Circuit Court for Prince George's County
Case No. CT141721B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 354

September Term, 2017

JARON DAVIS KENT

v.

STATE OF MARYLAND

Nazarian,
Shaw Geter,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: February 27, 2018

Appellant, Jaron Davis Kent, was tried and convicted by a jury in the Circuit Court for Prince George's County (Wallace, J.) of first-degree felony murder, second-degree felony murder and conspiracy to commit robbery with a dangerous weapon. Appellant was sentenced to life imprisonment for the conviction for first-degree felony murder and twenty years, consecutive, for the conviction for conspiracy to commit robbery with a dangerous weapon. Appellant was credited for time served since December 4, 2014. Appellant filed the instant appeal, positing the following questions for our review:

1. Did the trial court err in its answer to a jury note that was sent while the jury was deliberating?

2. Was the evidence sufficient to sustain Appellant's conviction for conspiracy to commit armed robbery?

3. Did the trial court commit reversible error when it permitted an expert witness, who was not properly disclosed in discovery, to testify?

4. Did the trial court err in preventing the admission of the DNA report?

FACTS AND LEGAL PROCEEDINGS

Yolanda Davis lived at 6311 Gateway Boulevard in District Heights, Maryland with her boyfriend, Tommie Moore, Jr. and two friends, Crystal and Darrell. In December of 2014, Davis earned money, working as a prostitute, soliciting clients from online. Customers would contact Davis by calling her phone number, ending in –9424, and scheduling an appointment.

In the early morning hours of December 4, 2014, Davis received a telephone call from a phone number ending in –1105 around 12:30 a.m. Davis spoke to someone who

wanted to schedule an appointment and was told that she had met him before. The conversation ended and Davis waited for her customer to arrive. Davis received another call from the same telephone number and the person told her that he was outside. Davis opened the door and saw a man, who Davis identified as Appellant.

Davis invited Appellant into the apartment, told him to make himself comfortable, and asked for the money. Appellant walked through the apartment and tried to open one of the bedroom doors that was locked. Davis asked Appellant what he was doing and Appellant responded by asking if they were alone. Davis told him that they were alone and that he should get on the bed. Davis had already pulled the sofa bed out and she asked Appellant for the money; however, he said that he only had $50.00. While on the phone, Davis and Appellant had agreed on $75.00 for fifteen minutes of her time. Appellant offered Davis $55.00 and she told him that he "had ten minutes."

Davis put a condom on Appellant and engaged in oral sex with him for thirty seconds. The entire time that Davis was performing oral sex, Appellant was on his phone and tapping something on the phone. After performing oral sex, Davis turned around on her hands and knees in order that they could engage in intercourse. Appellant continued sending text messages on his phone. Davis asked Appellant what he was doing and told him that he was making her nervous. Appellant responded that he was texting his girlfriend. Davis and Appellant had intercourse for ten minutes and, when the time was up, Davis told Appellant that he had to leave. Appellant complained that he had not finished, but Davis told him that his time was over. When Davis saw that Appellant only wore one glove, she

asked him if he entered her apartment with one or two gloves. Davis and Appellant looked around the apartment for the missing glove, but they did not find the second glove. Appellant followed her to the door.

When Davis opened the door, there was a man, who wore a nylon ski mask, crouched down with his hands on the end of the door as if he were blocking the door. Davis attempted, but was unable to close the door. She then looked behind her, but she did not see Appellant. She started screaming when she couldn't close the door and then began to run to the back of the apartment, after which she ran to the second bedroom where Darrell was standing inside of the door. Moore opened his bedroom door and told Davis to go inside of the bedroom with Darrell.

While inside the bedroom with Darrell, Davis heard Moore screaming, "Get out," then she heard three gunshots at which time she started to run back out. Davis and Darrell left the bedroom and heard rattling in the kitchen. Moore walked from the direction of the kitchen and was holding his neck. Moore fell forward onto the ground and, when Davis rolled him over, she saw a big wound on his neck. Davis screamed for someone to call 9-1-1 and she thought that Darrell had called. An ambulance and police arrived; however, Moore had already died. Davis could not remember seeing Appellant while she was screaming in the apartment.

Winston Darrell Little testified that Tommie Moore, Jr. was his older brother. On December 3 and 4, 2014, Little was asleep in the back bedroom at his brother's house. When Little fell asleep, Moore, Davis and another young lady were in the apartment. Little

woke up when there was banging on his bedroom door and Davis was yelling. Little jumped up, grabbed his pants and ran to the door. Little heard gunshots and ran out of the bedroom at which time he saw Moore walking toward him, holding his neck. Little grabbed Moore and held him, then called 911.

Kristina Cheung, employed by the Firearm's Examination Unit of the Prince George's County Police Department, was admitted as an expert in firearm and toolmark examination. Cheung received three fired bullets as evidence in this case. Cheung concluded that the three bullets were fired from the same unknown firearm. There was insufficient detail for Cheung to determine the caliber of the bullets.

Chelsey Simonds, a crime scene investigator for Prince George's County, responded to 2726 Langston Place in Northeast District of Columbia, Apartment 301. Inside of the apartment, she located a Verizon statement addressed to Ronald Kent and a jacket. Inside of the jacket was a black facemask and a glove.

Detective Denise Shapiro was the lead officer in the investigation of the homicide at 3211 Gateway Boulevard in District Heights on December 4, 2014. As a result of the investigation, she had interviewed Appellant and determined that his cell phone number ended with number –1105. Detective Shapiro interviewed Ronald Kent and learned that his cell phone number ended with number –9810. Detective Shapiro also interviewed Roberto Miles and was informed that his telephone number ended with number –0027.

Ryan Miller, an employee of the Narcotics Enforcement Division of the Prince George's County Police Department, testified that he handled cell phone downloads.

Miller received a SGH-1437 Galaxy Express and did a download of the phone in February of 2015. The phone number associated with the phone that Miller received ended with number –0027. Based on a review of Lines 913 and 914 of the report, the phone received text messages at 1:11 a.m. and 1:12 a.m. that stated "Taking" and "Too long, fool." The text messages were from phone number ending with –1105. At 1:13 a.m., the phone received a text message that stated, "Y'all at the door?"

Prince George's County Police Department Lieutenant Jordan Swonger was accepted as an expert in the field of cell phones and cell phone technology over objection by the defense. Lieutenant Swonger testified that he personally conducted or supervised the extraction of information from cell phones in the instant case. Lieutenant Swonger also collected all of the phone records from various companies and mapped those for court and investigative purposes. Lieutenant Swonger collected the records from the companies for the cell phone that was associated with phone number ending with –0027. The records were provided by AT&T and TracFone and plotted the records for specific dates and times based off of the cell site that was used to complete the calls. On December 4, 2014, calls made between 12:52 a.m. and 1:22 a.m. connected with towers that were in the area of District Heights.

Detective Shapiro interviewed Appellant, on December 4 and 5, 2014, in reference to the investigation of the murder of Tommie Moore. During that interview, Appellant explained that Appellant's cousin, Ronald Kent, had a friend who wanted to rob Yolanda Davis. Appellant was supposed to go to Davis's home and receive oral sex from her.

Appellant did not know what Ronald Kent's friend was going to do or why. Appellant never saw a gun in the possession of Ronald Kent's friend.

Dr. Theodore King, Jr., employed by the Office of the Chief Medical Examiner, was admitted as an expert in the field of forensic pathology. Dr. King testified that he performed an autopsy on Tommie Moore, Jr. on December 5, 2014 and that Moore had a total of three gunshot wounds. Wound A was on the back of the left side of the neck. With respect to Wound A, the bullet went through the soft tissues of the lateral left front neck, then through the first left rib and, ultimately, entered the chest cavity, the upper lobe of the left lung, then through the front of the left ventricle and right side of the apex of the heart. It then passed through the left liver lobe and grazed the front of the antrum of the stomach. The bullet was recovered in the skin on the lower right abdomen.

Gunshot wound C had an entrance wound on the right side of the chest where Dr. King saw evidence of close-range firing. The bullet injured the skin and subcutaneous tissue on the right side of the chest and the back, then exited the right side of the back.

Gunshot wound B had an entrance wound on the left side of the upper back. The bullet injured the skin and soft tissue of the back, the left fourth rib, the upper lobe of the left lung, the pericardial sack, the outside of the left ventricle, then passed through the apex of the heart and went through the lower surface of the left levier, and passed through another region of the stomach. The bullet was recovered from the abdominal cavity.

Dr. King concluded that the cause of Mr. Moore's death was multiple gunshot wounds and the manner of death was homicide.

Appellant presented evidence that, when Davis spoke to Detective Thomas Crosby on December 4, 2014, she mentioned that she did not appear in court a month before the incident because Tommie Moore had beaten her. Davis had black eyes and bruises from Moore kicking and stomping on her in their home.

Detective Dennis Windsor remembered that, when he spoke with Davis, she mentioned that six months earlier, she had been involved in a sting operation. Davis set up a person by the name of Bugs. The person Davis set up in the sting operation knew that she was the person who had set him up and had made threats to kill her.

Gunnar Olgren, a DNA analyst at Bode Cellmark Forensics in Lorton, Virginia, was admitted as an expert in DNA analysis. Olgren testified that Bode Cellmark received samples from the case in which Moore was the victim, including a sample from a cutting of the center collar of a long-sleeve zip up jacket, a cutting from the nose and mouth area of a balaclava, a cutting from the front cuff and palm area of a right hand glove, swabs from the right hand palm of Moore, four swabs from the back of the right hand of Moore, and fingernail clippings from the right and left hand of Moore. Bode was also sent a blood card of Moore, oral swabs of Miles, oral swabs of Appellant and oral swabs of Ronald Kent. Olgren testified that Nicol Unger inventoried the items and made samples of the items. From the information that Olgren received, he did an analysis and made conclusions about certain pieces of evidence. The report he prepared contained his conclusions and the allele tables for each DNA profile.

Based on the foregoing evidence, the jury found Appellant guilty of first-degree

felony murder and conspiracy to commit robbery with a dangerous weapon. The jury found Appellant not guilty of using a handgun in a crime of violence. Appellant was sentenced to life imprisonment for the first-degree felony murder conviction and a consecutive twenty year sentence for the conviction of conspiracy to commit robbery with a dangerous weapon.

DISCUSSION

I.

Appellant contends that the trial court erred in its answer to the note that the jury sent while it was deliberating. According to Appellant, "[t]he trial court was required to give a correct definition of conspiracy to commit armed robbery, which included the fact that Appellant's knowledge that a weapon was brandished was essential. Appellant maintains that his conviction for conspiracy to commit armed robbery must be reversed.

The State responds that the issue has not been preserved for appellate review, but, if preserved, the court gave an accurate response to the jury note. Specifically, the State argues that a court must respond to a jury's material question on a point of law, but may exercise discretion in how it responds. Ultimately, according to the State, the instructions given to the jury properly defined conspiracy to commit armed robbery.

As a preliminary matter, we address the State's contention that the issue has not been preserved for our review. The State argues that Appellant did not object to the ultimate language that was used by the court. "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the

trial court[.]" MD. RULE 8-131(a). "Rule 8–131(a) requires a defendant to make 'timely objections in the lower court,' or 'he will be considered to have waived them and he cannot now raise such objections on appeal.'" *Brice v. State*, 225 Md. App. 666, 678 (2015) (citations omitted). *See also* MD. RULE 4–323(c) (requiring that a contemporaneous objection be made at the time a court makes rulings or orders).

In the instant case, Appellant's trial counsel urged the court to answer the jury's question in the affirmative, but did not object to the final language used by the court to answer the note submitted by the jury. Accordingly, we hold that the issue has not been preserved for our review and, therefore, we decline to review Appellant's arguments.

II.

Appellant's second assignment of error is that the evidence is insufficient to sustain his conviction for conspiracy to commit armed robbery. According to Appellant, no evidence supported the inference that Appellant had knowledge about the use of a dangerous weapon. Therefore, Appellant argues that his conviction for conspiracy to commit armed robbery must be vacated.

The State responds that there is sufficient evidence to support a charge of conspiracy and that the record is replete with "overwhelming evidence" to support Appellant's conviction. According to the State, "The jury had to choose between believing Kent's story—that he was a participant in every aspect of the conspiracy *except* the gun part—or believing all of the circumstantial evidence, showing that Kent was a full participant in every aspect of the conspiracy, full stop." The State urges this Court to affirm the circuit

court's decision.

When reviewing a claim for the sufficiency of the evidence, this Court must review "'the evidence, and all inferences fairly deducible from the evidence, in a light most favorable to the State.' Therefore, the test on review is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Alston v. State*, 177 Md. App. 1, 41 (2007) (citations omitted).

"A criminal conspiracy consists of the combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means." *Carroll v. State*, 428 Md. 679, 696 (2012) (citation omitted). "Conspiracy to commit a crime is generally distinct from the underlying crime itself." *Id.* at 697 (citations omitted). "The essential element of a criminal conspiracy is the unlawful agreement." *Vandegrift v. State*, 82 Md. App. 617, 640 (1990).

"It is important also to point out that, in establishing a criminal conspiracy, the State need only present facts which would allow the fact finder to infer that the parties entered into an unlawful agreement." *Id.* "In other words, a criminal conspiracy may be proved by circumstantial evidence." *Id.* Accordingly, "[t]he 'unit of prosecution' for conspiracy is 'the agreement or combination, rather than each of its criminal objectives.'" *Savage v. State*, 212 Md. App. 1, 13 (2013). "The State has the burden to prove the agreement or agreements underlying a conspiracy prosecution." *Id.* at 14.

In the instant case, Appellant does not dispute that an underlying agreement to commit robbery had been reached; however, Appellant disputes the premise that he had

knowledge of the use of a dangerous weapon. Considering the evidence in the light most favorable to the State, the jury was free to decline to give weight to Appellant's testimony that he did not have knowledge about the use of a dangerous weapon in the conspiracy to rob Davis. The State presented evidence that Appellant was a fully engaged participant in the planning and execution of the robbery, not just a last-minute actor. We are persuaded that the evidence permitted the jury to infer Appellant's awareness that his co-conspirators had the intent to use a dangerous weapon to commit the robbery of Davis. Accordingly, we hold that the evidence presented was sufficient to sustain Appellant's conviction beyond a reasonable doubt.

III.

Appellant next contends that the trial court committed reversible error when it permitted an expert witness, who was not properly disclosed in discovery, to testify. Appellant maintains that his trial counsel received Lieutenant Swonger's report; "however, because Lieutenant Swonger had not been declared as an expert witness, he had not received a copy of the CV and had not looked into obtaining an expert witness of his own in the area of cell phone mapping." Although the trial court overruled Appellant's motion on appeal, Appellant argues that the knowledge that the Lieutenant wrote a report, "did not put [his] counsel on notice that he would be testify[ing] as an expert in cell phones and cell phone technology."

The State responds that its "disclosures of an expert witness's name, address and report prior to trial complied with the discovery rules regarding expert witnesses."

According to the State, it "informed the defense that any expert whose reports were included in the discovery could be called as an expert by the State." The State maintains that it did not commit a discovery violation simply because it "did not file a separate memorandum specifically stating that Swonger would be called as an expert witness."

In the recent decision, *Green v. State*, 456 Md. 97, 124 (2017), the Court of Appeals reiterated that, when "a trial court does not expressly determine that a discovery violation occurred, an appellate court reviews the issue without deference."

Maryland Rule 4–263 governs discovery in the circuit court. Subpart (d)(8), which specifically references reports or statements of experts, provides that

> [a]s to each expert consulted by the State's Attorney in connection with the action:
>
> (A) the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion;
>
> (B) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and
>
> (C) the substance of any oral report and conclusion by the expert[.]

Md. Rule 4–263 only requires that the State comply with the disclosure requirements as written; however, there is nothing in the Rule that "requires the State to categorize its proposed witnesses as expert or non-expert." *Knoedler v. State*, 69 Md. App. 764, 768 (1987).

In the instant case, after the Court denied Appellant's Motion for Judgment of Acquittal, the Court asked Appellant's trial counsel whether he was unable to retain an

expert of [his] own. After counsel responded, "—in summary yes[,]" the Court addressed counsel as follows:

> I'm looking at Rule 4–263, the obligations for disclosure by the State's Attorney. (8), Reports or Statements of Experts. As to each expert consulted by the State's Attorney in connection with the action, the State shall provide:
>
> > The expert's name and address**.**
> > The subject matter.
> > The consultation.
>
> The substance of the expert's finding in opinions and a summary and the grounds for each opinion.
>
> The opportunity to inspect and copy all written reports of statements made in connection with the action by the expert, including the results of any physical and mental exam, scientific test, experiment or comparison and the substance of any oral report or conclusion by the expert.
>
> So I'm looking at what's been marked as State's Exhibit 57 which is entitled, Forensic Cellular Analysis summary. And, on the first page it says, "I, Sergeant Swonger, analyzed the provided phone record's calls made on December 4, 2014 at 00 hours through 0800 hours.
>
> "During this period, there were 28 calls with cellular phone number [ending with] –0027 which resulted in cell site communications.
>
> "These calls were plotted using AT&T's site tower locations. The plotted areas indicate the most likely area where the phone would have been at the time each call was initiated.
>
> "One data access is plotted to fill in a break on call activity which occurred between 1:22 and 2:03 hours. Due to technology upgrades, certain tower azimuth information is missing. AT&T has not been able to provide the azimuth, but does validate the tower contacted."
>
> That, to me, seems to comply with the requirements under Rule 4–263(d)(8); the expert's name and address, the subject matter of the consultation, substance of his findings and opinions and a summary of the grounds for each opinion, the opportunity to inspect and copy all the reports.

> And obviously, to the extent there's any oral report or conclusion beyond that, that wouldn't be permitted. So I'm going to overrule the objection.

We are persuaded that the trial court properly ruled that the State complied with the required discovery disclosures. Lieutenant Swonger had been identified as a potential witness and his report had been physically transmitted to Appellant's counsel who was thereby put on notice that Swonger, the author of the report, was a potential expert witness in the case. Therefore, we uphold the lower court's ruling.

IV.

Appellant's final contention is that the trial court erred in preventing the admission of the DNA report. Appellant maintains that, "[d]espite knowing that they had no intention of introducing the DNA report and failing to notify defense counsel that they would not be introducing the DNA report into evidence, the State objected to the DNA report being admitted on hearsay grounds." Appellant argues that the DNA report was admissible as a business record, as a statement made by a party opponent, pursuant to Md. Rule 5–803(b)(24) and under the Due Process Clause and the Sixth Amendment.

The State responds that the court properly refused to admit the DNA report without any supporting expert witness. The State also responds that, if there was any error, it was harmless. According to the State, Appellant "focuses entirely upon the hearsay nature of the report, without acknowledging the other obstacles to its admission—obstacles made plain by the court when it refused to allow the admission of the report." The State draws attention to Appellant's efforts at trial, to introduce the evidence *via* two different

witnesses. The State argues that the report was inadmissible *via* Detective Shapiro's testimony, "not only because it was hearsay, but also because it required expert testimony to become relevant to the jury." The State also argues that the report was inadmissible *via* Olgren, "not only because there was inadmissible hearsay within the report itself, but also because Olgren was unable to offer any testimony as to what the things were that were tested, because he had not prepared the samples from the physical items submitted by the Prince George's County investigators."

Typically, appellate courts review the admissibility of evidence under the abuse of discretion standard; however, we review whether evidence is hearsay *de novo*. *Bernadyn v. State*, 390 Md. 1, 7–8 (2005). "[W]e note that the admission of evidence is left to the 'considerable and sound discretion of the trial court.'" *Donaldson v. State*, 200 Md. App. 581, 595 (2011) (quoting *Merzbacher v. State*, 346 Md. 391, 404 (1997)). "On appellate review, we will 'not disturb a trial court's evidentiary ruling unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion.'" *Bey v. State*, 228 Md. App. 521, 535 (2016) (citations omitted), *cert. granted*, 450 Md. 105 (2016), and *cert. denied*, 450 Md. 108 (2016), and *aff'd*, 452 Md. 255 (2017).

"[I]t is well settled that the "admissibility of expert testimony is within the sound discretion of the trial court, and its action will seldom constitute a ground for reversal." *Brown v. Contemporary OB/GYN Associates*, 143 Md. App. 199, 252 (2002) (citation omitted).

Md. Rule 5–702 governs the admission of expert witness testimony and provides that,

> [e]xpert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

"DNA testimony is always based on specialized knowledge, skill, experience, training, or education[,]" *i.e.*, expert witness testimony. *Diggs & Allen v. State*, 213 Md. App. 28, 60 (2013).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MD. RULE 5-801(c). "Hearsay, under our rules, must be excluded as evidence at trial, unless it falls within an exception to the Hearsay Rule excluding such evidence or is 'permitted by applicable constitutional provisions or statutes.'" *Bernadyn*, 390 Md. at 8. "If one or more hearsay statements are contained within another hearsay statement, each must fall within an exception to the Hearsay Rule in order not to be excluded by that rule." MD. RULE 5-805.

"Maryland Rule 5–803(a) permits the introduction of a hearsay statement that is offered against a party and is either the party's own statement or one in 'which the party has manifested an adoption or belief in its truth.'" *Gordon v. State*, 204 Md. App. 327, 338 (2012) (citation omitted).

The Maryland Rules of Evidence also include "a 'residual' or 'catch all' exception for reliable, necessary hearsay in Rules 5–803(b)(24) and 5–804(b)(5)." *Walker v. State*, 107 Md. App. 502, 516 (1995).

> [T]he residual exceptions . . . provide for treating *new and presently unanticipated situations* which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 5–102.

Id. at 517 (emphasis supplied) (quoting MD. RULE 5–803 (advisory committee note)).

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

Easter v. State, 223 Md. App. 65, 75 (2015) (citations omitted).

Regarding Appellant's attempt to admit the DNA report *via* Detective Shapiro, the following occurred:

> [COURT]: [Counsel], we talked about this. The fact that she may collect a lot of hearsay doesn't mean that the hearsay rule does not apply to her in her testimony.
>
> ***
>
> [APPELLANT'S TRIAL COUNSEL]: I'm submitting to the Court that the hearsay rules and the exceptions to the hearsay rules would cover this information, and it should be admissible under the exception.
>
> [COURT]: What exception?

[APPELLANT'S TRIAL COUNSEL]: Well, this is stuff that was done by Prince George's County and the State of Maryland.

[COURT]: Yes.

[APPELLANT'S TRIAL COUNSEL]: As such, they are manifestly conducting this investigation as theirs. Therefore, it would come under the exception of manifest adoption of the material.

[COURT]: Okay. Overruled.

[APPELLANT'S TRIAL COUNSEL]: Okay. Notwithstanding that, may I make a different exception?

[COURT]: Tell me all of your exceptions, and let's go over them.

[APPELLANT'S TRIAL COUNSEL]: Okay. Your Honor, the catch-all.

[COURT]: What catch-all?

[APPELLANT'S TRIAL COUNSEL]: I think it's 805? 804? I'm not sure. The last one.

[COURT]: The last one. Yeah, okay.

[APPELLANT'S TRIAL COUNSEL]: It provides that, if there is any indicia of reliability, the whole issue, the whole issue with respect to hearsay and its exceptions is that if you can establish some indicia of reliability.

And this is the Prince George's County's investigation. This is their package. This is what they pulled together when they use DNA analysis. They use their experts. An expert that is in a representative capacity now.

***

The statement by the party's agent—

[COURT]: Wait. I'm sorry. What are you reading from?

[APPELLANT'S TRIAL COUNSEL]: 5–803(a)(4).

***

Okay. Did you identify any particular statement which you say is because she's the lead investigator, everything in her investigative file is admissible? So that doesn't mean because you haven't identified a particular statement. You said that everything in the file is admissible, and I disagree. And I don't think that exception covers it.

***

[APPELLANT'S TRIAL COUNSEL]: Okay. "A statement by the party's agent or employee made during the agency or employment relationship concerning a matter within the scope of the agency or employment."

The detective's statements are made right in a representative capacity for Prince George's County for this case. For this investigation. Therefore, I submit to the Court respectfully that it comes in. It should be admissible.

[COURT]: Okay. I disagree that some other detective's statement—and the only one that you made reference to, was the detective's notes and interview with a witness that was then provided to this detective. It's like three levels of hearsay. This exception doesn't cover it.

[APPELLANT'S TRIAL COUNSEL]: Okay.

[COURT]: Anything else?

[APPELLANT'S TRIAL COUNSEL]: No, Your Honor.

Regarding Appellant's attempt to admit the DNA report *via* Olgren, the following occurred:

[COURT]: You were on notice that once you figured out that it was beneficial to you and not to the State, you knew or should have known that they might not present it. In which case, you need to do what's necessary to prepare to present that evidence for admissibility. Subpoena the witnesses, get them here to lay the foundation for its admission.

***

So the bottom line is, you need to lay the same foundation, not only to the hearsay,

but to the expertise of those that you want to offer as experts and the opinions that you want to offer. And in the absence of that, it's not admissible.

***

[APPELLANT'S TRIAL COUNSEL]: He testified as part of Bode [Laboratory], he got the information, and he wrote the report. He did the report.

[COURT]: Right. He said it was based on information submitted by the County.

[APPELLANT'S TRIAL COUNSEL]: Right.

[COURT]: And information from Bode Lab.

[APPELLANT'S TRIAL COUNSEL]: Correct.

[COURT]: So that doesn't make it—so it's hearsay.

[APPELLANT'S TRIAL COUNSEL]: He's a representative of Bode. He has no question of what's—to Bode. He's testifying to what he did at Bode.

[COURT]: Well, he didn't testify about what he did. You didn't ask him to testify about what he did.

[APPELLANT'S TRIAL COUNSEL]: Well, he indicated he wrote the report.

***

[COURT]: As I understand the objection, he is saying that at least part of this analysis was not conducted by this witness. I think that's what the objection was.

[ASSISTANT STATE'S ATTORNEY]: The serologist—the people who do the application and the quantification are not present.

***

[APPELLANT'S TRIAL COUNSEL]: Okay. Mr. Olgren or Mr. Gunnar, okay, I'm looking at page 5 or 6 of the report. What is that?

[WITNESS]: So these are known as out allele tables . . . .

[APPELLANT'S TRIAL COUNSEL]: And you put that together? You did that?

[WITNESS]: Correct.

***

[ASSISTANT STATE'S ATTORNEY]: The objection is the same. He is getting this from—

[APPELLANT'S TRIAL COUNSEL]: He said he did it.

[COURT]: No. He said he put the table together. The objection is that the analysis, parts of the analysis, weren't done by him.

You haven't asked him if he did the whole analysis. If he did, then we're in a different position, but you still haven't established that.

***

[COURT]: Can you tell me whether he did it or not?

[APPELLANT'S TRIAL COUNSEL]: He didn't do everything.

[COURT]: Okay.

***

[COURT]: Well, then, you're missing that necessary element of the chain. Do you have another witness who is going to come in to fill in that gap?

[APPELLANT'S TRIAL COUNSEL]: No.

[COURT]: Then the objection is sustained, it's going to be sustained, and let's not spend any more time on it.

In the instant case, the trial court found that Appellant's asserted exceptions to the rule against hearsay, *i.e.*, 5–803(a)(4) statement by party agent manifestly adopting material and the "catch-all," residual exception, were not applicable. The main thrust of

Appellant's argument was that "this is stuff that was done by Prince George's County and the State of Maryland," *i.e.*, the police were acting as party agents because the County commissioned the DNA report. Patently, the police are not always party agents when any action is brought by the State or any action commissioned by the County. It further follows that every statement made by the police is not automatically admissible as an exception to hearsay. The Rules of Evidence still apply. Therefore, Appellant's argument that Detective Shapiro's testimony, as it pertains to the DNA report, is admissible as an exception to hearsay is without merit. It was undisputed that Detective Shapiro neither conducted nor drafted the DNA report. We agree with the trial court that the Detective's statements concerning the report constituted multiple levels of hearsay that Appellant's proffered exceptions did not render admissible. As Appellant limited himself to these exceptions at the trial level, so too will we limit our review on appeal. MD. RULE 8–131(a). ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

The trial court also determined that, in addition to hearsay hurdles, an expert was needed to interpret the results of the DNA report, as well as testify as to the results of the report and to testify as to the authenticity of the items tested in the report, thereby establishing the chain of custody. Specifically, the trial court noted that no exceptions to the rule against hearsay that Appellant proffered would apply to Detective Shapiro's testimony and, thereby, render the report admissible. The trial court also noted that, regarding Olgren, there was a concern regarding gaps of his knowledge as an expert witness

as to the chain of custody of the evidence. Accordingly, the trial court properly ruled that Olgren could not provide sufficient testimony as an expert witness to render the DNA report admissible.

Although Appellant also asserts arguments, on appeal, concerning the admissibility of the DNA report as a business record, pursuant to Md. Rule 5–801(c), and under both the Due Process Clause and the Sixth Amendment, Appellant did not argue these points before the lower court and, therefore, we will not review arguments not first considered and decided by the lower court. MD. RULE 8–131(a). ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

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