Circuit Court for Prince George's County
Case No. CT111485X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 9

September Term, 2017

---

JAJUAN DEMETRIUS TUNSTALL

v.

STATE OF MARYLAND

---

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

JJ.

---

Opinion by Leahy, J.

---

Filed: December 31, 2018

On August 21, 2011, Prince George's County police officers responded to the report of an armed robbery involving two suspects at a home in Landover. Following the incident, the robbery victim told Detective Craig Winegardner that she recognized the voice of one of the suspects as someone she knew as "Big Head." Later, she identified a photo of JaJuan Demetrius Tunstall ("Appellant") as the person she knew as "Big Head." Det. Craig Winegardner thereafter secured a search and seizure warrant for Tunstall's residence. Alongside other Prince George's County police officers, he searched the home and found Tunstall in a bedroom, where police also recovered various items of contraband and other evidence.

Tunstall was subsequently indicted in the Circuit Court for Prince George's County. He was charged with possession with intent to distribute cocaine, possession of marijuana with intent to distribute, illegal possession of a firearm after conviction of a disqualifying crime, illegal possession of a regulated firearm after conviction of a violent crime, and possession of a firearm with nexus to a drug trafficking crime.

Tunstall filed a Motion to Suppress with a request for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). Tunstall attached an unsworn handwritten note by Ms. Evans to his request for a *Franks* hearing. Ms. Evans stated in the note that the warrant affidavit misrepresented some of her assertions. After a hearing, the circuit court denied Tunstall's motion to suppress and request for a *Franks* hearing. A jury in the Circuit Court for Prince George's County convicted Tunstall of possession of cocaine with intent to distribute, as well as the uncharged lesser included possession of cocaine. The court sentenced Tunstall to fifteen years' incarceration, with all but five years suspended, and

five years of supervised probation upon release. In this appeal, Tunstall presents the following questions for our review:

> "1. Did the lower court err in denying Tunstall's request for a *Franks* hearing?
>
> 2. Did the lower court err in admitting into evidence over defense objection an envelope addressed to Tunstall and found in the downstairs bedroom?"

We hold that the circuit court did not err in denying Tunstall's request for a *Franks* hearing. We also hold that the partially redacted envelope constituted admissible circumstantial evidence linking Tunstall to the bedroom in question, and therefore, was properly admitted. Even if the trial court erroneously admitted the partially redacted envelope, we conclude that any error was harmless beyond a reasonable doubt. Accordingly, we affirm the judgments of the circuit court.

## BACKGROUND

### A. Motion to Suppress and Request for *Franks* Hearing

Prior to trial, Tunstall filed a request for a *Franks* hearing as part of his motion to suppress all evidence seized pursuant to the search warrant issued in the underlying case. At the suppression hearing, held on November 9, 2012, defense counsel argued that Det. Winegardner intentionally misstated some of the assertions made by the victim of the alleged robbery, Soncia Evans, in his sworn affidavit supporting the search warrant issued for 3111 Manson Place, Landover, Maryland. The following is an excerpt from Detective Winegardner's sworn application and affidavit for the search warrant at issue:

> 4. FACTUAL BASIS FOR WARRANT:

> On 8/21/11 at approximately 0318 hours officers responded to 8102 Manson Street, Landover, Prince George's County, Maryland 20785 for the report of a citizen armed robbery. Once on scene officers met with the victim (Evans, Soncia) who stated that she was sitting in her car in her driveway when she was approached by two masked suspects. The first unknown suspect produced a handgun, and demanded the victim's money. The victim stated that she did not have any money. The unknown suspect then got upset and stated to the second suspect, "Son, I'm about to shoot this bitch." The second suspect then stated, "Na, don't shoot her. Let's go." Both suspects then fled the scene on foot in an unknown direction.
>
> On 8/24/11 the victim (Evans), responded to the District III Detective Bureau to provide a written statement about the incident. During the interview the victim stated that during the robbery she recognized the voice of the second suspect that stated, "Na, don't shoot her. Let's go." The victim stated that she knows him as "Big Head." The victim also stated that "Big Head" lives in her neighborhood, and that she has known him her "entire life." The victim, Evans, was able to point out to detectives what car "Big Head" drives. A license plate check revealed the address of 3111 Manson Place, Landover, Prince George's County, Maryland 20785. An address check through Linx.com (Law Enforcement Information Exchange) revealed that Jajuan Demetris Tunstall resides at 3111 Manson Place, Prince George's County, Maryland 20785. A background search revealed that Jajuan Demetris Tunstall has previously been arrested on 7/16/2008 and 10/31/2008 and was charged with armed robbery both times. When he was booked for both the armed robbery charges he used the address of 3111 Manson Place, Landover, Prince George' County, Maryland 20785. On 9/2/11 this detective showed the victim a confirmation photograph of Jajuan Demetris [sic] Tunstall. The victim was able to positively identify the photograph as Jajuan Demetris [sic] Tunstall, the suspect who she knows as "Big Head" that stated, "Na, don't shoot her. Let's go," during the robbery. All events occurred in Prince George's County, Maryland.

(Emphasis omitted).[1]

[1] We note that on or around September 15, 2011, a second Application and Affidavit for Search and Seizure Warrant and accompanying Search and Seizure Warrant was issued, authorizing the seizure of a DNA swab from Tunstall. The DNA search warrant is not at issue in this appeal.

On or around September 13, 2011, a Search and Seizure Warrant inventory return was presented to the Honorable Philip Nichols, Jr, listing several items seized from the premises: a .40 caliber handgun and accompanying ammunition, suspected narcotics, assorted paraphernalia, documents, and photographs.

At the pre-trial motions hearing before the Honorable Michael Pearson, Tunstall challenged several statements in Detective Winegardner's affidavit as "untrue." In support of his *Franks* hearing request, Tunstall attached an undated and unsworn note, handwritten by Ms. Evans, which states as follows:

> I have reviewed the search warrant sworn out by Det. Winegardner in case CT 111485X. There are representations within the factual basis which are untrue.
>
> -- First, I never pointed out what type of car he drives.
>
> -- Secondly, I only told Det. Winegardner the second suspect sounded familiar. Officers showed up at my house one day with a picture of "Bighead" and I was surprised. Again, *I never said that he was the person who actually robbed me. Only that the voice sounded familiar*. After that Det. Winegardner responded by saying "with or without your help we're going to get him."

(Emphasis added). The trial court clarified that defense counsel's proffer was "that [the] victim of the robbery is going to say all of that is not true. I did not say I recognized the voice. I did not take them to the house. I did not point out the vehicle." The State responded that Tunstall failed to meet the threshold burden for a *Franks* hearing because he had not proven Det. Winegardner's reckless disregard for the truth in including the challenged assertions in the affidavit for the search warrant. Furthermore, the State

asserted that it had "other statements from Ms. Evans that contradict the statement" attached to Tunstall's request for a *Franks* hearing.

Defense counsel proffered the chronology of events as follows:

> The affidavit suggests, I think with some specificity, the chronology of events that happened.
>
> What gets misconstrued in reading either [ ] the warrant on its face or the statement that's attached to the Franks motion are little idiosyncrasies.
>
> The chronology of events – and this is I guess by way of proffer – is that she was robbed. That Detective Winegardner made contact with her and she made an indication that she recognized the voice of the second suspect. And she's here to testify today, if appropriate. She indicated that she did recognize that person's voice.
>
> Further investigation, I believe, that Detective Winegardner subsequently came back with a picture – *she said that she recognized the voice as sounding like someone named Big Head from the neighborhood. That was it. No direction, no anything else. Just recognized the voice sounding like somebody with the name of Big Head.*
>
> The detective comes back with a picture of Mr. Tunstall and says something to the effect, is this Big Head? There was a confirmation of the fact that she does know that person as Big Head.

(Emphasis added). Defense counsel continued, arguing that the crux of Tunstall's challenge was the "material misrepresentation[s] of what happened thereafter."

He argued that Ms. Evans never indicated to Det. Winegardner the type of vehicle Tunstall drove, and that she only stated "that the second person sounded like someone named Big Head." Ms. Evans did not say "that the person in the photograph is the person that robbed [her]" or "that Big Head was the person that robbed her." She only said "that she identified the picture of Jajuan Tunstall as someone she knew as Big Head." Counsel insisted that Det. Winegardner demonstrated a reckless disregard for the truth "because the

truth would be a search to determine whether or not Big Head is Jajuan Tunstall." He also highlighted the portion of Ms. Evans' statement in which she wrote that Det. Winegardner told her, "with or without your help, we're going to get him."

Judge Pearson then queried: "assum[ing] what [defense counsel is] saying are misrepresentations," the question becomes, "[w]ith what is left, do we still have probable cause?" Before answering this question, defense counsel conceded to the following two facts:

> THE COURT: Because you're saying that she identified the voice as someone belonging to Big Head, right?
>
> [DEFENSE COUNSEL]: Correct.
>
> THE COURT: That's agreed upon by everybody. As that the voice belonged to someone named Big Head?
>
> * * *
>
> THE COURT: But that she also identified the defendant as someone she knows by the name of Big Head?
>
> [DEFENSE COUNSEL]: Correct.
>
> THE COURT: And that she was shown the picture of the defendant?
>
> [DEFENSE COUNSEL]: Correct.
>
> THE COURT: And said yes, that is a person I know as Big Head?
>
> [DEFENSE COUNSEL]: Correct.

Defense counsel maintained, however, that there would still be insufficient probable cause remaining in the warrant affidavit. When the court asked why the statement regarding Tunstall's vehicle was "incredibly important" if Ms. Evans had already identified a photograph of Tunstall as "Big Head," defense counsel replied that the vehicle

identification corroborated the statement that Ms. Evans recognized the voice of the second suspect as belonging to someone named "Big Head" by "buttress[ing] the argument that she's familiar with the person[.]" Defense counsel also argued that had the first alleged statement been "phrased appropriately" to say that Ms. Evans only recognized the voice of the second suspect sounding like someone she knows as "Big Head," there would have been insufficient probable cause for the warrant.

Judge Pearson recessed briefly to review the warrant affidavit and written statement by Ms. Evans before finding that there had not "been a substantial showing [of] a reckless disregard for the truth." Judge Pearson further determined that, even assuming there was some reckless disregard for the truth, the affidavit still contained sufficient probable cause, which was "corroborated by what was agreed upon by defense counsel and the State." Namely, that Ms. Evans identified the voice of the second suspect as someone she knew as "Big Head" and positively identified a photograph of Tunstall as "Big Head."

**B. Jury Trial**

The case proceeded to a two-day jury trial that took place from February 19 through 20, 2013. At trial, the State called the following witnesses: Det. Winegardner; Officers Zachary Olare, Christopher Smith, Patrick Hampson, James Seger, and Gerald Caver; Rekha Acharya, the State's expert witness in identification analysis of controlled dangerous substances; and Det. Derryc Hale, the State's expert on narcotics, narcotics

investigations and narcotics enforcement.[2] The defense did not call any witnesses. The following facts were established at trial.

At approximately 6:00 a.m. on September 9, 2011, Prince George's County Police executed a search and seizure warrant at 3111 Manson Place in Landover, Maryland. The Prince George's County SWAT team responded to the location of the search warrant and made the initial entry through the front door of the home. The SWAT team knocked and announced its presence, then searched the residence for people to secure the premises for officer safety. While the SWAT team members searched the residence, the detectives and officers maintained the perimeter of the home to apprehend persons attempting to escape. When the SWAT team entered the home, they found Tunstall, his girlfriend, an infant, two juvenile females, and Tunstall's grandmother inside. The SWAT team told the officers that Tunstall was asleep with his girlfriend and his infant child in the only downstairs bedroom when they arrived.

Det. Winegardner testified that the residence was a split-foyer-style home with one bedroom downstairs. Inside that downstairs bedroom, Officer Olare searched the dresser and closet located in the back right corner, Officer Smith searched a two-drawer cabinet and dresser located in the middle of the room, and Officer Seger searched a nightstand next to the bed. Together, these officers discovered approximately 18 grams of crack cocaine, 75 grams of marijuana, a digital scale, a razor blade, glassine baggies, and $5,740 in U.S.

[2] By the time the case went to trial, some of the witnesses were promoted within the police department. We refer to these witnesses by their honorific at the time of the incident at issue and mean no disrespect thereby.

currency. Each officer testified that, following each discovery, they notified Det. Winegardner, who then subsequently took photographs of the items and recovered those with evidentiary value. The State's expert, Dr. Rekha Acharya, opined on direct examination that the totality of these circumstances suggested that the cocaine was possessed with intent to distribute, while the marijuana was "pretty much junk" and was likely possessed for personal use.

In addition to the narcotics, paraphernalia, and currency, police also recovered an operable, loaded Browning semiautomatic .40 caliber handgun, and a box of .40 caliber ammunition from inside a nightstand next to the bed. Officer Olare discovered two of Tunstall's driver's licenses in the bedroom, one of which was provisional. Only the provisional license listed 3111 Manson Place as Tunstall's address.[3] Various photographs of Tunstall were also found on the shelves against the bedroom's wall. Lastly, Officer Seger found an envelope addressed to Tunstall on top of a nightstand located next to the bed**.** Defense counsel objected to the admission of the copy of the envelope with the address redacted, arguing that the envelope was inadmissible hearsay being offered to prove Tunstall's residence. The trial court overruled the objection and admitted the envelope with the redaction.

[3] The provisional license was issued in 2009. The unrestricted license was issued in 2011 and listed an address located in Upper Marlboro, Maryland. On cross-examination, Detective Winegardner confirmed that the statement of charges and statement of probable cause in this case listed both the Landover and the Upper Marlboro addresses.

The jury found Tunstall guilty of possession of cocaine with intent to distribute and possession of cocaine. On April 19, 2013, the court sentenced Tunstall to fifteen years' incarceration, with all but five years suspended, and imposed five years' supervised probation upon release. Tunstall thereafter filed this belated appeal pursuant to a consent order.[4] We shall provide additional facts as necessary throughout our examination of each issue on appeal.

## DISCUSSION

### I.

### Request for a *Franks* Hearing

Before this Court, Tunstall argues that the trial court erred in denying his request for a *Franks* hearing because Det. Winegardner's sworn warrant affidavit issued to justify the search of 3111 Manson Place contained knowing and intentional or reckless misrepresentations. Tunstall contends that the contents of Ms. Evans' affixed statement

[4] On August 21, 2014, Tunstall filed a petition for post-conviction relief. Tunstall filed an amended petition for post-conviction relief on February 1, 2017, alleging ineffective assistance of counsel for failure to note a timely appeal to this Court. Arguing that he was entitled to a belated appeal, he requested, *inter alia*, the circuit court to grant him permission to file a belated notice of appeal. After holding a hearing on Tunstall's petition for post-conviction relief, the circuit court issued a consent order on February 1, 2017, permitting Tunstall to file a belated notice of appeal within 30 days of the order in exchange for withdrawing, without prejudice, Tunstall's petition for post-conviction relief. The court further ordered that Tunstall shall be allowed to file for post-conviction relief at the conclusion of the appellate process. *See Taylor v. State*, 236 Md. App. 397, 422-26 (2018) (treating a belated appeal granted under a consent order as a direct appeal because "[t]here exists, [ ] no rule [ ] *preventing courts from providing belated appeals as a remedy under the [Act]*. Belated appeals have been permitted when . . . a defendant is denied an appeal through no fault of his own.") (citing *Beard v. Wardon*, 211 Md. 658, 661 (1957) (internal quotations omitted) (first alteration added)).

"stand in direct conflict with the statements in the [warrant] affidavit[.]" Tunstall argues that this contradiction is apparent because "Ms. Evans specifically denied that she ever affirmatively identified the voice of the robber as belonging to 'Big Head' and she never told [Det. Winegardner] that 'Big Head' was the man who robbed her. Further, she specifically denied ever pointing out a car as the one belonging to 'Big Head.'" Tunstall further maintains that the search warrant would not have established probable cause in the absence of the disputed misstatements.

The State responds that Tunstall failed to make the preliminary showing required for a *Franks* hearing. Even if the affidavit contained "intentional or knowingly deceptive representations," the State argues that there still existed probable cause independent of any alleged misstatements in the warrant affidavit.

### A. The *Franks* Standard

The Fourth Amendment, made applicable against the States through the Fourteenth Amendment, protects the right of the people to be free from "unreasonable searches and seizures." *See Williamson v. State*, 398 Md. 489, 501-02 (2007) (citing *United States v. Sharpe*, 470 U.S. 675, 682 (1985)). The Warrant Clause of the Fourth Amendment requires that police obtain a warrant supported by probable cause as a means of ensuring that reasonableness. *Williamson*, 398 Md. at 501-02. In this case, Tunstall challenges the pre-trial ruling of the suppression court denying his request for a hearing under *Franks v. Delaware*, *supra*, on the charge that the warrant affidavit contained false statements that were necessary to a finding of probable cause. We confine our review of this issue to the

testimony and evidence presented at the suppression hearing. *Fitzgerald v. State*, 153 Md. App. 601, 614, (2003).

In making a probable cause determination, the "four corners rule" confines the issuing judge "to the averments contained in the search warrant application." *Ferguson v. State*, 157 Md. App. 580, 592 (2004) (citation omitted). Accordingly, the affidavit supporting a search warrant is presumptively valid. *Holland v. State*, 154 Md. App. 351, 386 (2003).

If a defendant challenges the issuance of a warrant, the reviewing court is also bound by the "four corners" doctrine. *Ferguson*, 157 Md. App. at 592-93 (citation omitted). Accordingly, "we do not undertake a *de novo* review, but, instead, pay great deference to the magistrate's determination." *Id.* The issuing judge's task is "to reach a practical and common-sense decision, given all of the circumstances set forth in the affidavit, as to whether there exists a fair probability that contraband or evidence of a crime will be found in a particular search." *Patterson v. State*, 401 Md. 76, 89-90 (2007) (quoting *Greenstreet v. State*, 392 Md. 652, 667-68 (2006), in turn, citing *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983)). Consequently, the issue before the reviewing court, as well as the appellate court, is "not whether probable cause existed that evidence would be found in the residence to be searched but whether the judge who issued the search warrant had a 'substantial basis' for so finding." *State v. Johnson*, 208 Md. App. 573, 581 (2012); *see also Moats v. State*, 230 Md. App. 374, 391 (2016) ("The evidence necessary to demonstrate a 'substantial basis' is less than that which is required to prove 'probable cause.'"), *aff'd*, 455 Md. 682 (2017).

In *Franks v. Delaware*, *supra*, however, the Supreme Court recognized that the Warrant Clause "would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause" and thereby "misle[a]d the magistrate" in order to obtain a warrant. *Franks*, 438 U.S. at 168. Accordingly, the Supreme Court in *Franks* created an exception to the "four corners" doctrine by establishing a process for a defendant to challenge the veracity of an affidavit supporting a warrant:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

*Id*. at 155-56.

To make a substantial "preliminary showing" of an intentional or reckless disregard for the truth in including a false statement, the defendant's challenge "must be more than conclusory and must be supported by more than a mere desire to cross examine." *Id*. at 171. A showing of mere negligent or innocent mistakes will not suffice.[5] *Id*. The Court in *Franks* explained:

[5] The Fourth Circuit has established that "[t]o satisfy the *Franks* intentional or reckless falsity requirement [ ], the defendant must show that [ ] the omission [or misstatement was] '*designed to mislead*' or [ ] '*in reckless disregard of whether [it] would* (continued)

> There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.

*Id*. Moreover, "a defendant must make a threshold showing that a governmental affiant has perjured himself on a *material* matter. And, unless that threshold showing is met, there will be no witnesses called." *Holland*, 154 Md. App. at 388-89 (emphasis added) (internal citations and quotation marks omitted); *see also McDonald v. State*, 347 Md. 452, 471 n.11 (1997) ("*Franks v. Delaware* set out a procedure requiring a detailed proffer from the defense before the defendant is even entitled to a hearing to go behind the four corners of the warrant"). No hearing will be required if, after excising the improperly included information, there remains sufficient probable cause in the warrant affidavit. *Franks*, 438 U.S. at 171-72. Conversely, if the remaining content in the warrant affidavit is insufficient to support a finding of probable cause, the defendant is entitled to a hearing. *Id*. at 172. As this Court recently noted, the *Franks* standard is a "*stringent* threshold which must be met before a defendant may go beyond the four corners of a warrant." *Young v. State*, 234 Md. App. 720, 739 (2017) (emphasis added), *cert. granted*, 457 Md. 662 (2018).

*mislead*.'" *U.S. v. State*, 524 F.3d 449, 454-55 (4th Cir. 2008) (internal citation omitted); *accord U.S. v. Wilford*, 961 F. Supp. 2d 740, 774 (D. Md. 2013) ("to fall within the scope of *Franks*, a misrepresentation [ ] must be made with the intent to mislead[.]") (citing *U.S. v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990)).

### B. Analysis

We turn to our analysis of whether the alleged misstatements in the warrant affidavit satisfy the *Franks* standard. Tunstall's challenge focuses on three statements (as opposed to omissions) in the affidavit:

> The victim stated that she knows him as "Big Head."
>
> The victim, Evans, was able to point out to detectives what car "Big Head" drives.
>
> * * *
>
> The victim was able to positively identify the photograph as Jajuan Demetris [sic] Tunstall, *the suspect who she knows as "Big Head" that stated, "Na, don't shoot her.* Let's go," during the robbery.

(Emphasis added).

#### The First and Third Statements

We will analyze the first and third statements together because, as a matter of substance, the disputed portion of the third statement and the first statement make the same representations: (1) that Ms. Evans knows the second suspect as "Big Head;" and (2) that Ms. Evans identified the photograph of Tunstall as the second robber who stated "Na, don't shoot her. Let's go." Ms. Evans' wrote in her signed statement accompanying Tunstall's *Frank* request: "I only told Det. Winegardner the second suspect sounded familiar. Officers showed up at my house one day with a picture of "Bighead" and I was surprised. Again, I never said that he was the person who actually robbed me." [6]

[6] At the suppression hearing, defense counsel argued that Ms. Evans' written statement indicating "Detective Winegardner [told her that] with or without [her] help, we're going to get him," was a "material misrepresentation." On appeal before this Court, however, Appellant offers no argument in its brief regarding the weight of this statement in the *Franks* analysis.

Looking at the alleged misstatements in the warrant affidavit and Ms. Evans' written affidavit, we find that Tunstall did not make a "substantial preliminary showing" that Det. Winegardner knowingly and intentionally, or recklessly, included a false statement in the warrant affidavit. Notably, Tunstall conceded—not only at the suppression hearing, but also in his brief submitted to this Court—the following two facts: (1) that Ms. Evans told Det. Winegardner that she recognized the voice of the second suspect as belonging to someone she knew as "Big Head;" and (2) that "in fact[,] the photo she was shown was "Big Head." Contrary to Tunstall's argument, we find that the conclusion that Tunstall was "Big Head," the second suspect in the robbery, is consistent with the undisputed portions of Ms. Evans' assertions. As such, the circuit court was entitled to believe that Det. Winegardner did not purposefully act to mislead the magistrate or act with a reckless disregard for the truth in including in his affidavit the statements that Ms. Evans knows the second suspect as "Big Head," and that Ms. Evans identified the photograph of Tunstall as the second suspect. The circuit court's conclusions regarding these two statements were not clearly erroneous.

**The Second Statement**

Tunstall's challenge to the second statement involves Det. Winegardner's assertion that "[t]he victim, Evans, was able to point out to detectives what car 'Big Head' drives." Ms. Evans wrote in her signed affidavit: "I never pointed out what type of car he drives." In the face of such direct contradiction, it is debatable whether Ms. Evans identified the vehicle "Big Head" drove. On the other hand, we cannot ignore the fact that Ms. Evans' statement—Tunstall's *only* offer of proof—was unsworn. In the absence of any other

corroborating affidavits or sworn statements, there is no way to assess the independent reliability of Ms. Evans' unsworn assertion, *see Franks*, 438 U.S. at 171 (requiring a defendant to furnish "[a]ffidavits or sworn *or otherwise reliable statements* of witnesses[.]" (emphasis added)), against the presumption of validity afforded to warrant affidavits. *See Dashiell v. State*, 143 Md. App. 134, 149 (2002) ("The facts included in the application for the search warrant are deemed credible, reliable, and trustworthy."). Given the "*stringent* threshold requirement which must be met before a defendant may go beyond the four corners of a warrant," *Young*, 234 Md. App. at 739 (emphasis added), we are not persuaded that Tunstall made a substantial preliminary showing where his only offer of proof was Ms. Evans' unsworn statement. *C.f. U.S. v. Arbolaez*, 450 F.3d 1283, 1294 (11th Cir. 2006) (holding that appellant failed to make a substantial preliminary showing because he relied entirely upon an unsworn statement denying that he made a statement attributed to him in the warrant affidavit); *U.S. v. Rosenthal*, 32 F.Supp.3d 774, 779 (S.D. Tex. 2013) (holding that appellant was not entitled to a *Franks* hearing where his "sole exhibit supporting the *Franks* hearing request is unsigned, unsworn to and pure speculation"); *see also U.S. v. Friel*, 448 F.Supp.2d 222, 225 (D. Me. 2006) (holding that appellant failed to make a substantial preliminary showing because his only offer of proof was his own unsworn assertions).

Even assuming Det. Winegardner included the alleged misstatement with deliberate or reckless falsity, as we discuss next, the materiality prong of *Franks* is dispositive of our holding in this case.

**Probable Cause in the Absence of Disputed Misstatements**

As this Court established in *Holland*, the alleged misstatements must be *material* for a defendant to be entitled to a *Franks* evidentiary hearing. *See id*. at 389. A misstatement is material if it is necessary to a finding of probable cause. *See Franks*, 438 U.S. at 156. It is not enough to merely identify intentional or reckless falsehoods in the warrant affidavit. *See id*. Therefore, for Tunstall to prevail under the materiality prong of *Franks*, he must show that, after setting aside the intentionally or recklessly included false material, there remains insufficient content in the warrant affidavit to establish probable cause. *See Franks*, 438 U.S. at 155-56.

Applying the materiality prong of *Franks* to the case at bar, we agree with the suppression court that, even assuming Det. Winegardner intentionally or recklessly included false statements, these statements were immaterial because their exclusion did not defeat probable cause for the search warrant in this case. *See Franks*, 438 U.S. at 156. Excising only the disputed portion of the alleged misstatements from the warrant affidavit leaves the following undisputed statements:

> On 8/24/11 the victim (Evans), responded to the District III Detective Bureau to provide a written statement about the incident. During the interview the victim stated that during the robbery she recognized the voice of the second suspect that stated, "Na, don't shoot her. Let's go." . . . as "Big Head." The victim also stated that "Big Head" lives in her neighborhood, and that she has known him her "entire life." . . . On 9/2/11 this detective showed the victim a confirmation photograph of Jajuan Demetris [sic] Tunstall. The victim was able to positively identify the photograph . . . who she knows as "Big Head[.]"

It is undisputed that Ms. Evans recognized the voice of the second suspect as belonging to an individual she knew as "Big Head," and, further, that she identified the

photograph of Tunstall as someone she knew as "Big Head." Accordingly, even absent an affirmative step positively linking Tunstall—"Big Head"—to the second robber, the remaining undisputed and material statements by Ms. Evans contained in the affidavit still supported a common-sense conclusion that Tunstall was involved in the robbery. Furthermore, defense counsel conceded at the suppression hearing that these two undisputed identifications took place *prior* to any alleged vehicle identification that would have led the police to Tunstall. Given that Ms. Evans identified the second suspect's voice and the photograph of Tunstall as the person she knew as "Big Head" for her entire life, Det. Winegardner had sufficient information to locate the 3111 Manson Place address absent any knowledge of the type of car "Big Head" drove. We therefore disagree with Tunstall's contention that the vehicle identification was material and necessary to a probable cause determination because the "police later connected [the car] with Appellant." We see no reason to disturb the circuit court's finding that Tunstall failed to succeed under the materiality prong of *Franks*. *See Henderson*, 416 Md. at 143-44.

In sum, we hold that the suppression court correctly determined that Tunstall failed to meet the required threshold showing to justify a *Franks* hearing. Further, even if Ms. Evans' statements demonstrated that the warrant affidavit contained intentional or reckless misrepresentations, we agree with the court's conclusion that, absent the disputed statements, probable cause existed independently to justify the issuance of the search warrant in this case. Accordingly, we affirm the suppression court's denial of Tunstall's request for a *Franks* hearing and motion to suppress.

## II.

## Hearsay Evidence

In its opening statement at trial, the State argued that the partially redacted envelope, alongside all of the other items found in the bedroom, established, "that's his room, that's where he puts his stuff." After the court briefly recessed, the State opined that Officer Seger would testify next that he located mail in the residence, which included an envelope bearing Tunstall's name, an "inma[te] number,"[7] and a Hagerstown return address. The State explained that he believed defense counsel's concern with the return address was that "anybody in the know, which would not include me, would know that this is a jail." In response, defense counsel highlighted its concern with the inmate number on the envelope and proffered that "the State [wa]s offering [the mail] to prove [Tunstall] lived at that address. But there's a case on point to suggest that that can't be used to prove he lives at that address. . . . The State can't introduce the name with the address for the purposes of proving that he lives at that address. Ultimately, it is hearsay."

The following exchange ensued:

> [PROSECUTOR]: I think that what the case says is I wouldn't be able to stand in front of the jury and say this is his address. Look, it's on this envelope, but we can say the mail and his name was found at the location, further tying him to the location.

[7] The trial transcript reflects that defense counsel identified the number on the envelope as an "in mail number." Given that the return address on this envelope indicates the sender is a jail, we will assume that defense counsel meant to say *inmate* number, instead.

> We could, I guess, redact the address to make sure that they don't get the other message that somebody said this is his address, but it would just be to show his mail at that location.
>
> THE COURT: Do you agree to his representation?
>
> [DEFENSE COUNSEL]: No. I don't think you can cure it by providing an envelope that has a redacted address and say disregard the address that's redacted, but we want to show you that this piece of mail was in that room at that address.
>
> I guess in this case the most important issue was his identifications were both found there. You've got all the pictures and everything else. The piece of mail which I believe the court has already ruled on does not have to be introduced in this because there are plenty of other ways to show she lived there.
>
> THE COURT: I'm going to reserve at this juncture with respect to the mail issue. I will allow you to recall the witness tomorrow. But I really need to reread the case.

The court then heard testimony from Officer Seger, who testified, in relevant part, as follows:

> Q. What did you do once you got inside that residence?
>
> A. Once inside that residence, I began a search in a bedroom downstairs that was part of my duties.
>
> Q. What, if anything, did you locate in the bedroom downstairs?
>
> A. The only thing I located was a document mail matter [sic] with the name of Jajuan Tunstall on it.
>
> Q. Where was that located?
>
> A. On the nightstand next to the bed, or TV stand.

The next day at trial, the court addressed some evidentiary issues. The State offered into evidence two driver's licenses bearing Tunstall's photograph and address, both of which were also found in the downstairs bedroom. In explaining its purpose for offering

these items of evidence, the State contended, "[w]e're just saying it was found in the bedroom" and "[i]t's collectively things that were just found in the bedroom." Tunstall did not object to the admission of this evidence. The State also sought to admit the envelope with a redaction of Tunstall's home address. The State confirmed that it "just want[ed] to enter an envelope with his name on it." Tunstall objected, and the following ensued:

> [DEFENSE COUNSEL]: I just don't think redaction cures the obvious. If it's redacted, the logical conclusion is that it contains an address under his name. Additionally, given the location, the proximity, the house that it's found in, one would reasonably surmise it would be 3111 Manson Place.
>
> THE COURT: Why is that part illegal or impermissible? What's impermissible is hearsay, an out-of-court assertion offered to prove the truth of the matter asserted. The truth of the matter asserted is that Jajuan Tunstall, whose name is on there, lives at that particular address. If we redact the address, then what is the hearsay?
>
> [DEFENSE COUNSEL]: Well, the document itself.
>
> THE COURT: What is the hearsay?
>
> [DEFENSE COUNSEL]: The document is mail. Mail is received at the house.
>
> THE COURT: What is the out-of-court assertion?
>
> [DEFENSE COUNSEL]: Jajuan Tunstall.
>
> THE COURT: Jajuan Tunstall is the out-of-court assertion?
>
> [DEFENSE COUNSEL]: Just as the address would be an assertion, the name on the letter --
>
> THE COURT: No. The assertion before would be that Jajuan Tunstall is connected to that address in writing written by somebody else outside of court. Now we just have the name Jajuan Tunstall.
>
> [DEFENSE COUNSEL]: It's not a name that's generically written on a piece of paper or something. It's a name that is written on a piece of mail

> that comes in an envelope form that has a return address that has gone through the mail system because it's stamped with the line over the stamp; so presumably received, as well. It is making an assertion that this piece of mail is intended for Jajuan Tunstall.
>
> THE COURT: You're saying it's an implied assertion, implied hearsay. Like somebody coming into the courthouse shaking the umbrella that's wet; the implied assertion is that it's raining outside?
>
> [DEFENSE COUNSEL]: That would be an implied assertion, given your analogy. But I think because mail is specific, and everyone familiar with mail, just as a matter of course, as being an adult in this society – although e-mail may be taking over -- knows that mail that is stamped as being proceed has been received. The assertion as contained on the document as it currently exists. I don't think that redaction cures it.
>
> THE COURT: Anything else?
>
> [DEFENSE COUNSEL]: No.
>
> THE COURT: With the redaction, I will admit it over the objection of counsel.[8]

The State later moved to enter into evidence a copy of the partially redacted envelope as one of the State's exhibits, which the court admitted over the same objection from Tunstall. The State did not rely on the partially redacted envelope during its closing argument.

Tunstall asserts that the trial court erred in admitting the envelope bearing his name because the evidence was inadmissible hearsay. He argues that the State offered the envelope to prove its implied assertion that he lived at the residence where the search warrant was executed, and therefore, he owned the drugs found in the downstairs bedroom. The State responds that it offered the envelope as non-hearsay circumstantial proof of Tunstall's connection to the downstairs bedroom in question. The State continues that,

[8] The State also agreed to redact the return address, which appeared to indicate the letter originated from the Roxbury Correctional Institution in Hagerstown, Maryland.

even assuming any error occurred, the admission of the envelope was harmless beyond a reasonable doubt.

A trial court has no discretion to admit hearsay "unless it is otherwise admissible under a constitutional provision, statute, or other evidentiary rule." *Wallace-Bey v. State*, 234 Md. App. 501, 536 (2017). Therefore, "[w]hether evidence is hearsay is an issue of law reviewed *de novo*." *Darling*, 232 Md. App. at 458 (citation omitted).

The Maryland Rules define hearsay as "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). Accordingly, "a 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Md. Rule 5-801 (a). "A 'declarant' is a person who makes a statement." Md. Rule 5-801(b). Generally, hearsay evidence is not admissible. Md. Rule 5-802. In determining whether evidence constitutes hearsay, courts generally begin by identifying the proposition that the evidence was offered to prove. *See Bernadyn v. State*, 390 Md. 1, 9 (2005). Implied assertions can also constitute hearsay when "a declarant's out-of-court words imply a belief in the truth of X, [and] such words are [ ] *offered to prove that X is true*." *Stoddard v. State*, 389 Md. 681, 692 (2005) (emphasis added).

Tunstall relies on *Bernadyn*, in which the Court of Appeals considered whether a medical bill bearing Bernadyn's name and address constituted inadmissible hearsay. 390 Md. at 3. In *Berndayn*, defense counsel objected to the admission of the medical bill as prejudicial because Bernadyn did not live at the address listed on the bill. *Id*. at 4. The trial court, without asking the State its purpose for offering the medical bill, overruled the

defense counsel's objection. In its closing argument, the State specifically argued that the medical bill proved that Bernadyn lived at the location where the drugs in that case were found. *Id*. at 4-8. Before the Court of Appeals, the State argued that "addressing a letter is nonassertive conduct[.]" *Id*. at 8. The State also argued that the bill was non-hearsay because it was offered as circumstantial evidence of the hospital's belief that Bernadyn lived at the address, and, further, that belief was accurate because the hospital had an interest in getting paid for the medical bill. *Id*. The State also advanced the Court of Special Appeal's "alternative rationale" that the bill was circumstantial evidence connecting Bernadyn to the residence in question. *Id*. at 14-15.

The core of the analysis in *Berndayn* rested on "the principle that the admissibility of documents depends on the *purposes* for which they are offered." *Id*. at 16. (emphasis added). The Court explained, that "[t]he non-hearsay theory of admissibility upon which the state relie[d] permits the use of an utterance as circumstantial evidence of a proposition *different from the one asserted.*" *Id*. at 13-14. Applying this principle to the facts before it, the Court of Appeals summarized as follows:

> [t]he bill contained two significant items: Bernadyn's name, and his address. *The State did not argue simply that an item bearing Bernadyn's name was found in the house and that Bernadyn probably resided at the house. Rather, the State argued that the bill itself was "a piece of evidence that shows who lives there."* In particular, the State suggested that Bayview Physicians had Bernadyn's correct address because "any institution is going to make sure they have the right address when they want to get paid."

*Id*. at 11 (emphasis added). Based on the State's use of the medical bill at trial, the Court of Appeals determined that the State offered the medical bill to prove that Bernadyn lived at the mailing address on the bill. *Id*. at 23. The Court also determined that the medical

bill constituted a "written assertion" that Bernadyn lived at the address on the bill because "[a]s used, the probative value of the words depended on Bayview Physicians having communicated the proposition that Michael Bernadyn lived at 2024 Morgan Street." *Id*. at 11. Further, because the prosecution's actions at trial demonstrated that it was "used to prove the truth of that assertion," the Court of Appeals held that the use of the bill was inadmissible hearsay. *Id*.

Since *Bernadyn*, this Court has decided several cases involving the analytical distinction offered in *Bernadyn* between offering an assertion to prove the truth of the matter asserted and offering it as "circumstantial evidence of a proposition *different from the one asserted*." *Id*. at 13-14. For instance, in *Fields v. State*, 168 Md. App. 22, 37 (2006), *aff'd*, 395 Md. 758 (2006), this Court examined whether the appellant's name appearing on a television screen in a bowling alley was an implied assertion that constituted hearsay. Fields was convicted of first-degree murder and two counts of first-degree assault stemming from the shooting of three young men at a bowling alley. *Id.* at 27. At the scene of the crime, Detective Canales observed television monitors above each bowling lane bearing names, one of which included Fields' nickname, "Sat Dogg." *Id.* at 29. Det. Canales subsequently recorded all of the names, including Fields' nickname, on a handwritten list. *Id*.

Both before and during trial, Fields moved unsuccessfully to preclude the State from calling the detective to testify about the nickname on the monitor and from introducing the handwritten list into evidence. *Id*. at 29-30. Fields argued "that the name 'Sat Dogg' on the screen was an implied assertion, by an unknown declarant, made out of court, that the

appellant was present in the bowling alley that night; and the State was offering the implied assertion in evidence to show its truth." *Id*. at 29.

This Court held that the nickname on the screen, as relayed to the jury by Det. Canales' testimony, constituted circumstantial crime scene evidence. Looking to the hearsay distinction drawn in *Bernadyn*, we reiterated that the focus of this distinction relies on "how and for what purpose the proponent of the evidence [ ] was using it." *Id*. at 36. With this framework in mind, this Court determined that the prosecutor offered the nickname on the screen as circumstantial evidence because "[he] argued that [Fields'] nickname, 'Sat Dogg,' [ ] was one of several items of evidence at the crime scene that linked [Fields] to the scene[.]" *Id*. at 37. Furthermore, the evidence was not used as an implied assertion because "[u]nlike the probative value of the medical bill in *Berndayn*, the probative value of the evidence that [Fields'] name was on the television screen did not depend upon the belief of the person who typed the name on the screen, or upon the accuracy of that person's belief." *Id*. As such, this Court concluded that the name on the screen fell into the "category of non-assertive circumstantial crime scene evidence" that showed Fields was present at the bowling alley on the night of the crimes in question. *Id*.

Five years later, this Court revisited the *Bernadyn* distinction in *Fair v. State*, 198 Md. App. 1 (2011). In *Fair*, Detective Mahan of the Baltimore City Police Department arrested Fair for possession of marijuana. *Id.* at 3. While conducting a search of a nearby vehicle that contained marijuana in plain view, Det. Mahan found in the center console a firearm and a combined paycheck and stub in Fair's name. *Id*. On appeal, we considered,

*inter alia*, the admissibility of the paycheck. After an extensive review of the law in this area, we upheld the trial court's decision to admit the paycheck, stating:

> Recognizing some murkiness in the precedential landscape, but, treating the writing on the check as a verbal part of the act of issuing the check, we are persuaded that the check was merely circumstantial non-assertive crime scene evidence. Though the recent date of the paycheck was emphasized, the date on which [Fair] was paid was not a contested issue in the case. The contents of the check, including the date, were not relevant to the crime with which [Fair] was charged. *Its relevance was that its presence supported an inference that [Fair], who happened to be the payee of the check, had recently accessed the console and was therefore aware of its contents.*
>
> * * *
>
> In considering whether the declarant of the contents of the paycheck impliedly asserted any relevant fact not explicit on its face, we conclude that the only assertions implied by the paycheck are that the City owed, or believed it owed, a named employee wages for a period worked, and that the Payroll Division had, or believed it had, the funds in its account to cover the check for those wages. The paycheck was not offered to prove the truth of any of these implied assertions, and, in our view, was properly admitted.

*Id*. at 37-38. (emphasis added).

Returning to the case at bar, we find that the envelope found in the downstairs bedroom, that included Tunstall's name with the address redacted, was admissible non-hearsay evidence. Unlike the circumstances in *Bernadyn*, the main case on which Tunstall relies, the State in the underlying case did not use the envelope to prove that the sender of the mail believed that Tunstall lived at the residence where the envelope was found. The prosecutor here did not offer evidence about the sender's belief because the sender was never identified. *See Fields*, 168 Md. App. at 37. Instead, the prosecutor in this case argued at trial that it was offering the envelope to show that it was one of several items of evidence found in Tunstall's bedroom that linked Tunstall to the bedroom. *See Bernadyn*, 390 Md.

at 4-11. Considering all of this, we hold that the redacted envelope constituted admissible circumstantial evidence linking Tunstall to the bedroom in question, and therefore, was properly admitted.

We also hold that even if the trial court erred with respect to the hearsay issue, any error was harmless beyond a reasonable doubt. *See Dionas v. State*, 436 Md. 97, 108 (2013) ("[A]n error will be considered harmless if the appellate court is 'satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict'") (citations omitted). As the Court of Appeals has explained, "the general rule [is] that where testimony objected to comes in later without objection from another witness, there can be no successful claim on appeal that the original error, if any, was prejudicial." *Peisner v. State*, 236 Md. 137, 144 (1964); *Yates v. State*, 202 Md. App. 700, 708-09 (2011) ("This Court and the Court of Appeals have found the erroneous admission of evidence to be harmless if evidence to the same effect was introduced, without objection, at another time during the trial.").

In this case, Tunstall failed to object when the same information included on the envelope—Tunstall's name—later came in through Off. Seger's testimony. Tunstall's name was also on the two driver's licenses police found in the bedroom, both of which were entered into evidence without objection, and one of which listed 3111 Manson Place as his address. Lastly, Det. Winegardner testified on cross-examination, without objection, that "[e]verything we found in bedroom 1 of the basement had Jajuan Tunstall's name on it." Furthermore, as Tunstall himself pointed out at trial, there was ample evidence

connecting Tunstall to the bedroom in question absent the admission of the redacted envelope. Tunstall was asleep in the bedroom when police arrived to execute the search warrant. Finally, the officers observed several photographs of Tunstall prominently displayed throughout the bedroom, and male clothing in the closet. We conclude beyond a reasonable doubt that the admission of the redacted envelope did not influence the verdict.

**JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.**