UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0858

September Term, 2015

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CARLOS WHEELER

v.

STATE OF MARYLAND

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Meredith,
Nazarian,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

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Opinion by Thieme, J.

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Filed: June 10, 2016

Following a jury trial in the Circuit Court for Baltimore City, Carlos Wheeler, appellant, was convicted of attempted first-degree murder; conspiracy to commit murder; assault in the second degree; use of a handgun in the commission of a felony or crime of violence; wearing, carrying, or transporting a handgun on his person; wearing, carrying, or transporting a handgun in a vehicle; and unlawful possession of a regulated firearm. The trial court sentenced appellant to concurrent life sentences for conspiracy and attempted first-degree murder; a consecutive ten year term of imprisonment for use of a handgun in a felony or crime of violence; and concurrent five and ten year terms of imprisonment for unlawful possession of a regulated firearm and second-degree assault respectively.[1] Appellant filed this timely appeal and presents two questions for our review which we rephrase as follows:

1. Did the trial court err by denying appellant's motion to sever?

2. Did the trial court err in admitting a telephone call on the ground that it referenced other crimes or bad acts committed by appellant?[2]

Finding no error, we affirm.

[1] The trial court determined appellant's remaining convictions merged.

[2] Appellant phrased the questions presented as follows:

A. Did the trial court err by denying appellant's motion for separate trials for each shooting?

B. Did the trial court err in admitting appellant's alleged prior statement that other people said he threatened a woman (allegedly the state's princip[le] witness)?

## BACKGROUND

### I. Events Preceding the Shootings

Appellant's convictions arose from the non-fatal shootings of Ronnie Thomas, III ("Thomas") and Dewayne Marable ("Marable") occurring approximately nine hours apart in Baltimore City.[3] In the early morning hours of May 27, 2013, Dacora Ross ("Ross") and India Harris ("Harris") drove to Captain James Seafood Palace ("the restaurant") to meet with appellant, Ross's then boyfriend. Thomas, Ross's best friend, was also at the restaurant and for unknown reasons, he and appellant fought outside the restaurant shortly after Ross and Harris arrived. Appellant appears to have been on the losing end of the altercation as Thomas knocked him to the ground on two separate occasions.

The restaurant had security cameras that, while not capturing the fight, recorded both the "carry-out" area inside the restaurant and a portion of the sidewalk outside the entrance. At trial, Ross and Harris were shown video footage retrieved from those cameras and identified themselves, Thomas, and appellant. A police detective who was assigned to investigate Marable's shooting also reviewed the footage and identified a person in the video who he believed to be Marable; however, the video did not show that person interacting with Ross, Harris, Thomas, or appellant.[4]

[3] Neither Marable nor Thomas testified at trial.

[4] The detective was familiar with Marable's appearance because he had spoken with Marable following the shooting and had seized the clothes Marable was wearing when he was shot.

## II. The Marable Shooting

After the fight ended, Ross, Harris, and appellant left the restaurant in Ross's vehicle, a gold Honda Accord belonging to Ross's mother.[5] Appellant appeared to be "upset" about the fight and directed Ross to drive him to a friend's house. When they arrived, appellant exited the car, spoke with his friend for approximately three minutes, re-entered the car holding a black handgun, and directed Ross to drive to 33rd Street in Baltimore City. Ross parked the car on 33rd Street and appellant again exited the vehicle. Although Ross and Harris did not see where appellant went, they heard multiple gunshots shortly after he left. When appellant returned several minutes later, he was holding a handgun and accompanied by an unknown male.[6] Ross drove around the block and the unknown male directed her to stop beside a parked car. When appellant stated that someone appeared to be moving in the parked vehicle, the unknown male pulled out a handgun and fired a single shot, shattering Ross's rear passenger window. Ross then drove away, dropped off the unknown male, and took Harris home. Around 4:00 a.m., Ross and appellant went to Ross's mother's house and fell asleep.

At approximately 3:22 a.m., Baltimore City Police responded to several 911 calls reporting shots fired at the 1700 block of East 33rd Street. One of the callers stated that he saw "a couple of boys" get out of a gold car, start shooting, return to the car, and "roll off."

[5] Ross drove the vehicle, appellant sat in the front passenger seat, and Harris sat in the back seat behind appellant.

[6] Harris testified that the unknown male got into the backseat when they stopped to see appellant's friend.

When the police arrived, they located Marable bleeding from his stomach on the steps of 1635 East 33rd Street. Marable's vehicle, which was parked on the street approximately 150 feet away, had at least twenty-five bullet holes, including twelve in the driver's side door. Crime scene technicians recovered multiple shell casings, bullets, and bullet fragments from inside and outside the car; however no firearm was recovered. Subsequent testing indicated all the shell casings recovered from the scene were fired from the same unknown firearm.

## III. The Thomas Shooting

When appellant and Ross awoke later that morning, they went to pick up Ross's niece, again driving the gold Honda Accord. En route, appellant saw Thomas near the intersection of West Baltimore and Fayette Streets in Baltimore City ("the intersection"). Over Ross's objections, appellant exited the vehicle and walked toward Thomas holding a gun. Ross heard six gunshots and then pulled the car next to where appellant was standing. Appellant re-entered the car and Ross drove them toward East Baltimore. Video footage was retrieved from surveillance cameras at the intersection and showed a male exit and re-enter a gold vehicle around the time Thomas was shot. Ross viewed the videos and identified the car as her mother's gold Honda Accord and the male as appellant. [7]

At approximately 12:30 p.m., Baltimore City Police responded to a call for shots fired at the intersection. They later discovered Thomas had been shot in the leg at that

[7] After Ross failed to cooperate with the State, she was charged with two counts of conspiracy to commit attempted murder based on her involvement as the driver. The State later allowed her to plead guilty to obstruction of justice and two counts of accessory after the fact to attempted murder in exchange for her testifying at appellant's trial.

location and taken to University Hospital. Crime scene technicians recovered fifteen shell casings and five bullet jacket fragments in the immediate area of the shooting. The shell casings were later determined to have been fired from the same unknown firearm; however, the unknown firearm was not the same unknown firearm that was used to fire the shell casings in the Marable shooting. Additional facts are set forth later in this opinion as necessary for our discussion of the issues raised on appeal.

## DISCUSSION

### I. The Motion to Sever

After appellant was indicted in the instant case, he was charged in a separate indictment with witness intimidation and obstruction of justice. A new attorney was appointed to represent appellant on those charges. The State filed a motion to join appellant's cases for trial and the trial court considered the motion at a pre-trial hearing on April 7, 2015. Appellant's counsel on his new charges argued that joinder of those offenses was improper pursuant *McKnight v. State*, 280 Md. 604 (1977) because the evidence in each case was not mutually admissible. The trial court ultimately denied the State's motion.

At the same hearing, appellant's counsel in this case also requested the court to sever the counts related to the shooting of Marable and the counts related to the shooting of Thomas. When the trial court asked counsel if he had anything to add to the arguments made by appellant's other attorney, the following exchange occurred:

> DEFENSE COUNSEL: Your Honor, in my case . . . there is one indictment that alleges two separate shootings, one shooting at, I'm just

> going to say, 3:00 a.m. on the 27th of May and one at 12:00 p.m., nine hours later, in a different area of Baltimore City [.]
>
> Now, the State is arguing judicial economy. That is completely not possible because these are two completely separate scenes, completely different crime scene techs went out, completely different detectives went out, completely different victims.
>
> THE COURT: So, what are you arguing? What are you arguing about?
>
> DEFENSE COUNSEL: I am arguing, well certainly, the prejudice part of it, but judicial economy, I'm saying, isn't even relevant here, Your Honor, because you're going to have to call double witnesses no matter how we slice this. This only common witness, there is one common witness in both cases and that's Dacora Ross. Every other witness is either in one case or the other. So, whether they are severed or whether they are together they've all got to get called. So, judicial economy is an argument that holds water here.
>
> So, what the State is attempting to do is to show the jury that he's got two shootings so that he is prejudiced; so that the jury thinks, "Oh, he's done it twice. We should --

When trial court then asked appellant to specifically articulate how he would be prejudiced by the shooting cases being tried together, defense counsel further responded:

> DEFENSE COUNSEL: [ ] The prejudice would become that when listening to [the cases] individually, what they have, the State's evidence would be a shooting took place, if they were tried separately, a shooting took place. That's it. But if they're tried together, they hear about two shootings and make it seem like a spree, and that would prejudice my client. The jury would think -- they would be scared of [appellant]. They would think he went on a run, he's doing things like this, and they would judge him not necessarily based on the evidence in one individual case. They would judge him based on a person who went and committed two shootings. My worry is he would not be judged on the evidence; he would be judged on the actions -- the allegations, I should say, Your Honor, because the State really can't give Your Honor a definite reason why they have to be tried to together, because judicial economy is not the answer [.]

The trial court stated that judicial economy was a secondary discussion and inquired of the State why it believed the cases were not separable. The State indicated its theory was that appellant targeted Marable and Thomas because of their roles in the altercation at the restaurant. It further responded:

> THE STATE: We have a video from Captain James; video footage showing individuals -- I believe both victims are on the video. I believe, certainly, [appellant] is on the video. There are --
>
> THE COURT: There was an argument.
>
> THE STATE: There was a fight that is in the area captured in the --
>
> THE COURT: Inside or outside?
>
> THE STATE: It's just outside the carryout in the street. The actual altercation itself is not captured on video, but you can see individuals coming out of the carryout. Obviously, their attention is directed to something that's going on in the street, but we are able to identify multiple individuals and witnesses in the actual video.
>
> Then, at that point, Your Honor, we have -- certainly, Ms. Ross is a witness common to both shooting scenes. We have another civilian witness that is common to the first shooting scene. All of those individuals are at Captain James and I think, based on our preparation or our understanding of the evidence, I don't believe that just Ms. Ross would be the common witness to both shootings. I believe, based on the previous events, that there would be other witnesses that the State would call for purpose of laying the groundwork for why the shooting of Ronnie Thomas occurred.

After appellant declined an opportunity to make additional arguments regarding prejudice, the trial court denied the motion to sever finding that "under the circumstances, there seems to be a reasonable connection between the two [shootings] that not only judicial economy, but factual display is appropriate for the matters to be tried together."

Appellant argues on appeal that severance was required as a matter of law because the evidence of each shooting would not have been mutually admissible in separate trials. Specifically, he contends that the evidence of each offense was not mutually admissible to prove identity, a common plan or scheme, or motive. The State counters that appellant's argument is not preserved because he did not raise it in the trial court. Alternatively, the State contends the evidence of the two shootings was mutually admissible to prove appellant's identity and the existence of a common plan or scheme.

**A. Preservation**

In arguing that appellant failed to preserve his mutual admissibility argument, the State asserts that, at the hearing on the motion to sever, he "grounded his argument for severance on the fact that trying the cases together was not judicially economical and he would suffer general 'prejudice.'" *See* Md. Rule 8-131 (a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court.") Although the State's argument is well taken, the Court of Appeals has explained that the purpose of the preservation rule is "to prevent sandbagging and to give the trial court the opportunity to correct possible mistakes in its rulings." *Peterson v. State*, 444 Md. 105, 126 (2015) (internal quotation marks and citation omitted). Although appellant's trial counsel in this case never used the term "mutual admissibility," the trial court and the parties were clearly aware of this legal requirement as it was discussed at length by appellant's other counsel when opposing the State's motion for joinder. Moreover, a review of the record indicates the trial court allowed the parties an opportunity to address this issue and then considered it when ruling on appellant's

motion. We note appellant's argument at trial was less than precise and we believe it is a close call whether this argument is preserved. Nevertheless, we give appellant the benefit of the doubt and reach the merits of his claim.

**B. The Merits**

Md. Rule 4–253(c) provides: "[i]f it appears that any party will be prejudiced by the joinder for trial of counts, . . . the court may . . . order separate trials of counts . . . or grant any other relief as justice requires." The determination is to be made by use of two questions propounded in *Conyers v. State*, 345 Md. 525, 553 (1997). "If the answer to both questions is yes, then joinder of offenses . . . is appropriate." *Id*.

The first question is whether "evidence concerning the offenses [is] mutually admissible?" *Id*. "To resolve this question, the trial court is to apply the 'other crimes' analysis announced in *State v. Faulkner*, 314 Md. 630 (1989), and its progeny," which includes a non-exclusive list of "substantially relevant 'exceptions' to the general rule excluding other crimes evidence—motive, intent, absence of mistake or accident, identity, or common scheme or plan." *Cortez v. State*, 220 Md. App. 688, 694 (2014) (citations omitted). The second question is whether "the interest in judicial economy outweigh[s] any other arguments favoring severance?" *Conyers*, 345 Md. at 553. "To resolve this second question, the trial court weighs the likely prejudice against the accused in trying the charges together against considerations of judicial economy and efficiency, including the time and resources of both the court and the witnesses." *Cortez*, 220 Md. App. at 694 (citations omitted).

The Court of Appeals has noted that "[r]ulings on matters of severance or joinder of charges are generally discretionary." *Carter v. State*, 374 Md. 693, 704–05 (2003) (citations omitted). It elaborated:

> This discretion applies unless a defendant charged with similar but unrelated offenses establishes that the evidence as to each individual offense would not be mutually admissible at separate trials. In such a case, the defendant is entitled to severance. Nevertheless, where a defendant's multiple charges are closely related to each other and arise out of incidents that occur within proximately the same time, location, and circumstances, and where the defendant would not be improperly prejudiced by a joinder of the charges, there is no entitlement to severance. In those circumstances, the trial judge has discretion to join or sever the charges, and that decision will be disturbed only if an abuse of discretion is apparent.

*Id*. (internal quotation marks and citations omitted).

It is unnecessary to address appellant's arguments regarding the applicability of the "motive" or "common plan or scheme" exceptions because the evidence of each shooting was mutually admissible to prove identity. In challenging the applicability of this exception, appellant primarily relies on *Faulkner*, wherein the Court of Appeals catalogued ten different ways in which "other crimes" evidence might be used to help prove identity. *See Faulkner*, 314 Md. at 637-38. Appellant addresses each of these ten bases for admissibility in his brief and contends none of them are relevant to his case. To establish appellant's guilt, however, the State relied primarily on the testimony of Ross, who was not only a common witness to both shootings, but also an accessory. Appellant's theory at trial was to deny criminal agency and attack Ross's credibility based on her prior inconsistent grand jury testimony and subsequent plea agreement with the State. In doing so, however, he placed Ross's identification of him as the perpetrator of both offenses

squarely at issue. We therefore disagree with appellant's assessment and find that the evidence presented by the State was mutually admissible to prove appellant's identity in at least two of the ten ways outlined in *Faulkner*, specifically that: (1) "[appellant] had on another occasion used . . . the same confederate [Ross] as was used by the perpetrator of the [other] crime" and (2) "[Ross's] view of [appellant] at the other crime enabled [her] to identify [appellant] as the person who committed the crime on trial." *Id*.

More importantly, we note that in rigidly analyzing *Faulkner* appellant misses the point that "the ultimate analysis of mutual admissibility . . . is not a game of shuffleboard" and therefore "it is not necessary to collect a given quantum of probative value or evidentiary purpose into a square marked 'motive' or marked 'intent' or marked 'identity,' etc." *Solomon v. State*, 101 Md. App. 331, 378 (1994). Instead, "evidence of other crimes may be admitted . . . if it is substantially relevant to some contested issue in the case and if it is not offered to prove the defendant's guilt based on propensity to commit crime or his character as a criminal." *Faulkner*, 314 Md. at 634. Here, even if we believed that none of the categories outlined in *Faulkner* applied, it would be of no moment because the evidence with respect to each shooting was ultimately probative of appellant's identity in the other shooting and therefore relevant for a purpose other than showing criminal propensity. Specifically, Harris's testimony and the contemporaneous 911 calls bolstered Ross's account of the Marable shooting which, in turn, made it more likely that her testimony regarding the Thomas shooting was truthful and not, as appellant insinuated, based on her desire for a lesser prison sentence. Similarly, the evidence of appellant's prior fight with Thomas and the surveillance videos retrieved from the intersection of West

Baltimore and Fayette Street not only supported Ross's testimony regarding the Thomas shooting, but also lent credibility to her account of appellant's actions during the Marable shooting. Under the circumstances, we therefore hold that the evidence of each shooting was mutually admissible and the trial court did not abuse its discretion in refusing to sever appellant's charges.[8]

## II. The Telephone Call

At trial, the State sought to introduce an audio recording of a jail call allegedly made by appellant to his girlfriend Nykamiah Gillis ("Gillis"). The relevant portion of the call contained the following exchange:

> MALE: Her peoples say I threaten her. The one I used to talk to. Feel me. Do whatever she (indiscernible).
>
> FEMALE: Said you threatened her?
>
> MALE: Yeah. Like I was going to do something to her if she ain't -- you feel me? You know what. Take my -- take -- take shorty over there. You get what I'm saying? You feel me?
>
> FEMALE: Oh, yeah.

Appellant objected on the ground that this referenced an inadmissible prior bad act:

> DEFENSE COUNSEL: I have a problem with that coming in. Its other bad acts.
>
> THE COURT: "Said you threatened her," is what it says.

[8] In a footnote, appellant briefly asserts the interests of judicial economy did not favor joinder. As this claim is only averted in a perfunctory manner we need not address it on appeal. *See Klauenberg v. State*, 355 Md. 528, 551 (1999) (noting "arguments not presented . . . with particularity will not be considered on appeal."). Nevertheless, given that Ross and Harris provided relevant testimony with respect to both shootings, we find no abuse of discretion in the trial court's finding that judicial economy favored joinder.

DEFENSE COUNSEL: I'm saying that's prior bad acts.

THE COURT: Well, she already said that – she said that [appellant] threatened her.

DEFENSE COUNSEL: But it's not saying who.

The State clarified that, based on the context of the telephone conversation, it believed appellant was telling Gillis that other people were accusing him of threatening Ross. In response, defense counsel further argued:

DEFENSE COUNSEL: [Appellant's] not making a threat there. He's not saying, "You do something." He's saying people are saying he's doing that.

THE COURT: That's what it says. Okay. And what is it you want?

DEFENSE COUNSEL: I don't want it coming in.

THE COURT: And tell me a reason why it shouldn't come in.

DEFENSE COUNSEL: Because he's not, again, making a threat.

THE COURT: I agree.

DEFENSE COUNSEL: He's talking about what other people are saying.

The trial court overruled appellant's objection and the State played the call for the jury.

On appeal, appellant argues the trial court erred in admitting the call because it referenced an inadmissible crime or other bad act. The State asserts that (1) appellant failed to preserve this argument for appellate review; (2) the call did not reference another crime or bad act; (3) if the call referenced another crime or bad act, it was admissible to demonstrate appellant's consciousness of guilt; and (4) any error in admitting the call was harmless beyond a reasonable doubt.

### A. Preservation

The State acknowledges that appellant initially objected to the jail call on the ground that it contained evidence of "other bad acts." It nevertheless contends he abandoned this objection because he raised a different argument when the trial court later asked him to "tell me a reason why [the call] should not come in." We are not persuaded. "Generally, a party preserves an issue for appeal by interposing an objection -- with particularity -- on the record." *Webb v. State*, 185 Md. App. 580, 592 (2009). Here, appellant twice raised an "other bad acts" objection, therefore satisfying the particularity requirement. Additionally, to the extent appellant later raised a new ground for inadmissibility, nothing in the record suggests he intended to abandon his original objection. Accordingly, appellant's "other bad acts" argument is preserved for appeal.

### B. The Merits

Maryland Rule 5–404(b) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." "[A] bad act is an activity or conduct, not necessarily criminal, that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying [trial]." *Klauenberg*, 355 Md. at 547.

We need not delve into the intricate standard of review for prior bad acts, however, because the subject of the disputed phone call in this case does not constitute a prior crime or bad act for the purposes of Rule 5-404 (b). Instead, the speaker, who the State alleged to be appellant, merely stated that unknown parties had "accused" him of making an unspecified threat to an unspecified person. *See Khan v. State*, 213 Md. App. 554, 564-65,

572 (2013) (finding that testimony concerning a complaint made by an unknown customer about a prior, unspecified "touching" by appellant was not evidence of a prior bad act). Because appellant does otherwise challenge the admissibility of the call, we find that the trial court did not err in admitting it into evidence.[9]

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT**

[9] We note that in light of the overwhelming evidence of appellant's guilt and the relative unimportance of the phone call in relation to the other evidence at trial, even if the contested portion of the jail call had been improperly admitted, the error would be harmless beyond a reasonable doubt. *See Simms v. State*, 194 Md. App. 285, 323 (2010) ("Maryland's appellant courts have upheld criminal convictions, notwithstanding error committed by the trial court, when the evidence of guilty was so 'overwhelming' as to render the court's error harmless beyond a reasonable doubt."