Circuit Court for Cecil County
Case No. C-07-CR-18-000808

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3216

September Term, 2018

JEFFREY LYNN AMOS

v.

STATE OF MARYLAND

Friedman,
Beachley,
Gould,

JJ.

Opinion by Beachley, J.

Filed: April 17, 2020

On July 11, 2018, the State of Maryland charged appellant Jeffrey Lynn Amos by way of indictment with: 1) importation of heroin, 2) possession of a large amount of heroin, 3) possession with intent to distribute heroin, 4) possession of heroin, 5) possession of methamphetamine, 6) possession with intent to distribute methamphetamine, 7) possession of a firearm after having been convicted of a disqualifying crime, and 8) possession of a firearm in relation to drug trafficking. On the second day of a two-day trial, the trial court granted appellant's motion for judgment of acquittal as to possession of a firearm in relation to drug trafficking (count 8), and the jury convicted appellant on the remaining seven counts. The court ultimately sentenced appellant to an executed term amounting to ten years' imprisonment. Appellant timely appealed and presents the following four issues for our review, which we have slightly rephrased:

1. Did the circuit court err in denying appellant's motion for judgment of acquittal based on insufficient evidence to convict him of possession of a large amount of heroin where the State failed to establish the net weight of the heroin?

2. Did the circuit court err in admitting the controlled dangerous substances ("CDS") into evidence where there was unexplained evidence of tampering?

3. Did the circuit court err in admitting into evidence appellant's girlfriend's statements to police pursuant to the doctrine of forfeiture by wrongdoing?

4. Did the circuit court err by refusing to sever the possession of a firearm after having been convicted of a disqualifying crime charge from the remaining charges?

We answer all four questions in the negative, and affirm appellant's convictions.

FACTUAL AND PROCEDURAL BACKGROUND

On June 14, 2018, pursuant to an investigation of appellant, Maryland State Police traveled to a rest stop in Newark, Delaware. At the time, the police expected appellant to make contact with a man named Jon Faller. Before appellant arrived at the rest stop, police observed Faller and an individual, later identified as Amanda Byrd, in a gold Chevrolet Suburban. Appellant then arrived at the rest stop on a motorcycle. Although the testimony at appellant's eventual trial never clarified the details, appellant was apparently accompanied by a woman named Stephanie Edwards. Upon appellant and Edwards's arrival, the four of them exited their respective vehicles and went inside the travel plaza of the rest stop.

A short time later, police observed the four exit the travel plaza and enter Faller's vehicle, the gold Chevrolet Suburban. Appellant and Edwards then exited the vehicle, and police observed that Edwards was holding a plastic bag. The two walked to appellant's motorcycle, and then left the rest stop heading southbound on Interstate 95 towards Maryland.

Police followed appellant back to his residence in Cecil County. When appellant arrived, members of the Maryland State Apprehension Team arrested him and Edwards. On Edwards's person, police recovered a plastic bag which contained heroin. On appellant's person, police recovered $8,636 and a black zipper bag that contained both heroin and methamphetamine.

Pursuant to an extant search warrant, police then searched appellant's home and motorcycle. There appeared to be a separate living quarters in the attic area of the house, and officers focused their attention on this attic-room based on the presence of a piece of mail addressed to appellant. In appellant's room, police found a loaded gun wrapped in a shirt or towel inside a "water cooler/refrigerator." Police also observed drug paraphernalia, including scales, plastic glassine baggies, and a pipe.

Following the arrests and execution of the search warrant, police escorted appellant and Edwards to the police station in order to interview them. Whereas appellant invoked his right to remain silent, Edwards was interviewed, provided a written statement, and agreed to testify against appellant in order to avoid facing her own criminal charges. The officers recorded both the video and audio of Edwards's interview, and then released her. Apparently, Edwards was never charged as a result of the events of June 14, 2018.

On the morning of appellant's first day of trial, the State informed the trial court that although it had served Edwards with a subpoena, she had nevertheless failed to appear as a witness for appellant's trial. The State then sought admission of Edwards's recorded interview and written statement to police pursuant to the doctrine of forfeiture by wrongdoing, arguing that through jail phone calls, appellant had wrongfully procured Edwards's absence. The trial court listened to several phone calls appellant made from jail to Edwards and others, which we will discuss in greater detail below. Following argument, the court ruled that Edwards's recorded interview and written statement were admissible based on the doctrine of forfeiture by wrongdoing.

During the trial, the State introduced the testimony of several witnesses, including officers involved in appellant's arrest and the search of his room. Corporal Cornbrooks[1] of the Maryland State Police testified that he participated in the investigation and arrest of appellant on June 14, 2018, specifically in the capacity as "the seizing officer," or the officer responsible for collecting and documenting all evidence seized. Corporal Cornbrooks testified that, as other officers were arresting Edwards, he removed a plastic bag from her belt loop and placed it in his vehicle. He observed what appeared to be heroin packaged in clear glassine baggies with blue wax paper. As officers prepared to enter appellant's room, Corporal Cornbrooks searched appellant, and found $8,636 and a "black zipper bag" that contained heroin and methamphetamine. Corporal Cornbrooks then moved those items to his vehicle, which he secured while other police searched appellant's premises.

Deputy Charles Travis also testified for the State. Deputy Travis explained that he worked for the Cecil County Sheriff's Office and that he was involved with appellant's case as the "packaging officer," or officer responsible for packaging the items seized from the target of an investigation. In packaging the items seized, Deputy Travis was also responsible for counting each of the bags of substances seized from appellant and Edwards. According to the chain of custody log, Deputy Travis itemized and counted the following items provided by Corporal Cornbrooks:

[1] Corporal Cornbrooks did not provide his first name during the trial.

A-1: (1) large zip-lock bag containing 400 blue wax bags with a white powdery substance
A-2: (1) large zip-lock bag containing 400[2] blue wax bags with a white powdery substance
A-3: (1) s[m]all zip-lock bag containing 97[3] blue wax bags with a white powdery substance
A-4: (1) small zip-lock bag containing a tied plastic bag with a crystal[-] like substance.

Deputy Travis then sent these items to the Maryland State Police Forensic Sciences Division Lab in Pikesville for testing. A chemist, Heather Baxivanos, analyzed the substances Deputy Travis submitted. At trial, Ms. Baxivanos testified that for item A-2, she counted 413 bags compared to Deputy Travis's 400 bags, and that, because of the numerical discrepancy, Deputy Travis needed to resubmit item A-2 before she could perform her tests. Ms. Baxivanos was able to immediately test items A-1 and A-3, however, and concluded that all substances tested from those items were heroin. Ms. Baxivanos determined that item A-4 contained methamphetamine. Deputy Travis resubmitted item A-2, and Ms. Baxivanos determined that all substances tested within item A-2 were heroin.

As stated above, the jury ultimately convicted appellant of all charges except for possession of a firearm in relation to drug trafficking, because the court removed that count

[2] As we shall explain, Deputy Travis initially miscounted the bags in item A-2, and was required to correct the chain of custody log when the lab provided a different count.

[3] Whereas Deputy Travis counted 97 bags for item A-3, the chemist counted 99 bags.

pursuant to appellant's motion for judgment of acquittal. We shall provide additional facts as necessary.

DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE REGARDING POSSESSION OF A LARGE AMOUNT OF HEROIN

Appellant first argues that, because the evidence was insufficient to support his conviction for possession of a large amount of heroin, the trial court erred in denying his motion for judgment of acquittal. Specifically, he argues that the State failed to prove the net weight of the heroin officers recovered from him as the State only provided a weight that included both the heroin itself and the packaging materials, which improperly added the weight of approximately 900 glassine bags and wax paper to the measurement. As we shall explain, because appellant failed to raise this argument before the trial court, he failed to preserve it for our review.

Maryland Rule 4-324 governs motions for judgment of acquittal. It provides, in relevant part:

> (a) A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. *The defendant shall state with particularity all reasons why the motion should be granted*.

(Emphasis added).

Maryland courts have strictly construed the requirement that the defendant state *all reasons with particularity*. For example, in *Starr v. State*, 405 Md. 293, 294-95 (2008), the Court of Appeals determined that Starr's insufficiency argument was not preserved.

There, Starr was charged with openly carrying a dangerous weapon, and the evidence at trial indicated that the weapon at issue was a sawed-off shotgun. *Id*. at 295-98. At the conclusion of the State's case-in-chief, Starr's counsel argued, "Simply put[,] shotguns, even sawed off shotguns aren't dangerous weapons as contemplated by this particular statute." *Id*. at 298. On appeal, however, Starr made a different argument, *i.e.*, that the State only proved he was in possession of a handgun, which did not meet the definition of a dangerous weapon under the applicable statute. *Id*. at 301.

Rather than consider this argument, the Court of Appeals concluded that it was not preserved for appellate review. *Id*. at 301-302. The Court stated, "A criminal defendant who moves for judgment of acquittal is required by Md. Rule 4-324(a) to 'state with particularity all reasons why the motion should be granted[,]' and is not entitled to appellate review of reasons stated for the first time on appeal." *Id*. at 302 (quoting *State v. Lyles*, 308 Md. 129, 135-36 (1986)). The Court then provided the following example:

> [I]n *McIntyre v. State*, 168 Md. App. 504, 897 A.2d 296 (2006), while affirming possession and distribution of child pornography convictions, the Court of Special Appeals refused to decide whether "the evidence produced at trial was insufficient to establish that the images depicted actual children, as opposed to virtual images of childen[,]" because that argument was not made in the Circuit Court when the appellant's trial counsel moved for a judgment of acquittal. *Id*. at 526-27, 897 A.2d at 308-09.

Id. at 303. The Court further observed, "A defendant may not argue in the trial court that the evidence was insufficient for one reason, then urge a different reason for the insufficiency on appeal[.]" *Id*. (quoting *Bates v. State*, 127 Md. App. 678, 691 (1999), *overruled on other grounds by Tate v. State*, 176 Md. App. 365 (2007)). Additionally, the

Court noted that "While an appellant/petitioner is entitled to present the appellate court with 'a more detailed version of the [argument] advanced at trial[, this Court has refused] to require trial courts to imagine all reasonable offshoots of the argument actually presented to them before making a ruling on admissibility.'" *Id*. at 304 (quoting *Sifrit v. State*, 383 Md. 116, 136 (2004)). Applying *Starr* to appellant's case, we readily conclude that he has failed to preserve his sufficiency argument for our review.

At the outset, we note that Md. Code (2002, 2012 Repl. Vol., 2019 Supp.), § 5-612 of the Criminal Law Article ("CR"), which criminalizes possession of a large amount of heroin, provides, in relevant part:

> (a) A person may not manufacture, distribute, dispense, or possess:
>
> ***
>
> (5) 28 grams or more of morphine or opium or any derivative, salt, isomer, or salt of an isomer of morphine or opium;
>
> (6) 28 grams or more of any mixture containing a detectable amount, as scientifically measured using representative sampling methodology, of morphine or opium or any derivative, salt, isomer, or salt of an isomer of morphine or opium[.]

On appeal, appellant argues that the evidence was insufficient to support his conviction because "[t]he State, by wrongly relying on the gross weight of the heroin—including the weight of the approximately ***900 glassine bags and wax paper*** in which the heroin was packaged—failed to present evidence" that appellant violated CR § 5-612(a). In other words, appellant claims that the State never proved that he possessed "28 grams or more of any mixture containing a detectable amount" of heroin because it relied on the

"gross weight" of the heroin *and its packaging*, rather than simply the net weight of the heroin itself.

To support this argument, appellant notes that Ms. Baxivanos testified that items A-1 and A-3, which consisted of 499 bags of heroin, weighed 156.713 grams, including the weight of the packaging. Ms. Baxivanos testified that the total weight of heroin in three bags she tested was only 0.070 grams. Regarding item A-2, Ms. Baxivanos testified that the 413 bags of heroin weighed 130.196 grams, but that the total weight of heroin in three bags she tested was only 0.091 grams. From this, appellant argues that Ms. Baxivanos never testified to the total weight of heroin recovered from appellant—only the total combined weight of heroin and packaging materials.

This argument is not preserved. Whereas on appeal appellant alleges that the weight relied upon to support his conviction under CR § 5-612 for possession of a large amount of heroin wrongly included the weights of packaging materials, at trial he argued that, because testimony showed that the heroin was mixed with a cutting agent, Ms. Baxivanos had failed to sufficiently identify the net weight of the heroin without the cutting agent:

> [DEFENSE COUNSEL]: Count 2 deals with a large amount of heroin. The statute is quite specific. It says, morphine, heroin, cocaine. It does not say, heroin and *cutting agent*, or cocaine and *cutting agent*. It says possession of the CDS itself.
>
> The chemist testified that there is a cutting agent in the heroin. There is no net weight provided by the chemist, who is the expert here, as to the actual weight of the heroin in the packaged materials. The jury should not be left to

> speculate or guess that this might have been the right amount.
>
> It's up to the State to provide the element necessary there, which is the weight of the prohibited item. They have not provided a net weight. They have not therefore provided the evidence the jury needs to make a decision beyond a reasonable doubt. They could only speculate, they could only guess, and it would be improper to put them in that position. I would move Counts 1 and 2 to be dismissed for that reason.

(Emphasis added). Later in his argument, appellant's counsel reiterated his claim that the State failed to prove the net weight of the heroin exclusive of the cutting agent:

> [DEFENSE COUNSEL]: Your Honor, in discovery we requested the net weight of the CDS. I was told that the State does not have it and could not provide it. The statute calls specifically for the CDS. It does not call for heroin *and cutting agent*. It does not call for cocaine *and cutting agent*. It says, possession of heroin. . . .
>
> The Legislature is presumed to intend what they write, not intend something else. They wrote, heroin. *They did not write, heroin and cutting agent*. It has to be established that the net weight, *the actual heroin*, meets the statutory criteria. Here that is not met. *We know that there is a cutting agent and there is heroin. The chemist did not provide a net weight for the heroin*.
>
> The jury will be reduced to speculating or guessing or trying to determine themselves what a proper formula would be *and they don't even have the percentage of heroin in this as opposed to cutting*. . . .

> Your Honor, I would say that that is unconstitutional because it is not a specific -- there is no way of knowing what you're defending against. *And it's saying someone who wanted to set you up could take an ounce of flour, mix in a little bit of heroin, and that would be a mixture with a detectable amount.*

(Emphasis added).

Because appellant proffered a different argument at trial compared to that which he offers on appeal, he has failed to preserve his appellate argument for our review.[4]

II. EVIDENCE TAMPERING IN THE CHAIN OF CUSTODY

Appellant's second argument on appeal is that the trial court abused its discretion when it erroneously ignored credible evidence of tampering and admitted the heroin into evidence. Specifically, appellant points to the fact that, in his report, Corporal Cornbrooks, the seizing officer, stated that he recovered 36 bags of suspected heroin directly from appellant's person, but that on the Chain of Custody Log that Deputy Travis prepared, item A-3 consists of 97 bags of suspected heroin. According to appellant, "either (a) 61 bags were added to the 36 bags attributed to [appellant] in Cornbrooks' memorandum or (b)

[4] In his brief, appellant requests that we exercise our discretion to review this issue for plain error. We decline to do so because "there is no instance of a Maryland appellate court's ever applying the 'plain error' exception so as to entertain a non-preserved challenge to the legal sufficiency of the State's evidence[.]" *Williams v. State*, 131 Md. App. 1, 7 (2000); *see also McIntyre v. State*, 168 Md. App. at 528 (stating that "So far as we have been able to determine, no Maryland case has utilized the plain error doctrine to reverse a trial judge's denial of a motion for judgment of acquittal when the ground raised on appeal was never advanced before the trial court at the time the motion for judgment of acquittal was being considered.").

there was a third bag obtained from Edwards with 97 bags of heroin that was not accounted for by Corporal Cornbrooks. In either case, there is a serious issue with the evidence." We disagree.

As appellant correctly notes, "[d]eterminations regarding the admissibility of evidence generally are left to the sound discretion of the trial court." *Easter v. State*, 223 Md. App. 65, 74 (citing *Hajireen v. State*, 203 Md. App. 537, 552, *cert. denied*, 429 Md. 306 (2012)). This Court has previously explained,

> Chain of custody evidence is necessary to demonstrate the "ultimate integrity of the physical evidence." In most cases, an adequate chain of custody is established through the testimony of key witnesses who were responsible for the safekeeping of the evidence, i.e., those who can "negate a possibility of 'tampering' . . . and thus preclude a likelihood that the thing's condition was changed." What is necessary to negate the likelihood of tampering or of change of condition will vary from case to case. *The existence of gaps or weaknesses in the chain of custody generally go to the weight of the evidence and do not require exclusion of the evidence as a matter of law*.

Id. at 75 (emphasis added) (internal citations omitted). Regarding the burden of proof,

> The proponent of a particular tangible item of evidence must establish its "chain of custody," *i.e.*, must "account for its handling from the time it was seized until it is offered into evidence." *Lester v. State*, 82 Md. App. 391, 394, 571 A.2d 897 (1990). "The circumstances surrounding [the] safekeeping [of the item of evidence during that time] need only be proven as a reasonable probability . . . and in most instances is established . . . by responsible parties who can negate a possibility of 'tampering' . . . and thus preclude a likelihood that the thing's condition was changed." *Wagner v. State*, 160 Md. App. 531, 552, 864 A.2d 1037 (2005) (citing *Best v. State*, 79 Md. App. 241, 250, 556 A.2d 701, *cert. denied*, 317 Md. 70, 562 A.2d 718 (1989)).

Jones v. State, 172 Md. App. 444, 462 (2007) (alterations in original).

In *Easter*, Easter challenged the admission of blood test results taken after a fatal car crash on the basis that the State had failed to establish the chain of custody. 223 Md. App. at 69. There, following the crash, an officer transported Easter to a hospital and observed a phlebotomist draw blood from him in order to measure his blood alcohol level. *Id*. at 69-70. Easter challenged the admissibility of the test results based on the chain of custody, arguing that whereas a corporal testified that he sent the blood samples through the mail to the Maryland State Police, the forensic scientist who tested the samples testified that he obtained the kit from the Receiving Unit of the Maryland State Police. *Id*. at 73. According to Easter, this signified that there was a "hole in the chain of custody" because the items were handled by "numerous unknown people, both throughout the postal service en route to the State Police, and by people within the State Police Receiving Unit before [being] retrieved by [the forensic scientist]." *Id*. at 73-74 (first alteration in original). Easter also argued that there was no evidence showing that the chain of custody form remained attached to his samples, and noted that there was a portion of the chain of custody form missing, and that there was no evidence that form was "full, complete, and accurate." *Id*. at 74.

In rejecting Easter's arguments, this Court stated,

> Here, the evidence showed that Corporal Fox responded to the hospital with a blood collection kit that was "new, unopened, and it was still within its expiration period." He then observed the phlebotomist, Mr. Russom, draw blood from appellant. Mr. Russom then sealed the vials, and Corporal Fox placed them in a secured container, which was then "sealed into a bag," and then placed in the cardboard box. The box was then mailed to the Maryland State Police Crime Lab, where Mr. Shu took possession of the box, with its seals still intact. The box was kept in a locked and secure

> area of the crime lab while Mr. Shu performed his analysis. Mr. Shu testified that he inspected the cardboard box, in which the blood was delivered, the interior container protecting the vials, as well as the vials themselves, before performing his tests, and he saw no evidence of any tampering. This chain of custody evidence was sufficient to allow a rational fact finder to determine that the blood Mr. Shu tested was the same blood that Mr. Russom collected from appellant and turned over to Corporal Fox.

Id. at 75-76.

In his motion to exclude the evidence during trial, appellant's counsel argued that, whereas Corporal Cornbrooks indicated that he seized 36 bags from appellant's person, Deputy Travis counted 97 bags. Appellant's counsel argued that these 61 unaccounted for bags indicated a defective chain of custody, and "[it was] not cured by having the testimony of the live witnesses."

In rejecting appellant's argument, the trial court noted that appellant's concerns went to the weight, rather than the admissibility of the evidence, stating, "And I hear you and I think it's an argument that you can make to the finder of fact." The trial court further stated that appellant's argument relied solely upon the discrepancy in the number of bags of heroin, and "the [c]ourt would want something more than that." The court concluded, "This is an issue, if you want to raise it, you're not precluded from raising it in argument or through any other witnesses or through your closing."

We conclude that the trial court did not abuse its discretion because there was sufficient evidence to show, by a reasonable probability, that the evidence had not been tampered with and was substantially the same as when it was collected. *Jones*, 172 Md. App. at 462-3. In his memorandum, Corporal Cornbrooks stated that the plastic bag he

seized from Edwards's person contained "approximately 900 bags" of suspected heroin stamped "Cartier." He further provided that he seized 36 bags of suspected heroin stamped "Cartier" from appellant's person. Thus, Corporal Cornbrooks counted "approximately" 936 bags of suspected heroin. Deputy Travis similarly counted a total of 912 bags of heroin.[5] This relatively minor numerical discrepancy relates to the weight of the evidence rather than its admissibility.

Additionally, we reject appellant's baseless assertion that Deputy Travis mixed evidence from other cases when he "photographed the drugs with other paraphernalia unrelated to the case." In his opening brief, appellant implies that Deputy Travis mixed the heroin from his case with other drugs seized in other cases because of the presence of "other unrelated paraphernalia unrelated to the case" on his desk. In his reply brief, appellant doubles down on this notion when he baldly states that "The risk that Faller's and Byrd's CDS might be mixed with the CDS attributed to [appellant] during packaging was high." Appellant cites to the following colloquy to show that Deputy Travis mixed drugs from another case into his own:

> [DEFENSE COUNSEL]: What is that?
>
> [DEPUTY TRAVIS]: That is a picture of the drugs seized from Mr. Amos.

[5] As explained above, Deputy Travis counted 897 bags of heroin initially (400 + 400 + 97). Ms. Baxivanos's corrected count, however, indicated a total of 912 bags of heroin (400 + 413 + 99).

[DEFENSE COUNSEL]:	There are some other items on the table. Can you identify those? Like right there, what is that?
[DEPUTY TRAVIS]:	That's a digital scale.
[DEFENSE COUNSEL]:	Where did that come from?
[DEPUTY TRAVIS]:	That's part of our office.
[DEFENSE COUNSEL]:	That looks like another scale. Is that part of your office?
[DEPUTY TRAVIS]:	That's correct.
[DEFENSE COUNSEL]:	Would it be fair to say that everything at the top is part of your office?
[DEPUTY TRAVIS]:	Yes. Except the rubber bands. The rubber bands were with the drugs.
[DEFENSE COUNSEL]:	Why would you take a picture of the drugs with scales and baggies?
[DEPUTY TRAVIS]:	I probably should have took a picture somewhere else but that's what I decided to do that day.

We cannot discern how this colloquy supports appellant's claim that Deputy Travis mixed drugs from another case with drugs from appellant's case. Instead, it simply shows that Deputy Travis's photograph of the evidence apparently showed some of the office supplies on his desk.

In conclusion, we see no meaningful discrepancy between Corporal Cornbrooks's approximate count of 936 bags and the actual count of 912 bags. Additionally, appellant has failed to provide any facts tending to show that Deputy Travis comingled appellant's

evidence with drug evidence from other cases. We conclude that there is a reasonable probability that the heroin had not been tampered with and was substantially the same as when it was collected. *Jones*, 172 Md. App. at 462-3. Accordingly, the trial court did not err in admitting the heroin into evidence.

III. PROCURING EDWARDS'S UNAVAILABILITY

Appellant's third argument on appeal is that the trial court erred in admitting into evidence Edwards's recorded statement based on the doctrine of forfeiture by wrongdoing. As stated above, Edwards provided both a recorded statement and a written statement to police while in custody following her arrest. The parties agree that both statements implicated appellant. Edwards agreed to testify against appellant with the understanding that the State would not pursue charges against her related to the drug seizure. On the first day of trial, however, Edwards failed to appear despite the fact that the State had subpoenaed her. Due to her absence, the State moved to admit Edwards's recorded statements under the doctrine of forfeiture by wrongdoing, alleging that appellant had wrongfully procured Edwards's absence. The court held a hearing pursuant to Md. Code (1973, 2013 Repl. Vol.), § 10-901 of the Courts and Judicial Proceedings Article ("CJP") and Maryland Rule 5-804(b)(5)(B), and listened to recorded telephone calls appellant made from jail wherein appellant told Edwards, among other things, "So I'm asking you that when it comes to the day -- it's probably not going that far, but I'm asking you that you just not show up, if you can." Ultimately, the trial court concluded that by telling Edwards

not to come to his trial, appellant forfeited his right to object to the admissibility of her statements.

On appeal, appellant argues that the trial court erred in admitting Edwards's statements because his conduct, which he describes as "persuasion," does not constitute "wrongdoing" as contemplated by CJP § 10-901. As we shall explain, appellant's "persuasion" here constitutes wrongdoing for purposes of the forfeiture by wrongdoing doctrine. Accordingly, the trial court did not err in admitting Edwards's statement.

Maryland Rule 5-804(b)(5)(B) provides: "In criminal causes in which a witness is unavailable because of a party's wrongdoing, admission of the witness's statement under this exception is governed by [CJP] § 10-901." Courts and Judicial Proceedings Article § 10-901 provides, in relevant part:

> During the trial of a criminal case in which the defendant is charged with a felonious violation of Title 5 of the Criminal Law Article or with the commission of a crime of violence as defined in § 14-101 of the Criminal Law Article, a statement as defined in Maryland Rule 5-801(a) is not excluded by the hearsay rule if the statement is offered against a party that has engaged in, directed, or conspired to commit wrongdoing that was intended to and did procure the unavailability of the declarant of the statement, as defined in Maryland Rule 5-804.

In *Smiley v. State*, 442 Md. 168 (2015), the Court of Appeals discussed the history of CJP § 10-901. There, on an early morning in December 2011, Smiley shot a man named Travis Green several times. *Id*. at 170-71. Elmer Duffy witnessed the shooting, and relayed his observations to the Wicomico County Bureau of Investigation. *Id*. at 171-72. Upon learning of Mr. Duffy's interview, and that Mr. Duffy would testify against him, Smiley made two telephone calls from the detention center. *Id*. at 172.

> In the two calls, one of which was to his mother and the other to an unidentified female, Smiley stated that he knew Mr. Duffy would testify against him, which he wanted to prevent; in the first conversation with his mother, Smiley asked that his nephew, Keith "Heathcliff" Parker, get Mr. Duffy "out of the picture[.]"

Id. (footnote omitted). Smiley told his mother, "Make sure [Heathcliff] take care of everything, [M]om, what I'm talking about. You know what I'm talking about[.]" *Id*. at 173 (first alteration in original). Similarly, he told the unidentified woman, "And tell [Heathcliff] that I said, man, make sure that [Mr. Duffy] don't—he don't come to court, man. . . . And make sure they don't—do you know what I mean?" *Id*. "Two months after Smiley's telephone calls, Mr. Duffy was murdered, for which Keith "Heathcliff" Parker was indicted." *Id*.

"After Mr. Duffy's murder, the State noted its intent to introduce at trial Mr. Duffy's recorded statement to investigators, under [CJP § 10-901] and Maryland Rule 5-804(b) (2012), as a result of Smiley's alleged procurement of Mr. Duffy's death." *Id*. at 174-75 (footnotes omitted). Following a hearing, the court found by clear and convincing evidence that Smiley had engaged in wrongdoing that procured Mr. Duffy's unavailability, and therefore admitted Mr. Duffy's recorded statement and its transcript at Smiley's trial. *Id*. at 177-78. Following his conviction, Smiley argued on appeal that the court erred in admitting Mr. Duffy's statement because the State failed to prove by clear and convincing evidence that Smiley procured Mr. Duffy's unavailability. *Id*. at 185-186.

In rejecting Smiley's argument, the Court of Appeals traced the history of the enactment of CJP § 10-901.

> In the wake of the proliferation of the "Stop Snitching!" video in and around Baltimore City in 2004, in which "drug dealers" threatened violence to witnesses and police informants who testified against drug operatives, companion administration bills to address the harm were introduced during the 2005 legislative session in the Maryland Senate and House of Delegates, identified as Senate Bill 188 and House Bill 248. As initially proposed, the bills, *inter alia*, provided for an exception to the hearsay rule that would have permitted the admission of a prior statement given by a victim or witness if, in a criminal case, the person against whom the statement was to be introduced intentionally caused, or solicited another to procure, the unavailability of the victim or witness. The proposal also included a notice provision.

Id. at 186 (footnotes omitted). In a footnote, the Court noted that

> The proposed hearsay exception was based upon Federal Rule of Evidence 804 (2005), which provided, in relevant part:
>
> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> ***
>
> (6) *Forfeiture by Wrongdoing*. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Id. n.13. "Supporters of the bills emphasized that their passage was necessary to discourage violent intimidation of witnesses," citing numerous instances in which witnesses were murdered either in retaliation for testifying or to prevent them from testifying. *Id*. at 187. In affirming the court's admission of Mr. Duffy's statement, the Court of Appeals noted that,

> on the morning after Mr. Duffy gave his statement, Smiley, "in the conversation with his mother . . . wanted to quote, 'get Mr. Duffy out of the picture,'" and even told his mother "quote, 'make sure they take care of everything, Mom.'" Judge Seaton then found that "Mr. Duffy was murdered" and "that [the inmate's] testimony about the defendant's

> statements and his reaction to the news of Mr. Duffy's murder [was] credible"; those statements being that Smiley had told the inmate that Parker was involved with the murder and that Smiley was happy to hear of Mr. Duffy's death. Judge Seaton, finally, found that "Keith Parker ha[d] been charged with that murder" by taking "judicial notice of the case file in [the Circuit Court for Wicomico County], Case Number K12–0587 in which the murder charges [were] pending against Mr. Parker."

Id. at 190. Based on this evidence, the Court of Appeals affirmed the trial court's determination that Smiley had "'engaged in, directed, or conspired to' Mr. Duffy's murder, based upon the clear and convincing standard." *Id*. at 191.

Although *Smiley* provides helpful background for understanding Maryland Rule 5-804(b)(5)(B) and CJP § 10-901, it does not answer whether the "persuasion" alleged here constitutes "wrongdoing." Unfortunately, the legislative history of CJP § 10-901 also fails to illuminate the scope of the term "wrongdoing." The Fiscal and Policy Note to Senate Bill 188 simply explains that "Intimidation by drug dealers has been a top concern in Baltimore City," and that the Bill is a "response to problems of witness intimidation[.]" S.B. 188 Fiscal and Policy Note Revised, 2005 Reg. Sess. (Md. 2005).

Although Maryland's appellate courts have not yet considered whether the persuasion at issue here constitutes wrongdoing, several jurisdictions have construed the doctrine of "forfeiture by wrongdoing" in circumstances similar to the present case.

In *State v. Hallum*, 606 N.W.2d 351, 353 (Iowa 2000), the Supreme Court of Iowa concluded that Hallum "forfeited his right to object to the admission of [a] statement in question because he procured the witness's unavailability at trial." There, Hallum's "convictions arose from the sexual assault and murder of Tanya Rubottom. [Hallum]

admitted in his testimony at trial that he and his half-brother, Carlos Medina, had been at the apartment where Rubottom was murdered on the night of her death[,]" but that "she was alive when he and Medina left." *Id.* "Medina, who was a minor and fifteen years younger than [Hallum], gave a contradictory rendition of these events in a videotaped interview conducted by law enforcement officials within a day after the murder." *Id.* In his statement, Medina indicated that he and Hallum had sexually assaulted and then strangled Rubottom. *Id.*

"Later, while juvenile proceedings against Medina were still pending, Medina refused to give a deposition in [Hallum's] case, invoking his Fifth Amendment privilege against self-incrimination." *Id.* After being granted immunity regarding Rubottom's death, Medina still refused to testify in Hallum's case, causing the district court to hold Medina in contempt and confine him in the county jail. *Id.*

Because Medina continued to refuse to testify, the State sought to introduce Medina's statement at Hallum's trial based on the theory that Hallum had procured Medina's unavailability by encouraging him through correspondence not to testify. *Id.* At an evidentiary hearing on the State's motion to admit Medina's statement, Medina testified that "he would continue his refusal to testify and that this refusal was totally his own decision. He denied that [Hallum] had pressured him or threatened him in any way. He also said that he would refuse to testify even if [Hallum] wanted him to testify." *Id.* at 353-54. The district court ultimately concluded that Hallum had wrongfully procured Medina's unavailability, and admitted Medina's statement at Hallum's trial. *Id.* at 354.

On appeal, the Supreme Court of Iowa first stressed the distinction between "waiver" and "forfeiture" for purposes of the State's argument that Hallum had *forfeited* his right to object to the introduction of Medina's statement. *Id*. at 354-55. The court concluded that "the focus of the courts holding that a defendant has lost his right to object to the admission of an out-of-court statement falls more clearly within the common definition of a forfeiture." *Id*. at 355. The court noted that the United States Supreme Court first recognized that a defendant could lose his right to object to evidence based on wrongful conduct in *Reynolds v. United States*, 98 U.S. 145, 158-59 (1878). *Id*. The *Hallum* court described *Reynolds* as follows:

> In that case, the defendant was charged with bigamy. *Reynolds,* 98 U.S. at 146, 25 L.Ed. at 245. When the prosecution sought to subpoena the defendant's second wife to testify at trial, she could not be located, and the defendant refused to reveal her whereabouts. *Id.* at 159, 25 L.Ed. at 248. The district court found that the defendant had procured the witness's absence, and as a result, the prosecutor could put into evidence her testimony at a previous trial, notwithstanding the defendant's objection that such a procedure violated his constitutional right to confront the witnesses against him. *Id.* at 158-60, 25 L.Ed. at 247-48.
>
> On appeal to the Supreme Court, the Court affirmed, holding that, although the Constitution grants a defendant "the privilege of being confronted with the witnesses against him[,] if he voluntarily keeps the witnesses away, he cannot insist on his privilege." *Id.* at 158, 25 L.Ed. at 247. The Court stated that this "rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong." *Id.* at 159, 25 L.Ed. at 248; *accord United States v. Houlihan*, 92 F.3d 1271, 1279 (1st Cir. 1996); *Balano*, 618 F.2d at 629.

Hallum, 606 N.W.2d at 355.

The court then shifted its focus to what type of conduct is "wrongful" for purposes of forfeiture. The court recognized that, although the rule required a defendant's wrongful

conduct, "Misconduct sufficient to give rise to a forfeiture is not limited to the use of threats, force, or intimidation." *Id*. at 356 (citing *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982)). Indeed, misconduct "has also been held to include *persuasion* and control by a defendant, the wrongful disclosure of information, and a defendant's direction to a witness to exercise the fifth amendment privilege." *Id*. at 356 (emphasis added) (quoting *Steele*, 684 F.2d at 1201, 1203). The *Hallum* court further noted the broad construction of the doctrine:

> The broad scope of conduct that may give rise to a forfeiture is consistent with the philosophy underlying the forfeiture rule:
>
> > The theory of the cases appears to be that the disclosure of relevant information at a public trial is a paramount interest, and any significant interference with that interest, other than by exercising a legal right to object at the trial itself, is a wrongful act.

Id. (quoting *Steele*, 684 F.2d at 1201). In defining the contours of "wrongful conduct," the court concluded,

> Thus, it is the fact that a defendant's conduct interferes with the interest in having witnesses testify at a public trial that makes the defendant's conduct wrongful. As a result, the nature of the defendant's conduct is not as important as the effect of that conduct on the witness's willingness to testify at trial.

Id. In other words, it is the *effect* of the defendant's conduct that renders it wrongful. If a defendant engages in some conduct that interferes with the witness's willingness to testify, then that conduct is "wrongful." *Id*.

The *Hallum* court then turned to the facts of the case to determine whether Hallum's conduct interfered with Medina's willingness to testify at Hallum's trial. After Medina

refused to testify and was jailed, Hallum wrote Medina a letter stating, "hang in there. I know this jail sucks but you only got two months left." *Id*. at 357 n.2. The letter also stated that, "Any judge with any respect for the law would not allow [the tape of Medina's statement] to be used[,]" that Medina should "calm down" and "not discuss anything of any importance over these f------ phones." *Id*. at 356-57. Eleven months later, Medina wrote a letter to Hallum, begging Hallum to accept the State's plea offer because "he (Medina) 'just [could not] handle it anymore.'" *Id*. at 357. Medina's letter also "implied that he was going to break down and testify if [Hallum chose] to go to trial." *Id*.

At the hearing on the State's motion to admit Medina's statement, Medina testified that, when he wrote the letter to Hallum, "his girlfriend and baby had left him. He said he would have done anything to get them back, including testifying in his brother's case. He admitted that he was apologizing to his brother in the letter for the possibility that he would testify." *Id*. The district court determined that Hallum had influenced Medina's silence, although Hallum had not expressly instructed Medina not to testify. *Id*. at 358. Relying on Medina's letter, the court noted that Medina "was on the verge of testifying in spite of [Hallum's] wishes[,]" and "[t]he fact that Medina [was] apologetic, and the fact that he wrote to [Hallum] on the subject is evidence of [Hallum's] influence." *Id*. Although Medina testified at the hearing that he would not have testified at Hallum's trial, even if Hallum had asked him to, the court did not find that testimony credible. *Id*.

The Iowa Supreme Court agreed with the district court, stating:

> It is naive to think that the defendant was not encouraging his brother to persist in his refusal to testify when the defendant told Medina to "hang in

> there" and, in the same paragraph, reassures him that the judge would not let the tape of Medina's statement into evidence, "[s]o calm down." We also agree with the trial court's assessment that Medina's later letter to his brother showed that Medina was influenced by the defendant and was concerned about how the defendant would feel about Medina if Medina broke down and testified. Although Medina denied that the defendant influenced Medina's decision not to testify, we agree with the trial court's conclusion that this testimony was not credible, particularly in view of Medina's letter to the defendant.

Id. The court concluded that Hallum procured Medina's unavailability "by encouraging and influencing Medina not to testify." *Id*. Accordingly, Hallum "forfeited his right to object to the admission of Medina's videotaped statement." *Id*.

Other courts have applied *Hallum*'s analysis in construing what constitutes "wrongdoing" for purposes of the forfeiture by wrongdoing doctrine. In *Commonwealth v. Edwards*, 830 N.E.2d 158 (Mass. 2005), the Supreme Judicial Court of Massachusetts was tasked with determining whether Edwards procured the unavailability of a witness. There, three defendants (including Edwards) were charged with the shooting of Yves Andre. *Id*. at 162. A witness, Jeremy Crockett, testified on three occasions before a grand jury, and incriminated the three defendants. *Id*. at 163. Apparently, the Commonwealth conceded that, without Crockett's testimony, it had insufficient evidence to prosecute the three defendants for the shooting. *Id*.

The trial was initially scheduled for June 10, 2003, with the Commonwealth believing that Crockett would testify. *Id*. Crockett apparently changed his mind, however, and told the prosecution that he did not want to testify and would accept serving a sentence for contempt of court. *Id*. The Commonwealth rescheduled the defendants' trial for

December 2003, but Crockett failed to appear. *Id.* The Commonwealth again rescheduled the trial and, despite being granted immunity, Crockett nevertheless refused to testify. *Id.* The court found Crockett in contempt and sentenced him "to 365 days in the house of correction." *Id.*

The defendants' trial was once again rescheduled, and the Commonwealth moved *in limine* to admit Crockett's grand jury testimony as evidence against the defendants, arguing that "the defendants wrongfully procured [Crockett's] unavailability (refusal to testify) through collusion with the witness[.]" *Id.* At a hearing, the Commonwealth presented "the contents of several recorded telephone conversations, initiated by Edwards while he was incarcerated and made just prior to two scheduled trial dates (those on June 10, 2003, and December 8, 2003), in which Edwards allegedly conspired with Crockett and others to procure Crockett's unavailability for trial." *Id.* at 164. "The Commonwealth offered to play the recordings for the judge, but he declined the offer." *Id.* In denying the Commonwealth's motion, the trial court stated that the Commonwealth needed to "show that the defendant[s] participated in [Crockett's] absence in a significant way." *Id.* (alterations in original). Because the trial court found that Crockett had decided, on his own, that he would not testify, it concluded that the Commonwealth failed to show "that any of the defendants participated in encouraging or threatening with regard to [Crockett's] refusal to testify." *Id.*

On appeal, the Supreme Judicial Court of Massachusetts first explained that it would adopt the doctrine of forfeiture by wrongdoing. *Id.* at 165, 168. In doing so, the court

recognized that some version of the doctrine had been adopted in at least fourteen states and the District of Columbia, and that it was "aware of no jurisdiction that, after considering the doctrine, ha[d] rejected it." *Id*. at 166-67. In a footnote, however, the court observed, "Most notably, States disagree as to what constitutes 'wrongdoing' or 'misconduct' sufficient to trigger the doctrine's application, and vary as to whether an evidentiary hearing is necessary prior to a finding of forfeiture." *Id*. at 167 n.15.

After expressly adopting the doctrine, the court then considered whether Edwards's conduct was "wrongful." *Id*. at 168. The Commonwealth argued that collusion with a witness in order to procure that witness's unavailability constituted wrongdoing. *Id*. It further asserted that, "a joint plan between a defendant and a witness to remove the witness from the jurisdiction in order to avoid testimony is sufficient to trigger forfeiture." *Id*.

The court began its analysis by recognizing that, "[w]ithout question, the doctrine should apply in cases where a defendant murders, threatens, or intimidates a witness in an effort to procure the witness's unavailability. . . . While no court has expressly applied the doctrine to 'collusion,' no court has rejected such a broad approach either." *Id*. at 168-69 (footnotes omitted). Recognizing the holdings in *Reynolds* and *Hallum*, *supra*, the court noted that "[o]ther courts, while not yet applying the forfeiture doctrine to cases involving . . . collusion . . . have articulated *very broad tests* for the doctrine's application that, by their terms, would appear to include such collusion." *Id*. at 169-70 (emphasis added).

Ultimately, the court adopted the following test to determine whether a defendant forfeited his right to object to the admission of an unavailable witness's statements:

> (1) the witness is unavailable; (2) the defendant was involved in, or responsible for, procuring the unavailability of the witness; and (3) the defendant acted with the intent to procure the witness's unavailability. A defendant's involvement in procuring a witness's unavailability need not consist of a criminal act, and may include a defendant's collusion with a witness to ensure that the witness will not be heard at trial.

Id. at 170. In construing its new test, the court noted, "the causal link necessary between a defendant's actions and a witness's unavailability *may be established where* [] *a defendant puts forward to a witness the idea to avoid testifying*, either by threats, coercion, *persuasion*, or pressure[.]" *Id*. at 171 (emphasis added).[6] Further describing the causation requirement, the court noted that "[t]he method by which the witness becomes unavailable must, at the very least, be a logical outgrowth or foreseeable result of the collusion. Thus, where the defendant has had a meaningful impact on the witness's unavailability, the defendant may have forfeited" his objections to the admission of evidence. *Id*.

The court next noted that a wrongdoing that procured a witness's unavailability could be "carried out through lawful means." *Id*. at 171-72. The *Edwards* court then echoed the *Hallum* court's holding, "[I]t is the fact that a defendant's conduct interferes with the interest in having witnesses testify at a public trial that makes a defendant's conduct wrongful[;] the nature of the defendant's conduct is not as important as the effect

[6] In a footnote, the court noted that it was not suggesting that "merely informing a witness of the right to remain silent" would be sufficient to constitute forfeiture because providing publicly available information does not constitute "pressure" or "persuasion." *Edwards*, 830 N.E.2d at 171 n.23.

of that conduct on the witness's willingness to testify." *Id.* at 172 (alterations in original) (quoting *Hallum*, 606 N.W.2d at 356).

After adopting the holding in *Hallum*, the court applied the forfeiture doctrine to Edwards. The court held that the Commonwealth had alleged sufficient conduct, *i.e.* collusion, which, as a matter of law, could support a finding of forfeiture by wrongdoing. *Id*. at 174. The Supreme Judicial Court remanded the case for an evidentiary hearing, and implicitly instructed the court to review the recorded telephone conversations before reaching its decision. *Id*. at 175.

Whereas the *Edwards* court adopted language in *Hallum* to reach its holding, it expressed some disagreement with *United States v. Scott*, 284 F.2d 758 (7th Cir. 2002). *Edwards*, 830 N.E.2d at 172. Because *Scott* construed the Federal Rules of Evidence, the *Edwards* court simply noted that it was not bound by the *Scott* court's interpretation. *Id.* In our view, however, the *Scott* court's analysis largely comports with both *Hallum* and *Edwards*, and provides useful guidance regarding inferences related to influence and interference.

In *Scott*, the Seventh Circuit considered whether Robert Scott had wrongfully procured the unavailability of a witness who was to testify against him. 284 F.3d at 761-62. There, Scott, who was convicted of conspiracy to possess cocaine and marijuana with intent to distribute, argued that a district court judge erred in admitting into evidence Shawn Jones's grand jury testimony after Jones had refused to testify at Scott's trial. *Id*. at 759-62.

At an evidentiary hearing, the government sought to show that Scott procured Jones's unavailability by presenting evidence of several interactions between Scott and Jones. *Id*. at 762. The government first introduced transcripts of phone conversations between Scott and Jones "while Jones was incarcerated and Scott was the target of a grand jury investigation." *Id*. The government also introduced prison records showing that Scott and his wife visited Jones in prison, and that Scott and his wife gave Jones $200 and gave Jones's son a toy laptop computer for Christmas. *Id*. Finally, the government introduced the testimony of a man named Mr. Chance who was on the same cellblock with Scott and even shared a cell with him for a brief period of time when Scott was detained following his indictment. *Id*. at 762-63.

The Seventh Circuit described the phone conversations between Scott and Jones as "fairly mundane" and that they "only touch on subjects that could be construed (and they must be construed broadly) as coercive, influential, or even persuasive." *Id*. at 763. The court noted that it was Jones who placed the calls to Scott, and that there was no indication that Scott or his wife gave Jones money or gifts for Jones's son "with the intent of procuring his unavailability. The record establishe[d] that the Joneses and Scotts were longstanding friends." *Id*.

Mr. Chance's testimony, however, did suggest wrongdoing. Mr. Chance testified that

> Scott and Jones communicated at Sangamon [County jail] both in June of 1999, shortly after Scott's indictment, and in the fall of 1999, in the months preceding Scott's first trial. . . . After Scott's arrival, Jones seemed "nervous" and "frightened." Jones identified Scott as the person the government

> wanted him to testify against and told Chance that "he had a lot to lose and he had to protect himself." Chance observed Jones and Scott communicate through their adjacent cell blocks, out of sight of security cameras, regularly while Scott was there.

Id. Scott apparently told Chance that "'if [Jones] knew what was good for him, he'd keep his mouth shut' and that Jones 'better not testify if he knew what was good for him.'" *Id*. Jones had Chance relay to Scott that he was not going to testify against him, but apparently Scott was not satisfied, and obtained permission to use the jail's library to make direct contact with Jones, who was also incarcerated at the time. *Id*. Apparently, after a twenty-minute conversation, Scott returned, "was 'happy' and 'seemed relieved that Jones wasn't going to testify.'" *Id*. at 763 & n.3. The district court concluded that Scott had influenced Jones's unavailability, and admitted into evidence Jones's grand jury testimony. *Id*. at 762.

On appeal, the Seventh Circuit began its analysis by construing Federal Rule of Evidence 804(b)(6), stating: "To admit a statement against a defendant under the rule . . . the government must show (1) that the defendant engaged or acquiesced in wrongdoing, (2) that the wrongdoing was intended to procure the declarant's unavailability, and (3) that the wrongdoing did procure the unavailability." *Id*. In evaluating Scott's conduct, the Seventh Circuit noted that the word "wrongdoing" was not defined within Federal Rule of Evidence 804(b)(6). *Id*. at 763. Nevertheless, the court stated, "One thing seems clear: causing a person not to testify at trial cannot be considered the 'wrongdoing' itself,

otherwise the word would be redundant." *Id*.[7] This language appears to suggest that the mere act of causing a witness not to testify cannot constitute the "wrong" (contradicting *Edwards* and *Hallum*), however, the court seemingly clarified its position by stating that "applying pressure on a potential witness not to testify, including by threats of harm and suggestions of future retribution, is wrongdoing." *Id*. at 764.

Although there was no direct evidence concerning what Scott and Jones discussed, the Seventh Circuit held that the district court did not err when it relied on three separate facts to infer that Scott wrongfully procured Jones's unavailability. *Id*.

> First, Scott told Chance what he intended to do in the library; he wanted to "make sure [Jones] was not going to testify again"—this after threatening that Jones should "keep his mouth shut" and "better not testify if he knew what was good for him." The district judge could reasonably infer that Scott did exactly what he told Chance he would do. Second, there is no dispute that Scott had a golden opportunity to coerce Jones. He had a 20–minute conversation with Jones in Sangamon's law library where, likely not out of respect for library policy, they spoke in "low" tones. Third, Scott's reaction to the meeting was positive. He seemed "happy" and "relieved" that Jones would not testify, after previously worrying about it. All of this took place against a backdrop in which Jones was "frightened" by Scott's presence and feared that he had "to protect himself."

Id. In affirming the district court, the Seventh Circuit construed Scott's actions to be coercive because they ultimately influenced Jones not to testify. *Id*. at 764-65. Because his actions were coercive, and because they influenced Jones not to testify, Scott's actions

[7] We note that this is the language which the *Edwards* court disapproved. Specifically, the *Edwards* court stated, "The forfeiture by wrongdoing doctrine, as we have articulated it above, contains no independent 'wrongdoing' requirement." 830 N.E.2d at 172. Despite what may be loose language by the *Scott* court, however, we construe *Scott* to be largely consistent with *Edwards* and *Hallum*.

constituted "wrongdoing" for purposes of the forfeiture by wrongdoing doctrine. *Id*. at 764.

Following the guidance from *Scott*, *Edwards*, and *Hallum*, we adopt *Hallum*'s conclusion concerning "wrongdoing":

> Thus, it is the fact that a defendant's conduct interferes with the interest in having witnesses testify at a public trial that makes the defendant's conduct wrongful. As a result, the nature of the defendant's conduct is not as important as the effect of that conduct on the witness's willingness to testify at trial.

Hallum, 606 N.W.2d at 356. This means that "there must be a causal connection between the defendant's actions and the witness's ultimate unavailability." *Edwards*, 830 N.E.2d at 171. Additionally, wrongdoing may be inferred from the particular circumstances of the case. *Scott*, 284 F.3d at 764-65. Against this backdrop, we turn to appellant's conduct to determine whether it constitutes "wrongdoing."

The jail calls between appellant and Edwards indicate that the two were apparently in a romantic relationship. Appellant often told Edwards that he loved her, and that when his criminal case was resolved, they would "be set for life." Appellant also made the following troubling statements:

- On September 16, 2018, appellant told Edwards, "If [the State] come at you and they ask you -- I don't want you really talking to them, I mean, but if you do have to talk to them and . . . they ask you, whatever, just say, 'Listen, I don't want to talk about it. I've already made my statement,' you know. All right?"

- Also on September 16, 2018, appellant instructed Edwards to first get her immunity in writing, and then told her "when you get on the stand, you tell the story that is in the favor of us."

- On October 22, 2018, appellant told Edwards, "So I'm asking you that when it comes to the day -- it's probably not going that far, but I'm asking you that you just not show up, if you can."

- On November 26, 2018, appellant told Edwards that her penalty for not coming to his trial pursuant to the subpoena was "only" thirty days in jail.

- Also on November 26, 2018, appellant and Edwards's conversation implied that Edwards should hide from the police.

- On November 27, 2018, appellant told Edwards, "if they do get a hold of you and fricken force you to come up here [for his trial], you just tell them you're not going."

- Finally, in phone conversations with a person identified as Ms. Culver, appellant asked her to tell Edwards not to come to his trial, and expressed concern and frustration when he believed that Edwards was planning to testify at his trial.

From these facts, we conclude that appellant wrongfully influenced Edwards not to testify against him. First, appellant expressly told Edwards to "not show up" at his trial. Additionally, appellant and Edwards discussed the ramifications of her not appearing pursuant to her subpoena, and how Edwards could hide from the police to avoid being forced to come to court. Appellant also implied that he would take care of Edwards if she did not testify and he were free, suggesting that they would be "set for life" after this ordeal. Finally, appellant indicated to Ms. Culver his desire that Edwards not testify, and expressed concern and frustration upon learning that Edwards might be planning to testify.

We conclude that the requisite causal link existed between appellant's conduct and Edwards's ultimate unavailability to testify. Accordingly, appellant's conduct constituted "wrongdoing" within the meaning of CJP § 10-901 and Rule 5-804(b)(5)(B). Appellant influenced Edwards not to testify at his trial, and his doing so constituted wrongdoing. If the letter in *Hallum* urging Medina to "hang in there" and "calm down" constituted

wrongful conduct, then appellant's unequivocal requests that Edwards not testify clearly constituted wrongdoing. 606 N.W.2d at 356-57. Accordingly, the trial court did not err in admitting Edwards's statement under the doctrine of forfeiture by wrongdoing.

IV. SEVERING THE FIREARM CHARGE

Appellant's final argument is that the circuit court erred by refusing to sever his felon in possession of a firearm charge from his drug possession charges pursuant to Maryland Rule 4-253. Prior to trial, appellant filed a motion to sever his charge for possession of a regulated firearm after having been convicted of a disqualifying crime, arguing that the evidence related to this count was not mutually admissible in the trial of the other counts. After the State filed an answer, the circuit court denied appellant's motion.

Maryland Rule 4-253 provides, in relevant part:

> (b) If a defendant has been charged in two or more charging documents, either party may move for a joint trial of the charges. . . .
>
> (c) If it appears that any party will be prejudiced by the joinder for trial of counts, charging documents, or defendants, the court may, on its own initiative or on motion of any party, order separate trials of counts, charging documents, or defendants, or grant any other relief as justice requires.

In *Carter v. State*, 374 Md. 693 (2003), the Court of Appeals considered the issue of severance of charges, and the application of Rule 4-253. There, Carter faced three charges: 1) possession of a regulated firearm by one previously convicted of robbery with a deadly weapon, 2) possession of a regulated firearm by a person under 21 years of age, and 3) discharge of a firearm within Baltimore City. *Id*. at 698. All three charges stemmed

from a single incident in which a police officer observed Carter firing a handgun "'straight up' into the air." *Id*.

Prior to trial, Carter requested to "be tried separately for each offense[,]" *id*. at 699, and the trial court denied Carter's request, *id*. at 701. Ultimately, the Court of Appeals concluded that the trial court correctly declined to grant Carter's request for severance, but that it erred in permitting evidence regarding the specific nature of Carter's previous conviction. *Id*. at 704.

The Court began its discussion by noting that "Rulings on matters of severance or joinder of charges are generally discretionary." *Id*. (citing *Frazier v. State*, 318 Md. 597, 607 (1990)).

> 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. at 705 (emphasis added) (internal citations omitted).

To resolve *Carter*, the Court of Appeals relied on its decision in *Frazier*, where the defendant "sought to sever his criminal in possession of a firearm charge from other criminal counts that had arisen from a single series of events." *Id*. at 708 (citing *Frazier*, 318 Md. at 603). The trial judge denied Frazier's request, and he was convicted of wearing, carrying, and transporting a handgun, and possession of a revolver after having been

convicted of a crime of violence. *Id*. at 708 (citing *Frazier*, 318 Md. at 603-04). In holding that the trial court correctly denied Frazier's motion to sever, the Court of Appeals explained that because "Frazier's counts were closely related and all arose 'out of one incident involving one person and one handgun,' [it] required Frazier to 'show that he was improperly prejudiced by the joinder' of the counts." *Id*. at 708 (quoting *Frazier*, 318 Md. at 611).

In rejecting Frazier's prejudice argument, the Court of Appeals stated:

> We cannot conceive of a factual situation which would be less conducive to untoward prejudice than the circumstances here. The convictions go to the elements of the offense. Frazier was caught red-handed in possession of the handgun. Exactly the same evidence as to each charge would support a finding that Frazier unlawfully possessed a handgun, the foundation of both offenses. The only additional testimony as to one charge would be the fact of the prior conviction.

Id. at 709 (quoting *Frazier*, 318 Md. at 611).

The Court of Appeals held that *Frazier* was controlling in Carter's case. *Id*. It explained that, like Frazier, Carter was charged with three crimes "all emanating from a single incident and all involving the possession and discharge of a regulated firearm." *Id*. Regarding the crimes themselves, the Court noted that they "could not be more closely related—the bases of the crimes were not merely similar, they were one and the same." *Id*. (quoting *Frazier*, 318 Md. at 611). The Court held,

> All of the evidence that Carter possessed a firearm [went] directly to the elements of the crimes with which he was charged. It makes little sense to hold a completely separate trial on the criminal-in-possession charge when the 'only additional [evidence] as to [that] charge would be the fact of the prior conviction."

Id. (second alteration in original) (quoting *Frazier*, 318 Md. at 611).

Carter and *Frazier* guide our resolution of this issue. Here, appellant was charged with several drug-related charges, possession of a firearm after having been convicted of a disqualifying crime, and, significantly, *possession of a firearm in relation to drug trafficking*. In his brief, appellant disregards this last charge when he baldly asserts that his "other convictions revolved around his possession of CDS and could not be *less* related to the felon in possession charge."[8] We disagree. Clearly, the charge for possession of a firearm after having been convicted of a disqualifying crime and the separate charge of possession of a firearm in relation to drug trafficking both "emanat[e] from a single incident"—appellant's possession of the firearm found in his residence. *Id*. Moreover, all of the drug-related evidence would be admissible in the possession of a firearm in relation to drug trafficking count. Because both charges flow from the fact that appellant possessed the firearm, the two charges "could not be more closely related—the bases of the crimes were not merely similar, they were one and the same." *Id*. (quoting *Frazier*, 318 Md. at 611).

We fail to see why appellant would be entitled to a separate trial on the felon in possession of a firearm charge. All of the evidence that appellant possessed a firearm is

[8] Our analysis is not impacted by the trial court's grant of appellant's motion for judgment of acquittal regarding the count for possession of a firearm in relation to drug trafficking. A court must decide prior to trial whether to join or sever charges; a court may only decide whether the State failed to present sufficient evidence for any given charge at trial.

directly related to both his charge for possession of a firearm after having been convicted of a disqualifying crime, and his charge for possession of a firearm in relation to drug trafficking. "It makes little sense to hold a completely separate trial on the criminal-in-possession charge when the 'only additional [evidence] as to [that] charge would be the fact of the prior conviction.'" *Id*. (quoting *Frazier*, 318 Md. at 611). Accordingly, the court did not abuse its discretion in denying appellant's motion to sever.[9]

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

[9] We reject appellant's unsupported assertion that the court was required to make explicit findings in denying his motion to sever. Md. Rule 4-253(c) contains no such requirement.