Circuit Court for Montgomery County
Case No. 129380C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 395

September Term, 2018

KEVIN DARNELL CARROLL

v.

STATE OF MARYLAND

Graeff,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: January 7, 2020

A jury in the Circuit Court for Montgomery County convicted Kevin Darnell Carroll, appellant, of home invasion, robbery with a dangerous or deadly weapon, and related counts. He was sentenced to an aggregate forty years imprisonment. In this timely appeal, he asks four questions:

I. Did the trial court err in admitting testimony and other evidence relating to the "Weaver incident?"

II. Did the trial court err in admitting, and in refusing to strike, the evidence of flight; and did it err in instructing the jury on flight?

III. Did the trial court err in admitting irrelevant evidence of the police investigation leading to appellant's arrest?

IV. Is reversal required because of the prejudice resulting from cumulative error?

We answer the first question in the affirmative, reverse the convictions, and remand for further proceedings. For that reason, we need not answer the fourth question, but, we will address the second and third questions for guidance to the trial court on any re-trial.

FACTUAL AND PROCEDURAL BACKGROUND

Brandon Dowless testified that he and his sister, Alyssa Dowless,[1] were robbed by two men in a home invasion on the evening of November 17, 2015 when they returned to their family home in Germantown after getting food. As they entered the garage, two men entered the garage, pointed black handguns at them, and told them to lie down. The

[1] We will refer to the Dowless siblings by their first names and to their parents as Mr. and Mrs. Dowless.

men tied their hands with zip ties and put duct tape on Alyssa's mouth. One of them took him inside the house and asked "W[h]ere is the money[?]" Brandon indicated that there was money in a container in a closet and took the man into his father's office. After the man took that money (approximately $5,800), they returned to the garage area. The second man, when he took Brandon back inside to look for more money, suddenly bolted and left the house. Brandon got Alyssa out of the garage and called the police. .

Alyssa testified that she and Brandon went to get food and, upon returning home and entering through the garage, they were rushed from behind by two men with guns. One of the men told them to lie down, tied their hands with zip ties, and put duct tape over her mouth. The men asked about money. One of them took Brandon into the house; the other, who took her phone, kept her in the garage. Then the men switched roles and the man watching her took Brandon back into the house. Later, they both ran out of the garage. Brandon removed the duct tape from Alyssa, who described the tape as "standard silver-gray duct tape."

Neither Brandon nor Alyssa identified their assailants. Brandon gave general descriptions of the men: one was "5'9" [tall] 180 [pounds]" and the other "6'1" [tall] 180 [pounds]." He stated that the men were wearing all black, that he could only see their eyes, and that one had darker skin than the other. Alyssa stated that the men were wearing dark clothes and masks.

Officer Christopher Marquez was one of the police officers responding to the Dowless' home on the evening of November 17, 2015. He cut the zip ties off Brandon

and Alyssa and recovered a piece of duct tape from the kitchen floor. Forensic Specialist Amanda Kraemer testified that she responded to the scene that evening and collected various items of evidence, including the duct tape and zip ties. No fingerprints of value were obtained from those items, but they were swabbed for DNA testing purposes.

Detective Thomas Thompson also responded to the scene and supervised the investigation. Brandon's mother, Bibi Dowless, provided officers with information that led them to Horseshoe Casino in Baltimore. She revealed that, prior to this incident, she had hired a private investigator, Greg Townsend, to investigate her husband, Terry Dowless, and his gambling activities. Two GPS tracking devices were retrieved from under Mr. Dowless's Audi. Detective Thompson believed that one belonged to the private investigator and the other belonged to the suspects of the home invasion robbery.[2] Detective Thompson learned from Mr. Townsend that Mr. Dowless was seeing a former female employee of Horseshoe Casino, but this information did not produce any suspects.

Private investigator Greg Townsend testified that he was hired in the fall of 2015 by Mrs. Dowless to surveille her husband's gambling activities. On November 11, 2015 (six days before the incident), he followed Mr. Dowless, who was driving his black Audi, from his residence to the parking garage of Horseshoe Casino. Mr. Townsend video-recorded Mr. Dowless entering the casino and while he was inside gambling. When he

[2] The GPS tracker thought to have belonged to the robbery suspects was retrieved by police from the Audi parked inside the garage. The other GPS tracker was retrieved by Brandon and Mr. Dowless several days later.

returned to Mr. Dowless's car to affix a GPS device onto it, he observed two people in a gold Acura vehicle parking next to Mr. Dowless's Audi. One of them got out and looked underneath the Audi. Mr. Townsend did not record this event, but he remembered the tag number of the gold Acura and gave it to Detective Thompson.[3]

After that vehicle left, Mr. Townsend approached the Audi to affix his GPS device and saw another "live" GPS device affixed underneath the Audi. After returning to his own car, Mr. Townsend saw a black Acura with no front tag pull next to Mr. Dowless's Audi. The driver got out and looked underneath the Audi. Mr. Townsend did not get the license plate of the black Acura.

Montgomery County Forensic Scientist Naomi Lobosco testified that she conducted DNA testing on the physical evidence from the casino scene. The duct tape swab contained a mixed DNA profile of two contributors. Alyssa Dowless was a minor contributor and an unknown male was a major contributor. After appellant was arrested on March 1, 2016, and a buccal swab was obtained from him, Ms. Lobosco concluded that appellant was the major contributor to the mixed DNA profile on the duct tape.

When appellant's home was searched, police recovered a handgun, a ski mask, and gloves. It was stipulated that the handgun was operable, and that appellant had been issued traffic citations in Baltimore County on May 21, 2014 and Baltimore City on May 15, 2015, while operating a light-blue, 2009 Acura bearing tag number "2BF9408."

[3] Police investigated the tag number, but determined that the parties related to it were not involved in this case.

Appellant presented evidence that provided an alternative reason for the presence of his DNA on the duct tape. Wade Adams, an employee of a self-storage facility located near Horseshoe Casino, testified that appellant rented a storage unit where he kept motorcycles, tools, and other supplies, including duct tape. According to Mr. Adams, appellant had obtained new locks in 2015 because his code had been used by others to access the facility.

The jury convicted appellant of a home invasion, two counts of robbery with a dangerous or deadly weapon, two counts of first degree assault, and use of a handgun in the commission of a felony. He was sentenced to a total of forty years imprisonment: twenty years for the home invasion; a consecutive fifteen years for armed robbery; and a consecutive mandatory five years for use of a handgun.

Further facts will be provided in the discussion.

DISCUSSION

I.

Appellant moved pre-trial to preclude the admission of testimony or evidence about an incident resulting in no charges related to James Weaver about eight months prior to the events of this case. The trial court conducted a hearing on the motion and

decided that the "Weaver Incident" evidence[4] would be admissible under Md. Rule 5-404(b).[5]

The Weaver Incident

We summarize the Weaver Incident based on the testimony and evidence presented at the motions hearing and trial. Sometime in 2015, Mr. Weaver met appellant at the dice tables at Horseshoe Casino, and had seen him over a dozen times since. They struck up a casual friendship, and on one occasion, appellant had asked him where he lived. But Mr. Weaver had not seen appellant on the evening of March 24, 2015, before he left the casino with $20,000 at about 9:00 p.m. and headed to his home in Leisure World, a private residential community in Montgomery County.

He left the casino parking lot and drove south on I-95 towards Maryland Route 200, known as the Inter-County Connector ("ICC"). At some point, he noticed behind him a car with "halogen" or "bright lights", about fifty to one hundred feet, or ten to thirty car lengths. That vehicle followed him onto the ICC and when he exited onto Georgia Avenue. To determine whether the vehicle was following him, he turned right at

[4] As do the parties, we refer to this as the "Weaver Incident."

[5] Maryland Rule 5-404(b) provides:

> Evidence of other crimes, wrongs, or other acts . . . is not admissible to prove the character of a person in order to show action in the conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident, or in conformity with Rule 5-413.

a red light against a "no turn on red" sign. The other vehicle did the same, and, when he then turned left against a red light, the other car did so too. It followed him through the security gate into Leisure World. Mr. Weaver circled back to the security gate, and relayed his concerns to security personnel who escorted the other vehicle out of Leisure World.

At the security booth, Mr. Weaver saw that that other vehicle was an Acura but he did not see who was in the vehicle and did not get the tag number. He testified that two or three nights later at Horseshoe Casino, he saw what he thought was the same vehicle, and that he photographed this vehicle and individuals from it. He gave the police these photos, but "nobody was interested because no crime occurred." The police later determined that the vehicle in the photographs had not gone through the E-ZPass tolls on the ICC on March 24, 2015.

Mr. Weaver spoke to Montgomery County Police Officer Chris Jerman about being followed. Officer Jerman obtained, from E-ZPass, photographs of vehicles that "went through the toll plaza shortly after Mr. Weaver drove through." One photograph showed an Acura with the license plate "2BF9408" that was registered to appellant's mother. Officer Jerman associated appellant with that car based on a traffic stop in January of 2015. But, when he showed Mr. Weaver the photo, Mr. Weaver "was unsure" that car was the one that followed him. Officer Jerman concluded his investigation of the Weaver Incident because he "couldn't determine who was driving any of these vehicles at the time and also there was no crime."

The trial court made a pre-trial ruling regarding the Weaver Incident, which is, in relevant part, as follows:

> This is just a question of whether or not the State has met their burden of making this evidence. I've already ruled that it would be relevant[6] if they could establish by clear and convincing evidence that the defendant was involved in the pursuit of Mr. Weaver back in March. So, that's the only issue at this point. And based upon Mr. Weaver's testimony, . . . obviously it's absolutely crystal clear from his testimony that he was being followed by a car with halogen lights as he described.
>
> The car followed him down parts of [I-]95, he's not sure exactly where they picked it up, turned onto the ICC with him. Thereafter got off on Georgia Avenue and also, he said he noticed that when he sped up, the car sped up. When he slowed down, the car slowed down and always seemed to maintain, you know, a certain distance behind him.
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> * * *
>
> He turned left against a red light and again, the car behind him did the same thing, followed into Leisure World. He said that he ended up going to the security gate at Leisure World asking why you let that guy in and the guard then said, oh I thought that they were with you. And when he found out that he wasn't, the security guard calls other security there tells them there's a car at Leisure World that doesn't belong there. And as Mr. Weaver pointed out, it's 10 o'clock at night and Leisure World is a retirement community and most people are in bed by 8:00.
>
> So, very soon thereafter he says he sees the security escorting this car which he now can see close up because he's standing in the security booth and he describes it as an Acura. He says he's very familiar with Acuras and it was an Acura that is escorted from Leisure World.
>
> So, we know based upon his testimony that he was followed on the night in question having won approximately, I think he said $20,000 in cash by a car, an Acura with halogen lights, had tinted window so *he couldn't*

[6] At an earlier hearing, the trial court had preliminarily concluded, based upon proffers, that the evidence would be relevant other crimes evidence related to identity and that it was more probative than prejudicial.

see who was inside. Whether it was one people, two people, there's no way for him to identify them at all.

He further testified that he's familiar with the defendant. He knows the defendant. That the defendant was frequently gambling with him at the craps table at the Horseshoe Casino. The defendant on one occasion asked him where he lived, he asked the defendant where the defendant lived.

* * *

Officer Jerman does some research and among other things asks for the ICC, issues a subpoena for them for photographs following Mr. Weaver's car which he identifies by a license number and may have given them a time, a time range. Although he wasn't sure of that, that wasn't in his report.

But in response t[o] that subpoena, E-ZPass sends him three photographs. Two are of the same car, which turns out to be a Ford Taurus. And the other car following Mr. Weaver on the night in question is an Acura which is registered to the defendant's mother, but which was driven by the defendant as recently as January of 2015 . . . when he got a ticket. So, there's indication that a friend of the defendant's may have been driving the car on another occasion but of course, that wouldn't preclude the defendant from being in the vehicle on that occasion. It would mean just that somebody else was driving the vehicle in question.

So, clearly, I think at this point *that the State has established by clear and convincing evidence that Mr. Weaver was followed on the night in question by the defendant's mother's vehicle, a car which the defendant frequently drives.* And if I recall correctly from the time when this was last before the Court for a trial, as part of the evidence proffered by the State, the defendant had given a statement to the police which said that he never goes to Montgomery County.

* * *

And I don't know where the ticket in question was written but the defendant's vehicle on the night in question clearly is in Montgomery County. And *I think in other circumstances they have established by clear and convincing evidence that the defendant was the one driving the vehicle given his connection to the victim in this case and his interest in the victim as demonstrated by the testimony of Mr. Weaver.* So, for all those reasons I

> think the State has met their burden of establishing by clear and convincing evidence that the defendant was involved in the earlier incident in March. I've already ruled that it would be admissible because it has significant probative value in light of the proffered defense in this case. Now, obviously in the event that records from Leisure World are developed that show that the Acura on the night in question was not this Acura, the whole thing changes. But, in the absence of that, I find there is clear and convincing evidence[.]

(Emphasis added).

Contentions

Appellant contends that the testimony and other evidence presented at trial regarding the Weaver Incident was inadmissible to show "identity" or "*modus operandi*," but, even if it were, that the State failed to prove by clear and convincing evidence that appellant was the driver or passenger in the car that followed Mr. Weaver home. In other words, that appellant was "the agent of the prior act." And, to the extent that *modus operandi* may inform identity, the two incidents "did not possess the requisite commonality of unusual and distinctive characters to constitute a signature crime." Therefore, the Weaver Incident was, at most, inadmissible "propensity" evidence, and, as such, its admission could not be harmless beyond a reasonable doubt. Appellant also asserts that the related ICC records and photographs were inadmissible hearsay evidence and were not properly authenticated.

The State responds that the Weaver Incident was relevant to show opportunity and a common scheme or plan. Its *modus operandi* theory is that appellant targeted gamblers at Horseshoe Casino by observing regular gamblers, choosing his mark, and tracking them to their homes in Montgomery County with the intent to rob them of their winnings.

It also contends that the trial court did not err or abuse its discretion in admitting the ICC records and photographs because they "were properly admitted under the public record hearsay exception."

Analysis

When asked to admit bad acts evidence, the trial court must engage in a three-step analysis. First, the court must determine that the evidence is for one of the permissible purposes specified in Rule 5-404(b). *Hurst v. State*, 400 Md. 397, 408 (2007) (citing *State v. Faulkner*, 314 Md. 630, 634–35 (1989)). Second, the court must then determine "whether the accused's involvement in the other crimes [or acts] is established by clear and convincing evidence." *Id.* Third, the court must balance the probative value of the evidence against any undue prejudice that would result from its admission. *Id.*

We review the first step of the trial court's analysis *de novo* because it "is a legal determination and does not involve any exercise of discretion." *Faulkner*, 314 Md. at 634. We review the second step "to determine whether the evidence was sufficient to support the trial judge's finding." *Id.* at 635. And, if "the trial court proceeds to the final step . . . . the analysis implicates the exercise of the trial court's discretion," which we review for abuse of discretion. *Id.* (citations omitted).

Md. Rule 5-404(b) is "a rule of exclusion" based on the principle that "substantive and procedural protections are necessary to guard against the potential misuse of other crimes or bad acts evidence and [to] avoid the risk that the evidence will be used improperly by the jury against a defendant." *Burris v. State*, 435 Md. 370, 385 (2013)

(quoting *Streater v. State*, 352 Md. 800, 807 (1999)); *see also Faulkner*, 314 Md. at 633 ("Evidence of other crimes may tend to confuse the jurors, predispose them to a belief in the defendant's guilt, or prejudice their minds against the defendant."). Further, "there are few principles of American criminal jurisprudence more universally accepted than the rule that evidence which tends to show that the accused committed another crime independent of that for which he is on trial, even one of the same type, is inadmissible." *State v. Taylor*, 347 Md. 363, 369 (1997) (quoting *Cross v. State*, 282 Md. 468, 473 (1978)).

"The *modus operandi* exception is a subset of the identity exception," *Hurst*, 400 Md. at 414, and other crimes or bad acts evidence is "one means of establishing identity." *McKinney v. State*, 82 Md. App. 111, 124 (1990). But to establish *modus operandi*, the other crimes or acts must be "so nearly identical in method as to earmark them as the handiwork of the accused." *State v. Faulkner*, 314 Md. 630, 638 (1989). In other words, it must be "so unusual and distinctive as to be like a signature." *Id.* (citations omitted).

We have explained:

> [I]t is necessary that the crimes, including the crime charged, so relate to each other that proof of one tends to establish the other. Moreover, there must be not merely a similarity in results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations. The concurrence of common features under this exception, however, must be more than simply a manner of operation, which is possessed to some extent by most criminal recidivists . . . .

Reidnauer v. State, 133 Md. App. 311, 322 (2000) (quoting *Cross v. State*, 282 Md. 468, 475–76 (1978)) (cleaned up). Stated differently, "there must be a causal relation or

logical or natural connection among the various acts or they must form part of a continuing transaction to fall within the exception." *Id.* at 322 (quoting *State v. Jones*, 284 Md. 232, 244 (1979)). Clearly, more is demanded than the "mere repeated commission of crimes of the same class, such as . . . robberies." 1 *McCormick on Evid.* § 190 (7th ed. 2013).

Some courts have differentiated between "common design" and *modus operandi*, explaining that a "common design refers to a larger criminal scheme of which the crime charged is only a portion," while *modus operandi* "refers to a pattern of criminal behavior so distinctive that separate crimes are recognizable as the handiwork of the same wrongdoer." *People v. Barbour*, 106 Ill. App. 3d 993, 999–1000, 436 N.E.2d 667, 672 (1982). And, while "common design is frequently relevant to show the motive for the crime charged," *modus operandi* "is *most useful in showing that the accused is the perpetrator* of the crime charged." *Id.* (emphasis added).

In this case, the evidence of the Weaver Incident was ostensibly admitted at trial under the interrelated identity or *modus operandi* exceptions under Md. Rule 5-404(b). But, the flaw in its admission is succinctly summarized in the words of Officer Jerman: "I couldn't determine who was driving any of these vehicles at the time[.]" And, as the trial court found, Mr. Weaver "couldn't see who was inside" the Acura that followed him home, and therefore, there was "no way for him to identify [any one inside that vehicle] at all."

Modus operandi can inform identity, but ordinarily the involvement and identity of the agent in the prior crime or bad act is not at issue.[7] The oft-cited case of *Faulkner v. State*, 314 Md. 630 (1989) manifests some similarities to the instant case. In *Faulkner*, the defendant was convicted for an armed robbery of a Safeway grocery store, and the State was allowed to introduce evidence of two other armed robberies of the same

[7] Professor McClain cites several cases that demonstrate the need for a distinctive *modus operandi*:

> *See Page v. State*, 222 Md. App. 648, 664 (2015), *cert. denied*, 445 Md. 6 (2015) (evidence that the defendant attempted to shoot the witness two weeks before he was actually shot [by the defendant] was "specially relevant" to show motive and intent, was shown by clear and convincing evidence, did not unfairly prejudice the defendant, and was relevant to prove criminal agency, a contested issue in the case); *Garcia-Perlera v. State*, 197 Md. App. 534, (2011) (four burglaries of homes located close to one another, when older, female victims were hog-tied); *Oesby v. State*, 142 Md. App. 144, 155–68, (2002) (no abuse of discretion in admitting other crimes evidence to prove defendant's identity, when, "within a nine-day period, four lone women, living in close proximity to each other in Prince George's County, were approached in the common areas of their garden style apartment complexes, in an ostensibly friendly and unthreatening manner and, when their guards were then relaxed, were [sexually] attacked" in a similar modus operandi); *Wilson v. State*, 136 Md. App. 27, 85–90 (2000), *rev'd and remanded on other grounds*[,] 370 Md. 191, 216–17 (2002) (in trial for murder of accused's infant child, on whose life he had purchased insurance, evidence of his having purchased and recovered on life insurance for two other infants who died under highly similar circumstances, when he was near them, was properly admitted to show his motive, his intent, his identity as the perpetrator, and the lack of accidental death) (this issue was not addressed by Court of Appeals, as expert testimony on remand would affect whether other death was properly viewed as a prior bad act)[.]

5 *Maryland Evid.*, § 404:11 n.5 (3d ed. 2013, Cum. Supp. 2019) (cleaned up).

Safeway within a nine-month period. The defendant argued that the State could not establish by clear and convincing evidence his involvement in the other robberies. *Id.* at 633. The Court of Appeals upheld the conviction,[8] explaining:

> The evidence in this case also establishes Faulkner's presence at the Safeway robberies. The testimony of witnesses to the effect that Faulkner's voice and physical characteristics were the same as those of the accused, along with the testimony regarding the identification of the handgun found near his house and the clothes he wore, bolster this proposition. The request for large bills in each instance also supports the State's contention

[8] In *Faulkner*, the three dissenting judges explained:

> Here, I am convinced that evidence of the other Safeway robberies is anything but clear and convincing, certainly not so unique or strikingly similar as to suggest a signature quality to the crimes and to unmistakably identify Faulkner as the culprit.
>
> The State's primary evidence tended to establish that the perpetrator of the other robberies had similar "build, mannerisms, and language" to that of the defendant; that Faulkner had spent large sums of money similar in denomination to that stolen; that Faulkner had indicated his involvement in a robbery of an unidentified Safeway on an unspecified date in the spring of 1985; and that Faulkner had boasted that he had "hit" a place on at least two occasions.
>
> The true test, as unequivocally articulated in *Ross* [*v. State*, 276 Md. 664 (1976)] and its progeny, requires the separate crimes to display a unique signature quality. Clearly, the evidence here does not meet that test. Significantly, the November 15, 1985, robbery was committed by an assailant brandishing a .22 caliber revolver, carrying a burlap sack, and wearing a blue denim mask. The perpetrator of the April 19, 1985, crime wore a ski mask, carried a green trash bag, and used a .22 caliber rifle. The January 10, 1986, robbery was committed by an assailant who wore a blue denim mask, carried a plastic bag, and used a .22 caliber handgun. Any mere similarity existing between the crimes is of insufficient strength to trigger the identity exception.

State v. Faulkner, 314 Md. 630, 644-45 (1989) (Cole, J., dissenting).

> that the same person committed the robberies in question. The testimony of witnesses regarding Faulkner's possession of large amounts of money in small denominations of bills also supports this contention. Based on the testimony produced by the State, we believe that Faulkner's agency in the 19 April 1985 and 10 January 1986 robberies was established by clear and convincing evidence.

Id. at 640. The Court also noted that "[a]dditional support for application of the *modus operandi* facet of the identity rule is found in the evidence that the perpetrator in each robbery was right handed and that each robbery occurred at approximately the same time on a Friday night." *Id.* at 639.

When we look at the totality of the evidence presented regarding the Weaver Incident in the light most favorable to the State, we can say, at most, that someone in an Acura registered to appellant's mother, followed Mr. Weaver to Leisure World from Horseshoe Casino. The person or persons in the Acura were escorted away by Leisure World security. That Acura was photographed at a toll plaza on the ICC at about the same time Mr. Weaver indicates that he drove through. [9] The State contends that this evidence indicates that it was appellant who followed Mr. Weaver home that evening with the intent to rob him.

[9] The State produced no evidence that Mr. Weaver drove on the ICC on March 24, 2015. Officer Jerman testified that "Mr. Weaver gave [him] an approximate time [10:00 PM to 10:10 PM] of when he was driving on the ICC and then [he] provided that time to E-ZPass in the subpoena." The subpoenaed records included a time-stamped photograph of a vehicle with the tag number 2BF9408 on the ICC at 10:05 PM, but there was no time-stamped photograph of Mr. Weaver's car. Appellant argues that "[b]ecause [Officer] Jerman did not demonstrate from ICC records the *actual* time that Weaver's car was on the ICC, there was no competent evidence where [Mr.] Weaver's car was in relation to the other vehicle (*i.e.*, behind or ahead of Mr. Weaver's car)."

We are not persuaded. In our view, the evidence falls well below the threshold of clear and convincing. There was no evidence presented that appellant was present or even in the vicinity of Horseshoe Casino on the evening of March 24, 2015. Although Mr. Weaver knew appellant and appellant had previously asked where he lived, Mr. Weaver did not see him that evening. He first noticed a car with "bright lights" behind him when he was on I-95, so he could not be sure it had followed him from the casino. After exiting the ICC and engaging in some evasive maneuvers, he concluded the car was following him. Only at the security gate of Leisure World could he identify the car as an Acura; he did not state the color or any other details about the car. He later identified another Acura at Horseshoe Casino several nights later, but that vehicle was registered to another person.

Mr. Weaver was possibly followed home from Horseshoe Casino by pursuers with nefarious intent. But the only circumstantial evidence of appellant's involvement is that the Acura photographed on the ICC belonged to his mother which he sometimes drove.[10]

Unlike in *Faulkner*, there was no witness testimony that the "voice and physical characteristics" of anyone inside the Acura was "the same as those of the accused." *See* 314 Md. at 640. In fact, no one knows who was inside that vehicle on the night of March 24, 2015. And, unlike in *Faulkner* where witnesses testified that the defendant spent large amounts of money in small denominations of bills after the robbery, there was no

[10] There was evidence that others had access to and drove appellant's mother's Acura. Officer Jerman testified that Roy Porter, III had been stopped by police officers in that vehicle prior to the Weaver Incident.

evidence regarding appellant's subsequent actions or behavior to bolster the circumstantial evidence of his involvement in the Weaver Incident. *See id.*

In addition, the Weaver Incident and the Dowless robbery do not share a "concurrence of common features" that are "more than simply a manner of operation." *See Reidnauer*, 133 Md. App. at 322. In short, the only real common feature is that Mr. Weaver and Mr. Dowless both were regulars at Horseshoe Casino. Mr. Weaver was followed from the casino by a vehicle. Mr. Dowless had a GPS tracker placed under his vehicle. And it was later learned that, several days prior to the Dowless robbery, two Acura vehicles (one gold, one black) may have been involved in the placement of the GPS tracker on Mr. Dowless's car. The Acura registered to appellant's mother is a light blue. Mr. Weaver was befriended by appellant in person. Mr. Dowless's son and daughter were robbed in their home by two men with guns; no Acura was seen.

Harmless Error

The State contends that any error in admitting the Weaver Incident is harmless because the Weaver Incident "did not contribute to the verdict" and was "unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Bellamy v. State*, 403 Md. 308, 332 (2008). It views as "critical" the evidence that the duct tape on Alyssa Dowless's mouth had appellant's DNA on it.

"An error by trial court is harmless only if a reviewing court 'is able to declare a belief, beyond a reasonable doubt, that the error *in no way influenced the verdict*.'" *Harris v. State*, 458 Md. 370, 414 (2018) (quoting *Dorsey v. State*, 276 Md. 638, 659

(1976)) (emphasis added). Even with the *modus operandi* theory advanced by the State, any connection between Mr. Dowless and appellant is quite thin. Certainly, DNA evidence can be quite convincing, but appellant offered an alternate explanation at trial that the perpetrator took duct tape from his storage unit near the casino. We, of course, recognize that it is for the jury to weigh that evidence and assess the credibility of the witnesses, but we cannot conclude, beyond a reasonable doubt, that the Weaver Incident evidence "in no way influenced the verdict." *Dorsey*, 276 Md. at 659.

Because we hold that the erroneous admission of the Weaver Incident was not harmless, we need not address appellant's contentions regarding the related ICC records and photographs except to state that, in the event of retrial, that evidence would not be admissible. We will, however, address two issues that may arise in the event of a new trial.

II.

Evidence of Flight

Appellant was arrested in Baltimore City in February 2016—three months after the November 2015 crime in Montgomery County. Sergeant Charles Bullock[11] of the Montgomery County Police Department testified about how appellant's arrest was conducted and his attendant flight. In the "early afternoon," officers in two unmarked

[11] At the time of appellant's arrest, Sergeant Bullock was a Detective in the Special Investigations Division. Because the trial transcripts refer to him as "Sergeant Bullock," we will do the same.

cars had approached appellant's car in a parking garage, and flashed their police lights. Officers, "wear[ing] a vest along with badges or armbands [stating] police," approached the driver's side door. Appellant opened the door, ran, and jumped off of the second floor of the parking garage. After a canine officer's dog "engage[d]" and bit appellant, he was taken into custody and then to a nearby hospital for medical treatment.[12]

Defense counsel objected to Sergeant Bullock's testimony regarding appellant's flight. The trial court ruled the evidence would be admissible and indicated it would reserve on the question of whether to give the jury a flight instruction.

Later renewing his objection to the flight testimony, defense counsel stated that arrest occurred months later in response to being chased by police and dogs and that the State failed to show any connection or consciousness of guilt related to the crime charged. Defense counsel also asked the trial court to strike the testimony, which the trial court also denied.

At the conclusion of trial, appellant objected to any instruction on flight. The objection was overruled, and the trial court instructed the jury as follows:

> I further instruct you that a person's flight immediately after the commission of a crime or after being accused of committing the crime is not enough by itself to establish guilt but it is a fact that may be considered by you as evidence of guilt. Flight under these circumstances may be motivated by a variety of factors some of which are fully consistent with innocence. You must first decide whether there is evidence of flight. If you decide there is evidence of flight you must then decide whether the flight show a consciousness of guilt.

[12] The police recovered a large amount of money and two cell phones from appellant.

Standard of Review

The admissibility of flight evidence depends on its relevance, and we review "without deference a trial court's conclusion as to whether evidence is relevant." *Ford v. State*, 462 Md. 3, 46 (2018) (citations omitted).

And, in reviewing a circuit court's decision to give a jury instruction for an abuse of discretion, we consider: "(1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given." *Bazzle v. State*, 426 Md. 541, 549 (2012) (quoting *Stabb v. State*, 423 Md. 454, 464 (2011)). "Whether the evidence is sufficient to generate the desired instruction is a question of law for the judge." *Roach v. State*, 358 Md. 418, 428 (2000).

Contentions

Appellant contends that the evidence and jury instruction regarding flight was improper because the flight was not from a crime scene and occurred months after the Dowless robbery. Therefore, the flight was not relevant and the trial court had no discretion to admit it.

The State responds that the evidence of appellant's flight was relevant to his consciousness of guilt for the Dowless robbery, and that the trial court did not abuse its discretion in refusing to strike the flight testimony.

Analysis

A. Evidence of Flight

"The fundamental test in assessing admissibility is relevance." *Thomas v. State*, 372 Md. 342, 350 (2002) (*Thomas I*). That "is generally a low bar" because "evidence having *any tendency* to make the existence of *any fact* that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" is relevant. Md. Rule 5-401 (emphasis added); *see Simms*, 420 Md. at 727.

A defendant's "behavior after the commission of a crime" is not admissible "as conclusive evidence of guilt." *Thomas v. State*, 397 Md. 557, 575 (2007) (*Thomas III*). It is instead circumstantial evidence from which guilt may be inferred. *Thomas v. State*, 397 Md. 557, 575 (2007) (*Thomas III*); *Decker v. State*, 408 Md. 631, 640 (2009).

Such evidence "is 'considered relevant . . . because the particular behavior provides clues to the [defendant's] state of mind,' and state of mind evidence is relevant because 'the commission of a crime can be expected to leave some mental traces on the criminal.'" *Decker v. State*, 408 Md. at 641 (quoting *Thomas I*, 372 Md. 342, 351–52 (2002) (internal citations omitted)). For that reason, "consciousness of guilt evidence, including flight from the scene of a crime, or flight from apprehension" has been allowed as a factor that may be considered in determining guilt,[13] *Jones v. State*, 213 Md. App.

[13] We note that the Supreme Court of the United States has expressed a lack of confidence in the probative value of flight evidence. In *Wong Sun v. U.S.*, 371 U.S. 471, 483 n.10, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), the Court explained that "we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime." *See also U.S. v. Williams*, 33 F.3d 876, 879 (7th Cir. 1994) (discouraging use of flight evidence given its frequently minimal value).

483, 508 (2013) (internal citation and quotation marks omitted), even if it does not establish a defendant's guilt. *See Thomas I*, 372 Md. at 351.

Affirming the "evidentiary foundation" required "to admit evidence of [the defendant's] consciousness of guilt" in *Thomas I*, the Court of Appeals, in *Thomas III*, explained:

> "The relevance of the evidence as circumstantial evidence of [a defendant's] guilt depends on whether the following four inferences can be drawn: (1) from his [behavior], a desire to conceal evidence; (2) from a desire to conceal evidence, a consciousness of guilt; (3) from a consciousness of guilt, a consciousness of guilt of the [crime at issue]; and (4) from a consciousness of guilt of the [crime at issue], actual guilt of [that crime]."

Thomas III, 397 Md. at 576 (quoting *Thomas I*, 372 Md. at 356). And "[s]imply because there is a possibility that there exists some innocent, or alternate, explanation for the conduct does not mean that [appellant's evidence of flight] is *per se* inadmissible." *Thomas III*, 397 Md. at 557.

(…continued)
And, Professor McCormick has explained:

> [I]n many situations, the inference of consciousness of guilt of the particular crime is so uncertain and ambiguous and the evidence so prejudicial that one is forced to wonder whether the evidence is not directed to punishing the "wicked" generally rather than resolving the issue of guilt of the offense charged. Particularly troublesome are the cases where defendant flees when sought to be arrested for another crime, is wanted for another crime, or is not shown to know that he or she is suspected of the particular crime.

2 *McCormick on Evid*. § 263 (7th ed. 2013, Cum. Supp. 2016)

Appellant argues that evidence of his flight failed to satisfy the required *Thomas* inferences, most particularly the third inference: consciousness of guilt of the crime charged. He points out that he "was not running from a crime scene but, rather, the arrest occurred in Baltimore City some 3-4 months after the crime that happened in Montgomery County" and asserts that he "had no idea what he was being arrested for." As he sees it, "[t]here simply was no evidentiary basis to link the flight from arrest months later in Baltimore City to the earlier crime in Montgomery County."

Thompson v. State, 393 Md. 291 (2006) is instructive. Warren Thompson was arrested and charged with attempted first-degree murder, first-degree assault, possession of cocaine, and related charges. *Id.* at 294–95. When police approached him and asked him to stop at the crime scene, he fled on his bicycle. *Id.* at 294. When he was quickly apprehended, the police recovered a "significant quantity of cocaine" that was in his possession. *Id.* After his arrest, he told the police that he ran because he had drugs in his possession. *Id.* at 295, 299. Before trial, the circuit court suppressed Mr. Thompson's statement to the police about the drugs and dismissed the drug charges. *Id.* at 295.

At trial on the remaining charges, the court, over defense counsel's objection, gave a flight instruction, which Thompson challenged on appeal as an abuse of the trial court's discretion. *Id.* at 301. He maintained that he fled because he was in possession of cocaine and not because he was guilty of assault. *Id.* at 313. The Court of Appeals agreed, and held that the he trial court abused its discretion by providing the flight instruction under the circumstances presented. *Id.* at 311.

Focusing its analysis on the third *Thomas* factor, consciousness of guilt concerning the crime charged, the Court noted:

> Knowledge that the person is suspected of the charged crime is important because the value of the conduct lies in the culprit's knowledge that he or she has committed the charged offense and in his or her fear of apprehension.

Thompson, 393 Md. at 313 (quoting *Thomas I*, 372 Md. at 354). It explained that "[t]here must be an evidentiary basis, either direct or circumstantial, to connect a defendant's consciousness of guilt to the particular crime charged." *Id*. (quoting *Thomas I*, 372 Md. at 354–55).

The Court concluded that the flight instruction was misleading because "the jury was not presented with evidence of what may have been an alternative and at least a cogent motive for Mr. Thompson's flight, specifically that drugs were found on his person." *Id.* at 313. It explained that not revealing this "to the jury[] undermine[d] the confidence by which the inference could be drawn that Mr. Thompson's flight was motivated by a consciousness of guilt with respect to the crime for which he was on trial[.]" *Id*. at 313. Choosing between permitting evidence of his cocaine possession into evidence to explain his flight or "declin[ing] to explain his flight and risk that the jury would not infer an alternative explanation for his flight" was "mak[ing] a Hobson's choice." *Id*. at 314.

To be sure, defense counsel offered as *a* reason for the flight: that appellant as "a black man in Baltimore city . . . could easily infer that somebody [in the unmarked car] is

trying to hurt him that is not a police officer."[14] But, as the trial court noted, there was "no evidence that he committed any other crime" to undercut the inference that it was motivated by a consciousness of guilt for the crime charged.

[14] The trial court permitted defense counsel to make the argument with the exception of the reference to Baltimore:

> I think you could argue in the abstract that any person under the circumstances could believe that. I don't believe there is any evidence from which the jury could find that based upon environs of Baltimore that it would make such a theory more probative. I mean certainly there is no testimony to that extent and I do not believe that is something that is within the average knowledge of a Montgomery County jury.
>
> I mean this is not a Baltimore . . . jury – where perhaps a Baltimore jury would have more information and more knowledge about what occurs in Baltimore that might make that more believable but certainly a Montgomery County jury the average juror layperson is not possessed as far as I am concerned of general knowledge that would make that more probable simply because it is occurring in Baltimore than anywhere else.
>
> So I will not permit you to make reference to Baltimore but you can certainly – I'm not going to prevent you from arguing that under the circumstances, you know, he could believe that he was being carjacked, hijacked. Whatever you want to say. Four men approach him in [two] unmarked cars. If that's what you want to argue you can. I'm not going to prohibit that argument but I don't think you can make an argument that relates it specifically that this is more probable because it is Baltimore.
>
> * * *
>
> *When you say today's environment I guess if you are alluding to stories of police brutality I think it is within the common knowledge of jurors nowadays – lay people nowadays – there at least is a perception of a problem nationwide in police when they are dealing with young black men. So I think it is an argument that he is entitled to make.*

(Emphasis added).

The circuit court explained:

> [B]ut no evidence has been proffered to the court which would offer an alternative suggestion for which the court could make a finding that it could be related to something other than the crime [charged] that any such conceivable explanation exists. So there is no burden placed on him to present evidence to the jury.
>
> * * *
>
> So as far as the record in this case . . . the only explanation conceivable for him running or reasonable to evoke this response is [that] it is related to this crime. There is no other explanation that I am aware of other than you say people in Baltimore run all the time.
>
> * * *
>
> [W]hen you get arrested if you have only committed one crime[,] you are running because of your guilty knowledge about that particular crime. And before me there is no evidence, no proffer, that he had any other reason to flee from the police.

In short, appellant's flight in response to being approached by police officers "*could* support an inference that the defendant's conduct demonstrates a consciousness of guilt" of committing the crime for which he was arrested. *See Simms*, 420 Md. at 727.

In addition, appellant contends that even if the evidence of flight is relevant to his consciousness of guilt, the evidence was more prejudicial than probative. In his view, "if the jury concluded that the circumstances surrounding [a]ppellant's arrest were too remote in time and place to necessarily relate back to the charged crime, there remains the implication that [he] was fearful or apprehension for some other more immediate offense."

Md. Rule 5-403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
>
> We have explained:
>
> To justify excluding relevant evidence, the "danger of unfair prejudice" must not simply outweigh "probative value" but must, as expressly directed by Rule 5–403, do so "substantially." By its express provisions, Rule 5–403 has steeply tilted the weighing process in favor of admissibility.
>
> * * *
>
> This final balancing between probative value and unfair prejudice is something that is entrusted to the wide discretion of the trial judge. The appellate standard of review, therefore, is the highly deferential abuse-of-discretion standard. The fact that we might have struck the balance otherwise is beside the point. We know of no case where a trial judge was ever held to have abused his discretion in this final weighing process. As a practical matter, that will almost never be held to have occurred.

Newman v. State, 236 Md. App. 533, 555–56 (2018) (internal citation omitted).

In our view, the trial court was within its discretion to permit the evidence of flight. In this case, as discussed earlier, appellant was not fleeing the crime scene and the jury was not presented with evidence of another crime that might have caused him to flee. On the other hand, as we have explained, "[f]light does not have to be practically contemporaneous with the crime to be evidence of some consciousness of guilt." *Hines v. State*, 58 Md. App. 637, 668 (1984). Instead, "the lapse of time between the crime and the flight goes to the weight to be accorded to the circumstance." *Id.* In short, the trial court did not err in finding the evidence relevant and did not abuse its discretion in

refusing to strike the evidence of flight, and letting the jury decide what weight it was to be given.

B. Flight Instruction

Appellant does not dispute that the instruction given was a correct statement of law, nor does he contend that it was covered in the other instructions given. He focuses on whether it was applicable under the facts of this case. He contends that "for a flight instruction to be appropriate, the State must adduce sufficient evidence to support the aforementioned [*Thomas*] inferences." He argues that "[i]t goes without saying that if the evidence of flight was erroneously admitted in this case, the instruction on flight was erroneously given for the same reasons." But we are not persuaded that the circuit court abused its discretion in giving the instruction because we believe that appellant's flight was relevant and admissible.

Appellant also contends that the instruction "improperly and unconstitutionally shift[ed] the burden to the defense to introduce some affirmative evidence as an alternative innocent reason for flight[.]" For that reason, "an instruction on flight as consciousness of guilt is tantamount to comment[ing] on a criminal defendant's failure to testify or to present evidence to the contrary." Again, we are not persuaded.

The instruction did not suggest that flight was to be considered as evidence of guilt, but rather stated it "*may* be considered by [the jury] as evidence of guilt." (Emphasis added). It also stated that flight "may be motivated by a variety of factors some of which are fully consistent with innocence," and, as noted above, the court

permitted an argument on fear of the police based on being as a black man in today's society, and which defense counsel chose not to advance in closing argument. The flight instruction did not shift the burden to the defendant to testify to introduce an innocent reason for his flight. His presence in the courtroom and the evidence surrounding his arrest was sufficient to advance the argument that the court permitted. Coupled with the time between the crime and the arrest, that argument may have had some traction.

III.

Course of Investigation Evidence

At trial, Sergeant Bullock was permitted, over objection, to testify as to the investigative details leading to appellant's arrest. Specifically, he testified that: the police consulted databases and conducted surveillance to determine appellant's location; took photographs of appellant; obtained appellant's phone number and a court order to get cell tower information on his phone; and surrounded the block where appellant lived.

Contentions

Appellant contends that the trial court erred in admitting evidence of the police investigation leading to his arrest because it was irrelevant and inadmissible. In his view, this error was not harmless because Sergeant Bullock's testimony "only served to create the impression that [a]ppellant was someone dangerous and to further perpetuate the implication of [a]ppellant as a bad person and that he should be punished as such."

The State responds that the appellant's argument regarding Sergeant Bullock's testimony was not preserved for review because appellant waived his objection to its

admission by "fail[ing] to object at subsequent points in the proceedings." *Ridgeway v. State*, 140 Md. App. 49, 66 (2001), *aff'd*, 369 Md. 165 (2002) (citation and internal quotation marks omitted). And even if preserved, it argues Sergeant Bullock's testimony was properly admitted because it was "relevant to show that [appellant] had access to an Acura and tended to establish that he was the man in the parking garage who was caught fiddling with the underside of Mr. Dowless'[s] car."

Preservation

To preserve a challenge to the admissibility of evidence for appellate review, it is necessary to object "at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent." Md. Rule 4-323(a). If not, the objection is waived and the issue is not preserved for review. *Id.* "[T]o preserve an objection, a party must either 'object each time a question concerning the [matter is] posed or . . . request a continuing objection to the entire line of questioning.'" *Wimbish v. State*, 201 Md. App. 239, 261 (2011) (quoting *Brown v. State*, 90 Md. App. 220, 225 (1992)).

The State argues that appellant waived his objection to the evidence of the investigation because he "did not object to each question or contemporaneously move to strike." But when the State first asked Sergeant Bullock about the investigation, defense counsel immediately objected.[15] Defense counsel renewed objections twice, both of

[15] At trial, on January 31, 2018, defense counsel objected to the line of questioning related to the investigation:

which the court overruled.[16] He also requested a bench conference where he asked the court to note, for the record, his initial objection to the course of investigation evidence

(…continued)

[THE STATE]: And what did you [Sergeant Bullock] in this case?

[DEFENSE COUNSEL]: *Your Honor, I would object and ask to approach.*

THE COURT: Overruled.

[16] Defense counsel renewed his objections to Sergeant Bullock's testimony:

[SERGEANT BULLOCK]: I'm sorry. Can you repeat the question?

[THE STATE]: What did you do in this case, Sergeant?

[SERGEANT BULLOCK]: I met with Detective Thompson and he informed me –

[DEFENSE COUNSEL] *Objection.*

THE COURT: You don't have to tell us what he told you. You can just tell us what you did based upon the information that you got from him.

[SERGEANT BULLOCK]: Sure. I assisted his case with case enhancement. He wanted me to relocate [appellant]. He wanted me to put them him in a residence and he wanted me to locate a vehicle.

[THE STATE]: All right. What actions did you take in order to do that?

[SERGEANT BULLOCK]: I went back and spoke to my team. I told them what the conversation was. Told them what our task was and we began to do a complete background investigation of [appellant].

[THE STATE]: And does that begin as office work or field work?

[SERGEANT BULLOCK]: It starts in the office.

[THE STATE]: And what specifically did you do?

and explained that the ground for the objection was "relevance."[17] The court acknowledged the grounds and overruled the objection. In short, we are not persuaded that appellant waived his right to appellate review of this issue.

(…continued)

> [SERGEANT BULLOCK]: So we did a lot of computer work. We went to different police databases. We went to public databases.
>
> [DEFENSE COUNSEL]: *Again, Your Honor, I would object.*
>
> THE COURT: Overruled.

(Emphasis added).

[17] During the bench conference, defense counsel explained his ground for objecting to the course-of-investigation evidence:

> [DEFENSE COUNSEL]: Your Honor. I think we are now getting into the flight part which I'm making two objections. One, I'm preserving my objection on the investigation for the record prior to it which I would be asking the Court to strike that testimony. I don't see how that testimony of them finding [appellant] is relevant other than finding the house to get the search warrant of. And so for the record, I am preserving my original objection to that testimony of his officer's investigation into where my client lives. I made that at the beginning of him starting to testify.
>
> THE COURT: Quite simply, he explained how [it] was that they found him. He didn't about tell us about any information gleaned from the database with a few exceptions of the mother's address. Spoke to the mother and got a phone number, et cetera[.]
>
> [DEFENSE COUNSEL]: Well, I was objecting to that evidence and that evidence is not relevant to how he found [appellant]. And I don't think it goes to solving this crime and catching him. And now I'm making my –
>
> THE COURT: So the objection is relevance?

Analysis

The State "often offers testimony concerning the course of an investigation to explain why police officers did what they did." 1 *Wharton's Criminal Evid.* § 4:47 (15th ed. 1997, 2019 Cum. Supp.) "This 'background' information, however, generally is irrelevant and should be excluded." *Id*; *see Zemo v. State*, 101 Md. App. 303, 310 (1994) ("That an event occurs in the course of a criminal investigation does not, *ipso facto*, establish its relevance."). The jury "has no need to know the course of an investigation unless it has some direct bearing on guilt or innocence." *Zemo*, 101 Md. App. at 310.

Professor McCormick has explained:

> [Officers] should not . . . be allowed to relate historical aspects of the case, such as complaints and reports of others containing inadmissible hearsay. Such statements are sometimes erroneously admitted under the argument that the officers are entitled to give the information upon which they acted. The need for this evidence is slight, and the likelihood of misuse great.

1 *McCormick on Evid.*, § 249 (7th ed. 2013).

Both appellant and the State cite *Zemo* to advance their arguments. In that case, Joseph Phillip Zemo was charged with, and ultimately convicted of, the breaking and entering of a gasoline station. *Id.* at 305. At trial, the circuit court admitted evidence of Mr. Zemo's silence after receiving *Miranda* warnings and a detective's testimony regarding the investigation of Mr. Zemo. *Id.* Detective Michael Augerinos, who arrested

(…continued)

[DEFENSE COUNSEL]: Relevance as to the first part.

THE COURT: Okay. Overruled.

Mr. Zemo, told the jury about his investigative steps leading up to the arrest. *Id.* at 306. He testified that he had received information about the crime from a confidential informant who "put him on the trail of the appellant and other suspects, that other parts of the informant's information were corroborated and turned out to be correct, and that, acting on the informant's information, he arrested the appellant." *Id.* Defense counsel objected, arguing that it did not "have the ability to cross-examine whether that information was good or bad." *Id.* at 309. The State responded that Detective Augerinos did not explicitly testify about what any suspects told him, and insisted "that the information was 'not offered for the truth of the matter asserted" but was only offered as "to why he went where he went." *Id.*

We disagreed with the State and explained:

> That, of course, is nonsense. It doesn't matter *why* Detective Augerinos went where he went. It doesn't even matter *where* he went, regardless of why. Not only is it a matter of complete immateriality *why* Detective Augerinos interviewed certain persons, it is equally immaterial that he, indeed, even interviewed those persons at all. The persons referred to, other than the appellant, all testified as witnesses. Their testimony was capable of standing or falling in its own right. It would only be in the eventuality that one of the parties sought to rehabilitate or to impeach testimonial credibility by offering the substance of the interviews as prior consistent or inconsistent statements that the very event of the interviews would take on any pertinence. That never happened. Where the event itself is immaterial, the reason for the event is doubly immaterial.
>
> * * *
>
> At this point, it behooves us to point out that the State is retelling the "Old Wives' Tale" that it is somehow necessary always to lay out for the jury the detailed course of a criminal investigation. It is a tale that seems to be

> enjoying of late wide circulation at the prosecutorial council fires. It is an apocryphal tale, however, and one that urgently needs demythologizing.

Id. at 309–10.

Geiger v. State, 235 Md. App. 102, 123, 129 (2017), provided "[a] [r]eader's [g]uide to *Zemo v. State*," cautioning against "plucking a lyric phrase here or there from the low-hanging fruit." We clarified that the focus in *Zemo* was "not on the detective's testimony describing his investigation per se," but rather it "was on the fact . . . that the detective, by virtue of unduly extensive and, in that case, totally irrelevant testimony about his investigative procedures introduced into the case two highly prejudicial pieces of information against the defendant." *Geiger*, 235 Md. App. at 127.

In *Geiger*, which was a "simple case of theft by deception," Mr. Geiger allegedly purchased tires with a fraudulent credit card number and presented a fake North Carolina driver's license as identification. *Id.* at 105. Detective Matthew Kelly testified that he searched a database of North Carolina driver's licenses and found no matches to the license provided. An employee at the tire store identified Mr. Geiger as the person who presented the fake driver's license. Mr. Geiger was convicted of the crime charged and appealed. On appeal, Mr. Geiger relied heavily on *Zemo*.

We explained that *Geiger* and *Zemo* were "diametrically different in that the invocation of the right to silence in *Zemo* and the detailed corroboration of information from the confidential informant in *Zemo* were both completely inadmissible and highly prejudicial." *Id.* at 128–29. In *Geiger*, "by stark contrast," the information that Mr. Geiger presented a fake driver's license to the theft victim and the identification of him as

the thief "were both highly relevant matters as to which evidence would have been admissible." *Id.* at 129.

The State argues that the problems in *Zemo* are absent here because Sergeant Bullock's testimony was not unduly extensive, totally irrelevant, or highly prejudicial. In its view, Sergeant Bullock's testimony was relevant to identify appellant and establish a link between appellant and the Acura in relation to the "Weaver Incident."

But the fact that the testimony in this case was not as egregious or as highly prejudicial as in *Zemo* does not establish its relevance. Moreover, as discussed earlier, evidence linking appellant to an Acura would be inadmissible in a retrial unless the Acura can be connected to the Dowless robbery by something other than the Weaver Incident. In contrast to *Geiger*, Sergeant Bullock's testimony detailing the course of the investigation would have little probative value to any fact of consequence in this case and no "direct bearing on [appellant's] guilt or innocence." *See Zemo*, 101 Md. App. at 310.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED, AND CASE REMANDED FOR A NEW TRIAL. COSTS TO BE PAID BY MONTGOMERY COUNTY.