UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0184

September Term, 2013

CORNELL A. BENNETT

v.

STATE OF MARYLAND

Woodward,
Nazarian,
Reed,

JJ.

Opinion by Reed, J.

Filed: May 1, 2015

Appellant was tried and convicted of carjacking, kidnapping, robbery, and conspiracy to commit kidnapping in the Circuit Court for Prince George's County. The circuit court imposed a sentence of thirty years' imprisonment, with all suspended but ten years, for carjacking; a consecutive term of thirty years, with all suspended but twelve years, for kidnapping; a concurrent term of thirty years, with all suspended but twelve years, for conspiracy to commit kidnapping; and a concurrent term of fifteen years, with all suspended but five years, for robbery. The circuit court also placed appellant on supervised probation for five years. Appellant now appeals his convictions and presents the following questions for our review, which we have slightly rephrased[1]:

I. Did the circuit court err where it failed to suppress an extrajudicial pre-trial identification of appellant from a photographic array?

II. Did the circuit court err where it admitted irrelevant hearsay?

We answer both questions in the negative and, accordingly, we shall affirm the circuit court and explain further below.

FACTUAL AND PROCEDURAL BACKGROUND

On August 23, 2010, Devin Williams found himself waiting in the K. Della Underwood Park near Carlton Manor in Fort Washington, Maryland, for "C-Murder," a prospective client for his recording studio. When C-Murder arrived, Mr. Williams recognized him as Cornell Bennett, the appellant in this case. Mr. Williams explained at

[1] Appellant originally presented his questions as follows:

I. Did the lower court err in failing to suppress a pre-trial extrajudicial identification of appellant

trial that he and appellant were, in fact, acquainted with each other as Mr. Williams' brother and appellant were friends:

> [STATE'S ATTORNEY]: Now, a few minutes ago, you mentioned you were waiting to meet someone. Did you know who you were going to meet with before you met with him?
> . . . .
> [MR. WILLIAMS]: At that time, all I knew was his name was C-Murder.
> [STATE'S ATTORNEY]: C-Murder?
> [MR WILLIAMS]: Mm-hmm.
> [STATE'S ATTORNEY]: Okay. And you mentioned somebody came and got into your car?
> . . . .
> [MR. WILLIAMS]: Yes.
> . . . .
> [STATE'S ATTORNEY]: Who was it that got into your car?
> [MR. WILLIAMS]: [Appellant]
> [STATE'S ATTORNEY]: And the person you know as [appellant], do you see him in the courtroom today?
> [MR. WILLIAMS]: Yes.
> [STATE'S ATTORNEY]: If the record can reflect the witness has identified the defendant.
> THE COURT: The record so reflects the witness identified the defendant.
> . . . .
> [STATE'S ATTORNEY]: Now, you mentioned a few minutes ago that the person that got in the car you knew as [appellant]?
> [MR. WILLIAMS]: Mm-hmm.
> [STATE'S ATTORNEY]: How did you know his name?
> [MR. WILLIAMS]: Because I met him before.
> [STATE'S ATTORNEY]: Were you friends with him?
> [MR. WILLIAMS]: Not necessarily friends. Associates. He was friends with my brother.

II. Did the trial court err in admitting irrelevant hearsay?

Appellant and Mr. Williams sat in the latter's car to talk. Appellant briefly got out of Mr. Williams' car, went to his truck, returned to the car and moments later,[2] two individuals with their faces covered approached the vehicle. One of these individuals pointed a shotgun at Mr. Williams' head, the other put a knife to his throat, and appellant reached for Mr. Williams' keys. Mr. Williams attempted to escape but, instead, in the ensuing struggle, received a shotgun butt to the head that caused a gash. At this point, the assailants put Mr. Williams in the trunk of the car and drove away.

Mr. Williams' brother apparently owed a debt to appellant. Appellant asked Mr. Williams for his brother's phone number and told him that if his brother "paid up," he would not have to worry. Despite the reassurance, Mr. Williams' ordeal was only beginning. The assailants drove around for a couple of hours and then stopped at a gas station to refuel. In an effort to be conscientious about Mr. Williams' car, the assailants asked him what type of gasoline the car took. Further, as anyone who has spent a summer in the Washington-Metropolitan area knows, the heat and humidity in August is oppressive. Mindful of this fact as well as of Mr. Williams' placement in the trunk of his car, the assailants also asked him if he wanted any water. Naturally, Mr. Williams responded affirmatively and the assailants threw a bottle of water into the trunk.

Like most reasonable individuals, however, Mr. Williams wished to breathe the sticky, humid air of freedom. He attempted to break free of the trunk using a screwdriver and was almost successful but for a bump on the highway that closed the trunk. Mr.

[2] The amount of time that elapsed between the start of the conversation and initiation of the criminal activity is in dispute. Appellant claims it was seconds later,

Williams' assailants, perhaps becoming aware of Mr. Williams' escapist acts, stopped the car again, and bound Mr. Williams' hands and legs with duct tape in addition to covering his eyes and mouth with the tape.

Unfortunately, Mr. Williams had one final indignity to suffer. He was driven to the middle of the woods and placed into a playpen he kept in the trunk of the car. Before the assailants left, they made sure to seal the top of the playpen with duct tape. At this point, though unclear whether it was from heat exhaustion, extreme stress, or a combination of the two, Mr. Williams lost consciousness after the assailants departed.

Eventually, Mr. Williams regained consciousness and commenced his efforts to liberate himself. He first punctured the duct-tape ceiling his assailants had constructed. He was then able to remove the duct tape from his mouth—a critical step in securing his freedom from his adhesive shackles. From there, he was able to chew through the tape restraining his arms, and then removed the tape from his legs and eyes. He ran toward the street and flagged down Officer Armstrong Adams from the District of Columbia's Metropolitan Police Department ("MPD").

Prior to Mr. Williams' abduction, Jon Edgar Neal, a postal carrier assigned to the Carlton Manor area, witnessed the struggle between Mr. Williams and his assailants. Mr. Neal saw the assailants put Mr. Williams in the trunk, but was unable to see the faces of the assailants or whether they possessed a shotgun and a knife. Though he could not prevent the abduction, Mr. Neal did contact police and Detective Chalvin Truesdale of

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while the State states it was about a minute later.

the Maryland National Capitol Park Police arrived at the park. Unfortunately, Detective Truesdale arrived after the assailants had absconded with Mr. Williams.

Detective Truesdale was notified in the evening of August 23 that local law enforcement had located Mr. Williams. Detective Truesdale met with MPD officers who were safeguarding Mr. Williams after his escape, and he then took Mr. Williams back to the National Park Police headquarters in Maryland. There, Detective Truesdale took a written statement from Mr. Williams and interviewed him. Mr. Williams described appellant as a short, light-skinned male, with his hair braided in cornrows, and a teardrop tattoo under his left eye. The wheels were now set in motion for appellant's arrest.

Eight days after the kidnapping, on August 31, 2010, police located Mr. Williams' car in the District of Columbia. Police recovered a baseball hat and sweatshirt from the vehicle and collected DNA samples from those items. The DNA analysis indicated the traces of genetic material found on the hat were consistent with appellant's DNA profile.

Two days later, on September 2, 2010, Detective Truesdale conducted a photographic array identification procedure with Mr. Williams at his home. Detective Truesdale read Mr. Williams the instructions from the array[3] and then showed him the photographs. Mr. Williams identified appellant as his abductor after examining the photographs for a few minutes.

[3] "You will be asked to look at a group of photographs. The fact that the photographs are shown to you should not influence your judgment. You should not conclude or guess that the photographs contain the picture of the person who committed the crime. You are not obligated to identify anyone. It is just as important to free innocent persons from suspicion as to identify guilty parties. Please do not discuss the case with other witnesses nor indicate in any way that you have identified someone."

Appellant was indicted by the grand jury on December 15, 2011, for armed carjacking, kidnapping, robbery with a deadly weapon, and associated offenses. He filed an omnibus motion prior to his trial, which, *inter alia*, sought suppression of the array. The circuit court held a motions hearing on March 30, 2012. During the hearing, Mr. Williams was asked about why he selected appellant from the array. He stated he recalled appellant's face from the incident and his recollection was supported by his prior acquaintance with appellant. The court found the array was not unduly suggestive and denied appellant's motion.

A trial by jury was held on January 28–30, 2013, where appellant was convicted of carjacking, kidnapping, robbery, and conspiracy to commit armed carjacking. He was sentenced on March 22, 2013, to a term of imprisonment for thirty years, with all suspended but ten years, for carjacking; a consecutive term of thirty years, with all suspended but twelve years, for kidnapping; a concurrent term of thirty years, with all suspended but twelve years, for conspiracy to commit kidnapping; and a concurrent term of fifteen years, with all suspended but five years, for robbery. The circuit court also placed appellant on supervised probation for five years.

Appellant timely noted his appeal on March 28, 2013.

DISCUSSION

I. SUGGESTIVENESS OF PHOTO ARRAY

A. Parties' Contentions

Appellant argues the circuit court erred where it found there was no evidence that the photo array was impermissibly suggestive. When Mr. Williams testified at the suppression hearing, he explained he provided a description of appellant at the time he

gave his statement to the police. In that description, he noted appellant had a teardrop tattoo under his left eye. The photo array shown to Mr. Williams several days after the incident depicted six men of similar hairstyles and facial hair patterns, skin tone, and facial structure. At the suppression hearing, Mr. Williams testified that the other five individuals did not have tattoos under their eyes. Appellant claims he was the only individual depicted with a teardrop tattoo. Because Mr. Williams' attention could only be drawn to appellant as the sole possessor of a teardrop tattoo under his left eye, appellant claims the photo array constituted an impermissibly suggestive pre-trial identification warranting suppression.

Appellant also argues that, in the event we find the photo array was impermissibly suggestive, the identification was inherently unreliable. To demonstrate the unreliability of Mr. Williams' identification, appellant implies that the period of time between the incident and the pre-trial identification (one week) was too long; argues that Mr. Williams only saw appellant for less than five minutes at the time of the incident; and that Mr. Williams could not quantify for how long he had been familiar with appellant. Appellant concludes that these facts, along with the two to five minutes it took Mr. Williams to make the identification, suggest the identification is unreliable.

The State disagrees. First, the State argues appellant is unable to challenge the suppression ruling because it was not preserved at the circuit court level. Second, the State counters appellant's arguments regarding the array's suggestiveness. It argues the other men in the array had similar complexions, as well as similar hairstyles and facial hair patterns. Further, the State argues that appellant was not the only individual depicted

with a "blemish" under his eye (seemingly, the State's euphemism for a teardrop tattoo). Without anything inherently suggestive about the array, or any improprieties on the part of the detective administering the test, the array was not impermissibly suggestive.

Further, the State argues the identification was reliable, notwithstanding any potential finding of suggestiveness. Relying on the factors enunciated in *Neil v. Biggers*, 409 U.S. 188 (1972), the State argues, given the totality of the circumstances, Mr. Williams' identification was independently reliable. Mr. Williams had ample opportunity to view the appellant and with a high level of attention because the two men were discussing a business transaction. Further, the identification was accurate because it was highly consistent with the description of appellant Mr. Williams gave immediately after the incident, and was made with confidence because Mr. Williams knew the appellant prior to the incident. Finally, the amount of time between the incident and pre-trial identification—a little more than a week—was short. Accordingly, the State argues these facts constitute a reliable identification under *Biggers*.

B. Standard of Review

Our review of a circuit court's grant or denial of a suppression motion is limited to the evidence in the record of the suppression hearing itself. *Prioleau v. State*, 411 Md. 629, 638 (2009) (internal quotation marks and citations omitted). We defer to a circuit court's findings of fact and conclusions on the credibility of testimony unless they are clearly erroneous. *State v. Tolbert*, 381 Md. 539, 548 (2004). The evidence presented at the suppression hearing is examined in a light most favorable to the prevailing party. *Smiley v. State*, 216 Md. App. 1, 37 (2014). We review the constitutional questions raised

de novo by reviewing the applicable law and applying it to the facts of the case at bar. *Rush v. State*, 403 Md. 68, 83 (2008); *see also Polk v. State*, 378 Md. 1, 8 (2003) ("If the facts as found by the trier of fact are not clearly erroneous, our review of the application of the law to those facts, such as where impingement on an individual's constitutional rights may be in question, is *de novo*.").

C. Analysis

We do not agree with appellant's characterization that the pre-trial identification was impermissibly suggestive.[4] The array consisted of photographs of individuals, including appellant, who each possessed several common characteristics, such as skin tone, hairstyle, and facial structure. Furthermore, the teardrop tattoo was barely visible on the appellant's photograph, and moreover, he was not the only individual in the array with a teardrop tattoo or similar "blemish."

Modern suppression practice with regard to pre-trial identification centers on the due process rights afforded by the Fourteenth Amendment to the United States Constitution. *See State v. Hailes*, 217 Md. App. 212, 263–64 (2014). To establish that a

[4] We should also note at the outset of our analysis that the State argues appellant's pre-trial identification argument is not preserved for review. We disagree. Maryland Rule 8-131(a) states that "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." The State primarily takes issue with the form nature of appellant's omnibus motion and the fact that, instead of presenting argument in the motions hearing, appellant submitted on the motion. The State's position, however, is undermined by the fact that the issue of the array's suggestiveness was fully litigated in that hearing through the examination of witnesses. Furthermore, the State had the opportunity to file a motion to strike the offending omnibus motion, but elected not to do so and proceeded to litigating the motion at the hearing. The motions judge found the array was not suggestive and denied the motion. We fail to see, from the record, how the issue of the array was neither

pre-trial identification procedure is suppressible, a defendant must first establish the procedure was so impermissibly suggestive that it created a high likelihood of an incurable misidentification. *See Conyers v. State*, 115 Md. App. 114, 118 (1997) (citing *Biggers*, 409 U.S. at 198). An impermissibly suggestive procedure is not one where the police have coerced or otherwise harangued a witness into making an identification; it is one where the police have committed the "sin" of "contaminat[ing] the test by slipping the answer to the testee." *Conyers*, 115 Md. App. at 121. In the event an identification was obtained through impermissibly suggestive procedures, a court is not required, however, to suppress immediately the identification. Rather, a court must assess the reliability of the identification before it is admitted or suppressed. *See id.* at 120. The Supreme Court has articulated several factors employed when a court assesses reliability. Those factors are:

- the opportunity of the witness to view the criminal at the time of the crime;
- the witness' degree of attention;
- the accuracy of the witness' prior description of the criminal;
- the level of certainty demonstrated by the witness at the confrontation; and
- the length of time between the crime and the confrontation.

Biggers, 409 U.S. at 199–200.

We agree with the circuit court that there was nothing impermissibly suggestive regarding the photo array procedure. First, the detective who administered the photo array committed no perceptible "sin." *Conyers*, 115 Md. App. at 121. During the hearing on the motion to suppress, the State's Attorney cross-examined Detective Truesdale of the

"raised in [n]or decided by the trial court," and, therefore, not preserved.

Maryland Park Police regarding the procedure. Detective Truesdale testified that he provided no information to Mr. Williams regarding the ongoing investigation or any suggestions or encouragement to select appellant's photo from the array.[5] The testimony further demonstrates that Mr. Williams made the identification in two minutes after Detective Truesdale read him the standard instructions listed on the back of the folder containing the array. The testimony does not indicate that Detective Truesdale said or did anything while Mr. Williams was examining the array.

Second, the array was not inherently suggestive. Where photographic arrays are composed of individuals with similar appearance and attire, courts are unlikely to declare the array suggestive. *See Webster v. State*, 299 Md. 581, 620 (1984) (finding no unduly suggestive array where all the individuals depicted were "dressed identically and were

[5] [STATE'S ATTORNEY]: Detective, any time from the time that you called Mr. Williams to tell him you were coming to when you were seated with him showing the pictures, and when you showed him the pictures, did you ever tell him that you had arrested somebody in reference to this incident?
[DET. TRUESDALE]: No.
[STATE'S ATTORNEY]: Did you ever tell him that you had a suspect in reference to this incident?
[DET. TRUESDALE]: No, not that — no.
[STATE'S ATTORNEY]: When you showed him the pictures, did you give him any kind of indication that he had to identify somebody in the pictures?
[DET. TRUESDALE]: No.
[STATE'S ATTORNEY]: Did you give him any hints or indications as to who he should choose?
[DET. TRUESDALE]: No.

Mots. Hrg. Tr. at 30. Detective Truesdale's conduct of the identification procedure is similar to the conduct of a photo array procedure in *Smiley*—a procedure our colleague Judge Moylan called "impeccable." *Smiley*, 216 Md. App. at 36.

reasonably similar in physiognomy and physique."); *Smiley*, 216 Md. App. at 36–37 (finding no unduly suggestive array where, notwithstanding some variance between the images arising from their transmission, the array depicted six black men of approximately the same age, with similar hairstyles and facial hair patterns, and the same facial expression); *Gatewood v. State*, 158 Md. App. 458, 477 (2004) (finding no unduly suggestive array where all six men depicted were of the same race and possessed similar complexions, little facial hair, and no observable facial features, *i.e.*, tattoos, scars, or birthmarks; the court further remarked that the similarity in features among the six men was "critical.").

In the present case, the array featuring appellant was similar to the arrays in the aforementioned cases. The array features six African-American males of approximately the same age, with braided or dreadlocked hairstyles, and similar facial structure, skin tone, and facial hair patterns. Perhaps realizing that a court would not find the array unduly suggestive given the similarities between the individuals depicted, appellant emphasizes that he is the only individual depicted with a teardrop tattoo under his left eye. Although appellant is technically correct that he is the only individual with a sinister marking, it is hard to discern from the photograph that the spot is in fact a teardrop tattoo; it may just as easily be a skin blemish or birthmark.

Although the tattoo may somehow distinguish appellant from his neighbors in the array, it is not sufficient to brand the array as unduly suggestive. Maryland courts have not specifically considered the impact of teardrop tattoos on photographic array procedures, but they have considered similar markings and found them not to be

suggestive. *See Sallie v. State*, 24 Md. App. 468, 472–73 (1975) (holding that appellant's diamond tattoo on his face did not result in a suggestive procedure because recognition of distinctive marks can reduce significantly the likelihood of irreparable misidentification). A sister court in Texas, however, has considered the impact of teardrop tattoos on pre-trial identifications and determined they do not render an array unduly suggestive. *See, e.g.*, *Escovedo v. State*, 902 S.W.2d 109, 117 (Tex. App. 1995) (holding pre-trial identification procedure not impermissibly suggestive where all individuals depicted in photo array were of same race and possessed similar characteristics, and more than one had teardrop tattoo).

The array in the present case possesses no traits of undue suggestiveness. It possessed enough detail to permit Mr. Williams to make an accurate identification, but without any features that would render it unduly suggestive. The fact that appellant has a teardrop tattoo and is one of two individuals depicted with an under-eye marking is not designed to suggest. Rather, ensuring the photographs include all necessary details reduces the possibility of an irreparable misidentification. Mr. Williams knew appellant had a teardrop tattoo—a distinctive mark—and a photograph depicting the tattoo likely assisted him in making a reliable identification. Moreover, all the individuals depicted shared a similar appearance with appellant, which, again, would not draw an unwarranted amount of attention to him. *See Escovedo*, 902 S.W.2d at 117. Finally, as we discussed *supra* in the factual background of the case, Mr. Williams was already acquainted with appellant, as he was a friend of Mr. Williams' brother.

The facts and circumstances surrounding the array, as well as the array itself, lead us to conclude there was nothing impermissibly suggestive regarding the array. Although distinctive, the tattoo was not so prominently featured that it drew unwarranted attention to create a risk of misidentification. Accordingly, we think it is unnecessary to analyze the reliability of the identification. We discern no error in the circuit court's application of the relevant constitutional principles and hold the circuit court committed no error where it denied the motion to suppress the pre-trial identification.

II. HEARSAY EVIDENCE

A. Parties' Contentions

Appellant also argues the circuit court erred in admitting inadmissible hearsay. As part of its case-in-chief, the State presented testimony from Officer Armstrong Adams, the MPD officer whom Mr. Williams flagged down when he broke free of his restraints and escaped from the woods. Officer Adams testified regarding his investigation into appellant's residence and whereabouts after MPD located Mr. Williams' car in Northeast Washington. The relevant passage from the direct examination of Officer Adams is excerpted below:

> [STATE'S ATTORNEY]: All right. Then I want to [] fast-forward a little bit to August 31st, about 5:00 in the evening. That's an estimate. Did there come a time when you again met with the Park Police officers in reference to the vehicle that was involved in this case?
> [OFFICER ADAMS]: Yes.
> [STATE'S ATTORNEY]: Do you recall what the vehicle looked like?
> [OFFICER ADAMS]: Yes.
> [STATE'S ATTORNEY]: What did it look like?
> [OFFICER ADAMS]: It is a blue —
> [STATE'S ATTORNEY]: You don't have to say the exact make, but if you know what it looked like generally.

> [OFFICER ADAMS]: One of those old Buicks, the bubble side.
> [STATE'S ATTORNEY]: And where, if you recall, did you see this vehicle?
> [OFFICER ADAMS]: It was parked in the parking lot of the 3600 Block of Jay Street.
> [STATE'S ATTORNEY]: One more time I'll ask you to come down. If you could, put a pin where you saw the car.
> [OFFICER ADAMS]: Okay. Right there (indicating).
> [STATE'S ATTORNEY]: All right. And stay right there for a second. After finding the car, what, if anything, did you do?
> [OFFICER ADAMS]: When we found the car, it was a suspect vehicle, so we called for another unit to come to the car. And we also learned that —
> [APPELLANT'S TRIAL ATTORNEY]: Objection
> THE COURT: Sustained.
> [STATE'S ATTORNEY]: Without saying what anyone told you, what did you do?
> [OFFICER ADAMS]: We went to an apartment right across from here to look for the driver.
> [STATE'S ATTORNEY]: Who were you looking for?
> [APPELLANT'S TRIAL ATTORNEY]: Objection. May we approach?

Upon the objection and request for a sidebar by appellant's trial attorney, the parties had an extensive discussion with the trial judge regarding Officer Adams' testimony. Appellant's trial attorney objected on hearsay grounds because she did not know the origins of the information that demonstrated a connection between the driver of the vehicle and the apartment. Her chief concern was that Officer Adams would relate an out-of-court statement in which an unnamed occupant of the apartment might imply appellant resided there:

> [STATE'S ATTORNEY]: . . . What I can say, though, is I believe his testimony is going to be they went to the apartment and asked for [appellant] and was told he was not home, and that's the end of it.
> Her concern is hearsay, that it's relying on hearsay, but hearsay is negated by the fact they didn't say no one by that

> name lives here. They said he's not home, confirming that he does in fact live there.
> [APPELLANT'S TRIAL COUNSEL]: And [that] would be hearsay. He's not at home gives the impression that he lives there. So the entire point is based on hearsay with no one here to testify that [appellant] has any link to that address. As a medium, if [the State's Attorney] wanted to ask, you went to this location and that the result was negative, he wasn't located, that's a different story. But wanting to elicit the pure hearsay statement, "He's not home," that clearly gives the impression he lives there.

After this exchange, the parties and the judge ultimately agreed the State's Attorney would have to limit her inquiry to whether Officer Adams was able to find appellant at the apartment:

> [STATE'S ATTORNEY]: [Referring to the above-quoted exchange] That's still – talking about mediums, that allows the officer to testify he was looking for Cornell at that address.
> THE COURT: Why don't we do it that way?
> [STATE'S ATTORNEY]: I asked who he was looking for and she objected.
> THE COURT: What is the prejudice of [the objected-to testimony], because we already have evidence, depending on how they look at it or view the evidence, that he may have been one of the persons when the incident happened that was in that blue vehicle. So I don't see why it would be prejudice. We figure that he's found the vehicle and saw the victim, that he was looking for that person, who the victim already said he know.
> [APPELLANT'S TRIAL COUNSEL]: I would object because the answer calls for hearsay, but in lieu of that, I ask that the question be phrased, You were looking for so and so, and not eliciting an []hearsay of unnamed occupant.
> THE COURT: I'll allow leeway a little bit, because I don't know what is going to have –
> [STATE'S ATTORNEY]: I will ask if he was able to find [appellant] at that location.
> THE COURT: All right. Thank you.

Once the sidebar concluded, the State's Attorney resumed her direct examination of Officer Adams:

> [STATE'S ATTORNEY]: I'm sorry, Officer. If I can just have you step out one more time. You indicated this green pushpin is where you found the car. After finding the car, where did you go?
> [OFFICER ADAMS]: Went to an apartment across from where the car was.
> [STATE'S ATTORNEY]: Now, because you're familiar with this area, the apartment that you just indicated, what would the address be considered on that? Would that be Hayes Street or Jay Street address, if you know.
> [OFFICER ADAMS]: Jay Street.
> [STATE'S ATTORNEY]: Okay. And when you went to that apartment, who were you look[ing] for?
> [OFFICER ADAMS]: [Appellant]
> [STATE'S ATTORNEY]: Okay. And when you went to that apartment, did you find [appellant]?
> [OFFICER ADAMS]: No.
> [STATE'S ATTORNEY]: Okay. Thank you. You can have a seat.

On appeal, appellant argues that the testimony before and after the sidebar is inadmissible hearsay. He contends in his brief that Officer Adams was "clearly" testifying about information communicated to him by an unknown declarant. That information provided details regarding appellant's connection to the apartment across the street from where Mr. Williams' vehicle was found. The State disagrees, claiming in its brief that Officer Adams' testimony was "clearly" not hearsay because it was based on his personal observations. Although both sides proclaim their positions are imbued with clarity, we find the light shines on the State.

B. Standard of Review

With regard to evidentiary rulings, it is generally within the sound discretion of the trial court to determine admissibility. *Myer v. State*, 403 Md. 463, 476 (2008).

Accordingly, we review the trial court's determinations for an abuse of discretion. *Id.* We apply a different standard when the admissibility of hearsay is questioned. The Court of Appeals has explained that appellate courts must review hearsay determinations *de novo*, and to leave undisturbed the trial court's factual findings underpinning its hearsay determinations "absent clear error." *Gordon v. State*, 431 Md. 527, 538 (2013). We review hearsay determinations under a *de novo* standard because "[h]earsay, under our rules, *must* be excluded as evidence at trial[.]" *Bernadyn v. State*, 390 Md. 1, 7–8 (2005) (citing Md. Rule 5-802) (emphasis in original). Hearsay evidence will be excluded unless it falls within an exception to the hearsay rule or is "permitted by applicable constitutional provisions or statutes." Md. Rule 5-802. The mandatory language of the rule strips the circuit court of the discretion to admit hearsay in the absence of a provision providing for its admissibility. *Bernadyn*, 390 Md. at 8. The foundations of a hearsay determination, however, may entail factual findings or discretionary considerations. *Gordon*, 431 Md. at 536–38. Discretionary or factual matters are accorded a more deferential standard of review, and we review them only for clear error. *Id.* at 538.

C. Analysis

We conclude from our review of the record that Officer Adams' testimony, which recounted his investigation of the offense, did not contain any implied assertions that would implicate the hearsay rule. The officer's testimony included no statements made by an out-of-court declarant from which implied assertions could be derived. Accordingly, we hold that Officer Adams' testimony was not hearsay. But, even if we had determined Officer Adams' testimony was hearsay, any erroneous admission of that

testimony would be harmless because of the substantial amount of evidence introduced that linked appellant to the offense.

Maryland Rule 5-801 defines hearsay evidence 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." When analyzing whether a particular piece of evidence qualifies as hearsay, we examine, first, "whether the declaration at issue is a 'statement,'" and, second, "whether it is offered for the truth of the matter asserted." *Parker v. State*, 408 Md. 428, 436 (2009) (internal citations omitted). A statement is either an oral or written assertion, or the nonverbal conduct of an individual, if it is intended by that person as an assertion. Md. Rule 5-801(a). A declaration that is neither a statement nor offered for the truth of the matter asserted is not hearsay and will not be excluded under that rule. *See id.* 5-801(c). Potential hearsay evidence may be admissible if it is not offered for the truth of the matter asserted or it falls within a recognized hearsay exception. *Wagner v. State*, 213 Md. App. 419, 470–71 (2013) (quoting *Conyers v. State*, 354 Md. 132, 158 (1999)).

We disagree with appellant's argument because the testimony in question does not fall within the definition of hearsay. To be a hearsay statement, the assertion, whether oral or written, must be made *out of court*. Md. Rule 5-801(c) ("'Hearsay' is a statement, *other than one made by the declarant while testifying at the trial or hearing* . . . ." (emphasis added)). The disputed testimony here centers on Officer Adams' responses as to whom he was looking for when he visited the apartment. That testimony, however, conveyed no statements that were made out-of-court:

> [STATE'S ATTORNEY]: I'm sorry, Officer. If I can just have you step out one more time. You indicated this green pushpin is where you found the car. After finding the car, where did you go?
> [OFFICER ADAMS]: Went to an apartment across from where the car was.
> [STATE'S ATTORNEY]: Now, because you're familiar with this area, the apartment that you just indicated, what would the address be considered on that? Would that be Hayes Street or Jay Street address, if you know.
> [OFFICER ADAMS]: Jay Street.
> [STATE'S ATTORNEY]: Okay. And when you went to that apartment, who were you look[ing] for?
> [OFFICER ADAMS]: [Appellant]
> [STATE'S ATTORNEY]: Okay. And when you went to that apartment, did you find [appellant]?
> [OFFICER ADAMS]: No.

Appellant's trial counsel objected to testimony the State's Attorney sought to elicit from Officer Adams because she believed it would relate an implied assertion of appellant's status as resident of the apartment. Because the term "assertion" is not defined in Rule 5-801, courts must examine the declaration's literal contents as well as "the implications or inferences contained within or drawn from an utterance." *See McClurkin v. State*, — Md. App. —, Nos. 2746 & 2749, Sept. Term 2011, slip op. at 18–19 (filed April 1, 2015) (quoting *Stoddard v. State*, 389 Md. 681, 689–90 (2005)). The Court of Appeals has explained that whether a declaration is hearsay turns not on a declarant's intent to communicate a belief in the truth of a proposition, but if the words are offered to prove the truth of that proposition. *Id.* at 703. This is because "out-of-court words offered for the truth of unintentional implications are not different substantially from out-of-court words offered for the truth of intentional communications." *Id.*

In *McClurkin*, the State introduced at the trial of co-defendants McClurkin and Jackson the recording of a jailhouse telephone call that Jackson made with the purpose of preventing the victim from implicating the co-defendants in the charged offenses. *McClurkin*, slip. op. at 6–7. This Court reasoned that the State offered the recording "to prove the only direct assertion it contained—that Jackson had not been responsible for shooting the victim—but to encourage the jury to infer from the call that Jackson, and by implication McClurkin, were urging others to intimidate the victim into changing his story so that it no longer implicated them in the shooting at issue; that they were doing so because they had 'guilty minds'; and that, therefore, they were guilty of the charges against them." *Id.* at 21–22. The State confirmed it wished to use Jackson's recorded statements for its implied assertions when it urged the jury in closing arguments to determine the call demonstrated "a 'consciousness of guilt' because [it was] not [a] 'call[] that innocent people make[.]'" *Id.* at 22. We concluded the State offered hearsay when the recording was used for that particular purpose. *Id.*

In *Stoddard*, the appellant was convicted of the second-degree murder and child abuse resulting in the death of three-year-old Calen. *Id.* at 683. The evidence at trial demonstrated the appellant was the sole adult supervising Calen and her eighteen-month-old cousin Jasmine at the time of the assault. *Id.* at 684. The appellant contended the trial court erred in admitting testimony that recounted Jasmine's out-of-court statement—"Is [the appellant] going to get me?"—because that testimony implied Jasmine had witnessed appellant assaulting Calen. *Id.* at 683. The Court held Jasmine's statement was an implied assertion because it entailed a factual proposition the State offered "to prove that Jasmine

had in fact witnessed [appellant] assaulting Calen[,]" and that the assertion was inherently unreliable. *See id.* at 711–12 (explaining Jasmine's statement entailed a number of "untested and unsupportable" inferences, *i.e.*, that "[The jury] needed to infer first that Jasmine meant those words to convey a sincere inquiry as to whether [appellant] was going to harm her. It needed to infer next that, by making this inquiry, Jasmine revealed unambiguously a belief that she had witnessed [appellant] assaulting Calen. It needed to infer further that Jasmine remembered accurately her perceptions of [the dates of the assault]. And it needed to infer finally that Jasmine's perceptions were correct at the moment she experienced them.").

Here, the State sought to elicit testimony that would link appellant to the residence on Jay Street. During the sidebar as set forth *supra*, the State's Attorney explicitly stated she believed Officer Adams' testimony would convey testimony linking appellant to the apartment:

> [STATE'S ATTORNEY]: . . . What I can say, though, is *I believe his testimony is going to be they went to the apartment and asked for [appellant] and was told he was not home*, and that's the end of it.

(Emphasis added).

Although the State's Attorney indicated the potential testimony would pose no hearsay problems, had the State elicited those statements, they would have constituted an implied assertion. Words to the effect of "he's not home" could convey that appellant was, in fact, a resident of the Jay Street apartment. But the State was not concerned with whether appellant was at the apartment at the time of Officer Adams' visit. They were much more concerned with proving the truth of the implied factual proposition that

appellant resided in the apartment outside of which the blue Buick used in the kidnapping was found. That implied assertion, however, would suffer from the same infirmities as the statement in *Stoddard*. The jury would need to make several inferences about the accuracy and sincerity of the resident's statement regarding appellant, which would be of limited reliability absent in-court examination of that individual. *See id.*

The trial court, however, was ever vigilant about hearsay—as demonstrated by the number of hearsay objections it sustained in Officer Adams' direct examination—and suggested to the State's Attorney and defense counsel that the State pursue a line of questioning narrowly focused on the officer's investigative process. The State complied, asking questions that elicited testimony indicating where Officer Adams went (the Jay Street apartment), who he was looking for (appellant), and whether he was successful (no). At no point during this testimony was the out-of-court statement of a resident of the apartment ever recounted to the jury. Accordingly, there was no statement impliedly or explicitly linking appellant to the apartment. Moreover, without any out-of-court statements, the jury only had to focus on the credibility of Officer Adams' testimony, as opposed to assessing both his credibility and that of an absent individual.

Without testimony that conveyed the out-of-court statements of a Jay Street apartment resident, there are no grounds for a hearsay objection to an implied assertion. Moreover, there would still be sufficient evidence to convict appellant in the event Officer Adams' testimony had conveyed hearsay. Mr. Williams not only testified to appellant's involvement in the kidnapping and his personal connection to appellant, but also identified him from a photo array. Further still, there was DNA evidence linking

appellant to the incident. Had the trial court erroneously admitted any implied assertions into the record, we would find that error harmless beyond a reasonable doubt. *See id.* at 582 ("To be harmless, we must be convinced beyond a reasonable doubt that the error in no way influenced the verdict."). Nevertheless, without the improper admission of an implied assertion, we find no grounds for error—harmless or otherwise.

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