UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2814

September Term, 2015

SEAN T. TURKOT

v.

STATE OF MARYLAND

Arthur,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: June 22, 2017

On January 4, 2015, Edward Hayden was reported missing. After Sean Turkot confessed that he and a friend killed Hayden, the authorities found his body in the Susquehanna River north of Havre de Grace, wrapped in tarps, with his hands and feet bound by duct tape. Hayden had suffered blunt-force head trauma and stab wounds to the back of his neck.

Following a seven-day trial in the Circuit Court for Harford County, a jury convicted Turkot of premeditated murder, rejecting his defense that Hayden was killed in a spontaneous attack by Alexander Smoot, Turkot's friend. The jury found Turkot guilty of conspiring with Smoot to murder Hayden and committing murder in the first degree. Turkot was sentenced, by a judge, to life without the possibility of parole for the murder and to a life sentence for the conspiracy.[1]

In this timely appeal, Turkot challenges his convictions and sentences, presenting five questions,[2] which we restate as follows:

[1] At sentencing, the trial judge did not specify whether the sentence for conspiracy would run consecutively with or concurrently to his sentence for murder, but the Commitment Record indicates that the sentence runs concurrently.

[2] In his brief, Turkot frames the questions as follows:

1. Must Appellant's life without parole sentence be vacated?
2. Did the trial court err in prohibiting Appellant from introducing evidence of the victim's propensity for violence?
3. Did the trial court err in admitting evidence of prior bad acts?

1. Must the sentence of life without the possibility of parole for first-degree murder be vacated, either (a) because Turkot had a right, under Md. Code (2002, 2012 Repl. Vol., 2016 Supp.), section 2-304 of the Criminal Law Article ("CR"), to have the jury decide his sentence; or (b) because the statutory sentencing scheme is unconstitutional?

2. Did the trial court err or abuse its discretion in restricting the examination of witnesses about character traits and incidents proffered as evidence of the victim's propensity for violence?

3. Did the trial court err or abuse its discretion in admitting other wrongs evidence of an altercation shortly before the murder, involving Turkot, the victim's fiancée, and the victim?

4. Did the trial court err or abuse its discretion in admitting, over a Confrontation Clause objection, messages sent to Turkot via Facebook Messenger by a person who did not testify at trial?

5. Did the trial court err or abuse its discretion in (a) refusing to instruct the jury on defense of others or (b) instructing the jury regarding a co-defendant's invocation of his Fifth Amendment right against self-incrimination?

Following *Bellard v. State*, 452 Md. 467 (2017), we reject Turkot's sentencing challenges. On the remaining issues, we find no error or abuse of discretion.

Accordingly, we shall affirm Turkot's convictions and sentences.

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4. Did the trial court erroneously admit the Facebook conversation between Appellant and Daniel Crenshaw, a person who was not called as a witness at trial?

5. Did the trial court err in refusing to propound a jury instruction on defense of others and in how the jury was instructed on the co-defendant's invocation of the Fifth Amendment?

FACTS AND LEGAL PROCEEDINGS

The Love-Hate Triangle

At trial, the State's theory was that a love-hate triangle led to the murder of Edward "Eddie" Hayden at the hands of Sean Turkot and Alexander Smoot. At the apex of that triangle was a woman, Blair Short. Turkot had been in a sexual relationship with Short, but they broke up in 2010, shortly after they gave up their child for adoption. Within months, Short began a sexual relationship with Hayden. Although their relationship was tumultuous, Short and Hayden had reached a reconcilation by Christmas 2014. Short accepted Hayden's marriage proposal on January 2, 2015, two days before he was murdered.

At that time, Short and Hayden were living in Abingdon, in an apartment with one bedroom, where they earned money by performing live sex acts for paying customers on the internet. Turkot had been living in their apartment for a few months, paying rent and sleeping on a futon in the living room. Turkot typically communicated with Short by sending messages from his laptop computer via Facebook Messenger. He sent her messages while both of them were in the apartment. He sometimes sent her messages while she was "working" in her bedroom.

Turkot's communications with Short indicated that he still loved her and that he wanted her to end her relationship with Hayden and get back together with him. At the same time, he would complain both about how Short treated him and about how Hayden treated Short.

In messages to his friend Vanessa Ann Fletcher, sent on December 18, 2014, Turkot vented his grievances about Short, complaining that "all i hear is her doing her job," "fool[ing] around" with "eddie."[3] He wrote that Short "needs to put out . . . . and stop treating [him] like a piece of shit" and that he was "sick of feeling like her ATM . . . or servant." Describing Short's view of him as "a crazy fucker who crashes on the sofa and pays rent[,]" Turkot wrote that he was "tired of being a tool" and that he could not "stand to see [his] own face in the mirror . . . let alone stand in front of them without wanting to punch them both in the face." He complained that all he did was "love and support her," but that he got "ignored and treated like shit for it."

During other conversations with Vanessa Fletcher, Turkot expressed a belief "that Blair would be different if Eddie was gone" and said that he "wish[ed] Eddie was dead." In a Facebook message to Fletcher on December 21, 2015, Turkot wrote that he "should pull s[o]mething from godfather part two," like "the horse head scene," "cut her butt buddie eddies head off and leave it next to her ignoran[t] ass."[4]

One or two days after Christmas, Short and Turkot had an argument, during which he choked her. Hayden came to Short's aid, pulling Turkot away from her. During the ensuing fight, Hayden beat Turkot and knocked out one of his teeth.

[3] We set forth these messages in the unedited form in which they were sent via Facebook Messenger, omitting technical transmission information.

[4] The so-called "horse head" scene, in which a Hollywood producer awakens to find his prized thoroughbred's severed head in his bed after he had refused to change a casting decision, is actually in *The Godfather* (1972), not *The Godfather Part II* (1974).

In a Facebook Messenger exchange with his friend Daniel Crenshaw on December 29, 2014, Turkot complained that Short "loves hurting [him]" and "so does . . . eddie." Turkot again expressed his desire to kill Hayden, this time discussing potential plans for doing so:

> **[Turkot]:** i would love to take him out into the woods and hunt him like the pig he is…
>
> **[Crenshaw]:** Also that can be arranged
> We can use a Dick Cheney excuse[5]
>
> **[Turkot]:** : . . .
> well…i need a hand truck, duct tape, two tarps, a bag of lime, and some hefty big trash bags.
> and a hammer i can dispose of.
> i simply want to kidnap him and kill him at rock state park.[6]
>
> **[Crenshaw]:** And a disposable vehicle and alibi?
> And please
> Take him out to the Allegheny Forest
>
> **[Turkot]:** and dump his cold dead corpse in the roaring waters so the sharkes eat him.
> it has to be nearby.
>
> **[Crenshaw]:** It's huge out there and we can dump the body in a million different inhospitable off trail places
>
> **[Turkot]:** someplace nobody would look.
> well if we do this… blair would have to be out if the house.

[5] The "Dick Cheney excuse" is apparently a reference to an accidental shooting. *See* https://en.wikipedia.org/wiki/Dick_Cheney_hunting_incident (last viewed June 6, 2017); *see also* http://www.cnn.com/2006/POLITICS/02/12/cheney/ (last viewed June 13, 2017).

[6] The phrase "rock state park" may have been intended to refer to Rocks State Park in northern Harford County. *See* http://dnr.maryland.gov/publiclands/Pages/central/rocks.aspx (last viewed June 6, 2017).

and we would need to use the camery.[7]

[Crenshaw]: Eh, I'd rather let those two deserve themselves

[Turkot]: i want him to drown or be buried alive.

[Crenshaw]: And now I remember, Eddie's the one who kept pissing me off when I was dealing with Blair a few years ago

[Turkot]: she's the mother of my child.
i hate her too.
but he needs to die.
she was getting better before he came into the picture. he made her worse.
He is the source of her problems
shes changed and want to. but this fucker wont let her…
so i feel like killing his deadbeat ass.
i asked him to leave, and he laughed at my face. told me i get whatever i want and you wont stop me.
so since he wont listen to reason… i feel like his ungrateful ass needs to be dealt with.
and i think it would be fun to hunt his deadbeat ass don't you agree??

[Crenshaw]: It would, but I'm the overly cautious sort

[Turkot]: she would have payed you bck if it were not for this digraceful pig.

[Crenshaw]: Simple yet well thought out

[Turkot]: well i know he has no family here. they are in Florida.
and there are many places to take this asshole. i want to bury him alive in the middle of the woods.

[Crenshaw]: If you want?
North Carolina
Dump him in the swamp . . . .

[Turkot]: we would have to go through tolls which have infra red cameras for this sort of thing.
i was thinking near Conowingo. before the dam,
dump his ass in the water let the inpellers do the work for us.

[7] The "camery" probably refers to an automobile (a Camry), and not to a camera.

and the sharks.
its clean.
leaves no trace.
sounds like fun to me. like watching jaws!
lol
it would get her to grow up.
and she deserves to be treated like shit for a change.

On January 2, 2015, Short told Turkot that she had agreed to marry Hayden. Two days later, on January 4, 2015, Turkot and Smoot killed Hayden.

The Murder

On January 3, 2015, Vanessa Fletcher made plans with Blair Short for the following day, to get their hair done "and have some girl time." On January 4, 2015, Turkot used Facebook Messenger to communicate with Fletcher regarding her plans. Turkot gave Fletcher $40 so that she could afford to go out with Short. He asked Fletcher to let him know when she picked up Short from their apartment and to keep him "in the loop." "[T]he longer you two are out, the better," he wrote.

Enlisting the help of the person whom he called his "best friend," Alex Smoot, Turkot purchased most of the materials itemized in his December 29, 2014, messages to Daniel Crenshaw. Images from a Harbor Freight Tool store in Edgewood show that at 4:24 p.m. on January 4, 2015, Turkot, accompanied by Smoot, bought a heavy rubber mallet, tarps, duct tape, bungee cords, latex work gloves, and a flashlight. Store records confirmed the purchases.

While Fletcher and Short were out together on the afternoon of January 4, 2015, Turkot sent messages to Fletcher, asking her to keep Short away: "[I] honestly need her gone for a while." He added that he was "helping dumbass move out," but that "she and

you know nothing. He also wrote that it was "pretty sad when danny [Crenshaw] who would never hurt a fly . . . wants to kill eddie."

After 7:30 p.m. on January 4, 2015, the two women returned to Short's apartment. Finding no one there, they immediately noticed an overwhelming smell of bleach or ammonia, which Turkot was known to use in cleaning the apartment. Short saw signs of a struggle in the bedroom. Although Hayden's backpack and some bedding were missing, his shoes were still under the bed. On the carpet next to the bed was a large, dark brown stain.

Unable to reach either Turkot or Hayden by phone, Fletcher urged Short to call the police. Short called 911 to report that Hayden was missing.

After securing what appeared to be a crime scene, Harford County deputy sheriffs interviewed Short and Fletcher, who called Turkot while the deputies were present. When Turkot returned to the apartment, accompanied by Alex Smoot, all four were taken to the sheriff's office for questioning. There, Turkot gave a recorded statement after receiving *Miranda* warnings. In Turkot's statement, which was played for the jury, he recounted increasingly inculpatory versions of what happened to Hayden, eventually admitting that he and Smoot ambushed him, killed him, and dumped his body into the water.

Initially, Turkot denied any knowledge of Hayden's whereabouts. When the detectives confronted him with the neighbors' statement that they had seen him and another man carrying a large object wrapped in tarps, Turkot claimed that he and Smoot had wrapped up his tools and some motorcycle parts, taken them out of the apartment,

and put the materials in the back of his truck. The detectives responded that they had looked at his truck and seen nothing. They also told him that they knew about his Facebook messages to Fletcher and that they had spoken to Smoot, who had told them that "Eddie got what was coming to him" and that he and Turkot "took care of it."

At that point, Turkot changed his story to admit that he and Smoot had been moving Hayden's body, but he claimed that Hayden was already dead, by suicide, with "a knife in his neck," when they arrived at the apartment. He said that he and Smoot "panicked" and disposed of Hayden's body, using the tarp and duct tape that he had just purchased at Harbor Freight. Turkot told investigators that the body was near a mill in Rocks State Park.

When the detectives expressed their disbelief at the implausible assertion that Turkot and Smoot had just happened to find Hayden dead immediately after buying tarps, duct tape, and latex gloves at the Harbor Freight store, Turkot abandoned it. Instead, he claimed that Smoot "snapped" and killed Hayden:

> **Turkot:** You know what? I'm going to tell you the truth. He did it. Alex . . .
>
> **Burns:** He?
>
> **Turkot:** killed him.
>
> **Burns:** Okay. Did he kill him for you?
>
> **Turkot:** He did.
>
> **Burns:** So he had a little man crush kind of thing going on for you? I'm just asking, I'm asking why? You're, here's a chance for the whys.
>
> **Turkot:** He's my best friend and would do anything in the world for me.

Burns: Did you ask him to do it?

Turkot: No. The whole Facebook messaging thing was me venting. Again, I'm not one to ever act on this crap. . . .

Alex decided to snap . . . .

Look he did it because he wanted this to end. [Hayden] and Blair fought so much. When [Hayden] was locked up, . . . Blair was in a lot better state of mind. She wanted me to move in. I told everybody that. . . .

Burns: But you planned this with Alex. . . . Your . . . Facebook messages clearly say you paid [Vanessa Fletcher] to take Blair away and keep her away. You wanted them out of the house for a duration of period [sic] so that this could happen. That to me is planned.

Turkot: You, you know what? I didn't want this to happen. And I, I know.

Burns: Were you just planning on scaring him? What was?

Turkot: Look, I was just planning on buying this stuff for the sake of buying it to get it out of my system. I never wanted to act on this shit.

Burns: Well Alex doesn't have a key to the house. You had to have opened the door and gone in.

Turkot: I did.

Burns: Do you know what I mean like if I'm looking at this from the outside . . . . it's your roommate . . . .

Turkot: . . . . When [Alex] stopped at the apartment, he peed at my apartment. He acted on this. And I feel bad for helping him.

Burns: And so when he, as he's stabbing him, who's conscious and walking around, awake, or whatever he was. What were you doing? The neighbors didn't hear any screaming. . . .

Turkot: I'm a coward. And I looked. I couldn't act. I couldn't speak.

Burns: So your fingerprints won't be anywhere on any of the weapons when we find them, if we haven't already

Turkot: They won't. . . .

Burns: Because you were wearing gloves?

Turkot: Yes. . . .

At this point, the detective noted Turkot's admission that he "wore gloves during the whole act" after he had just bought the gloves, duct tape, and tarps. He suggested that Turkot was trying to blame the killing on his friend:

Turkot: I'm not blaming . . . . it on my friend. We did this thing together.

Burns: You say wham it's all Alex. . . . Alex is the one that did it.

Turkot: I'm a coward. Alright? And I'll be fair with you. That man helped me every step of the way and not just with that. I've been stepped on my whole life.

Burns: But what I'm saying is you're changing, you're throwing him under the bus. He did this all by himself, you did none of this. You didn't plan it. You had nothing to do with it.

Turkot: . . . . [Y]ou're twisting my words now. No I did do stuff. Okay? You'll notice that there was ah rubber mallet marks. I wanted to hit him, I didn't want to do nothin' else. We both were in that together.

Burns: But you knew where the daggers were then. . . . Alex says he clearly doesn't go in that house . . . .

Blair says he doesn't belong there. Vanessa says he doesn't go there. Alex says he doesn't go there. You're saying he knew where everything was and kind of just took it into his own hands. The dagger was not laying out. . . . Where did he get the dagger?

Turkot: Eddie had it around the room. . . .[8]

[8] According to Short, she and Hayden both had received daggers for Christmas.

> And there was four of them right on that shelf . . . . He had a knife obsession. Okay?
>
> **Burns:** Okay. That's your version. That's not the other versions is what I'm saying.
>
> **Turkot:** I didn't want him to use the damn thing. I said here Alex, because I wanted him to crack, I wanted him to crack [Eddie] on the skull to get him to talk.
>
> **Burns:** What did you want him to talk about? What were you trying to get him to talk about? Apologize? . . .
>
> **Turkot:** I wanted him to stop beating Blair. I wanted him to stop using Blair. Blair doesn't stand up for herself. She's like my mom. She gets constantly railroaded by my dad. And Blair's always going to be in that position.
>
> **Burns:** So you guys did this for Blair? Even though . . .
>
> **Turkot:** For her.
>
> **Burns:** she didn't ask. She doesn't know about any of it.
>
> **Turkot:** I didn't want her to know.

Turkot insisted that Blair Short and Vanessa Fletcher were not aware of his plan and that he did not "want anything to happen to Alex." Detective Burns responded that "[w]e need to know specifically what happened before we can exclude Alex." Without stating who threw the first blow, Turkot recounted the murder:

> **Turkot:** Alex and I beat him for five minutes . . .
>
> **Burns:** With . . .
>
> **Turkot:** trying to, trying, we were literally trying to put him to sleep.
>
> **Burns:** When you say beat him, was that fist? Hand? You said you had a mallet . . . .

> **Turkot:** A freakin' rubber mallet, it was ah isolated. I hit him with that. . . .
>
> **Burns:** Okay what else happened?
>
> **Turkot:** Alex stabbed him in the neck.
>
> **Burns:** And then where?
>
> **Turkot:** I think in the back of the neck or something. I really wasn't paying attention. I was too horrified watching the blood. You guys can think I'm the biggest monster in the world, but . . .
>
> **Defazio:** Nobody said that. . . .
>
> **Burns:** You guys have all come together in this emotional triangle of hate and love.
>
> **Turkot**: He did it because he didn't want me to be stressed out anymore. And I did it because I got tired of that bum taking advantage of the mother of my child. . . .

When the detectives asked how long he had been planning the murder, Turkot answered that he started talking to Alex Smoot about it just "to vent" and talked to others on Facebook about "the way it should be done[.]" He explained that he "would constantly catch [himself] and say no that's just not worth it[,]" but "after a series of a few months, it's what happened." He admitted, "I know it's premeditated but I didn't want to[.]" At another point he said: "I thought in the back of my head, don't do it. But after a while of being stressed out, that that [sic] voice just goes away."

Turkot told the detectives that, on the way to the apartment from Harbor Freight, he and Smoot were "quiet": "We knew. We didn't think[;] we just acted." When they went into the apartment, Hayden was "laying down on his stomach playing his [video] game" while Turkot "was playing really cool to him." According to Turkot:

> I wasn't thinking at all. We just acted. We may have talked about it, but neither one of us was up to doing anything like this. When we did it, we did it, we finished it. But this job we were never ready for.

Turkot expressed his "regret" for "taking [his] best friend into my apartment and killing this idiot."

As a result of Turkot's confession, Hayden's body was discovered that night, in the Susquehanna River at Susquehanna State Park, near a mill.[9] It was wrapped in the blue tarps, duct tape, and bungee cords that Turkot had purchased at Harbor Freight. About a mile and a half away, on an embankment along Deer Creek in Susquehanna State Park, police recovered other items from the crime scene, including the dagger and mallet used in the murder.

The medical examiner concluded that Hayden, whose hands were bound behind his back with duct tape, sustained multiple blunt-force injuries to his head and back, as well as three sharp-force wounds. The cause of death was a combination of two blunt-force head wounds to the back of his head and two knife wounds to the back of his neck. One of the lethal knife wounds transected (i.e., cut across) both the jugular vein and the carotid artery on the left side of his neck; the other nearly severed the cervical spine.

[9] The mill does not appear to have been the mill that Turkot mentioned early in his recorded statement. Turkot originally appears to have said that he disposed of the body in Rocks State Park, which is in northern Harford County. The sheriffs found the body near the historic Rock Run Grist Mill, which is just south of the confluence of Rock Run, a tributary of the Susquehanna, and the Susquehanna itself.

Turkot's Trial Testimony

Testifying at trial, Turkot's account changed once again. Even though the jury had watched his recorded confession that he and Smoot jointly planned and executed the murder, Turkot testified that Smoot unexpectedly attacked Hayden. According to Turkot, when he and Smoot entered the apartment with his Harbor Freight purchases, Hayden was in his bedroom, playing a video game. Despite their differences, and the recent altercation in which Hayden knocked out his tooth, Turkot claimed that he "[f]igured some guy time was nice." When Smoot accidentally tripped over a power cord for a game console and broke a wire on the console, Turkot suggested that Smoot go home, and Smoot left the bedroom.

With no warning, Turkot said, Smoot "came running into the bedroom with the mallet" and "jumped on the bed and attempted to hit Eddie." Smoot swung the mallet at Hayden's head, but missed and hit his shoulder. Hayden fought back, punching Smoot in the face, gaining control, and "choking" him. Hayden also grabbed one of his knives from a shelf.

Claiming to have been in fear for Smoot, who he said was "turning different colors[,]" Turkot "picked up the rubber mallet by impulse" and "swung." He struck Hayden "five times in the lower back" and "twice" on "the top of his head," but he denied striking Hayden "very hard" and denied striking him on the back of the head, where the medical examiner opined that two lethal mallet blows had landed. Turkot claimed that his attack on Hayden allowed Smoot to get free. After the two men were

separated, Turkot claimed to have asked each one whether he was okay and to have received affirmative responses from both.

According to Turkot, he again asked Smoot to leave, but Smoot launched a second attack on Hayden. Turkot testified that he was trapped in the bedroom because Smoot was blocking the door. Smoot punched Hayden, choked him, and grabbed a sheathed dagger that belonged Hayden. Smoot "began pummeling" Hayden with the hilt of the knife, breaking his nose. He got on top of Hayden "with his knee into his neck." He "unsheathed the knife" and "stabbed him three times." When Turkot asked why he did what he did, Smoot said, "I'm glad he's dead."

Turkot testified that, without his help, Smoot wrapped up Hayden's body, using the tarps and duct tape that had been purchased that afternoon. Turkot said that he was too afraid of Smoot either to run or to "call the cops" or 911. Instead, he helped Smoot remove the body.

Turkot testified that he lied to police about what happened because he "was scared and . . . in denial and shock." He said that he confessed to killing Hayden because he "felt responsible" for complaining to Smoot about Hayden and talking about "roughing" him up. He claimed to believe that his complaints had caused Smoot to "snap[.]" Although his purchases at Harbor Freight matched the supply list that he had composed in his Facebook message to Daniel Crenshaw, and although those materials were used to dispose of the body in a manner much like the one that he had proposed to Crenshaw, Turkot claimed that he bought the items to use on his vehicles and in other household

tasks. He said that his exchange with Crenshaw was merely "venting" about things that he would never do.

On cross-examination, Turkot acknowledged that this and other such rants reflected the intensity of his anger and grievances against Blair Short and Eddie Hayden. He denied that he wanted to resume a sexual relationship with Short or that he was jealous of her relationship with Hayden. But when confronted with his Facebook messages to Short, Fletcher, and Crenshaw, Turkot conceded that he was jealous and upset about Short's refusal to "work" with him in live sex shows, that he did not like Short's relationship with Hayden, and that he knew that they were engaged.

Turkot also conceded that his assault on Short after Christmas was the result of his anger. He acknowledged that he had choked her, that he "let [his] emotions get out of control," and that Hayden had to pull him off of her. He agreed that, after Hayden knocked out one of his teeth in that altercation, his relationship with Hayden was "[r]ough" until he apologized and "admitted [he] was wrong." Finally, he conceded that his statements to Crenshaw in the aftermath of that altercation, about killing Hayden and dumping his body in the river, were "exactly" what he did.

The Verdicts

The case was tried over seven days, from November 30 to December 8, 2015. After six days of evidence and argument, the jury left the courtroom to begin deliberations at 1:52 p.m. on December 8, 2015. After the court and counsel inventoried the trial exhibits, they were sent to the jury room at 2:13 p.m. Less than 45 minutes later,

at 2:56 p.m., the jury returned to the courtroom with its verdicts, finding Turkot guilty of premeditated murder in the first degree and conspiracy to commit first-degree murder.

We shall add pertinent facts in our discussion of the issues raised by Turkot.

DISCUSSION

I. Sentencing Challenges

In Maryland, the penalty for murder in the first degree is either life imprisonment with the possibility of parole or life imprisonment without the possibility of parole. *See* CR § 2-201(b). The State must file a written notice if it intends to seek life imprisonment without the possibility of parole. CR § 2-203.[10]

Under CR section 2-304(b),[11] a provision of the statutory sentencing scheme for first-degree murder that previously had been applied only in cases in which the State

[10] CR section 2-203 provides:

> A defendant found guilty of murder in the first degree may be sentenced to imprisonment for life without the possibility of parole only if:
>
> (1) at least 30 days before trial, the State gave written notice to the defendant of the State's intention to seek a sentence of imprisonment for life without the possibility of parole; and
>
> (2) the sentence of imprisonment for life without the possibility of parole is imposed in accordance with § 2-304 of this title.

[11] CR section 2-304 provides:

> (a) If the State gave notice under § 2-203(1) of this title, the court shall conduct a separate sentencing proceeding as soon as practicable after the defendant is found guilty of murder in the first degree to determine whether

sought the death penalty, "[a] determination *by a jury* to impose a sentence of imprisonment for life without the possibility of parole must be unanimous." (Emphasis added.) Turkot contends that because section 2-304(b) preserved the jury-sentencing provisions after Maryland repealed the death penalty in 2013, he has a statutory right to have a jury decide whether he receives a sentence of life without parole. In addition, Turkot challenges the constitutionality of a sentencing regime under which the State can seek life imprisonment without parole without proving anything beyond a first-degree murder, and under which the court may impose the sentence without any predicate findings of eligibility by the jury.

Following the Court of Appeals' decision in *Bellard v. State*, 452 Md. 467 (2017), we reject Turkot's statutory and constitutional sentencing challenges.

> the defendant shall be sentenced to imprisonment for life without the possibility of parole or to imprisonment for life.
>
> (b)(1) A determination by a jury to impose a sentence of imprisonment for life without the possibility of parole must be unanimous.
>
> (2) If the jury finds that a sentence of imprisonment for life without the possibility of parole shall be imposed, the court shall impose a sentence of imprisonment for life without the possibility of parole.
>
> (3) If, within a reasonable time, the jury is unable to agree to imposition of a sentence of imprisonment for life without the possibility of parole, the court shall impose a sentence of imprisonment for life.

A. Claim of Statutory Right to Jury Sentencing Under CR Section 2-304

As Turkot acknowledges, his statutory challenge was raised in other cases that were pending in this Court before this appeal ripened. In *Bellard v. State*, 229 Md. App. 312, 333-38 (2016), *aff'd*, 452 Md. 467 (2017), this Court held that CR section 2-304 does not authorize jury sentencing in first-degree murder cases. *See also Shiflett v. State*, 229 Md. App. 645, 674-76 (2016), *cert. denied*, 452 Md. 545 (2017). The Court of Appeals has now affirmed that decision and confirmed its rationale:

> under CR § 2-304(a), where a defendant is convicted of first-degree murder and the State has given notice of an intent to seek life imprisonment without the possibility of parole, the trial court, not the jury, determines whether to sentence the defendant to life imprisonment or life imprisonment without the possibility of parole; stated otherwise, CR § 2-304 does not grant a defendant who is convicted of first-degree murder the right to have a jury determine whether to impose a sentence of life imprisonment without the possibility of parole[.]

Bellard, 452 Md. at 474.

Before the repeal of the death penalty in 2013, the jury-sentencing procedure in subsection (b) of section 2-304 was available only when the State sought the death penalty. *Id*. at 494-95. *See generally Woods v. State*, 315 Md. 591, 599-600 (1989) (under predecessor statute, defendant convicted of first-degree murder was not entitled to jury-sentencing unless the State sought the death penalty). Although the General Assembly eliminated a long list of statutory provisions pertaining to the death penalty in 2013, it overlooked subsection (b) of section 2-304. The failure to repeal subsection (b) gave rise to an ambiguity as to whether the right to jury-sentencing had been extended, at

least by implication, to defendants facing a sentence of life imprisonment without the possibility of parole. *Bellard*, 452 Md. at 487.

The *Bellard* Court conducted a "thorough review" of the legislative purpose and history of Senate Bill 276, the legislation that simultaneously repealed the death penalty and created the ambiguity in section 2-304. *Id*. at 497. Writing for a unanimous Court, Judge Watts concluded that the "legislative history unequivocally demonstrates that the General Assembly's sole intent was to repeal the death penalty[.]" *Id*. While focusing on "identifying, and deleting, express references to the death penalty[,]" none of which appeared in section 2-304(b), the General Assembly apparently failed to notice that the jury-sentencing procedure in that provision was available only when the State sought the death penalty. *Id*. at 498. The Court of Appeals, like this Court, found it "evident that CR § 2-304(b) is a vestige" of the prior law, which "is no longer operative in light of the General Assembly's repeal of the death penalty." *Id*.

The Court recognized that in 2015 and 2016 the General Assembly had considered, but failed to pass, legislation that would have repealed section 2-304 and its provisions concerning a separate jury-sentencing proceeding in cases involving life imprisonment without the possibility of parole. Nonetheless, the Court attributed no weight to the failed legislation, reasoning that a bill's failure is a weak reed upon which to lean in ascertaining legislative intent, because a bill might fail for a myriad of reasons. *Id*. at 501. "[T]he General Assembly's inaction with respect to bills that were introduced after Senate Bill 276 was passed in 2013," proposing to repeal section 2-304(b), is "not indicative of an intent on the part of the General Assembly to create a right for a

defendant who is convicted of first-degree murder to have a jury determine whether to impose life imprisonment without the possibility of parole." *Id.*[12]

The Court went on to explain that the rule of lenity is inapplicable here because the ambiguity created by Senate Bill 276 is resolved by its purpose and history. *Id.* at 502.

> [A]n examination of the circumstances of that repeal reveals that the General Assembly did not intend to do more than repeal the death penalty, and certainly did not intent [sic] to disturb the established principle, as set forth in this Court's holding in *Woods*, that a trial court, not a jury, decides whether to impose life imprisonment without the possibility of parole where a defendant is convicted of first-degree murder and the State has provided the requisite notice of its intent to seek such a sentence.

Id.

This decision governs our disposition of Turkot's statutory sentencing challenge, which rests on the same arguments that the Court rejected in *Bellard*. Accordingly, we hold that the trial court correctly ruled that Turkot did not have a right under CR section 2-304 to be sentenced by a jury.

[12] On March 30, 2017, the day before the Court of Appeals handed down its decision in *Bellard*, the Senate passed Senate Bill 1187, which would repeal the provision concerning a separate jury-sentencing proceeding in first-degree murder cases in which the State requests a sentence of life imprisonment without the possibility of parole. http://thedailyrecord.com/2017/03/30/md-senate-gives-initial-ok-to-life-without-parole-sentencing-bill/ (last viewed Apr. 11, 2017). The bill's sponsor, Senator Cassilly, was quoted as saying that the legislature had "overlooked" the jury-sentencing provision when it repealed the death penalty in 2013. *Id.* On April 4, 2017, however, the legislation was recommitted to the Senate Judicial Proceedings Committee. https://legiscan.com/MD/bill/SB1187/2017 (last viewed Apr. 11, 2017).

B. Constitutionality of Sentencing Scheme for First-Degree Murder

Turkot also challenges the constitutionality of the current sentencing scheme for murder in the first degree on the grounds that (1) "it does not limit prosecutorial discretion" over which cases merit a request for the harsher sentence, (2) "it fails to provide any meaningful guidance" for the sentencing authority in determining when to impose the harsher sentence, and (3) it does not identify factors justifying the harsher sentence or require the sentencing authority "to find any such factors beyond a reasonable doubt."

The *Bellard* Court reviewed and rejected constitutional challenges identical to those raised by Turkot:

> Maryland's sentencing scheme for life imprisonment without the possibility of parole does not violate the United States Constitution or the Maryland Declaration of Rights, and [] neither the United States Constitution nor the Maryland Declaration of Rights provides a defendant with a right to have a jury determine whether the defendant should be sentenced to life imprisonment without the possibility of parole; stated otherwise, both the United States Constitution and the Maryland Declaration of Rights permit a sentence of life imprisonment without the possibility of parole to be imposed in the same manner as every other sentence except the death penalty, which has been abolished in Maryland.

Bellard, 452 Md. at 474.

Citing the holding in *Woods v. State*, 315 Md. at 599-600, that a defendant facing a maximum sentence of life without the possibility of parole for first-degree murder does not have the right to have a jury decide his sentence, the Court of Appeals reiterated that "the imposition of a sentence of life without the possibility of parole rests with the trial court's discretion and is subject to traditional sentencing procedures." *Bellard*, 452 Md.

at 513. The Court rejected the argument that the sentencing scheme was unconstitutional in the absence of "guidelines regarding what considerations are relevant in determining whether to impose life imprisonment or life imprisonment without the possibility of parole." *Id*. Because Supreme Court and Maryland precedent establish that "the death penalty differs from all other sentences," neither a mandatory list of relevant factors, nor the "type of individualized sentencing that is required when imposing the death penalty," is necessary to comport with federal or Maryland constitutional law. *Id*.

Finally, the Court rejected an argument, based on *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), that a defendant is entitled to have a jury make factual findings that support the imposition of the harshest penalty available under the sentencing scheme, life imprisonment without the possibility of parole. *Bellard*, 452 Md. at 299-300. *Apprendi* held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. at 490. Hence, predicate fact-finding by a jury would be constitutionally required if the State sought to impose a sentence greater than the statutory maximum sentence, as in the case of the hate-crime "enhancement" that was struck down in *Apprendi*. *See Bellard*, 452 Md. at 514. But when the State seeks life without the possibility of parole for first-degree murder, the *Bellard* Court explained, no additional fact "must be established to increase the penalty for first-degree murder beyond the prescribed statutory maximum[.]" *Id.* at 514-15. That is because life without the possibility of parole *is* the prescribed statutory maximum for that crime. *Id*. at 514.

Following *Bellard*, we hold that the circuit court did not violate Turkot's constitutional rights under federal and Maryland law by imposing a sentence of life imprisonment without the possibility of parole under the current statutory scheme.

II. Examination Regarding the Victim's Alleged Propensity for Violence

Before trial, defense counsel moved *in limine* for an order permitting the introduction of evidence concerning Hayden's alleged propensity for violence. The court reserved its decision.

On cross-examination by defense counsel, Blair Short agreed that Hayden "was in anger management classes." But when defense counsel inquired about why Hayden was in anger management and asked her to confirm her statement to the detectives that Hayden was "slightly mentally unstable," the court sustained the State's objections. The court also sustained an objection during Turkot's direct examination, when defense counsel asked about "acts of violence" by Hayden.

Turkot argues that "[t]he limited inquiry allowed by the trial court . . . effectively deprived [him] of his right to present a defense and the jury of its function to make a discriminating appraisal of Mr. Hayden's propensity for violence." We are unpersuaded that the rulings violated Turkot's due process right to present his defense or that the trial court abused its discretion in foreclosing the examination.

A. Restrictions on Propensity Evidence

Generally, evidence of person's other wrongs are not admissible "to show action in conformity therewith" on a particular occasion. *See* Md. Rule 5-404(b). "Such evidence, however, may be admissible for other purposes, such as proof of motive,

opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." *Id.*

Similarly, "evidence of a person's character or character trait is not admissible to prove that the person acted in accordance with the character or trait on a particular occasion." Md. Rule 5-404(a)(1). But "evidence of an alleged crime victim's pertinent trait of character" may be admissible when that trait is relevant to a contested issue at trial (*see* Md. Rule 5-404(a)(2)(B)), such as whether the defendant acted in self-defense or in defense of others.

Rule 5-405, governing methods of proving character, states:

> (a) **Reputation or opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) **Specific instances of conduct**. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of relevant specific instances of that person's conduct.

Applying these rules, the Court of Appeals has held that when self-defense is a contested issue, the accused may testify about violent acts by the victim for the purpose of proving that the accused "had reason to perceive a deadly motive and purpose in the overt acts of the victim." *Thomas v. State*, 301 Md. 294, 307 (1984). "To use character evidence in this way, the defendant must first prove: (1) his knowledge of the victim's prior acts of violence; and (2) an overt act demonstrating the victim's deadly intent[.]" *Id*.

Alternatively, the court may admit evidence of the victim's violent character to "corroborate evidence that the victim was the initial aggressor," *Thomas*, 301 Md. at 307, or to counter evidence of the victim's pacifism. *See, e.g.*, *Williamson v. State*, 25 Md. App. 338, 345-46 (1975) ("evidence of the victim's propensity for violence and shotguns was crucially important, if for no other purpose than to counter the inference of pacifism conferred by the sister-in-law's testimony" that "although she knew the victim well, she had never seen him carry a gun").

When evaluating restrictions on the examination of a witness, courts are bound not only by the rules of evidence, but also by the Confrontation Clause of the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights, which "guarantee a criminal defendant the right to confront the witnesses against him" or her. *Martinez v. State*, 416 Md. 418, 428 (2010). Under the Confrontation Clause, a criminal defendant must be "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness," such as information concerning bias. *Davis v. Alaska*, 415 U.S. 308, 318 (1974). Nonetheless, the right to examine witnesses "may reasonably be limited" in a manner that does not deprive the accused of a fair trial. *Church v. State*, 408 Md. 650, 664 (2009).

Within these constitutional constraints, the trial court has discretion to control the scope of inquiry during both direct and cross-examination. *See* Md. Rule 5-611; *see also Robinson v. State*, 298 Md. 193, 201 (1983). "'[T]rial judges retain wide latitude . . . to impose reasonable limits . . . based on concerns about, among other things, harassment,

prejudice, confusion of the issues, . . . or interrogation that is repetitive or only marginally relevant.'" *Lyba v. State*, 321 Md. 564, 570 (1991) (quoting *Smallwood v. State*, 320 Md. 300, 307 (1990)).

B. Turkot's Challenges

Turkot contends that "the trial court erred in prohibiting [him] from introducing evidence of the victim's propensity for violence" when it curtailed an examination that, in his view, would have supported his defense-of-others claim. In Turkot's view, three rulings prevented him from inquiring about Hayden's reputation for violence and specific instances of violent conduct, thereby undermining his efforts to show that he struck Hayden while acting in defense of Alex Smoot. Specifically, Turkot complains that the trial court violated his constitutional right to present his defense when the court sustained the State's objections to (1) cross-examination of Blair Short about why Hayden was in anger management and whether she told a police officer that Hayden was "mentally unstable," and (2) his own direct examination regarding whether Hayden assaulted Short.

The State counters that defense counsel sought to elicit testimony that "was irrelevant, tended to confuse the issues, and was highly prejudicial." In the State's view, the court did not err "in limiting the extent to which Short and Turkot testified about Hayden's prior acts," because Turkot had "no legally viable claim of defense-of-others," "Short's awareness of Hayden's prior acts was irrelevant in any case[,]" and "Turkot was allowed to relate Hayden's prior acts."

After reviewing the challenged rulings in the procedural context in which each was made, we conclude that the trial court did not err or abuse its discretion in excluding

evidence or restricting examination regarding Hayden's alleged propensity for violence. Consequently, we conclude that Turkot had a sufficient opportunity to present his defense.

C. Restrictions on Cross-examination of Blair Short

On cross-examination, Blair Short testified that Hayden was in an anger-management program. When defense counsel asked why, the trial court sustained the State's objection. Defense counsel did not proffer what the answer to this question would be. Nor did he proffer why such evidence was relevant. In his brief, Turkot does not identify the evidence defense counsel sought to elicit with this question, much less articulate how its exclusion prejudiced his defense.

Under Maryland Rule 5-103(a)(2), error may be predicated on a ruling that excludes evidence only if "the substance of the evidence of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered." "A claim that the exclusion of evidence constitutes reversible error is generally not preserved for appellate review absent a formal proffer of the contents and materiality of the excluded testimony." *Muhammad v. State*, 177 Md. App. 188, 281 (2007). Because we cannot determine that Short's answer would have supplied admissible information critical to Turkot's defense, he is not entitled to appellate relief based on this ruling.

It was not until the court foreclosed cross-examination about Short's remark regarding Hayden's mental instability that defense counsel articulated a relevancy theory and, for the first time, proffered a basis for Turkot's defense:

THE COURT: The question to her was if she had spoken to Detective Burns and said to Detective Burns that who was mentally unstable?

[Defense Counsel]: Eddie.

THE COURT: That Eddie was mentally unstable?

[Defense Counsel]: Yes, ma'am.

THE COURT: And you objected?

[Prosecutor]: Yes.

THE COURT: Why is that relevant? Why should that come in?

[Defense Counsel]: I think it is relevant, Your Honor. Certainly, the entire dynamic between these three individuals is relevant. We already know that Eddie is in anger management. The fact that he is slightly unstable is very important to the defense that we're going to put on.

THE COURT: What is the defense?

[Defense Counsel]: Possibly self-defense or defense of others or second degree.

THE COURT: You need to proffer for me facts related to your defense because you have not done that. So, I don't know what it is.

[Defense Counsel]: Your Honor, the scenario briefly would be that when Mr. Turkot and Mr. Smoot enter the residence there is no conspiracy, there is no plan. Mr. Smoot attacks Eddie first. The victim, Edward Hayden, gets the better of Alex, actually has the better advantage of him at that point. Then and only then does Mr. Turkot respond and attack Mr. Hayden to help his friend Mr. Smoot. So, basically a defense of others type of theory.

THE COURT: Based on that, I don't see the relevance of asking the witness whether or not she told Detective Burns that Eddie was mentally unstable.

[Defense Counsel]: I would note that it is in her statement.

THE COURT: I understand. It doesn't mean it comes in. . . . Sustained.

(Emphasis added.)

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." Md. Rule 5-401. "Evidence that is not relevant is not admissible." Md. Rule 5-402. "In reviewing a trial court's determination that evidence is relevant and admissible, we apply the 'de novo' standard of review to the court's 'conclusion of law that the evidence at issue is or is not "of consequence to the determination of the action."'" *Wagner v. State*, 213 Md. App. 419, 453 (2013) (quoting *State v. Simms*, 420 Md. 705, 725 (2011), *which quoted Parker v. State*, 408 Md. 428, 437 (2009)).

The trial court did not err in preventing defense counsel from eliciting Short's remark regarding Hayden's mental instability. Counsel's question sought to elicit "evidence of an alleged crime victim's pertinent trait of character," *i.e.*, that Hayden was "mentally unstable." *See* Md. Rule 5-404(a)(2)(B). But counsel's proffer of relevancy related to Hayden's history of *violence*, not his history of *mental instability*. Even if Hayden's history of violence might have been relevant to Turkot's claim of defense of another, we agree with the trial court that evidence of his mental instability was not. Because evidence that Short described the victim as "mentally unstable" did not support the proposition for which it was proffered, *i.e.*, that the victim had a violent character, the trial court did not err in sustaining the State's relevancy objection.

D. Restrictions on Direct Examination of Sean Turkot

During the direct examination of Turkot, the trial court sustained the State's objection to defense counsel's attempt to elicit evidence of specific incidents of violence by Hayden against Blair Short. Turkot argues that "the limited inquiry allowed by the trial court . . . deprived [him] of his right to present" his defense-of-others claim, by excluding evidence that would have helped the jury "to make a discriminating appraisal of Hayden's propensity for violence."

As a threshold matter, the State relies heavily on Turkot's trial testimony in arguing that the trial court did not abuse its discretion in foreclosing this line of questioning. The court ruled, however, before Turkot gave that testimony. Because the court based its ruling on a defense proffer, which was more detailed than defense counsel's earlier proffer, but differed from Turkot's subsequent testimony, we review the ruling in the context of the proffer.[13]

After Turkot testified that he "thought about roughing [Hayden] up" because Hayden had "knocked one of [Turkot's] teeth out," defense counsel asked whether Turkot was "aware of acts of violence Eddie may have committed[.]" In response to the State's objection, defense counsel argued that specific incidents of violence by Hayden were admissible under Rule 5-404, as evidence of both "prior bad acts" by the victim and of the victim's "character." Counsel argued that he did not intend to employ the incidents

[13] We defer discussion of whether Turkot's trial testimony generated a defense-of-others claim untul Part V of this opinion, which addresses whether the trial court erred in refusing to give a defense-of-others instruction.

"to show propensity but to show knowledge on Mr. Turkot's part that he's familiar with the violent propensity of Mr. Hayden," which would be "fair game" in support of "a defense of others type of defense." According to counsel's proffer, Turkot would "say he ha[d] seen Eddie commit certain violent acts" and that when Smoot attacked Hayden and Hayden fought back, Turkot became "worried about [Smoot]'s welfare because of the known nature of violent behavior on the part of Mr. Hayden."

The trial court asked for a proffer of Turkot's personal knowledge regarding specific acts of violence. Defense counsel responded: "Well, he just testified Eddie knocked his tooth out. In addition, he knew he [Hayden] was in anger management. He would also probably testify that he witnessed Eddie hurting Blair in the past." The court asked, "what about anything specific concerning Alex [Smoot] and Eddie?" Defense counsel admitted that there were "[n]o prior indications there."

The prosecutor argued that Turkot's knowledge of specific acts of violence toward Short was not relevant "because the defense is going to be that Eddie wasn't the aggressor." Defense counsel countered that he could rely on a defense-of-others defense without showing that "Alex [Smoot] was not the aggressor."

At that point, the trial court required defense counsel to proffer the facts in support of Turkot's defense-of-others claim. Defense counsel stated:

> That Alex Smoot takes a rubber mallet and hits Eddie on the back of the lower head. Eddie then fights back and actually gets Alex in a choke hold. Mr. Turkot would testify that he is at that point fearful for Mr. Smoot's life; that he feels his life is in danger; and that then and only then does he come to try to get Eddie off of Alex.

Based on this proffer, the trial court sustained the objection:

> I don't see the relevance . . . . You were very specific as to an incident that occurred and he responds to Eddie's conduct by the assault that was committed first by Mr. Smoot and what was presented to Mr. Turkot there in his presence by him being in a choke hold. How that has to do with anything Eddie may have done with Blair has no relevance whatsoever.

Assuming that Hayden successfully parried Smoot's initial attack and put him "in a choke hold" that caused Turkot to fear for Smoot's life, it is unclear what Hayden's alleged violence toward Short would add. Turkot was not acting to protect Short, but to protect Smoot. In the absence of a proffer that Hayden had been involved in a comparable incident with Short – for example, that Hayden had beaten or strangled Short in a manner that could have led to her death had a third party not intervened – Turkot's knowledge of some unspecified incidents of violence between Hayden and Short was at most only "marginally relevant" to his defense. *See Smallwood v. State*, 320 Md. at 307. At the same time, Turkot's allegations that Hayden had beaten Short were likely to unfairly prejudice Hayden in the jury's eyes. The trial court did not err in ruling that Turkot's proffer did not adequately establish how those unspecified incidents of violence established Hayden's "deadly intent" towards Smoot when he put Smoot in a chokehold in defending himself against Smoot's aggression.

Nor did that ruling deprive Turkot of the right to present an effective defense. By this time, the jury had already heard multiple references to Hayden's alleged violence, including Short's testimony that Hayden had been "in anger management" and Turkot's testimony that Hayden knocked out Turkot's tooth (ironically, when acting in defense of Short as Turkot choked her). In addition, Turkot's recorded statement to police contained several allegations of violence by Hayden, including allegations that Turkot saw him "fist

fighting" with Short; that Hayden "beat the crap" out of her, "beat her like an old blanket," and "was riding her like a bicycle"; and that Hayden had been "locked up," was on "probation," and had "his two strikes."

In short, through his own statements to the detectives, Turkot managed to inform the jury of his allegation that Hayden had beaten Short. The court did not err or abuse its discretion in prohibiting him from testifying on that subject.

III. Evidence Regarding Turkot's Assault on Blair Short

After unsuccessfully brandishing Rule 5-404(b) as a sword requiring the admission of propensity evidence involving Hayden, Turkot wields the same rule as a shield supposedly requiring the exclusion of propensity evidence involving his own altercation with Short and Hayden shortly before the murder. In Turkot's view, the court should not have allowed the jury to consider "other wrongs" evidence that he assaulted and choked Short until Hayden came to her defense. We disagree.

As discussed in Part II, Rule 5-404(b) permits the introduction of evidence of a criminal defendant's other wrongs when it is not offered "to prove the character of a person in order to show action in conformity therewith," but has special relevance "for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident."

"Before evidence of prior bad acts or crimes may be admitted, the trial court must engage in a three-step analysis." *Hurst v. State*, 400 Md. 397, 408 (2007) (citing *Faulkner v. State*, 314 Md. 630, 634-35 (1989)). First, the court must decide whether the evidence had "special relevance," in that it falls within one of the exceptions in Rule 5-

404(b), *Hurst*, 400 Md. at 408 (citing *Faulkner*, 314 Md. at 634), "such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." Md. Rule 5-404(b). "Second, the court must decide 'whether the accused's involvement in the other crimes is established by clear and convincing evidence.'" *Hurst*, 400 Md. at 408 (quoting *Faulkner*, 314 Md. at 634). "Finally, the court must balance the necessity for, and the probative value of, the other crimes evidence against any undue prejudice likely to result from its admission." *Id.* (citing *Faulkner*, 314 Md. at 635).

We conduct a de novo review of the first decision, concerning whether the conduct fell within any of the exceptions in Rule 5-404(b). *See Sifrit v. State*, 383 Md. 116, 133 (2004) (citing *Faulkner*, 314 Md. at 634). We review the second decision, concerning whether the State adduced clear and convincing evidence of the defendant's involvement in other wrongs, to determine the sufficiency of the supporting evidence. *Id.* (citing *Faulkner*, 314 Md. at 635). We review the third decision, concerning the balance of probative value and undue prejudice, for abuse of discretion. *Id.* (citing *Faulkner*, 314 Md. at 635).

In Turkot's view, the trial court erred at the first and third steps of its analysis, by determining that the evidence had special relevance to show Turkot's motive and state of mind and in failing to exclude it as unnecessarily and unfairly prejudicial. He is incorrect.

The trial court did not err or abuse its discretion in admitting evidence of Turkot's fight with Short and Hayden under Md. Rule 5-404(b). The fight had special relevance

because it supported the State's theory that Turkot's relationships with both Short and Hayden were deteriorating in the days leading up to the murder and that the fight itself contributed to his motive for murder. Turkot had a love-hate relationship with Short. On one hand, he expressed his love for her, his desire to resume a romantic relationship with her, and his impulse to protect her from Hayden. On the other, Turkot vented his anger and desire to punish her for ignoring and mistreating him. The evidence that he choked Short indicated that his frustrations, which he had previously expressed to Short and Fletcher, had escalated into violence. That evidence also made it less likely that Short would choose Turkot over Hayden.

Indeed, the evidence that Hayden fought with Turkot was highly relevant to Turkot's motive to murder him. Turkot was already angry about Hayden's relationship with Short, and it could only have angered him further that Hayden rescued Short when Turkot was choking her and, in the process, knocked out Turkot's tooth.

The evidence that Turkot fought with Short and lost a tooth to Hayden also made it more likely that Turkot had decided to kill his rival, Hayden, thereby protecting Short from Hayden and punishing her for mistreating him. In addition, that evidence made it more likely that Hayden's death resulted from Turkot's premeditated plan and less likely that it resulted from Smoot's sudden impulse. Because the fight was relevant to show both Turkot's intent and his motive for murder, the trial court did not err or abuse its discretion in admitting that evidence. *See* Md. Rule 5-404(b).

We are unpersuaded by Turkot's contention that his state of mind and motive were adequately "established with other, less prejudicial evidence." In support of that

proposition, Turkot points to Short's testimony that he was angry about her relationship with Hayden and to Fletcher's testimony that Turkot still loved Short and opposed her relationship with Hayden. Although that evidence was also relevant to show Turkot's motive and state of mind, Turkot's altercations with Short and Hayden established a specific event, less than ten days before the murder, that demonstrated Turkot's escalating conflict with Short and Hayden and his attendant motive for premeditated murder. The circuit court did not abuse its discretion in concluding that the probative value of that evidence was not outweighed by the danger of "undue prejudice." *Faulkner*, 314 Md. at 635.

IV. Facebook Messenger Exchange With Daniel Crenshaw

Turkot challenges the admission of his inculpatory Facebook Messenger conversation with Daniel Crenshaw. Tacitly conceding that he cannot contest the admissibility of his own messages, which are the statements of a party-opponent (*see* Md. Rule 5-803(a)(1)), he argues that the out-of-court statements by Crenshaw, who did not testify at trial, were inadmissible under the Confrontation Clause and the rule against hearsay. Alternatively, he argues that they should have been excluded under Rule 5-403 because, in his view, they were more prejudicial than probative.

We agree with the State that Turkot did not preserve his hearsay and Rule 5-403 complaints and that, in any event, the challenged evidence was neither testimonial, nor hearsay, nor unfairly prejudicial.

A. Confrontation Clause Challenge

When the State moved to introduce the Facebook Messenger conversation between Turkot and Daniel Crenshaw, defense counsel objected on Confrontation Clause grounds. The trial court overruled that objection.

In making a Confrontation Clause objection, Turkot did not preserve a hearsay challenge to the same evidence, because those objections "are not synonymous or coextensive[.]" *Collins v. State*, 164 Md. App. 582, 606 (2005). Turkot concedes that he preserved no other grounds for appellate review. *See* Md. Rule 8-131(a); *see also Klauenberg v. State*, 355 Md. 528, 541 (1999) ("when specific grounds . . . are given for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal") (citations omitted).

Consequently, the only question that is properly before us is whether the admission of Crenshaw's statements violated the Confrontation Clause. We conduct a de novo review of a decision to admit a statement over a Confrontation Clause objection. *See Langley v. State*, 421 Md. 560, 567 (2011).

The Confrontation Clause of the Sixth Amendment prohibits admission of an out-of-court statement by a non-testifying witness if the statement is testimonial in nature. *See Davis v. Washington,* 547 U.S. 813, 821 (2006); *see also Derr v. State*, 434 Md. 88, 106-07 (2013). Whether a statement is testimonial is measured by its "primary purpose," and specifically whether it was intended as "an out-of-court substitute for trial testimony." *Michigan v. Bryant*, 562 U.S. 344, 358 (2011); *see also Derr*, 434 Md. at 114-15.

In *Cox v. State*, 421 Md. 630, 650-51 (2011), the Court of Appeals held that statements were not testimonial because they were made during "a casual conversation between private acquaintances." Here, as in *Cox,* there was patently no "testimonial purpose" for Crenshaw's statements during his Facebook Messenger exchange with Turkot, because nothing Crenshaw wrote in that informal one-on-one exchange over a private messaging service was intended as "an out-of-court substitute for trial testimony." *Bryant*, 562 U.S. at 358; *Cox*, 421 Md. at 650-51. The court, therefore, did not err in rejecting Turkot's Confrontation Clause challenge to Crenshaw's statements.

B. Unpreserved Hearsay and Rule 5-403 Challenges

Although Turkot acknowledges that his hearsay and Rule 5-403 challenges were not preserved for appellate review, we shall, in the interest of judicial economy, briefly explain why those challenges would have had no merit had defense counsel preserved them.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Hearsay "is not admissible" unless it falls within one of the exceptions to the rule against hearsay, which are enumerated in Md. Rules 5-802.1, 5-803, and 5-804. *See* Md. Rule 5-802. "[A] relevant extrajudicial statement is admissible as nonhearsay when it is offered for the purpose of showing that a person relied on and acted upon the statement and is not introduced for the purpose of showing that the facts asserted in the statement are true." *Graves v. State*, 334 Md. 30, 38 (1994).

The court properly admitted Turkot's own statements to Crenshaw as the statements of a party opponent (*see* Md. Rule 5-803(a)(1)), which provided highly relevant evidence of premeditation and motive, and which impeached Turkot's claim that, to his surprise, Smoot attacked Hayden, suddenly, spontaneously, and without provocation. Because Crenshaw's statements provided context for Turkot's inculpatory statements, the trial court, in turn, did not err in admitting them as nonhearsay. *See, e.g., United States v. Wills*, 346 F.3d 476, 490 (4th Cir. 2003) (statements by defendant's brother during recorded conversations, responding to defendant's statements, "were reasonably required to place [defendant's] responses into context"). Regardless of whether Crenshaw's statements were true, they showed that after Turkot "ranted" about killing Hayden, Crenshaw expressed reluctance, but Turkot persisted in detailing his grievances against Hayden and his plans to murder him.

If defense counsel had lodged a Rule 5-403 objection to Crenshaw's statements, it would have been just as unsuccessful. Even if relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Md. Rule 5-403. "'[T]he fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in Rule 5-403.'" *Odum v. State*, 412 Md. 594, 615 (2010) (quoting Lynn McLain, *Maryland Evidence: State and Federal* § 403:1(b) (2d ed. 2001)). "[E]vidence is considered unfairly prejudicial when it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged." *Burris v. State*, 435 Md. 370, 392 (2013) (citation and internal quotation marks omitted). "The more probative the

evidence is of the crime charged, the less likely it is that the evidence will be unfairly prejudicial." *Odum*, 412 Md. at 615. Given the relevance of Crenshaw's statements as context for Turkot's highly incriminating statements revealing his motive for and premeditation of the murder for which he was on trial, the court would not have abused its discretion had it rejected an objection that the evidence was unfairly prejudicial within the contemplation of Rule 5-403.

V. Jury Instructions

In his final assignment of error, Turkot argues that "the trial court erred in refusing to propound a jury instruction on defense of others" and in declining to instruct the jury that it could consider Smoot's invocation of the Fifth Amendment against him. Turkot, however, failed to preserve his objection to the instructions. Moreover, even if he had preserved his objections, we would reject both claims of error.

A. Preservation

Under 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, stating distinctly the matter to which the party objects and the grounds for the objection." "A principal purpose of Rule 4-325(e) 'is to give the trial court an opportunity to correct an inadequate instruction' before the jury begins deliberations." *Alston v. State*, 414 Md. 92, 112 (2010) (quoting *Bowman v. State*, 337 Md. 65, 69 (1994)).

On December 7, 2015, the court discussed the proposed jury instructions with counsel. Turkot requested an instruction on defense of others and an instruction that the

jury could infer Smoot's guilt from his invocation of his right to remain silent. The court stated that it would not give either instruction, but it left open the possibility of further argument concerning the instruction about Smoot's invocation of his right to remain silent.

On the following day, December 8, 2015, Turkot offered no additional argument, and the court proceeded to instruct the jury. After it had given the instructions, the court asked if either party "need[ed] to approach for any reason." Both counsel responded that they had nothing further for the court.

Because Turkot did not promptly object after the court instructed the jury and did not state the grounds for his objection, he did not preserve his objection to the instructions. Md. Rule 4-325(e); *see Stabb v. State*, 423 Md. 454, 464-65 (2011).

Citing *Gore v. State*, 309 Md. 203 (1987), and *Bennett v. State*, 230 Md. 562 (1963), Turkot claims to have substantially complied with Rule 4-325(e). We reject that claim.

To show substantial compliance with Rule 4-325(e), a party must meet the following requirements:

> [T]here must be an objection to the instruction; the objection must appear on the record; the objection must be accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record[,] and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless.

Gore v. State, 309 Md. at 209.

In this case, there is nothing to suggest that a renewal of the objection would have been any more futile or useless than it would have been in other cases in which this Court

has found the objection to be unpreserved. *E.g. Correll v. State*, 215 Md. App. 483, 516 (2013). Indeed, in the case of the instruction concerning Smoot's invocation of his Fifth Amendment rights, the court had expressed its willingness to entertain additional argument. This is certainly not a case like *Gore*, in which the Court of Appeals found substantial compliance with the rule when defense counsel did not reiterate an objection after the court, on its own motion, had devised and delivered an erroneous instruction that amounted to a comment on the evidence.

"There are good reasons for requiring an objection at the conclusion of the instructions even though the party had previously made a request." *Johnson v. State*, 310 Md. 681, 686 (1987). "If the omission is brought to the trial court's attention by an objection, the court is given an opportunity to amend or correct its charge." *Id.* "Moreover, a party initially requesting a particular instruction may be entirely satisfied with the instructions as actually given." *Id.*

If we deemed a further objection to be futile or useless merely because a court had previously stated that it would not give a particular instruction, we would obliterate the express requirement in Rule 4-325(e) that a "party object[] on the record promptly after the court instructs the jury." A party, therefore, is not relieved of the obligation to object to the instructions after the court has given them merely because he or she believes that the trial court is unlikely to reconsider its decision about whether to give a particular instruction. Accordingly, Turkot failed to preserve his objections to the instructions.

B. Review of Jury Instructions

Even if Turkot had preserved his objection to the instructions, we would find no error.

Maryland Rule 4-325(c) provides that a trial "court may, and at the request of any party shall, instruct the jury as to the applicable law[.]" Under this rule, trial courts are required "to give jury instructions requested by a party when a three-part test is met." *Preston v. State*, 444 Md. 67, 81 (2015). "The instruction must correctly state the law, the instruction must apply to the facts of the case (*e.g.*, be generated by some evidence), and the content of the jury instruction must not be covered fairly in a given instruction." *Id.* at 81-82 (footnote omitted).

In evaluating the adequacy of the evidence to generate a requested instruction, "we view the record in the light most favorable to the accused," *General v. State*, 367 Md. 475, 487 (2002), to determine "'whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired.'" *Bazzle v. State*, 426 Md. 541, 550 (2012) (quoting *Dishman v. State,* 352 Md. 279, 292-93 (1998))). "[T]he threshold is low, as a defendant needs only to produce 'some evidence' that supports the requested instruction[.]" *Id.* at 551. "Some evidence" simply means any evidence, regardless of source, that, if believed, would support the defendant's claim. *Id.* "The threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law for the judge." *Id.* at 550 (citation omitted).

C. Defense-of-Others Instruction

Turkot contends that the trial court erred in refusing to give the pattern jury instruction on defense of others in a premeditated murder case, *Maryland Criminal Pattern Jury Instruction* (MPJI-Cr.) 4:17.3 (2d ed. 2013, 2016 Supp.).[14] A court should

[14] The pattern instruction sets forth the following elements and principles for this defense:

> You have heard evidence that the defendant killed (name) in defense of another person. . . .
>
> Defense of another person is a complete defense, and you are required to find the defendant not guilty, if all of the following four factors are present:
>
> (1) the defendant actually believed that the person [he] [she] was defending was in immediate and imminent danger of death or serious bodily harm;
>
> (2) the defendant's belief was reasonable;
>
> (3) the defendant used no more force than was reasonably necessary in light of the threatened or actual force; and
>
> (4) the defendant's purpose in using force was to aid the person [he] [she] was defending. . . .
>
> Even if you find that the defendant did not act in complete defense of another person, the defendant may still have acted in partial defense of another person. [If the defendant actually believed that the person defended was in immediate and imminent danger of death or serious bodily harm, even though a reasonable person would not have so believed, the defendant's actual, though unreasonable, belief is a partial defense of another person and results in a verdict of voluntary manslaughter rather than murder.] [If the defendant used greater force than a reasonable person would have used, but the defendant actually believed that the force used was necessary, the defendant's actual, though unreasonable, belief is a partial defense of another person and the verdict should be guilty of voluntary manslaughter rather than murder.] . . .

give this instruction "only if there is an issue of justification generated by evidence of a perfect defense of others and an issue of mitigation generated by evidence of an imperfect defense of others." MPJI-Cr 4:17.3, Notes on Use. A court may give a comparable instruction when the defensive action does not result in the victim's death.[15] *See* MPJI-Cr. 5:01.

The defense "is available . . . without regard to the actual right of self-defense on the part of the one defended, so long as the one defending honestly and reasonably believes that the one defended has the right of self-defense." MPJI-Cr. 5:01, cmt.

Turkot argues that he generated some evidence of a defense-of-others defense because he claims to have come to Smoot's aid when Hayden was choking him during the first (of two) incidents in which, Turkot said, Smoot spontaneously attacked Hayden. Turkot argues that his assistance to Smoot "led to the death of Mr. Hayden, as it led Mr. Smoot to recover, attack, and stab Mr. Hayden" in the second spontaneous assault.

> If the defendant did not act in complete defense of another person, but did act in partial defense of that person, the verdict should be guilty of voluntary manslaughter and not guilty of murder.

MPJI-Cr. 4:17.3.

[15] A viable defense of another claim exists in an assault case when:

> (1) the defendant actually believed that the person he was defending was in immediate and imminent danger of bodily harm; (2) the defendant's belief was reasonable; (3) the defendant used no more force than was reasonably necessary in light of the threatened or actual force; and (4) the defendant's purpose in using force was to aid the person he was defending.

MPJI-Cr. 5:01.

Turkot's defense, as depicted in his brief, is not one of defense of others. In Turkot's account, he did not kill Hayden; Smoot did. Turkot does not argue that he killed Hayden in the course of defending Smoot from Hayden's lethal assault; instead, he argues that he inadvertently facilitated Hayden's death by saving Smoot from Hayden, and thereby unwittingly allowing Smoot to launch a second, successful attack in which he pummeled and stabbed Hayden. Turkot's conduct (as he described it at trial) might, in some attenuated sense, have led to Hayden's death. But as the State argues, "[t]he jury was not charged with resolving whether Turkot bore karmic responsibility for the future actions of those whom he had saved." Because Turkot did not generate "some evidence" in support of his claim of defense of others, the court did not err in declining to give a defense-of-others instruction.

D. Instruction Regarding Invocation of Fifth Amendment

The parties stipulated to a jury instruction that "the defense called co-defendant Alexander Smoot to testify in this case and that Smoot invoked his Fifth Amendment privilege against self-incrimination." Citing *Gray v. State*, 368 Md. 539, 564 (2002), defense counsel asked the court to give an additional instruction that Smoot's invocation of his Fifth Amendment right made his testimony "unavailable to the defendant," and that, contrary to the pattern instruction on Fifth Amendment silence, Smoot's silence could be considered as evidence against Smoot himself. *Compare* MPJI-Cr. 3:17 ("The fact that the defendant did not testify must not be held against the defendant and must not be considered by you in any way or even discussed by you").

The court and counsel agreed that although an "unavailable to the defendant" instruction would be appropriate under *Gray*, neither that case nor any other known precedent clearly authorized an instruction that the Fifth Amendment silence of a witness in a criminal trial may be considered as evidence against that witness. For that reason, the trial judge stated that she would instruct the jury, in accordance with the pattern instruction, that Smoot's election not to testify could not be used against him. The court, however, stated that it was willing to reconsider the instruction if defense counsel found a case or wished to present additional argument the following morning.

The trial proceeded the following day with no further mention of the Fifth Amendment issue. The court, deviating from its previously announced decision to give only the pattern instruction, instructed the jury that it could not consider Smoot's invocation of his Fifth Amendment right "against Mr. Smoot *or the defendant*." (Emphasis added.) When instructions were complete, the court asked, "Do counsel need to approach for any reason?" Defense counsel replied, "No, Your Honor."

Turkot concedes that defense counsel did not comply with Rule 4-325(e), which provides that "[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, stating distinctly the matter to which the party objects and the grounds for the objection." Turkot asks us to overlook that rule, arguing for review for plain error review.

We find plain error relief inappropriate. "[A]ppellate invocation of the 'plain error doctrine' 1) always has been, 2) still is, and 3) will continue to be a rare, rare

phenomenon." *Morris*, 153 Md. App. at 507. The Court of Appeals has established the following four-part test for plain error review:

> First, there must be an error or defect – some sort of [d]eviation from a legal rule – that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the . . . proceedings. Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error – discretion which ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings. Meeting all four prongs is difficult, as it should be."

State v. Rich, 415 Md. 567, 578 (2010) (citations and quotation marks omitted; emphasis added).

We need not address all four factors because the alleged error was certainly not "clear and obvious": no case authorizes, let alone requires, a court to give the instruction that Turkot wanted.

Furthermore, in the context of this unpreserved claim of instructional error, it is Turkot's "burden to persuade us, to our satisfaction, that the [allegedly] erroneous instruction *did* contribute to the outcome." *Austin v. State*, 90 Md. App. 254, 269 (1992). Turkot has not persuaded us that the challenged instruction "affected his substantial rights" or "the outcome of the proceeding[.]" *State v. Rich*, 415 Md. at 578.

Although the trial consumed six days, it took this jury less than an hour to reach its verdicts. Those swift verdicts indicate that Turkot's own words – in the messages to friends, his recorded statement to police, and his trial testimony that we have detailed – provided overwhelming evidence of his guilt. If the court had instructed the jury that

Smoot's failure to testify could be considered against him, it is difficult to conceive how the verdicts would have been different. On this record, plain error relief is not warranted.

JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.