce the issue has been generated by the evidence, the defendant is entitled to a jury instruction explaining the elements of perfect or imperfect self-defense." *Porter*, 455 Md. at 240. Appellant is mistaken. Whether a particular instruction has been generated by the evidence is not the sole factor in determining whether a court is required to give the instruction. Instead, an instruction is required when "(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given." *Dickey*, 404 Md. at 197-98. Our holding in *Nicholson* was not based on the second prong, *i.e.*, whether the instruction had been generated by the evidence, but rather was based on the first prong, *i.e.*, whether the instruction was a correct statement of law. As we explained in *Nicholson*, instructing the jury on self-defense for second-degree felony murder would not be a correct statement of

law because "self-defense is not a defense to felony murder." *Sutton*, 139 Md. App. at 454.

To the extent that Mr. Hurtado-Valdez's challenge to *Nicholson* is that it was "wrongly decided" on the law, and that we should now revert to *Commonwealth v. Fantauzzi*, 91 Mass. App. Ct. 194 (2017)(the Massachusetts case whose reasoning *Nicholson* rejected), we decline to take up this argument. Under the doctrine of *stare decisis*, we must adhere to the holding in *Nicholson* unless it is "clearly wrong or […] has been rendered archaic." *State v. Stachowski*, 440 Md. 504, 520 (2014); *DRD Pool Serv., Inc. v. Freed*, 416 Md. 46, 64 (2010) (providing that an appellate court may overrule a precedent if it is "clearly wrong and contrary to established principles"). Because Mr. Hurtado-Valdez offers no real argument for why *Nicholson* (and *Nicholson*'s rejection of *Fantauzzi)* was "clearly wrong," we decline to depart from *Nicholson*'s well-established precedent.

Mr. Hurtado-Valdez's second-degree felony murder convictions and the Maryland Cannabis Reform Act

The last issue Mr. Hurtado-Valdez raises is one occasioned by the Maryland Cannabis Reform Act ("MCRA"), a change in the law that occurred after Mr. Hurtado-Valdez noticed his appeal to this Court. Mr. Hurtado-Valdez asks that we reverse his murder convictions, arguing that they are predicated on conduct (possession with intent to distribute marijuana (cannabis)) that is no longer a felony per the MCRA's change to Md. Code Ann., Crim. Law ("CR") § 5-607(a)(2). According to Mr. Hurtado-Valdez, CR §5-607(a)(2) is an ameliorative statute that reduces the penalty for possession with intent

to distribute marijuana and reclassifies the crime to a misdemeanor. As such, the change in classification applies retroactively and requires that we set aside his convictions. We disagree.

Even though the MCRA reduced the penalty for possession with intent to distribute marijuana and reclassified it to a misdemeanor, Mr. Hurtado-Valdez identifies no provision of the MCRA that expressly provides a limit on the ordinary operation of Maryland's general savings clause, a statute that keeps convictions intact (among other things) even when the law on which the conviction is based changes after the conviction. Below, we review the elements of Mr. Hurtado-Valdez's murder convictions, then move to the MCRA and then to Maryland's law for determining when statutes operate retroactively, including Maryland's general savings clause.

At the time of the murders here (2019) and Mr. Hurtado-Valdez's jury trial and sentencing (2021), possession with intent to distribute marijuana was a felony.[12] Where a felony is committed or attempted in a manner that is "sufficiently dangerous to life," it can support a conviction for second-degree felony murder. *State v. Jones*, 451 Md. 680, 699 (2017). Possession with intent to distribute marijuana can be such a predicate felony. *Nicholson*, 239 Md. App. at 247-48. Here, the jury was instructed that possession with intent to distribute marijuana was a felony. They were also told what other elements, *i.e.*

[12] *See* CR § 5-607(a) (2019) ("[A] person who violates a provision of §§ 5-602 through 5-606 of this subtitle is guilty of a felony"); CR § 5-607(a) (2021) (same).

the other circumstances, they were required to find in order to conclude, as they did, that the homicides of Mr. Briggs and Mr. Queen were second-degree felony murders.[13]

House Bill 1 of 2022, which became the Maryland Cannabis Reform Act ("MCRA"), effected, as its name suggests, a variety of changes to Maryland's laws related to the possession and distribution of marijuana, as well as the punishment for those convicted of marijuana-related crimes. Thus, as of July 1, 2023, possession of marijuana by those over the age of 21 is merely a civil offense subject to the issuance of a citation, not a crime.[14] As of January 1, 2023, persons incarcerated for possession of marijuana may petition for resentencing to time served and immediate release unless they are "serving a concurrent or consecutive sentence for another crime[.]" Md. Code Ann., Crim. Proc. ("CP") § 10-105.3(c) (2023) (effective January 1, 2023).

Those convicted of distribution of, or possession with intent to distribute, marijuana saw less relief under the MCRA. As of January 1, 2023, distribution of and

[13] As to each victim, the jury was instructed that in order to find Mr. Hurtado-Valdez guilty of second-degree felony murder, it had to find:

> [THE COURT:] One, that [Mr. Hurtado-Valdez] committed possession with intent to distribute marijuana, which is a felony, [two] that the way in which possession with intent to distribute marijuana was committed or attempted, under all of the circumstances, created a reasonable, foreseeable risk of death or of serious, physical injury likely to result in death; three, that as a result of the way in which the possession with intent to distribute marijuana was committed or attempted, [the victim] was killed[;] and four, that the act resulting in the death of [the victim] occurred during the commission of the possession with intent to distribute marijuana.

[14] *See* CR § 5-607(a)(2) (2023) (effective July 1, 2023).

possession with intent to distribute marijuana remained crimes but were reclassified as misdemeanors, not felonies.[15] Those convicted of distribution of, or possession with intent to distribute, marijuana may now petition for expungement of their convictions, but no sooner than "[three] years after the person satisfies the sentence or sentences imposed for all convictions for which expungement is requested, including parole, probation, or mandatory supervision." CP § 10-110(c)(4). Where distribution of, or possession with intent to distribute, marijuana arises from the same incident, transaction, or set of facts as another crime ineligible for expungement, expungement of the distribution, or possession with intent to distribute, conviction likewise remains barred. CP § 10-107(b)(1); *State v. Nelson*, 156 Md. App. 558, 568-69 (2004).

Determining whether the General Assembly intended retroactive application of MCRA's change in how possession with intent to distribute marijuana is classified is not a hard lift. Going forward here, for ease, we will call this change "MCRA's classification change." Ordinarily, statutes and the changes they produce do not operate retroactively, as "it is a widely recognized principle that retroactive operation of statute is disfavored." *State v. Johnson*, 285 Md. 339, 343 (1979) (citing cases). An exception to this general rule exists for matters still in litigation when the new statute takes effect. For these matters, the reviewing court will apply the new statute after it takes effect " . . . even though the statute was not then law when the decision appealed from was handed down, unless the legislature expresses a contrary intent." *Id*. at 343 (citing cases). In Maryland,

[15] *See* CR § 5-601.1

the General Assembly has expressed its "contrary intent" with a statute that has come to be known as the "general savings clause" or the "general savings provision."

Maryland's general savings clause "preserves" or "saves" convictions and sentences rendered under an old statute by providing that the repeal, or the repeal and reenactment of, the old statute does not "extinguish" or "release" convictions or penalties under the old statute "except as otherwise expressly provided." Md. Code Ann., Gen. Provis. § 1-205(a) (2014). Maryland's general savings clause provides in full:

> a) *Effect on penalty, forfeiture, or liability*. Except as otherwise expressly provided, the repeal, repeal and reenactment, or amendment of a statute does not release, extinguish, or alter a criminal or civil penalty, forfeiture, or liability imposed or incurred under the statute.
>
> (b) *Purposes for which statute shall remain in effect*. A repealed, repealed and reenacted, or amended statute shall remain in effect for the purpose of sustaining any:
>
> (1) criminal or civil action, suit, proceeding, or prosecution for the enforcement of a penalty, forfeiture, or liability; and
>
> (2) judgment, decree, or order that imposes, inflicts, or declares the penalty, forfeiture, or liability.

Md. Gen. Provis. §1-205 (2014).

MCRA repealed and reenacted Maryland's criminal statute on how possession with intent to distribute marijuana is classified (felony or misdemeanor), among other changes, and made this classification change contingent on ratification by Maryland's voters. Specifically, MCRA provided:

> SECTION 5. AND BE IT FURTHER ENACTED, That the Laws of Maryland read as follows:
>
> [CR § 5-602](B)(1) except as otherwise provided in this title, a person may not possess cannabis in sufficient quantity reasonably to indicate under all circumstances an intent to distribute or dispense cannabis . . . .

* * *

> [CR § 5-607a](2) a person who violates § 5-602(b)(1) . . . of this subtitle is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 3 years or a fine not exceeding $5,000 or both.
>
> SECTION 14. AND BE IT FURTHER ENACTED, That Section[] 5 . . . of this Act [is] contingent on the passage of Chapter __ (H.B. 1) of the Acts of the General Assembly of 2022, a constitutional amendment, and its ratification by the voters of the State.

* * *

> SECTION 18. AND BE IT FURTHER ENACTED, That, subject to the provisions of Section 14 of this Act, Section[] 5 . . . of this Act shall take effect January 1, 2023.

2022 Maryland House Bill No. 837 ("H.B. 837") (cleaned up).

Even if the General Assembly intended the MCRA's classification change to reach second-degree felony murder convictions predicated on possession with intent to distribute marijuana (a decision we do not reach), Mr. Hurtado-Valdez identifies nothing in the MCRA to suggest that the General Assembly intended this classification change to operate other than how it normally would under Maryland's general savings clause. In other words, Mr. Hurtado-Valdez identifies no "express provision" in the MCRA to suggest that the General Assembly intended the general savings clause not to apply. The result is that the general savings clause does apply and operates to "preserve" or "save" Mr. Hurtado-Valdez's murder convictions. In other words, the general savings clause preserves or saves Mr. Hurtado-Valdez's murder convictions even though they are predicated on conduct that is not now a felony.

Mr. Hurtado-Valdez's reliance on the common law cannot overcome this conclusion. To be sure, under Maryland's common law, the presumption against

retroactivity does not apply in the face of repealed statutes where the cases on which they are based are still subject to appeal. Specifically, "the repeal of a statute creating a criminal offense, after conviction under the statute but before final judgment, including the final judgment of the highest court empowered to review the conviction, requires reversal of the judgment because the decision must accord with the law as it is at the time of the final judgment." *Bell v. State*, 236 Md. 356, 363 (1964). Thus, "it was often stated that the repeal of a statute 'operated as a pardon of all offenses under it, and superseded the jurisdiction of the court in any suit pending, to enforce a penalty under such repealed statute.'" *Miles v. State*, 349 Md. 215, 230 (1998) (quoting *Rutherford v. Swink*, 96 Tenn. 564, 566-67 (1896)).

But Maryland's general savings clause changed Maryland's common law on the effect of a repealed or amended statute. Under the general savings clause, "when the General Assembly repeals or amends a statute, the common law rule does not apply, and a prosecution under the repealed statute may ordinarily continue despite the repeal." *Bell v. State*, 236 Md. 356, 367 (1964).

In *Bell,* as here, appellants' challenge to their convictions failed because the new statute they relied on did not express an intent to "extinguish" existing convictions. *Id.* at 368. Appellants were convicted of trespassing for sitting at a lunch counter that refused to serve them. *Id.* at 358. After appellants' convictions, the General Assembly passed a public accommodations law that barred the lunch counter's refusal. *Id.* at 359. On remand from the United States Supreme Court, our Supreme Court held that the public

accommodations law did not affect appellants' trespass convictions because, while the public accommodations law impliedly repealed or amended the trespass statute, the public accommodations law did not expressly direct, as the general savings clause required, that "existing criminal liabilities or penalties were to be extinguished." *Bell v. State*, 236 Md. at 368. Finding nothing in the public accommodations law to suggest a legislative intent that past convictions under the trespass statute were not to survive, our Supreme Court affirmed the convictions. *Id*. at 369.

Mr. Hurtado-Valdez's reliance on *Waker v. State*, 431 Md. 1 (2013), doesn't help him either because when the law in *Waker* changed, Mr. Waker, unlike Mr. Hurtado-Valdez, had not yet been tried and convicted. Mr. Waker stole something valued at $615. *Id.* at 3. Between the crime and Mr. Waker's trial, the General Assembly raised the threshold for felony theft from $500 to at least $1000. *Id.* at 4. The consequence was that at trial, Mr. Waker faced a misdemeanor that subjected him to imprisonment of not more than 18 months, not the 10 years he would have faced had the charge remained a felony. *Id.* at 5. After the circuit court sentenced Mr. Waker under the greater penalty in effect at the time of the theft, our Supreme Court vacated the sentence, rejecting the State's contention that the general savings clause preserved the higher sentence. Because Mr. Waker did not incur any criminal liability until he was found guilty, the Supreme Court explained, "what the general saving clause should preserve was [Mr.] Waker's criminal liability and sentence under the law as it existed [at the time of Mr. Waker's trial]." *Waker*, 431 Md. at 12.

Finally, we are unpersuaded by Mr. Hurtado-Valdez's proposition that we should view the general savings clause as "merely an aid to interpretation," and therefore, nothing more than a suggestion that this Court may choose when to apply. Mr. Hurtado-Valdez grounds this proposition in a phrase from *Waker*, wherein we observed that in a 1954 decision, *State v. Kennerly*, our Supreme Court described the general savings clause as "merely an aide to interpretation, stating the general rule against repeals by implication in a more specific form." *Waker*, 431 Md. at 11 (discussing *State v. Kennerly*, 204 Md. 412, 417 (1954)). In *Waker*, we did not deem the general savings clause a rule of interpretation. *Waker*, 431 Md. at 9-10. Instead, we noted that the general savings clause pertained to criminal liabilities "which shall have been incurred" under the repealed statute, and because Mr. Waker had not incurred criminal liability until found guilty, there was nothing to "save" when the statute changed. *Id.* at 12. Here, by contrast, Mr. Hurtado-Valdez committed his crimes, and was convicted for them, and was sentenced for them, and noted his appeal of the convictions, all before MCRA, the statutory change on which he relies, took effect.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.